

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

*Reports of the Panel*

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**Note:**

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

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

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

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

### TABLE OF ABBREVIATIONS

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



<b>Abbreviation</b>	<b>Description</b>
USDA	United States Department of Agriculture
Vilsack letter	Letter to "Industry Representative" from the United States Secretary of Agriculture, Thomas J. Vilsack, of 20 February 2009
WTO	World Trade Organization

## I. INTRODUCTION

### A. COMPLAINTS OF CANADA AND MEXICO

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

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

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

### B. ESTABLISHMENT AND COMPOSITION OF THE PANEL

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

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

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

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

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

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<sup>1</sup> WT/DS384/1 and WT/DS386/1.

<sup>2</sup> WT/DS384/1/Add. 1 and WT/DS386/1/Add. 1.

<sup>3</sup> WT/DS384/3, WT/DS384/5, WT/DS386/2 and WT/DS386/4.

<sup>4</sup> WT/DS384/2, WT/DS384/6 and WT/DS386/5.

<sup>5</sup> WT/DS384/4, WT/DS384/7, WT/DS386/3 and WT/DS386/6.

<sup>6</sup> WT/DS384/8, WT/DS386/7 and WT/DS386/7/Corr.1.

<sup>7</sup> WT/DS384/8, WT/DS386/7 and WT/DS386/7/Corr.1.

<sup>8</sup> WT/DSB/M/276, para. 60.

<sup>9</sup> WT/DS/384/9 and WT/DS/386/8.

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

Chairman: Mr Christian Häberli

Members: Mr Manzoor Ahmad  
Mr João Magalhães

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

## C. PANEL PROCEEDINGS

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

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

## II. FACTUAL ASPECTS

### A. MEASURES AT ISSUE<sup>10</sup>

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

2.2 Canada submits that the COOL measure consists of the following provisions:<sup>11</sup>

- (a) the Agricultural Marketing Act of 1946, as amended by the Farm Security and Rural Investment Act of 2002 ("2002 Farm Bill") and the Food, Conservation, and Energy Act of 2008 ("2008 Farm Bill");
- (b) the Interim Final Rule on Mandatory Country of Origin Labelling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, published on 1 August 2008 as 7 CFR Part 65 ("Interim Final Rule (AMS)") and on Mandatory Country of Origin Labelling of Muscle Cuts of Beef (including Veal), Lamb, Chicken, Goat, and Pork, Ground Beef, Ground Lamb, Ground Chicken, Ground Goat, and Ground Pork, published on 28 August 2008 as 9 CFR Parts 317 and 381 ("Interim Final Rule (FSIS)");

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<sup>10</sup> The Panel's adoption of the terminology – "measures at issue" – in its sub-headings of these Reports is for convenience only and does not prejudice any disputed factual or legal issues relating to that terminology.

<sup>11</sup> WT/DS384/8.

- (c) the Final Rule on Mandatory Country of Origin Labelling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, published on 15 January 2009 as 7 CFR Part 65 (the "2009 Final Rule (AMS)");
- (d) the letter to "Industry Representative" from the United States Secretary of Agriculture, Thomas J. Vilsack, of 20 February 2009 (the "Vilsack letter"); and
- (e) any modifications, administrative guidance, directives or policy announcements issued in relation to items (a) through (d) above.

2.3 Mexico submits that the measures relating to the COOL provisions adopted by the United States include the following:<sup>12</sup>

- (a) the Agricultural Marketing Act of 1946 (7 U.S.C. 1621 et seq.), as amended by the Farm Security and Rural Investment Act of 2002 (Section 10816 of Public Law 107-171) and the Food, Conservation, and Energy Act of 2008 (Section 11002 of Public Law 110-246);
- (b) Interim Final Rule – Mandatory Country of Origin Labelling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts (published in 73 Federal Register 45106, 1 August 2008);
- (c) Final Rule – Mandatory Country of Origin Labelling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts (7 CFR Parts 60 and 65);
- (d) Interim Final Rule – Mandatory Country of Origin Labelling of Muscle Cuts of Beef (including Veal), Lamb, Chicken, Goat and Pork, Ground Beef Ground Lamb, Ground Chicken, Ground Goat, and Ground Pork (9 CFR Parts 317 and 381, published in 73 Federal Register 50710, 28 August 2008);
- (e) the letter from Thomas Vilsack, Secretary of Agriculture (United States Department of Agriculture, USDA), to Industry Representatives (20 February 2009), cited in USDA News Release No. 0045.09, "Vilsack Announces Implementation of Country of Origin Labelling Law" (20 February 2009); and
- (f) any modification or amendment to measures (i) through (v) above, including any further implementing guidance, directives or policy announcements or any other document issued in relation to those measures.

## B. PROCEDURAL HISTORY

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

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

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<sup>12</sup> WT/DS386/7 and WT/DS386/7/Corr.1.

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

## **2. Procedures for open hearings**

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

## **3. Enhanced third party rights**

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

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

- (a) participation in the first and second substantive meetings of the Panel;
- (b) access to the parties' first and second written submissions; and
- (c) the right in both the first and second substantive meetings to ask questions to the parties and other third parties without any obligation to respond on the part of the parties and other third parties.

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

## **4. *Amicus curiae* briefs**

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

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<sup>13</sup> WT/DSB/M/276, para. 65.

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

## **5. Request for separate reports**

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

## **III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS**

### **A. CANADA**

3.1 Canada requests that the Panel find that:

- (a) the COOL measure of the United States is inconsistent with its obligations under the TBT Agreement, in particular Articles 2.1 and 2.2; and
- (b) the COOL measure of the United States is inconsistent with its obligations under the GATT 1994, in particular Articles III:4, X:3(a) and XXIII:1(b).

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

### **B. MEXICO**

3.3 Mexico requests that the Panel find that:

- (a) the COOL measures are inconsistent with Articles III:4 and X:3 of the GATT 1994 and Articles 2.1, 2.2, 2.4 and 12 of the TBT Agreement; and
- (b) the COOL measures nullify or impair benefits accruing to Mexico under the GATT 1994 within the meaning of Article XXIII:1(b) of the GATT 1994.

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

### **C. UNITED STATES**

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

#### IV. ARGUMENTS OF THE PARTIES

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

#### V. ARGUMENTS OF THE THIRD PARTIES

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

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

#### VI. INTERIM REVIEW

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

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

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

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

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

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<sup>14</sup> Third party written submissions were received from Australia, Brazil, Colombia, the European Union, Japan, Korea, and New Zealand.

<sup>15</sup> United States' comments on the Interim Panel Reports, para. 5, referring to its second written submission, para. 28.

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

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

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

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

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

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

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<sup>16</sup> See Mexico's second written submission, para. 187, referring to Exhibit CDA-29.

<sup>17</sup> See Canada's response to Panel question No. 1.

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



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

## 2. Paragraph 7.24

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

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

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

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

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

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<sup>19</sup> See footnote 18.

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

#### 4. Other comments

##### (a) Paragraph 7.19

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

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

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

##### (b) Paragraph 7.28

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

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

#### B. FACTUAL BACKGROUND

##### 1. Paragraph 7.85

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

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

##### 2. Paragraph 7.93

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

6.22 The **Panel** declines Canada's request because paragraph 7.93 describes relevant part of the COOL statute as the United States submits. We added quotation marks in the relevant parts of

paragraph 7.93 to indicate that the descriptions for the items listed are quoted directly from the text of the COOL statute.

### **3. Paragraph 7.94**

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

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

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

### **4. Paragraph 101**

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

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

### **5. Paragraph 7.126 and footnote 179**

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

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

### **6. Paragraphs 7.127-7.131**

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

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

## C. CLAIMS UNDER THE TBT AGREEMENT

### 1. Technical regulation

#### (a) Paragraph 7.178

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

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

#### (b) Paragraph 7.195

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

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

### 2. Article 2.1

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

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

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

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

6.38 The **United States** suggests modifying paragraph 7.242 to better reflect the relevant arguments in paragraphs 196-199 of the United States' first written submission. **Canada** and **Mexico** oppose this suggested modification, arguing that paragraph 7.242 properly summarises the arguments in paragraphs 196-199 of the United States' first written submission. Mexico adds that the United States has never withdrawn this argument. At the same time, Mexico concedes that the United States made an additional argument in its opening oral statement at the Panel's first substantive

meeting. Accordingly, Mexico does not exclude adding, with minor modifications, part of the text that the United States would insert into paragraph 7.242.

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

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

(i) *Paragraph 7.264*

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

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

(ii) *Paragraph 7.267*

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

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

(iii) *Paragraph 7.276*

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

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

(iv) *Paragraph 7.290*

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

paragraph 7.663 of the Interim Reports, Mexico argues that the suggested modifications are inaccurate because Label D could involve some domestic elements.

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

(v) *Paragraph 7.299*

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

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

(vi) *Paragraph 7.314*

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

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

(vii) *Paragraph 7.329*

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

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

(viii) *Paragraph 7.340*

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

the word "[t]his", which is a reference to the preceding paragraph. As regards the suggested modification to the second sentence, Mexico is silent and Canada does not disagree.

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

(ix) *Paragraph 7.348*

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

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

(x) *Paragraph 7.361*

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

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

(xi) *Paragraph 7.367*

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

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

(xii) *Paragraph 7.368*

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

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

(xiii) *Paragraph 7.368, footnote 515*

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

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

(xiv) *Paragraph 7.371*

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

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

(xv) *Paragraph 7.373*

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



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

*(xvi) Paragraph 7.375*

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

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

*(xvii) Paragraph 7.375, footnote 527*

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

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

*(xviii) Paragraphs 7.385 and 7.415*

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

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

*(xix) Paragraph 7.392*

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

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

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

(xx) *Paragraph 7.384, footnotes 556 and 557*

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

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

(d) Actual trade effects

(i) *Paragraph 7.443*

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

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

(ii) *Paragraph 7.462, footnote 632*

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

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

(iii) *Paragraphs 7.464 and 7.468*

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

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

(iv) *Paragraph 7.478*

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

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

(v) *Paragraph 7.480, footnote 669*

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

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

(vi) *Paragraphs 7.485-7.486*

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

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

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<sup>21</sup> Exhibit US-143.

(vii) *Paragraph 7.513*

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

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

(viii) *Paragraph 7.514*

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

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

(ix) *Paragraph 7.517*

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

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

(x) *Paragraph 7.522*

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

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

(xi) *Paragraph 7.523*

6.100 The **United States** suggests modifying paragraph 7.523 to reflect US concerns with Canada's econometric models. In particular, the United States questions whether it is appropriate to base a legal analysis under Article 2.1 of the TBT Agreement on the use of an econometric study that

purports to show trade effects. The United States also wonders whether a reduced form model, such as Exhibit CDA-152, properly captures price and export effects in a highly complex market like the North American livestock market. **Canada** disagrees with the suggested changes. Canada argues *inter alia* that the objective of the Sumner Econometric Study is to assess the differential effect of the COOL measure and not its "trade effect".

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

(xii) *Paragraph 7.530*

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

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

(xiii) *Paragraph 7.532*

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

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

(xiv) *Paragraph 7.539*

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

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

(xv) *Paragraph 7.548*

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

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

### 3. Article 2.2

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

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

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

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

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

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

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

<sup>24</sup> See paragraphs 7.615-7.621.

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

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

6.114 The **United States** submits that a discussion of the United States' position with regard to the relationship between Article 2.2 of the TBT Agreement and Article XX of the GATT 1994 should reflect its argument and evidence submitted in support of its position. The United States reiterates its arguments put forward in the panel proceedings that the Panel should apply the legal interpretative approach under Article 5.6 of the SPS Agreement, but not that of Article XX of the GATT 1994, to Article 2.2 of the TBT Agreement. The United States suggests that the Panel modify paragraphs 7.673 and 7.674, and add a new footnote to paragraph 7.673.

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

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

D. TYPOGRAPHICAL ERRORS AND CLERICAL OBSERVATIONS

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

## VII. FINDINGS

### A. OVERVIEW OF THE MATTERS BEFORE THE PANEL

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

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

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

7.4 Finally, the complainants allege that the United States administered the COOL requirements in a manner inconsistent with Article X:3(a) of the GATT 1994. Canada claims that the United States

administered the COOL requirements in an unreasonable manner by issuing the Vilsack letter. Mexico submits that an unreasonable, non-uniform, and partial administration of the COOL requirements is shown by in the shifts in the guidance provided by USDA on the COOL requirements, as reflected in the associated guidelines issued by USDA, non-public pressure by the US government on individual companies, and the Vilsack letter.

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

## B. PRELIMINARY MATTERS

### 1. Measures at issue

#### (a) Introduction

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

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

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

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

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<sup>26</sup> See para. 1.6.

<sup>27</sup> Canada defined the measures identified in its panel request as the provisions comprising the "COOL measure".

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

<sup>29</sup> See paras. 2.1-2.3.



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

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

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

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

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

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

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

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

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<sup>30</sup> See paras. 2.1-2.3.

<sup>31</sup> Canada's and Mexico's responses to Panel question Nos. 1 and 2.

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

<sup>33</sup> See para. 7.84 for an explanation of the interim final rule in the context of the US legal system.

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

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

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

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

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

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

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

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

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

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

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

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

<sup>40</sup> See paras. 7.9-7.10.

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

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

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

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

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

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

7.20 In addition, Mexico identified "any further implementing guidance, directives or policy announcements" in its panel request.<sup>47</sup>

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

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

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

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

<sup>43</sup> WT/DS386/7 and WT/DS386/7/Corr.1.

<sup>44</sup> Mexico's first written submission, para. 9, referring to Exhibit MEX-6; response to Panel question No. 1.

<sup>45</sup> Exhibit MEX-6.

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

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

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

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

(i) *Main arguments of the parties*

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

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

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

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

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<sup>48</sup> The Interim Final Rule (FSIS) is relevant only for the dispute brought by Mexico.

<sup>49</sup> United States' first written submission, paras. 46 and 69-71.

<sup>50</sup> United States' second written submission, paras. 23-25.

<sup>51</sup> See Section VII.C.1(b)(i).

<sup>52</sup> Exhibit CDA-5, p. 2706. The United States also refers to other differences between the 2009 Final Rule (AMS) and the Interim Final Rule (AMS) in para. 25 of its second written submission (footnotes 34-38) (Exhibit CDA-5, p. 2659-2660).

<sup>53</sup> The United States explains in footnote 33 in its second written submission that this change was made at the request of consumer groups, among other interested parties, who believed that meat derived from animals born, raised, and slaughtered in the United States should largely be labelled as US-origin.

<sup>54</sup> Canada clarified that it did not include either the 2009 Final Rule (FSIS) or the Interim Final Rule (FSIS) as part of the measures at issue.

As for Mexico's claim in respect of the 2009 Final Rule (FSIS), we concluded above that it is not within the scope of our review in this dispute as that specific instrument was not identified in Mexico's panel request.

<sup>55</sup> Canada's response to Panel question No. 2.

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

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

(ii) *Analysis by the Panel*

Interim Final Rule (AMS)

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

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

<sup>57</sup> Canada's response to Panel question No. 2.

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

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

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

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

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

<sup>63</sup> Canada's response to Panel question No. 2; Mexico's response to Panel question No. 2; United States' first written submission, paras. 13,46, 59.

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

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

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

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

#### The Interim Final Rule (FSIS)

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

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<sup>64</sup> Mexico's response to Panel question No. 2.

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

<sup>66</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 188.

<sup>67</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 188.

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

### Conclusion

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

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

(i) *Main arguments of the parties*

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

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

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

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

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

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

<sup>71</sup> Mexico's second written submission, para. 20; response to Panel question No. 1.

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

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

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

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

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

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<sup>72</sup> Mexico's response to Panel question No. 1.

<sup>73</sup> United States' second written submission, paras. 11-28; response to Panel question No. 89; and comments on each other's response to Panel question No. 89.

<sup>74</sup> United States' first written submission, paras. 129-130, referring to the Panel Reports on *Japan – Film*, paras. 10.88-10.89 and *Turkey – Rice*, paras. 7.279-7.281.

<sup>75</sup> United States' second written submission, para. 12.

<sup>76</sup> United States' comments on each other's responses to Panel question No. 89.

<sup>77</sup> United States' comments on each other's responses to Panel question No. 89.



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

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

(ii) *Analysis by the Panel*

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

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

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

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

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

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

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

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

<sup>79</sup> Canada also points this out in its response to Panel question No. 89.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>85</sup> See paras. 7.83-7.86.

<sup>86</sup> United States' first written submission, para. 46.

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

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

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

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

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

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

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

7.58 The panel further elaborated:

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

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

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

<sup>89</sup> See paras. 7.77-7.122.

<sup>90</sup> See paras. 7.87-7.100.

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

<sup>92</sup> Panel Report, *US – Section 301 Trade Act*, para. 7.28.

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

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

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

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

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<sup>93</sup> Panel Report, *Japan – Apples*, para. 8.15.

<sup>94</sup> Appellate Body Report, *US – Gambling*, para. 124.

<sup>95</sup> See para. 7.123 and Section VII.D.1.

## 2. Products at issue

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

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

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

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

## 3. Order of analysis

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

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

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

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<sup>96</sup> Canada's first written submission, para. 1 (emphasis added).

<sup>97</sup> Canada's response to Panel question No. 47.

<sup>98</sup> Mexico's first written submission, paras. 193, 199, 261 and 273.

<sup>99</sup> See para. 7.246.

<sup>100</sup> See Sections III and VII.A.

<sup>101</sup> Mexico's opening oral statement at the first substantive meeting of the Panel, para. 26. Mexico then addressed its national treatment claims under Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994 together in its first oral statement.

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

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

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

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

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

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

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<sup>102</sup> Panel Report, *EC – Sardines*, para. 7.18.

<sup>103</sup> Appellate Body Report, *US – Shrimp*, para. 120.

<sup>104</sup> Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 277.

<sup>105</sup> The Appellate Body in *EC – Bananas III* stated:

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

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

<sup>106</sup> Panel Report, *EC – Sardines*, para. 7.16. See also Panel Report, *EC – Asbestos*, paras. 8.16-8.17.

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

C. FACTUAL BACKGROUND

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

**1. The COOL measure**

(a) Recent legislative history of the COOL measure

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

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

(i) *The COOL statute*

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

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

<sup>108</sup> Exhibit CDA-29.

<sup>109</sup> Exhibit CDA-24 (BCI); CDA-36 to 39, CDA-107 (BCI); Exhibit MEX-33, MEX-57.

<sup>110</sup> Farm Security and Rural Investment Act of 2002 ("the 2002 Farm Bill") (Public Law 107-171) (Exhibits CDA-1 and MEX-2). The 2002 Farm Bill was enacted by the United States Congress on 13 May 2002 and amended the Agricultural Marketing Act of 1946.

<sup>111</sup> 7 U.S.C. 1638 (2)(A) and 1638a (a)(1) (Exhibits CDA-1 and MEX-2).



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

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

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

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

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

(ii) *Regulations implementing the COOL statute*

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

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<sup>112</sup> 7 U.S.C. 1638a (a)(2) (Exhibits CDA-1 and MEX-2).

<sup>113</sup> Canada's first written submission, para. 14.

<sup>114</sup> 7 U.S.C. 1638d.

<sup>115</sup> See footnote 34 above.

<sup>116</sup> Mexico's first written submission, paras. 29-32; United States' first written submission, para. 67.

<sup>117</sup> Public Law 108-119, 118 Stat. 3 (23 January 2004).

<sup>118</sup> This extension, however, did not apply to "farm-raised fish" and "wild fish". Consequently, the implementing regulations for these two categories of products were enacted on 5 October 2004. (Mandatory Country of Origin Labeling of Fish and Shellfish; Interim Rule, 7 C.F.R. Part 60 (Exhibit MEX-17).

<sup>119</sup> Public Law 109-97, 119 Stat. 2120 (10 November 2005).

<sup>120</sup> United States' first written submission, para. 68.

<sup>121</sup> United States' first written submission, paras. 73-83.

<sup>122</sup> Food, Conservation and Energy Act of 2008 ("the 2008 Farm Bill") (Public Law 110-234) (Exhibits CDA-2 and MEX-3).

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

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

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

(b) Country of origin labelling requirements for meat products

(i) *Main requirements*

The COOL statute

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

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

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

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

<sup>124</sup> U.S.C. Title 5, Part I, Chapter 5, Subchapter II, §553 (c).

<sup>125</sup> Exhibits CDA-3 and MEX-4.

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

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

<sup>128</sup> Canada's first written submission, para. 26.

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

<sup>130</sup> 7 U.S.C. 1638a (a)(1), (Exhibit MEX-9).

<sup>131</sup> 7 U.S.C. 1638a (e).

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

- (A) United States country of origin ("U.S. origin" – Category A<sup>134</sup>) – meat derived from animals:
    - (1) "exclusively born, raised, and slaughtered in the United States";
    - (2) "born and raised in Alaska or Hawaii and transported for a period not more than 60 days through Canada to the United States and slaughtered in the United States"; or
    - (3) "present in the United States on or before 15 June 2008".
  - (B) Multiple countries of origin (Category B<sup>135</sup>) – meat derived from animals:
    - (1) "not exclusively born, raised, and slaughtered in the United States"; or
    - (2) "born, raised, or slaughtered in the United States"; and
    - (3) "not imported into the United States for immediate slaughter".
- The retailer may designate the country of origin as all of the countries in which the animal may have been born, raised, and slaughtered.
- (C) Imported for immediate slaughter (Category C<sup>136</sup>) – meat derived from animals
    - "imported into the United States for immediate slaughter".
  - (D) Foreign country origin (Category D<sup>137</sup>) – meat derived from animals
    - "not born, raised, or slaughtered in the United States".
  - (E) Ground meat products (Category E<sup>138</sup>) – the notice of country of origin includes
    - (1) "a list of all countries of origin ..."; or
    - (2) "a list of all 'reasonably possible' countries of origin ...".

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<sup>132</sup> The parties refer to the categories as A, B, C, D and E, which corresponds to the literals used in the COOL Statute.

<sup>133</sup> The descriptions in this paragraph of the categories of meat for labelling purposes are based on the text of the COOL statute.

<sup>134</sup> 7 U.S.C. 1638a (2)(A).

<sup>135</sup> 7 U.S.C. 1638a (2)(B).

<sup>136</sup> 7 U.S.C. 1638a (2)(C).

<sup>137</sup> 7 U.S.C. 1638a (2)(D).

<sup>138</sup> 7 U.S.C. 1638a(2)(E).

### The 2009 Final Rule (AMS)

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

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

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

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

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

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

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

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

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

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<sup>139</sup> 2009 Final Rule (AMS), 7 C.F.R. §65.125 (Exhibits CDA-5 and MEX-7).

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

<sup>141</sup> 7 C.F.R. §65.235.

<sup>142</sup> 7 C.F.R. §65.180.

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

<sup>144</sup> 7 C.F.R. §65.300 (e)(2).

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

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

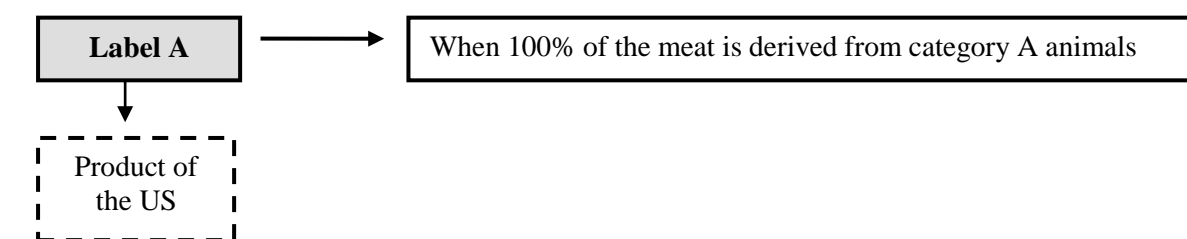
7.97 The 2009 Final Rule (AMS) further provides that the labelled countries may be listed *in any order* when the meat is derived from animals classified as category B, or when meat falling under categories A and B, as well as B and C, is commingled during a single production day.<sup>148</sup>

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

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

<b>Category B</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.)	<i>Product of the US, Country X, Country Y (if applicable)</i>
<b>Category C</b>	Meat from animals imported into the United States for immediate slaughter	<i>Product of Country X, US</i>
<b>Category D</b>	Foreign meat imported into the United States	<i>Product of Country X</i>

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



<sup>145</sup> 7 C.F.R. §65.300 (e)(4).

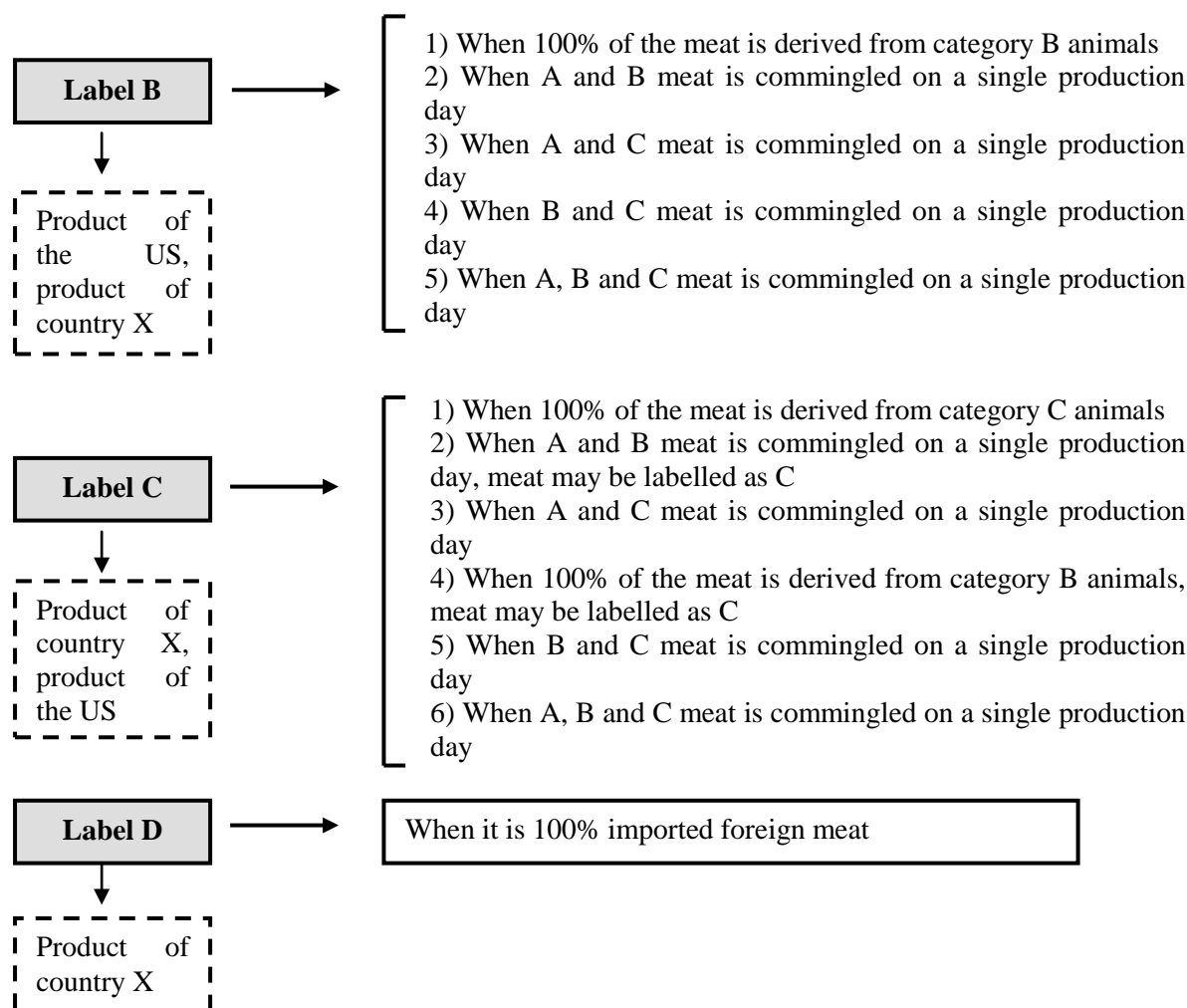
<sup>146</sup> To illustrate, when meat classified under category A is commingled during a single production day with meat falling under category B, the resulting meat can use Label B.

<sup>147</sup> 7 C.F.R. §65.300 (e)(4).

<sup>148</sup> The text of this provision contained in the 2009 Final Rule (AMS). 7 C.F.R. §65.300 (e)(4) states the following: "In each case of paragraphs (e)(1), (e)(2), and (e)(4) of this section, the countries may be listed in any order".

<sup>149</sup> United States' first written submission, para. 77.

<sup>150</sup> United States' first written submission, para. 54. Canada and Mexico provided similar tables which do not differ substantially from the one presented by the United States.



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

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

<sup>151</sup> 7 U.S.C. 1638 (6).

<sup>152</sup> 7 C.F.R. §65.240.

<sup>153</sup> United States' first written submission, para. 34, referring to 7 U.S.C. 499a(b).

<sup>154</sup> United States' first written submission, para. 34, referring to 7 U.S.C. 499a(b)(6).

<sup>155</sup> 7 C.F.R. §65.205.

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

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

(iii) *Exemptions from the scope of the COOL requirements*

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

Products exempted

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

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

Entities exempted

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

"if the covered commodity is –

- (1) prepared or served in a food service establishment; and
- (2) (A) offered for sale or sold at the food service establishment in normal retail quantities; or  
(B) served to consumers at the food service establishment."<sup>161</sup>

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

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

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

<sup>157</sup> 7 U.S.C. §1638a (e).

<sup>158</sup> 7 U.S.C. §1638a (e).

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

<sup>160</sup> 7 C.F.R. §65.220.

<sup>161</sup> 7 U.S.C. §1638a (b).

<sup>162</sup> 7 U.S.C. §1638 (4).

establishments that provide ready-to-eat foods that are consumed either on or outside of the retailer's premises".<sup>163</sup>

(iv) *Other obligations*

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

The methods of notification

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

7.111 The 2009 Final Rule (AMS) prescribes that the declaration made in any of the mentioned forms can be "typed, printed or handwritten"<sup>166</sup> 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".<sup>167</sup>

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

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<sup>163</sup> 7 C.F.R. §65.140.

<sup>164</sup> 7 U.S.C. 1638a (c) (1).

<sup>165</sup> 7 C.F.R. § 65.400 (a).

<sup>166</sup> 7 C.F.R. § 65.400 (c).

<sup>167</sup> 7 C.F.R. § 65.400 (b).

<sup>168</sup> 7 C.F.R. § 65.400 (a).

<sup>169</sup> 7 C.F.R. § 65.400 (e).



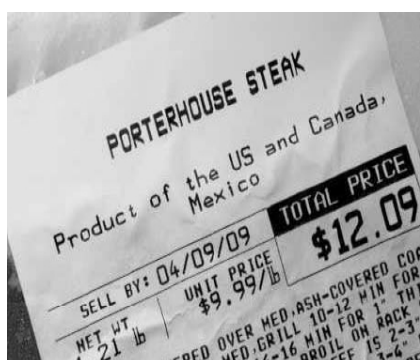
7.113 In response to a question from the Panel, the parties submitted photographs of muscle cut labels taken in 2010.<sup>170</sup> For instance, Mexico and the United States submitted the following photographs of Label A<sup>171</sup>:



7.114 As regards mixed-origin labels, Canada submitted, for instance, a photograph containing the following label<sup>172</sup>:



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



<sup>170</sup> See Canada's, Mexico's and the United States' responses to Panel question No. 23. See also Exhibits CDA-161, MEX-71 and US-67, US-94, US-95, US-96, US-97 and US-98.

<sup>171</sup> Exhibit MEX-71 and US-67.

<sup>172</sup> Exhibit CDA-161.

<sup>173</sup> Exhibit US-67.

<sup>174</sup> Exhibit US-67.

### The audit verification system

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

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

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

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

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

### The certification of origin

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

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

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

<sup>177</sup> 7 C.F.R. § 65.500(b)(3).

<sup>178</sup> 7 C.F.R. § 65.500(b)(1).

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

<sup>180</sup> 7 C.F.R. § 65.500(b)(4).

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

#### The enforcement of the COOL requirements

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

## **2. The Vilsack letter**

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

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

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<sup>181</sup> 7 U.S.C. 1638a(f).

<sup>182</sup> 7 U.S.C. 1638b(a).

<sup>183</sup> 7 U.S.C. 1638b(b).

<sup>184</sup> United States' first written submission, para. 82.

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

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

<sup>186</sup> United States' response to Panel question No. 27.

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

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

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

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

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

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

### **3. The North American livestock and meat industries and trade**

(a) Stages of livestock and meat production

(i) *Cattle and beef*

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

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

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

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<sup>187</sup> Vilsack letter, page 1 (Exhibits CDA-6 and MEX-8).

<sup>188</sup> Vilsack letter, pages 1-2 (Exhibits CDA-6 and MEX-8).

<sup>189</sup> Canada's first written submission, para. 42 and Annex I (Exhibit CDA-51); Mexico's first written submission, paras. 116-148.

<sup>190</sup> Canada's first written submission, Annex III.

<sup>191</sup> Canada's first written submission, paras. 43-46; Mexico's first written submission, paras. 116-121.

<sup>192</sup> Canada's first written submission, para. 47; Mexico's first written submission, paras. 137-139.

the expected future price of fed cattle.<sup>193</sup> At the end of the backgrounding stage, calves are sold to feeding operations.

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

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

(ii) *Hogs and pork*<sup>196</sup>

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

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

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

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

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

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

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<sup>193</sup> Canada's first written submission, para. 48.

<sup>194</sup> Canada's first written submission, paras. 43-50 (Exhibit CDA-51); Mexico's first written submission, paras. 140-143.

<sup>195</sup> Canada's first written submission, para. 100; Mexico's first written submission, paras. 144-147.

<sup>196</sup> Hogs and pork are relevant only to the dispute by Canada.

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

<sup>198</sup> Canada's first written submission, paras. 59-68 and Annex II.

<sup>199</sup> Canada's first written submission, Annex III.

<sup>200</sup> Canada's first written submission, para. 60.

<sup>201</sup> Canada's first written submission, para. 61.

<sup>202</sup> Canada's first written submission, paras. 59-63 and Annex II; Exhibit CDA-61.

The carcasses are further processed into pork chops, which are packed and then sold to wholesalers, retailers and others.<sup>203</sup>

(b) Integrated nature of the North American livestock trade

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

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

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

D. CLAIMS UNDER THE TBT AGREEMENT

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

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

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<sup>203</sup> Canada's first written submission, paras. 100-103.

<sup>204</sup> Canada's first written submission, para. 37; Mexico's first written submission, paras. 109 and 114; United States' first written submission, paras. 88, 115 and 107.

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

<sup>206</sup> Exhibits US-150 and 151.

<sup>207</sup> United States' first written submission, para. 89; Exhibit US-28, Table 3; Exhibit CDA-196.

<sup>208</sup> Mexico's first written submission, paras. 137-138; United States' first written submission, para. 107.

<sup>209</sup> Mexico's first written submission, paras. 120-121; Exhibit MEX-35.

<sup>210</sup> Exhibit CDA-196.

<sup>211</sup> Canada's first written submission, para. 35; Mexico's first written submission, paras. 109 and 120-121.

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

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

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

### 1. Technical regulation

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

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

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

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

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

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<sup>213</sup> Appellate Body Report, *EC – Sardines*, para. 175. See also Appellate Body Report, *EC – Asbestos*, para. 59 and Panel Report, *EC – Sardines*, para. 7.20.

<sup>214</sup> See Mexico's first written submission, para. 372.

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

because of its distinctive nature, the Vilsack letter should be examined separately from the COOL measure.<sup>216</sup>

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

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

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

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

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

(i) *Whether compliance with the COOL measure is mandatory*

#### Main arguments of the parties

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

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

<sup>216</sup> See para. 7.55 above.

<sup>217</sup> (footnote original) *The New Shorter Oxford English Dictionary* (1993).

<sup>218</sup> Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.453.

<sup>219</sup> Appellate Body Report, *EC – Asbestos*, para. 68.

<sup>220</sup> For the purpose of the sections on the main arguments of the parties in these reports, we use the term "the COOL measure" and "the COOL measures" as presented by the parties in their written submissions. The use of these terms in the parties' arguments section of the reports, therefore, does not reflect the Panel's conclusion above in Section VII.B.1 on the characterization of the instruments at issue.

<sup>221</sup> See Canada's first written submission, para. 73 and Mexico's first written submission, para. 246.

<sup>222</sup> Appellate Body Report, *EC – Asbestos*, para. 68.

<sup>223</sup> See Canada's first written submission, paras. 73-74.



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

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

#### Analysis by the Panel

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

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

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

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

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

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

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

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<sup>224</sup> See Mexico's first written submission, paras. 247-250.

<sup>225</sup> See United States' first written submission, paras. 132-136.

<sup>226</sup> 7 U.S.C. § 1638a(a)(1).

<sup>227</sup> 7 U.S.C. § 1638a(e).

<sup>228</sup> 7 U.S.C. § 1638b. See also 74 FR 2664 (Exhibits CDA-5 and MEX-7).

<sup>229</sup> 7 U.S.C. § 1638b.

<sup>230</sup> Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.453. See also Appellate Body Report, *EC – Sardines*, para. 194, footnote 111.

<sup>231</sup> Appellate Body Report, *EC – Asbestos*, para. 72.

<sup>232</sup> 7 U.S.C. § 1638a(a)(2)(B)(ii).

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

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

(ii) *Whether compliance with the Vilsack letter is mandatory*

Main arguments of the parties

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

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

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

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

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<sup>233</sup> See Canada's response to Panel question No. 7 and Canada's second written submission, para. 107.

<sup>234</sup> See Canada's second written submission, paras. 106-107 and Canada's response to Panel question Nos. 7 and 8.

<sup>235</sup> See Canada's response to Panel question No. 95.

<sup>236</sup> See Canada's response to Panel question No. 95.

<sup>237</sup> See Canada's response to Panel question No. 99.

<sup>238</sup> See Mexico's first written submission, paras. 252-258.

<sup>239</sup> See para. 258.

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

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

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

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

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

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<sup>240</sup> See Mexico's response to Panel question No. 7.

<sup>241</sup> See Mexico's second written submission, para. 38.

<sup>242</sup> See Mexico's response to Panel question No. 8 and 96.

<sup>243</sup> See Mexico's second written submission, paras. 35, 37.

<sup>244</sup> See Mexico's response to Panel question No. 99.

<sup>245</sup> See United States' first written submission, para. 134.

<sup>246</sup> See United States' first written submission, para. 84.

<sup>247</sup> See Appellate Body Report, *EC – Asbestos*, para. 68.

<sup>248</sup> See United States' first written submission, para. 134-136 and United States' opening oral statement at the second substantive meeting of the Panel, paras. 16-17.

<sup>249</sup> See United States' first written submission, para. 135 and United States' comments on Canada's and Mexico's responses to Panel question No. 96.

<sup>250</sup> See United States' comments on Canada's and Mexico's responses to Panel question No. 96.

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

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

#### Analysis by the Panel

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

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

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

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

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

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<sup>251</sup> The United States refers to Exhibits CDA-67, 83, 86, and 92 in this context.

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

<sup>253</sup> See United States' response to Panel question No. 6.

<sup>254</sup> See para. 7.55 above.

<sup>255</sup> See Appellate Body Report, *EC – Asbestos*, para. 68. See para. 7.150 above.

<sup>256</sup> Appellate Body Report, *EC – Asbestos*, para. 68 (emphasis added).

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

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

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

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

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

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

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

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

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<sup>257</sup> See para. 7.177 above.

<sup>258</sup> See para. 7.55 above.

<sup>259</sup> Exhibits CDA-42 and MEX-23.

<sup>260</sup> See Canada's first written submission, para. 28 and Mexico's first written submission, para. 225.

<sup>261</sup> See 7 U.S.C. § 1638c(b).

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

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

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

"[O]nly four stores (all in California) marked veal items with production steps out of 53 stores that carried veal ('Born in Canada, Processed in the U.S.'). Production steps were not found on any other covered commodity.

Retailers were – for the most part – labeling covered commodities for country of origin."<sup>266</sup>

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

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

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

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

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<sup>262</sup> See Exhibits CDA-227 and US-145. See also United States' response to Panel question Nos. 6 and 90 and Canada's comments on the United States' response to Panel question No. 90.

<sup>263</sup> See Exhibit CDA-227. See also Exhibit US-145.

<sup>264</sup> Exhibit CDA-227.

<sup>265</sup> Exhibit CDA-227.

<sup>266</sup> Exhibit CDA-227.

<sup>267</sup> Exhibit CDA-227.

<sup>268</sup> See Exhibits CDA-161, MEX-71 and US-67.

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

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

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

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

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

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

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

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

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

<sup>272</sup> See Exhibit CDA-193.

<sup>273</sup> See Exhibits CDA-67, 83 and 86.

<sup>274</sup> Appellate Body Report, *EC – Asbestos*, para. 68 (emphasis added).

<sup>275</sup> Appellate Body Report, *EC – Asbestos*, para. 68 (emphasis original).

<sup>276</sup> See Canada's first written submission, para. 74, footnote 98.

three elements of the definition of "technical regulations" is found to be unfulfilled, there is no need to analyse the other two elements.<sup>277</sup>

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

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

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

(i) *Main arguments of the parties*

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

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

(ii) *Analysis by the Panel*

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

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

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

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

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<sup>277</sup> See Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.508.

<sup>278</sup> The Vilsack letter will be analysed subsequently in the context of the claims under the GATT 1994.

<sup>279</sup> See Canada's first written submission, para. 71 and Mexico's first written submission, para. 239.

<sup>280</sup> See Mexico's first written submission, para. 240.

<sup>281</sup> See Mexico's first written submission, para. 241.

<sup>282</sup> Appellate Body Report, *EC – Asbestos*, para. 70 (emphasis original).

<sup>283</sup> Appellate Body Report, *EC – Asbestos*, para. 70 (emphasis original, footnote omitted).



for country of origin labelling purposes as including "(i) muscle cuts of beef ... and pork" and "(ii) ground beef ... and ground pork".<sup>284</sup>

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

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

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

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

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

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

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

(i) *Main arguments of the parties*

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

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<sup>284</sup> 7 U.S.C. § 1638(2).

<sup>285</sup> See Appellate Body Report, *EC – Sardines*, para. 182.

<sup>286</sup> Appellate Body Report, *EC – Sardines*, para. 183 (emphasis original).

<sup>287</sup> Appellate Body Report, *EC – Sardines*, para. 185 (emphasis original).

<sup>288</sup> Appellate Body Report, *EC – Sardines*, para. 186.

<sup>289</sup> See 7 U.S.C. § 1638a(a)(1).

<sup>290</sup> 7 U.S.C. § 1638a(e).

<sup>291</sup> 7 U.S.C. § 1638(1).

<sup>292</sup> 7 U.S.C. § 1638(7).

<sup>293</sup> See Canada's first written submission, para. 72 and Mexico's first written submission, paras. 244-245.

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

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

(ii) *Analysis by the Panel*

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

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

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

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

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

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

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

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<sup>294</sup> See Appellate Body Report, *EC – Asbestos*, para. 67.

<sup>295</sup> See Canada's first written submission, para. 72 and Mexico's first written submission, paras. 242-243.

<sup>296</sup> 7 U.S.C. § 1638a(e).

<sup>297</sup> See Appellate Body Report, *EC – Asbestos*, para. 67. See also Appellate Body Report, *EC – Sardines*, paras. 187-193.

<sup>298</sup> See Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, paras. 7.447-7.448.

<sup>299</sup> See Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, paras. 7.449-7.452.

## 2. Article 2.1

### (a) Introduction

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

7.218 Article 2.1 of the TBT Agreement provides:

"With respect to their central government bodies:

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

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

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

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

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

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

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

##### Main arguments of the parties

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

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

<sup>301</sup> Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.444.

<sup>302</sup> Canada's first written submission, para. 78; and Mexico's first written submission, para. 266.

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

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

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

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

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

#### Analysis by the Panel

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

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<sup>303</sup> Canada's first written submission, para. 79, referencing Appellate Body Report, *EC – Asbestos*, para. 99.

<sup>304</sup> Mexico's first written submission, para. 263, in particular footnote 199.

<sup>305</sup> Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.464.

<sup>306</sup> Mexico's first written submission, paras. 263, 266, in particular footnotes 199 and 204.

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

<sup>308</sup> Canada's response to Panel question No. 42; and Mexico's response to Panel question No. 42.

<sup>309</sup> United States' response to Panel question No. 42.

<sup>310</sup> United States' response to Panel question No. 42.

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

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

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

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

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

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

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

"With respect to their central government bodies:

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

<sup>312</sup> Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.469.

<sup>313</sup> Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.464.

<sup>314</sup> Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.444.

See para. 7.219 above.

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

<sup>316</sup> Appellate Body Report, *US – Section 211 Appropriations Act*, para. 242 (original emphasis).

the treatment given either to other foreign products, under the most favoured nation standard, or to domestic products, under the national treatment standard of Article III.<sup>317,318</sup>

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

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

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

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

(i) *Whether the COOL measure is a technical regulation*

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

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

#### Main arguments of the parties

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

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<sup>317</sup> (footnote original) *US – Section 337*, BISD 36S/345, 386-387, paras. 5.11.

<sup>318</sup> Panel Report, *Japan – Film*, para. 10.379.

<sup>319</sup> See also Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.464.

<sup>320</sup> Panel Report, *EC – Bananas III*, para. 7.162.

<sup>321</sup> See paras. 7.196-7.216 above.

<sup>322</sup> United States' first written submission, footnote 166.

<sup>323</sup> United States' first written submission, para. 196.

<sup>324</sup> United States' first written submission, paras. 196-199.

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

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

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

#### Analysis by the Panel

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

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

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

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

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<sup>325</sup> United States' first written submission, para. 197.

<sup>326</sup> United States' first written submission, para. 198.

<sup>327</sup> United States' opening oral statement at the first substantive meeting of the Panel, para. 34.

<sup>328</sup> Canada's second written submission, paras. 13-14.

<sup>329</sup> Mexico's second written submission, paras. 117 and 120.

<sup>330</sup> (*footnote original*) *The New Shorter Oxford English Dictionary*, (Clarendon Press, 1993), p. 2565.

<sup>331</sup> Panel Report, *US – Section 211 Appropriations Act*, para. 8.30.

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

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

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

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

#### Main arguments of the parties

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

- (a) the products' properties, nature and quality;
- (b) the products' end-uses in a given market;
- (c) consumer tastes and habits in respect of the products; and

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<sup>332</sup> Appellate Body Report, *EC – Asbestos*, para. 100.

<sup>333</sup> 7 U.S.C. § 1638.

<sup>334</sup> 7 U.S.C. § 1638a.

<sup>335</sup> See para. 7.205 above.

<sup>336</sup> 7 U.S.C. § 1638a.

<sup>337</sup> 7 U.S.C. § 1638a.

<sup>338</sup> 7 U.S.C. § 1638b.

<sup>339</sup> Canada's response to Panel question No. 42, Mexico's response to Panel question No. 42, United States' response to Panel question No. 42, Canada's opening oral statement at the first substantive meeting of the Panel, para. 11 and Mexico's opening oral statement at the first substantive meeting of the Panel, para. 29.

<sup>340</sup> Canada's first written submission, para. 79 and Mexico's first written submission, paras. 200 and 266.



(d) the tariff classification of the products.<sup>341</sup>

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

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

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

#### Analysis by the Panel

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

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

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<sup>341</sup> See Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 20-21 and Appellate Body Report, *EC – Asbestos*, para. 101.

<sup>342</sup> Canada's first written submission, paras. 81-84.

<sup>343</sup> Mexico's first written submission, paras. 199-205 and 266-267.

<sup>344</sup> United States' first written submission, para. 281.

<sup>345</sup> United States' first written submission, para. 282.

<sup>346</sup> Canada's first written submission, para. 85.

<sup>347</sup> United States' response to Panel question No. 117 (footnote omitted).

does not object to the contention that the only basis of distinction between the products at issue is that of origin.<sup>348</sup>

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

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

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

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

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

#### Main arguments of the parties

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

#### Legal test

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

<sup>348</sup> Canada's first written submission, para. 85.

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

<sup>350</sup> Canada's first written submission, para. 86.

<sup>351</sup> Mexico's first written submission, para. 219.

<sup>352</sup> United States' first written submission, para. 140.

<sup>353</sup> Canada's first written submission, para. 86, Mexico's first written submission, para. 268, Canada's Response to Panel question No. 42, Mexico's Response to Panel question No. 42, and United States' Response to Panel question No. 42.

<sup>354</sup> Canada's first written submission, para. 83 and Mexico's first written submission, para. 217.

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

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

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

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

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

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<sup>355</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 137.

<sup>356</sup> Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 93.

<sup>357</sup> GATT Panel Report, *US – Section 337 Tariff Act*, para. 5.11.

<sup>358</sup> Canada's first written submission, para. 88.

<sup>359</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 145.

<sup>360</sup> Canada's first written submission, para. 90.

<sup>361</sup> Mexico's first written submission, para. 218.

<sup>362</sup> Canada's first written submission, para. 89.

<sup>363</sup> Canada's first written submission, paras. 91-154 and Mexico's first written submission, paras. 220-232 and 269.

<sup>364</sup> Canada's response to Panel question No. 42 and Mexico's first written submission, para. 218.

<sup>365</sup> Canada's first written submission, para. 91.

<sup>366</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 146.

<sup>367</sup> Canada's first written submission, para. 91.

<sup>368</sup> Mexico's first written submission, para. 218.

<sup>369</sup> Mexico's first written submission, para. 220.

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

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

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

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

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<sup>370</sup> United States' first written submission, para. 147, footnote 169.

<sup>371</sup> United States' first written submission, para. 142.

<sup>372</sup> Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.464.

<sup>373</sup> United States' first written submission, para. 142.

<sup>374</sup> United States' first written submission, paras. 142-145.

<sup>375</sup> United States' first written submission, para. 147.

<sup>376</sup> Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 96.

<sup>377</sup> United States' first written submission, para. 174.

<sup>378</sup> United States' first written submission, para. 173. See also Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 9

<sup>379</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 149.

<sup>380</sup> United States' second written submission, paras. 64-65.

<sup>381</sup> Canada's first written submission, para. 91.

<sup>382</sup> Canada's first written submission, paras. 92-94.

and slaughterhouses. The price basis between Canadian and US-fed cattle has widened, and US imports of Canadian livestock have dramatically decreased.<sup>383</sup>

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

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

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

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

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<sup>383</sup> Canada's first written submission, paras. 140-154.

<sup>384</sup> Canada's first written submission, paras. 95-106.

<sup>385</sup> Canada's first written submission, paras. 107-112.

<sup>386</sup> Canada's first written submission, paras. 113-117.

<sup>387</sup> Canada's first written submission, paras. 118-124.

<sup>388</sup> Canada's first written submission, paras. 193-195.

<sup>389</sup> Mexico's first written submission, para. 228.

<sup>390</sup> Mexico's first written submission, paras. 222-230.

<sup>391</sup> Mexico's first written submission, para. 228.

<sup>392</sup> Mexico's first written submission, para. 230.

<sup>393</sup> Mexico's first written submission, para. 221.

<sup>394</sup> Mexico's first written submission, para. 89.

<sup>395</sup> United States' first written submission, para. 193.

<sup>396</sup> United States' first written submission, para. 194.

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

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

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

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

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<sup>397</sup> United States' first written submission, para. 191.

<sup>398</sup> United States' first written submission, para. 150.

<sup>399</sup> United States' first written submission, paras. 150, 152-159; and United States' second written submission, paras. 42-44.

<sup>400</sup> United States' first written submission, paras. 153-156 and 158.

<sup>401</sup> United States' first written submission, para. 158; and United States' second written submission, para. 43.

<sup>402</sup> United States' first written submission, paras. 164-167; and United States' second written submission, para. 57.

<sup>403</sup> United States' first written submission, paras. 150 and 168-189.

<sup>404</sup> United States' first written submission, paras. 168-170, United States' response to Panel question No. 43 and United States' second written submission, para. 59.

<sup>405</sup> Canada's second written submission, paras. 25-32, Canada's response to Panel question No. 120, Mexico's response to Panel question No. 43, Mexico's response to Panel question No. 120.

<sup>406</sup> Canada's second written submission, paras. 25-32.

<sup>407</sup> Canada's opening oral statement at the second substantive meeting of the Panel, para. 27.

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

Whether there is any incentive to process domestic livestock

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

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

#### Analysis by the Panel

##### Introduction

##### *Relevance of Article III:4 of the GATT 1994*

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

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

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<sup>408</sup> Mexico's opening oral statement at the second substantive meeting of the Panel, paras. 20-23.

<sup>409</sup> Canada's first written submission, para. 91 and Mexico's first written submission, para. 215.

<sup>410</sup> Canada's opening oral statement at the second substantive meeting of the Panel, para. 23.

<sup>411</sup> Mexico's second written submission, para. 135.

<sup>412</sup> United States' first written submission, para. 169.

<sup>413</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 146.

<sup>414</sup> United States' first written submission, para. 171.

<sup>415</sup> See para. 7.233 above.

<sup>416</sup> See para. 7.234 above.

<sup>417</sup> Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16. See also Appellate Body Report, *EC – Asbestos*, para. 93.

means ... according *conditions of competition* no less favourable to the imported product than to the like domestic product".<sup>418</sup>

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

#### *Order of analysis*

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

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

- (a) whether the different categories of labels under the COOL measure accord different treatment to imported livestock;
- (b) whether the COOL measure involves segregation and, consequently, differential costs for imported livestock; and
- (c) whether, through the compliance costs involved, the COOL measure creates any incentive to process domestic livestock, thus reducing the competitive opportunities of imported livestock.

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

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

#### Statutory definition of the relevant meat labels under the COOL measure

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

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<sup>418</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 135 (original emphasis). See also *ibid.*, paras. 136-137.

<sup>419</sup> See Canada's second written submission, paras. 17-23 and Mexico's response to Panel question No. 94.

<sup>420</sup> United States' first written submission, para. 33; 7 U.S.C. § 1638a(a)(1).



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

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

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

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

#### Muscle cut labels

##### *The relationship among the muscle cut labels under the COOL measure*

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

<sup>421</sup> 7 U.S.C. § 1638a(a)(2)(E).

<sup>422</sup> 74 FR 2671.

<sup>423</sup> 7 U.S.C. §§ 1638a(a)(2)(A)-(D).

<sup>424</sup> 7 U.S.C. §§ 1638a(a)(2)(A)-(D).

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

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

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

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

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

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

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

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<sup>425</sup> 74 FR 2659.

<sup>426</sup> 74 FR 2659.

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

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

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

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

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

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

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

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

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

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<sup>429</sup> Exhibit CDA-21.

<sup>430</sup> Exhibits CDA-117, 199 and MEX-53.

<sup>431</sup> 74 FR 2659.

<sup>432</sup> 74 FR 2659.

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

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

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

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

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

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

#### De jure versus de facto discrimination

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

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

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

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

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

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<sup>434</sup> Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.464.

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

<sup>436</sup> See Canada's response to Panel question Nos. 42 and 46 and Mexico's first written submission, paras. 218, 220 and 263.

<sup>437</sup> (*footnote original*) See, e.g. Panel Report, *Italian Discrimination against Imported Agricultural Machinery*, L/833, BISD 7S/60, adopted 23 October 1958, para. 12.

<sup>438</sup> Panel Report, *Canada – Autos*, para. 140.

<sup>439</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 137 (original emphasis).

<sup>440</sup> Appellate Body Report, *EC – Bananas III*, para. 233. See also Appellate Body Report, *Canada – Autos*, para. 141.

*de jure* discrimination would facilitate circumvention.<sup>441</sup> As the Appellate Body explained in *EC – Bananas III* with regard to Article II of the GATS:

"[I]f Article II was not applicable to *de facto* discrimination, it would not be difficult – and, indeed, it would be a good deal easier in the case of trade in services, than in the case of trade in goods – to devise discriminatory measures aimed at circumventing the basic purpose of that Article."<sup>442</sup>

7.301 As the TBT Agreement serves "to further the objectives of GATT 1994", it would be incongruous to interpret Article 2.1 of the TBT Agreement as excluding *de facto* discriminatory treatment, while the corresponding national treatment provision in Article III:4 of the GATT 1994 covers that type of discrimination.

7.302 Accordingly, we continue our analysis by addressing whether the muscle cut labels under the COOL measure accord *de facto* less favourable treatment to imported than to domestic livestock and *de facto* modify the *conditions of competition* in the US market to the detriment of imported livestock.<sup>443</sup> The complainants allege this is the case because in general the COOL measure entails higher costs for handling imported than domestic livestock. We now turn to this issue.

#### *Costs of compliance with the COOL measure*

7.303 The complainants argue, and the United States does not contest, that the COOL measure involves compliance costs. In fact, in the 2009 Final Rule (AMS), USDA indicated that the COOL measure entails compliance costs for all participants in the livestock and meat sector:

"[F]irms and establishments throughout the supply chain for affected commodities will incur costs associated with the implementation of COOL. This includes producers, intermediaries, and retailers."<sup>444</sup>

7.304 The 2009 Final Rule (AMS) includes a dedicated section analysing the benefits and costs of the COOL measure for various stages of the meat supply chain.<sup>445</sup> As regards cattle and beef, for "retail stores", the USDA cost analysis identifies the following as "cost drivers": "individual package labels or other point-of-sale materials", potential "additional labor and personnel training", "modification of existing recordkeeping systems", possibly involving "software programming and ... additional computer hardware".<sup>446</sup>

7.305 The analysis then turns to "distribution centers or warehouses", explaining that "[d]irect store deliveries (such as when a local truck farmer delivers fresh produce directly to a retail store) are an exception". For the distribution segment, the USDA cost analysis identifies the following as cost drivers: the "modification of existing recordkeeping processes", "additional labor and training" and "new processes and procedures needed to maintain the flow of country of origin ... information through the distribution system". Moreover, according to the USDA cost analysis, "[t]here may be a

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<sup>441</sup> See Appellate Body, *Canada – Autos*, para. 142 and Appellate Body Report, *EC – Bananas III*, para. 233.

<sup>442</sup> Appellate Body Report, *EC – Bananas III*, para. 233.

<sup>443</sup> In light of the complainants' arguments, we refrain from addressing whether the COOL measure involves *de jure* less favourable treatment for imported Canadian and Mexican livestock.

<sup>444</sup> 74 FR 2680. See also Exhibits CDA-72 (BCI) and US-18.

<sup>445</sup> See 74 FR 2682 *et seq.*

<sup>446</sup> 74 FR 2684-2685.

need to further separate products within the warehouse, add storage slots, and alter product stocking, sorting, and picking procedures".<sup>447</sup>

7.306 Turning to beef "packers and processors", the USDA cost analysis points out that "[t]he efficiency of operations may be affected as products move through the receiving, storage, processing, and shipping operations".<sup>448</sup> Finally, at "the production level", according to the USDA cost analysis, "additional producer costs include the cost of modifying and maintaining a recordkeeping system for country of origin information, animal or product identification, and labor and training". The USDA cost analysis adds that:

"[T]o estimate the direct cost of this rule, the focus is on those units of production that are affected ... For livestock, the relevant unit of production is an animal because there will be costs associated with maintaining country of origin information on each animal. These costs may include recordkeeping, ear tagging, and other related means of identification on either an individual animal or lot basis."<sup>449</sup>

7.307 The USDA cost analysis of the COOL measure points to increasing costs as livestock and meat move downstream in the supply and marketing chain, based on "the expectation of relatively small implementation costs at the cow-calf level of production, but relatively higher costs each time cattle are resold". As regards intermediaries, the 2009 Final Rule (AMS) expects "increased costs associated with tracking cattle and the covered beef commodities produced from these animals and then providing this information to subsequent purchasers, which may be other intermediaries or covered retailers". According to the 2009 Final Rule (AMS), "[i]ncremental costs for beef packers may include additional capital and labor expenditures to enable cattle from different origins to be tracked for slaughter, fabrication and processing". For retailers, the 2009 Final Rule (AMS) takes into account specific:

"[C]osts for individual package labels, meat case segmentation, record keeping and information technology changes, labor, training, and auditing. In addition, there likely will be increased costs for in-store butcher department operations related to cutting, repackaging, and grinding operations."<sup>450</sup>

7.308 For hogs, the 2009 Final Rule (AMS) depicts a similar situation. It estimates that "[c]osts for all pork sector intermediaries (including handlers, processors, and wholesalers) should be similar to costs for beef sector intermediaries". As regards pork retailers, the 2009 Final Rule (AMS) estimates costs being "lower than for beef" retailers but this difference is primarily due to "higher costs incurred by in-store grinding operations to produce ground beef", whereas "most ground pork is processed into sausage and other products not covered by the [2009 Final Rule] [(AMS)]".<sup>451</sup>

7.309 Canada submitted a cost assessment of the COOL requirements prepared by a consultancy, Sparks Companies Inc., in 2003.<sup>452</sup> Further, both complainants submitted an updated version of this cost assessment prepared by Informa Economics, the successor to Sparks Companies Inc., in 2010 on the basis of 2009 data.<sup>453</sup>

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<sup>447</sup> 74 FR 2685.

<sup>448</sup> 74 FR 2685.

<sup>449</sup> 74 FR 2685.

<sup>450</sup> 74 FR 2687.

<sup>451</sup> 74 FR 2687.

<sup>452</sup> See Exhibit CDA-70.

<sup>453</sup> See Exhibits CDA-64 and MEX-24.

7.310 Although the United States has called into question the underlying data and methodology of these studies, these criticisms relate primarily to the specific cost estimates in the studies and the comparison between the costs incurred by handling only US-origin versus handling both domestic and imported livestock and meat.<sup>454</sup> The United States has not contested the findings of the Sparks and Informa reports regarding the existence of the costs incurred as a result of the country of origin labelling requirements at the various livestock and meat processing stages. Like the cost analysis of the 2009 Final Rule (AMS), the Informa Report finds that, in general, costs of compliance with the requirements arise at every stage of the livestock and meat supply chain, and that these costs increase as livestock and meat move downstream in the chain. The United States has not contested these aspects of the Informa Report. In fact, as Canada points out<sup>455</sup>, already the 2003 Proposed Rule relied on the Sparks Report to assess the costs associated with the adoption of country of origin labelling requirements.<sup>456</sup> Accordingly, we consider that these reports confirm the general observations of the 2009 Final Rule (AMS) with regard to the existence of costs involved in the COOL measure.<sup>457</sup>

7.311 The United States argues that any regulation potentially involves costs. But it is not the costs of the COOL measure in itself that the complainants contest in this dispute. Rather, they argue that the compliance costs of the COOL measure are distributed differentially between domestic and like imported livestock, to the detriment of the latter.

7.312 The United States also argues that any regulation may involve differential costs for different types of market participants.<sup>458</sup> In support of this contention, the United States references the OECD Council Recommendation on Improving the Quality of Government Regulation<sup>459</sup> and the OECD Guiding Principles for Regulatory Quality and Performance.<sup>460</sup>

7.313 As we explained<sup>461</sup>, like Article III:4 of the GATT 1994, Article 2.1 is concerned with the equality of competitive conditions between domestic and imported products. This has been interpreted as meaning that "a measure accords less favourable treatment to imported products if it gives domestic like products a competitive advantage in the market over imported like products".<sup>462</sup> The flip side of this is that, under Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement, no competitive disadvantage shall be accorded to imported products as compared to like domestic products. A cost resulting from a (technical) regulation may qualify as a competitive disadvantage if it is incurred only by imported and not like domestic products. The OECD Recommendation and Guiding Principles referenced by the United States do not suggest that higher costs for foreign products are an attribute or acceptable effect of sound regulation.

7.314 Accordingly, we turn to whether the costs of the COOL measure are higher for imported than for domestic livestock, and result in less favourable treatment for imported livestock. In light of the complainants' arguments, we first assess whether the COOL measure involves segregation of meat and livestock according to origin.

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<sup>454</sup> See Exhibit US-43.

<sup>455</sup> See Canada's opening oral statement at the first substantive meeting of the Panel, para. 41.

<sup>456</sup> See 68 FR 61962 (Exhibit CDA-11).

<sup>457</sup> For a more detailed summary and analysis of the Informa Report, see paras. 7.489-7.499 below.

<sup>458</sup> See United States' first written submission, paras. 193-194.

<sup>459</sup> See Exhibit US-45. See also Exhibit US-66.

<sup>460</sup> See Exhibit US-44.

<sup>461</sup> See para. 7.276 above.

<sup>462</sup> Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 93. See also Panel Report, *Mexico – Taxes on Soft Drinks*, para. 8.117.

### *Segregation*

7.315 Turning to whether the COOL measure requires segregation according to origin, we note that the COOL measure does not explicitly require segregation, let alone the segregation of domestic and imported livestock. In relevant part, it sets out labelling requirements for muscle cuts of meat, namely beef and pork, at the retail stage, i.e. "at the final point of sale to consumers".<sup>463</sup> However, as we explained above, the COOL measure requires labelling of meat based on the origin of an animal from which meat is derived, and upstream stages of livestock and meat production are directly relevant for determining the origin of meat.

7.316 To accurately label muscle cuts under the COOL measure, a covered retailer needs to possess information on where livestock processing steps determining origin under the COOL measure have taken place with regard to each muscle cut. This information can be obtained only from the upstream livestock and meat supply chain. This is why, as explained above<sup>464</sup>, the COOL measure establishes recordkeeping requirements – as well as sanctions for violating these – for both retailers and any "person engaged in the business of supplying a covered commodity to a retailer". In fact, the 2009 Final Rule (AMS) elaborates on the "Responsibilities of Retailers *and Suppliers*" and references a "recordkeeping provision concerning *livestock*".<sup>465</sup> In addition, the COOL measure requires "[a]ny person engaged in the business of supplying a covered commodity to a retailer [to] provide information to the retailer indicating the country of origin of the covered commodity".<sup>466</sup>

7.317 Hence, as a matter of principle, the COOL measure prescribes an unbroken chain of reliable country of origin information with regard to every animal and muscle cut. In other words, to comply with the COOL measure, livestock and meat processors need to possess, at each and every stage of the supply and distribution chain, the kind of origin information required by the various COOL labels for which each animal or portion of meat is eligible, and they need to transmit such information to the next processing stage. The 2009 Final Rule (AMS) stresses that "it is necessary to ensure information accurately reflects the origin of any group, lot, box, or package in accordance with the intent of the statute ...".<sup>467</sup> Further, under the 2009 Final Rule (AMS), as a general rule, "[l]abeling of covered commodities offered for sale whether individually, in a bulk bin, carton, crate, barrel, cluster, or consumer package must contain country of origin as set forth in this regulation".<sup>468</sup>

7.318 Further, in its analysis of the costs and benefits of the COOL measure, the 2009 Final Rule (AMS) points out that the COOL measure creates costs throughout the supply chain by requiring an unbroken chain of reliable country of origin information:

"[T]his [Final R]ule directly regulates the activities of retailers (as defined by the law) and their suppliers. Retailers are required by the rule to provide country of origin information for the covered commodities that they sell, and firms that supply covered commodities to these retailers must provide them with this information. In addition, virtually all other firms in the supply chain for the covered commodities are potentially affected by the rule because country of origin information will need to be maintained and transferred along the entire supply chain."<sup>469</sup>

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<sup>463</sup> 7 U.S.C. § 1638a(a)(1).

<sup>464</sup> See paras. 7.116-7.122 above.

<sup>465</sup> 74 FR 2660 (emphasis added).

<sup>466</sup> 7 U.S.C. § 1638a(e).

<sup>467</sup> 74 FR 2684.

<sup>468</sup> 74 C.F.R. § 65.300(a).

<sup>469</sup> 74 FR 2684.



7.319 As regards ensuring this unbroken chain of reliable country of origin information, the 2009 Final Rule (AMS) explains that "the COOL program is ... [not] a traceability program"<sup>470</sup>, and the COOL statute prohibits USDA from imposing "a mandatory identification system to verify the country of origin of a covered commodity".<sup>471</sup> Further, the recordkeeping obligations for retailers and their suppliers under the COOL statute are limited to "records maintained in the normal conduct of the business of such person, including animal health papers, import or customs documents, or producer affidavits"<sup>472</sup>, and the COOL statute explicitly prohibits USDA from requiring retailers and suppliers to maintain any "additional records".<sup>473</sup> For instance, the COOL measure allows the use of established identification numbers or ear tags to identify the origin of live animals.<sup>474</sup>

7.320 Accordingly, a practical way to ensure that the chain of reliable information on country of origin required by the COOL measure remains unbroken is the segregation of meat and livestock according to origin as defined by the COOL measure.

7.321 This is confirmed by the Country of Origin Labeling Compliance Guide revised by USDA in May 2009, which was issued after the entry into force of the 2009 Final Rule (AMS). This USDA Compliance Guide mentions a "segregation plan" as one of the "examples of records and activities that may be useful" to comply with the COOL measure.<sup>475</sup>

7.322 In regard to "Cattle, Beef, Muscle Cuts of Beef, Ground Beef", the same USDA Compliance Guide references a "segregation plan" specifically for each type of participant in the meat supply chain from "[s]eed [s]tock/[c]ow [c]alf" all the way to "[d]istributor".<sup>476</sup> Further, it refers to the "[r]esponsibility" of each type of participant for identifying the origin of all products processed, including meat and animals, and segregating or at least providing or maintaining origin information:

TYPE OF PARTICIPANT	RESPONSIBILITY
"Seed Stock/Cow Calf"	"Provide enough information for an auditor to verify the origin and ownership of the animals identified and to verify the stated designation. Properly <i>identify and record all animals</i> according to the designation."
"Stocker/Backgrounder"	" <i>Identify and segregate animals as to the origin designation. Properly identify all animals sold. Maintain the integrity of the identification. Maintain ownership transfer.</i> "
"Preconditioning/Feedlot"	"Upon receipt <i>properly identify animals</i> according to their designation. <i>Segregate and control animals. Properly identify all animals sold. Maintain ownership records.</i> "

<sup>470</sup> 74 FR 2679.

<sup>471</sup> 7 U.S.C. § 1638a(f)(1). See also Exhibit MEX-101.

<sup>472</sup> 7 U.S.C. § 1638a(d)(2)(A).

<sup>473</sup> 7 U.S.C. § 1638a(d)(2)(B).

<sup>474</sup> See 74 FR 2660.

<sup>475</sup> Exhibits CDA-65 and MEX-41.

<sup>476</sup> Exhibits CDA-65 and MEX-41.

<b>TYPE OF PARTICIPANT</b>	<b>RESPONSIBILITY</b>
"Slaughter/Fabricator"	"Segregate animals according to the country designation. Segregate and control carcasses throughout the system and properly label product according to the country designation. Document origin of all products."
"Fabricator/Processor"	"Transfer labels and identification of all products processed. Operate under a labeling program. Inventory all products according the origin."
"Distributor"	"Maintain the integrity of labeled product. If repackaged, transfer the original identification." <sup>477</sup>

7.323 For "Hogs, Pork, Muscle Cuts of Pork, Ground Pork", the USDA Compliance Guide similarly refers to "segregation plans" in regard to participants in the meat supply chain from "Feeder/Finish" onward. In addition, the USDA Compliance Guide lists the following as the "[r]esponsibility" of each type of participant:

<b>TYPE OF PARTICIPANT</b>	<b>RESPONSIBILITY</b>
"Nursery"	"Identify animals as to the sow/farrow origin. Maintain the integrity of the identification system. Document all movements of animals."
"Feeder/Finish"	"Upon receipt properly identify animals according to their designation. Segregate and control animals. Properly identify all animals sold. Maintain ownership records."
"Slaughter/Processor"	"Segregate animals according to the country designation. Segregate and control carcasses throughout the system and properly label product according to the country designation. Document origin of all products."
"Processor"	"Transfer labels and identification of all products processed. Operate under a SOP the [sic] addresses labeling. Inventory all products according to the origin."
"Distributor"	"Maintain the integrity of the product. If repackaged, transfer the original identification." <sup>478</sup>

7.324 These passages also underscore that the COOL measure involves not only initial adjustment costs but also regular costs that participants in the supply and distribution chain will incur in their daily operations. As the 2009 Final Rule (AMS) explains, "[t]he costs of production for directly affected firms increase due to the costs of implementing the COOL programme"<sup>479</sup>, and "[t]he rule increases the operating costs for the supply chains of the covered commodities".<sup>480</sup>

<sup>477</sup> Exhibits CDA-65 and MEX-41 (emphasis added).

<sup>478</sup> Exhibit CDA-65 (emphasis added).

<sup>479</sup> 74 FR 2683.

<sup>480</sup> 74 FR 2691.

7.325 Various entities in the United States have expressed the view that the COOL measure will necessarily lead to segregation in the meat supply chain. The US Congressional Research Service explained that among the various commodities covered by the COOL measure, "[t]he meat labeling requirements have proven to be among the most complex and controversial areas of rulemaking, in large part because of the steps that U.S. feeding operations and packing plants *must* adopt to segregate, hold, and slaughter foreign-origin livestock from U.S. livestock".<sup>481</sup> Further, a backgrounder on the COOL measure by the Food Marketing Institute (FMI), whose members represent "three-quarters of all retail food store sales in the United States", explains that "[t]he law *requires* the entire supply chain — from the farm to the retail store — to segregate, track and document the origin of hundreds of foods, including those produced in the U.S. and imported from more than 50 countries".<sup>482</sup> The same FMI backgrounder adds that "[the] labeling and segregation systems [entailed in the COOL measure] will be extremely costly and complex for the large quantities of beef and produce that are multinational in their origin, processing and packaging".<sup>483</sup>

7.326 Under the provisions of the COOL statute, the COOL requirements are enforced by USDA, which can eventually also impose a fine "for each violation" on a retailer or a person engaged in the business of supplying the covered commodity to a retailer.<sup>484</sup> Lack of segregation is not identified as a violation of the COOL measure subject to a fine. Yet, the COOL measure does set out the possibility of USDA imposing a fine on a retailer or supplier breaching the recordkeeping requirements (which may be complied with, for instance, by means of a "segregation plan") or on a supplier breaching the requirement to provide accurate information on country of origin.<sup>485</sup>

7.327 In light of these considerations, we conclude that, for all practical purposes, the COOL measure necessitates segregation of meat and livestock according to origin, even though this segregation is subject to certain flexibilities, which we have described above, and the cost implications of which we address in more detail further below.

7.328 In any event, the complainants are not arguing, and we do not find, that segregation *per se* would be a violation of Article 2.1 of the TBT Agreement. As the Appellate Body held in *Korea – Various Measures on Beef*, the "separation [of imported and domestic products], *in and of itself*, does not necessarily compel the conclusion that the treatment thus accorded to imported [products] is less favourable than the treatment accorded to domestic [products]".<sup>486</sup> Rather, the question is whether such separation "modifies the *conditions of competition* ... to the disadvantage of the imported product"<sup>487</sup> by imposing higher costs on imported than on domestic livestock.

7.329 We therefore turn to whether the segregation of livestock – to the extent it is necessitated by the COOL measure, and taking also into consideration the commingling flexibility – imposes higher costs on imported livestock than on like domestic livestock.

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<sup>481</sup> Exhibits CDA-117, CDA-199 and MEX-53 (emphasis added).

<sup>482</sup> Exhibit CDA-192 (emphasis added). See also Exhibits CDA-69, 75, 76, 81, 90 (all BCI), MEX-37 and 97 (both BCI).

<sup>483</sup> Exhibit CDA-192. See also Exhibits CDA-69, 75, 76, 81, 90 (all BCI). Exhibits MEX-33 and 55. See also Exhibits, MEX-37, 42 and 97 (all BCI).

<sup>484</sup> See 7 U.S.C. § 1638b(b).

<sup>485</sup> See also the USDA Compliance Guide, which explicitly identifies "Failure to Maintain Records" and "Failure to Provide COOL Information" as violations, and explicitly references the table listing "segregation plans" as one of the "examples of the types of records that may be useful to comply with the record keeping requirements for Country of Origin labeling." (Exhibit CDA-65).

<sup>486</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 144 (original emphasis).

<sup>487</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 144 (original emphasis).

*Whether segregation entails higher costs for imported livestock*

7.330 The segregation involved in the COOL measure does not necessarily impose differential implementation costs on imported and domestic products. If imported and domestic livestock are being processed, in principle, these need to be equally segregated from each other according to origin. In principle, the resulting implementation costs are the same for both imported and domestic products.

7.331 Yet, it is evident that the more origins and the more types of muscle cut labels involved, the more intensive the need for segregation throughout the livestock and meat supply and distribution chain. In turn, more intensive segregation leads to higher compliance costs with the COOL measure.

7.332 As the Chief Economist of USDA explained in his statement to the Committee on Agriculture of the US House of Representatives:

"Regarding the costs of country of origin labeling, they depend on the extent to which firms have to implement new control and verification systems including recordkeeping, reconfiguring processing and handling, producing signage and labels and training and educating their staff.

...

Several studies have estimated the costs for the cattle/beef and hog/pork sectors at up to several billion dollars annually, after examining all costs for the entire supply chain, including segregation and identity preservation."<sup>488</sup>

*Segregation costs under five business scenarios*

7.333 In the context of the COOL measure, there are five possible business scenarios in terms of whether the livestock being processed has domestic or imported origin:

- (a) processing domestic and imported livestock and meat irrespective of origin and solely according to price and quality;
- (b) processing meat from exclusively domestic livestock;
- (c) processing meat from exclusively imported livestock;
- (d) processing exclusively domestic and exclusively imported livestock at different times; or
- (e) processing both domestic and imported meat by commingling the two on the same production day.

7.334 These business scenarios involve different levels of segregation and, accordingly, different relative compliance costs.

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<sup>488</sup> Exhibit MEX-51.

*Processing domestic and imported livestock and meat solely according to price and quality*

7.335 The COOL measure does not prohibit processing domestic and imported livestock and meat solely according to the price and quality of the products, i.e. based on purely competitive considerations and irrespective of the origin of livestock.

7.336 This, however, seems a rather costly way of complying with the COOL measure. Muscle cuts processed under this scenario are eligible for at least two different labels. To ensure the unbroken chain of reliable country of origin information required under the COOL measure, this business scenario involves the identification by origin of each and every livestock and piece of meat throughout the supply and distribution chain. This entails extensive segregation, and relatively high compliance costs at every stage.

*Processing exclusively domestic or exclusively imported livestock*

7.337 The United States argues that segregation for muscle cuts may be avoided by processing livestock of either exclusively domestic or exclusively foreign origin.<sup>489</sup> Yet, these two scenarios are forms of separating imported and domestic products. Indeed, either scenario involves an absolute form of segregation in that it reflects a choice of not processing any domestic or foreign livestock at all.

7.338 Undoubtedly, these two business scenarios involve lower costs of compliance with the COOL measure, since there are fewer origins involved, and thus less intensive segregation is necessary throughout the operation of the market participant in question. Further reductions of compliance costs may be realized if entire supply chains switch to processing livestock and meat of exclusively domestic or exclusively foreign origin.

*Processing exclusively domestic and exclusively imported livestock at different times*

7.339 Market participants might also choose to segregate imported and domestic livestock according to time, namely by processing exclusively domestic livestock at certain times, and processing exclusively imported livestock at other times. Under this scenario, segregation takes place by shifts or days.

7.340 This approach, however, appears more costly than processing either exclusively foreign or domestic livestock. Overall, this scenario still involves processing more than one origin by the same market participant. Further, while segregation by time might reduce COOL compliance costs for individual market participants, e.g. a slaughterhouse, it does not reduce costs for suppliers, who need to segregate livestock by origin to allow meaningful segregation by time at a later stage. In fact, one US hogs processor procuring imported hogs on specific days of the week indicated to its livestock suppliers that "[t]o clarify these limited delivery times, if you have Canadian born hogs, they must be segregated, therefore we can only accept them certain times during the week as listed".<sup>490</sup>

7.341 This business scenario involves additional costs for livestock suppliers as they can only supply specific origin meat at specific times. As explained further below<sup>491</sup>, the complainants have

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<sup>489</sup> See United States' first written submission, para. 159.

<sup>490</sup> Exhibit CDA-105. See also Exhibit MEX-106 (BCI).

<sup>491</sup> See paras. 7.345-7.372 below.

submitted extensive evidence of the negative impacts of segregating imported livestock by time under the COOL measure.

7.342 Nor is this scenario less costly for downstream market participants, e.g. distributors and retailers, who need to segregate if they choose to handle the different origin meat processed at different times and carrying different labels.

*Commingling domestic and imported livestock and meat on the same production day*

7.343 Market participants might also benefit from the above-mentioned commingling flexibility. This, however, allows the reduction of segregation costs only to a certain extent.

7.344 Even at the stage where commingling takes place, it is limited to a single production day. Any commingled meat carrying, for instance, Label B still needs to be segregated at the processing stage and further downstream from Label A meat that was processed by the same slaughterhouse on another day. Also, commingling still requires keeping "accurate records" as well as maintaining the accuracy of country of origin information on mixed-origin labels. As the 2009 Final Rule (AMS) explains:

"[t]he initiator may elect to segregate and specifically classify each different category within a production day or mix different sources and provide a mixed label *as long as accurate records are kept*. Likewise, if a retailer wants to mix product from multiple categories, it can only be done in multi-product packages and then only when product from the different categories is represented in each package in order to correctly label the product."<sup>492</sup>

Overall assessment of the costs of segregation under the different business scenarios

*Incentive to process domestic livestock*

7.345 The above five business scenarios involve segregation of livestock and meat of domestic and imported origin at different levels of intensity and at different compliance costs. Three of the five scenarios involve processing meat from both domestic and imported livestock; one involves meat from exclusively domestic livestock; and another involves meat from exclusively imported livestock.

7.346 As noted above, the more origins and labels involved, the more intensive the segregation and the higher the compliance costs with the COOL measure throughout the livestock and meat supply chain. Commingling might reduce these costs at specific stages, but overall it still involves higher costs than processing single origin livestock only.

7.347 Accordingly, as a direct result of the COOL measure, business scenarios involving more than one origin or muscle cut label result in generally higher costs than scenarios involving only one origin. The relatively less costly business scenarios are the ones that involve processing meat from either exclusively domestic or exclusively foreign livestock at all times.

7.348 As the 2009 Final Rule (AMS) explained:

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<sup>492</sup> 74 FR 2670.

"[I]n the case where products of different origins are segregated, our analysis indicates costs are likely to increase. The rule requires that records be maintained to ensure that accurate country of origin information is retained throughout the process and available to permit compliance and enforcement reviews.

Processors handling only domestic origin products or products from a single country of origin may have lower implementation costs compared with processors handling products from multiple origins, although such costs would likely be mitigated in those cases where firms are only using covered commodities which are multiple-origin labeled."<sup>493</sup>

7.349 Turning to the scenarios involving either exclusively domestic or exclusively imported livestock, it seems logical that the scenario of processing exclusively domestic livestock and meat is in general less costly and more viable than processing exclusively imported livestock. Livestock imports have been and remain small compared to overall US livestock production and demand, and US livestock demand cannot be fulfilled with exclusively foreign livestock.<sup>494</sup> And even if it could be, in light of the evidence before us, it appears that this scenario would in all likelihood involve more than one foreign origin, and thus in general more segregation and higher compliance costs than processing exclusively domestic livestock, which by definition has one single origin. Also, in general, US livestock is often geographically closer to most if not all US domestic markets, so processing exclusively imported livestock and meat remains a relatively less competitive option.

7.350 As a result, overall, the least costly way of complying with the COOL measure is to rely on exclusively domestic livestock. Thus, in general, business scenarios involving imported livestock, including the scenario involving exclusively imported products, are overall more costly than the exclusively Label A approach.

7.351 Livestock and muscle cuts are agricultural commodity products, and the various business scenarios are in competition with each other. The compliance costs of the COOL measure, in particular the higher costs arising from the use of imported livestock, are at least in part passed on to upstream or downstream market participants, or both. As a major US meat processor explained, when moving from a predominantly Label B to a mostly Label A approach:

"[I]ncreased costs will result from these changes. Ultimately, we believe these additional expenses will have to be passed on through higher finished product prices or reduced prices for livestock."<sup>495</sup>

7.352 In other words, under the COOL measure and all other things being equal, either consumers pay more or livestock producers receive less for the livestock they sell to processors.

7.353 Indeed, it appears that the additional costs of the COOL measure cannot be fully passed on to consumers.<sup>496</sup> As the 2009 Final Rule (AMS) explains, at least some of the compliance costs of the COOL measure will arise at the level of suppliers of covered commodities: "[w]hile some of the increase in their costs will be offset by reduced production and higher prices over the longer term, the suppliers of the covered commodities will still bear direct implementation costs".<sup>497</sup>

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<sup>493</sup> 74 FR 2685.

<sup>494</sup> See 74 FR 2690.

<sup>495</sup> Exhibits CDA-36 to 38, CDA-24 (BCI), MEX-33, 35, 55, 56 and 57.

<sup>496</sup> See, for instance, Exhibits MEX-58, 70 and 101.

<sup>497</sup> 74 FR 2690.

7.354 The fact that consumers are not ready to bear all the costs of country of origin labelling of beef and pork is also demonstrated by the lack of interest in a voluntary COOL regime. This is acknowledged by USDA itself in the 2009 Final Rule (AMS):

"While USDA recognizes that there appears to be consumer interest in knowing the origin of food based on the comments received, USDA finds little evidence that private firms are unable to provide consumers with country of origin labeling (COOL) consistent with this regulation, if consumers are willing to pay a price premium for it. USDA also finds little evidence that consumers are likely to increase their purchase of food items bearing the United States origin label as a result of this rulemaking. Current evidence does not suggest that United States producers will receive sufficiently higher prices for United States-labeled products to cover the labeling, recordkeeping, and other related costs. The lack of widespread participation in voluntary programs for labeling products of United States origin provides evidence that consumers do not have strong enough preferences for products of United States origin to support price premiums sufficient to recoup the costs of labeling."<sup>498</sup>

7.355 In his statement to the Committee on Agriculture of the US House of Representatives, the Chief Economist of USDA offered a similar explanation on the lack of consumer interest in voluntary country of origin labelling.<sup>499</sup> He pointed out that at least some of the compliance costs of the COOL measure would be borne by livestock producers:

"Generally, when there is an increase in marketing costs like this rule would require, those costs would get passed on to consumers, and they would get passed back to suppliers – passed back to suppliers in the form of decreased demand for their product. That is one possible consequence livestock producers face, decreased demand because of increased marketing costs. Then they have their own direct increase in costs themselves that will be forced on them by suppliers. The prospect is that livestock prices would be the same or decline and profits probably decline. The only thing that would overcome that is demand in retail expands far out to overcome these effects, and as I stated, I think the prospects of that are low."<sup>500</sup>

7.356 In fact, there is direct evidence of major slaughterhouses applying a considerable COOL discount of USD 40-60 per head for imported livestock.<sup>501</sup> This proves that major processors are passing on at least some of the additional costs of the COOL measure upstream to suppliers of imported livestock.<sup>502</sup> We have no evidence of a similar discount being applied to suppliers of domestic livestock, nor has the United States responded to the evidence submitted by Canada and Mexico in this respect.

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<sup>498</sup> 74 FR 2682.

<sup>499</sup> The Chief Economist of USDA stated that "there is evidence that consumer preference for domestic product is weak. This evidence is the lack of voluntary programs that provide products labeled as domestic origin. USDA has been offering the opportunity for a U.S.-origin meat labeling program for years and there have been no takers.

If consumers distinguish goods depending on their country of origin, market incentives exist for suppliers to act without Government intervention, just as they do under voluntary certification programs such as for organic foods. There, consumers willing to pay a premium sufficient to cover the additional costs of the program. [sic] While the market has given us evidence that consumers would be willing to pay for organic, if [sic] has not done so for U.S. origin." Exhibit MEX-51.

<sup>500</sup> Exhibit MEX-51.

<sup>501</sup> See Exhibits CDA-57 and 81 (both BCI), MEX-37, 46, 64, 97 and 105 (all BCI).

<sup>502</sup> See Exhibits MEX-37, 46, 97 and 105 (all BCI). See also Exhibit MEX-101.



7.357 The COOL measure creates an incentive for participants to process domestic rather than imported livestock because, under the COOL measure, processing meat from exclusively domestic livestock is less costly than other business scenarios. Passing on these costs at least in part to imported livestock in turn creates a reduction in the competitive opportunities of imported livestock, relative to domestic livestock.

7.358 In previous disputes, government measures creating an incentive to use domestic over imported input products were found inconsistent with Article III:4 of the GATT 1994. In *US – FSC (Article 21.5 – EC)*, for example, the Appellate Body reviewed a "beneficial tax exemption" under a government measure "provid[ing] a considerable impetus, and, in some circumstances, in effect, a requirement, for manufacturers to use domestic input products, rather than like imported ones". The Appellate Body concluded that this measure "treats imported products less favourably than like domestic products".<sup>503</sup> Likewise, in *China – Auto Parts*, the Appellate Body held that a government measure that created an incentive for automobile manufacturers to use exclusively domestic auto parts was inconsistent with Article III:4 of the GATT 1994.<sup>504</sup> Further, the panel in *Mexico – Taxes on Soft Drinks* reviewed a government measure "creating an economic incentive for producers to use cane sugar as a sweetener in the production of soft drinks and syrups, instead of other non-cane sugar sweeteners such as beet sugar or HFCS".<sup>505</sup> Since "[d]omestically produced sweeteners in Mexico consist overwhelmingly of cane sugar", that panel concluded that, "although on their face the challenged measures do not distinguish between imported and domestic sweeteners, the distinction they make between the use of cane sugar and non-cane sugar sweeteners is, in fact, one that distinguishes between imported and domestic sweeteners".<sup>506</sup>

7.359 A similar incentive to use domestic input exists under the COOL measure, as explained above.

7.360 The existence of such an incentive is confirmed by evidence on the relative use of the muscle cut labels under the COOL measure. As described below<sup>507</sup>, several leading cattle and hog processors in the United States decided to affix exclusively Label A on their meat products as a result of the labelling requirements under the COOL measure, despite the limited commingling flexibility. This appears to have been the case particularly after the unqualified flexibility to use Label B for Label A meat, originally contained in the Interim Final Rule (AMS) of August 2008, was removed.

7.361 In fact, several major US meat processors indicated that they would move to using Label A for the vast majority of their beef and pork products, given the end of the previous unqualified

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<sup>503</sup> Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 220.

<sup>504</sup> The Appellate Body held that "[t]he use by an automobile manufacturer, in a given vehicle model, of certain key assemblies or combinations of assemblies that are imported means that a higher (25%) charge will be payable on *all* imported parts than would be the case if those combinations of imported assemblies were *not* used and the thresholds were *not* met, in which case any imported parts used in the vehicle model would be subject to only a 10% duty. This creates an incentive for manufacturers to *limit* their use of imported parts relative to domestic parts. In addition, the measures at issue in this dispute impose administrative procedures, and associated delays, on automobile manufacturers using imported parts, which could be avoided entirely if a manufacturer were to use exclusively domestic auto parts. These incentives 'affect' the conditions of competition for imported auto parts on the Chinese internal market." Appellate Body Report, *China – Auto Parts*, para. 195 (original emphasis; footnote omitted).

<sup>505</sup> Panel Report, *Mexico – Taxes on Soft Drinks*, para. 8.117.

<sup>506</sup> Panel Report, *Mexico – Taxes on Soft Drinks*, para. 8.119.

<sup>507</sup> See paras. 7.361-7.363 below.

flexibility to use Label B for Label A meat and its replacement with the commingling flexibility.<sup>508</sup> For instance, Tyson notified its fresh meats hog and cattle suppliers that "[its] goal is to label substantially all beef and pork from livestock born, raised and processed in the U.S. with the Category A label by the middle of 2009", and "estimate[d] around 90% of all of the fresh, retail beef and pork cuts produced in the U.S. would qualify for the Category A label".<sup>509</sup> Cargill was reported as moving in the same direction, with around 70% of its meat carrying Label A.<sup>510</sup> JBS indicated in a standard letter addressed to its customers that it would "transition[] to a 'Product of U.S.A.' label [i.e. Label A] on the majority of [its] beef products", and that "[t]he majority of [its] pork products will continue to be produced as 'Product of U.S.A.'".<sup>511</sup> Smithfield, a major pork processor, even announced that "effective April 2009 [it] intends to procure only hogs born and raised in the U.S. for processing at its U.S. fresh meat facilities and will label fresh pork for retail as born, raised and processed in the USA".<sup>512</sup>

7.362 Whilst most of these major US meat processors indicated that they would continue processing "some" Label B and C meat, they are silent on any intention of commingling. Rather, the chief executives of these three US meat producers are reported to have expressed at the annual convention of the Texas Cattle Feeders' Association held in November 2008 that their "chief concern was the ability to ensure that cattle coming into their plants are properly segregated".<sup>513</sup> The chief executive of the meat processor with the highest market share among the three top US beef packers<sup>514</sup> expressed in the press release of the Texas Cattle Feeders' Association that in order "to avoid passing higher costs [of the COOL measure] onto consumers", the three beef packers in question "[we]re going to ask your (cattlemen's) help to make sure that cattle are not commingled when they get to us".<sup>515</sup> The same chief executive added that "[w]hen they get to the plants, we have to make sure that we can keep them separate, so that we can run the cattle as cheaply as we can to get (product) to the consumers".<sup>516</sup> The chief executive of the second biggest US beef packer<sup>517</sup> explained that the major outstanding question was whether segregation under the COOL law would happen in terms of place or time. He is reported as having said that one of the uncertainties associated with the COOL law, is whether the effort to minimize costs will "require segmentation of plants or days to harvest".<sup>518</sup>

7.363 Even by the United States' own indication, Cargill, JBS and Tyson were the three top beef packers in 2009<sup>519</sup>, representing a total market share of above 65% in 2008.<sup>520</sup> Further, Smithfield described itself as "the leading processor and marketer of fresh pork and packaged meats in the United States, as well as the largest producer of hogs"<sup>521</sup>, and the United States identified Smithfield,

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<sup>508</sup> This commingling flexibility was mentioned for the first time in the above-mentioned USDA FAQ Publication of 26 September 2008. See Exhibit CDA-31.

<sup>509</sup> See Exhibits CDA-36 to 38 and CDA-24 (BCI). See also Exhibits CDA-71 (BCI), MEX-33, 55 and 64 (BCI).

<sup>510</sup> See Exhibits CDA-41 and CDA-77 (BCI).

<sup>511</sup> Exhibits CDA-39 and MEX-57.

<sup>512</sup> Exhibit CDA-40.

<sup>513</sup> Exhibit CDA-71.

<sup>514</sup> See Exhibit US-37. See also Exhibit US-152 (BCI).

<sup>515</sup> Exhibit CDA-71.

<sup>516</sup> Exhibit CDA-71.

<sup>517</sup> See Exhibit US-37. See also Exhibit US-152 (BCI).

<sup>518</sup> Exhibit CDA-71.

<sup>519</sup> See Exhibit US-37. See also Exhibit US-152 (BCI).

<sup>520</sup> See Exhibits US-152 (BCI) and MEX-111. See also Exhibit MEX-55.

<sup>521</sup> Exhibit CDA-40. See also Exhibit CDA-215.

Tyson, JBS, and Cargill as the top four commercial hog packers for most of the period between 2002 and 2008.<sup>522</sup>

7.364 Although it appears that some commingling is taking place, it is difficult to establish its precise extent. The United States submitted an affidavit from a person working in the US meat industry indicating that at least one major US processor is commingling Canadian, Mexican and US origin meat at one of its facilities.<sup>523</sup> We accept this as showing that commingling has been taking place, although we note that this piece of evidence does not specify the extent of commingling either at the facility in question, let alone by the US processor concerned or in the US meat industry at large.

7.365 All three parties reference a letter from the American Meat Institute (AMI) anticipating that "[w]hen the final rule becomes effective, ... almost 95% of beef and pork products eligible to bear a 'Product of the USA' label will bear such labeling".<sup>524</sup> This AMI letter indicates that even by the US meat industry's calculations, only some 5% of domestic meat might actually be commingled with imported meat. However, this evidence is silent on whether in practice less than 5% of domestic meat ends up being commingled. It does not specify either in what proportion such domestic meat might be commingled with imported meat, i.e. the quantities and share of non-US origin meat involved in any commingling.

7.366 The United States submitted photographs of Label B suggesting that these labels had been affixed on commingled meat.<sup>525</sup> However, photographs of Label B merely demonstrate that there are muscle cuts carrying Label B. Label B, and in particular the photos of such labels submitted by the United States, provide no information on whether the muscle cuts in question result from commingling Label A and B meat on a single production day.

7.367 Further, the United States references an exhibit submitted by Canada to demonstrate that one of the complainants even recognizes that commingling is actually taking place.<sup>526</sup> However, the Canadian exhibit in question only indicates that some US processing plants are accepting Label B meat, but not that these plants are necessarily commingling it with Label A meat. As regards commingling proper, this Canadian exhibit refers only to the commingling "flexibility" between meat eligible for Labels B and C, but not for Label A meat.

7.368 Finally, the United States submitted a producer affidavit declaring that livestock supplied to a major US meat processor is eligible for Label B.<sup>527</sup> This affidavit, however, is silent on whether such Label B livestock ends up being commingled, or whether livestock eligible for Labels A and B are being processed on separate production days.

7.369 The above relative proportions of the use of the various labels are largely confirmed by the United States, as well. In response to a question from the Panel, the United States explained that "approximately 71 percent of the beef sold at the retail level is being labeled as Category A", and "70 percent of the pork sold at the retail level is being labeled as Category A".<sup>528</sup> The United States

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<sup>522</sup> See Exhibit US-38. See also Exhibits MEX-43, 44 and 45.

<sup>523</sup> See United States' second written submission, para. 57 and Exhibit US-102 (BCI).

<sup>524</sup> Exhibit MEX-67. See also United States' second written submission, para. 57, Canada's response to Panel question No. 91, Mexico's response to Panel question No. 91 and United States' response to Panel question No. 91.

<sup>525</sup> See Exhibits US-95, 96 and 98.

<sup>526</sup> See Exhibit CDA-41.

<sup>527</sup> See United States' second written submission, para. 57 and Exhibit US-101 (BCI).

<sup>528</sup> United States' response to Panel question No. 91. See also United States' response to Panel question No. 90.

added that "up to 14 percent of Category A beef muscle cuts might be labeled as Category B or C beef and up to 20 percent of Category A muscle cuts might be labeled as Category B or C pork".<sup>529</sup>

7.370 The complainants contest the US figures arguing that the US estimates on the use of Label A are too low and that those on commingling are exaggerated.<sup>530</sup> According to the complainants, the proportion of meat that carries Label A is closer to 90%.<sup>531</sup> Indeed, several major US meat processors indicated that, with the entry into force of the 2009 Final Rule (AMS), "around 90 percent of all of the fresh, retail beef and pork cuts produced in the U.S. would qualify for the Category A label".<sup>532</sup> Nonetheless, the complainants do not contest the US argument that, despite commingling, the use of Label A affects the vast majority of meat labelled under the COOL requirements.<sup>533</sup>

7.371 Likewise, the complainants do not contest the US argument that the use of category C and D labels remains "small".<sup>534</sup> Rather, Mexico contests the justification advanced by the United States for the limited use of Label D.<sup>535</sup>

7.372 In light of the foregoing, we preliminarily conclude that the COOL measure creates an incentive to use domestic livestock – and a disincentive to handle imported livestock – by imposing higher segregation costs on imported livestock than on domestic livestock. Consequently, the COOL measure affects competitive conditions in the US market to the detriment of imported livestock.

*Reduction in the competitive opportunities of imported livestock*

7.373 As noted above, in *Korea – Various Measures on Beef*, the Appellate Body found a "reduction of competitive opportunit[ies]"<sup>536</sup> for imported products relative to domestic like products.

7.374 We are faced with the same situation in the current dispute. The competitive opportunities of imported livestock are reduced as the additional costs of compliance with the COOL measure incurred when handling imported livestock are, at least in part, passed on to suppliers of imported livestock. We referenced in this regard direct evidence of a considerable COOL discount being applied by several major processors to imported livestock and the absence of evidence of a similar discount being applied to domestic livestock.<sup>537</sup>

7.375 Further evidence of the reduction of competitive opportunities for imported livestock includes statements by imported livestock suppliers that some plants and companies are simply refusing to process any imported livestock any more.<sup>538</sup> For instance, a major US hog processor informed its

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<sup>529</sup> United States' response to Panel question No. 91. See also United States' response to Panel question No. 90.

<sup>530</sup> See Mexico's comments on United States' response to Panel question Nos. 90 and 91 and Canada's comments on United States' response to Panel question Nos. 90 and 91.

<sup>531</sup> See Canada's response to Panel question No. 90 and Mexico's response to Panel question No. 90. See also Exhibits CDA-198 (BCI) and CDA-211.

<sup>532</sup> Exhibits CDA-36 to 38 and CDA-24 (BCI). See also Exhibit MEX-33.

<sup>533</sup> United States' response to Panel question No. 91.

<sup>534</sup> United States' response to Panel question No. 90. See also Exhibit US-146.

<sup>535</sup> Mexico's comments on United States' response to Panel question No. 90.

<sup>536</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 147. See also *ibid.*, para. 146.

<sup>537</sup> See para. 7.363 above.

<sup>538</sup> See Exhibits CDA-56 (non-BCI), CDA-57, 66 to 69, 76, 81, 88 (all BCI). See also Exhibit CDA-89.

Canadian livestock suppliers that "[d]ue to Country of Origin Labeling (COOL)", it will only process US-born, raised and slaughtered hogs.<sup>539</sup>

7.376 Moreover, as a result of the COOL measure, fewer US processing plants are accepting imported livestock than before.<sup>540</sup> The complainants have submitted maps and lists of US processing facilities showing how US processing plants have become less accessible for imported cattle and hogs under the COOL measure.<sup>541</sup> Although the United States contests the specific figures submitted by the complainants in this regard<sup>542</sup>, it does not call into question the complainants' case on the overall reduction in the number of plants processing imported livestock as a result of the COOL measure.

7.377 We also have evidence before us showing that, as a result of the reduction of available processing plants, certain suppliers had to transport imported livestock longer distances than before the COOL measure.<sup>543</sup> Further, several plants that continue to process imported livestock do so at specific, limited times<sup>544</sup>, namely only on specific days of the week (typically at most one or two days per week)<sup>545</sup>, or only after specific hours of the day.<sup>546</sup> Processing imported livestock only at specific times as a result of the COOL measure has created logistical problems and additional costs for certain imported livestock suppliers.<sup>547</sup> Due to the congestion resulting from limited specific-time deliveries, certain imported livestock suppliers find it more difficult to obtain trucks for their deliveries or to use their trucks in an efficient way.<sup>548</sup> Congestion has also increased waiting time for imported livestock crossing the border, and thus created transportation delays for certain suppliers of imported livestock.<sup>549</sup> In turn, these have increased the transportation costs of certain suppliers of imported livestock<sup>550</sup>, and have had a negative impact on the welfare and quality of imported livestock as a result of long waiting times in extreme temperatures and shrinkage<sup>551</sup>, sometimes leading even to increased mortality.<sup>552</sup> Also, transportation of imported livestock has become less efficient in that certain suppliers can make fewer deliveries due to longer distance transport and less turn-around time.<sup>553</sup> Further, certain slaughterhouses accepting imported livestock only on Monday has resulted in increased costs for veterinary checks of imported livestock on Sunday.<sup>554</sup>

7.378 Contractual terms for suppliers of imported livestock have also changed as a result of the COOL measure. We have evidence that several major processors introduced a COOL opt-out clause allowing them to unilaterally terminate or amend their contracts with suppliers of imported livestock.<sup>555</sup> In certain other situations, supply contracts for imported livestock have been cancelled or terminated<sup>556</sup>, or simply not renewed.<sup>557</sup> Sometimes, the contractual relationship has survived the

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<sup>539</sup> See Exhibit CDA-92. See also Exhibits CDA-107 (BCI) and CDA-109.

<sup>540</sup> See Exhibits CDA-56 (non-BCI), CDA-57, 72, 75, 80, 81 and 94 (all BCI), MEX-37, 42, 97 and 106 (all BCI). See also Exhibit CDA-90 (BCI).

<sup>541</sup> See Exhibits CDA-95 to 103 and MEX-98.

<sup>542</sup> See Exhibits CDA-41, US-102 and 152 (both BCI).

<sup>543</sup> See Exhibits CDA-57, 66, 67, 69, 81, and 85 to 87 (all BCI).

<sup>544</sup> See Exhibits CDA-77, 87 and 88 (all BCI).

<sup>545</sup> See Exhibits CDA-55, 57, 66, 75, 80, 84, 90 (all BCI) and CDA-105 (non-BCI), MEX-97 and 106 (both BCI).

<sup>546</sup> See Exhibit CDA-85 (BCI).

<sup>547</sup> See Exhibit CDA-57 (BCI).

<sup>548</sup> See Exhibits CDA-55 to 57 and 80 (all BCI).

<sup>549</sup> See Exhibits CDA-55, 57, 66, 80 and 85 (all BCI).

<sup>550</sup> See Exhibits CDA-57, 67, 68, 75, 80, 81, 85 and 87 (all BCI).

<sup>551</sup> See Exhibits CDA-55, 66 and 85 (all BCI). See also Exhibits CDA-93 and CDA-106.

<sup>552</sup> See Exhibit CDA-85 (BCI).

<sup>553</sup> See Exhibit CDA-68 (BCI).

<sup>554</sup> See Exhibit CDA-80 (BCI).

<sup>555</sup> See Exhibits CDA-67 and CDA-108 (both BCI).

<sup>556</sup> See Exhibits CDA-86, 88 (BCI) and 108 (all BCI).

COOL measure, although at terms less favourable for imported livestock suppliers.<sup>558</sup> For instance, in certain cases, former long-term contracts have been replaced with spot contracts at lower purchase prices.<sup>559</sup> In at least one case, a former automatically renewed, "evergreen" contract was replaced with a contract involving less favourable terms.<sup>560</sup> Further, we have evidence of 14 days' advance notice being required for supplies of Mexican cattle at various US processing facilities.<sup>561</sup>

7.379 Certain suppliers of imported livestock have also suffered significant financial disadvantages resulting from the COOL measure. Several suppliers reported that the price difference between imported and domestic livestock has become larger to the detriment of domestic livestock<sup>562</sup>, and that discounts for imported livestock appeared or existing ones increased as a result of the COOL measure.<sup>563</sup> Further, in several cases, financial institutions are reported to have refused to provide credits and loans to Canadian livestock producers due to the risks resulting from the COOL measure.<sup>564</sup>

7.380 Finally, we have evidence before us – undisputed by the United States – that imported cattle have been excluded from premium beef programmes, such as the Certified Angus Beef programme and other programmes, as a result of the COOL measure.<sup>565</sup> In general, these premium programmes are particularly profitable for operators in the supply chain, including livestock suppliers.

7.381 In light of the above considerations, we preliminarily conclude that the COOL measure reduces the competitive opportunities of imported livestock relative to domestic livestock. Before making a definitive finding on this matter, though, we need to address the counterarguments advanced by the United States in this regard.

*Arguments by the United States*

7.382 The United States argues that various phenomena prevent the COOL measure from creating the above-described negative incentives and from reducing the competitive opportunities of imported livestock. We have already addressed some of these arguments, e.g. the United States' arguments that any (technical) regulation creates costs and that costs might be distributed differently among market participants. We now turn to the additional arguments raised by the United States, namely:

- (a) the continued processing of imported livestock;
- (b) the lack of a legal necessity for private market participants to choose Label A;
- (c) the influence of factors distinct from the COOL measure;
- (d) pre-existing segregation programmes; and
- (e) exceptions from the COOL measure.

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<sup>557</sup> See Exhibits CDA-67 and 88 (both BCI).

<sup>558</sup> See Exhibit CDA-56 (BCI).

<sup>559</sup> See Exhibits CDA-68, 69, 82, 88 (all BCI). See also Exhibit CDA-66 (BCI).

<sup>560</sup> See Exhibit CDA-86 (BCI).

<sup>561</sup> See Exhibits MEX-37, 46, 97 and 105 (all BCI).

<sup>562</sup> See Exhibits CDA-55 and 94 (both BCI).

<sup>563</sup> See Exhibits CDA-55 to 57, 66 to 69, 75, 80, 83, 84, 86, 87, 89, 94, 108, 198 (all BCI), MEX-37, 97 and 105 (all BCI).

<sup>564</sup> See Exhibits CDA-67, 69, 83, 85 and 86 (all BCI).

<sup>565</sup> See Exhibits CDA-36 and 38 and MEX-33. See also Exhibits CDA-41, 55 to 57, 81 (all BCI), MEX-57 and 64 (both BCI).

### The continued processing of imported livestock

7.383 The United States argues that not all beef and pork covered by the COOL measure carries Label A, as there is continued processing of imported livestock. We do not see the need to assess whether this contention is in fact supported by the evidence, for even if the US argument is correct, it would not change our preliminary conclusion that the COOL measure creates an incentive to process exclusively domestic livestock and reduces the competitive opportunities of imported livestock.

7.384 As the Appellate Body explained in *US – FSC (Article 21.5 – EC)*, less favourable treatment of imported products may exist even if a measure "will not give rise to less favourable treatment for like imported products in each and every case".<sup>566</sup> Further, like Article III:4 of the GATT 1994, Article 2.1 of the TBT Agreement does not serve to protect "expectations ... of any particular trade volume".<sup>567</sup>

7.385 The United States also argues that even if the number of US plants processing Canadian and Mexican livestock has diminished, these plants have the capacity to process all the livestock that Canada and Mexico export to the United States.<sup>568</sup> We do not consider that the capacity of the US plants in question is particularly relevant. As the Appellate Body held in *Korea – Various Measures on Beef*, "the reduction of competitive opportunity through the restriction of access to consumers ... is not a function of the limited volume of foreign [products] actually imported": "the fact that the WTO-consistent quota ... has ... been fully utilized does not detract from the lack of equality of competitive conditions entailed by the [measure]".<sup>569</sup>

### The legal necessity of making a choice

7.386 The United States argues that the COOL measure does not create a legal necessity for differential and less favourable treatment; if individual market participants happen to process predominantly Label A meat, that is due to their private business decisions.<sup>570</sup>

7.387 We note that the United States does not contest the complainants' description of the situation preceding the COOL measure. According to the complainants, prior to the COOL measure, conditions of competition were the same for imported and domestic products:<sup>571</sup> there was an integrated NAFTA livestock and meat market, in which livestock and meat products were processed together, without any major segregation due to origin but purely on the basis of considerations of price and quality.<sup>572</sup>

7.388 The US Congressional Research Service described the pre-COOL North American livestock and meat market as follows:

"The animal products industries have become increasingly integrated across all three North American countries in recent years, particularly after the onset in 1994 of the North American Free Trade Agreement (NAFTA) and, before that, the Canada-U.S. Free Trade Agreement in 1988. *These agreements*, along with the global Uruguay Round Agreements under the World Trade Organization (WTO), by helping to

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<sup>566</sup> Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 221.

<sup>567</sup> Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 16. See also Appellate Body Report, *EC – Asbestos*, para. 93.

<sup>568</sup> See United States' opening oral statement at the first substantive meeting of the Panel, para. 25.

<sup>569</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 147.

<sup>570</sup> See United States' first written submission, paras. 147 and 150.

<sup>571</sup> See Appellate Body Report, *Korea – Various Measures on Beef*, para. 145.

<sup>572</sup> See Exhibit CDA-50, p. 20. See also See Exhibits CDA-192, MEX-35, and 37 (BCI).

reduce tariff and nontariff barriers to trade, *have enabled animals or their products to move across borders more freely, based on market demands.*"<sup>573</sup> (emphasis added)

7.389 Likewise, a backgrounder on the COOL measure by the Food Marketing Institute, whose members represent "three-quarters of all retail food store sales in the United States", explained that "[e]ver since the North American Free Trade Agreement was ratified in 1993, cattle and produce have moved freely among Canada, Mexico and the U.S".<sup>574</sup>

7.390 It is the COOL measure, and not solely the private decisions of market participants, that has had a decisive impact in changing this pattern, by creating an economic incentive to process exclusively domestic livestock. In this regard, the COOL measure is similar to the dual beef retail distribution system reviewed in *Korea – Various Measures on Beef*. In that dispute, the Appellate Body made a distinction between the "legal necessity of making the choice imposed by the measure itself" and differential treatment that is "solely the result of private entrepreneurs acting on their own calculations of comparative costs and benefits of differentiated distribution systems":

"We are aware that the dramatic reduction in number of retail outlets for imported beef followed from the decisions of individual retailers who could choose freely to sell the domestic product or the imported product. The legal necessity of making a choice was, however, imposed by the measure itself. The restricted nature of that choice should be noted. The choice given to the meat retailers was *not* an option between remaining with the pre-existing unified distribution set-up or going to a dual retail system. The choice was limited to selling domestic beef only or imported beef only. Thus, the reduction of access to normal retail channels is, in legal contemplation, the effect of that measure. In these circumstances, the intervention of some element of private choice does not relieve Korea of responsibility under the GATT 1994 for the resulting establishment of competitive conditions less favourable for the imported product than for the domestic product.

...

We are *not* holding that a dual or parallel distribution system that is *not* imposed directly or indirectly by law or governmental regulation, but is rather solely the result of private entrepreneurs acting on their own calculations of comparative costs and benefits of differentiated distribution systems, is unlawful under Article III:4 of the GATT 1994. What is addressed by Article III:4 is merely the *governmental* intervention that affects the conditions under which like goods, domestic and imported, compete in the market within a Member's territory."<sup>575</sup>

7.391 Indeed in the dispute before us, like in *Korea – Various Measures on Beef*, the COOL measure does not allow non-compliance. Although, as explained above, the COOL measure does not prohibit the processing of domestic and imported livestock irrespective of origin, the COOL measure itself makes this business scenario more costly than other business scenarios.<sup>576</sup> Further, in the dispute before us, like in *Korea – Various Measures on Beef*, any decisions by private market participants are not "solely" the result of their independent business calculations, but are attributable in large part to the economic incentive and disincentive created by the provisions of the COOL measure.

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<sup>573</sup> Exhibits CDA-117, 199 and MEX-53.

<sup>574</sup> Exhibit CDA-192. See also Exhibits CDA-69, 75, 76, 81, 90 (all BCI), MEX-37 and 97 (both BCI).

<sup>575</sup> Appellate Body Report, *Korea – Various Measures on Beef*, paras. 146 and 149 (original emphasis).

<sup>576</sup> See para. 7.333.



7.392 In particular, we disagree with the United States that the distinction under *Korea – Various Measures on Beef* is between legal and economic aspects of a measure. We have already noted that the complainants argue *de facto* discrimination in this dispute. In the context of such a claim of *de facto* discrimination, contrary to what the United States suggests, the distinction should be made between (i) a measure of a WTO Member creating a sufficiently strong incentive, including possibly an economic incentive, for private market participants to act in a particular way; and (ii) business decisions of private market participants based "solely" on private economic considerations.<sup>577</sup>

#### Factors distinct from the COOL measure

7.393 The United States argues, referencing the Appellate Body report in *Dominican Republic – Import and Sale of Cigarettes*, that the COOL measure does not involve less favourable treatment because any detrimental effects on imported livestock are attributable to economic factors, and not to the foreign origin of such livestock *per se*.<sup>578</sup>

7.394 Unlike in *Dominican Republic – Import and Sale of Cigarettes*, the current dispute does not focus on the unit costs entailed by the contested measure for imported and domestic products. The complainants do not claim less favourable treatment due to increased unit costs for imported livestock. Likewise, our analysis concentrates on the relative overall costs of the different business scenarios that market participants may choose in order to comply with the COOL measure. Further, unlike the bond requirement reviewed in the Appellate Body report in *Dominican Republic – Import and Sale of Cigarettes*, the COOL measure is directly concerned with the origin of meat and livestock. Thus, the incentive created by the COOL measure in favour of processing domestic-origin meat is clearly related to the origin of livestock.

7.395 We agree that this incentive is partly due to the relatively small market share of imported livestock compared to domestic livestock. In fact, as we explained above, faced with the choice between the two business scenarios of absolute segregation, namely the scenario involving exclusively domestic livestock and the scenario involving exclusively imported livestock, one reason for choosing the former scenario is that in most cases the latter is not viable due to the smaller proportion of imported livestock.

7.396 It is appropriate to consider this economic factor in determining whether the COOL measure has a *de facto* negative impact on the competitive conditions of imported livestock. The dictionary defines "*de facto*" by creating a link to factual circumstances: "in fact, in reality, in actual existence, force, or possession, whether by right or not".<sup>579</sup> Likewise, the Appellate Body defined *de facto*

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<sup>577</sup> See Panel Report, *Mexico – Taxes on Soft Drinks*, paras. 8.116-8.117.

<sup>578</sup> United States' first written submission, para. 146. In *Dominican Republic – Import and Sale of Cigarettes* the Appellate Body stated:

"The Appellate Body indicated in *Korea – Various Measures on Beef* that imported products are treated less favourably than like products if a measure modifies the conditions of competition in the relevant market *to the detriment of imported products*. However, the existence of a detrimental effect on a given imported product resulting from a measure does not necessarily imply that this measure accords less favourable treatment to imports if the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product, such as the market share of the importer in this case." (Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 96 (footnote omitted; original emphasis)).

<sup>579</sup> *The Shorter Oxford English Dictionary*, (Sixth Edition) Oxford University Press, Vol. I, p. 626 (2007).

discrimination under Article III:4 of the GATT 1994 by referring to conditions "in the relevant market".<sup>580</sup>

7.397 The very essence of the *de jure / de facto* dichotomy is that the first involves an analysis focussing on the language of the measure at issue, whereas the second entails assessing how a measure with language that is not discriminatory on its face plays out in actual circumstances. In the context of Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement, assessing whether a measure has actual discriminatory effects cannot be dissociated from the circumstances prevailing in the market at issue. Indeed, taking into account the circumstances in which the measure in question is applied is essential for an objective assessment of a claim of *de facto* discrimination.

7.398 The COOL measure creates a *de facto* incentive in favour of domestic, and to the detriment of imported, livestock in the particular circumstances of the US livestock and meat market. The small market share of imported livestock is an element of these market circumstances.

7.399 As explained, before the COOL measure, the North American livestock and meat market was highly integrated. In the US market, domestic and imported livestock were processed according to competitive considerations of price and quality, irrespective of origin.

7.400 The Interim Final Rule (AMS) of August 2008 did not completely disrupt this pattern, even if it introduced certain compliance costs. This is because, under the Interim Final Rule (AMS), it remained possible to process domestic and imported livestock together on a large scale and to affix one single label, Label B, on these products. As regards the magnitude of this flexibility, it is telling that the National Farmers Union criticised it as "a loophole big enough to drive a truck through".<sup>581</sup> Since a single-label approach is in general less costly than business scenarios involving more labels, as explained above<sup>582</sup>, industry chose to follow a predominantly Label B approach for all livestock, including both imported livestock and the majority of livestock that would have otherwise qualified for Label A.

7.401 The 2009 Final Rule (AMS) changed this by reducing the unqualified possibility of affixing Label B on meat otherwise eligible for Label A to the limited flexibility of commingling on a single production day. Indeed, the 2009 Final Rule (AMS) indicates that the majority of meat eligible for Label A should be carrying that label: "[i]t was never the intent of the Agency for the majority of product eligible to bear a U.S. origin declaration to bear a multiple origin designation".<sup>583</sup>

7.402 As a result of the 2009 Final Rule (AMS), the meat supply chain is faced with the requirement to affix Label A on the majority of meat eligible for that label, which involves a significant reduction in the amount of domestic meat and livestock being processed together with imported meat and livestock. This, in turn, creates the necessity for the supply chain to choose between a single-origin, Label A business scenario and the scenario of processing both Label A and imported meat and livestock. A single-origin approach is less costly, and given the high market share of domestic livestock, it is also generally viable.

7.403 It is the result of the COOL measure, in particular the 2009 Final Rule (AMS), that in the circumstances of the US market, market participants, when faced with the choice between a scenario involving exclusively domestic livestock and a scenario involving both domestic and imported

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<sup>580</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 137. See also Panel Report, *Canada – Pharmaceutical Patents*, para. 7.101.

<sup>581</sup> Exhibit CDA-28.

<sup>582</sup> See para. 7.357 above.

<sup>583</sup> 74 FR 2659.

livestock, opted predominantly for the former. While the small market share of imported livestock influenced this choice, that very choice was made necessary by the COOL measure. Indeed, as the history of the COOL measure shows, market participants would not have opted this way, and the small market share of imported livestock *per se* did not dictate such an option either.

7.404 Thus, in the circumstances of the US market, the COOL measure, in particular the 2009 Final Rule (AMS), creates an incentive in favour of domestic livestock and negatively affects the competitive conditions of imported livestock. Hence, we disagree with the United States that this effect is attributable exclusively to factors distinct from the COOL measure.

#### Pre-existing segregation

7.405 The United States argues that various pre-existing segregation programmes preceded the COOL measure, namely USDA grade labels, private premium label programmes, animal production and raising label programmes, and export market requirements. According to the United States, these programmes allowed market participants to gain experience with segregation, and their continued existence reduces the costs of any additional segregation under the COOL measure.<sup>584</sup>

7.406 While pre-existing segregation might have allowed certain market participants to gain experience with segregation, we observe that not all market participants are necessarily involved in all of the pre-existing segregation programmes evoked by the United States. Whereas USDA grade labels are affixed on the majority of beef slaughtered in the United States, private premium labels and animal production and raising labels affect a smaller proportion of beef marketed in the United States. Likewise, given the small proportion of US exports relative to US beef consumption<sup>585</sup>, export programmes do not involve the majority of beef marketed in the United States.

7.407 More importantly, most pre-existing segregation programmes are not concerned with country of origin but rather with quality or production processes. Even among the export programmes, which involve some segregation according to origin, not all are foreclosed for Canadian or Mexican livestock and beef. In fact, some export programmes allow Canadian or Mexican-origin beef to be exported along with US beef<sup>586</sup>, whereas some other export programmes cover cattle that spent at least 100 days before slaughter in the United States, including feeder cattle born in Canada and Mexico.<sup>587</sup>

7.408 As most pre-existing programmes do not necessarily entail segregation of Canadian and Mexican beef from US beef, the COOL measure adds an additional layer of segregation to pre-existing segregation programmes. In practice, after the COOL measure, beef that qualifies, for instance, for a specific premium programme needs to be additionally segregated according to origin as defined by the COOL measure. This involves additional segregation and costs specific to the COOL measure.

7.409 The 2009 Final Rule (AMS) explains that:

"[I]n [certain] cases ... firms may need to revamp current operating processes to implement the rule. For example, a processing or packing plant may need to sort

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<sup>584</sup> See United States' first written submission, para. 169, United States' second written submission, paras. 59-60, and United States' response to Panel question No. 46. See also Exhibit US-43.

<sup>585</sup> See Exhibits US-28 and 71. See also Exhibits CDA-207 and 209, Canada's response to Panel question No. 109, Exhibit MEX-104, Mexico's response to Panel question No. 109, Exhibits US-150 and 151, United States' response to Panel question Nos. 30 and 109.

<sup>586</sup> See Exhibits MEX-75 and US-81.

<sup>587</sup> See Exhibits MEX-76, 77 and US-82.

incoming products by country of origin and, if applicable, method of production, in addition to weight, grade, color, or other quality factors. This may require adjustments to plant operations, line processing, product handling, and storage."<sup>588</sup>

7.410 Several major US beef processors declined to bear such additional costs, and informed their suppliers that, due to the entry into force of the COOL measure<sup>589</sup>, they would not include Canadian and Mexican beef in their Certified Angus Beef and other premium beef programmes. For instance, Tyson issued a standard letter to its fresh meat cattle suppliers informing them that "[o]ur approach will be to use the 'U.S.' or Category A label on all of our premium beef programs beginning early 2009", following the replacement of the former unqualified possibility of affixing Label B on Label A meat with the more restrictive commingling flexibility.<sup>590</sup>

7.411 Further, unlike the COOL measure, the pre-existing segregation programmes evoked by the United States are voluntary and exist to the extent that they meet consumer demand, i.e. they are also contingent upon consumers' willingness to pay for the type and quality of beef covered by such programmes.

7.412 Finally, as Canada points out, none of the pre-existing segregation programmes evoked by the United States relates to hogs.<sup>591</sup>

7.413 Accordingly, we are not persuaded by the argument that the pre-existence of segregation programmes reduces the costs of any additional origin-based segregation under the COOL measure. Thus, we maintain our view that the COOL measure involves costs that are apportioned differently between the business scenario involving only domestic livestock and the scenarios involving imported livestock.

#### Exceptions under the COOL measure

7.414 The United States argues that it had narrowed the originally envisaged coverage of the COOL measure to reduce compliance costs.<sup>592</sup>

7.415 The COOL measure requires "retailers" to affix labels on the "covered commodity"<sup>593</sup>, which in relevant part is defined as "muscle cuts of beef... and pork" and "ground beef ... and ground pork".<sup>594</sup> However, as the United States points out, the COOL measure excludes from its scope any otherwise covered commodities that serve as an "ingredient to a processed food item".<sup>595</sup>

7.416 Further, not all actors selling beef and pork at retail level are subject to the COOL measure. As described above<sup>596</sup>, in the context of the COOL measure, an individual "retailer" is covered only

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<sup>588</sup> 74 FR 2689.

<sup>589</sup> See CDA-56 (BCI).

<sup>590</sup> See Exhibits CDA-36, 38 and MEX-33. See also Exhibits CDA-41, 55, 56, 57 and 81 (all BCI), MEX-57 and 64 (both BCI).

<sup>591</sup> See Canada's response to Panel question No. 43. See also Exhibit CDA-179.

<sup>592</sup> See United States' second written submission, para. 153. See also United States' first written submission, para. 185; United States' second written submission, para. 89; and Exhibit US-43.

<sup>593</sup> 7 U.S.C. §§ 1638(2) and 1638a(a)(1).

<sup>594</sup> 7 U.S.C. §§ 1638(2)(A)(i) and (ii).

<sup>595</sup> 7 U.S.C. § 1638(2)(B) and 74 C.F.R. § 65.135(b).

<sup>596</sup> See paras. 7.101, 7.106 above.

when the invoice cost of all of its purchases of perishable agricultural commodities exceeds \$230,000 during a calendar year.<sup>597</sup> "Food service establishments" are also exempt from the COOL measure.<sup>598</sup>

7.417 Evidence submitted by the parties indicates that, as a result of these exceptions, a considerable proportion of beef and pork is exempted from the COOL measure.<sup>599</sup> The exact proportion or magnitude of the exceptions and exclusions is irrelevant for our review of the complainants' claims under Article 2.1 of the TBT Agreement. In fact, when asked about the relevance of these exceptions in terms of practical compliance with the COOL measure, the United States indicated that:

"[It] is not aware of any evidence to suggest that meat producers in the distribution chain – feed lot operators and slaughterhouses – are systematically separating source animals or meat products depending on whether the ultimate meat products derived from those animals are subject to the 2009 Final Rule. This is due to the fact that the ultimate disposition of a meat product is often not known at any particular stage of the production chain."<sup>600</sup>

7.418 The complainants' answers to the same question confirm that there is no systematic differentiation based on the ultimate destination of the meat produced.<sup>601</sup>

7.419 Accordingly, we conclude that the exceptions to the coverage of the COOL measure do not alter the distribution of compliance costs for livestock and meat producers and processors in a way that would modify the incentives created by the COOL measure.

*Conclusion with regard to the muscle cut labels*

7.420 In light of our analysis of the parties' arguments, we find that, in the context of the muscle cut labels, the COOL measure creates an incentive in favour of processing exclusively domestic livestock and a disincentive against handling imported livestock. Accordingly, we also find that, in the context of muscle cut labels, the COOL measure *de facto* discriminates against imported livestock by according less favourable treatment to Canadian cattle and hogs, and to Mexican cattle, especially Mexican feeder cattle, than to like domestic livestock.

Ground meat label

7.421 Unlike for muscle cuts, there is one single label for ground meat under the COOL measure. This label applies equally to ground meat of imported and domestic origin.

7.422 Pursuant to the COOL measure, the ground meat label must list "all of the countries of origin of ... ground beef [or] ... pork".<sup>602</sup> According to the 2009 Final Rule (AMS), this means that "if a country of origin is utilized as a raw material source in the production of ground meat, it must be listed on the label".<sup>603</sup>

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<sup>597</sup> See Exhibit CDA-7. See also 74 C.F.R. § 65.240.

<sup>598</sup> 7 U.S.C. § 1638a(b).

<sup>599</sup> See Canada's response to Panel question No. 92, Exhibit CDA-199, Mexico's response to Panel question No. 92, Exhibits MEX-99, MEX-100 and MEX-101, United States' response to Panel question Nos. 92-101, Exhibits US-147 and 148.

<sup>600</sup> United States' response to Panel question No. 93.

<sup>601</sup> See Canada's response to Panel question No. 93 and Mexico's response to Panel question No. 93.

<sup>602</sup> 7 U.S.C. § 1638a(a)(2)(E).

<sup>603</sup> 74 FR 2671.

7.423 To ensure that the ground meat label carries this information, the meat which has been ground needs to be segregated according to origin. In fact, the above-quoted COOL Compliance Guide issued by USDA references "segregation" and a "segregation plan" not just for muscle cuts, but also in the context of ground meat. Like for muscle cuts, this segregation involves costs and, as a matter of logic, the fewer origins involved, the less costly compliance with the COOL measure is in the context of ground meat.

7.424 The United States explains that in its final form, the COOL measure does not prescribe any order for listing the countries of origin of ground meat.<sup>604</sup> The complainants have not contested this. In fact, evidence from Canada confirms this.<sup>605</sup>

7.425 Further, the ground meat label might list "all of the reasonably possible countries of origin of ... ground beef [or] ... pork".<sup>606</sup> The 2009 Final Rule (AMS) defines this as follows: "when a raw material from a specific origin is not in a processor's inventory for more than 60 days, that country shall no longer be included as a possible country of origin".<sup>607</sup>

7.426 The 2009 Final Rule (AMS) explains that:

"[t]he 60-day in inventory allowance speaks only to when countries may no longer be listed. The 60-day inventory allowance is an allowance for the Agency' enforcement purposes for when the Agency would deem ground meat products as no longer accurately labeled."<sup>608</sup>

7.427 This 60-day "inventory allowance" allows flexibility from the segregation involved in the ground meat label under the COOL measure. In effect, it allows a processor to reference a country of origin on its ground meat label even if the processor has not had ground meat from that particular country in its inventory for the last 60 days or less. Thus, a processor may use the same label for all of its ground meat, provided that the label lists all countries of origin of the meat ground by the processor, and that the processor has had in its inventory meat for grinding of each origin at least every 60 days.

7.428 In fact, comments on the 60-day "inventory allowance" under the Interim Final Rule (AMS) of August 2008 included the following:

"The commenters stated that in practical terms, this provision appears to allow a processor to have 60 days to correct the label of a product to delete specific country(s), even though that country's product may no longer exist in its inventory. The commenters provided the example that a processor on day one could have product from the U.S. and Canada, and then on day 7 run out of product from the U.S., and yet could continue using the 'Product of U.S. and Canada' label for another 53 days. Commenters feared this provision could be easily abused by meat processors."<sup>609</sup>

7.429 In response, USDA did not deny this possibility or that the provision might be "abused" in specific instances. USDA merely indicated that "it does not believe *widespread* abuses of this

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<sup>604</sup> See United States' first written submission, para. 78.

<sup>605</sup> See Exhibit CDA-41.

<sup>606</sup> 7 U.S.C. § 1638a(a)(2)(E).

<sup>607</sup> 74 C.F.R. § 65.300(h).

<sup>608</sup> 74 FR 2671.

<sup>609</sup> 74 FR 2670.

provision will occur and will address any issues with this provision during routine compliance reviews".<sup>610</sup> There is no indication in the evidence placed before us of USDA having addressed any potential "abuses" of the 60-day "inventory allowance" in any routine compliance reviews it might have conducted.

7.430 The flexibility under the 60-day "inventory allowance" was also confirmed by Secretary Vilsack, who explained in his letter that:

"[t]he language in the Final Rule allows a label for ground meat product to bear the name of a country, even if product from that country was not present in a processor's inventory, for up to 60 days. This provision allows for labels to be used in a way that does not clearly indicate the product's country of origin."<sup>611</sup>

7.431 Another commenter on the Interim Final Rule (AMS) of August 2008 argued that the 60-day "inventory allowance" "was intended to reflect the sourcing processes of commercial grinders and not to require them to change their labels simply because the market had changed and source product was more expensive from one country than another".<sup>612</sup> USDA essentially confirmed this:

"The Agency arrived at the 60-day allowance during its analysis of the ground meat industry. In this analysis, the Agency determined that in the ground beef industry a common practice is to purchase lean beef trimmings from foreign countries and mix those with domestic beef trimmings before grinding into a final product. Often those imported beef trimmings are not purchased with any particular regard to the foreign country, but the cost of the trimmings due to currency exchange rates or availability due to production output capacity of that foreign market at any particular time. Because of that, over a period of time, the imported beef trimmings being utilized in the manufacture of ground beef can and does change between various foreign countries.

As large scale beef grinders can have in inventory at any one time, several days' worth of beef trimmings (materials to be processed into ground beef) from several different countries and have orders from yet other foreign markets, or from domestic importers, trimmings from several foreign countries that will fulfill several weeks' worth of ground beef production, *the Agency determined that it was reasonable to allow the industry to utilize labels representing that mix of countries that were commonly coming through their inventory during what was determined to be a 60-day product inventory and on order supply.*"<sup>613</sup> (emphasis added)

7.432 Further, USDA explained that it did not consider it necessary to change the existing "normal business practices" in the grinding industry:

"To require beef grinders to completely change their production system into grinding beef based on specific batches was determined to be overly burdensome and not conducive to normal business practices, which the Agency believes was not the intent of the statute."<sup>614</sup>

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<sup>610</sup> 74 FR 2671 (emphasis added).

<sup>611</sup> Vilsack letter, pages 1-2.

<sup>612</sup> 74 FR 2671.

<sup>613</sup> 74 FR 2671.

<sup>614</sup> 74 FR 2671.

7.433 USDA added that it did not intend to modify the grinding industry's pre-existing bulk labelling policies:

"[B]ecause beef grinders often purchase their labeling material in bulk, if a given foreign market that a beef grinder is sourcing from is no longer capable of supplying product, the interim final rule allowed that grinder a period of time to obtain new labels with that given country of origin removed from the label."<sup>615</sup>

7.434 Finally, in response to another comment, USDA confirmed that the 60-day "inventory allowance" flexibility is available not only for meat grinders, but for market participants at every stage of meat supply and distribution:

"With regard to if this 60-day inventory allowance is made for retailers or for suppliers of covered commodities, the Agency has made no distinction in this final rule and, as such, the same requirements would apply."<sup>616</sup>

7.435 Thus, the 60-day "inventory allowance" provides for significant flexibility with respect to the segregation entailed by the ground meat label under the COOL measure. This flexibility appears to us to render redundant certain aspects of ground meat segregation, and thus limits any additional costs of implementing the COOL measure with regard to ground meat.

7.436 The complainants have not made specific arguments in response to the United States' contentions regarding this flexibility, nor as to how any remaining costs would affect imported livestock less favourably in the context of ground meat.<sup>617</sup>

7.437 Accordingly, we find that the complainants have not demonstrated that the ground meat label under the COOL measure results in less favourable treatment for imported livestock.

(c) Actual trade effects

7.438 We have reached our conclusions on less favourable treatment under Article 2.1 of the TBT Agreement without examining in detail the actual trade effects of the muscle cuts and ground meat labels under the COOL measure. Instead, by assessing segregation and the resulting cost implications of the COOL measure, we have followed the Appellate Body's approach in *Korea – Various Measures on Beef*. As suggested by the Appellate Body in that dispute, there is a "more direct, and perhaps simpler approach" to assessing a national treatment claim by "focus[ing] on what appears ... to be the fundamental thrust and effect of the measure itself".<sup>618</sup>

7.439 As the Appellate Body explained in *US – FSC (Article 21.5 – EC)* this examination does not involve the actual effects of the measure in the marketplace:

"This examination cannot rest on simple assertion, but must be founded on a careful analysis of the contested measure and of its implications in the marketplace. At the same time, however, the examination need not be based on the *actual effects* of the contested measure in the marketplace."<sup>619</sup>

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<sup>615</sup> 74 FR 2671.

<sup>616</sup> 74 FR 2671.

<sup>617</sup> See United States' first written submission, paras. 78 and 159.

<sup>618</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 142.

<sup>619</sup> Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215 (footnote omitted).



7.440 Further, the Appellate Body noted in *EC – Bananas III (Article 21.5 – US)* that the absence of "actual trade effects" of a measure does not prevent a Member from bringing a successful claim of violation under the covered agreements.<sup>620</sup> Likewise, the GATT panel in *US – Superfund* held in regard to the national treatment provision of the first sentence of Article III:2 of the GATT that:

"[It] cannot be interpreted to protect expectations on export volumes; it protects expectations on the competitive relationship between imported and domestic products. A change in the competitive relationship contrary to that provision must consequently be regarded *ipso facto* as a nullification or impairment of benefits accruing under the General Agreement."<sup>621</sup>

7.441 The GATT panel based this finding on the fact that "[u]nlike some other provisions in the General Agreement, [the first sentence of Article III:2] does not refer to trade effects".<sup>622</sup> This is equally valid for Article III:4 of the GATT and Article 2.1 of the TBT Agreement. In fact, in the context of Article III:4 of the GATT, the panel in *Korea – Various Measures on Beef* held that "the jurisprudence on Article III makes it clear that no consideration needs to be given to the effects of any less favourable treatment or the impact of such discriminatory regulation on trade volume".<sup>623</sup>

7.442 The parties agree that we do not need to verify the actual trade effects of the COOL measure in assessing the complainants' claims under Article 2.1 of the TBT Agreement.<sup>624</sup>

7.443 Yet, the parties have extensively argued the alleged actual economic and trade effects of the COOL measure, and whether such effects are attributable to the COOL measure or to other factors. For this purpose, they have submitted economic figures and analyses as well as econometric studies, which we consider relevant factual evidence in this dispute.

7.444 Whether the COOL measure has negative trade and economic effects is an important factual matter in this dispute. It is linked to the conclusions of our above analysis in regard to a violation of Article 2.1 of the TBT Agreement.

7.445 Accordingly, we consider it important to make findings on the actual trade effects of the COOL measure, even if, under the legal standard we have identified for Article 2.1 of the TBT Agreement, these findings are not indispensable for the analysis of the complainants' claims.

7.446 Indeed in *Korea – Dairy*, the Appellate Body emphasised the unique role of panels in making factual findings by reviewing the totality of the evidence in the panel record:

"[U]nder Article 11 of the DSU, a panel is charged with the mandate to determine the facts of the case and to arrive at factual findings. In carrying out this mandate, a panel has the duty to examine and consider all the evidence before it, not just the evidence submitted by one or the other party, and to evaluate the relevance and probative force of each piece thereof.

In *European Communities – Hormones*, we had occasion to stress that:

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<sup>620</sup> Appellate Body Report, *EC – Bananas III (Article 21.5 – US)*, para. 469. See also Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II)*, para. 469.

<sup>621</sup> GATT Panel Report, *US – Superfund*, para. 5.1.9.

<sup>622</sup> GATT Panel Report, *US – Superfund*, para. 5.1.9.

<sup>623</sup> Panel Report, *Korea – Various Measures on Beef*, para. 637.

<sup>624</sup> See Canada's opening oral statement at the first substantive meeting of the Panel, para. 19, Mexico's response to Panel question No. 21 and United States' response to the Panel's second set of questions to the parties, para. 34.

The duty to make an objective assessment of the facts is, among other things, an obligation to consider the evidence presented to a panel and to make factual findings on the basis of that evidence. The deliberate disregard of, or refusal to consider, the evidence submitted to a panel is incompatible with a panel's duty to make an objective assessment of the facts.<sup>625</sup> <sup>626</sup>

7.447 Importantly, this review of the factual evidence does not mean that "panels ... are ... required to accord factual evidence the same meaning and weight as do the parties".<sup>627</sup> Further, as the Appellate Body explained in *EC – Hormones*, "it is generally within the discretion of the Panel to decide which evidence it chooses to utilize in making findings".<sup>628</sup>

7.448 The United States contends that our review of the econometric studies submitted by Canada raises systemic concerns, as traditionally econometric analysis has been employed in arbitrations under Article 22.6 of the DSU to determine the level of nullification or impairment of benefits as a result of a WTO-inconsistent measure. According to the United States, Canada's approach risks conflating these two different inquiries and processes. In particular, the United States questions whether panel findings with respect to such an econometric model might prejudice any findings by the same persons possibly acting as arbitrators under Article 22.6 of the DSU.<sup>629</sup>

7.449 Clearly, panels are not arbitrators and arbitrators are not panels, even if in a given dispute these bodies might comprise the same persons. Panels and Article 22.6 arbitrators operate on the basis of different procedures and legal provisions, and at different stages of WTO dispute settlement. Their roles and mandates are also different. As the arbitrator in *EC – Hormones (Article 22.6 – EC)* pointed out, panels and arbitrators have different tasks:

"There is ... a difference between our task here and the task given to a panel. In the event we decide that the [original complainant's] proposal [concerning the level of suspension of concessions or other obligations] is *not* WTO consistent, i.e. that the suggested amount is too high, we should not end our examination the way panels do, namely by requesting the DSB to recommend that the measure be brought into conformity with WTO obligations. Following the approach of the arbitrators in the *Bananas* case – where the proposed amount of US\$ 520 million was reduced to US\$ 191.4 million – we would be called upon to go further. In pursuit of the basic DSU objectives of prompt and positive settlement of disputes, we would have to estimate the level of suspension we consider to be equivalent to the impairment suffered. This is the essential task and responsibility conferred on the arbitrators in order to settle the dispute. In our view, such approach is implicitly called for in Article 22.7."<sup>630</sup>

7.450 In light of the above-quoted interpretation of Article 11 of the DSU, entitled "Function of Panels", we consider that we have the right, and in fact the duty, to make the factual findings necessary to carry out an objective analysis of the dispute and all of the evidence before us.

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<sup>625</sup> (footnote original) Appellate Body Report, *EC – Measures Concerning Meat and Meat Products (Hormones)* ("European Communities – Hormones"), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, para. 133.

<sup>626</sup> Appellate Body Report, *Korea – Dairy*, para. 137.

<sup>627</sup> Appellate Body Report, *Australia – Salmon*, para. 267.

<sup>628</sup> Appellate Body Report, *EC – Hormones*, para. 135.

<sup>629</sup> See United States' response to the Panel's second set of questions to the parties, para. 33.

<sup>630</sup> Decision by the Arbitrators, *EC – Hormones (US) (Article 22.6 – EC)*, para. 12 (footnotes omitted) and Decision by the Arbitrators, *EC – Hormones (Canada) (Article 22.6 – EC)*, para. 12 (footnotes omitted).

7.451 In doing so, we certainly do not intend to usurp the role of arbitrators under Article 22.6 of the DSU. We are not assessing any level of nullification or impairment, let alone whether there is any equivalence with any suggested level of suspension of concessions or other obligations. We have no mandate to do so – either under the DSU, or according to our own specific terms of reference.<sup>631</sup> These matters are left to be decided by an eventual arbitration under Article 22.6 of the DSU and on the basis of evidence submitted in the context of such arbitration – provided such arbitration actually becomes necessary.

7.452 Also, there is no reason to consider economic or econometric evidence inappropriate *per se*, let alone exempt from panels' review. The ultimate role of panels is to conduct the necessary factual and legal review of the arguments and evidence advanced by the parties, and thus to carry out an objective assessment of the matter brought before the panel. This basic function of panels does not exclude – and may, in fact, necessitate – the review of economic and econometric evidence and arguments.

7.453 Accordingly, in the following sections we examine the basic trade flows in livestock between Canada and the United States, and Mexico and the United States. In particular, we cover fluctuations in import volumes and shares between 2000 and 2010, with particular emphasis on the second half of this period. Subsequently, we examine the costs involved in the COOL measure in light of the economic studies submitted by the parties. Finally, we assess whether, in light of the econometric studies submitted by Canada and the United States, the COOL measure had a negative and significant impact on the price and volume of imported livestock.

(i) *Trade volumes in the North American livestock market*

Cattle

7.454 The parties provide figures on the import volume of Canadian and Mexican cattle into the United States during the last five to ten years. Despite certain divergences among some of these figures, it is possible to establish the main trends of overall US cattle imports from Canada and Mexico.

Imports of Canadian cattle into the United States

*Overall imports from 2000 to 2009*

7.455 Between 2000 and 2009, Canada exported to the United States an annual average of about 950,000<sup>632</sup> or 1,000,000<sup>633</sup> head of cattle, according to the United States and Canada, respectively. There were significant fluctuations in annual export figures. In particular, in 2004 overall imports of Canadian cattle dipped to a few thousand<sup>634</sup> or a few hundred<sup>635</sup> head of cattle, according to the United States and Canada, respectively. This was mainly due to the discovery of Bovine Spongiform Encephalopathy ("BSE") in Canada, which resulted in significant US import restrictions for Canadian cattle from 2003 to 2005.<sup>636</sup>

7.456 Canada and the United States provide figures of US imports of Canadian cattle using statistics from the Animal and Plant Health Inspection Service ("US APHIS") and the US Bureau of the Census

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<sup>631</sup> See para. 1.6 above.

<sup>632</sup> United States' first written submission, para. 89 (Exhibit US-28, table 3).

<sup>633</sup> Exhibit CDA-208.

<sup>634</sup> See Exhibit US-28, table 3.

<sup>635</sup> See Exhibit CDA-208.

<sup>636</sup> United States' first written submission, paras. 99-105 (Exhibit US-28, table 3; Exhibit CDA-208).

("US Census Bureau") for the period starting in 2005. The parties' figures from the two sources, and in certain cases even from the same source, are not identical. However, the figures show similar overall patterns in the development of the imports of Canadian cattle into the United States.

7.457 Both parties' statistics show an increase in imports of Canadian cattle between 2005 and 2007 and a considerable decrease in 2009 *vis-à-vis* 2008. The main difference is that the data submitted by Canada show a decline in the number of cattle imports starting already in 2008, whereas the data submitted by the United States point to a decrease only for 2009.

<b>Imports of Canadian cattle</b> <i>Source: US APHIS</i>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>
Data submitted by Canada <sup>637</sup>	518,287	1,025,522	1,379,105	1,252,279	797,638
Data submitted by the United States <sup>638</sup>	518,287	993,620	1,397,156	1,407,081	999,045

<b>Imports of Canadian cattle</b> <i>Source: US Census Bureau</i>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>
Data submitted by Canada <sup>639</sup>	555,528	1,030,790	1,386,745	1,301,910	812,108
Data submitted by the United States <sup>640</sup>	559,134	1,031,870	1,404,871	1,581,303	1,061,005

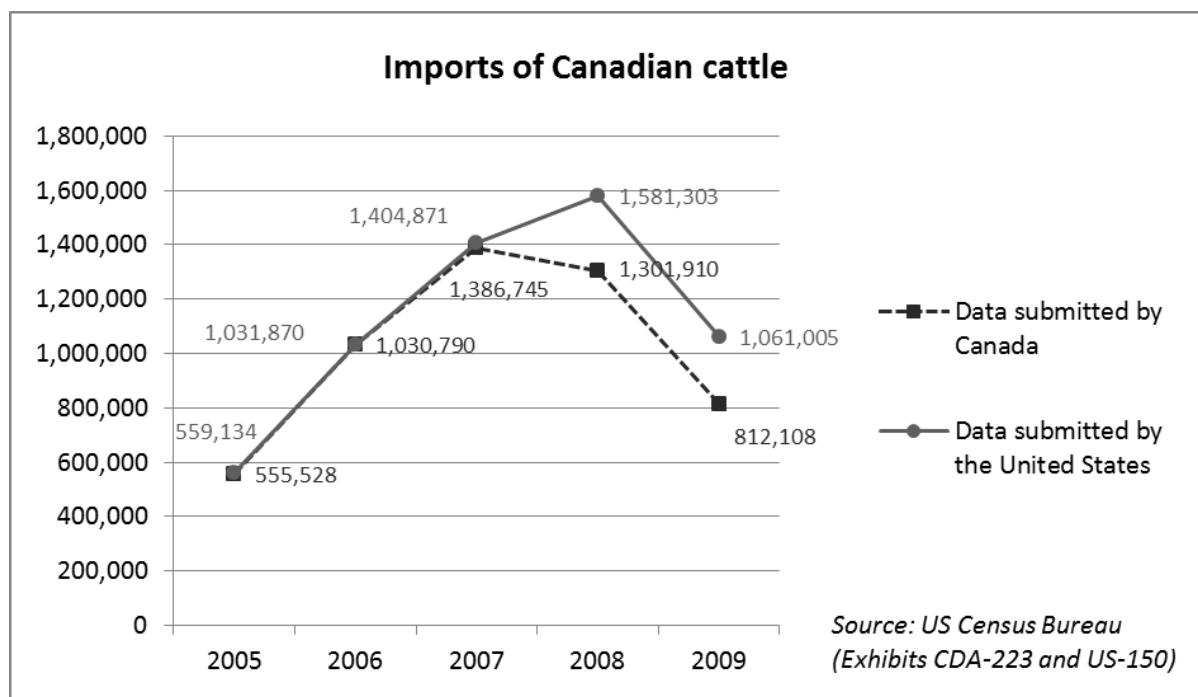
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<sup>637</sup> Exhibit CDA-223. This information presented by Canada excludes cows, bulls and breeding animals.

<sup>638</sup> Exhibit US-28, Table 3. This information presented by the United States excludes breeding animals.

<sup>639</sup> Exhibit CDA-223. This information presented by Canada excludes cows, bulls and breeding animals.

<sup>640</sup> Exhibit US-150.



*Overall imports during 2010*

7.458 Canada and the United States have only submitted partial import volume figures for the year 2010 as this period partly coincided with the proceedings of this dispute. The United States compares the import volume of Canadian cattle from January to September 2010 with figures for the corresponding period of 2009. This comparison shows that the number of imported Canadian cattle increased from 809,513 head between January and September 2009 to 864,579 in the same period of 2010.<sup>641</sup> There is, however, no evidence before us on whether this upward trend continued in the remaining months of 2010.

7.459 In the absence of data for the corresponding period of 2009, no similar comparison is possible for the other partial import figures submitted by Canada and the United States for specific periods of 2010. Canada has submitted US APHIS statistics showing 765,248 heads of imported Canadian cattle in the first 11 months of 2010.<sup>642</sup> Further, on the basis of data from the US Census Bureau, Canada submits that imports of Canadian cattle from January to October 2010 reached 756,275 animals, whereas the United States argues that from January to September 2010 Canadian cattle imports were 864,579.<sup>643</sup> All these partial data for 2010 show that in the first 11 months of 2010 imports of Canadian cattle did not surpass the import levels for 2009 as a whole.

*Further data*

7.460 Canada also presents more detailed data specifying the import volume depending on the category of animal examined, i.e. feeder or fed cattle, cows, bulls and, in general, animals for breeding purposes. This is because Canada and the United States disagree whether certain categories of cattle should be excluded from the data set used to measure import volume fluctuations. Canada argues that its economic evidence appropriately excludes cows and bulls from the data set

<sup>641</sup> Exhibit US-150.

<sup>642</sup> Exhibit CDA-223.

<sup>643</sup> Exhibit US-150.

because these animals are used primarily for breeding, rather than for producing muscle cuts of meat subject to the COOL measure.<sup>644</sup> The United States submits that cows and bulls over 30 months of age account for a large portion of Canada's exports to the United States.<sup>645</sup>

7.461 Canada files evidence from Agriculture and Agri-Food Canada<sup>646</sup> showing that the number of Canadian animals imported into the United States, excluding animals for breeding, from 2006 to 2009 gradually increased until 2008, followed by a significant reduction in 2009.

	2006	2007	2008	2009
Imports of Canadian cattle excluding animals for breeding (Source: Agriculture and Agri-Food Canada) <sup>647</sup>	1,031,767	1,402,172	1,557,910	1,054,596

7.462 Canada also submits statistics from US APHIS and the US Census Bureau to compare data including and excluding cows and bulls. For that purpose, the information is subdivided into slaughter cattle, a category potentially including cows and bulls over 30 months of age, and feeder cattle imports:<sup>648</sup>

	2007	2008	2009	2010 (Jan.-Aug.)
Imports of Canadian slaughter cattle not including cows and bulls (US APHIS)	840,015	644,360	523,635	418,864
Imports of Canadian slaughter cattle not including cows and bulls (US Census Bureau)	838,495	661,028	523,474	437,375
Imports of Canadian slaughter cattle including cows and bulls (US APHIS)	858,060	844,667	755,817	565,305
Imports of Canadian slaughter cattle including cows and bulls (US Census Bureau)	849,315	895,643	763,145	588,810
Imports of Canadian feeder cattle (US APHIS)	539,090	607,919	274,003	158,785
Imports of Canadian feeder cattle (US Census Bureau)	548,250	640,882	288,634	180,779

7.463 Based on the above data, we find that the main trend of imports of Canadian cattle is not affected by whether cows and bulls are included or not. In fact, imports of slaughter and feeder cattle, whether cows and bulls are included or excluded, follow the same general trend from year to year under the US APHIS and US Census Bureau data. The only exception in the comparison is the data on slaughter cattle including cows and bulls in 2007 and 2008; APHIS figures, which follow the trend shown in the other slaughter cattle data, decrease during that period, whereas US Census Bureau data show an increase. Importantly, all the sources and data in the above table show a substantial decrease in imports of Canadian cattle in 2009, whether it involves feeder or slaughter cattle, and

<sup>644</sup> Canada's opening oral statement at the second substantive meeting of the Panel, para. 43.

<sup>645</sup> United States' second written submission, para. 95.

<sup>646</sup> Exhibit CDA-110.

<sup>647</sup> Exhibit CDA-110.

<sup>648</sup> Exhibit CDA-196.

whether or not the latter excludes cows and bulls. Being limited to the first eight months, the data for 2010 do not show a clear trend in the absence of data for the same period of previous years.

Imports of Mexican cattle into the United States

*Overall imports from 2000 to 2009*

7.464 From 2000 to 2009, Mexico exported to the United States an average of approximately 1.1-1.2 million head of cattle per year.<sup>649</sup>

7.465 The data presented by Mexico and the United States for the period starting in 2003 show a similar trend in the development of import volumes of Mexican cattle into the United States. Imports of Mexican cattle fluctuated between approximately 1,239,000 and 1,370,000 head during the 2003-2006 period.<sup>650</sup> In 2007 the import volume decreased below 1,100,000 head of Mexican cattle, with a further drop to 700,000 head in 2008. In 2009 the number of Mexican cattle imported into the United States increased to 940,000.<sup>651</sup>

<b>Imports of Mexican cattle</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>
Data submitted by Mexico ( <i>US International Trade Commission</i> ) <sup>652</sup>	1,239,220	1,370,259	1,256,351	1,256,996	1,090,094	702,651	940,851
Data submitted by the US ( <i>US Census Bureau</i> ) <sup>653</sup>	1,239,531	1,370,476	1,256,404	1,256,973	1,090,094	702,661	940,869

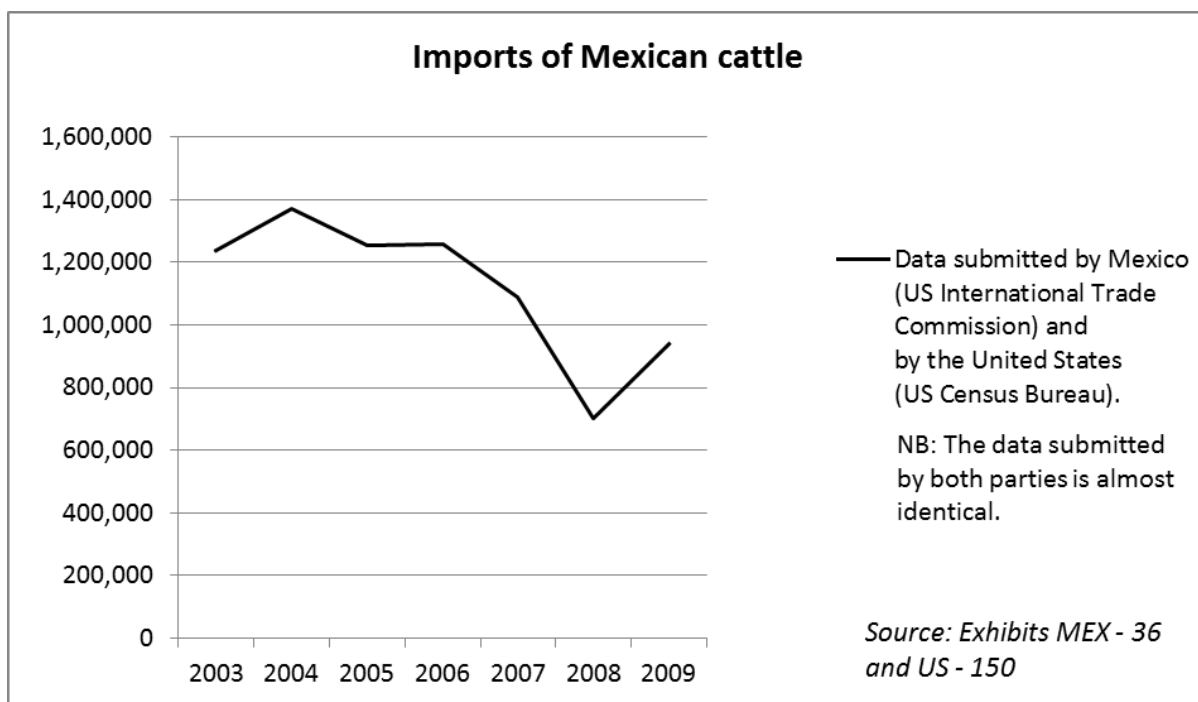
<sup>649</sup> Mexico's first written submission, para. 114 and United States' first written submission, para. 108 (Exhibits MEX-36, 79, 104; US-28, table 13, US-150).

<sup>650</sup> Exhibits MEX-36 and US-150.

<sup>651</sup> Exhibits MEX-36 and US-150.

<sup>652</sup> Exhibit MEX-36.

<sup>653</sup> Exhibit US-150.



*Imports during 2010*

7.466 Mexico and the United States compare import volumes of Mexican cattle during the first seven months of 2009 and 2010 on the basis of data from the Mexican *Secretaría de Hacienda y Crédito Público* and the US Census Bureau, respectively. These figures show an increase in the import volume of Mexican cattle between January and July 2010 with respect to the same period in 2009.

7.467 Mexico provides January-July data since 2007, which allows for a more thorough comparison with the figures for the same period in 2010. This comparison shows that Mexican cattle imports have increased during the first seven months of 2010 *vis-à-vis* the same period in all three previous years.

<b>Imports of Mexican cattle</b>	<b>2007 (Jan.-Jul.)</b>	<b>2008 (Jan.-Jul.)</b>	<b>2009 (Jan.-Jul.)</b>	<b>2010 (Jan.-Jul.)</b>
Data submitted by Mexico <sup>654</sup>	583,829	421,266	496,214	648,143
Data submitted by the United States <sup>655</sup>			478,694	628,817

7.468 The United States also provides US Census Bureau data comparing the number of Mexican cattle head imports from January to September of 2009 and 2010. According to this data, import volumes increased from 569,405 in the first nine months of 2009 to 737,644 in the same period of

<sup>654</sup> Exhibit MEX-79.

<sup>655</sup> Exhibit US-71.



2010.<sup>656</sup> This confirms the above upward trend from the relevant period of 2009 to the same period in 2010.

Canadian hogs

Overall imports from 2000 to 2009

7.469 Imports of Canadian hogs into the United States increased from 4.2 million head in 2000 to approximately 4.7 million head in the first ten months of 2010<sup>657</sup>, peaking at approximately 10 million head in 2007<sup>658</sup>, with a continuous increase from 2000 to 2007. Imports of Canadian hogs slightly dropped in 2008 and further declined in 2009.

7.470 Canada's statistics from Agriculture and Agri-Food<sup>659</sup> and data submitted by the United States from US APHIS and the US Census Bureau for the period starting in 2005 provide further detail on the evolution of imports of Canadian hogs. Although the data are not identical, they show an increase in imports of Canadian hogs between 2005 and 2007, followed by a two-year decrease in 2008 and 2009.

<b>Imports of Canadian hogs</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>
<i>Canada's Agriculture and Agri-food</i> <sup>660</sup>		8,647,391	9,894,930	9,270,268	6,306,919
<i>US APHIS</i> <sup>661</sup>	7,911,137	8,494,939	9,907,316	9,072,783	6,169,537
<i>US Census Bureau</i> <sup>662</sup>	8,190,467	8,763,378	10,004,317	9,347,951	6,364,553

Imports during 2010

7.471 Evidence submitted by the United States shows that imports of Canadian hogs from January to September 2010 remain slightly below the levels of the same period in 2009. Specifically, the number of Canadian hogs imported into the United States from January to September in 2009 was 4,892,846, compared to 4,332,342 during the same period of 2010.<sup>663</sup>

7.472 Canada provides further evidence showing that during the January-October period, imports of Canadian hog reached 4,788,520.<sup>664</sup> However, Canada has not submitted comparable data for the same ten-month period of calendar years preceding 2010.

Further data

7.473 Canada also submits data including figures for slaughter hog<sup>665</sup> and feeder hog imports, and comparable data from US APHIS and the US Census Bureau.<sup>666</sup> This comparison shows that

<sup>656</sup> Exhibit US-150.

<sup>657</sup> Exhibits CDA-210 and US-151.

<sup>658</sup> Canada's first written submission, para. 34 and United States' first written submission, para. 116 (Exhibits CDA-47, 49 and 111; US-28, table 10 and US-72).

<sup>659</sup> The figures from Agriculture and Agri-Food Canada exclude Canadian breeding hogs imported into the United States.

<sup>660</sup> Exhibit CDA-111.

<sup>661</sup> Exhibit US-28, Table 10.

<sup>662</sup> Exhibit US-151.

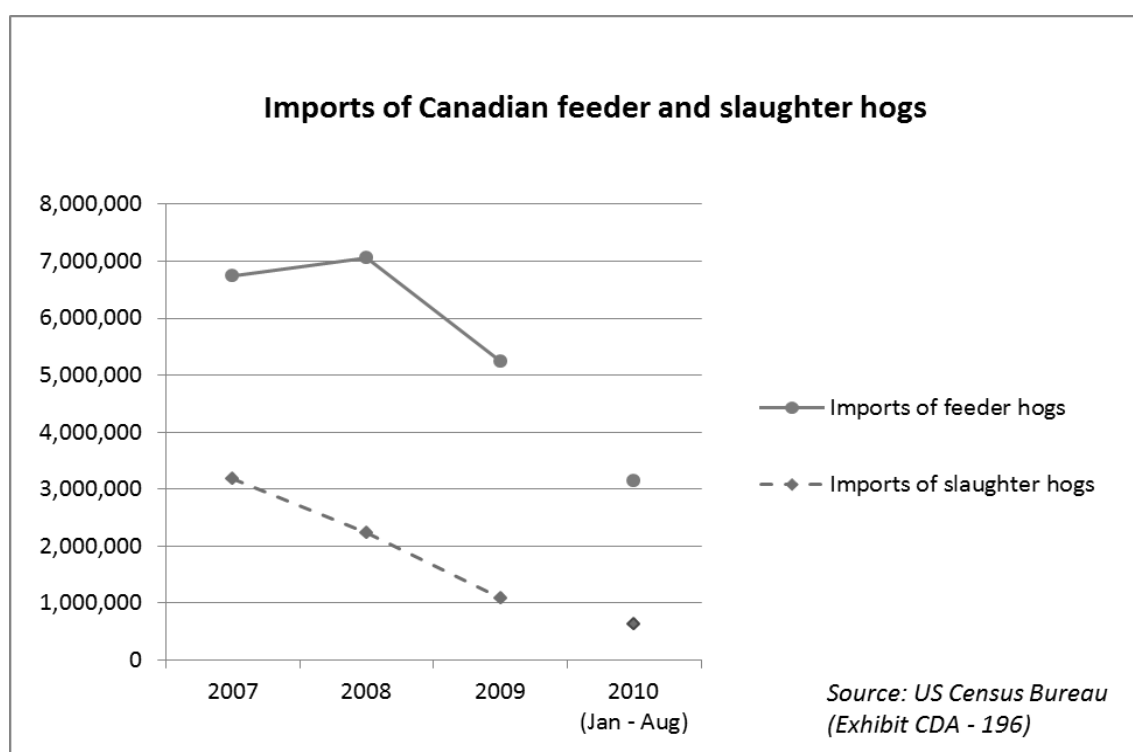
<sup>663</sup> Exhibit US-151.

<sup>664</sup> Exhibit CDA-210.

<sup>665</sup> The slaughter hog category includes sows and boars.

slaughter hog imports started decreasing in 2008, whereas feeder hog imports only dropped in 2009. Being limited to the first eight months, the data for 2010 do not show a clear trend in the absence of data for the same period in previous years.

	2007	2008	2009	2010 (Jan-Aug.)
Imports of Canadian slaughter hogs (US APHIS) <sup>667</sup>	3,292,100	2,334,367	1,191,944	673,250
Imports of Canadian slaughter hogs (US Census Bureau) <sup>668</sup>	3,174,415	2,234,238	1,085,480	641,126
Imports of Canadian feeder hogs (US APHIS) <sup>669</sup>	6,602,321	7,065,734	5,099,259	2,962,822
Imports of Canadian feeder hogs (US Census Bureau) <sup>670</sup>	6,736,221	7,055,529	5,246,057	3,143,804



(ii) *Share of imported livestock in the United States*

7.474 Overall, the share of Canadian and Mexican livestock in the United States has been small between 2005 and 2010. Canadian cattle imports as a share of US cattle slaughter<sup>671</sup> and Mexican

<sup>666</sup> Exhibit CDA-196.

<sup>667</sup> Exhibit CDA-196.

<sup>668</sup> Exhibit CDA-196.

<sup>669</sup> Exhibit CDA-196. US APHIS provides statistics both with and without an eight-week lag. The figures provided in the table are the ones without an eight-week lag.

<sup>670</sup> Exhibit CDA-196.

<sup>671</sup> Exhibit CDA-46.

cattle imports as a share of US feed placements<sup>672</sup> during that period have been below 5% for each category. Canadian hogs imported into the United States never exceeded a 10% share of US hog slaughter between 2005 and 2009.<sup>673</sup>

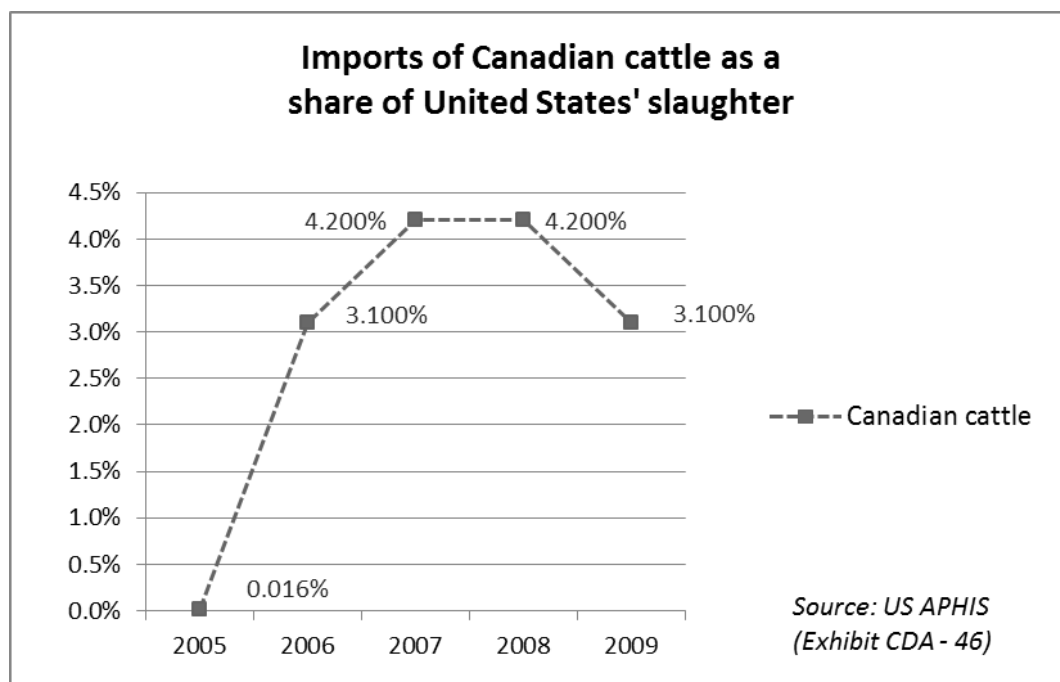
Cattle

Share of Canadian cattle imports in the United States

*Overall share of Canadian cattle imports*

7.475 The share of Canadian cattle imports to the United States has been small over the past decade. On the basis of APHIS statistics, Canada submits information on the total imports of Canadian cattle as a share of US cattle slaughter, showing an upward trend from 2005 to 2008, followed by a drop in 2009.<sup>674</sup>

Source: US APHIS	2005 <sup>675</sup>	2006	2007	2008	2009
Total imports of Canadian cattle as a share of US slaughter <sup>676</sup>	0.016%	3.1%	4.2%	4.2%	3.1%



<sup>672</sup> Exhibit US-86. This exhibit contains a chart showing the monthly fluctuations on imports of Mexican feeder cattle as a share of US feed placements. The Panel calculates the annual average from 2007 to 2009 on the basis of this information.

<sup>673</sup> Exhibit US-86. This exhibit contains a chart showing the monthly fluctuations on imports of Mexican feeder cattle as a share of US feed placements. The Panel calculates the annual average from 2007 to 2009 on the basis of this information.

<sup>674</sup> Exhibit CDA-46.

<sup>675</sup> The low figure for 2005 is mostly due to the import restrictions of Canadian cattle imposed by the United States between 2003 and 2005 because of Bovine Spongiform Encephalopathy (BSE) being detected in Canada.

<sup>676</sup> Exhibit CDA-46.

7.476 Canada and the United States have also submitted figures on feeder and fed cattle as a share of US feed placements and US slaughter placements, respectively. The data show that the share of imports of Canadian feeder cattle compared to US feed placements increased from 2007 to 2008, but dropped considerably in 2009.

<i>Source: USDA/USDC</i>	<b>2007</b>	<b>2008</b>	<b>2009</b>	<b>2010 (Jan.-Aug.)</b>
Imports of Canadian feeder cattle as a share of US feed placements (Canada) <sup>677</sup>	2.29%	2.71%	1.22%	1.14%
Imports of Canadian feeder cattle as a share of US feed placements (US) <sup>678</sup>	2.65%	3%	1.41%	

7.477 The share of Canadian fed cattle compared to US cattle slaughter placements has steadily decreased since at least 2008.

<i>Source: USDA/USDC</i>	<b>2007</b>	<b>2008</b>	<b>2009</b>	<b>2010 (Jan.-Aug.)</b>
Imports of Canadian fed cattle as a share of US slaughter (Canada) <sup>679</sup>	3.1%	2.4%	2%	2.4%
Imports of Canadian fed cattle as a share of US slaughter (US) <sup>680</sup>	2.54%	1.86%	1.73%	

7.478 As regards the first eight months of 2010, data submitted by Canada indicates that the share of Canadian feeder cattle dropped *vis-à-vis* 2009, while the share of Canadian fed cattle recouped to the level of 2008.

#### *Concerns raised by the parties*

7.479 Canada and the United States disagree on two aspects of the methodological approach for calculating the share of Canadian cattle and hog imports in the US livestock market: the choice of the denominator and the unit of time.

7.480 As regards the denominator, the United States argues that "the import ratio that Canada uses to illustrate market share uses the amount of U.S. slaughter or placements in any given year as the

<sup>677</sup> Exhibit CDA-159.

<sup>678</sup> Exhibit US-86. This exhibit contains two charts showing the monthly fluctuations on imports of Canadian feeder and fed cattle as a share of US feed placements and US cattle slaughter, respectively. The Panel calculates the annual average from 2007 to 2009 on the basis of this information.

<sup>679</sup> Exhibit CDA-159.

<sup>680</sup> Exhibit US-86. This exhibit contains two charts showing the monthly fluctuations on imports of Canadian feeder and fed cattle as a share of US feed placements and US cattle slaughter, respectively. The Panel calculates the annual average from 2007 to 2009 on the basis of this information.

denominator, and thus, captures larger trends in the U.S. market that have nothing to do with Canadian imports".<sup>681</sup> Canada justifies this with the need to disregard market factors that do not have a differential impact on imported livestock, such as a general increase in grain prices.<sup>682</sup> We note that the United States did not provide any alternative methodology for calculating the shares, and its own evidence uses the same denominator as Canada's. In any event, given the use of the same numerator and denominator, the data allow for a useful comparison, irrespective of the parties' disagreement on the denominator.

7.481 As regards the unit of time, the United States submits that the data presented by Canada "is inappropriate because of the significant 'noise' associated with using weekly data instead of monthly data".<sup>683</sup> Accordingly, the United States presents estimates on the basis of monthly data. Canada replies that "[b]y using monthly observations rather than weekly data from the U.S.-APHIS, the United States reduces the size of the available data set and reduces the precision with which the effects of the COOL measure may be measured".<sup>684</sup> Canada further submits that the statistics prepared by US APHIS and the US Census Bureau are similar, with an expected variation attributable to weekly data not aligning exactly with monthly data.<sup>685</sup> As explained above, the general trend shown by both parties' data is quite similar, irrespective of the unit of time chosen.

#### Share of Mexican cattle imports in the United States

7.482 The share of Mexican cattle imports in the United States has remained small over the past decade. According to the United States, imports of Mexican cattle as a share of US slaughter have represented between 3% and 5% from 2000 to 2009.<sup>686</sup>

7.483 Data submitted by the United States for the period between 2007 and 2009 show that imports of Mexican feeder cattle as a share of US feed placements have fluctuated in the same range:<sup>687</sup>

<i>Source: Department of Commerce and USDA</i>	<b>2007</b>	<b>2008</b>	<b>2009</b>
Imports of Mexican feeder cattle as a share of US feed placements	4.75%	3.6%	4.95%

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<sup>681</sup> United States' second written submission, para. 73.

<sup>682</sup> Canada's opening oral statement at the second substantive meeting of the Panel, para. 49.

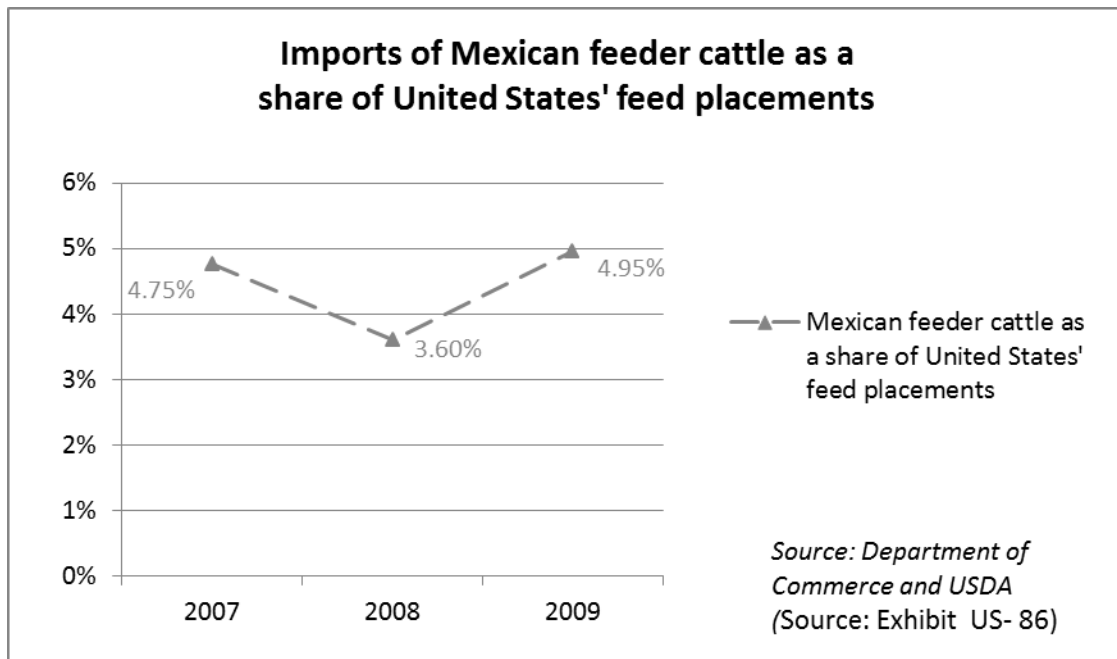
<sup>683</sup> United States' second written submission, para. 74.

<sup>684</sup> Canada's second written submission, para. 42.

<sup>685</sup> Canada's opening oral statement at the second substantive meeting of the Panel, para. 43.

<sup>686</sup> United States' first written submission, para. 108 (Exhibit US-28, Tables 5 and 13).

<sup>687</sup> Exhibit US-86. This exhibit contains a chart showing the monthly fluctuations on imports of Mexican feeder cattle as a share of US feed placements. The Panel calculates the annual average from 2007 to 2009 on the basis of this information.

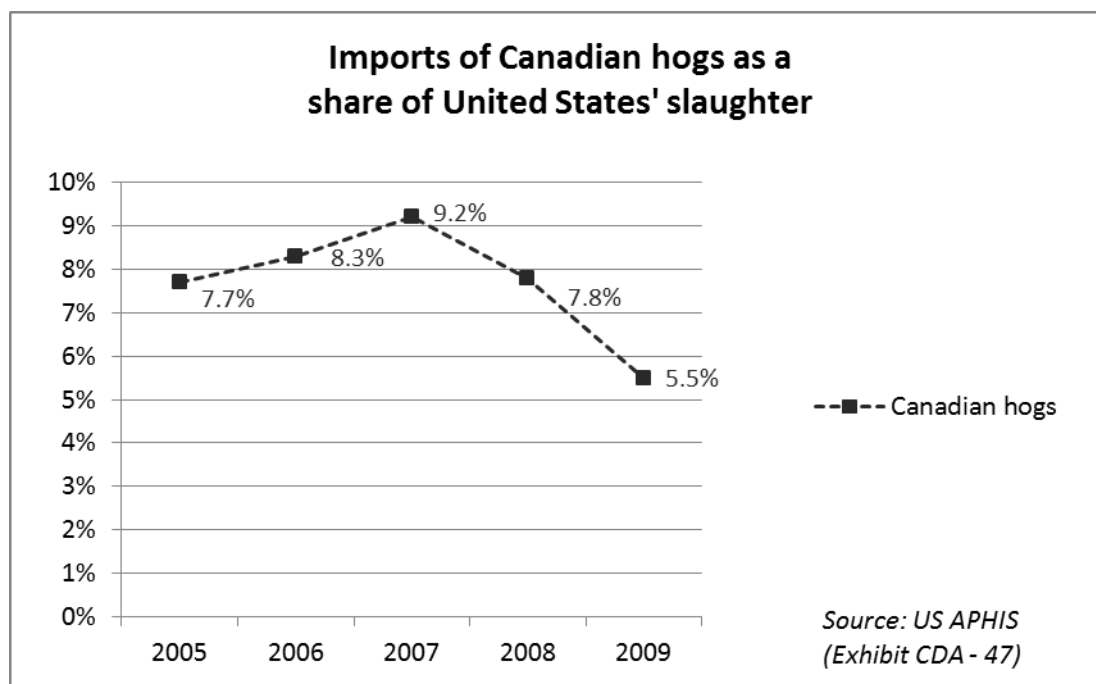


Canadian hogs

7.484 Canada provides data showing that total imports of Canadian hogs as a share of US hog slaughter increased continuously between 2005 and 2007, followed by two consecutive years of reduction.<sup>688</sup>

<i>Source: US APHIS</i>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>
Total imports of Canadian hogs as a share of US slaughter	7.7%	8.3%	9.2%	7.8%	5.5%

<sup>688</sup> Exhibit CDA-47.



7.485 Canada also submits more detailed data showing that Canadian feeder hogs as a share of US hog production<sup>689</sup> declined in 2009 and in the first eight months of 2010, and that the number of Canadian slaughter hogs as a share of US hog slaughter has been steadily decreasing since at least 2008:<sup>690</sup>

<i>Source: USDA</i>	<b>2007</b>	<b>2008</b>	<b>2009</b>	<b>2010 (Jan.-Aug.)</b>
Imports of Canadian feeder hogs as a share of US hog production	4.9%	5%	3.6%	3%
Imports of Canadian slaughter hogs as a share of US hog slaughter	3.1%	2%	1.1%	1%

(iii) *Costs of the COOL measure*

7.486 As explained above, the COOL measure entails compliance costs, including segregation costs.<sup>691</sup> In fact, all parties agree on the existence of compliance costs associated with the introduction of the COOL measure. However, parties' views differ on the extent of these costs. While Canada and Mexico argue that the costs of segregation are significant, the United States claims they remain small thanks to the flexibilities contained in the COOL requirements.

<sup>689</sup> Canada provides this information with and without an eight-week lag between the imports of Canadian hog and total US hog production. According to Canada's response to Panel question No. 21, Canadian hogs are approximately eight weeks older than the US pig crop as a whole. Therefore, argues Canada, in order to compare the two groups of hogs with greater accuracy, it is necessary to use the eight-week lag. As an example, Canada states that under this scenario Canadian hog exports to the United States in week 9 are compared to the US hog crop in week 1.

<sup>690</sup> Exhibit CDA-159.

<sup>691</sup> See paras. 7.330-7.372 above.

7.487 The structure of segregation costs can be complex depending on whether the structure of the supply chain is highly integrated and on consumers' willingness to pay a premium for country of origin labelling. These costs have to be covered by some participants along the supply chain either by setting a higher sale price or by imposing a discounted purchasing price. As a result, prices and quantities are likely to be affected.

7.488 Besides affidavits indicating price discounts for imported animal and meat as a result of the COOL requirements<sup>692</sup>, Canada provides two economic studies on the segregation costs of the COOL measure. The first one, prepared by Informa Economics<sup>693</sup> ("Informa Report") in June 2010, assesses the implementation costs of the supply chain in the United States. The second one is an economic simulation model by Professor Sumner ("Sumner Simulation Study") published in June 2010, which measures the impact of the COOL measure on the willingness of operators along the supply chain to pay for imported Canadian animals based on the estimated segregation costs provided by the Informa Report.

### Informa Report

#### Summary of the study

7.489 The Informa Report provides a descriptive assessment of the costs associated with the implementation of the 2009 Final Rule (AMS). It updates a previous assessment of the country of origin labelling as established in the 2002 Farm Bill published in April 2003.<sup>694</sup> The report analyses the US cattle and beef supply chain as well as the hog and pork supply chain, by comparing two supply chain configurations: production processes involving only US-origin animals or mixed-origin animals.

7.490 The Informa Report identifies various types of compliance costs of the COOL measure and it provides figures suggesting that the costs under the mixed origin configuration are substantially higher than the ones associated with the supply chain configured to handle only US-origin products. These costs flow from the adaptations which operators in the supply chain need to make to comply with the COOL measure.

7.491 The Informa Report explains that the magnitude of these costs depends on the stage of the supply chain and whether mixed-origin products are being processed. The segregation costs are particularly high at the packer/processing and distribution/retail level for operators accepting mixed-origin livestock and meat.

7.492 The Informa Report compares the estimated costs under the 2002 Farm Bill and the costs under the 2009 Final Rule (AMS) and finds that despite the flexibilities under the latter instrument, e.g. the possibility of commingling and the interchangeable use of Labels B and C, operators processing animals and products with mixed origin continue to bear additional costs of segregation and compliance compared with a supply chain configured to process only US-origin animals.

7.493 Based on an industry survey and an analysis of the retail meat sector, the Informa Report concludes that the COOL measure had different cost impacts in the beef and pork sectors.

7.494 In the supply chain of cattle and beef, a large number of operators adopted a configuration that can handle one or more of the labels despite high segregation costs associated with the use of

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<sup>692</sup> See para. 7.356 above.

<sup>693</sup> Exhibit CDA-64.

<sup>694</sup> Exhibit CDA-70.



animals and products of mixed origin. Concerns over long-term supply availability explain why operators decided to bear the segregation costs. Slaughterhouses were aware that there might not be enough US-born animals to satisfy a high utilization rate necessary to ensure minimum production costs and, thus, decided to handle both domestic and foreign-born cattle.

7.495 The Informa Report indicates that, unlike the beef sector, the costs of segregation in the hog industry are particularly complex and depend on the type of production configuration and the degree of vertical integration. In fact, the Informa Report distinguishes between integrated hog production and packer/processor, large scale production not integrated into the packer/processor, and small independent hog producers. The report concludes that many operators in the hog and pork supply chain opted to handle only US-origin hogs to avoid large and complex segregation costs and, thus, remain competitive.

#### Criticisms by the United States

7.496 The United States argues that the lack of transparency of the methodology of the Informa Report calls into question the validity of the estimated costs presented by the report.<sup>695</sup> Further, according to the United States, the Informa Report failed to account for previously occurring segregation and for the flexibilities provided by the 2009 Final Rule (AMS). The Informa Report suggests that no livestock imports should occur but this is rebutted by actual market trends. Accordingly, the United States argues, the Informa Report overestimates the costs of compliance with the COOL requirements.

7.497 In response, Canada submits a follow-up letter from the Vice President of Informa Economics, explaining that the Informa Report is based on information gathered from interviews and firm-level cost data.<sup>696</sup> The sensitive nature of the data and the confidentiality agreements with survey participants explain why the sources cannot be disclosed. According to the follow-up letter, the Informa Report was able to distinguish between the costs associated with the COOL measure and those occurring for other reasons like the BSE, other labels or export requirements. The flexibilities provided for in the 2009 Final Rule (AMS) were also included in the cost estimates and explain why some compliance costs decreased.

#### Analysis by the Panel

7.498 The Informa Report provides insights on how the different types of compliance and segregation costs are allocated in the supply chain. The Report demonstrates that compliance costs of the COOL measure faced by operators depend on a large number of determinants, including the decision to process only US-origin or mixed-origin products, the stage of the supply chain, the size of the firm, the geographical location of operators and the time of the year. The Report also shows that, in general, COOL costs arise at every stage of the livestock and meat supply chain, and that these costs increase as livestock and meat move downstream on the chain.

7.499 However, the Informa Report is silent on its methodology and the sample considered (i.e. time period, geographical zone, number of firms surveyed). Accordingly, we cannot assess with sufficient certainty whether the Informa Report is reliable and precise as regards its exact quantification of the costs of the COOL measure.

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<sup>695</sup> Exhibit US-43.

<sup>696</sup> Exhibit CDA-174.

## Sumner Simulation Study

### Summary of the Study

7.500 The economic simulation study undertaken by Professor Daniel A. Sumner<sup>697</sup> applies economic reasoning to explain some of the descriptive facts on segregation costs highlighted in the Informa Report. In particular, Professor Sumner compares the situations with and without the COOL measure, and develops an economic model of the US livestock sector (feeder pigs, fed hogs and pork, feeder cattle, fed cattle and beef) to illustrate how the differential implementation costs of the COOL measure are distributed among market participants through market forces. Like the Informa Report, the Sumner Simulation Study considers operators that process either only US-origin or mixed-origin animals. The Study presents the results of the economic model simulation which assesses the reduction in the demand for Canadian livestock, in terms of willingness to pay, following the implementation of the COOL measure.

7.501 The Sumner Simulation Study lays down the economic competitive mechanism that explains how the implementation of the COOL measure affects Canadian cattle and hogs compared with US domestic production. According to the Study, the competitive market pressure of the COOL requirements starts at the end of the supply chain. Retailers who propose mixed-origin meat need to sell this meat at a price at least equal or lower than the price of US-origin meat in order to remain competitive with other retailers selling only US-origin meat. Yet, retailers selling mixed-origin meat face additional labelling costs related to segregation by origin. According to the Study, these additional costs cannot be passed on to customers, who can buy US-origin meat that does not face segregation costs. Thus, the Study considers that the only option for these retailers is to pay to their suppliers, i.e. feeding operators and packers, a price for mixed-origin meat below the price paid for US-origin meat. Faced with this market pressure, the Study considers that feeding operators and packers processing Canadian cattle and hogs are unable to pass their additional segregation and compliance costs on to the retailers or the suppliers of US cattle and hogs. In order to remain competitive, the Study concludes that the only option for these operators is to either avoid using imported feeder and fed animals or to request a lower import price for Canadian livestock and meat in order to offset additional segregation and compliance costs. In both cases, strong market pressure leads most implementation costs of the COOL measure to be borne by livestock and meat importers/suppliers through a reduction of Canadian imports and/or price. Since Canadian livestock already represented a small share in the US market before the implementation of the COOL measure, and the switch to only US-origin products can be done at little or no cost, the Study expects the reduction of Canadian imports and/or price to be significant.<sup>698</sup>

7.502 The Sumner Simulation Study proceeds with the derivation of a mathematical representation of the economic competitive mechanisms. In order for the model to remain tractable and to limit the number of equations involved, Professor Sumner introduces several assumptions to define the relationship of market forces in the supply chain and to isolate the changes caused by the implementation of the COOL requirements. Ultimately, the economic model depends on a set of parameters representing the market shares, the technical mark-up (i.e. difference between the cost and the selling price of the product) and the costs of segregation. To quantify the impacts of the

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<sup>697</sup> Professor Daniel A. Sumner is Director of the University of California Agricultural Issues Center and the Frank H. Buck Jr. Professor in the Department of Agricultural and Resource Economics, University of California, Davis.

<sup>698</sup> Similar economic reasoning is described in a spring 2003 economic study provided by Mexico (cf. Exhibit MEX-88). This study assesses the implementation costs associated with the 2002 Farm Bill based on two methods of implementation: a "certification with an audit" or a "traceback" system. We are not reviewing this study.

COOL measure at each stage of the supply chain, the model is then simulated by introducing data from the Informa Report, USDA and Statistics Canada. The results of the Study show how the implementation of the COOL requirements, through market forces, leads to a reduction of the willingness to pay by the operators along the supply chain for given quantities of Canadian cattle and hogs

#### Criticisms by the United States

7.503 The United States questions the accuracy of the simulated figures of the Study, since it relies extensively on data from the Informa Report, which, according to the United States, lacks transparency and relies on a model based on too restrictive and unrealistic assumptions.<sup>699</sup> For instance, according to the United States, the Sumner Simulation Study failed to account for the increase in the cost of procuring cattle resulting from the switch to a US-only process.<sup>700</sup> Further, according to recent trade data, the United States continues to import Canadian and Mexican livestock, which suggests that the additional costs resulting from the COOL measure are being absorbed.<sup>701</sup>

7.504 The US criticisms relating to the use of the Informa Report are addressed by Canada in the follow-up letter from the Vice President of Informa Economics.<sup>702</sup> However, Canada does not address in detail the United States' criticisms relating to the assumptions of the model in the Sumner Simulation Study.

#### Analysis by the Panel

7.505 As explained in the Sumner Simulation Study, the simulation results cannot be viewed as projections of market price outcomes. Rather, the study provides an example of how demand for imported products compared to demand for US-origin products could be affected by the COOL measure at each stage of the supply chain. Although it is reasonable to expect that operators processing only US-origin products face lower compliance costs of COOL, it is extremely difficult to draw reliable conclusions from the Sumner Simulation Study as regards the precise level of segregation costs and their specific impact on price and quantities. In fact, the economic model derived by Professor Sumner is a simplification to illustrate the complex economic mechanism underlying the impact of the COOL measure, which by definition introduces additional uncertainty into the estimated figures.

#### Conclusion on the Informa Report and the Sumner Simulation Study

7.506 Although we cannot rely directly on the figures included in the Informa Report and the Sumner Simulation Study, both studies shed some light on the different types of segregation and compliance costs encountered at different stages of the supply chain. Given that these costs have to be borne somewhere in the system, it all comes down to economic competition pressure. The Sumner Simulation Study shows how market-force mechanisms allocate these costs along the supply chain. In the absence of a large share of US consumers willing to pay a price premium for country of origin labelling, the cheapest way to comply with the COOL measure is to process only US-origin livestock, all other things being equal. The other possibility is to continue processing imported livestock through segregation, which entails additional costs in virtually all cases. Either process configuration is likely to cause a decrease in the volume and price of imported livestock.

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<sup>699</sup> See Exhibit US-43; United States' first written submission, para. 188; and United States' second written submission, para. 91.

<sup>700</sup> See Exhibit US-43.

<sup>701</sup> See Exhibit US-43.

<sup>702</sup> See Exhibit CDA-174.

- (iv) *Whether the COOL measure had a negative and significant impact on imported Canadian livestock volumes and prices*

### Introduction

7.507 Canada and the United States also submit econometric analyses to determine if the implementation of the COOL measure affected prices and shares of imported livestock.

7.508 As discussed above, the economic analyses submitted by Canada and the United States cannot be relied upon exclusively in order to establish whether any negative trade and economic effects are attributable specifically to the COOL measure. We have found that these descriptive analyses have shortcomings both in terms of the reliability of the underlying data and in the methodological approach. Although tables and graphs provide some insights, making an inference of the impact of the COOL measure based solely on this type of information can be misleading or inaccurate. This is because, as the United States argues, many factors can explain the evolution of market shares and prices, including the general economic situation, a specific event (e.g. BSE), seasonal effects, changes in transportation costs, fuel prices and livestock inventories, and exchange rate fluctuations. Failing to consider and give proper weight to these factors would invalidate any conclusions with regard to whether any negative effects on the price and share of imported livestock are attributable to the COOL measure. This is particularly important because the COOL measure started to develop its effect in 2008, shortly after the US economic recession started in December 2007.<sup>703</sup>

7.509 Unlike descriptive analyses, econometric studies are able to isolate and quantify the different factors at play. Specifically, the econometric approach permits a distinction and assessment of the impact of the COOL measure, economic recession and other determinants on the quantity and price of imported livestock. To be accurate, the assessment of the estimated causal relationship between two given variables should rely on the level of statistical significance. Statistical significance provides information on the degree of confidence and reliability of the estimated value of each parameter.

7.510 The level of significance is important because the sign of the estimated coefficient of the variable is not sufficient to interpret the empirical results. Technically speaking, statistical significance is a mathematical tool to assess the probability that the relationship between specific variables (for instance the impact of the COOL measure on the import share or price basis) is the result of chance.<sup>704</sup> Typically, a variable is said to be statistically significant when there is a 95% probability that the coefficient of a given variable (for instance the COOL measure) is different from zero. Conversely, there is only a 5% probability that the value of the estimated coefficient is due to chance or random error. The 95% probability has been widely adopted to accept or reject the reliability of estimates.<sup>705</sup>

7.511 In order to infer any conclusion on the empirical estimates, the results should also remain qualitatively similar to a series of robustness checks, such as the inclusion of additional explanatory variables or the extension of the time period.

### General observations on the econometric studies submitted by Canada and the United States

7.512 Both Canada and the United States submitted an econometric study to assess the impact of the COOL measure on the imports of Canadian cattle as a share of US feed or slaughter placements and on the price difference between imported Canadian and US livestock (also known as the "price

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<sup>703</sup> Exhibit US-156.

<sup>704</sup> R.A. Fisher, *Statistical Methods for Research Workers*, 1<sup>st</sup> ed. (Oliver & Boyd, 1925).

<sup>705</sup> R.A. Fisher, *Statistical Methods for Research Workers*, 1<sup>st</sup> ed. (Oliver & Boyd, 1925).

basis"). In addition, the econometric study submitted by Canada also analyses the impact of the COOL measure on the imports of Canadian hogs as a share of US feed or slaughter placements. Both econometric studies are based on an equation, where the dependent variable, namely the import ratio or the price difference, is a function of several explanatory variables and an error term. The error term reflects the fact that the model does not fully represent the actual relationship between the dependent variables and the explanatory variables. In other words, all the factors not explicitly controlled in the model specification are included in what is called the error term. The estimation in the two econometric studies submitted by Canada and the United States consists of minimizing such error term.

7.513 Although the econometric studies submitted by Canada and the United States estimate the same types of impact of the COOL measure, they reach different conclusions. Since both studies rely on the same standard estimation method (i.e. so-called "ordinary least squares method"<sup>706</sup>), these opposite estimates result from the use of different types of data (weekly or monthly), time period and model specifications. It is not our task to establish a unified econometric report or to conduct our own econometric assessment; instead we will assess the robustness of each study.

#### Summary of the Sumner Econometric Study submitted by Canada

##### Main findings of the Sumner Econometric Study

7.514 The econometric study prepared by Professor Sumner on behalf of Canada ("Sumner Econometric Study") is composed of two elements: a theoretical economic model and an empirical econometric study.<sup>707</sup>

7.515 The theoretical economic model part of the Sumner Econometric Study derives a partial equilibrium model of the impact of the COOL measure on the US market for Canadian fed cattle, feeder cattle, fed hogs and feeder pigs. The partial equilibrium nature of the model implies that the impact of the COOL measure in a given market, in this case the US market, is analysed independently from prices and quantities demanded and supplied in other markets, e.g. the Canadian market. The model suggests that, under perfect competition, the impact of the implementation of the COOL measure will depend on the price elasticity of Canadian import supply, which corresponds to the responsiveness of the import quantity to a change in the import price. Based on the actual market conditions determining the price elasticity of the cattle and hog sectors, the Sumner Econometric Study concludes that the implementation of the COOL measure is more likely to lead to a decrease in Canadian imports than to a price reduction. The Sumner Econometric Study expects a significant price reduction only in the US fed cattle market. These theoretical findings are used by Professor Sumner to interpret the empirical findings of the econometric model.

7.516 The second part of the Sumner Econometric Study estimates empirically the impact of the COOL measure on the share of Canadian cattle and hogs relative to US feed or slaughter placements and price basis based on weekly data. Unlike a theoretical model, this econometric model does not rely on any specific assumptions on market structure and consumer or producer behaviour. The study performs its econometric estimations separately for the US fed cattle, feeder cattle, fed hogs and feeder pigs markets for the period between September 2005 and September 2009. The impact of the COOL measure is represented by a so-called dummy variable, which is an indicator variable that takes the value of zero before the implementation of the COOL measure and one afterwards to represent its existence in the model.

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<sup>706</sup> William H. Greene, *Econometric Analysis*, 5<sup>th</sup> ed. (Prentice Hall, 2000), pp. 19-38.

<sup>707</sup> Exhibits CDA-64, 174.

7.517 The empirical findings suggest that the COOL measure did have a negative and significant impact on the import share of Canadian livestock and the price basis of Canadian fed cattle. In other words, the introduction of the COOL measure seems to have reduced significantly the share of imports of Canadian cattle and hogs as well as the price of Canadian fed cattle with respect to the US livestock. These results suggest that in the absence of the COOL measure and all other things being equal, the price basis for Canadian fed cattle would have been smaller and the import share of Canadian cattle and hogs would have been higher. The evidence of a negative impact of the COOL measure on the price basis is partially in line with the empirical findings provided by another econometric study from CanFax submitted by Canada.<sup>708</sup>

#### Criticisms by the United States

7.518 The United States raised some concerns relating to certain aspects of the Sumner Econometric Study, which in their view invalidate the study's main findings.<sup>709</sup> Besides the issues related to the choice of the denominator of the import share<sup>710</sup> and the unit of time (monthly instead of weekly)<sup>711</sup>, the United States questioned the use of a reduced form model to determine whether the COOL measure had price and export effects given the complexity of the North American livestock market. In particular, the United States argued that the Study yields misleading results because it fails to account for important factors unrelated to the COOL measure, such as exchange rate fluctuations, changes in livestock inventories, transport costs and fuel prices. Further, the United States argued that the negative impact established by the Study is attributable to economic recession and not to the COOL measure. The United States added that the Study fails to address the BSE period between 2003 and 2005 and the long-term structural change until November 2007, when imports of Canadian cattle over 30 months were allowed again. As a result, according to the United States, the conclusions reached by the Sumner Econometric Study are unreliable and misleading.

#### Canada's response

7.519 Although Canada argues that the US criticisms are unfounded, in response to these criticisms, Canada updates its econometric analysis to include more recent data and account for transport costs.<sup>712</sup> Since these updated empirical results remain qualitatively similar to the initial estimates, Canada argues that the impact of the COOL measure continues to be negatively significant on import share and price basis.<sup>713</sup> Canada further claims that the Sumner Econometric Study already takes into account pre-existing trends relating to inventories.<sup>714</sup> More generally, Canada argues that the inclusion in the model specification of variables that are affected by the COOL measure/requirements (i.e. endogenous variables) would be a mistake.<sup>715</sup>

7.520 Regarding the impact of economic recession, Canada agrees that this can have an effect on livestock demand in North America. Canada claims, however, that the United States failed to provide any arguments to explain why economic recession would affect differentially Canadian imports with respect to US production.<sup>716</sup>

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<sup>708</sup> Exhibit CDA-114.

<sup>709</sup> Exhibit US-43.

<sup>710</sup> United States' second written submission, para. 73. See para. 7.480 above.

<sup>711</sup> United States' response to Panel questions following the second substantive meeting, paras. 45-46.

See para. 7.481 above.

<sup>712</sup> Exhibit CDA-152.

<sup>713</sup> Canada's opening oral statement at the first substantive meeting of the Panel, para. 37.

<sup>714</sup> Canada's opening oral statement at the second substantive meeting of the Panel, para. 36.

<sup>715</sup> Canada's opening oral statement at the second substantive meeting of the Panel, para. 52.

<sup>716</sup> Canada's opening oral statement at the first substantive meeting of the Panel, para. 44.

7.521 Canada explains that the Sumner Econometric Study deliberately does not consider the BSE period (2003-2005), because the integration of the Canada-US cattle market temporarily suffered structural disruption during that period. However, Canada points out, the Study takes into account the effects of BSE through a 0-1 indicator variable for the fact that between July 16, 2005 and November 19, 2007 imports of Canadian cattle over 30 months were banned.<sup>717</sup>

#### Further updates of the Sumner Econometric Study

7.522 Canada submits a further updated version of the Sumner Econometric Study which addresses economic recession and BSE more extensively.<sup>718</sup> The period analysis was accordingly extended from December 2003 to November 2010 to include the 2003-2005 BSE period and more recent data, explicitly including a dummy variable equal to one until November 2007 and zero afterwards to account for the import ban on cattle over 30 months. Economic recession is also included in the updated model specification either through a 0-1 indicator variable or the relative unemployment ratio between Canada and the United States.

7.523 Canada argues that these further updated results are robust and qualitatively similar to the estimates of the original Sumner Econometric Study. In particular, the impact of the COOL measure remains negative and significant after controlling for economic recession that started a few months prior to the entry into force of the COOL measure. Although not always significant, BSE reduced the Canadian import share and increased the price basis. More generally, despite economic recession, the updated results suggest that prices and quantities of imported Canadian livestock would have been higher in the absence of the COOL measure.

7.524 Canada subsequently provides another set of estimates, where the import shares and price basis are based on monthly data.<sup>719</sup> In most specifications, the impact of the COOL measure on price and import quantities of Canadian livestock is negative and significant. According to Canada, these findings confirm that the COOL measure affected the conditions of competition for Canadian livestock in the US market in a negative and significant manner.

7.525 According to the United States, the adjustments undertaken in these further updates of the Sumner Econometric Study do not address the flaws of the econometric model contained in the original Sumner Econometric Study. In particular, the use of the unemployment ratio is not adequate, because it does not capture the impact of the economic recession on the labour market<sup>720</sup>; in addition, it is often a lagging indicator of the economic activity. The United States also questions how weekly unemployment rates were computed by these further updates. Instead, the United States proposes to consider overall trade in agriculture commodities as a measure of economic recession.<sup>721</sup>

7.526 Regarding BSE, the United States argues that the period during the BSE-related US import ban cannot be considered as normal or representative to undertake any analysis of the trade effects of the COOL measure on the US market.<sup>722</sup> Consequently, the United States rejects these new results.<sup>723</sup>

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<sup>717</sup> Canada's opening oral statement at the first substantive meeting of the Panel, para. 45.

<sup>718</sup> Exhibit CDA-174.

<sup>719</sup> Exhibit CDA-228

<sup>720</sup> United States' comments on Canada's response to Panel questions following the second substantive meeting, paras. 28-30.

<sup>721</sup> United States' comments on Canada's response to Panel questions following the second substantive meeting, para. 30.

<sup>722</sup> United States' comments on Canada's response to Panel questions following the second substantive meeting, paras. 32-33.

Summary of the USDA Econometric Study submitted by the United States

Main findings of the USDA Econometric Study

7.527 The United States argues that, as the respondent, it need not develop a competing econometric model.<sup>724</sup> Yet, the United States submits an alternative econometric study prepared by the Office of the Chief Economist of USDA ("USDA Econometric Study").<sup>725</sup> Unlike the Sumner Econometric Study, the USDA Econometric Study only focuses on the Canadian and Mexican fed and feeder cattle import markets. The period of analysis covers July 2003 to April and May 2010 for import shares and for price difference, respectively. Further, the USDA Econometric Study provides estimates using data between January 1997 and April/May 2010. Although the USDA Econometric Study considers the same definition of the import share and price basis as the Sumner Econometric Study, it calculates the import quantity share and price basis on monthly, not weekly data. Further, the USDA Econometric Study includes additional explanatory variables (e.g. gasoline prices) in the model specification not present in the initial Sumner Econometric Study. Nonetheless, the United States follows the same approach as the Sumner Econometric Study and also represents the impact of the COOL measure as a 0-1 indicator variable.

7.528 Nonetheless, the USDA Econometric Study reaches different conclusions from the Sumner Econometric Study regarding the impact of the COOL measure on the import ratio and the price basis between imported Canadian and domestic US livestock. On the one hand, the USDA Econometric Study finds that in some specifications the impact of the COOL measure on the price basis is positive and significant. This suggests that the COOL measure reduced the price gap between the Canadian and US livestock. The United States attributes this to the substitution effect in the US market from more expensive high-grade US meat (Choice) to low-grade Canadian meat (Select) resulting from the economic recession.<sup>726</sup> The higher demand for Canadian livestock led to an increase in its price and a decrease in the price of US cattle. As a result, according to the USDA Econometric Study, the price difference between Canadian and the US livestock decreased following the implementation of the COOL measure.

7.529 The empirical results of the USDA Econometric Study indicate that there is a negative but not significant impact of the COOL measure on the import ratio of Canadian livestock. Since this impact is not significantly different from zero, the United States infers that the COOL measure had no impact on Canadian imports. In addition, the United States argues that when the COOL variable is replaced by an economic recession dummy variable in the model specification, economic recession has a significant negative impact on the import share in some specifications. This result, argues the United States, corroborates its claim that the economic recession was the main determinant in any decline in import shares.

7.530 With respect to the hogs sector, the USDA Econometric Study concludes, without providing an econometric analysis, that the main factor explaining the reduction in Canadian imports is the decline in Canadian hog inventories which began before the implementation of the COOL measure. The United States claims that this factor is so strong that no econometric analysis is needed to explain the drop in Canadian hog imports.

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<sup>723</sup> United States' comments on Canada's response to Panel questions following the second substantive meeting, para. 34.

<sup>724</sup> United States' response to Panel questions following the second substantive meeting, para. 35. See also para. 7.518 above.

<sup>725</sup> Exhibits US-42 and 149.

<sup>726</sup> United States' response to Panel questions following the second substantive meeting, para. 49.



#### Canada's criticisms

7.531 Canada argues that the USDA Econometric Study has failed to address the criticisms formulated by the United States against the Sumner Econometric Study.<sup>727</sup> In particular, the use of a constant measure of economic recession, such as the dummy variable, in the USDA Econometric Study is not appropriate, because the economic recession and its recovery fluctuate over time.<sup>728</sup> In addition, Canada claims that the USDA Econometric Study relies on a misdefined recession dummy variable, which continues to take the value of one after the end of the economic recession in June 2009. With respect to BSE, Canada claims that including the BSE period in the USDA Econometric Study is inappropriate because the structural disruptions are associated with a large price basis and zero import shares.<sup>729</sup> Canada also criticises the use of a single variable to account for the full range of structural changes resulting from the BSE-related import ban.<sup>730</sup>

7.532 Further, Canada argues that the USDA Econometric Study relies on the wrong index to measure transport costs. Instead of representing the transport costs faced by producers with the "Producer Price Index for Trucking", the United States considers the "Consumer Price Index for Transportation", which includes amounts paid by consumers for new cars, parking fees, airline fares and tickets for public transport. Accordingly, Canada argues that the USDA Econometric Study applies a wrong economic analysis.<sup>731</sup>

7.533 Turning to the hog analysis in the USDA Econometric Study, Canada rejects the gradual decline in hog inventories in Canada as the sole explanation of the drop in Canadian hog imports.<sup>732</sup> Canada notes that while the decline in hog inventories began in 2005, Canadian hog imports increased before the implementation of the COOL measure. In fact, the drop in Canadian hog imports in levels and as a percentage of US slaughter began in 2008, at the same time as hog inventories in the United States started to decrease.

#### The United States' response

7.534 The United States responds that the aim of the USDA Econometric Study was not to address the flaws of the Sumner Econometric Study, but rather to demonstrate how the inclusion of more relevant variables produced contradictory results.<sup>733</sup> More generally, the United States claims, the estimation of a "reduced form model", where a system of equations (i.e. demand and supply) is solved to express the endogenous variable (import share or price basis) as a function of explanatory variables, is not appropriate, because the results associated with the "reduced form model" depend mostly on the variables chosen. Moreover, a large number of variables are necessary to quantify any potential effects with a sufficient level of confidence.

7.535 The United States argues that the decision to omit the empirical econometric analysis of the hog sector from the USDA Econometric Study is based on the specific characteristics of the Canadian hog sector. Besides the decline in Canadian hog inventories, the United States notes that the Canadian hog price is based on the US price, thus there is not a unique "Canadian hog price" *per se*.<sup>734</sup>

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<sup>727</sup> Canada's opening oral statement at the second substantive meeting of the Panel, para. 39.

<sup>728</sup> Canada's opening oral statement at the first substantive meeting of the Panel, para. 44.

<sup>729</sup> Canada's comments on the United States' response to Panel questions following the second substantive meeting, para. 15.

<sup>730</sup> Canada's opening oral statement at the first substantive meeting of the Panel, paras. 45-46.

<sup>731</sup> Canada's opening oral statement at the first substantive meeting of the Panel, para. 47.

<sup>732</sup> Canada's opening oral statement at the second substantive meeting of the Panel, para. 35.

<sup>733</sup> United States' response to Panel question No. 106.

<sup>734</sup> United States' response to Panel questions following the second substantive meeting, para. 51.

### Updated USDA Econometric Study

7.536 The United States provided an updated version of the USDA Econometric Study in response to questions from the Panel.<sup>735</sup> In the updated study the United States considers the same period of analysis and specification but includes the COOL and economic recession variables at the same time.

7.537 In this modified specification, the impact of the COOL measure and economic recession are no longer significant when both variables are included at the same time in the model specification. The United States explains that it initially did not introduce both variables in the same specification because the overlap between the COOL measure and the period of economic recession would lead to multicollinearity.<sup>736</sup> (Multicollinearity arises when two or more explanatory variables convey the same information.) According to the United States, although economic recession and COOL variables represent two different events, both variables are expressed as a 0-1 indicator. The economic recession variable takes a value of 1 after December 2007, while the COOL variable is equal to 1 after August 2008. Therefore, argues the United States, the only difference between the two variables is the value of 1 taken by the economic recession variable between January and August 2008. In the presence of multicollinearity, the predictive power of the model remains unchanged, but the confidence interval of the estimated coefficients of the variables subject to multicollinearity becomes larger. As a consequence, the United States contends, the estimation of the impact of the COOL measure and economic recession variables become less accurate.

7.538 According to Canada, multicollinearity is not a significant issue because the dates of the economic recession and the implementation of the COOL measure do not match exactly. Further, the Sumner Econometric Study did not suffer from any multicollinearity with respect to the two dummy variables.<sup>737</sup>

### Analysis by the Panel

7.539 As already explained, the econometric studies submitted by Canada and the United States rely on different data and methodology, and it is not our task to establish a unified econometric report or to conduct our own econometric assessment. Instead, we examine the robustness of each study separately.

7.540 We consider that the Sumner Econometric Study is sufficiently robust for several reasons. First, the empirical evidence of a significant negative impact of the COOL measure is robust due to the inclusion of additional explanatory variables such as transport costs, the BSE import ban and economic recession. Second, the use of a dummy variable and the unemployment ratio for measuring the economic recession confirms that the findings are independent of the definition of the economic recession variable. Third, the dynamic specification of the model through the inclusion of the lagged dependent variable (i.e. import shares or price basis) reduces any variable omission bias, such as changes in inventories. Fourth, the use of weekly data increases the sample size and thus reduces any multicollinearity between the COOL and the economic recession variables. Fifth, the inclusion of the BSE period and the recovery period from economic recession confirms that the evidence of the impact of the COOL measure is not specific to a given analysis period.

7.541 Overall, the updates to the Sumner Econometric Study and Canada's responses to questions from the Panel and to criticisms by the United States improve the soundness of the Study's findings,

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<sup>735</sup> Exhibit US-149.

<sup>736</sup> United States' response to Panel questions following the second substantive meeting, para. 42.

<sup>737</sup> Canada's comments on the United States' response to Panel questions following the second substantive meeting, para. 14.

namely that the COOL measure had a negative and significant impact on Canadian import shares and price basis. In fact, the vast majority of the 103 estimated equations provided in the Sumner Econometric Study indicate a negative and significant coefficient of the COOL variable. Therefore, the impact of the COOL measure has been properly defined. As a result, the COOL measure still has a negative and significant impact even if other, distinct factors may positively affect Canadian imports and prices.

7.542 Accordingly, the Sumner Econometric Study makes a prima facie case that the COOL measure negatively and significantly affected the import shares and price basis of Canadian livestock.

7.543 Conversely, the USDA Econometric Study lacks sufficient robustness both taken on its own and in comparison with the Sumner Econometric Study. In fact, the 13 estimated equations for the cattle analysis do not show sufficient consistency to reach a robust conclusion. According to the USDA Econometric study, the COOL variable and its impact are never significant. However, the impact of economic recession is only negative and significant in a limited number of specifications and even in those cases only at a relatively low level of precision, i.e. at a 90% instead of the usual 95% level of confidence. This means that the USDA Econometric Study does not provide a sufficiently robust explanation that any negative impact is attributable to economic recession rather than to the COOL measure. In addition, any finding of the USDA Econometric Study with regard to the economic recession variable and its impact is called into question by potential multicollinearity, which the study failed to address.

7.544 As regards hogs, the USDA Econometric Study merely refers to certain features of the hog market, i.e. US-based pricing and Canadian hog's inventory decline, but this cannot substitute for a proper and robust econometric analysis.

7.545 Hence, the USDA Econometric Study does not rebut the prima facie case for a negative and significant COOL impact established by the Sumner Econometric Study.

7.546 This significant and negative impact of the COOL measure demonstrated by the Sumner Econometric Study, and not refuted by the USDA Econometric Study, concurs with our finding that the COOL measure, in particular in regard to muscle cuts, accords less favourable treatment within the meaning of Article 2.1 of the TBT Agreement.

(d) Conclusion on the complainants' claims under Article 2.1 of the TBT Agreement

7.547 We have found above that the complainants have demonstrated that the COOL measure fulfils all three elements of the legal test under Article 2.1 of the TBT Agreement.

7.548 Accordingly, we conclude that the COOL measure, in particular in regard to muscle cuts, violates Article 2.1 of the TBT Agreement.

### **3. Article 2.2**

(a) Legal framework for the analysis of the complainants' claim under Article 2.2

7.549 Article 2 sets out certain obligations that the WTO Members must respect in preparing, adopting or applying technical regulations. Article 2.2 provides:

"Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international

trade. *For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.* Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products." (emphasis added)

7.550 The complainants' claim under Article 2.2 raises an initial question on the legal test to be applied in assessing the COOL measure's compliance with the specific obligations therein. We observe that we do not have the benefit of prior panels' or the Appellate Body's analysis on this question.<sup>738</sup>

7.551 We understand, and the parties agree, that the first sentence of Article 2.2 sets out a general principle, namely not to create unnecessary obstacles to international trade. The Preamble of the TBT Agreement confirms this understanding: The 5<sup>th</sup> recital in the Preamble states, "Desiring however to ensure that technical regulations ... marking and labelling requirements, ... *do not create unnecessary obstacles to trade*". This principle is also reflected in Article 2.5: "[W]henever a technical regulation is prepared, adopted or applied for one of the legitimate objectives explicitly mentioned in paragraph 2, and is in accordance with relevant international standards, it shall be rebuttably presumed *not to create an unnecessary obstacle to international trade*".<sup>739</sup>

7.552 We consider, and the parties further agree, that the conformity of a measure with the general principle reflected in the first sentence of Article 2.2 must be established based on the elements of the second sentence.<sup>740</sup> In other words, the second sentence explains what the first sentence means. As the parties observe, the phrase "[f]or this purpose" introducing the second sentence indicates that the second sentence explains the meaning of the general principle reflected in the first sentence by laying down the specific obligation that Members must observe.<sup>741</sup> We will therefore focus on the content of

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<sup>738</sup> Although Article 2.2 of the TBT Agreement was presented as a claim in several previous disputes, neither those panels nor the Appellate Body had the opportunity to provide a substantive analysis of the provision. For example, the panel in *EC – Trademarks and Geographical Indications (Australia)* was presented with a claim under Article 2.2, but did not proceed with a substantive analysis of the claim because the measure in question was found *not* to be a technical regulation within the meaning of Annex I.1 of the TBT Agreement. See also *EC – Asbestos*, *EC – Sardines*, and *EC – Approval and Marketing of Biotech Products*.

<sup>739</sup> The fact that Article 2.5 refers only to the language in the first sentence of Article 2.2 supports our understanding that the first sentence embodies the general principle of the obligation under Article 2.2. In our view, interpreting the first sentence of Article 2.2 as embodying a separate obligation would be incongruous with Article 2.5, which serves as context, for it would mean that the rebuttable presumption of compliance prescribed under Article 2.5 is applicable only with respect to the first sentence of Article 2.2. We do not consider this to be a reasonable interpretation, especially given that the second sentence starts with the words "For this purpose", referring back to the objective in the first sentence of not creating unnecessary obstacles to international trade.

Article 12.3 also contains a clause reflecting this general principle under Article 2.2: "Members shall, ... take account of the special development, financial and trade needs of developing country Members, with a view to ensuring that such technical regulations, standards and conformity assessment procedures *do not create unnecessary obstacles* to exports from developing country Members." (emphasis added)

<sup>740</sup> Parties' responses to the Panel question No. 51.

<sup>741</sup> The European Union considers that there is a connection between the first and the second sentences of Article 2.2 of the TBT Agreement by the use of the term "[f]or this purpose" (European Union's third party written submission, para.54). Australia also considers that the second sentence of Article 2.2 explains what the first sentence means (Australia's third party written submission, para. 66).

the second sentence to derive a legal framework necessary for the analysis of the complainants' claim under Article 2.2.

7.553 The second sentence of Article 2.2 reads as follows: "[f]or this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create". The text of the second sentence sets out an obligation that can be parsed into several elements, each of which we discuss below. Our approach to reviewing the COOL measure's compliance with the obligation under the second sentence of Article 2.2, as outlined below, reflects to a certain extent the manner in which the parties framed their arguments in light of the facts peculiar to this dispute. While the obligation contained in the second sentence of Article 2.2 remains the same in all cases, we do not consider that the analysis of these elements needs to be structured and organized in the same manner for every situation.

7.554 In this case, all parties agree that a complainant must first demonstrate that a given technical regulation is trade-restrictive.<sup>742</sup> We agree. It is self-evident that a measure must be "trade-restrictive" in some way in order to be "more trade-restrictive than necessary".

7.555 If the technical regulation is found to be trade-restrictive within the meaning of Article 2.2, logically, the next step of the analysis under the second sentence will be to identify the objective pursued by the technical regulation in question and examine its legitimacy within the meaning of Article 2.2.

7.556 Subsequently, if we determine that the objective of that technical regulation is legitimate within the meaning of Article 2.2, we will address the question whether the technical regulation fulfils the identified objective.<sup>743</sup>

7.557 If the answer is in the affirmative, we would then proceed with an examination of whether the technical regulation in question is not more trade-restrictive than necessary to fulfil the objective concerned. This would entail an analysis of the availability of less trade-restrictive alternative measures that can equally fulfil the objective, taking into account the risks non-fulfilment would create.

7.558 In the present dispute, the complainants argue that the COOL measure is inconsistent with Article 2.2 because it fails to meet the requirements under the second sentence. As confirmed by the Appellate Body in *EC – Sardines*, the burden of establishing a prima facie case for a measure's inconsistency with Article 2.2 rests with the complainants.<sup>744</sup> Therefore, based on the elements of the

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<sup>742</sup> In response to Panel question No. 52, the United States emphasizes that the trade-restrictiveness of the measures at issue is a threshold matter that the complainants must first establish and that if the measures are not trade-restrictive, they will not breach a Member's obligations under Article 2.2.

<sup>743</sup> The parties agree that the starting point is whether the technical regulation at issue fulfils a legitimate objective, which is an analytical step required to examine whether that technical regulation is more trade-restrictive than necessary. The United States in particular explains that it is appropriate to analyse whether the measure in question fulfils a legitimate objective first because an analysis of "more trade-restrictive than necessary", which often includes a consideration of the existence of alternative measures, would not be possible without first establishing the responding party's objective. Further, according to the United States, "taking account of the risks non-fulfilment would create" in Article 2.2 is an element considered by Members in determining the appropriate level for the particular legitimate objective at issue.

<sup>744</sup> The Appellate Body confirmed that the same principle on the burden of proof that applies under other WTO covered agreements is equally applicable in the context of the TBT Agreement. See the Appellate Body Report, *EC – Sardines*, para. 275.

second sentence of Article 2.2 as highlighted above, we will review in this section whether the complainants have established the following.<sup>745</sup>

- The COOL measure is trade-restrictive within the meaning of Article 2.2;
- The objective pursued by the United States through the COOL measure is not legitimate; and
- If the objective is legitimate, the COOL measure is more trade-restrictive than necessary to fulfil a legitimate objective(s).

(b) Whether the COOL measure is trade-restrictive within the meaning of Article 2.2

(i) *Main arguments of the parties*

7.559 **Canada** submits that technical regulations are not by definition trade-restrictive and that if a technical regulation imposes any restriction on international trade, it meets this element of the test.<sup>746</sup> If a technical regulation does not restrict international trade, however, it cannot violate Article 2.2 since such a measure would never create "unnecessary obstacles to international trade" or be "more trade-restrictive than necessary".

7.560 In the case of the COOL measure, there is evidence that it has restricted international trade by reducing the possibility of livestock born in Canada to be exported to the United States. The evidence provided by the complainants to establish that the conditions of competition were modified by the COOL measure shows that the COOL measure restricts international trade for purposes of the first step of the Article 2.2 analysis.<sup>747</sup> That same evidence is also relevant in assessing whether alternative measures are available that would be less trade-restrictive, taking into account the risks of non-fulfilment.

7.561 **Mexico** also submits that technical regulations are not by definition "trade-restrictive" under Article 2.2 of the TBT Agreement.<sup>748</sup> According to Mexico, certain technical regulations could in fact facilitate trade. The COOL measure is, however, a technical regulation that restricts trade. Trade restriction could be reflected in a reduction of competitive opportunities for imported products as well as in restrictions on trade flows. This is consistent with the view that the GATT disciplines on the use of restrictions are meant to protect the competitive opportunities of imported products.

7.562 Mexico is therefore of the view that the arguments and evidence raised by the complainants in the context of their claims under Article 2.1 also demonstrate the trade-restrictiveness of the COOL measure.<sup>749</sup> Specifically, the COOL measure has altered US beef production so as to restrict Mexican feeder cattle access to the US market and deny competitive opportunities to Mexican feeder cattle in that market.

7.563 The **United States** agrees that, to establish the inconsistency of the COOL measures with Article 2.2, the complainants must first show that the COOL measures restrict trade.<sup>750</sup>

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<sup>745</sup> Parties' responses to Panel question No. 52.

<sup>746</sup> Canada's response to Panel question No. 66; second written submission, paras. 48-49.

<sup>747</sup> Canada's response to Panel question No. 60.

<sup>748</sup> Mexico's response to Panel question No. 66.

<sup>749</sup> Mexico's response to Panel question No. 60.

<sup>750</sup> United States' second written submission, para. 103.

7.564 The United States submits that the complainants' arguments in this regard rest on their erroneous assertions that the COOL measures require segregation and that high costs associated with that practice have forced US processors to completely reject foreign livestock. Additionally, the complainants ignore recent trade data that illustrate a significant increase in Canadian and Mexican livestock exports in 2010 and thereby directly undermine their arguments. Thus, the complainants have not substantiated their claims about the COOL measures' impact on trade, much less demonstrated that any such impact restricts trade more than is necessary.<sup>751</sup>

(ii) *Analysis by the Panel*

7.565 The complainants assert that the arguments and evidence submitted with regard to their claim under Article 2.1, namely a reduction of competitive opportunities for imported products compared to like domestic products as well as restrictions on trade flows, equally establish that the COOL measure is trade-restrictive within the meaning of Article 2.2.<sup>752</sup>

7.566 To determine whether the COOL measure is trade-restrictive, we will first examine the ordinary meaning of the term "restrictive" and how the term has been understood in previous disputes.

7.567 The ordinary meaning of the term "restrictive" is "[i]mplying, conveying, or expressing restriction or limitation" and "[h]aving the nature or effect of a restriction; imposing a restriction".<sup>753</sup> The term "restriction" in turn is defined as "[a] thing which restricts someone or something, a limitation on action, a limiting condition or regulation".

7.568 As evidenced above, the dictionary defines "restrictive" and "restriction" broadly. There are no specific thresholds to be met in order to characterize a certain measure as a "restriction" or qualify it as "restrictive". A "restriction" can also be anything which restricts something, any limitation on action, or a limiting condition. Furthermore, based on the meaning of "restrictive", a measure "having the *nature or effect* of a restriction" can be considered as a "restrictive" measure.

7.569 The broad scope of the terms "restrictive" or "restriction" is confirmed by the findings of the panels in previous disputes.

7.570 The panel in *India – Quantitative Restrictions* concluded in the context of Article XI of the GATT 1994 that "[t]he scope of the term 'restriction' is also broad, as seen in its ordinary meaning, which is 'a limitation on action, a limiting condition or regulation'".<sup>754</sup> Subsequently, the panel in *India – Autos* endorsed this view in the context of the same provision.<sup>755</sup> More recently, in *Colombia – Ports of Entry*, the panel agreed with the interpretation of the term "restriction" given by previous panels.<sup>756</sup>

7.571 As highlighted by the panel in *Colombia – Ports of Entry*, previous WTO and GATT panels also determined a measure's restrictiveness based on the impact of the measure on the competitive opportunities available to imported products.<sup>757</sup> In particular, the panel in *Argentina – Hides and*

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<sup>751</sup> United States' opening oral statement at the first substantive meeting of the Panel, para. 49.

<sup>752</sup> Australia agrees with the complaining parties that trade-restrictive measures include those that impose any form of limitation of imports, discriminate against imports or deny competitive opportunities to imported product (Australia's third party written submission, para. 71).

<sup>753</sup> *The Shorter Oxford English Dictionary*, (Sixth Edition) Oxford University Press, Vol. I, p. 2553 (2007).

<sup>754</sup> Panel Report, *India – Quantitative Restrictions*, para. 5.128.

<sup>755</sup> Panel Report, *India – Autos*, paras. 7.269-2.270.

<sup>756</sup> Panel Report, *Colombia – Ports of Entry*, para. 7.241.

<sup>757</sup> Panel Report, *Colombia – Ports of Entry*, para. 7.236.

*Leather* found that, in determining whether a measure makes effective a restriction in the context of Articles I, II, III and XI:1 of the GATT 1994, the focus is on the competitive opportunities of imported products, not the trade effects. That panel therefore considered that the complaining party claiming the existence of a restriction need not prove actual trade effects.<sup>758</sup>

7.572 Based on the foregoing, we conclude that the scope of the term "trade-restrictive" is broad. We also understand that the concept of "trade-restrictiveness" under provisions of the GATT 1994 does not require the demonstration of any actual trade effects, as the focus is on the competitive opportunities available to imported products. We see no reason to depart from this understanding in the context of reviewing the "trade-restrictiveness" of the technical regulation at issue in this dispute under Article 2.2 of the TBT Agreement.

7.573 Having reached this conclusion, we do not find it necessary to define the exact scope of the term "trade-restrictive" under the second sentence of Article 2.2. Particularly, we are aware that the question remains whether a technical regulation's non-conformity with Article 2.1 has any bearing on the trade-restrictiveness element of Article 2.2. For the purpose of this dispute, we will proceed with our analysis of the COOL measure under Article 2.2 on the assumption that a technical regulation's non-conformity with Article 2.1 is not *per se* an issue for that technical regulation's conformity with Article 2.2 in general, or the "trade-restrictive" element in particular.

7.574 Turning to the technical regulation in question in the current dispute, we found in the previous section that the COOL measure negatively affects imported livestock's conditions of competition in the US market in relation to like domestic livestock by imposing higher segregation costs on imported livestock.<sup>759</sup>

7.575 We therefore conclude that the complainants have demonstrated that the COOL measure is "trade-restrictive" within the meaning of Article 2.2 by affecting the competitive conditions of imported livestock. In reaching this conclusion, we are not making a finding on the level of trade-restrictiveness of the COOL measure. This question will be addressed, if necessary, in an analysis of whether the COOL measure is more trade-restrictive than necessary.

(c) Whether the objective pursued by the United States through the COOL measure is legitimate

7.576 Canada and Mexico argue that the true objective of the COOL measure is to protect domestic industry.

7.577 The United States identifies providing consumer information on origin<sup>760</sup> as the objective that it seeks to achieve through the COOL measure.

7.578 Canada submits that, even if the US stated objective were accepted as the true objective, the United States has failed to prove why that objective is legitimate within the meaning of Article 2.2. Mexico asserts that, in the factual circumstances of this dispute, the declared objective by the United States is not legitimate.

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<sup>758</sup> Panel Report, *Argentina – Hides and Leather*, para. 11.20.

<sup>759</sup> See Section VII.D.2. Further, we observed in Section VII.D.2(c)(iv) that the COOL measure brought about actual negative trade effects on imported livestock as shown by a significant and negative impact on import shares and prices.

<sup>760</sup> See para. 7.617.



7.579 To address the issue before us, we will first examine whether the complainants are correct in identifying that protection of the domestic industry is the objective pursued by the United States through the COOL measure. We will then review the legitimacy of the identified objective.

(i) *Identification of the objective pursued by the United States through the COOL measure*

Main arguments of the parties

7.580 **Canada** and **Mexico** allege that the objective of the COOL requirements is trade protectionism.<sup>761</sup>

7.581 The **United States** submits that the objective it pursues through the COOL measure is to "provide consumer information about origin".<sup>762</sup> The United States confirms that human health and safety are not part of the objectives pursued by the COOL measure.<sup>763</sup>

7.582 **Canada** submits that the Panel should determine the objective of a measure by focusing on the "design, the architecture and the structure" of that measure, supplemented as necessary with additional information, including its legislative history.<sup>764</sup> According to Canada, the design, the architecture and the structure of the COOL measure reveal that its objective is protectionist in nature. Canada submits that this is also confirmed by the intent of legislators. Canada argues that the Panel should consider evidence that speaks to the motivations of the main legislative designers and promoters of the legislation. Unlike in the context of Article III:2 of the GATT 1994, intent is important in the context of Article 2.2 of the TBT Agreement because Article 2.2 requires an assessment not only of the effect of a measure, but also its "objective" – something not required in Article III:2.<sup>765</sup>

7.583 If however the Panel were to accept the objectives as identified by the United States, Canada submits that the Panel should begin its analysis with the idea that the objective of the COOL measure is to "provide information to consumers about where livestock used to produce meat in the United States was born, raised, and slaughtered so that consumers may [make decision X]". Canada argues that the reasons for providing the information are important.<sup>766</sup> All evidence adduced to this point in the current dispute shows that the few consumers who supported the COOL measure did so because of its protectionist objectives or because of objectives not addressed by the COOL measure.

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<sup>761</sup> Canada's first written submission, paras. 158-175; second written submission, paras. 57-68; Mexico's first written submission, paras. 279-283.

<sup>762</sup> United States' first written submission, paras. 206-225; second written submission, para. 106; opening oral statement at the second substantive meeting of the Panel, para. 38. See para. 7.616-7.617.

<sup>763</sup> United States' response to Panel question No. 17; Exhibit CDA-5, p.2677.

<sup>764</sup> Canada's second written submission, paras. 50-54, 57-68.

<sup>765</sup> Canada's second written submission, para. 52; response to Panel question No. 126. In light of this, Canada contests the United States' proposition based on the Appellate Body's findings in *Chile – Alcoholic Beverages* and *Japan – Alcoholic Beverages* that statements of intent by legislators and regulators should be ignored in determining the objective in this dispute. Further, in response to the United States' reference to certain decisions from US courts for the proposition that domestic tribunals refuse to look to statements of legislators in interpreting statutes, Canada asserts that use of legislative history in statutory interpretation is not the same as using legislative history to determine the objective of a measure for purposes of Article 2.2. To the extent that there is an analogy, the use of legislative history, Canada argues, is in keeping with the modern practice of statutory interpretation of many domestic tribunals as well as the interpretation of treaty obligations in international law (Canada's second written submission, para. 53).

<sup>766</sup> Canada's opening oral statement at the first substantive meeting of the Panel, paras. 49-53; second written submission, para. 69.

7.584 **Mexico** asserts that an objective of a Member in the context of Article 2.2 is not self judging and is part of a Panel's objective assessment of facts.<sup>767</sup> Accordingly, the Panel must determine all relevant details of the objectives of the technical regulation, not just its stated objective, as reflected in the design and structure of the measure and corroborated by other evidence. While Mexico acknowledges the right of every WTO Member to establish for itself the objectives of its technical regulations, this does not mean that another Member cannot question the "stated" or "acknowledged" objectives or challenge those stated or acknowledged objectives before a panel and request an objective assessment of the relevant facts.<sup>768</sup>

7.585 Mexico argues that the design, architecture and structure of the COOL measure show that its objective is not to provide consumer information, but rather to protect the US cattle producers by altering the operation of the US beef industry in favour of US feeder cattle. Its protectionist purpose is reflected in the limitation to certain commodities, the targeting of the principal downstream products and distribution networks, the exclusion of small retailers and the US processed food industry, and the departure from the established system for regulating consumer information.<sup>769</sup>

7.586 In the **United States'** view, the objective and the measure are distinct, as one is the objective or goal that is sought to be achieved and the other is the means for doing so. The United States therefore argues that the Panel should first assess whether the Member's legitimate objective is what the Member asserts it is and then whether the technical regulation fulfils that objective.<sup>770</sup>

7.587 The United States submits that the text, design, architecture, and structure of the statute, along with the 2009 Final Rule (AMS), all clearly indicate that the objective is to provide consumer information about the country of origin of the covered commodities at the retail level and to prevent consumer confusion regarding the origin of meat.<sup>771</sup>

7.588 Specifically, the objective of the measure is to provide consumers with as much clear and accurate information as possible about the country or countries origin of the meat products that they buy at the retail level.<sup>772</sup> This includes information on the countries, where the animal from which the meat was derived was born, raised, and slaughtered.

7.589 Regarding prevention of consumer confusion, the United States points to two types of consumer confusion.<sup>773</sup> First, many consumers in the United States mistakenly believed that meat products affixed with a USDA grade label were derived from animals born, raised, and slaughtered in the United States when this was not the case.<sup>774</sup> Second, many US consumers may also have been misled by the FSIS "Product of the U.S.A." labelling system, which allowed producers to voluntarily use this label if the meat products received minimal processing in the United States.<sup>775</sup> To further explain the confusion caused by the FSIS "Product of the U.S.A." labelling system, the United States

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<sup>767</sup> Mexico's response to Panel question No. 54; second written submission, paras. 155-157.

<sup>768</sup> Mexico's response to Panel question No. 54; second written submission, paras. 149-150.

<sup>769</sup> Mexico's first written submission, paras. 168-176; second written submission, para. 61.

<sup>770</sup> United States' response to Panel question No. 126. See paras. 7.582-7.585 for the complainants' contrasting view in this regard.

<sup>771</sup> United States' response to Panel question No. 3.

<sup>772</sup> United States' responses to Panel question Nos. 24, 58.

<sup>773</sup> United States' response to Panel question No. 56.

<sup>774</sup> United States' first written submission, para. 29; United States' response to Panel question No. 56; Exhibit CDA-10, p.p. 24, 71.

<sup>775</sup> United States' first written submission, paras. 30-31; United States' response to Panel question No. 56; Exhibits US-17, MEX-32.

refers to a letter from the Consumers Federation of America of the 17 September 2001 to USDA during the FSIS rule making on "Product of U.S.A.".<sup>776</sup>

Analysis by the Panel

7.590 In this dispute, the complainants contest the existence of a "legitimate objective" pursued by the United States through the COOL measure. The complainants argue that trade protectionism is the objective pursued by the United States through the COOL measure, which cannot be a legitimate objective within the meaning of Article 2.2.

7.591 The United States, on the other hand, submits that its objective is to provide consumer information on origin.<sup>777</sup>

7.592 As recognized by the panel in *EC – Sardines*, a Member implementing a certain measure would normally be in a position to identify and elaborate the objective it pursues through the measure adopted.<sup>778</sup> However, given the allocation of the burden of proof under Article 2.2 as further clarified by the Appellate Body in *EC – Sardines*, Canada and Mexico must identify the objective pursued by the United States based on the information obtained prior to or during the dispute settlement proceeding.

7.593 Specifically, the Appellate Body in *EC – Sardines* stated:

"The *TBT Agreement* acknowledges the right of every WTO Member to establish for itself the objectives of its technical regulations while affording every other Member adequate opportunities to obtain information about these objectives. That said, part of the reason why the Panel concluded that the burden of proof under Article 2.4 is on the respondent is because, in the Panel's view, the complainant cannot 'spell out' the 'legitimate objectives' of the technical regulation. ...

In our opinion, these two concerns are not justified. The *TBT Agreement* affords a complainant adequate opportunities to obtain information about the objectives of technical regulations or the specific considerations that may be relevant to the assessment of their appropriateness."<sup>779</sup>

7.594 In light of the parties' contrasting views on the objective pursued by the United States through the COOL measure, we must first determine the "objective" that the United States pursues through the COOL measure.<sup>780</sup>

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<sup>776</sup> United States' second written submission, para. 131; Exhibit US-84.

<sup>777</sup> United States' first written submission, paras. 68, 201, [heading above para. 227], 228; response to Panel question No. 17; second written submission, paras. 97, 106, 107, 147.

<sup>778</sup> We agree with the panel's statement in *EC – Sardines* that "only the Member pursuing the legitimate objective is in a position to elaborate the objective it is trying to accomplish." (Panel Report, *EC – Sardines*, para. 7.121)

<sup>779</sup> Appellate Body Report, *EC – Sardines*, paras. 276-277.

<sup>780</sup> The parties generally agree that the Panel should determine the objective of a measure. See Canada's second written submission, para. 50, footnote 61; Mexico's first written submission, para. 279; United States' opening oral statement at the first substantive meeting of the Panel, para. 39; response to Panel question No. 3. See also the European Union's third-party oral statement at the first substantive meeting of the Panel, paras. 19-22; response to Panel question No. 10.

## Nature of a legitimate "objective" under Article 2.2

7.595 To determine the objective that the United States pursues through the COOL measure, we find it useful to start with a review of what is meant by a "legitimate objective" in the context of Article 2.2.

7.596 The complainants' position is that the text as well as the design, architecture, and structure of the COOL measure reveal its protectionist intent. We consider the complainants' argument to be misplaced on several grounds.

7.597 First, in advancing this argument, the complainants appear to conflate the objective pursued by a technical regulation and the technical regulation itself. In fact, in response to a question from the Panel, the complainants state that the term "objective" in Article 2.2 refers to the objective of the technical regulation and not to any "general policy objective" that a Member may have.<sup>781</sup> For the following reasons, we consider that a legitimate "objective" under Article 2.2 needs to be distinguished from a specific technical regulation adopted by a Member to pursue the objective.

7.598 The distinction is important because it is the objective that leads to a Member's determination to adopt a technical regulation, not *vice versa*.

7.599 A policy objective pursued by a government would normally precede the establishment of a technical regulation to be introduced or maintained. Article 2.3 of the TBT Agreement provides contextual guidance for this understanding: "[t]echnical regulations shall not be maintained if the circumstances or objectives *giving rise to* their adoption no longer exist or if the changed circumstances or objectives can be addressed in a less trade-restrictive manner". The phrase "circumstances or objectives *giving rise to* [technical regulations]' adoption" indicates that "circumstances" or "objective(s)" are not identical to technical regulations and logically precede the adoption of technical regulations.

7.600 The text of the preamble of the TBT Agreement also expresses the Members' right to adopt technical regulations to achieve their policy objectives.<sup>782</sup> The Appellate Body in *EC – Sardines* also confirmed that "the TBT Agreement acknowledges the right of every WTO Member to establish for itself the objectives of its technical regulations".<sup>783</sup>

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<sup>781</sup> Canada's response to Panel question No. 126; Mexico's response to Panel question No. 126.

<sup>782</sup> The 6<sup>th</sup> preambular recital states, "no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate. ..."

The panel in *EC – Sardines* stated:

"Article 2.2 and this preambular text affirm that it is up to the Members to decide which policy objectives they wish to pursue and the levels at which they wish to pursue them. At the same time, these provisions impose some limits on the regulatory autonomy of Members that decide to adopt technical regulations: ... Thus, the TBT Agreement, like the GATT 1994, whose objective is to further, accords a degree of deference with respect to the domestic policy objectives which Members wish to pursue. At the same time, however, the TBT Agreement, like the GATT 1994, shows less deference to the means which Members choose to employ to achieve their domestic policy goals. We consider that it is incumbent upon the respondent to advance the objectives of its technical regulation which it considers legitimate." (Panel Report, *EC – Sardines*, para. 7.120).

<sup>783</sup> Appellate Body Report, *EC – Sardines*, para. 276.

7.601 The complainants do not contest either that the United States has the right, in principle, to establish for itself certain policy objectives.<sup>784</sup> To that extent, what the complainants actually argue is that the United States adopted the COOL measure with the intent to protect the US domestic livestock industry, not for consumer information.<sup>785</sup>

7.602 As noted above, a technical regulation, including the alleged intent behind the enactment of the particular technical regulation, however must be distinguished from a policy objective that is pursued by a Member. Whether a Member pursues a "legitimate objective" within the meaning of Article 2.2 is a separate issue from whether the measure in question was in fact adopted to fulfil and does fulfil that objective.

7.603 What needs to be identified as an objective within the meaning of Article 2.2, therefore, is the objective that preceded and led to the adoption by the United States of the COOL measure.

7.604 We find support for our view in this regard in the clarification by the Appellate Body of the relationship between the "appropriate level of protection" and the SPS measure in *Australia – Salmon*. In that dispute, the Appellate Body stated that "to imply the appropriate level of protection from the existing SPS measure would be to assume that the measure always achieves the appropriate level of protection determined by the Member".<sup>786</sup> Similarly, in our view, the objective pursued through a technical regulation cannot be necessarily implied from that technical regulation itself.

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<sup>784</sup> The panel in *Brazil – Retreaded Tyres* stated in para. 7.97:

"[W]e note that we are not, in our view, required to examine the desirability of the declared policy goal as such. In other words, we are not required to assess the policy choice declared by Brazil to protect human, animal or plant life or health against certain risks, nor the level of protection that Brazil wishes to achieve."

We also recall in this respect that in the *EC – Asbestos* case, the Appellate Body asserted clearly that it was each WTO Member's "... right to determine the level of protection of health that [it] consider[s] appropriate in a given situation." (Panel Report, *Brazil – Retreaded Tyres*, para. 7.97, citing to the Appellate Body Report, *EC – Asbestos*, para. 168.) The Appellate Body stated:

"[A]s to Canada's third argument, relating to the level of protection, we note that it is undisputed that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation. France has determined, and the Panel accepted, that the chosen level of health protection by France is a "halt" to the spread of *asbestos*-related health risks. By prohibiting all forms of amphibole asbestos, and by severely restricting the use of chrysotile asbestos, the measure at issue is clearly designed and apt to achieve that level of health protection. ...".

<sup>785</sup> Canada's first written submission, paras. 160-161; Mexico's first written submission, paras. 279-283.

<sup>786</sup> The Appellate Body in *Australia – Salmon* states:

"The correlation between the "appropriate level of protection" and the "SPS measure" is perhaps shown most clearly in Article 5.6 of the *SPS Agreement* which reads: ... *when establishing or maintaining* sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection ... (emphasis added) The words of Article 5.6, in particular the terms "*when establishing or maintaining* sanitary ... protection", demonstrate that the determination of the level of protection is an element in the decisionmaking process which logically *precedes* and is *separate* from the establishment or maintenance of the SPS measure. It is the appropriate level of protection which determines the SPS measure to be introduced or maintained, not the SPS measure introduced or maintained which determines the appropriate level of protection. To imply the appropriate level of protection from the existing SPS measure would be to assume that the measure always achieves the appropriate level of protection determined by the Member. That clearly cannot be the case. (para. 203)"

7.605 Second, the complainants' argument implies that what the United States has expressly identified as the objective pursued in its official WTO notification of the COOL measure is not true. The United States' notification to the TBT Committee of the COOL measure indicates "consumer information" as the objective.<sup>787</sup> While we are not saying that this constitutes definite and determinative evidence that the objective pursued through the COOL measure is not trade protectionism, we do consider that it is one of the objective circumstances that will inform the complainants of the objective of the COOL measure. Moreover, according to the Appellate Body, under the principle of good faith under general international law as embodied in Article 26 of the Vienna Convention on the Law of Treaties, parties to an international agreement enjoy a presumption that they will perform their treaty obligations in good faith, including their WTO obligations.<sup>788</sup> Thus, the United States must be presumed to have truthfully notified the TBT Committee of the objective it was seeking to pursue through its COOL measure. The presumption of good faith can, of course, be rebutted by solid evidence, in this case demonstrating that trade protectionism is indeed the objective pursued by the United States through the COOL measure. However, we have not been presented with such evidence.

7.606 In addition to considerations of good faith, the Appellate Body recalled in *EC – Sardines* that the TBT Agreement "affords a complainant adequate opportunities to obtain information about the objectives of technical regulations" and made specific reference to certain provisions of the TBT Agreement requiring Members to supply information about their technical regulations to other Members. Official notifications made pursuant to Article 2.9 of the TBT Agreement (which must contain a brief indication of the technical regulation's "objective") fall into the category of provisions referenced by the Appellate Body.

7.607 Third, the complainants' argument regarding the protectionist intent of the COOL measure relates to the general principle contained in the first sentence of Article 2.2, read in isolation from the second sentence of Article 2.2. The first sentence reads, "[M]embers shall ensure that technical regulations are *not prepared, adopted or applied with a view to* or with the effect of creating unnecessary obstacles to international trade". As we clarified above, and as the parties agree, the first sentence of Article 2.2 sets out a general principle, a separate violation of which is not required. The second sentence of Article 2.2 sets out the specific elements of the obligations that must be respected in order to comply with the general principle set out in the first sentence. The complainants' arguments based on the "design, architecture, and structure" of the COOL measure do not have a particular bearing on our analysis of the identification of the objective that gave rise to the COOL measure.

7.608 In our view, the characteristics of the measure, including its design, architecture, and structure, and legislative history such as legislators' statements, may be more properly addressed in the context of whether the COOL measure fulfils the identified objectives. For example, Canada also clarified that it is not challenging country of origin information generally, but it is challenging the COOL measure because of its *particular characteristics* including its structure and objective and the limited information it provides.<sup>789</sup> As explained above, a technical regulation, including its specific characteristics and features, must be distinguished from the objective pursued by the technical regulation itself. In this respect, we note that the Appellate Body, in addressing a claim under Article XIV(a) of the GATS in *US – Gambling*, also stated:

"[A] Member's characterization of a measure's objectives and of the effectiveness of its regulatory approach – as evidenced, for example, by texts of statutes, legislative

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<sup>787</sup> G/TBT/N/USA/281 and G/TBT/N/USA/281/Add.1.

<sup>788</sup> Appellate Body Report, *EC – Sardines*, para. 278.

<sup>789</sup> Canada's opening oral statement at the second substantive meeting of the Panel, para. 68.

history, and pronouncements of government agencies or officials – will be relevant in determining whether the measure is, objectively, 'necessary'. A panel is not bound by these characterizations [footnote omitted], however, and may also find guidance in the structure and operation of the measure and in contrary evidence proffered by the complaining party. In any event, a panel must, on the basis of the evidence in the record, independently and objectively assess the 'necessity' of the measure before it."<sup>790</sup>

7.609 The European Union in *Brazil – Retreaded Tyres* made a similar argument as the complainants in this dispute that the real objective of Brazil's import ban, the measure at issue in that dispute, was to protect Brazil's domestic industry, and not to achieve the objectives declared by Brazil under Article XX(b) of the GATT 1994 (i.e. to protect human, animal or plant life or health). The panel in that dispute did not find it necessary to consider the European Union's argument "in determining under paragraph (b) of Article XX whether the declared policy objective of a measure falls within the range of policies under that paragraph".<sup>791</sup> We agree with the *Brazil – Retreaded Tyres* panel and take the same approach in this case. Thus we are of the view that in identifying the objective of the COOL measure under Article 2.2, we need not consider the alleged intent behind the implementation of the COOL measure.

7.610 We therefore consider it inapposite to address at this stage of our analysis the complainants' arguments in support of their position that trade protectionism is the objective of the COOL measure.<sup>792</sup> We will address these arguments, to the extent necessary, in the context of our analysis of whether the COOL measure fulfils the identified objective.<sup>793</sup>

7.611 Fourth, the complainants' argument appears to be based on an overly liberal interpretation of the requirement, found in Article 11 of the DSU, that the Panel conduct an "objective assessment" of the facts of the case. The complainants emphasize the obligation imposed on WTO dispute panels under Article 11 to make an objective assessment of the facts of the case, including the "objective" set by the responding Member. To the extent that the complainants are challenging the objective(s) that the United States has set for itself, which is separate from its legitimacy, we find no support for such an approach in Article 11. In this regard, the Appellate Body observed in *Australia – Salmon*:

"We do not believe that Article 11 of the DSU, or any other provision of the DSU or of the *SPS Agreement*, entitles the Panel or the Appellate Body, for the purpose of applying Article 5.6 in the present case, to substitute its own reasoning about the implied level of protection for that expressed consistently by Australia. The determination of the appropriate level of protection, a notion defined in paragraph 5 of Annex A, as 'the level of protection deemed appropriate by the Member establishing a sanitary ... measure', is a *prerogative* of the Member concerned and not of a panel or of the Appellate Body.

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<sup>790</sup> Appellate Body Report, *US – Gambling*, para. 304. The United States claimed in that dispute that the measures at issue were necessary to protect public morals or maintain public order under Article XIV(a) of the GATS.

<sup>791</sup> Panel Report, *Brazil – Retreaded Tyres*, para. 7.101 (original footnote omitted). The panel stated, "In the Panel's view, what is relevant at this stage of the analysis is the existence of a risk and whether the policy objective to reduce such a risk, as declared by the Member taking the measure, falls within the scope of policies to protect human, animal or plant life or health."

<sup>792</sup> The parties do not dispute that trade protectionism, if proved to be the objective pursued through a technical regulation, cannot be a legitimate objective within the meaning of Article 2.2.

<sup>793</sup> See paras. 7.692-7.719.

The 'appropriate level of protection' established by a Member and the 'SPS measure' have to be clearly distinguished. They are not one and the same thing. The first is an *objective*, the second is an *instrument* chosen to attain or implement that objective."<sup>794</sup>

7.612 Although addressed in the context of the SPS Agreement, the Appellate Body's statement has a bearing on the question before us. The objective pursued through a technical regulation, clearly distinguished from the technical regulation chosen to attain that objective, is a prerogative of the Member concerned and not of a panel. The importance of recognizing the prerogative of the Members to pursue their own policy goals has also been observed by the Appellate Body in the context of the obligations under the GATT 1994.<sup>795</sup>

7.613 We find no basis to deviate from the above approach developed by the Appellate Body in determining the objective pursued by the United States through the COOL measure within the meaning of Article 2.2. The TBT Agreement purports to further the objectives of the GATT 1994. The WTO Members are just as free to adopt technical regulations as they are free to set the appropriate level of protection through an SPS measure or to legislate on internal taxation or regulation.<sup>796</sup> Accordingly, the identification of the objective pursued through a technical regulation must be based on the information provided by the Member implementing the technical regulation concerned.<sup>797</sup> However, as the panel in *EC – Sardines* noted, the *legitimacy* of the objectives pursued by a Member must be determined by panels.<sup>798</sup>

7.614 That said, we must identify the objective that the United States pursues through the COOL measure.

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<sup>794</sup> Appellate Body Report, *Australia – Salmon*, paras. 199-200.

<sup>795</sup> The Appellate Body in *Japan – Alcoholic Beverages* observed:

"Members of the WTO are *free to pursue their own domestic goals through internal taxation or regulation* so long as they do not do so in a way that violates Article III or any of the other commitments they have made in the *WTO Agreement*" (emphasis added)

Moreover, the Appellate Body further stated in *Chile – Alcoholic Beverages*:

"Members of the WTO have sovereign authority to determine the basis or bases on which they will tax goods, such as, for example, distilled alcoholic beverages, and to classify such goods accordingly, provided of course that the Members respect their WTO commitments. The reference in *Ad Article III:2*, second sentence, of the GATT 1994 to "not similarly taxed" is not in itself a prohibition against classifying goods *for revenue and regulatory purposes that Members set for themselves as legitimate and desirable*. Members of the WTO are free to tax distilled alcoholic beverages on the basis of their alcohol content and price, as long as the tax classification is not applied so as to protect domestic production over imports. Alcohol content, like any other basis or criterion of taxation, *is subject to the legal standard* embodied in Article III:2 of the GATT 1994." (para. 60) (emphasis added)

<sup>796</sup> Several third parties submit that WTO Members are free to decide which policy objectives they wish to pursue. For example, Australia states: "It is Australia's view that ... it is up to the United States to decide which policy objectives they wish to pursue and the levels at which they wish to pursue them..."; (Australia's third-party oral statement at the second substantive meeting of the Panel, para. 22); Brazil establishes that "[a] Member imposing a technical regulation is entitled to define its objective or objectives." (Brazil's third party written submission, para. 12); and New Zealand submits that "[a]s the list in Article 2.2 is non-exhaustive, New Zealand recognises that a Member may demonstrate that other legitimate objectives also justify technical regulations." (New Zealand's third party written submission, para. 32).

<sup>797</sup> The European Union is of the view that in the present dispute the Panel should not find that the objective is something other than the provision of consumer information (European Union's third party oral statement at the second substantive meeting of the Panel, para. 10).

<sup>798</sup> See footnote 825 for the panel's statement in this regard in *EC – Sardines*.



Identification of the objective pursued by the United States through the COOL measure

7.615 In light of our decision to accept the objective as identified by the United States, we continue our analysis on that basis.

7.616 In the course of this proceeding, the United States has variously identified its objective as follows: "to provide consumer information [on origin]"<sup>799</sup>; "to achieve the legitimate objective of providing consumer information, information that, among other things, helps prevent consumer confusion related to the use of USDA grade labels"<sup>800</sup>; "providing consumer information and preventing consumer confusion"<sup>801</sup>; "to provide information to consumers about the origin of the covered commodities they buy at the retail level, which for meat products includes listing the names of the countries in which the animal was born, raised, and slaughtered. In doing so, the COOL measures also help prevent consumer confusion"<sup>802</sup>.

7.617 As shown in the references above, the United States' formulation of its objective has varied somewhat throughout its written submissions. We observe, however, that the main element that the United States has consistently highlighted is "to provide consumer information on origin". Accordingly, we will proceed on the understanding that this is the objective pursued by the United States through the COOL measure.

7.618 In this regard, the United States further elaborated on the identified objective with respect to meat products. Regarding the exact information on origin that it wants to provide to consumers, the United States points to "information on the countries, where the animal from which the meat was derived was born, raised, and slaughtered".<sup>803</sup> Through this information, the United States also purports to prevent confusion relating to a USDA grade label, which led consumers to mistakenly believe that meat products affixed with a USDA grade label were derived from animals born, raised, and slaughtered in the United States, and the previous FSIS "Product of the U.S.A." labelling system, which allowed this label on meat products if such products received minimal processes in the United States.<sup>804</sup>

7.619 The United States used the following descriptions to indicate the level at which it aims to achieve the identified objective: "providing as much consumer information as possible"<sup>805</sup>; "to provide consumers with as much clear and accurate information as possible about the origin of the meat products"<sup>806</sup>; "to provide as much information as possible to consumers about the country of origin of the food products that they buy at the retail level and to minimize confusion about the origin of meat products to the maximum extent possible".<sup>807</sup>

7.620 Based on these references, we conclude that the objective pursued by the United States through the COOL measure is to provide as much clear and accurate origin information as possible to consumers.

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<sup>799</sup> United States' first written submission, paras. 68, 201, [heading above para. 227], 228; response to Panel question No. 17; second written submission, paras. 97, 106, 107, 147.

<sup>800</sup> United States' first written submission, para. 201.

<sup>801</sup> United States' opening oral statement at the first substantive meeting of the Panel, para. 41.

<sup>802</sup> United States' response to Panel question No. 74.

<sup>803</sup> United States' response to Panel question No. 58.

<sup>804</sup> United States' response to Panel question No. 56(a).

<sup>805</sup> United States' first written submission, para. 7.

<sup>806</sup> United States' response to Panel question No. 24.

<sup>807</sup> United States' response to Panel question No. 142(a).

7.621 The complainants argue that, if we were to accept the objective as declared by the United States ("consumer information on origin"), such objective is *not* legitimate. We examine the legitimacy of the objective as identified by the United States in the next section.

(ii) *Legitimacy of the identified objective within the meaning of Article 2.2*

Main arguments of the parties

7.622 **Canada** submits that since the alleged objective of the COOL measure is not listed in Article 2.2, the United States must prove based on clear and compelling evidence that the concerned objective is legitimate.<sup>808</sup> This proof cannot be based on mere assertion and must include evidence of a wider intent to implement a particular policy goal.<sup>809</sup> Canada argues that it is therefore necessary to look to the specifically listed legitimate objectives in Article 2.2 to determine whether an objective not specifically listed in Article 2.2 is a legitimate objective. Canada points out that, as the objectives listed in Article 2.2 are reflected in general exceptions in other covered agreements, it would be reasonable to conclude that the type of items listed covers objectives set out as general exceptions or other similar situations in the covered agreements.<sup>810</sup>

7.623 Canada alleges that the United States has not demonstrated that providing "information about country of origin as defined by COOL" is a legitimate objective. Canada clarifies that it is not challenging country of origin information on meat generally; rather, it is challenging the COOL measure because of its particular characteristics including its structure and objective, and the limited information it provides.<sup>811</sup> Specifically, Canada argues that the United States has not explained why the information provided by the COOL measure is important for consumers to have or why consumers need that information. Canada considers that there are some potential purposes for providing information to consumers that are, or could be, legitimate when the objective is sufficiently specific, such as to allow consumers to make decisions and choices based on food safety or environmental protection considerations, objectives closely linked to the listed objectives.<sup>812</sup> Canada contests the assertion by the United States that the reasons why consumers want information about origin are not relevant to determine the legitimacy of the measure's objective.<sup>813</sup> Rather, consumers' desire to purchase food produced in their own country, without evidence that consumers perceive a qualitative difference due to that fact, cannot form the basis of a legitimate objective within the meaning of Article 2.2 of the TBT Agreement.<sup>814</sup>

7.624 **Mexico** argues that the provision of consumer information can be a legitimate objective, but not in all circumstances.<sup>815</sup> Whether the objective is legitimate will depend on the specific type of information being provided to consumers and whether the provision of that information is "justifiable"

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<sup>808</sup> Canada's second written submission, paras. 70-76. We note that Canada initially argued that it did not take a stance on whether providing information to consumers is legitimate and that it was unnecessary for the Panel to determine whether consumer information is legitimate for the purpose of examining its claim under Article 2.2, because the measure does not satisfy other elements of that provision. (Canada's first written submission, para. 176)

<sup>809</sup> Canada refers to New Zealand's third party written submission (para. 32) and its response to Panel question No. 24.

<sup>810</sup> Canada's second written submission, para. 72, footnote 124. Canada refers to Colombia's third party written submission, paras. 43-47. Colombia suggests GATT, GATS, and TRIPS as potential sources of reference for determining whether an objective is legitimate.

<sup>811</sup> Canada's opening oral statement at the second substantive meeting of the Panel, para. 68.

<sup>812</sup> Canada's second written submission, para. 76.

<sup>813</sup> Canada's comments on United States' response to question No. 136.

<sup>814</sup> Canada's response to Panel question No. 136.

<sup>815</sup> Mexico's first written submission, paras. 284-295; response to Panel question No. 55.

in the light of all relevant circumstances relating to that information. This will require an assessment of the character and the intrinsic value of the information given to the consumers. According to Mexico, the objective of consumer protection is not legitimate in the circumstances of this dispute.<sup>816</sup> The *character* of the information given to consumers under the COOL requirements (i.e. US origin beef is produced from cattle that are "born, raised, slaughtered and processed" in the United States) has only one purpose, which is inherently protectionist. To support its position, Mexico distinguishes the nature of the information provided under the COOL measure from the type of information required, for example, for health or safety purposes or for making choices according to cultural or religious beliefs or dietary choices.<sup>817</sup>

7.625 Mexico argues that the COOL measure is applied in a manner which constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail and it is a disguised restriction on international trade, in line with the preamble to the TBT Agreement. According to Mexico, such objectives cannot be "legitimate" within the meaning of Article 2.2 because they go against the fundamental object and purpose of the WTO Agreements. Further, Mexico submits that consumer demand for the specific type of information provided by the COOL measure is relevant to the circumstances in which the measure was introduced and, therefore, to the protectionist intent of the measure.<sup>818</sup>

7.626 The **United States** submits that providing consumer information about origin and preventing consumer confusion are legitimate objectives within the meaning of Article 2.2.<sup>819</sup> Specifically, the United States asserts that providing consumers with country of origin information about the food products they buy so as to help them make informed purchasing decisions is always a legitimate objective within the meaning of Article 2.2.<sup>820</sup> As this provision contains a non-exhaustive list of legitimate objectives, objectives not explicitly listed in the list may also be legitimate. Furthermore, the legitimacy of providing consumer information about origin and preventing consumer confusion as objectives are supported by their connection to an objective listed in TBT Article 2.2 – the prevention of deceptive practices.<sup>821</sup> The United States also points out that the complaining parties have not directly challenged the United States' argument that providing consumer information about origin and preventing consumer confusion are legitimate objectives.<sup>822</sup> Neither Canada nor Mexico argues that country of origin labelling is *per se* inconsistent with the WTO Agreements.

7.627 The United States further submits that the strong consumer support for country of origin labelling in the United States, as well as the fact that many WTO Members have notified their country of origin labelling requirements to the TBT Committee identifying their objective as consumer information, also support the conclusion that providing consumer information about origin and preventing consumer confusion are legitimate objectives within the meaning of Article 2.2. The United States refers to examples of comments expressed by certain consumer organizations in the United States regarding country of origin information on the food products.<sup>823</sup> The United States therefore contests that it attempted to "shape consumer perception through regulatory intervention", a concern raised by the panel in *EC – Sardines*.<sup>824</sup> On the contrary, the design of the measures

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<sup>816</sup> Mexico's first written submission, para. 287; response to Panel question No. 55.

<sup>817</sup> Mexico's first written submission, paras. 287-289; response to Panel question No. 55.

<sup>818</sup> Mexico's second written submission, paras. 67-69; response to Panel question No. 135.

<sup>819</sup> United States' second written submission, paras. 106-117; opening oral statement at the second substantive meeting of the Panel, para. 38; Exhibit US-69.

<sup>820</sup> United States' response to Panel question No. 132.

<sup>821</sup> United States' first written submission, para. 229.

<sup>822</sup> United States' second written submission, para. 107.

<sup>823</sup> United States' second written submission, para. 110; response to Panel question Nos. 129 and 132; Exhibits US-17, 49, 61, 85, 113 to 115, 119 to 125.

<sup>824</sup> Panel Report, *EC – Sardines*, paras. 7.127-7.129; United States' first written submission, para. 234.

themselves and the role of consumer advocacy groups in urging their adoption reveal that the regulatory intervention was a response to consumer perception and misperception.

#### Analysis by the Panel

7.628 Having determined the objective pursued by the United States, we proceed to examine its legitimacy.<sup>825</sup> We recall that the object of our review in this context is the identified objective (providing consumer information on origin) pursued through the technical regulation, not the technical regulation itself (the COOL measure).

7.629 As a party challenging the legitimacy of the identified objective, the complainants bear the burden to establish that the objective concerned is not legitimate within the meaning of Article 2.2.

7.630 The word "legitimate" is defined as "2. a. Conformable to, sanctioned by or authorized by, law or principle; lawful; justifiable; proper. b. Normal, regular; conformable to a recognized standard type"<sup>826</sup> Based on the ordinary meaning, therefore, we need to assess whether "providing consumer information on origin" is "conformable to law or principle", "justifiable and proper", or "conformable to a recognized standard type".

7.631 This understanding is supported by the panel's analysis in this respect in *EC – Sardines*. Touching upon the meaning of the term "legitimate" in the context of a legitimate objective as referred to in Articles 2.2 and 2.4, the panel in *EC – Sardines* suggested that the term "legitimate" refers to the genuine nature of the objective.<sup>827</sup> It further noted the statement of the panel in *Canada – Pharmaceutical Patents*, in defining the term "legitimate interests" in the context of Article 30 of the TRIPS Agreement, that it must be defined "as a normative claim calling for protection of interests that are 'justifiable' in the sense that they are supported by relevant public policies or other social norms".<sup>828</sup>

7.632 The third sentence of Article 2.2 provides a non-exhaustive list of legitimate objectives under Article 2.2: national security requirements; the prevention of deceptive practices; protection of human health or safety; animal or plant life or health; or the environment. The use of the term "*inter alia*" in Article 2.2 of the TBT Agreement indicates that the objectives covered extend beyond the objectives specifically mentioned in Article 2.2.<sup>829</sup> The type of objectives explicitly listed in Article 2.2 nonetheless demonstrates that the legitimacy of a given objective must be found in the "*genuine nature*" of the objective, which is "justifiable" and "supported by relevant public policies or other social norms".

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<sup>825</sup> We note that there is no dispute that panels are required to determine the *legitimacy* of an objective pursued by a Member under Article 2.2 of the TBT Agreement. The panel in *EC – Sardines* stated that "panels are ... required to determine the legitimacy of those objectives" (Panel Report, *EC – Sardines*, para. 7.121).

Australia and Peru also agree that the Panel should examine the legitimacy of the objective pursued by the United States through the COOL measure. (Australia's third party written submission, paras. 58, 60; Peru's third-party oral statement at the first substantive meeting of the Panel, para.7)

<sup>826</sup> *The Shorter Oxford English Dictionary*, (Sixth Edition) Oxford University Press, Vol. I, p. 1577 (2007).

<sup>827</sup> Panel Report on *EC – Sardines*, para. 7.121.

<sup>828</sup> Panel Report on *EC – Sardines*, para. 7.121, referring to Panel Report on *Canada – Pharmaceutical Patents*, para. 7.69. The Panel also refers to the Panel in *US – Section 110(5) Copyright Act*, which stated that the term has "the connotation of legitimacy from a more normative perspective, in the context of calling for the protection of interests that are justifiable in the light of the objectives that underlie the protection of exclusive right" (para. 6.224).

<sup>829</sup> Appellate Body Report, *EC – Sardines*, para. 286.

7.633 As noted by the United States, the complainants do not contest that "consumer information" on country of origin at a general level can constitute a legitimate objective under Article 2.2.<sup>830</sup> Canada, however, considers that there are some potential purposes for providing information to consumers that are, or could be, legitimate when the objective is sufficiently specific as to the purpose of having the information, such as to allow consumers to make decisions and choices based on food safety or environmental protection considerations, objectives closely linked to the listed objectives. Mexico also agrees that the nature (character and intrinsic value) of the information that the United States purports to convey to consumers must be distinguished from the type of information required, for example, for health or safety purposes or for making choices according to cultural or religious beliefs or dietary choices.

7.634 In addressing the complainants' position on this issue, we must bear in mind, as pointed out above, that Article 2.2 of the TBT Agreement provides a non-exhaustive, open list of legitimate objectives. This can be contrasted, for instance, with the specific categories of policy objectives stipulated in the subparagraphs of Article XX of the GATT 1994. In our view, the fact that Article 2.2 refers to an open list of objectives without any modifying language initially indicates that a wide range of objectives could potentially fall within the scope of legitimate objectives under Article 2.2. We do not find in the text of Article 2.2 or any other provision of the TBT Agreement an explicit requirement that a policy objective pursued by a technical regulation must be specifically linked in nature to those objectives explicitly listed in Article 2.2.

7.635 Canada submits, on the basis of the *ejusdem generis* principle, that, in order to be legitimate, the objective pursued by the United States must be of the type of items specifically listed in Article 2.2 of the TBT Agreement. Canada argues that, according to this principle, when a general term such as "*inter alia*" is followed by specific terms (i.e. the list of legitimate objectives), such term must be limited to the type of items listed in the specific terms.<sup>831</sup> Based on the *ejusdem generis* principle, Canada further argues that the objective pursued by the United States is expressed in a level of generality that is not as specific as the explicitly listed objectives in Article 2.2.<sup>832</sup> According to the evidence submitted by Canada, this principle establishes that when general words follow special words, the general words are limited by the *genus* (class) indicated by the special words. For example, in the phrase "any nuclear weapon test explosion *or any other nuclear explosion*", the scope of the italicised words is limited by the preceding words.<sup>833</sup>

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<sup>830</sup> See, for example, Canada's opening oral statement at the second substantive meeting of the Panel, paras. 58-59 ("...Canada's challenge pertains specifically to the COOL measure and its discriminatory impacts on Canadian-born livestock. ... But a country of origin labelling measure may well be consistent with the TBT Agreement and the GATT 1994 if ... it fulfils a legitimate objective in the least trade-restrictive way. ..."); 62, 68 ("...Canada is challenging the COOL measure under *TBT* Article 2.2 because of its particular characteristics including its structure, its objective, and the limited information it provides. ..."; Mexico's first written submission, paras. 284-285 ("...Mexico is of the view that while in certain circumstances providing consumer information can be a legitimate objective within the meaning of the provision, it is not a legitimate objective in *all* circumstances."); Mexico's response to Panel question No. 55 ("It is not Mexico's position that consumer information is never a legitimate objective when the information supplied pertains to origin"). We also note the comments of third parties. Australia's third-party oral statement at the first substantive meeting of the Panel, para. 22 ("In Australia's view, the United States, through the COOL measure, is seeking to provide consumers with additional useful information. Australia considers that such an objective is a legitimate objective, and accepts the US view that this objective is "closely related" to preventing deceptive practices"); European Union's third-party oral statement at the second substantive meeting of the Panel, para. 12 ("We consider that the objective of providing consumer information about origin is a legitimate one").

<sup>831</sup> Canada's second written submission, paras. 71-72.

<sup>832</sup> Canada's response to Panel question No. 127.

<sup>833</sup> Exhibit CDA-186, 190-191.

7.636 In the present dispute, we do not find that the principle of *ejusdem generis* is helpful for determining whether the objective pursued by the United States is legitimate. While the term "legitimate objectives" might be regarded as a genus (or superordinate) and the list of objectives specifically mentioned in the provision as examples (or hyponyms), all of the listed examples are expressed at a high level of generality. Thus, assuming for the sake of argument that the *ejusdem generis* principle has a bearing on the level of specificity that an objective must have in the context of Article 2.2 of the TBT Agreement – a position the Panel doubts – it is difficult to see how the application of this principle advances Canada's argument.

7.637 Given that legitimate objectives under Article 2.2 are *not* confined to those explicitly listed in the provision. In our view, therefore, the fact that the objective of the COOL measure is not related to health, safety or environmental objectives, does not in itself provide a sufficient basis for finding the objective in question to be not legitimate. In this connection, the United States points out that nearly 70 other WTO Members maintain some form of mandatory country of origin labelling for food and other products intended for human consumption.<sup>834</sup> Many of these mandatory labelling systems apply to food products at the retail level.<sup>835</sup> According to the United States, among the WTO Members with mandatory labelling systems, many explicitly identified consumer information as the objective of their labelling requirements in their TBT notifications.<sup>836</sup> The United States also notes that many other WTO Members have also indicated that their mandatory country of origin labelling requirements for food products were adopted to prevent deceptive practices or prevent consumers from being misled or confused.<sup>837</sup> The United States considers that to conclude that consumer information and preventing consumer confusion are not legitimate objectives would suggest that none of these regimes was adopted to achieve a legitimate objective.

7.638 We have reviewed examples of the mandatory labelling requirements maintained by the complainants<sup>838</sup> and by third parties to this dispute.<sup>839</sup> We observe that many of these labelling

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<sup>834</sup> See Exhibit US-68 (listing Argentina, Australia, Barbados, Brazil, Canada, China, Chile, Costa Rica, Colombia, Dominica, the Dominican Republic, Egypt, El Salvador, the European Union and its 27 Member States (Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Republic of Ireland, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom), Ghana, the six members of the Gulf Cooperation Council (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates), India, Indonesia, Israel, Japan, Kenya, Korea, Malaysia, Mexico, New Zealand, Nigeria, Panama, Peru, the Philippines, Singapore, South Africa, Switzerland, Chinese Taipei, Thailand, and Vietnam as WTO Members with mandatory country of origin labelling requirements.) In addition to these 67 WTO Members, the United States has learned that Guatemala also has mandatory country of origin labelling requirements (as confirmed by Guatemala's responses to the Panel's questions).

<sup>835</sup> Many of the country of origin labelling systems that the United States identified in Exhibit US-68 apply at the retail level. Among the third parties, Australia, Brazil, Colombia, the EU, Japan, Guatemala, Korea, and Chinese Taipei all maintain mandatory country of origin labelling requirements that apply at the retail level. Others with such requirements include Chile, Malaysia, the Philippines, and Vietnam, among other WTO Members.

<sup>836</sup> This includes Australia, Barbados, Brazil, Chile, Dominica, the EU, Korea, and Chinese Taipei (Exhibit US-69).

<sup>837</sup> Among those Members are Colombia, Dominica, the EU, Malaysia, Qatar, and Switzerland (Exhibit US-69).

<sup>838</sup> Canada submits that "meat that is derived from animals slaughtered in Canada is not required to have a country of origin label"; rather, voluntary country of origin claims are governed by the "Product of Canada guidelines (Canada's response to Panel question No. 40). However, Canada maintains various mandatory country of origin requirements for dairy products (Exhibit CDA-164), eggs (Exhibit CDA-165) and processed eggs (Exhibit CDA-166). There are also several mandatory country of origin requirements for imported products, such as maple products (Exhibit CDA-167), processed fish (Exhibit CDA-168), processed products (Exhibit CDA-169), brandy (Exhibit CDA-170), organic products (Exhibit CDA-171), fresh fruit and

requirements purport to provide consumer information on origin of food products. This suggests that consumer information on country of origin is considered by a considerable proportion of the WTO Membership to be a legitimate objective under the TBT Agreement. For example, among the third parties, Australia notified the TBT Committee of its "Final Assessment Report Proposal P292 – Country of Origin Labelling of Food" whose objective is ensuring "that adequate information is provided about the origin of food products to enable consumers to make informed choices".<sup>840</sup>

7.639 Further support for our understanding can be found in the context of the GATS. Specifically, the *Accountancy Disciplines*, developed in accordance with Article VI:4 of the GATS, also refers to the "protection of consumers" as an example of "legitimate objectives" in Section II, paragraph 2 (General Provisions). The *Accountancy Disciplines*, as the first disciplines developed under the mandate of Article VI:4 of the GATS, have an almost identical text to that of Article 2.2. Section II, paragraph 2 of the *Accountancy Disciplines* states:

"Members shall ensure that measures ..., relating to licensing requirements and procedures, technical standards and qualification requirements and procedures *are not prepared, adopted or applied with a view to or with the effect of creating unnecessary barriers to trade in accountancy services. For this purpose, Members shall ensure that such measures are not more trade-restrictive than necessary to fulfil a legitimate objective. Legitimate objectives are, inter alia, the protection of consumers* (which includes all users of accounting services and the public generally), the quality of the service, professional competence, and the integrity of the profession."<sup>841</sup> (emphasis added)

7.640 We are mindful that, given the different types of measures falling within the scope of the TBT Agreement and Article VI:4 of the GATS, legitimate objectives pursued through measures

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vegetables (Exhibit CDA-172) and honey (Exhibit CDA-173). With the exception of the regulation on organic products, all of the other measures pre-date the establishment of the WTO. Mexico imposes certain mandatory country of origin labelling requirements for prepackaged food and non-alcoholic beverages through the measure *Especificaciones generales de etiquetado para alimentos y bebidas no alcohólicas preenvasados-Información comercial y sanitaria* (NOM-051-SCFI/SSA1-2010). The objective set out in the measure is to establish the commercial and sanitary information for the labelling of prepackaged food and non-alcoholic beverages of domestic or foreign origin (Exhibits MEX-72 and 73; G/TBT/N/MEX/178/Add.2.)

<sup>839</sup> The European Union notified the TBT Committee of its Proposal for Regulation Establishing a System for the Identification and Registration of Bovine Animals and Regarding the Labelling of Beef and Beef Products and Repealing Council Regulation (EC) No 820/97 (as amended) whose objective is establishing a compulsory labelling system in the beef sector based on objective criteria of the origin of the beef and to continue the voluntary labelling arrangements for labels containing indications other than those provided for in the compulsory system (Exhibit US-68; G/TBT/Notif.00/289 (20 June 2000)). Korea has notified several instruments to the TBT Committee establishing provisions regarding the country of origin labelling of certain meat products sold in restaurants. Within the various measures notified there are four main objectives: (i) ensuring the consumers' right-to-know and right-to-choose; (ii) the prevention of deceptive practices; (iii) establishing market and distribution order of agricultural and livestock products and providing correct information for purchase to consumers; and (iv) enhancing the credibility of beef products (Exhibit US-68; G/TBT/N/KOR/111 (22 June 2006); G/TBT/N/KOR/156 (18 September 2007) and G/TBT/N/KOR/202 – Addendum (20 January 2009); G/TBT/N/KOR/173 (7 May 2008); G/TBT/N/KOR/181 (7 August 2008); G/TBT/N/KOR/202 (20 January 2009); G/TBT/N/KOR/291 (23 September 2010)).

<sup>840</sup> The notified Proposal recommends, *inter alia*, expanding the scope of country of origin labelling beyond fish, fruit and vegetables for certain processed foods, such as fruit and vegetables and pork, which are displayed for retail sale unpackaged (Australia's third party response to Panel question No. 1; Exhibit US-68; G/TBT/N/AUS/45).

<sup>841</sup> The Council for Trade in Services adopted the concerned Accounting Disciplines on 14 December 1998.

falling under each agreement might not always be identical. Nonetheless, the reference to protection of consumers as one example of legitimate objectives in the context of the GATS, which has the language almost identical to Article 2.2, suggests to us that objectives relating to consumer information or consumer protection can in principle constitute a legitimate objective under the WTO covered agreements.

7.641 As already noted above<sup>842</sup>, there is a basic agreement among the parties that consumer information concerning country of origin can constitute a legitimate objective. At the same time, the complainants underline that its legitimacy should be determined based on the factual circumstances of each case. In their view, the United States' stated objectives in this dispute should not be found legitimate unless the United States can prove that it is important for consumers to be provided with that information or why consumers need that information. Specifically, Canada points out that the United States has provided very limited evidence of consumer desire for information related specifically to the origin of meat derived from imported livestock. It maintains that "[t]he 'consumer interest' expressed in that limited evidence is protectionist, based on a false premise, or concerned with an objective the COOL measure does not seek to achieve".<sup>843</sup>

7.642 The United States argues that the origin information in question helps consumers make informed choices and prevents consumer confusion caused by the FSIS "Product of the U.S.A." labelling system and the USDA grade labelling system.<sup>844</sup>

7.643 In addressing the parties' arguments in this regard, we recall the concern expressed by the panel in *EC – Sardines*:

"If we were to accept that a WTO Member can 'create' consumer expectations and thereafter find justification for the trade-restrictive measure which created those consumer expectations, we would be endorsing the permissibility of 'self-justifying' regulatory trade barriers. Indeed, *the danger is that Members, by shaping consumer expectations through regulatory intervention in the market, would be able to justify thereafter the legitimacy of that very same regulatory intervention on the basis of the governmentally created consumer expectations. ...*"<sup>845</sup> (emphasis added)

7.644 In the context of the present dispute, the complainants are of the view that the United States is trying to shape consumer perception through regulatory intervention and to justify the legitimacy of this intervention on the basis of a governmentally created consumer perception.<sup>846</sup> We bear this in mind in proceeding with our analysis.

7.645 The United States maintains that there is strong evidence showing US consumer demand for country of origin information of the kind covered by the stated objective.<sup>847</sup> The United States submits that leading consumer organizations in the United States have expressed support for country of origin labelling for consumer information purposes and as a means of preventing consumer confusion. As one example, the United States refers to Consumers Federation of America, which indicated that it "has long supported a mandatory country of origin labelling (COOL) program as a

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<sup>842</sup> See para. 7.633.

<sup>843</sup> Canada's opening oral statement at the first substantive meeting of the Panel, para. 49.

<sup>844</sup> See paras. 7.587-7.589.

<sup>845</sup> Panel Report, *EC – Sardines*, para. 7.127.

<sup>846</sup> Mexico's first written submission, paras. 294-295.

<sup>847</sup> United States' response to Panel question No. 129; Exhibits US-17, 49, 61, 85, 113 to 115, 119 to 125.



means of providing consumers with important information about the source of their food".<sup>848</sup> In a joint letter with the National Consumers League and Public Citizen – two other leading US consumer organizations, the Consumers Federation of America also wrote that "[w]ithout country of origin labelling, these consumers are unable to make an informed choice between US and imported products. In fact, under the Agriculture Department's grade stamp system, they could be misled into thinking some imported meat is produced in this country".<sup>849</sup> Similarly, the Consumers Union wrote that "it is clear that consumers desire to know where their food is coming from".<sup>850</sup>

7.646 The United States also refers to the following to demonstrate consumer support for the country of origin information of meat: (i) exhibits showing individual consumers who have expressed support for country of origin labelling to provide consumer information and prevent consumer confusion<sup>851</sup>; (ii) thousands of other consumers who expressed a similar view during the rule-making process, urging USDA to adopt the COOL implementing regulations for these purposes<sup>852</sup>; and (iii) numerous polls that indicate consumer support for mandatory country of origin labelling.<sup>853</sup>

7.647 This evidence generally refers to comments made during the legislative process, hence it may not necessarily prove the existence of public policies or consumer demand calling for the pursuit of the stated objective that led to the introduction of the COOL measure. The absence of evidence independent of the legislative process showing consumer desire for the information on origin as defined by the United States, however, is not in itself sufficient to prove that providing such consumer information on origin is not a legitimate objective within the meaning of Article 2.2.

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<sup>848</sup> Exhibit US-5 (20 August 2007). In their comments on mandatory country of origin during the legislative history of the COOL measure Consumers Federation of America defines itself as "a non-profit association of more than 300 organizations with a combined membership of over 50 million Americans nationwide (...) to advance the consumer interests through research, education and advocacy" (Exhibit US-5, page 1).

<sup>849</sup> Exhibit US-61, p. S13275.

<sup>850</sup> Exhibit US-4 (20 August 2007). The United States argues that the support of pro-consumer organizations for country of origin labelling for consumer information purposes is also found internationally. For example, the Trans Atlantic Consumer Dialogue ("TACD"), a forum of 27 U.S. consumer organizations (Exhibit US-110), 49 EU consumer organizations (Exhibit US-110), and 3 observer organizations from Canada and Australia (Exhibit US-110), adopted a resolution on country of origin labelling stating that "consumers have repeatedly and overwhelmingly expressed their support for country of origin labelling of food products both in the United States and in European countries." (TACD Resolution on Country of Origin Labelling, Doc. No. Food 29-08 (March 2008) (Exhibit US-111), p. 1) TACD's objective is to develop policy recommendations for the US government and the EU to promote consumer interest and the organizations often adopt recommendations and resolutions by consensus of its members (TACD Annual Recommendations (Exhibit US-112). The United States points out that in TACD's resolution on country of origin labelling, these 79 different consumer organizations espoused the benefits of country of origin labelling (Exhibit US-111, p. 2). It states in relevant part, "[C]ountry of origin labeling can provide consumers with additional information to make informed choices about the food they wish to purchase and consume. Many consumers may wish to purchase food from producers in their own country or may wish to purchase food products from another country known for producing a particular food. Reasons for this vary from environmental and ethical principles to food quality and food standard choices. Without labeling that identifies where that food has been produced, consumers are unable to make those choices in an informed manner when they are at the point of purchase."

<sup>851</sup> For example, Gregory Cook of Fircrest, Washington wrote to USDA: "I am writing in support of regulations requiring country of origin labelling (COOL) of meats sold in the U.S. I believe that we – consumers and citizens – should be able to make informed choices when purchasing meat and other foods. Labels stating country of origin would be a big help in those choices." (Comments submitted by Gregory Cook to USDA (July 18, 2007) (Exhibit US-113)); and Becky McManus of Volin, South Dakota wrote to USDA: "I completely support country of origin labelling. As consumers we have the right to know where the food we consume comes from" (Comments submitted by Becky McManus to USDA (July 2007) (Exhibit US-114)).

<sup>852</sup> Exhibits US-17, 49, 61, 85, 113 to 115, 119 to 125.

<sup>853</sup> Exhibit US-5.

7.648 Clearly, if consumers know the country of origin, they will be able to make informed choices with respect to origin of products, including meat. Some consumers may indeed have preferences for products produced by or originating in particular countries for a variety of reasons.

7.649 We also acknowledge that Members have certain policy space in determining their objectives. There are therefore circumstances in which Members may decide to adopt particular regulations even in the absence of a specific demand from their citizens, and may do so without in fact shaping consumer expectations through regulatory intervention. We also note the panel's statement in *Korea – Various Measures on Beef* that "there can be good reasons – apart from any protectionist motives – why a WTO Member might want information to be provided as to the origin of products, and particularly meat products, at the retail level".<sup>854</sup>

7.650 We are persuaded, based on the evidence before us regarding US consumer preferences as well as the practice in a considerable proportion of WTO Members, that consumers generally are interested in having information on the origin of the products they purchase. We also observe that many WTO Members have responded to that interest by putting measures in place to require the provision of such information, albeit with different definitions of "origin". In this regard, we once again recall the words of the panel in *EC – Sardines* referring to the conclusion of the panel in *Canada – Pharmaceutical Patents* that a legitimate objective refers to "protection of interests that are 'justifiable' in the sense that they are supported by relevant public policies or other social norms".<sup>855</sup> In our view, whether an objective is legitimate cannot be determined in a vacuum, but must be assessed in the context of the world in which we live.<sup>856</sup> Social norms must be accorded due weight in considering whether a particular objective pursued by a government can be considered legitimate. It seems to us, based on the evidence before us, that providing consumers with information on the origin of the products they purchase is in keeping with the requirements of current social norms in a considerable part of the WTO Membership.

7.651 In light of the foregoing, we conclude that providing consumer information on origin is a legitimate objective within the meaning of Article 2.2.

(d) Whether the COOL measure is more trade-restrictive than necessary to fulfil the legitimate objective

7.652 In this section, we assess whether the complainants have established that the COOL measure is more trade-restrictive than necessary to fulfil the identified objective of providing consumer information on origin. The complainants' position on this issue is based on the following two elements: (i) the COOL measure does not fulfil the objective; and (ii) even if the COOL measure were found to fulfil the objective, it is more trade-restrictive than necessary because there are alternative measures that are less trade-restrictive than the COOL measure, but which equally fulfil the objectives.

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<sup>854</sup> Panel Report, *Korea – Various Measures on Beef*, para. 655.

<sup>855</sup> Panel Report on *EC – Sardines*, para. 7.121, referring to Panel Report on *Canada – Pharmaceutical Patents*, para. 7.69. The Panel also refers to the Panel in *US – Section 110(5) Copyright Act*, which stated that the term has "the connotation of legitimacy from a more normative perspective, in the context of calling for the protection of interests that are justifiable in the light of the objectives that underlie the protection of exclusive rights" (para. 6.224).

<sup>856</sup> The Appellate Body in *EC – Hormones* states:

"It is essential to bear in mind that the risk that is to be evaluated in a risk assessment under Article 5.1 is not only risk ascertainable in a science laboratory operating under strictly controlled conditions, but also risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die" (Appellate Body Report, *EC – Hormones*, para. 187).

(i) *Main arguments of the parties*

7.653 **Canada** submits that, to fulfil its stated objective, the information available as a result of the COOL measure would have to be clear and accurate.<sup>857</sup> The COOL requirements can, however, provide consumers with inaccurate or misleading information. For example, the label information for muscle cuts is confusing because the meaning of the labels is not easily deciphered by consumers. Specifically, where meat products carrying labels B and C are put next to each other at the retail level, it is a reasonable inference that a consumer would not be able to appreciate the distinction between them.<sup>858</sup> Therefore, they are not provided with accurate information about the country of origin of the muscle cuts of the meat that they are purchasing.<sup>859</sup> Canada asserts that, even if consumers did understand the difference between labels A, B, and C, the information on a label provides virtually no useful information because of the way the COOL measure operates.<sup>860</sup> Moreover, with regard to ground meat, labels consistent with the requirements under the 2009 Final Rule (AMS) may indicate that a package of ground meat contains meat from a specified country when in fact it does not. Furthermore, the COOL measure requires limited information to be put on the labels because countries are mentioned without any explicit link to place of birth, raising, or slaughter of the livestock used to produce meat.<sup>861</sup> Specific information on the amount of time that the animal spent in the United States is not provided.

7.654 Canada further submits that to fulfil the objective of providing consumers with information, the information must be "meaningful" by providing consumers with information that is desired by them, or at least information on which they are willing to act.<sup>862</sup> The COOL measure, however, provides information that US consumers generally are not interested in knowing and thus is not meaningful.

7.655 Canada argues that, if the commingling provisions and exceptions were removed, the COOL measure would come closer towards fulfilling the objective. However, the COOL requirements would still not fulfil the objective because there is no evidence that consumers understand the meaning of labels B and C.<sup>863</sup>

7.656 Canada contests the United States' allegation that consumers of meat obtained from Canadian-born cattle or hogs are confused by the USDA grade labelling. Canada recalls that pork is not USDA graded and thus, any confusion could only apply to beef. Even assuming that consumers are confused about the meaning of the USDA grading, the COOL measure will not remove that confusion.<sup>864</sup>

7.657 **Mexico** submits that in examining whether the measures fulfil the objective, the Panel must consider not only the express legal provisions of the measures, but also their design, architecture and structure. The COOL measures have substantial gaps in coverage and impose confusing labels which create ambiguity and uncertainty.<sup>865</sup> Thus, they cannot fulfil a legitimate consumer information objective.

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<sup>857</sup> Canada's second written submission, paras. 78-80.

<sup>858</sup> Canada's response to Panel question No. 65; second written submission, para. 79.

<sup>859</sup> Canada's first written submission, paras. 178-181.

<sup>860</sup> Canada's second written submission, para. 80.

<sup>861</sup> Canada's response to Panel question No. 64(a).

<sup>862</sup> Canada's second written submission, paras. 81-82, referring to exhibits CDA-177, 192; US-87; opening oral statement at the second substantive meeting, para. 69.

<sup>863</sup> Canada's response to Panel question No. 143; second written submission, para. 79.

<sup>864</sup> Canada's response to Panel question No. 138.

<sup>865</sup> Mexico's first written submission, paras. 296-302; second written submission, para. 164.

7.658 Mexico asserts that while there have been no studies on the extent of consumer knowledge about the labels under the COOL measure, labels B and C are prima facie incomplete and misleading.<sup>866</sup> Mexico argues that consumers would need a matrix to determine even roughly where their meat products originated under the COOL requirements. This scheme does not and cannot enlighten consumers. Its only consequence is to create extra costs for foreign cattle. Mexico highlights the situation where a US consumer would not be able to tell if the animal from which the beef was derived was born and raised in the US, and then slaughtered in Mexico, because such beef would be labelled as Category D ("Product of Mexico"). Mexico contends that the average consumer would not be able to understand the exact meaning of the information on the labels under COOL.<sup>867</sup> Mexico argues that the only label giving accurate information to the consumer is Label A.<sup>868</sup>

7.659 Mexico submits that the COOL measure provides information on the labels with regard to the possible origin of the product, but not specific information on the amount of time that the animal spent in the United States.<sup>869</sup> Like Canada, Mexico suggests that the COOL requirements would better fulfil the stated objective if the commingling provisions and exceptions were removed. However, the COOL measure would still have an illegitimate objective and would be more trade-restrictive than necessary to fulfil that objective. In addition, the removal of the commingling flexibilities would not remedy the modification of conditions of competition, underlying the non-discrimination claims brought by Mexico.<sup>870</sup>

7.660 Further, the COOL measure does not alleviate the alleged consumer confusion derived from the USDA grade label.<sup>871</sup>

7.661 The **United States** argues that the COOL measures fulfil the legitimate objectives of providing consumers with additional information about the origin of the food that they buy at the retail level and of helping to prevent consumer confusion related to the labelling of certain products not entirely produced in the United States and which still carry a USDA grade label.

7.662 Regarding the complainants' position that the meat labels are confusing, the United States submits that the complainants have provided no evidence demonstrating that the current labelling scheme has caused or will cause any consumer confusion. Concerning whether average US consumers are able to tell the difference between label categories B and C, the United States submits that a consumer is likely to believe that the meat is most closely affiliated with the name of the country that appears first on the label.<sup>872</sup> Further, USDA has undertaken several efforts to educate consumers on the COOL requirements.<sup>873</sup>

7.663 As regards whether the COOL requirements convey accurate information in light of the COOL provisions on commingled commodities, the United States emphasizes that meat derived from livestock imported for immediate slaughter will not be labelled as solely of US origin (i.e. "Product of the U.S.A.") regardless of whether the animal was commingled with other animals on a single

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<sup>866</sup> Mexico's response to Panel question No. 65.

<sup>867</sup> Mexico's response to Panel question No. 75; opening oral statement at the second substantive meeting, paras. 49-51.

<sup>868</sup> Mexico's opening oral statement at the second substantive meeting, para. 51.

<sup>869</sup> Mexico's response to Panel question No. 64(a).

<sup>870</sup> Mexico's response to Panel question No. 143.

<sup>871</sup> Mexico's response to Panel question No. 138.

<sup>872</sup> United States' response to Panel question No. 65.

<sup>873</sup> The United States points out that a significant amount of information on the COOL measures is posted on USDA's website, including a brochure for consumers and retailers to educate them about the different COOL labels (Exhibit US-88). The United States also refers to a questions and answers page for consumers, and an explanatory video about the programme (United States' response to Panel question No. 71).

production day.<sup>874</sup> Consistent with consumer expectations, only meat derived from animals that were born, raised, and slaughtered in the United States will be designated as of US origin. The United States concedes that while it is true that the COOL requirements could have been designed to provide even more specific information in certain circumstances (requiring the labelling of each production step or not permitting commingling), it argues that measures designed in this way would also have been much more burdensome.<sup>875</sup> The envisaged measures were altered during the rule-making process in response to comments received from interested parties, including Canada and Mexico, and added flexibilities to help reduce compliance costs while providing greater information than previously available. Thus, the COOL measures achieve their stated objectives.<sup>876</sup>

7.664 The United States argues that certain gaps existing in the coverage of products under the measures do not mean that the measures do not fulfil the stated objective. Article 2.2 does not require that a Member pursue the particular objective to the maximum possible degree without regard to costs or other considerations. Nor does Article 2.2 preclude a Member from striking a balance between the level at which a technical regulation achieves a particular legitimate objective and the costs that a technical regulation imposes on market participants. The United States clarifies that taking costs into consideration does not reflect a lowering of the level at which it decided to fulfil its objectives of providing consumer information about origin and preventing consumer confusion.<sup>877</sup> In fact, the commingling provisions criticized by the complainants were specifically included at the request of the Canadian Pork Council and the Canadian government.<sup>878</sup>

7.665 Furthermore, the United States submits that the COOL requirements help prevent consumers from being misled about the origin of meat in two different ways.<sup>879</sup> First, by ensuring that all meat sold at the retail level has an origin label, the COOL requirements prevent consumer confusion related to the appearance of a USDA grade label on meat that is not US origin, while also allowing both domestic and imported products to benefit from the use of these grade labels. Second, the COOL requirements prevent the confusion that may have occurred when products that were derived from animals born and/or raised in another country and then slaughtered in the United States were labelled as a "Product of the U.S.A." Under the COOL requirements, these products will now be labelled as mixed origin products and consumers will not mistakenly believe that they are products derived from animals born, raised, and slaughtered in the United States when that is not the case.<sup>880</sup>

(ii) *Analysis by the Panel*

7.666 In assessing the COOL measure's fulfilment of the objective, we start by recalling the objective pursued by the United States and the core features of the country of origin labelling requirements.

7.667 In conducting this assessment, we will also refer to the legal test established under relevant provisions of other covered Agreements, including both Article XX of the GATT 1994<sup>881</sup> and

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<sup>874</sup> United States' response to Panel question No. 64(b).

<sup>875</sup> United States' first written submission, paras. 62-66; responses to Panel questions Nos. 58, 73.

<sup>876</sup> United States' first written submission, paras. 234-241; response to Panel question No. 24; second written submission, paras. 101-102; opening oral statement at the second substantive meeting, paras. 48-49.

<sup>877</sup> United States' response to Panel question No. 142.

<sup>878</sup> United States' second written statement, footnote 32; opening oral statement at the second substantive meeting, para. 44, referring to Exhibit US-44.

<sup>879</sup> United States' response to Panel question No. 56; Exhibit US-84.

<sup>880</sup> United States' response to Panel question No. 56.

<sup>881</sup> We are aware that Article 2.2 of the TBT Agreement sets out a provision setting out specific obligations, whereas Article XX of the GATT 1994 provides for general exceptions to obligations. This has an important implication regarding the allocation of the burden of proof between the complainants and the

Article 5.6 of the SPS Agreement, to the extent appropriate.<sup>882</sup> In this connection, we find support for our approach in the Appellate Body's statement in *Australia – Apples*. In the context of analysing a provision under the SPS Agreement, the Appellate Body found interpretative assistance in the meaning attributed to a provision of the GATT 1994, based on the fact that both provisions form integral parts of the same Agreement by virtue of Article II:2 of the WTO Agreement.<sup>883</sup>

7.668 Although the United States agrees that the legal interpretative approach undertaken by the Appellate Body in the context of Article 5.6 of the SPS Agreement provides useful insights for the interpretation of Article 2.2 of the TBT Agreement<sup>884</sup>, it has argued that the legal interpretive approach developed by previous panels and the Appellate Body in the context of Article XX of the GATT 1994 is not relevant to Article 2.2 in the present dispute.<sup>885</sup> In essence, the United States puts forward the following arguments to support its position. First, the United States contrasts the context in which the word "necessary" is used and the legal question under Article 2.2 of the TBT Agreement with that under Article XX of the GATT 1994. Specifically, the United States describes the question under Article 2.2 of the TBT Agreement as whether a measure is "more trade restrictive than necessary to fulfil a legitimate objective", whereas under Article XX of the GATT 1994 the question is whether it is necessary to breach the obligation(s) under the GATT 1994 to pursue one or more of the policy objectives under Article XX. Second, the United States highlights the difference in the allocation of the burden of proof under Article 2.2 of the TBT Agreement and Article XX of the GATT 1994.<sup>886</sup> Third, the United States argues that the language in Article 5.6 of the SPS Agreement is much more similar to the language in Article XX of the GATT 1994, and there is no textual basis to apply the legal interpretive approach under Article XX to Article 2.2.

7.669 We do not consider the United States' arguments as supporting its position that the legal interpretive approach under Article XX is not relevant to Article 2.2. We agree that Article 2.2 of the TBT Agreement and Article XX of the GATT 1994 are two independent provisions under two

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respondent. Thus, the complainants in the current dispute must establish a prima facie case that the COOL measure is more trade-restrictive than necessary to fulfil a legitimate objective within the meaning of Article 2.2. In contrast, it would be the respondent under Article XX of the GATT 1994 who must establish a prima facie case that the measure is necessary to [achieve] certain objectives within the scope of the provision.

<sup>882</sup> Several third parties submit that the Panel should refer to the extent necessary to the legal tests developed under Article XX of the GATT 1994 or Article 5.6 of the SPS Agreement. However, all these third parties agree that, in the context of Article 2.2 of the TBT Agreement, it is not necessary for the complainants to provide a less trade-restrictive alternative measure which is *significantly* less trade-restrictive, as is the case under Article 5.6 of the SPS Agreement. See, for example, Australia's third party written submission, paras. 74, 76; Brazil's third party written submission, paras. 7-8; Japan's third party written submission, para.27; and New Zealand's third-party oral statement at the second substantive meeting, para. 7.

<sup>883</sup> Appellate Body Report, *Australia – Apples*, para. 173, footnote 285. In finding interpretative assistance in the meaning that has been attributed to a phrase in Article III:1 of the GATT 1994 in relation to its analysis of a phrase contained in Annex A(1)(a) of the SPS Agreement, the Appellate Body noted that both provisions form part of the same Agreement by virtue of Article II:2 of the WTO Agreement and thus each constitutes context relevant to the interpretation of the other.

<sup>884</sup> United States' second written submission, paras. 102-105.

<sup>885</sup> United States' second written submission, paras. 104-105, also referring to Guatemala's response to Panel third party question No. 5.

The United States also referred to a letter from the Director-General of the GATT to the Chief Negotiator as evidence confirming that Article 2.2 of the TBT Agreement should be interpreted similarly to Article 5.6 of the SPS Agreement (United States' first written submission, para. 248; second written submission, para. 105; Exhibit US-53). Although it focuses on the similar interpretive approaches that should be taken between Article 2.2 of the TBT Agreement and Article 5.6 of the SPS Agreement, the United States has not elaborated on how the letter supports its position that the interpretive approach under Article XX of the GATT 1994 is irrelevant to Article 2.2 of the TBT Agreement.

<sup>886</sup> See footnote 881 for our observation in this regard.

different WTO covered agreements. This does not mean, however, that the legal interpretive approach under one provision and the legal interpretive approach under another cannot inform each other. In our understanding, the United States highlights the differences between these provisions without explaining why such differences render the legal test under Article XX irrelevant for an analysis under Article 2.2.

7.670 The following considerations further support the view that the legal interpretive approach under Article XX is relevant to Article 2.2. First, the 2<sup>nd</sup> recital in the Preamble of the TBT Agreement prescribes the WTO Members' desire to "further the objectives of GATT 1994". This indicates a close connection between the TBT Agreement and the GATT 1994. Second, Article 2.2 of the TBT Agreement is textually similar to Article XX of the GATT 1994. The examples of legitimate objectives explicitly listed in Article 2.2 resemble the types of policy objectives prescribed under Article XX of the GATT 1994.<sup>887</sup> Further, the wording of the 6<sup>th</sup> recital in the Preamble of the TBT Agreement is also similar to that of the chapeau of Article XX of the GATT 1994. We therefore disagree with the United States.

7.671 The objective that the United States pursues through the COOL measure is to provide consumers with information on the origin of products they consume. Specifically with respect to meat products, the United States describes its objective in more detail as follows: (i) consumer information – the COOL measure purports "to provide consumers with as much clear and accurate information as possible about the country or countries of origin of meat products that they buy at the retail level", particularly "information on the countries, where the animal from which the meat was derived was born, raised, and slaughtered"; and (ii) prevention of consumer confusion – the COOL measure purports to prevent confusion relating to a USDA grade label and the previous FSIS "Product of the U.S.A." labelling system, which allowed this label if the meat products received minimal processes in the United States.

7.672 As explained in detail in Section VII.C.1(b)(i) above, under the COOL measure, retailers of covered commodities are required to inform consumers of the country of origin of the covered commodity according to the labelling requirements under the measure. Muscle cuts of meat must fall under one of the four categories for labelling (i.e. Labels A, B, C, and D) based on the countries where the animal from which meat was derived was born, raised, and slaughtered. The 2009 Final Rule (AMS) allows the use of Labels B or C interchangeably when any combination of meat falling under category A, B, and/or C is commingled on a single production day.

7.673 The United States defines the origin of meat based on the place where an animal from which meat is derived was born, raised, and slaughtered.<sup>888</sup> In this context, the United States elaborates that the COOL measure adopts a definition of origin that avoids misleading consumers into believing that

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<sup>887</sup> The examples of legitimate objectives explicitly listed in Article 2.2 of the TBT Agreement are as follows: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. The policy objectives falling within the scope of Article XX of the GATT include the following: protection of public morals; protection of human, animal or plant life or health; the compliance with laws or regulations relating to customs enforcement or the prevention of deceptive practices; and the conservation of exhaustible natural resources.

The term "necessary" in Article XX of the GATT 1994 follows the term "measures" and is followed by the phrases such as "*to protect* human ... life or health" and "*to secure* compliance with laws or regulations". The same term "necessary" in Article 2.2 of the TBT Agreement follows the phrase "not more trade restrictive than" and is followed by the phrase "*to fulfil* a legitimate objective".

<sup>888</sup> We are not presented with evidence showing that any other Member has adopted the same definition of the origin of meat as the United States.

the meat they are buying was derived from an animal that was born, raised, and slaughtered in the United States when this is not the case.<sup>889</sup>

7.674 We are aware that the US definition of origin for labelling purposes is different from that employed for customs purposes. For customs purposes, the United States relies on the rules of substantial transformation for determining the origin of products imported into the United States.<sup>890</sup> For imports from a *NAFTA* country, there are two sets of rules regarding *NAFTA* qualification – one set for preference purposes and another for marking purposes. Usually they have the same outcome. The *NAFTA* Marking Rules are based on the tariff-shift principle. Thus, the tariff classification of the imported product is compared to the tariff classification of the finished product to determine whether a sufficient shift has occurred.

7.675 There is no basis, however, for us to find that the United States is prohibited from adopting for labelling purposes an origin definition which is different from that for customs purposes. We thus carry out our analysis of the COOL measure and its fulfilment of the stated objective on the basis of the definition of origin for meat products as determined by the United States. We recall that the United States defines the origin of meat based on the places where animals used to produce meat were born, raised and slaughtered.

7.676 The complainants argue that the COOL measure was designed to protect the domestic industry. Even if the objective were to provide consumer information on origin as claimed by the United States, according to the complainants, the COOL measure does not fulfil the identified objective, essentially because the country of origin information provided according to the labelling requirements is confusing and insufficient.

7.677 In light of the complainants' argument and of our earlier decision to examine this argument in the context of whether the COOL measure fulfils the identified objective<sup>891</sup>, we first examine whether the identified objective is indeed the objective of the COOL measure.

#### Whether consumer information on origin is the objective of the COOL measure

7.678 The complainants contend that the COOL measure is designed to protect the domestic industry. According to the complainants, this must be confirmed based on not only the text of the measure, but also the design, architecture and structure of the COOL measure. In this context, the complainants have also referred to various statements made by legislators during the legislative process for the COOL statute. We will address these elements in turn, starting with the text of the COOL measure.

7.679 We first turn to the text of the COOL measure.<sup>892</sup>

7.680 The text of the COOL statute and the 2009 Final Rule (AMS) contains provisions on the country of origin labelling requirements, including the product scope and nature of the requirements.<sup>893</sup> We find that while the text of these provisions does not describe the objective of the

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<sup>889</sup> United States' opening oral statement at the second substantive meeting, para. 42.

<sup>890</sup> Canada's response to Panel question No. 59; Mexico's response to Panel question No. 59.

<sup>891</sup> See para. 7.608.

<sup>892</sup> Australia agrees that the Panel should start its analysis for determining the objective of the COOL measure with the text of the measure (Australia's third-party oral statement at the second substantive meeting, para. 10).

<sup>893</sup> The main requirement ("Notice of Country of Origin" – "In General") under the 2002 Farm Bill, as amended and the 2008 Final Rule is the following: "a retailer of a covered commodity shall inform consumers,



measure, it is devoted exclusively to the labelling requirements on origin. The summary part of the 2009 Final Rule (AMS) also states that the COOL statute requires retailers to notify their customers of the country of origin of covered commodities.<sup>894</sup> As part of the agency response to comments from the public, USDA further explains that "[w]ith regard to producer benefits, while some U.S. producers may hope to receive benefits from the COOL program for products of U.S. origin, the purpose of the COOL program is to provide consumers with origin information".<sup>895</sup> Therefore, the text of the COOL measure confirms that the objective of the COOL measure is to provide consumer information on origin.

7.681 To support their position that the objective of the COOL measure is not consumer information as stated by the United States, the complainants also point to the measure's design and structure, particularly the coverage of commodities and exemptions, of the COOL measure.

7.682 The scope of covered commodities under the measure is defined in 7 U.S.C. §1638(2)(A) of as follows: "[t]he term 'covered commodity' means– (i) muscle cuts of beef, lamb, and pork; (ii) ground beef, ground lamb, and ground pork; (iii) farm-raised fish; (iv) wild fish; (v) a perishable agricultural commodity; (vi) peanuts; and [footnote omitted] (vii) meat produced from goats; (viii) chicken, in whole and in part; (ix) ginseng; (x) pecans; and (xi) macadamia nuts".<sup>896</sup> The complainants argue that the United States limited the product scope of the COOL measure to US products threatened by foreign competition. The complainants highlight the fact that various products<sup>897</sup> that are produced in the United States, but that face little or no competition, are not subject to the COOL measure.<sup>898</sup>

7.683 The complainants further submit that the true objective of the COOL measure is trade protectionism as demonstrated by the fact that the COOL measure excludes from its scope covered commodities that are an ingredient in a processed food item or that undergo processing<sup>899</sup>, as well as certain entities (e.g. service food establishments<sup>900</sup>, entities selling perishable agricultural commodities below US\$230,000 per year<sup>901</sup>). In fact, argue the complainants, if the objective of the COOL measure were to provide origin information, it would have to apply on a more widespread basis.<sup>902</sup>

7.684 We are not persuaded by the complainants' arguments. We consider that merely because the COOL measure does not apply to all food products and all relevant entities does not necessarily mean that the measure is designed for a protectionist purpose. In fact, it is not atypical for any kind of

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at the final point of sale of the covered commodity to consumers, of the country of origin of the covered commodity."

<sup>894</sup> 74 FR 2658.

<sup>895</sup> 74 FR 2670.

<sup>896</sup> Exhibits CDA-1; MEX-9.

<sup>897</sup> Canada argues that the products that face little or no import competition, include almonds (with a market share of 99.5%), walnuts (with a market share of 99.1%), pistachios (with a market share of 99%) and turkey (with a market share of 99.9%).

<sup>898</sup> Canada's first written submission, paras. 161-170; Mexico's first written submission, paras. 171-172.

<sup>899</sup> 7 C.F.R. §65.220.

<sup>900</sup> 7 U.S.C. §1638a (b).

<sup>901</sup> Mexico's first written submission, para. 10; United States' first written submission, para. 49; Exhibit CDA-5, p. 2705; 7 U.S.C. 499a(b)(11) of the PACA defines a retailer as "a person that is a dealer engaged in the business of selling any perishable agricultural commodity at retail." Then, 7 U.S.C. 499a(b)(6) defines the term "dealer" as follows: "(B) no person buying any such commodity solely for sale at retail shall be considered as a 'dealer' until the invoice costs of his purchases of perishable agricultural commodities in any calendar year are in excess of \$230,000".

<sup>902</sup> Canada's second written submission, para. 57; Mexico's first written submission, paras. 173-174.

regulation to have exceptions in terms of the products and entities that are subject to it. Some of such exceptions might be justifiable for practical reasons and simply facilitate the implementation of the measure at issue without necessarily involving protectionist intent. We also consider that the scope of the COOL measure is broad enough to cover a significant range of food products and entities handling these products.

7.685 Our assessment of the COOL measure, based on its text, and design and structure, is that its objective is consumer information on origin as declared by the United States.

7.686 Finally, we turn to the issue of meaning and legal relevance of various statements made by legislators during the legislation process for the COOL measure to confirm its objective.<sup>903</sup> We are aware of the Appellate Body's statement in *Japan – Alcoholic Beverages* addressing the prohibition in Article III against applying internal taxes and other charges "so as to afford protection to domestic production", indicating that it is "not necessary for a panel to sort through the many reasons legislators and regulators often have for what they do and weigh the relative significance of those reasons to establish legislative or regulatory intent".<sup>904</sup> In *Chile – Alcoholic Beverages*, the Appellate Body explained that "[t]he *subjective* intentions inhabiting the minds of individual legislators or regulators do not bear upon the inquiry, if only because they are not accessible to treaty interpreters".<sup>905</sup> The same logic could be applied to Article 2.2 of the TBT Agreement when inquiring into a Member's measure setting out its stated legitimate objective. In this case, we have evidence before us purporting to demonstrate the legislators' intentions. According to the Appellate Body, it is possible to have recourse to "the statutory purposes or objectives – that is, the purpose or objectives of a Member's legislature and government as a whole – to the extent that they are given objective expression in the statute itself".<sup>906</sup> Thus, although the Appellate Body has indicated that it is *not necessary* for a panel to conduct the inquiry, we will examine the statements referred to by the parties to assess whether they are given objective expression in the COOL measure itself.

7.687 The complainants presented several statements from Members of the US Congress with a view to demonstrating that the objective of the COOL measure is trade protectionism.<sup>907</sup> The United States argues in response that statements by Members of Congress confirm that the objective of the COOL measure is "to provide consumers with additional information regarding the origin of the covered commodities".<sup>908</sup>

7.688 Canada submits that the intent of the COOL measure is to protect US ranchers from foreign competition by recapturing market share for US cattle.<sup>909</sup> Examples of statements identified by Canada include the following: (i) "I want to capture that 22 percent of the beef market for our

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<sup>903</sup> Korea considers that reference to only certain chosen statements from legislators may not be able to convey the legislative background accurately (Korea's third party written submission, para. 18).

<sup>904</sup> Appellate Body Report, *Japan – Alcoholic Beverages*, p. 27.

<sup>905</sup> Appellate Body Report, *Chile – Alcoholic Beverages*, para. 62 (emphasis in original). See also the Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 259.

<sup>906</sup> Appellate Body Report, *Chile – Alcoholic Beverages*, para. 62.

<sup>907</sup> Canada's first written submission, paras. 13, 172-174; Mexico's second written submission, paras. 79-80. The complainants also refer to statements by an interest group, R-CALF. In particular, a letter from R-CALF to the US Secretary of Agriculture and US Trade Representative states the following: "[I]acking any affirmative action on the part of USDA or USTR to mitigate this untenable but prolonged trade imbalance that continues to drive tens of thousands of U.S. cattle farmers and ranchers out of business each year, COOL is the *only* available tool that the U.S. cattle industry has to even begin to rebalance the lopsided trade relationships with Canada and Mexico." (Canada's first written submission, para. 171, referring to Exhibit CDA-145; Mexico's first written submission, para. 182, referring to Exhibit MEX-50).

<sup>908</sup> United States' first written submission, para. 28 (Exhibit US-12).

<sup>909</sup> Canada's first written submission, paras. 13, 172-174.

American producers"<sup>910</sup>; (ii) "I am perfectly willing to put barriers at the borders so I just want to clear that up"<sup>911</sup>; (iii) "[the COOL measure would] give our independent producers a leg up".<sup>912</sup>

7.689 Mexico also puts forward statements by Members of the US Congress in the context of the 2002 Farm Bill allegedly showing protectionist intent. These include the following statements: (i) "[p]roducers pushed Congress to include a country of origin labeling and their work paid off. When given this option, I believe consumers will pick American produce over our foreign competitors"<sup>913</sup>; (ii) "Western South Dakota cow-calf ranchers will be proud to know that the standard for 'U.S. beef' under my provision will require it to come from cattle born, raised, and slaughtered in the United States, despite a last-minute campaign by opponents to allow foreign cattle to qualify as U.S. beef"<sup>914</sup>; (iii) "[t]his program will specifically inform consumers right at their local markets whether they are eating U.S. products, or products produced under the laws of another nation (...) U.S. origin labeling is important because it will allow consumers to vote with their wallets to support U.S. farmers, ranchers, and fishermen"<sup>915</sup>; (iv) "Country of Origin Labeling for fresh meats, fruits, vegetables and fish will help Oregon's producers".<sup>916</sup>

7.690 The United States submits statements by two Congressmen which support their position that the COOL measure provides information to consumers about the origin of their food. One of them states that this legislation is important mainly<sup>917</sup> because "[f]irst, consumers have the right to know the origin of the meat that they buy in the grocery store. Second, ranchers deserve to have their product clearly identified. Third, current law creates a false impression about the origin of USDA grade meat".<sup>918</sup> Another Member of Congress advances that "[t]he country of origin of their food is as important as knowing the country of origin of any other product they might buy as a consumer in the United States".<sup>919</sup>

7.691 We have examined all of the statements by individual legislators submitted by the parties in this respect and conclude that, while the sentiment in some of them finds expression in the COOL measure, the sentiment in others does not. On balance, we do not find this evidence of assistance in our inquiry into the objective of the COOL measure. In fact, it is not inconceivable that parliaments and governments pursue more than one objective through a certain measure. Different constituencies and legislators may have different objectives, which nonetheless lead to the adoption of a particular measure. In such cases, a panel should not be second-guessing various intents behind the introduction of that measure. The above statements therefore do not affect our conclusion that the objective of the COOL measure is to provide consumer information on origin.

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<sup>910</sup> Hearing before the Sub-committee of livestock and horticulture of the Committee on Agriculture, House of Representatives, 26 September 2000 (Exhibit CDA-10, p.6).

<sup>911</sup> Hearing before the Sub-committee of livestock and horticulture of the Committee on Agriculture, House of Representatives, 26 September 2000 (Exhibit CDA-10, p.42).

<sup>912</sup> Congressional Record, Farm Security and Rural Investment Act, 7 May 2002 (Exhibit CDA-146, S3918).

<sup>913</sup> Mexico's second written submission, para. 80; Exhibit MEX-89.

<sup>914</sup> Mexico's second written submission, para. 80; Exhibit MEX-91.

<sup>915</sup> Mexico's second written submission, para. 80; Exhibit MEX-92.

<sup>916</sup> Mexico's second written submission, para. 80; Exhibit MEX-93.

<sup>917</sup> The same Congressman advances two additional reasons why the COOL measure should be enacted: (i) "Most other consumer products are labeled as to country of origin. Meat should be no different"; and (ii) "Numerous countries already are imposing country of origin labeling requirements, including Canada, Mexico, and the European Union" (Exhibit US-13).

<sup>918</sup> United States' first written submission, footnote 31; Exhibit US-13.

<sup>919</sup> United States' first written submission, footnote 31; Exhibit US-14.

Whether the COOL measure fulfils the objective of providing consumer information on origin

7.692 The term "fulfil" can be defined as "2. Provide fully with what is wished for; satisfy the appetite or desire of; 3. Make complete, supply with what is lacking; replace (something); ... 6. Carry out, perform, do (something prescribed)".<sup>920</sup> The ordinary meaning of "fulfil", therefore, indicates that to meet the requirement in Article 2.2 of the TBT Agreement, the COOL measure must carry out and perform the objective of providing origin information to consumers.

7.693 Before starting our analysis, it is useful to recall the Appellate Body's clarification in the context of Article XX(b) of the GATT 1994 that in assessing whether a measure makes a contribution to the objective pursued under Article XX(b), panels are not required to apply a particular methodology. The Appellate Body considered that a contribution exists when there is *a genuine relationship of ends and means* between the objective pursued and the measure at issue.<sup>921</sup> In our view, this approach is also relevant for analysing a measure under Article 2.2 of the TBT Agreement, specifically with respect to whether it fulfils the objective for which it was put in place. As noted above<sup>922</sup>, we consider that the legal interpretive approach under Article XX(b) of the GATT 1994 is relevant to our analysis of Article 2.2 of the TBT Agreement.

7.694 Bearing this in mind, we now turn to the parties' specific arguments on the fulfilment by the COOL measure of the identified objectives.

7.695 The parties do not dispute that information on the origin of products must be clear and accurate for it to be able to convey meaningful information to consumers.<sup>923</sup> Under a labelling regime adopted for this purpose, the fulfilment of this objective will depend on the capability of labels to convey clear and accurate information on origin. To determine whether clear and accurate country of origin information of meat products is conveyed to consumers under the COOL measure, we must examine how the specific labelling scheme under the COOL measure, particularly the content and categorization of different categories of labels, is set out in the measure itself.

7.696 The complainants argue that country of origin labels under the COOL measure can provide consumers with inaccurate or misleading information. Their position is largely based on the following contentions: (i) the meaning of the labels, particularly labels B and C for muscle cuts, is

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<sup>920</sup> *The Shorter Oxford English Dictionary*, (Sixth Edition) Oxford University Press, Vol. I, p.1053 (2007).

<sup>921</sup> The Appellate Body in *Brazil – Retreaded Tyres* stated:

"We turn to the methodology used by the Panel in analyzing the contribution of the Import Ban to the achievement of its objective. Such a contribution exists *when there is a genuine relationship of ends and means between the objective pursued and the measure at issue*. The selection of a methodology to assess a measure's contribution is a function of the nature of the risk, the objective pursued, and the level of protection sought. It ultimately also depends on the nature, quantity, and quality of evidence existing at the time the analysis is made. Because the Panel, as the trier of the facts, is in a position to evaluate these circumstances, it should enjoy a certain latitude in designing the appropriate methodology to use and deciding how to structure or organize the analysis of the contribution of the measure at issue to the realization of the ends pursued by it. This latitude is not, however, boundless. Indeed, a panel must analyze the contribution of the measure at issue to the realization of the ends pursued by it in accordance with the requirements of Article XX of the GATT 1994 and Article 11 of the DSU." (Appellate Body Report, *Brazil – Retreaded Tyres*, para. 145)

<sup>922</sup> See paras. 7.667-7.670.

<sup>923</sup> Canada's first written submission, paras. 178, 210-211; Mexico's response to Panel question Nos. 64 and 105; United States' first written submission, paras. 85, 154, 155, 210-211, 240. Australia and New Zealand agree that the information conveyed through the COOL measure must be accurate. (Australia's third party written submission, para. 68; New Zealand, third party written submission, para. 40.)

confusing and cannot be easily understood by consumers; and (ii) the flexibility accorded to processors and retailers to use labels B and C interchangeably for all categories of muscle cuts upon commingling, makes origin information even more confusing for consumers.<sup>924</sup>

7.697 We start with the meaning of different categories of labels under the measure. We recall that meat falling within the scope of categories B and C is required to carry labels indicating "product of the US, Country X" (Label B) and "product of Country X, the US" (Label C). As described above in Section VII.C.1(b)(i), Label B refers to meat derived from animals born in Country X, and raised and slaughtered in the United States, whereas Label C refers to meat derived from animals imported for immediate slaughter (i.e. animals born and raised outside the United States). Labels B and C are therefore differentiated by the order of country names indicated on the label.

7.698 The complainants argue that the description of origin under Label B and Label C are confusing. For example, a meat product with a B or C label will indicate multiple countries of origin (i.e. "Product of the US, Country X" and "Product of Country X, the US"). This is confusing because consumers will not understand the meaning of these labels in terms of the countries where specific production steps took place.<sup>925</sup> Particularly, in Mexico's view, a label marked with "product of the US, Country X" might lead consumers to think that a package contains both muscle cuts of meat produced in the United States and muscle cuts produced in Mexico when this is not the case.<sup>926</sup>

7.699 As described above, the US definition of origin involves information on the places where animals from which meat is derived were born, raised, and slaughtered. Thus the labels identifying origin refer to several elements. As a result, it appears to us, the description of origin on Label B and Label C does not, in fact, deliver origin information as defined under the measure or as the consumer might understand it.

7.700 For example, a label "Product of the US, Mexico" does not describe what "the US and Mexico" means as far as origin of the meat is concerned. As Mexico suggests, on its face, these names could be understood as meaning products comprising meat originating in both the United States and Mexico. This may be the case particularly for meat sold in a bulk display. However, confusion is also likely in a case where a consumer-ready package contains only a single piece of meat, as the meaning of the two country names listed on the label is not clear. Indeed, in order for the average consumer to understand the meaning of a specific COOL label on meat products, he would also need to understand the definition of each category of labels as prescribed in the measure.

7.701 Furthermore, the complainants argue that the meaning of Label B and Label C is not easily distinguishable. The descriptions on Labels B and C are differentiated based on the order of country name, which is determined by whether animals were raised in the United States (Label B) or whether imported right before slaughter (Label C). For example, if an animal from which meat was derived was raised in the United States (not born in the United States), the first country name on the label is the United States ("Product of the US, Country X"). It is far from clear to us that differentiation of origin based on the order of country names will indeed communicate accurate origin information. For example, if two packages of steak on a store shelf respectively carrying the labels of "product of the

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<sup>924</sup> Most of the third parties agree with the view that certain aspects of the COOL measure might provide inaccurate information to consumers. See, for example, Australia's third party written submission, para.70; European Union's third-party oral statement at the first substantive meeting, para. 41; Guatemala's third-party oral statement at the first substantive meeting, p. 2; Japan's third-party oral statement at the second substantive meeting, para. 7.

<sup>925</sup> Canada's first written submission, para. 181; Mexico's first written submission, para. 301; second written submission, para. 46.

<sup>926</sup> Mexico's first written submission, para. 301; second written submission, para. 46.

US, Mexico (or Canada)" and "product of Mexico (or Canada), the US", in our view the similarity in content between these two labels will render it very unlikely that the average consumer in the United States will be able to distinguish between these two labels in terms of origin as defined under the COOL measure.<sup>927</sup> The United States argues that, generally speaking, a consumer is likely to think that the meat is most closely affiliated with the name of the country that appears first on the label.<sup>928</sup> We are not presented with any evidence to support this assertion and hence must set it aside for the purpose of our decision.

7.702 Even if we were to conceive of a perfect consumer who is fully informed of the meaning of different categories of labels under the COOL measure, she may never be assured that the label precisely reflects the origin of meat as defined under the COOL measure. This is because of the manner in which the labelling requirements under the measure operate, *inter alia*, in connection with the interchangeable use of Label B and Label C allowed for commingled meat.<sup>929</sup> We turn to consider this aspect of the measure now.

7.703 Under the 2009 Final Rule (AMS), when categories A and B, categories A and C, or categories A, B, and C animals are commingled in a single production day, meat produced from those animals may be labelled as either category B or C. Mexico describes different possible combinations of meat with different origins under the commingling provisions as follows: "A & B = B or C; A & C = B or C; B & C = B or C; A & B & C = B or C".<sup>930</sup> Therefore, a B or C label affixed to a meat product may not necessarily correspond to the definition of origin under the measure. This is the case even with meat derived from animals born, raised, and slaughtered in the United States (i.e. category A meat) as it may be carrying Labels B or C rather than Label A according to the commingling provisions.

7.704 We also note that commingling can take place in multiple stages of the meat production process (e.g. processors and packers), including at the retail level.<sup>931</sup> This, we understand, may reduce

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<sup>927</sup> Canada submits in response to a question from the Panel that it is a reasonable inference that a consumer would not be able to appreciate the distinction between meat products labelled as B and C respectively (Canada's response to Panel question No. 65). Mexico argues that there is no evidence that US consumers either can or do perceive the vast implications of this minute change in word order and that consumer would need a matrix to determine even roughly where their meat products originated under the COOL regime (Mexico's response to Panel question No. 65).

<sup>928</sup> United States' response to Panel question No. 65. In response to a similar question from the Panel that addressed two separate packages of beef, one labelled as "Product of the US, Canada, and Mexico" and another labelled as "Products of Mexico, Canada, and the US", the United States referred to three circumstances in which beef could be labelled as described in the question: (i) ground beef from a processor who had all three types of beef in its inventory in the last 60 days; (ii) a muscle cut of beef derived from an animal that spent time in all three countries (i.e. born in Canada, raised in Mexico, and slaughtered in the United States); or (iii) a muscle cut of beef from a processor who commingled multiple types of animals in a single production day. The United States adds that in none of these circumstances does the 2009 Final Rule (AMS) require the names of these countries to be listed in a particular order.

We note that the United States also asserts that the USDA has provided a significant amount of information on the COOL requirements, mainly directed to consumer education. Among the different types of information that can be found on the website there is a brochure for consumers and retailers to educate them about the different COOL labels (Exhibit US-88), a question and answer page for consumers and an explanatory video about the program. (United States' response to Panel question No. 71).

<sup>929</sup> We also note that the 2009 Final Rule (AMS) allows category B meat to list country names in any order.

<sup>930</sup> Mexico's second written submission, footnote 39. Mexico also provides a matrix of labels under the COOL measure (Mexico's response Q. 65).

<sup>931</sup> For example, a brochure on COOL prepared by USDA explains COOL for commingled commodities as follows: "[M]eat covered commodities (e.g., rib eye steaks) derived from U.S. and mixed origin

compliance costs to a certain extent.<sup>932</sup> At the same time, it further diffuses the content and impact of origin labels as defined by the measure. If a retailer were to decide to commingle meat products that had already been commingled during the production process, the resulting labels affixed to these products would be even less accurate in terms of the origin of such products as defined by the United States.

7.705 As an example, if Category A and B animals are commingled at the slaughterhouse, the meat derived thereof should, in principle, use Label B. If this Label B meat is commingled at the retail level with Label C meat, the resulting group can use Label B or C. Assuming that the retailer decides to use Label C for that group of meat, the consumer has no certainty as to the origin of meat as defined by the United States. In this scenario, the consumer could alternatively believe that this meat comes from any of the following: (i) animals born and raised in country X and slaughtered in the United States; (ii) animals born in country X and raised and slaughtered in the United States that were commingled with animals born and raised in country X and slaughtered in the United States; or (iii) animals born in country X and raised and slaughtered in the United States that simply list the country names in any order. As this example shows, the COOL measure creates a framework in which consumers make their purchasing decisions with little, if any, additional certainty as to the accurate origin of meat products.

7.706 Furthermore, as discussed in paragraphs 7.421-7.430 in the context of Article 2.1, the COOL measure allows the ground meat label to list "all of the reasonably possible countries of origin of ... ground beef [or] ... pork" and to reference a country of origin even if the processor has not had ground meat from that particular country in its inventory for the last 60 days or less. Because of this so-called "60-day inventory allowance" in the 2009 Final Rule (AMS), the ground meat label is likely to convey inaccurate origin information as a processor may use the same label for all of its ground meat listing all countries of origin of the ground meat that the processor has had in its inventory at least for 60 days. In other words, an origin label affixed on ground meat could be listing a country name of meat that the processor might not even have used to produce the specific ground meat in that package. In fact, the Vilsack letter contains a statement confirming this: "[t]his provision [60-day inventory allowance] allows for labels to be used in a way that does not clearly indicate the product's country of origin".

7.707 Therefore, for the reasons explained above, the labelling under the COOL measure in our view provides information on meat with regard to the *possible*, but not necessarily actual, or for that matter accurate, origin as defined by the measure.

7.708 The United States points out that the complainants provided no evidence demonstrating any confusion was caused by the labelling scheme under the COOL measure.<sup>933</sup> Although quantitative evidence based on market surveys, for example, could have been helpful in assessing consumers' understanding of the meaning of different categories of labels, we do not consider the presence of such quantitative evidence necessary in assessing the measure's contribution to the stated objective. As noted in paragraph 7.693 above, a certain degree of latitude is afforded to panels in adopting methodology to assess a measure's fulfilment of the objective. We are thus free to rely on either quantitative or qualitative evidence, or both. We are therefore allowed to determine whether the

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animals that are commingled during a production day may carry the mixed origin claim, *Product of the U.S., Country X, Country Y. ...*" (Exhibit, US-88)

<sup>932</sup> See paragraph 7.343.

<sup>933</sup> United States' first written submission, para. 239.

COOL measure fulfils the objective on the basis of the complainants' arguments on how the labelling provisions under the COOL measure operate.<sup>934</sup>

7.709 The United States further argues that, "in general", the COOL requirements satisfy the US definition of origin.<sup>935</sup> The United States explains that meat derived from mixed origin animals will always receive either a category B or C label that informs consumers of all the countries in which the animal from which the meat is derived had spent time.

7.710 We are not convinced by the United States' arguments. As described above, the United States has defined the origin of meat based on the place where animals from which meat was derived were born, raised, and slaughtered. The United States further submits that, in respect of meat products, providing origin information based on this specific definition forms part of the objective of providing consumer information on origin within the meaning of Article 2.2. We do not see how providing general information about the various countries in which an animal has spent time and slaughtered is in keeping with the objective that the United States claims the measure seeks to achieve.

7.711 Further, the United States created exceptions and added flexibility into the regulations because the United States strived to reduce the costs of compliance, and it wanted to provide as much consumer information as possible.<sup>936</sup> The United States argues that it had to strike a balance between providing consumer information and reducing the compliance costs for industry. Of course, it is often necessary and important for governments to take conflicting interests into account in implementing laws and regulations to fulfil policy objectives. The act of balancing conflicting interests cannot, however, justify any inconsistency found in the impugned measure with the obligations of the respondent under the covered agreements. In the factual circumstances of the present dispute, the pertinent question for us is whether the COOL measure is fulfilling the identified objective in accordance with the obligations under Article 2.2 of the TBT Agreement.

7.712 The United States further emphasizes that in no circumstances will animals that spent their entire life in another country before being imported to the United States for immediate slaughter be listed as a "Product of the US" under the measure. The United States highlights that "[c]onsistent with the expectations of the US consumer, only meat derived from animals that were born, raised, and slaughtered in the United States will be designated as U.S. origin".<sup>937</sup> This, in the United States' view, fulfils the objective of preventing consumer confusion relating to a USDA grade label and the previous FSIS voluntary "Product of the U.S.A." labelling system, which allowed this label if the meat products received minimal processes in the United States. The United States underlines that, by ensuring that all meat sold at the retail level has an origin label, the COOL requirements prevent consumer confusion relating to the appearance of a USDA grade label on meat that is not US origin while also allowing both domestic and imported products to benefit from the use of these grade labels.<sup>938</sup>

7.713 In essence, the specific objective pursued by the United States through the COOL measure as explained above, namely the prevention of confusion caused by the previous COOL regime as well as USDA grade labelling, is that the United States aims to prevent meat derived from animals of non-US origin from carrying a US-origin label under any circumstances. To that extent, the COOL measure appears to fulfil the objective because the measure prohibits such meat from carrying a Label A even though the same meat may still carry a USDA grade label.

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<sup>934</sup> See paragraph 7.693.

<sup>935</sup> United States' response to Panel question No. 73.

<sup>936</sup> United States' opening oral statement at the first substantive meeting, para. 44.

<sup>937</sup> United States' response to Panel question No. 64(b).

<sup>938</sup> United States' response to Panel question No. 56(d).



7.714 Finally, the United States emphasizes that the COOL measure ensures that consumers have much more information available to them about origin than they previously did.<sup>939</sup> According to the United States, the COOL measure reduces the likelihood of consumer confusion in certain circumstances.<sup>940</sup> Therefore, in the United States' view, the COOL measure fulfils the legitimate objectives at the level that the United States deemed appropriate.

7.715 However, as clarified in paragraph 7.620 above, the United States aims to achieve its stated objective by providing as much *clear* and *accurate* origin information as possible. Considered against this level of fulfilment of its objective and in light of the nature of the objective (i.e. to provide accurate origin information), merely providing *more* information than under the previous labelling regime or fulfilling only a limited aspect of the identified objective does not contribute in a meaningful way to fulfilling the objective. As discussed above, the different and complex categories of labels under the COOL measure and the operation of the COOL regime based on the commingling provisions render origin information contained in labels inaccurate and confusing.<sup>941</sup>

#### Overall assessment

7.716 Overall, the mandatory labelling scheme under the COOL measure falls short of providing consumers with information on the country of origin of meat products in an accurate and clear manner.

7.717 We acknowledge that labels required to be affixed to meat products according to the requirements under the measure provide additional country of origin information that was not available prior to the COOL measure. We also agree that the labelling requirements under the COOL measure may have reduced consumer confusion that existed under the pre-COOL measure and USDA grade labelling system.

7.718 However, we agree with the complainants that origin information on labels as prescribed by the measure does not ensure meaningful information for consumers, except origin information on Label A. Specifically, considered in light of the origin definition as determined by the United States for meat products, the description of origin for Label B and Label C is confusing in terms of the meaning of multiple country names listed in these labels. Moreover, the possibility of interchangeably using Label B and Label C for all categories of meat based on commingling does not contribute in a meaningful way to providing consumers with accurate information on origin of meat products.

7.719 We therefore conclude that the COOL measure does not fulfil the identified objective within the meaning of Article 2.2 because it fails to convey meaningful origin information to consumers. Given this conclusion, we do not consider it necessary to proceed with the next step of the analysis,

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<sup>939</sup> United States' response to Panel question Nos. 58, 64(b). The United States emphasizes that the COOL measure has provided millions of US consumers with information that was previously unavailable to them (United States' opening oral statement at the first substantive meeting, para. 43).

<sup>940</sup> United States' response to Panel question Nos. 64(b), 73. The United States characterizes country of origin information under the COOL measure as meaningful by distinguishing it from the allegedly misleading information that would be provided about meat products under a labelling system solely based on substantial transformation.

<sup>941</sup> According to Canada, data collected during the first quarter of 2010 show that the different labelling categories for muscle cuts of beef were supplied in major supermarkets as follows: Label A 78.6%; Labels A and B 6.3%; Label B 14.2%; and Labels B and C 0.9% (Exhibit CDA-211). According to the United States, as of July 2009 the different origin declarations for muscle cuts of beef were used in the following percentages: US 71%; US, Canada 5%; US, Mexico 0.5%; Canada, US 0.5%; US, Canada, Mexico 22%; and foreign (category D) 0.3% (Exhibit US-145).

namely whether the COOL measure is "more trade-restrictive than necessary" based on the availability of less trade-restrictive alternative measures that can equally fulfil the identified objective.<sup>942</sup>

(e) Conclusion on the complainants' claims under Article 2.2 of the TBT Agreement

7.720 For the foregoing reasons, we conclude that the complainants have demonstrated that the COOL measure does *not* fulfil the objective of providing consumer information on origin, particularly with respect to meat products, within the meaning of Article 2.2. We therefore find that the United States has acted inconsistently with Article 2.2.

#### 4. Mexico's claim under Article 2.4

(a) Introduction

7.721 Article 2.4 provides:

"Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems."

7.722 Mexico submits that the COOL measure is inconsistent with Article 2.4 because the United States failed to base its regulation on the General Standard for the Labelling of Prepackaged Foods ("CODEX-STAN 1-1985"), an international standard that is an effective and appropriate means for the fulfilment of the legitimate objective pursued by the United States.<sup>943</sup>

7.723 The United States argues that Mexico has failed to meet its burden to show that any of the COOL measures breach Article 2.4. In particular, Mexico has failed to show that this standard is not an ineffective or inappropriate means for achieving the legitimate objective of the United States.<sup>944</sup>

7.724 The United States therefore does not contest that CODEX-STAN 1-1985 was not used as a basis for the COOL measure. Given that the United States has not rebutted Mexico's argument on this point, we will be able to find that the United States acted inconsistently with its obligations under Article 2.4 if we conclude that Mexico has established that CODEX-STAN 1-1985 is an effective and appropriate means for the fulfilment of the legitimate objective pursued by the United States.

(b) Whether CODEX-STAN 1-1985 is not an ineffective or inappropriate means for the fulfilment of the legitimate objective pursued

(i) *Main arguments of the parties*

7.725 **Mexico** submits that if the Panel concludes that the COOL measure pursues a legitimate objective, CODEX-STAN 1-1985 is an effective and appropriate means for the fulfilment of such legitimate objective. According to Mexico, CODEX-STAN 1-1985 is an "effective" means of fulfilling the US objective because: (i) it seeks to: protect consumers from deceptive practices; and

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<sup>942</sup> See the Appellate Body Reports, *Brazil – Retreaded Tyres*, paras. 156, 178; and *China – Publications and Audiovisual Products*, paras. 237-249.

<sup>943</sup> Mexico's first written submission, para. 321.

<sup>944</sup> United States' second written submission, para. 173.

(ii) it conveys information on the country of origin through a label.<sup>945</sup> In support of its position, Mexico points to several comments that the USDA received during the revision of the Interim Final Rule (AMS), suggesting that CODEX-STAN 1-1985 should continue to apply instead of the proposed COOL measure.<sup>946</sup> Mexico adds that CODEX-STAN 1-1985 is "appropriate", because the rules on country of origin contained therein are specially designed, and thus suitable, for achieving the purpose of informing consumers about the country of origin of prepackaged foods.<sup>947</sup>

7.726 The **United States** argues that basing the COOL measures on CODEX-STAN 1-1985 is both an "ineffective" and "inappropriate" means of fulfilling the legitimate objective of providing consumer information on origin.<sup>948</sup> Regarding the exact information on origin that it seeks to provide to consumers, the United States refers to "information on the countries where the animal from which the meat was derived was born, raised and slaughtered"<sup>949</sup>. In particular, CODEX-STAN 1-1985, which appears to be based on substantial transformation, does not meet the objective of providing information about the different countries in which an animal was born, raised and slaughtered.<sup>950</sup> Moreover, CODEX-STAN 1-1985 would provide misleading information to consumers when meat derived from an animal that spent a portion of its life in another country before being brought into the United States for slaughter is labelled US-origin.<sup>951</sup>

7.727 Mexico rejects this argument and highlights that the only example of such situation provided by the United States is when cattle enters the US territory one day prior to slaughter. In Mexico's view, that is exactly the opposite situation of Mexican cattle, which gains 70% of their weight in the United States.<sup>952</sup>

(ii) *Analysis by the Panel*

7.728 In *EC – Sardines*, the Appellate Body established that under Article 2.4 of the TBT Agreement the complaining party bears the burden of demonstrating that the relevant international standard at issue is appropriate and effective to fulfil the legitimate objectives pursued by the responding party through its regulation.<sup>953</sup> Thus, we will examine whether Mexico has established that CODEX-STAN 1-1985 is an effective or appropriate means for the fulfilment of the legitimate objectives pursued by the United States through the COOL measure.

7.729 We are mindful that the parties disagreed on whether CODEX-STAN 1-1985 is a relevant international standard within the meaning of Article 2.4 of the TBT Agreement. In this context, we also recall that the SPS Agreement recognizes the relevance of the Codex Alimentarius Commission by acknowledging that for food safety, international standards, guidelines and recommendations are the ones established by the Codex Alimentarius Commission.<sup>954</sup> We also recognize that CODEX plays a crucial role in food safety and quality. For our analysis of Mexico's claim under Article 2.4 of the TBT Agreement, however, we find it sufficient to assess whether CODEX-STAN 1-1985 is an *effective* and *appropriate* means to fulfil the identified objective pursued by the United States. "To enhance simplicity and efficiency" in our decision-making in the present

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<sup>945</sup> Mexico's first written submission, para. 351; response to Panel question No. 78.

<sup>946</sup> Mexico's first written submission, paras. 352-355.

<sup>947</sup> Mexico's first written submission, para. 357; response to Panel question No. 78.

<sup>948</sup> United States' first written submission, paras. 68, 201, 228; response to Panel question No. 17; second written submission, paras. 97, 106, 107, 147.

<sup>949</sup> United States' response to Panel question No. 58.

<sup>950</sup> United States' opening oral statement at the first substantive meeting, paras. 51, 54.

<sup>951</sup> United States' first written submission, para. 268; second written submission, para. 176.

<sup>952</sup> Mexico's second written submission, paras. 176-177.

<sup>953</sup> Appellate Body Report, *EC – Sardines*, para. 282.

<sup>954</sup> Annex A(3)(a) of the SPS Agreement.

case<sup>955</sup>, we carry out this analysis on the assumption that CODEX-STAN 1-1985 is a relevant international standard within the meaning of Article 2.4.<sup>956</sup>

7.730 The panel in *EC – Sardines* established that "in the context of Article 2.4, an ineffective means is a means which does not have the function of accomplishing the legitimate objective pursued, whereas an inappropriate means is a means which is not specially suitable for the fulfilment of the legitimate objective pursued".<sup>957</sup> In that dispute, the Appellate Body found that, in that case, a consideration of the *appropriateness* of the standard and a consideration of the *effectiveness* of the standard were interrelated due to the nature of the objectives of the regulation under examination.<sup>958</sup>

7.731 We recall our findings above that the objective pursued by the United States through the COOL measure is providing consumer information on origin.<sup>959</sup> We also recall that the exact information on origin that the United States wants to provide to consumers through the COOL measure is the countries where the animal from which the meat is derived was born, raised and slaughtered.<sup>960</sup>

7.732 Turning to the matter of *effectiveness* and *appropriateness*, CODEX-STAN 1-1985 would be *effective* if it had the capacity to accomplish the objective, and it would be *appropriate* if it were suitable for the fulfilment of the objective.

7.733 We consider that in this case a consideration of the *effectiveness* and a consideration of the *appropriateness* of CODEX-STAN 1-1985 are interrelated, due to the nature of the objective of the COOL measure.

7.734 In our view CODEX-STAN 1-1985 does not have the function or capacity of accomplishing the objective of providing information to consumers about the countries in which an animal was born, raised and slaughtered. The reason is that the standard confers origin *exclusively* to the country where the processing of food took place. In other words, it is based on the principle of substantial transformation. This means that no more than one country can claim origin under CODEX-STAN 1-1985; even when an animal is born and raised in a third country and then slaughtered in the

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<sup>955</sup> In *China – Publications and Audiovisual Products*, the Appellate Body provided guidance on the use of *arguendo* assumptions by panels as follows:

"We observe that reliance upon an assumption *arguendo* is a legal technique that an adjudicator may use in order to enhance simplicity and efficiency in decision-making. Although panels and the Appellate Body may choose to employ this technique in particular circumstances, it may not always provide a solid foundation upon which to rest legal conclusions. Use of the technique may detract from a clear enunciation of the relevant WTO law and create difficulties for implementation. Recourse to this technique may also be problematic for certain types of legal issues, for example, issues that go to the jurisdiction of a panel or preliminary questions on which the substance of a subsequent analysis depends." (Appellate Body Report, *China – Publications and Audiovisual Products*, para. 213)

<sup>956</sup> In light of the guidance provided by the Appellate Body, our approach will not potentially affect our legal conclusions for two reasons. First, our assumption creates no difficulties for the implementation of DSB recommendations and rulings; and, second, the question of whether or not CODEX-STAN 1-1985 is an effective and appropriate means for the fulfilment of the objective pursued by the United States does not fall under our jurisdiction nor as a preliminary question on which the substance of our subsequent analysis depends.

<sup>957</sup> Panel Report, *EC – Sardines*, para. 7.116.

<sup>958</sup> Appellate Body Report, *EC – Sardines*, para. 289.

<sup>959</sup> United States' first written submission, paras. 68, 201, 228; response to Panel question No. 17; second written submission, paras. 97, 106, 107, 147.

<sup>960</sup> United States' response to Panel question No. 58.

United States, the origin would *exclusively* be the United States. Thus, the exact information that the United States wants to provide to consumers cannot be conveyed through CODEX-STAN 1-1985. For the same reasons, we find that CODEX-STAN 1-1985 is an inappropriate means for the fulfilment of this objective, as it is not specially suitable for providing this type of information to the consumer.

7.735 Based on the above, we find that CODEX-STAN 1-1985 is *ineffective* and *inappropriate* for the fulfilment of the specific objective as defined by the United States.

(c) Conclusion on Mexico's claim under Article 2.4

7.736 In light of the foregoing, we find that Mexico has not established that the COOL measure violates Article 2.4.

## 5. Mexico's claims under Articles 12.1 and 12.3

(a) Main arguments of the parties

7.737 **Mexico** argues that the COOL measure is inconsistent with Articles 12.1 and 12.3 of the TBT Agreement. It claims that the United States did not take into account Mexico's special needs as a developing country when preparing and applying the COOL measure, with a view to ensuring that no unnecessary obstacles are created to Mexico's cattle exports to the United States.

7.738 According to Mexico, Article 12.3 of the TBT Agreement contains two separate obligations in the context of the COOL measure: (i) to "take account of" the special development, financial and trade needs of Mexico as a developing country Member; and (ii) to ensure that the COOL measure does not create unnecessary obstacles to Mexico's cattle exports as a developing country.<sup>961</sup>

7.739 As regards the first type of action, Mexico contends that in the preparation of the COOL measure, the United States did not take into account the special development, financial and trade needs of Mexico as a developing country.<sup>962</sup> According to Mexico, 56% of its territory (110 million hectares, equalling 1.1 million km<sup>2</sup>) is used for cattle production, involving over 1 million direct and over 2 million indirect jobs at 1.132 million bovine production facilities, 65 federally inspected and 940 municipal slaughterhouses, and approximately 100 packing plants specialized in processing beef.<sup>963</sup> Of the approximately 30 million head of Mexican domestic cattle inventory, about 6 million are destined for domestic consumption and 1.2 million for exports to the United States.<sup>964</sup> Cattle production represents about 33% of Mexican agriculture and animal production GDP, and 1.3% of Mexico's overall GDP.<sup>965</sup> Export sales of feeder cattle to the United States amount to USD 400-600 million annually.<sup>966</sup>

7.740 According to Mexico, the term "take into account" means "consider", and "the requirement to 'consider' evidence would not be satisfied by simply 'receiving evidence' or merely 'tak[ing] notice of evidence'".<sup>967</sup> Mexico suggests that compliance with Article 12.3 of the TBT Agreement could be proven by showing that the United States considered (i) "how the measure may impact developing

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<sup>961</sup> Mexico's first written submission, para. 362.

<sup>962</sup> Mexico's first written submission, para. 364.

<sup>963</sup> Mexico's first written submission, para. 365.

<sup>964</sup> Mexico's first written submission, para. 366.

<sup>965</sup> Mexico's first written submission, para. 366.

<sup>966</sup> Mexico's first written submission, para. 366.

<sup>967</sup> Mexico's response to Panel question No. 82, para. 218 (citing Appellate Body Report, *US – Softwood Lumber V*, para. 133).

countries"; (ii) possible steps to "minimize the impact of the measure on developing countries"; and (iii) "discussion on less onerous alternatives considered".<sup>968</sup>

7.741 Mexico references the Summary of Comments on the Interim Final Rule (AMS) contained in the 2009 Final Rule (AMS), arguing that USDA anticipated, but did not address, some of the potential effects to trade of feeder cattle from Mexico.<sup>969</sup> Mexico alleges that it had the opportunity to comment on the development of the 2009 Final Rule (AMS) "when the COOL provisions were already established and only needed to be implemented". At this stage of development of the COOL measure, there was no flexibility for changes in the regulation. Thus, Mexico's comments were merely received, but not "taken into account" by the United States in the preparation and application of the COOL measure.<sup>970</sup>

7.742 Mexico adds that developing countries have no obligation under Article 12.3 of the TBT Agreement to identify and convey to the developed country the specific nature and character of their special needs. Nonetheless, Mexico contends that it explained to the United States that the COOL measure was going to have a disproportionately negative impact on Mexican cattle.<sup>971</sup>

7.743 With regard to the second type of action allegedly required under Article 12.3 of the TBT Agreement, Mexico contends that, as explained in the context of Article 2.2 of the TBT Agreement, the COOL measure creates unnecessary obstacles to trade. Therefore, the United States also failed to comply with its obligation to ensure that the COOL measure does not create unnecessary obstacles to Mexico's exports as a developing country Member under Article 12.3.

7.744 Mexico submits a consequential claim of violation under Article 12.1 of the TBT Agreement in that it argues that the COOL measure's inconsistency with Article 12.3 of the TBT Agreement results also in its inconsistency with Article 12.1 of the TBT Agreement. According to Mexico, Article 12.3 must be interpreted and applied together with Article 12.1, since "Article 12.1 requires that the United States provide *differential and more favourable* treatment to Mexico through, *inter alia*, Article 12.3".<sup>972</sup>

7.745 In response to Mexico's arguments, the **United States** contends that the COOL statute and 2009 Final Rule are not inconsistent with Article 12.1 or 12.3 of the TBT Agreement.<sup>973</sup>

7.746 According to the United States, there is one single obligation under Article 12.3 of the TBT Agreement, and Mexico must demonstrate the following to establish a violation of that Article: (i) "that [Mexico] is a developing country"; (ii) "that the [United States] did not take account of its special development, financial or trade needs during the preparation and application of [the COOL measure]"; and (iii) "that the [United States] did not take account of these needs *with a view* to ensuring that the technical regulation does not create unnecessary obstacles to export".<sup>974</sup>

7.747 The United States submits that Mexico failed to prove any of these three elements. Not only did Mexico not demonstrate that it is a developing country, but it also did not show evidence that it communicated its special needs to the United States or that the United States did not "take account of" these needs in the preparation and application of the COOL Statute and 2009 Final Rule. Hence, and

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<sup>968</sup> Mexico's response to Panel question No. 82.

<sup>969</sup> Mexico's first written submission, para. 368 (citing Exhibit MEX-7).

<sup>970</sup> Mexico's second written submission, paras. 181-182.

<sup>971</sup> Mexico's response to Panel question No. 154.

<sup>972</sup> Mexico's first written submission, paras. 372-373 (original emphasis) and Mexico's response to Panel question No. 82, paras. 216-218.

<sup>973</sup> United States' first written submission, para. 271.

<sup>974</sup> United States' first written submission, para. 274.

given that Mexico bears the burden of proof, Mexico did not establish a prima facie case of violation under Article 12.3 of the TBT Agreement.<sup>975</sup>

7.748 Even if Mexico had shown sufficient evidence for the above, the United States argues that, in fact, Mexico had many opportunities to comment on the development of the COOL measure. The United States responded to Mexico's comments, and changed the 2002 Farm Bill and implementing regulations in accordance with suggestions provided by Mexico to minimize the impact of the COOL measures on trade and facilitate compliance with record-keeping and audit verification requirements.<sup>976</sup> The United States argues that the term "take account of" in Article 12.3 of the TBT Agreement does not require a Member to "accept every recommendation presented by the developing country Member", and notes that "a developed country [Member] developing a regulation is expected to balance developing country considerations against the views of other interested parties, such as consumers and retailers".<sup>977</sup>

7.749 With regard to the alleged third element of Article 12.3, the United States contends that the term "with a view to ensuring" does not contain a substantive obligation prohibiting the creation of unnecessary obstacles to trade. The Member in question is required merely to attempt not to create unnecessary obstacles to developing country exports when preparing and applying a technical regulation. Thus, there is no obligation under Article 12.3 of the TBT Agreement contemplating the actual effects of the COOL measure on developing countries' exports.

7.750 On the relationship between Articles 12.3 and 2.2 of the TBT Agreement, the United States explains that Article 2.2 provides for a broader obligation as it also uses the term "with the effect of" creating unnecessary obstacles to trade. According to the United States, "a measure that is in compliance with TBT Article 2.2 would also be in compliance with TBT Article 12.3"; however, "a Member may violate TBT Article 2.2 without breaching TBT Article 12.3".<sup>978</sup>

7.751 As a result of Mexico's failure to demonstrate that the COOL measures are inconsistent with Article 12.3 of the TBT Agreement, the United States concludes that the Panel should also reject Mexico's consequential claim of inconsistency with Article 12.1 of the TBT Agreement.<sup>979</sup>

(b) Analysis by the Panel

7.752 In light of the parties' arguments, we turn first to Mexico's claim under Article 12.3 of the TBT Agreement. Article 12.3 reads:

"Members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, take account of the special development, financial and trade needs of developing country Members, with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members."

7.753 Before analysing the substance of Mexico's claim, we assess three points of disagreement concerning the legal test under Article 12.3 of the TBT Agreement, namely:

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<sup>975</sup> United States' first written submission, para. 275 and United States' response to Panel question No. 82.

<sup>976</sup> United States' first written submission, para. 275.

<sup>977</sup> United States second written submission, para. 185 (citing Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1621).

<sup>978</sup> United States' response to Panel question No. 83.

<sup>979</sup> United States' first written submission, para. 277.

- (a) whether Article 12.3 involves one or two legal obligations;
- (b) the distribution of the burden of proof under Article 12.3; and
- (c) the meaning of the term "take account of".

(i) *Whether Article 12.3 of the TBT Agreement involves one or two legal obligations*

7.754 The first question regarding the legal test under Article 12.3 of the TBT Agreement is whether, as Mexico argues, this provision involves two legal obligations, or only one, as the United States contends. As an interpretive issue, the question boils down to the function of the following clause at the end of Article 12.3: "with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members".

7.755 The dictionary defines the term "with a view to" as "with the aim or object of attaining, effecting, or accomplishing something".<sup>980</sup> Therefore, in the context of Article 12.3, the term "with a view to" introduces an objective.

7.756 The first part of Article 12.3 prescribes that "Members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, take account of the special development, financial and trade needs of developing country Members". This language uses the word "shall" and lays down an obligation addressed to all Members.

7.757 We read this first part of Article 12.3 as the operative part of that provision.

7.758 This reading of Article 12.3 is confirmed by *EC – Approval and Marketing of Biotech Products*, where the panel found that the various paragraphs of Article 12 contain a number of separate obligations (as opposed to a single obligation), and described the "obligation" under Article 12.3 as follows:

"Article 12.3 requires that in preparing and applying technical regulations, standards and conformity assessment procedures, Members take account of the special needs of developing country Members."<sup>981</sup>

7.759 Further, according to the same panel, "Article 12.3 is a specific application of the obligation in Article 12.2 to take account of developing country needs in the implementation of the TBT Agreement at the national level".<sup>982</sup>

7.760 Indeed, the final clause of Article 12.3 starting with "with a view to" is a specific formulation in favour of developing countries of the more general principle expressed in the preamble to the TBT Agreement as follows:

"*Desiring* ... to ensure that technical regulations and standards, including packaging, marking and labelling requirements, and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade."

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<sup>980</sup> Mexico's response to Panel question No. 82 (citing Exhibit MEX-82).

<sup>981</sup> Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.47, subpara. 75.

<sup>982</sup> Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.47, subpara. 77.



7.761 This principle is also reflected in other provisions of the TBT Agreement.<sup>983</sup>

7.762 In light of the above, we conclude that Article 12.3 of the TBT Agreement lays down only one of the two legal obligations argued by Mexico, namely the one spelt out in the operative part of that provision: "Members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, take account of the special development, financial and trade needs of developing country Members". The second half of the sentence lays down the objective of this obligation, namely to "ensur[e] that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members".

7.763 In finding that Article 12.3 of the TBT Agreement lays down only one legal obligation that is limited to the operative part of that sentence, we are not suggesting that the final clause of the sentence starting with "with a view to" should be read out of Article 12.3 or rendered ineffective.

7.764 An assessment of a claim under Article 12.3 entails a review of whether the respondent's relevant action or inaction with regard to the operative part of Article 12.3 fulfils, or is carried out with, the objective of ensuring that technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members.

7.765 This assessment, however, necessarily follows the review of whether the respondent has complied with the operative part of Article 12.3.

7.766 Accordingly, we turn to whether the United States has complied with the operative part of Article 12.3 of the TBT Agreement. We start this assessment by reviewing two major issues of disagreement in regard to this operative part, namely: (i) the distribution of the burden of proof; and (ii) the meaning of the term "take account of".

(ii) *Burden of proof under Article 12.3 of the TBT Agreement*

7.767 Mexico's claims under Articles 12.1 and 12.3 of the TBT Agreement raise the question as to which party has the burden to prove inconsistency with these provisions, in particular with Article 12.3.

7.768 The United States suggests that the burden of proof in this regard rests with Mexico as the complainant. In contrast, in its third-party written submission, Colombia argues that the burden is entirely on the United States to prove that it has complied with these provisions.<sup>984</sup> Mexico does not explicitly argue that the burden is on the United States; nevertheless, it specifies the kind of evidence the United States should be submitting in order to show that it has complied with Article 12.3.<sup>985</sup>

7.769 Articles 12.1 and 12.3 of the TBT Agreement are phrased like other classical obligations in the covered agreements. This suggests that, in principle, the established normal approach to burden of proof applies in regard to these provisions, too. In *EC – Sardines*, the Appellate Body referenced this established approach in the context of the TBT Agreement:

"We recall that, in *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, we said the following about the burden of proof:

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<sup>983</sup> See, for instance, Articles 2.2, 2.4, and 5.1.2 of the TBT Agreement.

<sup>984</sup> Colombia's third party written submission, paras. 64-65.

<sup>985</sup> See Mexico's response to Panel question No. 82 and Mexico's second written submission, para. 183.

... the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.

In the context of the GATT 1994 and the WTO Agreement, precisely how much and precisely what kind of evidence will be required to establish such a presumption will necessarily vary from measure to measure, provision to provision, and case to case. (footnote omitted)"<sup>986</sup>

7.770 Article 12 addresses the "Special and Differential Treatment of Developing Country Members", and its beneficiaries are limited to a subcategory of WTO Members. However, neither this in itself nor the level of development of the WTO Members in the subcategory should turn around the established normal distribution of burden of proof.

7.771 Articles 12.3 and 12.1 are not termed as exceptions from other obligations in the TBT Agreement. These Articles contain obligations additional to the rest of the Articles in the TBT Agreement. And even if Articles 12.3 and 12.1 of the TBT Agreement could be described as exceptions from other obligations, this in itself would not be sufficient to shift the initial burden of proof to the respondent. As the Appellate Body explained in the context of the SPS Agreement, and later confirmed in the context of the TBT Agreement:<sup>987</sup>

"The general rule in a dispute settlement proceeding requiring a complaining party to establish a *prima facie* case of inconsistency with a provision of the *SPS Agreement* before the burden of showing consistency with that provision is taken on by the defending party, is *not* avoided by simply describing that same provision as an 'exception'."<sup>988</sup>

7.772 The panel in *EC – Approval and Marketing of Biotech Products* also held that in the context of Article 10.1 of the SPS Agreement, which the panel described as the "equivalent provision" to Article 12.3 of the TBT Agreement<sup>989</sup>, the burden was clearly on the complaining party to prove that its development needs had not been taken into account:

"Argentina argues that the European Communities has not provided any evidence which would prove that it has taken into account Argentina's special needs as a developing country Member. This argument lacks merit, for it is incumbent on Argentina as the Complaining Party to adduce evidence and argument sufficient to raise a presumption that the European Communities has failed to take into account Argentina's special needs as a developing country Member."<sup>990</sup>

7.773 Accordingly, we see no reason to depart from the established normal distribution of burden of proof in assessing Mexico's Article 12.1 and 12.3 claims. It is not the respondent, the United States,

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<sup>986</sup> Appellate Body Report, *EC – Sardines*, para. 270 (footnote omitted). See also, Panel Report, *EC – Sardines*, paras. 7.48-7.50.

<sup>987</sup> Appellate Body Report, *EC – Sardines*, para. 271.

<sup>988</sup> Appellate Body Report, *EC – Hormones*, para. 104.

<sup>989</sup> Panel Report, *EC – Approval and Marketing of Biotech Products*, footnote 1330.

<sup>990</sup> Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1622.

that needs to establish that it has "take[n] account of [Mexico's] special development, financial and trade needs" "in the preparation and application of [the COOL measure]". In saying this, however, we are not calling into question that Article 12 imposes substantive obligations on the United States as a Member, and as a respondent in the current dispute.

7.774 In line with the established normal distribution of the burden of proof, it is Mexico, the complainant bringing a claim under Article 12.3, that bears the initial burden to make a prima facie case that the United States did not "take account of [Mexico's] special development, financial and trade needs" "in the preparation and application of [the COOL measure]". Once Mexico has succeeded in making a prima facie case, the burden is on the United States, the respondent, to refute this.

(iii) *Meaning of the term "take account of"*

7.775 As regards the meaning of "take account of", the first question is whether, in general, this term involves a requirement for a Member to merely consider specific needs, views or positions, or also to act upon, and in accordance with, them.

7.776 The dictionary defines "to take account of", as well as the similar term "to take into account" as: "to take into consideration as an existing element, to notice".<sup>991</sup> This suggests that "to take account of" and "to take into account" mean to consider, but not necessarily to act in line with the specific need, view or position under consideration.

7.777 This is confirmed by the meaning the panel in *US – Continued Suspension* gave to the term "take into account" in Article 5.2 of the SPS Agreement:

"As noted above in the context of risk assessment techniques, *taking available scientific evidence into account does not require that a Member conform its actions to a particular conclusion in a particular scientific study*. The available scientific information may contain a multiplicity of views and data on a particular topic. It is the view of the Panel that the requirement in Article 5.2 is to ensure that a Member, when assessing risk with the aim of formulating an appropriate SPS measure, has as wide a range as possible of scientific information before it to ensure that its measure will be based on sufficient scientific data and supported by scientific principles."<sup>992</sup> (emphasis added)

7.778 In *EC – Approval and Marketing of Biotech Products*, Argentina also made a claim under Article 10.1 of the SPS Agreement, which the panel described as the "equivalent provision" to Article 12.3 of the TBT Agreement.<sup>993</sup> Like Article 12.3 of the TBT Agreement, the key obligation under Article 10.1 of the SPS Agreement is "to take account of" the special needs of developing countries:

"In the preparation and application of sanitary or phytosanitary measures, Members *shall take account of* the special needs of developing country Members, and in particular of the least-developed country Members." (emphasis added)

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<sup>991</sup> See United States' second written submission, para. 178 and Exhibit US-140.

<sup>992</sup> Panel Report, *US – Continued Suspension*, para. 7.480.

<sup>993</sup> Panel Report, *EC – Approval and Marketing of Biotech Products*, footnote 1330.

7.779 The panel in *EC – Approval and Marketing of Biotech Products* emphasized that the obligation in Article 10.1 of the SPS Agreement is to "take account of" the needs of developing countries, and interpreted this term in a restrictive manner:

"Argentina's argument implies that when an importing Member applies a measure which (i) treats exports originating in the territory of developing country Members in the same way as exports originating in the territory of developed country Members and (ii) has a significant adverse effect on the developing countries' exports, the importing Member is acting inconsistently with its obligation under Article 10.1. Argentina suggests that in such situations the exports of developing country Members are entitled under Article 10.1 to special and differential treatment *vis-à-vis* the exports of developed country Members. However, the obligation laid down in Article 10.1 is for the importing Member to 'take account' of developing country Members' needs. *The dictionary defines the expression 'take account of' as 'consider along with other factors before reaching a decision'*.<sup>994</sup> Consistent with this, *Article 10.1 does not prescribe a specific result to be achieved. Notably, Article 10.1 does not provide that the importing Member must invariably accord special and differential treatment in a case where a measure has lead [sic], or may lead, to a decrease, or a slower increase, in developing country exports.*"<sup>995</sup> (emphasis added)

7.780 The same panel added that the needs of developing countries may be balanced against other interests:

"While the European Communities must take account of the interests of developing country Members in applying its approval legislation, the European Communities may at the same time take account of other legitimate interests, including those of its own consumers, its environment, etc. *There is nothing in Article 10.1 to suggest that in weighing and balancing the various interests at stake, the European Communities must necessarily give priority to the needs of Argentina as a developing country.*"<sup>996</sup> (emphasis added)

7.781 Based on the approach to Article 10.1 of the SPS Agreement by the panel in *EC – Approval and Marketing of Biotech Products* and the interpretation of the term "take into account" by the panel in *US – Continued Suspension*, we find that Article 12.3 of the TBT Agreement does not amount to a requirement for WTO Members to conform their actions to the special needs of developing countries but merely to give consideration to such needs along with other factors before reaching a decision.

7.782 We reach this conclusion in part based on the panel report in *EC – Approval and Marketing of Biotech Products*. Mexico points out the textual difference between Article 10.1 of the SPS Agreement and Article 12.3 of the TBT Agreement, in particular the absence from the former of the clause starting with "with a view to". According to Mexico, this makes the findings of the panel in *EC – Approval and Marketing of Biotech Products* irrelevant in the context of Mexico's claim under Article 12.3 of the TBT Agreement in the current dispute.<sup>997</sup>

7.783 However, as we explained above, the final clause of Article 12.3 of the TBT Agreement starting with the term "with a view to" is outside the operational part of that provision, and merely

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<sup>994</sup> (footnote original) *The Concise Oxford Dictionary*, 10th edn., J. Pearsall (ed.) (Clarendon Press, 1999), p. 8.

<sup>995</sup> Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1620.

<sup>996</sup> Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1621.

<sup>997</sup> See Mexico's response to Panel question Nos. 82 and 152.

specifies the objective to be achieved by the obligation contained in the operational part. Accordingly, we reach our conclusion with regard to the specific meaning of the term "take account of" in Article 12.3 of the TBT Agreement independently of the separate, final clause of that provision. Even considering that final clause together with the operational part does not make a difference, in that it does not change the nature or scope of the action required under Article 12.3 but merely specifies its objective.

7.784 Accordingly, we consider that the findings of the panel in *EC – Approval and Marketing of Biotech Products*, on the meaning of "take account of the special needs of developing country Members" in Article 10.1 of the SPS Agreement, are relevant for interpreting the meaning of the clause "take account of the special development, financial and trade needs of developing country Members", in particular the term "take account of".

7.785 As regards the practical meaning of the term "take account of", Mexico also references other WTO disputes interpreting the terms "account shall be taken of" and "consider".<sup>998</sup> In particular, Mexico quotes *US – Softwood Lumber V*, where the Appellate Body held that, in the context of Article 2.2.1.1 of the Anti-dumping Agreement, "the requirement to 'consider' evidence would not be satisfied by simply 'receiving evidence' or merely 'tak[ing] notice of evidence'".<sup>999</sup> Mexico also quotes *US – Softwood Lumber VI*, where the panel held that the term "consider" in Article 15.7 of the SCM Agreement entails that "consideration must go beyond a mere recitation of the facts in question, and put them in context".<sup>1000</sup> Further, Mexico quotes the following passage from the panel report on *EC and certain member States – Large Civil Aircraft* on the meaning of the phrase "account shall be taken of" in Article 2.1(c) of the SCM Agreement:

"To take something into account means to take something into reckoning or consideration; to take something on notice.<sup>1001</sup> Therefore, in the context of the third specificity factor, the last sentence of Article 2.1(c) requires that the length of time during which the relevant subsidy programme has been in operation must form part of the *consideration or reckoning* of whether the amount of a subsidy granted to certain enterprises pursuant to that same subsidy programme is disproportionately large."<sup>1002</sup>

7.786 We agree with these interpretations of the terms "consider" and "take account of". They show that the Member bound by these terms needs to accord active and meaningful consideration to certain factors. Thus, in the context of Article 12.3 of the TBT Agreement, the term "take account of" entails that Members are obliged to accord active and meaningful consideration to the special development, financial and trade needs of developing country Members.

7.787 As to what such active and meaningful consideration means in practical terms, we do not read Article 12.3 of the TBT Agreement as prescribing any specific way. In particular, while not excluding it, Article 12.3 does not specifically require WTO Members to actively reach out to developing countries and collect their views on their special needs. Further, we do not interpret the term "take account of" in Article 12.3 of the TBT Agreement as an explicit requirement for Members to document specifically in their legislative process and rule-making process how they actively considered the special development, financial and trade needs of developing country Members.

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<sup>998</sup> See Mexico's response to Panel question No. 152.

<sup>999</sup> Mexico's response to Panel question No. 82 (citing Appellate Body Report, *US – Softwood Lumber V*, para. 133). See also Mexico's response to Panel question No. 152.

<sup>1000</sup> Mexico's response to Panel question No. 82 (citing Panel Report, *US – Softwood Lumber VI*, para. 7.67). See also Mexico's response to Panel question No. 152.

<sup>1001</sup> (*footnote original*) The New Shorter Oxford Dictionary, Fourth Edition, p. 15.

<sup>1002</sup> Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.969.

Indeed, the panel in *EC – Approval and Marketing of Biotech Products* held that "it is not sufficient, for the purposes of establishing a claim under Article 10.1 [of the SPS Agreement], to point to the absence in the EC approval legislation of a reference to the needs of developing country Members".<sup>1003</sup>

7.788 Indeed, there are a variety of ways in which Members may take account of the special development, financial and trade needs of developing country Members. As explained above, this requires Members to accord active and meaningful consideration to such needs, entailing a positive obligation for the WTO Membership. We now turn to whether the United States has fulfilled its obligation in regard to the COOL measure.

(iv) *Assessment of Mexico's claim under Article 12.3*

7.789 Mexico argues that the United States breached Article 12.3 of the TBT AGREEMENT by not having given Mexico an opportunity to comment on the preparation of the COOL measure, in particular the 2002 Farm Bill.

7.790 As explained above, however, we do not consider that the United States had an explicit obligation, enforceable in WTO dispute settlement, to reach out and collect Mexico's views during the preparation and application of the COOL measure. The United States is merely required under Article 12.3 to "take account of [Mexico's] special development, financial and trade needs" "in the preparation and application of [the COOL measure]". This means giving active and meaningful consideration to such needs.

7.791 Mexico has not demonstrated that the United States failed to do this. Mexico argues that the United States ignored Mexico's comments and the impact that it knew the COOL measure would have on Mexican exports.<sup>1004</sup> However, Mexico does not prove this. In particular, we have no evidence from Mexico demonstrating that the United States has failed to "take account of [Mexico's] special development, financial and trade needs" "in the preparation and application of [the COOL measure]" in the above sense.

7.792 In fact, Mexico does not contest the United States' arguments and evidence showing that the United States actively reached out to discuss the development of the COOL measure with Mexico at the following occasions:

- (a) at least four opportunities for interested parties to provide formal comments on the COOL regulations<sup>1005</sup>;
- (b) a USDA briefing on 27 August 2008 on the Interim Final Rule (AMS) for embassy officials<sup>1006</sup>;
- (c) a meeting on 11 September 2008 between AMS Administrator Lloyd Day and officials from the Mexican Embassy to discuss COOL rule-making<sup>1007</sup>;

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<sup>1003</sup> Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.1623.

<sup>1004</sup> See Mexico's opening oral statement at the first substantive meeting, para. 48, opening oral statement at the second substantive meeting, para. 62 and closing oral statement at the second substantive meeting, para. 39.

<sup>1005</sup> See United States' first written submission, para. 60, United States' second written submission, para. 183 and Exhibits CDA-13, MEX-13, MEX-14, MEX-15, MEX-16, MEX-17, MEX-18, MEX-19 and MEX-20.

<sup>1006</sup> See United States' first written submission, para. 274 and United States' second written submission, para. 183.

- (d) meetings of the United States – Mexico Consultative Committee on Agriculture, chaired by USDA and USTR officials, in October 2002, April 2003, May 2004, May 2007 and January 2008 to discuss COOL rule-making.<sup>1008</sup>

7.793 Nor does Mexico contest the United States' arguments and evidence demonstrating that, in the context of the above consultations, Mexico submitted comments on key elements of the COOL measure on 23 February 2004 and 15 August 2008<sup>1009</sup>, and that high-level USDA officials indicated that Mexico's input will be taken into account. In particular, we have evidence before us that, in September 2003, the USDA Undersecretary sent a letter to the Secretary of Agriculture of Mexico stating that "[w]e will fully consider your comments ... as we develop the final rule".<sup>1010</sup> Similarly, in October 2008, the USDA Secretary sent a letter to the Secretary of the Mexican Association of Secretaries of Rural Development requesting additional input on the rule-making as part of the Canada-Mexico Working Group by "encourag[ing] the Canada-Mexico Working Group to submit comments on this COOL regulation so that we can implement the program in a way that incorporates your input".<sup>1011</sup>

7.794 Further, Mexico does not dispute that the United States introduced certain modifications to elements of the COOL measure in response to concerns expressed by Mexico, namely by softening the record-keeping requirements and by introducing the commingling flexibility in part in response to Mexico's comments.<sup>1012</sup>

7.795 We also note that the United States made a public invitation to comment on the 2002 Guidelines for the Interim Voluntary Country of Origin Labeling of Beef, Lamb, Pork, Fish, Perishable Agricultural Commodities, and Peanuts (AMS). The 2003 Proposed Rule (AMS) of October 2003 records this commenting process, and references *inter alia* "[t]estimony [by at least one commenter] that this law may violate United States trade obligations under the World Trade Organization".<sup>1013</sup> Further, as regards the Interim Final Rule (AMS) of August 2008<sup>1014</sup>, the comments section of the 2009 Final Rule (AMS)<sup>1015</sup> explicitly references the United States' "trading partners" and responds to at least one concern expressed by them.<sup>1016</sup>

7.796 Mexico argues that the United States failed to "take account of [Mexico's] special development, financial and trade needs" in particular in regard to the 2002 Farm Bill since the United States did not consult Mexico when developing that bill.<sup>1017</sup> As we explained, however, under Article 12.3 of the TBT Agreement, the United States did not have an explicit obligation to initiate such consultation.

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<sup>1007</sup> See United States' first written submission, para. 274 and United States' second written submission, para. 183.

<sup>1008</sup> See United States' second written submission, para. 183.

<sup>1009</sup> See United States' second written submission, para. 184 and Exhibits US-19 and 127.

<sup>1010</sup> Exhibit US-141. See also United States' second written submission, para. 183.

<sup>1011</sup> Exhibit US-142. See also United States' second written submission, para. 183.

<sup>1012</sup> See United States' response to Panel question No. 84, United States' second written submission, para. 184 and Exhibits US-19 and 127.

<sup>1013</sup> 68 FR 61945. See also United States' opening oral statement at the first substantive meeting, para. 55.

<sup>1014</sup> See Exhibit CDA-4.

<sup>1015</sup> 74 FR 2678 and 2679.

<sup>1016</sup> 74 FR 2678. See also Mexico's first written submission, para. 368 (citing 74 FR 2669).

<sup>1017</sup> Mexico's second written submission, paras. 180-182, opening oral statement at the second substantive meeting, para. 61, closing oral statement at the second substantive meeting, para. 40 and Mexico's response to Panel question Nos. 153-155.

7.797 Although the COOL measure was introduced in its initial form by the 2002 Farm Bill, it took effect as a fully developed and enforceable legal requirement for the products at issue in this dispute only on 30 September 2008. Mexico does not contest that it was consulted by the United States well before this later date.<sup>1018</sup> Mexico even recognizes that it expressed its views both to USDA and the US Congress: "[d]uring the preparation process of the COOL measure, both the United States Congress and the USDA were made aware that the COOL measure would harm imports of Mexican feeder cattle".<sup>1019</sup> The 2008 Farm Bill significantly amended the 2002 Farm Bill. Therefore, any opportunity to comment on the 2008 Farm Bill effectively involved an opportunity to express views on the 2002 Farm Bill as it was being developed by the United States towards what finally became what we address as the statutory part of the COOL measure in this dispute. In fact, the 2002 Farm Bill introduced specific rules only with regard to beef and pork exclusively born, raised and slaughtered in the United States.<sup>1020</sup> The specific provisions on what became Labels B, C and D and the ground meat label under the final version of the COOL measure, were introduced only by the 2008 Farm Bill, following consultations with Mexico on various occasions.<sup>1021</sup>

7.798 It is the finalized version of the COOL measure that Mexico calls into question in its claims in the current dispute, including in its claim under Article 12.3 of the TBT Agreement. In fact, Mexico argues that we should treat the various instruments challenged in this dispute as a single measure. We have chosen to do that for the most part. Accordingly, it is inappropriate for Mexico to single out one of the earliest instruments comprised in the COOL measure, and it would be inadequate also for us to review whether the United States violated Article 12.3 of the TBT Agreement with regard to that single instrument.

7.799 In light of the above considerations and the various documents showing how the United States considered Mexico's special development, financial and trade needs in an active and meaningful way, we conclude that Mexico has not demonstrated that the United States failed to "take account of [Mexico's] special development, financial and trade needs" "in the preparation and application of [the COOL measure]".

7.800 In light of this finding, we refrain from addressing other aspects of Mexico's Article 12.3 claim, and turn to Mexico's claim under Article 12.1 of the TBT Agreement.

(v) *Assessment of Mexico's claim under Article 12.1*

7.801 Article 12.1 of the TBT Agreement stipulates that:

"Members shall provide differential and more favourable treatment to developing country Members to this Agreement, through the following provisions as well as through the relevant provisions of other Articles of this Agreement."

7.802 As explained above, Mexico claims that the United States violated this provision by having breached Article 12.3 of the TBT Agreement.

7.803 Given that Mexico has failed to establish the violation of Article 12.3 of the TBT Agreement, we need not pursue Mexico's claim under Article 12.1 of the TBT Agreement; we conclude that Mexico has also failed to demonstrate the violation of Article 12.1.

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<sup>1018</sup> United States' second written submission, para. 183.

<sup>1019</sup> Mexico's first written submission, para. 367. See also Mexico's response to Panel question No. 82.

<sup>1020</sup> See 7 U.S.C. § 1638a(a)(2).

<sup>1021</sup> See 7 U.S.C. § 1638a(a)(2).



(c) Conclusion on Mexico's claim under Articles 12.1 and 12.3

7.804 Accordingly, we find that Mexico has not established that the United States acted inconsistently with Article 12.3 of the TBT Agreement.

E. CLAIMS UNDER THE GATT 1994

### 1. The complainants' claims under the GATT 1994

7.805 The complainants advance claims against the measures at issue under Articles III:4 and X:3(a) of the GATT 1994.

7.806 We note that there is a distinction between Articles III:4 and X:3(a) in respect of the type of measures subject to the obligations under the respective provisions. The obligation under Article X:3(a) applies to the administration of the laws, regulations, decisions and rulings of the kind falling within the scope of Article X:1, but not to such laws and regulations themselves.<sup>1022</sup> The consistency of laws and regulations themselves should be examined under the relevant provisions of the GATT 1994, such as Article III:4, and not Article X:3(a).<sup>1023</sup>

7.807 The complainants' claims under Article III:4 concern both the COOL measure and the Vilsack letter.<sup>1024</sup> In accordance with our decision to examine the COOL measure separately from the Vilsack letter, however, we examined the COOL measure under Article 2.1 of the TBT Agreement. As we found that the Vilsack letter was not a technical regulation, we did not proceed to examine the letter under Article 2.1. The COOL measure was then found inconsistent with the national treatment obligation under Article 2.1.<sup>1025</sup> Given the close connection between Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994 with respect to the nature of the obligations<sup>1026</sup> and in light of our finding under Article 2.1 of the TBT Agreement, we consider it unnecessary to examine the complainants' claims in respect of the COOL measure under Article III:4 of the GATT 1994.<sup>1027</sup>

7.808 As regards the Vilsack letter, Canada challenges it under Article X:3(a). Mexico also brought a claim under Article X:3(a) against the alleged shifts in the interpretation of the COOL measure as reflected in the USDA's guidelines, non-public pressure by the US government on individual

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<sup>1022</sup> Appellate Body Reports, *EC – Bananas III*, para. 200; *EC – Poultry*, para. 115. In this regard, the Appellate Body held in *EC – Bananas III* that "[t]he text of Article X:3(a) clearly indicates that the requirements of "uniformity, impartiality and reasonableness" do not apply to the laws, regulations, decisions and rulings *themselves*, but rather to the *administration* of those laws, regulations, decisions and rulings." (para. 200). The Appellate Body reiterated this view in *EC – Poultry*, where it held that "Article X relates to the *publication* and *administration* of "laws, regulations, judicial decisions and administrative rulings of general application", rather than to the *substantive content* of such measures." (para.115).

<sup>1023</sup> Appellate Body Report, *EC – Bananas III*, para. 200.

<sup>1024</sup> Canada's first written submission, para. 219; Mexico's first written submission, para. 225. See paras. 3.1-3.3.

<sup>1025</sup> See paras. 7.420, 7.547-7.548.

<sup>1026</sup> See Section VII.D.2.

<sup>1027</sup> In addressing the principle of judicial economy, the Appellate Body clarified that panels need not examine all legal claims made by a complaining party. The Appellate Body stated that, in line with the aim of the WTO dispute settlement system as set out in Articles 3.4 and 3.7 of the DSU, panels may make findings only on those claims that such panels concluded were necessary to resolve the particular matter (Appellate Body Report, *US – Wool Shirts and Blouses*, pp. 17-20).

Considered against the standard applied for the panels' exercise of judicial economy, we consider that, in this dispute, given our finding under Article 2.1 of the TBT Agreement, we need not make findings on the national treatment obligation embodied in Article III:4 of the GATT 1994.

companies, and the Vilsack letter.<sup>1028</sup> Accordingly, in this section, we will examine the complainants' claims concerning the United States' act of administering the COOL measure under Article X:3(a). If the Vilsack letter is found not to fall within the scope of Article X:3(a), we will proceed to examine whether it falls within the scope of Article III:4.

## 2. Article X:3(a)

7.809 Canada and Mexico claim that the United States acted inconsistently with its obligations under Article X:3(a) with respect to its administration of the COOL measure. Canada's claim is confined to a "reasonable" administration of the COOL measure, whereas Mexico's claim concerns all requirements under Article X:3(a), namely a "reasonable", "uniform", and "impartial"<sup>1029</sup> administration of the COOL measure.

7.810 Article X:3(a) provides:

"Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article."

7.811 Article X:1 in turn reads:

"Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefore, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, ..."

7.812 To establish a violation of Article X:3(a), a complaining party must show that the responding Member *administers* the legal instruments of the kind described in Article X:1 in a manner that does not meet the standard of *uniformity, impartiality, or reasonableness* set out in Article X:3(a).<sup>1030</sup>

7.813 In the current dispute, for the complainants to prove their claim under Article X:3(a), they must establish the following elements: (i) the COOL measure falls within the scope of laws, regulations, decisions and rulings of the kind described in Article X:1; (ii) the United States "administered" the COOL measure; and (iii) the administration of the COOL measure by the United States was not uniform, impartial or reasonable.

(a) Laws, regulations, decisions and rulings of the kind described in Article X:1

7.814 The parties do not dispute that the COOL measure falls within the category of "laws, regulations, decisions and rulings of the kind described in paragraph 1" of Article X of the GATT 1994 and referenced in Article X:3(a).<sup>1031</sup>

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<sup>1028</sup> Canada's first written submission, para. 227; opening oral statement at the first substantive meeting, para. 2; second written submission, para. 108; opening oral statement at the second substantive meeting, paras. 73-75. Mexico's first written submission, para. 378; opening oral statement at the first substantive meeting, paras. 49-51; second written submission, paras. 185-189; opening oral statement at the second substantive meeting, paras. 65-68.

<sup>1029</sup> Mexico's second written submission, paras. 185 and 189. Mexico's claim on the partial administration by the United States of the COOL measure is presented for the first time in its second written submission.

<sup>1030</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.866.

7.815 We agree with the parties' view on this issue. For the purposes of this dispute, we use the term "COOL measure" to refer to the COOL statute and the 2009 Final Rule (AMS). These are formal legal instruments, which qualify as either "laws" or "regulations" within the meaning of Article X:1 of the GATT 1994.

7.816 We therefore proceed to the next element of Article X:3(a), namely whether the complainants properly identified an act of the United States that amounts to the "administration" of the COOL measure.

(b) "Administer" its laws and regulations

(i) *Main arguments of the parties*

7.817 **Canada** argues that the exact "US government act of administration" in the present case is the Vilsack letter, because it is a means of "putting into practical effect, or applying" the 2009 Final Rule (AMS) and the underlying statutory provisions, which corresponds to the definition of the term "administer".<sup>1032</sup> The Vilsack letter created uncertainty as to the precise requirements of the COOL measure, thereby administering the COOL measure in an unreasonable manner.<sup>1033</sup> According to Canada, the requirements in the Vilsack letter went beyond the requirement of the COOL legislation and the 2009 Final Rule (AMS):<sup>1034</sup> it encouraged industry to take action that was not required by the COOL legislation and the 2009 Final Rule (AMS).<sup>1035</sup> This was accompanied by a threat to US market participants who were following the letter of the COOL legislation and the 2009 Final Rule (AMS). The threat involved the imposition of even more onerous requirements if market participants did not go beyond the law's requirements by complying with the Vilsack letter's "suggestions for voluntary action".<sup>1036</sup>

7.818 **Mexico** argues that the act of administration lies in the different changes made to the COOL measure during the implementation of the regulations, as reflected in the associated guidelines issued by USDA<sup>1037</sup>, non-public pressure by the US government on individual companies<sup>1038</sup>, and the Vilsack letter.<sup>1039</sup> According to Mexico, acts taken by USDA regarding changes in the criteria of compliance are actions taken "for purposes of the administration" of the measure.<sup>1040</sup> Mexico submits that the inconsistent and unpredictable guidance from USDA was not part of the legislative or rulemaking process, but the action of an agency not reflected in statutes or regulations.<sup>1041</sup> Mexico contends that the continuing changes in USDA policy, first indicating that mixed origin labels were permissible, then discouraging them, contributed to the disruptions experienced by the Mexican

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<sup>1031</sup> Canada's first written submission, para. 226; Mexico's first written submission, para. 376. The United States does not contest that the COOL measure is qualified as "laws, regulations, decisions and rulings of the kind described in paragraph 1" of Article X of the GATT 1994.

<sup>1032</sup> Canada's response to Panel question No. 85. (italics in the original).

<sup>1033</sup> Canada's first written submission, paras. 228-231.

<sup>1034</sup> Canada's first written submission, para. 228.

<sup>1035</sup> Canada's first written submission, para. 229.

<sup>1036</sup> Canada's first written submission, para. 230.

<sup>1037</sup> Mexico's second written submission, para. 187, referring to Exhibit CDA-29.

<sup>1038</sup> Mexico's first written submission, paras. 258-259; second written submission, para. 188 (Exhibits MEX-33, MEX-55, 56 and 57).

<sup>1039</sup> Mexico's first written submission, para. 378; response to Panel question No. 85; second written submission, para. 185.

<sup>1040</sup> Mexico's opening oral statement at the second substantive meeting, paras. 67-68.

<sup>1041</sup> Mexico's response to Panel question No. 86.

industry.<sup>1042</sup> The COOL measure has not been administered in a uniform, impartial and reasonable manner, contrary to Article X:3(a) of the GATT 1994.<sup>1043</sup>

7.819 The **United States** argues that the complainants have failed to provide any evidence relating to the administration of the COOL measures at all.<sup>1044</sup> The United States submits that the complainants cannot base their claims on the Vilsack letter because the issuance of that letter does not fall within the scope of Article X:3(a).<sup>1045</sup> That provision applies to the manner in which WTO Members "administer" their laws, regulations, decisions and rulings referred to in Article X:1. The United States contests that the Vilsack letter would have "put into practical effect" or "applied" the COOL requirements.<sup>1046</sup> Instead of dealing with the administration of either the statute or the 2009 Final Rule, the Vilsack letter merely suggests that certain market participants can voluntarily take actions that would go beyond what the COOL statute or 2009 Final Rule (AMS) require.<sup>1047</sup> The statement in the letter that "it pertains to the implementation of the Mandatory Country of Origin Labelling (COOL) Final Rule" merely indicates that the letter addresses the implementation of the 2009 Final Rule.<sup>1048</sup>

7.820 The United States also calls into question Mexico's characterization of the term "administration" because that term does not extend to the steps and actions related to the making of an administrative decision. The actions leading to the 2009 Final Rule (AMS) do not "put into practical effect" or "apply" the COOL requirements, because they occurred before the enactment of the 2009 Final Rule (AMS).<sup>1049</sup>

(ii) *Analysis by the Panel*

Canada's argument

7.821 The term "administer" in Article X:3(a) refers to "putting into practical effect or applying" a legal instrument of the kind described in Article X:1.<sup>1050</sup> We also recall the panel's observation in *Argentina – Hides and Leather* regarding the proper scope of Article X:3(a) that the relevant question is "whether the substance of such a measure is *administrative in nature* or, instead, involves substantive issues more properly dealt with under other provisions of the GATT 1994".<sup>1051</sup>

7.822 Canada argues that the Vilsack letter is an act of administration because it is a means of "putting into practical effect or applying" the COOL measure.

<sup>1042</sup> Mexico's response to Panel question No. 85; Mexico's second written submission, para. 188.

<sup>1043</sup> Mexico's second written submission, para. 189.

<sup>1044</sup> United States' first written submission, para. 289.

<sup>1045</sup> United States' first written submission, para. 291.

<sup>1046</sup> United States' first written submission, paras. 291-292 (citing Appellate Body Report, *EC – Bananas III*, para. 200); and second written submission, paras. 187-189.

<sup>1047</sup> United States' first written submission, para. 292; opening oral statement at the first substantive meeting, para. 59; and second written submission, paras. 187-188.

<sup>1048</sup> United States' response to Panel question No. 87.

<sup>1049</sup> United States' second written submission, paras. 187-189.

<sup>1050</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 224. See also Canada's second written submission, para. 108, footnote 164. In *EC – Selected Customs Matters*, the Appellate Body clarified that "the term 'administer' may include administrative processes", which can be understood "as a series of steps, actions, or events that are taken or occur in relation to the making of an administrative decision" (Appellate Body Report, *EC – Selected Customs Matters*, para. 224).

<sup>1051</sup> Panel Report, *Argentina – Hides and Leather*, para. 11.70 (emphasis added).

7.823 We clarified above that the legal instrument being administered within the meaning of Article X:3(a) in this case is the COOL measure (i.e. the COOL statute and the 2009 Final Rule (AMS)). We must determine therefore whether Canada has demonstrated that the United States put into practical effect or applied the COOL measure by issuing the Vilsack letter.

7.824 As previously noted<sup>1052</sup>, the Vilsack letter starts with the statement that it pertains to the implementation of the 2009 Final Rule (AMS). The essence of the Vilsack letter is that Secretary Vilsack announced that the 2009 Final Rule (AMS) would enter into force as scheduled by the previous administration and, at the same time, suggested that, based on "concerns" with the requirements set out in the 2009 Final Rule (AMS), industry take more stringent voluntary actions.

7.825 Regarding the circumstances surrounding the issuance of the Vilsack letter, the United States explains that, in accordance with the White House directive issued by the new administration, Secretary Vilsack reviewed the Interim Final Rule (AMS), which is one of the regulations developed by the previous administration that had not yet taken effect.<sup>1053</sup> Having reviewed the 2009 Final Rule (AMS), Secretary Vilsack sent the letter to US industry indicating that the 2009 Final Rule (AMS) would take effect without modifications and including certain suggestions that companies could follow on a voluntary basis to provide even more information to consumers. Assuming that, as the United States submits, Secretary Vilsack intended to allow the regulations to go into effect as drafted by the previous administration, it is not clear why the letter included suggestions for more stringent voluntary action by the industry than is required under the 2009 Final Rule (AMS). According to the United States, Secretary Vilsack chose to issue the letter instead of amending the 2009 Final Rule (AMS), because he did not intend to change US law but to allow the regulations to go into effect as drafted by the previous administration.<sup>1054</sup>

7.826 The United States put forward that other US secretaries and high-ranking administration officials have also issued letters of this kind to industry or made similar announcements to interested parties. Such other communications as presented by the United States – a podcast by the Interior Secretary on the importance of protecting polar bears; a letter from the Food and Drug Administration on the potential danger of an unsafe amount of vitamin D for infants; and a letter from the Secretary of Health and Human Services to CEOs of insurance companies to justify premium hikes – do not suggest, in our view, any particular similarity in nature or in content to the Vilsack letter.<sup>1055</sup> They nonetheless show the authority and discretion granted to heads of US administrative agencies in general, and confirm the administrative authority of Secretary Vilsack.

7.827 The contents of the Vilsack letter and the circumstances surrounding its issuance, as explained by the United States, therefore indicate that the issuance by Secretary Vilsack of the letter to the US industry falls within the broad scope of administrative authority given to USDA regarding the application of the COOL measure, including any guidance on the specific requirements under the measure to be provided to the public.

7.828 In fact, as noted above, the letter was issued to confirm the implementation of the 2009 Final Rule (AMS) after having reviewed the issues of law and policy relating to the requirements, in accordance with the mandate given by the new president. The directive issued by the White House indicates the possibility of revisiting laws and policies of new and pending regulations, including the

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<sup>1052</sup> See para. 7.123.

<sup>1053</sup> United States' response to Panel question No. 4, referring to the directive from the White House (Exhibit US-62). The directive states that as way of managing the federal regulatory process at the beginning of his Administration, President Obama sought to review and approve any new or pending regulations.

<sup>1054</sup> United States' response to Panel question No. 4.

<sup>1055</sup> Exhibits US-63, 65.

2009 Final Rule (AMS). Therefore, in the case of the 2009 Final Rule (AMS), the Vilsack letter effectively confirmed the application of the 2009 Final Rule (AMS), which we consider falls within the scope of the administration of the COOL measure.

7.829 In coming to this conclusion, we are well aware that the issuance of the concerned letter is distinguishable from situations where USDA "applies" the specific requirements under the COOL measure in particular instances. Despite the absence of any specific instance of application, the context in which the letter was issued by Secretary Vilsack to industry in general shows a sufficient basis for the letter to constitute an act of administering the COOL measure.

7.830 We therefore conclude that the issuance of the Vilsack letter falls within the scope of the term "administer" under Article X:3(a).

Mexico's argument

7.831 Unlike Canada, Mexico does not focus only on the Vilsack letter to identify acts of administration of the COOL measure. It is our understanding of Mexico's argument that the guidance from USDA on the labelling requirements under the COOL measure, which allegedly changed throughout the rule-making process, is an act taken for the purposes of administering the COOL measure. According to Mexico, the concerned guidance from USDA is reflected in the associated guidelines issued by USDA, the "non-public pressure by the US government on individual companies"<sup>1056</sup>, and the Vilsack letter.

7.832 The following table summarizes the evidence referenced by Mexico to demonstrate the guidance by USDA, and how this evidence relates to the regulatory rule-making process (highlighted in grey in the table) concerning the implementation of the COOL statute.

<b>Categorization by Mexico</b>	<b>Exhibit</b>	<b>Date</b>	<b>Content</b>
<b>Interim Final Rule (AMS) issued (01/08/2008)</b>			
<b>USDA guidelines</b>	USDA guidelines (FAQ) (CDA-29) <sup>1057</sup>	11/09/2008	USDA advised that Label B can be used for Label A meat

<sup>1056</sup> We note that the so-called "non-public pressure" is Mexico's own characterization of certain evidence as described in the table in paragraph 7.832.

<sup>1057</sup> In its second written submission, Mexico refers to the concerned exhibit submitted by Canada (Mexico's second written submission, para. 187).

<b>Interim Final Rule (AMS) entered into force 30/09/2008</b>			
<b>USDA guidelines</b>	Farm and Dairy website (MEX-83)	30/09/2008	Article referring to the USDA guidelines of 11 September 2008
<b>Non-public pressure</b>	"Tyson Cool With Federal Labeling Law" (MEX-55)	16/10/2008	Article referring to the USDA's intention of closing a "loophole" that allowed meat processors to use Label B for most of their products.
<b>Non-public pressure</b>	"The Pig Site" (MEX-56)	16/10/2008	"Reuters reports that the leading U.S. beef and No. 2 pork producer had initially planned on categorizing its beef and pork cuts with Label B, but abandoned that plan after receiving feedback from government officials and some industry groups".
<b>Non-public pressure</b>	JBS letter (MEX-57)	23/10/2008	JBS letter to customers explaining that their initial intention was to label the majority of their product under the category B label, but that due to the evolving interpretation of the COOL measure they would opt for producing the majority of meat under the category A label.
<b>2009 Final Rule (AMS) issued (15/01/2009)</b>			
<b>Vilsack letter sent to industry (20/02/2009)</b>			
<b>2009 Final Rule (AMS) entered into force (16/03/2009)</b>			
<b>Non-public pressure</b>	Tyson brochure to costumers (MEX-33)	April 2009	Tyson letter to customers explaining that although their initial compliance approach was using Label B for most of their products, input from government officials led them to shift to Label A for the majority of products.

7.833 We consider that the act of providing guidance on the meaning of specific requirements of a measure amounts to an act of administering such measure within the meaning of Article X:3(a). It is within the right of government agencies to provide businesses and the public with the guidance on the meaning of the specific requirements under the relevant regulations. In our view, USDA "put into practical effect" the COOL measure by providing guidance on the labelling requirements. As the authority implementing the COOL measure, USDA advised the subjects of the COOL requirements on how to comply with the specific labelling requirements.

7.834 We proceed to examine whether Mexico has established that USDA provided such guidance with respect to the COOL measure. Specifically, Mexico submitted three categories of evidence, namely the USDA guidelines, the non-public pressure, and the Vilsack letter, arguing that these show the act of USDA providing guidance to the industry.

7.835 First, regarding the USDA guidelines, Mexico refers to a list of "frequently asked questions" published by USDA on 11 September 2008 and the Farm and Dairy website in which the same guidelines were referenced.<sup>1058</sup> Specifically, Mexico argues that the administrative guidance at issue is the following:

**"Q.** Can a retailer, like a meat packer, declare the origin of meat products derived from livestock born, raised, and slaughtered in the United States (i.e. Product of

<sup>1058</sup> Exhibits CDA-29, MEX-83. Canada presents further evidence on other USDA guidelines. See Exhibits CDA-7, 30 and 31.

USA) as a mixed origin label such as Product of the United States, Canada, and Mexico?

A. Yes. Retailers are permitted to market U.S. produced meat products under a mixed origin label declaration."<sup>1059</sup>

7.836 As regards the second category of guidance by USDA, described by Mexico as the so-called "non-public pressure" from the US government, Mexico refers to two articles and two letters from meat producers. Mexico submits that these exhibits demonstrate that USDA subsequently reversed the initial guidance provided in the USDA guidelines of 11 September 2008 and privately contacted major US meat processors to advise them not to use mixed origin labels. We note that the two letters from meat producers indicate their intention to label the majority of their meat products under Label A in light of certain input from the US government.<sup>1060</sup> Both letters show that, to comply with the COOL requirements, these companies had initially intended to label the majority of their products under Label B. However, this initial compliance approach changed afterwards to labelling the majority of their meat products under Label A. Specifically, the letter from Tyson Fresh Meats, Inc. to customers states in relevant part:

"[The initial approach] involved offering the majority of our beef and pork cuts under the multi-country Category B label ... Based on the input we have since received from government officials and various industry groups, we now believe this initial compliance approach will not be viable in the longterm. ... Our approach will be to use the "U.S." or Category A label on all of our premium beef programs beginning early 2009".<sup>1061</sup>

7.837 The letter from JBS USA, Inc. to customers similarly establishes that:

"During the development of our policy on Country of Origin Labeling (COOL) for beef products JBS made the decision to label the majority of our products under the Category B label ... [A]s the interpretation of Country of Origin Labeling continues to evolve, we feel it is essential that we adapt to the most current understanding of the regulation. ... JBS has elected to begin transitioning to a "Product of U.S.A." label on the majority of our beef products. This change will occur during the next several months".<sup>1062</sup>

7.838 Mexico further refers to two press articles, one written by Tom Johnston and another published on a website called the "Pig Site". These articles describe the changes in Tyson's approach in how to comply with the COOL measure.<sup>1063</sup> One article reports that the initial compliance approach was abandoned after receiving feedback from the government and industry groups.<sup>1064</sup> The other article indicates that USDA worked to close the "loophole" reflected in the first compliance approach by the industry, considering that "the law seeks to differentiate US meat products from those of other countries".<sup>1065</sup>

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<sup>1059</sup> Mexico's second written submission, para. 187, referring to Exhibit CDA-29.

<sup>1060</sup> Exhibits MEX-33, 55, 56 and 57.

<sup>1061</sup> Exhibit MEX-33.

<sup>1062</sup> Exhibit MEX-57.

<sup>1063</sup> Exhibits MEX-55 and 56.

<sup>1064</sup> Exhibit MEX-56.

<sup>1065</sup> Exhibits MEX-55 and 83.



7.839 Of the above evidence referenced by Mexico, the USDA guidelines of 11 September 2008 and the Vilsack letter are instruments issued by the US government, whereas press articles and letters from meat producers are not.

7.840 We consider that the issuance by the US government of instruments such as the USDA guidelines of 11 September 2008 and the Vilsack letter constitutes acts of administering the COOL measure. As stated above, the act of providing guidance on the meaning of specific requirements under a measure, for instance by publishing "frequently asked questions", is an act of administering such measure within the meaning of Article X:3(a). We also recall our earlier conclusion that the issuance of the Vilsack letter is an act of administration under Article X:3(a).<sup>1066</sup>

7.841 We are further provided with press articles and industry letters to their customers. In this set of evidence, references are made to certain feedback and input from the US government regarding the labelling requirements under the COOL measure. Mexico attempts to show that certain contacts between meat producers and USDA, as referenced in these exhibits, have guided these meat producers' decision on how to comply with the labelling requirements. Specifically, the initial USDA guidance as illustrated in the USDA guidelines of 11 September 2008 appears to have led meat producers to decide to label most of their products under category B. The evidence implies that, in light of a subsequent change in the guidance from the US government, certain producers chose to adopt a different labelling policy, namely to label the majority of muscle cut meats under category A. Despite the absence of evidence demonstrating specific contacts between USDA and meat producers as referenced in these exhibits, we can nonetheless infer from them that USDA provided meat producers with certain input or guidance on the labelling requirements. We also note that the United States has not put forward an argument that such input or guidance from USDA as mentioned in these exhibits did not exist.

7.842 The evidence as a whole therefore shows that USDA provided guidance to meat producers. This, in our view, constitutes an act of administration within the meaning of Article X:3(a).

(c) "Not reasonable" administration of laws and regulations

(i) *Main arguments of the parties*

7.843 According to **Canada**, the Vilsack letter constitutes unreasonable administration of the COOL statute and the 2009 Final Rule (AMS).<sup>1067</sup>

7.844 Canada argues that the Vilsack letter constitutes government action that lies outside of the normal enforcement of laws and regulations in the United States and therefore is unreasonable.<sup>1068</sup> The Vilsack letter addresses the implementation of the Final Rule and amounts to "regulation-making" through a public letter invoking the intent of the US Congress.<sup>1069</sup> Canada emphasizes that threatening the US industry with the possibility of reopening the 2009 Final Rule (AMS) and

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<sup>1066</sup> See para. 7.830.

<sup>1067</sup> Canada's first written submission, para. 231. Canada quotes *Dominican Republic – Import and Sales of Cigarettes*, where based on the dictionary definition, the panel interpreted the term "reasonable" as referring to notions such as "in accordance with reason", "not irrational or absurd", "proportionate", "having sound judgement", "sensible", "not asking for too much", "within the limits of reason, not greatly less or more than might be thought likely or appropriate", "articulate" (Canada's first written submission, para. 231, footnote 262, referencing Panel Report, *Dominican Republic – Import and Sales of Cigarettes*, para. 7.385 and footnote 589).

<sup>1068</sup> Canada's first written submission, para. 231.

<sup>1069</sup> Canada's second written submission, para. 111.

imposing more onerous requirements if the industry did not comply with Secretary Vilsack's "suggestions for voluntary action" amounts to unreasonable administration of the COOL measure.

7.845 Canada submits that the available evidence in the form of witness statements, letters from US slaughterhouses and econometric analyses demonstrates compliance with the Vilsack letter.<sup>1070</sup> Canada maintains that the Vilsack letter had an impact on the industry, because of its timing and circumstances, the position of the person who signed the letter, the public nature of the letter, the directions given to US industry, and the explicit threat backing up Secretary Vilsack's directions.<sup>1071</sup> Therefore, according to Canada, the United States has violated its obligation under Article X:3(a) of GATT 1994 to administer its laws, regulations and administrative rulings of general application in a reasonable manner.<sup>1072</sup>

7.846 **Mexico** argues that the administration of the COOL measure, characterized by shifts in interpretation and guidance by USDA on its statutory and regulatory provisions, has been anything but predictable and reasonable.<sup>1073</sup> Mexico argues that the administration of the details of the COOL measure changed over the course of the Interim Final Rule (AMS) and the 2009 Final Rule (AMS) and the associated guidelines issued by USDA over this period. The recurrent changes of the USDA policy, which first allowed the use of mixed origin labels and then discouraged it, are further evidence of unreasonable administration.<sup>1074</sup>

7.847 These uncertainties continued with the Vilsack letter, which suggested additional practices and threatened to modify the COOL measure if such practices were not followed. Mexico contends that the Vilsack letter is part of a series of actions taken by the US government to preclude the industry from using foreign cattle. As a clear sign of effect of government input through the Vilsack letter, certain US meat processors have changed their initial compliance approach to the COOL requirements.<sup>1075</sup> Thus, the administration of a law or regulation in such a manner cannot amount to uniform (i.e. predictable) and reasonable administration within the meaning of Article X:3(a) of the GATT 1994.

7.848 The **United States** contends that Canada and Mexico have failed to demonstrate that the COOL measures have been administered in an *unreasonable* manner, either through the issuance of the Vilsack letter or via the changes made to the implementing regulations during their development.<sup>1076</sup> According to the United States, the complainants have not presented evidence establishing behaviour by USDA in administering the COOL measures that has been unreasonable in any sense.<sup>1077</sup> Since the Vilsack letter does not administer the COOL measures at all, the complainants are wrong to argue that the letter is an "unreasonable" administration of those measures. Further, Mexico has adduced no evidence to suggest that any decisions made to the implementing regulations as they evolved through the regulatory process were "irrational" or "absurd".

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<sup>1070</sup> Canada's second written submission, para. 106.

<sup>1071</sup> Canada's second written submission, para. 103.

<sup>1072</sup> Canada's first written submission, para. 232.

<sup>1073</sup> Mexico's first written submission, paras. 377, 378, referring to the Panel Report, *Dominican Republic – Import and Sales of Cigarettes*, para. 7.385 and footnote 589; second written submission, paras. 185-186.

<sup>1074</sup> Mexico's second written submission, para. 188, referring back to its first written submission, para. 258 (Exhibits MEX-33, 55, 56, 57 and 83); opening oral statement at the second substantive meeting, paras. 67-68.

<sup>1075</sup> Mexico's opening oral statement at the first substantive meeting, paras. 50-51. (Exhibit MEX-33)

<sup>1076</sup> United States' first written submission, para. 297.

<sup>1077</sup> United States' first written submission, para. 299.

7.849 The United States considers that the complainants have failed to demonstrate that the issuance of the Vilsack letter or the development of the 2009 Final Rule were unreasonable. The Vilsack letter was issued in accordance with a directive from the Obama Administration to review all pending regulations of the previous Administration. Some of the changes during the development of the 2009 Final Rule (AMS), such as the flexibility on commingling, served to address the concerns of the complainants.<sup>1078</sup>

(ii) *Analysis by the Panel*

7.850 The term "reasonable" is defined as "in accordance with reason", "not irrational or absurd", "proportionate", "sensible", and "within the limits of reason, not greatly less or more than might be thought likely or appropriate".<sup>1079</sup> We assess the parties' claims of not reasonable administration in light of these definitions.

7.851 In our view, whether an act of administration can be considered reasonable within the meaning of Article X:3(a) entails a consideration of factual circumstances specific to each case. This is confirmed by previous disputes where the requirement of reasonable administration was understood as requiring the examination of the features of the administrative act at issue in the light of its objective, cause or the rationale behind it.<sup>1080</sup>

Canada's argument – the Vilsack letter

7.852 We first recall the United States' explanation on the circumstances under which the letter was issued.<sup>1081</sup> It was issued in the context of the Directive from the new administration to review the laws and policies of the new and pending regulations that had been enacted by the previous administration. In essence, the Directive indicates that the new administration wanted to review these regulations to decide whether to maintain them without any change. As for the 2009 Final Rule (AMS), Secretary Vilsack confirms in the letter the new administration's intention to implement it as originally scheduled by the previous administration and includes certain voluntary suggestions to industry.

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<sup>1078</sup> United States' second written submission, para. 191.

<sup>1079</sup> Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.385 referring to the *The New Shorter Oxford English Dictionary*, (Fifth Edition) Oxford University Press, Vol. II, p. 2482 (2002).

<sup>1080</sup> In *Argentina – Hides and Leather*, for example, the panel considered access to confidential information by a competitor in the market to be a relevant factor in determining reasonableness of the administrative action in that dispute (para. 11.86). We further recall the Appellate Body's analysis in *Brazil – Retreaded Tyres* that "the analysis of whether the application of a measure results in arbitrary or unjustifiable discrimination should focus on the cause of the discrimination, or the rationale put forward to explain its existence" (Appellate Body Report, *Brazil – Retreaded Tyres*, para. 226; Panel Report, *Thailand – Cigarettes*, para. 7.291). In *Thailand – Cigarettes (Philippines)*, the Philippines claimed that the appointment of dual function officials as directors of a company under administrative proceedings constituted unreasonable administration because the officials were in a position where they could gather and reveal confidential information on Philippines industries' direct competitors. The panel found that Thailand did not act inconsistently with Article X:3(a). However, the overall delays in the administrative proceedings shown throughout the course of the review process of customs valuation were considered by the panel "not appropriate or proportionate" considered against the nature of the circumstances concerned, and therefore, the administration was considered to be "unreasonable" (Panel Report, *Thailand – Cigarettes*, para. 7.969). In *Dominican Republic – Import and Sale of Cigarettes*, the Panel found that the Dominican Republic had administered the provisions governing the Selective Consumption Tax in a manner that was "unreasonable" and therefore inconsistent with Article X:3(a) of GATT 1994 (paras. 7.365-7.394).

<sup>1081</sup> See paras. 7.39-7.42 above.

7.853 The letter, however, suggests that the industry voluntarily adopt stricter labelling practices concerning origin information than those required under the 2009 Final Rule (AMS). Specifically, the Vilsack letter asks the industry to voluntarily follow three recommendations for the labelling of meat products that are not contained in the COOL measure.

7.854 The first recommendation in the Vilsack letter is the inclusion of information about what production step occurred in each country when multiple countries appear on the label. The Vilsack letter gives the following examples about how such information could be included in the labels: "Born and Raised in Country X and Slaughtered in Country Y" or "Born in Country X and Raised and Slaughtered in Country Y".<sup>1082</sup> This suggestion goes beyond the labelling requirements set out in the COOL measure. Under the COOL measure, the country of origin declaration for meat products derived from livestock of multiple countries of origin (Label B) or imported for immediate slaughter (Label C) need not determine the countries where such livestock were born, raised and slaughtered. For Label B meat the producer only needs to label "Product of the United States, Product of country X", whereas for Label C the information is "Product of country X, Product of the United States".<sup>1083</sup>

7.855 The second recommendation in the Vilsack letter is that even when products are subject to curing, smoking, broiling, grilling, or steaming, voluntary labelling should be provided. This recommendation goes beyond the COOL measure, which clearly exempts from the general obligation of providing country of origin information covered commodities that undergo any of the above-mentioned processing steps.<sup>1084</sup>

7.856 Third, as regards ground meat, the COOL measure establishes that processors shall list all countries of origin that may have reasonably been contained in their inventory during the 60 days prior to the country of origin declaration. The Vilsack letter suggests that the industry reduce that time allowance from 60 days to ten days.<sup>1085</sup>

7.857 The above comparison shows that the voluntary actions suggested in the Vilsack letter go beyond certain obligations and reduce certain flexibilities foreseen in the COOL measure.

7.858 Canada does not challenge, and we see no issue *per se* with a new administration reviewing regulations and policies developed by a previous administration. Based on its assessment, the new administration may decide to change existing regulations or adopt new regulations making use of the latitude accorded to the executive branch of the government within the legislative framework.

7.859 However, as regards the Vilsack letter, we do not find any justifiable rationale for suggesting stricter labelling practices than the ones required by the 2009 Final Rule (AMS) while at the same time allowing the 2009 Final Rule (AMS) to enter into force. If anything, the suggestions in the letter – even if they concern voluntary action by industry – undermine the labelling requirements in the 2009 Final Rule (AMS).<sup>1086</sup> In fact, the letter addresses issues that do not directly emanate from the actual labelling requirements at issue under the 2009 Final Rule (AMS). Importantly, this is done in the very same letter announcing the entry into force of the 2009 Final Rule (AMS) as a result of Secretary Vilsack's having reviewed it. Although the suggested actions in the letter are only for

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<sup>1082</sup> Vilsack letter.

<sup>1083</sup> 7 C.F.R. § 65.300 (e).

<sup>1084</sup> 7 C.F.R. § 65.220.

<sup>1085</sup> 7 C.F.R. § 65.300 (h).

<sup>1086</sup> United States' first written submission, para. 293; United States' second written submission, para. 188.

The United States itself states that the Vilsack letter's recommendations are inconsistent with the 2009 Final Rule (AMS) (United States' comments on Canada's and Mexico's responses to Panel question No. 96).

voluntary action, the language of the letter may still have caused uncertainty and confusion as to the consequences of the letter, including possible modifications to the 2009 Final Rule (AMS) should the industry not follow Secretary Vilsack's suggestions for additional voluntary action.

7.860 Furthermore, the Vilsack letter was issued less than one month prior to the entry into force of the 2009 Final Rule (AMS). This may have caused further confusion for industry in terms of the specific labelling requirements to be observed. In particular, what we are addressing here is a letter issued by the head of a government agency to the industry in general. Compared to situations where the administration applies the COOL measure to particular individual entities, this type of letter can, in our view, have a broader impact on the industry because the letter was issued to the industry in general, not to specific entities.

7.861 Although, in general, a WTO Member has the discretion to administer its laws and regulations in the manner it deems fit, it equally has the responsibility to respect "certain minimum standards for transparency and procedural fairness" as regards its actions. As the Appellate Body observed, Article X:3(a) of the GATT 1994 establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations.<sup>1087</sup>

7.862 This responsibility, in our view, applies to all types of actions falling within the broad scope of the term "administer" under Article X:3(a). We consider that the Vilsack letter did not meet these minimum standards of procedural fairness in relation to the implementation of the 2009 Final Rule by both allowing the 2009 Final Rule (AMS) to enter into force and, at the same time, suggesting industry compliance with stricter labelling requirements than those contained in the 2009 Final Rule (AMS).

7.863 Based on the manner in which the Secretary of Agriculture addressed the decision to implement the 2009 Final Rule (AMS), taken together with the circumstances under which the letter was issued, we consider that the Vilsack letter was not "appropriate", and thus does not meet the requirement of reasonable administration of the COOL measure within the meaning of Article X:3(a).

7.864 We therefore conclude that Canada has demonstrated that the United States acted inconsistently with Article X:3(a) by failing to administer the COOL measure in a reasonable manner through the issuance of the Vilsack letter.

#### Mexico's argument – shifts in interpretation and guidance by USDA

7.865 As explained above, unlike Canada, Mexico did not focus its argument exclusively on the issuance of the Vilsack letter. In Mexico's view, the alleged unreasonable administration of the COOL measure is reflected in shifts in the guidance and interpretation by USDA on its statutory and regulatory provisions, which culminated in the Vilsack letter.

7.866 To the extent that Mexico's claim is based on the issuance of the Vilsack letter, we have already concluded that the issuance of the Vilsack letter was not a reasonable administration of the COOL measure within the meaning of Article X:3(a). We note that Mexico did not develop its argument relating to the Vilsack letter as extensively as Canada. In our view, however, Mexico has adduced sufficient evidence to demonstrate that the Vilsack letter created uncertainties for industry

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<sup>1087</sup> Appellate Body Report, *US – Shrimp*, para. 183. The Appellate Body also underlined that "inasmuch as there are due process requirements generally for measures that are otherwise imposed in compliance with WTO obligations, it is only reasonable that rigorous compliance with the fundamental requirements of *due process* should be required in the application and administration of a measure ... " (Appellate Body Report, *US – Shrimp*, para. 182) (emphasis added).

regarding how to comply with the specific labelling requirements contained in the 2009 Final Rule (AMS).<sup>1088</sup> In particular, Mexico highlights that the Vilsack letter suggested practices additional to the ones foreseen under the 2009 Final Rule (AMS), and threatened to modify the 2009 Final Rule (AMS) if such practices were not followed. It is essentially for these same reasons that we found that Canada has demonstrated that the Vilsack letter is inconsistent with the requirement of reasonable administration under Article X:3(a) of the GATT 1994. Accordingly, we find that Mexico has demonstrated that the Vilsack letter does not meet the standard of reasonable administration of the COOL measure within the meaning of Article X:3(a).

7.867 Regarding Mexico's argument that the United States changed its interpretation of the COOL measure too frequently to render the administration reasonable, Mexico presented the evidence summarized in the table in paragraph 7.832 above.

7.868 In our understanding, Mexico is referring to these exhibits *as a whole* as evidence to assert that USDA has been providing inconsistent implementation guidance to industry over time. We can infer from the content of these exhibits that the industry was indeed provided with evolving interpretations regarding the labelling requirements under the COOL measure.

7.869 At the same time, we note that the changes in guidance, particularly regarding the use of different labels for different categories of meat, reflect the very modifications made to the Interim Final Rule (AMS) prior to the issuance of the 2009 Final Rule (AMS). As explained in Section VII.C.1(a)(ii), the main changes from the Interim Final Rule (AMS) to the 2009 Final Rule (AMS) are the removal of the possibility of using Label B for category A meat and the addition of the commingling provisions. The USDA administrative guidance, as illustrated in the USDA guidelines of 11 September 2008 and as implied in news articles and industry letters after the entry into force of the Interim Final Rule (AMS), therefore corresponded to the changes made to the substance of the COOL implementing regulations during the rule-making process as envisaged under the US legal system. To the extent that the differences in the guidance by USDA were due to the changes made to the substantive law or regulations at issue, we do not find such administrative acts irrational or inappropriate within the meaning of Article X:3(a). USDA was acting within its authority and mandate to provide interpretations of the labelling requirements under the applicable COOL implementing regulations at a given time.

7.870 Accordingly, we find that, unlike with regard to the Vilsack letter, Mexico has not established that the United States failed to administer the COOL measure in a reasonable manner through the shifts in the guidance by USDA on the labelling requirements under the COOL measure.

(d) "Non-uniform" administration of laws and regulations

(i) *Main arguments of the parties*

7.871 **Mexico** argues that "uniform" administration requires that Members ensure that their laws are applied consistently and predictably.<sup>1089</sup> Mexico affirms that the "non-uniform" administration is due to the significant changes on requirements and interpretation during the implementation of the statutory and regulatory provisions.<sup>1090</sup> The administration of the details of the COOL measure changed over its implementation and review processes and the associated guidelines issued by USDA

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<sup>1088</sup> See paras. 7.846-7.847.

<sup>1089</sup> Mexico's first written submission, para. 377 (citing Panel Report, *Argentina – Hides and Leather*, para 11.83).

<sup>1090</sup> Mexico's second written submission, paras. 188-189.

over this period created uncertainties, which continued with the Vilsack letter issued on 20 February 2009.

7.872 The **United States** submits that Mexico has failed to demonstrate that the COOL measures have been administered in a *non-uniform* manner because of changes to the rule over time.<sup>1091</sup> Mexico has not produced evidence to prove this assertion either with regard to changes made to the implementing regulations or concerning the issuance of the Vilsack letter.<sup>1092</sup> The changes to which Mexico refers merely reflect the notice-and-comment system of US rule-making, and do not represent the application of the statute or the 2009 Final Rule (AMS).<sup>1093</sup> The United States references the panel report in *Argentina – Hides and Leather*<sup>1094</sup>, according to which "uniform" administration requires that Members ensure that their laws are applied consistently and predictably.<sup>1095</sup>

7.873 The United States adds that in *US – Stainless Steel*, the panel noted that, "the requirement of uniform administration of laws and regulations must be understood to mean uniformity of treatment in respect of persons similarly situated; it cannot be understood to require identical results where relevant facts differ". That panel clarified that Article X:3(a) does not require that the administration of a regulation be fixed and unvarying over time; the administration of a regulation must only be uniform at a given time.<sup>1096</sup> The United States argues that Mexico has not provided evidence to demonstrate that the COOL statute or the 2009 Final Rule has been administered in a way that affected similarly situated persons in a non-uniform manner.<sup>1097</sup> At all times the United States has maintained a single set of regulations implementing the COOL Statute, and these regulations have been administered in a uniform fashion. The United States adds that Mexico has not adduced evidence to suggest that the 2009 Final Rule has affected persons similarly situated in different ways with respect to the period after that date.<sup>1098</sup>

(ii) *Analysis by the Panel*

7.874 Mexico claims that the alleged "non-uniform" administration arises because of the significant changes to the guidance on the labelling requirements under the COOL measure. According to Mexico, these changes contributed to disruptions experienced by Mexican industry.

7.875 The United States argues that Mexico has not provided evidence to demonstrate that the COOL statute or the 2009 Final Rule (AMS) has been administered in a way that affected similarly situated persons in a non-uniform manner.<sup>1099</sup> At all times the United States has maintained a single set of regulations implementing the COOL statute, and these regulations have been administered in a uniform fashion. The United States adds that Mexico has not adduced evidence to suggest that the 2009 Final Rule (AMS) has affected persons similarly situated in different ways with respect to the period after that date.<sup>1100</sup>

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<sup>1091</sup> United States' first written submission, para. 296.

<sup>1092</sup> United States' first written submission, para. 293.

<sup>1093</sup> United States' opening oral statement at the first substantive meeting, para. 60.

<sup>1094</sup> Panel Report, *Argentina – Hides and Leather*, para. 11.83.

<sup>1095</sup> United States' first written submission, para. 294.

<sup>1096</sup> Panel Report, *US – Stainless Steel (Korea)*, para. 6.51.

<sup>1097</sup> United States' first written submission, para. 294.

<sup>1098</sup> United States' first written submission, para. 295.

<sup>1099</sup> United States' first written submission, para. 294.

<sup>1100</sup> United States' first written submission, para. 295.

7.876 The term "uniform" is defined as "of one unchanging form, character, or kind; that is or stays the same in different places or circumstances, or at different times".<sup>1101</sup> We find guidance for the meaning of "uniform" under Article X:3(a) in the findings by panels in previous disputes. For instance, the panel in *Argentina – Hides and Leather* stated that "uniform administration" requires that Members ensure that their laws are applied consistently and predictably.<sup>1102</sup> Additionally, in *US – Stainless Steel*, the panel noted that, "the requirement of uniform administration of laws and regulations must be understood to mean uniformity of treatment in respect of persons similarly situated".<sup>1103</sup> Based on the dictionary meaning and guidance provided by previous panels, we will assess whether Mexico has established that the concerned shifts in the guidance provided by USDA constitute a non-uniform administration of the COOL measure.

7.877 In the current dispute, as the United States points out, Mexico has not presented facts or evidence showing that at any specific point in time USDA treated persons similarly situated in a non-uniform manner when putting into practical effect the labelling requirements under the COOL measure. Rather, the evidence submitted by Mexico shows that USDA provided guidance on the labelling requirements which was applicable to the US industry in general.<sup>1104</sup>

7.878 Turning to the changes in USDA guidance over time challenged by Mexico as being non-uniform, we note that, as the panel in *EC – Selected Customs Matters* states, the interpretation of the term "uniform" in Article X:3(a) does not necessarily entail instantaneous uniformity. Rather, uniformity must be attained within a period of time that is reasonable. What is reasonable will depend on the form, nature and scale of the administration at issue, as well as on the complexity of the factual and legal issues raised by the act of administration that is being challenged.<sup>1105</sup>

7.879 The shifts in the guidance on the labelling requirements under the COOL measure, evoked by Mexico, took place between September 2008 and April 2009. As observed above, these changes or shifts during this period are related to the modifications made to the substance of the regulations themselves in the context of rule-making over a relatively short period of time. The form and structure of the changes in the guidance and interpretation, which Mexico argues culminated in the Vilsack letter, do not demonstrate an act "of changing form" or act which is "not the same at different times" so as to render it a "non-uniform" administration within the meaning of Article X:3(a).

7.880 In fact, the publication of the administration's guidance on the COOL implementing regulation through frequently asked questions can be considered as an example of an industry-friendly action by the administration, which can enhance the transparency of the government's administration of the regulations.

7.881 For the foregoing reasons, we conclude that Mexico has not established that the United States acted inconsistently with Article X:3(a) by administering the COOL measure in a non-uniform manner.

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<sup>1101</sup> *The Shorter Oxford English Dictionary*, (Sixth Edition) Oxford University Press, Vol. II, p. 3440 (2007); Panel Report, *EC- Selected Customs Matters*, para. 7.124.

<sup>1102</sup> Panel Report, *Argentina – Hides and Leather*, para. 11.83. The panel found that the measures at issue were inconsistent with Argentina's obligations under Article X:3(a) of GATT 1994.

<sup>1103</sup> Panel Report, *US – Stainless Steel (Korea)*, para. 6.51.

<sup>1104</sup> See Exhibits CDA-29; MEX-33, 55, 56, 57 and 83; Table in page 182.

<sup>1105</sup> Panel Report, *EC – Selected Customs Matters*, para. 7.135.



(e) "Partial" administration of laws and regulations

(i) *Main arguments of the parties*

7.882 **Mexico** argues that the administration of the COOL measure was partial as the final interpretation of the USDA on the implementation of the regulation and its provisions was in favour of US producers of cow-calves.<sup>1106</sup>

7.883 The **United States** does not address Mexico's argument regarding the "partial" administration.

(ii) *Analysis by the Panel*

7.884 Mexico presented its claim on the United States' alleged *partial* administration of the COOL measure for the first time in its second written submission by merely asserting the lack of impartial administration. Mexico, however, fails to explain in what way the administration of the COOL measure was partial by favouring US cow-calf producers.

7.885 Accordingly, we find that Mexico has not established a prima facie case that the United States administered the COOL measure in a partial manner within the meaning of Article X:3(a).

(f) Conclusion on the complainants' claims under Article X:3(a)

7.886 In light of the foregoing, we find that Canada and Mexico have established that the United States acted inconsistently with Article X:3(a) by failing to administer the COOL measure in a reasonable manner through the issuance of the Vilsack letter.

7.887 We find, however, that Mexico has not demonstrated that the concerned shifts in the USDA guidance on the labelling requirements under the COOL measure is not a reasonable administration of the COOL measure within the meaning of Article X:3(a). Further, we find that Mexico has failed to establish that the United States administered the COOL measure in a non-uniform and partial manner inconsistently with Article X:3(a).

### 3. Non-violation claim under Article XXIII:1(b)

7.888 We are turning to the complainants' non-violation claims after having addressed their claims of violation. This follows the sequence of the parties' arguments in the current dispute. It is also in line with the general priority to be accorded to dealing with violation as opposed to non-violation claims, enunciated by the panel in *Japan – Film*:

"[T]raditionally in cases involving both violation and non-violation claims, panels first address claims of inconsistency with a covered agreement pursuant to Article XXIII:1(a), before moving on to consider claims of non-violation nullification or impairment under Article XXIII:1(b)."<sup>1107</sup>

(a) Main arguments of the parties

7.889 **Mexico** and **Canada** submit that the application of the COOL requirements nullifies or impairs benefits accruing to them under successive rounds of multilateral trade negotiations.<sup>1108</sup> According to the complainants, by applying the COOL requirements, the United States is upsetting

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<sup>1106</sup> Mexico's second written submission, paras. 185 and 189.

<sup>1107</sup> Panel Report, *Japan – Film*, para. 10.26.

<sup>1108</sup> Canada's first written submission, para. 237 and Mexico's first written submission, para. 379.

the competitive relationship and frustrating the complainants' legitimate market access expectations with respect to live cattle and hogs from Canada<sup>1109</sup>, and live cattle from Mexico.<sup>1110</sup>

7.890 All three parties agree<sup>1111</sup> that the following three-pronged test established by the panel in *Japan – Film* for addressing non-violation claims is applicable also in the current dispute:

"The text of Article XXIII:1(b) establishes three elements that a complaining party must demonstrate in order to make out a cognizable claim under Article XXIII:1(b): (1) application of a measure by a WTO Member; (2) a benefit accruing under the relevant agreement; and (3) nullification or impairment of the benefit as the result of the application of the measure."<sup>1112</sup>

7.891 As regards the first element of this legal test, the complainants submit that the application by the United States of various aspects of the COOL requirements fulfils this element.<sup>1113</sup>

7.892 The **United States** responds that not all elements of the COOL requirements challenged by the complainants are eligible for a non-violation claim. According to the United States, a non-violation claim is possible only with regard to measures that are currently being applied; consequently, only the COOL statute and the 2009 Final Rule (AMS) may be subject to a claim under Article XXIII:1(b) of the GATT 1994 in this dispute.<sup>1114</sup>

7.893 As regards the second element of the legal test under Article XXIII:1(b) of the GATT 1994, the United States contends that the complainants have no legitimate expectations, since various country of origin labelling rules on meat at the retail level have existed in the United States since as far back as the 1930s, a long time before the Uruguay Round. Thus, the complainants could have reasonably anticipated at the time of these tariff negotiations that the United States would modify or supplement country of origin labelling rules as it has been doing since the 1960s, contemplating various pieces of legislation on country of origin labelling with additional requirements for meat at the retail level.<sup>1115</sup>

7.894 In response, the complainants maintain that their expectations of market access are legitimate as they could not have reasonably anticipated the application by the United States of the mandatory COOL requirements or any other measure regarding origin labelling with such drastic implications on the market access of cattle and hogs from Canada, and cattle from Mexico. Although there were voluntary country of origin labelling regulations in force at the time of the negotiation of tariff concessions subsequently incorporated in the WTO Agreement, these regulations were not specific to cattle and hogs, and they did not have such restrictive provisions as the COOL requirements.<sup>1116</sup>

7.895 With regard to the second element of the legal test, the United States also argues that the benefits invoked by the complainants accrue from tariffs under NAFTA because it is not the concessions made under the WTO that they are benefiting from, but the lower tariff rate negotiated

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<sup>1109</sup> Canada's first written submission, para. 239.

<sup>1110</sup> Mexico's first written submission, para. 379.

<sup>1111</sup> Canada's first written submission, para. 235, Mexico's first written submission, para. 385 and United States' first written submission, para. 303.

<sup>1112</sup> Panel Report, *Japan- Film*, para. 10.41.

<sup>1113</sup> Canada's first written submission, para. 235 and Mexico's first written submission, paras. 386-392.

<sup>1114</sup> United States' first written submission, para. 305, footnote 348.

<sup>1115</sup> United States' first written submission, paras. 309-310 and United States' second written submission, para. 195.

<sup>1116</sup> Canada's first written submission, paras. 237-239; Mexico's first written submission, paras. 388-390 and second written submission, para. 193.

under NAFTA, which entered into force at the beginning of 1994. Hence, the United States argues, these benefits cannot be enforced under Article XXIII:1(b) of the GATT 1994.<sup>1117</sup>

7.896 In response, the complainants assert that they are entitled to expect market access to the United States in accordance with the tariff bindings negotiated under the WTO, even though their current tariff concessions for livestock are based on NAFTA. In particular, Canada points out that the current MFN bound tariff of the United States for cattle other than dairy or breeding is 1 cent/kg for tariff line 0102.90.40. This tariff is in the United States' schedule of concessions negotiated in the Uruguay Round. In addition, Canada notes that all 8-digit tariff lines under Live Swine (tariff line 0103) in the same tariff schedule of the United States show an *ad valorem* bound duty of 0%, and the free import of hogs to the United States pre-dates the WTO Agreement (and also the Canada-United States Free Trade Agreement and NAFTA).<sup>1118</sup> Mexico adds that its non-violation claim is based on the United States' MFN bound tariff of 1 cent/kg of cattle negotiated under WTO.<sup>1119</sup> Hence, the complainants had a benefit accrued to them from legitimate market access expectations based on the United States schedule under the WTO.

7.897 As regards the third element of the legal test under Article XXIII:1(b) of the GATT 1994, the complainants maintain that the COOL requirements drastically restrict their market access as compared to the level of market access negotiated during the WTO Uruguay Round. Canada submits that by requiring US retailers to label beef and pork in a manner that is fundamentally at odds with the normal practice applied in other areas of United States customs law, the United States has nullified the unrestricted market access that Canada was entitled to expect for its cattle and hogs exports.<sup>1120</sup>

7.898 Mexico contends that the COOL measure created a new series of restrictions to cattle exported from Mexico. It reduced the number of US plants processing Mexican cattle, limited the days on which those plants receive cattle from Mexico, introduced new requirements of advance notice, and US processors imposed a discount on imports of Mexican cattle.<sup>1121</sup> The actual price discount created by the COOL measure is from USD 40 to USD 60 for the same 300-400 pound animal, and the competitive disadvantage and level of protection reflected in this price discount vastly exceeds Mexico's legitimate expectation of USD 1.36 to 1.81 tariff per animal negotiated under the WTO.<sup>1122</sup> According to Mexico, this competitive relationship with domestic livestock in the United States was upset by the application of the COOL requirements.<sup>1123</sup>

7.899 The United States responds that the complainants failed to demonstrate, "with the required 'detailed justification'" and with clear and solid evidence, that they have suffered a nullification or impairment of benefits "as a result of the application" of the COOL measure.<sup>1124</sup> According to the United States, the complainants did not demonstrate or provide evidence of a "clear correlation" between the COOL measure and the alleged adverse effects on imports of livestock from Mexico and Canada. The United States maintains that other market forces, including the financial crisis and animal diseases, had a serious negative impact on livestock markets in the United States, Canada and

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<sup>1117</sup> United States' second written submission, para. 194.

<sup>1118</sup> Canada's response to Panel question No. 88.

<sup>1119</sup> Mexico's response to Panel question No. 88.

<sup>1120</sup> Canada's first written submission, para. 239, Canada's response to Panel question No. 88 and Canada's second written submission, paras. 45-46.

<sup>1121</sup> Mexico's opening oral statement at the first substantive meeting of the Panel, para. 55.

<sup>1122</sup> Mexico's response to Panel question No. 88.

<sup>1123</sup> Mexico's first written submission, paras. 391-392, Mexico's response to Panel question No. 88 and Mexico's second written submission, para. 191.

<sup>1124</sup> United States' first written submission, para. 317 and United States' second written submission, para. 196.

Mexico. Thus, the adverse effects on livestock cannot be exclusively attributed to the COOL requirements.<sup>1125</sup>

(b) Analysis by the Panel

7.900 At the outset of our analysis of the complainants' non-violation claims, we recall that the panel in *Japan – Film* explained that the non-violation nullification or impairment remedy should be treated with caution and as an exceptional concept:

"Although the non-violation remedy is an important and accepted tool of WTO/GATT dispute settlement and has been 'on the books' for almost 50 years, we note that there have only been eight cases in which panels or working parties have substantively considered Article XXIII:1(b) claims.<sup>1126</sup> This suggests that both the GATT contracting parties and WTO Members have approached this remedy with caution and, indeed, have treated it as an exceptional instrument of dispute settlement. We note in this regard that both the European Communities and the United States in the *EEC – Oilseeds* case, and the two parties in this case, have confirmed that the non-violation nullification or impairment remedy should be approached with caution and treated as an exceptional concept.<sup>1127</sup> The reason for this caution is straightforward. Members negotiate the rules that they agree to follow and only exceptionally would expect to be challenged for actions not in contravention of those rules."<sup>1128</sup>

7.901 The Appellate Body confirmed this in *EC – Asbestos* by holding that, "[l]ike the panel in ... *Japan – Film* ... , we consider that the remedy in Article XXIII:1(b) 'should be approached with caution and should remain an exceptional remedy'".<sup>1129</sup>

7.902 We also note that in *Japan – Film* the panel stressed that the need for analysing a non-violation claim in a specific case "should be examined on its own merits", and should involve a case-specific assessment.<sup>1130</sup>

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<sup>1125</sup> United States' first written submission, paras. 314-316.

<sup>1126</sup> (footnote original) Report of the Working Party on *Australian Subsidy on Ammonium Sulphate*, adopted on 3 April 1950, BISD II/188; Panel Report on *Treatment by Germany of Imports of Sardines* ("*Germany – Sardines*"), G/26, adopted on 31 October 1952, BISD 1S/53; *Uruguayan Recourse*, adopted on 16 November 1962, BISD 11S/95; Panel Report on *EC – Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region* ("*EC – Citrus Products*"), GATT Doc. L/5576, dated 7 February 1985 (unadopted); Panel Report on *EEC – Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes* ("*EEC – Canned Fruit*"), GATT Doc. L/5778, dated 20 February 1985 (unadopted); *Japan – Semiconductors*, adopted on 4 May 1988, BISD 35S/116; *EEC – Oilseeds*, adopted on 25 January 1990, BISD 37S/86; *United States – Agricultural Waiver*, adopted on 7 November 1990, BISD 37S/228.

<sup>1127</sup> (footnote original) In *EEC – Oilseeds*, the United States stated that it "concurred in the proposition that non-violation nullification or impairment should remain an exceptional concept. Although this concept had been in the text of Article XXIII of the General Agreement from the outset, a cautious approach should continue to be taken in applying the concept". *EEC – Oilseeds*, BISD 37S/86, 118, para. 114. The EEC in that case stated that "recourse to the 'non-violation' concept under Article XXIII:1(b) should remain exceptional, since otherwise the trading world would be plunged into a state of precariousness and uncertainty". *Ibid.*, para. 113.

<sup>1128</sup> Panel Report, *Japan – Film*, para. 10.36. See also *ibid.*, para. 10.37.

<sup>1129</sup> Appellate Body Report, *EC – Asbestos*, para. 186 (footnote omitted).

<sup>1130</sup> Panel Report, *Japan – Film*, para. 10.37.

7.903 In the current dispute, we have already found that the COOL measure violates Articles 2.1 and 2.2 of the TBT Agreement, and that the Vilsack letter is in violation of Article X:3(a) of the GATT 1994.

7.904 The GATT panel in *EEC – Oilseeds I* set out the following test for assessing whether it is necessary to turn to the complainant's non-violation claim in light of a finding of inconsistency with Article III:4 of the GATT:

"The Panel first examined whether its finding that the payments to the processors are inconsistent with the General Agreement might make an examination of the question of the nullification or impairment of the tariff concessions unnecessary. The Panel noted that this would be the case *if compliance by the Community with the finding on Article III:4 would necessarily remove the basis of the United States claim of nullification or impairment.*"<sup>1131</sup> (emphasis added)

7.905 In the current dispute, compliance by the United States with the above-mentioned findings of violation would remove the basis of the complainants' non-violation claims of nullification or impairment. Indeed, the panel in *Japan – Film* identified a parallelism between key elements of the legal tests under Articles III:4 and XXIII:1(b) of the GATT 1994:

"[I]t could be argued that the standard we enunciated and applied under Article XXIII:1(b) – that of 'upsetting the competitive relationship' – may be different from the standard of 'upsetting effective equality of competitive opportunities' applicable to Article III:4. However, we do not see any significant distinction between the two standards apart from the fact that this Article III:4 standard calls for no less favourable treatment for imported products in general, whereas the Article XXIII:1(b) standard calls for a comparison of the competitive relationship between foreign and domestic products at two specific points in time, i.e. when the concession was granted and currently."<sup>1132</sup>

7.906 Arguably, a similar relationship exists between Article XXIII:1(b) of the GATT 1994 and Article 2.1 of the TBT Agreement. Indeed, we have noted the resemblance between key language in Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement; hence, we have recognized a similarity between relevant portions of the legal tests under these two provisions.<sup>1133</sup>

7.907 Accordingly, we stop our analysis of the complainants' non-violation claims here. Compliance by the United States with our finding of violation under Article 2.1 of the TBT Agreement would remove the basis of the complainants' non-violation claims of nullification or impairment. This also would be ensured by US compliance with our findings of violation under Article 2.2 of the TBT Agreement and Article X:3(a) of the GATT 1994.

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<sup>1131</sup> GATT Panel Report, *ECC – Oilseeds I*, para. 142.

<sup>1132</sup> Panel Report, *Japan – Film*, para. 10.380.

<sup>1133</sup> See paras. 7.228-7.234 above.

## VIII. FINDINGS AND RECOMMENDATIONS

8.1 We recall the United States' request that we issue our findings in the form of a single document containing two separate reports with separate findings and recommendations for each complainant. We also recall that Canada agreed, and Mexico did not object, to the United States' request.<sup>1134</sup> 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).

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<sup>1134</sup> See para. 2.11 above.

A. COMPLAINT BY CANADA (DS384): FINDINGS AND RECOMMENDATION

8.2 Canada has made claims with regard to the COOL measure and the Vilsack letter under Articles 2.1 and 2.2 of the TBT Agreement and Articles III:4, X:3(a) and XXIII:1(b) of the GATT 1994.

8.3 With respect to Canada's claims under the TBT Agreement, we conclude that:

- (a) the COOL measure is a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement, whereas the Vilsack letter is not;
- (b) the COOL measure, particularly in regard to the muscle cut meat labels, violates Article 2.1 because it affords imported livestock treatment less favourable than that accorded to like domestic livestock; and
- (c) the COOL measure violates Article 2.2 because it does not fulfil the objective of providing consumer information on origin with respect to meat products.

8.4 With respect to Canada's claims under the GATT 1994, we conclude that:

- (a) we need not make a finding on the COOL measure under Article III:4 in light of our finding that the same measure violated the national treatment obligation under Article 2.1 of the TBT Agreement;
- (b) the Vilsack letter violates Article X:3(a) because it does not constitute a reasonable administration of the COOL measure; and
- (c) having found that the Vilsack letter falls within the scope of Article X:3(a), we refrain from examining whether it is inconsistent with Article III:4.

8.5 Finally, in light of the above findings of violation, we have refrained from examining Canada's non-violation claim under Article XXIII:1(b) of the GATT 1994.

8.6 Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent that the United States has acted inconsistently with Articles 2.1 and 2.2 of the TBT Agreement and Article X:3(a) of the GATT 1994, it has nullified or impaired benefits accruing to Canada under these agreements.

8.7 Pursuant to Article 19.1 of the DSU, having found that the United States has acted inconsistently with Articles 2.1 and 2.2 of the TBT Agreement and Article X:3(a) of the GATT 1994, we recommend that the Dispute Settlement Body request the United States to bring the inconsistent measures into conformity with its obligations under the TBT Agreement and the GATT 1994.

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A. COMPLAINT BY MEXICO (DS386): FINDINGS AND RECOMMENDATION

8.2 Mexico has made claims with regard to the COOL measure and the Vilsack letter under Articles 2.1, 2.2, 2.4, 12.1 and 12.3 of the TBT Agreement and Articles III:4, X:3(a) and XXIII:1(b) of the GATT 1994.

8.3 With respect to Mexico's claims under the TBT Agreement, we conclude that:

- (a) the COOL measure is a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement, whereas the Vilsack letter is not;
- (b) the COOL measure, in particular in regard to the muscle cut meat labels, violates Article 2.1 because it affords imported livestock treatment less favourable than that accorded to like domestic livestock;
- (c) the COOL measure violates Article 2.2 because it does not fulfil the objective of providing consumer information on origin with respect to meat products;
- (d) Mexico has not established that the COOL measure violates Article 2.4;
- (e) Mexico has not established that the United States acted inconsistently with Article 12.3; and
- (f) in light of our finding on Mexico's claim under Article 12.3, Mexico has not established its claim under Article 12.1.

8.4 With respect to Mexico's claims under the GATT 1994, we conclude that:

- (a) we need not make a finding on the COOL measure under Article III:4 in light of our finding of violation by the same measure of the more specific national treatment obligation under Article 2.1 of the TBT Agreement;
- (b) the Vilsack letter violates Article X:3(a) because it does not constitute a reasonable administration of the COOL measure;
- (c) Mexico has not established that the United States administered the COOL measure in a non-uniform and partial manner inconsistently with Article X:3(a) through the shifts in the guidance by USDA on the COOL measure; and
- (d) having found that the Vilsack letter falls within the scope of Article X:3(a), we refrain from examining whether it is inconsistent with Article III:4.

8.5 Finally, in light of the above findings of violation, we have refrained from examining Mexico's non-violation claim under Article XXIII:1(b) of the GATT 1994.

8.6 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent that the United States has acted inconsistently with Articles 2.1 and 2.2 of the TBT Agreement and Article X:3(a) of the GATT 1994, it has nullified or impaired benefits accruing to Mexico under these agreements.



8.7 Pursuant to Article 19.1 of the DSU, having found that the United States has acted inconsistently with Articles 2.1 and 2.2 of the TBT Agreement and Article X:3(a) of the GATT 1994, we recommend that the Dispute Settlement Body request the United States to bring the inconsistent measures into conformity with its obligations under the TBT Agreement and the GATT 1994.

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