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

Recourse to Article 21.5 of the DSU by Canada (DS384)

Recourse to Article 21.5 of the DSU by Mexico (DS386)

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Exhibit US-17	AMI Statement on Commingling (Original Exh. MEX-67)
Exhibit US-18	*American Meat Institute, et al. v. United States Department of Agriculture, et al.*, No. 13-CV-1033 (D.D.C. July 25, 2013) (Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Injunction)
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I. INTRODUCTION

1. In the original proceeding, the Dispute Settlement Body (DSB) adopted the original panel's findings that the United States may, consistent with the *Agreement on Technical Barriers to Trade* (TBT Agreement), require retailers to inform U.S. consumers about the origin of meat products they purchase. And numerous WTO Members share the view that country of origin labeling is a valuable and worthwhile policy. Nearly 70 WTO Members impose some sort of mandatory country of origin labeling (COOL) regime – some of which are long-standing, some of which are brand new.

2. The original panel and the Appellate Body, however, had concerns with respect to precisely how the U.S. Department of Agriculture (USDA) implemented the U.S. COOL law with respect to meat. The United States undertook a careful analysis of the DSB's recommendations and rulings and developed a revised measure to address each of them. On May 23, 2013, USDA issued a new final rule (hereinafter the "2013 Final Rule") that specifically responds to these concerns.[1]

3. In short, the 2013 Final Rule now sets out what is in effect a single label for the three categories of meat derived from livestock traded among Canada, Mexico, and the United States. This label provides accurate and meaningful origin information regarding where these animals were born, raised, and slaughtered. At the same time, the 2013 Final Rule does not modify the recordkeeping and verification requirements that were at issue in the original proceeding.

4. As a result, the 2013 Final Rule ensures that the information conveyed to consumers is proportionate to the recordkeeping and verification requirements under the COOL measure. USDA has thus ensured that any detrimental impact on Canadian and Mexican livestock imports resulting from the amended COOL measure now stems exclusively from legitimate regulatory distinctions. In other words, the regulatory distinctions drawn in the amended COOL measure[2] between the different production steps and between the different labels are "even handed" in the treatment of domestic and imported livestock because the country of each production step must be listed for each label. As such, any detrimental impact resulting from the amended COOL measure does not reflect discrimination, and the changes made by the 2013 Final Rule prove that the measure is consistent with Article 2.1 of the TBT Agreement.

5. The complaining parties disagree with that assessment. What they think they are entitled to – but what the covered agreements do not give them – is a reduction in the information provided to consumers in order to reduce the concordant recordkeeping and verification requirements. How much information U.S. consumers receive, and to what extent that

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[1] *See Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts*, 78 Fed. Reg. 31,367 (May 24, 2013) (final rule) ("2013 Final Rule") (Exh. CDA-1).

[2] The United States uses the term "amended COOL measure" to refer to measure comprising of the COOL Statute, codified at 7 U.S.C. § 1638 et seq. (Exh. US-1), and the current version of USDA's COOL regulations, codified at 7 C.F.R. pt. 65 (Exh. US-2).

information is accurate and meaningful, is not a priority for the complainants. In fact, Canada repeatedly argued in the original proceeding that it is *not even legitimate* for the United States to mandate the provision of such origin information.

6. Canada lost this argument, of course, but now both complainants return to the WTO dispute settlement system with the same goal in mind – to convince the Panels that the covered agreements prohibit the United States from requiring that such origin information be provided. For Article 2.1 of the TBT Agreement, what this would mean is that no regulatory distinction that requires information for birth, raising, and slaughter could ever be legitimate. For Article III:4 of the *General Agreement on Tariffs and Trade* (GATT 1994), this would mean that Members have no discretion to pursue legitimate regulatory objectives if this may result in any detrimental impact on foreign imports. For Article 2.2 of the TBT Agreement, this would mean that the United States must accept a regime that either provides significantly less information to consumers, or adopt a regime that is so costly that the United States would likely have to forego COOL requirements altogether.

7. All three arguments end up in the same place for the complaining parties – that U.S. adjustments to the implementation of the COOL measure, despite being crafted with the DSB recommendations and rulings in mind, are not adequate. Instead, they argue that the only option available to the United States is that it simply walk away from the COOL measure *entirely*. The United States strongly disagrees with the complaining parties' conclusion, which is inconsistent with the texts of the relevant obligations and finds no support in the Appellate Body's interpretation of those obligations in *US – COOL*. For the reasons set out in this submission, Canada and Mexico's arguments should and do fail.

II. FACTUAL BACKGROUND

8. The United States took a measure to comply with the DSB recommendations and rulings by amending the 2009 Final Rule. Prior to addressing that new measure in section II.C, the United States will briefly summarize the COOL measure as originally challenged and the panel and Appellate Body findings relevant to the DSB recommendations and rulings regarding the complainants' claim under Article 2.1 of the TBT Agreement.

A. The COOL Measure as Originally Challenged

9. As originally challenged, the "COOL measure" consisted of two separate instruments:

(1) the COOL statute,[3] and (2) the 2009 Final Rule,[4] as promulgated by USDA's Agricultural Marketing Service ("AMS").[5] As discussed in the original proceeding, the COOL statute creates the broad framework of U.S. country of origin labeling requirements, but does not prescribe all of the details necessary for the program to operate in the market, instead instructing USDA to develop implementing regulations for this purpose.[6]

10. As discussed further below, and recognized by both the original panel and the Appellate Body, the COOL measure's objective is to provide consumer information on origin.[7] Furthermore, the original panel found (and the Appellate Body upheld) that the objective of providing consumers with information on origin – as defined in the COOL measure – that is, origin defined by where the animal was born, raised, and slaughtered – is a legitimate government objective under the TBT Agreement.[8]

1. The COOL Statute

11. The COOL statute requires retailers to inform consumers at the final point of sale of the country of origin of beef, lamb, pork, farm-raised fish, wild fish, perishable agricultural commodities (fruits and vegetables), goat meat, chicken, ginseng, pecans, macadamia nuts, and peanuts they buy.[9] For each covered commodity, the statute sets forth general requirements regarding country of origin labeling.[10] With respect to muscle cuts of meat, the statute defines

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[3] Subtitle D (Sections 281-285) of the Agricultural Marketing Act of 1946 (7 U.S.C. §§ 1638-1638c) ("COOL statute"), as amended by the Farm Security and Rural Investment Act of 2002 (the "2002 Farm Bill"), and the Food, Conservation, and Energy Act of 2008 (the "2008 Farm Bill") (Exh. CDA-5) (orig. Exh. CDA-2).

[4] "Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts; Final Rule," Agricultural Marketing Service, USDA, 74 Fed. Reg. 2658 (Jan. 15, 2009) (codified at 7 C.F.R. pts. 60 and 65) (Exh. CDA-2) (orig. Exh. CDA-5).

[5] *US – COOL (AB)*, para. 239; *US – COOL (Panel)*, paras. 7.59-7.61.

[6] *US – COOL (Panel)*, para. 7.83. The COOL statute directs USDA to "promulgate such regulations as are necessary to implement this subchapter." 7 U.S.C. § 1638c(b) (Exh. US-1).

[7] *US – COOL (AB)*, para. 433 (finding that the Panel did not err in making such a finding in the Panel Reports, paras. 7.617, 7.620, and 7.685); *see also US – COOL (Panel)*, para. 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.").

[8] *US – COOL (AB)*, para. 453; *US – COOL (Panel)*, para. 7.651.

[9] 7 U.S.C. § 1638(2)(A) (Exh. US-1); *US – COOL (AB)*, para. 239; *US – COOL (Panel)*, para. 7.87.

[10] 7 U.S.C. § 1638a(a)(1) (Exh. US-1) ("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.").

origin based on where the animal from which the meat was derived was born, raised and slaughtered.

12. The COOL statute creates four categories of labeling:

- "United States country of origin" meat (also known as "Category A") refers to meat derived from animals born, raised, and slaughtered in the United States.[11] If a source animal meets these requirements, the COOL statute states that a retailer may designate the resulting meat as U.S. origin.

- "Multiple countries of origin" meat (also known as "Category B") refers to meat derived from animals: (1) not exclusively born, raised, and slaughtered in the United States; (2) born, raised, or slaughtered in the United States; and (3) not imported into the United States for immediate slaughter.[12] If a source animal meets these requirements, the COOL statute states that a retailer may designate the country of origin of the resulting meat as all of the countries in which the source animal may have been born, raised, or slaughtered.

- "Imported for immediate slaughter" meat (also known as "Category C") refers to meat derived from animals born and raised in a foreign country and then imported into the United States for immediate slaughter.[13] If the source animal meets these requirements, the COOL statute states that a retailer shall designate the country of origin of the resulting meat as the country from which the source animal was imported and the United States.

- "Foreign country of origin" meat (also known as "Category D") refers to meat derived from an animal that is not born, raised, or slaughtered in the United States.[14] In this instance, the COOL statute states that a retailer shall designate a country other than the United States as the country of origin.

13. The COOL statute also defines certain key terms, the scope of the program, and its requirements. For example, the statute defines a "retailer" as "a person that is a dealer engaged

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[11] *US – COOL (Panel)*, para. 7.89. This category also includes animals born and raised in Alaska and Hawaii and transported through Canada for not more than 60 days and slaughtered in the United States or animals present in the United States on or before June 15, 2008.

[12] *US – COOL (Panel)*, para. 7.89.

[13] *US – COOL (Panel)*, para. 7.89; *see also* 7 C.F.R. § 65.180 (Exh. US-2) (defining "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.").

[14] *US – COOL (Panel)*, para. 7.89.

in the business of selling any perishable agricultural commodity at retail."[15] The statute exempts "food service establishments," such as restaurants, cafeterias, and other similar facilities from the scope of the program.[16] The statute further exempts "processed food item[s]" (and their ingredients) from the scope of the program.[17] The statute establishes recordkeeping requirements to ensure that retailers have the information necessary to provide the correct country of origin information to consumers as part of the "audit verification system," and grants auditing authority and enforcement authority to USDA.[18]

2. The 2009 Final Rule

14. On January 15, 2009, USDA's AMS published the 2009 Final Rule, which states that "the intent of the law and this rule is to provide consumers with additional information on which to base their purchasing decisions."[19] The 2009 Final Rule, which took effect on March 16, 2009, prescribed how the statutory U.S. COOL requirements were administered and enforced.

15. The 2009 Final Rule clarified the labeling requirements for the four categories for muscle cuts of meat in the COOL statute. As discussed extensively with the original panel, USDA built in a number of flexibilities into the 2009 Final Rule. Thus, the 2009 Final Rule also allowed for the use of a Category B or C label for meat derived from any combination of Category A, B, and C animals commingled during a single production day. This allowance permitted slaughterhouses and retailers to affix the same label on the meat derived from the commingled animals.[20] In addition, the 2009 Final Rule allowed Category B labels to list the countries in any order, thus allowing Category B labels to look like typical Category C labels where the production steps occurred in the same countries.[21]

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[15] 7 U.S.C. § 1638(6) (Exh. US-1) (stating that the term "retailer" has the same meaning given in the Perishable Agricultural Commodities Act [(PACA)] of 1930, sec. 1(b) (7 U.S.C. 499a(b)). The PACA definition of a retailer includes only those retailers handling fresh and frozen fruits and vegetables with an invoice value of at least $230,000 annually. 2009 Final Rule, 74 Fed. Reg. at 2694 (Exh. CDA-2).

[16] 7 U.S.C. § 1638a(b) (Exh. US-1).

[17] 7 U.S.C. § 1638(2)(B) (Exh. US-1) ("The term 'covered commodity' does not include an item described in subparagraph (A) if the item is an ingredient in a processed food item."). *See also* 7 C.F.R. § 60.119 (Exh. US-2) (defining processed food items).

[18] 7 U.S.C. §§ 1638a(d)-(e), 1638b (Exh. US-1); *US – COOL (Panel)*, para. 7.88; *see also* 7 U.S.C. § 1638a(c)(1) (Exh. US-1) (providing that information may be provided to consumers by means of a label, stamp, mark, placard, or sign); *see also US – COOL (Panel)*, para. 7.88.

[19] 2009 Final Rule, 74 Fed. Reg. at 2677 (Exh. CDA-2); *US – COOL (Panel)*, para. 7.680.

[20] *US – COOL (Panel)*, para. 7.704; *US – COOL (AB)*, para. 246.

[21] 2009 Final Rule, 74 Fed. Reg. at 2661-62 (Exh. CDA-2).

16. The 2009 Final Rule further defined the scope of the COOL requirements. In particular, the 2009 Final Rule also defines "processed food item" to encompass processing resulting in a change in the character of the covered commodity, such as cooking, curing, and smoking.[22]

17. The 2009 Final Rule includes recordkeeping requirements, which, *inter alia*, provided that, upon request, suppliers and retailers must make available records maintained in the normal course of business that verify a particular origin claim.[23] The 2009 Final Rule also required that suppliers make information about the country of origin available to the subsequent purchaser and that suppliers maintain records to establish and identify the immediate previous source and immediate subsequent recipient for a period of one year. In this regard, the 2009 Final Rule only required suppliers and retailers to produce records already maintained in the ordinary course of business in order to verify an origin claim, and permitted the use of ear tags and other common identifying marks already frequently used in the industry in order to maintain origin.[24]

B. The Original Panel and Appellate Body Reports

18. The original panel and Appellate Body made a number of findings relevant to this compliance proceeding. As a starting point, the original panel determined that not only is the objective of the COOL measure "to provide consumer information on origin" a legitimate government objective under the TBT Agreement, but that the COOL measure, in fact, contributes to that objective.[25] On appeal, the Appellate Body affirmed this finding, reasoning that the original panel's analysis of the COOL measure's text, design, architecture, structure, operation, and legislative history supported the panel's conclusion that the COOL measure's objective is to provide consumer information on origin.[26] In doing so, the Appellate Body (and

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[22] 2009 Final Rule, 74 Fed. Reg. at 2702 (Exh. CDA-2); 7 C.F.R. § 65.220 (Exh. US-2) ("*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. Specific processing that results in a change in the character of the covered commodity includes cooking (e.g., frying, broiling, grilling, boiling, steaming, baking, roasting), curing (e.g., salt curing, sugar curing, drying), smoking (hot or cold), and restructuring (e.g., emulsifying and extruding). Examples of items excluded include teriyaki flavored pork loin, roasted peanuts, breaded chicken tenders, and fruit medley.").

[23] 2009 Final Rule, 74 Fed. Reg. at 2703 (Exh. CDA-2); 7 C.F.R. § 65.500(2) (Exh. US-2); *US – COOL (Panel)*, paras. 7.116-7.120.

[24] *US – COOL (Panel)*, para. 7.319.

[25] *US – COOL (Panel)*, paras. 7.620, 7.651, 7.685.

[26] *US – COOL (AB)*, paras. 395-396, 453.

the original panel before it) specifically rejected a number of unsupportable contentions of the complaining parties, including: Canada's argument that the provision of consumer information on origin based on the COOL definition of origin is not a legitimate objective;[27] Canada's broader argument that providing consumer information on origin is not a legitimate governmental objective at all for purposes of the TBT Agreement;[28] and Canada and Mexico's argument that the objective of COOL is not consumer information, but trade protectionism.[29]

19. With regard to the Article 2.1 claims, the Appellate Body affirmed the Panel's finding that the challenged COOL measure imposed a detrimental impact on Canadian and Mexican livestock.[30] The Appellate Body then went on to analyze whether this "detrimental impact stems exclusively from a legitimate regulatory distinction or whether the measure lacks even-handedness."[31] In the Appellate Body's view, the relevant "regulatory distinctions are the three production steps (*i.e.*, birth, raising, and slaughter) as well as the four types of labels (*i.e.*, A, B, C, and D).[32] The Appellate Body ultimately found that the detrimental impact did not stem exclusively from legitimate regulatory distinctions because the cost of the recordkeeping required to comply with the labeling requirements was not "commensurate" with the information these same labels provided.[33] With regard to the B and C labels – which are affixed to virtually 100 percent of COOL-labeled meat derived from Canadian and Mexican livestock – the Appellate Body determined that "the origin information that must be conveyed to consumers is less detailed, and will often be less accurate" than "the type of origin information that upstream livestock producers and processors are required to maintain and transmit":[34]

> This is because the COOL measure requires the labels to list the country or countries of origin, but does not require the labels to mention production steps at all. If, for example, the relevant production steps took place in more than one

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[27] *US – COOL (AB)*, AB, paras. 446-447; *US – COOL (Panel)*, paras. 7.623, 7.647-75.

[28] *US – COOL (AB)*, paras. 434-435, 442, 444-445; *US – COOL (Panel)*, paras. 7.636-39.

[29] *US – COOL (AB)*, paras. 382, 421-424; *US – COOL (Panel)*, paras. 7.596, 7.610, 7.685.

[30] *US – COOL (AB)*, para. 292 (citing *US – COOL (Panel)*, paras. 7.372, 7.381, and 7.420).

[31] *US – COOL (AB)*, para. 293.

[32] *US – COOL (AB)*, para. 341.

[33] *US – COOL (AB)*, para. 343 ("As designed and applied, however, the COOL measure does not impose labelling requirements for meat that provide consumers with origin information *commensurate* with the type of origin information that upstream livestock producers and processors are required to maintain and transmit. Rather, the origin information that must be conveyed to consumers is less detailed, and will often be less accurate.") (emphasis in original).

[34] *US – COOL (AB)*, para. 343.

> country, the relevant label (B or C) will identify more than one country, but will not identify which production step took place in which of those countries. Under the labelling rules, labels for Category B meat may also list countries of origin in any order, such that the order of countries listed on the labels cannot be relied upon to indicate where certain production steps took place. Furthermore, due to the additional labelling flexibilities allowed for commingled meat, a retail label may indicate that meat is of mixed origin when in fact it is of exclusively US origin, or that it has three countries of origin when in fact it has only one or two.[35]

C. The Measure Taken to Comply: the 2013 Final Rule

20. The DSB adopted its recommendations and rulings for these disputes on July 23, 2012. An arbitrator pursuant to Article 21.3(c) of the DSU determined that the reasonable period of time ("RPT") for the United States to come into compliance would be 10 months, ending on May 23, 2013.[36]

21. On March 12, 2013, USDA published in the official government journal (the *Federal Register*) a proposal to amend the COOL regulations to bring the United States into compliance.[37] The proposed rule allowed for a 30 day comment period, which expired on April 11, 2013.[38] After carefully reviewing the comments submitted on the proposed rule, USDA issued a final rule on May 23, 2013. The rule was made effective on that day and published in the *Federal Register* the following day.[39]

22. As a starting point, the 2013 Final Rule pursues the same objective that the COOL statute and the 2009 Final Rule pursue – to provide consumers with information on origin, namely, with

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[35] *US – COOL (AB)*, para. 343.

[36] *US – COOL (Art. 21.3(c))*, para. 123 (Dec. 4, 2012).

[37] *Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts*, 78 Fed. Reg. 15,645, 15,645 (Mar. 12, 2013) (proposed rule) ("2013 Proposed Rule") (Exh. CDA-13).

[38] 2013 Proposed Rule, 78 Fed. Reg. at 15,645 (Exh. CDA-13).

[39] 2013 Final Rule, 78 Fed. Reg. at 31,367 (Exh. CDA-1) ("This final rule is effective May 23, 2013."). In making the rule effective immediately, USDA waived the 60 day delay in effective date provided for in the Congressional Review Act (5 U.S.C. 801 *et seq.*) and the 30 day delay in effective date provided for in the Administrative Procedure Act (5 U.S.C. 553)); *see also* 2013 Final Rule, 78 Fed. Reg. at 31,385 (Exh. CDA-1) (discussing the "good cause" USDA had for making such a waiver).

respect to meat, where the animal was born, raised, and slaughtered.[40] The 2013 Final Rule states clearly that this is its objective.[41]

23. The 2013 Final Rule pursues this objective in two different, but related, ways: (1) altering the labels such that they provide meaningful and accurate information on origin by detailing where the animal is born, raised, and slaughtered; and (2) eliminating the allowance for commingling.

24. Under the 2013 Final Rule, all origin designations for muscle cut covered commodities slaughtered in the United States must specify the production steps of birth, raising, and slaughter of the animal from which the meat is derived that took place in each country listed on the origin designation. This requirement applies equally to all muscle cut covered commodities derived from animals slaughtered in the United States (*i.e.*, all A, B, and C meat). In this regard, the United States agrees with Mexico that the 2013 Final Rule replaces the previous scheme with "a *single* label that specifies the country of each of the three production steps, *i.e.*, born, raised and slaughtered."[42] The 2013 Final Rule provides labeling requirements that are consistent with the statutory definition of origin for categories A, B, C, and D meat as set out in the 2008 Farm

[40] *US – COOL (AB)*, para. 453 ("Based on all of the above, we see no reason to disturb the Panel's finding with respect to the legitimacy of the objective pursued by the United States through the COOL measure, namely, to provide consumers with information on the countries in which the livestock from which the meat they purchase is produced were born, raised, and slaughtered.") (citing *US – COOL (Panel)*, para. 7.651); *US – COOL (AB)*, para. 466 ("Despite this overall finding, a number of findings and observations made by the Panel in the course of its analysis belie this conclusion and suggest that the COOL measure does contribute to the objective of providing information to consumers on the countries in which the livestock from which meat is derived were born, raised, and slaughtered."); *see also US – COOL (AB)*, para. 485 ("We recall the Panel's finding that the COOL measure's objective is to provide 'consumer information on origin,' and that 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.'") (citing *US – COOL (Panel)*, paras. 7.685, 7.673).

[41] *See, e.g.*, 2013 Final Rule, 78 Fed. Reg. at 31,368 (Exh. CDA-1) ("Under this final rule, all origin designations for muscle cut covered commodities slaughtered in the United States must specify the production steps of birth, raising, and slaughter of the animal from which the meat is derived that took place in each country listed on the origin designation. . . . This requirement will provide consumers with more specific information on which to base their purchasing decisions without imposing additional recordkeeping requirements on industry."); *id.* at 31,376 ("Specifying the production step occurring in each country listed on meat labels and eliminating the commingling flexibility as required by this final rule will benefit consumers by providing them with more specific information on which to base their purchasing decisions."); *id.* at 31,370 ("The Agency believes that the [COOL statute] provides the authority to amend the COOL regulations to require the labeling of specific production steps in order to inform consumers about the origin of muscle cuts of meat at retail.").

[42] Mexico's First Written 21.5 Submission, para. 119 ("The Amended COOL Measure makes the same distinctions among the three production steps. However, it eliminates the three types of labels for muscle cuts and replaces them with a *single* label that specifies the country of each of the three production steps, i.e., born, raised and slaughtered.") (emphasis added).

Bill.[43] Further, the 2013 Final Rule does not add to the record keeping requirements already imposed on regulated entities.[44]

1. Labeling of Muscle Cut Covered Commodities Slaughtered in the United States: Categories A, B, and C Meat

25. The 2013 Final Rule requires that meat derived from Category A, B, and C animals receive what is in effect the same label – *i.e.*, a label providing the location as to where the animal was born, raised, and slaughtered:

- United States Countries of Origin (Category A). The 2013 Final Rule eliminates the "Product of the U.S." label provided for under the 2009 Final Rule. Instead, Category A meat must be labeled to specifically identify the location information for each of the relevant production steps (*i.e.*, ''Born, Raised, and Slaughtered in the United States'').[45] As discussed with the original panel, Category A meat accounts for approximately 70 percent of beef and pork labeled under the COOL measure.[46]

- Multiple Countries of Origin (Category B). The 2013 Final Rule eliminates the ''Product of the U.S. and Country X'' label provided for under the 2009 Final Rule. Instead, Category B meat must be labeled to specifically identify the location information for each of the relevant production steps (*e.g.*, ''Born in Country X, Raised and Slaughtered in the United States''). As discussed with the original panel, Category B meat accounts for approximately 27 percent of the beef

[43] 7 U.S.C. § 1638a(a)(2)(A-D) (Exh. US-1).

[44] *See* 2013 Final Rule, 78 Fed. Reg. at 31,372 (Exh. CDA-1) ("[T]he Agency does not agree that additional recordkeeping or verification processes will be required to transfer information from one level of the production and marketing channel to the next. There are no recordkeeping requirements beyond those currently in place, and the Agency believes that the information necessary to transmit production step information is already maintained by suppliers in order to comply with the current COOL regulations. As with the current mandatory COOL program, this final rule contains no requirements for firms to report to USDA. Compliance audits will continue to be conducted at firms' places of business."); *see also id.* at 31,373 ("[N]o additional recordkeeping is required by this final rule, and no new processes need be developed to transfer information from one level of the supply chain to the next. The information necessary to transmit production step information should already be maintained by suppliers in order to satisfy the 2009 COOL regulations.").

[45] USDA permits retailers to use of the term "harvested" in lieu of slaughtered." 2013 Final Rule, 78 Fed. Reg. at 31,368 (Exh. CDA-1).

[46] *See US – COOL (Panel)*, para. 7.369; *see also* U.S. Response to Original Panel Question 90 (citing to orig. Exh. US-145 (Exh. US-3)).

and pork labeled under the COOL measure.[47]

- Imported for Immediate Slaughter (Category C). The 2013 Final Rule eliminates the ''Product of Country X and the United States'' label provided for in the 2009 Final Rule. Instead, Category C meat must be labeled to specifically identify the location information for each of the relevant production steps (*e.g.*, "Born and Raised in Country X, Slaughtered in the United States").[48] As discussed with the original panel, Category C meat accounts for approximately 0.5 percent of beef and 0.2 percent of pork labeled under the COOL measure.[49]

26. Finally, requiring the label for all muscle cut covered commodities derived from animals slaughtered in the United States to list the location of each of the three production steps mandated that USDA eliminate the allowance for commingling of different origin muscle cut commodities in a single production day. Under the previous regime, the commingling flexibility allowed entities in the production chain to commingle muscle cut commodities of different origins and affix one type of label (either B or C) on the commingled product. Such an allowance is simply incompatible with a born, raised, and slaughtered label.[50]

2. Labeling of Muscle Cut Covered Commodities Slaughtered Outside the United States: Category D Meat

27. With regard to imported muscle cuts (*i.e.*, Foreign Country of Origin (or D Label)), the 2013 Final Rule leaves unchanged the "Product of Country X" label provided for in the 2009

[47] *See* U.S. Response to Original Panel Question 90; Exh. US-3.

[48] 7 C.F.R. § 65.300(e) (Exh. US-2). The 2013 Final Rule states that: "the origin designation for muscle cut covered commodities derived from animals imported for immediate slaughter as defined in [7 C.F.R.] § 65.180 is required to include information as to the location of the three production steps. However, the country of raising for animals imported for immediate slaughter as defined in § 65.180 shall be designated as the country from which they were imported (*e.g.*, 'Born and Raised in Country X, Slaughtered in the United States')." 78 Fed. Reg. at 31,368-69 (Exh. CDA-1). The 2013 Final Rule did not amend 7 C.F.R. § 65.180, which defines the term "imported for immediate slaughter" to mean "consignment directly from the port of entry to a recognized slaughtering establishment and slaughtered within 2 weeks from the date of entry." *Id.* at 31,371.

[49] *See US – COOL (Panel)*, para. 7.371; *see also* U.S. Response to Original Panel Question 90; Exh. US-3.

[50] 2013 Final Rule, 78 Fed. Reg. at 31,369 (Exh. CDA-1) ("This final rule eliminates the allowance for commingling of muscle cut covered commodities of different origins. As discussed in the March 12, 2013, proposed rule, all origin designations are required to include specific information as to the place of birth, raising, and slaughter of the animal from which the meat is derived. Removing the commingling allowance lets consumers benefit from more specific labels.").

Final Rule.[51] The 2013 Final Rule thus maintains the pre-existing rule that muscle cut covered commodities retain their origin as declared to the U.S. Customs and Border Protection at the time the products entered the United States.[52] As discussed with the original panel, Category D meat accounts for approximately 0.3 percent of beef and 0 percent of pork labeled under the COOL measure.[53]

3. The Adjustment Costs of the 2013 Final Rule Are Minor

28. The costs that processors face to adjust to the 2013 Final Rule can be grouped into two categories: the cost of producing a different label than what was previously required, and costs resulting from the elimination of commingling.[54]

29. With regard to commingling, the original panel found that it could not determine "the precise extent" that U.S. industry is making use of commingling,[55] but in any event the benefits of commingling were quite limited.[56] The United States took note of these findings and, during its rulemaking process for the 2013 Final Rule, USDA specifically requested comments from industry and the public regarding the extent to which the industry is actually using the commingling provisions.[57]

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[51] 7 C.F.R. § 65.300(f)(2) (Exh. US-2); 2013 Final Rule, 78 Fed. Reg. at 31,385 (Exh. CDA-1) ("Muscle cut covered commodities derived from an animal that was slaughtered in another country shall retain their origin, as declared to U.S. Customs and Border Protection at the time the product entered the United States, through retail sale (e.g., 'Product of Country X'), including muscle cut covered commodities derived from an animal that was born and/or raised in the United States and slaughtered in another country. In addition, the origin declaration may include more specific location information related to production steps (i.e., born, raised, and slaughtered) provided records to substantiate the claims are maintained and the claim is consistent with other applicable Federal legal requirements.").

[52] 2013 Final Rule, 78 Fed. Reg. at 31,385 (Exh. CDA-1).

[53] *See US – COOL (Panel)*, n.941; *see also* U.S. Response to Original Panel Question 90; Exh. US-3.

[54] *See* 2013 Final Rule, 78 Fed. Reg. at 31,378 (Exh. CDA-1).

[55] *US – COOL (Panel)*, para. 7.364; *US – COOL (AB)*, paras. 309-310 (upholding that finding).

[56] *See US – COOL (Panel)*, para. 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.").

[57] *See, e.g.*, 2013 Proposed Rule, 78 Fed. Reg. at 15,648 (Exh. CDA-13) ("The Agency's experience with the current program suggests that the majority of muscle cut covered commodities are not produced and labeled using the labeling scheme afforded by commingling. The Agency invites comment and data regarding *the extent to which* the flexibility afforded by commingling on a production day *is used* to designate the country of origin under the current COOL program and the potential costs, such as labor and capital costs, which may result from the loss of such flexibility.") (emphasis added); *id.* at 15,650 ("The Agency invites public comment and associated quantitative

30. In response, three beef processors – Dallas City Packing of Texas, Agri Beef of Washington, and FPL Food of Georgia – stated for the record that they commingle different origin cattle.[58] No pork processors claimed to be commingling. In addition, certain commenters made vague allegations that numerous companies make use of the flexibility but provided no evidence as to that fact. Notably, the major industry trade groups, including the American Meat Institute (AMI), representing more than 90 percent of U.S. beef and pork processors, the National Pork Producers Council (NPPC), representing 67,000 U.S. pork producers, and the National Cattlemen's Beef Association (NCBA), representing a significant portion of beef producers, refused to provide any evidence as to the extent that their own members were commingling in their comments on the 2013 Proposed Rule despite the direct request of USDA to do so.[59]

31. Based on this response (and lack thereof), USDA could not definitively determine the extent to which U.S. industry has been commingling different origin animals for purposes of estimating the costs of the 2013 Final Rule.[60] Instead, USDA assumed that somewhere between 5 and 20 percent of the industry has been commingling.[61] USDA derived the lower bound estimate from evidence submitted in the original proceeding,[62] while the upper bound was

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data that would improve the Agency's estimate of the cost of the changes in the labeling and *commingling* requirements being proposed in this rulemaking, including any additional costs that have not been included in the estimates discussed above.") (emphasis added); *see also id.* at 15,651 ("Small packer and processor labeling costs under the proposed rule are estimated at $2.7 million. As with retailers, labeling costs are estimated at $982 per establishment. The Agency seeks comment on the accuracy of these estimates and the impacts on small businesses that may not be captured using the label cost model discussed above."); *id.* at 15,647 ("The Agency seeks comments and data on the estimated impacts of this rulemaking that may affect its designation under Executive Order 12866 and the Congressional Review Act.").

[58] *See* Comments of Dallas City Packing on 2013 Proposed Rule (Exh. CDA-63); Comments of Agri Beef on 2013 Proposed Rule (Exh. CDA-13); Comments of FPL Food on 2013 Proposed Rule (Exh. CDA-32).

[59] *See* AMI Comments on the 2013 Proposed Rule (April 9, 2013) (Exh. CDA-23); NPPC Comments on the 2013 Proposed Rule (April 11, 2013) (Exh. CDA-24); NCBA Comments on the 2013 Proposed Rule (April 11, 2013) (Exh. CDA-37).

[60] *See* 2013 Final Rule, 78 Fed. Reg. at 31,368 (Exh. CDA-1); *see also id.* at 31,373("[C]ommenters to the proposed rule submitted anecdotal information indicating that commingling flexibility is used by some packers. However, the information provided was insufficient to enable the Agency to determine the extent to which industry is making use of commingling flexibility.").

[61] 2013 Final Rule, 78 Fed. Reg. at 31,378 (Table 1) (Exh. CDA-1).

[62] 2013 Final Rule, 78 Fed. Reg. at 31,378 (Exh. CDA-1) ("The lower-bound estimate is derived from the position of certain U.S. industry actors as well as the complainants in the WTO dispute that the proportion of beef and pork that carries the U.S.-origin label is close to 90 percent. Given that imported livestock represent about eight percent of fed steer and heifer slaughter and just over five percent of barrow and gilt slaughter in recent years, and assuming that some portion of these animals are segregated and labeled accordingly, the Agency adopts five percent

estimated by assuming that *all* B and C labeled meats (accounting for 20 percent of meat being labeled[63]) were derived from commingled meat and applying this proportion to the entire national production of muscle cut covered commodities.[64] USDA considers such an assumption as "highly unlikely" to be true and considers that the actual extent of commingling "likely falls closer to the lower end than the higher end of the estimated range of commingling."[65] For purposes of the cost benefit analysis,[66] USDA estimated costs for the loss of commingling for those companies actually commingling based on the lower bound and upper bound estimates, as well as the midpoint.[67] However, USDA also considers that even the lower bound estimates "are likely to overstate actual adjustment costs [incurred by U.S. industry] over time."[68] Rather, USDA anticipates that industry will adjust to the new requirements and "that initial adjustment costs are not likely to persist."[69]

32. For the cost of producing the new label, neither Canada nor Mexico has indicated that this cost would be anything greater than the 2013 Final Rule cost analysis indicates it will be.

4. Steps Taken by USDA to Minimize Adjustment Costs

33. As noted above, the 2013 Final Rule, like all new labeling regimes, imposes new costs on industry participants. As discussed in the 2013 Final Rule, USDA maintained or took further steps to minimize the costs for industry to adjust to the new requirements:

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as a plausible lower-bound estimate of the portion of total production that may be commingled.") (citing *US – COOL (Panel)*, paras. 7.361, 7.370).

[63] The 20 percent figure is derived from USDA's mandatory COOL retail record reviews conducted in 2012.

[64] 2013 Final Rule, 78 Fed. Reg. at 31,378 (Exh. CDA-1) ("Of the 1,472 retail record reviews for beef and 1,652 for pork, 80 percent were of single-country origin and by definition, could be the result of commingling. The remaining 20 percent of items reviewed had either two or more countries of origin or were unlabeled. At most, then, 20 percent of the production could potentially be commingled, which implies the technically possible but highly unlikely assumption that every item with more than one country of origin plus all items without country of origin information are the result of commingling. Given that the assumption underlying the higher end estimate is highly unlikely, the extent to which the industry is commingling likely falls closer to the lower end than the higher end of the estimated range of commingling.").

[65] 2013 Final Rule, 78 Fed. Reg. at 31,378 (Exh. CDA-1).

[66] Under U.S. law, regulatory agencies must assess the costs and benefits for their new rules. *See* 2013 Final Rule, 78 Fed. Reg. at 31,377 (referring to Executive Order 12,866 and Executive Order 13,563) (Exh. CDA-1).

[67] *See* 2013 Final Rule, 78 Fed. Reg. at 31,380 (Table 3) (Exh. CDA-1).

[68] 2013 Final Rule, 78 Fed. Reg. at 31,373 (Exh. CDA-1).

[69] 2013 Final Rule, 78 Fed. Reg. at 31,373 (Exh. CDA-1).

- Provision of Information to Consumers. The 2013 Final Rule maintains the flexibility provided for in the 2009 Final Rule to allow for a variety of ways that the origin information can be provided, such as placards, signs, labels, stickers, etc.[70] As the 2013 Final Rule notes, many retail establishments have chosen to use signage above the relevant sections of the meat case to provide the required origin information in lieu of or in addition to providing the information on labels of each package of meat.[71]

- Abbreviations. For those retailers that do want to provide consumers origin information through labels and stickers, the 2013 Final Rule allows for the use of abbreviations in the light of the limited space that may be available to indicate the three production steps on the label or sticker.[72]

- Period of Education and Outreach. While the 2013 Final Rule was mandatory as of May 23, 2013, USDA recognized that it was not feasible to expect all affected entities to come into full compliance with the new labeling rules as of that date. As such, the 2013 Final Rule provided for a six month period where USDA devoted its resources to educating industry regarding the new requirements so that the regulated industries had clear expectations as to how the Agency would enforce this rule.[73] USDA considered that a six month time period, which is the same time period provided for in the 2008 Interim Final Rule and 2009 Final Rule, a sufficient time period for retailers and suppliers to become educated on and fully transition over to the new requirements of the final rule.[74] USDA believes that its education and outreach program has helped to "ensure that the industry effectively and rationally implements this final rule" as well as "help

[70] 2013 Final Rule, 78 Fed. Reg. at 31,369 (Exh. CDA-1).

[71] 2013 Final Rule, 78 Fed. Reg. at 31,369 (Exh. CDA-1).

[72] 2013 Final Rule, 78 Fed. Reg. at 31,369 (Exh. CDA-1) ("In terms of using labels and stickers to provide the origin information, the Agency recognizes that there is limited space to include the specific location information for each production step. Therefore, under this final rule, abbreviations for the production steps are permitted as long as the information can be clearly understood by consumers. For example, consumers would likely understand 'brn' as meaning 'born'; 'htchd' as meaning 'hatched'; 'raisd' as meaning 'raised'; 'slghtrd' as meaning 'slaughtered' or 'hrvstd' as meaning 'harvested'. In addition, the current COOL regulations allow for some use of country abbreviations, as permitted by Customs and Border Protection, such as 'U.S.' and 'USA' for the 'United States' and 'U.K.' for 'The United Kingdom of Great Britain and Northern Island.' This final rule retains that flexibility.").

[73] 2013 Final Rule, 78 Fed. Reg. at 31,369-70 (Exh. CDA-1) (discussing six month period). Such educational activities include: webinars, meetings, and making educational materials publicly available.

[74] 2013 Final Rule, 78 Fed. Reg. at 31,370 (Exh. CDA-1).

alleviate some of the economic burden on regulated entities."[75]

5. Domestic Legal Challenge to the 2013 Final Rule

34. Although it does not affect the existence or content of the 2013 Final Rule (the U.S. measure taken to comply), the United States will briefly describe a domestic legal challenge to the 2013 Final Rule. The United States believes that this additional background will be useful to the panel in light of certain factual findings by the trial-level court on the lack of substantiation of costs and harms that various meat processors alleged they would incur as a result of the 2013 Final Rule.

35. On July 8, 2013, a collection of U.S., Canadian, and Mexican industry stakeholders challenged the 2013 Final Rule in U.S. Federal Court in the District of Columbia (DC). Plaintiffs in *American Meat Institute, et al. v. U.S. Department of Agriculture, et al.* (hereinafter "AMI v. USDA") claim that the 2013 Final Rule violates the U.S. constitutional right to the freedom of speech, is contrary to the COOL statute (in part by eliminating commingling), and is "arbitrary and capricious" and therefore inconsistent with U.S. administrative law.[76] As part of their requested relief, plaintiffs requested the D.C. Federal Court to preliminarily enjoin the 2013 Final Rule pending an examination of the merits. Under well established U.S. law, a party seeking a preliminary injunction "must establish [1] that [it] is likely to succeed on the merits, [2] that [it] is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in [its] favor, and [4] that an injunction is in the public interest.'"[77]

36. On September 11, 2013, the D.C. Federal Court denied plaintiffs motion for a preliminary injunction, finding, among other things, that plaintiffs had failed to establish that they are likely to succeed on the merits in any of their three claims or that they will suffer "irreparable harm" in the absence of a preliminary injunction, notwithstanding the numerous witness statements that plaintiffs had gathered to support the allegation that the 2013 Final Rule

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[75] 2013 Final Rule, 78 Fed. Reg. at 31,369 (Exh. CDA-1). As the 2013 Final Rule also makes clear, USDA's education and outreach will not stp at the end of the six month time period, but will continue into the future as it manages the COOL program. In addition, the 2013 Final Rule does not contemplate forcing retailers and other entities to re-label already labeled products. Accordingly, 2013 Final Rule exempts "muscle cut covered commodities produced or packaged before May 23, 2013." *Id.* at 31,369. The 2013 Final Rule does not contemplate forcing retailers and other entities to discard already printed labels done pursuant to the 2009 Final Rule requirements. Accordingly, the 2013 Final Rule allows for entities to use labels printed prior to May 23, 2013 until that inventory of labels has been extinguished. In the unlikely event that inventory is still not extinguished at the end of the six month education and outreach period, entities can continue to use the old labels as long as retail establishments provide the more specific information via other means (e.g., signage). *Id.*

[76] *See* Complaint in *AMI v. USDA* (July 8, 2013) (Exh. CDA-66).

[77] *AMI v. USDA*, No. 13-CV-1033 (D.D.C. Sept. 11, 2013) (mem. op.) (denying preliminary injunction) ("D.C. Court PI Opinion") (Exh. US-4).

will "crippl[e]" the U.S. industry.[78] Reviewing these witness statements, many of which are the same statements that the complaining parties rely on here,[79] the D.C. Court stated:

> The Court is *not* persuaded. As Defendants rightly argue, bare allegations and fears about what may happen in the future are not sufficient to support a claim of irreparable injury. To be sure, Plaintiffs have gathered a number of declarants who are willing to *speculate* about the potential impact of the Final Rule on their business operations and profits, but without more than such blanket, *unsubstantiated* allegations of harm, *there is no strength in these numbers*.[80]

37. Using the statement of Brad McDowell, President of AgriBeef, as an example,[81] the D.C. Court noted that "*none* of the Plaintiffs' declarations adequately alleges and substantiates the kind of immediate and irreparable monetary injury that is required to sustain Plaintiffs' assertions regarding the Final Rule's dire financial effects or the lack of recoverability of the added expenditures."[82] The D.C. Court, however, noted that plaintiffs' failure to prove their case is "not for lack of trying":

> The packer declarants speak earnestly about what they truly 'expect' to happen in the marketplace; what their customers are 'likely' to demand; and what 'could' happen to their businesses if they are made to follow the Final Rule. But the Court cannot find 'certain' or 'actual' harm based on such speculation, let alone find the kind of extreme economic injury necessary to support a claim of irreparable harm.[83]

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[78] D.C. Court PI Opinion, at 62, 67, 72 (Exh. US-4). Not surprisingly, plaintiffs in *AMI v. USDA* refused to provide any specific evidence as to the extent of commingling to D.C. Court, much like is the case here. *Compare* D.C. Court PI Opinion, at n.33 ("The current record is not clear regarding the number of packing companies that commingle livestock."), *with supra* sec. II.C.3.

[79] *See* Exh. CDA-17, 18, 19, 29, 68; Exh. MEX-23, 28.

[80] D.C. Court PI Opinion, at 64 (emphasis added and internal quotes and citations omitted) (Exh. US-4). *See also id.* at 60-61 ("Because the court must decide whether the harm will *in fact* occur, a party seeking injunctive relief must *substantiate* the claim [of] irreparable injury and must show that the alleged harm will directly result from the action which the movant seeks to enjoin.") (emphasis in original and added and internal quotes omitted).

[81] Canada relies on the same statements, *see* Exh. CDA-17, 29, as well as a statement by Mr. McDowell's company. *See* Exh. CDA-28. Moreover, while Canada does not rely on the D.C. Court's other example, Alan Rubin's individual statement, *see* D.C. Court PI Opinion, at 65, Canada does rely on the very similar statements made by Mr. Rubin's company, Dallas City Packing. *See* Exh. CDA-63.

[82] D.C. Court PI Opinion, at 65-66 (emphasis added) (Exh. US-4).

[83] D.C. Court PI Opinion, at 66-67 (Exh. US-4) (quoting from Rubin and McDowell statements as example of a pervasive failure in plaintiffs' evidentiary support).

38. Plaintiffs have appealed the D.C. Court's opinion to the D.C. Circuit Court of Appeals. That appeal is pending.

D. Mandatory COOL Requirements Applied by WTO Membership

1. COOL Requirements Are Common Among WTO Members

39. As the original panel recognized, mandatory COOL requirements are common among WTO Members,[84] with nearly 70 Members imposing country of origin regimes of some scope.[85] These measures cover a wide array of products, including a whole host of different foods, alcoholic beverages, and consumer goods.[86] At least 10 WTO Members require origin labels on meat products in particular.[87] Members often state that the objective of such measures is to provide consumer information (or the related goal of preventing consumers from being misled or confused),[88] a point the original panel recognized as well.[89]

40. As also noted by the original panel, not only do the two complaining parties enforce extensive COOL regimes themselves, but the original third parties to the dispute do as well:

(1) Canada requires country of origin labels on a number of products, such as dairy

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[84] *See US – COOL (Panel)*, para. 7.638 ("We observe that many of these labelling 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.") (emphasis added).

[85] *See* WTO Members with Country of Origin Regimes (Exh. US-5); TBT Notifications of Country of Origin Measures (Exh. US-6).

[86] WTO Members with Country of Origin Regimes (Exh. US-5).

[87] *See* WTO Members with Country of Origin Regimes (Exh. US-5) (listing Australia, Barbados, Canada, Chile, Chinese Taipei, Colombia, the EU, Korea, Japan, and Mexico).

[88] *See* WTO Members with Country of Origin Regimes (Exh. US-5) (listing notifications to the TBT Committee by 20 WTO Members stating that consumer information is the sole or main objective in notifications to the TBT Committee of mandatory country of origin labeling requirements, including Australia, Brazil, Chile, Japan, and South Africa); *id.* (listing Australia, the EU, and Colombia as Members whose objective is to prevent deceptive practices or prevent consumers from being misled or confused); *see also US – COOL (Panel)*, n.839 (noting that one of Korea's stated objective is "enhancing the credibility of beef products").

[89] *See US – COOL (Panel)*, para. 7.638 ("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.'").

products, eggs, honey, and processed eggs.[90] In addition, Canada requires country of origin labels on certain imported (but not domestic) meat, maple products, fish, processed products, brandy, organic products, and fresh fruit and vegetables.[91]

(2) Mexico requires country of origin labels for domestic and imported prepackaged food and non-alcoholic beverages.[92] Mexico also imposes COOL requirements on meat and meat products, unless sold in bulk.[93]

(3) Australia requires country of origin labels for many food products, such as prepackaged foods and unpackaged fresh or processed pork and pork products, fruits, vegetables, and fish.[94] Recently, Australia expanded the regime's coverage to include unpackaged beef, mutton, and chicken meat.[95]

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[90] *US – COOL (Panel)*, n.838; *see also* Canada's National Mandatory COOL Requirements (Exh. US-7) (orig. Exh. US-3, CDA-164, 165, 166, 173) (citing Regulations Dairy Products, sec. 17-23, 68, 71; Regulations Eggs, Regulations Processed Eggs, sec. 12, 14, 15, 16; Regulations Honey, sec. 37). Among the many requirements of these regulations, is the specific labeling requirements for Canadian honey that has been blended with imported honey. *See* Regulations Honey, sec. 37(3) ("Where imported honey is blended with Canadian honey and is graded under these Regulations, the container shall be marked with the words 'A Blend of Canadian and (naming the source of sources) Honey' or 'mélange de miel canadien et de miel (naming the source or sources)' or 'A Blend (naming the source or sources) Honey and Canadian Honey' or 'mélange de miel (naming the source or sources) et de miel canadien", the sources being named in descending order of their proportions.'"); *see also* Canada's Response to the Original Panel's Question 40, paras. 45-49.

[91] *See* Canadian Food Inspection Agency, Country of Origin Labelling Requirements (Exh. US-8) (stating that such requirements are imposed under the Canadian Agricultural Products Act and the Meat Inspection Act); *see also* TBT Notifications of Country of Origin Measures (Exh. US-6) (citing Meat Inspection Regulations, 1990 Number 109)*; see also US – COOL (Panel)*, n.838 (listing all of these products except for meat); *see also* Canada's Mandatory COOL Requirements for Imported Products (Exh. US-9) (Orig. Exh. CDA-167-172) (citing Regulations Maple Products sec. 19, Regulations Fish sec. 6, Regulations Processed Products sec. 41, Regulations Brandy Pt B 02.060, Regulations Organic Products sec. 25, Regulations Fresh Fruits and Vegetables sec. 10); *see also* Canada's Response to the Original Panel's Question at 40, paras. 45-49.

[92] *US – COOL (Panel)*, n.838; *see also* TBT Notifications of Country of Origin Measures (Exh. US-6); Mexico's Response to the Original Panel's Question 40, paras. 62-71; WTO Members with Country of Origin Regimes (Exh. US-5) (listing Mexico's Especificaciones generales de etiquetado para alimentos y bebidas no alcohólicas preenvasados, NOM-051-SCFI/SSA 1-2010, art. 4.2.5.1).

[93] *See* TBT Notifications of Country of Origin Measures (Exh. US-6) (Mexican Official Standard "Productos y servicios. Especificacionessanitarias en los establecimientos dedicados al sacrificio y faenado de animals para abasto, almacenamiento, transporte y expendio," NOM-194-SSA1-2004, art. 9).

[94] *See* WTO Members with Country of Origin Regimes (Exh. US-5) (citing the Australian Food Standards Code 1.2.11 on "Country of Origin Labeling Requirements").

[95] *See* WTO Members with Country of Origin Regimes (Exh. US-5) (citing the Australian Food Standards Code 1.2.11 on "Country of Origin Labeling Requirements"); *see also* TBT Notifications of Country of Origin Measures (Exh. US-6) (citing Australia's Notification of Proposal P1011 – Country of Origin Labelling –

(4) The EU requires country of origin labels on all beef products to indicate where the animal from which the beef or veal was derived was born and reared.[96] Country of origin labeling for pre-packaged fresh, chilled, and frozen meat of swine, sheep, goat, and poultry meat is scheduled to become a mandatory requirement throughout the EU in December 2014.[97] Under draft implementing regulations, for meat imported from third countries, when all the requisite information labeling is not available, the label shall contain "Reared in: non-EU" and "Slaughtered in: (Name of the third country where the animals were slaughtered)."[98] The EU also requires mandatory country of origin labeling for honey,[99] certain fruits and vegetables,[100] wine,[101] and olive oil.[102]

(5) Japan requires country of origin labels on a number of food products, including processed foods and beverages sold at retail level, as well as certain fresh products, such as fresh, chilled, or frozen meat (*e.g.*, beef, pork, mutton, poultry, etc.).[103]

Unpackaged Meat Products, G/TBT/N/AUS/70 (Aug. 23, 2011)). This expansion entered into effect on July 18, 2013.

[96] *See* WTO Members with Country of Origin Regimes (Exh. US-5); *see also* TBT Notifications of Country of Origin Measures (Exh. US-6) (Regulation (EC) No. 1760/2000); *see also US – COOL (Panel)*, n.839.

[97] *See* TBT Notifications of Country of Origin Measures (Exh. US-6) (European Parliament and Council Reg. 1169/2011 on the provision of food information to consumers, Official Journal L 304 of November 22, 2011).

[98] *See* TBT Notifications of Country of Origin Measures (Exh. US-6) (referring to Draft Commission Implementing Regulation laying down rules for the application of Regulation (EU) No 1169/2011 of the European Parliament and of the Council as regards the indication of the country of origin or place of provenance for fresh, chilled and frozen meat of swine, sheep, goats and poultry Article 6).

[99] *See* WTO Members with Country of Origin Regimes (Exh. US-5); *see also* TBT Notifications of Country of Origin Measures (Exh. US-6) (Council Directive 2001/110/EC of 20 December 2001 relating to honey art 2:4(a)).

[100] *See* WTO Members with Country of Origin Regimes (Exh. US-5); *see also* TBT Notifications of Country of Origin Measures (Exh. US-6) (Commission Regulation (EC) No 1580/2007 of 21 December 2007).

[101] *See* WTO Members with Country of Origin Regimes (Exh. US-5); *see also* TBT Notifications of Country of Origin Measures (Exh. US-6) (Council Regulation (EC) No 479/2008 Title III Chapter III).

[102] *See* WTO Members with Country of Origin Regimes (Exh. US-5); *see also* TBT Notifications of Country of Origin Measures (Exh. US-6) (EC Notification of Regulation No. 1019/2002, G/TBT/N/EEC/226 (Oct. 22, 2008)).

[103] *See* Japan's Response to the Original Panel's Question 1, para. 1; *see also* TBT Notifications of Country of Origin Measures (Exh. US-7) (Quality Labeling Standards for Fresh Foods)*; US – COOL (Panel)*, n.839 (discussing various Korean notifications to the TBT Committee).

(6) Korea requires country of origin labels on red meat, pork, boiled rice, chicken, and Kimchi.[104]

2. COOL Measures Applied By WTO Members Have Limited Scope

41. The scope of these WTO Members' COOL measures varies widely. In devising these measures, Members have decided to cover certain products but not others, as well as impose a wide variety of other limitations and exemptions. In fact, the United States is not aware of any Member that applies a "universal" country of origin measure, *i.e.*, one that applies to all types of sales of all types of products. This merely confirms the unsurprising conclusion that while many Members want to provide origin information to consumers, Members must balance that objective against other, competing public policy objectives, such as limiting the costs to industry in providing such information. Such limitations include:

42. Limitations based on the type of product. The vast majority of COOL measures (if not all COOL measures), make at least some distinctions between products, with measures invariably covering some products but not others. For example:

- Canada's requirements: Cover brandy, but other types of liquors; cover maple products, but not olive oil;[105]
- Mexico's requirements: Cover prepackaged foods, but not fresh fruits and vegetables or loose nuts;[106]
- Australia's requirements: Cover fish, pork, fruit and vegetables, but not shellfish, loose nuts, and poultry products (other than chicken);[107]
- Brazil's requirements: Cover certain fruits (apples and mangoes), but not others (bananas and blueberries); certain nuts (cashews, chestnuts, and almonds), but not others (macadamia nuts and peanuts), and wine, but not beer;[108] and

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[104] *See* Korea's Response to the Original Panel's Question 1; *see also* TBT Notifications of Country of Origin Measures (Exh. US-6) (Enforcement Decree of the Food Sanitary Act through the Ministry of Health and Welfare Public Notification 2006-133 (June 19, 2006) G/TBT/N/KOR/111 (22 June 2006) and amendment G/TBT/N/KOR/173).

[105] *See* Scope of Third Party COOL Regulations (Exh. US-10) (referring to Canadian measures).

[106] *See* Scope of Third Party COOL Regulations (Exh. US-10) (referring to Mexican measures).

[107] *See* Scope of Third Party COOL Regulations (Exh. US-10) (referring to Australian Food Standards Code, Standard 1.2.11).

[108] *See* Scope of Third Party COOL Regulations (Exh. US-10) (referring to various Brazilian measures).

- EU's requirements: Cover honey and olive oil, but not maple products or vinegar; cover wine, but not beer; cover beef, but not fish or (currently) pork.[109]

43. Limitations based on who the seller of the product is. The applicability of a number of COOL measures depend on who the seller is. Thus, COOL measures enforced in Australia[110] and the EU[111] apply at the retail level, but do not apply when the same product is sold in a restaurant. In contrast, a Korean measure appears to cover food sold in restaurants, but not at retail.[112] Also, Mexico's country of origin labeling requirements for pre-packaged food and beverages do not apply when such products are packaged at the retail level or to bulk products.[113]

44. Limitations based on the origin of the product. Certain countries enforce regimes whose applicability depends on the national origin of the product. Thus, Canada applies country of origin requirements on imported meat, maple products, processed fish, processed products, brandy, organic products, fresh fruit and vegetables, and honey, but not on their domestic equivalent products.[114] Further, Canada applies various labeling specifications to imported

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[109] *See* Scope of Third Party COOL Regulations (Exh. US-10) (referring to various EU measures).

[110] *See* TBT Notifications of Country of Origin Measures (Exh. US-6) (citing Australian Food Standards Code, Standard 1.2.11, The Australian mandatory country of origin labeling regime applies only to products sold at the retail level or supplied to catering establishments, such as restaurants or hospitals, where the product is prepared. If the food is served to the public for immediate consumption at a restaurant or similar institution, then the product is not within the scope of the regulation). *See also* WTO Members with Country of Origin Regimes (Exh. US-5) (listing Australia's Notification of Proposal P1011 - Country of Origin Labelling - Unpackaged Meat Products, G/TBT/N/AUS/70 (Aug. 23, 2011)). The expansion entered into effect on July 18, 2013.

[111] *See* Scope of Third Party COOL Regulations (Exh. US-10) (referring to various EU measures)*; see also* TBT Notifications of Country of Origin Measures (Exh. US-7) (European Parliament and Council Reg. 1169/2011 on the provision of food information to consumers, Official Journal L 304 of November 22, 2011, Preamble(15) "Operations such as the occasional handling and delivery of food, the serving of meals and the selling of food by private persons, for example at charity events, or at local community fairs and meetings, should not fall within the scope of this Regulation.").

[112] *See* Scope of Third Party COOL Regulations (Exh. US-10) (referring to a Korean measure). *see also* TBT Notifications of Country of Origin Measures (Exh. US-7) (Enforcement Decree of the Food Sanitary Act through the Ministry of Health and Welfare Public Notification 2006-133 (June 19, 2006) G/TBT/N/KOR/111 (22 June 2006) and amendment G/TBT/N/KOR/173).

[113] *See* WTO Members with Country of Origin Regimes (Exh. US-5) (listing Mexico's Especificaciones generales de etiquetado para alimentos y bebidas no alcohólicas preenvasados, art. 1,2(c)).

[114] *See* Canadian Food Inspection Agency, Country of Origin Labelling Requirements (Exh. US-8) (stating that such requirements are imposed under the Canadian Agricultural Products Act and the Meat Inspection Act); *US – COOL (Panel)*, n.838 (listing all of these products except for meat); Canada's Response to the Original Panel's Question 40, paras. 45-49; *supra* n.90. Yet, Canada also imposes country of origin requirements on dairy products,

maple products that weigh below five kilograms or contain less than five liters of product.[115] China appears to apply country of origin requirements to all imported prepackaged foods, but not to the domestic equivalent products.[116]

III. LEGAL ARGUMENT

A. Terms of Reference of the Article 21.5 Proceeding

45. Article 21.5 of the DSU provides an expedited proceeding in situations "{w}here there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB. Thus, the subject matter is narrower than for original proceedings under Articles 4 and 6 of the DSU, which may cover any measure and any of the covered agreements.[117] In an Article 21.5 proceeding, the only measures at issue are those taken to comply with the recommendations and rulings of the DSB, and to prevail, the complaining Member must establish either that those measures do not exist, or are themselves inconsistent with one of the covered agreements.

46. One consequence of the limited terms of reference of an Article 21.5 panel proceeding is that the terms of reference would not include a claim of non-violation nullification or impairment. This is because Article 21.5 is limited to the question of "*consistency with a covered agreement*" of a measure taken to comply with a recommendation to bring a WTO-inconsistent measure into conformity with the covered agreements. By definition, claims of non-violation nullification and impairment involve a situation *other than* the question of "consistency" of a measure with a covered agreement. As set out in more detail in Section III.E, the clams by Canada and Mexico under GATT 1994 Article XXIII:(1)(b) are outside the terms of reference of the compliance Panels.

47. The DSB's recommendations and rulings, including as embodied in the panel and Appellate Body findings, are important to an identification of whether a measure taken to

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eggs, and processed eggs for all products sold in Canada, whether foreign or domestic in origin. *See supra*, n.91.

[115] *See* Canada's National Mandatory COOL Requirements (Exh. US-7) (orig. Exh. CDA-164-166, 173) (citing Regulations Maple Products Pt. V sec. 19).

[116] *See* China's Response to the Original Panel's Question 1.

[117] As the Appellate Body has observed, "[p]roceedings under Article 21.5 do not concern just *any* measure of a Member of the WTO; rather, Article 21.5 proceedings are limited to those 'measures taken to comply with the recommendations and rulings' of the DSB." *Canada – Aircraft (Art. 21.5) (AB)*, para. 36 (emphasis in original); *see also US – Softwood Lumber IV (Art. 21.5) (AB)*, para. 72 ("[T]he applicable time-limits are shorter than those in original proceedings, and there are limitations on the types of claims that may be raised in Article 21.5 proceedings. This confirms that the scope of Article 21.5 proceedings logically must be narrower than the scope of original dispute settlement proceedings.").

comply exists, and may also be important in evaluating whether such a measure is consistent with the covered agreements. As the Appellate Body explained in *Chile – Price Band System (Art. 21.5)*:

> Article 21.5 proceedings do not occur in isolation from the original proceedings, but . . . both proceedings form part of a continuum of events. The text of Article 21.5 expressly links the 'measures taken to comply' with the recommendations and rulings of the DSB concerning the original measure. A panel's examination of a measure taken to comply cannot, therefore, be undertaken in abstraction from the findings by the original panel and the Appellate Body adopted by the DSB. Such findings identify the WTO-inconsistency with respect to the original measure, and a panel's examination of a measure taken to comply must be conducted with due cognizance of this background.[118]

48. While parties may also address issues related to aspects of a measure taken to comply that differ from the original measure, "[t]his does not mean that a panel operating under Article 21.5 of the DSU should not take account . . . of the reasoning of the original panel."[119] As a corollary to this, the DSU does not allow complaining parties to use compliance proceedings to re-raise claims and arguments that were rejected during the original proceedings.[120] If this were permitted, complaining Members would have an unfair "second chance" with respect to any claims on which they do not prevail in original proceedings.[121] As set out in more detail below,

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[118] *Chile – Price Band System (Art. 21.5) (AB)*, para. 136; *see also US – Zeroing (Japan) (Art. 21.5) (Panel)*, para. 7.167 ("In the context of an Article 21.5 proceeding, we consider it appropriate that such 'objective assessment' should take into account the findings and conclusions resulting from the original proceeding. This is because Article 21.5 proceedings are concerned with the implementation of recommendations and rulings based on such findings and conclusions.").

[119] *US – Softwood Lumber VI (Art. 21.5) (AB)*, para. 103.

[120] *See, e.g.*, *US – Zeroing (EC) (Art 21.5) (AB)*, paras. 415-439 (concluding that "claims in Article 21.5 proceedings cannot be used to re-open issues that were decided on substance in the original proceedings..."); *US – Shrimp (Art. 21.5) (AB)*, para. 96 ("[T]he Panel properly examined Section 609 as part of its examination of the totality of the new measure, correctly found that Section 609 had not been changed since the original proceedings, and rightly concluded that our ruling in United States - Shrimp with respect to the consistency of Section 609, therefore, still stands."); *US – Shrimp (Art. 21.5) (Panel)*, paras. 5.5-5.9 (stating that for claims made in the 21.5 proceeding that were also made in the original proceedings, "the [panel's] examination is to be made in the light of the evaluation of the consistency of the original measure undertaken by the original panel and the Appellate Body").

[121] *US – Upland Cotton (Art. 21.5) (AB)*, para. 210 ("As the Appellate Body found in *EC – Bed Linen (Art. 21.5)*, a complainant who had failed to make out a *prima facie* case in the original proceedings regarding an element of the measure that remained unchanged since the original proceedings may not re-litigate the same claim with respect to the unchanged element of the measure in the Article 21.5 proceedings. Similarly, a complainant may not reassert the same claim against an unchanged aspect of the measure that had been found to be WTO-consistent in the original proceedings. Because adopted panel and Appellate Body reports must be accepted by the parties to a dispute, allowing a party in an Article 21.5 proceeding to re-argue a claim that has been decided in adopted reports

in a number of respects, Canada and Mexico inappropriately seek to assert claims to unchanged aspects of the amended COOL measure or to reargue issues already considered in the original proceeding.

49. Finally, the burden of proof in an Article 21.5 proceeding is the same as it is for the original proceeding.[122] That is, the complaining party must establish a *prima facie* case, by making arguments and adducing evidence sufficient to justify a presumption that its claim is correct. It is up to the responding party to make arguments and adduce evidence to counter that presumption.[123] If the complaining party fails to meet its burden of proof in the initial step, the panel must decide in favor of the responding party. A panel may not relieve a party of its burden and make a *prima facie* case for one of the parties.[124] The United States details below how the complaining parties have failed to make out any of their claims, often even failing to offer any arguments or evidence on critical elements of those claims.

B. Complainants Have Failed To Establish That the Amended COOL Measure is Inconsistent with Article 2.1 of the TBT Agreement

50. The United States has taken a measure to comply that specifically responds to the concerns of the Appellate Body. In particular, any detrimental impact resulting from the amended COOL measure now stems exclusively from legitimate regulatory distinctions.

51. The United States may, consistent with its WTO obligations, require retailers to provide information on origin to U.S. consumers regarding where the animal was born, raised, and

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would indeed provide an unfair '*second chance*' to that party.") (emphasis added).

[122] *See, e.g.*, *Chile – Price Band System (Art. 21.5) (AB)*, para. 134 ("[T]he burden of proof rests on the party that asserts the affirmative of a claim or defence. A complaining party will satisfy its burden when it establishes a prima facie case by putting forward adequate legal arguments and evidence.").

[123] *See, e.g.*, *EC – Hormones (AB)*, para. 98 ("The initial burden lies on the complaining party, which must establish a *prima facie* case of inconsistency with a particular provision of the SPS Agreement on the part of the defending party, or more precisely, of its SPS measure or measures complained about. When that *prima facie* case is made, the burden of proof moves to the defending party, which must in turn counter or refute the claimed inconsistency.").

[124] *See Japan – Agricultural Products II (AB)*, para. 129 ("Article 13 of the DSU and Article 11.2 of the SPS Agreement suggest that panels have a significant investigative authority. However, this authority cannot be used by a panel to rule in favour of a complaining party which has not established a *prima facie* case of inconsistency based on the specific legal claims asserted by it."); *see also US – Gambling (AB)*, para. 282 ("[A] panel may not take upon itself to rebut the claim (or defence) where the responding party (or complaining party) itself has not done so.").

slaughtered.[125] The amended COOL measure pursues this objective by requiring retailers to label the three origin categories for meat that affect the complainants' trade in livestock with the United States (*i.e.*, categories A, B, and C) as to three production steps. The amended COOL measure sets out what is in effect a *single* label for those three categories of meat, and provides accurate and meaningful information on origin to the consumer regarding the location of the production steps.[126]

52. The amended COOL measure thus corrects the imbalance found by the Appellate Body to exist under the previous regime where only the label affixed to A meat provided this level of origin information. The amended COOL measure is "even-handed" in its labeling of U.S. origin and mixed origin meat, and, as such, accords "treatment no less favourable," consistent with Article 2.1. That is, the amended COOL measure now ensures that any detrimental impact resulting from the label requirements regarding birth, raising, and slaughter now stem exclusively from a legitimate regulatory distinction.

53. The complaining parties disagree, but try as they might they cannot put forward a *prima facie* case to the contrary. And the heart of the problem for the complaining parties is that they fundamentally disagree with the Appellate Body's analysis in this dispute. In the original proceeding, the complaining parties urged the panel and Appellate Body to find that technical regulations that cause a detrimental impact on imports should be considered, for that reason alone, to be discriminatory in breach of Article 2.1. That has never been the legal test for technical regulations, or any measures for that matter, and the Appellate Body properly rejected that argument. The Appellate Body found instead that a complaining party must prove that any detrimental impact actually "reflects discrimination."[127]

54. But the complaining parties are undaunted. Now, they return to the WTO with the same arguments re-packaged for these compliance proceedings. First, they argue that Article III:4 of the GATT 1994 requires their unjustifiable reading of national treatment, a point we will address in section III.C below. Second, the complaining parties propose that argument's equivalent for their TBT Article 2.1 claims, arguing, in effect, that a detrimental impact on imports will result in an Article 2.1 breach. Yet it would seem that the complaining parties' approach would mean that no regulatory distinction could ever be considered legitimate. For example, here the

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[125] *US – COOL (AB)*, para. 453; *see also id.* ("Based on all of the above, we see no reason to disturb the Panel's finding with respect to the legitimacy of the objective pursued by the United States through the COOL measure, namely, to provide consumers with information on the countries in which the livestock from which the meat they purchase is produced were born, raised, and slaughtered.").

[126] *See also* Mexico's First Written 21.5 Submission, para. 119 ("The Amended COOL Measure makes the same distinctions among the three production steps. However, it eliminates the three types of labels for muscle cuts and replaces them with a single label that specifies the country of each of the three production steps, i.e., born, raised and slaughtered.").

[127] *US – COOL (AB)*, para. 327.

complaining parties contend that, on the one hand, the commingling allowance evidences a breach because it leads to inaccurate labels, while, on the other hand, they claim that *the elimination* of commingling evidences a breach because it raises costs. Complainants' position is impossible to square with the text of Article 2.1, the long-standing understanding of national treatment, and, in particular, the Appellate Body's report in *US – COOL*.

1. What the National Treatment Obligation Contained in Article 2.1 Requires

55. As the Appellate Body has stated:

> [T]o establish a violation of the national treatment obligation in Article 2.1, a complainant must demonstrate three elements: (i) that the measure at issue is a 'technical regulation' as that term is defined in Annex 1.1 to the TBT Agreement; (ii) that the imported and domestic products at issue are 'like products'; and (iii) that the measure at issue accords less favourable treatment to imported products than to like domestic products.[128]

56. The complaining parties claim that the COOL measure, as amended by the 2013 Final Rule, is in breach of Article 2.1 of the TBT Agreement. The question before the Panels then is whether the amended COOL measure "accords less favorable treatment to imported products than to like domestic products" (in this case the products at issue are livestock – *i.e.*, cattle and swine), as the first two elements are not in dispute here.

57. To prove that the measure accords less favorable treatment, and therefore discriminates *de facto* against imports from the complaining parties, Canada and Mexico must prove that the amended COOL measure "modifies the conditions of competition in the relevant market to the detriment of the group of imported products vis-à-vis the group of like domestic products."[129] The Appellate Body has further clarified that to make such a showing, complainants must establish: (1) that the measure has a "detrimental impact on imported livestock;"[130] and, if so, (2) that "the detrimental impact [does not] stem[] exclusively from a legitimate regulatory distinction."[131]

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[128] *US – COOL (AB)*, para. 267.

[129] *US – COOL (AB)*, para. 268 (citing *US – Clove Cigarettes (AB)*, para. 180 and *US – Tuna II (Mexico) (AB)*, para. 215)

[130] *See, e.g.*, *US – COOL (AB)*, para. 273.

[131] *US – COOL (AB)*, para. 293; *see also id.* para. 271 ("If a panel determines that a measure has such an impact on imported products, however, this will not be dispositive of a violation of Article 2.1. This is because not every instance of a detrimental impact amounts to the less favourable treatment of imports that is prohibited under that provision. Rather, some technical regulations that have a *de facto* detrimental impact on imports may not be

58. As to the second element, the Appellate Body has been clear, however, that because "technical regulations are measures that, by their very nature, establish distinctions between products according to their characteristics, or related processes and production methods,"[132] not every distinction a measure makes is relevant to the inquiry. Rather, "in an analysis under Article 2.1, we *only* need to examine the distinction that accounts for the detrimental impact on [imported] products as compared to [domestic] products."[133]

59. The Appellate Body has been equally clear that nothing in its Article 2.1 analysis alters the traditional notions of burden of proof,[134] whereby a complainant, in the first instance, must establish a *prima facie* case for all the elements of its claims.[135]

2. The DSB Recommendations and Rulings Regarding Legitimate Regulatory Distinctions

60. In its Article 2.1 analysis, the Appellate Body upheld the original panel's finding that the different definitions of origin (and corresponding labels) created segregation costs that resulted in a detrimental impact on Canadian and Mexican livestock imports.[136] Accordingly, the Appellate Body determined that the relevant distinctions for purposes of the national treatment analysis are the distinctions between the production steps and the distinctions between the

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inconsistent with Article 2.1 when such impact stems exclusively from a legitimate regulatory distinction.") (citing *US – Clove Cigarettes (AB)*, para. 182; *US – Tuna II (Mexico) (AB)*, para. 215.

[132] *US – COOL (AB)*, para. 268.

[133] *US – Tuna II (Mexico) (AB)*, para. 286 (emphasis in original); *see also US – COOL (AB)*, para. 268 ("... Article 2.1 should not be read to mean that any distinctions, in particular ones that are based *exclusively* on such particular product characteristics or on particular processes and production methods, would *per se* constitute less favourable treatment within the meaning of Article 2.1.") (emphasis in original).

[134] *US – COOL (AB)*, para. 272 ("[I]t is for the complaining party to show that the treatment accorded to imported products is less favourable than that accorded to like domestic products. Where the complaining party has met the burden of making its prima facie case, it is then for the responding party to rebut that showing. If, for example, the complainant adduces evidence and arguments showing that the measure is designed and/or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination of the group of imported products and thus is not even handed, this would suggest that the measure is inconsistent with Article 2.1. If, however, the respondent shows that the detrimental impact on imported products stems exclusively from a legitimate regulatory distinction, it follows that the challenged measure is not inconsistent with Article 2.1.").

[135] *US – Gambling (AB)*, para. 140 (A "prima facie case must be based on 'evidence *and* legal argument' put forward by the complaining party in relation to *each* of the elements of the claim.") (quoting *US – Wool Shirts and Blouses (AB)*, p. 16) (emphasis in original).

[136] *US – COOL (AB)*, paras. 314, 343, 347-350.

different types of labels.[137] The Appellate Body then proceeded to base its finding of a breach of Article 2.1 on its finding that the COOL measure's "recordkeeping and verification requirements impose a disproportionate burden on upstream producers and processors, because the level of information conveyed to consumers through the mandatory labelling requirements is far less detailed and accurate than the information required to be tracked and transmitted by these producers and processors."[138]

61. The Appellate Body explained that it "is these same recordkeeping and verification requirements that 'necessitate' segregation, meaning that their associated compliance costs are higher for entities that process livestock of different origins."[139] And the Appellate Body emphasized "that this lack of correspondence between the recordkeeping and verification requirements, on the one hand, and the limited consumer information conveyed through the retail labelling requirements and exemptions therefrom, on the other hand, is of central importance to our overall analysis under Article 2.1 of the *TBT Agreement*."[140]

3. The Changes in the 2013 Final Rule Address the Concerns Identified in the Appellate Body Report

62. The 2013 Final Rule directly addresses the Appellate Body's concerns regarding the recordkeeping and verification requirements, on the one hand, and the level of information conveyed by the labeling requirements on the other hand. The label that is now affixed to A, B, and C meat explicitly references the three production steps, and the location where each production step took place.[141] Accordingly, the label affixed on A meat will read "Born, Raised, and Slaughtered in the U.S.," while the label on B meat might read "Born in Mexico, Raised and Slaughtered in the U.S.," and the label on C meat might read "Born and Raised in Canada, Slaughtered in the U.S." Thus, the "information conveyed to consumers through the mandatory labeling requirements" will be as "detailed and accurate" as "the information required to be tracked and transmitted by the producers and processors."

63. The Appellate Body specified the basis for its conclusion that "the origin information that must be conveyed to consumers is less detailed, and will often be less accurate" than "the type of

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[137] *US – COOL (AB)*, para. 341.

[138] *US – COOL (AB)*, para. 349.

[139] *US – COOL (AB)*, para. 348 (citing *US – COOL (Panel)*, para. 7.327).

[140] *US – COOL (AB)*, para. 348.

[141] *See also* Mexico's First Written 21.5 Submission, para. 119 ("The Amended COOL Measure makes the same distinctions among the three production steps. However, it eliminates the three types of labels for muscle cuts and replaces them with a *single* label that specifies the country of each of the three production steps, i.e., born, raised and slaughtered.") (emphasis added).

origin information that upstream livestock producers and processors are required to maintain and transmit."[142] The United States took careful note of each of the concerns expressed and addressed those through the 2013 Final Rule:

- First, the Appellate Body noted that, "[t]his is because the COOL measure requires the labels to list the country or countries of origin, but does not require the labels to mention production steps at all."[143] The 2013 Final Rule requires that each production step be listed on the label.

- Second, the Appellate Body noted that, "[i]f, for example, the relevant production steps took place in more than one country, the relevant label (B or C) will identify more than one country, but will not identify which production step took place in which of those countries."[144] The 2013 Final Rule requires that the label identify in which country each production step took place

- Third, the Appellate Body noted that, "labels for Category B meat may also list countries of origin in any order, such that the order of countries listed on the labels cannot be relied upon to indicate where certain production steps took place."[145] The 2013 Final Rule mandates that each production be listed: birth, raising, and slaughter, eliminating any significance (or confusion) by the sequence in the label.

- Fourth, the Appellate Body noted that,"due to the additional labelling flexibilities allowed for commingled meat, a retail label may indicate that meat is of mixed origin when in fact it is of exclusively US origin, or that it has three countries of origin when in fact it has only one or two."[146] The 2013 Final Rule eliminates commingling, thus removing that source of potential inaccuracy or confusion identified by the Appellate Body.

64. In other words, the 2013 Final Rule addresses the concerns raised by the Appellate Body. Instead of three separate labels that are applied to livestock traded in the U.S. market, the 2013 Final Rule now requires what is in effect a single label that provides the information to the consumer that the Appellate Body found was lacking and was the basis for the Appellate Body's finding of a breach. This is a significant change from the 2009 Final Rule, under which the

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[142] *US – COOL (AB)*, para. 343.

[143] *US – COOL (AB)*, para. 343.

[144] *US – COOL (AB)*, para. 343.

[145] *US – COOL (AB)*, para. 343.

[146] *US – COOL (AB)*, para. 343 (citing *US – COOL (Panel)*, paras. 7.93-7.100).

original panel and Appellate Body found that only the A Label provided meaningful and accurate information.[147] To put it another way, under the 2013 Final Rule, the meat derived from A, B, and C animals is labeled in the exact same manner and provides meaningful and accurate information to consumers.

65. And also very significantly, all this was accomplished without increasing the recordkeeping and verification requirements under the COOL measure. The Appellate Body's findings were based on the disproportion it perceived between the recordkeeping and verification requirements and the information conveyed to consumers. By eliminating commingling and changing the content of the label affixed to the A, B, and C meat, the 2013 Final Rule has increased the level of information to consumers while not increasing the recordkeeping and verification requirements for U.S. industry.[148]

66. In light of these facts, any detrimental impact resulting from the regulatory distinctions under the 2013 Final Rule "stems exclusively from legitimate regulatory distinction[s]."[149] Accordingly, the amended COOL measure does not accord less favorable treatment to imported livestock within the meaning of Article 2.1 of the TBT Agreement.

4. The Complaining Parties Have Failed to Show That Any Detrimental Impact Caused by the Amended COOL Measure Does Not Stem Exclusively From Legitimate Regulatory Distinctions

a. The Complaining Parties Fail to Establish a *Prima Facie* Case That Any Detrimental Impact Caused by the Amended COOL Measure Does Not Stem Exclusively From Legitimate Regulatory Distinctions

67. As noted above, it is the complaining parties' burden to prove each and every element of their claim.[150] As such, it is their burden to prove that the regulatory distinctions between the production steps and between the different types of labels are not legitimate in that they are not

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[147] *See US – COOL (AB)*, para. 338 (citing *US – COOL (Panel)*, para. 7.718).

[148] *See* 2013 Final Rule, 2013 Final Rule, 78 Fed. Reg. at 31,368 (Exh. CDA-1) ("Under this final rule, all origin designations for muscle cut covered commodities slaughtered in the United States must specify the production steps of birth, raising, and slaughter of the animal from which the meat is derived that took place in each country listed on the origin designation. The requirement to include this information applies equally to all muscle cut covered commodities derived from animals slaughtered in the United States. This requirement will provide consumers with more specific information on which to base their purchasing decisions without imposing additional recordkeeping requirements on industry.").

[149] *US – COOL (AB)*, para. 293.

[150] *See supra*, sec. III.A.

"designed and applied in an even-handed manner, or [that] they lack even handedness, for example, because they are designed or applied in a manner that constitutes arbitrary or unjustifiable discrimination."[151] The complaining parties attempt to make such a showing through a series of arguments that contest the conclusion that the label affixed to A, B, and C meat provides meaningful and accurate information on origin. None of these arguments hold up to scrutiny, and the complaining parties fail to establish a *prima facie* case that the amended COOL measure is inconsistent with the national treatment obligation contained in Article 2.1.

68. First, Canada makes the truly remarkable argument that there is an even greater imbalance between the information conveyed to consumers and the recordkeeping requirements under the 2013 Final Rule because the new rule *eliminates* commingling.[152] Canada is wrong as a factual matter. The 2013 Final Rule did not increase the recordkeeping requirements. Canada also appears to ignore that eliminating commingling enhanced the accuracy of the information conveyed to consumers. Indeed, the United States eliminated commingling as a result of commingling being so heavily criticized by the original panel and Appellate Body as well as by the complainants during those proceedings as reducing the information conveyed to consumers.[153] Canada cannot have it both ways. It simply cannot be that the COOL measure breaches Article 2.1 because it allows commingling, but also breaches Article 2.1 because commingling was eliminated. Canada puts forward no argument as to how the elimination of commingling is not consistent with the Appellate Body's analysis. Indeed, Canada cannot do so since this modification to the COOL regime responds directly to the Appellate Body's analysis.

69. Second, Mexico contends that the amended COOL measure does not provide meaningful information because it allows retailers to use "obscure abbreviations" and does not establish "any requirements for the position and prominence of the COOL label."[154] But Mexico puts

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[151] *US – COOL (AB)*, para. 341.

[152] *See* Canada's First Written 21.5 Submission, para. 72 (contending, that "increased recordkeeping," which, in Canada's view, is caused by the elimination of commingling, "more than offset[s] any contribution that the additional information provided to consumers under the amended COOL measure . . ."). As discussed in the 2013 Final Rule, Canada is wrong as a factual matter that the elimination of commingling has increased recordkeeping. *See* 2013 Final Rule, 78 Fed. Reg. at 31,372-73 (Exh. CDA-1).

[153] *See US – COOL (AB)*, paras. 337, 343; *US – COOL (Panel)*, paras. 7.702-7.707, 7.718.

[154] *See* Mexico's First Written 21.5 Submission, paras. 129, 131. Mexico also appears to contend that the amended COOL measure does not provide meaningful or accurate information on origin because the 2013 Final Rule provided for the period of education and outreach explained above, and during this six month period of time not all labels may have been converted to the new requirements. *See* Mexico's First Written 21.5 Submission, paras. 125-127; *see also* Canada's First Written 21.5 Submission, para. 6. It is difficult to understand Mexico's exact argument in this regard – in particular, what legal significance Mexico attributes to its statements. Mexico does not make any specific legal claim in connection with them. However, it is worth noting as a matter of fact that USDA issued the 2013 Final Rule on May 23, 2013 and made it effective that same date. 2013 Final Rule, 78 Fed. Reg. at 31,367 (Exh. CDA-1). As such, the changes to U.S. law embedded in the 2013 Final Rule became mandatory as of

forward *no* evidence to support such arguments, and, in fact, are wrong as a matter of fact. For instance, the examples given in the 2013 Final Rule are, on their face, perfectly clear.[155]

70. Third, Canada contends that because the label affixed to B and C meat concern "less than a third of all muscle cuts that are subject to the COOL measure," the content change to the label does little to rectify the imbalance found by the Appellate Body between the recordkeeping requirements and the information conveyed to consumers.[156] This argument contains a critical concession: namely, Canada does *not* dispute that under the 2013 Final Rule the label applicable to A, B, and C meat provides meaningful and accurate information to consumers as to the three production steps.

71. Canada's objection is based on its assertion that the improved information of the label affixed to B and C meat only covers approximately 30 percent of the covered muscle cuts sold at retail. Canada's argument is unsupportable on the facts and the law.

72. As to the facts, the amended COOL measure changes the content of the label affixed not just to B and C meat, but A meat as well. As such, the 2013 Final Rule changes the content of the label covering *virtually 100 percent* of the muscle cuts subject to the COOL measure.[157]

73. As to the law, it is simply impossible to square Canada's argument with the Appellate Body's analysis, and, in fact, Canada makes no attempt to do so. As should be clear, the Appellate Body found that the previous A Label (which constitutes approximately 70 percent of the covered muscle cuts) conveyed meaningful information to consumers,[158] and its finding of a

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May 23, 2013. *Id.* at 31,369 ("The effective date of this regulation is May 23, 2013, and the rule is mandatory as of that date."). The United States took a measure to comply by the end of the RPT. And in any event, the six month education and outreach period has now expired. *See id.*

[155] Perhaps Mexico has failed to provide any evidence to substantiate its assertions because Mexico could not provide such evidence. Indeed, with regard to the abbreviations, USDA requires that the abbreviations must allow for the origin information to be "clearly understood by consumers." 2013 Final Rule, 78 Fed. Reg. at 31,369 (Exh. CDA-1) ("In terms of using labels and stickers to provide the origin information, the Agency recognizes that there is limited space to include the specific location information for each production step. Therefore, under this final rule, abbreviations for the production steps are permitted *as long as the information can be clearly understood by consumers*. For example, consumers would likely understand 'brn' as meaning 'born'; 'htchd' as meaning 'hatched'; 'raisd' as meaning 'raised'; 'slghtrd' as meaning 'slaughtered' or 'hrvstd' as meaning 'harvested.'") (emphasis added).

[156] Canada's First Written 21.5 Submission, paras. 74, 76.

[157] *See US – COOL (Panel)*, n.941 (noting that the evidence on the record suggested that muscle cuts sold with the D Label constituting somewhere between 0 and 0.3 percent of the market); *see also* USDA Country of Origin Labeling Survey (July 2009) (Exh. US-3).

[158] *See, e.g., US – COOL (AB)*, para. 338 (noting that "the Panel considered a 'Product of the United States' label, that is, Label A, to be the only label that provides 'meaningful information for consumers'") and para.

breach of Article 2.1 was based on the previous B and C Labels.[159] Indeed, the implication of Canada's argument is that the *only relevant label is the label affixed to A meat*. But if that were true, the Appellate Body would not have found a breach of Article 2.1 given that it agreed that under the 2009 Final Rule the previous A Label already conveyed meaningful and accurate information.[160]

74. Finally, collectively relying on hypotheticals regarding the labels affixed to B, C, and D meat, the complaining parties attempt to argue that the current label requirements will not provide accurate information. Canada argues that these hypotheticals establish that the current labels "may be misleading" or have the "potential to be misleading,"[161] while Mexico is more assertive, contending that "the revised scheme *will* result in inaccurate and confusing information."[162] Neither is true.

75. Stepping back for a moment, the reason that the complaining parties need to rely on exotic hypotheticals is that the 2013 Final Rule's labeling requirements do, in fact, provide meaningful and accurate information as to the *actual* livestock exports of the two countries. For example, Mexico does not even try to argue that the label "born in Mexico, raised and slaughtered in the U.S.," is misleading or inaccurate as it applies to Mexico's *actual* exports of feeder cattle. Canada similarly fails to explain how the "Born and Raised in Canada, Slaughtered in the U.S." label is inaccurate or misleading as to Canada's *actual* exports of C animals. Not surprisingly, both complainants are forced to argue from the realm of abstract hypotheticals.

76. But whether a *de jure* non-discriminatory regulatory scheme anticipates every possible hypothetical scenario is not relevant to the compliance Panels' analysis of the complaining parties' claim of *de facto* less favorable treatment. As the Appellate Body has articulated in this dispute, such a finding in relation to origin labeling will relate to the information conveyed to consumers and the recordkeeping and verification requirements imposed on processors and

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340 ("In our view, these findings provide a sufficient basis for us to determine whether the detrimental impact on Canadian and Mexican livestock stems exclusively from a legitimate regulatory distinction.").

[159] *See US – COOL (AB)*, para. 343 ("Under the labelling rules, labels for Category B meat may also list countries of origin in any order, such that the order of countries listed on the labels cannot be relied upon to indicate where certain production steps took place. Furthermore, due to the additional labelling flexibilities allowed for commingled meat, a retail label may indicate that meat is of mixed origin when in fact it is of exclusively US origin, or that it has three countries of origin when in fact it has only one or two.")

[160] *See US – COOL (AB)*, para. 476.

[161] Canada's First Written 21.5 Submission, paras. 77-78.

[162] Mexico's First Written 21.5 Submission, para. 130 (emphasis added).

producers.[163] The labeling requirements under the 2013 Final Rule provide meaningful information to consumers about the actual products being traded and sold in the United States.[164] The reliance on hypothetical scenarios not related to actual products being traded and sold reveals that there is no basis for the complainants' *de facto* claims.

77. In that regard, both Canada and Mexico criticize the label affixed to Category C meat, contending that it does not provide meaningful information for animals imported close to the threshold for immediate slaughter, in particular the definition of animals imported for immediate slaughter as meaning animals imported within 14 days of slaughter.[165] However, the complaining parties' criticisms are misplaced.

78. As the Appellate Body has affirmed, any technical regulation will make distinctions between products. For Canada and Mexico, there is *no* definition of "immediate slaughter" that would be acceptable since any such definition necessarily means that Canada and Mexico could complain based on a hypothetical involving an animal coming in just at the fringe outside of the period specified in the definition. There is nothing inherently discriminatory about 14 days. It is, in fact, part of the long-standing definition of animals imported into the United States for "immediate slaughter," which dates to at least the 1950s.[166]

79. Further, the complaining parties appear to be attacking *all* standards when they argue that, dividing lines, like the 14 day limit, are in essence arbitrary at the edges.[167] For example, WTO Members throughout the world set minimum residue levels (MRLs) for pesticides (and a whole host of other chemicals), and while it may be true that the apple that exceeds the domestic

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[163] *See US – COOL (AB)*, paras. 342-343.

[164] Canada further tries to argue that the content of the label is discriminatory because meat derived from an animal born in the United States, raised in a foreign country and the United States, and slaughtered in the the United States would not qualify for a label that states "born, raised, and slaughtered in the U.S." See Canada's First Written 21.5 Submission, para. 81 (third bullet). But Canada fails to explain why a label that states "Born in the U.S., raised in Country X, and Slaughtered in the U.S." is at all disadvantageous to the producer or retailer of that meat vis-a-vis the label affixed to A meat in a manner that could impact the trade in livestock. The fact of the matter it is not. Both labels are accurate, and the United States does not act in a manner inconsistent with Article 2.1 by requiring mixed origin meat to be labeled as such.

[165] *See* Canada's First Written 21.5 Submission, para. 77 (third bullet); Mexico's First Written 21.5 Submission, para. 130.

[166] *See* USDA Final Rule, 17 Fed. Reg. 8003 (Sept. 4, 1952) (Exh. US-11) (defining, in sec. 92.23, that "animals from Canada for immediate slaughter" must "be consigned from the port of entry to some recognized slaughtering center and there slaughtered within 2 weeks from the date of entry..."); Canada's First Written 21.5 Submission, para. 77 (third bullet). In other words, the allegedly misleading labeling situation that Canada refers to is not one that is likely to ever occur.

[167] *See* Canada's First Written 21.5 Submission, para. 77 (second bullet); Mexico's First Written 21.5 Submission, para. 130.

pesticide MRL by one part per million is not any less safe than the apple that does not, that fact alone does not mean that the MRL itself is discriminatory. What the complaining parties are really arguing, of course, is that providing consumers with information as to the different categories of origin is not a legitimate objective – a theme that runs through their entire submissions in this proceeding (as well as the previous one). But both the original panel and the Appellate Body have already addressed this argument, and the complaining parties have provided no rationale for the compliance Panels to revisit those findings.[168]

80. Finally, while we will fully address the D Label below, as an initial matter, it is worth highlighting the inconsistency in Canada's argument. On the one hand, Canada criticizes the United States for not changing the D Label, which accounts for approximately 0.3 percent of the meat sold with a COOL label,[169] because the label does not provide sufficient origin information, even though in the *very preceding paragraphs* Canada argues that a change to the information affixed to B and C meat, which accounts for approximately 30 percent of the meat sold with a COOL label,[170] is so "minimal" that such a change is worthless for purposes of this legal analysis.[171]

b. None of the Complaining Parties' Other Criticisms Undermines the Conclusion That Any Detrimental Impact Caused by the Amended COOL Measure Stems Exclusively From Legitimate Regulatory Distinctions

81. The complaining parties next put forward a series of arguments regarding other regulatory distinctions that either have nothing to do with any detrimental impact caused by the amended COOL measure or, in fact, are not regulatory distinctions at all. Again, the Appellate Body has been clear – in an analysis under Article 2.1, a panel need "*only* . . . examine the distinction that accounts for the detrimental impact on [imported] products as compared to [domestic] products."[172] Accordingly, *none* of these criticisms changes the conclusion that any detrimental impact resulting from the 2013 Final Rule stems exclusively from legitimate

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[168] *US – COOL (AB)*, para. 453 ("Based on all of the above, we see no reason to disturb the Panel's finding with respect to the legitimacy of the objective pursued by the United States through the COOL measure, namely, to provide consumers with information on the countries in which the livestock from which the meat they purchase is produced were born, raised, and slaughtered.") (citing *US – COOL (Panel)*, para. 7.651); *see also supra*, sec. III.A.

[169] *See US – COOL (Panel)*, para. 7.371; *see also* USDA Country of Origin Labeling Survey (Exh. US-3).

[170] *See* U.S. Response to Original Panel Question 90.

[171] *Compare* Canada's First Written 21.5 Submission, paras. 75-76, *with id.* para. 77 (first bullet).

[172] *US – Tuna II (Mexico) (AB)*, para. 286 (emphasis in original); *see also US – COOL (AB)*, para. 268 ("... Article 2.1 should not be read to mean that *any* distinctions, in particular ones that are based exclusively on such particular product characteristics or on particular processes and production methods, would *per se* constitute less favourable treatment within the meaning of Article 2.1.") (emphasis in original).

regulatory distinctions. That said, the United States will address each of the criticisms in turn.

i. The D Label

82. Canada appears to criticize the United States for not changing the content of the D Label.[173] However, Canada has not established that the COOL requirements applicable to category D meat impose a detrimental impact on imported livestock.

83. Just the opposite is, in fact, true. As the original panel recognized, Category D (and the corresponding D Label) does not apply to imported *livestock*, but rather, imported *meat* – that is, meat derived from an animal slaughtered in a foreign country and then imported to the United States.[174] Further, both the original panel and the Appellate Body made clear that the detrimental impact at issue in this dispute is on imported livestock, not imported meat.[175] And it was *that* impact on livestock that was the basis for the finding of a breach of Article 2.1 of the TBT Agreement. As such, the D Label is not relevant to the Article 2.1 inquiry, which is limited as to whether the amended COOL measure provides less favorable treatment to Canadian and Mexican *livestock*.[176]

84. Moreover, there are good reasons why the United States chose not to mandate adding the born, raised, and slaughtered origin information for meat derived from foreign slaughtered animals as it did for meat derived from U.S. slaughtered animals. First, given long-standing customs rules, altering the D Label could result in multiple and overlapping country of origin labels perhaps visible at the retail level, which could then result in confusion among consumers. Second, introducing multiple and overlapping country of origin labels could cause confusion

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[173] *See, e.g.*, Canada's First Written 21.5 Submission, paras. 73-75.

[174] *See, e.g.*, US – *COOL (Panel)*, paras. 7.89, 7.99, 7.119 (noting that Category D applies to "meat imported from Canada or Mexico"). As the original panel recognized, the COOL measure states that the customs designation of origin be provided to customers at retail. *US – COOL (Panel)*, para. 7.119 (citing 7 C.F.R. § 65.300(f)); *US – COOL (AB)*, para. 343 ("For Category D meat, the COOL measure requires only that the customs designation of origin be indicated.") (citing *US – COOL (Panel)*, para. 7.119 and n.179). The 2013 Final Rule makes no changes to the labeling of imported meat – the changes are limited to the labels that affect the importation of livestock. 2013 Final Rule, 78 Fed. Reg. at 31,369 (Exh. CDA-1) ("[U]nder the current COOL regulations, imported muscle cut covered commodities retain their origin as declared to the U.S. Customs and Border Protection at the time the products entered the United States (i.e., Product of Country X) through retail sale. Under this final rule, these labeling requirements for imported muscle cut covered commodities remain unchanged.").

[175] *US – COOL (Panel)*, para. 7.420 ("... the COOL measure creates an incentive in favour of processing exclusively domestic livestock and a disincentive against handling *imported livestock*.") (emphasis added); *US – COOL (AB)*, para. 292 (holding that the original panel did not err in finding that the COOL measure imposes a detrimental impact on "imported livestock by creating an incentive in favour of processing exclusively domestic livestock and a disincentive against handling *imported livestock*.") (emphasis added). The original panel defined "livestock" as cattle and hogs from which meat is produced. *US – COOL (Panel)*, para. 7.203.

[176] *See US – Tuna II (Mexico) (AB)*, para. 286; *see also US – COOL (AB)*, paras. 268, 289, 292-293.

among retailers as to what recordkeeping they need to maintain for inspection by AMS. Such confusion could then negatively impact AMS's efforts to ensure compliance with the COOL measure at U.S. retailers.

85. Third, different labeling and recordkeeping requirements for Category D meat would impose recordkeeping requirements on *foreign* processors and their *foreign* upstream producers. Yet it would be very difficult for AMS to ensure compliance in another Member's territory, including the resource constraints involved to ensure compliance across the globe by every exporter (and their upstream producers).

86. Finally, it would not appear that mandating a born, raised, and slaughtered label would add much, if any, additional information on origin to the consumer. Imported meat is typically – if not always – produced entirely within the exporting country as few countries around the world import significant quantities of live cattle and hogs, and even fewer represent major beef or pork suppliers to the United States. But it is also true because there is *so little* D Label meat being sold at retail in the United States.[177]

ii. The Defined Scope of the Amended COOL Measure

87. As noted in the original panel's report, the COOL measure has a defined scope in that the measure provides certain exemptions. Thus, the COOL measure does not apply when: the covered muscle cut commodity is prepared or served at a "food service establishment" (*i.e.*, the "restaurant exception"),[178] the covered muscle cut commodity is an ingredient in a "processed food item,"[179] and when the otherwise covered retailer is a small business.[180] The 2013 Final

[177] As noted above, the D Label is affixed to 0.3 percent of beef and 0.0 percent of pork that carries a COOL label. *See US – COOL (Panel)*, n.941; U.S. Response to Original Panel Question 90; USDA Country of Origin Labeling Survey (Exh. US-3).

[178] The COOL statute defines a "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." 7 U.S.C. § 1638a(4) (Exh. US-1); *see also* 7 C.F.R. § 65.140 (Exh. US-2); *US – COOL (Panel)*, para. 7.416.

[179] 7 U.S.C. § 1638(2)(B) (Exh. US-1); 7 C.F.R. § 65.135(b) (Exh. US-2); *see also* 7 C.F.R. § 65.220 (defining the term and noting that such processing "includes cooking (e.g., frying, broiling, grilling, boiling, steaming, baking, roasting), curing (e.g., salt curing, sugar curing, drying), smoking (hot or cold), and restructuring (e.g., emulsifying and extruding)"); *US – COOL (Panel)*, para. 7.415.

[180] The statute defines the term "retailer" such that otherwise covered retailers are exempt from the COOL requirements if they sell less than US $230,000 in perishable agricultural commodities in a calendar year. 7 U.S.C. § 7 U.S.C. § 1638(6) (Exh. US-1) (cross-referencing the Perishable Agricultural Commodities Act of 1930 (PACA)); 7 C.F.R. § 65.240 (Exh. US-2) (same); *see also US – COOL (Panel)*, para. 7.416.

Rule makes no change to the scope of the COOL measure.[181] Both complaining parties criticize the amended COOL measure for maintaining its provisions defining the scope of the measure.[182] This argument should be rejected.

88. The original panel was quite clear that the exemptions that define the scope of the amended COOL measure were simply "irrelevant" to the detrimental impact analysis.[183] The original panel explicitly found 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."[184] As such, the exemptions that define the scope of the measure are simply irrelevant to the Article 2.1 analysis.[185] Certainly, the complainants never even address the issue, and simply fail to establish a *prima facie* case in this regard.

89. The United States would further note that such exemptions are often included as part of the mandatory country of origin labeling requirements imposed by Members (whether through statute or regulation). As the original panel explained:

> 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 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.[186]

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[181] The 2013 Final Rule does clarify pre-existing regulatory language defining "retailer" to "more closely align[]" the COOL and PACA regulations to "clarif[y] that all retailers that meet the PACA definition of a retailer, whether or not they actually have a PACA license, are also covered by COOL." 2013 Final Rule, 78 Fed. Reg. at 31,368 (Exh. CDA-1).

[182] Canada's First Written 21.5 Submission, para. 81 (fourth bullet); Mexico's First Written 21.5 Submission, para. 133.

[183] *US – COOL (Panel)*, para. 7.417 ("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.") (emphasis added).

[184] *US – COOL (Panel)*, para. 7.419.

[185] *US – Tuna II (Mexico) (AB)*, para. 286 ("[I]n an analysis under Article 2.1, we *only* need to examine the distinction that accounts for the detrimental impact on [imported] products as compared to [domestic] products ....") (emphasis in original).

[186] *US – COOL (Panel)*, para. 7.684.

90. The facts on the ground confirm the original panel's conclusions. As discussed in section II.D above, the United States is not aware of *any* COOL measure applied by a Member that applies to all sales of all products, and certainly the complaining parties' own COOL measures that apply to food products are no exceptions to this rule. In this regard, the challenged measure is not unusual at all – in fact it is firmly in the majority.

91. The reason for these exemptions is obvious – they are important mechanisms that policy makers use to control costs of measures in pursuit of legitimate government objectives.[187] It is simply an example of the U.S. Government deciding to pursue a particular legitimate governmental objective, but not at *any* cost. Indeed, the United States is a large country and must grapple with cost burdens on a different scale than a number of other countries. For example, according to at least one estimate, there are over 600,000 restaurants in the United States.[188] The amended COOL measure is an entirely normal domestic measure in this regard.

92. As to the breadth of the exemptions themselves, the complaining parties repeatedly cite a U.S. Congressional Research Service (CRS) report that concludes that 30 percent of the U.S. beef supply and 11 percent of the U.S. pork supply is covered by the COOL measure. These percentages are lower than USDA's estimates of 42.3 percent of the U.S. beef supply and 15.9 percent of the U.S. pork supply, which were included in the 2013 Final Rule.[189] Regardless of the differences between the percentages estimated by CRS and USDA, what this argument misses is the sheer amount of beef and pork that is covered by the amended COOL measure. USDA estimates that there are 4,335 covered retailers in the United States that operate 30,156 retail establishments.[190] As estimated in the 2009 Final Rule, retailers subject to COOL sell an estimated 8.2 billion pounds of beef and 2.3 billion pounds of pork annually, worth $38.5 billion and $8.0 billion, respectively.[191] By way of comparison, in 2012, the total domestic consumption

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[187] *US – COOL (Panel)*, para. 7.711 ("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.").

[188] *See* NPD Group Press Release (2013) (Exh. US-12).

[189] For beef, the USDA estimate of 42.3 percent equals (0.622 x 0.756 x 0.900), which reflects the estimated 62.2 percent share of food eaten at home; the estimated 75.6 percent sales share of food for home consumption through covered supermarkets, warehouse clubs, and superstores; and the estimated 90.0 percent share of beef sold as products covered by COOL. For pork, the USDA estimate of 15.9 percent equals (0.622 x 0.756 x 0.338), which parallels the computation for beef but with an estimated 33.8 percent share of pork sold as products covered by COOL. *See* 2009 Final Rule, 74 Fed. Reg. at 2686 (Exh. CDA-2).

[190] *See* 2013 Final Rule, 78 Fed. Reg. at 31,383 (Table 5) (Exh. CDA-1).

[191] Using an annual average of all fresh retail beef value of $4.693 for 2012, the estimated retail value of the beef covered by COOL totals $38.5 billion. Similarly, at an annual average retail pork value of $3.467 for 2012, the estimated retail value of pork covered by COOL totals $8.0 billion. *See* USDA Economic Research Service Beef values and price spreads at http://www.ers.usda.gov/data-products/meat-price-spreads.aspx) and USDA Economic Research Service Pork values and price spreads at http://www.ers.usda.gov/data-products/meat-price-spreads.aspx);

of beef and veal was 4.4 billion pounds retail weight in Canada and Mexico combined, which amounts to 46.3 percent less than the 8.2 billion pounds of beef covered by the U.S. COOL measure.[192]

iii. The Ground Meat Label

93. Both complaining parties now argue that the fact that the 2013 Final Rule provides for a different labeling scheme for ground meat than it does for muscle cuts is somehow evidence that the COOL measure breaches Article 2.1.[193] This argument should be rejected.

94. First, the original panel has already found that the ground meat labeling rule does not have a detrimental impact on imported livestock, and, as such, is not inconsistent with Article 2.1.[194] Neither complaining party appealed this finding, the ground meat rule was not a basis for the Appellate Body's finding of a breach of Article 2.1, and the 2013 Final Rule does not make any changes to these rules. As such, the ground meat rule falls outside the terms of reference of these Article 21.5 proceedings, and the complaining parties cannot use these Article 21.5 proceedings as an opportunity to raise claims related to an unchanged aspect of the original measure.[195]

95. Second, given that the ground meat rule does not have a detrimental impact on imported livestock, it simply cannot be that any detrimental impact from the COOL measure stems from the ground meat labeling rules. Accordingly, this rule is simply irrelevant for purposes of

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see also USDA Economic Research Service Summary of Retail Prices and Spreads (Exh. US-13).

[192] Estimated total domestic consumption of beef and veal for 2012 was 1,023,000 metric tons in Canada and 1,836,000 metric tons in Mexico for a total of 2,859,000 metric tons carcass weight equivalent. Using a factor of 0.70 to convert carcass to retail weight equivalents results in a total of 2,001,300 metric tons or 4.4 billion pounds. *See* USDA Foreign Agricultural Service, Livestock and Poultry: World Markets and Trade, November 2013 at http://usda01.library.cornell.edu/usda/current/livestock-poultry-ma/livestock-poultry-ma-11-08-2013.pdf; USDA Economic Research Service Beef values and price spreads at http://www.ers.usda.gov/data-products/meat-price-spreads.aspx; USDA Economic Research Service Summary of Retail Prices and Spreads (Exh. US-13).

[193] *See, e.g.*, Canada's First Written 21.5 Submission, paras. 79-83; Mexico's First Written 21.5 Submission, para. 140.

[194] *See US – COOL (Panel)*, para. 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.").

[195] *See supra* sec. III.A; *see also EC – Bed Linen (Art. 21.5) (AB)*, para. 98 ("It would be incompatible with the function and purpose of the WTO dispute settlement system if a claim could be reasserted in Article 21.5 proceedings after the original panel or the Appellate Body has made a finding that the challenged aspect of the original measure is not inconsistent with WTO obligations, and that report has been adopted by the DSB. At some point, disputes must be viewed as definitely *settled* by the WTO dispute settlement system.") (emphasis in original).

Article 2.1.[196]

96. Third, Mexico alleges that the ground meat rule is "completely arbitrary."[197] As a factual matter, Mexico is wrong. USDA created the separate labeling rules for ground meat based on the unique attributes regarding the production of ground meat, which differs substantially from the production of muscle cuts.[198]

iv. The COOL Statute's Prohibition of Trace-Back

97. Both complaining parties argue that the fact that the COOL statute prohibits USDA from applying a trace back regime results in a breach of Article 2.1 because, in their view, a trace-back regime would be a non-discriminatory alternative to the COOL measure and so is evidence that the COOL measure is discriminatory.[199]

98. Yet the provisions on trace-back are part of the COOL statute, and are unchanged by the 2013 Final Rule, the measure taken to comply. The trace-back provisions were not challenged by the complainants in the original proceeding and not found to be in breach of Article 2.1. Thus, the trace-back provisions fall outside the terms of reference of these Article 21.5 proceedings, and the complaining parties cannot use these Article 21.5 proceedings as an

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[196] *See US – Tuna II (Mexico) (AB)*, para. 286.

[197] Mexico's First Written 21.5 Submission, para. 140; *see also* Canada's First Written 21.5 Submission, para. 81 (second bullet).

[198] 2009 Final Rule, 74 Fed. Reg. at 2671 (Exh. CDA-2) ("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. 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. Further, because 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.").

[199] Canada's First Written 21.5 Submission, para. 87; Mexico's First Written 21.5 Submission, para. 143. *But see* Mexico's First Written 21.5 Submission, n.227 (observing that even a trace-back regime could be discriminatory); Canada's First Written 21.5 Submission, n.352 (observing same).

opportunity to raise claims related to an unchanged aspect of the original measure.[200]

99. Moreover, the complaining parties fail to establish that any detrimental impact caused by the amended COOL measure stems from this prohibition of the statute. In fact, the trace-back provisions are not relevant for purposes of this analysis.[201]

100. Finally, the complaining parties appear to be arguing that because the United States could have chosen an alternative that (in the complainants' view) does not result in a detrimental impact, the actual COOL measure must itself be discriminatory. But as noted below, the complainants fail to appreciate the differences between Article 2.1 and Article 2.2 of the TBT Agreement, and their approach confuses these two different provisions.[202]

v. Other Arguments by Mexico Simply Rehash Points Already Rejected by the Original Panel

101. Mexico makes two further arguments that simply rehash points that the original panel already considered and rejected. Mexico has provided no reason why the DS386 compliance Panel should reconsider those findings.

102. First, Mexico appears to argue (or at least imply) that the amended COOL measure *in its entirety* is in breach of Article 2.1 because it is "intentionally discriminatory."[203] As is well understood, the complaining parties argued strenuously that the original COOL measure was designed for a protectionist purpose. The original panel rejected this argument, and the panel's factual finding was upheld on appeal.[204]

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[200] *See supra* sec. III.A (quoting, among other cases, *EC – Bed Linen (Art. 21.5) (AB)*, para. 98 ("It would be incompatible with the function and purpose of the WTO dispute settlement system if a claim could be reasserted in Article 21.5 proceedings after the original panel or the Appellate Body has made a finding that the challenged aspect of the original measure is not inconsistent with WTO obligations, and that report has been adopted by the DSB. At some point, disputes must be viewed as definitely settled by the WTO dispute settlement system.") (emphasis in original); *see also US – Upland Cotton (Art. 21.5) (AB)*, para. 210.

[201] *See US – Tuna II (Mexico) (AB)*, para. 286.

[202] *See infra*, sec. III.D.4.a (citing *US – Tuna II (Mexico) (AB)*, para. 286 ("The Panel's findings with respect to the calibration of the measure at issue for the purposes of its analysis under Article 2.2 are thus not necessarily dispositive of the question whether the measure is calibrated for the purposes of Article 2.1."); *US – Clove Cigarettes (AB)*, para. 171 ("The context provided by Article 2.2 suggests that 'obstacles to international trade' may be permitted insofar as they are not found to be 'unnecessary', that is, 'more trade-restrictive than necessary to fulfil a legitimate objective'. To us, this supports a reading that Article 2.1 does not operate to prohibit a priori any obstacle to international trade. Indeed, if any obstacle to international trade would be sufficient to establish a violation of Article 2.1, *Article 2.2 would be deprived of its effet utile*.") (emphasis added)).

[203] Mexico's First Written 21.5 Submission, para. 139.

[204] *See US – COOL (AB)*, paras. 424, 433, 453; *US – COOL (Panel)*, paras. 7.620, 7.651, 7.685.

103. Second, Mexico appears to argue that the amended COOL measure is inconsistent with Article 2.1 because there is not sufficient "consumer demand" in the United States for the information that the COOL measure provides.[205] In making this allegation, Mexico does not even identify a regulatory distinction, nor explain how this unidentified regulatory distinction causes a detrimental impact on Mexican cattle exports. Moreover, the original panel has already rejected the complaining parties' consumer demand argument.[206]

104. These arguments have already been considered and rejected by the original panel. Mexico has provided no reasons why the DS386 compliance Panel should reconsider those findings in this proceeding.[207]

5. The Complaining Parties' Claims of Increased Detrimental Impact Are Unfounded

105. As noted above, the 2013 Final Rule makes two changes to the existing COOL regulations: (1) it eliminates the one day commingling flexibility; and (2) it changes the content of the labels. There are no changes to the record keeping requirements or any other requirements contained in the 2009 Final Rule.[208] Both complaining parties contend that the amended COOL measure worsens the detrimental impact on imported livestock.[209] Neither complaining party appears to argue that the change in the content of the label (*e.g.*, the change of the "Product of

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[205] Mexico's First Written 21.5 Submission, para. 144.

[206] *See US – COOL (Panel)*, paras. 7.649-7.650.

[207] *See supra* sec. III.A (quoting, among other cases, *US – Upland Cotton (Art. 21.5) (AB)*, para. 210); *see also EC – Bed Linen (Art. 21.5) (AB)*, para. 98 ("It would be incompatible with the function and purpose of the WTO dispute settlement system if a claim could be reasserted in Article 21.5 proceedings after the original panel or the Appellate Body has made a finding that the challenged aspect of the original measure is not inconsistent with WTO obligations, and that report has been adopted by the DSB. At some point, disputes must be viewed as definitely settled by the WTO dispute settlement system.").

[208] *See* 2013 Final Rule, 78 Fed. Reg. at 31,372 (Exh. CDA-1) ("[T]he Agency does not agree that additional recordkeeping or verification processes will be required to transfer information from one level of the production and marketing channel to the next. There are no recordkeeping requirements beyond those currently in place, and the Agency believes that the information necessary to transmit production step information is already maintained by suppliers in order to comply with the current COOL regulations. As with the current mandatory COOL program, this final rule contains no requirements for firms to report to USDA. Compliance audits will continue to be conducted at firms' places of business."); *see also id.* at 31,373 ("[N]o additional recordkeeping is required by this final rule, and no new processes need be developed to transfer information from one level of the supply chain to the next. The information necessary to transmit production step information should already be maintained by suppliers in order to satisfy the 2009 COOL regulations.").

[209] *See, e.g.*, Canada's First Written 21.5 Submission, paras. 34, 36; Mexico's First Written 21.5 Submission, paras. 85, 100-106.

Mexico and U.S." label to one that states "Born in Mexico, Raised and Slaughtered in the U.S.") imposes costs that negatively impact their livestock imports.[210]

106. But the recordkeeping and verification requirements were the basis for the Appellate Body's findings under Article 2.1 of the TBT Agreement. As a result, the complaining parties attempt to seek a new basis for finding a breach of Article 2.1. The complaining parties now base their argument on detrimental impact on USDA's decision to eliminate commingling.[211] This is both surprising and somewhat ironic given that they, as well as the Appellate Body, had so heavily criticized the allowance for commingling in the original proceeding.[212] This argument should be rejected.

107. As both complaining parties readily admit, they have no *actual* evidence that the amended COOL measure has caused any worsening of trade flows in imported livestock. According to the complaining parties, such effects are "anticipated"[213] or "expected."[214] Rather, the "evidence" of this alleged worsening impact appears to be based solely on the statements of industry representatives. These statements should not be considered as probative.

108. As is readily obvious, much of the U.S. industry is strongly opposed to the COOL program and has done everything they can to undermine it, including challenging the 2013 Final Rule in U.S. domestic court. Simply put, these individuals, and the companies they represent, have every reason to exaggerate their claims, even if it means contradicting their own earlier statements in order to try to eliminate the COOL measure altogether.

109. For example, the original panel noted that as a result of the 2009 Final Rule, the major U.S. meat processing companies (Tyson, Cargill, JBS, and Smithfield) had moved to processing

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[210] *See* 2013 Final Rule, 78 Fed. Reg. at 31,381 (Table 4) (Exh. CDA-1).

[211] In this regard, the United States notes that Canada seems to couple both changes together, but Canada never explains how the change in the content of the label itself causes any negative impact on its imports. *Compare* Canada's First Written 21.5 Submission, para. 34 ("As a result of the removal of the commingling flexibility *and* the introduction of point-of-production labelling" the amended COOL measure has allegedly caused various negative impacts) (emphasis added), *with id.* paras. 34-65 (failing to explain how the latter has any connection with the alleged negative impacts). *See also* Mexico's First Written 21.5 Submission, paras. 100-116.

[212] *See, e.g.*, *US – COOL (AB)*, para. 343 ("Furthermore, due to the additional labelling flexibilities allowed for commingled meat, a retail label may indicate that meat is of mixed origin when in fact it is of exclusively US origin, or that it has three countries of origin when in fact it has only one or two."); *US – COOL (Panel)*, para. 7.718 ("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.").

[213] Canada's First Written 21.5 Submission, para. 35.

[214] Mexico's First Written 21.5 Submission, para. 99.

exclusively (or virtually exclusively) A meat. In particular, the original panel recounted that Tyson had "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 percent of all of the fresh, retail beef and pork cuts produced in the U.S. would qualify for the Category A label'.[215] The original panel also noted that while Tyson and the other meat companies "are silent on any intention of commingling," AMI, the trade association representing these same companies,[216] estimated that *no more than 5 percent of domestic meat* would be commingled under the 2009 Final Rule.[217]

110. Yet, the companies (and their trade associations) now appear to be taking an entirely different position on commingling, one that contradicts their earlier statements and the original panel's report. Tyson, for example, now declares mixed origin meat to be "critically important" to its business.[218] And while Tyson was unwilling in 2009 (and remains unwilling now) to provide any evidence as to what extent its plants commingle, the company nevertheless claims (again, without evidence) that the elimination of commingling will cost its operations tens of millions of dollars annually.[219] Yet Tyson indicated in 2009 that it commingles, if at all, only a

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[215] *US – COOL (Panel)*, para. 7.361. The original panel continued, stating: Cargill was reported as moving in the same direction, with around 70 percent of its meat carrying Label A. 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'. 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.'"

[216] AMI Comments on Proposed Rule, p. 1 (CDA-23) ("[AMI] member companies account for more than 90 percent of U.S. output of [beef, pork, lamb, veal, turkey, and processed meat products].").

[217] *US – COOL (Panel)*, para. 7.365. The original panel stated:

> 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'. 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.

[218] *See* Tyson Comment on Proposed Rule, p. 2 (Exh. CDA-25). It is further notable that Tyson did not identify the cost of compling with the 2013 Final Rule as a "material event" in any of its 2013 filings with the U.S. Security and Exchange Commission or on its normal conference call with investors. Exh. US-16.

[219] *See* Tyson Comment on Proposed Rule, p. 2 (Exh. CDA-25) ("The proposal would eliminate our ability to commingle animals of different USDA-defined origins and the muscle cuts derived from them in the production process. However, the agency does not consider the costs that would be borne by Tyson and other meat producers when the ability to commingle and utilize that system is eliminated. Tyson's estimated costs, including lost

very small percentage of its production.[220] Similarly, it is difficult to understand the actual impact of Tyson's recent declaration that, due to the 2013 Final Rule, the company will no longer purchase any C animals,[221] given other evidence put on the record by Canada that asserts that Tyson plants were already refusing to purchase C animals because of *the 2009 Final Rule*.[222] Moreover, in a recent submission to the U.S. Securities and Exchange Commission, Tyson projected 2014 to be a healthy growth year for the company and did not make a mention of COOL labeling requirements.[223]

111. AMI's characterizations of overall industry practice in 2009 and 2013 are equally discordant. While AMI claimed in 2009 that only 5 percent of domestic meat is commingled,[224] it now claims that use of commingling is so pervasive throughout the U.S. industry that the elimination of commingling will "fundamentally alter how meat is produced in the United States,"[225] imposing costs on the beef industry alone that will run a half a billion dollars.[226] According to AMI, commingling is so important to the beef and pork industries that, in fact, its

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throughput related to inefficiencies caused by the increased segregation, is $37.6 million annually for our beef and pork operations.").

[220] That is to say, Tyson has already declared that only 10 percent of its production will carry the B or C Labels and there is no evidence that Tyson commingled the entire 10 percent. *See US – COOL (Panel)*, para. 7.361. If that was true, of course, Tyson would not have been purchasing much foreign livestock at all. Moreover, Tyson's recent declaration that it will stop buying C animals means, at a minimum, that they have *not* been commingling their B animals as they appear to continue to purchase such animals even though commingling has been eliminated. *See also* Tyson Comment on Proposed Rule, p. 2 (Exh. CDA-25) ("Animals of different origins and the use of multiple countries (or, per the current rule, *the 'B' label*) for products derived from those animals is critically important.") (emphasis added).

[221] *See* Exh. CDA-70.

[222] This, according to maps put forward by Canada in the original proceeding. *See* Exh. US-14 (orig. Exh. CDA-96, 97, 99, 101, 102, and 104). *See also* Tyson Comment on Proposed Rule at 2 (Exh. CDA-25) (noting the importance of B – but not C – animals to its business). Similarly, while Cargill claimed in 2009 that they were not planning mitigating the costs of segregation by using the B Label, Cargill now claims that the elimination of commingling is harming their demand for foreign born cattle. *Compare* "Cargill Boards the COOL Train" (Exh. US-15) (orig. Exh. CDA-77), *with* Cargill Comments on Proposed Rule (Exh. CDA-27).

[223] *See* United States Securities and Exchange Commission, Commission File No. 001-14704 Tyson Foods, Inc. (September 28, 2013) (Exh. US-16).

[224] Exh. US-17 (orig. Exh. MEX-67).

[225] Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Injunction in *AMI v. USDA*, p. 10 (July 25, 2013) (Exh. US-18); *see also id.* ("[T]he Final Rule's bar on commingling will dramatically alter how meat is produced and packaged in the United States. ").

[226] AMI Comments on Proposed Rule, p. 12 (Exh. CDA-23).

elimination "will result in a *de facto* closing of the border to foreign origin livestock."[227]

112. Of course, the industry has never provided *any* evidence for these extreme statements, either in 2009 or now.[228] What is entirely clear from these U.S. industry statements and court submissions is that much of the U.S. industry opposes the COOL program, and is willing to engage in speculation and make unfounded assertions to undermine the program, whether the audience is the WTO, a U.S. court, or the court of public opinion. In the original proceeding, these entities made these assertions to minimize the impact of commingling; now they are making them to maximize it. And Canada and Mexico are following this same approach; suddenly, the commingling provisions that they assailed during the original proceedings for undermining the information provided to consumers without helping their industries are essential. What this shift in position from the industry and co-complainants demonstrates clearly is that the witness statements that the complaining parties rely so heavily on do not constitute reliable evidence. The United States respectfully requests the Panels to follow the lead of the D.C. Court reviewing the domestic challenge to the 2013 Final Rule and find these statements of expected business impacts to be unreliable and speculative.[229]

113. Leaving aside the industry statements, it is clear that the complaining parties' argument that the 2013 Final Rule worsens any detrimental impact falls apart.

114. With regard to the allegation that the 2013 Final Rule "compel[s] segregation,"[230] it is clear that the only companies that will have to change any internal procedures are those that *were already commingling*. Companies that already completely segregated A, B, and C livestock (and the resulting meat products) are, of course, unaffected by this change in the regulations. In the original proceeding, the parties heavily debated the question of how many U.S. producers were making use of the one day commingling flexibility. The original panel ultimately found that it

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[227] AMI Comments on Proposed Rule, p. 12 (Exh. CDA-23); *see also* Plaintiffs Complaint for Declaratory and Injunctive Relief in *AMI v. USDA*, para. 7 (Exh. CDA-66) (eliminating commingling will "destroy the market for meat from imported livestock").

[228] *See also* D.C. Court PI Opinion, n.33 (Exh. US-4) ("The current record is not clear regarding the number of packing companies that commingle livestock.").

[229] D.C. Court PI Opinion, p. 64 (Exh. US-4) (The Court is *not* persuaded. As Defendants rightly argue, bare allegations and fears about what may happen in the future are not sufficient to support a claim of irreparable injury. To be sure, Plaintiffs have gathered a number of declarants who are willing to *speculate* about the potential impact of the Final Rule on their business operations and profits, but without more than such blanket, *unsubstantiated* allegations of harm, *there is no strength in these numbers*.) (emphasis added and internal quotes and citations omitted).

[230] Canada's First Written 21.5 Submission, para. 34; *see also* Mexico's First Written 21.5 Submission, para. 99 (contending that it is "expected" that the 2013 will "increase[] requirements to segregate cattle of different nationalities ...").

could not determine "the precise extent" that U.S. industry is making use of commingling,[231] but in any event the benefits of commingling were quite limited.[232]

115. As discussed above in Section II.C.3, the United States took note of these findings and USDA specifically requested comment as to the extent that industry is actually using commingling.[233] In response, three beef processors stated for the record that they commingle different origin cattle. No pork processors claimed to commingle. Notably, the major industry trade groups of beef and pork producers and processors simply refused to comment on the extent that its own members were commingling, despite the direct request of USDA to do so.[234] This response (and lack thereof) confirms USDA's general understanding that only a few individual processors are commingling A animals with either B or C animals. As such, it is impossible to understand *why* the complaining parties allege that the 2013 Final Rule is increasing segregation in such a meaningful way as to affect their producers' market access in the United States.

116. By making such arguments, the complaining parties appear to allege that the original panel was *wrong* to find that the 2009 Final Rule "necessitated" segregation, and that, in fact, the commingling flexibility so reduced the need for segregation for the companies that purchased Canadian and Mexican livestock that it could not be concluded that the 2009 Final Rule "necessitated" segregation for those companies. Neither complainant puts forward any evidence for such an allegation, but it is impossible to read their submissions, which refer to the "sweeping changes" that will "destroy" their export market, that a key underpinning of the original panel's finding on detrimental impact is simply wrong.[235] The complaining parties have provided no basis to re-open the adopted findings of the original panel or Appellate Body in this

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[231] *US – COOL (Panel)*, para. 7.364; *US – COOL (AB)*, paras. 309-310 (upholding that finding).

[232] *See US – COOL (Panel)*, paras. 7.343-44 ("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.").

[233] *See, e.g.*, 2013 Proposed Rule, 78 FR at 15,648 (Exh. CDA-13) ("The Agency's experience with the current program suggests that the majority of muscle cut covered commodities are not produced and labeled using the labeling scheme afforded by commingling. The Agency invites comment and data regarding *the extent to which* the flexibility afforded by commingling on a production day *is used* to designate the country of origin under the current COOL program and the potential costs, such as labor and capital costs, which may result from the loss of such flexibility.") (emphasis added).

[234] As also noted above in Section II.C.3, AMI and its co-plaintiffs in *AMI v. USDA* have been consistent in this regard, never putting forward any evidence as to the extent of commingling by U.S. industry. *See* D.C. Court PI Opinion, at n.33 (Exh. US-4) ("The current record is not clear regarding the number of packing companies that commingle livestock.").

[235] *See, e.g.*, Canada's First Written 21.5 Submission, paras. 15, 55; *see also* Mexico's First Written 21.5 Submission, paras. 98, 104, 108-109.

compliance proceeding.[236]

117. Canada then makes the further unsupportable argument that the amended COOL measure increases recordkeeping costs.[237] This argument appears based on a number of faulty premises. First, Canada argues that producers and retailers of A animals do not need to maintain any recordkeeping and the *entire* recordkeeping burden falls on those that purchase foreign animals.[238] This is simply false. All labels need to be accurate and industry participants need to keep accurate records to verify that the label is accurate, as the 2013 Final Rule makes clear.[239] This is true whether the company deals exclusively in animals born, raised, and slaughtered in the United States or whether the company deals in animals of different origin.

118. Canada further argues that the elimination of both the commingling allowance and the allowance to have the countries listed in the same order on the label affixed to B and C meat increases the recordkeeping costs.[240] Again, this is false, as the 2013 Final Rule makes clear.[241] As the original panel found, under the 2009 Final Rule, even market participants that commingle

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[236] *US – Shrimp (Art. 21.5) (AB)*, para. 96 ("[T]he Panel properly examined Section 609 as part of its examination of the totality of the new measure, correctly found that Section 609 had not been changed since the original proceedings, and rightly concluded that our ruling in United States - Shrimp with respect to the consistency of Section 609, therefore, still stands."); *US – Shrimp (Art. 21.5) (Panel)*, paras. 5.5-5.9 (stating that for claims made in the 21.5 proceeding that were also made in the original proceedings, "the [panel's] examination is to be made in the light of the evaluation of the consistency of the original measure undertaken by the original panel and the Appellate Body").

[237] *See, e.g.*, Canada's First Written 21.5 Submission, para. 42.

[238] *See* Canada's First Written 21.5 Submission, para. 49 ("By contrast, producers and retailers marketing animals that are born, raised, and slaughtered in the United States and the muscle cuts derived therefrom will be spared the burden of maintaining separate sets of records that document these distinctions.").

[239] *See* 2013 Final Rule, 78 Fed. Reg. at 31,383 (Exh. CDA-1) ("Any manufacturer that supplies retailers or wholesalers with a muscle cut covered commodity will be required to provide revised country of origin information to retailers so that the information can be accurately supplied to consumers.").

[240] *See* Canada's First Written 21.5 Submission, paras. 42, 44.

[241] *See* 2013 Final Rule, 78 Fed. Reg. at 31,372 ("[T]he Agency does not agree that additional recordkeeping or verification processes will be required to transfer information from one level of the production and marketing channel to the next. There are no recordkeeping requirements beyond those currently in place, and the Agency believes that the information necessary to transmit production step information is already maintained by suppliers in order to comply with the current COOL regulations. As with the current mandatory COOL program, this final rule contains no requirements for firms to report to USDA. Compliance audits will continue to be conducted at firms' places of business.").

must keep accurate records and labels.[242] Moreover, the complaining parties' argument appears to run directly contrary to the Appellate Body's reasoning, which relied heavily on the original panel's finding that "at each and every stage of the supply and distribution chain, livestock and meat producers need to possess information sufficient to identify by origin each and every animal and piece of meat, and must transmit such information to the next processing stage."[243] Of course, even if the complainant's allegation is true, they have put forward *no* evidence that the use of commingling was so widespread under the 2009 Final Rule that the elimination of commingling has made a material impact on the market access of their products in the United States.

119. In sum, the complaining parties have simply failed to put forth a persuasive argument. They base their claims on unreliable, speculative witness statements, rather than actual evidence. Moreover, to credit those arguments based on speculation of business impacts would require the compliance Panels to find that the original panel's finding that the 2009 Final Rule "necessitated" segregation was wrong. The complainants have provided no basis for the compliance Panels to revisit and reverse findings adopted in the original proceeding.

6. Conclusion on Article 2.1

120. For the above reasons, the complaining parties have failed to establish a *prima facie* case that the amended COOL measure is inconsistent with Article 2.1 of the TBT Agreement.

C. Complainants Have Failed To Establish That the Amended COOL Measure is Inconsistent with Article III:4 of the GATT 1994

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[242] *US – COOL (Panel)*, para. 7.344 ("[C]ommingling still requires keeping 'accurate records' as well as maintaining the accuracy of country of origin information on mixed origin labels.") (quoting the 2009 Final Rule as stating: "[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*.") (emphasis added).

[243] *US – COOL (AB)*, para. 342. The Appellate Body continued by stating:

> In other words, the recordkeeping and verification requirements of the COOL measure require livestock and meat producers to track and transmit to their downstream buyers information regarding the countries in which each production step took place for the animals and/or meat that they process. Thus, for example, a livestock producer must maintain and transmit information sufficient to enable its customers to differentiate between cattle born and raised in the United States, and cattle born in Mexico and raised in the United States. Similarly, a slaughterhouse must maintain information sufficient to enable it to differentiate between Canadian-born but US-raised hogs, and hogs imported from Canada for immediate slaughter in the United States, as these two types of hogs would fall within different origin categories under the COOL measure.

1. Complainants' Attempt to Eliminate Any Examination of the Basis on Which the Member Is Regulating Must Fail

121. Canada and Mexico further claim that the amended COOL measure is inconsistent with Article III:4 of the GATT 1994, but argue that these Panels can find the amended COOL measure to be discriminatory using a much more limited legal analysis than under Article 2.1 of the TBT Agreement. Canada is more explicit than Mexico is in this regard, but both parties come out the same way – the determination of whether the measure accords less favorable treatment depends *solely* on whether the measure results in a detrimental impact on the imported like product.[244] In other words, Article III:4's reference to "treatment no less favourable" means that a detrimental impact – alone – is sufficient to find discrimination, while the Article 2.1 reference to "treatment no less favourable" means something entirely different, even though the interpretation of the latter *derives from the former*.

122. However, the complaining parties' approach has already been considered and rejected by the Appellate Body. For instance, in *Dominican Republic – Cigarettes*, in the context of examining a claim under GATT 1994 Article III:4, the Appellate Body explained:

> 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.[245]

123. Thus, a "detrimental effect" or impact is not enough. There must also be an analysis of whether the detrimental impact is explained by other factors or circumstances that do not reflect discrimination. In the context of Article 2.1 of the TBT Agreement, the Appellate Body has articulated this inquiry as to whether any detrimental impact stems exclusively from a legitimate regulatory distinction.

124. As explained above, any detrimental impact on imported livestock from the amended COOL measure can be explained by the information to be conveyed to the consumer – the

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[244] *See* Canada's First Written 21.5 Submission, para. 28 ("The legal test under the first element [of TBT Article 2.1] is the same test as that under GATT Article III:4 for determining whether a measure accords less favourable treatment to imported products; this test is addressed below. Unlike under GATT Article III:4, the analysis under TBT Article 2.1 requires the consideration of a second element if a detrimental impact on imported products is identified."); *id.*, para. 94; Mexico's First Written 21.5 Submission, paras. 223, 227.

[245] *DR – Cigarettes (AB)*, para. 96 (emphasis added).

recordkeeping and verification requirements are the same for companies handling imported and domestic livestock, and the information conveyed by the labels is also the same. The technical regulation's impacts simply cannot be explained as reflecting discrimination, inconsistent with the national treatment obligation.

125. This is just the latest attempt by complainants to alter the national treatment obligation by eliminating any examination of the basis on which the Member is regulating. Such an approach may serve complainants' offensive interests in this case, but, if accepted, would greatly undermine a Member's ability to regulate in the public interest, re-write the long-standing interpretation of Article III:4, and render the entirety of the Appellate Body's Article 2.1 analysis *in this very dispute* superfluous. This argument should be rejected.

2. Complainants Misunderstand the Meaning of "Treatment No Less Favourable"

126. Article III:4 of the GATT 1994 states:

> 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. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

127. Both complainants start by noting that the Appellate Body has observed that the "scope and content" of TBT Article 2.1 and GATT Article III:4 are not the same.[246] That is true, of course, but entirely irrelevant for purposes here. For example, it is plain that GATT 1994 Article III:4's content is narrower in some respects – it only contains a national treatment obligation – while TBT Article 2.1 contains both the national treatment and most-favored-nation obligations. At the same time, GATT 1994 Article III:4's scope is broader – it covers "*all* laws, regulations and requirements affecting [the] internal sale . . ." – while Article 2.1 covers only technical regulations.

128. But those differences in scope and content are not at issue in this case. What is at issue is something that the two provisions *share* – the phrase "treatment no less favourable."

129. However, the comparison of the scope and content of Article III:4 and Article 2.1 is instructive in a different sense. That comparison demonstrates that the national treatment

[246] Canada's First Written 21.5 Submission, para. 90; Mexico's First Written 21.5 Submission, para. 213.

obligation in Article 2.1 could usefully be considered as essentially a subset of the obligation in Article III:4 of the GATT 1994. This is because Article III:4 of the GATT 1994 applies this "treatment no less favorable" test to a broad range of measures, including technical regulations, while Article 2.1 of the TBT Agreement applies the same standard to technical regulations.[247]

130. The complainants argue that the phrase "treatment no less favorable," which is *identical* in both obligations, should nevertheless be interpreted *differently* from one another. Complainants put forward no reason for such an approach, nor would such an approach make sense here.[248]

131. As the Appellate Body has noted, the TBT Agreement and the GATT 1994 "overlap in scope and have similar objectives."[249] In fact, the preamble of the TBT Agreement states that the Members intend the TBT Agreement "to further the objectives of the GATT 1994."[250] The Appellate Body has thus concluded that "the two Agreements should be interpreted *in a coherent and consistent manner*."[251] In this light, coupled with the fact that the two national treatment obligations "are built around the same core terms," the Appellate Body has determined that Article III:4 of the GATT 1994 serves as relevant context for the interpretation of Article 2.1.[252]

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[247] This is not to say that the context should be ignored, including the context provided to Article 2.1 by the preamble of the TBT Agreement.

[248] *See, e.g.*, *US – Offset Act (Byrd Amendment) (AB)*, para. 68 ("As pointed out above, Article 32.1 of the SCM Agreement is identical in terminology and structure to Article 18.1 of the Anti-Dumping Agreement, except for the reference to subsidy instead of dumping. We endorse *Canada's* contention that '[t]his identical wording gives rise to a strong interpretative presumption that the two provisions set out the same obligation or prohibition.'") (emphasis added).

[249] *US – Clove Cigarettes (AB)*, para. 91.

[250] *US – Clove Cigarettes (AB)*, para. 91 (quoting the second preambular recital); *see also US – COOL (Panel)*, para. 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.'").

[251] *US – Clove Cigarettes (AB)*, para. 91 (emphasis added); *see also EC Asbestos (AB)*, para. 95 (concluding Article III:2 and III:4 "must be interpreted in a harmonious manner that gives meaning to both sentences of that provision," and the interpretation of one sentence "necessarily affects" the way that the other sentence is interpreted).

[252] *US – Clove Cigarettes (AB)*, para. 100; *id.* ("The very similar formulation of the provisions, and the overlap in their scope of application in respect of technical regulations, confirm that Article III:4 of the GATT 1994 is relevant context for the interpretation of the national treatment obligation of Article 2.1 of the TBT Agreement."); *see also US – COOL (Panel)*, para. 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.'").

132. Given this context, the Appellate Body has found that it is not sufficient to merely determine that the measure results in a detrimental impact to demonstrate that the measure accords less favorable treatment to the imported product for purposes of Article 2.1.[253] Rather, the question is whether the detrimental impact "reflects discrimination" by considering "whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction."[254]

133. Article III, of course, disciplines "discrimination." After all, the "treatment no less favourable" clause of Article III:4 "expresses the general principle, in Article III:1, that internal regulations 'should not be applied … so as to afford protection to domestic production.'"[255] And it has long been understood that, consistent with Article III:4:

> a Member *may draw distinctions* between products which have been found to be 'like,' without, for this reason alone, according to the group of 'like' imported products 'less favourable treatment' than that accorded to the group of 'like' domestic products.[256]

134. The analysis under Article III:4 thus necessarily entails an examination of whether the regulation *makes distinctions* that could not be considered even-handed as to the group of "like" imported products versus the group of "like" domestic products, or whether those distinctions are, in fact, even-handed and any detrimental effect can be explained by factors or circumstances unrelated to the foreign origin of the imported product.[257]

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[253] *See, e.g.*, *US – COOL (AB)*, para. 293 ("The Panel seems to have considered its finding that the COOL measure alters the conditions of competition to the detriment of imported livestock to be dispositive, and to lead, without more, to a finding of violation of the national treatment obligation in Article 2.1. In this sense, the Panel's legal analysis under Article 2.1 is incomplete.").

[254] *US – COOL (AB)*, para. 327 ("Only if we find that the detrimental impact reflects discrimination in violation of Article 2.1, can we uphold the Panel's finding that the COOL measure accords less favourable treatment to imported livestock than to like domestic livestock."); *see also US – Tuna II (Mexico) (AB)*, para. 215; *US – Clove Cigarettes (AB)*, para. 182.

[255] *US – Clove Cigarettes (AB)*, para. 178 (quoting *EC – Asbestos (AB)*, para. 100).

[256] *US – Clove Cigarettes (AB)*, para. 178 (quoting *EC – Asbestos (AB)*, para. 100) (emphasis added). The Appellate Body has further clarified that "there must be in every case a 'genuine relationship' between the measure at issue itself 'and its adverse impact on competitive opportunities for imported versus like domestic products to support a finding that imported products are treated less favourably.'" *US – Tuna II (Mexico) (AB)*, n.457 (quoting *Thailand – Cigarettes (Philippines) (AB)*, para. 134).

[257] *EC – Asbestos (AB)*, para. 100 (quoted above); *DR – Cigarettes (AB)*, para. 96 ("[T]he 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."); *Thailand – Cigarettes (Philippines) (AB)*, para. 128 ("[T]he mere fact that a Member draws regulatory distinctions between imported and like domestic products is, in itself, not

135. The Article 2.1 analysis thus flows *from* the Article III:4 analysis.[258] If this was not in fact the case, and these two national treatment obligations resulted in entirely different analyses (and entirely different results), the two agreements could not be interpreted "in a coherent and consistent manner."[259]

136. Yet the complainants put forward an analysis whose object is to create the thoroughly incongruous result that a technical regulation could be judged to be non-discriminatory under one agreement but discriminatory under the other. The fact that under the complainants' approach the technical regulation could be found consistent with the TBT Agreement, the agreement that specifically disciplines such measures, but run afoul of the GATT 1994, even though the national treatment obligation in Article 2.1 can be considered to be a subset of the corresponding obligation in Article III:4 of the GATT 1994, simply confirms the wrongness of complainants' approach.

137. Of course, the result of such an approach is to render Article 2.1 (and the Appellate Body's analysis thereof) entirely irrelevant. No complainant would ever bring an Article 2.1 claim, which, in the complainants' view, sets the higher bar, rendering Article 2.1 (and the Appellate Body's analysis thereof) a nullity.[260] Such an approach would be, of course, deeply concerning in any dispute settlement proceeding, but it is particularly concerning here, where the central question is whether the United States has brought itself into compliance with the DSB recommendations and rulings *on Article 2.1*. But if the complainants are to be believed, the United States could have ignored those recommendations and rulings – they are (in the complainants' view) simply *irrelevant* to determining whether the amended COOL measure is,

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determinative of whether imported products are treated less favourably within the meaning of Article III:4."); *EC – Biotech Products*, para. 7.2514 ("Argentina has not adduced argument and evidence sufficient to raise a presumption that the alleged less favourable treatment is explained by the foreign origin of the relevant biotech products."); *see also Canada – Pharmaceutical Patents*, para. 7.101 ("*[D]e facto* discrimination is a general term describing the legal conclusion that an ostensibly neutral measure transgresses a non-discrimination norm because its actual effect is to impose differentially disadvantageous consequences on certain parties, *and because those differential effects are found to be wrong or unjustifiable*.") (emphasis added).

[258] *See also US – COOL (AB)*, para. 269 ("The Appellate Body recognized in *US – Clove Cigarettes* and *US – Tuna II (Mexico)* that relevant guidance for interpreting the term 'treatment no less favourable' in Article 2.1 may be found in the jurisprudence relating to Article III:4 of the GATT 1994.").

[259] *US – Clove Cigarettes (AB)*, para. 91.

[260] Thus, in *European Community – Measures Prohibiting the Importation and Marketing of Seal Products ("EC – Seals")*, Norway originally alleged that the challenged measure is a technical regulation and requested a panel to examine whether the measure is inconsistent, *inter alia*, with TBT Article 2.1 and GATT Article III:4. But in its argument, Norway has simply dropped the Article 2.1 claim, relying exclusively on the Article III:4 claim to prove a national treatment breach of the measure Norway contends *is a technical regulation*.

in fact, *discriminatory* under a different WTO "national treatment" provision.[261]

138. The fact of the matter is that the United States, consistent with the national treatment obligation that exists in both the GATT 1994 and the TBT Agreement, has every right to draw legitimate distinctions between like products in the pursuit of a legitimate governmental objective, such as providing consumer information on origin. As discussed above in section III.C, the amended COOL measure does just that, and therefore does not accord less favorable treatment to imported livestock under *either* agreement. To accept complainants' approach would not only create two different obligations aimed at national treatment for imported products, but would be an interpretation that, rather than being "in the light of,"[262] would instead be at odds with, "the object and purpose of the TBT Agreement," which is "to strike a balance between, on the one hand, the objective of trade liberalization and, on the other hand, Members' right to regulate."[263]

139. Therefore, for the same reasons as set out above in respect of the complainants' claims under Article 2.1 of the TBT Agreement, the United States respectfully requests the compliance Panels to reject the complainants' claims under Article III:4 of the GATT 1994.

D. Complainants Have Failed To Establish That the Amended COOL Measure is Inconsistent with Article 2.2 of the TBT Agreement

140. Canada and Mexico's respective claims that the amended COOL measure is inconsistent with Article 2.2 fail. Both complaining parties rely on re-packaged arguments they made in the original proceeding, but were rejected by the Appellate Body. In essence, the complaining parties argue that, pursuant to Article 2.2, WTO panels are to make intrusive and far-ranging judgements as to whether a Member's measure is effective public policy. Neither the text of Article 2.2, nor its relevant context, suggests that a WTO panel should step into the shoes of the Member to determine whether a measure is "proportionate" or "reasonable" as the complaining parties repeatedly suggest. The question that Article 2.2 poses is much more specific and focused – whether the challenged measure is "more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non fulfilment would create." For purposes of this dispute, the answer to that question is clearly no. And proof that the complaining parties are unable to support their claims is found in their utter inability to put forward a reasonably available, less trade restrictive alternative measure that provides an equivalent level of origin information to what the amended COOL measure provides.

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[261] Canada's First Written 21.5 Submission, paras. 28, 94; Mexico's First Written 21.5 Submission, para. 227.

[262] *Vienna Convention on the Law of Treaties*, Art. 31 (Exh. US-19).

[263] *US – Clove Cigarettes (AB)*, para. 174.

1. Legal Framework

141. Article 2.2 states:

> 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.

142. The Appellate Body has made clear that the analysis consists of four inquiries: (1) whether the measure is trade restrictive;[264] (2) what objective does the measure pursue;[265] (3) whether that objective is legitimate;[266] and (4) whether the measure is more trade restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.[267]

143. In light of the findings of the original panel and the Appellate Body, the question before these Panels relates only to the fourth inquiry. It is uncontested that the amended COOL measure is "trade restrictive," although the parties disagree as to how this is measured, as discussed below.[268] In addition, the findings of the original panel and Appellate Body make clear that the COOL measure's objective is "to provide consumer information on origin,"[269] and that the COOL measure contributes to this objective by providing "consumers with information on the countries in which the livestock from which the meat they purchase is produced were

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[264] *See US – COOL (AB)*, sec. VI.C.2.

[265] *See US – COOL (AB)*, sec. VI.C.3.

[266] *See US – COOL (AB)*, sec. VI.C.4.

[267] *See US – COOL (AB)*, sec. VI.C.5.

[268] *See infra*, sec. III.D.4.a.

[269] *US – COOL (AB)*, para. 433 ("On the basis of the above, we find that the Panel did not err, in paragraphs 7.617, 7.620, and 7.685 of the Panel Reports, in identifying the objective pursued by the United States through the COOL measure as being to provide consumer information on origin.").

born, raised, and slaughtered."[270] It is equally clear that this objective is "legitimate" for purposes of the TBT Agreement.[271] This issue was exhaustively debated before the original panel, which concluded the objective was legitimate, and appealed by the complaining parties. In rejecting those appeals, the Appellate Body found:

> ... we see no reason to disturb the Panel's finding with respect to the legitimacy of the objective pursued by the United States through the COOL measure, namely, to provide consumers with information on the countries in which the livestock from which the meat they purchase is produced were born, raised, and slaughtered.[272]

144. Neither Canada nor Mexico argues that the amended COOL measure pursues an objective that is different from the one that the original COOL measure pursued, or that the objective is not legitimate (as they had previously argued). The question before the Panels, therefore, is whether the amended COOL measure is more trade restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.

2. The Legal Test for "More Trade Restrictive Than Necessary to Fulfil a Legitimate Objective, Taking Account of the Risks Non-Fulfilment Would Create"

145. The Appellate Body has explained that an Article 2.2 analysis involves a "relational analysis" of three factors: "the trade-restrictiveness of the technical regulation; the degree of contribution that it makes to the achievement of a legitimate objective; and the risks non-fulfilment would create."[273] Importantly, the Appellate Body considered that "the use of the comparative 'more … than' in the second sentence of Article 2.2 suggests that the existence of an 'unnecessary obstacle[] to international trade' in the first sentence may be established on the basis of a comparative analysis of [these] factors."[274] The Appellate Body has thus determined that in order for a complaining party to prove an Article 2.2 claim:

> [t]he complainant must make a *prima facie* case by presenting evidence and arguments sufficient to establish that the challenged measure is more trade restrictive than necessary to achieve the contribution it makes to the legitimate

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[270] *US – COOL (AB)*, para. 453.

[271] *US – COOL (AB)*, para. 453.

[272] *US – COOL (AB)*, para. 453.

[273] *US – COOL (AB)*, para. 374.

[274] *US – COOL (AB)*, para. 376; *US – Tuna II (Mexico) (AB)*, para. 320.

> objective, taking account of the risks non-fulfilment would create. A complainant may, and in most cases will, also seek to identify a possible alternative measure that is *less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available*.[275]

146. The comparison between the challenged measure and an alternative measure is thus central to the analysis.[276] The Appellate Body has identified only two instances where a panel would not need to make such a comparison: "when a measure is not trade restrictive at all, or when a trade-restrictive measure makes *no* contribution to the achievement of the relevant legitimate measure."[277] It appears uncontested that neither instance is applicable here, which is consistent with the Appellate Body's view that consideration of the previously challenged COOL measure *must* involve an examination of proposed alternative measures.[278] Accordingly, the burden is on the complainants to put forward sufficient evidence to establish a *prima facie* case that an alternative measure exists "that is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available."[279]

3. The DS386 Panel Should Reject Mexico's "Two Step Necessity" Test

147. Prior to discussing their three proposed alternatives, the complaining parties engage in lengthy explanations of legal tests that not only wildly diverge from each other, but, more importantly, significantly diverge from the Appellate Body's legal analysis. In particular, Mexico concocts what it calls a "two step necessity" test, which consists of two elaborate, multi-stage balancing tests, whereby failure of the first balancing test establishes a breach of Article

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[275] *US – COOL (AB)*, para. 379 (emphasis added). If the complaining party does establish a *prima facie* case:

> It is then for the respondent to rebut the complainant's *prima facie* case by presenting evidence and arguments showing that the challenged measure is not more trade restrictive than necessary to achieve the contribution it makes toward the objective pursued, for example, by demonstrating that the alternative measure identified by the complainant is not, in fact, 'reasonably available,' is not less trade restrictive, or does not make an equivalent contribution to the achievement of the relevant legitimate objective. *Id.*

[276] *See also Australia – Apples (AB)*, para. 356 ("[T]he legal question [for Article 5.6 of the SPS Agreement] is whether the importing Member could have adopted a less trade-restrictive measure.").

[277] *US – COOL (AB)*, n.929 (emphasis in original) (quoting *US – Tuna II (Mexico) (AB)*, para. 322).

[278] *US – COOL (AB)*, para. 469.

[279] *US – COOL (AB)*, para. 379; *see also id.* at para. 469 ("The Appellate Body has found, *and the participants do not contest*, that the burden of proof with respect to such alternative measures is on the complainants.") (emphasis added).

2.2 without resort to a comparison with an alternative measure.[280] This multi-stage analysis has no basis in the text of Article 2.2, nor is it reflected in the Appellate Body's reasoning in either *US – COOL* or *US – Tuna II (Mexico)*.[281] As is clear, the analysis of whether the challenged measure is "more trade restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create" is accomplished through a comparison with an alternative measure.[282] Mexico's argument appears to be nothing more than an inappropriate attempt to re-argue that such a comparison is not necessary.[283] Indeed, the Appellate Body reversed on this very aspect of the original panel's analysis, concluding that:

> we agree with the United States that, by finding the COOL measure to be inconsistent with Article 2.2 of the *TBT Agreement* without examining the proposed alternative measures, the Panel erred by relieving Mexico and Canada of this part of their burden of proof.[284]

148. Mexico does not even attempt to explain how its analysis of the "two step necessity test" comports with this finding or its underlying reasoning.[285] As the Appellate Body has made clear – the test for Article 2.2 *does not* involve a convoluted two step approach composed of entirely open-ended balancing tests as Mexico alleges. There is one test for Article 2.2 – and to prove that the test is satisfied the complaining party *must* establish that an alternative measure exists that "is less trade restrictive, makes an equivalent contribution to the relevant objective, and is

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[280] *See* Mexico's First Written 21.5 Submission, para. 155 (arguing that the amended COOL measure "is one such instance" where a comparison is not needed); *see also id.* at paras. 177-178 (concluding that the amended COOL measure fails the "first step" and therefore is inconsistent with Article 2.2 without the need to conduct a comparison).

[281] Of course, Mexico's "two step" approach is faulty in a number of ways, not just this one. To take but one example, Mexico argues that the "first step" involves an examination of the "relative importance" of the challenged measure. This factor does not appear in the text, and Mexico explicitly concedes that such a factor is not part of the Appellate Body's Article 2.2 analysis in either *US – COOL* or in *US – Tuna II (Mexico)*. *See* Mexico's First Written 21.5 Submission, paras. 157 (stating that the Appellate Body "has not explicitly identified" this factor in its Article 2.2 analysis); *compare US – COOL (AB)*, para. 107 (Mexico arguing that the "importance" of the measure should be analyzed for an Article 2.2 claim), *with id.* para. 379 (explaining Mexico's burden of proof for Article 2.2).

[282] *US – COOL (AB)*, para. 379.

[283] *Compare US – COOL (AB)*, para. 458 (summarizing the complaining parties' argument that the analysis need not include a comparison), *with id.* para. 469 (rejecting the complaining parties's argument and requiring such a comparison take place).

[284] *US – COOL (AB)*, para. 469.

[285] *See, e.g.*, Mexico's First Written 21.5 Submission, paras. 164-178 (concluding that the amended COOL measure is inconsistent with Article 2.2 without resort to a comparison of the amended COOL measure and an alternative measure under the "first step of the Necessity Test").

reasonably available."[286] Arguments by either complaining party that seek to relieve themselves of *any part* of this burden should be unavailing. As such, the United States respectfully requests the DS386 Panel to reject Mexico's unsupportable "two step necessity test," and respectfully requests both Panels to reject arguments of the complaining parties that seek to relieve themselves of their own burden.[287]

4. The Three Factor Comparison Between the Amended COOL Measure and an Alternative Measure

149. The comparison between the amended COOL measure and an alternative measure is with respect to whether the alternative measure is "less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available."[288] In evaluating these factors, the complaining parties appear to misunderstand the Article 2.2 analysis in two fundamental ways.

150. First, both parties engage in lengthy discussions of their views of how the amended COOL measure rates against these factors in the abstract rather than as part of the comparison. Yet the Appellate Body has made clear that the text of Article 2.2 ("more . . . than") requires these factors be evaluated as part of the comparison.[289] To put it another way, it does not matter whether the amended COOL measure scores "high" or "low" on any particular factor – as Canada and Mexico repeatedly suggest – the question is how does the amended COOL measure *compare* to a reasonably available alternative measure with regard to those factors.[290]

151. Second, both complaining parties treat the comparison as an open-ended balancing test. The complaining parties thus argue that the comparison measure proves an inconsistency because an alternative measure is more "reasonable" or less "disproportionate" than the amended

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[286] *US – COOL (AB)*, para. 379.

[287] *See, e.g., US – Zeroing (EC) (Art. 21.5) (AB)*, paras. 427 (concluding that "claims in Article 21.5 proceedings cannot be used to re-open issues that were decided on substance in the original proceedings...").

[288] *US – COOL (AB)*, para. 379.

[289] *US – COOL (AB)*, para. 376 ("[T]he use of the comparative 'more … than' in the second sentence of Article 2.2 suggests that the existence of an 'unnecessary obstacle[] to international trade' in the first sentence may be established *on the basis of* a comparative analysis of [these] factors.") (emphasis added); *see also US – Tuna II (Mexico) (AB)*, para. 320.

[290] *See generally EC – Asbestos (Panel)*, para. 8.207 ("[T]he availability of a measure should not be examined theoretically or in absolute terms.").

COOL measure.[291] But those are not tests of Article 2.2. Again, it is not the role of the WTO to second guess its Members as to what (or what is not) appropriate public policy. The question here is a much more focused one – whether the challenged measure is "more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non fulfilment would create." In other words, a panel should *not* be asking itself whether the Member could have pursued a particular objective in a myriad of different of ways – *only* whether the Member could have adopted a less trade restrictive route to the same end.[292]

152. To accomplish this task, the Appellate Body has instructed panels to examine the comparison with regard to three factors: trade-restrictiveness, equivalence of contribution, and reasonable availability.

a. Trade Restrictiveness

153. A complaining party must establish a *prima facie* case that the proposed alternative measure is "less trade restrictive" than the challenged measure.[293] The complaining parties appear to toggle back and forth between arguing that the phrase "trade restrictiveness" either means the restricting of exports,[294] or means discrimination.[295] The United States believes it is plain that the phrase refers to the restricting of trade flows, and not the concept of discrimination. The text of Article 2.2, of course, refers to "trade restrictive" measures, not measures that are "discriminatory," which are the subject of a separate provision.

154. The Appellate Body has noted that the term "trade restrictive" "means something having

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[291] *See, e.g.*, Canada's First Written 21.5 Submission, para. 167 ("Additional considerations demonstrate the *reasonableness* of the extension of the 60-day inventory allowance to muscle cuts of pork and beef as a less trade-restrictive alternative to the amended COOL measure.") (emphasis added); Mexico's First Written 21.5 Submission, para. 162 ("This interpretation is consistent with the concept of *proportionality*.") (emphasis added).

[292] *See also Australia – Apples (AB)*, para. 356 ("[T]he legal question [for Article 5.6 of the SPS Agreement] is whether the importing Member could have adopted a less trade-restrictive measure.").

[293] *US – COOL (AB)*, para. 379. As discussed with the original panel, a complaining party cannot establish a breach of TBT Article 2.2 simply based on the fact that the alternative measure is insignificantly less trade restrictive than the challenged measure. *See* Letter from Peter D. Sutherland, Director-General of the GATT, to Ambassador John Schmidt, Chief U.S. Negotiator (Dec. 15, 1993) (Exh. US-20) (orig. Exh. US-53). This letter provides supplemental means of interpretation within the meaning of Article 32 of the *Vienna Convention on the Law of Treaties*.

[294] *See, e.g.*, Mexico's First Written 21.5 Submission, para. 171 (referring to the "COOL discount," refusal of companies to buy Mexican product, etc.).

[295] *See, e.g.*, Mexico's First Written 21.5 Submission, para. 204; Canada's First Written 21.5 Submission, para. 175.

a limiting effect on trade."[296] That is, "Article 2.2 does not prohibit measures that have any trade-restrictive effect. It refers to 'unnecessary obstacles' to trade and thus allows for *some* trade-restrictiveness ... ."[297] Yet it is impossible to square this approach with the complaining parties' contention that the term "trade- restrictive" refers to discrimination. It simply does not make sense to discuss how Article 2.2 allows for "some" discrimination.[298]

155. Indeed, the Appellate Body noted, in particular, that what Article 2.2 disciplines is "trade-restrictive *effect*."[299] But that only makes sense when "trade restrictive" is understood to refer to limiting trade effects, *i.e.*, limiting market access.[300] It is, in fact, well understood that technical regulations often have trade limiting effects – that is, in fact, the entire point of having a TBT Agreement in the first place.[301]

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[296] *US – COOL (AB)*, para. 375 (quoting *US – Tuna II (Mexico) (AB)*, para. 319).

[297] *US – Tuna II (Mexico) (AB)*, para. 319 (emphasis added); *US – COOL (AB)*, para. 375(quoting same); *see also US – Tuna II (Mexico) (AB)*, para. 338 ("Hence, the mere fact that a WTO Member adopts a measure that entails a *burden* on trade in order to pursue a particular objective cannot *per se* provide a sufficient basis to conclude that the objective that is being pursued is not a 'legitimate objective' within the meaning of Article 2.2.") (emphasis added).

[298] Indeed, it would be odd to interpret "trade restrictive" as "discriminatory" since that would imply that a discriminatory measure was to be selected under the TBT Agreement as long as it was less discriminatory than the challenged measure.

[299] *US – Tuna II (Mexico) (AB)*, para. 319 ("What has to be assessed for 'necessity' is the trade-restrictiveness of the measure at issue. We recall that the Appellate Body has understood the word 'restriction' as something that restricts someone or something, a limitation on action, a limiting condition or regulation. Accordingly, it found, in the context of Article XI:2(a) of the GATT 1994, that the word 'restriction' refers generally to something that has a limiting effect. As used in Article 2.2 in conjunction with the word 'trade', the term means something having a limiting effect on trade. We recall that Article 2.2 does not prohibit measures that have any trade-restrictive *effect*. It refers to 'unnecessary obstacles' to trade and thus allows for some trade-restrictiveness; more specifically, Article 2.2 stipulates that technical regulations shall not be 'more trade-restrictive than necessary to fulfil a legitimate objective'. Article 2.2 is thus concerned with restrictions on international trade that exceed what is necessary to achieve the degree of contribution that a technical regulation makes to the achievement of a legitimate objective.") (emphasis added).

[300] It is notable that when the original panel looked at "actual trade effects" of the original COOL measure, it looked at just this – what effects the original COOL measure had on Canadian and Mexican livestock exports to the United States. *See US – COOL (Panel)*, paras. 7.438-7.546. Similarly, Mexico brought its tuna case because it believed that the U.S. "dolphin safe" prevents Mexican industry from selling *more* tuna in the United States. *US – Tuna II (Mexico) (AB)*, para. 56 (According to Mexico, the Panel's [Article 2.2] finding is correct because the U.S. objectives can be fulfilled with a less trade-restrictive alternative measure, thereby allowing more Mexican tuna to be sold in the U.S. market).

[301] *See, e.g., US – Tuna II (Mexico) (AB)*, para. 338 ("Hence, the mere fact that a WTO Member adopts a measure that entails a burden on trade in order to pursue a particular objective cannot per se provide a sufficient basis to conclude that the objective that is being pursued is not a 'legitimate objective' within the meaning of Article 2.2.").

156. The approach of the complaining parties is also wrong when viewed from the perspective of Article 2 generally. That is, Articles 2.1 and 2.2 are *separate* obligations. Article 2.2 is not a specific application of Article 2.1 in the TBT Agreement as Article 5.1 is to Article 2.2 in the *Agreement on the Application of Sanitary and Phytosanitary Measures* (SPS Agreement).[302] This is true for any number of reasons, but most particularly because the two obligations ask different questions. Article 2.1 asks whether there is less favorable treatment for imported products than for domestic products. Article 2.2 asks whether the measure limits trade "more than necessary."[303] Indeed, the Appellate Body in *US – Tuna II (Mexico)* cautioned that the analysis done under one article is not dispositive of the other.[304] But the complaining parties attempt to merge the two obligations into one, arguing, for example, that the possibility of adopting a trace back regime proves the amended COOL measure is inconsistent with both articles.[305] Not surprisingly, such an approach is impossible to square with the Appellate Body's analysis.[306] Indeed, the Appellate Body determined in *US – Tuna II (Mexico)* that the challenged measure was consistent with Article 2.2, but inconsistent with Article 2.1.[307]

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[302] *See, e.g., Australia – Salmon (AB)*, paras. 137-138.

[303] *See, e.g., US – Clove Cigarettes (Panel)*, para. 7.332 ("The main issues under Article 2.1 in this case are whether clove cigarettes and menthol cigarettes are 'like' products, and if so, whether clove cigarettes are accorded 'less favourable treatment' than that accorded to menthol cigarettes. The main issue under Article 2.2 in this case is whether the ban on clove cigarettes is 'more trade-restrictive than necessary' to fulfil the legitimate objective of reducing youth smoking. Thus, our finding that the measure is inconsistent with Article 2.1 does not prejudge the answer to the question of whether the measure is consistent with Article 2.2.").

[304] *See US – Tuna II (Mexico) (AB)*, para. 286 ("The Panel's findings with respect to the calibration of the measure at issue for the purposes of its analysis under Article 2.2 are thus not necessarily dispositive of the question whether the measure is calibrated for the purposes of Article 2.1. In particular, it would appear that in answering the question of whether the measure gives accurate information to consumers, *all* distinctions drawn by the measure are potentially relevant. By contrast, in an analysis under Article 2.1, we *only* need to examine the distinction that accounts for the detrimental impact on Mexican tuna products as compared to US tuna products and tuna products originating in other countries.") (emphasis in original).

[305] *See* Canada's First Written 21.5 Submission, paras. 159, 167, 169, 171; Mexico's First Written 21.5 Submission, paras. 200, 203-204; *see also* Canada's First Written 21.5 Submission, paras. 159, 167; Mexico's First Written 21.5 Submission, para. 194 (arguing that the ground meat rules are an acceptable alternative under Article 2.2 because they were already found consistent with Article 2.1).

[306] *See US – Clove Cigarettes (AB)*, para. 171 ("The context provided by Article 2.2 suggests that 'obstacles to international trade' may be permitted insofar as they are not found to be 'unnecessary', that is, 'more trade-restrictive than necessary to fulfil a legitimate objective'. To us, this supports a reading that Article 2.1 does not operate to prohibit a priori any obstacle to international trade. Indeed, if any obstacle to international trade would be sufficient to establish a violation of Article 2.1, *Article 2.2 would be deprived of its effet utile*.") (emphasis added).

[307] *US – Tuna II (Mexico) (AB)*, paras. 407-408; *see also US – Clove Cigarettes (Panel)*, paras. 8.1-8.6 (finding the challenged measure inconsistent with Article 2.1 but consistent with Article 2.2).

b. Equivalent Contribution

157. A complaining party must also establish that the alternative measure "makes an equivalent contribution to the relevant objective."[308] The Appellate Body has clarified that a panel should make its determination "taking account of the risks non-fulfillment would create."[309]

158. The starting point of this analysis is to "assess the degree to which a Member's technical regulation, as adopted, written, and applied, contributes to the legitimate objective pursued by that Member."[310] As the Appellate Body has made clear, rather than considering "whether the measure fulfils the objective completely or satisfies some minimum level of fulfilment of that objective," the consideration "should focus on ascertaining the degree of contribution achieved by the measure."[311] Such an interpretation is consistent with the preamble of the TBT Agreement, which assures that the Member may apply measures "that may take measures necessary to achieve its legitimate objectives '*at the levels it considers appropriate*.'"[312]

159. Complaining parties employ vague characterizations as to what the amended COOL measure does, describing the measure as making a "low" or "very low" contribution to its objective.[313] But such characterizations are not relevant to what the Panels must decide. As the Appellate Body has instructed, "what is relevant for the inquiry under Article 2.2 is the degree of contribution to the objective that a measure *actually* achieves."[314]

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[308] *US – COOL (AB)*, para. 379.

[309] *US – COOL (AB)*, para. 378 (quoting *US – Tuna II (Mexico)*, para. 322). Article 2.2 states that, 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."

[310] *US – COOL (AB)*, para. 390; *see also id.* para. 373

[311] *US – COOL (AB)*, para. 468.

[312] *US – COOL (AB)*, para. 373 (emphasis in original). The Appellate Body continued by stating that "[t]he degree or level of contribution of a technical regulation to its objective is not an abstract concept, but rather something that is revealed through the measure itself." *Id.*; *see also id.* para. 426 ("As we noted, the fulfilment of an objective is a matter of degree, and what is relevant for the inquiry under Article 2.2 is the degree of contribution to the objective that a measure *actually* achieves.") (emphasis in original).

[313] Canada's First Written 21.5 Submission, title above para. 126; Mexico's First Written 21.5 Submission, para. 169.

[314] *US – COOL (AB)*, para. 426 (emphasis in original); *see also id.*, para. 390 ("Rather, what a panel *is* required to do, under Article 2.2, is to assess the degree to which a Member's technical regulation, as adopted, written, and applied, contributes to the legitimate objective pursued by that Member.") (emphasis in original).

160. As is clear, the objective of the amended COOL measure is to provide information on origin, "namely, to provide consumers with information on the countries in which the livestock from which the meat they purchase is produced were born, raised, and slaughtered."[315] The amended COOL measure does this by providing specific information for muscle cuts sold at retail regarding the location of the three production steps (*e.g.*, "Born in Mexico, Raised and Slaughtered in the U.S."). Accordingly, the design, structure, and operation of the amended COOL measure clearly indicates that the degree to which the amended COOL measure *actually* contributes to its objective of providing consumer information on origin is that the measure provides meaningful and accurate information on origin for muscle cuts sold at retail as to where the animal was born, raised, and slaughtered.[316] Whether one considers this a "high" contribution to the objective or a "low" one is immaterial. The only question with regard to this factor is whether an alternative measure provides an "equivalent" amount of origin information regarding where the animal was born, raised, and slaughtered.

161. In this regard, Canada and Mexico argue at various times that they establish a *prima facie* case on this factor even if the alternative measure contributes to the objective to a "lesser" degree than does the amended COOL measure.[317] But that approach is contrary to the plain text of Article 2.2 – Article 2.2 provides for a Member to maintain the measure "to fulfil a legitimate objective." Under the complaining parties' approach, the alternative measure would fall short of fulfilling the legitimate objective. In particular, if a complaining party was able to establish that the Member's measure is "more trade restrictive than necessary" through an alternative measure that does *less* than what the challenged measure does, the Member would no longer be able to pursue objectives "at the levels it considers appropriate," as the sixth preambular recital provides

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[315] *US – COOL (AB)*, para. 453 ("[W]e see no reason to disturb the Panel's finding with respect to the legitimacy of the objective pursued by the United States through the COOL measure, namely, to provide consumers with information on the countries in which the livestock from which the meat they purchase is produced were born, raised, and slaughtered.").

[316] *See also US – COOL (AB)*, para. 453 ("[W]e see no reason to disturb the Panel's finding with respect to the legitimacy of the objective pursued by the United States through the COOL measure, namely, to provide consumers with information on the countries in which the livestock from which the meat they purchase is produced were born, raised, and slaughtered.").

[317] *See, e.g.*, Mexico's First Written 21.5 Submission, para. 162 ("[W]hen comparing the challenged measure and possible alternative measures, the degree of contribution to the relevant legitimate objective by the alternative measure does not have to be the same as that of the challenged measure. It can be a *lesser* degree of contribution where that lesser contribution can be justified in the light of the risks non-fulfilment would create.") (emphasis added); Canada's First Written 21.5 Submission, para. 118 ("The contribution that an alternative measure would make to the achievement of the objective has to be 'equivalent' to that made by the challenged measure. However, this does not mean that the alternative measure needs to achieve precisely the same degree of contribution to the achievement of the objective as that of the challenged measure in all cases."). Obviously, the complaining parties' approach ignores the plain meaning of "equivalent," which is defined as things that are "*equal* in value, significance, or meaning" or things "having the *same* effect." *Oxford English Dictionary*, at 843 (1993) (Exh. US-21) (emphasis added).

for.[318] Moreover, the complainants' approach runs directly contrary to the Appellate Body's guidance in *US – Tuna II (Mexico)*, which reversed that panel's Article 2.2 finding on this very point.[319] Specifically, the Appellate Body found that Mexico had not proved its case in that its proposed alternative "would contribute to both the consumer information objective and the dolphin protection objective *to a lesser degree* than the measure at issue, because, overall, it would allow more tuna harvested in conditions that adversely affect dolphins to be labelled 'dolphin-safe.'"[320]

c. Reasonably Available

162. As the Appellate Body has explained, Canada and Mexico must also establish a *prima facie* case that the alternative measure is "reasonably available."[321] This concept is consistent with the context provided by the text of Article 5.6 of the SPS Agreement.[322] And the Appellate Body has explained in other contexts how to analyze whether an alternative measure is reasonably available. For example, the Appellate Body has explained that an alternative measure should not be considered "reasonably available" where the measure is:

> merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that

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[318] *US – COOL (AB)*, para. 373 ("The word [fulfil] is concerned with the degree of contribution that the technical regulation makes towards the achievement of the legitimate objective. . . . [R]elevant contextual support for this reading [can be found] in the sixth recital of the preamble of the *TBT Agreement*, which provides that, subject to certain qualifications, a Member shall not be prevented from taking measures necessary to achieve its legitimate objectives '*at the levels it considers appropriate*.'") (emphasis added and in original). Thus, Mexico is wrong to argue that the concept of an equivalent contribution "originates" from the general exceptions provisions contained in the GATT and GATS, neither of which actually use that phrase. *See* Mexico's First Written 21.5 Submission, para. 162. Rather, this concept is grounded in the actual language of the TBT Agreement itself.

[319] *US – Tuna II (Mexico) (AB)*, para. 331.

[320] *US – Tuna II (Mexico) (AB)*, para. 330.

[321] *US – Tuna II (Mexico) (AB)*, para. 323 (" In making its *prima facie* case, a complainant may also seek to identify a possible alternative measure that is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available.").

[322] *See also* Letter from Peter D. Sutherland, Director-General of the GATT, to Ambassador John Schmidt, Chief U.S. Negotiator (Dec. 15, 1993) (Exh. US-20) (orig. Exh. US-53) (explaining that while "it was not possible to achieve the necessary level of support for a U.S. proposal [concerning a clarifying footnote to Article 2.2 and 2.3 of the TBT Agreement] . . . it was clear from our consultations at expert level that participants felt it was obvious from other provisions of the [TBT] Agreement that the Agreement does not concern itself with insignificant trade effects nor could a measure be considered more trade restrictive than necessary *in the absence of a reasonably available alternative*") (emphasis added).

Member, such as prohibitive costs or substantial technical difficulties.[323]

163. As to whether the alternative measure imposes an "undue burden," the party with the burden of proof "must support such an assertion with sufficient evidence," "substantiating the likely nature or magnitude of the costs that would be associated with the proposed alternative, as compared to the current system."[324] Simply alleging that the measure would or would not impose substantial costs does not relieve the party of its burden of proof.[325] In this regard, whether an alternative is reasonably available or not must be assessed in "the real world" – that is, in light of the actual economic and administrative realities facing the Member.[326]

5. The Complaining Parties Have Failed to Establish a *Prima Facie* Case That An Alternative Measure Exists That Proves the Amended COOL Measure Is Inconsistent with Article 2.2

164. The complaining parties put forward three wholly inadequate alternatives to the amended COOL measure. None of the alternatives establish a *prima facie* case that the amended COOL measure is inconsistent with Article 2.2.

a. First Alternative Measure: Mandatory Labeling of Origin Based on Substantial Transformation; Voluntary Point of Production Labeling; No Exemptions

165. The complaining parties put forward as their first alternative measure mandatory origin labeling on the basis of substantial transformation, coupled with voluntary point of production labeling, and the elimination of the three exemptions.[327]

166. It is readily clear that the complaining parties' first alternative measure does not provide

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[323] *US – Gambling (AB)*, para. 308; *see also id.* ("Moreover, a "reasonably available" alternative measure must be a measure that would preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued under paragraph (a) of Article XIV."); *EC – Asbestos (Panel)*, para. 8.207 ("[T]he availability of a measure should not be examined theoretically or in absolute terms. We consider that the existence of a reasonably available measure must be assessed in the light of the economic and administrative realities facing the Member concerned but also by taking into account the fact that the State must provide itself with the means of implementing its policies.").

[324] *China – Publications and Audio Visual Products (AB)*, paras. 327-328.

[325] *China – Publications and Audio Visual Products (AB)*, para. 328.

[326] *Australia – Apples (Panel)*, para. 7.1257 (analyzing the factor in the context of SPS Article 5.6); *EC – Asbestos (Panel)*, para. 8.207 (analyzing the factor in the context of GATT Article XX).

[327] *See* Canada's First Written 21.5 Submission, para. 157; Mexico's First Written 21.5 Submission, para. 182.

a contribution to the objective equivalent to that provided by the amended COOL measure, which provides meaningful and accurate information regarding where the animal was born, raised, and slaughtered for muscle cuts meat sold at retail.

167. First, the mandatory element (*i.e.*, substantial transformation) provides no information as to two of the three production steps, and therefore does not even come close to making the same contribution that the amended COOL measure does. Of course, the original panel has already determined as such, finding that "the exact information that the United States wants to provide to consumers cannot be conveyed through" substantial transformation.[328] This issue was not appealed. That finding is, of course, even more true with regard to the amended COOL measure, which provides explicit information as to where the animal was born, raised, and slaughtered for virtually all muscle cuts sold with a COOL label.

168. Second, the voluntary labeling element will also not provide an equivalent level of contribution to the objective for the simple fact that U.S. industry will not use the voluntary label. History shows that this is true, as the United States discussed in the original proceeding.[329] Complainants' reliance on the statements from U.S. industry further confirm the validity of this proposition – U.S. industry strongly disagrees with the COOL program and will not voluntarily provide their consumers origin information regarding where the animal was born, raised, and slaughtered.[330]

169. Although both complainants begin their respective arguments by contending that this alternative provides an equivalent level of origin information as the amended COOL measure does, both quickly retreat to claiming that the Panels should be "flexible" as to this element.

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[328] *US – COOL (Panel)*, paras. 7.734-7.735 (rejecting Mexico's Article 2.4 claim). There, the Panel states:

> 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 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. . . .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.

[329] *See* U.S. First Written Submission in Original Proceeding, paras. 251-254; U.S. Second Written Submission in Original Proceeding, paras. 161-163.

[330] *See supra*, sec. III.B.5. Notwithstanding the above, if a complainant could prove that a mandatory technical regulation is "more trade restrictive than necessary" simply by suggesting a voluntary measure that does the same thing, *all* technical regulations would be, by definition, inconsistent with Article 2.2, a clearly ridiculous result that Canada and Mexico do not even attempt to address.

Complainants' thus contend that an alternative could prove the amended COOL measure inconsistent with Article 2.2 even if it provides less information than the amended COOL measure does.[331] This is clearly wrong.

170. As discussed above, the TBT Agreement makes clear that it is up to the Member to decide what legitimate objectives it wishes to pursue, and to what degree it wishes to pursue them. If a complaining party were able to establish that the Member's measure is "more trade restrictive than necessary" through an alternative measure that does less than what the challenged measure does, the Member would no longer be able to pursue objectives "at the levels it considers appropriate." The Appellate Body has been clear on this point, reversing the *US – Tuna II (Mexico)* panel's finding that the measure was inconsistent with Article 2.2 where the measure did not make an equivalent contribution to the objective that the challenged measure did.[332]

171. The phrase "risks non-fulfilment would create," which complainants so heavily rely on, does not provide a different conclusion. In essence, what complainants are arguing is merely a re-packaged version of the argument that they made before the original panel – that the objective of consumer information is simply not "legitimate" or "important" enough to defeat an Article 2.2 challenge. It may be true that in these proceedings, neither Canada nor Mexico appear to consider this objective to be at all worthwhile (although their own domestic measures belie that belief).[333] But in any event, that is certainly not true for the United States, and nothing in the TBT Agreement generally, or Article 2.2 specifically, requires the United States to re-order its objectives to conform to the objectives of its trading partners. As such, Article 2.2 simply does not allow for the open-ended balancing tests that the complainants repeatedly request the Panels to second-guess U.S. public policy. Notably, the complainants fail to explain how their approach is consistent with the Appellate Body's reasoning in *US – Tuna II (Mexico)*, where the Appellate Body required that the alternative measure make an equivalent contribution to the objective, even though one of the two objectives at issue was, in fact, *consumer information*.[334]

b. Second Alternative Measure: Application of Ground Meat Rules to Muscle Cuts Without Exemptions

[331] Canada's First Written 21.5 Submission, para. 161; Mexico's First Written 21.5 Submission, paras. 186, 197.

[332] *US – Tuna II (Mexico) (AB)*, para. 330.

[333] *See supra*, sec. II.D.1 (citing *US – COOL (Panel)*, para. 7.638 ("We observe that many of these labelling 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."); WTO Members with Country of Origin Regimes (Exh. US-5); TBT Notifications of Country of Origin Measures (Exh. US-6).

[334] *US – Tuna II (Mexico) (AB)*, paras. 302-303, 342.

172. Both complaining parties put forward as their second alternative the extension of the ground meat rule to all muscle cuts (without the three exemptions).[335] As discussed above, the ground meat rule differs substantially from the rules on muscle cuts, owing to the significant differences in the production of those two types of products.[336] The ground meat rule allows for the label to simply list all the countries from which meat was in the processor's inventory within 60 days of the production of that particular ground meat.[337] Complainants challenged the ground meat rule as being discriminatory, but the original panel rejected those claims, finding the rule consistent with Article 2.1.[338]

i. Complainants Have Not Established that the Second Alternative Makes an Equivalent Contribution to the Relevant Objective

173. The ground meat rule does not provide any information regarding where the animal was born, raised, and slaughtered. As such, complainants' second alternative measure does not provide an equivalent contribution to the objective that the amended COOL measure does, which provides accurate information on where the animal was born, raised, and slaughtered. In fact, Canada readily concedes that the alternative measure does not provide as accurate origin information as the amended COOL measure does.[339] Accordingly, this alternative fails for all the reasons complainants' first alternative fails.

174. In response to this inevitable conclusion, Canada argues that this alternative proves that the amended COOL measure is inconsistent with Article 2.2 because the alternative is "reasonable[]" and "achieves a level of fulfilment that is acceptable to the United States.[340] But these are irrelevant considerations – the test for Article 2.2 whether an alternative measure exists "that is less trade restrictive, makes an equivalent contribution to the relevant objective, and is

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[335] *See* Canada's First Written 21.5 Submission, para. 164; Mexico's First Written 21.5 Submission, para. 192.

[336] *See supra*, sec. III.B.3.d.iii (quoting 2009 Final Rule, 74 Fed. Reg. at 2671 (Exh. CDA-2).

[337] 7 C.F.R. § 65.300(h) (Exh. US-2) ("The declaration for ground beef, ground pork, ground lamb, ground goat, and ground chicken covered commodities shall list all countries of origin contained therein or that may be reasonably contained therein. In determining what is considered reasonable, when a raw material from a specific origin is not in a processor's inventory for more than 60 days, that country shall no longer be included as a possible country of origin").

[338] *See US – COOL (Panel)*, para. 7.437.

[339] *See* Canada's First Written 21.5 Submission, para. 167 ("[T]his expanded coverage would offset the decline in accuracy.").

[340] *See* Canada's First Written 21.5 Submission, para. 167.

reasonably available."[341] Neither party made such a showing.

ii. Complainants Have Not Established that the Second Alternative Is Less "Trade Restrictive" or "Reasonably Available"

175. The complaining parties casually note that the first and second alternatives would eliminate the three exemptions contained in the amended COOL measure (*i.e.*, the processed food, restaurant, and small business exemptions).[342] Yet neither complaining party puts forward *any* detailed and comprehensive analyses regarding the impact on trade of eliminating these exemptions, and, in particular, how eliminating these exemptions would be less trade restrictive.

176. As should be clear, this is not a matter that should be taken lightly, and the complaining parties do not discharge their burden of proof simply because they believe otherwise. Rather, eliminating these exemptions would likely have significantly negative impacts on those entities and individuals directly implicated by the exemptions, as well as the U.S. economy as a whole. As such, any analysis submitted by complainants would certainly include how any increase in the costs of U.S. entities now covered by the exemptions would impact livestock exports from Canada and Mexico, consistent with their overall argument. That is, both complainants argue that the 2013 Final Rule, by raising costs on U.S. industry, worsens the trade restrictiveness of the COOL measure.[343]

177. Indeed, the comparison is stark between this part of the complainants' submissions and their Article 2.1 claims. As to the latter, complainants claim that the elimination of commingling will "destroy" the market for exported livestock, even though only a small percentage of meat processors appear to make use of the allowance.[344] But as to the former, complainants assume – without *any* analysis or evidence – that the elimination of the processed food and restaurant exemption, which *every one* of the approximately 600,000 restaurants in the United States makes use of, will have no effects at all – no costs, no trade impacts, *nothing*.[345]

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[341] *US – COOL (AB)*, para. 379.

[342] *See, e.g.*, Canada's First Written 21.5 Submission, para. 155; Mexico's First Written 21.5 Submission, para. 182.

[343] *See, e.g.*, Canada's First Written 21.5 Submission, para. 34; Mexico's First Written 21.5 Submission, paras. 98-116.

[344] Canada's First Written 21.5 Submission, para. 55.

[345] Not surprisingly, complainants, who based their entire detrimental impact argument on industry witness statements, do not have even one witness statement from the U.S. restaurant industry to support their argument that elimination of these exemptions would have no impact whatsoever.

178. Complainants have simply ignored their burden of proof to put forward evidence that establishes what effect the elimination of these exemptions would have on trade, and whether doing so would be cost prohibitive or involve substantial technical difficulties such that their elimination would not be "reasonably unavailable" to the United States.[346]

c. Third Alternative Measure: Mandatory Trace-Back

179. Both complaining parties put forward as their third alternative measure a mandatory trace-back regime.[347] However, the complaining parties present this more as a concept than as an actual measure. For instance, neither party explains what this measure consists of, how it would work, or even what the labels would say. Canada, for example, describes the alternative as a regime that would provide consumers information "not only in respect of country of origin, but on the precise name and location of the farm, feedlot and processing facility (*i.e.*, state/province, municipality, or specific address)."[348] Yet neither party provides much information beyond that. Certainly, neither party provides any detailed explanation of the measure, such as what measures the United States would need to put in place to track the individual animals (both cattle and hogs), as well as what measures would be needed to verify and enforce the regime.

180. These details are no small matter. As noted above, complainants have not provided any comprehensive and detailed cost analyses that would be relevant to whether their various alternatives are less trade restrictive and reasonably available. But it is impossible to put forth any serious cost study without exhaustively developing a detailed alternative measure. Again, the Appellate Body has been clear – the party putting forward the alternative measure that is "merely theoretical in nature" does not discharge its burden.[349] Rather, the party must support the alternative "with sufficient evidence," which "substantiat[es] the likely nature or magnitude of the costs that would be associated with the proposed alternative, as compared to the current system."[350] Bare allegations that the Member could or could not adopt the alternative are simply not enough to establish a *prima facie* case.[351]

181. As discussed further below, neither complaining party has discharged that burden – nor, frankly, have they come close.

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[346] *US – Gambling (AB)*, para. 308.

[347] *See* Canada's First Written 21.5 Submission, para. 169; Mexico's First Written 21.5 Submission, para. 200.

[348] Canada's First Written 21.5 Submission, para. 169.

[349] *US – Gambling (AB)*, para. 308.

[350] *China – Publications and Audio Visual Products (AB)*, paras. 327-328.

[351] *China – Publications and Audio Visual Products (AB)*, para. 328; *see supra*, sec. III.A.

i. Complainants Have Not Established that Trace-Back Makes an Equivalent Contribution to the Relevant Objective

182. It is impossible for the United States to judge whether such a measure would make an equivalent contribution to providing information on origin given that the complainants have failed to provide a description of their proposed trace-back alternative that provides any of the necessary details in order to be able to evaluate it. Complainants even decline to state what the content of the label would actually say. Given that the objective of the amended COOL measure is to provide consumer information on origin, the complainants could not possibly have established what contribution the alternative makes to this objective (in comparison with the amended COOL measure) without specifying the content of the label.

183. We would further note that trace-back regimes are intended to contribute to an entirely different objective – food safety (or animal health) – than the objective at issue here, consumer information on origin. In this regard, the objective of a trace-back regime would normally be to quickly recall animals (and meat) from the chain of commerce due to a food safety or animal health issue. We understand that this is the situation of the various other Members that have apparently adopted a trace-back regime.

ii. Complainants Have Not Established that Trace-Back Is A Less Trade Restrictive Alternative

184. As discussed above, complainants mis-understand the term "less trade-restrictive," arguing that this term should be interpreted as "less discriminatory," rather than having a "limiting effect on trade," as the Appellate Body has observed.[352] As discussed above, the United States considers it plain that the complaining parties must establish that the alternative will not reduce trade flows of livestock and meat exports to the United States compared to the effect that the amended COOL measure has had.

185. What the complaining parties have proposed is directly the opposite. Even without details or cost analyses, it is clear that a trace-back regime even in general terms would require significantly increasing the costs associated with recordkeeping and verification requirements as well as labeling.

186. The question then becomes what effect the adoption of this alternative would have on trade. The complainants claim that, as a result of a rule that USDA estimates will cost the U.S.

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[352] *US – COOL (AB)*, para. 375 (quoting *US – Tuna II (Mexico) (AB)*, para. 319).

meat processing industry somewhere between $19 million and $76.3 million to implement,[353] the 2013 Final Rule will greatly worsen trade in their livestock by, *inter alia*, reducing the value of foreign livestock and discouraging sales of foreign livestock.[354] Yet complainants put forward no analysis of the trade effects of this much more expensive rule.[355]

187. Of course, a trace-back regime would not merely impose costs inside the United States (which would impact trade), but would impose costs on foreign producers of both livestock and meat, and any cost analyses must account for the trade consequences of such costs. Although Mexico claims that it is prepared to implement such a trace-back regime,[356] neither complaining party claims to have a fully implemented trace-back regime for the livestock they produce. Moreover, this alternative would impose costs on *all* exporters of meat to the United States, who would need to develop compatible trace back programs to what the United States adopted.

188. As is clear, neither complaining party has established a *prima facie* case that a trace-back regime would be less trade restrictive than the amended COOL measure. As such, this alternative fails to establish that the amended COOL measure is inconsistent with Article 2.2.[357]

iii. Complainants Have Not Established that Trace-Back Is a "Reasonably Available" Alternative for the United States to Adopt

[353] 2013 Final Rule, 78 Fed. Reg. at 31,373 (Exh. CDA-1) (noting, however, that USDA estimates that the actual costs will likely be closer to the lower end).

[354] *See, e.g.*, Mexico's First Written 21.5 Submission, paras. 102-116.

[355] In this regard, we note that the complaining parties, who rely so heavily on the statements of the U.S. meat processing industry, do not put forward even one statement supporting the adoption of such a regime. In fact, Canada readily admits that the U.S. beef industry is adamantly opposed to adopting a trace-back regime. *See* Canada's First Written 21.5 Submission, para. 174 ("[P]arts of the U.S. cattle industry strongly opposed the idea on the ground that the [U.S. National Animal Identification System] would impose producer-level cost of implementation with no guarantee of market benefits.").

[356] Mexico's First Written 21.5 Submission, para. 211.

[357] Finally, we note that even under the complaining parties' faulty definition of "trade restrictiveness," the complaining parties are not willing to confirm that this alternative would be "less trade restrictive" than the amended COOL measure. According to complainants, to make such a conclusion one would need to analyze "the specific facts and circumstances relating to the design and implementation of the compliance mechanism," which is something that complainants have declined to do here. *See* Mexico's First Written 21.5 Submission, n.227 ("Mexico observes that whether or not discrimination still existed under this section opinion would depend on the specific facts and circumstances relating to the design and implementation of the compliance mechanism."); Canada's First Written 21.5 Submission, n.352 ("As pointed out by Mexico, whether or not discrimination would exist under a trace-back system would depend on the specific facts and circumstances relating to the design and implementation of the system.") (referring to Mexico's Second Written Submission in the original proceeding).

189. Both the complaining parties claim that it is technically and economically feasible for the United States to implement a mandatory trace-back regime.[358] But neither provides a detailed explanation of what the measure would actually be, nor provide a comprehensive cost analysis of that measure that substantiates their view that this is a reasonably available alternative for the United States to adopt.[359] As such, the complaining parties have failed to establish a *prima facie* case that this alternative is a "reasonably available" measure for the United States to adopt.

190. As discussed above, under any measure, the adoption of a measure that tracks individual animal for a country whose current herd is 89.3 million heads of cattle and 66.37 million heads of hogs would be enormously expensive.[360] Certainly, costs would run into the multi-billions of dollars, and as such, imposing such a measure for beef and pork production would constitute an "undue burden" to the United States for purposes of this analysis.[361]

191. In fact, as Canada itself notes, USDA abandoned its consideration of an animal identification program in 2010 in response to concerns expressed by domestic stakeholders.[362] These concerns were not limited to just the high costs of adopting such a program, but also the consequences of those costs on the U.S. meat industry, particularly the beef industry, which would have to absorb 90 percent of the annual costs of the U.S. National Animal Identification System (NAIS).[363] In this regard, the 2010 CRS Report on NAIS notes that the higher costs imposed on the beef industry could reward "vertical integration at the expense of family farms,"

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[358] Canada's First Written 21.5 Submission para. 180; Mexico's First Written 21.5 Submission paras. 208-212.

[359] *See China – Publications and Audio Visual Products (AB)*, paras. 327-328 (Parties must "substantiat[e] the likely nature or magnitude of the costs that would be associated with the proposed alternative, as compared to the current system.").

[360] For a sense of scale, the U.S. cattle herd is 7 times larger than Canada's herd of 12.3 million and 5 times larger than Mexico's herd of 18.5 million. For hogs, the numbers are equally extreme – Canada's herd of 12.6 million is 5 times smaller than the U.S. herd. USDA tracks foreign livestock populations at: http://www.fas.usda.gov/psdonline/psdhome.aspx.

[361] *US – Gambling (AB)*, para. 308.

[362] *See* Canada's First Written 21.5 Submission, para. 174; Congressional Research Service, "Animal Identification and Traceability: Overview and Issues," p. 1 (Nov. 29, 2010) ("2010 CRS Report") (Exh. CDA-92). An animal identification program would be a necessary (but not sufficient) measure to adopt to implement a traceability program.

[363] 2010 CRS Report, p. 9 (Exh. CDA-92). *see also id.*, p. 9-10 ("Studies have shown that the cattle industry is expected to bear the brunt of the costs of implementing a national ID program, in large part because each individual animal will have to be tagged, unlike in the large, vertically integrated pork and poultry industries, where animals are usually raised and moved in lots. Critics claim that this added cost factor would unfairly disadvantage cattle producers in domestic and international meat markets. For small operators who are unable to spread such new costs over large operations, ID costs would likely erode an already thin profit margin.").

in that "large retailers and meat packers will exercise market power to shift compliance costs backward to farms and ranches, making it even more difficult for the smaller, independent ones to remain in business."[364] Thus, the adoption of a trace back system may have greater effects than mere dollars and cents, but may have significant consequences for rural America in a way that will be difficult to predict.[365]

192. As noted above, the complaining parties simply put forward no detailed cost analyses to support their argument that this alternative is reasonably available, and Mexico's heavy reliance on the ten year old Hayes & Meyer article does not undermine that conclusion.[366] This article, which examines an older version of the U.S. COOL measure and how the EU trace back regime could be applied to the U.S. pork industry, does not provide an analysis of how costly it would be for the United States to apply a trace-back regime for the beef and pork industries. Moreover, Mexico simply assumes – without evidence or analysis – that the same circumstances that apply in the pork industry apply equally to the beef industry.[367] That assumption is false. The 2010 CRS Report notes, in fact, that the pork and beef industries are quite different, with the pork industry much more vertically integrated than the beef one.[368] So much so, in fact, that 90 percent of the costs of the NAIS would have fallen on the beef industry.[369]

193. As such, neither this article, nor any other document cited to by complainants, establish that a trace-back regime is, in fact, an economically viable alternative for the United States.[370]

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[364] 2010 CRS Report, p. 10 (Exh. CDA 92).

[365] In addition, the 2010 CRS Report notes that the technological requirements for such a program are not yet known and could exacerbate the industry's ability to adopt an animal identification program. *See* 2010 CRS Report, at 9 (Exh. CDA-92) ("In addition, the as-yet-unknown technology requirements (*e.g.*, computer hardware/software, record keeping, radio frequency recording, etc.) could potentially increase the complexity of operations and could easily exceed an operator's capability."); *see also China – Publications and Audio Visual Products (AB)*, para 330 (noting that "the technical difficulties that might arise in the implementation of the proposed alternative measure" is a relevant consideration).

[366] *See* Mexico's First Written 21.5 Submission, para. 201 (citing to Exh. MEX-37); *see also* Canada's First Written 21.5 Submission, para. 170 (citing to CDA-89).

[367] *See* Mexico's First Written 21.5 Submission, para. 201 ("Although [the Hayes & Meyer article] focuses on pork, its analysis and conclusions apply to equally to beef.") (no explanation or substantiation).

[368] 2010 CRS Report, pp. 9-10 (Exh. CDA-92) ("Studies have shown that the cattle industry is expected to bear the brunt of the costs of implementing a national ID program, in large part because each individual animal will have to be tagged, unlike in the large, vertically integrated pork and poultry industries, where animals are usually raised and moved in lots.").

[369] 2010 CRS Report, p. 9 (Exh. CDA-92).

[370] *Brazil – Retreaded Tyres (Panel)*, para. 7.201 (noting that the "economic viability" of various alternatives "has yet to be demonstrated").

As is readily obvious, the trace back regime is not. It, in fact, constitutes an "undue burden" to the United States.[371] A trace back regime is not a "reasonably available" alternative for the United States.

6. Conclusion on Article 2.2

194. For the above reasons, the complaining parties have failed to establish a *prima facie* case that any of their three alternatives are "less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available" in comparison with the amended COOL measure.[372] As such, the complaining parties have failed to establish a *prima facie* case that the amended COOL measure is inconsistent with Article 2.2.

E. Complainant's Claims Under Article XXIII:(1)(b) of the GATT 1994 Are Outside the Terms of Reference of these Panels and Otherwise Fail

195. In respect of their GATT 1994 Article XXIII:(1)(b) claims, the complaining parties repeat the same claims that they made in the original proceeding, and, as before, only give the most cursory attention to the elements of their respective claims.[373] As was the case in the original proceeding, complainants' claims fail.

196. Article XXIII:1(b) of the GATT 1994 provides the following:

> If any Member should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of . . .
>
> (b) the application of another Member of any measure, whether or not it conflicts with the provisions of this Agreement . . .
>
> the Member may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other Member or Members which it considers to be concerned.

197. Claims under Article XXIII:1(b) are commonly referred to as "non-violation nullification or impairment" or "NVNI" claims.

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[371] *US – Gambling (AB)*, para. 308.

[372] *US – COOL (AB)*, para. 379.

[373] *See* Canada's First Written 21.5 Submission, paras. 182-190; Mexico's First Written 21.5 Submission, paras. 230-243.

198. Article 26.1 of the DSU sets out procedures subject to which the procedures of the DSU apply to NVNI claims. This article provides in relevant part:

> Where and to the extent that such party considers and a panel or the Appellate Body determines that a case concerns a measure that does not conflict with the provisions of a covered agreement to which the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable, the procedures in this Understanding shall apply, subject to the following:
>
> (a) the complaining party shall present a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement . . . .

1. NVNI Claims Are Outside the Terms of Reference of These Article 21.5 Proceedings

199. As an initial matter, Article 26.1 establishes that Article XXIII:1(b) claims only arise in the context of a measure "that does not conflict" with a covered agreement. This has significant implications for an Article 21.5 proceeding that involves a measure found to be inconsistent with a covered agreement (such as in the present disputes).

200. Where a measure has been found inconsistent with a covered agreement, and a panel or the Appellate Body has made the mandatory recommendation pursuant to DSU Article 19.1 to bring the measure into conformity with that agreement, Article 21.5 applies in a specific context. Namely, where there is a "measure[] taken to comply with the recommendations and rulings" of the DSB, Article 21.5 proceedings are limited to resolving a disagreement between the parties to the question of either:

(1) "the existence" of a measure taken to comply or
(2) the "consistency with a covered agreement" of a measure taken to comply.

201. The first prong does not provide a basis for the complaining parties' NVNI claims. There is no question in this proceeding that a measure taken to comply, the amended COOL measure, exists. Furthermore, determining if there *exists* a measure taken to bring a WTO-inconsistent measure into conformity with a covered agreement does not entail determining if that measure causes non-violation nullification or impairment.

202. The second prong also does not provide a basis to examine NVNI claims. By definition, determining the "consistency" with a covered agreement of measures taken to comply involves the question of whether a complaining party can demonstrate that a measure taken to comply is *inconsistent* with a covered agreement. Such an examination of a measure's "consistency" does not entail the question of *non-violation* nullification or impairment by a measure "that does not

conflict with the provisions of a covered agreement."

203. As a result of these NVNI claims not falling within either prong of the disagreement that may be subject to Article 21.5 proceedings, the complaining parties' NVNI claims are not properly within the terms of reference of these Article 21.5 proceedings.

2. Complainants' NVNI Claims Otherwise Fail

204. Even aside from the terms of reference problem which alone is sufficient to dismiss the complaining parties' NVNI claims, those claims would fail. Article XXIII:1(b) establishes three elements that a complaining party must demonstrate in order to make out a cognizable claim under Article XXIII:1(b): (1) application of a measure by a WTO Member; (2) a benefit accruing under the GATT 1994; and (3) nullification or impairment of the benefit as a result of the application of the measure.[374]

205. As the original panel properly recognized,"the remedy in Article XXIII:1(b) 'should be approached with caution and should remain an exceptional remedy.'"[375] The Appellate Body has explained that "[t]he 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."[376]

206. The original panel determined that U.S. compliance with Article III:4 (and Article 2.1) "would remove the basis of the complainants' claim given the parallelism between key elements of the legal tests of national treatment and XXIII:1(b), and, as such, stopped its analysis.[377] Canada criticizes the original panel's analysis;[378] Mexico appears to take no position.[379]

207. Canada and Mexico bear the burden of proof of demonstrating that their benefits are being nullified or impaired, and Article 26.1 requires that they "present a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement."[380] The complaining parties have failed to comply with their obligation to provide a

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[374] *Japan – Film*, para. 10.41.

[375] *US – COOL (Panel)*, para. 7.901 (quoting *EC – Asbestos (AB)*, para. 186).

[376] *EC – Asbestos (AB)*, para. 186 (quoting *Japan – Film*, para. 10.36).

[377] *US – COOL (Panel)*, para. 7.905-07 (quoting *Japan – Film*, para. 10.38).

[378] *See* Canada's First Written 21.5 Submission, paras. 187-188.

[379] *See* Mexico's First Written 21.5 Submission, paras. 230-243.

[380] DSU Article 26.1(a); *see also Japan – Film*, para. 10.32.

detailed justification for their complaint, including to explain how the measure "does not conflict with the relevant covered agreement," for the obvious reason that they do not believe that the measure "does not conflict."

208. It is not sufficient for the complaining parties to simply prove that they enjoy a tariff concession and that the United States has adopted a measure that allegedly affects the value of the concession. The complainants also bear the burden of proving that the challenged measures could not have been reasonably anticipated at the time the relevant tariff concessions were negotiated.[381] They must further demonstrate that the challenged measures have directly upset the competitive relationship between domestic and imported products which existed as a consequence of the relevant tariff concessions.[382]

209. As discussed below, Canada's and Mexico's brief treatment of these elements in their first written submissions fails to establish that the amended COOL measure has nullified or impaired any legitimate expectations reasonably held by the complaining parties.

a. Canada and Mexico Have Failed to Identify the Relevant "Benefits" That Are Allegedly Being Nullified or Impaired

210. As was the case in the original proceeding, neither complainant explains how each of the tariff benefits accruing to them directly or indirectly under the GATT 1994 are being nullified or impaired where their trade does not, in fact, rely on the tariff concession under the GATT 1994: each concedes that there are tariff concessions under the NAFTA, not the GATT 1994, that provide them with market access.[383] However, Article XXIII:1(b) applies to benefits accruing "directly or indirectly under this Agreement" – that is, under the GATT 1994, not under the NAFTA.[384]

b. Canada and Mexico Have Failed to Prove That They Could Not Have Reasonably Anticipated the United States Would Adopt Retail Country of Origin Labeling for Meat Products

211. To prove that they had a legitimate expectation that market access for their livestock

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[381] *Japan – Film*, para. 10.76.

[382] *Japan – Film*, para. 10.82.

[383] *See* Canada's First Written 21.5 Submission, para. 183; Mexico's First Written 21.5 Submission, para. 240.

[384] *See also* DSU Article 1.1, which makes clear that the NAFTA is not a "covered agreement" (because it is not listed in Appendix 1of the DSU), and DSU Article 26.1, which provides that "a panel or the Appellate Body may only make rulings and recommendations where a party to the dispute considers that any benefit accruing to it directly or indirectly *under the relevant covered agreement* is being nullified or impaired" (emphasis added).

products would be unaffected by COOL labeling requirements on the downstream meat products, Canada and Mexico must demonstrate that they could not have reasonably anticipated the COOL measures at the time the tariff concessions were negotiated. "If the measures were anticipated, a Member could not have had a legitimate expectation of improved market access to the extent of the impairment caused by these measures."[385] Moreover, the burden of proof for a claim concerning concessions made many years ago "must be all the heavier inasmuch as the intervening period has been so long."[386]

212. As the United States has noted, imported meat, along with a host of other agricultural and non-agricultural goods, has been required to be labeled at the retail level with its country of origin since 1930, decades before the conclusion of the Uruguay Round or the NAFTA.[387] Given that long history, Canada and Mexico should have reasonably anticipated that the United States would maintain some kind of country of origin labeling on meat products when the tariff rates were negotiated. Instead, Canada asserts, without providing any further evidence or justification, that the "drastic deviation" from a substantial transformation regime "could not reasonably have been expected."[388] Mexico makes the same point in different terms – it "reasonably expected that its access to the U.S. market for feeder cattle would be unrestricted except in relation to appropriate sanitary and phytosanitary measures."[389]

213. To the extent that Canada and Mexico are implying that they could not have reasonably anticipated that the United States would modify or supplement its existing country of origin labeling requirements for meat products since the Uruguay Round, or in exactly what way the United States might have modified or supplemented these requirements during these intervening years, such argument is incorrect. As noted in the original dispute, for at least the last 40 years, since the 1960s, the U.S. Congress has contemplated various pieces of legislation that would have required additional requirements for country of origin labeling for meat at the retail level.[390]

214. In addition, many other WTO Members have required country of origin labeling for various products (including meat) for many years.[391] Indeed, for over 50 years, GATT

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[385] *Japan – Film*, para. 10.76.

[386] *EC – Asbestos (Panel)*, para. 8.292.

[387] *See, e.g.*, U.S. First Submission in Original Proceeding, paras. 18-19 (noting that the United States has maintained some form of country of origin labeling requirements since enactment of the Tariff Act of 1930).

[388] Canada's First Written 21.5 Submission, para. 190.

[389] Mexico's First Written 21.5 Submission, para. 243.

[390] *See* U.S. First Written Submission in Original Dispute, para. 25.

[391] *See supra*, sec. II.D.

contracting parties, and now WTO Members, have recognized the importance and the practice of labeling products with their country of origin. As noted above, these labeling practices continue to evolve. For example, the EU is poised to impose a label that will specify where the animal was raised and slaughtered.

215. Thus, both the United States' own long history of labeling laws and policy discussion on meat and other products, as well as the proliferation of similar labeling regimes by other WTO Members, prior to the time the Uruguay Round was concluded, "could not do other than create a climate which should have led [Canada and Mexico] to anticipate a change in the attitude of the importing countries" towards embracing more origin information being disclosed to consumers at the retail level.[392] Particularly in light of the many years that have elapsed since the Uruguay Round, Canada and Mexico "could not assume that, over such a long period, there would not be" changes to the U.S. labeling regime with the risk that meat products derived from imported livestock would have to be labeled.[393]

216. Consequently, neither complainant has met its burden of proof to demonstrate, with the required "detailed justification" and with clear and solid evidence, that it has suffered a nullification or impairment of benefits "as a result of the application of" the amended COOL measures.

IV. CONCLUSION

217. For the foregoing reasons, the United States respectfully requests that the Panels reject the claims made by Canada and Mexico in their entirety. In addition, the United States respectfully requests that the Panels find the complainants' Article 2.1 claims with regard to the unchanged trace-back provisions and their Article XXIII:(1)(b) claims outside the terms of reference for these Panels.

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[392] *EC – Asbestos (Panel)*, para. 8.297.

[393] *Cf. EC – Asbestos (Panel)*, para. 8.292 (noting that "it is for Canada to present detailed evidence showing why it could legitimately expect the 1947 and 1962 concessions not to be affected and could not reasonably anticipate that France might adopt measures restricting the use of all asbestos products 50 and 35 years, respectively, after the negotiation of the concessions concerned.. . . Indeed, it is very difficult to anticipate what a Member will do in 50 years time. It would therefore be easy for a Member to establish that he could not reasonably anticipate the adoption of a measure if the burden of proof were not made heavier.)