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)**

Second Written Submission of
the United States of America

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US – COOL (AB)	Appellate Body Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012
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Exhibit US-45	Canfax Research Services, Canadian Cattlemen's Association, "Economic Impacts of Livestock Production in Canada – A Regional Multiplier Analysis," Suren Kulshreshtha, Oteng Mondongo and Allan Florizone, at 11-12 (Sept. 2012)

I. INTRODUCTION

1. The heart of this dispute is now, as it always has been, whether the United States can require retailers to inform consumers of beef and pork muscle cuts as to where the animal was born, raised, and slaughtered, consistent with the obligation to provide "treatment no less favourable" to imported livestock. The United States did not adopt the COOL measure so as to afford protection to domestic production, as complainants have alleged in the past, but to provide accurate and meaningful origin information to consumers about the food they purchase, an objective that the Dispute Settlement Body ("DSB") has already found to be legitimate in this very dispute.

2. To provide accurate and meaningful information, the United States has designed its technical regulation to address the reality of the U.S. meat industry, which produces a substantial amount of meat derived from foreign born animals. In fact, the United States imports the largest share of internationally traded cattle and hogs,[1] with hundreds of thousands of those animals being slaughtered every year after spending only a day or two in the United States.[2] Certainly, the United States derives many advantages from relying heavily on international trade, but that reliance also creates challenges, including how best to inform consumers about the products that they and their families consume. Simply stamping "made in the USA" on the meat derived from any animal slaughtered in the United States is not sufficient.

3. To provide that accurate and meaningful information, the United States considered it necessary to draw distinctions between different like products (*i.e.*, A meat vs. B meat vs. C meat) so that, when sold at retail, muscle cuts will accurately reflect their origin. The United States does not dispute that drawing these distinctions has an economic impact on the U.S. meat industry and the companies and farms that provide the livestock to the U.S. industry. What the United States does dispute, however, is that simply because the amended COOL measure has a detrimental impact on Canadian and Mexican livestock producers, the United States has *per se* acted inconsistently with its WTO obligations. Rather, the obligations of the WTO Agreement acknowledge the balance between the pursuit of liberalized trade and other legitimate government objectives.

4. Complainants attempt to convince these Panels that no such balance exists. A Member may not provide consumer information on origin – undoubtedly a legitimate governmental objective – if the measure disproportionately impacts foreign producers. Period.

5. Complainants make their position quite plain in their claims under Article III:4 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), where they urge the Panels to adopt a legal framework that equates detrimental impact with discrimination. Under the complainants' approach, any examination of whether the technical regulation draws legitimate – even correct – distinctions must be deferred to the analysis under Article XX of the GATT 1994 (if available). Complainants' position is equally clear in their claims under Article 2.1 of the

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[1] *See infra*, sec. II.A.1.c.i (noting that U.S. livestock imports account for, on average, 72% of the global share of cattle trade and 91% of the global share of trade in hogs).

[2] Imports from Canada of cattle for immediate slaughter have averaged 172,000 head in the years 2008-2012.

Agreement on Technical Barriers to Trade ("TBT Agreement") where they contend that the detrimental impact itself is not legitimate, and, as such, cannot possibly stem exclusively from a legitimate regulatory distinction.[3] Again, for complainants, detrimental impact equals discrimination. Finally, complainants make their position clear in their TBT Article 2.2 claims where they urge the Panels to judge the U.S. measure "more trade restrictive than necessary" because the United States could have chosen a measure that did not result in a detrimental impact.[4]

6. Complainants' arguments should be rejected in their entirety. As the Appellate Body explained, detrimental impact alone is not enough to find a breach.[5] It is necessary to then go on to examine whether any detrimental impact stems exclusively from legitimate regulatory distinctions.

7. In the original proceeding, the Appellate Body found that the disconnect between the amount of information called for under the recordkeeping and verification requirements and the amount of information conveyed to consumers meant that the detrimental impact did not stem exclusively from legitimate regulatory distinctions. The United States took those findings very seriously and reacted accordingly. The 2013 Final Rule amended the original COOL measure such that now the information conveyed to the consumer includes each stage of production. As a result, a single country of origin label is affixed to muscle cuts produced from livestock slaughtered in the United States. That label is designed and applied in an even-handed manner. Moreover, the United States has chosen the least trade restrictive alternative to provide the level of origin information it considers appropriate, a point confirmed by complainants' inability to offer a less trade restrictive, reasonably available alternative that makes an equivalent contribution to the relevant objective as the amended COOL measure.

8. The United States respectfully requests the Panels to reject the claims of the complainants that the United States has not brought itself into compliance with the recommendations and rulings of the Dispute Settlement Body.

II. LEGAL ARGUMENT

A. Complainants Have Failed to Establish That the Amended COOL Measure Is Inconsistent with Article 2.1 of the TBT Agreement

9. The United States has taken a measure to comply that directly addresses the concerns in the Appellate Body reports. The amended COOL measure now increases the information provided and sets out what is in effect a single label – disclosing the country of birth, raising, and slaughter – for the three categories of meat that impact complainants' livestock imports (*i.e.*, categories A, B, and C). The single label affixed to those categories of meat is even-handed. As

[3] *See infra*, sec. II.A.1.c.iv (discussing complainants' Article 2.1 arguments regarding trace-back).

[4] *See infra*, sec. II.C.3.b (discussing complainants' Article 2.2 arguments regarding substantial transformation).

[5] *See, e.g., US – COOL (AB)*, para. 293.

such, any detrimental impact resulting from the amended COOL measure now stems exclusively from legitimate regulatory distinctions.

10. What complainants primarily contest, however, is a series of regulatory distinctions that has nothing to do with the detrimental impact at all. The sum result of complainants' arguments appears to be an attempt to convince the Panels that proof of a detrimental impact alone proves a technical regulation to be discriminatory,[6] despite the Appellate Body's statements to the contrary.[7] And, of course, this insistence that a detrimental impact is enough to prove a technical regulation discriminatory is the foundation of complainants' claim under Article III:4 of the GATT 1994.

11. Complainants' approach, if successful, would render a great many regulatory measures vulnerable to WTO challenge for the first time.[8] All a complainant would need to prove to successfully make a national treatment claim would be that a majority of the domestic producers satisfy a particular standard, while a majority of the complainants' producers do not,[9] a fact pattern that surely repeats itself many times over throughout the WTO membership.

12. Contrary to Canada and Mexico's approach, however, the Appellate Body has confirmed that technical regulations are not to be judged discriminatory where they draw legitimate, even-handed regulatory distinctions, even where the technical regulation disproportionately impacts the complaining party's producers. And complainants' arguments fail on this very point. The regulatory distinctions made in the amended COOL measure are, in fact, legitimate distinctions. In particular, the label that is now affixed to A, B, and C meat explicitly references the location where each of the three production steps took place, and provides equally meaningful and accurate origin information for all three categories of meat. Moreover, because the 2013 Final Rule eliminates the allowance for commingling, the information provided for each of the three categories of meat is equally accurate.

13. Complainants thus fail to prove their case that any detrimental impact "reflect[s] discrimination."[10] 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.

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[6] Complainants are most explicit on this point in regard to their Article 2.2 arguments relating to a trace-back alternative, but the theme runs through the entirety of their submissions. *See infra*, sec. II.C.3.d (responding to complainants' Article 2.2 trace-back argument); *see also infra*, sec. II.A.3.c.ii (responding to complainants' Article 2.1 scope argument).

[7] *See, e.g., 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.").

[8] *See infra*, sec. II.B.

[9] *See, e.g., US – Tuna II (Mexico) (AB)*, paras. 234-235.

[10] *US – COOL (AB)*, para. 271.

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

a. The DSB Recommendations and Rulings Regarding Legitimate Regulatory Distinctions

14. As discussed in the U.S. First Written 21.5 Submission,[11] to prove that the measure accords less favorable treatment, and therefore discriminates *de facto* against imports from the complaining parties, complainants 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."[12] The Appellate Body has further clarified that to make such a showing, a party must demonstrate: (1) that the measure has a "detrimental impact on imported livestock;"[13] and, if so, (2) that this detrimental impact does not stem exclusively from a legitimate regulatory distinction, but rather reflects discrimination or a lack of even-handedness.[14] While the parties agree on that general framework, they appear to agree on little else. In particular, the parties disagree as to: (1) which regulatory distinctions are relevant to the Article 2.1 analysis, and (2) what analysis should be performed with regard to the relevant regulatory distinctions.

15. As to the first point – which regulatory distinctions are relevant – the Appellate Body has stated that because "technical regulations are measures that, by their very nature, establish distinctions between products according to their characteristics, or related processes and production methods,"[15] 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."[16] Such an analysis is thus focused on answering the central question at hand – whether the "detrimental

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[11] *See* U.S. First Written 21.5 Submission, paras. 55-59.

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

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

[14] *US – COOL (AB)*, para. 293.

[15] *US – COOL (AB)*, para. 268.

[16] *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); *see also US – COOL (AB)*, para. 271 ("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 inconsistent with Article 2.1 when such impact stems exclusively from a legitimate regulatory distinction. In contrast, where a regulatory distinction is not designed and applied in an even-handed manner - because, for example, it is designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination - that distinction cannot be considered 'legitimate', and thus the detrimental impact will reflect discrimination prohibited under Article 2.1.").

impact … reflect[s] discrimination prohibited under Article 2.1."[17] An analysis of other regulatory distinctions – *i.e.*, ones that do not cause the detrimental impact – simply cannot answer that question. While Canada appears to argue that the Appellate Body only used this approach in *US – Tuna II (Mexico)*, the Appellate Body, in fact, applied this framework consistently throughout the three recent TBT disputes.[18]

16. As to the second point – what analysis should be performed with regard to those relevant regulatory distinctions – the Appellate Body has also been clear that a panel should examine whether the regulatory distinction is "even-handed" or not. Thus, in *US – COOL*, the Appellate Body stated, "where a regulatory distinction is not designed and applied in an even-handed manner . . . the detrimental impact will reflect discrimination prohibited under Article 2.1."[19] Looking at the Appellate Body's analysis in the three TBT disputes, it is apparent that the Appellate Body uses the term "even-handed" in accordance with its ordinary meaning of not favoring one side or group over another.[20] Such an understanding is consistent with the Appellate Body's use of the same term in the context of determining the proper treatment of evidence.[21]

17. In *US – Clove Cigarettes*, the relevant regulatory distinctions were the ban on the cigarettes with a characterizing flavor (other than menthol or tobacco) and the exemption from that ban for menthol-flavored cigarettes.[22] However, the Appellate Body found that the prohibition on the sale of flavored cigarettes, which were subject to the ban because of their particular appeal to young people, was not even-handed because that same characteristic (youth

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[17] *US – COOL (AB)*, paras. 271, 293, heading above paragraph 341.

[18] *See US – COOL (AB)*, para. 341 ("We first identify the relevant regulatory distinction."); *US – Clove Cigarettes (AB)*, para. 224; *US – Tuna II (Mexico) (AB)*, para. 284.

[19] *See, e.g., US – COOL (AB)*, para. 271.

[20] *Merriam-Webster's Collegiate Dictionary*, at 401 ("even-handed: fair, impartial"), 417 ("fair: free from favor toward either or any side…impartial stresses an absence of favor or prejudice") (10th ed.) (1997) (Exh. US-22); *see also The Oxford English Dictionary* at 475 (1989) (Exh. US-23) ("[S]howing no partiality"); *The American Heritage College Dictionary* at 454 (3d ed.) (Exh. US-24) ("[O]n equal terms; also without either gain or loss"); *Encarta World English Dictionary* at 617 (1999) (Exh. US-25) ("[T]reating everyone fairly, without favoritism or discrimination.").

[21] *See US – Clove Cigarettes (AB)*, para. 149 (recalling that the Appellate Body in *US – Upland Cotton (Article 21.5 – Brazil)* instructed panels to "treat evidence with 'even-handedness'"). In *Upland Cotton*, the Appellate Body found that the panel did not treat the evidence in an even-handed manner when the panel dismissed evidence put forward by the United States due to internal inconsistencies while accepting Brazil's evidence, even though that Brazilian evidence suffered from the same limitations that the U.S. evidence did. *See US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 292 ("[T]he Panel should have provided a reasoned explanation as to why it preferred one category of quantitative evidence over the other. Instead, the Panel dismissed the import of the re-estimates, which were the central piece of evidence relied on by the United States, on the basis of reasoning that, in our view, is internally incoherent, and compounded the matter by relying on evidence that suffered from the same limitation as the re-estimates. The Panel's treatment of the evidence submitted by the parties lacked even-handedness.").

[22] *See US – Clove Cigarettes (AB)*, para. 224. Both the prohibition on the sale of flavored cigarettes and the exemption from that ban for menthol and regular cigarettes are contained in Section 907(a)(1)(A) of the Tobacco Control Act. *See id.*

appeal) existed in both U.S.-produced menthol cigarettes (which were not banned) and Indonesian-produced clove cigarettes (which were banned).[23]

18. Similarly, in *US – Tuna II (Mexico)*, the Appellate Body determined that the relevant regulatory distinction was "the difference in labelling conditions for tuna products containing tuna caught by setting on dolphins in the ETP, on the one hand, and for tuna products containing tuna caught by other fishing methods outside the ETP, on the other hand."[24] The Appellate Body, however, found that the regulatory distinctions were not applied in an even-handed manner because those differences in labelling conditions allowed tuna caught by non-Mexican vessels in oceans other than the Eastern Tropical Pacific (ETP) to be labeled "dolphin safe" even if a dolphin was killed in the capture of the tuna, while tuna caught by Mexican vessels in the ETP could not be similarly labeled where a dolphin was killed in the capture of the tuna.[25]

19. The Appellate Body followed this same framework in *US – COOL*. The Appellate Body found that the relevant regulatory distinctions were between the production steps and the different labels.[26] As such, the question was "whether these distinctions are designed and applied in an even-handed manner, or whether they lack even-handedness, for example, because they are designed or applied in a manner that constitutes arbitrary or unjustifiable discrimination."[27] The Appellate Body determined that they were not even-handed. In particular, while the A label provided meaningful and accurate information on origin, the B and C labels did not, as the labels did not mention the production steps, the countries could be listed in any order, and the B and C labels would be less accurate than the A label due to

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[23] *US – Clove Cigarettes (AB)*, para. 225 ("One of the particular characteristics of flavoured cigarettes that makes them appealing to young people is the flavouring that masks the harshness of the tobacco, thus making them more pleasant to start smoking than regular cigarettes. To the extent that this particular characteristic is present in both clove and menthol cigarettes, menthol cigarettes have the same product characteristic that, from the perspective of the stated objective of Section 907(a)(1)(A), justified the prohibition of clove cigarettes.").

[24] *US – Tuna II (Mexico) (AB)*, para. 284 ("In the light of the findings of fact made by the Panel, we concluded earlier that the detrimental impact of the measure on Mexican tuna products is caused by the fact that most Mexican tuna products contain tuna caught by setting on dolphins in the ETP and are therefore not eligible for a 'dolphin-safe' label, whereas most tuna products from the United States and other countries that are sold in the US market contain tuna caught by other fishing methods outside the ETP and are therefore eligible for a 'dolphin-safe' label. *The aspect of the measure that causes the detrimental impact on Mexican tuna products is thus the difference in labelling conditions* for tuna products containing tuna caught by setting on dolphins in the ETP, on the one hand, and for tuna products containing tuna caught by other fishing methods outside the ETP, on the other hand. The question before us is thus whether the United States has demonstrated that *this* difference in labelling conditions is a legitimate regulatory distinction, and hence whether the detrimental impact of the measure stems exclusively from such a distinction rather than reflecting discrimination.") (emphasis added and in original).

[25] *See US – Tuna II (Mexico) (AB)*, para. 297 ("We note, in particular, that the US measure *fully* addresses the adverse effects on dolphins resulting from setting on dolphins in the ETP, whereas it does not address mortality (observed or unobserved) arising from fishing methods other than setting on dolphins outside the ETP. In these circumstances, we are not persuaded that the United States has demonstrated that the measure is even-handed in the relevant respects, even accepting that the fishing technique of setting on dolphins is particularly harmful to dolphins.") (emphasis in original, internal quotes omitted).

[26] *US – COOL (AB)*, para. 341.

[27] *US – COOL (AB)*, para. 341.

commingling.[28] In other words, the Appellate Body determined that for the B and C labels in particular, the amount of information that needed to be collected and maintained by upstream producers was greater than the amount of information ultimately conveyed to consumers with respect to this type of meat.

20. Neither complainant incorporates this analytical framework into their arguments. For example, while Canada "agrees that the regulatory distinction that must be examined to determine *the consistency* with TBT Article 2.1 is the distinction that *causes* the detrimental impact on imported products," Canada argues that that is not the entirety of the analysis.[29] Rather, Canada contends that "panels are not precluded from considering elements of the challenged technical regulation that do not specifically cause the detrimental impact but nevertheless demonstrate *that the relevant regulatory distinction(s)* reflect discrimination."[30] But the test is not whether the relevant regulatory distinctions reflect discrimination, but whether *the detrimental impact* reflects discrimination – a point that the Appellate Body has made repeatedly.[31] Canada, notably, provides no support for its preferred analytic framework.[32] Mexico ignores this part of the analysis entirely.[33]

21. Moreover, complainants largely ignore whether the regulatory distinctions that they do focus on are even-handed or not, preferring to criticize the distinctions as not constituting

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[28] *US – COOL (AB)*, para. 343. The United States further notes that the *EC – Seals* panel also appears to have applied this same understanding of the term "even-handedness," albeit as part of a larger, and entirely unwarranted analysis. With regard to even-handedness, the *Seals* panel found that the distinction between commercial hunt and the Inuit and other indigenous communities exception was not, in fact, even-handed as it allowed seals killed in Greenland to be sold in the EU even though the Greenland indigenous hunt greatly approximated the Canadian commercial hunt, whose seals could not be sold in the EU. *See EC – Seals (Panel)*, para. 7.317; *see also id.* para. 7.351 (making a similar finding regarding the marine resource management (MRM) exception where only EU Members would likely benefit from this exception and other evidence suggested "that the MRM exception was designed with the situation of EU member States in mind").

[29] Canada's Second Written 21.5 Submission, para. 49 (emphasis added and in original).

[30] Canada's Second Written 21.5 Submission, para. 49 (emphasis added).

[31] *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.") (emphasis added); *US – Tuna II (Mexico) (AB)*, para. 231 ("Second, we will review whether *any detrimental impact* reflects discrimination against the Mexican tuna products.") (emphasis added); *US – Clove Cigarettes (AB)*, para. 224 ("Given the above, the design, architecture, revealing structure, operation, and application of Section 907(a)(1)(A) strongly suggest that *the detrimental impact* on competitive opportunities for clove cigarettes reflects discrimination against the group of like products imported from Indonesia.") (emphasis added).

[32] *See* Canada's Second Written 21.5 Submission, para. 49.

[33] Instead, Mexico argues that the DS386 Panel should adopt an entirely different framework – one that examines two different "informational asymmetries." *See, e.g.*, Mexico's Second Written 21.5 Submission, para. 49. The DS386 Panel should not adopt this invented framework, which is not based on either the text of Article 2.1 or the Appellate Body's guidance in *US – COOL* or in the other two TBT cases for that matter. Contrary to Mexico's assertion, it should be quite obvious that the United States rejects this framework, and has adopted the one developed by the Appellate Body in *US – COOL*. The United States responds to the substance of Mexico's arguments in the context of the appropriate analysis.

"significant" enough change,[34] or being "arbitrary,"[35] or that the information is not "intelligible."[36] In so arguing, the complainants appear to apply the wrong test. The test under Article 2.1 is *not* whether another Member thinks that the measure could be designed better, or more clearly, or otherwise improved upon. The test is whether the measure treats imported products less favorably than like products of another origin. And as the Appellate Body has explained, this means whether any detrimental impact on imported products stems exclusively from legitimate regulatory distinctions.

22. The question then is whether the regulatory distinctions being made are legitimate, not whether the technical regulation could, in the opinion of another Member, be better designed.

23. As a result, much of the complainants' arguments are misplaced. The issue is not whether complainants can propose a clearer label or a better dividing line for when an animal is imported for immediate slaughter. The issue is whether the distinctions between the three stages of production and the A, B, and C labels are legitimate regulatory distinctions such that they are even-handed. And in the case of the amended COOL measure, they are. The labels distinguish between each of the three production stages, and they do so equally for domestic and imported livestock. Moreover, it is simply wrong for complainants to claim that the defined scope of the amended COOL measure suggests a different result. The United States does not act inconsistently with its national treatment obligation simply by not requiring all companies and all products to be covered, particularly where such a hypothetical measure would have no impact on the detrimental impact whatsoever.

24. Despite the fact that complainants take the wrong approach, this submission discusses below a number of errors that the complainants make even under their incorrect approach.

25. Mexico also errs in appearing to argue that the DS386 Panel should adopt the approach adopted by the panel in *EC – Seals* where the panel analyzed whether: the distinction is rationally connected to the objective of the measure; there is any cause or rationale that can justify the distinction; and whether the measure is even-handed.[37] Mexico provides no explanation of why it asserts a framework that differs so significantly from the one adopted by the Appellate Body in *US – Clove Cigarettes*, *US – Tuna II (Mexico)*, and *US – COOL*. However, the United States notes that even though Mexico puts forward this particular analysis, Mexico refuses to complete it by examining whether the regulatory distinction is, in fact, even-handed. Instead, Mexico seems content to ignore this step of the analysis conducted by the *EC – Seals* panel entirely,[38] or simply make conclusory statements in this regard.[39]

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[34] *See* Canada's Second Written 21.5 Submission, para. 54.

[35] *See* Mexico's Second Written 21.5 Submission, paras. 19, 70.

[36] *See* Mexico's Second Written 21.5 Submission, para. 57.

[37] Mexico's Second Written 21.5 Submission, para. 51.

[38] *See, e.g.*, Mexico's Second Written 21.5 Submission, para. 70.

26. The Panels should reject the complainants' errant analysis and apply the analysis laid out by the Appellate Body.

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

27. As explained in the U.S. First Written 21.5 Submission, it is the complaining parties' 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 "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."[40] Neither complaining party contests this point.

28. As they did in their first submissions, the complainants attempt to carry this burden in their second submissions by contending that the label affixed to A, B, and C category meat does not provide meaningful and accurate information on origin as it is those separate categories (and the label affixed to those categories) that causes the detrimental impact on imported livestock. As was the case in their first submissions, none of the complainants' arguments hold up to scrutiny. Complainants fail to establish a *prima facie* case that the amended COOL measure is inconsistent with the national treatment obligation contained in Article 2.1.

i. The Single Label Affixed to A, B, and C Category Meat Provides the Same Level of Accurate and Meaningful Origin Information

29. Both Canada and Mexico appear to argue that the information provided for B and C category meat is less accurate than the information provided for A category meat.[41] This appears to be the one instance where the parties *even allege* that the relevant regulatory distinctions are

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[39] *See, e.g.*, Mexico's Second Written 21.5 Submission, para. 72 ("Finally, under the third step of the test, the prohibition is evidence that the Amended COOL Measure is a disguised restriction on trade and, for that reason, is not even-handed.").

[40] U.S. First Written 21.5 Submission, para. 67 (quoting *US – COOL (AB)*, para. 341).

[41] Canada's Second Written 21.5 Submission, paras. 51-53. Mexico only makes the briefest reference to this argument, stating that "Mexico also pointed out that the new labelling requirements would continue to have ambiguities, especially with regard to the identification of the country of raising ..." Mexico's Second Written 21.5 Submission, para. 58. The United States has fully responded to Mexico's contentions in section II.A.1.b of our second submission. *See also* U.S. First Written 21.5 Submission, paras. 67-80. In addition, Mexico, in this same sentence, also makes reference to a criticism of Category D meat. *See* Mexico's Second Written 21.5 Submission, para. 58 ("... and for imported beef products where the cattle may have been born and/or raised in the United States."). We will address category D in section II.A.1.c.i *infra*.

not even-handed.[42] However, neither party puts forward any new arguments in their second submission, nor responds to the arguments the United States has already made in this regard.[43]

30. Again, Canada argues that the B and C labels have the "potential [for] inaccuracy" where the animal "spends as little as 15 days in the United States" and where animals "spend a short time in Canada prior to export for slaughter in the United States."[44] Analyzing these two situations together, Canada argues that the label affixed to the A, B, and C categories is not even-handed because the information provided for B and C meat is "potentially ambiguous" as to the "raising" step given that the amended COOL measure permits "the omission of raising occurring in a foreign country where the animal is also raised in the United States (for as little as 15 days) and … require[s] that the country of raising be listed as the country of import (even where little raising occurred there)."[45]

31. As an initial matter, distinguishing between the three stages of production necessarily entails having to define when each stage ends and the next occurs. And any such definition will always be open to criticism that it could be done differently or better, or that product on one side of the defined line between stages is not sufficiently distinct from product on the other side of the defined line. But as discussed above, that is not the issue presented in this dispute.

32. Furthermore, as explained previously, complainants must rely on such exotic hypotheticals because the new labeling requirements do, in fact, provide the same accurate and meaningful origin information on A, B, and C categories of meat resulting from animals actually being produced in the three countries.[46]

33. First, Mexico exports its feeder cattle to the United States after the cow/calf stage, and Canada exports its feeder cattle to the United States following the background stage.[47] The exact age of the imported animal will depend on environmental and genetic conditions, but the United States understands that all (or virtually all) feeder cattle are imported into the United States during the first year of their lives.[48] Importantly, neither complainant disputes that the origin information provided regarding the meat produced from *these animals* is inaccurate (*e.g.*, "Born in Mexico, Raised and Slaughtered in the U.S."), and certainly not less accurate than the information provided for A category meat.

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[42] *See* Canada's Second Written 21.5 Submission, para. 51 ("[T]he potential inaccuracy of the information on labels, particularly in respect of muscle cuts derived from animals *that do not satisfy the definition of U.S. origin*, leave consumers guessing at the reliability of the information that is conveyed on the labels.") (emphasis added).

[43] *See* U.S. First Written 21.5 Submission, paras. 74-79.

[44] Canada's Second Written 21.5 Submission, paras. 51-52.

[45] Canada's Second Written 21.5 Submission, para. 53.

[46] *See* U.S. First Written 21.5 Submission, para. 75.

[47] *US – COOL (Panel)*, para. 7.141; *see also id.* 7.129 (defining the various meat production stages for beef).

[48] *US – COOL (Panel)*, para. 7.141; *see also* Canada's First Written Submission in Original Proceeding, paras. 42-50; Canada Beef Export Federation, *Our Industry* (Exh. US-26) (orig. Exh. CDA-51).

34. Second, the balance of the Canadian exports (for either cattle or hog destined for slaughter) consists of Canadian born and raised animals for immediate slaughter. While such an animal could be exported up to 14 days before slaughter, animals imported for immediate slaughter are almost always slaughtered on the day of importation. Although allowed under the rules, U.S. slaughterhouses simply have no economic reason for delaying slaughter for up to two weeks, thereby incurring the additional expense of keeping those animals alive any more than necessary. Again, Canada makes no claim that the origin information provided for *these animals* (*i.e.*, "Born and Raised in Canada, Slaughtered in the United States") is inaccurate, and certainly not less accurate than the information provided for A category meat.[49]

35. As discussed previously,[50] the analysis should end there. 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 producers. The fact that complainants are forced to rely on hypothetical scenarios not related to actual products being traded and sold reveals that there is no basis for the complainants' *de facto* claims.

36. Of course, no actual labeling situation will be able to address every hypothetical a clever lawyer can invent, or every unusual circumstance that may occur. Rather, the labelling system should address what is happening in the real world. And the amended COOL measure does just that. The origin information regarding meat produced from all (or virtually all) animals *actually traded* by Canada and Mexico is *as meaningful* and *as accurate* as the origin information regarding A meat, *and neither Canada nor Mexico dispute that fact*. That neither Canada nor Mexico can put forward real-world facts to support their argument that the information conveyed is inaccurate is revealing in the context of the *de facto* national treatment claim. As such, the complainants fail to establish a *prima facie* case that the distinctions between the A, B, and C category meat (and the corresponding label) is not even-handed.

ii. The 2013 Final Rule Equalized the Level of Origin Information Provided to U.S. Consumers purchasing A, B, and C Category COOL-Labelled Meat

37. Next, Canada (but not Mexico) contends that because B and C meat only constitute approximately a third of the COOL labeled meat, any "new accurate information conveyed by the amended COOL measure cannot be regarded as significant."[51]

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[49] Canada likewise does not dispute that that the pork produced by the typical hog export (whether fed or feeder) is inaccurate, and certainly not less accurate than the information provided for A category pork.

[50] *See* U.S. First Written 21.5 Submission, para. 76.

[51] Canada's Second Written 21.5 Submission, para. 54. As noted previously, Canada's 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. U.S. First Written 21.5 Submission, para. 70.

38. Canada never explains why it considers "significant" to be the relevant standard here. There is no requirement under Article 21.5 of the DSU that compliance requires a particular level of difference between the measure found to be in breach and the measure taken to comply – whether one frames the difference as "significant" or some other level. Rather, the question is whether the complaining party has demonstrated that a measure taken to comply does not exist or is inconsistent with the specified obligations under the particular covered agreement.

39. As discussed above, the standard in this proceeding is whether the detrimental impact of the amended COOL measure stems exclusively from legitimate regulatory distinctions.

40. As the United States explained in its first submission, by adding the production steps to the label and eliminating the allowance for commingling, the amended COOL measure provides a single label that provides for the same level of origin information for A, B, and C category meat, which constitutes approximately 99.7 percent of COOL labeled muscle cuts sold in the United States.[52] The United States has thus directly responded to the concerns in the Appellate Body reports regarding the original COOL measure, which was not just limited to the B and C labels, but included a concern that the previous A label did not explicitly list the three production steps either.[53] Canada has provided no response to these or any of the arguments the United States put forward in its first submission.[54]

iii. Neither the Size of the Label Nor the Allowed Abbreviations Undermines the Conclusion That Single Label Affixed to A, B, and C Category Meat Provides Accurate and Meaningful Origin Information to U.S. Consumers

41. Mexico (but not Canada) again argues that the labels being used by retailers to provide origin information (both in terms of the size of the font and the abbreviations allowed) does not provide "information that is accessible by or intelligible to consumers."[55] Mexico puts forward

[52] *US – COOL (Panel)*, n.941 (noting that both Canada and the United States had submitted evidence on the record that muscle cuts sold with the D Label constituted somewhere between 0 and 0.3 percent of the market); *see also* USDA Country of Origin Labeling Survey (July 2009) (Exh. US-3); National Meat Case Study Methodology (Exh. US-27) (orig. Exh. CDA-211).

[53] *See US – COOL (AB)*, para. 343 ("Even Label A, indicating 'Product of the USA', which the Panel found to be the only label that provides 'meaningful information for consumers', is not required to refer explicitly to the productions steps of birth, raising, and slaughter.").

[54] *See* U.S. First Written 21.5 Submission, paras. 70-74. Among other points, Canada continues to fail to acknowledge that its argument here is completely contradicted by its criticism of the D Label. As the United States noted, Canada cannot discount, on the one hand, that raising the accuracy of the information on the B and C labels, which account for approximately 30 percent of COOL labeled meat as not being "significant," while on the other hand argue that the D label, which accounts for 0.3 percent of COOL labeled meat, proves the amended COOL measure to be discriminatory. *See* U.S. First Written 21.5 Submission, para. 80.

[55] Mexico's Second Written 21.5 Submission, para. 57.

no evidence to support its claim as to what labels are (or are not) understandable by U.S. consumers, merely stating that Mexico "submits" that what it alleges is true.[56] It is not.

42. First, Mexico makes no claim that that the label affixed to the B or C meat is less intelligible than the label affixed to A meat. Indeed, Mexico and the United States agree that a "single label" is now used provide origin information regarding A, B, and C category COOL-labelled meat.[57] Accordingly, we understand Mexico to concede that the design and application of the label itself is even-handed.

43. As to Mexico's particular criticisms, Mexico does not establish a *prima facie* case by merely making bare allegations that it "submits" are true.[58] As discussed in the U.S. First Written 21.5 Submission, it appears that Mexico fails to provide any evidence to substantiate its assertions. Indeed, with regard to the abbreviations, USDA requires that the abbreviations must allow for the origin information to be "clearly understood by consumers."[59] There is no evidence that the current labels do not do just that.[60]

iv. The Fact That USDA Provided for a Six Month Period of Education and Outreach Does Not Mean That the A, B, and C Categories of Meat (and the Single Label Affixed to That Meat) Are Not Even-Handed

44. In its second submission, Mexico again criticizes the six month period of education and outreach that USDA provided for in the 2013 Final Rule,[61] although it remains unclear what legal significance Mexico attributes to its argument.[62] However, Mexico does not appear to contest that the six month period of education and outreach is even-handed (if, it could even be considered a regulatory distinction at all). That is, Mexico does not argue that USDA has provided more education and outreach to producers of A meat and less to producers of mixed origin meat. Nor does Mexico argue that USDA has enforced compliance with the new labelling requirements for A meat any differently from what it does for B or C meat.

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[56] Mexico's Second Written 21.5 Submission, para. 57.

[57] 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).

[58] *See, e.g., US – Wool Shirts and Blouses (AB)*, p. 14 ("[W]e find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof."); *see also* U.S. First Written 21.5 Submission, para. 69 (noting that the examples given in the 2013 Final Rule are, on their face, perfectly clear).

[59] U.S. First Written 21.5 Submission, n.155 (quoting 2013 Final Rule, 78 Fed. Reg. at 31,369 (Exh. CDA-1)).

[60] *See* Exhibit US-28.

[61] Mexico's Second Written 21.5 Submission, paras. 54-55.

[62] *See* U.S. First Written 21.5 Submission, n.154 (responding to Mexico's argument).

45. As to Mexico's specific criticisms, the new labelling requirements became part of U.S. law on May 23, 2013, and were mandatory as of that date,[63] a point that Mexico appears to concede.[64] Mexico further concedes that retailers are complying with the new rule and provides photographs from retailers to prove this point.[65] Finally, Mexico mis-interprets USDA's statement that it will continue to provide education and outreach into the future to mean that USDA does not intend to enforce the measure ever.[66] That is not true. What that statement means is that, as the regulator, USDA will continue to educate the regulated enterprises as to the COOL program and be available to answer enquiries from those regulated entities (and, in fact, all interested stakeholders) at any time.[67]

v. The Elimination of Commingling Does Not Mean that the A, B, and C Categories of Meat (and the Single Label Affixed to That Meat) Are Not Even-Handed

46. In our first submission, the United States responded to Canada's remarkable argument that the original COOL measure was inconsistent with Article 2.1 because it allowed commingling but the amended COOL measure was inconsistent with Article 2.1 because it eliminated commingling.[68] Canada now appears to abandon this argument as it makes no mention of it in the Article 2.1 argument of its second written submission.[69]

47. Nevertheless, Canada continues to argue, incorrectly, that the elimination of the commingling will dramatically increase the record keeping requirements and the overall detrimental impact on Canadian livestock imports.[70] To be clear, the United States has always taken the position that the allowance of commingling reduced costs for those producers that handle both U.S. origin and mixed origin animals or meat.[71]

48. However, as discussed in the U.S. First Written 21.5 Submission, only *three* beef processors, and *zero* pork processors, stated for the record that they commingle different origin

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[63] U.S. First Written 21.5 Submission, n.154 (quoting 2013 Final Rule, 78 Fed. Reg. at 31,369 (Exh. CDA-1) ("The effective date of this regulation is May 23, 2013, and the rule is mandatory as of that date.")).

[64] *See* Mexico's Second Written 21.5 Submission, paras. 54-55 (failing to contest the point).

[65] *See* Exh. MEX-50; Exh. MEX-51; Exh. MEX-52. *See also* Exhibit US-28.

[66] *See* Mexico's Second Written 21.5 Submission, para. 55.

[67] *See* U.S. First Written 21.5 Submission, n.73 (noting that such educational activities include: webinars, meetings, and making educational materials publicly available).

[68] *See* U.S. First Written 21.5 Submission, para. 68 (responding to paragraph 72 of Canada's First Written 21.5 Submission).

[69] *See* Canada's Second Written 21.5 Submission, sec. IV.B.

[70] *See* Canada's Second Written 21.5 Submission, para. 13 ("To be sure, the elimination of commingling, … has exacerbated the original COOL measure's 'significant and negative impact' on Canadian cattle and hogs in the U.S. market.").

[71] 2013 Final Rule, 78 Fed. Reg. at 31,367-31,368 (Exh. CDA-1).

animals.[72] Accordingly, the administrative record of the 2013 Final Rule suggests that a limited number of processors have been actually making use of this flexibility, and that the adjustment costs due to the elimination of commingling are low. Notably, Canada puts forward no evidence that any additional beef processors (other than three already on the record) or any pork processors at all have been commingling. In addition, it would appear that the large processors themselves do not consider that the 2013 Final Rule (including the loss of the commingling) will have a material impact on their operations or on earnings.[73] Accordingly, Canada has failed to establish that the elimination of commingling will disproportionately burden those U.S. meat producers that purchase mixed origin animals or meat in any material way, as the vast majority of those U.S. meat producers were not commingling prior to May 23, 2013 in any event.

49. As to the burden itself, the 2013 Final Rule acknowledges that those processors currently commingling would likely incur costs in implementing the elimination of commingling. The United States does not agree, however, that these processors will incur additional recordkeeping burdens, a point that the 2013 Final Rule makes clear.[74] Canada asserts this is so because under the current labelling requirements "records that verify the distinctions" between U.S. origin and mixed origin must now be kept.[75] Again, what Canada continues to ignore is that under the previous regime all labels needed to be accurate and industry participants needed to keep accurate records to ensure that the labels were, in fact, accurate.[76] As noted previously, Canada's argument runs directly contrary to the Appellate Body's reasoning, which relied heavily on the

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[72] *See* U.S. First Written 21.5 Submission, para. 30.

[73] For example, Tysons Food makes *no* mention of USDA's 2013 Final Rule or the elimination of commingling in its 2013 financial reporting to the U.S. Securities Exchange Commission. *See generally* Tysons Food, Inc., Annual Report (Form 10k) (Sept. 28, 2013) (Exh. US-29) (Tysons 2013 10K). In fact, Tysons, the second largest food production company in the *Fortune 500*, has had sales in the beef portion of its business consistently increase since 2009. *See* Tysons 2013 10K, at 21 (Exh. US-29); *see also* Tysons Food, Inc., Annual Report (Form 10k), at 22 (Sept. 29, 2012) (Exh. US-30) (Tysons 2012 10K); Tysons Food, Inc., Annual Report (Form 10k), at 23 (Oct. 1, 2011) (Exh. US-31) (Tysons 2011 10K). In its 2013 financial reporting, Tysons reported a record 4 percent increase in revenues of $34.4 billion, primarily due to its beef and chicken segments. The company cited the beef segments success in 2013 was due to a "less volatile live cattle markets." Tysons 2013 10K, at 18 (Exh. US-29). Furthermore, Tysons' fiscal 2014 outlook predicts "profitability [in the beef segment will] be similar to fiscal 2013." *Id.* at 25.

[74] U.S. First Written 21.5 Submission, n.44 (quoting 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."); *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.")).

[75] Canada's Second Written 21.5 Submission, para. 22.

[76] *See* U.S. First Written 21.5 Submission, paras. 117-118 (quoting *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.")).

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."[77]

vi. Conclusion

50. In sum, complainants utterly fail to establish a *prima facie* case that the detrimental impact does not stem exclusively from legitimate regulatory distinctions. And the reason for this is readily obvious – the amended COOL regime increases the origin information provided, and now, under the revised labels, the amended COOL regime provides equally meaningful and equally accurate origin information for all labeled muscle cuts derived from animals slaughtered in the United States (which accounts for 99.7 percent of COOL-labeled muscle cuts).

51. Significantly, the United States raised the level of information provided without increasing the recordkeeping and verification requirements that were put in place under the COOL measure. As noted previously, 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 amended COOL measure has increased the level of information to consumers while not increasing the recordkeeping and verification requirements for U.S. industry.[78] In light of these facts, the information provided is now "commensurate" with any burden the measure causes to the U.S. meat industry through the recordkeeping and verification requirements.[79]

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

[77] U.S. First Written 21.5 Submission, para. 118 (quoting *US – COOL (AB)*, para. 342). Canada further criticizes the elimination of the previous allowance that the countries could be listed in any order for the previous B and C labels. *See* Canada's Second Written 21.5 Submission, para. 24. Again, the labels always had to be accurate, and Canada is simply wrong to assert that under the previous regime that retailers and upstream participants did not have to maintain records where the raising step occurred. Notably, Canada cites no support for such a statement – nor is the United States aware that Canada ever made such an argument in the original proceeding. The fact of the matter is that retailers selling A, B, and C meat have always been required to maintain accurate records as to all three production steps, a point that was central to the Appellate Body's analysis. Changing the labels such that those production steps are explicitly referenced did not change this underlying requirement

[78] *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.").

[79] *US – COOL (AB)*, para. 343.

52. In their second written submissions, the complaining parties again make a series of arguments regarding other regulatory distinctions that do not cause the detrimental impact. And again, the United States notes that 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."[80] Accordingly, none of these criticisms change the conclusion that any detrimental impact resulting from the 2013 Final Rule stems exclusively from legitimate regulatory distinctions. That said, the United States will address each of the criticisms in turn.

i. The D Label

53. Canada again argues that the regulatory distinction between the label affixed to D category meat and the single label affixed to A, B, and C category meat means that the detrimental impact on imported livestock does not stem from legitimate regulatory distinctions.[81]

54. In our first submission, the United States established that the D Label is affixed to imported *meat*, and therefore does not cause any detrimental impact on imported *livestock*.[82] Neither complaining party contests this fact. It should be quite clear, therefore, that any examination of the D Label will simply not explain whether the detrimental impact on imported livestock reflects discrimination.

55. Canada further fails to even argue that this regulatory distinction is not even-handed. That is, Canada does not even allege – much less prove – that the content of the D Label disadvantages Canadian producers while benefiting U.S. producers. Indeed, Canada (and Mexico) believe just the opposite – that it is categories A, B, and C that disadvantage their producers, not Category D.[83]

56. Rather, Canada makes the curious dual argument that the D Label is not legitimate because it does not refer explicitly to the three production steps, and that Label D has the "potential to mislead consumers" where the meat was produced from animals that were born and raised in a different country than the exporting one.[84] As to the former point, the United States

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[80] *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).

[81] Canada's Second Written 21.5 Submission, para. 37. Mexico also references what appears to be the same argument Canada makes but provides no explanation, nor appears to contest any of the U.S. arguments on this issue. *See* Mexico's Second Written 21.5 Submission, para. 58.

[82] U.S. First Written 21.5 Submission, para. 83.

[83] In fact, Canada and Mexico argue that the A, B, and C categories are more "trade restrictive than necessary" because they do not define origin through substantial transformation. *See* Canada's Second Written 21.5 Submission, para. 101 (contending that its first alternative proves that amended COOL measure is inconsistent with Article 2.2); Mexico's Second Written 21.5 Submission, para. 132 (same).

[84] Canada's Second Written 21.5 Submission, para. 37.

has already explained the basis for leaving the D Label unchanged.[85] Canada largely ignores these points, only stating one particular point is not "credible" without explaining why.[86] As to the latter point, the United States has explained that requiring production steps to be listed will not provide additional origin information as:

> 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.[87]

Canada appears to disagree with this statement, contending that Canada imports approximately 20,000 to 350,000 head of cattle annually since 2000.[88] But as noted in the below graph, while Canada did import over 300,000 heads of cattle in the years 2000 and 2001, over the last ten years (2003-2012), Canada has imported on average 48,000 head (apparently all from the United States).[89] In none of those years has Canadian imports amounted to more than 2 percent of its slaughter volume.

Canadian Cattle 1,000 head

Attribute	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Imports	353	302	138	63	19	21	38	54	49	54	56	73	56
Total Slaughter	3,836	3,804	3,851	3,574	4,450	4,400	3,972	3,820	3,849	3,705	3,746	3,391	3,132
Imports share of Slaughter	9%	8%	4%	2%	0%	0%	1%	1%	1%	1%	1%	2%	2%

Source: USDA PSDonline

57. Moreover, Canada is unable to say whether any meat derived from those imported cattle is actually exported back into the United States (much less sold as D labeled-meat by a retailer). Accordingly, Canada is forced to argue that the D Label merely has the "potential to mislead consumers" because Canada has *no* evidence that the Canadian D labeled meat (*i.e.*, "Product of Canada") is *actually* misleading.

58. Moreover, the total volume of D labeled meat is quite small indeed. For example, Canada's Category D beef muscle cut exports to the United States in the last ten years (2003-

[85] *See* U.S. First Written 21.5 Submission, paras. 84-85.

[86] Canada's Second Written 21.5 Submission, para. 38.

[87] U.S. First Written 21.5 Submission, para. 86.

[88] *See* Canada's Second Written 21.5 Submission, para. 39.

[89] Canadian imports of live swine are even lower. *See* International Trade in Cattle and Hogs (Exh. US-32).

2012) account for on average 30.8 percent of total beef muscle cut imports to the United States.[90] Assuming the same percentage of Canadian beef muscle cuts is sold at retail as all other Category D beef is, this would mean that Canadian beef muscle cuts would only constitute approximately 0.1 percent of COOL-labeled muscle cuts sold at retail (given that D meat from all sources only constitutes 0.3 percent of COOL labeled beef muscle cuts).[91] Moreover, in light of the fact that Canadian imports of U.S. livestock do not exceed 2 percent of Canadian slaughter, this in turn would mean that only 0.002 percent of COOL labeled muscle cuts sold at retail would even raise the concern that muscle cuts labeled "Product of Canada" are allegedly "misleading" because they actually contains mixed origin meat. Canada simply cannot establish a *prima facie* case of discrimination based on such *de minimis* amounts.[92]

59. In light of the above, it is clear that requiring the additional production step information to be provided would not provide the consumer much, if any, additional origin information as all (or virtually all) imported meat sold by U.S. retailers will be derived from animals born, raised, and slaughtered in the country denoted on the label (*e.g.*, "Product of Canada"). In other words, "Product of Canada" means, for all practical purposes, "born, raised, and slaughtered in Canada." The same, however, cannot be said for complainants' Article 2.2 first alternative "Product of the U.S." label, which would be applied to the 30 percent of muscle cuts derived from animals born outside of the United States.[93] Given that, it is certainly not surprising that the United States has

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[90] U.S. Beef Import Market Shares (by volume)

	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Canada	26%	30%	31%	29%	27%	35%	32%	39%	34%	25%
Mexico	1%	1%	1%	2%	2%	2%	3%	5%	8%	12%

GTIS: HS 0201, 0202, 0210.20, 1602.50; Source: U.S. Census via GTIS

[91] As explained in our first submission, both Canada and the United States put forward evidence in the original proceeding that D labeled meat constituted an extremely small percentage of all COOL-labeled muscle cuts. *See, e.g.*, U.S. First Written 21.5 Submission, para. 27. In particular, the Canada submitted evidence that the number was 0 percent and the United States submitted evidence that the figure was closer to 0.3 percent. *See* National Meat Case Study Methodology (Exh. US-27) (orig. Exh. CDA-211); USDA Country of Origin Labeling Survey (Exh. US-3) (orig. exh. US-145); *see also US – COOL (Panel)*, n.941 ("According to Canada, data collected during the first quarter of 2010 show that the different labelling categories for muscle cuts of beef were supplied in major supermarkets as follows: Label A 78.6 percent; Labels A and B 6.3 percent; Label B 14.2 percent; and Labels B and C 0.9 percent (Exhibit CDA-211). According to the United States, as of July 2009 the different origin declarations for muscle cuts of beef were used in the following percentages: US 71 percent; US, Canada 5 percent; US, Mexico 0.5 percent; Canada, US 0.5 percent; US, Canada, Mexico 22 percent; and foreign (category D) 0.3 percent (Exhibit US-145)."). Canada does not appear to contest either piece of evidence, nor the original panel's summary of that evidence. Moreover, the United States would note that imports of beef muscle cuts have declined over time as overall consumption of beef has declined and there is no reason to believe that D labeled meat is being sold at higher percentages in 2013 than it has in any previous year. *See* Beef Imports and Beef Consumption (Exh. US-33).

[92] In this regard, we note again that Canada takes the entirely contradictory position elsewhere that changing the information affixed to B and C meat, which accounts for approximately 30 percent of COOL labeled muscle cuts, affects such a "minimal" amount of meat, that such a change in information is worthless for this analysis. Canada's First Written 21.5 Submission, paras. 75-76; Canada's Second Written 21.5 Submission, para. 54; *see supra*, sec. II.A.1.b.ii.

[93] Exhibit US-32 shows that the United States livestock imports over the last ten years (2003-2012) accounts for, on average, 72 percent of the global share of cattle trade and 91 percent of the global share of trade in hogs. *See* International Trade in Cattle and Hogs (Exh. US-32).

mandated different labels for meat derived from animals slaughtered in the United States (Categories A, B, and C), on the one hand, and meat derived from animals slaughtered outside the United States (Category D), on the other.

ii. The Defined Scope of the Amended COOL Measure

60. The complainants again argue that the three exemptions from the COOL measure ("food service establishments" (*e.g.*, restaurants), processed foods, and small businesses[94]) prove that the amended COOL measure is discriminatory in that the detrimental impact does not stem exclusively from legitimate regulatory distinctions.[95] While Canada, for example, describes the scope of the amended COOL measure to be of "fundamental importance" to the analysis,[96] neither party is able to articulate exactly how the design and operation of these exemptions make the amended COOL measure discriminatory.

61. In particular, neither party asserts that the design and operation of the three exemptions has any nexus to any detrimental impact. In fact, Canada affirmatively argues that such exemptions do not cause the detrimental impact at all.[97] As such, it would appear that all parties agree with the original panel's finding that the "exact proportion or magnitude of the exceptions and exclusions is irrelevant" for purposes of the detrimental impact analysis.[98] As the United States has previously explained, the inexorable result of this conclusion is that the scope of the measure simply cannot explain whether the detrimental impact stems exclusively from legitimate regulatory distinctions.[99]

62. It is also clear that the exemptions themselves are perfectly even-handed. In fact, neither Canada nor Mexico even allege this not to be the case.[100] That is to say, nothing in the design or

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[94] *See* U.S. First Written 21.5 Submission, para. 87.

[95] *See* Canada's Second Written 21.5 Submission, paras. 31-36; Mexico's Second Written 21.5 Submission, paras. 61-65.

[96] Canada's Second Written 21.5 Submission, para. 36.

[97] *See* Canada's Second Written 21.5 Submission, para. 33 ("While the amended COOL measure's exemptions may reduce costs for certain U.S. market participants, they do not alleviate the disproportionate compliance burden that falls on Canadian livestock producers. This results from the fact that because 'the ultimate disposition of a meat product is often not known at any particular stage of the production chain […] information regarding the origin of all livestock will have to be identified, tracked, and transmitted through the chain of production by upstream producers.' It is, of course, these tracking and recordkeeping requirements that create the incentive to process exclusively domestic livestock in the U.S. market.") (emphasis added) (quoting *US – COOL (AB)*, para. 344).

[98] *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.").

[99] *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).

[100] The closest either comes is Mexico, which argues that the amended COOL measure is, itself, not even handed. *See* Mexico's Second Written 21.5 Submission, para. 63.

operation of the exemptions that define the scope of the amended COOL measure disadvantage Canadian and Mexican livestock exports.

63. In this regard, these exemptions appear to be wholly different from the exemptions discussed in other TBT cases. For example, in *US – Clove Cigarettes*, the Appellate Body determined that the relevant exemption was not even-handed in that only U.S. producers could take advantage of the exemption even though those U.S. products (menthol flavored cigarettes) also presented a risk similar to that presented by the banned Indonesian products (clove flavored cigarettes).[101] In *EC – Seals*, the panel found that the indigenous communities exemption was not even-handed in light of the fact that the seal products of the Greenland hunt could benefit from the exemption, but the seal products of the Canadian hunt could not, even though the two hunts greatly approximated one another.[102] Similarly, the *EC – Seals* panel found the exception for marine resource management to be not even handed where only EU Members would likely qualify for this exception and other evidence suggested that the "exception was designed with the situation of EU member States in mind".[103]

64. This same dynamic is simply *not present* in the COOL exemptions. For example, complainants do not argue that there is something about the design or operation of any of the exemptions that somehow favors U.S. producers of livestock over imported livestock. Rather, Canada criticizes the exemption because it reduced costs for U.S. restaurants and small businesses but does not lessen the detrimental impact of imported livestock *vis-à-vis* U.S. livestock.[104] And of course this is true – the exemptions do not lessen any detrimental impact – indeed, they do not affect it at all. But that does not mean *ipso facto* that the exemptions are not legitimate. To accept such an argument is simply to accept the argument that a detrimental impact alone establishes that the measure is discriminatory, a point that the Appellate Body has already disagreed with.[105]

65. Second, Mexico argues that the exemptions prove that the amended COOL measure itself is not even-handed.[106] But, Mexico, like Canada, fails to explain why a measure that required small businesses and restaurants to label their muscle cuts would make the measure, as a whole,

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[101] *US – Clove Cigarettes (AB)*, para. 225 ("One of the particular characteristics of flavoured cigarettes that makes them appealing to young people is the flavouring that masks the harshness of the tobacco, thus making them more pleasant to start smoking than regular cigarettes. To the extent that this particular characteristic is present in both clove and menthol cigarettes, menthol cigarettes have the same product characteristic that, from the perspective of the stated objective of Section 907(a)(1)(A), justified the prohibition of clove cigarettes.").

[102] *See EC – Seals (Panel)*, para. 7.317.

[103] *EC – Seals (Panel)*, para. 7.351.

[104] *See* Canada's Second Written 21.5 Submission, para. 33.

[105] *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.").

[106] *See* Mexico's Second Written 21.5 Submission, para. 63.

more even-handed in the measure's treatment of imported livestock on the one hand and U.S. livestock on the other.[107] The fact of the matter is that it would not.

66. Finally, complainants argue that the "disconnect" between the amended COOL measure's "very limited coverage" and the upstream costs of the amended COOL measure proves that the detrimental impact reflects discrimination.[108] Of course, neither Canada nor Mexico can explain why exemptions that do not cause the detrimental impact, and are, themselves, entirely even-handed, mean that the measure is discriminatory. In this regard, it is not surprising that complainants are unable to articulate where such line should even be drawn. Indeed, at what scope of coverage would the detrimental impact no longer "reflect discrimination"? For complainants, the answer, of course, is that there is no line – the measure will be "discriminatory" as long as the detrimental impact exists.

67. The United States, of course, disagrees with this approach – complainants must prove that the detrimental impact reflects discrimination because it does not stem exclusively from legitimate regulatory distinctions. And, as the United States has explained, the exemptions are normal mechanisms that policy makers in the United States (and other Members[109]) make use of to control costs while pursuing legitimate government objectives.[110] Moreover, as the United States has previously explained, the coverage of COOL is hardly limited.[111] The measure

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[107] We would further note that Mexico's criticisms of the small business exemption are wholly without merit. *See* Mexico's Second Written 21.5 Submission, para. 63. Mexico simply has no factual basis to say that butchers "serve the most sophisticated consumers of beef" nor why that would possibly matter. The fact is that small business exemptions are a normal mechanism that governments use to reduce the regulatory burden on the smallest (and often most vulnerable) companies. It would be difficult indeed for Mexico to argue that such an objective is not legitimate in itself. Moreover, it is entirely normal for a measure to contain different provisions that serve different objectives and doing so does not make the measure inconsistent with the TBT Agreement. As the original panel has already recognized, "it is often necessary and important for governments to take conflicting interests into account in implementing laws and regulations to fulfil policy objectives." *US – COOL (Panel)*, para. 7.711.

[108] *See* Canada's Second Written 21.5 Submission, paras. 34-35; *see also* Mexico's Second Written 21.5 Submission, paras. 64-65.

[109] *See* U.S. First Written 21.5 Submission, paras. 41-44 (discussing the exemptions that other WTO Members have written into their own COOL measures).

[110] *See* U.S. First Written 21.5 Submission, para. 91; *see also US – COOL (Panel)*, para. 7.684 ("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.").

[111] *See* U.S. First Written 21.5 Submission, para. 92. While Canada criticizes the U.S. figures as to beef and pork covered by the amended COOL measure, it is Canada that misinterprets the data. *See* Canada's Second Written 21.5 Submission, para. 34. First, Canada references 0.622 as USDA's estimate "of the amount of food sold in food service establishments," when it is in fact just the opposite. The 62.2 percent figure is USDA's estimate of the share of food eaten at home, which is the food that is not sold in food service establishments. Second, Canada critiques USDA's estimates of 62.2 percent of food eaten at home and 75.6 percent share of sales of food for home consumption by retailers subject to the amended COOL measure because the they are general estimates and are not specific to beef and pork. Notably, Canada provides no evidence that estimates specific to beef and pork would be

constitutes a major policy decision to require over 30,000 grocery stores and other retailers throughout the United States to provide country of origin information to their customers on the $38.5 billion worth of beef and $8.0 billion worth of pork they sell annually.[112]

iii. The Ground Meat Label

68. In their first submissions, complainants argue that the rules regarding ground meat (Category E) prove that rules for muscle cuts are discriminatory without providing any basis for that argument. The United States explained in its first submission that, in fact, the original panel has already found that the ground meat labeling rule does not have a detrimental impact on imported livestock.[113] As such, it simply cannot be that any detrimental impact from the COOL measure stems from the ground meat labeling rules. The United States further explained that 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.[114] Both complaining parties re-raise the issue, but neither provides any basis as to

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appreciably smaller than the general estimates used by USDA. USDA has employed such estimates in the regulatory impact analyses for the 2003 Proposed Rule, the 2009 Final Rule, and the 2013 Final Rule.

Moreover, Canada artificially lowers the estimated percentages of beef and pork subject to COOL by using carcass weight numbers to measure total consumption, but retail weight numbers to measure the amount of beef and pork covered by COOL. *See* Canada's Second Written 21.5 Submission, para. 35. Dividing a retail weight number by a carcass weight number results in a percentage that is lower than it should be when both the amount of meat covered by COOL and total meat consumption are measured on the same basis. For 2009, USDA reports beef consumption (more precisely, "disappearance") of 26.7 billion pounds carcass weight and 18.7 million pounds retail weight, with a 70 percent factor to convert carcass weight to retail weight. In 2009, USDA reports pork disappearance of 19.6 billion pounds carcass weight and 15.2 billion pounds retail weight with a 0.78 factor to convert carcass weight to retail weight. Correctly applying retail weight estimates as the appropriate denominator results in estimates of: 8.2 billion pounds/18.7 billion pounds = 43.9 percent of retail beef; and 2.3 billion pounds/15.2 billion pounds = 15.1 percent of retail pork. Due to rounding errors and updates to USDA's estimates of beef and pork supply and disappearance for 2009, these estimates differ slightly from the estimates of 42.3 percent of beef and 15.9 percent of pork covered by COOL that were presented in the United States first submission.

[112] *See* U.S. First Written 21.5 Submission, para. 92. Finally, we would note that we are not claiming our size is a "justification for discrimination" as Canada so alleges. *See* Canada's Second Written 21.5 Submission, para. 32. The "discrimination," as the complainants see it, is the detrimental impact of the COOL measure that the original panel determined to exist. But the United States does not justify the detrimental impact on its size. The detrimental impact is being driven by two factors: (1) the U.S. policy decision to provide accurate and specific country of origin information as to muscle cuts sold in the United States; and (2) the fact that U.S. origin muscle cuts accounts for approximately 70 percent of the market. In contrast, our size is relevant when discussing the exemptions as the point of the exemptions is to limit the costs to those market actors that benefit from the exemptions. In this case, there is quite a bit of benefit to the restaurant exemption when one considers that there are over 600,000 restaurants in the United States. *See* U.S. First Written 21.5 Submission, para. 91.

[113] U.S. First Written 21.5 Submission, paras. 93-96 (quoting *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.")).

[114] U.S. First Written 21.5 Submission, para. 96 (citing "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," 74 Fed. Reg. 2658, 2671 (Jan. 15, 2009) (2009 Final Rule) (Exh. CDA-2).

why the ground meat rule establishes that the detrimental impact on livestock does not stem exclusively from legitimate regulatory distinctions.

69. In particular, neither complainant even appears to contest that the ground meat rule causes the detrimental impact on livestock. Moreover, neither complainant alleges that the ground meat rule disadvantages their producers in such a way that the regulatory distinction could be considered not even-handed. Finally, neither complainant challenges in any way the factual basis for the ground meat rule provided by USDA in its 2009 Final Rule, and as such appears to accept that ground meat is produced in a different manner than muscle cuts are produced.[115] Rather, complainants make a series of irrelevant arguments, none of which should be accepted.

70. Canada contends that while it "is not challenging the consistency of the ground meat label,"[116] it also claims that the ground meat label provides origin information that "is far less detailed than that which is required to be tracked and verified," and, therefore, not legitimate.[117]

71. It is difficult to see how Canada's arguments are relevant. First, the ground meat does not cause a detrimental impact and therefore it is impossible to say that the detrimental impact does not stem from a legitimate regulatory distinction because the ground meat rule provides a different level of information. Moreover, and as noted above, nothing about the ground meat rule could be said not to be "even-handed." The rule operates exactly the same – not only between the products of Canada, Mexico and the United States, but between the products of all countries that are used by U.S. ground meat producers.[118] Notably, Canada does not appear to argue that its products are disadvantaged in any way through the operation of the ground meat rule.

72. Mexico appears to stake out a different, and more extreme, position. First, Mexico appears to argue that the ground meat rule does not provide consumer information on origin.[119] Mexico is wrong, of course. The ground meat rule does provide consumer information on origin, but does so differently than the rules governing muscle cuts, a point that Mexico itself concedes in the final sentence of its argument.[120] Second, Mexico argues that it is "arbitrary" for the United States to set forth different origin labeling rules for ground meat than for muscle cuts. According to Mexico, "[i]t is irrelevant" that ground meat is produced differently from muscle

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[115] 2009 Final Rule, 74 Fed. Reg. at 2671 (Exh. CDA-2).

[116] Canada's Second Written 21.5 Submission, para. 40.

[117] Canada's Second Written 21.5 Submission, paras. 40-41.

[118] Ground meat sold in the United States is produced by the United States and four other countries: Australia, Canada, New Zealand, and Uruguay.

[119] Mexico's Second Written 21.5 Submission, para. 70 ("[T]here is no rational connection between the objective pursued by the United States through the Amended COOL Measure (i.e., the provision of consumer information on origin) and the application of a different origin rule for different types of beef.").

[120] *See* Mexico's Second Written 21.5 Submission, para. 70 ("It is arbitrary that less precise origin information can be provided for some processed beef (i.e., ground beef) and not others (i.e., muscle cuts).").

cuts as "there is no cause or rationale that can justify the distinction" between ground meat and muscle cuts.[121]

73. Mexico's argument is misplaced in a number of different ways. First, Article 2.1 disciplines discriminatory measures, not arbitrary measures, and as discussed above, the analysis of whether a measure provides less favorable treatment to imported products does not call for an analysis of arbitrariness – standing alone – as Mexico appears to contend.[122] Second, Mexico appears to argue that Article 2.1 does not allow for the United States to set out different rules for different products. Mexico cites to no support for such an argument, and the United States is not aware that a previous Appellate Body or panel report has determined that a measure is discriminatory for such a reason.

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

74. Complainants again argue that the statutory prohibition of USDA implementing a trace-back regime proves that the amended COOL measure is discriminatory.[123] In its first submission, the United States explained this statutory provision (7 U.S.C. § 1638A(f)(1)) is an unchanged part of the amended COOL measure, which does not cause any detrimental impact, and, as such, is not relevant for purposes of this analysis.[124] Additionally, the United States noted that, by basing their Article 2.1 argument on the fact that the United States could have chosen an alternative that (in the complainants' view) does not result in a detrimental impact, 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.[125] Complainants do not respond to the arguments of the United States.

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[121] Mexico's Second Written 21.5 Submission, para. 70.

[122] In any event, Mexico is clearly wrong on the merits of its argument, and in fact, appears to misunderstand what the term "arbitrary" even means. As the United States has explained, USDA had more than an adequate factual basis for setting out different rules for ground meat than it did for muscle cuts. U.S. First Written 21.5 Submission, para. 96 (citing 2009 Final Rule, 74 Fed. Reg. at 2671 (Exh. CDA-2)). It is, therefore, impossible for Mexico to argue that the ground meat rule is "[b]ased on mere opinion or preference as opp[osed] to the real nature of things." *The New Shorter Oxford English Dictionary* at 107 (1993) (Exh. US-34) (defining "arbitrary").

[123] Canada's Second Written 21.5 Submission, para. 45; Mexico's Second Written 21.5 Submission, para. 72.

[124] *See* U.S. First Written 21.5 Submission, paras. 98-99 (citing *US – Tuna II (Mexico) (AB)*, para. 286).

[125] *See* U.S. First Written 21.5 Submission, para. 100 (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)).

75. Rather, Canada now argues that "the prohibition [of a trace-back system], coupled with a mandate for the Secretary of Agriculture to audit retailers to verify compliance, necessitates the implementation of the amended COOL measure's labelling requirements through the system of recordkeeping and verification that is the cause of the detrimental impact on Canadian livestock."[126] Mexico appears to take a similar position, contending that "the prohibition is a disguised restriction on international trade," and establishes that the entire measure "is not even-handed."[127]

76. Again, complainants' arguments are seriously misplaced. The prohibition contained in 7 U.S.C. § 1638A(f)(1) is not the cause of the detrimental impact. The original panel made no such finding, and neither did the Appellate Body. Rather, the Appellate Body determined that the detrimental impact stemmed from the distinctions between the production steps and the distinctions between the different types of labels.[128] Those distinctions are set out in other parts of the statute and the 2009 Final Rule, and it is those parts – not 7 U.S.C. § 1638A(f)(1) – that are relevant to this inquiry.[129] In other words, it is plain that 7 U.S.C. § 1638a(2)(A)-(C), and the corresponding regulatory provisions (*i.e.*, 7 C.F.R. § 65.300(d)-(e)), mandate what categories of muscle cuts will exist and how those different categories will be labeled, *irrespective* of whether 7 U.S.C. § 1638A(f)(1) exists or not.

77. Of course, the core of complainants' argument here – and throughout their submissions – is the existence of the detrimental impact, and this particular argument appears to be simply a mechanism for the complaining parties to try to convince the Panels that the amended COOL measure is inconsistent with Article 2.1 based only on the fact that it results in a detrimental impact. Yet the Appellate Body has already determined that such a finding is not enough to make a determination of inconsistency under Article 2.1.[130]

v. Mexico's Other Arguments Similarly Fail

78. In its first submission, the United States noted that Mexico made two other minor arguments that appeared to simply rehash points that the original panel already considered and rejected.[131] Mexico now re-raises these same two minor arguments, but again provides no basis to support them. First, Mexico argues that "to the extent" that the United States designed the amended COOL measure to undermine the USDA Prime, Choice or Select label when the product is made from imported cattle, "the Amended COOL Measure is intentionally

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[126] Canada's Second Written 21.5 Submission, para. 45.

[127] Mexico's Second Written 21.5 Submission, para. 72 (stating that the prohibition "establishes that the Amended COOL Measure is not even-handed"); *id.* (stating that, "the prohibition is evidence that the Amended COOL Measure is a disguised restriction on trade and, for that reason, is not even-handed").

[128] *US – COOL (AB)*, para. 341.

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

[130] *See US – COOL (AB)*, para. 271.

[131] *See* U.S. First Written 21.5 Submission, paras. 101-104.

discriminatory and not even-handed."[132] Second, Mexico again argues that the allegedly small demand for this type of information "demonstrates that the Amended COOL Measure is a disguised restriction on international trade and, thus, not even-handed."[133] While Mexico claims that the United States mischaracterizes its arguments, it provides no explanation of them, prefers to rely on the conclusory statement that "the Amended COOL Measure is not even-handed because these elements of the measure demonstrate that it is a disguised restriction on trade within the meaning of the sixth recital of the TBT Agreement."[134]

79. In response, we would merely note that these arguments do appear to raise issues addressed in the original proceeding, notwithstanding Mexico's characterization to the contrary.[135] In addition to what we have already said, we would further note that Mexico does not even attempt *to prove* either accusation. Indeed, Mexico only argues that its first argument is valid "to the extent" it is true. Yet for these two arguments, Mexico *does not even identify a regulatory distinction*, much less establish that it is not even-handed. Mexico's arguments should be rejected.

2. Conclusion on Article 2.1

80. For the above reasons, the complainants' Article 2.1 claims fail.

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

81. Despite arguing repeatedly in the original proceeding that the national treatment provisions contained in the TBT Agreement and the GATT 1994 should be given the same interpretation,[136] complainants now encourage these Panels to judge as to whether the amended COOL measure is discriminatory under two entirely different legal standards. For purposes of Article III:4, complainants contend that "treatment no less favourable" is established solely

[132] Mexico's Second Written 21.5 Submission, para. 67.

[133] Mexico's Second Written 21.5 Submission, para. 67.

[134] Mexico's Second Written 21.5 Submission, para. 67.

[135] *See* U.S. First Written 21.5 Submission, para. 102 (regarding the first argument, the United States noted that, "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.") (citing *US – COOL (AB)*, paras. 424, 433, 453; *US – COOL (Panel)*, paras. 7.620, 7.651, 7.685.); U.S. First Written 21.5 Submission, para. 103 (regarding the second argument, the United States noted that, "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.") (citing *US – COOL (Panel)*, paras. 7.649-7.650).

[136] *See, e.g.*, *US – COOL (Panel)*, para. 7.223 ("The complainants argue that [the terms 'like product' and 'treatment no less favourable'], and Article 2.1 of the TBT Agreement in general, should be interpreted in light of Article III:4 of the GATT 1994.").

based on proof that the technical regulation results in a detrimental impact on imported products.[137] As explained previously, this analysis is incorrect.[138]

82. The phrase "treatment less favourable" as used in Article III:4 has always provided regulatory space for the Member to take otherwise legitimate measures that may restrict trade unevenly across the membership.[139] Complainants disagree, arguing that, once a detrimental impact is established, the reasons underlying the requirements of the technical regulation are irrelevant to the national treatment analysis. The WTO has never adopted as narrow of an interpretation of the national treatment obligation as complainants assert here. Just the opposite is true, in fact. As 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.[140]

83. That is, the existence of distinctions between imported and domestic products is not enough. Any Article III:4 analysis, therefore, must include an examination of whether such distinctions are evidence that the measure is discriminatory or not.[141] Given this history, the

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[137] *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."); Mexico's First Written 21.5 Submission, paras. 223, 227; Mexico's Second Written 21.5 Submission, paras. 73-78.

[138] *See* U.S. First Written 21.5 Submission, para. 121-139.

[139] *See, e.g.*, *US – Tuna II (Mexico) (Panel)*, para. 7.330 (noting that while Mexican tuna products do not qualify for the "dolphin-safe" label because Mexican vessels intentionally encircle dolphins to catch tunas, other countries that operate in the same ocean that Mexico does have abandoned the practice, and their tuna products qualify for the "dolphin-safe" label).

[140] *US – Clove Cigarettes (AB)*, para. 178 (quoting *EC – Asbestos (AB)*, para. 100) (emphasis added); *see also US – Clove Cigarettes (AB)*, para. 178 (quoting *EC – Asbestos (AB)*, para. 100) ("[T]he 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.'"); *see also Chile – Alcoholic Beverages (AB)*, paras. 69-71 (concluding that the absence of a clear relationship between the stated objectives of a measure and the structure of the Chilean tax measures confirmed its conclusion that, based on the architecture, structure and design of the measures, the measures were applied so as to afford protection).

[141] *EC – Asbestos (AB)*, para. 100; *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 determinative of whether imported products are treated less favourably within the meaning of Article III:4."); *EC – Approval and Marketing of 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 (Panel)*, 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

Appellate Body's approach to Article 2.1 is hardly surprising. As the Appellate Body has noted, "the two Agreements should be interpreted in a coherent and consistent manner" in light of the fact that the Members intended the TBT Agreement "to further the objectives of the GATT 1994."[142]

84. Complainants advocate for a much different approach. Under their approach, the *sole* relevant consideration is the effect of the measure.[143] Any examination of whether the technical regulation draws legitimate, even-handed distinctions is deferred to the analysis of whether the "discrimination" is "arbitrary or unjustified" under Article XX. Of course, for technical regulations that pursue legitimate objectives not listed in Article XX, the matter would end there. As to these measures, the question of whether a measure is discriminatory turns only on whether a majority of the domestic products satisfy a particular technical regulation, while a majority of the like foreign products do not.[144] A responding Member is simply not afforded the opportunity to explain, nor would a panel have the ability to examine, the underlying rationale and operation of the standard. The legitimacy – *even the correctness* – of the requirements is wholly immaterial to the national treatment analysis.

85. Complainants' overly narrow interpretation of Article III:4 greatly undermines a Member's ability to regulate in the public interest, particularly where the Member pursues legitimate governmental objectives not listed in Article XX. In doing so, the complainants' approach puts at risk a whole host of measures involving standards or technical regulations, including those that: provide consumer information; prevent deceptive, misleading, and fraudulent practices; and ensure the compatibility and efficiency of telecommunication goods.[145]

86. A fairly typical example of such a TBT measure is the Canadian organics measure, whose stated objective is the "prevention of deceptive and misleading labeling practices."[146] This measure sets out certain standards for what type of chemicals and other substances can be

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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.").

[142] *US – Clove Cigarettes (AB)*, para. 91; *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.'").

[143] *See, e.g.*, Canada's First Written 21.5 Submission, para. 28.

[144] *See, e.g., US – Tuna II (Mexico)*, paras. 234-235.

[145] Exhibit US-35 summarizes 68 different notifications Members have submitted to the TBT Committee as listed on the WTO website.

[146] *See* Canada's Revised TBT Notification, G/TBT/N/CAN/177/Rev.1 (Jan. 15, 2007); Canada's Revised TBT Notification, G/TBT/N/CAN/177/Rev.2 (March 2, 2009) (Exh. US-36); *see also* Organic Production Systems General Principles and Management Standards, CAN/CGSB-32.310-2006, at iv (reprinted Aug. 2011) (Exh. US-37) ("Neither this standard nor organic products in accordance with this standard represent specific claims about the health, safety and nutrition of such organic products.").

present for the product to still be labeled "organic."[147] To import and market a foreign product as "organic" the product must satisfy either Canada's standards or a foreign country's standards that have been judged to be equivalent to Canada's standards.[148] Applying complainants' approach, all that a complaining party would need to prove would be that the Canadian product qualifies for the organic label (and thus can be sold at a premium price), while the like foreign product does not.[149] The fact that the Canadian organics measure set legitimate standards such that it would *actually be deceptive* to allow the foreign product to be labeled as organic *is irrelevant* to the Article III:4 analysis in complainants' view. As the respondent, Canada would only be able to make such an argument under the chapeau of Article XX, but because the "prevention of deceptive and misleading labeling practices" is not a listed objective under Article XX, Canada would not have that opportunity, and the complaining party's discrimination claim would succeed.

87. What complainants' approach suggests, therefore, is that a Member must, prior to applying a technical regulation, survey all current and potential trading partners of products affected by the measure to determine whether the affected products of those countries either meet that standard (or whether its producers are willing to adapt to the new standard).[150] Where a particular country's products do not meet that standard (and that country's producers are not willing to adapt), the Member must *lower* its standards to avoid creating an obstacle to trade. Obviously this "least common denominator" analysis suggested by complainants' approach would undermine entirely the fact that the Member may take technical regulations "necessary to achieve its legitimate objectives '*at the levels it considers appropriate*.'"[151]

88. Complainants attack the U.S. approach in a number of ways. Each criticism fails.

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[147] *See generally* Canada's Organics Product Regulations, 2009, Interpretation and Application (Exh. US-38); Canada's Organic Production Systems, Permitted Substances Lists (reprinted Aug. 2011) (Exh. US-39); *see also* Canada's Organics Product Regulations, 2009, Interpretation and Application, para. 13(1)(a) (Exh. US-38) (noting that for a multi-ingredient product to be considered organic, at least 70 percent of the contents of the product must be organic and its composition complies with Canada's standards).

[148] Canada's Organics Product Regulations, 2009, Interpretation and Application, para. 27 (Exh. US-38); Organics Regulatory Impact Analysis Statement, comment section regarding trade (Exh. US-40) ("With respect to agreements regarding the importation and exportation of organic products, some concern was expressed that imports under an importation/exportation agreement would not be required to meet the Canadian Standard. It was explained that this would only be permitted after the Government of Canada had done a thorough analysis of the foreign country's organic system and *deemed it equivalent* to the Canadian system.") (emphasis added).

[149] *See, e.g., US – Tuna II (Mexico) (AB)*, paras. 234-235. Indeed, it would seem that Canadian producers have adopted (or soon will) adapt to these new standards given that one of the stated goals of the regime is "to support further development of the domestic organic agriculture product market." Organics Regulatory Impact Analysis Statement, comment section regarding trade (Exh. US-40).

[150] As noted in *US – Tuna II (Mexico)*, at the time the United States prohibited tuna products from carrying the "dolphin-safe" label where that tuna was caught through the intentional encirclement of dolphins, both the U.S. and Mexican fleets engaged in this fishing practice. However, the U.S. fleet adapted to the new standard and ceased its intentional encirclement of dolphins while Mexico continued the fishing practice. *See US – Tuna II (Mexico) (AB)*, para. 206.

[151] *US – COOL (AB)*, para. 373 (emphasis added); *see also US – Tuna II (AB)*, paras. 315-316.

89. First, Canada challenges that the United States has "no textual basis" for claiming that the Article III:4 analysis "necessarily entails an examination of whether the regulation makes distinctions that could not be considered even-handed as to the group of 'like' imported products versus the group of 'like' domestic products . . ."[152] But what Canada ignores, of course, is that this conclusion is built upon the Appellate Body's interpretation of the text of Article III. Notably, neither complainant directly argues that the Appellate Body was incorrect in *EC – Asbestos* when it said that a Member does not act inconsistently with Article III:4 based solely on the fact that the Member has "draw[n] distinctions" between like products.[153]

90. Moreover, Canada is simply wrong to argue that the United States ignores the context of the TBT Agreement and the GATT 1994.[154] The context supports, rather than undermines, the U.S. interpretation. That it is to say, while it is unquestioned that Article III:4 provides relevant context for the interpretation of Article 2.1,[155] Article 2.1, in fact, provides relevant context for the interpretation of Article III:4, especially *where the measure at issue is a technical regulation*.

91. Second, complainants criticize the U.S. interpretation as trying to alter the "balance" already set out between Article III:4 on the one hand and Article XX on the other.[156] The United States, of course, agrees that such a balance exists, but the exact nature of that balance depends on the scope of the discrimination analysis, as discussed above. In this regard, Canada misunderstands the U.S. position. The United States is not contending that the Panel must "read into" Article III:4 an assessment of whether the discrimination is "arbitrary or unjustifiable," as Canada so alleges.[157] Rather, what the United States is saying is that the appropriate interpretation of *whether* a technical regulation *is discriminatory* must necessarily include an examination of the basis for the regulatory distinctions that cause the detrimental impact. Unlike complainants, the United States does not take the view that proof of detrimental impact is enough to declare the measure as "discriminatory," under either the TBT Agreement or the GATT 1994.

92. Furthermore, in light of their view that Article 2.1 sets a much higher bar for a discrimination claim, complainants fail to explain how their approach interprets the two agreements "in a coherent and consistent manner."[158] Just the opposite would appear to be the case. Complainants' artificially narrow interpretation of Article III:4 renders Article 2.1 a

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[152] Canada's Second Written 21.5 Submission, para. 58 (quoting U.S. First Written 21.5 Submission, para. 134).

[153] *EC – Asbestos (AB)*, para. 100; *see also US – Clove Cigarettes (AB)*, para. 178 (quoting same); *DR – Cigarettes (AB)*, para. 96 (quoted above); *Thailand – Cigarettes (Philippines) (AB)*, para. 128 (quoted above); *EC – Approval and Marketing of Biotech Products*, para. 7.2514 (quoted above); *see also Canada – Pharmaceutical Patents*, para. 7.101 (quoted above).

[154] Canada's Second Written 21.5 Submission, para. 58.

[155] *See, e.g., US – COOL (AB)*, para. 270.

[156] *See* Canada's Second Written 21.5 Submission, paras. 59-60; Mexico's Second Written 21.5 Submission, para. 76.

[157] Canada's Second Written 21.5 Submission, para. 62.

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

nullity. There would simply be no reason for complainants to prove the more difficult claim that a technical regulation is inconsistent with Article 2.1, a point that complainants in *EC – Seals* have already demonstrated.[159]

93. The flaws running through complainants' approach are on full display in this dispute. Canada, for example, declares that the defined scope of the amended COOL measure is of "fundamental importance" to determining that the measure is discriminatory in its Article 2.1 claim, and asks the DS384 Panel to make findings in that regard.[160] We disagree on the merits, of course, but note the serious tension in Canada's argument. Under complainants' view, the scope of the amended COOL measure is entirely immaterial as to whether the United States has brought itself into compliance by altering the COOL measure such that it no longer discriminates against Canadian and Mexican livestock.[161] That is to say, the findings that complainants ask the Panels to make with regard to Article 2.1 in this dispute appear to be *simply meaningless* from a compliance perspective. Complainants argue that the only relevant question as to whether the United States has come into compliance is whether the United States has eliminated any detrimental impact. Because the United States has not done so, complainants urge the Panels to find the amended COOL measure to be discriminatory under Article III:4, *even if* the Panels consider the amended COOL measure to be non-discriminatory under Article 2.1.

94. The ultimate goal of complainants is clear enough. While they no longer directly challenge the proposition that providing consumer information on origin as to where the animal is born, raised, and slaughtered is a legitimate governmental objective,[162] complainants' overly narrow construction of Article III:4 would prevent the United States from doing just that, short of fundamentally altering how the entire U.S. meat industry operates.[163] To accept complainants' approach would be to accept that there is no practical and reasonable way for the United States to provide accurate origin information to its consumers, even where the meat was derived from an animal that spent less than a day in the United States before being slaughtered.

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

95. Canada and Mexico's respective claims that the amended COOL measure is inconsistent with Article 2.2 fail. Neither party has provided any additional evidence to support its

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[159] Canada thus requested the *Seals* Panel to examine its GATT 1994 claims first and, if successful, "to exercise judicial economy with respect to Canada's claims under Article 2.1 of the TBT Agreement." *EC – Seals (Panel)*, para. 7.59. Norway was even more direct – making no claim under Article 2.1, choosing to rely only on GATT 1994 claims to prove that the challenged technical regulation was discriminatory. *See id.*, para. 3.4.

[160] Canada's Second Written 21.5 Submission, para. 36; *see also* Mexico's Second Written 21.5 Submission, paras. 61-65 (also contending that the three exemptions prove the amended COOL measure to be discriminatory).

[161] Article 21.5 of the DSU. This point is equally true for complainants' Article 2.1 arguments regarding the categories D and E as well. *See supra*, sec. II.A.1.c.i-iii.

[162] *See US – COOL (AB)*, para. 453.

[163] *See infra*, sec. II.C.3.d (discussing complainants' Article 2.2 trace-back arguments).

contention that any one of the (now) four alternative measures establishes that the amended COOL measure is "more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non fulfilment would create." Perhaps recognizing this failure on their part, both parties seek to avoid the burden of proving their own cases. Mexico is quite blatant in this regard – making the sweeping argument that it simply does not carry the burden of proof for any of the alternatives that Mexico itself proposes.[164] Canada takes a narrower – but in substance no different – approach than Mexico, contending that it should not have to carry the burden where it is difficult to do so.[165] Neither approach is consistent with the admonition of the Appellate Body as to the burden of proof resting on the party that asserts a claim.[166]

96. In this case, it is clear that neither Canada nor Mexico have established a *prima facie* case that any one of the four alternatives is a reasonably available, less trade restrictive alternative measure that provides an equivalent level of origin information to what the amended COOL measure provides. Accordingly, complainants' Article 2.2 claims fail.

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

97. In its second submission, Mexico again argues that the DS386 Panel should adopt what Mexico refers to as the "two step necessity" test, comprising what Mexico calls a "relational analysis" and a "comparative analysis."[167] The United States responded fully to Mexico's argument in our first submission.[168] Mexico provides no further basis for such an approach, either in the text of Article 2.2 or in the guidance of the Appellate Body in *US – COOL* or in *US – Tuna II (Mexico).* In particular, Mexico again fails to explain why the Appellate Body did not engage in this "two step necessity" test in the one dispute where it examined the merits of the claim, *US – Tuna II (Mexico).* Indeed, in *US – Tuna II*, the Appellate Body *does not even acknowledge* the possibility of such an approach.[169]

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[164] *See* Mexico's Second Written 21.5 Submission, paras. 114, 116, 117 ("Mexico's burden is simply to 'identify possible alternatives,' and then it is "for the respondent (i.e. the United States) to demonstrate that the alternative measure identified by the complainant is less trade restrictive, does not make an equivalent contribution to the relevant objective and is not reasonably available").

[165] *See* Canada's Second Written 21.5 Submission, para. 77 ("Further, while ascertaining the level of trade-restrictiveness of a technical regulation as proposed by the United States would be possible for regulations that have been in force long enough to produce documented trade effects, such an ascertainment may not be done with the same precision for regulations that have not yet produced measurable trade effects or for possible alternative measures.").

[166] *See, e.g., US – Wool Shirts and Blouses (AB),* p. 14 ("[I]t is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.").

[167] *See* Mexico's Second Written 21.5 Submission, paras. 89-94.

[168] *See* U.S. First Written 21.5 Submission, paras. 147-148.

[169] Not surprisingly, Mexico fails to even cite the Appellate Body's report in *US – Tuna II (Mexico)* for any part of its approach. *See* Mexico's Second Written 21.5 Submission, paras. 89-94; Mexico's First Written 21.5 Submission, paras. 154, 157.

98. Mexico is untroubled by this fact, however, and continues to argue that the Appellate Body intends to engage in a "relational analysis" wholly separate from an analysis of the comparison. Mexico is incorrect. As the Appellate Body has made clear in its characterization of its own analysis – *and in the analysis itself* – panels are to engage in this "relational analysis" in its examination of the comparisons.[170] There are not two steps, but one.[171]

99. In its second submission, Mexico tries to ground its two step approach in the fact that the Appellate Body acknowledges that there may be instances where a comparison between the challenged measure and an alternative measure would not be needed.[172] But what Mexico cannot explain – and, in fact, studiously ignores – is *why* the Appellate Body determined in the original *US – COOL* proceeding that, in fact, the original panel should have made this comparison.[173] Indeed, the Appellate Body reversed the original panel's Article 2.2 finding on this very point.[174]

100. Of course, it is clear that Mexico's "two step" invention is designed to lessen its own burden of proof. Mexico was quite explicit in this regard in its first submission, arguing that the DS386 Panel could find the amended COOL measure inconsistent with Article 2.2 without making a comparison to an alternative measure.[175] In its second submission, Mexico now takes a slightly different approach, contending that the DS386 Panel should, regardless of the result of the first step, compare the amended COOL measure to an alternative "to ensure that the record is complete in the event of a review by the Appellate Body."[176] (And Mexico claims it does not have the burden of proof in "completing" the record, as discussed below.)

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[170] *US – COOL (AB)*, para. 379; *US – Tuna II (Mexico) (AB)*, para. 323.

[171] As should be quite plain from our first submission, the United States does not "acknowledge[] the need" for a two step test as Mexico wrongly asserts in paragraph 92 of its second submission. *See, e.g.*, U.S. First Written 21.5 Submission, para. 148 ("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 reasonably available.'") (quoting *US – COOL (AB)*, para. 379).

[172] *See* Mexico's Second Written 21.5 Submission, paras. 92-93 (relying heavily on the words "at least" and "may be").

[173] *US – COOL (AB)*, para. 469 ("It follows therefore that, as the Appellate Body explained in *US – Tuna II (Mexico)*, the Panel in this case was required also to evaluate the other factors referred to in Article 2.2, and to undertake a comparison with the alternative measures proposed by Mexico and by Canada.").

[174] *US – COOL (AB)*, para. 469 ("[W]e 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.").

[175] *See, e.g.*, Mexico's First Written 21.5 Submission, 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).

[176] *See, e.g.*, Mexico's Second Written 21.5 Submission, para. 110 ("Even if the Panel decides that the Amended COOL Measure is inconsistent with Article 2.2 on the basis of the relational weighing and balancing test discussed above, it should make a comparative analysis of challenged measure and each alternative measure to ensure that the record is complete in the event of a review by the Appellate Body.").

101. As the United States stated previously, under Article 2.2 the complaining party must establish that an alternative measure exists that "is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available."[177] The arguments by either complaining party that seek to relieve themselves of any part of this burden should be rejected.

2. Factors to Consider in Comparison Between the Amended COOL Measure and an Alternative Measure

a. The Objective and Contribution to That Objective

102. In the U.S. First Written 21.5 Submission, we stated that the objective of the amended COOL measure was "to provide consumers with information on the countries in which the livestock from which the meat they purchase is produced were born, raised, and slaughtered," quoting the Appellate Body.[178] Both Canada and Mexico disagree with this characterization, contending that the United States has taken the Appellate Body's quote out of context in that the Appellate Body made that statement in the context of whether the objective was legitimate, and not in the identification of the objective.[179] As such, complainants appear to be arguing that the Appellate Body, in evaluating whether the COOL measure's objective was legitimate, analyzed the *wrong* objective.

103. That is clearly incorrect. As the Panels are well aware, the relevant objective can be stated in a number of ways. Certainly, it could be stated as "to provide consumer information on origin," which is how both the Appellate Body and the Panel has characterized it.[180] Of course, that same objective can be stated in more specific terms, such as how the Appellate Body has also stated it.[181] They are simply two formulations of the same objective.

104. Complainants, of course, disagree with the Appellate Body's formulation because that formulation mentions the three production steps. Although they do not say so directly, it would appear that complainants view such a formulation as undermining their first two alternatives, neither of which provide much, if any, origin information on the three production steps. Complainants would simply prefer that providing consumers with information about the production steps not factor into the analysis.

105. But this is where the flaw of complainants' approach is truly exposed. For the real issue before the Panels is not what the objective is – that has already been decided – the real issue is,

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[177] *US – COOL (AB)*, para. 379.

[178] U.S. First Written 21.5 Submission, para. 143 (quoting *US – COOL (AB)*, para. 453).

[179] *See* Canada's Second Written 21.5 Submission, para. 66; Mexico's Second Written 21.5 Submission, para. 85.

[180] *See* U.S. First Written 21.5 Submission, para. 143, n.269 (quoting *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.")).

[181] *US – COOL (AB)*, para. 453.

as the Appellate Body explains, what "is the degree of contribution to the objective that a measure *actually* achieves."[182] And what the amended COOL measure *actually* achieves is that it provides meaningful and accurate information on origin for muscle cuts sold at retail as to where the animal was born, raised, and slaughtered. That is, in fact, what the label for the A, B, and C categories states after all (*e.g.*, "Born in Mexico, Raised and Slaughtered in the U.S.").[183] It is thus immaterial whether the objective is characterized as "to provide consumer information on origin," on the one hand, or it is "to provide consumers with information on the countries in which the livestock from which the meat they purchase is produced were born, raised, and slaughtered," on the other. The degree of contribution to the objective that the measure actually achieves is *the same* under either formulation. And it is that characterization – not the objective in the abstract – that is used to determine whether an alternative measure exists that establishes that the amended COOL measure is inconsistent with Article 2.2.[184]

b. Trade Restrictiveness

106. Canada and (sometimes) Mexico continue to equate the phrase "less trade restrictive" with the phrase "less discriminatory."[185] Both complainants frame this discussion in terms of whether the amended COOL measure is itself "trade restrictive."[186] Yet the fact that the amended COOL measure is "trade restrictive" is not in dispute. But the complainants have failed to establish a *prima facie* case that any of the (now) four proposed alternatives are *less* trade restrictive than the amended COOL measure while fulfilling the objective at the same level. And for a *prima facie* case the complainants must adduce evidence that the alternative measure will allow greater market access for their products than is currently provided for under the amended COOL measure. Notably, the complainants have not adduced such evidence for any of their

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[182] *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) (citing *US – Tuna II (Mexico) (AB)*, para. 316.

[183] U.S. First Written 21.5 Submission, para. 160.

[184] *See US – Tuna II (Mexico) (AB)*, para. 330 (holding that an alternative measure would have to "achieve the United States' objectives to an equivalent degree as the measure at issue"); *see also US – COOL (AB)*, para. 373 ("The 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.").

[185] *See, e.g.*, Canada's Second Written 21.5 Submission, para. 122; Canada's First Written 21.5 Submission, para. 175. In its first submission, Mexico appeared to argue that its first and second alternatives were less trade restrictive than the amended COOL measure as those two alternatives would allow expanded market access for Mexican feeder cattle, but argued that the third alternative was less trade restrictive because it was less discriminatory than the amended COOL measure. *Compare* Mexico's First Written 21.5 Submission, paras. 183 and 194, *with id*. para. 204 ("Thus, the economic incentive to discriminate against Mexican cattle would likely be eliminated."). In its second submission, Mexico urges the DS386 Panel to reject the U.S. argument that trade restrictiveness refers to market access, even though it appears to continue to argue that the first and second alternatives are less trade restrictive because Mexico would sell more cattle (and at a higher price) under these alternatives. *See* Mexico's Second Written 21.5 Submission, paras. 101, 104, 126, 133.

[186] *See* Canada's Second Written 21.5 Submission, para. 72; Mexico's Second Written 21.5 Submission, para. 102.

proposed alternatives, particularly the third alternative, trace-back, and Canada's newly proposed fourth alternative, state/province designations, despite the fact that the United States has contested the complainants' mere assertions.

107. As the United States has previously discussed,[187] the term "trade restrictive" "means something having a limiting effect on trade."[188] Accordingly, the Appellate Body in *US – Tuna II (Mexico)* concluded that "Article 2.2 does not prohibit measures that have any trade-restrictive effect. It refers to 'unnecessary obstacles' to trade and thus allows for *some* trade-restrictiveness …"[189] In light of that guidance, it simply cannot be that Article 2.2 allows for *some* discrimination. Indeed, the Appellate Body's statement that what Article 2.2 disciplines is "trade-restrictive effect" only makes sense when "trade restrictive" is understood to refer to limiting trade effects, *i.e.*, limiting market access.[190]

108. Given the tension between the TBT Agreement and complainants' arguments, it should not be surprising that the complainants have not argued for this interpretation in their other disputes. In *EC – Seals*, Canada argued for (and the panel accepted) that Canada's proposed alternative measure was less trade restrictive because Canadian products could *gain market access* – where none now existed – provided the Canadian killing of the seals met EU animal welfare requirements.[191] Similarly, in *US – Tuna II (Mexico)*, Mexico argued that its proposed alternative – the coexistence of two "dolphin safe" labels, one of which Mexican tuna products

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[187] *See* U.S. First Written 21.5 Submission, paras. 154-155.

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

[189] *US – Tuna II (Mexico) (AB)*, para. 319 (emphasis added); *US – COOL (AB)*, para. 375(quoting same).

[190] *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.").

[191] *See EC – Seals (Panel)*, para. 7.470 ("Canada describes this alternative as less trade restrictive because the current EU Seal Regime excludes all non-Inuit commercial seal products from the EU market, whereas the alternative regime would allow such non-Inuit commercial seal products provided they meet the animal welfare requirements."); *id.* at para. 7.472 (accepting Canada's argument and determining that, "[w]e found above that the EU Seal Regime limits trade in seal products, including those imported from the complainants, and thus is trade restrictive. . . . In comparison, the alternative measure could possibly permit seal products from the complainants that are prohibited under the EU Seal Regime. In view of the potentially large quantities of seal products derived from non-IC or MRM hunts, we consider that their potential allowance under the proposed alternative measure makes such proposed measure less trade restrictive.") (internal footnotes omitted).

qualified for – was less trade restrictive because Mexican producers could *sell more tuna products* in the United States under such a regime.[192]

109. While neither complainant directly addresses why they are pursuing a different interpretation in this dispute, it seems fairly obvious that the complainants' arguments are driven by the fact that they cannot prove that their producers will have greater market access opportunities under a trace-back regime (or Canada's new proposed fourth alternative for that matter).[193] In fact, it would appear to the United States that their market access could dramatically worsen following adoption of this significantly more expensive regulatory regime. But the fact that complainants' arguments will fail as to that alternative measure is not a valid reason for giving an incorrect interpretation to the TBT Agreement.

110. Canada requests that the DS384 Panel "be sufficiently flexible" in its interpretation of the agreement "to account for elements that are difficult to quantify, such as practical difficulties in selling or handling imported products" under the amended COOL measure.[194] Yet the difficult question here is not what the trade effects of the amended COOL measure are. The original panel was quite able to determine what the actual trade effects of the original COOL measure were, for example.[195] The question is what will be the trade effects of the trace-back regime, and it is that burden that complainants fail to meet.

111. Mexico attempts to lessen its burden by contending that it does not have the burden of proof with regard to any of the alternative measures it proposes, a point the United States addresses below. Canada appears to take a similar, albeit more limited approach, contending that it should not have to carry this burden where it is difficult to do so.[196] Yet the Appellate Body has been clear on this point – the allocation of the burden of proof does not depend on how difficult it is for the complainant to prove its case.[197]

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[192] *See US – Tuna II (Mexico) (AB)*, paras. 56, 88; *see also US – Tuna II (Mexico) (Panel)*, para. 7.568 ("[A]s noted above, the parties agree that the US public has a preference for tuna products that are dolphin-safe, and access to the label is therefore a valuable advantage on the US market. To the extent that the proposed alternative would provide access to the label, and thus to this advantage, to a greater range of tuna products, including imported tuna products, it would be less-trade restrictive than existing US measures, in that it would allow greater competitive opportunities on the US market to those products.").

[193] This dynamic is particularly transparent in Mexico's submissions where it appears to argue for different interpretations for the phrase "less trade restrictive" depending on which alternative Mexico is discussing. *See, e.g.*, Mexico's First Written 21.5 Submission, paras. 183, 194, and 204.

[194] Canada's Second Written 21.5 Submission, para. 76.

[195] *See US – COOL (Panel)*, paras. 7.438-7.546.

[196] Canada's Second Written 21.5 Submission, para. 77 ("Further, while ascertaining the level of trade-restrictiveness of a technical regulation as proposed by the United States would be possible for regulations that have been in force long enough to produce documented trade effects, such an ascertainment may not be done with the same precision for regulations that have not yet produced measurable trade effects *or for possible alternative measures*.") (emphasis added).

[197] *See EC – Sardines (AB)*, para. 281 (Regardless of whether it is relatively straightforward or difficult to establish that a measure was in violation "… the complainant must prove its claim. There is nothing in the WTO

112. The United States agrees with Canada that it may very well be difficult to establish that a trace-back regime (or the state/province alternative) is actually less trade restrictive than the amended COOL measure. The reason for this is fairly obvious – determining how a complicated regulatory mechanism would affect the complex U.S. livestock and meat industries is not easily done. Indeed, Canada may understand this problem better than most, given that it has failed to completely implement its own trace-back regime in Canada despite examining the issue for over a decade. But this is the burden the complainants decided to shoulder when they proposed this alternative, and it is a burden from which the Panels may not relieve them of.[198]

c. Reasonably Available

113. Complainants appear to accept the framework for evaluating whether a measure could be considered to be "reasonably available."[199] However, neither party satisfies its burden in this regard, particularly with regard to the trace-back alternative and state/province designation alternative, as discussed below.

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

a. Canada and Mexico Have the Burden of Proof for Their Respective Article 2.2 Claims

114. In its second submission, Mexico, for the first time, contends that it does not have the burden of proving that an alternative measure exists that establishes that the amended COOL measure is inconsistent with Article 2.2.[200] Rather, Mexico contends that it merely has the burden of "identify[ing]" a possible alternative, and then the United States has the burden of proving that such an alternative does not prove that the amended COOL measure is inconsistent with Article 2.2.[201] Such a position is entirely unsupportable.[202] Indeed, Mexico's position here

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dispute settlement system to support the notion that the allocation of the burden of proof should be decided on the basis of a comparison between the respective difficulties that may possibly be encountered by the complainant and the respondent in collecting information to prove a case."). "

[198] *See generally US – COOL (AB)*, para. 469 ("[W]e 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.").

[199] U.S. First Written 21.5 Submission, paras. 162-163 (relying on the Appellate Body's reports in *US – Gambling* and *China – Publications and Audio Visual Products*); *see also* Canada's Second Written 21.5 Submission, para. 89; Mexico's Second Written 21.5 Submission, para. 115.

[200] *See* Mexico's Second Written 21.5 Submission, paras. 114-119.

[201] Mexico's Second Written 21.5 Submission, para. 117 ("Mexico's burden is simply to 'identify possible alternatives', which it has done so. Contrary to the United States' argument, it is for the respondent (i.e., the United States) to demonstrate that the alternative measure identified by the complainant is not less trade restrictive, does not make an equivalent contribution to the relevant objective pursued and is not reasonably available.").

[202] Canada makes no such explicit argument, although given how little evidence Canada puts forward to support its proposed alternatives, it appears that Canada, in effect, agrees with Mexico that the United States carries

directly contradicts *its own position* before the Appellate Body in this very dispute where it accepted that, as a complainant, *it is Mexico* that carries "the burden of proof with respect to such alternative measures."[203]

115. Mexico's position appears to be based on a serious misunderstanding of Article 2.2 and the Appellate Body's guidance in *US – COOL*.

116. First, Mexico appears to equate Article 2.2 with the general exceptions contained in Article XX of the GATT 1994 and Article XIV of the *General Agreement on Trade in Services* (GATS).[204] But that is clearly incorrect – Article 2.2 contains positive rules for Members to adhere to while the general exceptions provisions contain affirmative defenses which Members may rely on when a measure has been found to be inconsistent with an obligation of that agreement.[205] It has been long understood that complainants carry the burden of proof for their claims under those rules, and respondents carry the burden of proof for their affirmative defenses.[206]

117. Second, Mexico also misunderstands paragraph 379 of the Appellate Body's report in *US – COOL*. Mexico reads this paragraph – in particular, the reference to "identify" – to mean that the Appellate Body has relieved Mexico of its burden of proof. But paragraph 379 simply restates the normal long-standing understanding of the allocation of burden of proof as it applies to Article 2.2.[207] Nothing in this paragraph, or in *US – COOL* or *US – Tuna II (Mexico)* more generally, indicates that the Appellate Body considers that the burden of proof for Article 2.2

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the burden of proof for this analysis. *See, e.g.*, Canada's Second Written 21.5 Submission, paras. 138-152 (putting forward essentially *no evidence* to establish a *prima facie* case that its fourth alternative is a reasonably available, less trade restrictive alternative).

[203] *US – COOL (AB)*, 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) (citing *US – Tuna II (Mexico) (AB)*, para. 323).

[204] *See* Mexico's Second Written 21.5 Submission, para. 115.

[205] *US – Wool Shirts and Blouses (AB)*, p. 15-16.

[206] *Compare US – Wool Shirts and Blouses (AB)*, p. 14 ("[I]t is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption."), *with id.* pp. 15-16 ("We acknowledge that several GATT 1947 and WTO panels have required such proof of a party invoking a defence such as those found in Article XX or Article XI:2(c)(i), to a claim of violation of a GATT obligation, such as those found in Articles I:1, II:1, III or XI:1. Articles XX and XI:2(c)(i) are limited exceptions from obligations under certain other provisions of the GATT 1994, not positive rules establishing obligations in themselves. They are in the nature of affirmative defences. It is only reasonable that the burden of establishing such a defence should rest on the party asserting it."); *see also US – Gambling (AB)*, paras. 138-139, 282.

[207] In paragraph 379, the Appellate Body is clear that it is up to the complainant to "make a *prima facie* case by presenting *evidence and arguments* sufficient to establish that the challenged measure is more trade restrictive than necessary." As part of this *prima facie* case, "[a] complainant may, and in most cases will, also seek to identify a possible alternative measure. Only if the complainant establishes such a *prima facie* case, does the burden of proof shift to the respondent. *US – COOL (AB)*, para. 379 (emphasis added).

differs considerably from the normal burden of proof as described by the Appellate Body in *US – Wool Shirts and Blouses (AB)*.[208] The fact that the Appellate Body chose to use the word "identify" in that one particular paragraph does not change the fact that it is up to the complainant to prove its case through the presentation of "evidence and arguments" sufficient to establish a *prima facie* case.[209]

118. Finally, Mexico misunderstands paragraph 469 of the Appellate Body's report in *US – COOL*. There, the Appellate Body reversed the original panel's finding that the COOL measure was inconsistent with Article 2.2 "without examining the proposed alternative measures," because, by doing so, the original panel improperly relieved "Mexico and Canada of this part of their burden of proof."[210] Mexico simply has no explanation for how the Appellate Body could make such a finding if, in fact, the burden of proof *did not lie with Mexico*.

119. Mexico's argument is just the latest attempt by the complainants to relieve themselves of their own burden of proof. As discussed previously, the United States respectfully requests both Panels to reject arguments of the complaining parties that seek to relieve themselves of their own burden.[211]

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

120. As in their first submissions, the complaining parties reiterate that the first alternative measure: mandatory labeling of origin based on substantial transformation, coupled with voluntary point of production labeling, and the elimination of the three exemptions, establishes that the amended COOL measure is inconsistent with Article 2.2.[212] While complainants appear to concede the obvious – that this alternative measure provides less origin information regarding

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[208] *US – Wool Shirts and Blouses (AB)*, p. 14 ("[I]t is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption."); *see also EC – Sardines (AB)*, para. 281 ("There is nothing in the WTO dispute settlement system to support the notion that the allocation of the burden of proof should be decided on the basis of a comparison between the respective difficulties that may possibly be encountered by the complainant and the respondent in collecting information to prove a case.").

[209] *US – COOL (AB)*, para. 379.

[210] *US – COOL (AB)*, para. 469.

[211] *See* U.S. First Written 21.5 Submission, para. 148.

[212] *See* Canada's Second Written 21.5 Submission, para 101; Mexico's Second Written 21.5 Submission, para. 132.

where the animal is born, raised, and slaughtered than the amended COOL measure does – neither acknowledges the implications of this concession.[213]

121. As the United States has previously explained,[214] 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: the amended COOL measure provides meaningful and accurate information on origin for muscle cuts sold at retail as to where the animal was born, raised, and slaughtered.[215] Alternative measures that contribute to the objective at a lesser degree than that do not prove a challenged measure inconsistent with Article 2.2, as the Appellate Body has made clear.[216] This is the only logical interpretation of the TBT Agreement whose sixth preambular recital explicitly acknowledges that the Member "shall not be prevented from taking measures necessary to achieve its legitimate objectives '*at the levels it considers appropriate*,'" a point that the Appellate Body has repeatedly emphasized.[217]

122. Canada and Mexico simply ignore this critical point. Nowhere in their analyses do they account for the preambular language, and nowhere do they even try to explain how their analyses is consistent with the Appellate Body's guidance. Indeed, neither party even cites *US – Tuna II (Mexico)*.[218] The undeniable fact is that the first alternative provides a lesser degree of origin information on where the animal was born, raised, and slaughtered.[219] As such, complainants'

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[213] *See* Mexico's Second Written 21.5 Submission, para. 129 (stating that the alternative "arguably provides less specific information than the labeling requirements for other categories of beef products covered by the Amended COOL Measure"); Canada's Second Written 21.5 Submission, para. 98.

[214] *See supra*, sec. II.C.2.a; U.S. First Written 21.5 Submission, para. 160.

[215] *US – COOL (AB)*, para. 426 ("[T]he 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); *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).

[216] *US – Tuna II (Mexico) (AB)*, para. 330 (reversing the panel's finding that the challenged measure was inconsistent with Article 2.2 because Mexico's proposed alternative "would contribute to both the consumer information objective and the dolphin protection objective *to a lesser degree* than the measure at issue …") (emphasis added).

[217] *US – COOL (AB)*, para. 373 (emphasis added); *US – Tuna II (AB)*, paras. 315-316; *see also US – COOL (AB)*, para. 373 ("The 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.").

[218] Of course, neither party can account for the original panel's determination that "the exact information that the United States wants to provide to consumers cannot be conveyed through" substantial transformation. *US – COOL (Panel)*, paras. 7.734-7.735 (rejecting Mexico's Article 2.4 claim).

[219] Mexico relies on a photograph of meat taken in September 2013 to argue that retailers would voluntarily label meat as to the production steps. *See* Mexico's Second Written 21.5 Submission, para. 130; Exhibit MEX-15-A (photograph of meat whose "sell by date" is "September 26, 13"). It is unclear why Mexico believes such evidence supports its argument. The fact of the matter is that the United States has already relied on a voluntary labelling regime program and found it did not provide an equivalent level of contribution to the objective for the simple fact that U.S. industry will not use the voluntary label. *See* U.S. First Written 21.5 Submission, para. 168 (citing to U.S. First Written Submission in Original Proceeding, paras. 251-254; U.S. Second Written Submission in Original

analyses are directly contradictory to both the applicable agreement and the Appellate Body's interpretation of that agreement.[220] Complainants' proposed first alternative unquestionably fails the legal test of Article 2.2.[221]

123. Rather than acknowledging these problems directly, complainants discuss the labeling differences between Categories A, B, and C, on the one hand, and Categories D and E, on the other.

124. First, Canada appears to argue that they have satisfied their own burden of proof because *the United States* "has not explained why it considers that Label D and Label E fulfil its objective."[222] Notwithstanding the obvious burden of proof problem, what should be obvious to all participants in this dispute is that this is not the test for Article 2.2 – *none* of the parties need to prove that a label does or does not "fulfill" the U.S. objective in the abstract.[223] The question is rather, whether complainants have established a *prima facie* case that an alternative measure exists "that is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available."[224]

125. Second, Mexico argues that "[t]he United States has not provided a basis for distinguishing consumers' desires for origin information as between muscle cuts, ground beef and imported meat products."[225] But again Mexico, like Canada, fails to explain how the existence or non-existence of such a basis is relevant to the required *prima facie* case for this claim. To put it another way, the fact that consumers may or may not be more interested in

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Proceeding, paras. 161-163). Moreover, as the United States has already stated, if a complainant could prove that a technical regulation is "more trade restrictive than necessary" simply by suggesting a voluntary measure does the same thing, all technical regulations would be, by definition, inconsistent with Article 2.2, a clearly erroneous result that complainants continue to ignore. *See* U.S. First Written 21.5 Submission, para. 168, n.330.

[220] *See also EC – Seals (Panel)*, para. 7.502 ("We recall in this regard the Appellate Body's guidance that a responding Member cannot be reasonably expected to employ an alternative measure that involves a continuation of the very risk that the challenged measure seeks to halt.") (citing *EC – Asbestos (AB)*, para. 174).

[221] Canada states that "the United States did not raise any issues regarding the elimination of the exceptions under the proposed alternative measure." Canada's Second Written 21.5 Submission, para. 100. That is incorrect. The United States strongly disputes that the complainants' have put forward a sufficient evidentiary basis to establish a *prima facie* case that eliminating the three exemptions would be less trade restrictive and reasonably available. *See* U.S. First Written 21.5 Submission, paras. 87, 175-176; *see also infra*, sec. II.C.3.c.

[222] Canada's Second Written 21.5 Submission, para. 97; *see also* Mexico's Second Written 21.5 Submission, para. 128 ("But the labelling rule for imported meat products ("Label D") in the Amended COOL Measure uses the substantial transformation test and it must be deemed to provide consumers with sufficient information on origin.").

[223] *US – COOL (AB)*, para. 468 ("[A] panel's assessment should focus on ascertaining the degree of contribution achieved by the measure, rather than on answering the questions of whether the measure fulfils the objective completely or satisfies some minimum level of fulfilment of that objective. Because the Panel seems to have considered it necessary for the COOL measure to have fulfilled the objective completely, or satisfied some minimum level of fulfilment to be consistent with Article 2.2, it erred in its interpretation of Article 2.2.").

[224] *US – COOL (AB)*, para. 379.

[225] Mexico's Second Written 21.5 Submission, para. 128.

origin information regarding one product as opposed to another is simply irrelevant to whether a an alternative such as this is less trade restrictive, makes an equivalent contribution to the relevant objective that the amended COOL measure does, and is reasonably available to the United States.

126. Finally, the United States has already explained why the phrase "risks non-fulfilment would create" does not provide a different conclusion.[226] Again, what complainants are essentially arguing here is that the objective of consumer information is simply not "legitimate" or "important" enough to rebut an Article 2.2 challenge. As should be clear, the United States considers that providing consumers with this information is very important. And nothing in the TBT Agreement generally, or Article 2.2 specifically, requires the United States to re-order its objectives to conform to the policy priorities of its trading partners. Again, it is notable that complainants make their argument without *even a reference* to the Appellate Body's analysis 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*.[227]

127. Accordingly, complainants' first alternative fails.

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

128. Second, the complainants continue to maintain that applying the ground meat rules to all muscle cuts without exemptions proves the amended COOL measure to be inconsistent with Article 2.2. As explained previously, this argument is in error.[228] The ground meat rules provide limited origin information as to where the animal was born, raised, and slaughtered, and, therefore, cannot be considered to make an equivalent contribution to the objective that the amended COOL measure does – namely, to provide meaningful and accurate information on origin for muscle cuts sold at retail as to where the animal was born, raised, and slaughtered.[229]

129. As they did in the context of their first alternative measure, complainants fill their arguments with irrelevant considerations. Canada contends that the success of the alternative depends on whether the United States has explained why the ground meat rule "fulfils its objective whereas this alternative measure would not."[230] Similarly, Mexico contends that the alternative succeeds because "there is no rational basis for distinguishing between ground beef and muscle cuts."[231] As discussed above, neither of these criticisms reflect the actual test the Panels must apply to make a finding on complainants' Article 2.2 claims. Whether a

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[226] *See* U.S. First Written 21.5 Submission, para. 171.

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

[228] *See* U.S. First Written 21.5 Submission, paras. 172-178.

[229] *See supra*, sec. II.C.2.a; U.S. First Written 21.5 Submission, para. 160.

[230] Canada's Second Written 21.5 Submission, para. 103.

[231] Mexico's Second Written 21.5 Submission, para. 134.

complaining Member considers that another measure would better "fulfil" the responding Member's objective, or whether a complaining Member considers that the alternative measure is better supported by consumer demand,[232] are simply irrelevant considerations for purposes of Article 2.2. The central question for purposes here is whether the alternative measure makes an equivalent contribution to the objective as the amended COOL measure does. This second alternative does not because it provides less information as to where the animal was born, raised, and slaughtered. Under the Appellate Body's guidance in *US – Tuna II (Mexico)*, that is the end of the inquiry.[233]

130. Next, complainants maintain their position that this alternative is less trade restrictive, notwithstanding that it includes an elimination of the three exemptions. As the United States noted in its first submission,[234] neither complaining party has put forward any detailed and comprehensive analyses regarding the impact that the elimination of these exemptions would have on trade or how eliminating them would be less trade restrictive. Bare allegations of the complainants that theorize as to the impact of eliminating these exemptions cannot discharge complainants' burden.[235]

131. Accordingly, complainants' second alternative fails.

d. Third Alternative Measure: Mandatory Trace-Back

132. Third, complainants continue to maintain that the alternative of a trace-back regime proves the amended COOL measure to be inconsistent with Article 2.2.[236] This argument is in error.[237]

133. As the United States explained previously,[238] a complaining party does not discharge its burden of proof by putting forward the alternative measure that is "merely theoretical in

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[232] Mexico's Second Written 21.5 Submission, para. 134 ("Certainly, the United States has presented no evidence that the consumers who purportedly want information on the origin of beef products have indicated that they want more specific information on muscle cuts than ground beef.").

[233] *US – Tuna II (Mexico) (AB)*, para. 330 (reversing the panel's finding that the challenged measure was inconsistent with Article 2.2 because Mexico's proposed alternative "would contribute to both the consumer information objective and the dolphin protection objective *to a lesser degree* than the measure at issue …") (emphasis added).

[234] U.S. First Written 21.5 Submission, para. 176.

[235] *See* Canada's Second Written 21.5 Submission, para. 104. Canada puts forward an argument, unsupported by any evidence, that since these three groups purchase exclusively meat of U.S. origin then they would be unaffected by this alternative measure. This reasoning has no logic or evidence to support such conclusions. *Id.* ("…the vast majority of retailers, food processors and restaurateurs covered by this alternative measure would be unaffected because the vast majority of livestock and meat in the U.S. market is of exclusively U.S. origin.").

[236] Canada's Second Written 21.5 Submission, para. 129; Mexico's Second Written 21.5 Submission, para. 143.

[237] U.S. First Written 21.5 Submission, paras. 179-193.

[238] U.S. First Written 21.5 Submission, para. 180.

nature."[239] Rather, the party must base its proposed alternative on "sufficient evidence," which "substantiat[es] the likely nature or magnitude of the costs that would be associated with the proposed alternative, as compared to the current system."[240] Bare allegations that the Member could or could not adopt the alternative are simply not enough to establish a *prima facie* case.[241]

134. Yet neither complainant takes the opportunity of their second submissions to provide any cost analysis that would bear on the questions of whether a trace-back regime is a less trade restrictive alternative or is reasonably available to the United States. Mexico puts forward no new evidence at all, nor responds to the U.S. criticisms of Mexico's previously submitted evidence.[242] Canada takes a different tack, putting forth an estimate of potential revenue losses to Canadian exporters from COOL and arguing that the trace-back regime, whatever its costs, could not conceivably surmount that (highly inflated) potential loss.[243] As to the costs of the trace-back alternative itself, Canada puts forward no additional information, and continues to rely solely on an analysis related to the voluntary federal animal identification system operated by the USDA's Animal and Plant Health Inspection Service (APHIS) known as the U.S. National Animal Identification System (NAIS). That analysis provided an assessment of an existing and limited voluntary system, where only "direct" costs of changing the tagging and branding systems in place to an electronic system were evaluated, and where the system was limited to identifying animals only from birth up to slaughter (*i.e.*, identification maintained through carcass inspection).

135. As discussed in detail below, the United States does not consider that such evidence satisfies the complainants' burden of proof with regard to such an alternative. Indeed, it should be readily obvious that complainants propose that the United States adopt an exceedingly complex regime, which would likely have far reaching consequences for the U.S. economy and its citizens. Yet neither party even attempts to provide a detailed examination of what such a regime would entail, nor provide any cost analysis of the myriad of steps that the U.S. Government and its industry would need to undertake to put it into place.[244] The fact that this

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[239] *US – Gambling (AB)*, para. 308; *see also* U.S. First Written 21.5 Submission, para. 180.

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

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

[242] *Compare* U.S. First Written 21.5 Submission, para. 192, *with* Mexico's Second Written 21.5 Submission, para. 119.

[243] Canada's Second Written 21.5 Submission, para. 122 ("A trace-back system would be less trade-restrictive than the amended COOL measure because, first, it could not possibly entail costs that would have a greater impact on trade in livestock between Canada and the United States than the impact of the original COOL measure"); Canada's Second Written 21.5 Submission, para. 123 ("A trace-back system could not conceivably entail such additional costs.").

[244] Again, it is very notable that complainants, 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, and, in fact, concede that the U.S. beef industry has strongly opposed even the more modest NAIS. *See* U.S. First Written 21.5 Submission, n.355.

may be very difficult to do can provide no excuse – burden of proof is not allocated based on difficulty.[245]

136. Canada and Mexico's strategy in this case appears to be no different than Canada and Norway's strategy in *EC – Seals* where those complainants also refused to put forward a detailed description of the alternative and any cost analysis of such a regime.[246] Not surprisingly, the *EC – Seals* panel rejected the complainants' Article 2.2 claim.[247] Complainants' claims should also be rejected here.

i. Complainants Have Not Established That Trace-Back Is a Less Trade Restrictive Alternative

137. Complainants continue to maintain – without evidence – that a trace-back system would be less trade restrictive than the amended COOL measure. Canada now argues that trace-back is less trade restrictive for two reasons: 1) trace-back is non-discriminatory; and 2) trace-back "could not possibly entail" the same costs that the amended COOL measure does with respect to Canadian producers.[248] Canada continues to decline to examine what effects a trace-back system would actually have on trade. Mexico provides no additional evidence in its second submission, simply alleging that such a system "would not impose material new costs on Mexican producers."[249]

138. As to Canada's first argument, the TBT Agreement cannot be read to mean that a "less trade restrictive" measure is one that is simply "less discriminatory." Rather, a "less trade restrictive" measure is one that will permit greater market access for goods than the challenged measure.[250] Moreover, in *EC – Seals*, Canada appears to agree with the United States that trade flows, not discrimination, is the touchstone of trade restrictiveness.[251]

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[245] *See EC – Sardines (AB)*, para. 281 ("There is nothing in the WTO dispute settlement system to support the notion that the allocation of the burden of proof should be decided on the basis of a comparison between the respective difficulties that may possibly be encountered by the complainant and the respondent in collecting information to prove a case.").

[246] *EC – Seals (Panel)*, para. 7.503 ("The complainants have not specified the substance of the exact regime (including the standard of animal welfare and method of certification) that would comprise their suggested alternative measure.").

[247] *EC – Seals (Panel)*, para. 7.504.

[248] Canada's Second Written 21.5 Submission, para. 122.

[249] Mexico's Second Written 21.5 Submission, para. 139.

[250] *See supra*, sec. II.C.2.b (discussing the trade-restrictiveness element).

[251] In *Seals*, Canada argued for (and the panel accepted) that Canada's proposed alternative measure was less trade restrictive because it had the potential for increasing trade flows of Canadian seal products into the EU market. *See EC – Seals (Panel)*, para. 7.470 ("Canada describes this alternative as less trade restrictive because the current EU Seal Regime excludes all non-Inuit commercial seal products from the EU market, whereas the alternative regime would allow such non-Inuit commercial seal products provided they meet the animal welfare requirements."); *id.* at para. 7.472 (accepting Canada's argument and determining that, "[w]e found above that the EU Seal Regime limits trade in seal products, including those imported from the complainants, and thus is trade

139. As explained previously,[252] the central question here is what effect the adoption of a trace-back regime will have on trade. And as to this central question, neither complainant *even alleges* that trade would increase under a trace-back regime.[253] Moreover, while Canada contends that the DS384 Panel must "take into account" the practical difficulties in selling or handling imported livestock under the amended COOL measure "that are difficult to quantify," Canada does not address how the "difficult to quantify" consequences of a trace-back regime will affect trade.[254] Finally, while Canada contends that the United States could adopt a trace-back regime for just animals slaughtered in the United States given the distinction the United States makes between categories A, B, and C on the one hand, and D on the other, Canada provides no explanation as to why it considers that the different labeling rule for category D meat would be legitimate for purposes of trace-back, but not legitimate for purposes of the amended COOL measure, as it strongly asserts in its submissions.[255]

140. As to Canada's second argument, Canada relies on Dr. Sumner's analyses of the original COOL regime, which Canada claims to prove the trace-back regime to be less trade restrictive because it "could not possibly entail" the same amount of costs to Canadian industry as the original COOL measure has allegedly imposed, an impact which Dr. Sumner estimates to be the equivalent of increasing processing and marketing costs by $608 per head of cattle and $116 per

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restrictive. . . . In comparison, the alternative measure could possibly permit seal products from the complainants that are prohibited under the EU Seal Regime. In view of the potentially large quantities of seal products derived from non-IC or MRM hunts, we consider that their potential allowance under the proposed alternative measure makes such proposed measure less trade restrictive.").

[252] *See* U.S. First Written 21.5 Submission, para. 186.

[253] Of course to do so would require complainants to explain how, in their view, the 19-76 million dollar amended COOL measure has (or will) significantly reduce trade, while a vastly more expensive trace-back regime would increase trade.

[254] *See* Canada' Second Written 21.5 Submission, para. 128. As discussed in the subsequent sub-section, the imposition of such a complicated and expensive measure may have consequences that go far beyond the mere dollars and cents of a cost-benefit analysis. *See infra*, sec. II.C.3.d.ii (discussing that a trace-back systems is not "reasonably available" to the United States). Yet neither complainant even attempts to address this serious and difficult issue. Canada, for one, simply accepts that the imposition of such a regime will result in bankruptcies in rural America, and moves forward with its argument. *See* Canada's Second Written 21.5 Submission, para. 136 ("While there might be some contraction in the U.S. industry under a trace-back system as a result of a possible reduction in consumer demand . . ."). We do note, however, that Canada appears to be more cautious when it comes to its own economy where it has failed to implement a trace-back regime despite years of study. *See* Canada's Second Written Submission, para. 127 (noting that "Canada and stakeholders are working towards a practical phased-in strategy for tracking animal movements …").

[255] *See* Canada's Second Written 21.5 Submission, para. 125. In fact, just the opposite is true. As discussed above, the distinction in the content of the A, B, and C label on the one hand and the D label on the other makes perfect sense because requiring the born, raised, and slaughtered information on the D Label would not provide much, if any, additional origin information as all (or virtually all) imported meat sold by U.S. retailers will be derived from animals born, raised, and slaughtered in the same country (*e.g.*, "Product of Canada" is the functional equivalent of "born, raised, and slaughtered in Canada"). But that cannot be said of a trace-back regime where the information is not on origin, but the name of the specific ranch, feedlot, or slaughterhouse. In other words, "Product of Canada" is *not* the functional equivalent of "born at Alan's ranch, raised at Bill's feedlot, and slaughtered at Carrie's slaughterhouse."

hog on all livestock processed in the United States.[256] However, the conclusions drawn from the previous econometric models are not credible, highly inflated (to say the least), and suffer from numerous data and methodological shortcomings.

141. For example, it is unclear how Dr. Sumner has updated his data and modeling since Canada's earlier submissions and whether or not those models have corrected for earlier flaws that they had contained. In Exhibit CDA-71, Dr. Sumner, without explanation, abandons variables that at least attempted to pick up seasonal fluctuations in the cattle and hog markets and is now attempting to pick up the effects of major holidays in the United States.

142. Further, it appears to the United States that Dr. Sumner continues to rely on unofficial weekly cattle import data. Weekly data for cattle imports is often revised and may not be reported for each week causing overall data to not be comparable. For that reason, only released monthly data is considered U.S. official import data for cattle. By utilizing unofficial and potentially incomplete weekly data, Dr. Sumner's regression introduces inaccuracy or "noise" into the dataset, his econometric regressions, and his subsequent analysis.

143. Additionally, the data Dr. Sumner has used was misaligned such that it compared last week's U.S. fed steer prices to this week's Canadian fed steer prices. If Dr. Sumner had aligned U.S. and Canadian steer prices with the dates at which these prices were actually paid, then the post-COOL price fluctuations would have reflected more typical seasonal fluctuations for imports of Canadian fed steers.[257] Those inaccuracies persisted throughout his entire analysis and dramatically inflated Dr. Sumner's earlier estimates of a COOL impact as well as the statistical significance of those estimates. It is not clear whether or not Dr. Sumner has corrected for some of those errors. Judging by the estimates provided, which are similar to his earlier results, it is likely that he continues to use the misaligned and unofficial trade data.[258]

144. However, even if we were to set aside those inaccuracies and discrepancies, then Dr. Sumner's conclusions should be readily observable in today's market for Canadian cattle in the

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[256] Canada's Second Written 21.5 Submission, para. 122; *see also* Daniel Sumner, "Magnitude of added compliance costs required for a non-discriminatory alternative measure to have equivalent export losses (trade effects) as the original discriminatory COOL measure," at 5 (Dec. 17, 2013) ("Sumner's magnitude analysis") (Exh. CDA-123).

[257] Aligned Pre-COOL and Post-COOL Fluctuations in U.S. to Canadian Steer Prices (Exh. US-41).

[258] In addition to those issues, Dr. Sumner's regression also did not include important variables that would have changed the statistical significance and level of impact in his findings. For example, Dr. Sumner did not account for the economic recession of 2008 as a variable within his regression, instead using unemployment as a recession proxy. There are serious problems with using unemployment as a proxy for recession, since it is a lagging indicator. In addition, Dr. Sumner's "pre-COOL" time period did not sufficiently account for the 2003-2005 United States ban on Canadian cattle due to an occurrence of BSE in the Canadian herd. In order to compare post-COOL effects with accurate pre-COOL normal fluctuations in cattle imports, Dr. Sumner should have utilized a larger pre-COOL dataset extending back to 2000. By not accounting for those and other factors such as additional BSE and feed ban effects, Dr. Sumner provided an economic model that attributes many otherwise explainable fluctuations in Canadian exports of livestock cattle to the original COOL measure. It is unclear if Dr. Sumner's new regressions address those concerns. Without correcting for those, estimates provided by Dr. Sumner's regression models will likely overstate the effect of COOL as well as inflate the statistical significance of those estimates.

United States, given that the original COOL measure is imposing costs of approximately $600 per head, in the form of increased processing and marketing costs, on Canadian exported cattle. Under these circumstances, one would expect to see drastic differences between Canadian steer prices and U.S. steer prices to account for such an effect. In fact, to the contrary, there has been minimal change between the price of U.S. and Canadian cattle and the difference between these prices has actually narrowed.[259]

145. Given these minimal changes in Canadian steer prices in respect of U.S. steer prices, Dr. Sumner's model, if appropriate, implies that Canadian cattle producers and U.S. packers and feedlots purchasing Canadian livestock are internalizing the majority of the estimated equivalent costs (which, according to Dr. Sumner, at a minimum, are equivalent to 39 percent of the average wholesale steer price).[260] But to do so would be prohibitively expensive and should cause the Canadian live cattle export market to the United States to disappear entirely. But this is not occurring. In fact, the quantity and price of cattle exported from Canada into the United States has remained relatively consistent, accounting for normal fluctuations since the implementation of the 2009 Final Rule.[261] In short, Dr. Sumner's analysis is simply not credible and is not borne out by the facts and data in the market.

146. For the above reasons, neither Dr. Sumner's analysis, which purports to analyze the costs of the original COOL measure, nor any other evidence submitted by complainants, demonstrates that the trace-back regime is less trade-restrictive than the amended COOL measure.

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

147. While complainants appear to accept the Appellate Body's view in *US – Gambling* that an alternative measure is not "reasonably available" where it "imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties," neither complainant provides any evidence to establish a *prima facie* case that the measure is, in fact, reasonably available.

148. First, Mexico contends that it does not shoulder the burden in this regard, and (presumably) in light of that position, provides no additional cost analysis, nor responds to any of the U.S. criticisms of the sole piece of evidence that Mexico relies on, the ten year old Hayes & Meyer article.[262] As discussed above, it is clear that Mexico, as the complaining party, has the

[259] Differences in Auction Prices for U.S. and Canadian Feeder and Fed Cattle pre and post COOL (Exh. US-42).

[261] Exh. US-43.

[261] Exh. US-43.

[262] *Compare* U.S. First Written 21.5 Submission, para. 182, *with* Mexico's Second Written 21.5 Submission, para. 119.

burden of proof with regard to the alternatives it proposes.[263] It is equally clear that Mexico has failed to satisfy that burden of proof.

149. Second, while Canada appears to accept that it has the burden of proof to prove that a trace-back regime is "reasonably available," Canada does not put forward sufficient evidence to establish a *prima facie* case in this regard, relying solely on a cost estimate done in relation to the NAIS.[264]

150. As a general matter, and as noted previously, USDA has previously investigated whether to implement an animal ID program, but abandoned the project in light of significant concerns regarding how it would affect the U.S. beef industry. These concerns were not just related to the significant costs involved, but also to the consequences of those costs – namely, that such a system could reward "vertical integration at the expense of family farms."[265] And Canada agrees that the risk of this and other impacts on the U.S. industry is real, conceding that "there might be some contraction in the U.S. industry under a trace-back system as a result of a possible reduction in consumer demand . . . ."[266] Not surprisingly, the United States is extremely concerned about such a risk. To be clear, the United States considers any alternative measure that would re-organize U.S. industry to the detriment of the family farm and other small businesses to be *per se* an undue burden, and thus not "reasonably available" to the United States.

151. As to the costs of trace-back itself, as noted above, Canada misleadingly relies on a cost analysis commissioned by APHIS and performed by a consortium of non-government researchers in connection with the NAIS.[267] The NAIS Study did not did not evaluate a trace-back system from farm to *retail*. Rather, it only evaluated traceability up to the point of *slaughter*, since it was focused on animal disease status, not consumer information. Yet the implementation of animal traceability would create heavy costs after the animal has been slaughtered at the processing and retail levels where workers are forced to keep meat from each animal segregated and attached to data generated at the farm and intermediary production steps. As such, it is clear that Canada has not put forward a complete cost analysis – the numbers it cites in paragraph 133 of its second submission only relate to the pre-harvest production level – and Canada simply provides no cost analysis whatsoever with regard to the processing and retail levels.[268]

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[263] *See supra*, sec. II.C.3.a.

[264] Canada's Second Written 21.5 Submission, para 124.

[265] U.S. First Written 21.5 Submission, para. 191 (quoting Congressional Research Service, "Animal Identification and Traceability: Overview and Issues," p. 10 (Nov. 29, 2010) ("2010 CRS Report") (Exh. CDA-92)).

[266] Canada's Second Written Submission, para. 136.

[267] *See* USDA, Animal and Plant Health Inspection Service (APHIS), "Benefit-Cost Analysis of the National Animal Identification System" (Jan., 14, 2009) (NAIS Study) (Exh. CDA-133).

[268] *See* Canada's Second Written 21.5 Submission, paras. 134-135.

152. The U.S. beef and pork supply chain is large and exceedingly complicated. In order to implement a full trace-back system in the United States, the system would need to apply to three production and distribution stages. The first stage would encompass trace-back of an animal from birth, raising, and entering the slaughter plant, as discussed above. The second stage would encompass slaughter and processing of an animal into carcass and muscle cuts. Most U.S. slaughterhouses process animals from carcasses into muscle cuts before shipping to retailers for further fabricating.[269] Logistically, industrial slaughterhouses process between 2.8 million to 3.2 million pounds of beef per day.[270] Maintaining individual trace-back to each animal once processing has begun, especially on such a massive industrial scale, would be a herculean task. The third stage of trace-back would require each retailer throughout the United States to provide consumers with the ability to trace-back each individual cut of beef that is sold within its stores to individual cattle. This would be especially costly for retailers that continue to process and cut down the meat they receive from slaughterhouses. Such retailers would need to setup potentially complicated processes to ensure that each cut that was further processed would continue to retain traceability. Any cost analysis must account for each of the three stages.

153. USDA has never produced an analysis of the costs of implementing a farm to retail trace-back regime for beef and pork, and, as discussed above, it is not the U.S. burden to do so for purposes of this proceeding.

154. As is clear, however, the costs of implementing such a regime would be high indeed, and would likely have dramatic effects on the industry. By moving from a COOL regime to a traceability regime that is concerned with the life history of each animal, animals are forced to move in batches of one animal (*i.e.*, animal by animal) through the slaughter facility, in the packaging process, and at the retail level, as meat cutters are forced to segregate each animal and the meat for each animal from other animals to ensure the label finally placed at retail has accurate detailed information about place of birth, development, and slaughter. Those procedures would require dramatic slowdowns in the meat cutting process, and would add substantial burdens to retailers and other vendors who must associate particular cuts of meat with labels that correspond to the individual animal.

155. In this regard, the U.S. industry differs greatly from the two examples Canada cites to, Japan and Uruguay, both of which have much smaller industries than the United States does.[271] For example, Japan produced 1.3 million head of cattle and 17. 3 million hogs in 2012 (compared to 34.3 million head of cattle and 117.6 million hogs in the United States). As such,

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[269] Carcasses are generally dissembled into primal cuts that are further broken down into sub-primal cuts. Once processing has begun (from carcass to primal cuts) cuts from the same carcass do not move as a single unit, but are split off for further fabrication (into sub-primal cuts) to disassembly lines specializing in each cut of meat. These sub-primal cuts of meat are then graded (based on marbling of the meat), chilled, further fabricated, and packaged for shipping to retailers.

[270] U.S. industrial slaughterhouses have the capacity to slaughter 4,000 cattle per day, while moderate-sized slaughterhouses may slaughter between 1,200 to 1,600 cattle per day. Due to the scale of these plants, processing of cattle depends on narrow margins and high volume operational efficiencies to remain profitable.

[271] *See* Canada's Second Written 21.5 Submission, para. 134.

the Japanese meat industry is set up to process much less volume, and at a much slower speed than the U.S. industry, orienting itself more towards artisanal production than the assembly-line efficiency of the U.S. system.[272] Not surprisingly, Japanese beef prices are much higher, with November 2013 retail sirloin per pound prices of approximately $27.38 in Japan compared to $6.80 in the United States.[273]

156. It is, of course, telling that Canada cannot cite *itself* as an example of a country that has implemented a trace-back regime, despite studying the issue since 2003. All Canada can say is that it and its stakeholders "are working towards a practical phased-in strategy for tracking animal movements."[274] The fact that Canada has been "working towards" full national traceability for over a decade now, without being able to implement (or even being able to state *when* it will implement), underscores how just how difficult it is for a country to implement this extremely expensive system. And if that is true for Canada then it means it will be even more true for the United States, which has much larger herds than does Canada,[275] and whose individual animals appear to move much more frequently domestically than do Canadian animals.[276] It is therefore curious that Canada chooses to criticize the United States for "lag[ging] behind several other WTO Members" in implementing a trace-back regime,[277] as Canada itself does not appear willing to impose such costs on its industry.

157. In light of the above, it is clear that complainants have failed to prove that trace-back would not constitute an "undue burden" on the United States and therefore could be considered a "reasonably available" alternative. In particular, neither complainant provides any estimates of the costs that implementing such a complicated system would entail, and therefore cannot prove that it would not, in fact, be a "prohibitively expensive" option.[278] As discussed above, this is a

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[272] Similarly, Uruguay has a much smaller industry than the United States does. However, as cited in Exhibit CDA-131, the Uruguayan industry has been firmly committed to developing a trace-back system since the Uruguay Round to ensure access to the EU market, in particular to the "Hilton quota" for high quality beef that fetches a market premium and helps support the additional costs of trace-back. Importantly, despite industry imperative to access demanding markets like the EU, technical assistance from the likes of IICA, the World Bank and others, and a relatively small and highly organized industry, it is only now, *30 years later*, that Uruguay is finally implementing a national trace-back system.

[273] Figures are derived from a comparison of USDA AMS Market News "Japanese Retail Prices of Beef," available at http://www.ams.usda.gov/mnreports/wa_ls681.txt, and USDA ERS dataset "Retail prices for beef, pork, poultry, poultry cuts, eggs, and dairy products," available at http://www.ers.usda.gov/data-products/meat-price-spreads.aspx.

[274] Canada's Second Written 21.5 Submission, para. 127.

[275] *See* U.S. First Written 21.5 Submission, n.360 (noting that U.S. cattle and hog herds are 7 and 5 times larger than the Canadian herds, respectively).

[276] *See infra*, sec. II.C.3.e (discussing Canada's proposed fourth alternative).

[277] Canada's Second Written 21.5 Submission, para. 131.

[278] *US – Gambling (AB)*, para. 308; *Brazil – Retreaded Tyres (AB)*, para. 156 (recognizing that "prohibitive costs or substantial technical difficulties" can prevent an alternative measure from being considered to be reasonably available); *see also EC – Seals (Panel)*, para. 7.502 (recognizing same); *China – Publications and Audio Visual Products (AB)*, paras. 327-328 (Party must base its proposed alternative "with sufficient evidence," which

vastly more expensive option. Moreover, the imposition of a trace-back regime poses a real risk of increased consolidation in U.S. industry (to the detriment of the family ranch and other small businesses) as well as forcing larger processors and retailers to completely change their business model. Neither complainant puts forward any explanation as to why an alternative that poses such significant risks as these could ever be considered "reasonably available." The fact of the matter is that an alternative measure of this nature simply cannot prove that the amended COOL measure is "more trade restrictive than necessary."

158. Accordingly, complainants' third alternative fails.

e. Fourth Alternative Measure: State/Province Labeling

159. In its second submission, for the first time, Canada (but not Mexico) puts forward a fourth alternative measure: a labeling regime whereby the label would inform consumers as to the state or province from which an animal was born, raised, and slaughtered.[279] Canada puts forward no (or virtually no) evidence to support this alternative, and it is abundantly clear that Canada has not established a *prima facie* case that that this alternative proves that the amended COOL measure is inconsistent with Article 2.2. Canada merely alleges, without support, that the alternative would provide a "greater degree of fulfillment" than the amended COOL measure and would be less trade-restrictive.[280] Importantly, however, it does not appear to the United States that this alternative is any more reasonably available or any less trade-restrictive than the trace-back regime. As such, the United States considers that this alternative does not present an entirely new alternative at all.

160. Cattle production in the United States is widely dispersed throughout the entire country.[281] However, because it is often less expensive to move animals than feed, the U.S. industry is characterized by a large amount of interstate movement of animals. This is particularly true for cattle, 57 percent of which move interstate,[282] but it is true for hogs as well. As such, the U.S. industry has evolved such that different regions of the country have specialized in certain aspects of livestock production system.[283] As an individual cow moves through its lifecycle it would not be unusual for it to move through multiple states as it goes to different

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"substantiat[es] the likely nature or magnitude of the costs that would be associated with the proposed alternative, as compared to the current system.").

[279] Canada's Second Written 21.5 Submission, para. 138 (stating that these requirements would be in "addition to the existing requirements of the amended COOL measure").

[280] Canada's Second Written 21.5 Submission, para. 138.

[281] Economic Research Service USDA, "Interstate Livestock Movements," Dennis A. Shields and Kenneth H. Matthews, Jr., at 4 (June 2013) (Exh. US-44) ("Interstate Livestock Movements") ("The U.S. cattle herd is dispersed throughout the U.S., reflecting the distribution of forage, the most important production input."); *see also id.* at 8 ("The U.S. calf crop is widely dispersed, reflecting a widely dispersed cow herd.").

[282] Interstate Livestock Movements, at 2 (Exh. US-44).

[283] Interstate Livestock Movements, at 6 (Exh. US-44).

specialized feed lots, etc.[284] Moreover, the overwhelming majority of cattle (85 percent) are sold and resold in local auctions, often several times, where they are "sorted and mixed with calves from other areas before ultimately arriving at pastures or feedlots."[285] This repeated intermingling of cattle from different states between multiple auction houses commonplace within the cattle industry would necessitate that each individual head of cattle be tracked as it goes through the livestock production process. As such, it would appear to the United States that the recordkeeping that would need to be required in any such system would need to track the individual animal, no different from the trace-back system.[286]

161. We do note, however, that U.S. cattle production is in stark contrast to Canadian cattle production, which is highly concentrated in Western Canada, with nearly 86.6 percent of all beef cows within this region.[287] Additionally, the remaining cattle not produced in Western Canada are exceptionally concentrated, with 91 percent of all beef cattle raised in Eastern Canada occurring in the provinces Ontario and Quebec.[288] It does not appear to the United States that there is the same amount of inter-province movement of cattle (or hogs) as there is in the United States.

162. As noted above, Canada has not provided any evidence to validate its assertions that this alternative measure will be less trade restrictive than the amended COOL measure. Instead, Canada makes unsubstantiated statements that such a measure would "level the playing field." As discussed above, this is not the test for whether an alternative measure is less trade restrictive.

163. Finally, the United States and not Canada has the right to determine the level of fulfillment required under its regulations. The United States has clearly stated that the original COOL measure requires the *country* of origin labeling for where meat was born, raised and slaughtered, and the amended COOL measure has not altered this level of fulfillment. Canada may voluntarily provide greater information from its processors to U.S. producers and retailers, but the amended COOL measure does not require such additional information.

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[284] Interstate Livestock Movements, at 8 (Exh. US-44). For example, four States contain 25 percent of the U.S. calf crop, while 65 percent of cattle feeding is concentrated in four States, and finally two-thirds of a cattle are slaughtered in three States. *See id.*

[285] Interstate Livestock Movements, at 6 (Exh. US-44).

[286] Hogs are very similar to cattle in that a piglet may be born in North Carolina, fed to market weights in Iowa, and slaughtered in California. Interstate Livestock Movements, at 2 (Exh. US-44). Although hogs travel more frequently in lots between states, there is just as much likelihood that pigs from different states may mix in auction houses and will also require individual trace-back to comply with this alternative measure.

[287] Canfax Research Services, Canadian Cattlemen's Association, "Economic Impacts of Livestock Production in Canada – A Regional Multiplier Analysis," Suren Kulshreshtha, Oteng Mondongo and Allan Florizone, at 11-12 (Sept. 2012) (Exh. US-45) ("Economic Impacts of Livestock Production in Canada") Western Canada accounts for 78.2 percent of calves under one year, 73.9 percent of steers, and 81 percent of heifer for slaughter or feeding.

[288] Economic Impacts of Livestock Production in Canada, at 14 (Exh. US-45). Within Eastern Canada, most cattle are dairy cattle, with only 18 percent being in beef production. Of those 18 percent, 54 percent of the total beef numbers are concentrated in Ontario, with 37 percent remaining concentrated in Quebec.

164. For these reasons, Canada has not proved that this alternative establishes that the amended COOL measure is inconsistent with Article 2.2.

4. Conclusion on Article 2.2

165. For the above reasons, the complaining parties have failed to establish a *prima facie* case that any of their three (or four) alternatives are "less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available" in comparison with the amended COOL measure.[289] As such, the complaining parties have failed to establish a prima facie case that the amended COOL measure is inconsistent with Article 2.2.

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

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

166. In its first written submission, the United States explained that under the plain text of Article 21.5 of the DSU, the terms of reference of a compliance panel do not include a claim that a measure taken to comply causes non-violation nullification or impairment ("NVNI"). This is for the simple reason that the questions presented for purposes of Article 21.5 are either: (1) whether a measure taken to comply exists (an issue not presented in the current proceeding); or (2) whether a measure taken to comply is inconsistent with a covered agreement. The first question is inapplicable in this case since the United States has taken a measure to comply. The second question by definition concerns the inconsistency of a measure, and therefore excludes a claim of *non-violation* nullification and impairment.

167. Complainants attempt to respond by arguing that "'consistency' can have a meaning that is broader than a violation or infringement of a covered agreement"[290] or, perhaps even more surprisingly, that a "measure 'taken to comply' that results in the non-violation nullification or impairment of any benefit which accrues to a party under the GATT 1994 is no less *inconsistent* with the GATT 1994 than a measure which results in a violation of one or more provisions."[291] Neither approach can be reconciled with the text of the DSU or with the complainants' own claims.

168. For example, Article 19.1 of the DSU provides that: "Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement." At the same time, Article 26.1(b) of the DSU (which applies "[w]here 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") provides that: "where a measure has

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[289] *US – COOL (AB)*, para. 379.

[290] Canada's Second Written 21.5 Submission, para. 154.

[291] Mexico's Second Written 21.5 Submission, para. 144.

been found to nullify or impair benefits under, or impede the attainment of objectives, of the relevant covered agreement without violation thereof, there is no obligation to withdraw the measure. However, in such cases, the panel or the Appellate Body shall recommend that the Member concerned make a mutually satisfactory adjustment."

169. These two provisions of the DSU make it clear that if it is a case of measure that is inconsistent with the covered agreements, then Article 19.1 applies and Article 26.1(b) does not apply, and the converse is also true. Contrary to what the complainants now assert, the term "inconsistent" does not encompass measures that are both consistent and inconsistent with the covered agreements.

170. The NVNI claims of the complainants appear to be claims in the alternative. Essentially, the complainants are claiming that, if the Panels find that the amended COOL measure is not inconsistent with one of the provisions of a covered agreement cited by a complainant in its panel request, then the amended COOL measure nonetheless nullifies or impairs the benefits of Canada or Mexico.

171. However, the complainants' own claims demonstrate that their NVNI claims do not involve a "disagreement as to the … consistency with a covered agreement of measures taken to comply." Rather, at the point their NVNI claims would become relevant, there is no longer a disagreement as to consistency, and the issue involves instead the issue of whether, despite the lack of any inconsistency, the amended COOL measure nullifies or impairs benefits. This latter question is not within the terms of reference of Article 21.5 of the DSU.

2. Complainants' NVNI Claims Otherwise Fail

a. Canada and Mexico Have Failed to Demonstrate that their "Benefits" Are Being Nullified or Impaired

172. The complainants appear to agree that they need to demonstrate that the amended COOL measure nullifies or impairs benefits accruing to them under the WTO Agreement.[292] However, they fundamentally misunderstand what this demonstration entails. First, they have only generally referred to "tariff concessions" under the GATT 1994 without ever specifying what they are in detail. This general reference is not sufficient to meet the requirement in Article 26.1(a) that "the complaining party shall present a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement."

173. But even more importantly, the complainants do not explain how the amended COOL measure can nullify or impair any benefits under these unspecified tariff concessions when they concede that currently their trade is governed by, and benefitting from, tariff concessions under the North American Free Trade Agreement ("NAFTA"). If their trade is not benefitting from

[292] *See e.g.*, Mexico's Second Written 21.5 Submission, para. 155; Canada's Second Written 21.5 Submission, para. 157.

WTO tariff concessions, then the benefits under those tariff concessions are being neither nullified nor impaired.

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

174. Complainants also appear to misunderstand the aspect of an NVNI claim relating to reasonable expectations. Complainants state that they could not have anticipated the "upset of the competitive relationship"[293] or "a change to the labelling regime that is designed and implemented in a manner which results in severe discriminatory treatment and the modification of competitive opportunities in the U.S. market to the detriment of Mexican cattle."[294] In both cases, however, complainants appear to be arguing that they did not anticipate a measure in breach of the covered agreements. This argument does not, however, address *NVNI* claims.

175. Furthermore, the complainants do not address the evidence put forward by the United States that the complainants had a reasonable expectation that the United States could require more information be provided to consumers as to the origin of the meat they purchased.

III. CONCLUSION

176. 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 XXIII:(1)(b) claims outside the terms of reference for these Panels.

[293] Canada's Second Written 21.5 Submission, para. 156.

[294] Mexico's Second Written 21.5 Submission, para. 164.