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)**

(AB-2014-10)

Appellant Submission
of the United States of America

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Canada – Periodicals (AB)	Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R, adopted 30 July 1997
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EC – Hormones (AB)	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998
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US – Tuna II (Mexico) (AB)	Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012
US – Wools Shirts and Blouses (AB)	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1

I. INTRODUCTION AND EXECUTIVE SUMMARY

A. Introduction

1. The United States stands alone as a leader in importing livestock for slaughter. The evidence on the record is clear on this point – U.S. livestock imports over the last ten years (2003-2012) account for, on average, 72 percent of the global share of cattle trade and 91 percent of the global share of trade in hogs.[1]

2. In terms of cattle, the United States imports "feeder" cattle into the United States that may be as young as 6 months old and as old as 15 months old.[2] These animals undergo a veterinarian certificate for purposes of U.S. animal health requirements before entering the U.S. herd. The animals are then further fattened in the United States before reaching slaughter weight at approximately 22 months of age.[3] The muscle cuts produced from such animals are considered "B" category muscle cuts for purposes of the amended county of origin labeling ("COOL") measure. In addition, Canada (but not Mexico) exports to the United States animals that are sent directly to U.S. slaughterhouses for "immediate slaughter" in the United States. Such cattle need not pass a veterinarian exam and are kept physically segregated from the U.S. herd at these slaughterhouses for animal health reasons. Such animals are typically slaughtered on the same day that they are imported. The muscle cuts produced from such animals are considered "C" category muscle cuts for purposes of the amended COOL measure. Finally, the United States produces muscle cuts from animals born, raised, and slaughtered in the United States. The muscle cuts produced from such animals are considered "A" category muscle cuts for purposes of the amended COOL measure.

3. Prior to the application of the original COOL measure, it was impossible for U.S. consumers to know the origin of beef and pork muscle cuts they purchased at retail. The animal could have spent its entire life in the United States, half its life in the United States, or a single day – there was no way of knowing. The original and amended COOL measures changed this. Now customers, at any one of the over 30,000 retail establishments in the United States that is covered by the amended COOL measure,[4] have a clear idea of the country of origin of these products. And they have that clear idea because the COOL measure, as amended by the 2013 Final Rule,[5] provides meaningful and accurate information on labels that clearly distinguish the country of origin of different muscle cuts based on where the animal was born, raised, and slaughtered.

4. But, as has been thoroughly discussed in these proceedings, providing that information comes at a cost. It is simply *impossible* to provide consumers information on origin as to different muscle cuts produced from animals slaughtered in the United States without

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[1] *See* International Trade in Cattle and Hogs (Exh. US-32).

[2] *US – COOL (Article 21.5) (Panel)*, para. 7.241.

[3] *US – COOL (Article 21.5) (Panel)*, para. 7.242.

[4] U.S. First Written 21.5 Submission, para. 92.

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

establishing some sort of recordkeeping system that can be used to produce the labels used at retail, and verify that those labels are accurate. And that recordkeeping, combined with the fact that the United States produces the majority of cattle slaughtered in the United States, led the Appellate Body in the original proceeding to determine that distinguishing muscle cuts based on where the animal was born, raised, and slaughtered (along with the corresponding labels), created a detrimental impact on the conditions of competition for imported livestock.[6]

5. However, the amended measure is consistent with Article 2.1 of the *Agreement on Technical Barriers to Trade* ("TBT Agreement"). Indeed, as discussed below, accurate and meaningful information on origin relating to the three production steps for muscle cuts is now provided to consumers on all of the labeled Category A, B, and C meat that they buy at retail. This clearly provides a sound basis for why the measure requires the recordkeeping in the first place, such that the relevant regulatory distinctions are even-handed and the detrimental impact no longer reflects discrimination. The Panels erred in finding otherwise.

6. Similarly, the Panels erred in finding the amended measure to be in breach of Article III:4 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"). Under the Panels' interpretation and application of Article III:4 of the GATT 1994, the United States is *prohibited* from providing consumers such information on origin simply on the basis that to do so causes a detrimental impact on imported livestock. But the DSB has already found that the amended COOL measure's objective is entirely legitimate, the pursuit of providing consumers information on origin,[7] and not protectionism as complainants had argued. Nor could the United States provide this same level of information in a less trade restrictive manner. Indeed, neither complainant put forward a less trade restrictive alternative to the amended COOL measure that satisfied their burden of proof under Article 2.2.

7. The United States considers this to be in error. Providing consumer information on origin is an entirely legitimate governmental objective, and the Membership did not design the covered agreements to prevent a Member from pursuing such legitimate objectives "at the levels it considers appropriate."[8]

8. The fact that causing a detrimental impact to imported livestock is an *unavoidable consequence* of providing accurate origin information on muscle cuts produced from animals slaughtered in the United States cannot mean that the United States discriminates against foreign livestock imports in pursuit of this legitimate governmental objective without more. That "more" cannot be the exemptions from COOL requirements, which permit competitive opportunities for imported livestock not subject to the labeling and record-keeping requirements. And the Panels have, in fact, pointed to no evidence that the exemptions do not operate in this way; to the contrary, record evidence (including from the complainants) which the Panels did not even examine suggested that distinct channels of distribution do exist for entities that are exempt. While Canada and Mexico, and certain U.S. operators, may prefer that there be no requirement

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[6] *See US – COOL (AB)*, paras. 290-92, 341.

[7] *See US – COOL (AB)*, paras. 433, 453.

[8] TBT Agreement, sixth preambular recital.

to let U.S. consumers know where the meat they are purchasing was produced (including in Canada or Mexico), there is nothing about the design or operation of the COOL requirements that is not "even-handed". Whatever one thinks of the policy of country-of-origin labeling, including whether the costs outweigh the benefits, the U.S. COOL measure does not discriminate.

9. The United States respectfully requests the Appellate Body to reverse the Panels' errant findings on Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994, and make clear that the United States does not breach its WTO obligations by providing consumers information on origin for the beef and pork they purchase at retail.

10. To do otherwise, would lead to the following untenable result. The COOL measure would provide accurate origin information on retail labels; the records required to be maintained and transmitted would correspond to the information provided by those labels; there would be no evidence that the exemptions are discriminatory or otherwise do not operate as designed, for example, to exempt food service establishments and their suppliers from the COOL requirements; and no less-trade-restrictive alternative would have been identified that provides U.S. consumers with as much origin information as the amended COOL measure. Yet despite this situation, the amended COOL measure would be found to discriminate against imported livestock and breach WTO rules. The United States does not consider that this is or could be the right result. The WTO Agreement should not be understood to hold that a WTO Member has illegally discriminated if it chooses to adopt a perhaps costly, but neutral, requirement to provide truthful origin information for meat.

B. Executive Summary

1. The Panels Erred in Finding the Amended COOL Measure Inconsistent with Article 2.1 of the TBT Agreement

11. In the underlying dispute, the Appellate Body raised certain concerns with the original COOL measure and found that it breached Article 2.1 of the TBT Agreement. The United States took careful note of each of the concerns expressed and addressed those through the 2013 Final Rule:

- First, the Appellate Body noted that, "the COOL measure requires the labels to list the country or countries of origin, but does not require the labels to mention production steps at all."[9] The 2013 Final Rule requires that each production step be listed on the label.

- Second, the Appellate Body noted that, "[i]f, for example, the relevant production steps took place in more than one country, the relevant label (B or C) will identify more than one country, but will not identify which production step took place in

[9] *US – COOL (AB)*, para. 343.

which of those countries."[10] The 2013 Final Rule requires that the label identify the country where birth and slaughter took place, and requires that at least one country be listed where the animal was raised.[11]

- Third, the Appellate Body noted that, "labels for Category B meat may also list countries of origin in any order, such that the order of countries listed on the labels cannot be relied upon to indicate where certain production steps took place."[12] The 2013 Final Rule mandates that each production step be listed: birth, raising, and slaughter, eliminating any confusion by the sequence in the label.

- Fourth, the Appellate Body noted that, "due to the additional labelling flexibilities allowed for commingled meat, a retail label may indicate that meat is of mixed origin when in fact it is of exclusively US origin, or that it has three countries of origin when in fact it has only one or two."[13] The 2013 Final Rule eliminates commingling, thus removing that source of potential inaccuracy or confusion identified by the Appellate Body.

12. As a result of these concerns, the Appellate Body broadly noted that "the COOL measure does not impose labeling requirements for meat that provide consumers with origin information *commensurate* with the type of origin information that upstream livestock producers and processors are required to maintain and transmit."[14] By making the changes mentioned immediately above, the 2013 Final Rule now ensures that all labeled Category A, B, and C meat contains information on the same three production steps that producers and processors are required to maintain.

13. Thus, the United States sought through the 2013 Final Rule to address the concerns raised by the Appellate Body and to ensure that any detrimental impact to imported livestock stemmed exclusively from legitimate regulatory distinctions.

14. In this compliance dispute, the Panels nonetheless found the amended COOL measures inconsistent with Article 2.1 of the TBT Agreement because the detrimental impact resulting from the measure did not stem exclusively from legitimate regulatory distinctions. The Panels based this erroneous conclusion on three findings it appeared to consider independently: (1) the amended measure "entails an increased recordkeeping burden"; (2) the B and C labels have "a potential for label inaccuracy"; and (3) the amended measure "continues to exempt a large proportion of muscle cuts."

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[10] *US – COOL (AB)*, para. 343.

[11] As discussed below, for the B Label, the United States must be listed as a country of raising (although other countries may be listed as well), and for the C Label the country of export must be listed as a country of raising (although other countries may be listed as well). *See* U.S. Response to Panels' Question 6, paras. 12-17.

[12] *US – COOL (AB)*, para. 343.

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

[14] *US – COOL (AB)*, para. 343 (emphasis in original).

15. Based on these findings, the Panels found that the amended measure provides less favorable treatment to complainants' livestock imports inconsistent with the national treatment obligation contained in Article 2.1.[15] The United States now appeals that ultimate finding of inconsistency with Article 2.1 as well as these three intermediary findings, all of which are the result of fundamental legal errors.

a. Panels Erred in Finding that the Detrimental Impact Does Not Stem Exclusively From Legitimate Regulatory Distinctions Due to Recordkeeping

16. With respect to recordkeeping, the United States appeals the Panels' finding that the detrimental impact does not stem exclusively from legitimate regulatory distinctions because the amended COOL measure "entails an increased recordkeeping burden" in three respects.

17. First, the Panels erred in considering that their finding that the amended measure "entails an increased recordkeeping burden" constitutes a basis for finding that the amended measure's detrimental impact does not stem exclusively from legitimate regulatory distinctions. The Panels failed to put the issue of record-keeping within the proper analysis, which involves a comparison of the burdens of recordkeeping and the provision of information through labels. Specifically, whether the amended COOL measure "entails an increased recordkeeping burden" or not, and, if so, to what extent, is *not directly relevant* to the question of whether any regulatory distinctions that cause that detrimental impact are themselves legitimate in the sense that they are designed and applied in an even-handed manner.

18. Rather, to the extent that the recordkeeping burden has increased under the amended COOL measure is at all relevant to the second step of the Article 2.1 analysis, it is only relevant to the question of whether a "disconnect" exists between the amount of origin information collected and the origin information provided. The appropriate inquiry is whether this burden is so disproportionate that the collection of the information cannot be explained by the information provided to the consumer.[16] For this reason, the Panels' reliance on *any increase* in recordkeeping burden without considering that finding within a proper analysis of whether the detrimental impact stems exclusively from legitimate regulatory distinctions is in error and does not support a conclusion that the amended measure is inconsistent with Article 2.1 of the TBT Agreement.

19. Second, the Panels erred in basing their finding that the point of production labels "in of themselves" "increased [the] recordkeeping burden in practice" for U.S.-slaughtered livestock has no basis and therefore reliance on such a finding to support a conclusion on detrimental impact is legal error.[17] The Panels based their conclusion on hypothetical livestock transactions devised by the Panels without regard to the actual trade in livestock between the three parties. As a preliminary matter, the Panels found that the point of production labels for "single foreign

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[15] *US – COOL (Article 21.5) (Panel)*, para. 7.284.

[16] *See US – COOL (AB)*, para. 349.

[17] *US – COOL (Article 21.5) (Panel)*, paras. 7.134, 7.150.

origin" animals would *not* lead to more labels, or record-keeping burden, provided those animals (or the resulting muscle cuts) are not commingled.[18] The Panels appear to recognize this, and as such, unreasonably stretch their analysis to include purely hypothetical livestock transactions "without assessing the probabilities of the various hypothetical scenarios."[19]

20. Specifically, single foreign origin animals constitute virtually the entirety of the livestock market in the United States. That is to say, the market for livestock slaughtered in the United States consists of A animals (*i.e.*, animals born, raised, and slaughtered in the United States), "single foreign origin" B animals from either Canada or Mexico (*i.e.*, animals born in either Canada *or* Mexico, raised and slaughtered in the United States), and "single foreign origin" C animals from Canada (*i.e.*, animals born and raised in Canada and exported for immediate slaughter in the United States). Contrary to the various scenarios posited by the Panels, there is no evidence of trade in live animals between Canada and Mexico that would result in the "multiple origin" animals on which the Panels based their findings. For this reason, the Panels' analysis of the recordkeeping burden was based on incorrect and impractical hypotheticals, and therefore lacks a "proper reasoning based on inadequate factual analysis,"[20] and, as such, constitutes legal error.

21. Third and finally with respect to recordkeeping, the Panels erred in relying on the removal of the country order flexibility as increasing recordkeeping burdens.[21] The Panels found that the removal of the commingling flexibility and order of country flexibility both increased the number of distinct labels, which in turn increased segregation, and thus, increased the recordkeeping burden.[22] However, enhancing the information provided to consumers by using point of production labels did not change the underlying record-keeping requirement, and the removal of the country order flexibility did not change, much less increase, recordkeeping requirements for origin claims. To put it another way, the underlying recordkeeping requirements were not changed at all by the modifications to the COOL measure; these

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[18] *See US – COOL (Article 21.5) (Panel)*, para. 7.96-98.

[19] *US – COOL (Article 21.5) (Panel)*, n.280.

[20] *Canada – Periodicals (AB)*, p. 22. Moreover, the fact that Panels do account for what is (and what is not) actually traded in other parts of their analysis merely highlights the Panels' legal error. Thus, while the Panels "reach[ed] these conclusions [with regard to segregation] without assessing the probabilities of the various hypothetical scenarios," *US – COOL (Article 21.5) (Panel)*, n.280, with regard to whether the point of production labels are accurate, the Panels not only rely on the actual trade in livestock to determine how much raising is *actually* occurring on average in the three countries, *Id.*, para. 7.242, the Panels discount the importance that the B label would be accurate where it was produced from an animal that was born in the United States, raised in Canada, and slaughtered in the United States in light of "the remote likelihood that such a point-of-production scenario would actually occur in any significant numbers for traded livestock." *Id.*, para. 7.238. The Panels provide no logical explanation as to why they considered the degree of remoteness of certain possibilities relevant in one context, but not relevant in another context.

[21] As the Panels note, under the original measure, the countries of origin could be listed on the B Label in any order. As such, "the labels for Categories B and C meat could look the same in practice." *US – COOL (Article 21.5) (Panel)*, para. 7.284 (quoting *US – COOL (AB)*, para. 245).

[22] *See US – COOL (Article 21.5) (Panel)*, para. 7.115. For reasons that are unexplained, the Panels only analyzed the effect of removing these two flexibilities together, instead of analyzing them separately.

modifications only changed (*i.e.* enhanced) the information provided to consumers on the labels themselves. The Panels made no findings that the amended COOL measure changed the records underlying the origin claims. The Panels therefore erred in finding that the removal of the country order flexibility supported a conclusion that the detrimental impact does not stem exclusively from legitimate regulatory distinctions through increased recordkeeping.

22. For these reasons, the Panels' findings with respect to recordkeeping do not form a basis for finding the amended COOL measure inconsistent with Article 2.1 of the TBT Agreement.

b. The Panels Erred in Finding that the Detrimental Impact Reflects Discrimination Because the Amended Measure's Labels Are Potentially Inaccurate

23. The Panels erred in determining that the detrimental impact does not stem exclusively from legitimate regulatory distinctions. Indeed, instead of assessing whether these regulatory distinctions are even-handed or not, consistent with the legal framework set out in the DSB recommendations and rulings, the Panels found that the detrimental impact did not stem exclusively from legitimate regulatory distinctions because the point of production labels are "potential[ly]" inaccurate. The Panels based this finding, in large part, on incorrect hypothetical livestock trade scenarios.[23] In this regard, the United States considers the Panels' conclusion to be erroneous in at least two specific respects.

24. First, the Panels erred by finding that the B and C labels are "potential[ly]" inaccurate based on hypothetical livestock transactions that do not reflect actual trade in livestock among the three parties to this dispute. Indeed, for purposes of those scenarios that the Panels considered resulted in "potentially inaccurate" labels, the Panels treated each of the scenarios as being equally persuasive, without regard to the improbability of a scenario actually reflecting real trade. The labeling implications of the B labeled muscle cut produced from an animal born in Canada and exported to the United States for further raising and slaughter (a scenario that unquestionably *does happen*) is treated *on equal terms* with the scenario of the B labeled muscle cut produced from an animal born in Canada, exported to Mexico for further raising, then exported to the United States for raising and slaughtering (a scenario that unquestionably *does not happen*). As was the case with the Panels' analysis of whether the amended measure entailed an increased recordkeeping burden, the Panels' commit legal error by drawing any conclusion that the detrimental impact does not stem exclusively from legitimate regulatory distinctions based on these hypothetical scenarios with no basis in the facts found by the Panels relating to the U.S. market.[24]

25. Second, the Panels erred by not making a determination as to whether the amended measure's labels involve regulatory distinctions that are designed and applied in an "even-handed" manner or not, including whether a "disconnect" exists between the information

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[23] *US – COOL (Article 21.5) (Panel)*, para. 7.282.

[24] *Canada – Periodicals (AB)*, p. 22 (panel commits legal error by engaging in improper reasoning based on inadequate factual analysis).

required to be collected and the information provided on the A, B, and C labels. The 2013 Final Rule amended the COOL measure requires each of the three labels provide clear, accurate, and meaningful information on origin. It also eliminated the "disconnect" previously found to exist between the information collected by upstream producers and processors and the information actually provided by the labels. Under the amended measure, no information is required to be collected and maintained that is not provided on the A, B, or C labels. In other words, the "disconnect" that the Appellate Body identified with regard to the original measure's labels no longer exists. Even applying this legal framework without regard to whether the labels themselves are "even-handed" or not, the labels are entirely legitimate and do not prove that the detrimental impact reflects discrimination.

c. The Panels Erred in Finding that the Detrimental Impact Reflects Discrimination Due to the Existence and Scope of the Exemptions

26. The third basis for the Panels' conclusion that the detrimental impact does not stem exclusively from legitimate regulatory distinctions is that the amended measure "continues to exempt a large proportion of muscle cuts."[25] The United States appeals the Panels' finding that the three identified exemptions for muscle cut meat ("processed food items," restaurants, and certain small businesses) form a basis for the finding that the detrimental impact does not stem exclusively from legitimate regulatory distinctions for three primary reasons.

27. First, the Panels set out an incorrect legal framework for determining whether the detrimental impact reflects discrimination. The question of whether a particular regulatory distinction is relevant or not to the analysis is not a mere formality, as the Panels appear to presume. Rather, only those distinctions that account for the detrimental impact can answer the central question of the less favorable treatment analysis – whether the detrimental impact reflects discrimination. And, thus it is only those regulatory distinctions that are relevant to the analysis. The Panels erred in determining otherwise.

28. In this compliance proceeding, the Panels' consideration of what regulatory distinctions are relevant to this analysis as a mere formality is confirmed by their examination of complainants' arguments that the D Label, the E Label, and the statutory prohibition on the U.S. Department of Agriculture ("USDA") mandating a trace-back regime prove that the detrimental impact reflects discrimination. By taking an approach whereby the question of which regulatory distinctions are relevant to the analysis is a mere formality, and thus allowing the Article 2.1 analysis to cover all parts of the measure, regardless of whether the distinction itself is alleged to contribute to the detrimental impact, the Panels unhinge their analysis from an examination of whether the amended COOL measure discriminates and so is inconsistent with Article 2.1. The Panels thus erred in basing its legal conclusion on the exemptions by treating as a mere formality the question of which regulatory distinction is relevant to the analysis.

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[25] *US – COOL (Article 21.5) (Panel)*, para. 7.282.

29. Second, aside from the fact that the exemptions are not relevant to the Article 2.1 analysis, the Panels erred in determining that the exemptions, under the Panels' approach, proved that the detrimental impact reflects discrimination.[26] The Panels failed to take note that the exemptions apply equally to meat derived from imported and domestic livestock, and thus are even-handed. The Panels also failed to account for the legitimate desire of Members to adjust the scope of their technical regulations to take costs into account. And, given the enhanced accuracy of the country-of-origin labels under the amended COOL measure, the recordkeeping requirements can now "be explained by the need to provide origin information to consumers."[27] By failing to account for these considerations, the Panels erred in finding that the exemptions contribute to a finding of discrimination.

30. Third, the Panels' conclusion that the exemptions supported its findings of a disconnect between the recordkeeping burden and information provided was legally erroneous because the Panels made no evaluation of the operation of the exemptions in the U.S. market and pointed to no evidence to support their finding. The Panels ignore that the existence of legal exemptions provides an economic incentive to operators to establish distinct distribution channels to avoid the allegedly significant costs related to the COOL requirements. To conclude that operators would not act in their economic interests and seek to avoid those costs, the Panels would have had to evaluate evidence and make sufficient findings. But the complainants presented no evidence, and the Panels made no such findings. In fact, the limited evidence on the record on this issue, including from the complainants, suggests that distinct distribution channels for sales to exempt establishments do exist, thus rendering the Panels' conclusion unsupportable.

d. Conclusion Regarding Panels' Article 2.1 Findings

31. The Panels' finding that the detrimental impact does not stem exclusively from legitimate regulatory distinctions because: (1) the amended measure "entails an increased recordkeeping burden"; (2) the B and C labels have "a potential for label inaccuracy"; and (3) the amended measure "continues to exempt a large proportion of muscle cuts" is in error.[28] The United States thus requests the Appellate Body to reverse the Panels' finding that the amended measure is inconsistent with Article 2.1 of the TBT Agreement.[29]

2. Conditional Appeal of the Panel's Interpretation of "Taking Account of the Risks Non-Fulfillment Would Create" Under Article 2.2 of the TBT Agreement

32. In the event that Canada or Mexico appeals the Panels' finding that the amended measure is not inconsistent with Article 2.2 of the TBT Agreement, the United States appeals the Panels' interpretation of the phrase "taking account of the risks non-fulfillment would create." In

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[26] *See US – COOL (Article 21.5) (Panel)*, paras. 7.276, 7.282.

[27] *US – COOL (AB)*, para. 349.

[28] *US – COOL (Article 21.5) (Panel)*, para. 7.282.

[29] *US – COOL (Article 21.5) (Panel)*, para. 7.282.

particular, the Panels erred in interpreting this phrase to mean that "providing less origin information to consumers for a significantly wider range of products" "might achieve an equivalent degree of contribution as the amended COOL measure." This is of particular relevance when considering the first and second proposed alternative measures, which provide less detailed or complete origin information regarding a broader range of products.

33. In this dispute, the Panels erred when they interpreted Article 2.2 as permitting a WTO panel to engage in the type of weighing and balancing of public policy objectives that would be necessary under its approach. In particular, the Panels' interpretation erroneously calls for a panel to substitute for a Member's sovereign discretion the panel's judgment regarding determinations of what legitimate objectives the Member seeks to pursue, and to what degree or level of fulfilment the Member wishes to pursue those objectives.

34. The phrase "taking account of the risks non-fulfillment would create" is properly understood as a reflection that an individual Member takes into account such risks when setting its level of fulfillment (*i.e.*, required degree of contribution). In the context of country of origin labeling, the reason for this is straightforward – the balancing of the information provided versus who this information is provided to sits squarely in the political and regulatory sphere, and not in the legal sphere. For this reason the central issues of Article 2.2 are appropriately narrow: does a less trade restrictive and reasonably available alternative measure exist that makes an equivalent contribution to the objective provided by the Member. If Members had intended panels to engage in the weighing and balancing of the value of objectives pursued and the extent of fulfillment of a particular objective – essentially to engage in making regulatory and policy decisions – Members would have negotiated and provided panels with guidance for how to do so. However, neither the TBT Agreement, nor any other document provided by the Members, provides such guidance.

35. It is for these reasons that the Panels' interpretation of the phrase "taking account of the risks non-fulfillment would create" is unsupported and in error. The United States respectfully request the Appellate Body to reverse the Panels' interpretation, in the event that Canada or Mexico appeals the Panels' finding that the amended measure is not inconsistent with Article 2.2 of the TBT Agreement**.**

3. The Panels Erred in Finding that the Amended COOL Measure is Inconsistent with Article III:4 of GATT 1994

36. The Panels erred in finding that the amended COOL measure is inconsistent with Article III:4 of the GATT 1994. In their analysis, the Panels explained that "there are three elements that must be demonstrated to establish that a measure is inconsistent with Article III:4", but the Panels determined that only the third of these elements ("that the treatment accorded to imported products is 'less favourable' than that accorded to like domestic products") was at issue.[30] The Panels relied on their findings of "detrimental impact" under Article 2.1 of the TBT Agreement[31]

[30] *US – COOL (Article 21.5) (Panel)*, para. 7.620.

[31] *US – COOL (Article 21.5) (Panel)*, para. 7.642.

to find that "such detrimental impact will amount to treatment that is 'less favourable' within the meaning of Article III:4."[32]

37. The Panels erred in conducting this truncated analysis under Article III:4 of the GATT 1994 focused solely on the finding of detrimental impact. In particular, in the context of a dispute such as the current one involving a measure to inform consumers as to the origin of products, the Panels erred in failing to take into account the context of Article III:4 within GATT 1994, including Article IX of the GATT 1994, which is titled "Marks of Origin" and contains a number of provisions specifically negotiated for situations of Members' measures for marking products as to their origin.

38. Under the GATT 1994, and in particular Article IX, Members have recognized that laws and regulations that inform consumers as to origin may cause difficulties and inconvenience to exporting Members, and that such measures may increase the cost of imported products.[33] The Panels did not consider the context provided by Article IX or conduct any of the relevant inquiries relevant under that Article. The Panels considered simply whether there was "a detrimental impact on the competitive opportunities of imported livestock in comparison with like US products." Just as the presence of Article XX of the GATT 1994 informs the interpretation of Article III:4 of the GATT 1994 where there is an exception under Article XX that is involved, and it would be legal error to analyze Article III:4 without taking into account the context afforded by Article XX, so too does Article IX of the GATT 1994 inform the interpretation of Article III:4 of the GATT 1994.

39. Consequently, the United States respectfully requests the Appellate Body to find that the Panels erred in interpreting Article III:4 and in finding that less favorable treatment could be demonstrated based on a detrimental impact without regard to further inquiry in the light of the context provided by Article IX**.** Because the Panels' legal conclusion was based on that erroneous interpretation, the United States respectfully requests the Appellate Body to reverse the Panels' finding that the amended COOL measure is in breach of Article III:4 of the GATT 1994.

4. The Panels Erred by Not Addressing the Availability of an Article XX Exception with Respect to the GATT 1994 Article III:4 Claim

40. The Appellate Body in *EC – Seal Products* found that the balance between a Member's right to regulate and the desire to avoid creating unnecessary obstacles to trade was not different, in principle, between Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994 due to the qualifications provided by Article XX of the GATT 1994. This suggests that there must be

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[32] *US – COOL (Article 21.5) (Panel)*, para. 7.642.

[33] Under Article IX:2, Members expressly "recognize that, in adopting and enforcing laws and regulations relating to marks of origin, the difficulties and inconveniences which such measures may cause to the commerce and industry of exporting countries should be reduced to a minimum, due regard being had to the necessity of protecting consumers against fraudulent or misleading indications." Furthermore, Article IX:4 provides that: "The laws and regulations of contracting parties relating to the marking of imported products shall be such as to permit compliance without seriously damaging the products, or materially reducing their value, or unreasonably increasing their cost."

an Article XX exception that would be available for COOL. The Panel declined to address this issue for a number of reasons, including that each Panel "found the amended COOL measure to be in violation of both Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994. Therefore, the Panel is not faced with the situation hypothetically suggested by the United States."[34]

41. The Panels appear to have failed to appreciate the concern being expressed. Under the Panels' approach, a measure that was in compliance with Article 2.1 of the TBT Agreement would nonetheless be in breach of Article III:4 of the GATT 1994 because there would remain some level of detrimental impact which stems exclusively from a legitimate regulatory distinction. Under the Panels' approach, the only way to maintain such a measure consistent with the GATT 1994 would be if the measure qualified under an exception under Article XX of the GATT 1994. The Panels were therefore requested to address the availability of Article XX as an exception with respect to COOL as this would help facilitate the resolution of the COOL dispute.

42. If the balance under Article 2.1 of the TBT Agreement is in principle no different from the balance under Article III:4 of the GATT 1994 in light of Article XX of the GATT 1994, then the Panels should have been able to explain how that would apply in the context of the COOL dispute. Further, if no such GATT Article XX exception exists, it would appear to undermine a Member's ability to regulate in the public interest, putting at risk a whole host of measures, including those that: provide consumer information; prevent deceptive, misleading, and fraudulent practices; and ensure the compatibility and efficiency of telecommunication goods.

43. If one were to consider that there is no exception under Article XX of the GATT 1994 that would provide an exception for country of origin labeling, then the logical result would be that the interpretation of Article III:4 in this area would need to accord with that under Article 2.1 of the TBT Agreement. Otherwise a measure could be consistent with the non-discrimination provisions of the TBT Agreement while being inconsistent with the non-discrimination provisions of the GATT 1994. Members' right to regulate under the two agreements would be out of balance. However, this would not conform to the Appellate Body's explanation that the balance between a Member's right to regulate and the desire to avoid creating unnecessary obstacles to trade was not different, in principle, between Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994.

44. Consequently, the United States respectfully requests the Appellate Body to find that the Panels erred in not addressing the availability of Article XX of the GATT 1994 as an exception for COOL. Further, the United States respectfully requests the Appellate Body to complete the analysis and find which of the Article XX exceptions would be available so as to maintain the balance between a Member's right to regulate and the desire to avoid unnecessary obstacles to trade.

[34] *US – COOL (Article 21.5) (Panel)*, para. 6.74.

45. Several subparagraphs of Article XX require that a measure be "necessary" to achieve the specified objective. In this dispute, the Panels found that the amended measure "contributes to the objective of providing consumer information on origin to a significant degree for products carrying Labels A-C,"[35] and did not find there was any alternative reasonably available to fulfill this objective at the appropriate level. The amended measure therefore should be considered to qualify as "necessary" within the meaning that has been given to that term as used in Article XX. Furthermore, as explained in this appeal, the regulatory distinctions under the amended measure are legitimate regulatory distinctions. Accordingly, the amended measure is not applied in a manner that constitute arbitrary or unjustifiable discrimination and is not a disguised restriction on international trade. The amended measure thus satisfies the conditions in the chapeau of Article XX.

5. Conditional Appeal That the Panels Erred in Finding Their Terms of Reference under DSU Article 21.5 Extended to GATT 1994 Article XXIII:1(b) Claims

46. Canada and Mexico raised a non-violation nullification or impairment ("NVNI") claim under Article XXIII:1(b) of the GATT 1994 before the Article 21.5 Panels. The United States seeks conditional review by the Appellate Body of the Panels' findings and conclusion that these claims were within the Panels' terms of reference, in the event that Canada or Mexico appeals the determination by either Panel not to make findings or legal conclusions in relation to the NVNI claim by that complainant under Article XXIII:1(b) of the GATT 1994.

47. Specifically, in the 21.5 proceeding, the Panels erred by ignoring the plain text of Article 21.5, which permits compliance panels to review a disagreement as to "the consistency with a covered agreement of measures taken to comply with recommendations and rulings," within the context of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"). A review of a measure's "consistency" with the provisions of the covered agreements is distinct from whether that measure "that does not conflict with the provisions of a covered agreement" may result in *non-violation* nullification or impairment.[36] For this reason, NVNI claims are clearly excluded from the terms of reference of Article 21.5 compliance panels.

48. Further, the Panels erred when they substituted their views as to what would be "efficient" in place of the procedures actually negotiated and agreed by Members as reflected in the text of Article 21.5. Panels are charged with clarifying "the existing provisions" of the covered agreements "in accordance with customary rules of interpretation of public international law." Clarifying "the existing provisions" does not include ignoring those provisions for the sake of "efficiency."

49. Based on the text of Article 21.5 of the DSU, the Panels should have found that the newly raised NVNI claim was outside the terms of reference of an Article 21.5 compliance panel. For this reason, the United States respectfully requests that, in the event either Canada or Mexico

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[35] *US – COOL (21.5 Panel)*, para. 7.356.

[36] Article 26.1 of the DSU.

appeals the determination by either Panel not to make findings or legal conclusions in relation to the NVNI claim by that complainant under Article XXIII:1(b) of the GATT 1994, that the Appellate Body find that the NVNI claim was not within the terms of reference of the relevant Panel(s).

II. THE PANELS ERRED IN FINDING THAT THE COOL MEASURE BREACHES ARTICLE 2.1 OF THE TBT AGREEMENT

A. Introduction and Overview

50. The United States has taken a measure to comply that specifically responds to the concerns of the Appellate Body as adopted by the DSB in its recommendations and rulings. In particular, any detrimental impact resulting from the amended COOL measure now stems exclusively from legitimate regulatory distinctions.

51. The DSB recommendations and rulings affirmed that the United States may, consistent with its WTO obligations, require retailers to provide information on origin to U.S. consumers regarding where the animal was born, raised, and slaughtered.[37] The amended COOL measure pursues this objective by requiring retailers to clearly provide consumers the location of the three production steps for the beef and pork muscle cuts they purchase at retail. In doing so, the labeling requirements clearly distinguish between the three origin categories of muscle cuts produced from animals slaughtered in the United States (*i.e.*, animals that lived entirely in the United States (Category A), animals that were born elsewhere but spent significant time in the United States (Category B), and animals that were imported only for slaughter (typically only spending less than 24 hours in the United States) (Category C)).[38]

52. The amended COOL measure thus corrects the imbalance found by the Appellate Body to exist under the original measure where only the A Label provided a high level of detailed and accurate origin information. The amended COOL measure is "even-handed" in its labeling of categories A, B, and C muscle cuts, as each of these labels now provides the same detailed and accurate origin information. As a result, the measure provides a legitimate, non-discriminatory basis for why the measure requires the upstream producers and processors to keep the records in the first place, despite the resulting detrimental impact on imported livestock. In other words, the amended COOL measure now ensures that any detrimental impact caused by keeping track of the three different origins of muscle cuts now stems exclusively from legitimate regulatory distinctions, and, as such, accords imported livestock "treatment no less favourable," consistent with Article 2.1 of the TBT Agreement.

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

[38] Further, the amended measure draws a clear distinction between muscle cuts produced from animals slaughtered in the United States and elsewhere, requiring the labels affixed to the latter to read: "Product of Country X" (Category D).

53. The Panels disagreed, however, finding that the detrimental impact does not stem exclusively from legitimate regulatory distinctions based on three findings, each of which the Panel appears to have considered independently: (1) the amended measure "entails an increased recordkeeping burden"; (2) the B and C labels have "a potential for label inaccuracy"; and (3) the amended measure "continues to exempt a large proportion of muscle cuts."[39]

54. As the United States explains below, none of these three findings support the Panels' ultimate finding that the amended measure is inconsistent with Article 2.1.[40] The United States now appeals that ultimate finding as well as the Panels' findings as to each of these three bases for that ultimate finding, all of which are the result of fundamental legal errors.

55. At the heart of the U.S. appeal is the fact that the Panels conducted a fundamentally improper legal analysis of the amended measure, one that is in direct conflict with the Appellate Body's report in this dispute. Specifically, the Panels never examined whether the detrimental impact on the actual conditions of competition found to exist in this dispute "reflects discrimination," a necessary analysis to determine the consistency of the amended measure with Article 2.1.[41]

56. First, the Panels' findings with regard to recordkeeping and label accuracy are not based on the actual impact of the amended measure on goods produced from real-world trade in livestock between the three parties. Rather, the Panels posited, on their own initiative, hypothetical livestock transactions, and then based their findings on these hypothetical transactions. However, while some of these hypothetical transactions reflect only rare, isolated livestock trade,[42] most of the hypotheticals – such as those that involve the international trade of livestock *between* Canada and Mexico and then further transit *to the United States* for slaughter – simply do not occur in the real world *at all*. In relying on such hypothetical transactions that do not reflect real-world trade, the Panels erred. These hypotheticals do not answer whether the *actual* detrimental impact that forms the basis for the Panels' findings stems exclusively from legitimate regulatory distinctions. Viewed differently, the Panels' analysis is also fatally flawed because this dispute involves a *de facto* discrimination claim – but the Panels' conclusion on the "potential" for label inaccuracy is not based on facts but on supposition.

57. Second, the Panels failed to explain how the elements on which it based its finding are relevant to the Article 2.1 analysis. Instead, the Panels appeared to consider that *any* element of

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[39] *US – COOL (Article 21.5) (Panel)*, para. 7.282.

[40] *US – COOL (Article 21.5) (Panel)*, para. 7.285.

[41] *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.").

[42] *See, e.g., US – COOL (Article 21.5) (Panel)*, para. 7.238 ("In any event, Scenario B4 for animals 'exported twice' was considered by the USDA to be a 'relatively rare situation.' The evidence before us does not refute this assessment. We therefore find that the amended COOL measure would require accurate indication of the raising in the foreign country in such cases. At the same time, this is qualified by the remote likelihood that such a point-of-production scenario would actually occur in any significant numbers for traded livestock.").

the measure, regardless of whether it relates to the detrimental impact or not, can prove that the detrimental impact reflects discrimination. In this reliance on elements irrelevant to the detrimental impact, the Panels erred. Rather, to determine whether the challenged measure provides less favorable treatment, a WTO panel should only be examining those elements that "account[] for the detrimental impact."[43] Other elements of the measure, ones that have no nexus with the detrimental impact, simply cannot answer the question presented – whether the detrimental impact reflects discrimination.

58. Third, the Panels erred in conducting their analysis of the three bases for their finding – increased recordkeeping, the "potential" inaccuracy of the B and C labels, and the scope of the amended measure – on entirely independent tracks from one another. As such, the Panels make no real examination at all whether the adjustments made by the 2013 Final Rule sufficiently address a central criticism of the Appellate Body of the original measure – that the labels required under the original measure were so "significantly" less detailed and less accurate than what is required to be collected by upstream suppliers that the burden of such recordkeeping cannot "be explained by the need to provide origin information to consumers," such that the regulatory distinctions "cannot be said to be applied in an even-handed manner."[44] Indeed, by not conducting the proper analysis, the Panels fail to even recognize that the origin information provided to consumers on the A, B, and C labels (*i.e.*, where the animal was born, raised, and slaughtered) is now *identical* to the information the amended measure requires upstream producers and processors to collect.

59. Finally, the Panels appear to misinterpret the import of the Appellate Body's discussion of whether a "disconnect" exists to mean that the existence (or non-existence) of such a "disconnect" or, indeed, a "potential inaccuracy" of the labels, is dispositive of a finding regarding less favorable treatment itself. But that is not the Appellate Body's guidance in this dispute. The question was not one of "disconnect" *per se*, as the Panels appear to assume, but rather whether a severely disproportionate difference between the information collected by industry and information provided to consumers is indicative of something other than a legitimate regulatory distinction – or whether that distinction is, in fact, even-handed.

60. Simply determining whether a "disconnect" exists is insufficient, on its own, to determine whether the detrimental impact reflects discrimination as such a "disconnect" may reflect legitimate regulatory constraints (*e.g.*, where there is no practical way to limit further the information collected), or the level of fulfillment desired (as the Member is not seeking to provide every possible piece of information to the consumer). Rather, the question is whether any "disconnect" that may exist between what is collected and what is provided reflects discrimination, an examination that the Panels failed to conduct.

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[43] *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).

[44] *US – COOL (AB)*, paras. 346, 349.

61. Indeed, as framed by the Panels, the Article 2.1 analysis appears to be one that no measure that causes a detrimental impact could ever satisfy – what labeling regime could not be found to have some "informational shortcomings," as the Panels put it,[45] and what similar measure covers all products and all sellers? None the United States is aware of.[46] In this regard, the Panels' analysis is more accurately seen as not applying the Appellate Body's analysis, but replicating its own legal framework from the original proceeding that a finding that a detrimental impact exists is sufficient to find a breach of Article 2.1. This framework has already been rejected by the Appellate Body.

62. Nor is the Panels' conclusion that the detrimental impact does not stem exclusively from legitimate regulatory distinctions supported by its analysis of the exemptions to the amended COOL measure. The Panels' conclusion is flawed in at least three respects.

63. First, the Panels set out an incorrect legal framework for determining whether the detrimental impact reflects discrimination. Only those distinctions that account for the detrimental impact can answer the central question of the less favorable treatment analysis – whether the detrimental impact reflects discrimination. But the exemptions do not form part of the relevant distinctions, and the Panels erred in proceeding otherwise.

64. Second, aside from the fact that the exemptions are not relevant to the Article 2.1 analysis, the Panels erred in that they failed to take any note that the exemptions apply equally to meat derived from imported and domestic livestock, and thus are even-handed. Given the enhanced accuracy of the country-of-origin labels under the amended COOL measure, the record-keeping requirements can now "be explained by the need to provide origin information to consumers."[47] By failing to account for these considerations, the Panels erred in finding that the exemptions contribute to a finding of discrimination.

65. Third, the Panels' conclusion was legally erroneous because the Panels made no evaluation of the operation of the exemptions in the U.S. market and pointed to no evidence to

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[45] *US – COOL (Article 21.5) (Panel)*, para. 7.271.

[46] As the United States explained to the Panels, mandatory COOL requirements are common among WTO Members, with nearly 70 Members imposing country of origin regimes of some scope. *See* WTO Members with Country of Origin Regimes (Exh. US-5); TBT Notifications of Country of Origin Measures (Exh. US-6); *US – COOL (Panel)*, para. 7.638 ("We observe that many of these labelling requirements purport to provide consumer information on origin of food products. This suggests that consumer information on country of origin is considered by a considerable proportion of the WTO Membership to be a legitimate objective under the TBT Agreement."); *US – COOL (Article 21.5) (Panel)*, para. 7.275 (noting that the original panel acknowledged that 'it is not atypical for any kind of regulation to have exceptions in terms of the products and entities that are subject to it. Some of such exceptions might be justifiable for practical reasons and simply facilitate the implementation of the measure at issue without necessarily involving protectionist intent.'"). While the scope of these other COOL measures varies widely, the United States is not aware of any Member that applies a "universal" country of origin measure, *i.e.*, one that applies to all types of sales of all types of products. This merely confirms the unsurprising conclusion that while many Members want to provide origin information to consumers, Members must balance that objective against other, competing public policy objectives, such as limiting the costs to industry in providing such information. *See generally* Scope of Third Party COOL Regulations (Exh. US-10).

[47] *US – COOL (AB)*, para. 349.

support their finding. To conclude that economic operators would not utilize the legal exemptions to establish distinct distribution channels to avoid the allegedly significant costs related to the COOL requirements, as would be in their economic interests, the Panels would have had to evaluate evidence and make sufficient findings in relation to the U.S. market. But the complainants presented no evidence, and the Panels made no such findings. In fact, the limited evidence on the record on this issue, including from the complainants, suggests that distinct distribution channels for sales to exempt establishments *do* exist, thus rendering the Panels' conclusion unsupportable. For all these reasons, the Panels erred in concluding that the exemptions supported its legal conclusion that the detrimental impact does not stem exclusively from legitimate regulatory distinctions.

66. In this Section, the United States develops these arguments and explains the Panels' errors in the following order.

67. First, in sections B, C, and D, the United States explains the Article 2.1 analysis, the DSB's recommendations and rulings in this dispute, and the changes made by the 2013 rule to implement those recommendations and rulings.

68. Then, in Section E, the United States explains that the Panels erred in finding that any detrimental impact caused by the amended COOL measure does not stem exclusively from legitimate regulatory distinctions.

69. In Section E.1, the United States explains how the Panels erred in considering that their finding that the amended measure "entails an increased recordkeeping burden" supports its legal conclusion when the Panels' failed to relate that burden to the correct legal test and that the Panels erred in basing their conclusions on hypothetical livestock transactions that do not reflect any actual livestock trade.

70. In Section E.2, the United States explains that the Panels erred in finding that the detrimental impact reflects discrimination because the amended COOL measure's labels are potentially inaccurate. Again, those conclusions are based on hypothetical livestock transactions, and not facts, and the Panels make no determination that the labels create regulatory distinctions that are not "even-handed".

71. Finally, in Section E.3, the United States explains that the Panels erred in finding that any detrimental impact reflects discrimination due to the existence of exemptions. The Panels have misunderstood the role exemptions play in an analysis of whether detrimental impact stems exclusively from legitimate regulatory distinctions, and the Panels' conclusion is erroneous because it is not based on any evidence or findings.

B. What the National Treatment Obligation of Article 2.1 Requires

72. As the Appellate Body has stated:

> [T]o establish a violation of the national treatment obligation in Article 2.1, a complainant must demonstrate three elements: (i) that the measure at issue is a 'technical regulation' as that term is defined in Annex 1.1 to the TBT Agreement;

> (ii) that the imported and domestic products at issue are 'like products'; and (iii) that the measure at issue accords less favourable treatment to imported products than to like domestic products.[48]

73. The Panels determined that the complainants had demonstrated each of these three elements, and thus found the amended measure to be in breach of Article 2.1 of the TBT Agreement. The United States appeals the Panels' finding that the amended measure "accords less favourable treatment to imported products than to like domestic products," *i.e.*, cattle and swine.

74. For the challenged measure to accord less favorable treatment, and therefore discriminate *de facto* against the complainants' imports, it must be proven that the challenged 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."[49] The Appellate Body has further clarified that to make such a showing, it must be established: (1) that the measure has a "detrimental impact on imported livestock;"[50] and, if so, (2) that the detrimental impact does not stem exclusively from a legitimate regulatory distinction.[51]

75. As to the second element, the Appellate Body has been clear, however, that because "technical regulations are measures that, by their very nature, establish distinctions between products according to their characteristics, or related processes and production methods,"[52] 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."[53] Such an analysis is thus focused on answering the central question at hand – whether the "detrimental impact … reflect[s] discrimination prohibited under Article 2.1."[54] An analysis of other regulatory distinctions – *i.e.*,

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[48] *US – COOL (AB)*, para. 267.

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

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

[51] *US – COOL (AB)*, para. 293; *see also id.* para. 271 ("If a panel determines that a measure has such an impact on imported products, however, this will not be dispositive of a violation of Article 2.1. This is because not every instance of a detrimental impact amounts to the less favourable treatment of imports that is prohibited under that provision. Rather, some technical regulations that have a de facto detrimental impact on imports may not be inconsistent with Article 2.1 when such impact stems exclusively from a legitimate regulatory distinction.") (citing *US – Clove Cigarettes (AB)*, para. 182; *US – Tuna II (Mexico) (AB)*, para. 215.

[52] *US – COOL (AB)*, para. 268.

[53] *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).

[54] *US – COOL (AB)*, paras. 271, 293.

ones that do not cause the detrimental impact – simply cannot answer that question. The Appellate Body has applied this framework consistently in recent TBT disputes.[55]

76. Consistent with the Appellate Body's guidance in these disputes, to prove that a detrimental impact does not stem exclusively from a legitimate regulatory distinction, the complainant must establish that at least one of the relevant regulatory distinctions is not "even-handed."[56] In this regard, a regulatory distinction will be found not to be even-handed where it disadvantages one set of like products in favor of another without a sound basis for doing so.[57]

77. The Appellate Body followed this approach in the original *US – COOL* proceeding. The Appellate Body first determined that the relevant regulatory distinctions were between the production steps and the different labels.[58] 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."[59] The Appellate Body determined that they were not designed and applied in an even-handed manner.

78. In particular, the Appellate Body found that while all upstream producers were required to keep information on where an animal was born, raised, and slaughtered, none of the labels provided this information. Indeed, the Appellate Body concluded that only the A label ultimately provided meaningful origin information as the information provided by the B and C labels was confusing and inaccurate in light of the fact that the production steps were not listed, the countries where production steps occurred could be listed in any order, and commingling was permitted.[60] In this regard, the Appellate Body determined that the origin information provided by the B and C labels in particular was so "significantly" less detailed and less accurate than what is required to be collected that the burden of collecting such information could not "be explained by the need to provide origin information to consumers," such that "the regulatory

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[55] *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.

[56] *See, e.g., US – COOL (AB)*, para. 271 ("[W]here a regulatory distinction is not designed and applied in an even-handed manner . . . the detrimental impact will reflect discrimination prohibited under Article 2.1.").

[57] *See 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."); *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).

[58] *US – COOL (AB)*, para. 341.

[59] *US – COOL (AB)*, para. 341.

[60] *US – COOL (AB)*, para. 343.

distinctions imposed by the COOL measure amount to arbitrary and unjustifiable discrimination" and "cannot be said to be applied in an even-handed manner."[61]

79. Finally, the Appellate Body has been clear that nothing in Article 2.1 alters the traditional notions of burden of proof,[62] whereby a complainant, in the first instance, must establish a *prima facie* case for all the elements of its claims.[63]

80. Below, the United States summarizes the DSB recommendations and rulings at issue in this proceeding, explains how the changes to the COOL measure made by the 2013 Final Rule address the DSB recommendations and rulings, and, finally, explains the U.S. appeals of the Panels' reports.

C. The DSB Recommendations and Rulings Regarding Legitimate Regulatory Distinctions

81. In its Article 2.1 analysis, the Appellate Body upheld the original panel's finding that the different definitions of origin (and corresponding labels) created segregation costs that resulted in a detrimental impact on Canadian and Mexican livestock imports.[64] Accordingly, the Appellate Body determined that the relevant distinctions for purposes of the national treatment analysis are the distinctions between the production steps and the distinctions between the different types of labels.[65] The Appellate Body then proceeded to base its finding of a breach of Article 2.1 on its finding that the COOL measure's "recordkeeping and verification requirements impose a disproportionate burden on upstream producers and processors, because the level of information conveyed to consumers through the mandatory labelling requirements is far less detailed and accurate than the information required to be tracked and transmitted by these producers and processors."[66]

82. The Appellate Body explained that it "is these same recordkeeping and verification requirements that 'necessitate' segregation, meaning that their associated compliance costs are

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[61] *US – COOL (AB)*, paras. 346, 349.

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

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

[64] *US – COOL (AB)*, paras. 290-292.

[65] *US – COOL (AB)*, para. 341.

[66] *US – COOL (AB)*, para. 349.

higher for entities that process livestock of different origins."[67] And the Appellate Body emphasized "that this lack of correspondence between the recordkeeping and verification requirements, on the one hand, and the limited consumer information conveyed through the retail labelling requirements and exemptions therefrom, on the other hand, is of central importance to our overall analysis under Article 2.1 of the TBT Agreement."[68]

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

83. The 2013 Final Rule directly addresses the Appellate Body's concerns regarding the recordkeeping and verification requirements, on the one hand, and the level of information conveyed by the labeling requirements on the other hand. The label that is now affixed to A, B, and C meat explicitly references the three production steps, and the location where each production step took place. Accordingly, the label affixed on A meat now reads "Born, Raised, and Slaughtered in the U.S.," while the label on B meat now reads, *e.g.*, "Born in Mexico, Raised and Slaughtered in the U.S.," and the label on C meat now reads, *e.g.*, "Born and Raised in Canada, Slaughtered in the U.S." Thus, the "information conveyed to consumers through the mandatory labeling requirements" will be as "detailed and accurate" as "the information required to be tracked and transmitted by the producers and processors."[69]

84. The Appellate Body specified the basis for its conclusion that "the origin information that must be conveyed to consumers is less detailed, and will often be less accurate" than "the type of origin information that upstream livestock producers and processors are required to maintain and transmit."[70] The United States took careful note of each of the concerns expressed and addressed those through the 2013 Final Rule:

- First, the Appellate Body noted that, "[t]his is because the COOL measure requires the labels to list the country or countries of origin, but does not require the labels to mention production steps at all."[71] The 2013 Final Rule requires that each production step be listed on the label.

- Second, the Appellate Body noted that, "[i]f, for example, the relevant production steps took place in more than one country, the relevant label (B or C) will identify more than one country, but will not identify which production step took place in which of those countries."[72] The 2013 Final Rule requires that the label identify

[67] *US – COOL (AB)*, para. 349.

[68] *US – COOL (AB)*, para. 348.

[69] *US – COOL (AB)*, para. 349.

[70] *US – COOL (AB)*, para. 343.

[71] *US – COOL (AB)*, para. 343.

[72] *US – COOL (AB)*, para. 343.

the country where birth and slaughter took place, and requires that at least one country be listed where the animal was raised.[73]

- Third, the Appellate Body noted that, "labels for Category B meat may also list countries of origin in any order, such that the order of countries listed on the labels cannot be relied upon to indicate where certain production steps took place."[74] The 2013 Final Rule mandates that each production step be listed: birth, raising, and slaughter, eliminating any confusion by the sequence in the label.

- Fourth, the Appellate Body noted that, "due to the additional labelling flexibilities allowed for commingled meat, a retail label may indicate that meat is of mixed origin when in fact it is of exclusively US origin, or that it has three countries of origin when in fact it has only one or two."[75] The 2013 Final Rule eliminates commingling, thus removing that source of potential inaccuracy or confusion identified by the Appellate Body.

85. In other words, the 2013 Final Rule addresses the concerns raised by the Appellate Body. Instead of three separate labels that are applied to livestock traded in the U.S. market, the 2013 Final Rule now requires what is in effect a single label that provides the information to the consumer that the Appellate Body found was lacking and was the basis for the Appellate Body's finding of a breach. This is a significant change from the 2009 Final Rule, under which the original panel and Appellate Body found that only the A Label provided meaningful and accurate information.[76]

86. To put it another way, under the 2013 Final Rule, the meat derived from A, B, and C animals is labeled in the exact same manner and provides meaningful and accurate information to consumers of the muscle cuts that are actually sold at retail in the United States. In doing so, the amended measure does not require upstream producers and processors to keep records that contain more origin information than is actually provided by labels affixed to the muscle cuts that these producers and processors actually produce (*i.e.*, A, B, and C category muscle cuts).

87. Of course, in deciding to make these changes, the United States chose not to make others, including altering the scope of the measure, which exempts restaurants, processed foods, and small businesses. As was the case when the United States first designed the COOL measure, the United States continues to maintain that imposing the costs of the measure on the over 600,000 restaurants in the United States and on the many diverse producers and sellers of foods

[73] As discussed below, for the B Label, the United States must be listed as a country of raising (although other countries may be listed as well), and for the C Label the country of export must be listed as a country of raising (although other countries may be listed as well). *See* U.S. Response to Panels' Question 6, paras. 12-17.

[74] *US – COOL (AB)*, para. 343.

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

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

containing processed beef and pork not covered by the measure exceeds the benefits of providing such origin information in the first place.

88. This judgment is neither unreasonable nor unusual.[77] Nor did the United States consider that such a drastic alteration to the original measure was necessary to come into compliance with U.S. WTO obligations given that (1) none of these exemptions causes the detrimental impact;[78] (2) the COOL measure continues to cover an extremely large amount of food – $38.5 billion worth of beef and $8.0 billion worth of pork sold annually at over 30,000 retail establishments spread throughout the United States;[79] and (3) the exemptions, far from contributing to any disproportionate burden, permit competitive opportunities for imported livestock in which COOL requirements do not apply. Given these considerations, and the fact that the labels now require accurate and meaningful origin information for all three categories of the muscle cuts that account for the detrimental impact, provides a legitimate, non-discriminatory basis for why the measure requires upstream producers and processors to maintain records, despite the detrimental impact on the trade in foreign livestock from doing so.

89. In light of these facts, any detrimental impact resulting from the regulatory distinctions under the 2013 Final Rule "stems exclusively from … legitimate regulatory distinction[s]."[80] 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, and the Panels erred by finding otherwise.

E. The Panels Erred in Finding that any Detrimental Impact Caused by the Amended COOL Measure Does Not Stem Exclusively From Legitimate Regulatory Distinctions

90. As noted above, the Panels found that the detrimental impact does not stem exclusively from legitimate regulatory distinctions based on three independent findings: (1) the amended measure "entails an increased recordkeeping burden"; (2) the B and C labels have "a potential for label inaccuracy"; and (3) the amended measure "continues to exempt a large proportion of muscle cuts."[81] Based on these findings, the Panels found that the amended measure provides less favorable treatment to complainants' livestock imports inconsistent with the national treatment obligation contained in Article 2.1.[82] The United States now appeals that ultimate

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[77] *See* Scope of Third Party COOL Regulations (Exh. US-10); *see also* WTO Members with Country of Origin Regimes (Exh. US-5); TBT Notifications of Country of Origin Measures (Exh. US-6).

[78] *See US – COOL (Panel)*, para. 7.417 (noting that the "exact proportion or magnitude of the exceptions and exclusions is irrelevant" for purposes of the detrimental impact analysis); *US – COOL (Article 21.5) (Panel)*, para. 7.200.

[79] U.S. First Written 21.5 Submission, para. 92.

[80] *US – COOL (AB)*, para. 293.

[81] *US – COOL (Article 21.5) (Panel)*, para. 7.282.

[82] *US – COOL (Article 21.5) (Panel)*, para. 7.284.

finding of inconsistency with Article 2.1 as well as these three intermediary findings, all of which are the result of fundamental legal errors.

1. The Panels Erred in Considering that Their Finding That the Amended Measure "Entails an Increased Recordkeeping Burden" Supports Its Legal Conclusion

91. The United States appeals the Panels' finding that the detrimental impact does not stem exclusively from legitimate regulatory distinctions because the amended measure "entails an increased recordkeeping burden" in three respects:

(1) The Panels erred in considering that their finding that the amended measure "entails an increased recordkeeping burden" constitutes an independent basis for finding that the amended measure's detrimental impact does not stem exclusively from legitimate regulatory distinctions.

(2) The Panels erred in basing their finding that the point of production labels "in of themselves" increased recordkeeping based on hypothetical livestock transactions devised by the Panels without regard to the actual trade in livestock between the three parties.

(3) The Panels erred in finding that the removal of the country order flexibility increased recordkeeping.[83]

92. To be clear, the United States does not appeal the Panels' finding that the amended measure "entails an increased recordkeeping burden" to the extent that the removal of the commingling flexibility has increased the recordkeeping burden. Yet that burden has only increased to the extent that companies were actually using the commingling flexibility to begin with (on which the Panels made no specific finding).[84] However, this one aspect, which is an inherent result of the need to amend the measure to respond to the Appellate Body's concern that commingling resulted in label inaccuracy, does not support the Panels' finding with respect to a breach of Article 2.1.

a. The Panels' Analysis

93. The Panels' examination of whether the amended measure results in an increased recordkeeping burden began with their analysis of whether the amended measure increased

[83] As the Panels note, under the original measure, the countries of origin could be listed on the B Label in any order. As such, "the labels for Categories B and C meat could look the same in practice." *US – COOL (Article 21.5) (Panel)*, para. 7.35 (quoting *US – COOL (AB)*, para. 245).

[84] *US – COOL (Article 21.5) (Panel)*, para. 7.126 ("Based on the above, like the original panel, we conclude that it appears that some commingling was taking place before the amended COOL measure both for cattle and hogs and resulting muscle cuts, but it is difficult to establish its precise extent. In light of the parties' arguments, we can only conclude that the use of the commingling flexibility did not exceed the rough estimate of 20% in the livestock and meat industry. However, we are unable to establish the share of commingling with any more specificity.") (citing to *US – COOL (Panel)*, para. 7.364).

segregation. Finding that the amended measure did result in an increase in segregation, the Panels concluded that, logically, this means that the amended measure increased the recordkeeping burden,[85] which the Panels considered to be "closely linked to the need for segregation and its cost implications."[86] For convenience, in the following two sections, the United States summarizes the Panels' findings, and in Section E.1.b, then explains the legal errors committed by the Panels.

i. Segregation

94. As to segregation, the Panels examined "whether, *in practice*, 'provid[ing] consumers with more specific information' on these labels increases the number of distinct labels" in light of the original panel's finding that "more origins and labels means more segregation."[87] To conduct this examination, the Panels looked at what the labels would be in a number of different factual scenarios, some of which reflect actual trade in livestock between the three parties, and some of which do not. The Panels conducted this examination, and made their findings, without any regard to whether the particular scenario represents actual trade or not.[88]

(A). The A, B, and C Labels

95. With regard to Label A, the Panels found that the amended measure "does not increase the number of labels for Category A muscle cuts, and thus does not lead to increased segregation."[89]

96. With regard to Label B, the Panels examined whether there is any increased segregation according to three scenarios.

97. First, the Panels examined whether muscle cuts produced from an animal of a "single foreign origin," – *i.e.*, an animal born in a foreign country, raised for a time in that country, then exported to the United States for further raising and slaughter – would require additional labels than what was required under the original measure (scenario B1 in Table 4).[90] The Panels found that the muscle cuts produced from such a "single foreign origin" "may continue to carry a uniform label" as was the case under the original measure, and therefore no increase in segregation is indicated under the amended measure.[91] As the record indicates, the "single

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[85] *US – COOL (Article 21.5) (Panel)*, para. 7.150.

[86] *US – COOL (Article 21.5) (Panel)*, para. 7.137.

[87] *US – COOL (Article 21.5) (Panel)*, para. 7.90 (emphasis added); *US – COOL (Panel)*, para. 7.33.

[88] *US – COOL (Article 21.5) (Panel)*, n.280 ("As we are reviewing differences in the design and structure of the original and amended COOL measures to assess increased segregation, we reach these conclusions without assessing the probabilities of the various hypothetical scenarios.").

[89] *US – COOL (Article 21.5) (Panel)*, para. 7.92.

[90] *US – COOL (Article 21.5) (Panel)*, para. 7.93-94.

[91] *US – COOL (Article 21.5) (Panel)*, para. 7.94 ("Thus, like for Label A, the amended COOL measure requires more information on Label B, but Category B muscle cuts from livestock born in a *single* foreign country, and raised and slaughtered in the United States may continue to carry a uniform label. As shown in Table 4 below,

foreign origin" B animal is the only animal actually traded between the three countries. Neither Mexico nor Canada put forward any evidence that animals they export to the United States for further raising and slaughter have been previously raised elsewhere.[92]

98. Second, the Panels then examined the scenario (scenario B2 in Table 5) where two single foreign origin "B" animals exported from Canada and Mexico are commingled together at the processor.[93] The Panels found that the amended measure increased segregation in this scenario in light of the fact that under the original measure a single label "Product of the United States, Canada, and Mexico" could be affixed to the resulting commingled muscle cuts,[94] while two separate labels must be used now (*i.e.*, "Born in Canada, Raised and Slaughtered in the U.S." and "Born in Mexico, Raised and Slaughtered in the U.S.").[95] The extent that processors have actually taken advantage of this particular type of commingling appears to be small as processors that do purchase mixed origin livestock typically purchase livestock born in either Canada or Mexico, not both.[96] The Panels make no finding as to the extent that this variation on the commingling flexibility is actually used.

99. Third, the Panels examined the entirely fictional scenario where an animal is born in Canada, exported to Mexico for raising, then exported to the United States for raising and slaughtering is commingled at the time of slaughter with an animal born in Mexico, exported to Canada for raising, then exported to the United States for raising and slaughtering (Scenarios B3a and B3b of Table 6).[97] The Panels note that under the original measure, the resulting label could have said "Product of the United States, Canada, and Mexico," but under the amended measure, no one label could be used for all the resulting meat as the label would at least need to signify the different countries of birth.[98] Again, neither Mexico nor Canada put forward any evidence that animals they export to the United States for further raising (and eventual slaughter) have been previously born or raised in another foreign country.

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point-of-production labelling does not increase the number of labels and, hence, segregation for Category B muscle cuts of a single foreign origin in addition to raising and slaughter in the United States (Scenario B1).") (emphasis in original).

[92] *See generally* Mexico's Response to Panels' Question 7, para. 5; Canada's Response to Panels' Questions 5, para. 4-7; Canada's Response to Panels' Question 7, paras. 8-10.

[93] *US – COOL (Article 21.5) (Panel)*, para. 7.96.

[94] *US – COOL (Article 21.5) (Panel)*, para. 7.98, Table 5.

[95] *US – COOL (Article 21.5) (Panel)*, para. 7.99, Table 5. As noted in Table 5, the amended rule allows (but does not require) the country of birth to be listed as a country of raising as well.

[96] The only evidence of this happening at all was submitted by the United States in the original proceeding. *See* Original Proceeding Exh. US-102 (BCI); *see also US – COOL (Panel)*, para. 7.364 (noting that this exhibit discusses that one U.S. processor is commingling Canadian, Mexican, and U.S. origin meat, but notes that Canadian origin and Mexican origin are generally processed at different facilities).

[97] *US – COOL (Article 21.5) (Panel)*, paras. 7.100-02.

[98] *US – COOL (Article 21.5) (Panel)*, para. 7.102, Table 6.

100. With regard to Label C, the Panels also examined whether there is any increased segregation according to various scenarios.

101. First, the Panels determined, as they did with regard to the B Label, that the muscle cuts produced from the "single foreign origin" C animal will not result in more labels (or more segregation) under the amended measure than it did under the original measure (scenario C2 to Table 8).[99] That is, under the original measure, the animal born and raised in Canada and exported to the United States for immediate slaughter would produce one label ("Product of Canada, U.S.") while there would be only one label under the amended measure as well ("Born and Raised in Canada, Slaughtered in the U.S."). In this proceeding, Canada has claimed that it exports animals to the United States for immediate slaughter. Mexico makes no claim that it exports such animals to the United States.[100]

102. Second, the Panels examined various purely fictional hypotheticals involving Category C muscle cuts produced from animals "multiple origins," *i.e.*, where an animal was exported once (or twice) between Canada and Mexico before being exported a second (or third) time to the United States for immediate slaughter (scenarios C3-C6 in Table 9).[101] For example, with regard to the twice exported animal, the Panels posited a scenario where the animal is born in Mexico, raised in Mexico, exported to Canada for further raising, then exported to the United States for immediate slaughter (Scenario C3).[102] With regard to the thrice exported animal, the Panels posited a scenario where the animal is born in Canada (and thus raised in Canada), exported to Mexico for further raising, exported back to Canada for further raising, then exported to the United States for immediate slaughter (Scenario C4).[103]

103. With regard to these scenarios, the Panels found that if the 2013 Final Rule precludes countries other than the country of export from being listed as the country of raising, there are more labels and thus more segregation."[104] "Alternatively, if the 2013 Final Rule permits countries of raising other than the country of immediate import on Label C – and provided the countries of raising do not have to be listed in strict chronological order – the label could be

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[99] *US – COOL (Article 21.5) (Panel)*, para. 7.104 ("Despite the more detailed information, Category C muscle cuts of a single foreign origin can thus continue to carry a uniform label under the amended COOL measure.").

[100] Mexico's Response to Panels' Question 7, para. 5.

[101] The Panels also determined that there would be no increase in the number of labels where two "single foreign origin" animals are processed together. See *US – COOL (Article 21.5) (Panel)*, para. 7.106, Table 8.

[102] *US – COOL (Article 21.5) (Panel)*, Table 9. Scenario C6 is the mirror image of C3 – the animal is born in Canada, raised in Canada, exported to Mexico for further raising, then re-exported to the United States for immediate slaughter. *Id.*

[103] *US – COOL (Article 21.5) (Panel)*, Table 9. Scenario C5 is the mirror image of C4 – the animal is born in Mexico (and thus raised in Mexico), exported to Canada for further raising, exported back to Mexico for further raising, then exported to the United States for immediate slaughter. *Id.*

[104] *US – COOL (Article 21.5) (Panel)*, para. 7.109.

arranged so as to retain the same number of distinct labels as under the original COOL measure, namely two distinct labels covering the four separate scenarios."[105]

104. Neither complainant has put forward any evidence that any of the scenarios posited in Table 9 (*i.e.*, C3 through C6) has ever occurred, *even once*. In fact, the United States is not aware that Canada and Mexico trade *any* livestock for purposes of slaughter (as opposed to breeding or dairy). As discussed in Section II.E.2.a.i of this submission, the only evidence of a C animal being raised in a country other than the country of final export to the United States is of a particular transaction whereby animals that were raised in the United States were exported to Canada for further raising, then exported back to the United States for immediate slaughter.[106] The Panels appear to misunderstand this scenario as being one that resulted in B labeled muscle cuts, and, in any event, did not analyze the implications for segregation under any scenario, as a B or C animal.[107]

105. Despite the lack of evidence that the hypothetical "multiple origin" animals are actually traded between Canada and Mexico, the Panels conclude "that point-of-production labelling, as prescribed by the amended COOL measure, *in and of itself* increases the number of distinct labels," and thus segregation, in the above described scenarios.[108] Indeed, the Panels explicitly noted that they "reach[ed] these conclusions *without* assessing the probabilities of the various hypothetical scenarios."[109]

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[105] *US – COOL (Article 21.5) (Panel)*, para. 7.110.

[106] *See US – COOL (Article 21.5) (Panel)*, n.552 (noting that Canada argued that "[i]t is *likely* that some of the *muscle cuts* produced from these animals are subsequently exported to the United States.' [citation omitted] Canada cites a specific example of 'value added feeder cattle … sold to feedyards in Quebec that *finished* these cattle and then shipped them back to *processors* in the U.S.'") (emphasis in original and added).

[107] Notably, the Panels did determine that the label affixed to such muscle cuts would be accurate, but discount the importance of this scenario in light of "the remote likelihood that such a point-of-production scenario would actually occur in any significant numbers for traded livestock." *US – COOL (Article 21.5) (Panel)*, para. 7.238.

[108] *US – COOL (Article 21.5) (Panel)*, para. 7.111 (emphasis added) ("In light of the above, we conclude that point-of-production labelling, as prescribed by the amended COOL measure, in and of itself increases the number of distinct labels for: a. Category B muscle cuts of different foreign origins (Scenario B2 – Table 5) – irrespective of the multiple countries of raising flexibility under the amended COOL measure; b. Category B muscle cuts of different, multiple foreign origins (Scenarios B3a and B3b taken together – Table 6) – irrespective of the multiple countries of raising flexibility under the amended COOL measure; and c. Category C muscle cuts of animals born in a foreign country, raised in that and another foreign country, and imported into the United States for immediate slaughter (Scenarios C3-C6 taken together – Table 9) – if only the country of immediate import can be shown as the country of raising on the label.").

[109] *US – COOL (Article 21.5) (Panel)*, n.280 (emphasis added).

(B). Elimination of Commingling and Country Order Flexibilities

106. The Panels next examined the effect of the 2013 Final Rule's elimination of the commingling[110] and the country order flexibilities,[111] finding that the elimination of the two flexibilities led to more labels based on various scenarios involving the combination of two different categories of muscle cuts or the combination of all three.[112]

107. Unlike the previous analysis regarding the labels, the Panels did examine to what extent commingling was actually taking place. As the United States explained to the Panels, only three beef processors and no pork processors stated for the record in the 2013 rulemaking process that they commingled.[113] However, the Panels concluded that "it appears that some commingling was taking place before the amended COOL measure both for cattle and hogs and resulting muscle cuts, but it is difficult to establish its precise extent."[114]

108. Moreover, the Panels concluded that they could not determine the extent that the country order flexibility had been used prior to the 2013 Final Rule taking effect, but, in any event, the Panels determined that they "need not do so."[115] In the Panels' view, "it suffices to conclude that both the commingling and country order flexibilities were clearly available possibilities under the original COOL measure, and that these have now been eliminated. Having removed these flexibilities, the amended COOL measure leads to increased segregation for US-slaughtered livestock and resulting muscle cuts."[116]

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[110] *US – COOL (Article 21.5) (Panel)*, para. 7.32 ("The 2009 Final Rule included flexibility with respect to the commingling of muscle cuts from US-slaughtered livestock. This flexibility applied specifically between Label A and Label B97 muscle cuts, as well as between Label B and Label C98 muscle cuts, "commingled during a production day.").

[111] *US – COOL (Article 21.5) (Panel)*, para. 7.35 ("The 2009 Final Rule contained flexibility concerning the order of countries of origin on Label B. The countries of origin could be listed in any order, so Label B for muscle cuts of, for example, mixed US-Canadian origin could read 'Product of U.S., Canada or Product of Canada, U.S.' As a result, the Appellate Body noted that [b]ecause the countries of origin for Category B meat c[ould] be listed in any order [under the original COOL measure], the labels for Categories B and C meat could look the same in practice.") (internal quotes omitted).

[112] *See US – COOL (Article 21.5) (Panel)*, paras. 7.118-20, Tables 10 and 11.

[113] *US – COOL (Article 21.5) (Panel)*, para. 7.124 (citing U.S. First Written 21.5 Submission, para. 29).

[114] *US – COOL (Article 21.5) (Panel)*, para. 7.126. The Panels further noted that, "[i]n light of the parties' arguments, we can only conclude that the use of the commingling flexibility did not exceed the rough estimate of 20% in the livestock and meat industry. However, we are unable to establish the share of commingling with any more specificity." *Id.*

[115] *US – COOL (Article 21.5) (Panel)*, para. 7.127.

[116] *US – COOL (Article 21.5) (Panel)*, para. 7.127.

(C). Panels' Conclusion on Segregation

109. The Panels concluded that, "as compared with the original COOL measure, for all practical purposes, the amended COOL measure necessitates *increased* segregation of livestock and the resulting muscle cuts of meat according to origin in order to meet the information requirements on origin labels."[117]

ii. Recordkeeping

110. Next, the Panels examined "whether *in practice* the amended COOL measure requires greater recordkeeping as compared to the original COOL measure."[118] The Panels consider the issue of recordkeeping to be "closely linked to the need for segregation and its cost implications."[119]

111. The Panels began from the premise that the "suppliers' recordkeeping burden and obligations are explicitly tied to the 'information needed to correctly label the covered commodities.'"[120] As such, because the amended measure requires "augmented" origin claims on the label, it must be the case that the amended measure "entail[s] corresponding augmentation of the records kept by livestock and meat producers to substantiate such claims."[121]

112. The Panels then noted that "it follows" from its increased segregation analysis "that the revised labels create a greater variety of scenarios that must be verifiable by retailer and supplier records."[122] Thus, "according to its design, operation, and application, the amended COOL measure necessarily imposes increased recordkeeping burdens in order to secure information of requisite verifiability on origin."[123] The Panels thus ultimately conclude that, "compared with the original COOL measure, the amended COOL measure entails an increased recordkeeping burden in practice for US-slaughtered livestock and the resulting muscle cuts of meat."[124]

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[117] *US – COOL (Article 21.5) (Panel)*, para. 7.136 (emphasis in original).

[118] *US – COOL (Article 21.5) (Panel)*, para. 7.139 (emphasis in original).

[119] *US – COOL (Article 21.5) (Panel)*, para. 7.137.

[120] *US – COOL (Article 21.5) (Panel)*, para. 7.144 (quoting the 2009 Final Rule).

[121] *US – COOL (Article 21.5) (Panel)*, para. 7.146.

[122] *US – COOL (Article 21.5) (Panel)*, para. 7.147; *see also id.* para. 7.149 (reasoning that "the increase in the number of distinct labels and in segregation logically entails a higher recordkeeping burden").

[123] *US – COOL (Article 21.5) (Panel)*, para. 7.271 (concluding that the "amended COOL measure's responsiveness to the DSB recommendations and rulings must be assessed with regard to the new informational shortcomings on Labels B and C, as well as the aggravated source of detrimental impact due to increased recordkeeping").

[124] *US – COOL (Article 21.5) (Panel)*, para. 7.150; *see also id.* para. 7.221 (noting that an increase in recordkeeping "is particularly evident in scenarios for which the original COOL measure permitted uniform origin claims for products of diverse origin, but which now must be differentiated by both retailers and suppliers").

b. The Panels' Analysis Is in Error

i. The Panels Failed to Put Their Finding on an Increase in Recordkeeping Burden Within the Proper Analysis of Whether the Detrimental Impact Reflects Discrimination

113. The Panels erred in considering that their finding that the amended measure "entails an increased recordkeeping burden" constitutes a basis for finding that the amended measure's detrimental impact does not stem exclusively from legitimate regulatory distinctions.[125] The Panels failed to put the issue of recordkeeping within the proper analysis, which involves a comparison of the burdens of recordkeeping and the provision of information through labels.

114. Whether the amended measure "entails an increased recordkeeping burden", and, if so, to what extent, is not directly relevant to the question of whether any regulatory distinctions that cause that detrimental impact are themselves legitimate in the sense that they are designed and applied in an even-handed manner. As such, the Panels erred in listing this as one of the bases for their finding on the second step of the Article 2.1 analysis.[126]

115. To the extent that the recordkeeping burden has increased under the amended measure is at all relevant to the second step of the Article 2.1 analysis, it is only relevant to the question of whether a "disconnect" exists between the amount of origin information collected and the origin information provided that is so disproportionate that the collection of the information cannot be explained in the first place.[127] But to make such a finding, the Panels would have needed to examine what information is collected versus what is actually provided by the current labels that are actually used in the marketplace. The Panels failed to make this examination, as discussed below.[128]

116. As such, the Panels' reliance on any increase in recordkeeping burden without considering that finding within a proper analysis of whether the detrimental impact stems exclusively from legitimate regulatory distinctions is in error and does not support a conclusion that the amended measure is inconsistent with Article 2.1 of the TBT Agreement. In particular, this finding is indicative of the Panels' apparent (and continuing) misunderstanding that a measure can be found inconsistent with Article 2.1 based simply on the finding that the measure results in a detrimental impact on the conditions of competition for imports notwithstanding the fact that this detrimental impact stems from legitimate regulatory distinctions.

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[125] *US – COOL (Article 21.5) (Panel)*, para. 7.282.

[126] *US – COOL (Article 21.5) (Panel)*, para. 7.282.

[127] *See US – COOL (AB)*, para. 349.

[128] *See infra*, sec. II.E.2.b.

ii. The Panels Erred in Finding that the Amended Measure Results in an Increased Recordkeeping Burden Based on Hypothetical Livestock Transactions

117. The Panels determined that the amended measure "entails an increased recordkeeping burden in practice" based on their determination that the point of production labels as well as the elimination of the flexibilities regarding commingling and the order of countries increased segregation.[129] The United States does not dispute that the elimination of the commingling flexibility (both in terms of commingling different categories (*e.g.*, B with A[130]) as well as the same category (*i.e.*, B with B[131])) has increased segregation at those companies that had actually been commingling (on which the Panels make no precise finding). However, the United States appeals the finding as to the other two bases. With regard to the impact of the labels themselves, the Panels' finding as to the impact of point of production labels on recordkeeping "in practice" is in error as it is not based on an examination of labels that reflect the actual trade in livestock between the three parties but on incorrect hypothetical livestock transactions.

118. As noted above, the Panels determined that the use of point of production labels leads to more total possible labels, which leads to more segregation, resulting in an increase in recordkeeping burden. However, the Panels found that the point of production labels for "single foreign origin" animals would *not* lead to more labels, provided those animals (or the resulting muscle cuts) are not commingled.[132] But it is those very scenarios that constitute virtually the entirety of the livestock market in the United States. That is to say, the market for livestock slaughtered in the United States consists of A animals (*i.e.*, animals born, raised, and slaughtered in the United States), "single foreign origin" B animals from either Canada or Mexico (*i.e.*, animals born in either Canada *or* Mexico, raised and slaughtered in the United States), and "single foreign origin" C animals from Canada (*i.e.*, animals born and raised in Canada and exported for immediate slaughter in the United States).

119. Contrary to the various scenarios posited by the Panels, there is no evidence of trade in live animals between Canada and Mexico that would result in the "multiple origin" animals on which the Panels based their findings. That is to say, neither complainant provides any evidence of exports of "B" animals to the United States for further raising and slaughter that were born in the other complainant as scenarios B3a and B3b of Table 6 envisions. Likewise, there is no evidence of trade in animals between Canada and Mexico that are eventually exported to the United States for immediate slaughter, a point that the Panels appear to recognize.[133] Indeed, the

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[129] *US – COOL (Article 21.5) (Panel)*, para. 7.150 ("[C]ompared with the original COOL measure, the amended COOL measure entails an increased recordkeeping burden *in practice* for US-slaughtered livestock and the resulting muscle cuts of meat.") (emphasis added).

[130] *US – COOL (Article 21.5) (Panel)*, paras. 7.118, Table 10.

[131] *US – COOL (Article 21.5) (Panel)*, para. 7.99, Table 5.

[132] *See US – COOL (Article 21.5) (Panel)*, para. 7.96-98.

[133] *See US – COOL (Article 21.5) (Panel)*, para. 7.253 (noting that the "most common situation for trade Category C animals" is "where an animal is born and raised in the same country before import into the United States for immediate slaughter").

United States is not aware that Canada and Mexico trade *any* animals with each other for purposes of producing meat (as opposed to trading in dairy or breeding animals).

120. As noted elsewhere, the *only* evidence of B or C animals being born or raised in a country other than the country of export was the single instance where animals were born in the United States, raised in Canada, then exported to the United States for immediate slaughter.[134] Although the Panels only mention this transaction as part of their analysis of the accuracy of the labels,[135] the Panels notably discount the importance of this scenario in light of "the remote likelihood that such a point-of-production scenario would actually occur in any significant numbers for traded livestock."[136]

121. Of course, the reason for this lack of actual trade in livestock that the Panels' hypotheticals envision is that it is highly improbable (if not inconceivable) that the prices for energy, feed, and livestock would ever align such that it would be profitable to export animals between Canada and Mexico *even once* (before exporting to the United States), as scenarios B3 of Table 6, and C3 and C6 of Table 9 envision, much less exporting the animals between Canada and Mexico *twice* (before exporting to the United States), as scenarios C4 and C5 of Table 9 envision.[137]

122. In light of the Panels' own examination, it is clear that the Panels' finding that point of production labeling "in of itself" "increased [the] recordkeeping burden in practice" for U.S.-slaughtered livestock has no basis and therefore reliance on such a finding to support a conclusion on detrimental impact is legal error.[138] Indeed, the scenarios that reflect the actual "practice" of the livestock trade between the parties prove just the opposite – the point of production labels do not increase the recordkeeping burden. The Panels appear to recognize this,

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[134] *US – COOL (Article 21.5) (Panel)*, para. 7.238 ("In any event, Scenario B4 for animals 'exported twice' was considered by the USDA to be a 'relatively rare situation.' The evidence before us does not refute this assessment. We therefore find that the amended COOL measure would require accurate indication of the raising in the foreign country in such cases. At the same time, *this is qualified by the remote likelihood that such a point-of-production scenario would actually occur in any significant numbers for traded livestock*.") (emphasis added).

[135] In any event, there is no reason to believe that the labels resulting from this transaction would cause a higher recordkeeping burden as the number of labels would not increase for this particular transaction – *i.e.*, the C Label under the original label would read "Product of Canada, U.S." while the C Label under the amended label could read "Born in U.S., Raised in Canada, Slaughtered in U.S." (As noted elsewhere, the label could also list the United States as a country of "raising" as well.)

[136] *US – COOL (Article 21.5) (Panel)*, para. 7.238 ("In any event, Scenario B4 for animals 'exported twice' was considered by the USDA to be a 'relatively rare situation.' The evidence before us does not refute this assessment. We therefore find that the amended COOL measure would require accurate indication of the raising in the foreign country in such cases. At the same time, *this is qualified by the remote likelihood that such a point-of-production scenario would actually occur in any significant numbers for traded livestock*.") (emphasis added).

[137] As noted above, Scenario C3 describes where the animal is born in Mexico, raised in Mexico, exported to Canada for further raising, then exported to the United States for immediate slaughter, and Scenario C4 describes where the animal is born in Canada (and thus raised in Canada), exported to Mexico for further raising, exported back to Canada for further raising, then exported to the United States for immediate slaughter. *US – COOL (Article 21.5) (Panel)*, Table 9.

[138] *US – COOL (Article 21.5) (Panel)*, paras. 7.111, 7.150.

and, as such, unreasonably stretch their analysis to include purely hypothetical livestock transactions "without assessing the probabilities of the various hypothetical scenarios."[139]

123. A similar issue arose in *Canada – Periodicals* where the Appellate Body reversed the panel's like product analysis in light of the panel's reliance on an incorrect hypothetical.[140] There, the Appellate Body noted that the panel improperly "leapt from its discussion of an incorrect hypothetical" to conclude that the products are "like".[141] The Appellate Body thus concluded that, "as a result of the lack of proper reasoning based on inadequate factual analysis," the panel could not "logically arrive" at its conclusion.[142]

124. As was the case in *Canada – Periodicals*, the Panels' analysis of the recordkeeping burden was based on incorrect hypotheticals and therefore lacks a "proper reasoning based on inadequate factual analysis,"[143] and, as such, constitutes legal error.

iii. The Findings with Regard to the Removal of the Country Order Flexibility Is in Error

125. The Panels further found that the removal of the commingling flexibility and order of country flexibility both increased the number of distinct labels, which in turn increased segregation, and thus, increased the recordkeeping burden.[144]

126. The United States does not dispute that the removal of the commingling flexibility (for both muscle cuts and livestock) increased segregation on those affected industry actors. That

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[139] *US – COOL (Article 21.5) (Panel)*, n.280.

[140] *Canada – Periodicals (AB)*, p. 20-23.

[141] *Canada – Periodicals (AB)*, p. 22 ("[I]t is not obvious to [the Appellate Body] how the Panel came to the conclusion that it had 'sufficient grounds' to find the two products at issue are like products from an examination of an incorrect example which led to a conclusion that imported split-run periodicals and domestic non-split-run periodicals can be 'like.'") (emphasis in original).

[142] *Canada – Periodicals (AB)*, p. 22.

[143] *Canada – Periodicals (AB)*, p. 22. Moreover, the fact that Panels do account for what is (and what is not) actually traded in other parts of their analysis merely highlights the Panels' legal error. Thus, while the Panels "reach[ed] these conclusions [with regard to segregation] without assessing the probabilities of the various hypothetical scenarios," *US – COOL (Article 21.5) (Panel)*, n.280, with regard to whether the point of production labels are accurate, the Panels not only rely on the actual trade in livestock to determine how much raising is *actually* occurring on average in the three countries, *Id.*, para. 7.242, the Panels discount the importance that the B label would be accurate where it was produced from an animal that was born in the United States, raised in Canada, and slaughtered in the United States in light of "the remote likelihood that such a point-of-production scenario would actually occur in any significant numbers for traded livestock." *Id.*, para. 7.238. The Panels provide no logical explanation as to why they considered the degree of remoteness of certain possibilities relevant in one context, but not relevant in another context. *See also EC – Hormones (AB)* para. 187 (noting that "it is essential to bear in mind that the risk…to be evaluated in a risk assessment under Article 5.1 [of the SPS Agreement] is….risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die").

[144] *See US – COOL (Article 21.5) (Panel)*, para. 7.115. For reasons that are unexplained, the Panels only analyzed the effect of removing these two flexibilities together, instead of analyzing them separately.

was, in fact, the entire point of allowing commingling in the first place – to reduce segregation and its associated costs. But the Panels' logic does not apply to the removal of the country order flexibility. While removing the country order flexibility does create more distinct labels, it does not alter the recordkeeping burden as different categories of muscle cuts already had different records.

127. Under the original measure, the country order flexibility allowed non-commingled B and C labels to look alike – *i.e.*, both the B and C labels could read "Product of Canada, U.S."[145] Under the amended measure, the Panels correctly note that those same two muscle cuts would be labeled differently – *i.e.*, the B muscle cut would now be labeled "Born in Canada, Raised and Slaughtered in the U.S.,"[146] while the C muscle cut would now be labeled "Born and Raised in Canada, Slaughtered in the U.S."

128. However, the fact that there are now two labels (where before there was one) does not mean that the recordkeeping burden has increased under the amended measure. The records underlying the origin claims were not the same under the original measure, and the Panels have made no finding to the contrary. That is, the recordkeeping required for the B muscle cut under the original measure must have been able to substantiate that the product was produced from an animal born in Canada, raised and slaughtered in the United States. The recordkeeping required for the C muscle cut must have been able to substantiate that the product was produced from an animal born in Canada, raised in Canada, and exported to the United States for immediate slaughter. Requiring point of production labels changes the information displayed but did not change this underlying requirement. The removal of the country order flexibility, which did increase the distinct number of labels on non-commingled muscle cuts, did not increase recordkeeping for origin claims of those muscle cuts.

129. The Panels made no findings that the amended COOL measure changed the records underlying the origin claims. The Panels therefore erred in finding that the removal of the country order flexibility supported a conclusion that the detrimental impact does not stem exclusively from legitimate regulatory distinctions through increased recordkeeping.

2. The Panels Erred in Finding that the Detrimental Impact Reflects Discrimination Because the Amended Measure's Labels Are Potentially Inaccurate

130. Consistent with the Appellate Body's analysis, the Panels examined the accuracy of the A, B, and C labels in the second step of the Panels' analysis. The United States does not dispute that these three categories of muscle cuts, and the corresponding labels, are relevant regulatory distinctions to determine whether the detrimental impact reflects discrimination as it is these

[145] *See US – COOL (Article 21.5) (Panel)*, para. 7.118, Table 10. The United States uses only Canada as an example here as Mexico does not export C animals to the United States.

[146] Although the amended measure permits the longer label to be used: "Born and Raised in Canada, Raised and Slaughtered in the U.S."

distinctions that account for the detrimental impact as reflected in the DSB recommendations and rulings.[147]

131. However, the Panels erred in determining that the detrimental impact does not stem exclusively from legitimate regulatory distinctions. Indeed, instead of assessing whether these regulatory distinctions are even-handed or not, consistent with the legal framework set out in the DSB recommendations and rulings, the Panels found that the detrimental impact did not stem exclusively from legitimate regulatory distinctions because the B and C labels are "potential[ly]" inaccurate based, in large part, on incorrect hypothetical livestock trade scenarios.[148] In this regard, the United States considers the Panels' conclusion to be erroneous in at least two specific respects:

(1) The Panels erred by finding that the labels are "potential[ly]" inaccurate based on incorrect hypotheticals without regard to the actual trade in livestock among the three parties to this dispute.

(2) The Panels erred by not making a determination as to whether the amended measure's labels involve regulatory distinctions that are designed and applied in an "even-handed" manner or not, including whether a "disconnect" exists between the information required to be collected and the information provided on the A, B, and C labels.

a. The Panels' Analysis

132. After summarizing the Appellate Body's criticisms of the original measure's labels, the Panels noted that in light of the fact that the A, B, and C labels now provide origin information as to the location of birth, raising, and slaughter, "the amended COOL measure generally seeks to address the defect of Labels A-C identified by the Appellate Body by requiring explicit indication of the country(ies) of each production step."[149] Moreover, in light of the 2013 Final Rule's elimination of the commingling flexibility, the Panels determined that "the 2013 Final Rule generally addresses factors that led the Appellate Body to find that the original COOL measure's 'prescribed labels do not expressly identify specific production steps and, in particular for Labels B and C, contain confusing or inaccurate information.'"[150]

133. With regard to the specific production steps, the Panels did not appear to have any criticisms of how "birth" and "slaughter" are defined or are portrayed on the labels, which the

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[147] *US – COOL (AB)*, para. 341.

[148] *US – COOL (Article 21.5) (Panel)*, para. 7.282.

[149] *US – COOL (Article 21.5) (Panel)*, para. 7.229.

[150] *US – COOL (Article 21.5) (Panel)*, para. 7.231 (quoting *US – COOL (AB)*, para. 349); *see also US – COOL (Article 21.5) (Panel)*, para. 7.350 ("We note that, under the modified requirements of the amended COOL measure, the requirement of point-of-production information and the removal of commingling on Labels B and C remedy many of the sources of inaccuracy found in the original dispute.").

Panels describe as "relatively straightforward."[151] Rather, the Panels' entire analysis of whether the B and C labels provide "potentially inaccurate" origin information relates to the "raising" step, and how it is portrayed on the B and C labels, based on a number of livestock trade scenarios, some of which reflect real trade in livestock among the three parties, and others that are purely hypothetical.[152] The Panels' analysis focuses entirely on cattle, ignoring hogs.

i. The B Label

134. For the B Label, the Panels focused on the flexibility afforded under the 2013 Final rule that not every country of raising needs to be listed on the label. As discussed above, under the 2013 Final Rule, only the raising that occurs in the United States needs to be declared on the label, although the other country (or countries) is also permitted to be listed. In light of the actual livestock trade between the parties, what this means is that the retailer has the option of listing the country of birth (which is already so listed) as a country of raising in addition to the United States. The choice is thus between a shorter label, which could read "Born in Mexico, Raised and Slaughtered in the U.S.," and a longer label, which could read "Born and Raised in Mexico, Raised and Slaughtered in the U.S."

135. In providing this allowance, USDA recognizes that the additional information regarding raising does not provide much (if any) additional information on origin as it is understood that an animal born in another country (which will already be noted on the B Label) will have been raised at least a portion of its life in that other country.[153] Moreover, the flexibility allows retailers to limit the number of characters on the label to only that information that is needed to provide accurate information on origin regarding that particular muscle cut, and does not require unnecessarily long labels, which is costly.[154]

136. The only limitation to this flexibility occurs in the very rare situation where the animal was born in the United States, exported to a foreign country for raising, then re-exported to the United States for further raising and slaughter. Permitting the omission of the other country from the label would mean that the muscle cuts would be misleadingly labeled as produced from an animal of U.S. origin (*i.e.*, "Born, Raised, and Slaughtered in the U.S.") when in fact that animal

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[151] *US – COOL (Article 21.5) (Panel)*, para. 7.269 (noting that "'birth' and 'slaughter' are relatively straightforward and temporally discrete…").

[152] 2013 Final Rule, 78 Fed. Reg. at 31,371 (Exh. CDA-1) (noting that the amended COOL measure defines "raised" as ''the period of time from birth until slaughter or in the case of animals imported for immediate slaughter as defined in section 65.180, the period of time from birth until date of entry into the United States.'').

[153] 2013 Final Rule, 78 Fed. Reg. at 31,368 (Exh. CDA-1) ("As discussed in the preamble of the January 15, 2009, final rule and in the March 12, 2013, proposed rule, if animals are born and raised in another country and subsequently further raised in the United States, only the raising that occurs in the United States needs to be declared on the label, as it is understood that an animal born in another country will have been raised at least a portion of its life in that other country. Because the country of birth is already required to be listed in the origin designation, and to reduce the number of required characters on the label, the Agency is not requiring the country of birth to be listed again as a country in which the animal was also raised.").

[154] *See* 2013 Final Rule, 78 Fed. Reg. at 31,383 (Exh. CDA-1) (determining that "the average cost for each retail establishment is calculated assuming an average label cost per establishment of approximately $984…").

was of mixed origin. In this rare case, the other country would need to be listed, and the label could read "Born and Raised in the U.S., Raised in Mexico, Slaughtered in the U.S."[155]

137. The Panels thus analyzed the treatment of the "raising" flexibility from the perspective of three scenarios: (1) where the animal is born in a foreign country, raised in that country, and then exported to the United States for further raising and slaughter (once exported/single foreign origin);[156] (2) where an animal is born in a foreign country, raised in that country, exported to another foreign country for further raising, then exported again to the United States for further raising and slaughter (twice exported/multiple foreign origin);[157] and (3) where an animal is born in the United States, raised in the United States, exported to a foreign country for further raising, and then exported back to the United States for further raising and slaughter (twice exported/single foreign origin).[158]

138. The evidence on the record indicates that only the first scenario – the once exported animal – reflects actual trade in livestock. As to the second scenario, it is clear – and undisputed by the parties – that this situation *never* occurs. Neither complainant even alleged, much less proved, that an animal is ever born in Mexico (or Canada), exported to Canada (or Mexico) for further raising, and then exported to the United States for further raising and slaughter. As noted above, the United States is not aware that Canada and Mexico ship between the two countries *any* livestock that is destined for slaughter.

139. With regard to the third scenario, the Panels do not appear to disagree with USDA's assessment that such a scenario would be a "relatively rare situation," concluding that the Panels have "not been given evidence to suggest that [this s]cenario [] has a high probability or frequency of occurrence in US livestock trade."[159] The United States would note, however, that, in fact, complainants put forward *zero* evidence that this scenario occurs at all. In this regard, the Panels note that Canada only claims that some of the muscle cuts it exports to the United States (*i.e.*, Label D) could have been produced from animals born in the United States, and that Canada is aware of a single transaction of cattle born in the United States, raised in Canada, then sold back to U.S. processors for immediate slaughter (*i.e.*, Label C).[160] Mexico states that that it has no evidence of animals born in the United States, exported to Mexico for raising, then re-exported to the United States for further raising and slaughter.[161]

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[155] 2013 Final Rule, 78 Fed. Reg. at 31,368 (Exh. CDA-1); *US – COOL (Article 21.5) (Panel)*, para. 7.237.

[156] *US – COOL (Article 21.5) (Panel)*, para. 7.236, Table 13 (scenarios B1/B2).

[157] *US – COOL (Article 21.5) (Panel)*, para. 7.236, Table 13 (scenario B3).

[158] *US – COOL (Article 21.5) (Panel)*, para. 7.236, Table 13 (scenario B4).

[159] *US – COOL (Article 21.5) (Panel)*, n.552.

[160] *US – COOL (Article 21.5) (Panel)*, n.552 (noting that Canada argued that "[i]t is *likely* that some of the *muscle cuts* produced from these animals are subsequently exported to the United States.' [citation omitted] Canada cites a specific example of 'value added feeder cattle … sold to feedyards in Quebec that *finished* these cattle and then shipped them back to *processors* in the U.S.'") (emphasis in original and added).

[161] *US – COOL (Article 21.5) (Panel)*, n.552 ("Mexico 'does not have examples or data concerning livestock born and slaughtered in the United States, but raised in another country(ies).'") (quoting Mexico's

140. As to the evidence of how long cattle are typically raised in their countries of birth, the Panels found that cattle are slaughtered at an average age of 22 months,[162] and that the "evidence indicates that on average Canadian feeder cattle spend between 45 and 68%, and feeder cattle from Mexico between 27 and 32%, of their raising period outside the United States."[163]

141. With regard to the first two scenarios, the Panels determined that the B label was not "entirely accurate," or, as the Panels also put it, the label "represents potential inaccuracy," as the amended measure permits, but does not require, all countries where raising to occur to be designated as such in light of the fact that a "B" animal spends "approximately one third to one half of their lives elsewhere."[164] As to the third scenario, the Panels found that the label would be accurate, although the Panels discounted the importance of that finding, noting that it "is qualified by the remote likelihood that such a point-of-production scenario would actually occur in any significant numbers for traded livestock."[165]

ii. The C Label

142. The Panels began their analysis of the C label by debating, but not deciding, whether, in the unlikely event that an animal exported to the United States for immediate slaughter was raised in multiple countries, the resulting label could list both countries of raising.[166]

143. As the United States explained to the Panels, while for C labels the exporting country must be listed as a country of raising, the measure does not require that it be the only country of raising.[167] If, in fact, the animal was raised in two different countries prior to export for immediate slaughter in the United States, then both countries may be listed on the label. The permissive nature of the measure is indicated in 7 C.F.R. § 65.235 where the term "raised," for purposes of immediate slaughter, is defined as "the period of time from birth until date of entry into the United States," rather than simply the country of export, as well as in 7 U.S.C. § 1638a(a)(2)(C)) and 7 C.F.R. § 65.300(e), both of which indicate that the country of export

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Response to Panels' Question 8). USDA had no information of any specific such transactions at the time of the 2013 Final Rule and therefore stated that it considered such a scenario to be a "relatively rare situation," as the Panels note. *US – COOL (Article 21.5) (Panel)*, para. 7.238 (quoting 2013 Final Rule, 78 Fed. Reg. at 31,368 (Exh. CDA-1)).

[162] *US – COOL (Article 21.5) (Panel)*, para. 7.242 (citing Canada's Response to the Panels' Question 9, para. 13 and Exh. CDA-75; U.S. Response to Panels' Question 9, para. 21 and Exh. US-50.

[163] *US – COOL (Article 21.5) (Panel)*, para. 7.242.

[164] *US – COOL (Article 21.5) (Panel)*, paras. 7.243-244, 7.269.

[165] *US – COOL (Article 21.5) (Panel)*, para. 7.238.

[166] *See US – COOL (Article 21.5) (Panel)*, para. 7.249 ("Taken together, the text of the relevant provisions of the amended COOL measure, combined with the USDA's guidance, are open to the competing interpretations put forward by the parties. We examine label accuracy under both interpretations of the requirements for Label C under the amended COOL measure.").

[167] *See* U.S. Response to the Panels' Question 6, paras. 12-17.

"shall" be listed as the country of raising, not that this country must be the "only" country of raising.

144. However, it does not appear that the Panels considered that making a finding on this point would make a material difference as the Panels found that the C Label affixed to muscle cuts produced from the "twice exported" or "thrice exported" C animal is "potentially inaccurate" regardless of any finding on this point of U.S. law.

145. Again, the Panels analyzed the "potential" accuracy of the C Label under different factual scenarios. First, the Panels analyzed the accuracy of the label with regard to the scenario where the "single foreign origin" animal exported once in its lifetime (*i.e.*, born and raised in Canada (or Mexico), and then exported to the United States for immediate slaughter), which is described as Scenarios C1 and C2 in Tables 7 and 8.[168] Second, the Panels analyzed the accuracy of the C Label with regard to four different scenarios, all of which involve the animal being born in either Canada or Mexico, and then being exported once or twice for raising, before being exported to the United States for immediate slaughter. The Panels describe these fact patterns involving the "twice exported" and "thrice exported" animals as Scenarios C3 through C6 in Table 9.[169]

146. For purposes of the once exported animal, *i.e.*, the animal born and raised in either Canada or Mexico, then exported to the United States for immediate slaughter (Scenario C2), the Panels found that the label "Born and Raised in Country X, Slaughtered in the United States" "would be generally accurate for the animals actually traded between the complainants and the United States."[170] The evidence on the record indicates that Canada exports such animals to the United States while Mexico does not.[171]

147. However, the Panels found the labels would not be "generally accurate" for muscle cuts processed from C animals that had been exported between Canada and Mexico once or twice

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[168] *See US – COOL (Article 21.5) (Panel)*, para. 7.104 (Table 7), and para. 7.106 (Table 8). Table 7 describes the single exported animal generically, while Table 8 describes the same single exported animal as being born and raised in Canada, and then exported to the United States for immediate slaughter, or, alternatively, the animal has been born and raised in Mexico, and then exported to the United States for immediate slaughter.

[169] *See US – COOL (Article 21.5) (Panel)*, para. 7.110 (Table 9). Table 9 describes the following hypothetical fact patterns. Scenario C3 is where the animal was born in Mexico, raised in Mexico, exported to Canada, and then re-exported to the United States for immediate slaughter (twice exported). Scenario C4 is where the animal was born in Canada, exported to Mexico for raising, exported to Canada for further raising, and then exported to the United States for immediate slaughter (thrice exported). Scenario C5 is where the animal was born in Mexico, exported to Canada for raising, exported to Mexico for further raising, and then exported to the United States for immediate slaughter (thrice exported). Scenario C6 is where the animal was born in Canada, raised in Canada, exported to Mexico for further raising, and then exported to the United States for immediate slaughter (twice exported).

[170] *See US – COOL (Article 21.5) (Panel)*, para. 7.253.

[171] *See* Mexico's Response to the Panels' Question 7, para. 5 ("Mexico's cattle industry is focused mainly on exporting feeder cattle, which are not for immediate slaughter. Therefore, Mexico does not have recent volume/origin data related to livestock that is 'imported for immediate slaughter' into the United States that were raised in more than one country.").

before being exported to the United States for immediate slaughter.[172] In such cases, the extra country of raising either would not be required to be listed as a country of raising (U.S. view) or would be prohibited from being listed (Canadian view).[173] For example, in Scenario C4, where the animal was born in Canada, exported to Mexico for raising, exported to Canada for further raising, and then exported to the United States for immediate slaughter,[174] the Panels found that the label would not be "generally accurate" under either the U.S. view, where Mexico could be omitted from the label, or under the Canadian view, where Mexico must be omitted from the label.[175]

148. As to the trade that is actually occurring, neither complainant submitted any evidence that any of the scenarios C3 through C6 have ever occurred, *even once*. That is to say, neither complainant has made any claim that they trade live animals that are ultimately exported to the United States for immediate slaughter. Of course, it would be very expensive to ship feeder cattle (which can weigh anywhere between 90 Kg and approximately 500 Kg[176]) even once between Mexico and Canada, as Scenarios C3/C6 envision, *much less twice*, as Scenarios C4/C5 envision, prior to export to the United States for immediate slaughter. None of these scenarios appears to be economically viable, and neither complainant even alleges that they occur, much less offer any proof of such an occurrence.

149. The only evidence put forward by any of the parties that an animal could be exported even once prior to being exported to the United States for immediate slaughter was Canada's statement that it is aware of a transaction involving cattle born in the United States, raised in Canada, then sold back to U.S. processors for immediate slaughter. (As noted above, the Panels mistakenly appear to consider this a sale of B, rather than C, animals.[177]) In the U.S. view, the label affixed to the resulting muscle cuts of these animals could say either "Born and Raised in

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[172] *US – COOL (Article 21.5) (Panel)*, para. 7.253 (noting that the label would not be "generally accurate…for any of Scenarios C3-C6, which would lead to label inaccuracy as described above. Specifically, the label for Scenario C3/C6 would omit raising in Country X but would still indicate that the animal was born in that country. The label for Scenario C4/C5 would be required to omit the other country of raising (Country Y) altogether.").

[173] *See US – COOL (Article 21.5) (Panel)*, paras. 7.251-53.

[174] *See US – COOL (Article 21.5) (Panel)*, paras. 7.110 (Table 9), 7.250 (Table 14).

[175] The Panels further noted that "[i]n Scenario C3/C6, the omission of the raising in Country X may have less implications for informational accuracy if, as suggested by the USDA, one may infer that some amount of raising will naturally occur in Country X as the place of birth." *US – COOL (Article 21.5) (Panel)*, para. 7.251.

[176] *See* U.S. Response to Panels Question 9, para. 21; *US – COOL (Article 21.5) (Panel)*, para. 7.242.

[177] *Compare US – COOL (Article 21.5) (Panel)*, n.551, *with id.* n.579 ("Neither Canada nor Mexico submit evidence of livestock 'imported for immediate slaughter' that were raised in more than one country (i.e. in any country other than their place of birth).") (citing Canada's and Mexico's Responses to the Panels' Question 7; U.S. Comments on the Complainants' Responses to the Panels' Question 7); *see also* Mexico's Response to the Panels' Question 7, para. 5 (noting that "Canada provided in its First Written Submission evidence of this specific situation") (citing Canada's First Written Submission, n.223). However, given that Canada claims that these U.S. feeder animals "were sold to feedyards in Quebec *that finished* these cattle and then shipped them back to processors in the U.S. *for processing*," it is highly likely that these were, in fact, C animals, as Canada suggests, not B animals as the Panels appear to conclude. Canada's Response to the Panels' Question 7, para. 9 (emphasis added).

the U.S., Raised in Canada, Slaughtered in the U.S.," or, alternatively, "Born in the U.S., Raised in Canada, Slaughtered in the U.S."[178] Canada appears to disagree, contending that only the second label would be allowed.[179] In any event, the Panels made no finding that either the possibility or requirement that the United States be omitted as a country of raising in such an "uncommon" transaction means that the C Label itself is inaccurate.[180]

150. As to the accuracy of the C Label, the Panels concluded that in the "*actual application* to traded livestock," "Label C does not appear likely to convey misleading information about the country where animals imported for immediate slaughter are raised, given that these appear to be most commonly born and raised in the country of export."[181] However, in its overall assessment of the measure, the Panels concluded that:

> Although Label C appears to accurately reflect the place of raising of Category C fed cattle in practice, certain ambiguities in the design of its labelling rules may also create the potential for inaccuracy due to the possible omission of countries of raising.[182]

b. The Panels' Analysis Is in Error

i. The Panels Erred in Finding that the B and C Labels Are "Potential[ly]" Inaccurate Based on Hypothetical Livestock Transactions

151. The Panels ultimately concluded that the A, B, and C labels did not constitute legitimate regulatory distinctions because both the B and C labels entail a "potential for label inaccuracy."[183] As recounted above, the Panels made this finding based on their examination of a variety of hypothetical scenarios.

152. Thus, the Panels found the B Label was "potentially inaccurate" in two scenarios: where the animal had a "single foreign origin," *i.e.*, the animal was born in either Canada or Mexico and then exported to the United States for further raising and slaughter; and where the animal had a "multiple foreign origin," *e.g.*, the animal was born in Mexico, exported to Canada for

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[178] *See* U.S. Response to the Panels' Question 6, para. 14.

[179] *See, e.g., US – COOL (Article 21.5) (Panel)*, para. 7.247.

[180] *See US – COOL (Article 21.5) (Panel)*, para. 7.268 ("The possibility for overlap between Labels B and C is generally foreclosed under the amended COOL measure, given the typical indication on Label B of the United States as a country of raising. Label C could bear a similar indication of US raising only hypothetically in the case of an animal born in the United States, raised abroad, and imported back into the United States for immediate slaughter. *This appears to be uncommon in practice and, in any event, depends on how Label C requirements are interpreted*.") (emphasis added).

[181] *US – COOL (Article 21.5) (Panel)*, para. 7.254.

[182] *US – COOL (Article 21.5) (Panel)*, para. 7.269.

[183] *US – COOL (Article 21.5) (Panel)*, para. 7.282-83; *see also id.*, para. 7.270 (noting "the potential inaccuracies on Labels B and C with respect to the country of raising, which do not similarly arise for Label A").

further raising, then exported to the United States for further raising and slaughter.[184] The Panels' finding with regard to the C Label was even more extreme. There, the Panels found that while the label affixed to C category muscle cuts are accurate "in practice," the C Label is potentially inaccurate when affixed to muscle cuts produced from animals that have been the subject of at least one (and maybe two) transactions between Mexico and Canada, prior to being exported to the United States for immediate slaughter.[185]

153. As discussed above, the Appellate Body reasoned in *Canada – Periodicals* that a panel errs where, based on an "inadequate factual analysis," the panel could not "logically arrive" at its conclusion.[186] But in determining whether B and C labels are "potentially inaccurate," the Panels, as they had with regard to their analysis of the recordkeeping burden, have relied on hypothetical livestock transactions that do not reflect actual trade in livestock. Indeed, for purposes of those scenarios that the Panels considered resulted in "potentially inaccurate" labels, the Panels treated each of the scenarios as being equally persuasive, without regard to the improbability of a scenario actually reflecting real trade.

154. The labeling implications of the B labeled muscle cut produced from an animal born in Canada and exported to the United States for further raising and slaughter (a scenario that unquestionably *does happen*) is treated *on equal terms* with the scenario of the B labeled muscle cut produced from an animal born in Canada, exported to Mexico for further raising, then exported to the United States for raising and slaughtering (a scenario that unquestionably *does not happen*). As was the case with the Panels' analysis of whether the amended measure entailed an increased recordkeeping burden, the Panels' commit legal error by drawing any conclusion that the detrimental impact does not stem exclusively from legitimate regulatory distinctions based on these hypothetical scenarios with no basis in the facts found by the Panels relating to the U.S. market.

155. And, again, as was the case in the Panels' analysis regarding the recordkeeping burden, the Panels highlight their error by treating the relevance of the actual trade of livestock inconsistently, ignoring it for purposes of determining whether the B and C labels are ultimately "potentially inaccurate," but relying on such actual trade in other parts of the analysis.

156. Thus, as discussed above, the Panels determined that the B label would be accurate in the scenario where the animal was born in the United States, exported to a foreign country for further raising, and then exported to the United States for further raising and slaughter given that, in this situation, both countries of raising would need to be listed on the label.[187] However, the Panels discounted the importance of this finding in light of "the remote likelihood that such a

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[184] *US – COOL (Article 21.5) (Panel)*, para. 7.243-244; *see also id.*, para. 7.236 Table 13 (scenarios B1/2 and B3).

[185] *US – COOL (Article 21.5) (Panel)*, para. 7.269 ("Although Label C appears to accurately reflect the place of raising of Category C fed cattle in practice, certain ambiguities in the design of its labelling rules may also create the potential for inaccuracy due to the possible omission of countries of raising.").

[186] *Canada – Periodicals (AB)*, p. 22.

[187] Thus, the label could read: "Born in the U.S., Raised in Canada, Raised and Slaughtered in the U.S."

point-of-production scenario would actually occur in any significant numbers for traded livestock."[188]

157. Likewise, while the Panels ignored the fact that they were relying on hypotheticals of livestock trade that unquestionably do not happen, the Panels do rely on the actual trade in livestock in determining exactly how much raising is *actually* occurring on average in the three countries.[189] That said, the Panels also rely on the proposition that an animal could spend "as little as 15 days in the United States before slaughter" and still be labeled as "raised" in the United States,[190] even though the Panels had previously found that this does not occur "in practice."[191]

158. Of course, and as noted above, the fact that complainants' have claimed that the amended measure discriminates, *de facto*, against their livestock exports to the United States further supports the position that the Panels cannot rely on hypotheticals that do not reflect the actual trade. In a *de facto* case, a panel is basing their finding of detrimental impact on the effect in the marketplace (*i.e.*, the "facts"). Indeed, if the marketplace were different in this dispute (*e.g.*, U.S. livestock had less than a majority share of that which is slaughtered domestically), there might not be any detrimental impact at all. As such, using purely fictional scenarios to determine whether that detrimental impact reflects discrimination simply cannot stand.

159. In sum, and as was the case in *Canada – Periodicals*, the Panels' reliance on incorrect hypotheticals lacks a "proper reasoning based on inadequate factual analysis," and, as such, constitutes legal error.[192]

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[188] *US – COOL (Article 21.5) (Panel)*, para. 7.238 ("In any event, Scenario B4 for animals 'exported twice' was considered by the USDA to be a 'relatively rare situation.' The evidence before us does not refute this assessment. We therefore find that the amended COOL measure would require accurate indication of the raising in the foreign country in such cases. At the same time, *this is qualified by the remote likelihood that such a point-of-production scenario would actually occur in any significant numbers for traded livestock*.") (emphasis added).

[189] *US – COOL (Article 21.5) (Panel)*, para. 7.242 ("The parties' evidence indicates that on average Canadian feeder cattle spend between 45 and 68%, and feeder cattle from Mexico between 27 and 32%, of their raising period outside the United States.").

[190] *US – COOL (Article 21.5) (Panel)*, para. 7.269 ("Apart from this, the design of the amended COOL measure permits an even greater amount of raising in Canada or Mexico to be omitted from the label, including in the most extreme case for an animal spending as little as 15 days in the United States before slaughter.").

[191] *US – COOL (Article 21.5) (Panel)*, para. 7.244 ("Turning to the design of the amended COOL measure, as explained above, the amended COOL measure would similarly afford this flexibility to designate the United States as the sole place of raising to an animal that spent as little as 15 days in the United States. *Nevertheless, it does not appear that this occurs in practice*. The parties' data indicate that Category B exports to the United States tend to be nearer to the midpoint of an average animal's lifespan, and livestock within Category C are usually slaughtered well within the 14 day window mentioned above.") (emphasis added).

[192] *Canada – Periodicals (AB)*, p. 22.

ii. The Panels Erred by Not Making a Determination as to Whether the A, B, and C Labels Involve Regulatory Distinctions that Are "Even-Handed"

160. Under the DSB recommendations and rulings, the A, B, and C categories of muscle cuts (and the corresponding labels) are relevant regulatory distinctions for determining whether the detrimental impact reflects discrimination. Under the approach set out in those DSB recommendations and rulings, the question of whether the detrimental impact reflects discrimination hinges on the question of whether the relevant regulatory distinctions are designed and applied in an "even-handed" manner or whether instead they reflect discrimination.[193]

161. A central criticism of the original measure was that 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 commingling.[194] In this regard, 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 so disproportionate to what information was ultimately conveyed to consumers through these two labels that the recordkeeping and verification requirements "cannot be explained by the need to convey to consumers information regarding the countries where livestock were born, raised, and slaughtered," such that the labels reflected arbitrary discrimination.[195]

162. The 2013 Final Rule amended the COOL measure to directly address these criticisms. Each of the three labels provide clear, accurate, and meaningful information on origin. The labels do this by requiring the location where each production step occurred. Under the minimum requirements of the measure, at least one country must be listed for each production step (with one exception).[196] The rule is the same for all three labels. Moreover, the 2013 Final Rule eliminated the "disconnect" previously found to exist between the information collected by upstream producers and processors and the information actually provided by the labels. Under the amended measure, no information is required to be collected and maintained that is not provided on the A, B, or C labels. We address both points in turn.

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[193] *See, e.g., US – COOL (AB)*, para. 271 ("[W]here a regulatory distinction is not designed and applied in an even-handed manner . . . the detrimental impact will reflect discrimination prohibited under Article 2.1.").

[194] *US – COOL (AB)*, para. 343.

[195] *US – COOL (AB)*, para. 349.

[196] The one exception is where the animal was born in the United States, raised in Canada, then exported to the United States for further feeding and slaughter. In this case, the label must list both Canada and the United States as countries of "raising." Otherwise, the B label affixed to the muscle cuts produced from this animal would wrongly indicate that they are of U.S. origin when, in fact, the muscle cuts are of mixed Canada and U.S. origin. *See* 2013 Final Rule, 78 Fed. Reg. at 31,368 (Exh. CDA-1). The same risk of conveying misleading origin information does not exist for C category muscle cuts produced from an animal with a similar history (*i.e.*, born in the United States, raised in Canada, exported to the United States for immediate slaughter) as the C label will need to convey that the animal was of mixed origin in that Canada was a country of raising. *See* U.S. Response to Panels' Question 6, paras. 12-17.

(A). The A, B, and C Labels Provide Accurate Origin Information

163. The A, B, and C labels provide the same level of accurate origin information as to where the animal is born, raised, and slaughtered.

164. For the B Label, the measure requires that the United States be listed as a country of raising, thereby drawing a clear distinction between the C Label, which requires that the country of export be listed as a country of raising.[197] In addition, due to the removal of commingling flexibility, the Panels acknowledge that the information listed is *correct* – that is to say, muscle cuts labeled "Born in Mexico, Raised and Slaughtered in the U.S." will need to have been produced from an animal that, in fact, was born in Mexico, then exported as a feeder cattle to the United States for raising and slaughtering in the United States.[198]

165. As discussed above, the Panels' criticism of the current labels stems from the fact that that the Panels consider that by only requiring one country to be listed as a country of raising, the B and C labels could be considered "inaccurate" where there were, in fact, multiple countries of raising, and the label does not actually list all of these countries. In light of the potential for some of the countries of raising to be omitted from the label, the Panels conclude that the B and C labels are not "entirely accurate," and that the allowance to only list one country as a country of raising "takes no account of the substantial amount of time that traded livestock typically spend outside the United States."[199]

166. At this point, it may be useful to note that what the Panels refer to as "inaccuracy" is not a question of accuracy. There is nothing "inaccurate" about the information conveyed. In each instance, the animal was born, raised, and slaughtered in the listed countries. The listed countries are accurate. Rather, the Panels use the term "inaccuracy" when what they appear to mean is "less detailed."

167. In this regard, the Panels appear to criticize the COOL requirements because they do not require the labels to provide as much detail as the Panels appear to consider optimal – the labels are not required to specify multiple countries of raising in the case of hypothetical situations that do not reflect actual, real world trade. But it is not up to WTO panels to determine the level at which Members should seek to fulfill their legitimate objectives. And it was not up to the Panels in this dispute to determine what level of detail would be optimal to provide to consumers.

168. As is clear, the Panels never make a finding that, in light of the origin information provided in the A-C labels, the COOL requirements are not even-handed, and as such, do not constitute legitimate regulatory distinctions, and the Panels thus err.

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[197] Although, in both cases, retailers have the option of adding more countries of raising if they so wish and can substantiate those claims in the recordkeeping.

[198] *US – COOL (Article 21.5) (Panel)*, paras. 7.118-120.

[199] *US – COOL (Article 21.5) (Panel)*, para. 7.243.

169. The closest the Panels come to making a such a finding is when the Panels conclude that the B and C labels do not provide "the same level of accurate and meaning of origin information" "in light of the potential inaccuracies on Labels B and C with respect to the country of raising, which do not similarly arise for Label A."[200] But such a statement cannot provide a basis for a finding that the COOL requirements are not even-handed.

170. First, the extra location of raising that the Panels criticize the amended measure for permitting (but not requiring) would provide little to no additional origin information of the labeled muscle cut. Even without this information, the labels in all cases will list all countries where at least one production step occurred, without exception.

171. Thus, for purposes of the "single foreign origin" feeder cattle exported to the United States, the B Label will provide accurate origin information that the muscle cut was produced from an animal that is of mixed origin as the label will already state that at least one step occurred outside the United States (birth) and two steps occurred inside the United States (raising and slaughter). Indeed, as the 2013 Final Rule explains, USDA considers that "it is understood that an animal born in another country will have been raised at least a portion of its life in that other country," and the Panels provide no reason why a label that provides a location for "birth" would not be understood by the consumer to include a period of "raising." As such, it is entirely reasonable for USDA not to require the longer label given that it would not provide any additional origin information, and given the costs of requiring the additional characters on the label.[201]

172. Second, even if the extra information regarding that the animal was raised in Mexico (in addition to being born in Mexico) does provide some marginal additional origin information, that still does not mean that the COOL requirements are not even-handed. Indeed, the central criticism of the Appellate Body of the original measure was that the information provided by the B and C labels was so "far less detailed and accurate than the information required to be tracked and transmitted by these producers and processors" that those requirements on upstream producers and processors "cannot be explained by the need to convey to consumers information regarding the countries where livestock were born, raised, and slaughtered."[202] But under the amended measure the recordkeeping requirements can be explained by the information provided by the labels. Indeed, the labels could not provide the point of production information without

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[200] *US – COOL (Article 21.5) (Panel)*, para. 7.270.

[201] 2013 Final Rule, 78 Fed. Reg. at 31,368 (Exh. CDA-1).

For C category muscle cuts the example is even more extreme as the only scenario where an additional country of raising would ever occur is where the extra raising of the animal occurred in the United States. *See US – COOL (Article 21.5) (Panel)*, n.551 (providing one example of this isolated occurrence). The Panels put forward no reason why not including the United States as an additional country of raising (where it is already listed as the location for birth and slaughter) detracts so much from the origin information provided by that C label such that the COOL requirements could not be considered even-handed, even leaving aside that such twice exported animals occurs only rarely. *See also* 2013 Final Rule 78 Fed. Reg. at 31,168 (Exh. CDA-1) (noting that the parallel transaction for a B animal to be "rare" occurrence).

[202] *US – COOL (AB)*, para. 349.

the required recordkeeping. And the Panels fail to explain why requiring the extra information regarding raising would make a legally significant difference *vis-à-vis* the recordkeeping burden. As discussed in the subsequent section, there is, in fact, no "disconnect" between the information required to be collected and the information provided on the labels, a point that the Panels fail to address entirely.

173. Rather, and as noted above, the Panels appear to consider whether the labels are legitimate regulatory distinctions to hinge on the determination of whether the labels provide "complete" information or not, irrespective of the recordkeeping burden.[203] This is an entirely different legal framework from the one the Appellate Body discussed, and one that hardly any labeling regime could ever satisfy – surely most, if not all, labeling regimes would fail such a standard. Every accommodation to cost, burden, or practicalities of the industry would prove the labels illegitimate as those accommodations would invariably allow the label to provide some less amount of information. Or to put it another way, one would expect that the information conveyed by labels could be increased, but this would entail increased costs and burdens. The Panels failed to consider the increased costs and burdens associated with the additional information that the Panels appear to seek to have the amended COOL measure provide.

174. Indeed, the Panels appear to hint that even requiring the country of birth to be listed as a country of raising on the "single foreign origin" B label may not be sufficient because that would still not take account "of the substantial amount of time that traded livestock typically spend outside the United States."[204] But such a labeling regime is a much different one from what the amended measure is, and this critique goes far beyond the original guidance of the Appellate Body. Such a measure would appear to be one that actually tracked for purposes of labeling how much time the feeder cattle spent in the two countries of raising (in this example, between the Mexico and the United States). But that measure would result in substantially more segregation than the amended measure does as Mexican producers, for example, export feeder cattle to U.S. purchasers of different ages. Under this alternative, such Mexican born B animals would need to be segregated from one another whereas today they need not be.[205]

(B). No "Disconnect" Exists Between the Information Collected and the Information Provided by the Labels

175. While the Panels considered that "the informational requirements imposed on upstream producers" and "the nature and accuracy of the information conveyed on labels" to constitute

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[203] *US – COOL (Article 21.5) (Panel)*, para. 7.243 ("Under these circumstances, we are not persuaded by the United States' contention that such a label can be regarded as '*entirely* accurate', particularly given the definition of 'raised' according to the amended COOL measure.") (emphasis in original).

[204] *US – COOL (Article 21.5) (Panel)*, para. 7.243.

[205] *US – COOL (Article 21.5) (Panel)*, para. 7.269 (noting that "[w]hile 'birth' and 'slaughter' are relatively straightforward and temporally discrete, the definition of 'raised' as the entire intervening period between them *is potentially problematic* in the context of certain requirements of the amended COOL labels.") (emphasis added).

two of the three "key determinants" of whether such a "disconnect" exists,[206] at no point do the Panels ever make a finding that a "disconnect" exists between the origin information required to be collected by upstream suppliers and the origin information provided to consumers on the labels. In fact, no such "disconnect" exists between the information collected and that provided by the A, B, and C labels. The information collected is the same that is provided. This further confirms that the Panel erred by finding that "the detrimental impact caused by the amended COOL measure does not stem exclusively from legitimate regulatory distinctions" based, in part, on any "potential inaccuracies" of the B and C labels.[207] The fact is that the labels are even-handed, and do not reflect arbitrary discrimination.

176. In the original proceeding, the Appellate Body conducted a comparison between the origin information required to be collected by upstream producers and the information provided by the labels. And, based on that comparison, the Appellate Body found the labels required under the original measure to be lacking because "the detail and accuracy of the origin information that upstream producers are required to track and transmit to be *significantly greater* than the origin information that retailers of muscle cuts of beef and pork are required to convey to their customers."[208] In the Appellate Body's view, the labels "reflect origin information in *significantly less* detail than the information regarding the countries in which the livestock were born, raised, and slaughtered, which upstream producers and processors are required to be able to identify in their records and transmit to their customers."[209] In this regard, the Appellate Body found that the recordkeeping burden "cannot be explained by the need to convey to consumers information regarding the countries where livestock were born, raised, and slaughtered, because the detailed information required to be tracked and transmitted by those producers is not necessarily conveyed to consumers through the labels prescribed under the COOL measure."[210]

177. The Panels' overall assessment of whether the labels used under the amended measure constitute legitimate regulatory distinctions differs from this analysis in significant respects.

178. The Panels begin by noting that the 2013 Final Rule made the "[t]he greatest incremental improvement" in the B and C labels.[211] However, the Panels then notes that it is of "primary importance" that the B label permits, but does not require, the country of birth to be listed as a country of raising despite the fact that feeder cattle "spend a substantial portion of their lives either in Canada or Mexico" in that this "represents potential inaccuracy in light of the average age of cattle traded between the complainants and the United States."[212]

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[206] *US – COOL (Article 21.5) (Panel)*, para. 7.265.

[207] *US – COOL (Article 21.5) (Panel)*, paras. 7.283, 7.270.

[208] *US – COOL (AB)*, para. 346 (emphasis added).

[209] *US – COOL (AB)*, para. 346 (emphasis added).

[210] *US – COOL (AB)*, para. 349.

[211] *US – COOL (Article 21.5) (Panel)*, para. 7.268.

[212] *US – COOL (Article 21.5) (Panel)*, para. 7.269.

179. While the Panels note that "the amended COOL measure's responsiveness to DSB recommendations and rulings must be assessed with regard for the new informational shortcomings on Labels B and C, as well as the aggravated source of detrimental impact due to increased recordkeeping," the Panels make no such assessment. Indeed, as recounted above, the Panels' analyze the recordkeeping burden and what information is provided by the labels completely independently of each other. The Panels never identify any information that is required to be collected by upstream producers that is not provided in the labels. As such, the Panels erred as a matter of law by finding that the "disconnect" as the Appellate Body found exists with regard to the origin information provided on the labels continues under the amended measure.

180. The fact is that no such "disconnect" exists under the amended measure revised labeling requirements, and, in any event, certainly does not exist to such a "significant[]" degree to provide the basis that for the Appellate Body's finding that the detrimental impact reflected discrimination.[213]

181. Thus, for example, as to the so-called "single foreign origin" B animal, which is the only label which the Panels considered to be "potentially inaccurate" that reflected actual trade, the label could read: "Born in Mexico, Raised and Slaughtered in the U.S." And while the Panels criticize the 2013 Final Rule for permitting (but not requiring) the omission of Mexico as a country of raising, the Panels do not find that the amended measure requires the upstream producers independently track that the animal was raised in Mexico, or how much time the animal spent in Mexico versus the United States (information that would require segregation on an animal-by-animal basis). All the records need to establish is what is on the label – that the animal was born in Mexico, and was raised (for some time) in the United States and slaughtered in the United States.

182. The same point holds true for the entirely far-fetched – and, indeed, *purely fictional* – scenarios involving livestock trade between Canada and Mexico. Thus, in the scenario where an animal is born in Canada, exported to Mexico for raising, exported back to Canada for further raising, and then exported to the United States for immediate slaughter,[214] the Panels criticize the amended measure for permitting the raising step in Mexico from being omitted and allowing a label that indicates the normal C label, *i.e.*, "Born and Raised in Canada, Slaughtered in the U.S." But in this hypothetical, the recordkeeping would not need to prove that the animal was raised in Mexico – under the amended measure the record keeping would only need to establish that the label is accurate.

183. In other words, the "disconnect" that the Appellate Body identified with regard to the original measure's labels no longer exists. As such, even applying this legal framework without

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[213] *US – COOL (AB)*, para. 346 (noting that "the detail and accuracy of the origin information that upstream producers are required to track and transmit to be *significantly greater* than the origin information that retailers of muscle cuts of beef and pork are required to convey to their customers") (emphasis added).

[214] *US – COOL (Article 21.5) (Panel)*, Table 9 (Scenario C4).

regard to whether the labels themselves are "even-handed" or not, the labels are entirely legitimate and do not prove that the detrimental impact reflects discrimination.

3. The Panels Erred in Finding that the Detrimental Impact Reflects Discrimination Due to the Existence and Scope of the Exemptions

184. The third basis for the Panels' conclusion that the detrimental impact does not stem exclusively from legitimate regulatory distinctions is that the amended measure "continues to exempt a large proportion of muscle cuts."[215] As noted previously, the COOL measure's scope is defined by three exemptions. The COOL measure does not apply when the covered muscle cut commodity: (1) is an ingredient in a "processed food item,"[216] (2) is prepared or served at a "food service establishment" (*i.e.*, the "restaurant exception"),[217] or (3) is prepared or served at an otherwise covered retailer that is a small business.[218] The 2013 Final Rule clarifies the definition of "retailer" subject to the COOL requirements but makes no change to the exemptions delimiting the scope of the COOL measure.[219]

185. The Panels' finding that the scope of these three exemptions constitute a basis for the finding that the detrimental impact does not stem exclusively from legitimate regulatory distinctions is in error.

186. First, the Panels set out an incorrect legal framework for determining whether the detrimental impact reflects discrimination. The question of whether a particular regulatory distinction is relevant or not to the analysis is not a mere formality, as the Panels appear to presume. Rather, only those distinctions that account for the detrimental impact can answer the central question of the less favorable treatment analysis – whether the detrimental impact reflects discrimination. And, thus it is only those regulatory distinctions that are relevant to the analysis and the Panels erred in determining otherwise.

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[215] *US – COOL (Article 21.5) (Panel)*, para. 7.282.

[216] 7 U.S.C. § 1638(2)(B) (Exh. US-1); 7 C.F.R. § 65.135(b) (Exh. US-2); *see also* 7 C.F.R. § 65.220 (defining the term and noting that such processing "includes cooking (e.g., frying, broiling, grilling, boiling, steaming, baking, roasting), curing (e.g., salt curing, sugar curing, drying), smoking (hot or cold), and restructuring (e.g., emulsifying and extruding)"); *US – COOL (Article 21.5) (Panel)*, para. 7.29.

[217] The COOL statute defines a "food service establishment" as a "restaurant, cafeteria, lunch room, food stand, saloon, tavern, bar, lounge, or other similar facility operated as an enterprise engaged in the business of selling food to the public." 7 U.S.C. § 1638a(4) (Exh. US-1); *see also* 7 C.F.R. § 65.140 (Exh. US-2); *US – COOL (Article 21.5) (Panel)*, para. 7.30.

[218] The statute defines the term "retailer" such that otherwise covered retailers are exempt from the COOL requirements if they sell less than US $230,000 in perishable agricultural commodities in a calendar year. 7 U.S.C. § 7 U.S.C. § 1638(6) (Exh. US-1) (cross-referencing the Perishable Agricultural Commodities Act of 1930 (PACA)); 7 C.F.R. § 65.240 (Exh. US-2) (same); *see also US – COOL (Article 21.5) (Panel)*, para. 7.28.

[219] The 2013 Final Rule does clarify pre-existing regulatory language defining "retailer" to "more closely align[]" the COOL and PACA regulations to "clarif[y] that all retailers that meet the PACA definition of a retailer, whether or not they actually have a PACA license, are also covered by COOL." 2013 Final Rule, 78 Fed. Reg. at 31,368 (Exh. CDA-1); *see also US – COOL (Article 21.5) (Panel)*, para. 7.28.

187. Second, aside from the fact that the exemptions are not relevant to the Article 2.1 analysis, the Panels erred in determining that the exemptions, in their own approach, proved that the detrimental impact reflects discrimination.[220] The Panels failed to take note that the exemptions apply equally to meat derived from imported and domestic livestock, and thus are even-handed. The Panels also failed to account for the legitimate desire of Members to adjust the scope of their technical regulations to take costs into account. And, given the enhanced accuracy of the country-of-origin labels under the amended COOL measure, the recordkeeping requirements can now "be explained by the need to provide origin information to consumers."[221] By failing to account for these considerations, the Panels erred in finding that the exemptions contribute to a finding of discrimination.

188. Third, the Panels' conclusion that the exemptions supported its findings of a disconnect between the recordkeeping burden and information provided was legally erroneous because the Panels made no evaluation of the operation of the exemptions in the U.S. market and pointed to no evidence to support their finding. The Panels ignore that the existence of legal exemptions provides an economic incentive to operators to establish distinct distribution channels to avoid the allegedly significant costs related to the COOL requirements. To conclude that operators would not act in their economic interests and seek to avoid those costs, the Panels would have had to evaluate evidence and make sufficient findings. But the complainants presented no evidence, and the Panels made no such findings. In fact, the limited evidence on the record on this issue, including from the complainants, suggests that distinct distribution channels for sales to exempt establishments do exist, thus rendering the Panels' conclusion unsupportable.

189. In the discussion that follows, the United States first explains the Panels' approach to the exemptions and then further elaborates each of the Panels' analytical errors identified above.

a. The Panels' Analysis

190. The Panels began by recognizing that "the Appellate Body 'consider[ed] that it is the distinctions between the three production steps, as well as between the four types of labels that must be affixed to muscle cuts of beef and pork, that constitute the relevant regulatory distinctions under the [original] COOL measure' and that these regulatory distinctions "remain broadly intact under the amended COOL measure."[222] As such, the Panels found that "the regulatory distinctions under the amended COOL measure are essentially the same as those under the original COOL measure," and that "the distinctions between the three production steps as well as the mandatory labels to be affixed to muscle cuts of beef and pork are relevant regulatory distinctions under the amended COOL measure for the purposes of our analysis under Article 2.1 of the TBT Agreement."[223]

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[220] *See US – COOL (Article 21.5) (Panel)*, paras. 7.276, 7.282.

[221] *US – COOL (AB)*, para. 349.

[222] *US – COOL (Article 21.5) (Panel)*, paras. 7.196-97 (quoting *US – COOL (AB)*, para. 341).

[223] *US – COOL (Article 21.5) (Panel)*, para. 7.198.

191. The Panels then addressed whether other aspects of the amended COOL measure, such as the exemptions, are relevant "for the Panel's assessment of legitimate regulatory distinctions,"[224] noting that the Appellate Body has previously stated that "in an analysis under Article 2.1, we *only* need to examine the distinction that accounts for the detrimental impact on [imported] products as compared to [domestic] products."[225]

192. The Panels noted that while they "agree with the United States that the exemptions were not explicitly identified by the Appellate Body as relevant regulatory distinctions, and that they were not found by the original panel to be a source of detrimental impact," a "broad appraisal of a measure's design and application" is required.[226] To determine whether the detrimental impact reflects discrimination, the Panels stated that it must examine all aspects of "the design, architecture, revealing structure, operation, and application of the technical regulation at issue."[227]

193. In this regard, the Panels apparently consider the question of whether a regulatory distinction is relevant to the Article 2.1 analysis to not be limited to whether that regulatory distinction accounts for the detrimental impact, but whether the regulatory distinction is "relevant to whether the detrimental impact reflects discrimination in violation of Article 2.1."[228] Under this revised framework, the Panels found that while "the exemptions under the amended COOL measure are not relevant regulatory distinctions as such," the Panels determined that the exemptions were "part of our examination of the overall architecture of the amended COOL measure, insofar as they are relevant to whether the detrimental impact reflects discrimination in violation of Article 2.1."[229]

194. As to the merits of whether the detrimental impact actually does, in fact, reflect discrimination due to the three exemptions, the Panels merely recounted the scope of the amended measure and the volume beef and pork covered by the exemptions.[230] At no time did the Panels ever analyze whether the exemptions are themselves "even-handed," nor provide any analysis as to whether the existence of the exemptions means that the detrimental impact reflects discrimination in light of the overall changes to the COOL measure made by the 2013 Final Rule. While the Panels do summarize the cost-saving related reasons that the United States put forward with regard to the three exemptions, they make no particular findings in this regard, other than to determine that such "practical considerations" do not "justify the discriminatory

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[224] *US – COOL (Article 21.5) (Panel)*, para. 7.199.

[225] *US – COOL (Article 21.5) (Panel)*, para. 7.199 (citing *US – Tuna II (Mexico) (AB)*, para. 286 (emphasis in original)).

[226] *US – COOL (Article 21.5) (Panel)*, paras. 7.201, 7.203.

[227] *US – COOL (Article 21.5) (Panel)*, para. 7.202.

[228] *US – COOL (Article 21.5) (Panel)*, para. 7.203.

[229] *US – COOL (Article 21.5) (Panel)*, para. 7.203 (internal quotes omitted).

[230] *US – COOL (Article 21.5) (Panel)*, paras. 7.222-26, 7.257-63.

nature of the amended COOL measure or call into question the Appellate Body's concern with the exemptions in the original dispute."[231]

b. The Panels' Analysis Is in Error

i. The Panels Erred by Determining that the Exemptions Are Relevant to the Article 2.1 Analysis

195. As discussed above, because "technical regulations are measures that, by their very nature, establish distinctions between products according to their characteristics, or related processes and production methods,"[232] not every distinction a measure makes is relevant to the inquiry. Only the distinctions that account for the detrimental impact could possibly answer the question of whether the detrimental impact reflects discrimination.[233]

196. As the Panels noted, the original panel had already determined that the "exact proportion or magnitude of the exceptions and exclusions is irrelevant" for purposes of the detrimental impact analysis.[234] Moreover, the original panels found that "the exceptions to the coverage of the COOL measure do not alter the distribution of compliance costs for livestock and meat producers and processors in a way that would modify the incentives created by the COOL measure."[235] Nothing in the Panels' report questions those findings. Indeed, the Panels' do not rely on the scope of the exemptions to make their finding that the amended measure results in a detrimental impact on Canadian and Mexican livestock exports to the United States. As such, it is clear that the three exemptions are not relevant regulatory distinctions for purposes of this analysis and no analysis of those exemptions can answer the central question of the less favorable treatment analysis – whether the detrimental impact reflects discrimination such that the amended measure is inconsistent with Article 2.1.

197. As discussed above, while the Panels appear to agree that the exemptions are not "relevant" regulatory distinctions "as such," the Panels consider that the exemptions remain relevant to the more general question of "whether the detrimental impact reflects discrimination in violation of Article 2.1."[236] In this sense, the Panels appear to consider that the examination of whether a regulatory distinction is "relevant" or not to be a mere formality, as, ultimately, *every*

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[231] *US – COOL (Article 21.5) (Panel)*, para. 7.276; *see also id.* para. 7.275 ("Although the Appellate Body has thus recognized that cost considerations are not *per se* prohibited, it did not accept them as *supervening justification for discriminatory measures*.") (emphasis added).

[232] *US – COOL (AB)*, para. 268.

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

[234] *US – COOL (Panel)*, para. 7.417; *US – COOL (Article 21.5) (Panel)*, para. 7.200.

[235] *US – COOL (Panel)*, para. 7.419; *US – COOL (Article 21.5) (Panel)*, para. 7.200.

[236] *US – COOL (Article 21.5) (Panel)*, para. 7.203 (internal quotes omitted).

element of the measure could, potentially, prove that the detrimental impact reflects discrimination.[237]

198. The fact that the Panels consider the question of what regulatory distinctions are relevant to this analysis to be a mere formality is confirmed by their examination of complainants' arguments that the D Label, the E Label, and the statutory prohibition on USDA mandating a trace-back regime prove that the detrimental impact reflects discrimination.

199. For the D Label, the Panels initially suggest that the Label D is not a "relevant" regulatory distinction because the complainants do not challenge this aspect of the measure and the label (which applies to imported *muscle cuts*) does not account for the detrimental impact on imported *livestock*.[238] Nevertheless, the Panels still examined whether the D Label provides "compelling evidence of arbitrary or unjustifiable discrimination," finding that it does not in light of evidence regarding the actual trade in Canadian and Mexican muscle cuts and the livestock that produce those products.[239]

200. For the E Label, the Panels appear to affirmatively find that the label is not a "relevant" regulatory distinction given that complainants had not challenged this label (which is affixed to ground meat), nor put forward any evidence that this label causes the detrimental impact on imported livestock.[240] However, again, the Panels further examined whether the E Label provides evidence that the detrimental impact reflects discrimination. As they did with regard to the D Label, the Panels again find that it does not.[241]

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[237] *US – COOL (Article 21.5) (Panel)*, para. 7.202 ("In the original dispute, the three production steps and four muscle cut labels were distinctions drawn by the original COOL measure that did not operate in isolation, but were given effect in conjunction with other elements essential to the measure's design and operation. The assessment of legitimate regulatory distinctions took account of the overall architecture of the measure, and encompassed aspects of the measure that were not themselves relevant regulatory distinctions or independent sources of detrimental impact.") (internal quotes omitted).

[238] *US – COOL (Article 21.5) (Panel)*, para. 7.204 ("Given the complainants' explicit delimitation of their claims and the lack of demonstrated detrimental impact, however, the relevance of Label D for legitimate regulatory distinctions must accordingly be adjusted in this compliance dispute.").

[239] *US – COOL (Article 21.5) (Panel)*, para. 7.279 ("[A]lthough the omission of production steps would result in provision of less detailed information, this does not seem apt to mislead consumers of Category D muscle cuts in the same fashion as would omission of countries on Labels B and C. Combined with the relatively small portion of Category D muscle cuts in the US market, and the absence of a claim that Label D creates any detrimental impact, we are not convinced that Label D rules of substantial transformation are compelling evidence of arbitrary or unjustifiable discrimination.").

[240] *US – COOL (Article 21.5) (Panel)*, paras. 7.206-07; *see also id.* n.491 ("Canada and Mexico's arguments focus on the flexibilities for ground meat and the accuracy of resulting labels, but they do not address whether and how the ground meat labelling rules account for any alleged detrimental impact on imported livestock.").

[241] *US – COOL (Article 21.5) (Panel)*, para. 7.280 ("Given the findings in the original dispute and the complainants' arguments and claims in this compliance dispute, we do not consider Label E to evidence the amended COOL measure's violation of Article 2.1.").

201. The Panels' legal framework is in error. Regulatory distinctions that are not relevant fall outside the scope of the Article 2.1 analysis.[242] And the reason that the only regulatory distinctions that are "relevant" to the analysis are those that account for the detrimental impact is that other regulatory distinctions cannot answer the key question – whether the detrimental impact reflects discrimination.

202. While the Panels state that their examination is "not without limits,"[243] this appears inaccurate. By taking an approach whereby the question of which regulatory distinctions are relevant to the analysis is a mere formality, and thus allowing the Article 2.1 analysis to cover all parts of the measure, regardless of whether the distinction itself is alleged to contribute to the detrimental impact, the Panels unhinge their analysis from an examination of whether the amended COOL measure discriminates and so is inconsistent with Article 2.1. For purposes here, the fact that the existence and scope of the exemptions do not cause – or even affect – the detrimental impact means that any such analysis of the exemptions cannot answer the question of whether the detrimental impact reflects discrimination or not.

203. The Panels thus erred in treating the question of whether a regulatory distinction is relevant to the analysis as a mere formality. The exemptions are not the regulatory distinctions that allegedly create the detrimental impact. The Panels also err by determining that the exemptions are relevant to the analysis of whether the detrimental impact stems exclusively from legitimate regulatory distinctions, and therefore whether the amended COOL measure is inconsistent with Article 2.1.

ii. The Panels Erred by Determining that the Detrimental Impact Reflects Discrimination Due to the Three Exemptions

204. Even aside from the fact that the exemptions are not relevant to the Article 2.1 analysis, the Panels erred in determining that the exemptions, under the Panels' approach, proved that the detrimental impact reflects discrimination.[244] The Panels failed to take note that the exemptions apply equally to meat derived from imported and domestic livestock, and thus are even-handed. The Panels also failed to account for the legitimate desire of Members to adjust the scope of their

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[242] The Panels' examination of the statutory prohibition on USDA mandating a trace-back system is even more opaque than those described in the immediately preceding paragraphs. The Panels appear to initially imply that this particular provision (7 U.S.C. § 1638A(f)(1)) is not a "relevant" regulatory distinction, although the Panels make no particular finding in that regard. *See US – COOL (Article 21.5) (Panel)*, para. 7.205 ("It is in a similar light [to the Panels' examination of the D Label] that the COOL statute's prohibition of trace-back could be considered under Article 2.1."). Ultimately, the Panels merely deflect the issue in lieu of making a finding as to whether this regulatory distinction proves that the detrimental impact reflects discrimination. *See id.*, para. 7.281 ("Instead, the relevance of this argument to the Article 2.1 analysis appears to be limited to whether the trace-back prohibition necessitates the same (or similar) audit and verification system of the amended COOL measure and its related detrimental impacts. Inasmuch as this argument reverts focus to the claimed deficiencies of the amended COOL measure's labelling rules, we consider that this is already addressed in the foregoing analysis.").

[243] *US – COOL (Article 21.5) (Panel)*, n.483.

[244] *See US – COOL (Article 21.5) (Panel)*, paras. 7.276-77, 7.282.

technical regulations to take costs into account. And, given the enhanced accuracy of the country-of-origin labels under the amended COOL measure, the record-keeping requirements can now "be explained by the need to provide origin information to consumers."[245] By failing to account for these considerations, the Panels erred in finding that the exemptions contribute to a finding of discrimination.

205. After noting that the exemptions meant that the COOL requirements do not apply to all muscle cuts sold in the United States, the Panels correctly acknowledged that "it is not atypical for any kind of regulation to have exceptions in terms of the products and entities that are subject to it," and "such exceptions might be justifiable for practical reasons and simply facilitate the implementation of the measure at issue without necessarily involving protectionist intent."[246] The Panels further acknowledged that the Appellate Body's statement that "[n]othing in Article 2.1 prevents a Member from seeking to minimize the potential costs arising from technical regulations, provided that the technical regulation at issue does not overtly or covertly discriminate against imports."[247] However, the Panels also noted that the Appellate Body "did not accept [cost considerations] as supervening justification for discriminatory measures," and thus concluded that the Panels "do not consider that such practical considerations justify the discriminatory nature of the amended COOL measure or call into question the Appellate Body's concern with the exemptions in the original dispute."[248]

206. In this regard, the Panels appear to consider that the analysis is limited to whether the reasons put forward by the responding party can justify a measure that has already been found to be discriminatory. But that is clearly the wrong analysis. The question being answered in this analysis is not whether the discrimination is justified, as can be the case in an Article XX analysis, but whether there is discrimination at all. And it is clear the answer to that question is no.

(A). The Exemptions Are Even-Handed and Apply to Domestic and Import Livestock Equally

207. The exemptions from the COOL requirements are perfectly even-handed. Indeed, it is *uncontested* that nothing in the design or operation of the exemptions that define the scope of the amended COOL measure disadvantage Canadian and Mexican livestock exports at all. Mexico, for example, noted that "the evidence indicates that the distribution of beef products made from Mexican cattle as between products covered by the Amended COOL Measure and those that are not should be same as for beef products generally."[249] Thus, Mexico concedes that the existence and scope of the exemptions do not impact whether muscle cuts derived from cattle born in Mexico will be labeled or not labeled – the same proportion of the beef derived from cattle of

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[245] *US – COOL (AB)*, para. 349.

[246] *US – COOL (Article 21.5) (Panel)*, para. 7.275 (quoting *US – COOL (Panel)*, para. 7.684).

[247] *US – COOL (Article 21.5) (Panel)*, para. 7.275 (quoting *US – Clove Cigarettes (AB)*, n.431).

[248] *US – COOL (Article 21.5) (Panel)*, paras. 7.275-76.

[249] Mexico's Response to Panels' Question 12, para. 11.

Mexican origin likely will end up in both products that are subject to the labeling requirements as well in products and market segments that are not subject to the labeling requirements.[250]

208. Thus, the exemptions at issue in this dispute are wholly different from the exemptions in *US – Clove Cigarettes*, where the Appellate Body determined that the relevant exemption was not even-handed in that 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).[251] Similarly, in *EC – Seal Products*, 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.[252]

209. This same dynamic is simply *not present* in the COOL exemptions, and the Panels made no such finding that it is.

(B). Reduction of Costs Provides a Sound, Non-Discriminatory Basis for Exemptions

210. The Panels explicitly recognized that "it is not atypical for any kind of regulation to have exceptions in terms of the products and entities that are subject to it. Some of such exceptions might be justifiable for practical reasons and simply facilitate the implementation of the measure at issue without necessarily involving protectionist intent."[253] Similarly, the Panels found that "there may be a variety of possible reasons unrelated to risks for exempting or treating differently certain product categories under a Member's technical regulation, such as regulatory or compliance costs."[254]

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[250] *See* U.S. Comments on Mexico's Response to Question 12, paras. 24-25.

[251] *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.").

[252] *See EC – Seal Products (Panel)*, para. 7.317. Moreover, the 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." *Id.* para. 7.351.

[253] *US – COOL (Article 21.5) (Panel)*, para. 7.275 (quoting *US – COOL (Panel)*, para. 7.684).

[254] *US – COOL (Article 21.5) (Panel)*, para. 7.380.

211. Consistent with this recognition, the United States had a sound basis for including these exemptions in the measure. Such exemptions constitute important mechanisms that policy makers use to control costs of measures in pursuit of legitimate government objectives.[255]

212. In particular, as discussed previously in this dispute, the United States wants to provide consumers accurate and meaningful information on origin on the meat that they buy, *but not at any cost*. And U.S. policymakers ultimately made the determination that the provision of such information in restaurants, by small retailers, and in all processed foods would cross the threshold for the overall level of cost that it was appropriate for consumers and industry to bear. Accordingly, even if this information was and remains desired by consumers, the United States ultimately set the level at which it set out to fulfill its objective at a slightly lesser level, the prerogative of any regulator.

213. And the cost savings provided by these exemptions are real. Indeed, it was uncontested that removing these three exemptions would increase record-keeping, verification, and segregation costs in the United States.[256] The "food service establishment" exemption covers, by at least one estimate, over 600,000 restaurants in the United States.[257] In this regard, and as the United States explained to the Panels, compliance with COOL may be significantly more burdensome for restaurants, which typically use menus, than for retailers, such as supermarkets, which individually label each package of meat. That is, changing origin information between A, B, C, and D requires that the supermarket employee type a new code into the labeling machine. In contrast, restaurants preprint their menus, and reprinting a menu can be a significant cost.[258]

214. The United States is, of course, hardly alone in trying to balance providing consumers information regarding the products they purchase and the costs of providing such information, a

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[255] *See also US – COOL (Panel)*, para. 7.711 ("Of course, it is often necessary and important for governments to take conflicting interests into account in implementing laws and regulations to fulfil policy objectives.").

[256] *See* U.S. Comments on Canada's and Mexico's Responses to Question 47, para. 144 (citing Canada's Response to Question 47, para. 103; Mexico's Response to Question 47, para. 96).

[257] U.S. First Written 21.5 Submission, para. 941 (citing NPD Group Press Release (2013) (Exh. US-12)).

[258] U.S. Comments on Canada's and Mexico's Responses to Question 46, para. 138. In terms of the costs of eliminating the "food service establishment" exception, the United States has explained that one point of reference would be the preliminary regulatory impact analysis conducted by the U.S. Food and Drug Administration (FDA) for nutrition labeling of standard menu items in restaurants and similar retail food establishments. *Id.* paras. 136-137 (citing FDA, "Food Labeling: Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments Notice of Proposed Rulemaking, Preliminary Regulatory Impact Analysis (March 2011) (Exh. US-75)). To meet the proposed food nutrition information requirements, FDA has estimated that approximately 95,500 restaurants (a fraction of the total number of food service establishments in the United States) would incur on average $182 in annual costs for replacing menus once per year. Of course, COOL would require menu replacement more often to reflect changes in country-of-origin information. Suppose that each establishment kept on hand 4 types of menus to reflect A, B, C, and D label meat (of course various combinations of those would be required in combination with different menu items). There are an estimated 634,361 food service establishments in the United States (Economic Census, 1997). Having 3 additional menus on hand for each of those could cost approximately 3 x $182 x 634,361 = $350 million per year.

point that the original panel recognized.[259] Indeed, the United States is not aware of *any* COOL measure applied by *any* Member that applies to all sales of all products. Certainly, the complaining parties' own COOL measures that apply to food products are no exceptions.[260] In this regard, the challenged measure is not unusual at all – in fact it is firmly in the majority.

215. In sum, the exemptions to the amended measure thus reflect sound public policy, not arbitrary discrimination.

(C). The Panels Fail to Examine Whether the "Disconnect" Proves that the Detrimental Impact Reflects Discrimination

216. Finally, the Panels erred even under their own approach by never examining whether the nature and scope of the exemptions establish a "disconnect" between what is collected and what is provided that is so disproportionate to prove that the detrimental impact reflects discrimination. Rather, the Panels appear to consider that the fact that the United States maintained the exemptions is sufficient to establish that the "disconnect" identified by the Appellate Body still exists, and therefore, the amended COOL measure is inconsistent with Article 2.1. This is in error.

217. The question is not whether the measure covers all sellers of all beef and pork, with a conclusion following that any measure that does not have such a coverage is inconsistent with Article 2.1. Such an analysis has no support in the text of the agreement nor in reality itself – again, it is uncontested that such exemptions are normal mechanisms used by WTO Members to regulate the costs of achieving policy goals at the level considered appropriate by that Member.[261] The question at issue is not whether there is a "disconnect" for "disconnect's" sake.

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[259] *US – COOL (Article 21.5) (Panel)*, para. 7.275 ("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.") (quoting *US – COOL (Panel)*, para. 7.684).

[260] *See* U.S. First Written 21.5 Submission, paras. 41-44 (citing Scope of Third Party COOL Regulations (Exh. US-10); WTO Members with Country of Origin Regimes (Exh. US-5); TBT Notifications of Country of Origin Measures (Exh. US-6)).

[261] As the United States explained to the Panels, mandatory COOL requirements are common among WTO Members, with nearly 70 Members imposing country of origin regimes of some scope. *See* WTO Members with Country of Origin Regimes (Exh. US-5); TBT Notifications of Country of Origin Measures (Exh. US-6); *US – COOL (Panel)*, para. 7.638 ("We observe that many of these labelling requirements purport to provide consumer information on origin of food products. This suggests that consumer information on country of origin is considered by a considerable proportion of the WTO Membership to be a legitimate objective under the TBT Agreement."); *US – COOL (Article 21.5) (Panel)*, para. 7.275 (noting that the original panel acknowledged that 'it is not atypical for any kind of regulation to have exceptions in terms of the products and entities that are subject to it. Some of such exceptions might be justifiable for practical reasons and simply facilitate the implementation of the measure at issue without necessarily involving protectionist intent.'"). While the scope of these other COOL measures varies widely, the United States is not aware of any Member that applies a "universal" country of origin measure, *i.e.*, one that applies to all types of sales of all types of products. This merely confirms the unsurprising conclusion that while many Members want to provide origin information to consumers, Members must balance that objective against

218. Rather, the question is whether the information provided by the labels, which were not detailed under the original COOL measure, and could be inaccurate, along with the scope of the exemptions, meant that the burden of the recordkeeping could not "be explained by the need to provide origin information to consumers," such that the regulatory distinctions could not "be said to be applied in an even-handed manner."[262] To put it another way, the scope of the exemptions when considered in the context of the original measure further corroborated a problem with the underlying measure in that it did not provide an adequate amount of information provided with respect to the B and C labels so as to justify the level of recordkeeping required.

219. But the United States has now corrected this underlying problem and the information now provided by the labels is much greater, both in detail and in accuracy than was the case in the original measure. Indeed, for purposes of labels that are, in fact, used in the marketplace and that reflect *actual* trade in livestock among the three parties, *i.e.*, the A Label, the "single foreign origin" B Label (born either in Canada or Mexico), and the "single foreign origin" C Label (born and raised in Canada), the information provided by those labels is accurate and meaningful. In this sense, there is no "disconnect" between the information recorded and the information provided – none of the labels require upstream producers and processors to record and keep any information that is not provided on the labels, and the Panels did not find to the contrary.[263]

220. And while the United States has not eliminated the exemptions for reasons previously described, this alone cannot be determinative of the question at issue. This is because the scope of the exemptions no longer exacerbate any underlying problem since the underlying problem no longer exits. Rather, as stated above, the only question is whether the exemptions now standing alone are hallmarks of a lack of even-handedness. Undoubtedly, they are not.

221. In this context, it is important to recall further, as the United States explained to the Panels, that the coverage of the amended COOL measure is hardly limited. The measure requires 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.[264] Enacting this measure on this many stores and this much product was a major policy decision only taken by the United States after a detailed assessment of its costs and benefits.

222. And it is these two factors – the origin information provided to consumers (in terms of detail and accuracy) and the sheer breadth of what is sold in the tens of thousands of retailers covered by the amended measure, that provide a sound basis as to why the United States requires the recordkeeping burden it does require to substantiate where the animal was born, raised, and slaughtered. Indeed, neither complainant has even suggested a less costly or otherwise less

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other, competing public policy objectives, such as limiting the costs to industry in providing such information. *See generally* Scope of Third Party COOL Regulations (Exh. US-10).

[262] *US – COOL (AB)*, paras. 346, 349.

[263] *See supra*, sec. II.E.2.b.ii.B.

[264] *See* U.S. First Written 21.5 Submission, para. 92.

burdensome alternative measure that provides the same level of origin information as part of their Article 2.2 claims. In light of this sound basis, and consistent with the legal framework set out by the Appellate Body, the regulatory distinctions of the amended measure are even-handed such that the detrimental impact does not, in fact, reflect discrimination, but rather the legitimate choice of U.S. policy makers to provide origin information regarding where the animal was born, raised, and slaughtered subject to perfectly normal cost constraints.

223. The fact that a substantial amount of beef and pork are exempt from the requirements does not alter that conclusion. Again, those exemptions are explained by real concern as to the cost to restaurants and other small food service businesses, processed food producers and retailers, and small retailers more generally of providing consumers origin information.

224. Thus, based on this analysis under the Panels' framework, the exemptions do not support a finding that the regulatory distinctions are not even-handed and amount to arbitrary or unjustifiable discrimination. The "detailed information required to be tracked and transmitted by" producers *is* "conveyed to consumers through labels prescribed under the [amended] COOL measure."[265] This is "because the prescribed labels do […] expressly identify specific production steps and, in particular for Labels B and C, [do not] contain confusing or inaccurate origin information." (As explained in the next section, detailed information is *not* "required to be tracked and transmitted" by producers for product subject to the exemptions.) And therefore the manner in which the amended COOL measure seeks to provide information to consumers is not arbitrary, and the burden imposed on upstream producers and processors is not disproportionate or unjustifiable.[266]

225. Thus, as explained above, the three exemptions are entirely even-handed in their operation, are provided for a sound, non-discriminatory basis, and do not, in fact, contribute to a disproportionate "disconnect." As such, the exemptions cannot constitute a basis for finding that the detrimental impact reflects discrimination, and the Panels erred in so finding.

iii. The Panels' Conclusion in Relation to the Exemptions Is Legally Unsupportable and Based on No Examination of the Effects of Exemptions At All

226. The issues explained above – that the exemptions are not themselves the regulatory distinctions leading to any detrimental impact, and the exemptions are even-handed and based on rational regulatory cost considerations – are each sufficient reasons to reverse the Panels' legal conclusion that any detrimental impact from the amended COOL measure does not stem exclusively from a legitimate regulatory distinction. But in addition to these issues, the Panels have drawn a legal conclusion that cannot stand as it is based on a fundamental and unexamined misapprehension of the effect of the exemptions under the amended measure.

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[265] *US – COOL (AB)*, para. 349.

[266] *See US – COOL (AB)*, para. 347.

227. The Panels did not undertake any examination of the effect of the exemption on competitive opportunities for imported livestock because they assert that no new facts had been presented that the scope of the exemptions changed.[267] But the Panels have merely assumed that market participants, despite the alleged very high costs of record-keeping and segregation, nonetheless voluntarily take on those costs even though there is no requirement to maintain or transmit country of origin information for sales to exempt establishments. That is, the Panels effectively assume U.S. slaughterhouses, wholesalers, and exempt retailers are economically irrational and take on costs they are not obligated to assume.

228. There are *no facts* to support this assumption. And given that there is no disconnect between the records required to be maintained and transmitted and label accuracy for retailers (non-exempt establishments), whether the exemptions actually result in market participants acting irrationally – that is, maintaining and transmitting information and records throughout the entire U.S. meat distribution system, even for sales to exempt establishments – is critical to the Panels' own approach. The decision by the Panels not to examine this issue and to draw a legal conclusion without an adequate basis is another sufficient reason to reverse the Panels' conclusion.

229. First, and critically, the Panels misconstrue the effect of the exemptions. The exemptions for, *inter alia*, food service establishments (such as all restaurants, cafeterias, convenience stores, etc.) and retailers falling below certain thresholds reduce the scope of the country-of-origin labeling requirements. That is, meat sold through these establishments are not subject to labeling requirements; accordingly, any slaughterhouses or wholesalers selling to those establishments are not required to maintain or transmit country-of-origin information for that product.

230. USDA has recognized since its first proposal to implement COOL that the exemption of certain establishments from labeling requirements would result in certain sales and channels of distribution being exempt from the associated recordkeeping requirements. For example, in the 2003 proposed rule, the USDA noted:

> The proposed rule has no mandatory requirement, however, for any firm other than statutorily defined retailers to make country of origin claims. In other words, no producer, processor, wholesaler, or other supplier is required to make and substantiate a country of origin claim provided that the commodity is not ultimately sold in the form of a covered commodity at the establishment of a retailer subject to the proposed rule. Thus, for example, a processor and its suppliers may elect not to maintain country of origin information nor to make country of origin claims, but instead to sell through marketing channels not subject to the proposed rule. Such marketing alternatives include foodservices, export, and retailers not subject to the proposed rule.[268]

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[267] *US – COOL (Article 21.5) (Panel)*, para. 7.272.

[268] 2003 Proposed Rule, 68 Fed. Reg. 61,944, 61,977 (Exh. CDA-7). The proposed rule reiterated this statement a number of times: "[M]arket participants other than those retailers defined by the statute may decide to sell products through marketing channels not subject to the proposed rule." *Id.* at 61974. "[T]here is no

231. USDA made the same statements in subsequent iterations of the proposed rule[269] and then the 2009 Final Rule,[270] where it also noted: "[t]he majority of product sales are not subject to the rule, and there are many current examples of companies specializing in production of commodities for foodservice, export markets, and other channels of distribution that would not be directly affected by the rule."[271]

232. Thus, to conclude that the exemptions did not result, as intended, in reduced costs and significant marketing and competitive opportunities not subject to country-of-origin labeling and recordkeeping requirements, but rather contributed to the "disconnect" between recordkeeping and label accuracy, suggesting discrimination, would have required the Panels to examine and draw a conclusion, based on facts, that the exemptions were not operating as designed.

233. The Panels' entire analysis of the exemptions is to repeat a statement by the original panel that "the ultimate disposition of a meat product is often not known at any particular stage of the production chain" and a statement by the Appellate Body that "information regarding the origin of *all* livestock will have to be identified, tracked, and transmitted through the chain of production by upstream producers … even though a considerable proportion of the beef and pork derived that livestock will ultimately be exempt from the COOL requirements and therefore carry no COOL label at all."[272] The United States will return to each of those statements below, but under the Panels' own approach, whether the "information regarding the origin of *all* livestock will have to be identified, tracked, and transmitted through the chain of production by upstream producers" is critical to the weight the Panels could have placed on the exemptions. That is, the Panels needed to consider whether this statement is *currently* supported by facts in the U.S. market, or whether information regarding the origin of *less than "all"* livestock is being identified, tracked, and transmitted. But the Panels did not undertake any analysis of that issue. And for that reason, the Panels had no basis to conclude that *all* U.S. slaughterhouses, wholesalers, and exempt retailers take on recordkeeping and information transmittal costs they are not obligated to assume.

234. Whether the origin information of "all" livestock, or less than all livestock, and how much less, is relevant to the weight that could be accorded the issue of exemptions under the Panels' approach. But contrary to logic, the Panels appear to assume the issue is irrelevant,

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requirement that firms in the supply chain must supply their products to retailers subject to the proposed rule." *Id.* "[S]ome producers and suppliers may choose to market their products through channels not subject to the rule." *Id.* "[W]holesalers will be given flexibility to develop their own systems to comply with the proposed rule. . . . . In addition, wholesalers have the option of supplying covered commodities to retailers or other suppliers that are not covered by the proposed rule." *Id.* at 61976.

[269] *See* 2008 Interim Final Rule, 73 Fed. Reg. 45106, 45,141-43 (Exh. CDA-102).

[270] 2009 Final Rule, 74 Fed Reg. 2658, 2695-96 (Exh. CDA-2).

[271] 2009 Final Rule, 74 Fed. Reg. at 2696 (Exh. CDA-2); 2008 Interim Final Rule, 73 Fed. Reg. at 45,143 (Exh. CDA-102).

[272] *US – COOL (Article 21.5) (Panel)*, para. 7.272 (italics in original; quotation marks and footnotes omitted).

despite the fact that the exemptions were included in the measure precisely to reduce its burden by limiting its scope.

235. Consider if the country of origin labeling requirements covered only meat sold in the United States by the single largest U.S. retailer; that is, all meat sold by other establishments was exempt from the requirements. It would be irrational to assume that slaughterhouses, wholesalers, and all the exempt establishments (whether food service or retailers) would take on the costs of maintaining and transmitting origin records and information. Rather, and absent facts to the contrary, it would be logical to conclude that rational economic actors would establish channels of distribution for those exempt establishments to avoid the costs of recordkeeping and segregation. Those costs would be incurred for and borne by the non-exempt largest retailer and its suppliers (and consumers).

236. The facts of this compliance proceeding are not significantly different. The Panels have found up to 66.7 percent of beef and up to 84.1 percent of pork muscle cuts are exempt from the country of origin labeling requirements.[273] In fact, the overall value of sales to exempt food service establishments is approximately $31.9 billion for beef and $19.1 billion for pork.[274]

237. Given the amount of product subject to exemptions, it was critical for the Panels' approach to understand *how* those exemptions impacted the channels of distribution in the market, and whether slaughterhouses, wholesalers, and exempt establishments were *actually* taking on the costs of maintaining and transmitting unnecessary records and information or instead setting up a lower-cost distribution channel to avoid being affected by the COOL measure. Indeed, given the enormous benefits, it is hard to believe that no rational economic actor would establish a lower-cost channel of distribution.

238. In drawing a legal conclusion without foundation, the Panels essentially held contradictory thoughts on U.S. market actors simultaneously. The Panels concluded that the recordkeeping and segregation costs of complying with mandatory COOL requirements were so costly that there was a detrimental impact on Canadian and Mexican livestock. But at the same time, the Panels considered that no slaughterhouse, wholesaler, or exempt establishment would make use of the exemptions to establish a lower-cost channel of distribution for those very substantial sales. The Panels' contradictory thoughts make no economic sense. However, if they were to be credited, the Panels should have examined and based its conclusion on actual facts in the U.S. market to support them.

239. The Panels' evaluation, in addition to having no basis in logic or profit-maximizing behavior, also is not supported by a close examination of the statements from the original

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[273] *US – COOL (Article 21.5) (Panel)*, para. 7.273.

[274] These figures were derived by multiplying the value of the food service exemption for beef and pork by the cost per pound ratios of the retail sales of beef and pork, which are subject to the COOL measure. Retailers subject to COOL sell an estimated 8.2 billion pounds of beef and 2.3 billion pounds of pork annually, worth $38.5 billion and $8.0 billion, respectively. U.S. First Written Submission, para. 92. Based on these figures, the cost per pound ratios are $4.69 and $3.48 for beef and pork, respectively. Approximately 6.8 billion pounds of beef and 5.5 billion pounds of pork are served in food service establishments, which are exempt under COOL. Exhibit US-59.

proceeding on which it drew. The Panels assert that "[w]e have no evidence before us that calls into question the original panel's finding" that "often" the ultimate disposition of a meat product is not known at "any particular stage" of distribution.[275] In addition to not relieving the Panels of having a basis to support the conclusion drawn (as explained above), this statement is in error.

240. As noted, in the proposed, interim, and final rules, the U.S. Department of Agriculture had explained that channels of distribution to exempt establishments would not be subject to the requirements and that firms were engaged in distribution through such channels.[276] In the 2013 Final Rule, a commenter argued that imported products would derive an advantage from the revised labeling requirements as "imported products will be sold through foodservice channels like restaurants where it will not have to be labeled."[277] In examining estimated implementation costs of the 2013 Final Rule, the Department excluded muscle cuts of cows from its estimate, noting that these "typically are marketed through hotel, restaurant, or institutional channels … such that COOL requirements no longer apply."[278] In the 2009 Final Rule, the Department noted that "[m]ost manufacturers of covered commodities will likely print country of origin and, if applicable, method of production information on retail packages supplied to retailers."[279] And Canada itself presented evidence from a packer that once cattle are slaughtered and the meat is processed, "packers ship it in boxes to distributors, food service establishments, and retailers."[280] In each of these examples, the ultimate disposition of the meat *was known* at the slaughterhouse / packer or wholesaler stage of distribution. Thus, there *was* evidence before the Panels in this proceeding that the ultimate disposition of a meat product is known at a "particular stage of distribution." The question the Panels should then have asked is how "often" the ultimate disposition would not be known, but the Panels simply did not examine that question.

241. The Panels pointed to a statement by the Appellate Body that "information regarding the origin of *all* livestock will have to be identified, tracked, and transmitted," which, of course, was not made on the basis of an examination of the record of this proceeding. The Appellate Body had cited to a passage of the original panel report indicating that "the ultimate disposition of a meat product is often not known at any particular stage of the production chain."[281] This passage, in turn, is a quotation from a U.S. answer to a panel question.[282] Therefore, it is not clear that this quotation of a U.S. answer constitutes "the original panel's finding" as the compliance Panels assert.[283] But, in any event, the answer, in using the term "often," does not provide a quantitative sense of how often this is the case. Furthermore, the statement related to

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[275] *US – COOL (Article 21.5) (Panel)*, para. 7.272.

[276] *See, e.g.*, 2009 Final Rule, 74 Fed. Reg. at 2696 (Exh. CDA-2).

[277] 2013 Final Rule, 78 Fed. Reg. at 31,374 (Exh. CDA-1).

[278] 2013 Final Rule, 78 Fed. Reg. at 31,380 (Exh. CDA-1).

[279] 2009 Final Rule, 74 Fed. Reg. at 2695 (Exh. CDA-2).

[280] First McDowell Statement, para. 5 (Exh. CDA-17).

[281] *US – COOL (AB)*, para. 344 (quoting original panel reports, para. 7.417).

[282] *US – COOL (Panel)*, para. 7.417 (quoting U.S. Response to Original Panel's Question 93).

[283] *US – COOL (Article 21.5) (Panel)*, para. 7.272.

the situation at the time of the original proceeding and not the situation at the time of the compliance proceeding, and the U.S. answer was in response to a specific question from the original panel.

242. That question was not whether distinct distribution channels exist for sales to exempt establishments. The question was how operators in the distribution chain distinguish exempt and non-exempt meat, for example, "are meat products systematically separated throughout the production chain"? The U.S. answer spoke to that specific question, and indicated that the "United States is not aware of any evidence" that operators "are systematically separating" animals or meat products. That is, the U.S. answer was focused on whether operators selling to both exempt and non-exempt establishments engage in physical segregation "throughout the production chain," as opposed to other forms of distinguishing animals and products. The answer went on to state that "[t]his is due to the fact that the ultimate disposition of a meat product is often not known at any particular stage of the production chain." The answer did not assign a value to "often," and cited no evidence for that term, consistent with the position that the United States is "aware of no evidence" of systematic separation. Therefore, while in the context of the original proceeding, this U.S. answer might have been understood in isolation as supporting a view that mixed distribution channels may exist (even, may "often" exist), it does not, on its face, support a conclusion that distinct distribution channels do *not* exist for sales to exempt establishments.

243. In the light of the Appellate Body's subsequent clarification of the role an evaluation of the exemptions could play in an assessment of whether the disconnect between record-keeping requirements and the information provided through labeling requirements is indicative of discrimination, the Panels were required to do more in this proceeding. As suggested above, to draw a legal conclusion from the exemptions, the Panels would have needed to assess in light of the evidence[284] how "often" ultimate disposition is not known, and what this means for the ability of the exemptions (of up to 66.7 percent of beef and up to 84.1 percent of pork muscle cuts) to avoid costs and provide equality of competitive opportunities for imported and domestic livestock. In particular, rather than simply refer to a U.S. answer to a particular (and different) question, and which *did not claim to be able to assign a value to "often,"* the Panels should have examined the evidence on the record to determine if it was sufficient to make findings on these issues.

244. In this regard, as noted previously, record evidence suggests that distinct distribution channels for sales to exempt establishments *do* exist. As in the original proceeding, the United States is not aware in this proceeding of the extent of use of those channels by U.S. economic operators. But Canada and Mexico have presented *no evidence* that slaughterhouses, wholesalers, and exempt establishments are *not* making use of the exemptions to establish lower-cost channels of distribution for those very substantial sales. To the contrary, the packer statement submitted by Canada and quoted above suggests exactly the opposite. Because "packers ship [the processed meat] in boxes to distributors, food service establishments, and

[284] Of course, as an initial matter, Canada and Mexico would have needed to provide the evidence sufficient to support a finding of how often the exemptions were used.

retailers,"[285] this statement suggests that a distinct channel of distribution can and does exist from the packer/slaughterhouse to food service establishments, which are exempt from COOL requirements.

245. The absence of any affirmative evidence on the part of complainants that U.S. economic operators are not making use of the exemptions is particularly notable given that they have presented evidence on other issues in this proceeding from U.S. actors (such as producers and slaughterhouses) that would possess this information. That is, these same entities would have been able to present information, which may relate to business plans or relationships, in individualized or aggregate form to provide a basis to conclude how often such distinct channels are utilized. That such information was never presented from the entities that would possess it is striking and relevant.

246. In sum, the Panels' conclusion that the exemptions did not undermine but rather supported its findings of a "disconnect" between the recordkeeping burden and information provided was legally erroneous. The Panels made no evaluation of the operation of the exemptions in the U.S. market and pointed to no evidence to support its finding. The Panels ignore that the existence of legal exemptions provides an economic incentive to operators to establish distinct distribution channels to avoid the allegedly significant costs related to the COOL requirements.[286] To conclude that operators would not act in their economic interests and seek to avoid those costs, the Panels would have had to evaluate evidence and make sufficient findings. But the complainants presented no evidence, and the Panels made no such findings. And the U.S. answer from the original proceeding to which the Panels refer does not provide that sufficient basis as it does not purport to have any specific evidence and does not even purport to address the existence of distinct distribution channels to exempt establishments. The limited evidence on the record on this issue, including from the complainants, suggests that distinct distribution channels for sales to exempt establishments do exist, thus rendering the Panels' conclusion unsupportable.

247. The establishment exemptions (among others) were included in the COOL legislation precisely to reduce the costs of the measure, and they afford competitive opportunities for sales to those establishments without regard to COOL requirements. It cannot be that the existence of those exemptions can instead be considered to *support* a finding of *discrimination*, without any actual evidence from the U.S. market that those competitive opportunities had been denied. Under the Appellate Body's approach, the exemptions might be understood to operate differently than designed if "information regarding the origin of *all* livestock *will have to be* identified, tracked, and transmitted through the chain of production by upstream producers in accordance with the recordkeeping and verification requirements."[287] But the Panels simply failed to examine the issue identified by the Appellate Body and instead assumed an affirmative answer

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[285] First McDowell Statement, para. 5 (Exh. CDA-17).

[286] In fact, the Panels found that the recordkeeping burden had increased under the amended COOL measure. This would increase the incentive to use other distribution channels, but the Panels failed to recognize or analyze this change.

[287] *US – COOL (AB)*, para. 344 (emphasis added).

and legal conclusion. This is an inadequate basis to find that the *exemptions* from the country-of-origin requirements (including recordkeeping) in the amended COOL measure actually contribute to a *breach* of the national treatment obligation.

E. Conclusion on Article 2.1 of the TBT Agreement

248. In light of the above, the Panels finding that the detrimental impact does not stem exclusively from legitimate regulatory distinctions, and the amended measure is therefore inconsistent with Article 2.1 of the TBT Agreement, because: (1) the amended measure "entails an increased recordkeeping burden"; (2) the B and C labels have "a potential for label inaccuracy"; and (3) the amended measure "continues to exempt a large proportion of muscle cuts" has no basis and is therefore in error.[288] The United States thus requests the Appellate Body to reverse the Panels' finding that the amended measure is inconsistent with Article 2.1 of the TBT Agreement.[289]

III. THE UNITED STATES CONDITIONALLY APPEALS THE PANELS' INTERPRETATION OF THE PHRASE "TAKING ACCOUNT OF THE RISKS NON-FULFILMENT WOULD CREATE" IN ARTICLE 2.2 OF THE TBT AGREEMENT

249. In the event that Canada or Mexico appeals the Panels' finding that the amended measure is not inconsistent with Article 2.2 of the TBT Agreement, the United States appeals the Panels' interpretation of the phrase "taking account of the risks non-fulfillment would create." In particular, the Panels erred in interpreting this phrase to mean that "providing less origin information to consumers for a significantly wider range of products" "might achieve an equivalent degree of contribution as the amended COOL measure."[290] The Panels erred in interpreting Article 2.2 as permitting a WTO panel to engage in the type of weighing and balancing of public policy objectives that would be necessary under its approach. Importantly, the Panels erred in adopting an interpretation that determines how Members should value the trade-off between the provision of less information on a wider scope with more information on a more limited scope of products.

250. Rather, the phrase "taking account of the risks non-fulfillment would create" is properly understood as a reflection that an individual Member takes into account such risks when setting its level of fulfillment (*i.e.*, required degree of contribution). However, that does not mean that the phrase allows a WTO panel to find that a Member has acted inconsistently with Article 2.2 where it could have applied a measure that provides less information on origin. Such an approach ignores the Member's agreement on the right to pursue legitimate objectives "at the levels [they] consider[] appropriate" – as the TBT Agreement makes clear. The Panels' approach is therefore in error.

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[288] *US – COOL (Article 21.5) (Panel)*, para. 7.282.

[289] *US – COOL (Article 21.5) (Panel)*, para. 7.282.

[290] *See, e.g., US – COOL (Article 21.5) (Panel)*, para. 7.488.

251. Moreover, the Panels' approach suggests that a WTO panel would be in a position to balance the Member's desired degree of contribution with other variables to determine whether the Member has made the "best" policy choice. That is not the province of Article 2.2 specifically, or of the WTO more generally.

A. The Panels' Analysis

252. After rejecting complainants' argument that "the relative importance of interests or values" is a separate factor of the Article 2.2 test,[291] the Panels began their analysis by examining two criteria: "the nature of the risks and the gravity of the consequences."[292] In the Panels' view, the examination of these two criteria are done "by assessing consumer interest in, and willingness to pay for, country of origin information."[293]

253. As to the first criteria, the Panels found that "consumers are interested both in country of origin information in general and in country of origin information according to point of production," and that "consumers show some willingness to pay for general country of origin information."[294] To that end, the Panels concluded that "there is some risk associated with the non-fulfilment of the amended COOL measure's legitimate objective," in that "consumers would not receive meaningful information" and may be "misinformed, confused, or not informed at all."[295]

254. As to the second criteria – "the gravity of this specific consequence" – the Panels looked to "consumer demand," "benefits accruing to consumers," economic benefits of the amended COOL measures, and the "Member's interest in pursuing a legitimate objective."[296] The Panels ultimately determined that while they had "established the nature of the risks, and the consequences of not fulfilling the amended COOL measure's objective," it had "been unable to ascertain the gravity of these consequences."[297]

255. The Panels then engaged in a comparison of the four alternatives with the challenged measure.

256. With respect to the first alternative measure, the Panels determined that mandatory labeling based on substantial transformation for all types of meat (Labels A-E) with additional voluntary point of production labeling "would provide less information on origin than the

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[291] *US – COOL (Article 21.5) (Panel)*, para. 7.379.

[292] *US – COOL (Article 21.5) (Panel)*, para. 7.379.

[293] *US – COOL (Article 21.5) (Panel)*, para. 7.381.

[294] *US – COOL (Article 21.5) (Panel)*, para. 7.416.

[295] *US – COOL (Article 21.5) (Panel)*, para. 7.417.

[296] *US – COOL (Article 21.5) (Panel)*, paras. 7.418-422.

[297] *US – COOL (Article 21.5) (Panel)*, para. 7.424.

amended COOL measure for . . . US-slaughtered livestock covered by Labels A-C."[298] Despite this finding, the Panels further examined whether the proposed alternative still could be considered to make an equivalent contribution to the objective in light of the "nature of the risks and the gravity of the consequences of non-fulfillment."[299] According to the Panels:

> Given the potential relevance of risks of [sic] non-fulfilment in comparing degrees of contribution, we consider that providing less origin information to consumers for a significantly wider range of products through a measure like the complainants' first alternative measure might achieve an equivalent degree of contribution as the amended COOL measure.[300]

257. However, in light of the Panels' inability to "ascertain the gravity of these consequences," the Panels subsequently found that they "cannot determine the specific implications of risks of nonfulfillment for the interplay between less information coupled with more extensive coverage under the first alternative measure, or for the first alternative's degree of contribution."[301] The Panels further stated that while less origin information might be beneficial, "it is difficult to establish the exact implications for consumer information of having less information on the labels – even for a wider coverage of products."[302] The Panels thus found that the complainants had not made a *prima facie* case as they "have not persuasively demonstrated how the increased coverage of their first alternative measure would compensate for less origin information provided on Labels A-C under the first alternative measure."[303]

258. With respect to the second alternative, the Panels similarly found that extending the ground meat rules to all muscle cuts from U.S.-slaughtered animals would "not seem capable of making an actual contribution to the objective of providing consumer information on origin at least equivalent to the actual contribution of the amended COOL measure."[304] And again, while

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[298] *US – COOL (Article 21.5) (Panel)*, para.7.479.

[299] *US – COOL (Article 21.5) (Panel)*, paras. 7.486-491.

[300] *US – COOL (Article 21.5) (Panel)*, para. 7.488. The reference to risks "of" non-fulfilment appears to be a typographical error, as it is not the term used in Article 2.2. The risk "of" non-fulfilment would refer to the likelihood an objective would not be fulfilled at the desired level, but Article 2.2 is referring to the risks non-fulfilment would create, which is a distinct and significantly different concept that starts from the premise that the level is not fulfilled and then proceeds to consider what would be the risks arising from that situation.

[301] *US – COOL (Article 21.5) (Panel)*, para. 7.488.

[302] *US – COOL (Article 21.5) (Panel)*, para. 7.489.

[303] *US – COOL (Article 21.5) (Panel)*, para. 7.490.

[304] *US – COOL (Article 21.5) (Panel)*, para. 7.500 ("The second alternative measure could thus result in muscle cuts from US-slaughtered animals born or raised in different countries carrying the same label, which could possibly be affixed on muscle cuts that do not originate in at least one of the countries shown on the label. This would be in sharp contrast with the amended COOL measure, which mandates distinct labels for Category A, B, and C muscle cuts, reflecting – with the relatively higher degree of accuracy established above – the countries of birth, raising, and slaughter of the originating animals. Thus, the complainants' second alternative measure would potentially provide less accurate origin information than the amended COOL measure for covered muscle cuts of US-slaughtered animals. Based on this, the second alternative measure as described by the complainants does not

the Panels stated that extending ground meat labeling rules to all cuts of muscle meat "might achieve an equivalent degree of contribution," the Panels declined to make such a finding in light of the Panels' inability "to ascertain the gravity of the consequences of not fulfilling the objective of providing consumer information on origin" given the arguments and evidence put forward by the complainants.[305]

B. The Panels' Analysis Is in Error

259. The Panels erred by misinterpreting the phrase "taking account of the risks non-fulfillment would create" to mean that the Panels could find that either the first or second proposed alternative, both of which provide less information on origin than the amended measure, could, nevertheless, still be found to make a contribution to the objective equivalent to the amended measure.

260. The TBT Agreement makes clear that it is within a Member's discretion to determine what legitimate objectives it seeks to pursue, and to what degree it wishes to pursue those objectives.[306] Properly interpreted, Article 2.2 is not in tension with this fundamental premise of the agreement. To wit, the challenged measure will only be found to be "more trade restrictive than necessary" where an alternative, less trade restrictive measure that makes an equivalent contribution to the objective is reasonably available to the Member.

261. For purposes here, it simply cannot be the case that an alternative that provides no (or very little) origin information as to where the animal was born, raised, and slaughtered – as is the case with both the first and second alternatives – could be considered to make an equivalent contribution to the objective that the amended measure does, no matter whether the origin information is provided at more establishments (*e.g.*, restaurants), or on more products (*i.e.*, processed foods). And the Panels erred by suggesting that the significance of the phrase "taking account of the risks non-fulfilment would create" would allow such a finding. Such a suggestion would mean that the provision of such point of production information is more trade restrictive than necessary, despite the fact that complainants were never able to prove that there exists a less trade restrictive way of providing this same type of origin information.

262. As noted above, the phrase "taking account of the risks non-fulfillment would create" is properly understood as a reflection that an individual Member takes into account such risks when

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seem capable of making an actual contribution to the objective of providing consumer information on origin at least equivalent to the actual contribution of the amended COOL measure.") (internal footnotes omitted).

[305] *US – COOL (Article 21.5) (Panel)*, para. 7.501.

[306] *US – COOL (AB)*, para. 373, noting that the sixth preambular recital of the TBT Agreement provides that it is a Member's right to pursue legitimate objectives "at the levels it considers appropriate." *See* Sixth Recital of the Preambular Recital to the TBT Agreement; *see also US – COOL (Article 21.5) (Panel)*, paras. 7.484-85.

Additionally, the Appellate Body in the original COOL dispute noted that 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." *US – COOL (AB)*, para. 373; *see also id.*, para 426 ("As we noted, the fulfillment 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).

setting its level of fulfillment (*i.e.*, required degree of contribution). In any event, the United States considers that a measure that provides less origin information could never prove the amended measure "more trade restrictive than necessary."[307] That is to say, it is simply not the case that, in order to comply with Article 2.2, the United States could not provide point of production labeling at all, or, if it chose to provide such information, must require it to be provided to all consumers, regardless of the seller or the product. Neither approach is compatible with the fundamental premise that it is up to the United States to decide at what level it wants to provide consumers information on origin, regardless of whether the "risks non-fulfilment would create" are high or low, great or small.

263. Moreover, the Panels' interpretation of the phrase "taking account of the risks non-fulfilment would create" suggests that it is even possible for a WTO panel to be in the position to judge whether a measure that provides much less origin information over a greater amount of food could ever make an equivalent contribution to the very different challenged measure. The United States disagrees. While the Panels faulted complainants for not demonstrating how "the increased coverage of their first alternative measure would compensate for less origin information provided on Labels A-C under the first alternative measure,"[308] there is no reason to believe that such evidence could ever exist and that panels could rely on it.

264. The reason for this is straightforward – the balancing of the information provided versus to whom it is provided sits squarely in the political and regulatory sphere, not in the legal sphere. And that is why the central issues of Article 2.2 are appropriately narrow – does a less trade restrictive and reasonably available alternative exist that makes an equivalent contribution to the objective? Indeed, a WTO panel will never be in a position to determine whether adjusting one variable or another would adequately "compensate" for providing less information than the Member intends to provide, and the Panels erred by suggesting otherwise. Such a review would appear to go beyond considering the challenged measure's contribution to a legitimate objective, and require an analysis of a Member's domestic interests, expectations, risks, and concerns, that squarely interferes in the "policy space" that panels have previously found exists under the TBT Agreement.[309]

265. If Members had intended panels to engage in this type of weighing and balancing – essentially to engage in making regulatory and policy decisions – Members would have negotiated and provided panels with guidance for how to do so. However, it is no surprise that they did not. The value to assign to various objectives and the levels at which Members desire to fulfill particular objectives are very sensitive questions. The views of Members on these questions will vary, based on domestic conditions, societal preferences, cultural considerations,

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[307] *See also 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).

[308] *US – COOL (Article 21.5) (Panel)*, para. 7.490.

[309] *US – COOL (Panel)*, para. 7.854 (acknowledging that "Members have certain policy space to determine their objectives"); *US – COOL (Article 21.5) (Panel)*, para. 7.421.

and other factors. It is not realistic to expect that there is a consensus among Members as to what priority to assign to different objectives.

266. While the Panels developed their approach in the context of providing consumers information as to the country of origin for meat, there is nothing that limits the Panels' approach to the area of this legitimate objective. It is important to recognize that the Panels' approach would apply to any legitimate objective.

267. The concerns raised by the Panels' misinterpretation are highlighted by the fact that the objectives at issue include those with respect to human health and safety. Under the Panels' approach, WTO panels would substitute their judgment for Members with respect to what value to assign to human health and safety and the risks created by not fulfilling the protection of human health and safety at the desired level.

268. Under the Panels' approach, a panel would be able to say that it is acceptable to expose some portions of the population to greater health risks if that meant exposing some other portions to lower risk. How is a panel to make those kinds of judgments? Is a WTO panel to decide that, for example, the health of pregnant women is less important than the health of children and so a Member must adopt an alternative measure that is less trade restrictive because although the alternative would significantly reduce the protection for pregnant women, it would slightly increase the protection for children? Or are panels to decide, when examining a measure protecting human safety for example, what is the appropriate balance to strike between worker safety and consumer safety?

269. Any judgment by a panel would ultimately be subjective. There are no objective bases for the weighing and balancing policy exercise that the Panel's approach would necessitate. And there is nothing in Article 2.2 that supports the Panels' view that Members have assigned such difficult and extremely sensitive tasks to panels.

270. These are not the types of subjective judgments that panels are called to make or that are contemplated under Article 2.2. The Panels' approach relies on a fundamentally flawed interpretation of Article 2.2.

271. It is for these reasons that the Panels' interpretation of the phrase "taking account of the risks non-fulfillment would create" is unsupported and in error. The United States respectfully request the Appellate Body to reverse the Panels' interpretation, in the event that Canada or Mexico appeals the Panels' finding that the amended measure is not inconsistent with Article 2.2 of the TBT Agreement.

IV. THE PANELS ERRED IN FINDING THAT THE AMENDED COOL MEASURE IS INCONSISTENT WITH ARTICLE III:4 OF THE GATT 1994

272. In their reports, the Panels found, based on a brief analysis, that the amended COOL measure is inconsistent with Article III:4 of the GATT 1994. This finding is in error.

273. Article III:4 of the GATT 1994 provides in relevant part:[310]

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

274. The Panels first explained that "there are three elements that must be demonstrated to establish that a measure is inconsistent with Article III:4: '(i) that the imported and domestic products are 'like products'; (ii) that the measure at issue is a 'law, regulation, or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution, or use' of the products at issue; and (iii) that the treatment accorded to imported products is 'less favourable' than that accorded to like domestic products."[311] The Panels then found that only the third of these elements was at issue.[312]

275. In examining the third element, the Panels relied on their findings under Article 2.1 of the TBT Agreement that "the amended COOL measure has a detrimental impact on the competitive opportunities of imported livestock in comparison with like US products."[313] The Panels then went on to rely on prior Appellate Body findings in *EC – Seal Products* to find that "such detrimental impact will amount to treatment that is 'less favourable' within the meaning of Article III:4."[314]

276. The Panels erred in conducting this summary analysis under Article III:4 of the GATT 1994. In particular, the Panels erred in failing to take into account the context of Article III:4, including Article IX of the GATT 1994. This context informs the interpretation and application of Article III:4 in a dispute such as the current one involving a measure to inform consumers as to the origin of products, and indicates relevant inquiries to be conducted. The Panels however failed to do so.

277. As an initial matter, the Panels relied on the Appellate Body report in *EC – Seal Products*, which found that "under the TBT Agreement, the balance between the desire to avoid creating unnecessary obstacles to international trade under the fifth recital, and the recognition of Members' right to regulate under the sixth recital, is not, in principle, different from the balance

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[310] The quoted text that follows uses the term "Member" in accordance with paragraph 2(a) ("Explanatory Notes") to the GATT 1994: "The reference to 'contracting party' in the provisions of the GATT 1994 shall be deemed to read 'Member.'")

[311] *US – COOL (Article 21.5) (Panel)*, para. 7.619.

[312] *US – COOL (Article 21.5) (Panel)*, para. 7.620.

[313] *US – COOL (Article 21.5) (Panel)*, para. 7.642.

[314] *US – COOL (Article 21.5) (Panel)*, para. 7.642.

set out in the GATT 1994, where obligations such as national treatment in Article III are qualified by the general exceptions provision of Article XX."[315]

278. The Appellate Body's approach in that dispute, which involved a claim of a defense under Article XX of the GATT 1994, is that there is no difference *in principle* between a situation involving Article 2.1 of the TBT Agreement and one involving Article III:4 together with Article XX of the GATT 1994. And in discerning that principle, the Appellate Body relied on the context afforded to Article III:4 by Article XX.

279. In this dispute, as discussed further below, no party identified a defense that could be raised under Article XX of the GATT 1994 in relation to this Article III:4 claim in relation to labeling. There is though relevant context provided by another provision of the GATT 1994 that is directly related to indicating the origin of products. Article IX of the GATT 1994 is titled "Marks of Origin" and contains a number of provisions specifically negotiated for situations of Members' measures for marking products as to their origin.

280. Under Article IX:2, Members expressly "recognize that, in adopting and enforcing laws and regulations relating to marks of origin, the difficulties and inconveniences which such measures may cause to the commerce and industry of exporting countries should be reduced to a minimum, due regard being had to the necessity of protecting consumers against fraudulent or misleading indications."

281. Furthermore, Article IX:4 provides that: "The laws and regulations of contracting parties relating to the marking of imported products shall be such as to permit compliance without seriously damaging the products, or materially reducing their value, or unreasonably increasing their cost."

282. Accordingly, under the GATT 1994, Members have recognized that laws and regulations that inform consumers as to origin may cause difficulties and inconvenience to exporting Members, and that such measures may increase the cost of imported products.

283. In this area, then, Members have also provided for a balance between Members' right to regulate and avoiding unnecessary obstacles to trade. Article III:4, when read in the context of Article IX, provides regulatory space to Members to provide consumers with information as to the origin of products.

284. In light of the recognition by Members of these elements associated with measures to inform consumers of the origin of products, some of the relevant inquiries would be the reasons for any difficulties and inconveniences caused by the measures. This would include whether they are able to be reduced, with due regard to the necessity of protecting consumers, and what the reasons would be for any increased cost for imported products caused by the measures, in particular whether the measures unreasonably increase the cost of imported products.

[315] *EC – Seal Products (AB)*, para. 5.127 (quoting *US – Clove Cigarettes (AB)*, para. 96).

285. The Panels did not consider the context provided by Article IX or conduct any of the relevant inquiries. The Panels considered simply whether there was "a detrimental impact on the competitive opportunities of imported livestock in comparison with like US products."[316] Yet Members have already recognized that measures informing consumers as to the origin of products may entail difficulties, inconveniences, and increased costs.

286. Indeed, the Panels themselves explained that "there may be a variety of possible reasons unrelated to risks for exempting or treating differently certain product categories under a Member's technical regulation, such as regulatory or compliance costs."[317] Yet in their Article III:4 analysis, the Panels never consider the role of possible reasons, such as regulatory or compliance costs, for the structure of the amended COOL measure and its impact on imported livestock.

287. Just as the presence of Article XX of the GATT 1994 informs the interpretation of Article III:4 of the GATT 1994 where there is an exception under Article XX that is involved, and it would be legal error to analyze Article III:4 without taking into account the context afforded by Article XX, so too does Article IX of the GATT 1994 inform the interpretation of Article III:4 of the GATT 1994. It was legal error for the Panels to analyze Article III:4 without taking into account the fact that in this case Article XX was not the context that was relevant. However, the Panels should have taken into account the context afforded by Article IX and conducted a more comprehensive analysis.

288. The need to take into account the context of Article III:4 is particularly acute in this dispute. The DSB has ruled that it is a legitimate objective of the United States to provide consumers with information as to the country of origin of meat, at the level of fulfilment that the United States considers appropriate. At the same time, the Panels have found that providing that information at that level of fulfilment results in a detrimental impact on the conditions of competition for imported livestock. Under the Panels' approach then, there would be a paradox. The United States would be entitled to adopt a COOL measure to provide this information to consumers, but that COOL measure could never be consistent with Article III:4 since it would have a detrimental impact on imported livestock. The covered agreements would recognize the legitimacy of providing this information to consumers while at the same time denying any WTO-consistent means for doing so.

289. It is also informative that the approach taken by the Panels in this dispute with respect to the GATT 1994 would appear to render Article IX inutile. If a finding of detrimental impact alone were sufficient to establish discrimination, such as under Article I:1 of the GATT 1994, in the context of marks of origin, then the provisions of Article IX would not appear to be relevant – a complaining party would invoke the non-discrimination provisions of the GATT 1994. There would not appear to be any utility for a complaining party in invoking Article IX.

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[316] *US – COOL (Article 21.5) (Panel)*, para. 7.642.

[317] *US – COOL (Article 21.5) (Panel)*, para. 7.380.

290. Consequently, the United States respectfully requests the Appellate Body to find that the Panels erred in interpreting Article III:4 and in finding that less favorable treatment could be demonstrated based on a detrimental impact without regard to further inquiry in the light of the context provided by Article IX. Because the Panels' legal conclusion was based on that erroneous interpretation, the United States respectfully requests the Appellate Body to reverse the Panels' finding that the amended COOL measure is in breach of Article III:4 of the GATT 1994.

V. IN THE CIRCUMSTANCES OF THIS DISPUTE, THE PANELS ERRED IN NOT ADDRESSING THE AVAILABILITY OF ARTICLE XX AS AN EXCEPTION FOR ARTICLE III:4 OF THE GATT 1994 WITH RESPECT TO COOL

291. As discussed above, in conducting their Article III:4 analysis, the Panels relied on the reports of the Appellate Body in *EC – Seal Products*. However, those reports were only circulated after the conclusion of the period for the parties in the COOL dispute to submit their evidence and arguments. As a result, the Article 21.5 panel proceedings presented an extraordinary situation. The Appellate Body had found that the balance between a Member's right to regulate and the desire to avoid creating unnecessary obstacles to trade was not different, in principle, between Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994 due to the qualifications provided by Article XX of the GATT 1994. But this finding came too late for the parties to submit any evidence and argumentation with respect to Article XX in the Article 21.5 proceedings. Indeed, the Appellate Body reports were circulated over a month after the Panels had provided their draft descriptive parts to the parties on April 10, 2014. Nor had any party identified during the proceedings a subparagraph of Article XX that would be relevant to the type of measure represented by the amended measure, relating to consumer information on origin.

292. Consequently, in its comments on the interim reports, the United States noted that under the Appellate Body's approach, there must be an Article XX exception that would be available for COOL. Accordingly, the United States requested the Panels to address the Article III:4/Article 2.1 relationship as relied upon by the Panels in their findings and address the availability of Article XX of the GATT 1994 as an exception with respect to the amended COOL measure.[318]

293. The Panels declined this request. The Panels cited among their reasons for declining the request that each Panel "found the amended COOL measure to be in violation of both Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994. Therefore, the Panel is not faced with the situation hypothetically suggested by the United States."[319]

294. The "hypothetical" situation to which the Panels referred was a situation in which a COOL measure was consistent with Article 2.1 of the TBT Agreement because any detrimental

[318] *US – COOL (Article 21.5) (Panel)*, para. 6.73.

[319] *US – COOL (Article 21.5) (Panel)*, para. 6.74.

impact stemmed exclusively from legitimate regulatory distinctions, while the same measure was inconsistent with Article III:4 of the GATT 1994 due to that same detrimental impact.

295. In their response to the comments on the interim reports, the Panels appear to have failed to appreciate the concern being expressed. It was not a "hypothetical" concern. Rather, it was a concern flowing logically from the findings of the Panels in the draft interim report. As the Panels' final report indicates,[320] the Panels contemplate that the amended COOL measure could be brought into compliance with the Panels' findings on Article 2.1 of the TBT Agreement without fundamentally altering the information conveyed on the label or the manner in which the measure operates. It is at this point that the concern was focused. At this point, the measure at issue would be consistent with Article 2.1 of the TBT Agreement. There would presumably still be a detrimental impact on imported livestock, but that detrimental impact would stem exclusively from legitimate regulatory distinctions.

296. However, under the Panels' approach, a measure that was in compliance with Article 2.1 of the TBT Agreement would nonetheless be in breach of Article III:4 of the GATT 1994 because there would remain a detrimental impact. Furthermore, under the Panels' approach, the only way to maintain the measure consistent with the GATT 1994 would be if the measure qualified under an exception under Article XX of the GATT 1994. The Panels were therefore requested to address the availability of Article XX as an exception with respect to COOL. Addressing the availability of Article XX would help facilitate the resolution of the COOL dispute.

297. If the balance under Article 2.1 of the TBT Agreement is in principle no different from the balance under Article III:4 of the GATT 1994 in light of Article XX of the GATT 1994, then the Panels should have been able to explain how that would apply in the context of the COOL dispute. The Panels failed to do so. That failure raises the question as to whether the Panels' approach would mean that the balance is upset where the objective of the measure at issue is not one that is specified in Article XX of the GATT 1994.

298. Such an approach would appear to undermine a Member's ability to regulate in the public interest, putting at risk a whole host of measures, including those that: provide consumer information; prevent deceptive, misleading, and fraudulent practices; and ensure the compatibility and efficiency of telecommunication goods. For example, a measure setting standards for deceptive practices could be found inconsistent with Article III:4 on the basis that the domestic products satisfied the standard and the complaining products did not satisfy the standard, and absent the availability of an Article XX exception, the Member would be unable to prevent deceptive practices in a manner consistent with the GATT 1994.

[320] The Panels' reports affirm that providing the consumer information at issue is a legitimate objective under the TBT Agreement, *see, e.g., US – COOL (Article 21.5) (Panel)*, para. 7.333, and do not find that a COOL measure is *per se* inconsistent with Article 2.1, but rather indicate specific aspects of the amended COOL measure that give rise to the Panels' findings.

299. Canada's organics measure is another example.[321] Briefly, it is uncontroverted that this measure sets out certain standards for what type of chemicals and other substances can be present for the product to still be labeled "organic." The measure declares that it is "deceptive and misleading" to label "organic" foodstuffs that exceed these stated residue limits. Under the Panels' approach, the fact that a particular Member's food product does not generally satisfy these standards, while a like product from the regulating Member satisfies those standards, would establish a breach of Article III:4, yet there is no obvious exception under Article XX that would apply.

300. If one were to consider that there is no exception under Article XX of the GATT 1994 that would provide an exception for country of origin labeling, then the logical result would be that the interpretation of Article III:4 in this area would need to accord with that under Article 2.1 of the TBT Agreement. Otherwise a measure could be consistent with the non-discrimination provisions of the TBT Agreement while being inconsistent with the non-discrimination provisions of the GATT 1994. Members' right to regulate under the two agreements would be out of balance. However, this would not conform to the Appellate Body's explanation that the balance between a Member's right to regulate and the desire to avoid creating unnecessary obstacles to trade was not different, in principle, between Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994.

301. Consequently, the United States respectfully requests the Appellate Body to find that the Panels erred in not addressing the availability of Article XX of the GATT 1994 as an exception for COOL. Further, as set forth below, the United States respectfully requests the Appellate Body to complete the analysis and find which of the Article XX exceptions would be available so as to maintain the balance between a Member's right to regulate and the desire to avoid unnecessary obstacles to trade.

302. In completing that analysis, it may be useful to recall some of the DSB recommendations and rulings with respect to Article XX in prior disputes. Several subparagraphs of Article XX require that a measure be "necessary" to achieve the specified objective. Prior reports have found that "the term 'necessary' refers to a range of degrees of necessity, but that a 'necessary' measure would be located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to.'"[322]

303. In this dispute, the Panels found that the amended measure "contributes to the objective of providing consumer information on origin to a significant degree for products carrying Labels A-C,"[323] and did not find there was any alternative reasonably available to fulfill this objective at the appropriate level. The amended measure therefore should be considered to qualify as "necessary" within the meaning that has been given to that term as used in Article XX.

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[321] *See* U.S. Second Written 21.5 Submission, para. 86.

[322] *EC – Seal Products (AB)*, n.1300 (quoting *Korea – Various Measures on Beef (AB)*, para. 161; *US – Gambling (AB)*, para. 310).

[323] *US – COOL (Article 21.5) (Panel)*, para. 7.356.

304. Furthermore, as the United States has explained above, the regulatory distinctions under the amended measure are legitimate regulatory distinctions. Accordingly, the amended measure is not applied in a manner that constitutes arbitrary or unjustifiable discrimination and is not a disguised restriction on international trade. The amended measure thus satisfies the conditions in the chapeau of Article XX.

VI. THE PANELS ERRED IN FINDING THE NON-VIOLATION CLAIM TO BE WITHIN THEIR TERMS OF REFERENCE

305. In addition to their other claims, Canada and Mexico raised a NVNI claim under Article XXIII:1(b) of the GATT 1994.[324] Based on the text of Article 21.5 of the DSU, however, the Panels should have found that this claim was outside their terms of reference. By failing to do so, the Panels erred.[325]

306. In particular, the Panels failed to recognize the inherent limitations on the terms of reference in Article 21.5 of the DSU. These terms of reference are limited to any "disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB.[326] Accordingly, the United States seeks conditional review by the Appellate Body of the Panels' findings and conclusion that these claims were within the Panels' terms of reference, in the event that Canada or Mexico appeals the determination by either Panel not to make findings or legal conclusions in relation to the NVNI claim by that complainant under Article XXIII:1(b) of the GATT 1994.

A. The Panels' Analysis of the Terms of Reference Provided in Article 21.5 of the DSU Was in Error

307. The Panels characterized the question under this claim as one regarding the "scope of Article 21.5 *vis-à-vis* Article 26 of the DSU and Article XXIII:1(b) of the GATT 1994."[327] In particular, the Panels described the central question as whether a compliance panel's mandate under Article 21.5 of the DSU to review a disagreement as to "the *consistency with a covered agreement* of measures taken to comply with recommendations and rulings" encompasses more than "conflicts" or "violations" of covered agreements.[328] Ultimately, the Panels erroneously concluded that "reviewing the 'consistency' of a measure taken to comply under Article 21.5 of the DSU extends to non-violation claims under Article XXIII:1(b) of the GATT 1994 and Article 26.1 of the DSU."[329]

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[324] *US – COOL (Article 21.5) (Panel)*, para. 7.644; *see also* Canada's First Written 21.5 Submission, paras. 182-190; Mexico's First Written 21.5 Submission, paras. 230-243.

[325] *US – COOL (Article 21.5) (Panel)*, paras. 7.644-7.663.

[326] Article 21.5 of the DSU.

[327] *US – COOL (Article 21.5) (Panel)*, para. 7.649.

[328] *US – COOL (Article 21.5) (Panel)*, para. 7.650 (emphasis added); *id.*, para. 7.651-663.

[329] *US – COOL (Article 21.5) (Panel)*, para. 7.663.

308. The Panels' erroneous conclusion is not based on the text of Article 21.5 of the DSU itself, but rather the Panels over-ride that text based on "systemic considerations" and what the Panels perceived to be the "objective" of Article 21.5 of the DSU. However, neither "systemic considerations," nor the alleged "objective" of a provision permits derogating from the agreed text of that provision. Yet that is what the Panels here have done.

309. In particular, the Panels begin by eschewing the text of Article 21.5, noting that focusing on the meaning of the term "consistency", which appears in that Article, and attempting to contrast it with "conflict", which appears in Article 26, would be "too mechanical an approach."[330] The Panels also found that the treatment of nullification and impairment found in Article 26 generally, as well as Article 23.1, may lead to the conclusion that review of NVNI claims is not explicitly excluded from the element of an Article 21.5 compliance panel's terms of reference related to "consistency with a covered agreement."[331]

310. Finally, the Panels stated that the underlying purpose of the DSU and the goal of efficiency weighed in favoring of finding an NVNI claim to be within the element of an Article 21.5 compliance panel's terms of reference related to "consistency with a covered agreement." In particular, the Panels noted that a measure taken to comply could be in breach of the covered agreements or result in NVNI. According to the Panels, barring review of NVNI claims under this element of Article 21.5 would result in a complaining party needing to initiate a separate dispute to pursue its NVNI claim and ultimately inefficiencies.[332] Thus, the Panels concluded that the review of "the 'consistency' of a measure taken to comply under Article 21.5 of the DSU extends to non-violation claims under Article XXIII:1(b) of the GATT 1994 and Article 26.1 of the DSU."[333]

311. The Panels' analysis ignored the plain text of Article 21.5 and substituted the Panels' views as to what would be "efficient" in place of the procedures actually negotiated and agreed by Members as reflected in the text of Article 21.5. In accordance with the text of Article 21.5, the expedited panel proceedings under that Article only apply to situations where "there is a disagreement as to the existence or consistency with a covered agreement of measures taken to comply" with the DSB recommendations and rulings.

312. It is key to this issue to recall that by its plain language, Article 21.5 is limited to resolving a "disagreement" between the parties regarding either (1) "the existence" of a measure taken to comply with the DSB recommendations and rulings, or (2) the "consistency with a

[330] *US – COOL (Article 21.5) (Panel)*, para. 7.652.

[331] *US – COOL (Article 21.5) (Panel)*, paras.7.657-660.

[332] *US – COOL (Article 21.5) (Panel)*, paras. 7.661-662.

[333] *US – COOL (Article 21.5) (Panel)*, para. 7.663.

covered agreement" of a measure taken to comply with the DSB "recommendations and rulings."[334]

313. This appeal and this dispute does not concern the "existence" element of Article 21.5 and there is hence no need to address whether a complaining party could pursue an NVNI claim with respect to the "existence" of a measure taken to comply where the original DSB recommendations and rulings had included that a measure resulted in NVNI. The panels in the original proceeding did not find it necessary to make a finding or recommendation with respect to the NVNI claims made at that stage of the proceeding, and the Appellate Body did not modify this finding on appeal.[335] Consequently the DSB recommendations and rulings did not include any recommendations or rulings on NVNI. Therefore, there is no issue presented in these Article 21.5 proceedings as to the existence of a measure taken to comply with NVNI recommendations and rulings. As a result, the only issue presented, and the Panels' conclusion reflects this, is whether the element under Article 21.5 of "consistency with a covered agreement of measures taken to comply" encompasses a review of a measure taken to comply to determine if the measure results in NVNI.

314. A careful reading of Article 21.5, in context, reveals that the answer is "no." Review of a measure's "consistency" with the provisions of the covered agreements is distinct from whether that measure "that does not conflict with the provisions of a covered agreement" may result in *non-violation* nullification or impairment.[336]

315. The Panels attempt to overcome this clear exclusion of NVNI claims by stating that nothing in Article 26.1 explicitly prohibits such an analysis, but this misses the point. Article 26.1 is not what controls the terms of reference of an Article 21.5 panel. It is the text of Article 21.5 that controls.

316. The conclusion that Members did not agree to include NVNI claims under the "consistency" element of Article 21.5 is further supported by the context provided by other provisions of the DSU. Notably, Article 19.1 of the DSU explicitly contrasts "inconsistency" with "not involving a violation." Article 19.1 specifies the recommendation in the situation where "a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement." That recommendation is "that the Member concerned bring the measure into conformity with that agreement." This recommendation is expressly not permitted under Article 26, which provides that where there is a finding of NVNI, "there is no obligation to withdraw the

[334] *US – COOL (Article 21.5) (Panel)*, para.7.650; *see also* DSU Article 21.5; United States' First Written 2.5 Submission, para. 200.

[335] *US – COOL (Panel)*, para. 7.907 (declining to make a finding with respect to NVNI because "[c]ompliance by the United States with [the panel's] finding of violation under Article 2.1 of the TBT Agreement would remove the basis of the complainants' non-violation claims of nullification or impairment"); *US – COOL (AB)*, para. 495.

[336] Article 26.1 of the DSU.

measure. However, in such cases, the panel or the Appellate Body shall recommend that the Member concerned make a mutually satisfactory adjustment."[337]

317. Further, footnote 10 to Article 19.1 addresses and recognizes this difference between "consistency" and "non-violation." Footnote 10 provides: "With respect to recommendations in cases not involving a violation of GATT 1994 or any other covered agreement, see Article 26."

318. Ironically, the Panels quoted footnote 10 to Article 19.1,[338] but failed to analyze or assign any significance to it. Yet the text of Article 19.1, including footnote 10, make it clear that NVNI is distinct and separate from "consistency" with a covered agreement. And "consistency" is the term used in Article 21.5. Indeed, the Panels conceded that "it could be argued that a finding that a measure is 'inconsistent' within the meaning of Article 19.1 does not encompass a finding of nullification or impairment of benefits without violation of a covered agreement."[339] But the Panels then went on to discard this proper interpretation of the text in favor of an interpretation that would respond to the Panels' "systemic concerns."

319. It is clear when reading the text of Article 21.5, in the context of the DSU, that compliance proceedings under the element of Article 21.5 regarding the "consistency with a covered agreement" do not have within their terms of reference claims with respect to NVNI.

320. The distinct treatment of NVNI claims was noted by the Panels themselves. The Panels stated that NVNI claims are "an exceptional remedy,"[340] and that as Members have negotiated the rules that they agree to follow, "only exceptionally would [Members] expect to be challenged for action not in contravention of those rules."[341] In view of the "exceptional" status of NVNI claims, it is reasonable that Members sought to limit the review of compliance proceedings to the consistency of measures taken to comply with the DSB recommendations and rulings, rather than permitting a claim that is "exceptional" as in the case of NVNI to be raised for the first time under the expedited, special dispute settlement procedures under Article 21.5.

321. The Panels' reliance on their view of the "objective" of Article 21.5 does not justify the Panels' conclusion. As an initial matter, customary rules of interpretation of public international law[342] are reflected in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* ("Vienna Convention").[343] And those customary laws do reference the "object and purpose" of

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[337] Article 26.1(b) of the DSU.

[338] *US – COOL (Article 21.5) (Panel)*, para. 7.654.

[339] *US – COOL (Article 21.5) (Panel)*, para. 7.656.

[340] *US – COOL (Article 21.5) (Panel)*, para. 7.646 (*quoting EC – Asbestos (AB)*, para. 186 (citing *Japan – Film*, para. 10.37)).

[341] *US – COOL (Article 21.5) (Panel)*, para. 7.646 (quoting *EC – Asbestos (AB)*, para. 186 (citing J*apan – Film*, para. 10.36)).

[342] Article 3.2 of the DSU.

[343] United Nations, Vienna Convention on the Law of Treaties, United Nations Treaty Series, vol. 1155, p. 331, (May 23, 1969), Art. 31 and 32. *See also US – Gasoline (AB)*, at p. 17.

individual provisions, but rather the object and purpose of the agreement.[344] Furthermore, the Panels' reliance on their view of the "objective" of Article 21.5 appears to result in the Panels finding that their perceived "objective" justifies ignoring, even re-writing, the actual text of Article 21.5. That is something that panels are not permitted to do.

322. Similarly, the Panels err in invoking "efficiency" as a basis for disregarding the agreed text of the covered agreements. Panels are charged with clarifying "the existing provisions" of the covered agreements "in accordance with customary rules of interpretation of public international law." Clarifying "the existing provisions" does not include ignoring those provisions for the sake of some perceived "efficiency."

323. As the Appellate Body has recently observed, if there is a perceived imbalance in the existing rights and obligations in the covered agreements, "the authority rests with the Members of the WTO to address that imbalance."[345]

324. In conclusion, the United States respectfully requests that, in the event either Canada or Mexico appeals the determination by either Panel not to make findings or legal conclusions in relation to the NVNI claim by that complainant under Article XXIII:1(b) of the GATT 1994, that the Appellate Body find that the NVNI claim was not within the terms of reference of the relevant Panel(s).

VII. CONCLUSION

325. For the foregoing reasons, the United States respectfully requests that the Appellate Body review and modify the Panels' relevant underlying findings and ultimate conclusion that the amended COOL measure breaches Article 2.1 of the TBT Agreement. Among the underlying findings on which the United States seeks review are: (1) the Panels' finding that the detrimental impact does not stem exclusively from legitimate regulatory distinctions because the amended COOL measure entails an increased recordkeeping burden and increased segregation; (2) the Panels' finding that the detrimental impact does not stem exclusively from legitimate regulatory distinctions because the current labels provided by the amended COOL measure have a potential for label inaccuracy; and (3) the Panels' finding that the detrimental impact does not stem exclusively from legitimate regulatory distinctions because the amended COOL measure continues to exempt a large proportion of muscle cuts.[346]

326. The United States also respectfully requests that the Appellate Body modify the Panels' relevant underlying findings and ultimate conclusion that the amended COOL measure breaches Article III:4 of the GATT 1994. In this context, the United States seeks review by the Appellate Body of the Panels' failure to address the aspect of the relationship between Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994 related to the availability of an exception

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[344] Vienna Convention, art. 31.1 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").

[345] *EC – Seal Products (AB)*, para. 5.129.

[346] *See, e.g.*, Panel Reports, paras. 7.216-7.219, 7.201-7.203, 7.272-7.277, 7.282.

under Article XX of the GATT 1994 and the Panels' failure to address the availability of Article XX as an exception for Article III:4 of the GATT 1994 with respect to the amended U.S. COOL measure.

327. Additionally, in the event that Canada or Mexico appeal the Panels' ultimate findings with respect to Article 2.2 of the TBT Agreement, the United States respectfully requests that the Appellate Body modify the Panels' legal interpretation of the phrase "the risks non-fulfilment would create."

328. Likewise, if Canada or Mexico appeal the determination by the Panels to not make findings or legal conclusions in relation to the non-violation claim by that complainant under Article XXIII:1(b) of the GATT 1994, the United States respectfully requests that the Appellate Body overturn the Panels' findings and conclusion that these claims were within the Panels' terms of reference