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

(AB-2012-3 / DS384/386)

Appellant Submission
of the United States of America

March 23, 2012

SERVICE LIST

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Australia – Salmon (AB)	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998
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Philippines – Distilled Spirits (Panel)	Panel Report, *Philippines – Taxes on Distilled Spirits*, WT/DS396/R, WT/DS403/R, adopted 20 January 2012, as modified by the Appellate Body Reports, WT/DS396/AB/R, WT/DS403/AB/R
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US – Wool 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

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. At issue in this dispute are the country of origin labeling ("COOL") requirements adopted by the United States to inform consumers of the origin of certain food products they buy at the retail level, including muscle cuts of meat and ground meat. The United States adopted these requirements in response to strong consumer demand for the provision of such information, and is among a group of nearly 70 WTO Members who maintain mandatory country of origin labeling requirements for food products.

2. Based in part on the fact that country of origin labeling regimes are commonplace around the world, the Panel recognizes the legitimacy of the objective pursued by the United States – consumer information on origin – thereby, acknowledging the right of the United States to adopt COOL requirements. However, the Panel finds fault with the precise manner in which the United States designed its requirements and finds them to breach U.S. WTO commitments on seemingly contradictory grounds.

3. On one hand, the Panel finds that the U.S. COOL requirements breach Article 2.1 of the *Agreement on Technical Barriers to Trade* ("TBT Agreement") because these requirements introduce compliance costs, and on the basis of these costs, allegedly create an incentive for U.S. market participants to process only domestic origin animals instead of imported animals. However, the Panel's analysis overlooks the fact that any country of origin labeling regime will necessarily introduce compliance costs, and WTO Members are not in a position to control the response of private market actors to these costs or to dictate the environment into which labeling requirements may be imposed (such as the market share of imported products). For this reason, the appropriate Article 2.1 inquiry should not focus on whether imported and domestic products are equally competitive in a Member's market at some point in time, but whether the measure at issue modifies the conditions of competition to the detriment of imported products. It is inappropriate, as the Panel does here, to focus entirely on potential costs in a pre-existing market, to speculate on how private market actors may respond to those costs, and ultimately, to find that an origin-neutral labeling requirement breaches Article 2.1 on the basis of factors not within the Member's control.

4. On the other hand, the Panel also finds that the flexibility built into the COOL requirements to help reduce compliance costs, but which affects the extent of the information provided to consumers, forms the basis for an Article 2.2 breach as, in the Panel's view, some of the relevant labels do not provide enough information for the measure to "fulfil" its objective. In making such a judgment, the Panel disregards not only the particular balance the United States strikes in the COOL measure between providing information to consumers about the food they consume and the costs to market participants in providing that information, but the scope of the obligation contained in Article 2.2. Article 2.2 does not, as this Panel appears to believe, charge the WTO with making intrusive and far-ranging judgements as to whether a Member's measure is effective public policy. Rather, under Article 2.2, a WTO panel is to make two inquiries: (1) whether the measure pursues an objective that is "legitimate;" and (2) whether the Member could have adopted a less trade-restrictive measure that fulfills the objective at the same level chosen

by the United States. While the Panel finds that the COOL measure pursues a legitimate objective, it makes no finding as to the second inquiry, yet nonetheless erroneously reaches the conclusion that the measure breaches Article 2.2.

5. The Panel's findings are in error. The COOL measure does not breach Article 2.1 because it requires meat derived from both imported and domestic livestock to be labeled under the exact same set of circumstances. Accordingly, the measure itself does not modify the conditions of competition to the detriment of imported livestock. To the extent that imported livestock may not currently on equally competitive terms with domestic livestock, this would not be due to the COOL measure, but would be due to factors outside the control of the United States, such as the smaller market share of imports and the independent decisions of private market actors uncompelled by the measure.

6. The COOL measure does not breach Article 2.2 either. The Panel fundamentally misunderstands the Article 2.2 obligation, and, as such, undertakes an erroneous analysis of the COOL measure – one which allows the Panel to find the COOL measure inconsistent with the obligation without answering the central question of the obligation – whether the complainants have proved the COOL measure is "more trade-restrictive than necessary."

A. The Panel Errs in Finding That the COOL Measure Breaches Article 2.1 of the TBT Agreement With Regard to Muscle Cuts of Meat

7. The United States appeals the Panel's finding that U.S. COOL requirements[1] are inconsistent with Article 2.1 of the TBT Agreement. The Panel bases its erroneous finding on a flawed legal interpretation of the obligation at issue and on a failure to make an objective assessment of the facts of the case as called for by Article 11 of the *Understanding on the Rules and Procedures Governing the Settlement of Disputes* ("DSU").

8. The Panel adopts a troubling and problematic legal test to examine the question of less favorable treatment under Article 2.1. The proper question for purposes of Article 2.1 is not, as the Panel assumes, whether imported livestock are equally competitive with domestic livestock in the current marketplace, but whether the technical regulation *itself* modifies the *conditions* of competition so as to deny imported products the ability to compete, by nature of their origin, under the same conditions as like domestic products. The Panel's analysis, which misses this crucial distinction, has no basis in the TBT Agreement or in any past Appellate Body or WTO panel reports. Indeed, nothing in the TBT Agreement or the WTO agreements requires Members

[1] The U.S. COOL requirements consist of the relevant sections of the Agricultural Marketing Act of 1946 (7 U.S.C. §§ 1638-1638c) ("the COOL statute") and regulations promulgated by the United States Department of Agriculture's Agricultural Marketing Service on January 15, 2009, entitled "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, which are codified at 7 C.F.R. Parts 60 and 65 ("2009 Final Rule"). *See* Panel Report, para. 7.61.

to ensure that imported products are placed on an equal footing in terms of their ability to compete. To the contrary, these Agreements require that the measure does not accord different and less favorable treatment to imported products on the basis of their origin so as to modify the conditions of competition to their detriment.

9. In the context of its flawed legal analysis, the Panel also errs in finding that the U.S. COOL requirements treat imported livestock differently than domestic livestock. The COOL requirements are origin-neutral, and to the extent that they apply to livestock at all, they treat imported and domestic livestock the same. The COOL requirements apply the same recordkeeping requirements to market participants who handle imported and domestic livestock, and meat derived from both types of livestock is required to be labeled with its origin in the same set of circumstances, regardless of what that origin may be.

10. Additionally, the Panel errs in finding that the U.S. COOL requirements accord less favorable treatment to imported livestock than accorded to domestic livestock. The COOL measure *itself* imposes the same set of labeling requirements on the meat derived from both imported and domestic livestock. It does not impose any additional requirements or conditions on imported livestock. To the extent that imported livestock may currently be less competitive than domestic livestock in the U.S. market, this would not result from the COOL measure itself, but external market conditions, such as the smaller market share of imports in the U.S. market, and the independent and uncompelled actions of private market actors.

11. Finally, the Panel errs in its analysis of crucial facts related to segregation, commingling, and the price differential in the U.S. livestock market. In particular, the Panel acts inconsistently with Article 11 of the DSU by failing to make an objective assessment of the facts related to these issues and by using these faulty factual findings to support its conclusions with regard to different treatment and less favorable treatment.

B. The Panel Errs in Finding That the COOL Measure Breaches Article 2.2 of the TBT Agreement

12. The United States appeals a number of aspects of the Panel's conclusions regarding Article 2.2.

13. With regard to section VII.D.3(b) of the Panel Report, the United States appeals the Panel's finding that the COOL measure is "trade restrictive" for purposes of Article 2.2.

14. With regard to section VII.D.3(c) of the Panel Report, the Panel mischaracterizes the U.S. position regarding its level of fulfillment by relying on partial quotes that omitted key elements of the U.S. description of the level to which the United States considers appropriate to fulfill its objective. In doing so, the Panel willfully distorts and misrepresents the U.S. position as to the U.S. level of fulfillment, contrary to Article 11 of the DSU. Moreover, the Panel errs in failing to consider all relevant information regarding the level of fulfillment in its determination of that

chosen level of fulfillment.

15. With regard to sections VII.D.3(b)-(c) of the Panel Report, the Panel's legal framework to determine whether a measure is "more trade restrictive than necessary to fulfil a legitimate objective" is incorrect: it is not a two step analysis, but a single analysis, containing three elements that are to be judged cumulatively, consistent with the Appellate Body's analysis in *Australia – Salmon* of the parallel provision in Article 5.6 of the SPS Agreement. The Panel's "two step" approach appears drawn from the approach taken to analyze whether GATT-inconsistent measures are justified under Article XX(b) of the GATT 1994, which is not the relevant guidepost for Article 2.2. Further, and aside from the fact that the Panel's legal framework is incorrect, the Panel erred in determining that the COOL measure does not fulfill its objective at the level the United States considers appropriate. Additionally, and notwithstanding these two errors, the Panel erred in failing to require the complaining parties to meet their burden to prove that the measure is "more trade-restrictive than necessary" based on the availability of a significantly less trade-restrictive alternative measure that also fulfills the objective at the level the United States considers appropriate.

16. For these reasons, the Panel's finding that the COOL measure is inconsistent with Article 2.2 is in error.

II. FACTUAL BACKGROUND

A. The COOL Requirements and Their History

17. The COOL requirements that the United States adopted for meat products were not constructed hastily. Rather, these requirements were the product of a long and considered legislative and regulatory process during which the United States balanced the interests of consumers who sought information on the origin of the food they consume and those involved in the production of the meat, including U.S., Canadian, and Mexican livestock producers, who sought to minimize the costs of providing such information.

18. The end result of this process – the COOL statute[2] and 2009 Final Rule[3] – was carefully constructed to provide consumers with a significant amount of new information about the origin of the meat products they buy (*i.e.,* additional information about where the source animals from which the meat was derived were born, raised, and slaughtered) while at the same time

[2] Subtitle D (Sections 281-285) of the Agricultural Marketing Act of 1946 (7 U.S.C. §§ 1638-1638c) ("COOL statute"), as amended by the Farm Security and Rural Investment Act of 2002 (the "2002 Farm Bill"), and the Food, Conservation, and Energy Act of 2008 (the "2008 Farm Bill") (Exhibit MEX-1).

[3] "Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts; Final Rule," Agricultural Marketing Service, USDA, 74 Fed. Reg. 10,2658 (Jan. 15, 2009) (codified at 7 C.F.R. pts. 60 and 65) ("2009 Final Rule") (Exhibit CDA-5).

minimizing compliance costs for market actors throughout the supply chain. In this section, the United States will briefly describe the efforts by U.S. consumers and consumer advocacy groups that led to adoption of the COOL statute and regulations, U.S. efforts to balance the interests at stake, and the COOL requirements that were eventually adopted.

1. U.S. Consumers and Consumer Advocacy Organizations Strongly Support Country of Origin Labeling

19. The United States has maintained some form of mandatory country of origin labeling requirements since 1930.[4] However, the requirements preceding those at issue in this dispute contained gaps that frequently prevented consumers from receiving this information for certain products, including meat, which was not required to be labeled at retail.[5] Even when country of origin information was provided, some consumers found it confusing or misleading as there was no consistent definition of U.S. origin.[6]

20. U.S. consumers strongly supported the adoption of enhanced COOL requirements to address these concerns. As the evidence submitted to the Panel demonstrates, between 80 and 95 percent of consumers support country of origin labeling for the food products they buy.[7] These consumers consistently advocated for mandatory COOL throughout the process and for labels that provide information about where the source animals for meat products were born, raised, and slaughtered so as to avoid consumer confusion.[8] As one consumer wrote in 2001: "I strongly support a mandatory labeling program with a uniform, consistent definition for domestic origin as born, raised, slaughtered, and processed in the United States."[9]

21. Not surprisingly, U.S. consumer advocacy organizations also advocated for mandatory

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[4] U.S. First Written Submission ("U.S. FWS"), para. 18.

[5] *See* U.S. FWS, paras. 18-19 (explaining the gaps in the pre-COOL framework).

[6] *See* U.S. FWS, paras. 29-30 (describing consumer confusion related to USDA grade labeling and voluntary labeling requirements established by USDA's Food Safety and Inspection Service "FSIS").

[7] *See, e.g.,* Panel Report, para. 7.646; Exhibits US-5, US-111, and US-117; U.S. Second Written Submission ("U.S. SWS"), para. 114 (citing polls from Zogby, the Consumers Union, Food & Water Watch, the National Farmers Union, and Packer magazine, all of which show support for country of origin labeling exceeding 82 percent in the United States).

[8] *See, e.g.*, Panel Report, para. 7.646; Exhibits US-113, US-119, US-120, US-121, US-122, US-123, US-124, US-125, and US-126 (letters from consumers expressing support for mandatory COOL that defines origin based on where the source animal was born, raised, and slaughtered). *See also* Exhibit CDA-10, p. 71; Exhibits US-49 and US-85 (testimony and letters from U.S. consumers also expressing support for mandatory COOL during congressional hearings and during a previous rulemaking by USDA's FSIS to determine the appropriate definition of U.S. origin).

[9] Exhibit US-125.

COOL for meat.[10] For example, in 2001, the Consumers Federation of America wrote a joint letter with the National Consumers League and Public Citizen stating that "[w]hen the Senate takes up the farm bill, please support legislation to require country of origin labeling at retail for meat...Please oppose efforts to water down country of origin labeling legislation by allowing domestic origin labels on beef that has been slaughtered and processed—but not born—in this country."[11]

22. To address the concerns about the existing regime and to better enable consumers to make informed purchasing decisions, the U.S. Congress included new COOL requirements in the Farm Security and Rural Investment Act of 2002 ("2002 Farm Bill"). The Senate Agriculture Committee report accompanying the 2002 Farm Bill explains:

> Many American consumers want to know the country of origin of their food. This Act therefore requires retailers to notify consumers of the country of origin of beef, pork, lamb, fish, fruits, vegetables, and peanuts. This provision provides consumers with greater information about the food they buy. Most of the products U.S. consumers purchase today are already labeled, with the notable exception of many food products. This provision brings the United States in line with many of its current trading partners, who already have country of origin labeling. These countries include Canada, Japan, and the countries of the European Union . . .[12]

2. The USDA Rulemaking Process

23. Following passage of the 2002 Farm Bill, the U.S. Department of Agriculture ("USDA") began a lengthy regulatory process to implement the law, which included specifying certain aspects of the labeling program not specified in the legislation, such as what the various labels would say or how meat derived from animals with production steps in more than one country would be required to be labeled.[13]

24. USDA's rulemaking process ultimately involved numerous versions of the implementing

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[10] *See, e.g.*, Panel Report, para. 7.645; Exhibits US-4, US-5, US-61, US-84, US-89, US-90, US-100, US-111, and US-116 (illustrating the support and advocacy work of U.S. consumer groups – including the Consumers Union, the Consumers Federation of America, the National Consumers League, Food & Water Watch, and Public Citizen – for the adoption of COOL requirements in the United States).

[11] Exhibit US-61, at S13271. As another example, the Consumers Union wrote to the U.S. Department of Agriculture ("USDA") in 2007 that "[w]e believe that this COOL proposal should be as expansive as possible...as it is clear that consumers desire to know where their food comes from." Exhibit US-4; Panel Report, para. 7.645.

[12] Exhibit US-11, at 233.

[13] Panel Report, para. 7.83.

regulations and multiple episodes of congressional intervention.[14] Throughout this process, stakeholders with diverse interests provided comments to Congress and USDA to ensure that their perspectives were considered. Among the most active and vocal stakeholders were the U.S. consumers and consumer advocacy organizations, U.S. retailers and slaughterhouses, and livestock producers from the United States, Canada, and Mexico. In general, consumers and consumer advocacy organizations supported strict COOL requirements that provided the maximum amount of information,[15] while industry groups and U.S. trading partners pressed for less precise requirements and greater flexibility to help minimize compliance costs.[16] The diverse views of these stakeholders, and U.S. efforts to adequately reflect all of their views, led to proposals that varied widely.

25. In 2003, USDA issued its first proposed rule ("2003 Proposed Rule").[17] This proposal leaned in the direction of providing more consumer information, and proposed requiring retailers to adopt a form of point-of-production labeling for meat muscle cuts, whereby they would be required to explicitly identify which production steps took place in another country and which production steps took place in the United States.[18] The 2003 Proposed Rule also proposed stringent requirements for ground meat, and would have required retailers to list all the countries of origin of the blended meat in alphabetical order. It proposed strict recordkeeping requirements as well. Based on its design, the 2003 Proposed Rule, if adopted, would have required market participants throughout the supply chain to track where each production step took place for *each and every* animal and for *each and every* piece of meat they processed, significantly raising costs throughout the supply chain. While consumer organizations generally supported the 2003 Proposed Rule, many industry organizations and U.S. trading partners believed the proposal was too stringent and costly to implement and urged the United States to modify the rule.[19]

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[14] Panel Report, paras. 7.76-7.86; U.S. FWS, para. 60-83.

[15] *See, e.g.*, Exhibits US-4, US-5, and US-100 (letters from the Consumers Union, Consumers Federation of America, and Food & Water Watch supporting COOL requirements that provide consumers with as much information as possible).

[16] *See, e.g.,* Exhibit US-21 (letter from the American Frozen Food Institute, the Grocery Manufacturers of America, and the National Food Processors Institute expressing concerns about compliance costs under the 2003 Proposed Rule).

[17] "Mandatory Country of Origin Labeling of Beef, Lamb, Pork, Fish, Perishable Agricultural Commodities, and Peanuts; Proposed Rule," 68 Fed. Reg. 61944 (Oct. 30, 2003) ("2003 Proposed Rule") (Exhibit MEX-14). The 2003 Proposed Rule followed voluntary guidelines that USDA published in 2002 in order to provide stakeholders with an opportunity to comment before mandatory requirements were adopted. U.S. FWS, paras. 63-66.

[18] U.S. FWS, paras. 64-66. *See also* U.S. FWS, para. 63 (describing the labeling requirements of the 2002 Voluntary Guidelines that were incorporated into the 2003 Proposed Rule in a mandatory form).

[19] *See, e.g.*, Exhibits US-19, US-21, and US-23 (letters from Australia, Mexico, and U.S. retailers expressing concerns about the 2003 Proposed Rule).

26. In 2008 USDA issued an Interim Final Rule,[20] which leaned in the direction of minimizing compliance costs, thus reflecting changes that Congress made to the COOL statutory requirements in the Food, Conservation, and Energy Act of 2008 ("2008 Farm Bill") to address the concerns raised by market participants and U.S. trading partners about the 2003 Proposed Rule.[21] The 2008 Interim Final Rule used the four categories of meat labels created in the 2008 Farm Bill – (A) U.S. origin; (B) multiple countries of origin; (C) imported for immediate slaughter; and (D) foreign origin – and included certain flexibility between certain categories.[22] The 2008 Interim Rule also relaxed the ground meat labeling requirements and recordkeeping provisions as compared with the 2003 Proposed Rule. Many U.S. consumer advocacy organizations and other COOL proponents expressed concerns about the 2008 Interim Final Rule, believing it diluted the information that would be provided to consumers.[23]

27. After another round of comments from stakeholders, the United States ultimately adopted the 2009 Final Rule, which struck a balance between the 2003 Proposed Rule and the 2008 Interim Final Rule. While the 2009 Final Rule does not require country of origin labels to provide as much precise information as the labels under the 2003 Proposed Rule would have provided, the costs to market participants of complying with the requirements of the 2009 Final Rule are significantly lower than they would have been under the 2003 Proposed Rule. Additionally, while the 2009 Final Rule may increase compliance costs in some respects as compared with the 2008 Interim Final Rule, it provides more information to consumers than provided by the pre-COOL statute regime. The 2009 Final Rule reflects a balance of the views of all interested parties, including consumer groups, market participants, and U.S. trading partners like Canada and Mexico. The COOL requirements provide consumers with a significant amount of new information about the products they buy at a reasonable cost to all of those affected by the requirements, including entities in the supply chain and U.S. consumers.

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[20] "Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts; Interim Final Rule," Agricultural Marketing Service, USDA, 73 Fed. Reg. 45106 (Aug. 1, 2008) ("2008 Interim Final Rule") (Exhibit CDA-3).

[21] U.S. FWS, paras. 68-70; Panel Report, para. 7.80. The 2008 Interim Final Rule addressed this issue in the following manner: "The 2008 Farm Bill contains a number of provisions that amended the COOL provisions in the Act. In general, these changes provide for greater flexibility in labeling by retailers and suppliers and reduce the burden on livestock producers. For example, the 2008 Farm Bill provides for flexibility in labeling ground products by allowing the notice of country of origin to include a list of countries contained therein or that may reasonably be contained therein. In addition, the law provides flexibility in labeling meat covered commodities derived from animals of multiple countries of origin." (2008 Interim Final Rule, p. 45127) (Exhibit CDA-3).

[22] Panel Report, paras. 7.290; 73 C.F.R. § 65.300(e)(1)(i) (Exhibit CDA-3).

[23] *See, e.g.*, Exhibit US-100 (letter from Food & Water Watch expressing concern about the potential flexibility between the use of Category A and B labels in the 2008 Interim Final Rule); Panel Report, para. 7.293 (noting that Members of Congress and other COOL proponents in the United States opposed the 2008 Interim Final Rule).

3. The COOL Measure

28. As identified by the Panel,[24] the "COOL measure" actually consists of two separate instruments: (1) the COOL statute, which refers to the relevant sections of the Agricultural Marketing Act of 1946, as amended by the 2002 Farm Bill and 2008 Farm Bill;[25] and (2) the 2009 Final Rule, as promulgated by USDA's Agricultural Marketing Service ("AMS").[26] As noted above, the COOL statute creates the broad framework of U.S. country of origin labeling requirements, but does not prescribe all of the details necessary for the program to operate in the market, instead instructing USDA to develop implementing regulations.[27] The 2009 Final Rule provides the specifics of U.S. country of origin labeling requirements, and it is the instrument that actually put in force the COOL requirements currently in place.

a. The COOL Statute

29. The COOL statute requires retailers to inform consumers at the final point of sale of the country of origin of beef, lamb, pork, farm-raised fish, wild fish, perishable agricultural commodities (fruits and vegetables), goat meat, chicken, ginseng, pecans, macadamia nuts, and peanuts they buy.[28] For each covered commodity, the statute sets forth general requirements regarding country of origin labeling.

30. With respect to muscle cuts of meat, the COOL statute creates four categories of labeling, depending on where the animal was born, raised, and slaughtered.[29]

31. "United States country of origin" meat (also known as "Category A") refers to meat derived from animals born, raised, and slaughtered in the United States.[30] If a source animal

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[24] Panel Report, paras. 7.59-7.61.

[25] Subtitle D (Sections 281-285) of the Agricultural Marketing Act of 1946 (7 U.S.C. §§ 1638-1638c) (Exhibit MEX-1).

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

[27] Panel Report, para. 7.83; U.S. FWS, para. 45. The COOL statute directs USDA to "promulgate such regulations as are necessary to implement this subchapter." 7 U.S.C. § 1638c(b) (Exhibit MEX-1).

[28] 7 U.S.C. § 1638(2)(a) (Exhibit MEX-1); Panel Report, para. 7.87.

[29] Panel Report, para. 7.89.

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

meets these requirements, the COOL statute states that a retailer *may* designate the resulting meat as U.S. origin. The statute thus ensures that only meat derived from an animal that spent its entire life in the United States can receive a U.S.-origin label, but it does not require that all such animals *must* be so designated.

32. "Multiple countries of origin" meat (also known as "Category B") refers to meat derived from animals (1) not exclusively born, raised, and slaughtered in the United States; (2) born, raised, or slaughtered in the United States; and (3) not imported into the United States for immediate slaughter.[31] If a source animal meets these requirements, the COOL statute states that a retailer *may* designate the country of origin of the resulting meat as all of the countries in which the source animal may have been born, raised, or slaughtered. The statute does not prescribe the order in which multiple countries must be listed on a Category B label.

33. "Imported for immediate slaughter" meat (also known as "Category C") refers to meat derived from animals born and raised in a foreign country and then imported into the United States for immediate slaughter.[32] If the source animal meets these requirements, the COOL statute states that a retailer *shall* designate the country of origin of the resulting meat as the country from which the source animal was imported and the United States. However, as is the case for Category B meat, the COOL statute does not prescribe the order in which the multiple countries must be listed on a Category C label.

34. "Foreign country of origin" meat (also known as "Category D") refers to meat derived from an animal that is not born, raised, or slaughtered in the United States.[33] In this instance, the COOL statute states that a retailer *shall* designate a country other than the United States as the country of origin.

35. For ground meat, the COOL statute requires that the notice of country of origin include (1) a list of all countries of origin or (2) a list of all "reasonably possible" countries of origin.[34] The statute does not define the term "reasonably possible," leaving the term to be defined in the regulations.

36. The COOL statute also defines certain key terms, creates certain exemptions, and

[31] Panel Report, para. 7.89.

[32] Panel Report, para. 7.89.

[33] Panel Report, para. 7.89.

[34] Panel Report, para. 7.89.

describes some methods of labeling.[35] Finally, the statute establishes recordkeeping requirements to ensure that retailers have the information necessary to provide the correct country of origin information to consumers.[36]

b. The 2009 Final Rule

37. On January 15, 2009, USDA's AMS published the 2009 Final Rule, which implements the labeling requirements for the commodities identified in the COOL statute. The 2009 Final Rule states that "the intent of the law and this rule is to provide consumers with additional information on which to base their purchasing decisions."[37] The 2009 Final Rule, which took effect on March 16, 2009, prescribes how the statutory U.S. COOL requirements will be administered and enforced in the market. While the 2009 Final Rule includes many essential details on the COOL program, this section will primarily focus on aspects related to the muscle cut and ground meat labeling requirements at issue in this appeal.

38. The 2009 Final Rule sets out the same four categories for meat muscle cuts as the COOL statute – (A) U.S. origin; (B) multiple countries of origin; (C) imported for immediate slaughter; and (D) foreign origin – and provides additional details about each of these categories not provided for in the COOL statute.[38] For example, the 2009 Final Rule specifies the order in which countries of origin should be listed on the Category B and C ("mixed origin") labels – allowing Category B labels to list the countries in any order while requiring Category C labels to first list the country from which the livestock was born and raised, followed by the United States, the country where the animal was slaughtered.[39] The categories, requirements, and corresponding labels under the 2009 Final Rule are as follows:

Category A	Meat from animals born, raised, and slaughtered in the United States[40]	*Product of the U.S.*

[35] 7 U.S.C. § 1638(6) (defining the term "retailer"); 7 U.S.C. § 1638a(b) (exempting food served in restaurants); 7 U.S.C. § 1638(2)(B) (exempting "processed food"); 7 U.S.C. § 1638a(c)(1) (providing that information may be provided to consumers by means of a label, stamp, mark, placard, or sign) (Exhibit MEX-1); U.S. FWS, para. 34-36.

[36] 7 U.S.C. § 1638a(4)(d)-(e) (Exhibit MEX-1); Panel Report, para. 7.88.

[37] 2009 Final Rule, p. 2677 (Exhibit CDA-5); Panel Report, para. 7.680.

[38] 7 C.F.R. § 65.260, 7 C.F.R. § 65.300(d)-(e) (Exhibit CDA-5); Panel Report, paras. 7.90-7.100.

[39] Panel Report, para. 7.97.

[40] This category also includes animals born and raised in Alaska and Hawaii and transported through Canada for not more than 60 days and slaughtered in the United States or animals present in the United States on or before June 15, 2008.

Category B	Meat from animals born in Country X and raised and slaughtered in the United States	*Product of the U.S., Country X, Country Y (if applicable; can appear in any order)*
Category C	Meat from animals imported into the United States for immediate slaughter (slaughtered within 2 weeks of entering the United States)	*Product of Country X, U.S.*
Category D	Foreign meat imported into the United States	*Product of Country X*

39. The 2009 Final Rule also addresses the issue of flexibility between categories, another issue not addressed by the COOL statute.[41] In particular, the 2009 Final Rule allows for the use of a Category B or C label for meat derived from any combination of Category A, B, and C animals commingled during a single production day. This permits feedlots, slaughterhouses, and retailers and other entities throughout the supply chain to commingle and affix the same label on the meat derived from the commingled animals and meat.[42] The labeling provisions, as affected by commingling, are outlined in the chart below:

A = A	When 100% of the animals are Category A animals, the meat must be labeled with Label A
B = B or C	When 100% of the animals are Category B animals, the meat may be labeled with Label B or C because the order of countries on Label B is interchangeable
C = C	When all of the animals are Category C animals, the meat must be labeled with Label C
A & B = B or C	When Category A and B animals are commingled on a single production day, the meat may be labeled with Label B or C because the order of countries is interchangeable
A & C = B or C	When Category A and C animals are commingled on a single production day, the meat may be labeled with Label B or C because the order of countries is interchangeable

[41] 7 C.F.R. § 65.300(d)-(e) (Exhibit CDA-5); Panel Report, paras. 7.90-7.100.

[42] Panel Report, para. 7.704.

B & C = B or C	When Category B and C animals are commingled on a single production day, the meat may be labeled with Label B or C because the order of countries is interchangeable
A & B & C = B or C	When Category A, B, and C animals are commingled on a single production day, the meat may be labeled with Label B or C because the order of countries is interchangeable

40. While the commingling flexibility allowed in the 2009 Final Rule does not allow retailers to use a Category B label on Category A meat in all circumstances,[43] the commingling provisions were specifically designed to reduce compliance costs for entities throughout the supply chain, including for Canadian and Mexican livestock producers.[44] In fact, the ability to use a B label on A or C meat when a combination of A, B, and C animals are commingled during a single production day and the ability to list countries on a B label in any order were added to the regulations in response to comments from Canada and the Canadian Pork Council, among other stakeholders.[45]

41. With respect to ground meat, the 2009 Final Rule provides that a country may not be listed on the label if raw material from a specific origin has not been within the processor's inventory within the last 60 days.[46]

42. The 2009 Final Rule includes recordkeeping requirements, which provide that, upon request, suppliers and retailers must make available records maintained in the normal course of business to verify a particular origin claim.[47] The 2009 Final Rule also requires that suppliers make information about the country of origin available to the subsequent purchaser and that suppliers maintain records to establish and identify the immediate previous source and immediate subsequent recipient for a period of one year.

43. The 2009 Final Rule makes a substantial effort to reduce the record keeping burden associated with meeting these requirements. For example, the 2009 Final Rule requires that suppliers and retailers produce only records already maintained in the ordinary course of business in order to verify an origin claim, and permits the use of ear tags and other common identifying marks already frequently used in the industry in order to maintain origin.[48]

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[43] Panel Report, para. 7.290.

[44] U.S. FWS, para. 77.

[45] Exhibit US-25; Exhibit US-99; U.S. FWS, para. 77; U.S. SWS, para. 42.

[46] Panel Report, para. 7.425.

[47] 7 C.F.R. § 65.300(b) (Exhibit CDA-5); Panel Report, paras. 7.116-7.120.

[48] Panel Report, para. 7.319.

B. Mandatory Country of Origin Labeling Requirements Are Common Among WTO Members

44. At least 68 WTO Members maintain mandatory country of origin labeling requirements, with many of these Members imposing those requirements at the retail level.[49] Some of the WTO Members who apply mandatory COOL at retail include, *inter alia*, Australia, Brazil, Chile, Colombia, the European Union ("EU"), Guatemala, Japan, Korea, Malaysia, the Philippines, Chinese Taipei, and Vietnam. Canada and Mexico both maintain some form of mandatory country of origin labeling requirements for food products as well.

45. The country of origin labeling requirements of these other WTO Members share many similarities with the COOL measure. Like the United States in its notification of the COOL measure to the TBT Committee,[50] many of these Members identified consumer information as the objective of their requirements.[51] Further, many of the other Members' labeling requirements do not define origin based on substantial transformation.[52] A few Members with mandatory COOL for meat who do not define origin simply based on substantial transformation include:

- *Australia*: Australia's mandatory COOL requirements for all packaged foods and unpackaged fresh or processed fruit, vegetables, seafood, and pork are not based on substantial transformation. To qualify for the "Product of" label for a particular country, "virtually all the processes of production or manufacture of the goods must have happened in the country of origin claimed."[53] Similarly, to qualify for the "Made in" label for a particular country, "more than 50 percent of the costs of production must have been carried out in the country claimed to be the origin."[54]

- *EU*: The EU's labeling requirements for beef and other meat products are not based on substantial transformation. As the EU explained to the Panel, "in the situation where there is more than one country concerned, the label requires information

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[49] *See, e.g.,* Panel Report, paras. 7.637-7.638 (noting that many WTO Members have adopted mandatory COOL requirements with a consumer information objective); Exhibit US-68 (listing 67 countries with mandatory COOL requirements); Guatemala's Responses to the Panel's Questions (explaining Guatemala's mandatory COOL requirements).

[50] Exhibit US-26.

[51] Panel Report, para. 7.638; Exhibit US-69.

[52] U.S. SWS, para. 171.

[53] Australia's Responses to Questions of the Panel Following the First Substantive Meeting with the Panel ("Australia's Responses"), Question 1.

[54] Australia's Responses, Question 1.

about the country of birth, the country of fattening and the country where slaughter occurred, and eventually also about the place of cutting."[55]

- *Japan*: Japan's labeling requirements for fresh food are not based on substantial transformation. Japan determines the origin of livestock for meat labeling in the following way: "Where the livestock was raised in no less than two countries, the country of origin is the country with a longer raising period."[56]

- *Korea*: Korea's labeling requirements for beef, pork, and chicken (as well as rice and *kimchi*) are not based on substantial transformation. In the case of beef, a retailer may only use a "domestic label" if the source animal was raised in Korea for at least six months. In the case of pork and chicken, a retailer may only use a "domestic label" if the source animal was raised in Korea for at least two months. In cases where the animal was raised in Korea for a shorter period of time than six months for beef and two months for pork and chicken, respectively, a retailer must label the product as a "Domestic Product," with the name of the importing country in parentheses.[57]

C. The North American Livestock Market

46. The North American livestock market is highly complex. Many factors affect the level of trade in U.S., Canadian, and Mexican livestock and meat products at any given time as well as the prices paid for these products, including overall economic conditions, the prevalence of animal diseases, exchange rates, weather conditions, inventories, and energy, transportation, and feed costs, among others.[58] Not only are there many factors that may affect the market, but these factors are inter-related, making it extremely difficult to disaggregate them and assess the impact of any one factor at any given time.

47. Despite the complexity of the market, several facts and recent trends are of note. First, it is the longstanding practice of U.S. feedlots and slaughterhouses to discount Canadian and Mexican livestock *vis-à-vis* U.S. livestock. This is due to the fact that livestock prices are set in the larger U.S. market, and Canadian and Mexican animals are discounted from that price based on transport costs and currency exchange rates.[59]

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[55] Replies to Questions from the Panel Following the First Hearing by the European Union, para. 27; Exhibit EU-4.

[56] Japan's Replies to Questions from the Panel Following the First Substantive Meeting, para. 5.

[57] Exhibit US-139.

[58] U.S. FWS, paras. 86-125.

[59] *E.g.*, U.S. FWS, paras. 90-92.

48. Second, some unusual events in the past decade influenced recent market trends. Among other events, the outbreak of bovine spongiform encephalopathy ("BSE"), the economic recession, and the restructuring of the Canadian hog industry all had significant effects on the market.[60]

49. However, Canadian and Mexican cattle exports to the United States are doing well, with the market for these exports largely normalized, despite these recent events.[61] For example, the most recent data submitted to the Panel illustrated that Canadian cattle exports were up 6.8 percent in the first nine months of 2010 over the same period in 2009,[62] and Canadian beef exports were up 13 percent over the first eight months of 2010 over the same period in the previous year.[63] Mexican exports were faring even better. In fact, Mexican cattle exports were up 29.7 percent over the first nine months of 2010, following an increase of 34 percent in 2009 over 2008 levels.[64]

50. Canadian and Mexican livestock producers also have been receiving high prices for their product, and the price basis between U.S. and imported livestock has declined since the adoption of the COOL measure.[65] In fact, data submitted by the United States shows that the average price differential between U.S. and Canadian livestock declined from $8.95 in U.S. dollars prior to the publication of the 2008 Interim Rule to $7.95 following the implementation of the 2009 Final Rule, a decline of 15.2 percent.[66] This trend, which is illustrated in the chart below, shows that price discounting has not increased since the adoption of the COOL measure.

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[60] *See, e.g.*, Panel Report, paras. 7.455-7.457 (discussing the impact of BSE); U.S. SWS, paras. 84-85 (discussing the economic recession); U.S. FWS, paras. 118-125 (discussing the restructuring of the Canadian hog industry, including declining inventories).

[61] According to the latest data submitted by the United States, Canadian hog exports continue to decline. However, this is related to the long-term restructuring of the Canadian hog industry as described in para. 48 of this submission and paragraphs 118-125 of the U.S. First Written Submission.

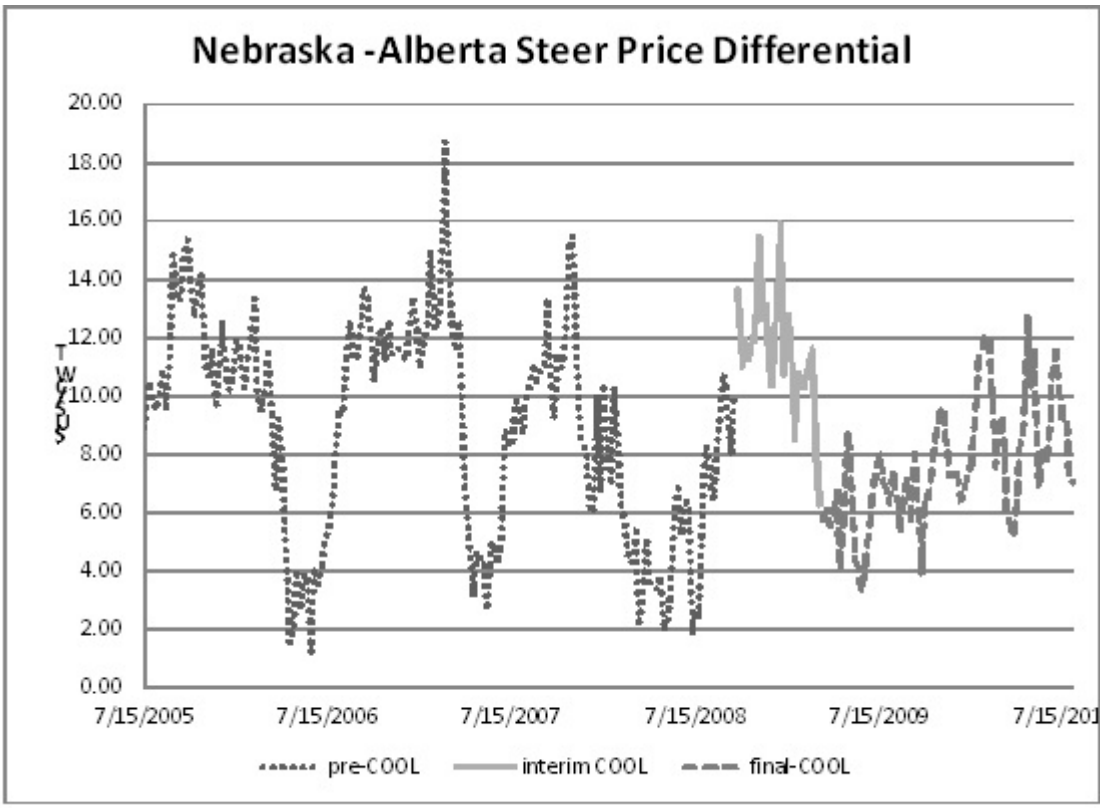
[62] Exhibit US-143; Panel Report, para. 7.458.

[63] *See* U.S. SWS, paras. 69-70 (showing the 2009-2010 increase in Canadian beef exports and explaining its significance for Canada's cattle exports).

[64] Panel Report, paras. 7.466-7.468; Exhibit US-104 (showing the 2008-2009 increase in Mexican cattle exports); Exhibit US-143 (showing the 2009-2010 increase in Mexican cattle exports); U.S. SWS, para. 71; Panel Report, paras. 7.466-7.468 (discussing the increase in Mexican cattle exports over the first seven months of 2010).

[65] U.S. SWS, paras. 81-83.

[66] U.S. SWS, para. 83.



51. The price paid for Canadian and Mexican cattle and Canadian hogs also increased for the first eight months in 2010 (the data submitted by the United States during the Panel proceedings) at levels that met or even exceeded the increase in equivalent U.S. prices. For example:

- Canadian slaughter cattle and Canadian feeder cattle prices were up 15.3 percent and 18.9 percent, respectively, over 2009 levels. This exceeded the price increase in comparable U.S. slaughter and feeder cattle of 14.5 and 16.6 percent, respectively.[67]

- Mexican cattle prices were up 23.2 percent over the previous year, almost 9 percentage points higher than the 12.6 percent price increase experienced by equivalent U.S. feeder cattle.[68]

- Canadian hog prices grew by 20.9 percent, which kept pace with the price growth in U.S. hogs of 21.8 percent.[69]

[67] Exhibit US-108; U.S. SWS, para. 78.

[68] Exhibit US-108; U.S. SWS, para. 79.

[69] Exhibit US-108; U.S. SWS, para. 80.

The price increase in imported animals at levels similar or above the price increase in domestic animals provides further evidence that price discounting has not increased since the adoption of the COOL measure.[70]

III. THE PANEL ERRS IN FINDING THAT THE COOL MEASURE BREACHES ARTICLE 2.1 OF THE TBT AGREEMENT WITH REGARD TO MUSCLE CUTS OF MEAT

52. The United States appeals the Panel's finding that the COOL measure breaches Article 2.1 of the TBT Agreement with regard to muscle cuts of meat, and in particular, its finding that the COOL measure accords less favorable treatment to imported livestock than domestic livestock. The Panel's finding is based on a faulty and unprecedented legal test for the assessment of less favorable treatment and on a failure to make an objective assessment of the facts related to segregation, commingling, and the price differential in the U.S. livestock market as required by Article 11 of the DSU. Using an appropriate legal framework for the issue of "less favorable treatment," it is clear that the COOL measure is not inconsistent with Article 2.1 as it applies to meat muscle cuts, just as the Panel concludes that the COOL measure is not inconsistent with this provision as it applies to ground meat.[71]

A. The Panel's Flawed Analysis

53. Article 2.1 of the TBT Agreement provides:

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

54. The United States agrees with the Panel that, in a dispute involving a claim concerning national treatment, the appropriate legal test under Article 2.1 should focus on three elements: (1) whether the measure at issue is a technical regulation; (2) whether the imported and domestic products at issue are "like products"; and (3) whether the measure accords less favorable treatment to the imported products than the like domestic products.[72] The United States also agrees with the Panel that Article III:4 of the GATT 1994 provides relevant context for the interpretation of this obligation.[73] Additionally, the United States does not appeal the Panel's findings that the COOL

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[70] U.S. SWS, paras. 82-83.

[71] Panel Report, paras. 7.421-7.437.

[72] Panel Report, paras. 7.219-7.220; *EC – Geographical Indications (Australia)*, para. 7.444.

[73] Panel Report, para. 7.234.

measure is a technical regulation[74] or that Canadian, Mexican, and U.S. livestock are like products.[75]

55. However, the United States appeals the Panel's assessment of the COOL measure under the third element of the Article 2.1 analysis, where the Panel finds that the COOL measure, as it relates to meat muscle cuts, accords less favorable treatment to imported livestock.[76] As the United States will explain, the Panel's legal approach to this element is in error, and the Panel compounds its legal mistakes by failing to make an objective assessment of the critical facts.

56. To determine whether the COOL measure accords less favorable treatment to imported livestock than domestic livestock, the Panel primarily examines three issues:

(1) "whether the different categories of labels under the COOL measure accord different treatment to imported livestock;"

(2) "whether the COOL measure involves segregation and, consequently, differential costs for imported livestock;" and

(3) "whether, through the compliance costs involved, the COOL measure creates any incentive to process domestic livestock, thus reducing the competitive opportunities of imported livestock."[77]

57. In examining the first issue, the Panel concludes that the COOL measure (or more precisely, the 2009 Final Rule with respect to meat muscle cuts) treats imported livestock differently than domestic livestock based on the commingling flexibility provided with regard to the labeling of meat. According to the Panel:

> In other words, under the COOL measure, in particular the 2009 Final Rule (AMS), Label B may be used for Label A meat but only in the case of commingling on a single production day. Under the COOL measure, therefore, imported livestock is ineligible for the label reserved for meat from exclusively US-origin livestock, whereas in certain circumstances meat from domestic livestock is eligible for a label that involves imported livestock.[78]

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[74] Panel Report, para. 7.162.

[75] Panel Report, para. 7.236.

[76] Panel Report, para. 7.420.

[77] Panel Report, para. 7.279.

[78] Panel Report, para. 7.295.

58. Notably, the Panel's finding that the COOL measure accords different treatment to imported livestock than domestic livestock is not premised on any actual different treatment of livestock, but is based on how the commingling flexibility affects another product not at issue in this dispute – meat.[79] In addition to premising its finding of different treatment on a product not at issue, the Panel does not attempt to link the purported different treatment to its later finding of less favorable treatment. Instead, the Panel quickly pivots from the question of different treatment to an assessment of whether there is *de facto* less favorable treatment for entirely unrelated reasons, most of which concern potential costs of compliance for different market participants based on the different ways they may decide to comply with the COOL measure and how these independent decisions might ultimately affect imported livestock.

59. In examining the second issue, the Panel first determines that a measure may breach Article 2.1 even if it does not discriminate on its face.[80] The Panel then concludes that there are costs associated with complying with the COOL measure[81] and that the measure, "for all practical purposes," necessitates the segregation of livestock and meat throughout the supply chain, despite the measure's commingling provisions specifically designed to avoid segregation.[82] Next, the Panel assesses potential business scenarios that independent market participants could follow in response to the COOL measure, and concludes that those scenarios involving more origins and more segregation are more costly than those involving less origins; thus, the Panel theorizes that market participants will generally process only a single origin of product to minimize costs.[83] Faced with a choice of which single origin to process, the Panel states that market participants will process U.S. livestock instead of imported livestock because "[l]ivestock imports have been and remain small compared to overall livestock production and demand, and US livestock demand cannot be fulfilled with exclusively foreign livestock,"[84] as well as the fact that "US livestock is often geographically closer to most if not all US domestic markets, so processing exclusively imported livestock and meat remains a relatively less competitive option."[85] Finally, the Panel theorizes that those market participants that process multiple origins of livestock will pass on the higher costs to imported livestock because they cannot pass them on to consumers.[86]

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[79] *See* Panel Report, paras. 7.64-7.67 (identifying livestock as the product at issue in this dispute).

[80] Panel Report, paras. 7.298-7.302.

[81] Panel Report, paras. 7.303-7.314.

[82] Panel Report, paras. 7.315-7.327.

[83] Panel Report, paras. 7.331-7.348.

[84] Panel Report, para. 7.349.

[85] Panel Report, para. 7.349.

[86] Panel Report, paras. 7.353-7.356.

60. Turning to the third issue, the Panel finds that, on the basis of the foregoing, "the COOL measure creates an incentive to use domestic livestock – and a disincentive to handle imported livestock – by imposing higher segregation costs on imported livestock than on domestic livestock."[87] Consequently, the Panel finds that the COOL measure "affects competitive conditions in the United States to the detriment of imported livestock" in breach of Article 2.1 of the TBT Agreement.[88]

61. The Panel confirms its preliminary finding by affirming evidence submitted by the complaining parties purporting to show a reduction in the competitive opportunities for imported livestock in the U.S. market[89] and by dismissing contrary U.S. evidence and argumentation.[90] The Panel also examines the "actual trade effects" of the COOL measure[91] – imports but not prices – and decides to rely on a Canadian econometric model, which claims to demonstrate the differential effects of the COOL measure on Canadian livestock, to further confirm its conclusion.[92]

62. The Panel's analysis contains numerous legal and factual errors. From a legal standpoint, the Panel adopts a radical and unprecedented test for less favorable treatment that does not focus on whether the measure *itself* modifies the *conditions* of competition to the detriment of imported livestock (*i.e.,* whether the measure affects the terms under which products compete in the market), but instead examines whether imported livestock are equally competitive with domestic livestock, a very different question. Nothing in the TBT Agreement or the WTO agreements requires Members to ensure that imported products are placed on an equal footing in terms of their ability to compete. There is a vast difference between ensuring that a measure does not adversely affect the *conditions* of competition, for example by imposing more onerous requirements on imported products, and ensuring that imported products are competitive with domestic products. Indeed, many factors affect competition, including pre-existing market conditions such as product design, economies of scale, transportation costs, distribution networks, or a smaller market share of imports.

63. The question for purposes of Article 2.1 of the TBT Agreement is whether the technical regulation alters the *conditions* of competition so as to deny imported products the ability to compete under the same conditions as like domestic products. The Panel's legal error appears to be that the Panel assumes that conditions of competition equate to competitive opportunities which

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[87] Panel Report, para. 7.372.

[88] Panel Report, para. 7.372.

[89] Panel Report, paras. 7.374-7.381.

[90] Panel Report, paras. 7.382-7.419.

[91] Panel Report, paras. 7.438-7.485.

[92] Panel Report, para. 7.542.

in turn equate to being equally competitive. However, these are logically and legally distinct questions. Any measure can affect industry costs, but there is nothing in the WTO agreements that requires those costs to be allocated equally among all producers, whether domestic or foreign (and indeed it would be impossible for regulators to do so). Rather, the issue is whether the measure denies imported products, by nature of their origin, the ability to compete under the same conditions. How the producers of those imported products choose to respond to the conditions of competition may vary and indeed for sound business reasons a producer may choose not to adapt to those conditions. But that is not the issue. The issue is whether the measure changes the conditions of competition so as to favor domestic over imported products.

64. In other words, the question is not, as the Panel appears to assume, whether a technical regulation ensures that imported products and like domestic products are equally competitive. And here, the Panel does not find that the COOL measures modifies the conditions of competition such that imported products face some additional or more onerous requirement than like domestic products. Rather, the Panel focuses on whether imported livestock are equally attractive from a financial standpoint as domestic livestock such that imported livestock will command the same price as domestic livestock. But that is not the proper inquiry under Article 2.1.

65. The problem with the Panel's approach is not limited to the specifics of country of origin labeling or the TBT Agreement. This approach has broad, systemic implications that would fundamentally alter the interpretation of Members' WTO obligations. For example, under the Panel's approach, could a Member challenge another Member's value-added taxation system because it means imported products incur greater costs than like domestic products in the record-keeping involved (for example due to language differences or because different accounting methods are more common in one Member than another), even though the tax rates and record-keeping requirements are the same? Is it sufficient for purposes of establishing a breach of Article III:4 of the GATT 1994 to demonstrate that some purchasers are more inclined to prefer domestic products than imported products, even though the measure treats both the same? Under the Panel's approach, the answer to these questions appears to be "yes," and for these reasons, the Panel's approach should be rejected.

66. In addition to these severe legal errors, several of the factual findings that the Panel relies on to support its less favorable treatment finding are inconsistent with its obligations under Article 11 of the DSU. In particular, the Panel fails to conduct an objective assessment of other critical facts related to segregation, commingling, and the price differential in the U.S. livestock market. The facts presented by the United States, which were either disregarded or misunderstood by the Panel, clearly demonstrate that market participants are not all segregating, but are commingling on a regular and widespread basis so as to reduce compliance costs. Additionally, the facts presented by the United States with regard to prices, which the Panel completely disregarded, show that Canadian and Mexican livestock prices have not been adversely affected by the COOL measure, but that the price differential between domestic and imported livestock has actually narrowed since the 2009 Final Rule was adopted. Finally, the Panel erroneously relies on an econometric study commissioned by Canada in support of its conclusion that the COOL measure has a differential

impact on the price being paid for imported livestock, without recognizing that this flawed study does not support its conclusion with regard to three out of the four classes of animals at issue in this dispute.

67. In the sections that follow, the United States will explain the appropriate legal test that the Panel should have followed to determine whether the COOL measure accords less favorable treatment to imports and will describe the Panel's many factual errors. In doing so, the United States will show that the COOL measure does not breach Article 2.1 of the TBT Agreement for meat muscle cuts, just as it does not do so for ground meat either.

B. The Appropriate Less Favorable Treatment Legal Test

68. To determine whether the COOL measure accords "less favorable treatment" to imported livestock under Article 2.1 of the TBT Agreement, the Panel should have followed past Appellate Body and WTO panel reports that have focused on whether the measure *itself* "modifies the conditions of competition...to the disadvantage of the imported product."[93] The Appellate Body and WTO panels have assessed whether a measure modifies the condition of competition in slightly different ways, but they have generally focused on the following:

- whether the measure *itself* treats imported products differently and less favorably than domestic like products on the basis of their origin;[94] and

- to the extent that there are adverse effects on imported products, whether these effects are attributable to the measure *itself* or are based on external non-origin related factors, such as pre-existing market conditions and the independent actions of private market actors.[95]

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[93] *Korea – Beef (AB)*, para. 137; *Thailand – Cigarettes (AB)*, para. 128.

[94] *E.g.*, *Korea – Beef (AB)*, paras. 143-148 (finding that the Korean measure accorded *de jure* less favorable treatment to imported beef because the measure itself set up different distribution systems for domestic and imported beef and thereby modified the conditions of competition to the detriment of the imported beef); *Thailand – Cigarettes (AB)*, paras. 128-140 (finding that the Thai measure accorded *de jure* less favorable treatment to imported cigarettes because the measure itself imposed additional requirements on imports on the basis of their origin that modified the conditions of competition to the detriment of imported cigarettes).

[95] *E.g., Dominican Republic – Cigarettes (AB)*, para. 96 (finding that the measure at issue did not accord less favorable treatment to imported cigarettes because the adverse effects were not related to origin or the measure itself, but to the smaller market share of the imports); *US – Tuna (Panel)*, paras. 7.334 (finding that adverse effects related to the measures at issue do not accord less favorable treatment to imports because they are the result of actions of private market actors); *Japan – Film*, paras. 10.381-10.382 (finding that Japan's measure do not provide less favorable treatment since they do not discriminate against U.S. imported film or paper on their face and are not applied in a way that has a disparate impact; rather, the disparate impact on U.S. imports resulted from pre-existing market conditions).

69. The requirement that the treatment of the products must be different to be less favorable springs from the fact that, as a matter of logic, treatment that is identical cannot be less favorable. The notion that this different treatment must be based on origin (as opposed to origin-neutral criteria) is evident from Article 2.1 of the TBT Agreement itself, as well as the relevant context provided by the TBT Agreement and GATT Article III, the latter of which the Panel acknowledges is relevant to an interpretation of Article 2.1.[96] The language of Article 2.1 of the TBT Agreement is similar to GATT Article III:4, and in interpreting the GATT provision, the Appellate Body has made clear that it must be read in view of its immediate context, including Article III:1, which states that internal laws, regulations, and requirements affecting the internal sale of a product "should not be applied to imported or domestic products so as to afford protection to domestic production."[97] The Appellate Body has explained that this general principle embodied in GATT Article III:1 "informs the rest of Article III and acts 'as a guide to understanding and interpreting the specific obligations contained' in the other paragraphs of Article III, including paragraph 4."[98] Further, the Appellate Body has noted that "[t]he broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures."[99] Given the similar language and obligations in GATT Article III:4 and Article 2.1 of the TBT Agreement, the broad and fundamental purpose of Article 2.1 should also be understood to be to avoid protectionism in the application of technical regulations by imposing different treatment on the basis of origin.[100]

70. In interpreting Article 2.1 of the TBT Agreement, the fact that the provision comprises part of the TBT Agreement is also relevant context. The TBT Agreement concerns standards, technical regulations, and conformity assessment procedures, measures that the TBT Agreement clearly permits Members to impose to achieve legitimate objectives.[101] By their inherent nature, these types of measures draw distinctions between products.[102] These distinctions do not necessarily indicate a difference in treatment.

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[96] Panel Report, para. 7.234.

[97] *Japan – Alcohol (AB)*, p. 18.

[98] *EC – Asbestos (AB)*, para. 93 (quoting *Japan – Alcohol (AB)*, p. 18).

[99] *EC – Asbestos (AB)*, para. 97 (quoting *Japan – Alcohol (AB)*, p. 16).

[100] *US – Tuna (Panel)*, para. 7.276.

[101] *TBT Agreement*, Preamble ("[N]o country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement.").

[102] *US – Tuna (Panel)*, paras. 7.275-7.276.

71. Based on the language of the national treatment provisions and their context, the Appellate Body and WTO panels have only found a measure to accord less favorable treatment by adversely modifying the conditions of competition to the detriment of imports when they have found that the measure *itself* treats imports differently and less favorably based on origin, and that any adverse effects are directly attributable to the measure's different treatment of these products, not based on external factors unrelated to origin or to the measure *itself*. This is consistent with the notion that the broad purpose of both GATT Article III:4 and Article 2.1 of the TBT Agreement is to avoid measures that serve as a disguised form of protectionism, since this test will focus on whether the Member's enactment of the measure (and the different treatment of imports on the basis of origin) is the reason for any adverse effects as opposed to the possibility that these effects may result from factors not under the Member's control, such as the market share of imports or the independent actions of private market actors.

72. In *Thailand – Cigarettes*, the Appellate Body explained that a less favorable treatment assessment must focus on the measure *itself*, noting that:

> ...an analysis under Article III:4 must begin with careful scrutiny of the measure, including consideration of the design, structure, and expected operation of the measure at issue. Such scrutiny may well involve —but does not require—an assessment of the contested measure in the light of evidence regarding the actual effects of that measure in the market. In any event, there must be in every case a genuine relationship between the measure at issue and its adverse impact on competitive opportunities for imported versus like domestic products to support a finding that imported products are treated less favourably.[103]

73. Past Appellate Body and panel reports have also distinguished between actions required by a measure and uncompelled actions by private market actors. For example, in *Korea – Beef,* the Appellate Body stated:

> We are not holding that a dual or parallel distribution system that is not imposed directly or indirectly by law or governmental regulation, but is solely the result of private entrepreneurs acting on their own calculations of comparative costs and benefits of differentiated distribution systems, is unlawful under Article III:4 of the GATT 1994. What is addressed by Article III:4 is merely the governmental intervention that affects the conditions under which like goods, domestic and imported, compete in the market within a Member's territory.[104]

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[103] *Thailand – Cigarettes (AB)*, para. 134.

[104] *Korea – Beef (AB)*, para. 149. *See also US – Tuna (Panel)*, para. 7.334 (stating that "[i]n the context of Article 2.1 of the TBT Agreement, what must be considered is the treatment arising from the preparation, adoption, and application of the technical regulation by the Member taking the measure, rather than differences in the impact of the measure that are attributable to the behaviour of private actors on the market.").

74. In *Dominican Republic – Cigarettes*, the Appellate Body further clarified that a measure does not accord less favorable treatment if any detrimental effect on imports is not due to different treatment imposed by the measure *itself*, but can be explained by external factors. More specifically, the Appellate Body stated that:

> ...the existence of a detrimental effect on a given imported product resulting from a measure does not necessarily imply that this measure accords less favourable treatment to imports if the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product, such as the market share of the importer in this case.[105]

75. To determine whether the COOL measure accords less favorable treatment to imported livestock, the Panel should have followed these past reports and should have examined whether the measure *itself* modifies the conditions of competition to the detriment of imported livestock because it treats imports differently based on origin. Further, to the extent that there are any adverse effects on imported livestock, the Panel should have assessed whether these effects are due to the measure *itself* or whether they result from external factors. As explained below, the Panel's failure to do so constitutes a legal error and is the basis for its erroneous finding that the COOL measure breaches Article 2.1.

C. Under the Appropriate Legal Framework, the COOL Measure Does Not Breach Article 2.1 of the TBT Agreement

76. Approaching the third element under Article 2.1 of the TBT Agreement using the appropriate legal framework clearly demonstrates that the COOL measure does not breach Article 2.1 of the TBT Agreement. Unlike the measure at issue in *Korea – Beef*, *Thailand – Cigarettes*, and other similar disputes, the COOL measure *itself* does not treat imports differently than domestic products. Further, to the extent that there are any adverse effects on Canadian and Mexican livestock imports and prices (a point that the United States disputes), this results from external factors not related to the measure and not controlled by the United States, such as the smaller market share of imported livestock in the United States and the independent actions of private market actors. These are similar to the factors that the Appellate Body held did not constitute less favorable treatment in *Dominican Republic – Cigarettes*.

1. The COOL Measure Does Not Treat Imported Livestock Differently than Domestic Livestock

77. The United States agrees with the Panel that the question of whether or not a measure treats

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[105] *Dominican Republic – Cigarettes (AB)*, para. 96. *See also US – Clove Cigarettes (Panel)*, para. 7.268 (stating that "it is not sufficient to find inconsistency with Article III:4 solely on the basis that the measure at issue adversely affects the conditions of competition for an imported product. The complainant must also show that those adverse effects are related to the foreign origin of the product at issue.").

imports differently than like domestic products should serve as the starting point for a less favorable treatment analysis; thus, it was appropriate for the Panel to examine this issue as the first component of its less favorable treatment analysis.[106] The United States also agrees with the Panel that it is possible for a facially origin-neutral measure to accord less favorable treatment to imports even in the absence of formally different treatment.[107] However, past panel and Appellate Body reports have not made *de facto* discrimination findings lightly, and they have only found national treatment breaches on these grounds when there was evidence that the measure at issue used a "proxy" to single out imported products and target them for discrimination,[108] a factual situation not presented in this dispute.

78. To the extent that the COOL measure applies to livestock, its does not treat imported livestock differently than domestic livestock. The COOL measure is origin-neutral. Its recordkeeping requirements apply to all market participants regardless of where they are located and regardless of the type of livestock – imported or domestic – in their feedlots and slaughterhouses.[109] These market participants must also keep track of the origin of both types of products. Accordingly, the COOL measure treats both domestic and imported products the same with respect to its recordkeeping requirements, the only aspect of the measure that directly affects livestock.

79. The COOL measure also does not treat meat differently based on whether it is derived from imported or domestic livestock. Meat derived from both imported and domestic livestock is required to be labeled with information about its origin regardless of what that origin may be.[110] Thus, the COOL measure does not indirectly treat imported livestock differently than imported livestock by virtue of its meat labeling requirements either.

80. The concept of different treatment may at first be confusing in the context of country of origin labeling; one may mistakenly assume that there is always different treatment based on origin in a country of origin labeling regime due to the different content of the labels. However, in the context of COOL, the actual name of the country on the label is a simple conveyance of the

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[106] Panel Report, para. 7.296; *EC – Geographical Indications (Australia)*, para. 7.464.

[107] Panel Report, para. 7.298; *Korea – Beef (AB)*, para. 137.

[108] *See, e.g.*, *Mexico – Soft Drinks (Panel),* paras. 8.54-8.58 (finding that the Mexican measure accorded *de facto* less favorable treatment to U.S. soft drinks on the basis of a higher tax rate imposed on soft drinks made with non-cane sugar, a product characteristic that the panel determined served as a "proxy" for imported soft drinks, than on soft drinks produced with cane sugar, a "proxy" for domestic products); *Philippines – Distilled Spirits (Panel)*, paras. 7.86-7.89 (finding that the Philippine measures accorded *de facto* less favorable treatment to U.S. alcoholic beverages on the basis of higher taxation rates on certain product characteristics that served as "proxies" for imports.).

[109] Panel Report, paras. 7.116-7.120.

[110] Panel Report, para. 7.88.

information concerning that particular product. Thus, asserting that there is different treatment because one label says "Product of the United States" and another says "Product of Canada" or "Product of the United States and Mexico" is incorrect and akin to asserting that a wattage labeling requirement for light bulbs provides different treatment to 60 watt light bulbs than 100 watt light bulbs because the labels contain a different number. As is obvious to most people, 60 watt and 100 watt light bulbs are treated the same if both 60 and 100 watt light bulbs are required to be labeled as to their wattage. Similarly, under the COOL measure, U.S., Canadian, and Mexican livestock are not treated differently because the labels for meat derived from them say different things. Rather, they are all treated the same because the meat derived from all of them needs to be labeled with the same relevant information.

81. If the COOL measure (or any other country of origin labeling regime) did not require labels on meat derived from imported and domestic livestock in the same conditions (*e.g.,* different labeling exceptions applied to meat derived from imported livestock), that would be different treatment. However, there is not different treatment because meat derived from domestic livestock may sometimes be labeled as "Product of the United States and Canada" but meat derived from imported livestock cannot be labeled as a "Product of the United States."[111] The meat derived from domestic and imported livestock must be labeled under the exact same conditions, and the livestock are not treated differently because the label ultimately placed on the meat derived from them sometimes says different things.

82. Even in the circumstance that the Panel suggests there is different treatment – when there is commingling – domestic and imported livestock are being treated the same. Indeed, the exact same label (a B or C label) is affixed to all of the meat derived from the commingled domestic and imported livestock. The United States could have just as easily chosen to label all of the resulting meat with an A label instead of a B or C label, and the conclusion would remain the same – there is no different treatment.

83. The Panel also errs in its attempt to distinguish the A label from the B-D labels to establish different treatment by failing to recognize that it could just as easily distinguish the D label from the A-C labels if it sought a different conclusion. For example, just as easily as the Panel distinguishes between Label A and the rest of the labels by saying that Label A is the only label with no *imported* element,[112] the Panel could have distinguished between Label D and the rest of the labels by saying that Label D is the only label with no *domestic* element. Similarly, when the Panel states that "there is no flexibility under the COOL measure allowing for meat from *imported* livestock to carry *Label A*,"[113] it could have stated that "there is no flexibility under the COOL measure allowing for meat from *domestic* livestock to carry *Label D*."

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[111] Panel Report, para. 7.295.

[112] Panel Report, para. 7.286.

[113] Panel Report, para. 7.287 (emphasis added).

84. It is also notable that, in identifying this purported distinction between the treatment of meat based on the commingling provisions, the Panel concludes that the COOL measure on its face accords different treatment to imported livestock even though the complainants never made this argument. Indeed, the Panel notes that "the complainants are not contesting any formal difference in the treatment accorded to domestic and imported livestock *per se*, nor the existence or extent of the flexibility of commingling domestic and imported livestock. Instead, they argue that the COOL measure accords *de facto* less favorable treatment to imported livestock."[114]

85. Finally, it is worth noting that the commingling flexibility that the Panel claims as evidence of "different" treatment was included in the 2009 Final Rule at the request of the complainants.[115] Interestingly, it appears that if the United States did not honor the complainants' request to provide flexibility in the 2009 Final Rule, the Panel would not have been able to conclude that the COOL measure provides different treatment to imported livestock as compared with domestic livestock. With no commingling flexibility, there would be no different treatment under the Panel's analysis.

2. The COOL Measure *Itself* Does Not Accord Less Favorable Treatment to Imported Livestock

86. After erroneously finding that the COOL measure treats imported livestock differently than domestic livestock, the Panel erroneously finds that the COOL measure accords less favorable treatment to imported livestock because (1) the COOL measure involves segregation and, consequently, differential costs for imported livestock,[116] and (2) the compliance costs involved in the COOL measure create an incentive to process domestic livestock, thereby reducing the competitive opportunities for imported livestock.[117] The Panel does not attempt to link either of these findings to its previous finding that the COOL measure treats imported livestock differently than domestic livestock, instead concluding that these findings are sufficient on their own merits to establish less favorable treatment.

87. Had the Panel followed the appropriate less favorable treatment legal analysis, which focuses on the measure itself, it would not have found that the COOL measure accords less favorable treatment to imported products. As described above, the COOL measure does not treat imported livestock differently than domestic livestock on the basis of origin. Additionally, the measure does not modify the conditions of competition to the detriment of imported livestock. To the extent they exist at all, any adverse effects on imports result from pre-existing market

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[114] Panel Report, para. 7.297.

[115] Exhibit US-99; U.S. SWS, para. 42.

[116] Panel Report, paras. 7.315-7.356.

[117] Panel Report, paras. 7.357-7.420.

conditions and the decisions of private market actors; they do not result from any origin-based discrimination under the measure.

a. The Panel's Findings Do Not Support the Conclusion that the COOL Measure Modifies the Conditions of Competition to the Detriment of Imported Livestock

88. The Panel's less favorable treatment finding is premised on a fundamental misunderstanding of the less favorable treatment analysis conducted in past panel and Appellate Body reports. The United States agrees with the Panel that past assessments of less favorable treatment have focused on whether the measure at issue modifies the conditions of competition to the detriment of imported products.[118] However, in the instant dispute, the Panel does not actually focus on this question. Instead, the Panel focuses its entire less favorable treatment inquiry on how compliance costs may differ for market participants depending on their business models and sourcing patterns and how the independent actions of these market participants in response to potential costs might hypothetically affect imported livestock in light of pre-existing market conditions.

89. By conducting its less favorable treatment analysis in this fashion, the Panel appears to be conflating the question of whether the *measure* modifies the conditions of competition to the detriment of imports with the question of whether or not imported livestock may somehow be just as competitive at the present time as they were before the measure was enacted due to external factors unrelated to what the *measure* provides. This is not the question posed by TBT Article 2.1. Rather, as the Appellate Body has explained, "there must be in every case a genuine relationship between the measure at issue and its adverse impact on competitive opportunities for imported versus like domestic products to support a finding that imported products are treated less favourably."[119] Further, the Appellate Body has stated that the national treatment provisions do not serve to protect "expectations...of any particular trade volume."[120]

90. Under the appropriate analysis, the Panel would have found that the COOL measure does not accord less favorable treatment to imported livestock by modifying the conditions of competition to the detriment of imported livestock. To the extent that the COOL measure relates to livestock, it treats domestic and imported livestock the same. The COOL measure requires market participants to follow the same recordkeeping requirements regardless of which type of meat they are processing, and meat derived from both domestic and imported livestock must be labeled in the exact same set of conditions (*i.e.,* retailers must affix a label to all categories of meat unless one of the origin-neutral exceptions applies). In other words, because the COOL measure

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[118] Panel Report, para. 2.276; *Korea – Beef (AB)*, paras. 130-151.

[119] *Thailand – Cigarettes (AB)*, para. 134.

[120] *Japan – Alcohol (AB)*, p. 16.

imposes the same set of conditions on each piece of meat to be sold in the market, the measure itself does not modify the conditions of competition with regard to imported and domestic products, let alone modify the conditions in a detrimental way.

91. Even though some market participants may decide that the segregation of domestic and imported livestock will facilitate their recordkeeping with the COOL requirements, this does not establish that the measure modifies the conditions of competition to the detriment of imported livestock either. First, it is important to recall that the COOL measure does not require the segregation of imported and domestic livestock, but is specifically designed to allow market participants to more easily retain accurate records without having to segregate through the use of the commingling provisions.[121] Accordingly, any market participant's choice to segregate instead of commingle is not a choice required by the measure. Second, any segregation that does occur equally affects both imported and domestic livestock since the act of segregation inherently involves separating one type of animal from the other.[122] Thus, any choice to pass the costs of segregation on to domestic or imported livestock instead of distributing them equally is not a choice required by the measure.

92. In other words, if there is currently any incentive for market participants to process domestic livestock and a disincentive against handling imported livestock (a point with which the United States does not agree), this is not due to the COOL measure. Even the Panel acknowledges that the incentive upon which it bases its less favorable treatment finding is not related to the measure itself but the conditions that existed before the COOL measure was adopted; namely, the smaller market share of the imports and their longer distance from the market. To recall, the Panel declares that the reason market participants would decide to process only domestic livestock instead of imported livestock when given the choice was that "[l]ivestock imports have been and remain small compared to overall livestock production and demand, and US livestock demand cannot be fulfilled with exclusively foreign livestock"[123] then justifies this conclusion by stating "US livestock is often geographically closer to most if not all US domestic markets, so processing exclusively imported livestock and meat remains a relatively less competitive option."[124] Because the Panel's conclusion is entirely based on pre-existing market conditions and would have been entirely different if these conditions had been different (*e.g.,* if Canadian and Mexican livestock had a larger market share and were closer to U.S. slaughterhouses), it is clearly an inappropriate test to determine whether a measure accords less favorable treatment to imports.

b. The Panel's Analysis Does not Accord with Prior Panel and

[121] Panel Report, paras. 7.90-7.100.

[122] Panel Report, para. 7.330.

[123] Panel Report, para. 7.349.

[124] Panel Report, para. 7.349.

Appellate Body Reports

93. The Panel's efforts to fit its less favorable treatment finding into the paradigm established by past Panel and Appellate Body reports is not persuasive.[125] In comparing this dispute with *Korea – Beef*, *US – FSC (Article 21.5 – EC)*, and *China – Auto Parts*, the Panel overlooks key distinctions between the facts in those disputes and the facts presented here. Of primary significance is the fact that the reports the Panel cites all pertained to *de jure* less favorable treatment claims where the measure in question treated imports differently on its face on the basis of origin.[126] The instant dispute is not a *de jure* less favorable treatment dispute where the measure at issue on its face provides different treatment to imported and like domestic products on the basis of their origin; thus, none of the disputes the Panel cites are analogous.

94. There are other significant differences between the instant dispute and *Korea – Beef* that the Panel attempts to gloss over. For example, the Panel states that "like in *Korea – Beef*, any decisions by private market participants [in the instant dispute] are not 'solely' the result of their independent business calculations, but are attributable in large part to the economic incentive and disincentive created by the provisions in the COOL measure."[127] However, this overlooks the fact that in *Korea – Beef*, the measure itself required a choice to be made between imports and domestic products as a matter or law, and that the decisions made by private market participants were made on the basis of this legal requirement, not on the basis of any economic incentive or disincentive.[128] By contrast, in the instant dispute, the COOL measure itself does not impose any legal requirement on any market participants to choose between imported and domestic livestock, and it does not require them to buy and sell these products through separate distribution channels either. Independent market participants all have a free choice of how to respond to the COOL measure, and in fact, the United States included the commingling provisions in the 2009 Final Rule to help mitigate the need to ever make any choices that could potentially have an adverse effect on imports. To the extent that any market participants ignore these provisions and ultimately decide to only purchase one type of product or to buy and sell products through different distribution

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[125] *E.g.*, Panel Report, paras. 7.358, 7.390-7.394.

[126] *Korea – Beef (AB),* paras. 130-151 (retail system required different marketing channels for product based on origin); *US – FSC (Article 21.5 – EC) (AB)*, para. 217 (stating that "[t]he fair market value rule, therefore, draws a formal distinction, on its face, between the treatment of like domestic and imported input products."); *China – Auto Parts (AB)*, paras. 192-197 (additional administrative procedures for users of imports).

[127] Panel Report, para. 7.391.

[128] *Korea – Beef (AB)*, para. 146 ("We are aware that the dramatic reduction in the number of retail outlets for imported beef followed from the decisions of individual retailers who could choose freely to sell the domestic product or the imported product. The legal necessity of making the choice was, however, imposed by the measure itself. The restricted nature of that choice should be noted. The choice given to the meat retailers was not an option between remaining with the pre-existing unified distribution set-up or going to a dual retail system. The choice was limited to selling domestic beef only or imported beef only. Thus, the reduction of access to normal retail channels is, in legal contemplation, the effect of that measure.").

channels, these decisions are solely the result of private entrepreneurs acting on their own calculations of the comparative costs and benefits of the situation, a situation that the Appellate Body in *Korea – Beef* went to great lengths to distinguish from the type of situation at issue here.[129]

95. The current dispute is also distinguishable from *Mexico – Soft Drinks*, the other dispute the Panel cites where there was a finding of less favorable treatment. In *Mexico – Soft Drinks*, the panel found that Mexico's measure accorded *de facto* less favorable treatment in the absence of *de jure* different treatment, but only after determining that the measure used non-cane sugar sweetener as a "proxy" for imported soft drinks because all Mexican soft drinks were produced with cane sugar while imports were not.[130] Accordingly, the panel determined that taxing soft drinks produced with non-cane sugar sweetener more than those produced with cane sugar, Mexico was impermissibly singling out imports in a discriminatory fashion.[131] Unlike the measure in *Mexico – Soft Drinks,* neither the Panel nor the complaining parties have asserted that the COOL measure itself singles out imports and discriminates against them on the basis of some neutral characteristic that serves as a "proxy" for imports, and thus acts as a disguised restriction on trade.

96. The Panel's attempts to distinguish the present situation from that in *Dominican Republic – Cigarettes*, the only dispute it cites where the Appellate Body did not find less favorable treatment, are also not persuasive.[132] Indeed, the facts facing the Appellate Body in this dispute are very similar to those in *Dominican Republic – Cigarettes*. For example, like the measure in *Dominican Republic – Cigarettes*, the COOL measure is an origin-neutral measure that imposes the same set of requirements on imported and domestic products, and it is a measure that was adopted in a pre-existing market where domestic products had a significantly larger market share than imports. In light of these relevant facts, the Appellate Body found that the Dominican Republic's measure did not accord less favorable treatment to imports because it concluded that, to the extent there were adverse effects on imports, the measure itself did not compel these effects, but rather they resulted from the smaller market share of the imported product.[133] Despite the fact that the Panel in this

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[129] *Korea – Beef (AB)*, para. 149 ("We are not holding that a dual or parallel distribution system that is *not* imposed directly or indirectly by law or governmental regulation, but is rather solely the result of private entrepreneurs acting on their own calculations of comparative costs and benefits of differentiated distribution systems, is unlawful under Article III:4 of the GATT 1994. What is addressed by Article III:4 is merely the *governmental* intervention that affects the conditions of competition under which like goods, domestic and imported, compete in the market in the Member's territory.").

[130] *Mexico – Soft Drinks (Panel)*, paras. 8.54-8.57.

[131] *Mexico – Soft Drinks (Panel)*, para. 8.58.

[132] Panel Report, paras. 7.393-7.394.

[133] *Dominican Republic – Cigarettes (AB)*, para. 96 (stating that "the existence of a detrimental effect on a given imported product resulting from a measure does not necessarily imply that this measure accords less favourable treatment to imports if the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product, such as the market share of the importer in this case."). Similarly, the panel in *US –*

dispute discussed the pre-existing market into which the COOL measure was adopted and found the exact same factor responsible for the alleged adverse effects on imports as the Appellate Body did in *Dominican Republic – Cigarettes* – smaller market share – it reached the opposite conclusion regarding less favorable treatment. In this sense, the Panel's reasoning is fundamentally at odds with the Appellate Body's reasoning in *Dominican Republic – Cigarettes*.

97. Furthermore, contrary to the Panel's assertion, the complainants in this dispute do in fact claim "less favourable treatment due to increased unit costs for imported livestock,"[134] and it is this factor that underlies the Panel's entire less favorable treatment analysis. To recall, the Panel finds that the costs of segregation under the COOL measure are higher for imports than domestic products.[135] This is simply another way of saying that the unit cost of each import is higher than the unit cost of each domestic like product, the same set of circumstances under which the Appellate Body rejected Honduras' claim in *Dominican Republican – Cigarettes*. Thus, the Appellate Body should reach the same conclusion here that it did in *Dominican Republic – Cigarettes* and find that the measure at issue does not accord less favorable treatment to imports.

c. The Panel's Faulty Legal Test Would Needlessly Jeopardize Country of Origin Labeling Requirements and Other Technical Regulations Around the World

98. As noted above, adopting the Panel's faulty legal test, which does not focus on whether the measure itself modifies the *conditions* of competition, could have severe unintended consequences. Indeed, under the Panel's approach, an origin-neutral measure can be found to breach Article 2.1 of the TBT Agreement solely because one set of market participants may incur higher costs in complying with the measure than another set based on their independent decision on how to comply.[136] This would mean even the most common technical regulations could be considered to breach the TBT Agreement. After all, nearly all technical regulations impose compliance costs on market participants, and these compliance costs are almost never uniform.[137] Many factors can affect compliance costs for a particular market participant, including that market participant's size, its production methods, product design, particular niche in the market, its sourcing patterns, its

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Tuna noted that "the existence of additional costs for some operators as a result of factors such as existing practices also does not necessarily...imply that less favorable treatment is being afforded in respect of the measures at issue, in violation of Article 2.1 of the TBT Agreement....this is especially the case...where the differential impact of the measures on products of different origins is the result of external factors other than the origin of the products itself," and found that the measure at issue did not breach Article 2.1 on that basis. *US – Tuna (Panel)*, paras. 7.342, 7.345.

[134] Panel Report, para. 7.394.

[135] Panel Report, paras. 7.257-7.420.

[136] *Contra US – Tuna (Panel)*, paras. 7.342-7.346.

[137] U.S. FWS, paras. 190-195.

relationship with others in the supply chain, and its relative market share. Many factors also affect how market participants respond to compliance costs. Because not all market participants are situated the same, it is inappropriate to examine the potential compliance costs of these differently situated entities under different scenarios, attempt to assess which scenario they are likely to follow, and then speculate on how their independent decisions could potentially affect imports to determine whether there is less favorable treatment.

99. Furthermore, it is impossible for a Member to know at the time it is developing a measure the precise costs the measure will impose on each producer in every other Member, or, more broadly, the unique circumstances of every Member's industry. Even if a Member was able to know with precision how each Member's industry would be affected by a measure, it would be nearly impossible to calibrate a measure such that it does not have a greater impact on one or another Member's products relative to its own or other Members. Yet, under the Panel's theory, any significant differentiation that results automatically gives rise to a breach. Members would thus be unable to anticipate and avoid breaching their nondiscrimination obligations.

100. The Panel's speculative cost comparison-based approach is even more problematic in the context of a country of origin labeling requirement since it is always true that compliance costs will be higher for market participants that process products that fall in more than one label category (however those categories are defined) than those who process products that fall in a single category.[138] Retailers will always face higher costs when they source products of more than one label category because they will need to put different labels on these products and keep them separate from each other.[139] Costs will also always be higher for market participants who process products of more than one label category throughout the supply chain because they need to keep track of the origin of the different products they process and keep them separate from each other to ensure that the resulting labels are accurate. Based on the Panel's logic then, any Member's COOL requirement could be found to accord less favorable treatment to imported products because it will always be more costly to process products of more than one origin than a single origin (and it is likely that the domestic product in most countries has the highest market share). Thus, the Panel's legal test would jeopardize mandatory COOL requirements around the world, not only those in the United States.

101. Finally, such an interpretation of the obligations in question is also contrary to the object and purpose of the TBT Agreement. For example, the third recital of the preamble to the TBT Agreement recognizes the importance of international standards and conformity assessment systems to facilitating trade – yet even a regulation based on an international standard may result in different costs to various producers in different Members, depending on how that Member's particular industry is organized. If the national treatment requirement is breached whenever a measure results in different costs, Members would be prevented even from adopting technical

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[138] *Contra* Panel Report, para. 7.281.

[139] Panel Report, para. 7.307.

regulations based on international standards.

102. Accordingly, the Panel errs in endorsing a faulty cost comparison-based legal framework for less favorable treatment to find that a Member's origin-neutral measure (especially one whose objective the Panel determined to be a legitimate objective[140]) breaches Article 2.1 of the TBT Agreement merely because the costs of compliance do not fall equally on every market participant, but instead may be higher on some participants because of external factors, such as market share, geographic location, and sourcing patterns, even though the measure itself applies equally to imported and domestic products.

D. The Panel Fails to Make an Objective Assessment of the Matter Before It as Required by Article 11 of the DSU in Its Assessment of the Facts Related to Segregation, Commingling, and Conditions in the U.S. Market

103. In addition to its significant legal errors, the Panel's less favorable treatment analysis includes significant factual errors, in particular with regard to its findings on segregation, commingling, and conditions in the U.S. livestock market, including the use of econometric models to confirm those conditions. The Panel fails to conduct an objective assessment of these facts under Article 11 of the DSU, and uses its incorrect assessment of the facts to support its erroneous less favorable treatment finding.

104. Article 11 of the DSU calls on the Panel to objectively assess the facts of the dispute at hand. This means that the Panel "has the duty to examine and consider all the evidence before it, not just the evidence submitted by one or the other party, and to evaluate the relevance and probative force of each piece thereof."[141] According to the Appellate Body, "[t]he deliberate disregard of, or refusal to consider, the evidence submitted to a panel is incompatible with a panel's duty to make an objective assessment of the facts."[142] Additionally, the Appellate Body has interpreted Article 11 of the DSU to require panels to refrain from issuing "affirmative findings that lack a basis in the evidence contained in the panel record."[143]

1. The Panel Fails to Make an Objective Assessment of the Facts Related to Segregation and Commingling

105. Despite acknowledging that "the COOL measure does not explicitly require segregation, let

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[140] Panel Report, paras. 7.678-7.691.

[141] *Korea – Dairy (AB)*, para. 137.

[142] *EC – Hormones (AB)*, para. 133.

[143] *Canada – Wheat (AB)*, para. 181.

alone the segregation of domestic and imported livestock,"[144] the Panel incorrectly concludes that "for all practical purposes," the COOL measure "necessitates segregation."[145] The Panel bases this finding on its simplistic statement that segregation is "a practical way to ensure that the chain of reliable information on country of origin required by the COOL measure remains unbroken,"[146] the fact that USDA references segregation as one possible means of compliance in its guidance documents,[147] and on publications by two entities not affiliated with USDA.[148] While, as the USDA guidance documents note, segregation is one means of facilitating recordkeeping for the COOL measure, the evidence on the record clearly shows that it is not "necessitated" by the COOL measure in an economic sense, let alone a legal one.

106. The Panel's conclusion that the COOL measure "necessitates" segregation is directly undermined by the evidence on the record, including the COOL measure itself. The measure, on its face, does not contain any requirement to physically separate livestock by origin. Moreover, the measure, on its face, clearly permits market participants to commingle various types of livestock and meat throughout the supply chain instead of segregating, a point which the Panel acknowledges.[149] Additionally, evidence submitted by the United States, which was either ignored or disregarded by the Panel, shows that market participants are in fact taking advantage of the commingling flexibility to avoid segregation on a widespread basis. For example:

- The United States submitted a USDA survey showing that 22 percent of beef muscle cuts and 4 percent of pork muscle cuts were labeled as a "Product of the United States, Canada, and Mexico."[150] Given the negligible number of livestock that are born in either Canada or Mexico, raised in the other country, and then slaughtered in the United States (*e.g.*, born in Mexico, raised in Canada, slaughtered in the United States),[151] this exhibit shows that approximately 22 percent of beef sold and 4 percent of the pork sold in the United States is derived from commingled livestock or meat (*i.e.,* some combination of Category A, B, and C meat processed together on the same production day). Another survey submitted by Canada shows

[144] Panel Report, para. 7.315.

[145] Panel Report, para. 7.327.

[146] Panel Report, para. 7.320.

[147] Panel Report, paras. 7.321-7.323.

[148] Panel Report, para. 7.325.

[149] Panel Report, paras. 7.94-7.100; Panel Report, para. 7.704.

[150] Exhibit US-145.

[151] *See, e.g.*, U.S. Answer to Panel Question 90, para. 10; Exhibits US-28 and US-144 (illustrating that Canada and Mexico's livestock imports are largely negligible as a portion of their overall slaughter).

that at least 7 percent (and more likely about 17 percent) of the beef sold in the United States is being commingled and at least 2 percent (and more likely about 12 percent) of the pork sold is being commingled.[152] This directly contradicts the Panel's statement that "[a]lthough it appears that some commingling is taking place, it is difficult to establish a precise extent."[153]

- The United States submitted at least four photographs of commingled meat being sold at various locations around the country.[154] The Panel dismisses this evidence by stating that these photographs "merely demonstrate that there are muscle cuts carrying Label B,"[155] again missing the fact that all of the photographs show muscle cuts labeled "Product of the United States, Canada, and Mexico," which is a label only used on commingled meat given the nature of the North American market.

- The United States submitted an affidavit demonstrating that one of the three major livestock producers that the Panel references in paragraphs 7.361-7.363 is processing commingled animals. Contrary to the Panel's conclusion that the affidavit "is silent on whether such Label B livestock ends up being commingled,"[156] the affidavit clearly indicates that the meat is being commingled because it is meat of "U.S., Canadian, Mexican origin,"[157] a label only used on commingled meat given the nature of the North American market. This supplements the additional information submitted by the United States, which shows that another major livestock producer is also commingling.[158]

- An exhibit submitted by Canada states that "[t]he flexibility in the Final Rule has

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[152] Exhibit CDA-211. Canada's exhibit shows that 7 percent of beef is being labeled as commingled Category "A+B" beef or Category "B+C" beef and that another 14 percent of the beef is being labeled as Category B. Given that the percentage of Category B beef in the market is only 3-4 percent (*see, e.g.*, Exhibit US-146), approximately 10 of the 14 percent of the overall beef being labeled Category B is actually commingled beef, meaning that the total amount of commingled beef in the market is closer to 17 percent. Likewise, Canada's exhibit shows that 2 percent of pork is being labeled as commingled Category "A+B" pork and that another 14 percent of the pork is being labeled as Category B. Given that the percentage of Category B pork in the market is only 4-5 percent *(see, e.g.*, Exhibit US-146), approximately 10 of the 14 percent of the overall pork being labeled Category B is actually commingled pork, meaning that the total amount of commingled beef in the market is closer to 12 percent.

[153] Panel Report, para. 7.364.

[154] Exhibits US-67, US-95, US-96, and US-98.

[155] Panel Report, para. 7.366.

[156] Panel Report, para. 7.368.

[157] Exhibit US-101 (BCI), p. 1.

[158] Exhibit US-102 (BCI); Panel Report, para. 7.364.

> encouraged plants that were intending to accept only B or C cattle to accept both with processing on the same production day,"[159] which by definition indicates that these plants are commingling. Despite the clear nature of this evidence, the Panel again dismisses it, stating that this "Canadian exhibit refers only to the commingling 'flexibility' between meat eligible for Labels B and C, but not for Label A meat."[160] This exhibit shows that processors are commingling all types of livestock and meat on a wide scale to reduce compliance costs, contrary to the Panel's overall assessment of the viability of the commingling provisions.

107. By disregarding this evidence submitted by the United States with regard to commingling, the Panel fails to conduct the objective assessment of the facts called for by DSU Article 11. The U.S. commingling evidence indisputably shows significant use of the commingling provisions whereby some market participants are choosing not to segregate, and instead processing domestic and imported livestock together on a large scale. Given such evidence, the Panel clearly errs in concluding that the COOL measure "necessitates" segregation.

108. This conclusion has significant consequences for the Panel's findings with regard to less favorable treatment by proving many of the Panel's statements in support of that conclusion to be false. In particular, if a market participant chooses to commingle livestock from two different origins at an early stage in the process, such as a feedlot, the commingled designation is carried with all such commingled animals throughout the supply chain, as well as the resultant meat, which remains eligible for a B or C label regardless of what happens to those animals or meat at a subsequent time. Thus, the Panel's conclusion that "[t]o accurately label muscle cuts under the COOL measure, a covered retailer needs to possess information on where livestock processing steps determining origin under the COOL measure have taken place with regard to *each* muscle cut"[161] is rendered inaccurate, as is the Panel's conclusion that making a decision to process domestic livestock and meat solely according to price and quality "involves the identification by origin of *each and every* livestock and piece of meat throughout the supply chain."[162] To the contrary, if the commingling provisions are utilized, all the retailer or any other entity at a subsequent stage in the supply chain needs to know is that the meat was commingled. This entity does not need to know where *each and every* animal or piece of meat was processed.[163]

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[159] Exhibit CDA-41.

[160] Panel Report, para. 7.367.

[161] Panel Report, para. 7.316 (emphasis added).

[162] Panel Report, para. 7.336 (emphasis added).

[163] This is not contradicted by the language from the 2009 Final Rule that the Panel quotes in paras. 7.318 or 7.344. The United States acknowledges that "country of origin information will need to be maintained and transferred along the entire supply chain," and that "accurate records [must be] kept" but in the case of commingling, this information is not needed for *each and every* piece of meat as the Panel implies, but is rather only needed for the

109. In other words, the commingling provisions ensure that market participants will never need to track *each and every* animal or piece of meat; instead, they only need to know whether the entire lot that is being processed was commingled. This could result in substantial cost savings to the entity handling the commingled meat and help diminish any potential incentive to processing meat from a single origin over multiple origins.

110. The Panel also errs in finding that any costs of segregation cannot be passed on to the consumer, and cannot otherwise be absorbed in the supply chain.[164] In particular, because the COOL measure requires meat to be labeled, most consumers do not have viable alternatives to the purchase of labeled meat.[165] Given this situation, there is no reason that the retailer cannot pass on at least some portion of the compliance costs to the consumer. Similarly, the Panel ignores evidence on the record related to this issue. In fact, an exhibit submitted by Canada states that slaughterhouses are "trying to pass part of [their compliance] costs to their clients."[166]

111. As the foregoing establishes, in making these findings related to segregation and commingling, the Panel failed to conduct an objective assessment of the facts as required by DSU Article 11. These erroneous conclusions that COOL "necessitated segregation" which in turn "necessarily" resulted in higher costs for imported livestock formed the basis of the Panel's erroneous conclusion with regard to less favorable treatment. Like that conclusion, these erroneous factual conclusions should also be reversed by the Appellate Body.

2. The Panel Fails to Make an Objective Assessment of Facts Related to the Price Differential in the U.S. Livestock Market

112. The Panel also fails to make an objective assessment of the facts related to the price differential in the U.S. livestock market. In particular, the Panel failed to consider all the evidence before it, considered only the evidence submitted by the complainants, and failed to evaluate the relevance and probative force of the U.S. evidence related to the existence of a COOL discount being applied in the marketplace. In addition, the Panel mischaracterizes the U.S. response to the evidence submitted by Canada and Mexico in this regard.

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entire commingled lot.

[164] Panel Report, paras. 7.352, 7.353, 7.487.

[165] While a consumer could hypothetically decide to purchase its meat at speciality stores that do not meet the definition of a "retailer" under the COOL measure, most of these stores do not directly compete with the large supermarkets subject to COOL. Further, the niche stores are unlikely to have the capacity to supply the entire demand for meat in the U.S. market and do not typically serve the same types of customers as the major U.S. grocery chains.

[166] Exhibit CDA-174.

113. The Panel discusses the alleged COOL discount being applied to imported livestock in paragraph 7.356, where it stated that:

> ... there is direct evidence of major slaughterhouses applying a considerable COOL discount of USD 40-60 per head for imported livestock. This proves that major processors are passing on at least some of the additional costs of the COOL measure upstream to suppliers of imported livestock. We have no evidence of a similar discount being applied to suppliers of domestic livestock, nor has the United States responded to the evidence submitted by Canada and Mexico in this respect.[167]

The Panel reiterates a similar point in paragraph 7.374 and paragraph 7.379, where it states that "[s]everal suppliers reported that the price difference between imported and domestic livestock has become larger to the detriment of the latter, and that discounts for imported livestock appeared or existing ones increased as a result of the COOL measure."[168]

114. These statements by the Panel fail to reflect any of the evidence submitted by the United States with regard to the prices being paid for imported livestock and the price differential between U.S. and imported livestock. In fact, in its Second Written Submission, the United States laid out a detailed response to Canada and Mexico's claims with regard to the COOL discount.[169] The United States presented evidence showing that the prices being paid for Canadian and Mexican livestock had been increasing at levels that meet or exceed the price increase for U.S. livestock since the adoption of the COOL measure and submitted evidence showing that the price differential between Canadian and U.S. livestock has narrowed since the adoption of the COOL measure.[170] This directly contradicts Canada and Mexico's claims that the COOL measure is responsible for widespread price discounting. Further, even if Canada and Mexico's evidence with regard to specific, individual slaughterhouses imposing a COOL discount is to be believed, the U.S. evidence shows that it is not happening to an extent that has impacted overall prices in the market. Yet, the Panel did not discuss, let alone refute, any of this evidence in the report. Accordingly, the Panel's claim that the United States has not responded to the evidence submitted by Canada and Mexico in this respect is incorrect.

115. In addition to ignoring the U.S. evidence with regard to prices, the Panel also fails to make an objective assessment of the facts related to prices in stating that "the Sumner Econometric Study makes a prima facie case that the COOL measure negatively and significantly affected the import

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[167] Panel Report, para. 7.356.

[168] Panel Report, para. 7.379.

[169] U.S. SWS, paras. 77-83.

[170] *See* Exhibit US-108 (data on prices paid for U.S., Canadian, and Mexican animals).

shares and *price basis* of Canadian livestock."[171] Contrary to the Panel's finding, the Sumner Econometric Study does not support its conclusion that the COOL measure affected the price basis of Canadian livestock, let alone make a prima facie case in this regard. In fact, the Sumner Econometric Study does not find any price effects on feeder cattle, feeder hogs, or slaughter hogs.[172] Accordingly, the Panel's reliance on this model and its finding that this model makes a prima facie case that the COOL measure negatively affected the price basis of Canadian livestock lacks a basis in the factual record.

E. Conclusion

116. For the foregoing reasons, the Panel errs in finding that the COOL measure breached Article 2.1 of the TBT Agreement with respect to muscle cuts of meat.

IV. THE PANEL ERRS IN FINDING THAT THE COOL MEASURE IS INCONSISTENT WITH ARTICLE 2.2 OF THE TBT AGREEMENT

A. Summary of U.S. Appeal of the Panel's Findings on the Article 2.2 Claim

117. Although the Panel made a number of different findings throughout its analysis of the Article 2.2 claim, the Panel ultimately finds the COOL measure to be inconsistent with Article 2.2 because the measure "does not fulfil the identified objective within the meaning of Article 2.2 . . ."[173] In other words, the Panel finds that because the COOL measure does not contribute to its public policy goal *enough* – in a sense, perhaps, that it reflects ineffective public policy – the measure is inconsistent with the international obligations of the United States. In the Panel's view, it is not necessary to answer the question of whether the United States could have chosen a less trade-restrictive alternative to determine whether the COOL measure is consistent with Article 2.2.[174]

118. This finding of inconsistency reflects a fundamental misunderstanding by the Panel of the obligation imposed by Article 2.2 of the TBT Agreement, which provides that "technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective . . ." Neither the text of Article 2.2, nor its relevant context, suggests that a WTO panel should step into the shoes of the Member to determine whether a measure is "good enough" at achieving the

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[171] Panel Report, para. 7.542 (emphasis added).

[172] Exhibits CDA-79 and CDA-206. The Sumner Econometric Study only showed an impact on the prices for Canadian slaughter cattle.

[173] Panel Report, para. 7.719.

[174] Panel Report, para. 7.719 ("Given this conclusion, we do not consider it necessary to proceed with the next step of the analysis, namely whether the COOL measure is 'more trade-restrictive than necessary' based on the availability of less trade-restrictive alternative measures that can equally fulfil the identified objective.").

Member's public policy objectives. Designing technical regulations often necessitate difficult choices, especially when balancing competing interests, such as the desire to provide information to consumers about the food they consume and the desire to limit costs to those market participants of providing such information (and thereby limit the expense of food to consumers), as was the case when the United States designed the COOL measure. As discussed above in section II of this Appellant Submission, the United States struck a particular balance in the COOL measure, and Article 2.2 does not call for the Panel to re-calibrate the balance that the United States did strike, as this Panel appears to believe. Rather, a measure's consistency with Article 2.2 is to be judged with regard to two questions: (1) whether the measure pursues an objective that is "legitimate"; and (2) whether the Member could have adopted a less trade-restrictive measure that fulfills the objective at the same level chosen by the United States. The Panel only made findings as to the first question, determining that the COOL measure does, in fact, pursue a legitimate objective,[175] but never reached the second question, and thus never examined whether the COOL measure was "more trade-restrictive than necessary."[176] The Panel's finding of inconsistency with Article 2.2 is thus in error.

119. To make the same point in different terms, the United States fundamentally disagrees with the Panel as to the number of scenarios that Article 2.2 disciplines. The United States considers that the obligation disciplines two scenarios: (1) where a Member applies a trade-restrictive measure to pursue an illegitimate objective; and (2) where a Member applies a measure that is more trade-restrictive than necessary in light of the relevant considerations. To these two scenarios, the Panel adds a third: where a Member applies a measure that falls short of the policy goal that the Member intends for the measure to achieve. And it is this third scenario that the Panel considers the COOL measure to fit within. In making such a finding, the Panel misunderstands the scope of the Article 2.2 discipline.

120. The United States appeals three aspects of the Panel Report conclusions under Article 2.2:

- First, the United States appeals the Panel's finding that the COOL measure is "trade restrictive" for purposes of Article 2.2.[177]

- Second, the United States appeals: whether the Panel made an "objective assessment of the matter before it," consistent with Article 11 of the DSU, in characterizing what level the United States considers appropriate to fulfill its objective;[178] and that the Panel errs in failing to consider all relevant information

[175] *See* Panel Report, para. 7.685.

[176] Panel Report, para. 7.719.

[177] Panel Report, paras. 7.565-7.575. *See infra* note 187.

[178] Panel Report, paras. 7.619-7.620, 7.715.

regarding the U.S. level of fulfillment in making its determination.[179]

- Third, the United States appeals the analysis and ultimate finding of the Panel regarding whether the COOL measure is "more trade-restrictive than necessary to fulfil a legitimate objective."[180] In particular, the United States appeals:
  - the Panel's legal framework for determining whether a measure is "more trade-restrictive than necessary to fulfil a legitimate objective";[181]
  - the Panel's determination that the COOL measure does not fulfill its legitimate objective at the level the United States considers appropriate;[182] and
  - Third, the Panel's failure to require the complaining parties to meet their burden to prove that the measure is "more trade-restrictive than necessary" based on the availability of a significantly less trade-restrictive alternative measure that also fulfills the objective at the level the United States considers appropriate.[183]

B. Legal Overview of Article 2.2

121. Article 2.2 of the TBT Agreement provides:

> Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. *For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.* Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products. (Emphasis added)

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[179] Panel Report, paras. 7.590-7.620.

[180] Panel Report, paras. 7.652, 7.666-7.670, 7.692-7.720.

[181] Panel Report, paras. 7.652, 7.666-7.670, 7.692-7.720.

[182] Panel Report, paras. 7.692-7.719.

[183] Panel Report, para. 7.719.

122. The first sentence of Article 2.2 establishes the general rule that Members shall ensure that technical regulations do not create unnecessary obstacles to international trade, while the second sentence of Article 2.2 makes this general rule operational by explaining that "for this purpose" "technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective." As the Panel stated, "[w]e consider, and the parties further agree, that the conformity of a measure with the general principle reflected in the first sentence of Article 2.2 must be established based on the elements of the second sentence. In other words, the second sentence explains what the first sentence means."[184]

123. If the measure pursues an objective considered "legitimate" for purposes of Article 2.2, then a measure is inconsistent with Article 2.2 only if the measure is "more trade-restrictive than necessary to fulfill" that legitimate objective. To establish that this is the case, a complaining Member must prove that: (1) there is a reasonably available alternative measure; (2) that fulfills the Member's legitimate objective at the level that the Member considers appropriate; and (3) is significantly less trade restrictive.[185] As is the case for the parallel provision in the SPS Agreement, the *key* legal question for Article 2.2 is whether the importing Member could have adopted a less trade-restrictive measure yet still achieve its objective at the chosen level.[186]

C. The Panel's Analysis of What the Objective of the COOL Measure Is and at What Level the United States Considers It Appropriate to Fulfill That Objective

124. Following its determination that the COOL measure is "trade restrictive" for purposes of Article 2.2,[187] the Panel turned to analyze "whether the objective pursued by the United States through the COOL measure is legitimate," which included an analysis of what the objective of the COOL measure is and a paragraph addressing the level at which the United States considers it appropriate to fulfill the objective.[188] The reasons for making such determinations are readily apparent in the text of Article 2.2, read in light of its context. The second sentence of Article 2.2 explicitly refers to the "legitimate objective" of the measure. And the sixth preambular recital of

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[184] Panel Report, para. 7.552.

[185] *See infra* section IV.D.2(c).

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

[187] For the reasons discussed above in section III of this Appellant Submission, the Panel erred in the analysis and conclusion contained in section VII.D.2 of the Panel Report where it found that: "the COOL measure negatively affects imported livestock's conditions of competition in the US market in relation to like domestic livestock by imposing higher segregation costs on imported livestock." Panel Report, para. 7.574 (cross-referencing Section VII.D.2 of the Panel Report). Accordingly, the Panel erred in finding that the COOL measure was "trade restrictive" for purposes of Article 2.2. Panel Report, para. 7.575.

[188] *See* Panel Report, section VII.D.3(c).

the TBT Agreement "makes clear that a Member is entitled to take measures 'at the level it considers appropriate,' in pursuance of a legitimate objective under the Agreement."[189] In other words, "it is up to the Members to decide which policy objectives they wish to pursue and the levels at which they wish to pursue them."[190] While this "level" is sometimes loosely referred to as the "level of protection," it is more accurate to think of this concept as the "level of fulfillment" (of the objective), as the Panel refers to it,[191] since the objective may not be "protection" but some other legitimate objective.

125. As discussed in detail below, the determinations regarding the objective and the level of fulfillment are important for the Article 2.2 analysis, not for their own sake, but because the analysis of any proposed less trade restrictive alternative measure will necessarily require an analysis of whether that proposed alternative measure fulfills the Member's objective at the level chosen by the Member. Accordingly, a Panel first needs to ascertain what objective the measure pursues, as well as the level chosen by the Member, *in order* to consider whether the same level of fulfillment could be achieved by a significantly less trade-restrictive alternative measure proposed by the complaining party.

126. What this means is that, outside the narrow inquiry of whether the objective pursued is "legitimate," Article 2.2 does not charge a panel with determining what objectives the Member *should* pursue or at what level the Member *should* pursue them. Those are the decisions for the Member, and the Member only, and it is not within the province of a panel to second guess those decisions. Rather, Article 2.2 requires the panel to assess what is the Member's objective, and at what level the Member pursues that objective, *in order* to evaluate whether the complaining party is correct that there is a significantly less trade-restrictive alternative measure available to achieve that objective at the chosen level.

127. The United States will now summarize the Panel's analysis relevant for the U.S. appeal and then discuss the two errors of the Panel that the United States has appealed.

1. The Panel's Analysis of the Objective of the COOL Measure and at What Level the United States Considers It Appropriate to Fulfill that Objective

128. In paragraphs 7.590-7.621, the Panel analyzes what objective the United States pursues

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[189] *Cf.*, *US – Tuna (Panel)*, para. 7.460 ("[W]e recall that the preamble of the TBT Agreement makes clear that a Member is entitled to take measures 'at the level it consider appropriate', in pursuance of a legitimate objective under the Agreement.").

[190] *EC – Sardines (Panel)*, para. 7.120.

[191] *See* Panel Report, para. 7.715 ("Considered against this *level of fulfilment* of its objective and in light of the nature of the objective . . .") (emphasis added); Panel Question 142(a) ("[P]lease define the United States' objective(s) pursued by the COOL requirements according to the adjusted *level of fulfilment*.") (emphasis added).

through the COOL measure. The Panel begins its analysis from the premise that the objective of the measure must be distinguished from the measure adopted by the Member to pursue the objective.[192] "The distinction is important because it is the objective that leads to a Member's determination to adopt a technical regulation, not *vice versa*."[193] Looking to the Appellate Body's discussion of the relationship between a SPS measure and the "appropriate level of protection," the Panel concludes that "the objective pursued through a technical regulation cannot be necessarily implied from that technical regulation itself."[194] The Panel thus concludes that because the "objective pursued through a technical regulation [is] clearly distinguished from the technical regulation chosen to attain that objective [it] is a prerogative of the Member concerned and not of a panel."[195]

129. As to the objective, the Panel notes that the consistent thread running through the U.S. submissions was the objective of providing "consumer information on origin," and "proceed[s] on the understanding that this is the objective pursued by the United States through the COOL measure."[196] The Panel further recognizes, however, that the United States had "further elaborated" that the information provided to consumers constituted:

> 'information on the countries, where the animal from which the meat was derived was born, raised, and slaughtered'. Through this information, the United States also purports to prevent confusion relating to a USDA grade label, which led consumers to mistakenly believe that meat products affixed with a USDA grade label were derived from animals born, raised, and slaughtered in the United States, and the previous FSIS 'Product of the U.S.A.' labelling system, which allowed this label on meat products if such products received minimal processes in the United States.[197]

130. Regarding the level of fulfillment, the Panel states that "[t]he United States used the following descriptions to indicate the level at which it aims to achieve the identified objective: '[to

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[192] Panel Report, para. 7.597; *see also id.* para. 7.602 ("Whether a Member pursues a 'legitimate objective' within the meaning of Article 2.2 is a separate issue from whether the measure in question was in fact adopted to fulfil and does fulfil that objective.").

[193] Panel Report, para. 7.598 (emphasis in original).

[194] Panel Report, para. 7.604 (citing *Australia – Salmon (AB)*, para. 203).

[195] Panel Report, para. 7.612.

[196] Panel Report, para. 7.617.

[197] Panel Report, para. 7.618; *see also id.* para. 7.673 ("The United States defines the origin of meat based on the place where an animal from which meat is derived was born, raised, and slaughtered. In this context, the United States elaborates that the COOL measure adopts a definition of origin that avoids misleading consumers into believing that the meat they are buying was derived from an animal that was born, raised, and slaughtered in the United States when this is not the case.").

provide] as much consumer information as possible'; 'to provide consumers with as much clear and accurate information as possible about the origin of the meat products'; [and] 'to provide as much information as possible to consumers about the country of origin of the food products that they buy at the retail level and to minimize confusion about the origin of meat products to the maximum extent possible.'"[198]

131. Based on its characterization of the U.S. statements, the Panel concludes that the United States had identified in this proceeding that the objective it pursues through the COOL measure and the level at which the United States considers it appropriate to fulfill that objective as: "*to provide as much clear and accurate origin information as possible to consumers*."[199]

132. The Panel then appears to interpret this to mean that the U.S. level of fulfillment was to *completely* fulfill its objective of providing consumer information by providing "clear and accurate" consumer information in every conceivable scenario. Based on this interpretation, the Panel then, in paragraphs 7.692-7.720, tests whether the COOL measure did, in fact, fulfill its objective by examining whether, and if so, in what scenarios, the measure *did not* provide clear and accurate information.

133. The United States considers the term "objective" as used in Article 2.2 refers to the policy goal that the Member pursues through the challenged measure, a point the Panel agrees with. However, policy goals are just that – goals – and Members often do not mean for individual measures to achieve, fully, those goals. Nor does the TBT Agreement require Members to achieve their objectives at a level of 100%. Again, the Preamble to the TBT Agreement confirms this truism by making clear that "it is up to the Members to decide which policy objectives they wish to pursue and *the levels at which they wish to pursue them*."[200]

134. As such, in addition to determining what objective the Member pursues, the panel must determine at what level the Member pursues that objective through the challenged technical regulation. The level of fulfillment is not the objective itself but is the level at which the Member seeks to achieve the objective.

135. The Panel, however, offers virtually no analysis of the level of fulfilment sought by the United States, confining its analysis to a single paragraph purporting to rely on three quotations from U.S. submissions that blatantly distorts the U.S. description of the level of fulfillment it sought.[201] This determination is in error.

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[198] Panel Report, para. 7.619 (quoting U.S. FWS, para. 7, U.S. Answer to Panel Question 24, para. 43, and U.S. Answer to Panel Question 142(a), para. 98).

[199] Panel Report, para. 7.620 (emphasis added).

[200] *EC – Sardines (Panel)*, para. 7.120 (emphasis added).

[201] *See* Panel Report, para. 7.619.

2. The Panel Errs in Its Analysis of the Level that the United States Considers Appropriate to Fulfill Its Objective

136. The United States appeals two errors committed by the Panel in 7.590-7.621 of its Report. First, the Panel acted inconsistently with Article 11 of the DSU by mischaracterizing the U.S. position regarding its level of fulfillment by relying on partial quotes that omitted key elements of the U.S. description of the level to which the United States considers appropriate to fulfill its objective. Second, even setting aside this mischaracterization, the Panel errs in failing to consider all relevant information regarding the level of fulfillment in its determination of that chosen level of fulfillment.[202]

a. The Panel Mischaracterizes the U.S. Description of its Level of Fulfillment

137. The Panel's conclusion as to the level to which the United States considers appropriate to fulfill that objective is based entirely on the following three very "selective" quotations from statements that the United States made to the Panel:

- "providing as much consumer information as possible";[203]
- "to provide consumers with as much clear and accurate information as possible about the origin of the meat products";[204] and
- "to provide as much information as possible to consumers about the country of origin of the food products that they buy at the retail level and to minimize confusion about the origin of meat products to the maximum extent possible."[205]

138. On the sole basis of these partial statements, the Panel concludes that the United States aimed to provide "*as much clear and accurate* origin information *as possible*."[206]

139. The Panel's erroneous determination of the U.S. level of fulfillment is based on a manifest mischaracterization of the U.S. argument, which is made plain when those three statements are rendered in full, rather than selectively excerpted. The full statements are provided with the

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[202] *See* Panel Report, paras. 7.590-7.620, 7.715.

[203] Panel Report, para. 7.619 (quoting U.S. First Written Submission, para. 7).

[204] Panel Report, para. 7.619 (quoting U.S. Answer to Panel Question 24, para. 43).

[205] Panel Report, para. 7.619 (quoting U.S. Answer to Panel Question 142(a), para. 98).

[206] Panel Report, para. 7.620 (emphasis added to highlight the level of fulfillment).

portions the Panel *did not* include in its Report reproduced with double underline:

- "Throughout the process, the United States carefully weighed competing objectives – the desire to provide as much consumer information as possible and the desire to limit the impact on market participants – and incorporated the views of interested parties (both consumers and market participants) in an attempt to strike the correct balance."[207]

- "First, the U.S. objective was to provide consumers with as much clear and accurate information as possible about the origin of the meat products that they buy at the retail level and to prevent consumer confusion. In deciding how to fulfill that objective, the United States conducted a lengthy regulatory process that took into consideration the costs of compliance for market participants, including specific cost concerns identified by Canada and Mexico during the public comment periods. The United States adopted a 2009 Final Rule that provides a significant amount of new information to consumers but includes certain labeling flexibilities to ensure that its requirements do not impose overly burdensome costs on foreign or domestic industry participants."[208]

- "Rather, in determining the level, the United States took compliance costs into consideration, and modifications to the COOL requirements to reduce costs were part of the U.S. effort to design measures to fulfill the U.S. objectives at the level the United States considers appropriate. In other words, in designing the COOL measures, the United States strived to provide as much information as possible to consumers about the country of origin of the food products that they buy at the retail level and to minimize confusion about the origin of meat products to the maximum extent possible while also seeking to ensure that compliance costs for market participants would not be prohibitive."[209]

140. As is readily obvious, the above quotations make clear that the references to as much information "as possible" refer to a level that strikes a balance with other considerations as well, in particular the costs for market participants. And, in fact, the United States took this position not only in these three quotations, but throughout its submissions to the Panel.[210] By mischaracterizing

[207] U.S. First Written Submission, para. 7.

[208] U.S. Answer to Panel Question 24, para. 43.

[209] U.S. Answer to Panel Question 142(a), para. 98.

[210] U.S. FWS, para. 240 ("The United States chose an approach that ensures that consumers will have much more information than was previously the case, while also minimizing potential market disruption.") (emphasis added); U.S. FWS, para. 241 ("For ground meat, Congress and USDA took a similar approach. Instead of requiring detailed information about the origin percentages of each country or taking some other similarly burdensome

the U.S position in this manner, the Panel fails to comply with Article 11 of the DSU, which instructs each panel to:

> make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.

141. In examining a panel's obligation to make an "objective assessment of the matter," the Appellate Body has explained that Article 11 requires panels to take account of the evidence and argument put before them and prohibits them from wilfully disregarding or distorting such evidence and argument or making affirmative findings that lack a basis in the record before them.[211]

142. Here the Panel mischaracterizes the U.S. argument to indicate that the United States aims through the COOL measure to provide "as much clear and accurate origin information as possible" *without regard to the cost of doing so*. By selectively editing U.S. statements, the Panel disregards that the COOL measure reflects a balance between the provision of information and costs incurred.

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approach, Congress and USDA decided to simply require that retailers provide information about what types of meat are 'reasonably contained therein.' While other approaches might have provided more detailed information, the United States again chose to balance the objective of providing consumers with additional information against the potential burdens on industry. As a result, the statute and 2009 Final Rule ensure that consumers receive much more information than before at the retail level, without imposing unnecessary costs on industry.") (emphasis added); U.S. First Oral Statement, para. 5 ("The updated U.S. COOL requirements were the product of a long and thoughtful legislative process followed by an equally deliberative regulatory process. In crafting these measures, the United States made substantial efforts to ensure that they would provide consumers with as much information as possible without imposing unduly burdensome compliance costs on market participants.") (emphasis added); U.S. First Oral Statement, para. 45 ("It is true that, if these exceptions and flexibilities were not included and that if certain modifications had not been made, the 2009 Final Rule would require retailers to provide even more information to consumers than it currently does. However, the Final Rule would also have imposed higher costs on the industry. Indeed, given that USDA made a number of changes to the proposed regulations to ease compliance costs in response to concerns expressed by interested parties (including Canada and Mexico), the United States finds it somewhat ironic that the complaining parties are now claiming that these changes mean that the measures do not meet the U.S. objectives.") (emphasis added); U.S. Answer to Panel Question 64, para. 117 ("USDA strove throughout the rule making process to provide as much flexibility as possible to the industry on how to comply with the COOL measures in an effort to reduce costs, while at the same time providing a quantity of information to consumers that was greater than the information made available to them before.") (emphasis added).

[211] *See EC – Hormones (AB)*, para. 133 ("The deliberate disregard of, or refusal to consider, the evidence submitted to a panel is incompatible with a panel's duty to make an objective assessment of the facts."); *EC – Large Civil Aircraft (AB)*, para. 894 ("The Panel also failed to comply with its duties under Article 11 of the DSU by not engaging with the European Communities' argument as to the inconsistency between the project-specific risk premium proposed by the United States and the discount rate used in the Dorman Report."); *see also Philippines – Distilled Spirits (AB)*, para. 240 (The Panel acts inconsistently with Article 11 when its errors "undermine the objectivity of the Panel's assessment.") (quoting *EC – Large Civil Aircraft (AB)*, para. 1318).

As such, the Panel willfully distorts and misrepresents the U.S. position as to what the U.S. level of fulfillment, contrary to Article 11 of the DSU.[212]

b. The Panel Fails to Consider All Relevant Information Regarding the Level of Fulfillment

143. Furthermore, by relying exclusively on these statements to determine the level at which the United States sought to achieve its objective, the Panel commits legal error. The true balance between costs and consumer information evident from the U.S. descriptions is confirmed by the text, structure, and design of the COOL measure, which provides certain information on origin while also allowing commingling that indisputably reduces costs to the market participants.[213] Yet instead of using this information to draw conclusions about the chosen level of fulfillment, as discussed in the next section, the Panel relies on it to conclude that the measure did not fulfill its objective sufficiently such that it breached Article 2.2.

144. The result of the balance between information and costs is, of course, that the COOL measure does not provide perfect information to consumers on origin in every conceivable scenario, and the United States has never maintained that the measure does so, or that it intended to do so.[214] The extent of information provided depends upon which label is used (whether A, B, C,

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[212] *See EC – Hormones (AB)*, para. 133 ("The wilful distortion or misrepresentation of the evidence put before a panel is similarly inconsistent with an objective assessment of the facts."); *see also US – Large Civil Aircraft (AB)*, para. 235 (The panel must treat evidence with "even handedness.").

[213] *See supra* section II.A.3(a) (discussing 2009 Final Rule). *Compare* U.S. First Oral Statement, para. 40 ("The text of the COOL statute and regulations clearly indicate that their objective is consumer information. The 2009 Final Rule states that 'the intent of the law and this rule is to provide consumers with additional information on which to base their purchasing decisions.' Likewise, the Senate Committee Report accompanying the 2002 COOL statute states 'Many American consumers want to know the country of origin of their food. This Act therefore requires retailers to notify consumers of the country of origin of beef, pork, lamb, fish, fruits, vegetables, and peanuts. This provision provides consumers with greater information about the food they buy.' The COOL measures are also designed to ensure that consumers receive information about the covered commodities and are structured to prevent consumer confusion.") (quoting Exhibit CDA-5, p. 2677 and Exhibit US-11, p. 93-94, respectively), *with* 2009 Final Rule, at 2665 ("The Agency believes that the costs associated with this segregation and identification of beef variety meats would be overly burdensome and that these items were not intended to be included as covered commodities under the statute."), Exhibit CDA-5; *Id.* at 2669 (discussing the flexibility allowed by commingling); *Id.* at 2670 ("[T]he Agency determined that requiring origin notification [for commingled product] either by alphabetical listings or by listing the countries of origin by order of predominance by weight was overly burdensome to the regulated industries."); *Id.* at 2671 ("To require beef grinders to completely change their production system into grinding beef based on specific batches was determined to be overly burdensome and not conducive to normal business practices, which the Agency believes was not the intent of the statute."); *Id.* at 2681 ("The Agency is implementing COOL in the most cost effective way available while still meeting Congressional mandates.").

[214] U.S. FWS, para. 241 ("While other approaches might have provided more detailed information, the United States again chose to balance the objective of providing consumers with additional information against the potential burdens on industry."); *see also* U.S. Second Oral Statement, para. 49 ("While many consumers and

or D) and, for categories A, B, or C, whether commingling has occurred.[215] This difference in the extent of information provided reflects the balance that the United States strikes between the provision of information and the costs of providing it. While it may be true that some Members may choose to impose country of origin labeling schemes that provide more information than the United States seeks to provide through the COOL measure (at a greater cost to market participants),[216] that simply means that those Members have decided to strike a different balance from the one that the United States chose. Again,"it is up to the Members to decide which policy objectives they wish to pursue and the levels at which they wish to pursue them,"[217] and Article 2.2 does not require a different result. A Member does not act inconsistently with its international obligations by not seeking to accomplish 100% of a policy goal. Yet this was precisely what the Panel required under its analysis.

D. The Panel's Analysis of Whether the COOL Measure Is Inconsistent with Article 2.2 Because It Is "More Trade-Restrictive Than Necessary to Fulfil a Legitimate Objective"

145. In sections VII.D.3(d)-(e) of the Panel Report, the Panel analyzes "whether the complainants have established that the COOL measure is more trade-restrictive than necessary to fulfil the identified objective of providing consumer information on origin."[218] The Panel, however, only reaches the issue of whether the measure fulfills its objective and did not reach the question of "whether the COOL measure is 'more trade-restrictive than necessary' based on the availability of less trade-restrictive alternative measures that can equally fulfil the identified objective."[219] Rather, the Panel determines that its finding that "the COOL measure does not fulfil the objective of providing consumer information on origin, particularly with respect to meat products, within the meaning of Article 2.2," is sufficient to find that the United States has acted inconsistently with Article 2.2.[220]

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consumer organizations are pleased with the COOL measures and the information they provide, it is undeniable that the United States could have designed these measures to provide even more information by omitting the commingling flexibility or requiring point-of-production labeling, to name a few possibilities. However, the TBT Agreement does not require Members to take every step possible to fulfill its legitimate objectives without regard to cost, and it is for this reason that Canada and Mexico's arguments regarding product coverage and imperfect information must fail.").

[215] *See supra* section II.A.3(b) (discussing commingling).

[216] *See supra* section II.B (discussing the country of origin labeling measures of other Members).

[217] *EC – Sardines (Panel)*, para. 7.120.

[218] Panel Report, para. 7.652.

[219] Panel Report, para. 7.719.

[220] Panel Report, para. 7.720.

146. The United States considers this finding of inconsistency to be in error and appeals the Panel's finding and underlying analysis contained in sections VII.D.3(d)-(e) of the Panel Report. Article 2.2 does not, as the Panel Report indicates, call for a panel to determine whether it considers that a Member could have done a better job of designing a measure. This is not a proper inquiry under Article 2.2 and would indeed call for panels to insert themselves in the place of Members and make their own policy judgments and assessments as to how best to achieve a particular objective within the circumstances of those Members. Panels are not equipped to do so; nor have Members agreed to this type of inquiry, which is very intrusive and involves sensitive questions of sovereignty. Rather, the question for Article 2.2 is whether the Member could have adopted a less trade-restrictive measure that fulfills the objective at the chosen level of fulfillment.

147. In the following sections, the United States will summarize the relevant points of the Panel's analysis and then discuss each appeal of the Panel's findings in order.

1. The Panel's Analysis of Whether the COOL Measure Is "More Trade-Restrictive Than Necessary to Fulfil a Legitimate Objective"

148. The Panel begins from the premise that an examination of whether "the COOL measure is more trade-restrictive than necessary to fulfil the identified objective of providing consumer information on origin," involves a two step analysis: (1) whether the COOL measure fulfils the objective; and, if so, (2) whether the COOL measure is more trade-restrictive than necessary because there are alternative measures that are less trade-restrictive than the COOL measure, but which equally fulfill the objectives.[221] As the Panel determines that the COOL measure does not fulfill its objective at the chosen level, the Panel finds that it is not necessary to reach this second step.[222]

149. After determining that the objective of the COOL measure identified by the United States "is indeed the objective of the COOL measure,"[223] the Panel addresses the first element of its analysis: "[w]hether the COOL measure fulfils the objective of providing consumer information on origin."[224] The Panel begins with the premise that whether the COOL measure fulfills the objective "will depend on the capability of labels to convey clear and accurate information on origin."[225] In making its examination, the Panel focuses on what information the A, B, and C labels provide (and do not provide), and what information the B and C labels provide in light of the

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[221] *See* Panel Report, para. 7.652.

[222] Panel Report, para. 7.719.

[223] Panel Report, paras. 7.677-7.691.

[224] Panel Report, heading above para. 7.692.

[225] Panel Report, para. 7.695.

COOL measure's allowance of commingling.[226] The Panel does not mention the D label.

150. As to the meaning of the B and C labels, the Panel considers that because of the labels' description of origin and the order that the countries are listed on those labels, the B and C labels will not "deliver origin information as defined under the measure or as the consumer might understand it."[227] Moreover, the Panel states that it is not clear that the "differentiation of origin based on the order of country names will indeed communicate accurate origin information," and that "the similarity in content between the [B and C] labels will render it very unlikely that the average [U.S.] consumer will be able to distinguish between these two labels in terms of origin . . ."[228]

151. As to any commingling allowance under the B and C labels, the Panel notes that while "commingling can take place in multiple stages of the meat production process," and the allowance to do so "may reduce compliance costs to a certain extent," commingling "further diffuses the content and impact of origin labels as defined by the measure."[229] In the Panel's view, due to commingling, even "a perfect consumer who is fully informed of the meaning of different categories of labels under the COOL measure . . . may never be assured that the label *precisely* reflects the origin of meat as defined under the COOL measure."[230] "Therefore, . . . the labelling under the COOL measure in our view provides information on meat with regard to the *possible*, but not necessarily actual, or for that matter accurate, origin as defined by the measure."[231]

152. As to the U.S. argument, the Panel disagrees with the United States that "providing general information about the various countries in which an animal has spent time and slaughtered is in keeping with the objective that the United States claims the measure seeks to achieve."[232] While the Panel appears to recognize that the United States allows commingling as part of its effort "to strike a balance between providing consumer information and reducing the compliance costs for industry," according to the Panel:

> The act of balancing conflicting interests cannot, however, justify any inconsistency found in the impugned measure with the obligations of the respondent under the

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[226] *See* Panel Report, para. 7.696.

[227] Panel Report, paras. 7.699-7.700.

[228] Panel Report, para. 7.701.

[229] Panel Report, para. 7.704.

[230] Panel Report, para. 7.702 (emphasis added).

[231] Panel Report, para. 7.707 (emphasis in original).

[232] Panel Report, paras. 7.709-7.710.

> covered agreements. In the factual circumstances of the present dispute, the pertinent question for us is whether the COOL measure is fulfilling the identified objective in accordance with the obligations under Article 2.2 of the TBT Agreement.[233]

153. As to the U.S. position that the measure does fulfil its objective at the level the United States considers appropriate, the Panel does find that the COOL measure, with regard to meat labeled with the A label, *i.e.*, at least 71% of meat sold in the United States,[234] does satisfy this threshold (as the Panel interpreted it) "because the measure prohibits such meat from carrying a Label A even though the same meat may still carry a USDA grade label."[235] However, in the Panel's view, while the B and C labels may provide "more information than under the previous labelling regime or fulfil[] only a limited aspect of the identified objective," the information provided by these labels "do[] not contribute in a meaningful way to fulfilling the objective" as determined by the Panel – *i.e.*, "providing as much clear and accurate origin information as possible."[236]

154. In light of these findings, the Panel provides an "overall assessment" of whether the COOL measure fulfils its objective where the Panel states:

> We acknowledge that labels required to be affixed to meat products according to the requirements under the measure provide additional country of origin information that was not available prior to the COOL measure. We also agree that the labelling requirements under the COOL measure may have reduced consumer confusion that existed under the pre-COOL measure and USDA grade labelling system.
>
> However, we agree with the complainants that origin information on labels as prescribed by the measure does not ensure meaningful information for consumers, except origin information on Label A. Specifically, considered in light of the origin definition as determined by the United States for meat products, the description of origin for Label B and Label C is confusing in terms of the meaning of multiple country names listed in these labels. Moreover, the possibility of interchangeably using Label B and Label C for all categories of meat based on commingling does not contribute in a meaningful way to providing consumers with accurate

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[233] Panel Report, para. 7.711.

[234] *See* Panel Report, n.941 (noting that the United States had provided evidence that 71% of meat sold at retail in July 2009 had the A label while Canada had provided evidence that 78.6% of the meat sold at major supermarkets in the first quarter of 2010 had the A label).

[235] Panel Report, para. 7.713. The Panel made no findings as to the D label, although the same presumably would be true for that label for the same reasons.

[236] Panel Report, para. 7.715.

information on origin of meat products.[237]

155. The Panel Report then concludes "that the COOL measure does not fulfil the identified objective within the meaning of Article 2.2 because it fails to convey meaningful origin information to consumers."[238] The Panel Report continues that it does "not consider it necessary to proceed with the next step of the analysis, namely whether the COOL measure is 'more trade-restrictive than necessary' based on the availability of less trade-restrictive alternative measures that can equally fulfil the identified objective."[239] Finally, the Panel states that "the complainants have demonstrated that the COOL measure does not fulfil the objective of providing consumer information on origin, particularly with respect to meat products, within the meaning of Article 2.2. We therefore find that the United States has acted inconsistently with Article 2.2."[240]

2. The Panel Errs in Its Analysis of Whether the COOL Measure Is "More Trade-Restrictive Than Necessary to Fulfil a Legitimate Objective"

156. The Panel Report's sections VII.D.3(d)-(e) contain numerous errors, both legally and factually, that lead the Panel to find, erroneously, that the COOL measure is inconsistent with Article 2.2. First, and most broadly, the Panel's legal framework to determine whether a measure is "more trade restrictive than necessary to fulfil a legitimate objective" is incorrect: it is not a two step analysis, but a single analysis, containing three elements that are to be judged cumulatively, consistent with the Appellate Body's analysis in *Australia – Salmon* of the parallel provision in Article 5.6 of the SPS Agreement.[241] The Panel's "two step" approach appears drawn from the approach taken to analyze whether GATT-inconsistent measures are justified under Article XX(b) of the GATT 1994, which is not the appropriate interpretative guidepost for Article 2.2. As such, the Panel veers from the course set out in Article 2.2, finding, in essence, that the United States has acted inconsistently with its international obligations for striking the wrong balance between the provision of information and the costs incurred in providing that information. Second, and aside from the fact that the Panel's legal framework is incorrect, the Panel errs in determining that the COOL measure does not fulfill its objective at the level the United States considers appropriate. Third, and notwithstanding these two errors, the Panel errs in failing to require complaining parties

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[237] Panel Report, paras. 7.717-7.718.

[238] Panel Report, para. 7.719.

[239] Panel Report, para. 7.719.

[240] Panel Report, para. 7.720.

[241] *See Australia – Salmon (AB)*, para. 194 (In order to find a violation of SPS Article 5.6, "there is an SPS measure which: (1) is reasonably available taking into account technical and economic feasibility; (2) achieves the Member's appropriate level of sanitary or phytosanitary protection; and (3) is significantly less restrictive to trade than the SPS measure contested.").

to meet their burden to prove that the measure is "more trade-restrictive than necessary" based on the availability of a significantly less trade-restrictive alternative measure that also fulfills the objective at the level the United States considers appropriate. The United States appeals each of these errors.

a. The Panel's Legal Framework for Determining Whether a Measure Is "More Trade-Restrictive Than Necessary" Is in Error

157. Under the Panel's two part legal framework for analyzing whether the COOL measure is "more trade-restrictive than necessary," the Panel first inquires as to whether the challenged measure fulfills its objective. Only if the Panel finds that the measure does, in fact, fulfill its objective, will the Panel make its second inquiry: whether the measure is more trade-restrictive than necessary because there is an alternative measure that is less trade-restrictive than the challenged measure, but which equally fulfills the objective.[242]

158. Designing a technical regulation may necessitate difficult choices, often involving balancing competing interests, and the COOL measure – like many technical regulations – strikes a *particular* balance. Yet the first step of the Panel's analysis, which appears to draw from the Panel's view of the interpretative framework of Article XX(b) of the GATT 1994,[243] inquires as to whether the Member has struck the "correct" balance – an inquiry that falls outside the scope of Article 2.2. Rather, the relevant inquiry for Article 2.2 is entirely contained within the Panel's second step – whether the measure is "more trade-restrictive than necessary." As explained below, the jurisprudence developed under Article XX(b) of the GATT 1994 is not a useful interpretative guide to the Article 2.2 inquiry, particularly the Article XX(b) inquiry as to whether the measure makes a "material contribution" to its objective.

159. In its brief analysis of this important issue, the Panel considers that both the fact that Article 2.2 "is textually similar" to Article XX of the GATT 1994, and that the second and sixth preambular recitals reflect a "close connection" between the GATT and the TBT Agreement, support its conclusion that the Article XX jurisprudence is relevant to the Article 2.2 legal framework.[244] The Panel is incorrect on both counts, and these considerations do not establish that

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[242] *See, e.g.*, Panel Report, paras. 7.652, 7.719.

[243] *See* Panel Report, para. 7.693.

[244] Panel Report, para. 7.670 ("The following considerations further support the view that the legal interpretive approach under Article XX is relevant to Article 2.2. First, the 2nd recital in the Preamble of the TBT Agreement prescribes the WTO Members' desire to 'further the objectives of GATT 1994.' This indicates a close connection between the TBT Agreement and the GATT 1994. Second, Article 2.2 of the TBT Agreement is textually similar to Article XX of the GATT 1994. The examples of legitimate objectives explicitly listed in Article 2.2 resemble the types of policy objectives prescribed under Article XX of the GATT 1994. Further, the wording of the 6th recital in the Preamble of the TBT Agreement is also similar to that of the chapeau of Article XX of the

Article XX(b) jurisprudence is "relevant" to the interpretation of the phrase "no more trade-restrictive than necessary," as the Panel determined.

160. The Panel errs in considering that the two provisions are "textually similar." In fact, the only similarity the two texts share is that both use the term "necessary." But simply because two provisions have one word in common is not a basis to interpret the two provisions similarly, particularly where the two provisions are otherwise dissimilar. In the current instance, there are three important contextual differences between how the term "necessary" is used in the two provisions that prove how dissimilar the two provisions are.

161. First, the two provisions are asking very different questions. The question posed in Article XX(b) of the GATT 1994 is whether the measure *itself* is "necessary," whereas under Article 2.2 the question is whether the amount of *trade-restrictiveness* of the measure is necessary.[245] The *US – Tuna* panel's view in this regard is instructive. In comparing the texts of Article 2.2 and Article XX(b), that panel found that significant differences existed between the two texts, and that, "[g]iven the fact that, under Article 2.2, the 'necessity' to be assessed is that of the 'trade-restrictiveness' of the measures rather than of the measures themselves, we understand the term 'necessary' in the second sentence of Article 2.2 to mean essentially that the trade-restrictiveness must be 'required' for the fulfilment of the objective."[246] The two provisions are using the term "necessary" in two different senses, in the course of asking two different questions.

162. Second, the analysis under Article 2.2 of the TBT Agreement involves comparing two presumptively WTO-consistent measures, while to the extent that alternatives are compared under Article XX of the GATT 1994, the WTO-inconsistent measure (for which the exception is being invoked) is compared to a hypothetical measure that is WTO-consistent.

163. Third, unlike under Article XX of the GATT 1994, it is the complaining party (not the responding one) that has the burden of establishing that the measure is "more trade-restrictive than necessary" under Article 2.2 of the TBT Agreement. Burden of proof is an important issue, and may be dispositive. Moreover, the fact that one measure is an obligation, while the other is an exception to obligations – is consistent with the fact that the two provisions are, fundamentally,

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GATT 1994.").

[245] *See also US – Tuna (Panel)*, para. 7.459 ("[W]e note that Article 2.2 of the TBT Agreement refers to technical regulations that are more trade restrictive than necessary to fulfil a legitimate objective, whereas Article XX of the GATT 1994 refers to 'measures necessary' to protect public morals, to protect human, animal or plant life or health, to secure compliance with laws or regulations.").

[246] *US – Tuna (Panel)*, para. 7.460.

asking different questions.[247] One asks whether the measure is necessary, while the other asks whether the trade-restrictiveness of the measure is necessary. The fact that the two provisions have different functions, with different allocations of the burden of proof, supports the proposition that the two provisions are, in fact, different, and prior panel and Appellate Body reports addressing Article XX reflect these differences. And this of course is aside from the fact that the texts themselves are different and have nothing in common other than the use of one word, and that word is a general adjective that does not have a technical meaning for purposes of the WTO agreements and cannot be read to include the entire range of meaning and conditions that the Panel assigned to it.

164. The Panel also errs in considering that the second and sixth preambular recitals of the TBT Agreement support the conclusion that the interpretation of Article XX is relevant to the Article 2.2 analysis. The United States does not, of course, disagree that the second and sixth recitals of the preamble to the TBT Agreement indicate a "close connection" between the two agreements, but it does not follow from this fact that Article 2.2 is to be interpreted using the same analytical framework used to interpret Article XX(b), particularly given the significant textual differences between the two provisions.

165. First, to the extent there is a "close connection" between Article XX(b) of the GATT 1994 and the TBT Agreement, it is with the second and sixth recitals of the preamble to the TBT Agreement, not with Article 2.2. Each preambular recital applies to the TBT Agreement *as a whole* and there is no indication in either recitals that those preambular statements should affect the interpretation of Article 2.2 *in particular*. For the same reason, there is no reason to believe Article 2.2 should be interpreted similarly to Article XXI of the GATT 1994 simply because the seventh preambular recital recalls the security exceptions to the GATT 1994.

166. Moreover, to the extent that such a "close connection" may exist, it surely exists *even more* so as between Article XX(b) and Article 5.6 of the SPS Agreement, where the preamble, and, in fact, the *entire* agreement, is much more explicitly "a development" of Article XX(b). Yet the Appellate Body has not required that measures must be proved to be "necessary," consistent with Article XX(b), in order to meet the obligation of Article 5.6 of the SPS Agreement.[248] In fact, the Appellate Body has indicated just the opposite, using the terms "required" and "necessary" interchangeably for purposes of determining whether a Member could have adopted a less trade-

[247] *See also US – Tuna (Panel)*, para. 7.458 ("At the same time, we note that there are differences in the wording of Article 2.2 of the TBT Agreement, as compared to Article XX of the GATT 1994 or Article XIV of the GATS, which reflect also the different positions of the provisions within their respective agreements. In particular, we note that Article 2.2 of the TBT Agreement sets out a positive obligation, and is not formulated as an exception.").

[248] *Australia – Salmon (AB)*, para. 194; *see also Australia – Apples (AB)*, para. 337 (quoting same).

restrictive SPS measure.[249]

167. Accordingly, the Panel's decision to apply a two part analysis, whereby it can find that the United States has acted inconsistently with Article 2.2 simply because the measure does not contribute to the objective – or fulfill the objective – *enough* is in error. This is not the test for Article 2.2. That is to say, whether a measure makes a "material contribution" to its objective, in the sense that the Appellate Body used the term in *Brazil – Retreaded Tyres*, is not a test of whether a measure is consistent with Article 2.2 of the TBT Agreement. The text of Article 2.2 makes no such reference to "material contribution," and a measure is not *per se* inconsistent with Article 2.2 *solely* because it does not meet some minimum threshold of contribution to its objective, as the Panel, in fact, found in this dispute. Rather, the measure is inconsistent *only* if the complaining party is able to establish that a significantly less restrictive alternative measure exists that also makes at least this level of contribution to the objective.

168. As discussed above,[250] while the determinations identifying the objective and the level at which a Member seeks to fulfill that objective are important for the Article 2.2 analysis, they are not an end in themselves. Rather, a panel first needs to ascertain what objective the measure pursues, as well as the chosen level of fulfillment, *in order* to consider whether the complaining party has met its burden of showing that the same level of fulfillment could be achieved by a significantly less trade-restrictive alternative measure. In this regard, at what level the measure at issue fulfills the objective may be relevant to the overall inquiry, particularly where the complaining party disputes the chosen level of fulfillment claimed by the responding party, as was the case in this dispute. The Panel's conclusion regarding the information that the A, B, and C labels do provide is thus relevant to the analysis of the U.S. level of fulfillment.[251] But it is relevant not to determine whether the COOL measure is consistent with Article 2.2 in the first instance, but in helping to inform the analysis of what is the chosen level of fulfillment. And it would then be relevant in turn in evaluating whether the proposed alternative measure in fact would fulfill the objective at the chosen level in a less trade restrictive manner.

169. The inquiry required under Article 2.2 is whether the United States could have adopted a less trade-restrictive measure than the COOL measure, not whether the COOL measure accomplishes what the United States intends for it to accomplish – or, for that matter, whether one

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[249] *Compare* SPS Agreement, art. 5.6 (". . . Members shall ensure that such measures are not more trade-restrictive than *required* to achieve their appropriate level of protection . . .") (emphasis added), *with Australia – Apples (AB)*, para. 363 ("The function of Article 5.6 is to ensure that SPS measures are not more trade restrictive than *necessary* to achieve a Member's appropriate level of protection.") (emphasis added); *see also Australia – Apples (AB)*, para. 363 ("A demonstration that an alternative measure meets the relevant Member's appropriate level of protection, is reasonably available, and is significantly less trade restrictive than the existing measure suffices to prove that the measure at issue is more trade restrictive than *necessary*.") (emphasis added).

[250] *See, e.g.*, *supra* section IV.C.

[251] *See* Panel Report, paras. 7.713, 7.717.

WTO panel considers the COOL measure to be sound public policy.

170. For the above reasons, the Panel's legal framework for determining whether a measure is "more trade-restrictive than necessary" is in error.

b. The Panel Errs in Finding That the COOL Measure Does Not Fulfill Its Objective

171. Setting aside the errors in the Panel's legal framework, the Panel errs in finding that the COOL measure is inconsistent with Article 2.2 because in the Panel's view it does not fulfill its objective at the level the importing Member considers appropriate. As discussed below, the COOL measure does make a "material contribution" to its objective of providing "consumer information on origin," such that there exists "a genuine relationship of ends and means between the objective pursued and the measure at issue."[252]

172. In accepting the U.S. position that "[c]onsistent with the expectations of the US consumer, only meat derived from animals that were born, raised, and slaughtered in the United States will be designated as U.S. origin,"[253] the Panel finds that the COOL measure *completely* fulfills its objective for meat that carries the A label.[254] Moreover, it is an uncontested fact that meat carrying the A label constitutes at least 71% of the meat sold in the United States.[255] Further, while the Panel has numerous criticisms of the information that the B and C labels provides, even the Panel acknowledges that those labels "provide additional country of origin information that was not available prior to the COOL measure," and that "the COOL measure may have reduced consumer confusion that existed under the pre-COOL measure and USDA grade labelling system."[256] It is also an uncontested fact that meat carrying the B and C labels constitute the vast majority of meat

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[252] Panel Report, para. 7.693 (quoting from the Article XX(b) analysis of *Brazil – Retreaded Tyres (AB)*).

[253] Panel Report, para. 7.712.

[254] Panel Report, para. 7.713 ("To that extent, the COOL measure appears to fulfil the objective because the measure prohibits such [non U.S.-origin] meat from carrying a Label A even though the same meat may still carry a USDA grade label."); *see also id.* para. 7.718 ("However, we agree with the complainants that origin information on labels as prescribed by the measure does not ensure meaningful information for consumers, *except origin information on Label A*.") (emphasis added).

[255] Panel Report, n.941 ("According to Canada, data collected during the first quarter of 2010 show that the different labelling categories for muscle cuts of beef were supplied in major supermarkets as follows: Label A 78.6%; Labels A and B 6.3%; Label B 14.2%; and Labels B and C 0.9% (Exhibit CDA-211). According to the United States, as of July 2009 the different origin declarations for muscle cuts of beef were used in the following percentages: US 71%; US, Canada 5%; US, Mexico 0.5%; Canada, US 0.5%; US, Canada, Mexico 22%; and foreign (category D) 0.3% (Exhibit US-145).") (emphasis added).

[256] Panel Report, para. 7.717 (emphasis added).

sold without the A label (*i.e.*, between 21% and 29% of the market).[257]

173. Thus, if one analyzes what origin information the COOL measure *does* provide, according to the Panel's own findings, the COOL measure provides "clear and accurate" consumer information for at least 71% of the meat sold in the United States; and while not providing the same level of information for the remaining meat sold, the COOL measure provides more information on origin for this meat than the previous scheme provided.[258] Such a contribution to an objective – under any definition – is "material, not merely marginal or insignificant."[259]

174. Viewing the evidence from this perspective is consistent with the approach in *Brazil – Retreaded Tyres* where the Appellate Body examined whether the Panel had erred in finding that the measure had contributed to the achievement of its objective on its own terms, not in comparison with measures that, arguably, contributed to the objective at a greater extent.[260] It is also consistent with the *US – Clove Cigarettes* panel's approach in evaluating whether the ban on clove cigarettes makes a "material contribution" to the objective of "reducing youth smoking." In that dispute, it was an uncontested fact that youth smoke the non-banned cigarettes (*i.e.*, regular and menthol flavored cigarettes) "in far greater numbers" than the banned cigarettes, clove cigarettes."[261] Yet not only was this fact *not dispositive* – it was *not even relevant* to the question of whether the ban on clove cigarettes made a material contribution to the reduction of youth smoking.[262] For this inquiry, the relevant question was what the measure *could do*, not what the

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[257] *See* Panel Report, n.941.

[258] This positive contribution of the COOL measure to its objective is further confirmed by the Panel's finding that a substantial transformation regime is "an ineffective and inappropriate means for the fulfilment of the legitimate objectives pursued," given that such a regime "does not have the function or capacity of accomplishing the objective of providing information to consumers about the countries in which an animal was born, raised and slaughtered." Panel Report, para. 7.734 (analyzing the Article 2.4 claim).

[259] *Brazil – Retreaded Tyres (AB)*, para. 210.

[260] *See Brazil – Retreaded Tyres (AB)*, paras. 153-155; *see also id.* para. 151 ("In order to justify an import ban under Article XX(b), a panel must be satisfied that it brings about a material contribution to the achievement of its objective. Such a demonstration can of course be made by resorting to evidence or data, pertaining to the past or the present, that establish that the import ban at issue makes a material contribution to the protection of public health or environmental objectives pursued. This is not, however, the only type of demonstration that could establish such a contribution. Thus, a panel might conclude that an import ban is necessary on the basis of a demonstration that the import ban at issue is apt to produce a material contribution to the achievement of its objective. This demonstration could consist of quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence.").

[261] *US – Clove Cigarettes (Panel)*, para. 7.394. In this dispute, Indonesia had consistently argued that "by prohibiting only a 'tiny sliver' of the cigarettes smoked by youth, the measure cannot make a 'material contribution' to the objective of reducing youth smoking, and is therefore more trade-restrictive than necessary to fulfil this objective." *Id.* para. 7.393.

[262] *See US – Clove Cigarettes (Panel)*, paras. 7.400-7.415.

measure *does not do*.[263]

175. Yet the *COOL* Panel rejects this approach, focusing on what the measure does not do *vis-à-vis* the "identified" objective, rather than on what the measure does do. The basis for the Panel's contrary approach is its erroneous finding regarding the U.S. level of fulfillment – that is, that the United States aims to provide "*as much clear and accurate* origin information *as possible*." Given this erroneous determination that the United States, essentially, intends for the COOL measure to completely fulfill its objective in every scenario, the question for the Panel is simply whether there are scenarios in which the COOL measure falls short – that is, do not always provide clear and accurate origin information. The fact that the COOL measure does not provide perfect information in all cases is dispositive in the Panel's view:

> However, as clarified in paragraph 7.620 above, the United States aims to achieve its stated objective by providing as much *clear* and *accurate* origin information as possible. Considered against this level of fulfilment of its objective and in light of the nature of the objective (i.e. to provide accurate origin information), merely providing *more* information than under the previous labelling regime or fulfilling only a limited aspect of the identified objective does not contribute in a meaningful way to fulfilling the objective.[264]

176. Moreover, the fact that where the COOL measure does not provide "as clear and accurate information as possible" derives from the fact that the United States was striking a balance between the information provided and the cost of providing it has no legal consequence to the Panel:

> [t]he act of balancing conflicting interests cannot, however, justify any inconsistency found in the impugned measure with the obligations of the respondent under the covered agreements. In the factual circumstances of the present dispute, the pertinent question for us is whether the COOL measure is fulfilling the identified objective in accordance with the obligations under Article 2.2 of the TBT Agreement.[265]

177. The Panel's finding is in error. It relies on an erroneous determination of the chosen level of fulfillment for the reasons discussed above.[266] The fact that its approach forces the Panel to

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[263] *US – Clove Cigarettes (Panel)*, para. 7.415 (concluding that "there is extensive scientific evidence supporting the conclusion that banning clove and other flavoured cigarettes could contribute to reducing youth smoking").

[264] Panel Report, para. 7.715 (emphasis in original).

[265] Panel Report, para. 7.711.

[266] *See supra* sections IV.C(1)-(2).

disregard entirely the acknowledged fact that where the COOL measure provides less information, it does so to lower costs to market participants – including Canadian and Mexican producers – which is an entirely normal regulatory approach, further confirms the Panel's error. Rather, looking at the evidence consistent with the approach taken in previous disputes, the COOL measure clearly makes a substantial contribution to its objective of providing"consumer information on origin," such that there exists "a genuine relationship of ends and means between the objective pursued and the measure at issue."[267]

c. The Panel Errs in Failing to Examine Whether the Complaining Parties Had Met Their Burden to Establish that There Is a Less Trade-Restrictive Alternative Measure

178. The Panel further errs in making a finding of inconsistency under Article 2.2 without requiring that the complaining parties meet their burden of establishing that the measure is "more trade restrictive than necessary" based on the existence of a less trade restrictive alternative measure.[268]

179. As discussed above, a complaining party has the burden to prove that a measure is "more trade-restrictive than necessary" by establishing that: (1) there is a reasonably available alternative measure; (2) that fulfills the objective of the measure at the level that the Member imposing the measure considers appropriate; and (3) is significantly less trade restrictive.[269] This analysis is consistent with the Appellate Body's analysis of the parallel provision in Article 5.6 of the SPS

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[267] *Brazil – Retreaded Tyres (AB)*, para. 145.

[268] Panel Report, para. 7.719.

[269] Given the footnote to Article 5.6 clarifies that "a measure is not more trade restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is *significantly* less restrictive to trade," the United States considers the same to be true for the analysis of Article 2.2 of the TBT Agreement. This interpretation is confirmed by a December 15, 1993 letter from the Director-General of the GATT to the Chief U.S. Negotiator concerning the application of Article 2.2 of the TBT Agreement. That letter explains that while "it was not possible to achieve the necessary level of support for a U.S. proposal [concerning a clarifying footnote to Article 2.2 and 2.3 of the TBT Agreement] . . . it was clear from our consultations at expert level that participants felt it was obvious from other provisions of the [TBT] Agreement that the Agreement does not concern itself with insignificant trade effects nor could a measure be considered more trade restrictive than necessary in the absence of a reasonably available alternative." Letter from Peter D. Sutherland, Director-General of the GATT, to Ambassador John Schmidt, Chief U.S. Negotiator (December 15, 1993), Exhibit US-53. This letter provides supplemental means of interpretation within the meaning of Article 32 of the *Vienna Convention on the Law of Treaties*, in particular as circumstances of the TBT Agreement's conclusion, that confirms the meaning derived from the ordinary meaning, in context, and in light of the object and purpose of the TBT Agreement.

Agreement in *Australia – Salmon*,[270] which the Appellate Body has confirmed in other cases.[271]

180. However, the Panel considered that it is not "necessary" to continue the analysis and examine whether the COOL measure is "more trade-restrictive than necessary" based on the availability of a less trade-restrictive alternative measure.[272] The Panel provides no explanation for why this is except to refer to the analysis of Article XX(a) and (b) of the GATT 1994 by the Appellate Body.[273] For the reasons explained above, the Article XX of the GATT 1994 legal framework is not useful to the interpretation of Article 2.2 of the TBT Agreement.[274]

181. Moreover, the Article XX analysis is a *particularly* inappropriate basis for not examining whether the measure is "more trade-restrictive than necessary" given that this is the *entirety* of the Article 2.2 analysis. Again, the *key* legal question for Article 2.2 is whether the importing Member could have adopted a less trade-restrictive measure, as the text of the provision itself indicates. The Panel simply cannot avoid the central question of the obligation even if a similar question may be avoided in the Article XX context. The language of Article 2.2 simply requires the Panel to assess the issue, and the Panel erred in not doing so.

E. Conclusion on Article 2.2

182. It is unquestionably true that "it is up to the Members to decide which policy objectives they wish to pursue and the levels at which they wish to pursue them."[275] Although the Panel gives lip-service to this idea,[276] the Panel's approach and findings in this claim denies the United States the ability to actually do this. The Panel first badly distorts the U.S. argument, then feeds that distorted information into an erroneous question – whether the COOL measure is inconsistent with Article 2.2 because it fails to fulfill its objective. As such, the Panel is able to discard a central element of the COOL measure – that it was designed to strike a balance between providing consumers information about the food they eat and the costs to the market participants of providing

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[270] *See Australia – Salmon (AB)*, para. 194 (In order to find a violation of SPS Article 5.6, "there is an SPS measure which: (1) is reasonably available taking into account technical and economic feasibility; (2) achieves the Member's appropriate level of sanitary or phytosanitary protection; and (3) is significantly less restrictive to trade than the SPS measure contested.").

[271] *See, e.g.*, *Australia – Apples (AB)*, para. 360; *Japan – Agricultural Products II (AB)*, para. 95.

[272] Panel Report, para. 7.719.

[273] Panel Report, para. 7.719 (citing *Brazil – Retreaded Tyres (AB)*, paras. 156, 178; *China – Publications and Audiovisual Products (AB)*, paras. 237-249).

[274] *See supra* section IV.D.2(a).

[275] *EC – Sardines (Panel)*, para. 7.120.

[276] *See* Panel Report, para. 7.601.

that information. To the Panel this balance is irrelevant to the legal question,[277] but in fact it is central to how regulators in WTO Members act and is accounted for in the Article 2.2 inquiry. That inquiry, in its simplest terms, is whether the Member could have adopted a less trade-restrictive measure that still fulfills its legitimate objective at the chosen level. The fact that the Panel creates a construct that enables it to avoid having the complainants prove – and the Panel decide – the central question of the obligation makes plain that the Panel's analysis, and ultimate finding that the COOL measure is inconsistent with Article 2.2, is in error.

V. CONCLUSION

183. For the reasons set forth in this submission, the United States respectfully requests that the Appellate Body reverse the Panel's findings with respect to Canada and Mexico's claims under TBT Articles 2.1 and 2.2.

[277] *See* Panel Report, para. 7.711 ("The act of balancing conflicting interests cannot, however, justify any inconsistency found in the impugned measure with the obligations of the respondent under the covered agreements. In the factual circumstances of the present dispute, the pertinent question for us is whether the COOL measure is fulfilling the identified objective in accordance with the obligations under Article 2.2 of the TBT Agreement.").