United States – Certain Country of Origin Labelling (COOL) Requirements:

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

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

Responses of
the United States of America
to the Questions Posed by the Panels

March 7, 2014

TABLE OF EXHIBITS

Exhibit	Description
US-49	7 C.F.R. § 46.2
US-50	"Raising Cattle: The Stages of Beef Production," 2014 Cattlemen's Beef Board and National Cattlemen's Beef Association. www.explorebeef.org/raisingbeef.aspx.
US-51	"Fact Sheet: Feedlot Finishing Cattle," National Cattlemen's Beef Association http://www.beefusa.org/uDocs/Feedlot%20finishing%20fact%20sheet%20FINAL_4%2026%2006.pdf.
US-52	Wendy J. Umberger, "County-of-origin labeling (CoOL) A review of relevant literature on Consumer Preferences, Understanding, Use and Willingness-to-Pay for CoOL of Food and Meat," Final Report Food Standards Australia New Zealand, September 2010, pp. 20-22.
US-53	Livestock Marketing Association Comments on Proposed Animal Traceability Rule (Dec. 6, 2011) .
US-54	National Cattlemen's Beef Association Comments on Proposed Animal Traceability Rule (Dec. 9, 2011).
US-55	USDA, Animal and Plant Health Inspection Service (APHIS), Regulatory Impact Analysis & Final Regulatory Flexibility Analysis, "Traceability for Livestock Moving Interstate," APHIS-2009-0091 (July 2012), p. 34.
US-56	USDA, Economic Research Service (ERS), "NAFTA Commodity Supplement," p.5 (March 2000).
US-57	USDA, APHIS, Foreign Animal Disease Preparedness & Response Plan (FAD PReP), "Swine Industry Manual," March 2011, p 3.
US-58	James Rude, Jared Carlberg, and Scott Pellow (2007) "Integration to Fragmentation: Post-BSE Canadian Cattle Markets, Processing Capacity, and Cattle Prices," Canadian Journal of Agricultural Economics 55(2): 197-216.
US-59	Econometric Exhibit A (pies/tables)
US-60	USDA, Economic Research Service, "Standard Pig Calculation."
US-61	USDA Market News, "National Daily Base Lean Hog Carcass

	Slaughter Cost" http://marketnews.usda.gov/gear/browseby/txt/LM_HG213.TXT.
US-62	Econometric Exhibit F.
US-63	Gary Brester and Vincent Smith (1999) "Evaluating the Impacts of the US Department of Commerce's Preliminary Imposition of Tariffs on US Imports of Canadian Live Cattle," Trade Research Center discussion paper No. 34, Montana State University, Bozeman, MT.
US-64	Gary W. Brester, John M. Marsh, and Vincent Smith (2005) "The Impacts on U.S. and Canadian Slaughter and Feeder Cattle Prices of a U.S. Import Tariff on Canadian Slaughter Cattle," Canadian Journal of Agricultural Economics 50(1): 51-66.
US-65	Richard Barichello, Timothy Josling and Daniel Sumner (2004) "Agricultural Trade Relations between Canada and the United States," Working paper 2004-03, Food and Resource Economics, University of British Columbia (January).
US-66	Daniel Sumner, Richard Barichello, and Mechel Paggi (2004) "Economic Analysis in Disputes over Trade Remedy and Related Measures in Agriculture with Examples from Recent Cases," Working Paper No. 2004-01, Food and Resource Economics, University of British Columbia (January 2004).
US-67	Charts for Panels' question No. 75.
US-68	"New Poll Shows Consumers Overwhelming Support Country-of-Origin Labeling on Food," Public Citizen Press Release (June 20, 2005) (Orig. Exh. US-117)
US-69	Letter from Consumer Federation of America to USDA (Aug. 20, 2007) (Orig. Exh. US-5)
US-70	Consumers Union letter to Congress (Feb. 26, 2007) (Orig. Exh. US-116)
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US-74	Letter from Ross Vincent to FSIS (Oct. 2, 2001) (Orig. Exh. US-115)

TABLE OF REPORTS

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Chile – Price Band System (Article 21.5 – Argentina)(Panel)	Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS207/RW and Corr.1, adopted 22 May 2007, upheld by Appellate Body Report WT/DS207/AB/RW
DR – Cigarettes (AB)	Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005
EC – Asbestos (Panel)	Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R and Add.1, adopted 5 April 2001, as modified by Appellate Body Report WT/DS135/AB/R
Japan – Film	Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998
Mexico – Taxes on Soft Drinks (AB)	Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006
US – Clove Cigarettes (AB)	Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012
US – COOL (AB)	Appellate Body Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012
US – COOL (Panel)	Panel Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R / WT/DS386/R, adopted 23 July 2012, as modified by Appellate Body Reports WT/DS384/AB/R / WT/DS386/AB/R
US – Shrimp (Article 21.5 – Malaysia)(AB)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted 21 November 2001
US – Tuna II (Mexico) (AB)	Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012

US – 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, and Corr.1

Terms of reference

1. *(United States)* Please list and explain in detail what you consider to be outside the terms of reference of these compliance proceedings.

1. Complainants' claims under Article XXIII:(1)(b) of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") are outside the terms of reference of the Panels, which relate to an examination of the existence or consistency of measures taken to comply with the DSB's recommendations and rulings. The United States would refer to the explanations provided in paragraphs 199-203 of the U.S. First Written 21.5 Submission, paragraphs 166-171 of the U.S. Second Written 21.5 Submission, and paragraphs 58-64 of the U.S. opening statement at the meeting of the Panels.

2. In addition, complainants' claims with respect to two aspects of the COOL measure that were not the subject of DSB recommendations and rulings and remain unchanged in the revised COOL measure are outside the Panels' terms of reference.[1]

3. The first unchanged aspect of the original COOL measure that complainants challenge is the ground meat rule. The United States refers to the explanation provided in paragraph 94 of the U.S. First Written 21.5 Submission, which explains why this measure is not in the Panels' terms of reference.

4. With regard to complainants' Article 2.1 claims, we take note that Canada alleges that it "is not challenging the consistency of the ground meat label."[2] However, the substance of Canada's argument seems to be identical to the argument that Canada would make if it was challenging the consistency of the ground meat label under Article 2.1. That is, Canada is arguing that the ground meat label provides country of origin information that "is far less detailed than that which is required to be tracked and verified," and, therefore, not legitimate.[3] If the Panels consider that Canada (as well as Mexico) has mischaracterized the ground meat arguments and that these arguments, in substance, challenge the consistency of the ground meat

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[1] *US – Shrimp (Art. 21.5 – Malaysia) (AB)*, para. 96 ("As we see it, then, the Panel properly examined Section 609 as part of its examination of the totality of the new measure, correctly found that Section 609 had not been changed since the original proceedings, and rightly concluded that our ruling in *United States – Shrimp* with respect to the consistency of Section 609, therefore, still stands."); *Chile – Price Band System (Art. 21.5) (Panel)*, para. 7.133 (stating that in *US – Countervailing Measures on Certain EC Products*, "[t]he panel decided that it could not consider the new claim because it had already concluded that the challenged measure was 'not an aspect of the measure taken to comply.' The panel went on to indicate that, even if it were to consider that such challenged measure was an aspect of the measures taken to comply, it would nevertheless still conclude that the new claim was not within its mandate. The panel found that it was not legally empowered to consider new claims on aspects of the original measure that were unchanged and were not challenged in the original proceedings, since this would provide the complainant with a second chance to raise a claim that it had failed to raise in the original case and it would jeopardize the principles of fundamental fairness and due process.").

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

[3] *See* Canada's Second Written 21.5 Submission, paras. 40-41; *see also* U.S. Second Written 21.5 Submission, paras. 68-73.

label under Article 2.1, the Panels should find that such arguments fall outside the Panels' terms of reference.[4]

5. The second unchanged aspect of the original COOL measure challenged by the complainants is the provision in the COOL statute regarding a "farm to fork" traceability system (*i.e.*, "trace-back" as that term has been used in this dispute thus far).[5] The United States refers to the explanation provided in paragraph 98 of the U.S. First Written 21.5 Submission, which explains why this aspect is also not within the Panels' terms of reference.

Factual questions

2. (*United States*) What persons and entities are "subject to be licensed as a retailer" under PACA (Perishable Agricultural Commodities Act, 1930) that are not actually licensed? What are the practical implications of this for the coverage and application of the amended COOL measure?

6. The U.S. Department of Agriculture ("USDA") modified this aspect of the COOL measure to ensure that the provision defining a "retailer" is more closely aligned with the language contained in the Perishable Agricultural Commodities Act ("PACA") regulation.[6] USDA understands that no more than a *de minimis* number of entities operate without a PACA license even though they meet the licensing requirements. As such, the United States does not consider that there are any practical implications of this change for the coverage of the amended COOL measure.

3. (*all parties*) Under the 2009 Final Rule, Label D corresponded to imported muscle cuts from an animal "for which no production steps have occurred in the US" (2009 Final Rule, § 65.300(f)). Under the 2013 Final Rule, Label D is affixed to muscle cuts from an animal "slaughtered in another country [than the United States]…, including … from an animal that was born and/or raised in the United States and slaughtered in another country." (2013 Final Rule, § 65.300(f)(2)). What are the practical implications of this change? What proportion/volumes of livestock and muscle cuts are covered by this change? Did the 2013 Final Rule likewise change the coverage of the ground meat label? If yes, what are the practical implications of such a change, and the proportions/volumes of ground meat covered?

7. There are no practical implications of the change to the regulatory text addressing Label D meat. The United States made this change to reflect that USDA has never required Canada or Mexico (or any other foreign country) to track individual (or groups of) animals that are destined for slaughter in one of their own domestic facilities to ensure that all muscle cuts imported to the United States from that particular country were not born or raised outside that country (including in the United States).

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[4] U.S. First Written 21.5 Submission, para. 94.

[5] 7 U.S.C. § 1638A(f)(1) (Exh. US-1).

[6] *See* 7 C.F.R. § 46.2 (Exh. US-49).

8. As the United States has discussed previously, all (or virtually all) imported muscle cuts sold by U.S. retailers are derived from animals born, raised, and slaughtered in the country denoted on the label ("Product of Country X").[7] In particular, only Canada and Mexico could be affected because those are the only two countries to which the United States exports a material amount of beef cattle or hogs destined for slaughter and from which the United States also imports Label D meat. However, there is no evidence that any beef and pork sold under the D Label as "Product of Canada" or "Product of Mexico" was produced from animals born or raised in the United States. As we have said, "Product of Canada" or "Product of Mexico" means, for all practical purposes, "born, raised, and slaughtered in Canada" or "born, raised, and slaughtered in Mexico."[8] Accordingly, the proportion/volume of livestock and muscle cuts covered by this change is zero.

9. With respect to ground meat, as discussed in response to question 1, the 2013 Final Rule did not change the coverage of that label.

4. (*United States*) The 2009 Final Rule provides that ground meat "shall list all countries of origin contained therein or that may be reasonably contained therein." (74 C.F.R. § 65.300(h)). Please clarify how the country of origin is determined for ground meat products. In particular, is it determined based on substantial transformation or some other criteria, such as the place of birth, raising, and slaughter of the livestock?

10. As the original panel recounted, U.S. entities produce ground meat by purchasing lean beef trimmings from foreign countries and mixing those with domestic beef trimmings before grinding into a final product.[9] The country of origin of those trimmings is determined in exactly the same manner that the country of origin of muscle cuts are determined. That is, there are category A, B, C, and D trimmings. If, for example, a particular U.S. grinder had in inventory during the last 60 days trimmings from A animals and C animals (imported from Canada), as well as trimmings imported from Australia, the COOL label affixed to any particular package of ground meat produced by that entity could list all three countries, *i.e.*, Australia, Canada, and the United States.

5. (*all parties*) Please provide examples and data concerning Label D imported muscle cuts derived from animals that were not born and/or raised in the country in which they were slaughtered.

11. As noted in response to question 3, all (or virtually all) imported muscle cuts sold by U.S. retailers are derived from animals born, raised, and slaughtered in the country denoted on the label ("Product of Country X"). The United States does not have any data that there is any beef or pork exported to the United States produced from animals not born or raised in their country of slaughter. This is consistent with the fact that, other than the United States, countries import

[7] *See* U.S. Second Written 21.5 Submission, paras. 56-59; U.S. First Written 21.5 Submission, para. 86.

[8] *See* U.S. Second Written 21.5 Submission, para. 59.

[9] *US – COOL (Panel)*, para. 7.431 (quoting 2009 Final Rule).

very little livestock compared to consumption.[10] Canada cattle imports, for example, amounted to no more than 2 percent of its slaughter volume in the years 2003-2012.[11] Such percentages would be even lower if instead of consumption you looked at beef exports to one particular country (here, the United States).

6. (*United States*) Under the amended COOL measure, is the country of raising of animals imported for immediate slaughter designated only as the country from which they were immediately imported? Please provide any examples and specify recent volumes/origins covered, and explain the relevance of this for the Panel's analysis of the complainants' violation claims.

12. Under the amended COOL measure, the exporting country must be listed as a country of raising, but the measure does not require that it be the *only* country of raising. If, in fact, the animal was raised in two different countries prior to export for immediate slaughter in the United States, then both countries may be listed on the label: "If an animal was … raised in Country X and/or (as applicable) Country Y, and slaughtered in the United States, the resulting muscle cut covered commodities shall be labeled to specifically identify the production steps occurring in each country." (7 C.F.R. § 65.300(e).) The permissive nature of the measure is also indicated in 7 C.F.R. § 65.235 where the term "raised," for purposes of immediate slaughter, is defined as the "the period of time from birth until date of entry into the United States," rather than simply the country of export.[12]

13. As to the labels actually used, the vast majority of labels affixed to C meat (imported for immediate slaughter) will indicate Canada as the country of raising and will state: "Born and Raised in Canada, Slaughtered in the United States."[13]

14. The Panels' question seems to contemplate the much more improbable situation where an animal is exported twice in its short lifespan (approximately 18-22 months for cattle and 26 weeks for hogs).[14] There is no evidence that suggests this is actually occurring or that it could be

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

[11] U.S. Second Written 21.5 Submission, para. 56.

[12] This principle is further indicated in both the statute and the regulations, which only indicate that the country of export "shall" be listed as the country of raising, not that this country must be the "*only*" country of raising. *See* 7 U.S.C. § 1638a(a)(2)(C) (Exh. US-1); 7 C.F.R. § 65.300(e) (Exh. US-2).

[13] We understand that Mexico exports a small amount of cattle for immediate slaughter as well. As discussed previously, the actual label may contain abbreviations and used the term "harvested" in lieu of "slaughtered." U.S. First Written 21.5 Submission, para. 33 (second bullet).

[14] Cattle are typically slaughtered in the 18-22 month age range, but can be slaughtered up to 26 months; it would be unusual for beef cattle to be slaughtered as late as 30 months old. For further information, please see "Raising Cattle: The Stages of Beef Production," 2014 Cattlemen's Beef Board and National Cattlemen's Beef Association. www.explorebeef.org/raisingbeef.aspx (Exh. US-50); *see also* "Fact Sheet: Feedlot Finishing Cattle," National Cattlemen's Beef Association.

economically viable for this to occur. But in the highly improbable situation where something like this did occur, and, for example, an animal is born in Mexico, exported to Canada, then exported to the United States for immediate slaughter, the label could read: "Born in Mexico, Raised in Canada, slaughtered in the United States." However, it would also be permissible for the label to read "Born and Raised in Mexico, Raised in Canada, Slaughtered in the United States."[15] The same requirement (and flexibility) is also available for the other highly improbable scenario where an animal born in the United States, exported to Canada, and then re-exported to the United States as a C animal. The United States considers both versions of the label (long and short) to be accurate, and the retailer may use either. However, as noted with regard to the labeling of meat derived from B animals, because birth is already required to be listed, and to reduce the number of required characters on the label, the United States is not requiring retailers to use the longer label.[16]

15. As discussed in response to questions 3 and 5, the United States does not have any data indicating that any animals exported to the United States for immediate slaughter have been exported previously during their lifespan. Likewise, there is no evidence on the record that any meat sold under a C label was produced from an animal that was exported twice in its lifetime. Indeed, as discussed above, the hypothetical situation where an animal is exported twice in its lifetime is highly improbable, and in fact, there is no economic incentive to do so.

16. The United States considers that the accuracy of the label affixed to C muscle cuts (at least compared to the accuracy of the label affixed to A muscle cuts) is relevant to the Panels' analysis because the labeling of each production step ensures even-handedness.[17] However, we do not consider that the accuracy of the label affixed to C muscle cuts can be undermined with hypothetical scenarios or isolated examples of unusual transactions. Rather, the accuracy of the label must be judged on the products sold in the real world. And in the real world, it is Canada that is the one exporting C animals to the United States and those animals are born and raised *in Canada*.

17. Accordingly, the label "Born and Raised in Canada, Slaughtered in the United States" is entirely accurate for muscle cuts derived from the animals Canada actually exports to the United States. However, if in fact there is an isolated occurrence whereby the animal is exported twice in its lifetime, the label will necessarily reflect that – *e.g.*, "Born in Mexico, Raised in Canada, slaughtered in the United States" or "Born and Raised in Mexico, Raised in Canada, Slaughtered in the United States." Under all of these scenarios – the probable and the improbable – the label is accurate as to the C meat sold at retail, and, certainly, no less accurate than the A Label.

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http://www.beefusa.org/uDocs/Feedlot%20finishing%20fact%20sheet%20FINAL_4%2026%2006.pdf (Exh. US-51).

[15] What would *not* be permissible would be for the label to eliminate the production step in Canada – *i.e.*, Born and Raised in Mexico, Slaughtered in the United States" – as Canada is the country of export. *See* 7 U.S.C. § 1638a(a)(2)(C) (Exh. US-1); 7 C.F.R. § 65.300(e) (Exh. US-2).

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

[17] *See* U.S. Second Written 21.5 Submission, paras. 37-40; U.S. First Written 21.5 Submission, paras. 62-66.

7. (*Canada and Mexico*) Please provide evidence and recent volume/origin data regarding livestock "imported for immediate slaughter" into the United States that were raised in more than one country. Please explain the relevance of this for the Panel's analysis of the complainants' violation claims.

8. (*all parties*) Please provide evidence and recent volume/origin data concerning livestock born and slaughtered in the United States, but "raised" (as defined under the amended COOL measure) in another country(ies).

18. As discussed above, the United States does not have any data indicating that any animals exported to the United States for immediate slaughter have been exported previously during their lifespan.

9. (*all parties*) Please provide evidence and recent volume/origin data regarding the age at which feeder cattle are imported into the United States from the complainants.

19. The below tables provide information in response to the Panels' question regarding volumes and origin of feeder cattle. The United States does not import feeder cattle from any countries other than Canada and Mexico. The United States tracks this information by Harmonized Schedule ("HS") codes, which categorizes the animal by weight rather than age. The source for the data is the U.S. Department of Commerce, Bureau of Census, via USDA's Foreign Agricultural Service ("FAS") Global Agricultural Trade System ("GATS").

20. In addition, we have estimated the age categories for animals falling into particular weight categories. These approximations are based on USDA's experience,[18] and the particular age of individual animals falling within a weight range may differ.

21. As noted, the HS codes only provide a category for above 320 kg, but within this group, the average weight for exported feeder cattle is 401 kg for cattle from Canada and 346 kg for cattle from Mexico in 2013. The age of such average animals is approximately 12 months.[19] (Mexican animals of the same age as Canadian animals tend to be lighter due to differences in breeds and pastures between the two countries). Average slaughter weight of cattle is approximately 544 kg (or 1,200 pounds). Animals reach this slaughter weight, on average, somewhere between 18 and 22 months of age.[20]

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[18] For further information, please see "Raising Cattle: The Stages of Beef Production," 2014 Cattlemen's Beef Board and National Cattlemen's Beef Association. www.explorebeef.org/raisingbeef.aspx. (Exh. US-50).

[19] Average weights and ages were calculated using import data in kg and head of cattle, both from the U.S. Department of Commerce, Bureau of Census, via USDA's FAS GATS. *See generally* www.fas.usda.gov/gats.

[20] *See* U.S. Response to Panels' question No. 6.

U.S. Feeder Cattle Imports from Canada (1,000 head)

Weight Category and Approx. Age Range	HS Codes	2009	2010	2011	2012	2013
Less than 90 KG (<2month)	01022940 24/28, 01029040 24/28	5	4	4	2	0
90KG - 200 KG (2-6 months)	01022940 34/38, 01029040 34/38	1	1	0	0	2
200 KG - 320 KG (6-10 months)	01022940 54/58, 01029040 54/58	69	50	28	45	133
Greater than 320 KG (>10 months)	01022940 82/84, 01029040 82/84	214	167	72	121	222

Note: Excludes breeding cattle and cattle for immediate slaughter

U.S. Feeder Cattle Imports from Mexico (1,000 head)

Weight Category and Approx. Age Range	HS Codes	2009	2010	2011	2012	2013
Less than 90 KG (<2month)	01022940 24/28, 01029040 24/28	0	0	0	84	0
90KG - 200 KG (2-6 months)	01022940 34/38, 01029040 34/38	545	683	889	731	489
200 KG - 320 KG (6-10 months)	01022940 54/58, 01029040 54/58	379	520	526	648	494
Greater than 320 KG (>10 months)	01022940 82/84, 01029040 82/84	13	14	4	3	5

Note: Excludes breeding cattle and cattle for immediate slaughter

10. (*all parties*) For US imports of fed cattle, please provide evidence regarding the amount of time such fed cattle spend in the United States prior to slaughter.

22. While USDA does not keep this data, and thus we are unable to provide specific figures to the Panels' question, the United States understands that cattle imported for immediate slaughter are almost always slaughtered the day they arrive in the United States based on its experience in the regulation of U.S. slaughter facilities. This makes sense as it is the most economically rational decision. The animals need to be fed and watered constantly merely to maintain their current weight, and for this reason often lose weight on export. There is simply no economic incentive for a slaughter facility to delay slaughtering an animal that they have already paid for (and whose price is largely driven by the animal's weight). As discussed, slaughter facilities have up to 14 days to slaughter the animal pursuant to rules originally set out in the 1950s,[21] but we have no reason to believe slaughter facilities would delay slaughtering fed animals they have purchased for more than a day or two.

11. (*United States*) Please specify the import sources and quantities of ground meat trimmings imported into the United States.

23. The United States imports lean beef trimmings for mixing with domestic product with higher fat content to produce ground beef. The United States estimates that 2013 imports were 406,226 tons with 84 percent of product coming from Australia and New Zealand because of the comparative leanness of the trimmings associated with pasture-based systems in these countries.

[21] *See* U.S. First Written 21.5 Submission, para. 78.

U.S. Beef Trim Imports in metric tons (product weight)

Country	2009	2010	2011	2012	2013
Australia	230,241	161,580	123,834	184,539	171,812
New Zealand	168,274	152,618	147,345	159,429	170,353
Nicaragua	24,553	27,721	32,749	29,128	26,616
Uruguay	18,085	12,539	9,259	17,106	18,533
Canada	10,427	10,854	11,128	8,355	6,821
Costa Rica	5,744	6,409	5,682	5,513	6,105
Honduras	1,541	1,142	4,764	5,056	3,041
Mexico	156	25	13	1,066	2,943
Chile	711	679	232	39	2
Total	459,731	373,566	335,006	410,230	406,226

Includes HS 0202305000

Source: U.S. Department of Commerce, Bureau of Census, via FAS Global Agricultural Trade System (www.fas.usda.gov/gats)

12. (*Mexico*) Please provide evidence for your argument that "the great majority of [Mexican] cattle will end up in products or are destined for market segments that are not subject to the labelling requirements." (Mexico's opening statement, para. 7).

13. (*United States*) Please provide evidence and examples of US consumer demand, and willingness to pay, for COOL information with respect to (i) muscle cuts; (ii) ground meat; (iii) meat products served in food service establishments; (iv) small retailers not covered by the amended COOL measure; and (v) meat in processed food items. Please elaborate on any difference in consumer demand for COOL information under these five categories, and on the reasons for such differences.

24. As an initial matter, the United States appreciates that the question distinguishes between consumer demand and consumer willingness to pay since the United States has in previous submissions articulated a clear distinction between them.[22] In fact, there may be many instances

[22] *See, e.g.*, U.S. Responses to the Original Panel's Questions, question No. 69, para. 122.

in which a consumer greatly desires certain information, but is not willing to pay more for a product that provides that information *vis-à-vis* a product that does not. This is often the space into which a government regulator steps in on the basis that it is sound public policy to provide such information, and as the original panel and Appellate Body agreed, the provision of country of origin information in these disputes is a legitimate regulatory objective.

25. With respect to consumer demand, the United States submitted extensive evidence that consumers support mandatory country of origin labeling for meat muscle cuts and ground meat (categories i and ii in the Panels' question) during the original panel proceedings, and it has provided more during these compliance proceedings. For example, at the compliance Panels' meeting, the United States provided a Consumer Federation of America study which found that 87 percent of U.S. consumers surveyed favored meat labels indicating the country or countries from where an animal was born, raised, and processed.[23] At the same time, the United States also provided two examples of comments by consumer groups in support of the amended COOL measure.[24] During the comment period on this measure, consumer groups and community organizations, on behalf of tens of thousands of individual consumers, expressed strong support for point-of-processing country of origin labels. In total, commenters submitted 396 comments in favor of the 2013 Proposed Rule that specifically mentioned improved consumer information as a reason for their support.[25]

26. The United States refers the Panels to similar types of evidence that the United States previously put on the record during the original panel proceedings, including consumer surveys,[26] comments by consumer organizations,[27] and comments by individuals.[28] This voluminous evidence demonstrates that consumers support mandatory country of origin information for meat muscle cuts and ground meat – categories i and ii in the Panels' question – and in many instances, it illustrates that these consumers strongly support labeling that defines origin with consideration to all of the countries in which an animal spent certain periods of its life (*i.e.*, where it was born, raised, and slaughtered).

27. Certain information that was submitted by the United States and complainants during the original proceedings may also suggest that U.S. consumers would have been pleased to have seen the COOL requirements extended beyond their current scope to include meat served in

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[23] Exh. US-46.

[24] Exh. US-47.

[25] All comments on the 2013 Proposed Rule are available at www.regulations.gov under Docket ID AMS-LS-13-0004-0001.

[26] *See, e.g.*, Exh. US-48; "New Poll Shows Consumers Overwhelming Support Country-of-Origin Labeling on Food," Public Citizen Press Release (June 20, 2005) (Orig. Exh. US-117) (Exh. US-68).

[27] *See, e.g.*, Letter from Consumer Federation of America to USDA (Aug. 20, 2007) (Orig. Exh. US-5) (Exh. US-69); Consumers Union letter to Congress (Feb. 26, 2007) (Orig. Exh. US-116) (Exh. US-70).

[28] *See, e.g.*, Consumers Union letter to Congress (Feb. 26, 2007) (Orig. Exh. US-116) (Exh. US-71), Comments submitted by Ron Krishner to USDA (July 2007) (Orig. Exh. US-124) (Exh. US-72); Comments submitted by Jennifer Walla to USDA (July 2007) (Orig. Exh. US-125) (Exh. US-73); Letter from Ross Vincent to FSIS (Oct. 2, 2001) (Orig. Exh. US-115) (Exh. US-74).

restaurants, at small retailers, and in processed foods – categories iii-v of the Panels' question – and there is no evidence on the record to suggest that consumers themselves have a different level of demand depending on where the meat is served. However, U.S. policymakers ultimately made the determination that the provision of such information in restaurants, by small retailers, and in all processed foods would cross the threshold for the overall level of cost that consumers and industry were willing to bear (for example, the United States and many other Members may find it advisable to limit the costs of regulation on small businesses as compared with larger ones). Accordingly, even if this information was and remains desired by consumers, the United States ultimately set the level at which it set out to fulfill its objective at a slightly lesser level, the prerogative of any regulator.

28. With respect to consumer willingness to pay, the United States does not consider this to be a relevant consideration with respect to the claims at issue in this dispute or the original proceedings for the reasons discussed above and in previous submissions. However, to the extent that such information is of interest to the Panels, the United States would refer the Panels to original Exhibit US-87, an academic paper providing an overview of thirteen studies on consumer demand for country of origin labeling. Studies by Umberger in 2002, 2003, 2005, and 2007 that are cited in this exhibit found that U.S. consumers value country of origin labeling and are willing to pay premiums for such information.[29] For example, in an Umberger and Loureiro 2007 study of U.S. consumer preferences with regard to country-of-origin labeling, the study found that consumers placed a "premium for country-of-origin information [which] was about 1.35 times higher than the premium for 'traceable to the farm' [information] and 2.7 times higher than for 'guaranteed tender' [information]"; and that consumers were willing to pay a premium (US$2.57/pound) for country-of-origin labeling.[30]

29. Furthermore, an Umberger study for Australia and New Zealand performed an overall review of studies concerning consumers' value of country of origin labeling and found that in a multitude of countries (including the United States) consumers' interest in country of origin labeling is "multi-dimensional," including a desire for more information about the source of origin of their meat, quality, and food safety concerns.[31]

30. The United States is not aware of any consumer willingness to pay studies that distinguish among the five categories identified in the Panels' question.

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[29] For example, Umberger's 2003 study found that U.S. consumers were willing to pay premiums of 38 percent and 58 percent for "Certified U.S." steaks and hamburgers respectively (in the Colorado sample), and 73 percent of U.S. consumers were willing to pay average premiums of 11 percent and 24 percent premiums to have steak and hamburger labelled with country-of-origin (in Colorado and Illinois sample). *See* Wendy J. Umberger, "County-of-origin labeling (CoOL) A review of relevant literature on Consumer Preferences, Understanding, Use and Willingness-to-Pay for CoOL of Food and Meat," Final Report Food Standards Australia New Zealand, September 2010, p. 10 (Exh. US-52) .

[30] Umberger (2010), pp. 20-22 (Exh. US-52).

[31] Umberger (2010), pp. 20-22 (Exh. US-52).

14. (*United States*) Please provide evidence and examples of US consumer demand, and willingness to pay, for COOL information based on substantial transformation and point of production (i.e. the place of birth, raising and slaughter).

31. As noted in response to question 13, studies on U.S. consumer demand and willingness to pay for country of origin labeling information have focused on preferences of U.S. consumers for labeling that specifies the country of origin for muscle cuts as related to points of production. This evidence indicates that U.S. consumers are interested in having labels provide more detailed information on each of these three production steps. When asked about this nearly half (47 percent) of consumers said that the label for meat should reflect the animal's complete history when raised in multiple countries. The United States has presented evidence that indicates that U.S. consumers prefer defining country of origin by means other than substantial transformation.[32]

15. (*all parties*) Please explain what type of evidence is relevant to show consumer demand for COOL information for the complainants' claims under the TBT Agreement.

32. The United States considers the evidence discussed in response to questions 13 and 14 to be probative of consumer demand.

33. The larger question is whether consumer demand is relevant to complainants' claims under the *Agreement on Technical Barriers to Trade* ("TBT Agreement"). In this Article 21.5 proceeding, we understand that complainants only consider evidence of consumer demand to be relevant to their Article 2.2 claims, in particular how those claims relate to the phrase "risks non-fulfilment would create."[33]

34. As discussed at the Panels' meeting, "risks non-fulfilment would create" is primarily a recognition that Members are to take into account such risks when deciding how to regulate, rather than forming an independent element of complainants' burden of proof.[34] To the extent that the phrase is relevant to the Panels' analysis, the phrase indicates that panels should be particularly cautious in evaluating the evidence where the risks non-fulfilment would create are particularly high. In particular, panels should be extremely thorough in their assessment of the evidence to ensure that an alternative measure would provide the same level of fulfillment as the Member's measure being examined.

35. But under no circumstances does the phrase mean what complainants say it means – that it is a window for panels to second guess the "importance" of the public policy the Member has

[32] Exhibit US-48.

[33] *See, e.g.*, Canada's First Written 21.5 Submission, para. 143; Mexico's First Written 21.5 Submission, para. 176.

[34] *See US – COOL (AB)*, para. 379 (not listing "risks non-fulfilment would create" as a separate element that complainants must prove as part of their *prima facie* case).

chosen to pursue.[35] Specifically, complainants are wrong to argue that where "the risks non-fulfilment would create" are "low" a measure that makes a lesser contribution to the objective can prove the challenged measure inconsistent with Article 2.2. That can never be the case, as the United States has explained, consistent with the Appellate Body's analysis in *US – Tuna II (Mexico)*.[36]

36. Even under complainants' errant interpretation of the "risks non-fulfilment would create," such consumer surveys would be of limited value. More important is evidence as to how the U.S. Government views these risks, as it is the U.S. Government that is imposing these requirements. In this regard, providing information to consumers about the products they purchase is a key objective of the U.S. Government. And the evidence on the U.S. Government interest in providing such information is clear – Congress has passed legislation to implement a COOL regime in 2002 and 2008, and the current Administration has ensured it is implemented appropriately.

37. Of course, there are many situations where consumer demand for a labeling regime could conceivably be low – health warnings on tobacco products, nutrition labeling on food products – but that would not mean that government mandating the requirement would consider the risks non-fulfilment would create to be low. In other words, the fact that the consumers of particular products – cigarettes or high fat foods, for example – are not demanding the information being provided to them does not make a challenged measure more vulnerable to being inconsistent with Article 2.2 than it otherwise would be if those consumers were demanding the information. The same holds true for the amended COOL measure.

16. (*United States*) Mexico references the size of letters and use of abbreviations on labels under the amended COOL measure and the placement of country of origin information on meat packs. Please comment.

38. Mexico has criticized the size of the letters and use of abbreviations on the labels in its first two submissions.[37] The United States responded to these arguments in our first two

[35] *See also* U.S. Response to Panels' question No. 38.

[36] *See, e.g.*, U.S. Second Written 21.5 Submission, paras. 120-122; U.S. First Written 21.5 Submission, paras. 161, 170-171.

[37] Mexico's First Written 21.5 Submission, paras. 129, 131; Mexico's Second Written 21.5 Submission, para. 57.

submissions.[38] Then, at the Panels' meeting, Mexico appeared to add the location of the label on the package to its criticism without altering the substance of the argument itself.[39]

39. Briefly, Mexico (but not Canada) criticizes the amended COOL measure for allowing retailers a certain amount of flexibility in the content of the label (abbreviations and the use of "harvested" in lieu of "slaughtered"), size, and placement of the label. Mexico contends that the labels do not provide "information that is accessible by or intelligible to consumers."[40]

40. Mexico puts forward no evidence to support its claim as to what labels are (or are not) understandable to U.S. consumers, merely stating that Mexico "submits" that what it alleges is true.[41] As we have explained previously,[42] Mexico does not prove that the label is "unintelligible" to U.S. consumers by merely "submit[ting]" that what it says is true. Mexico puts forward *no* evidence to suggest what is and what is not intelligible to the U.S. consumer. Mexico does not establish a *prima facie* case by merely making bare allegations unsupported by any evidence.[43]

41. Moreover, Mexico makes no claim that the label affixed to B or C meat is *les*s intelligible than the label affixed to A meat, and thus, its claim does not establish that the regulatory distinctions between A, B, and C category meat lack "even-handedness." Indeed, Mexico and the United States agree that a "single label" is now used to provide origin information regarding A, B, and C category COOL-labelled meat.[44] Accordingly, Mexico appears to concede that the design and application of the label itself is even-handed, and any further argument on this issue appears to be entirely irrelevant to its own claim.[45]

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[38] U.S. First Written 21.5 Submission, para. 69; U.S. Second Written 21.5 Submission, paras. 41-43; *see also* 2013 Final Rule, 78 Fed. Reg. at 31,369 (Exh. CDA-1) ("In terms of using labels and stickers to provide the origin information, the Agency recognizes that there is limited space to include the specific location information for each production step. Therefore, under this final rule, abbreviations for the production steps are permitted as long as the information can be clearly understood by consumers. For example, consumers would likely understand 'brn' as meaning 'born'; 'htchd' as meaning 'hatched'; 'raisd' as meaning 'raised'; 'slghtrd' as meaning 'slaughtered' or 'hrvstd' as meaning 'harvested.'").

[39] Mexico's Opening Statement at the Panels' meeting, para. 15.

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

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

[42] U.S. Second Written 21.5 Submission, para. 42.

[43] *See, e.g., US – Wool Shirts and Blouses (AB)*, p. 14 ("[W]e find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof.").

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

[45] U.S. Second Written 21.5 Submission, para. 42.

17. (*United States*) Please identify the various industry and consumer groups involved in the US domestic legal challenge against the 2013 Final Rule, and their positions in that litigation.

42. The domestic legal challenge of the 2013 Final Rule is summarized in the decision of the U.S. District Court for the District of Columbia (hereinafter "D.C. District Court").[46]

43. On July 8, 2013, a group of U.S., Canadian, and Mexican industry stakeholders challenged the 2013 Final Rule in the D.C. Federal Court in *American Meat Institute, et al. v. U.S. Department of Agriculture, et al.* (hereinafter "AMI v. USDA").[47] Other interested stakeholders joined the case as "defendant-intervenors."[48]

44. Plaintiffs put forward three claims on the merits and requested the D.C. District Court to preliminarily enjoin the 2013 Final Rule pending an examination of the merits of the case. As noted in the U.S. First 21.5 Submission, it is well established in U.S. law that a party seeking a preliminary injunction "must establish that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest.'"[49] As such, the D.C. District Court addressed the merits of plaintiffs' claims in examining plaintiffs' request for a preliminary injunction.

45. First, plaintiffs have alleged that the 2013 Final Rule violated their right to "free speech" as guaranteed under the U.S. Constitution under the theory that the 2013 Final Rule impermissibly "compel[s] them to speak when they would rather not."[50] USDA responded by asserting that the government may regulate speech where the government has a direct or substantial interest, such as combating misleading labels and consumer confusion.[51] Defendant-intervenors similarly contended that the COOL statute, evident from its legislative history and

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[46] *AMI v. USDA*, No. 13-CV-1033 (D.D.C. Sept. 11, 2013) (mem. op.) ("D.C. Court PI Opinion") (Exh. US-4); *see also* U.S. First Written 21.5 Submission, paras. 34-38 (summarizing opinion).

[47] The plaintiffs include American Meat Institute, the American Association of Meat Processors, the Canadian Cattlemen's Association, the Canadian Pork Council, the National Cattlemen's Beef Association, the National Pork Producers Council, the North American Meat Association, and the Southwest Meat Association; the Confederación Nacional de Organizaciones Ganaderas was added as a plaintiff through an amended complaint.

[48] The following consumer advocacy groups and meat industry trade groups were granted defendant-intervenor status by the Court: The United States Cattlemen's Association, the National Farmers Union, the American Sheep Industry Association, and the Consumer Federation of America. Additionally, Food & Water Watch, Inc., the South Dakota Stockgrowers Association, the Western Organization of Resource Councils, and the Ranchers Cattlemen Action Legal Fund, United Stockgrowers of America, have also requested defendant-intervenor status, but the Court has not yet ruled on this motion. In addition to these groups, the following groups filed *amici curiae* brief before the D.C. Court of Appeals in support of the D.C. District Court's denial of plaintiffs preliminary injunction: Humane Society of the United States, the Organization for Competitive Markets, United Farm Workers of America, the American Grassfed Association, Fulton Farms, Fox Hollow Farm, and Marshy Meadows Farm.

[49] D.C. Court PI Opinion, at 8 (Exh. US-4).

[50] D.C. Court PI Opinion, at 9-10 (Exh. US-4).

[51] D.C. Court PI Opinion, at 10, 14 (Exh. US-4).

public comments, was intended to prevent consumer confusion in the marketplace.[52] The Court held that the 2013 Final Rule mandates "purely factual and uncontroversial disclosures," and the rule targets consumer deception in disclosing production steps.[53] As such, the Court held that plaintiffs' claim is unlikely to succeed on the merits.[54] Plaintiffs have appealed the D.C. District Court's holding on this point.

46. Second, plaintiffs have alleged that 2013 Final Rule is contrary to the COOL statute because the 2013 Final Rule's required born, raised and slaughtered label exceeds the agency's authority under the COOL statute, and because the rule eliminates commingling.[55] USDA and defendant-intervenors argued that the agency's actions are entitled to deference because the COOL statute does not clearly prohibit regulations that require more detailed labeling and that AMS is authorized to promulgate regulations that further the legislatures intent to provide consumers more specific country-of-origin information, which the commingling ban furthers.[56] The Court held that the COOL statute permits the agency to require point-of-productiopn labeling (born, raised, and slaughtered labeling).[57] As to commingling, the D.C. District Court held that the commingling flexibility was a creation of USDA, not Congress, and USDA does not act contrary to the statute by eliminating its own creation.[58] Accordingly, the D.C. District Court held that plaintiffs' second claim was unlikely to succeed on the merits.[59] Plaintiffs have appealed the D.C. District Court's holding on this point.

47. Third, plaintiffs have alleged that the 2013 Final Rule is "arbitrary and capricious," and therefore inconsistent with U.S. administrative law as the rule fails to achieve the stated goal of providing accurate country-of-origin information to consumers.[60] USDA and defendant-intervenors argued that the 2013 Final Rule is rationally related to providing more accurate information to consumers, and therefore consistent with U.S. administrative law.[61] The Court concluded that the plaintiffs' claim was unlikely to succeed on the merits as the Final Rule was generally designed to achieve its stated purpose (of providing more information to consumers) and had a rational connection to the agency's goal.[62] Plaintiffs have not appealed the D.C. District Court's holding on this point.

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[52] D.C. Court PI Opinion, at 14 (Exh. US-4).

[53] D.C. Court PI Opinion, at 14-16 (Exh. US-4).

[54] D.C. Court PI Opinion, at 19 (Exh. US-4).

[55] D.C. Court PI Opinion, at 19 (Exh. US-4).

[56] D.C. Court PI Opinion, at 19 (Exh. US-4).

[57] D.C. Court PI Opinion, at 31 (Exh. US-4).

[58] D.C. Court PI Opinion, at 34 (Exh. US-4).

[59] D.C. Court PI Opinion, at 46-47 (Exh. US-4).

[60] D.C. Court PI Opinion, at 47-48 (Exh. US-4).

[61] D.C. Court PI Opinion, at 48 (Exh. US-4).

[62] D.C. Court PI Opinion, at 49-50 (Exh. US-4).

48. The D.C. District Court ultimately denied plaintiffs' motion for a preliminary injunction, holding that plaintiffs had failed to show a likelihood of success on the merits for any of their three claims or that they had would suffer "irreparable harm" in the absence of an injunction, and that the public interest factor weighed in favor of the defendants.[63]

49. Plaintiffs have appealed various findings of the D.C. District Court to the D.C. Court of Appeals. Oral argument took place on January 9, 2014, and that appeal is pending as of the date of this submission. As noted previously, the domestic litigation has no bearing on the existence or content of the 2013 Final Rule.[64]

Article 2.1 of the TBT Agreement

18. (*United States*) In what respects does the amended COOL measure lessen or modify any detrimental impact on foreign livestock found in the original proceedings?

50. The DSB recommendations and rulings found that the original COOL measure breached Article 2.1 of the TBT Agreement because "its recordkeeping and verification requirements impose a disproportionate burden on upstream producers and processors, because the level of information conveyed to consumers through the mandatory labelling requirements is far less detailed and accurate than the information required to be tracked and transmitted by these producers and processors."[65] And it was the recordkeeping and verification requirements regarding the A, B, and C categories that resulted in the original COOL measure having a detrimental impact on the competitive opportunities of imported livestock.[66]

51. As a result, to comply with the DSB recommendations and rulings, the United States could either remove the detrimental impact on imports *or* ensure that any detrimental impact stems exclusively from a legitimate regulatory distinction. The 2013 Final Rule implements the second option – it addresses the DSB recommendations and rulings by ensuring that any detrimental impact stems exclusively from a legitimate regulatory distinction. In this sense, the 2013 Final Rule is also directly responsive to the Appellate Body's critique regarding the "disconnect" between the information collected and provided. Now, all of the COOL labels on muscle cuts of meat provide information on where the animal from which the meat was derived was born, raised, and slaughtered – the exact same information that upstream processors have been required to collect all along.

52. At the same time, complainants are incorrect in arguing that the 2013 Final Rule increases any detrimental impact on imports. First, the 2013 Final Rule did not alter the legal requirements that are relevant to any detrimental impact – *i.e.*, the recordkeeping and verification requirements regarding the A, B, and C categories remain the same.[67] Second, the market forces

[63] D.C. Court PI Opinion, at 19, 47, 48, 62, 75 (Exh. US-4).

[64] U.S. First Written 21.5 Submission, para. 34.

[65] *US – COOL (AB)*, para. 349.

[66] *US – COOL (AB)*, para. 341.

[67] *US – COOL (AB)*, para. 341.

found to exist during the original dispute – *i.e.*, the vast majority of beef sold at retail is produced from animals born, raised, and slaughtered in the U.S. – have also not changed in the interim time period.[68]

53. Complainants are incorrect in alleging that the elimination of the commingling flexibility greatly exacerbates the detrimental impact.[69] As we have previously discussed, USDA allowed commingling to lessen the adjustment costs on industry in complying with the 2009 Final Rule. To show that the elimination of commingling increased the detrimental impact, however, complainants would need to prove at least: (1) which companies were actually making use of the commingling flexibility; (2) whether *those companies* have changed their purchasing policies to the detriment of Canadian and Mexican livestock *because* commingling has been eliminated ; and (3) that these changes in purchasing policies are significant such that the detrimental impact increases for Canadian and Mexican suppliers as a whole. Complainants have made no such showing in relation to any of these three issues. And in fact, it is worth recalling that during the original Panel proceedings, complainants argued that companies were not making any meaningful use of commingling. That is, they consistently and forcefully downplayed the relevance and utility of the commingling provisions altogether.

54. In the U.S. First Written 21.5 Submission, the United States explained that only three beef processors – Dallas City Packing of Texas, Agri Beef of Washington, and FPL Food of Georgia – stated that they commingle different origin cattle in response to USDA's request for comment on the use of commingling in the 2013 Proposed Rule.[70] No pork processors stated they were commingling in response to the request. Complainants have made no showing that these three companies, or any companies who were previously commingling, have actually made changes to their purchasing of B or C animals to the detriment of Canadian and Mexican suppliers because commingling has been eliminated. Nor have they shown or that any change in policy has been so significant that it could reasonable be said to worsen the detrimental impact for Canadian and Mexican suppliers as a whole.

55. Accordingly, there is no evidence showing, and complainants have failed to prove, that the 2013 Final Rule worsens any detrimental impact already found to exist as a result of the original COOL measure.

19. (*all parties*) Does the incentive to rely exclusively on domestic livestock change under the 2013 Final Rule?

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[68] *US – COOL (AB)*, para. 287.

[69] Canada's First Written 21.5 Submission, para. 48; Canada's Second Written 21.5 Submission, para. 14; Mexico's First Written 21.5 Submission, para. 172; Mexico's Second Written 21.5 Submission, para. 29.

[70] *See* U.S. First Written 21.5 Submission, paras. 29-30 (citing Comments of Dallas City Packing on 2013 Proposed Rule (Exh. CDA-63); Comments of Agri Beef on 2013 Proposed Rule (Exh. CDA-13); Comments of FPL Food on 2013 Proposed Rule (Exh. CDA-32)); *see also* D.C. Court PI Opinion, at n.33 (Exh. US-4) ("The current record is not clear regarding the number of packing companies that commingle livestock.").

56. The complainants have provided no evidence that the costs related to meat from animals of different origins increased under the amended rule, such as quantification of specific costs of handling such animals, and instead have provided only conclusory statements of processors related to their alleged purchasing decisions. Therefore, there is no evidence in this proceeding of any increased incentive to rely exclusively on domestic livestock under the amended COOL measure. As noted previously, the record-keeping requirements of the amended measure are the same for meat from animals of any origin. The amended rule refers to records maintained in the ordinary course of business, in either electronic or hard copy formats, and these same requirements apply throughout the distribution chain to covered retailers regardless of the origin of the meat. (7 C.F.R. § 65.500.) Therefore, meat sold from animals slaughtered in establishments handling exclusively domestic livestock would bear the same record-keeping requirements and costs through the distribution chain as meat sold from mixed origin animals. The costs that may differ according to the origin of the animal would be those related to identification of animals of different origin (whether through animal ID, ear-tagging, physical segregation, or other means) at the time of slaughter. As noted, there is no evidence in this proceeding of the level of any such costs at the slaughterhouse or how and to what extent they could have increased under the amended rule.

20. (*United States*) Please explain the relationship between the recordkeeping requirements and the information on labels under the amended COOL measure. To the extent that the amended COOL measure prescribes more detailed COOL information on muscle cut labels (point of production labelling), does it also entail increased record-keeping requirements?

57. The 2009 Final Rule required slaughter facilities to possess records that are necessary to substantiate origin claims, regardless of the origin category. The 2013 Final Rule *did not* amend these requirements. For both U.S. origin animals and Mexican and Canadian born animals, producer affidavits are sufficient to convey this information, and no additional records are required. Likewise, if the animals are part of an official identification system, no additional records are required.

58. What the 2013 Final Rule did do was to require that consumers be provided with the information that was being collected and retained by entities in the supply chain. Further, by eliminating the commingling flexibility, the 2013 Final Rule ensured that the origin information that is affixed to B and C meat is as accurate and meaningful as the information affixed to A meat.

59. Thus, the 2013 Final Rule, by eliminating commingling and changing the content of the label affixed to A, B, and C meat, increased the level of information to consumers under the COOL measure while not increasing the recordkeeping and verification requirements for industry.[71] In light of these facts, the information provided is now "commensurate" with any

[71] *See* U.S. Second Written 21.5 Submission, para. 51; U.S. First Written 21.5 Submission, para. 24; *see also* 2013 Final Rule, 2013 Final Rule, 78 Fed. Reg. at 31,368 (Exh. CDA-1) ("Under this final rule, all origin designations for muscle cut covered commodities slaughtered in the United States must specify the production steps of birth, raising, and slaughter of the animal from which the meat is derived that took place in each country listed on

burden the measure causes to the U.S. meat industry through the recordkeeping and verification requirements.[72]

21. (*Mexico*) Please elaborate on your reference to "the arbitrariness of the trace-back prohibition to constitute evidence that the Amended COOL Measure is a disguised restriction on international trade and not even-handed". (Mexico's second written submission, para. 20).

22. (*Mexico*) Please explain why "the design of the relevant regulatory distinctions in the Amended COOL Measure" serves "to override the positive impression for beef products with USDA Prime, Choice or Select label". (Mexico's opening statement, para. 32).

23. (*all parties and European Union*) The European Union points out that the United States acknowledges the asymmetry in cost distribution under the amended COOL measure. At the same time, the European Union argues that the Panel should not adopt a line of reasoning that would "stifle completely" the legitimate exercise of regulatory autonomy. (European Union's third-party statement, paras. 17-18). Does the degree of asymmetry in the distribution of costs have any bearing on the legitimacy of regulatory distinctions? How would you draw the boundaries for the legitimate exercise of regulatory autonomy?

60. We agree with the European Union ("EU") that the crux of complainants' *de facto* national treatment claims (under both Article 2.1 and Article III:4) relies on the assertion that the amended COOL measure results in an asymmetry of costs and this, alone, is sufficient to establish a breach. Like the EU, we consider complainant's theory to be unfounded.

61. As we discussed previously, complainants seek to significantly undermine the Members' ability to regulate in the public interest by rendering a whole host of measures discriminatory that have never been considered discriminatory previously.[73] Rather, the national treatment obligation contained in the TBT Agreement and the GATT 1994 allow Members to apply technical regulations that draw legitimate distinctions between products. Drawing such distinctions may result in different impacts to different producers serving that market. Some standards may make it more costly for some producers to continue to do business in that market (creating this "asymmetry of costs" in Mexico's phraseology), while other producers may not find it more costly or may not find it more costly to the same degree. In any event, a national treatment (or MFN) claim cannot stand on these facts alone. Rather, a panel must determine whether this detrimental impact stems from legitimate regulatory distinctions.

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the origin designation. The requirement to include this information applies equally to all muscle cut covered commodities derived from animals slaughtered in the United States. This requirement will provide consumers with more specific information on which to base their purchasing decisions without imposing additional recordkeeping requirements on industry.").

[72] *US – COOL (AB)*, para. 343.

[73] *See* U.S. Second Written 21.5 Submission, paras. 85-87.

62. In the U.S. Second Written 21.5 Submission, we used Canada's organics measure to illustrate our point.[74] Briefly, that measure sets out certain standards for what type of chemicals and other substances can be present for the product to still be labeled "organic." The measure declares that it is "deceptive and misleading" to label "organic" foodstuffs that exceed these stated residue limits. Yet the fact that a particular Member's food product does not generally satisfy these standards, while a like product from another Member satisfies those standards, does not, alone, establish a breach. The question rather is whether Canada's organics measure draws legitimate distinctions between like products (*e.g.*, organic broccoli versus non-organic broccoli).

63. If, for example, distinctions between the standard which one Member can satisfy and the other cannot satisfy are entirely arbitrary, the detrimental impact on the product cannot be said to stem exclusively from legitimate, even-handed regulatory distinctions. Further, evidence that the standard was set in order to prevent imports from a particular Member will likely be found inconsistent with national treatment or MFN. In any event, there must be some analysis beyond merely the trade impacts of the measure. Otherwise, the Canadian measure would be vulnerable to challenge even if it was entirely correct that marketing a non-qualifying foodstuff as "organic" *would actually be deceptive*. Such a situation would greatly undermine a Member's ability to apply an organics regime like the one Canada has, and any number of other regimes, as discussed in the U.S. Second Written 21.5 Submission.[75]

64. The *degree* of trade restrictiveness (or degree of "asymmetry of costs" in Mexico's phraseology) should not have a bearing on whether the regulatory distinctions that the measure makes are legitimate or not. For example, a measure that results in a sales ban (such as the measures challenged in *US – Clove Cigarettes* and *EC – Seal Products*) where the asymmetry between the impact on domestic products and like imported products is particularly acute, is not less likely to stem exclusively from legitimate regulatory distinctions than where the measure allows trade to continue to flow (such as the measure challenged in this dispute). A panel must examine the even-handedness of the relevant distinctions in all cases. We do not read the Appellate Body's reports in *US – COOL*, *US – Tuna II (Mexico)*, and *US – Clove Cigarettes* as setting out a correlation between the degree of trade-restrictiveness (or degree of "cost asymmetry") and the legitimate regulatory distinction analysis.

65. The boundaries for the legitimate exercise of regulatory autonomy can be found in the TBT Agreement, as discussed in previous Appellate Body interpretations of that Agreement. The TBT Agreement makes clear that Members may regulate in pursuit of legitimate governmental objectives even if such regulations present uneven obstacles to trade. The question then becomes whether that obstacle to trade for some Members (but not others) – the detrimental impact – stems exclusively from legitimate regulatory distinctions. In other words, the TBT

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

[75] *See* U.S. Second Written 21.5 Submission, para. 85; Exh. US-35.

Agreement acknowledges the autonomy of the Member to regulate, regardless of the impact on trade, as long as it does so by drawing legitimate regulatory distinctions.[76]

66. The referenced portion of the EU's oral statement also points out the problems that would arise from the approach advocated by complainants in terms of the MFN obligation under Article 2.1 of the TBT Agreement and Article I of the GATT 1994. According to complainants' approach, where the costs associated with a measure would not be the same for different Members, that difference in costs would necessarily mean the measure breaches the MFN obligation.

67. For example, under complainants' approach, if Member A adopts a measure that results in costs for products of Member X that are 10 percent higher than the costs for products of Member Y, then that alone would be sufficient to demonstrate a *de facto* breach of the MFN obligation. Not only is the Member adopting a measure unlikely to have the information necessary to know the associated costs for producers in other Members, it could not be that the Member adopting the measure could know precisely the costs associated with each other Member. And the Member adopting the measure would not be in control of the difference in costs. As a result, according to the approach of complainants, the Member would not be able to adopt the measure consistent with its MFN obligations.

68. Yet it cannot be a correct interpretation of the covered agreements that Members are prohibited from adopting a measure unless they can be certain that the costs associated with the measure are currently identical for all producers of every other Member *and* that those costs *will remain* identical. (This is because under complainants' approach, as soon as the costs in one

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[76] In this regard, the Panels' national treatment analysis must be limited to the regulatory distinctions that cause the detrimental impact. And, again, Canada agrees with the United States on this point. It is only Mexico that claims that there are no limits to the analysis. *See* Canada's Appellant Submission in *EC – Seal Products*, paras. 93-94, where Canada argues that:

> "93. The Panel *erred* in applying the even-handedness element of the [legitimate regulatory distinction (LRD)] test by focussing on comparing different Inuit hunts *rather than on the regulatory distinction that causes the detrimental impact*. The Panel determined that the regulatory distinction drawn by the measure is between conforming and non-conforming products. *This was the distinction that was found to cause the detrimental impact and thus what had to be examined under the LRD test*. The type of seal hunt from which a seal product is derived determines whether that product is a conforming product under the EU Seal Regime or not.
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> 94. Under the LRD test, the Appellate Body has focussed *only* on the 'distinction that accounts for the detrimental impact on [imported] products as compared to [domestic] products'. [citing Appellate Body Report, *US – Tuna II (Mexico)*, para. 286.] The Appellate Body in *US – COOL* began its analysis under the LRD test by first identifying the regulatory distinction that causes the detrimental impact. [citing Appellate Body Report, *US – COOL*, para. 341.] The Appellate Body in *US – Clove Cigarettes* also centred its analysis on the regulatory distinction that caused the detrimental impact. [citing Appellate Body Report, *US – Clove Cigarettes*, para. 215.] In the latter dispute, similar to the EU Seal Regime, where the distinction results in an exemption for certain products from a ban, the Appellate Body found the regulatory distinction that causes the detrimental impact to be between the ban that applied to clove cigarettes and the exemption from the ban that applied to menthol-flavoured cigarettes."
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> Emphasis added and in original. Citations omitted except where indicated.

Member are no longer identical to those in every single other Member, the measure would become in breach of the MFN obligation.)

Article 2.2 of the TBT Agreement

Legal test

24. (*all parties*) In the following graph, X represents the challenged measure's trade restrictiveness and degree of contribution of a Member's hypothetical challenged measure. Please specify whether an Article 2.2 comparative analysis should approve a hypothetical, reasonably available alternative measure that falls anywhere in quadrants A, B, C or D, or at any specific point on the blue or green dotted lines. What role, if any, do the "risks non-fulfilment would create" play in this context? Does the placement of X influence the answer?

69. As an initial matter, the graph does not account for whether the measure is reasonably available or not and therefore it would be inaccurate to say whether an Article 2.2 analysis "should approve" of a hypothetical based only on the information on the graph. Rather, we would think it would be more appropriate to frame the question as in what quadrants would a measure fall that would satisfy two of the three elements of the analysis.[77]

70. As we have discussed, we believe that it is plain that the TBT Agreement allows the Member "to take measures at the levels it considers appropriate."[78] Applying that principle to the graph, the Member has discretion as to where to place the X on the horizontal axis. Once the Member places the X on the horizontal axis, Article 2.2 asks the question whether the Member could have chosen an alternative at that spot on the horizontal axis that was significantly less trade restrictive (*i.e.*, lower on the vertical axis by more than a *de minimis* amount). If so, and that alternative is reasonably available to the respondent Member, then complainant proves its claim.

71. As to the quadrants, the alternative measure must be less trade restrictive, not more or equally trade restrictive. The United States does not consider that a measure that exists in either the A or B quadrants, or on the horizontal line extending from the X, would satisfy the element that the alternative is "less trade restrictive" than the challenged measure.

72. We would further note that we do not consider that a complainant can prove its claim with an argument that the alternative is less trade restrictive by some *de minimis* amount. To the extent that the Panels intend the blue box to set out a *de minimis* range, the United States considers that the alternative must be at or below the lower dotted horizontal line of the blue box.

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[77] *US – COOL (AB)*, para. 379 (stating that the complainant carries the burden of proving an alternative measure exists "that is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available").

[78] U.S. Second Written 21.5 Submission, para. 121; U.S. First Written 21.5 Submission, para. 158.

73. Further, and as noted above, the United States considers that it is up to the Member to decide where to place the X on the horizontal axis. As such, the United States does not consider that alternatives falling into quadrants A or C make an equivalent contribution to the objective and do not satisfy that element.

74. Accordingly, only alternatives falling inside quadrant D would satisfy these two elements, subject to the consideration regarding *de minimis* trade discussed above. Alternative measures that make an equivalent contribution would satisfy that element. As such, alternative measures that fall on or to the right of the vertical line that runs through the X would satisfy this element.

What role, if any, do the "risks non-fulfilment would create" play in this context?

75. The phrase "the risks non-fulfillment would create" reflects that an individual Member takes into account such risks when setting its level of fulfillment (*i.e.*, required degree of contribution). In this way, the phrase does not increase complainants' burden by creating a separate element for which complainants must set out a *prima facie* case. Likewise, the phrase does not lessen complainants' burden to prove that an alternative measure exists "that is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available,"[79] although complainants have argued repeatedly in this proceeding for such a lessening of their burden. The Appellate Body's report in *US – Tuna II (Mexico)* is quite clear on this point.[80]

76. If the phrase does play a role in the Panels' analysis, the phrase reinforces the proposition that where the risks would be particularly great, it would be even more important for a panel to be confident that the proposed alternative measure actually fulfills the objective at the level chosen by the responding Member. If it were otherwise, Article 2.2 would require a WTO panel to substitute its own sense of policy priorities for the judgment of each Member. This is what complainants urge – essentially, that the Panels should rank the provision of consumer information on origin to be a particularly unimportant objective (notwithstanding statements to the contrary by the United States) simply because that is how they view it within their own domestic priorities. Such a "low" ranking would allow the Panels to find, in complainants' view, that alternatives that provide no (or very little) origin information regarding where the animal was born, raised, and slaughtered prove that the amended COOL measure is inconsistent with Article 2.2. As we have discussed, complainants' view is incorrect, and is unsupported by the text of Article 2.2 or the Appellate Body's interpretation of that text.

Does the placement of the X influence the answer?

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[79] *US – COOL (AB)*, para. 379.

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

77. The United States does not consider that the placement of the X influences the role of the phrase "risks non-fulfilment would create." The "risks nonfulfillment would create" could be high or low irrespective of where the X is placed.

25. (*all parties*) Do you read Article 2.2 as establishing a correlation:

(i) between a technical regulation's trade restrictiveness and the risks of non-fulfilment of its objective(s)? (For instance, should more trade-restrictive measures be tolerated under Article 2.2 if the risks of non-fulfilment are higher?)

78. As discussed at the Panels' meeting, the United States is concerned that the parenthetical portion of this question implies that a WTO panel could make a finding of consistency without comparing the challenged measure to an alternative measure. The Appellate Body has been clear that the comparison need take place unless the challenged measure is not trade-restrictive or where it makes no contribution to its objective.[81] It is uncontested by the parties that neither is the case in this dispute. As such, one must make a comparison. Failure to do so amounts to legal error,[82] a point that Mexico continues, without any basis, to dispute.[83]

79. As a technical matter, the United States would distinguish between the concept of "risks of non-fulfillment" and the concept of "risks non-fulfillment would create." The concept of "risks of non-fulfillment" appears to refer to an evaluation of the likelihood that the legitimate objective would not be fulfilled and is not the concept used in the text of Article 2.2. The concept that is used in the text of Article 2.2 is "risks non-fulfillment would create" and refers to the risks that would arise if the legitimate objective is not fulfilled at the level chosen by the Member. The United States does not consider that there is a correlation between a technical regulation's trade restrictiveness and the risks non-fulfilment would create such that one must undertake a comparison of these and somehow determine that the particular risks non-fulfillment would create would result in some particular limit on the permissible degree of trade-restrictiveness. This comparison and implied limitation are nowhere in the agreed text of the Article 2.2. The alternative must be less trade restrictive than the challenged measure regardless of whether these risks are high or low.

(ii) between the risks of non-fulfilment and the degree of contribution to the objective?; and

80. Again, there is no correlation. As we have explained, the phrase reflects that each Member takes into account such risks when setting its level of fulfillment (*i.e.*, degree of contribution).

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[81] *US – COOL (AB)*, n.748.

[82] *US – COOL (AB)*, para. 379.

[83] *See* Mexico's First Written 21.5 Submission, paras. 177-178 (concluding that the amended COOL measure fails the "first step" of the Article 2.2 analysis and is therefore inconsistent with Article 2.2 without the need to conduct a comparison).

81. Complainants are wrong to argue that if these risks are low, the complainant need not prove that its alternative measure makes an equivalent contribution to the objective. Under no circumstances could such a measure prove a challenged measure inconsistent with Article 2.2. This is clear from the text of the TBT Agreement and the Appellate Body interpretation of that text, as discussed above and previously.[84]

82. Of course, no correlation exists in the other direction either. That is, when these risks are high the complainant need not prove that its alternative contributes at a greater degree to the objective. Equivalence will be sufficient in all cases.

(iii) between the degree of contribution and trade restrictiveness?

83. As discussed above, there is no correlation between the degree of contribution and trade restrictiveness. It is up to the Member to decide at what degree it wants a measure to contribute to its objective. Then, under Article 2.2, the question becomes whether a reasonably available alternative measure existed that was significantly less trade restrictive that made the same contribution.

84. Whether a Member requires a high degree of contribution or a lesser degree of contribution does not change the analysis under Article 2.2. In either case, the proposed alternative measure must be significantly less trade restrictive and reasonably available while making the required degree of contribution. We consider our position to be perfectly in line with the Appellate Body's report in *US – Tuna II (Mexico)*. Nowhere in that analysis does the Appellate Body indicate that such a correlation exists.

For any correlation that you see, please explain how it should be applied in the context of comparing the amended COOL measure and the complainants' four suggested alternatives.

85. As discussed above, no correlations exist.

26. (*all parties*) Do you read Article 2.2 as establishing a correlation between (a) a technical regulation's costs (to the extent distinct from trade restrictiveness); and (b) the risks of non-fulfilment of its objective(s)? Do you believe, for instance, that the higher the risks of non-fulfilment, the more costly measures should be tolerated under Article 2.2? If yes, how should this correlation be applied in the context of comparing of the amended COOL measure and the complainants' each suggested alternative?

86. As with other preceding questions, this question seems to assume that a measure could be found inconsistent with Article 2.2 without resort to a comparison with alternative measures. That is not the situation in this dispute. The United States has explained this in its response to question 25.i above.

[84] *See, e.g.*, U.S. Second Written 21.5 Submission, paras. 121-122.

87. Article 2.2 does not reference costs that are distinct from trade restrictiveness and these costs are not part of the obligation. However, such costs are relevant to whether the alternative measure is "reasonably available" to the United States. It appears uncontested by the parties that alternative measures that cause an "undue burden" in that they are prohibitively expensive are not "reasonably available" to the respondent Member.[85] Such alternatives do not prove a challenged measure inconsistent with Article 2.2.

88. The United States does not consider that there is a correlation between the phrase "risks non-fulfillment would create" and the complainants' burden to prove that the alternative measure is "reasonably available" to the United States. Complainants' must prove that the measure is "reasonably available," which includes whether the alternative measure would be prohibitively expensive (as well as where substantial technical difficulties exist), regardless of whether these risks are high or low.

27. (*China*) Do you consider that the reduction of trade flows is not a necessary condition for a measure to be seen as trade-restrictive in the context of Article 2.2?

28. (*China*) Do you consider that the provision of an 'equivalent' amount of origin information is the "only" indicator to be taken into account in assessing the degree of contribution to the objective?

29. (*Brazil*) Brazil argues in its analysis of Article 2.2 of the TBT Agreement that the changes in the amended COOL measure "must ensure that the same conditions of competition prevail between imported and national products". Please clarify to what extent, if any, this is connected to the phrase "the same conditions prevail" in the chapeau of Article XX of the GATT 1994.

30. (*all parties and Colombia*) Colombia argues that the Panel may apply a complex approach or a simple approach in assessing of the "more restrictive than necessary" standard. The complex approach would entail an examination of the degree of the measure's contribution to the legitimate objective, whereas a simple approach would entail examining whether a measure is a proportional and proper response to achieve an objective. (*all parties*) Please comment. (*Colombia*) Please elaborate, including with regard to your argument on "comity" (Colombia's third-party statement, para. 9).

89. The United States disagrees with the notion that there may be two possible analyses available to the Panels. Rather, it is clear based on past Appellate Body assessment of Article 2.2 that there is only one analysis available. That analysis is whether complainants have proved that at least one of their alternatives "is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available."[86] In order to determine whether

[85] *See* U.S. Second Written 21.5 Submission, para. 147; U.S. First Written 21.5 Submission, para. 162; *see also* Canada's Second Written 21.5 Submission, para. 89; Mexico's Second Written 21.5 Submission, para. 119.

[86] *US – COOL (AB)*, para. 379.

complainants have made such a showing, the Panels must determine what "is the degree of contribution to the objective that a measure *actually* achieves."[87] The Appellate Body was quite clear on this subject, stating that: "what a panel *is* required to do, under Article 2.2, is to assess the degree to which a Member's technical regulation, as adopted, written, and applied, contributes to the legitimate objective pursued by that Member."[88] Colombia's suggestion that these Panels may avoid making this examination by taking a "simpl[er]" route is thus in error.[89]

90. The United States also disagrees with any suggestion that the Article 2.2 analysis sets out a proportionality test. Article 2.2 does not mention proportionality and the Appellate Body has never interpreted the text as setting out a such test. Just the opposite is true. Article 2.2 requires panels to determine whether the Member could have taken a reasonably available, less trade restrictive alternative that makes an equivalent contribution to the objective that the challenged measure does. Any suggestion that these Panels may, in lieu of making this more narrow inquiry, make an intrusive and far-ranging judgment as to whether the amended COOL measure is effective public policy is simply wrong.[90]

31. (*Japan*) Japan suggests that a "stricter comparison" would be required between degrees of contribution of the amended COOL measure and alternative measures than suggested by the complainants. Please specify what this "stricter comparison" would entail.

32. (*all parties*) Is the degree of accuracy of label information required by an alternative measure a factor for assessing the reasonable availability of such a measure?

91. The degree of accuracy of label information is not a factor in assessing the reasonable availability of the measure in this case.

92. The degree of accuracy of an alternative label is an important factor in assessing whether the alternative makes an equivalent contribution to the legitimate objective. As noted previously, it is up to the United States to decide how much consumer information to require its retailers to provide, and the amended COOL measure provides a particular amount of information regarding where the animal is born, raised, and slaughtered. Alternatives that provide much less accurate information regarding where the animal was born, raised, and slaughtered do not make an equivalent contribution to the legitimate objective of the amended COOL measure.

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[87] *US – COOL (AB)*, para. 426 (emphasis in original).

[88] *US – COOL (AB)*, para. 390 (emphasis in original) (citing *US – Tuna II (Mexico) (AB)*, para. 316).

[89] As the United States has previously noted, what the amended COOL measure *actually* achieves is that it provides meaningful and accurate information on origin for muscle cuts sold at retail as to where the animal was born, raised, and slaughtered. That is, in fact, what the label for the A, B, and C categories states after all (*e.g.*, "Born in Mexico, Raised and Slaughtered in the U.S."). U.S. Second Written 21.5 Submission, para. 105;U.S. First Written 21.5 Submission, para. 160.

[90] *See, e.g.*, U.S. First Written 21.5 Submission, para. 140.

33. (*all parties*) What would be the *compliance* implications of any finding that there could be a less trade-restrictive, reasonably available alternative measure with an at least equivalent degree of contribution to the objective?

93. The compliance implications would be that one option for the responding Member to come into compliance would be to adopt the alternative that proved the inconsistency.

94. That said, the responding Member would not be required to adopt the proposed alternative. Members have discretion to choose how to come into compliance, and there could be other means that the Member may decide to use. Article 19.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") makes clear that a recommendation by a panel or the Appellate Body is simply a recommendation that the Member concerned bring its measure into conformity with the WTO Agreement, not a recommendation prescribing the specific way in which that must be done.

34. (*Mexico*) In what sense, if any, do you rely on Canada's Exhibit CDA-126 in the context of Article 2.2? Please elaborate on the US arguments regarding the lack of relevance of this study, in its current form, for Mexico.

35. (*all parties*) Please elaborate on a complainant's burden of proof in disputes brought on the same matter by two complainants against the same respondent. In particular, please address any implications of the timing of introducing arguments and evidence, including by reference. Please answer in regard to Questions 34 and 72.

95. The burden of proof in disputes brought by two complainants on the same matter, against the same respondent, should be borne by each complainant individually as Article 9 of the DSU provides.

96. Article 9 of the DSU provides for three situations that must be taken into account by the panels when multiple complainants are involved: (1) the panel must take into account "the rights of all Members" involved in the panel proceeding;[91] (2) the panel must "examine and present its findings to the DSB" in the same manner as parties would have enjoyed "had separate panels examined the complaints";[92] and (3) if more than one panel has been established "to examine the complaints related to the same matter" the panel "to the greatest extent possible" should attempt to "harmonize" the panel process.[93]

97. Taken as a whole, Article 9 of the DSU prescribes that in single or separate panels, with multiple complainants against the same respondent on the same matter, each complainant must meet their burden of proof as if they were going before the panels individually. This in fact applies to the current dispute where there are actually two separate panels, DS384 and DS386, which have been harmonized by the panels pursuant to Article 9.3 of the DSU.

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[91] Article 9.1 of the DSU.

[92] Article 9.2 of the DSU.

[93] Article 9.3 of the DSU.

98. For this reason, Mexico and Canada must individually meet their burden of proof in showing that the amended COOL measure is inconsistent with a covered agreement.

99. Furthermore, paragraph 7 of the Working Procedures of the Panels explicitly provides that in most instances factual evidence must be submitted by the parties "no later than during the substantive meeting."[94] Additionally, Article 12.4 of the DSU states "the panel shall provide *sufficient* time for the parties to the dispute to prepare their submissions." (emphasis added).

100. At the Panels' meeting, Mexico, for the first time, argued that it relies on Dr. Sumner's econometric analysis of Canada's livestock market as evidence that Mexico's third alternative is less trade restrictive as well as "adopting" Canada's fourth alternative as its own. Mexico further argued that it would input Mexican trade figures into Dr. Sumner's model at some later date, presumably for today's submission.

101. The United States respectfully requests the DS386 Panel to reject Mexico's new arguments or any new evidence going to Mexico's affirmative case that Mexico may submit following the Panels' meeting. USDA issued its final rule on May 23, 2014, and Mexico had a full five months to prepare its first submission. Mexico then had an additional three weeks to respond to the U.S. First Written Submission. Now Mexico argues, in essence, that its arguments is incomplete (it should have the benefit of the fourth alternative if Canada does), and its evidence is insufficient (it should be granted leave to prove the third and fourth alternatives are less trade restrictive with evidence Mexico has yet to manufacture). This "new factual evidence" that Mexico has proposed submitting is not in response to a panel question or in rebuttal to a U.S. argument.

102. Mexico's position is inconsistent with paragraph 7 of the Working Procedures of the Panel, and should be rejected on that basis. Moreover, even if Mexico puts forward evidence on March 7, 2014, the United States will only have a limited opportunity to respond. Commenting on responses to the Panels' questions is simply not a sufficient opportunity for the United States to fully respond to this evidence. As such, Mexico's submission of any evidence on March 7 (or later) does not provide "sufficient" time for the United States to respond pursuant to Article 12.4 of the DSU.

Risks non-fulfilment would create

36. (*all parties*) What are the relevant factors for assessing the risks of non-fulfilment for country-of-origin labelling?

103. Article 2.2 provides an open list of "relevant elements of consideration" for assessing the risks as non-fulfilment would create as "available scientific and technical information, related processing technology or intended end-uses of products." For country of origin labeling, the United States considers that no particular factor would necessarily be irrelevant. As noted above, we consider that consumer confidence and impact on consumer demand to be relevant as well as the U.S. Government's own actions in requiring this information be provided and its defense of

[94] Working Procedures of the Panels, para. 7 (Oct. 25, 2013).

challenges to this labelling regime both at the WTO and in U.S. Federal Court (as discussed in response to question 17).

37. (*all parties*) Once the risks of non-fulfilment of the amended COOL measure's objective are established in a relational analysis under Article 2.2, how should they be taken into account in a comparative analysis of each suggested alternative? Does the risk of non-fulfilment remain the same for the Panel's analysis of the various alternative measures?

104. At the outset, we would note that the question appears to mis-paraphrase the text of Article 2.2. The exact wording of the text of Article 2.2 makes clear that the concept is about what could happen if the objective is not fulfilled at the level the Member has chosen to fulfill the objective.

105. As to the Panels' first question, the United States has explained in response to questions 24, 25, and 36 how the Panels should interpret the phrase. As to the Panels' second question, and as noted above, the United States considers that the risks non-fulfilment would create speaks to what would happen if the objective is not fulfilled at the level the Member has chosen to fulfill the objective. Therefore, it would appear to the United States that such risks would remain constant for purposes of the comparative analysis, and not vary depending on the particular alternative the Panels are considering at any one time. And this is further confirmed by the fact that, as explained above, any alternative must also fulfill the objective at an equivalent level in order to be considered as part of the Article 2.2 analysis.

Appropriate level of protection

38. (*all parties*) The preamble to the TBT Agreement states that "no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, *at the levels it considers appropriate*". (emphasis added) Are there any implications of different levels of protection sought for the degree of trade restrictiveness of the measure in the context of Article 2.2 (e.g. consumer information on toy safety, animal welfare, etc.)? Please provide any comments you may have on the European Union's argument in paragraphs 30-31 of its third-party statement.

106. The United States does not agree that there is any correlation between different levels of protection (or fulfillment) and the trade restrictiveness of the measure. As we have discussed above and previously, the sixth preambular recital (quoted in this question) makes clear that it is up to the Member to decide which objectives it wishes to pursue and to what degree it wishes to pursue them. A challenged measure is not inconsistent with Article 2.2 merely because it does not fulfill its legitimate objective at some certain level, as complainants unsuccessfully argued in the original dispute.[95]

[95] *See US – COOL (AB)*, para. 426.

107. Accordingly, a measure that pursues a particularly "important" legitimate objective at a high degree is no more or less vulnerable to an Article 2.2 challenge than a measure that pursues an "unimportant" legitimate objective at a low degree of contribution. In both cases the inquiry is the same – does an alternative measure exist "that is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available."[96] This is clear from the Appellate Body's guidance in both *US – COOL* and *US – Tuna II (Mexico)*.

108. In this regard, the United States concurs with the EU that complainants are in error when they seek to turn Article 2.2 into a vehicle for WTO panels to rank the "importance" of a Member's objective and to use such a ranking to find the challenged measure inconsistent with Article 2.2, a point the United States has made repeatedly. Such a role for panels is not part of the agreement of Members in the TBT Agreement and would "add to or diminish the rights and obligations provided in the covered agreements," contrary to Article 3.2 of the DSU. And complainants' approach should raise concerns with all Members, as it has for the EU, since complainants' approach would indeed be detrimental to the WTO systemically, and to the WTO dispute settlement system in particular.[97]

Costs

39. (*all parties*) What is the relevance of costs to an assessment of trade restrictiveness under Article 2.2?

109. As the United States has previously discussed,[98] the Appellate Body has noted that the term "trade restrictive" "means something having a limiting effect on trade."[99] Indeed, the Appellate Body noted, in particular, that what Article 2.2 disciplines is "trade-restrictive *effect*."[100] But that interpretation only makes sense when "trade restrictive" is understood to

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[96] *US – COOL (AB)*, para. 379.

[97] *See* EU's Third Party Oral Statement, para. 31 ("We would have a very genuine fear that if WTO judges would take it upon themselves to tell WTO Members how they are to generally rank their various political objectives, then that would be unsustainable and ultimately destructive to the interests of the dispute settlement systems and the WTO."); *see also* U.S. First Written 21.5 Submission, para. 140.

[98] *See* U.S. First Written 21.5 Submission, paras. 154-155; U.S. Second Written 21.5 Submission, para. 107.

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

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

refer to limiting trade effects, *i.e.*, limiting market access.[101] And past disputes involving claims of *de facto* discrimination in breach of national treatment obligations have involved whether a measure treats imported products differently and less favorably than like domestic products, for example whether there is an extra requirement that applies to imported products *de facto* or whether a requirement applies differently *de facto* to imported products.[102] The analysis has not concerned a comparison of the costs associated with a measure for producers in other Members and the costs for producers in the Member adopting the measure.

110. And the fact that Article 2.2 does not provide any guidance on how to conduct such a comparison further confirms that Article 2.2 is not concerned with such a comparison. In fact, there would be a number of difficult questions involved in any such comparison – for example, does one look only to average costs? The costs of the most efficient producers? The costs of the least efficient producers? The costs of the largest producers? Only the costs of those actually exporting? If Members had agreed to undertake an obligation based on costs, one would have expected Members to have then needed to address the issues of how to conduct such a comparison of costs.

111. Given this, the United States would expect that an analysis of whether an alternative is less trade restrictive than the challenged measure would focus on whether the alternative measure would provide expanded market access to the complainants' producers. This was the analysis that took place in both *US – Tuna II (Mexico)* and *EC – Seals Products* as discussed previously,[103] a point that complainants appear to concede. As such, it is not clear that "costs" – under whatever meaning complainants give that term – would be *per se* relevant to an assessment of trade restrictiveness, or, more precisely, whether an alternative measure is less trade restrictive than the challenged measure. Indeed, if Members had intended Article 2.2 to refer to no more "costly" than necessary, they would have used that term. The fact that they did not, and used the term "trade-restrictive" instead, indicates that "trade-restrictive" means something other than costs.

112. The term "costs" appears to be used in a number of different ways in this dispute.

113. First, there are the costs incurred by the U.S. industry to adjust to the amended COOL measure. These costs are fully explained in the regulatory impact analyses included in the 2009 and 2013 Final Rules. As discussed previously, USDA estimated that U.S. industry will incur somewhere between $19 and $76.3 million to adjust to producing the revised labels.[104]

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[101] As noted previously, and not disputed by complainants, when the original panel looked at "actual trade effects" of the original COOL measure, it looked at just this – what effects the original COOL measure had on Canadian and Mexican livestock exports to the United States. *See US – COOL (Panel)*, paras. 7.438-7.546.

[102] *See, e.g., DR – Cigarettes (AB)*, para. 94; *Mexico – Taxes on Soft Drinks (Panel)*, para. 8.119.

[103] *See* U.S. Second Written 21.5 Submission, para. 108.

[104] 2013 Final Rule, 78 Fed. Reg. at 31,373 (Exh. CDA-1) (noting, however, that USDA estimates that the actual costs will likely be closer to the lower end).

114. In this sense, we do not understand Mexico when it repeatedly alleged at the Panels' meeting the *entirety* of the "costs" of COOL falls on Canada and Mexico. That is simply not a true statement. Mexico's position is further undermined by the opposition to COOL by certain elements of the U.S. industry, and the decision of those same entities (led by the large slaughter facilities) to challenge the amended COOL measure in domestic court, as discussed in response to question 17.[105]

115. It is certainly conceivable that such costs to the domestic industry could be relevant to a trade restrictive analysis, but complainants would have to establish a causal nexus between a change in costs on the U.S. industry and a change in market access for Canadian and Mexican producers. Simply stating that the costs to U.S. industry were *x* or *y* would not prove that challenged measure was trade restrictive, nor would that establish that an alternative measure would be less trade restrictive. For purposes of complainants' third alternative and Canada's fourth alternative, the challenge would be to prove that the imposition of a multi-billion dollar rule (complainants have thus far failed to provide an estimate) on U.S. industry would mean increased market access for complainants' producers. For example, Canada would need to prove that imposing costs of a "farm to fork" traceability system on U.S. slaughter facilities would lead these slaughter facilities to purchase more C animals (and, presumably, at a better price) than the U.S. slaughter facilities do now under the amended COOL measure. Yet Canada has not *even alleged* that U.S. slaughter facilities would react in such a way, much less offered any evidence on this point.

116. Of course, the reason that complainants have failed to provide any evidence (or even make this argument) is that surely the opposite would occur. As the costs to U.S. slaughter facilities increase, these businesses will purchase fewer animals overall and thus will purchase fewer C animals. Complainants would prove their third alternative to be *more* trade restrictive, not less. And, of course, if the dramatic increase in costs leads to the closure of a particular slaughter facility that has been purchasing C animals, then that slaughter facility's purchase of C animals will be reduced to zero.

117. In this regard, it is again notable that while complainants have obviously worked very closely with U.S. industry in the preparation of their cases (relying on affidavits, etc.), complainants are unable to find even one entity in the U.S. beef industry that agrees with complainants' argument that a "farm to fork" traceability system will be less trade restrictive than the amended COOL measure. Indeed, one of the more vocal domestic opponents of the COOL program, the American Meat Institute ("AMI"), alleged in its comments on the 2013 Proposed Rule that "it is a virtual certainty" that the 2013 Final Rule would lead to plant closures.[106] As discussed previously, AMI and other COOL opponents are prone to

[105] *See also* U.S. First Written 21.5 Submission, paras. 34-38.

[106] *See* AMI Comments on the 2013 Proposed Rule (April 9, 2013) (Exh. CDA-23) ("Moreover, if the existing mandatory country of origin labeling (COOL) rules are amended as provided by the proposal there is a virtual certainty that several meat packing establishments will ultimately close because of the costs they will be forced to incur in order to implement the proposal's requirements.").

exaggeration,[107] and the United States is not aware of any plant closures resulting from the 2013 Final Rule taking effect. However, even Canada concedes that a "farm to fork" traceability system would lead to plant closures,[108] a point surely supported by AMI and other members of the U.S. industry, given their prognostications on the much more modest $19-76 million amended COOL measure. Canada utterly fails take account of its own concession in its less trade restrictive analysis.

118. Second, Canada refers to Dr. Sumner's calculation as producing a "minimum amount of compliance cost[]."[109] Canada appears to equate this term with "export revenue losses,"[110] rather than a "cost" *per se*.

119. Setting aside the obvious fact that Dr. Sumner's calculation is highly inflated, we do not understand how such a number is relevant to the analysis of whether the third and fourth alternatives are less trade restrictive than the amended COOL measure.

120. Canada does not prove this element by alleging that its producers have incurred a certain amount of "export revenue losses" under the original COOL measure. Again, the question before these Panels is not whether the amended COOL measure is "trade restrictive." That is not at issue in these compliance proceedings. The question is whether the third and fourth alternatives are *less* trade restrictive than the amended COOL measure is. And Canada puts forward no evidence at all on that side of the ledger.

121. As such, Canada is surely mistaken when it stated that "Dr. Sumner has demonstrated that a non-discriminatory alternative measure could not plausibly cause greater export losses than those caused even by the original COOL measure and would be far smaller than the losses under the amended COOL measure."[111] Dr. Sumner has, in fact, provided *zero* evidence as to the trade restrictiveness – or in Dr. Sumner's terms, the "export revenue losses" – Canadian producers would incur if the United States imposed a "farm to fork" traceability system. All Canada does is repeatedly assert that such an alternative could not "plausibly entail" such "costs."[112] But

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[107] *See* U.S. First Written 21.5 Submission, paras. 108-112; U.S. Second Written 21.5 Submission, para. 48 (*citing* Exh. US-29, Exh. US-30, Exh. US-31).

[108] Canada's Second Written 21.5 Submission, para. 136.

[109] Canada's Opening Statement at the Panels' meeting, para. 45 ("The $608 figure quoted by the United States is clearly stated by Dr. Sumner as the minimum amount of compliance costs that a non-discriminatory alternative measure would have to entail per head of cattle to generate an impact on trade equivalent to the impact of the original COOL measure.").

[110] Canada's Opening Statement at the Panels' meeting, para. 45. Canada also phrases the "cost" as "export losses in dollar amounts." *Id.* para. 42.

[111] Canada's Opening Statement at the Panels' meeting, para. 42.

[112] Canada's Second Written 21.5 Submission, para. 92; *id.* para. 95 ("Therefore, 'a non-discriminatory alternative measure could not plausibly reduce trade by as much as the original COOL measure did and the amended COOL measure is continuing to do.'") (quoting Dr. Sumner); *id.* para. 122 ("A trace-back system would be less trade-restrictive than the amended COOL measure because, first, it could not possibly entail costs that would have a greater impact on trade in livestock between Canada and the United States than the impact of the original COOL measure …"); *id.* para. 123 ("A trace-back system could not conceivably entail such additional costs."); *id.* para. 124

Canada does not prove its case by repeatedly asking the DS384 Panel to take a logical leap. Canada must prove its case with evidence, and on this point, Canada has none.[113] Canada fails to prove its third and fourth alternatives are less trade restrictive than the amended COOL measure.[114]

40. (*Canada*) Canada calculates the minimum trade-restrictive cost per imported livestock (Exhibit CDA-126), and argues that none of the four suggested alternatives would result in costs close to that level. Canada, please explain why the sum of any additional costs under each of the alternatives would not exceed the minimum trade-restrictive cost calculated in Exhibit CDA-126 or using any other method.

41. (*all parties*) Please comment on the issue of minimum trade-restrictive cost levels, and the relevance of this, if any, for an Article 2.2 analysis.

122. The United States refers the Panels to its response to question 39.

42. (*Canada and Mexico*) Canada, please respond to the United States' argument that "Canada provides no cost estimates" "[a]s to th[]e more expensive stages [of meat production] (slaughter and retail)". (United States' opening statement, para. 52). Mexico, please comment.

Ground meat

43. (*Canada and Mexico*) Please specify whether and, if yes, how the ground meat label should be taken into account in assessing the amended COOL measure's contribution to the objective.

44. (*Canada and Mexico*) Does your first suggested alternative measure cover ground meat? If yes, please compare the degrees of contribution and trade restrictiveness of the proposed first alternative and the amended COOL measure concerning ground meat.

45. (*Canada and Mexico*) Please explain whether your second alternative measure, in particular the suggested removal of the amended COOL measure's three main exemptions, would apply to ground meat. If not, please explain how the exemptions

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("The second and third stages could not possibly entail such costs."); Canada's Opening Statement at the Panels' meeting, para. 42 ("Using that approach, Dr. Sumner has demonstrated that a non-discriminatory alternative measure could not plausibly cause greater export losses than those caused even by the original COOL measure and would be far smaller than the losses under the amended COOL measure.")

[113] The same point, of course, is equally true of Mexico, which did not even ask the DS386 Panel to take such a logical leap until the Panels' meeting, and has yet to provide any evidence whatsoever on this point.

[114] *See, e.g., US – Wool Shirts and Blouses (AB)*, p. 14 ("[W]e find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof.").

would be removed in practice only for muscle cuts, and not for ground meat, under the second alternative measure.

Exemptions

46. (*Canada and Mexico*) Please specify how the removal of the amended COOL measure's three main exemptions would operate in practice under your first two suggested alternative measures. For instance, how would food service establishments label muscle cuts, as well as ground meat (to the extent the second alternative would apply to ground meat)?

47. (*Canada and Mexico*) How would the removal of the amended COOL measure's three main exemptions affect record-keeping, verification, and segregation costs for imported livestock under the first and second suggested alternative measures. Please explain for both the mandatory and the voluntary elements of the first alternative measure, and also in regard to (i) labels for muscle cuts from US-slaughtered animals, (ii) labels for muscle cuts from foreign-slaughtered animals; and (iii) ground meat.

48. (*United States*) New Zealand observes that "[w]ell-designed voluntary COOL can make an equivalent (or even better) contribution to the objective of providing consumers with information as to origin than a mandatory COOL regime that is peppered with exceptions." (New Zealand's third-party submission, para. 23). The United States affirms that the "U.S. industry strongly disagrees with the COOL program and will not voluntarily provide their consumers origin." Did the United States test this approach or any alternative approaches with the US industry in revising the 2009 Final Rule?

123. The United States did not formally "test" an alternative approach in the U.S. market during the regulatory process that the produced the 2013 Final Rule. The United States did not consider that providing a voluntary regulatory regime alongside the un-amended 2009 Final Rule would provide any additional information regarding where the animal was born, raised, and slaughtered.

124. The U.S. Administration, including USDA, did participate in multiple meetings with U.S. industry representatives during USDA's regulatory process. At no time did U.S. industry representatives ever indicate that a sizeable proportion of the U.S. meat industry would be willing to provide voluntary information regarding where the animal was born, raised, and slaughtered. Complainants put forward no evidence to the contrary in this proceeding. U.S. industry's position is entirely consistent with USDA experience with overseeing a voluntary program in the 1990s. Under that voluntary program, retailers did not readily provide more

general country of origin information on a consistent basis, much less information regarding where the animal was born, raised, and slaughtered.[115]

125. U.S. industry's unwillingness to voluntarily provide a point of production label at this time can also be seen the arguments made by plaintiffs in *AMI v. USDA*, as discussed in response to question 17. In that litigation, the U.S. stakeholders, led by the large slaughter facilities, contend that providing such information not only is illegal under U.S. administrative law, *but violates their Constitutional rights*. Plaintiffs are, of course, wrong in this regard, as the D.C. District Court has indicated.[116] However, we take plaintiffs at their word and do not doubt that their arguments reflect the deeply held beliefs of much of the U.S. industry. As such, there is a tension in thinking that U.S. industry would be willing to provide a label if only it were not required of them when they choose to challenge the requirement to provide a label today as inconsistent with the guarantees provided by the U.S. Constitution.

126. Finally, we would note that New Zealand's comments appear to reflect the principle, recognized explicitly in the TBT Agreement, that the Member may determine for itself what objectives to pursue and to what degree to purse those objectives. The fact that New Zealand has determined a voluntary system works best for New Zealand is absolutely within New Zealand's purview to decide. The United States has decided that a voluntary labeling regime would not be appropriate for the United States, and has thus implemented a mandatory one that requires a point of production labeling for muscle cuts sold at retail. There is nothing unusual or surprising that different Members have decided to implement different COOL programs based on the unique facts of their particular situations. The TBT Agreement explicitly contemplates these differences will occur throughout the membership, and the Member that imposes a mandatory technical regulation does not act inconsistently with Article 2.2 simply because another Member implements a voluntary regime.

Label D

49. (*Canada and Mexico*) To what extent would your second suggested alternative measure provide accurate and meaningful origin information in comparison with Label D (muscle cuts from foreign-slaughtered livestock) under the amended COOL measure?

50. (*Canada and Mexico*) What is the relevance, if any, of Label D under Articles 2.1 and 2.2 of the TBT Agreement, respectively?

First and second alternative measures

51. (*Canada and Mexico*) Please quantify the proportion of meat that would be labelled "Product of the U.S." (or some variant indicating only US origin) under your first

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[115] *See* U.S. First Written 21.5 Submission, para. 168 (citing U.S. Original First Written Submission, paras. 251-254; U.S. Original Second Written Submission, paras. 161-163).

[116] *See* U.S. Response to Panels' question No. 17.

alternative measure. What is the relevance, if any, of this for assessing the degree of contribution of this alternative measure?

52. (*Canada and Mexico*) Please confirm that the labels under your second alternative measure would not provide information on where an animal was born, raised or slaughtered. What is the relevance, if any, of this for assessing the degree of contribution of this alternative measure?

53. (*Canada and Mexico*) Canada argues that the second suggested alternative measure would be less trade-restrictive because "market participants throughout the meat supply chain would have sufficient flexibility to handle and process animals and muscle cuts derived therefrom according to market conditions and with little regard to the location of the production steps." (Canada's first written submission, para. 167). Please describe the expected labels under your second alternative measure, accounting for the possible countries of origin. Would the majority of meat end up carrying the same label? What is the relevance, if any, for assessing the degree of contribution of this alternative measure?

Third alternative measure

54. (*all parties*) Please explain any difference between "trace-back" and "traceability". *(Canada and Mexico)* Please explain the use of these terms in relation to your third proposed alternative.

127. The United States understands that the term "trace-back" refers to the activity of tracing a product back to a particular stage of its production cycle (sometimes the product's source, sometimes a later stage in the production stage). That activity is facilitated by having various data and infrastructure in place, which is known as a "traceability system." In this sense "trace-back" is a noun and "traceability" is an adjective.

128. Traceability systems vary widely in a number of different ways. Some systems track very precise information, tracking the vegetable to the exact area of a field where it was grown. Other systems are less precise, tracking products back to farms in a large geographical area, such as the area served by a single grain elevator.

129. Traceability systems also differ in scope of the production stages it covers. Some traceability systems are "farm to fork" – that is, the product sold at retail can be traced back to its original source. Other traceability systems only track from farm to a particular stage in the production process, such as slaughter. Yet other systems have even a narrower scope. For example, as discussed below in response to question 62, APHIS's traceability for the interstate movement of cattle covers from when the animal is 18 months old to the day of slaughter (approximately the 0-4 months of the typical beef cow's life).[117]

[117] *See* U.S. Response to Panels' question No. 6.

130. Traceability systems also differ in how the information is recorded and how readily that information is retrievable. Some systems will require the records to physically accompany the products or to be available through a national database such that the retailer has access to the production history of the particular product instantaneously. Other systems do not have such requirements, but rather rely on entities to keep records at various locations. Such systems allow the government to trace a product's history, but over a period of days, weeks, or months, depending on the system and the industry.

131. Although there are many differences between the traceability systems that countries have developed around the world, there is one general consistency – Members have generally adopted these systems to achieve objectives related to health and safety, not consumer information. Thus, it is inappropriate for Canada and Mexico to be asserting that the United States adopt this type of system here for an entirely different purpose.

132. In the context of this dispute, the United States has thus far been using the term "trace-back" in the sense that Canada and Mexico have been using it. That is, a "farm to fork" traceability system that tracks the location (or locations) where each production step occurred in such a manner such that the information is readily available to the consumer in the form of a label displayed at retail or otherwise.[118] That type of system is clearly what complainants intend as their third alternative as that is the only type of system that could provide consumer information on origin regarding where the animal was born, raised, and slaughtered.

133. However, we note that complainants use the term inconsistently. For example, Canada refers to Uruguay has having a "trace-back" system.[119] Yet Uruguay does not have a "farm to fork" traceability system.[120] Rather, Uruguay has set up a traceability system in order to gain access to the EU market.[121] The Uruguayan system allows the "trace back" of carcasses (or parts of carcasses) sent to the EU as to where the animal was born, raised, and slaughtered. Uruguay

[118] *See, e.g.*, Canada's Second Written 21.5 Submission, para. 120 ("Under a trace-back systems, the label could indicate the precise name and address of the farm, feedlot and processing facility where each of the production steps took place."); *id.* n.208 ("Instead of displaying all the information on the label, the label could instead contain a bar code that consumers could scan using a scanner made available in the store. Another possibility is to put an identification number on the label, as in Japan, to allow consumers to obtain the information through a website, which they could access in the store with their smartphones.").

[119] Canada's Second Written 21.5 Submission, para. 118.

[120] "SNIG [National Livestock Information System] does not yet mandate further traceability to consumers, although this is under consideration." (quoting Congressional Research Service, "Animal Identification and Traceability: Overview and Issues," p. 41 (Nov. 29, 2010) ("2010 CRS Report") (Exh. CDA-92)).

[121] "The purpose [of setting up the Animal Identification and Registration System] was to respond to observations made by the EU in consecutive audits regarding some aspects of the Uruguayan group identification system, and to take steps they requested toward a system offering greater guarantees." (Ministry of Livestock, Agriculture and Fishery, National Meat Institute, Inter-American Institute for Cooperation on Agriculture, Office in Uruguay, Horizontal Technical Cooperation Division, "Uruguay's Experience in Beef Cattle Traceability," December 2009, p. 5 (Exh. CDA-131)).

does not impose a system akin to the third alternative where meat sold in Uruguay is labeled as to where the animal was born, raised, and slaughtered.[122]

55. (*Canada and Mexico*) Please explain whether your alternative traceability measure would apply only to animals slaughtered in the United States.

56. (*Canada and Mexico*) For production steps occurring outside the United States, would your traceability alternative entail the same record-keeping and verification requirements as under the amended COOL measure? Please discuss this for the other alternatives, where relevant.

57. (*Canada and Mexico*) Please explain in more detail why the third pillar (animal movement) of the first stage of trace-back (from animal birth to arrival in the slaughterhouse) would be dispensable. What would be the specific implications of excluding this third pillar for comparing the complainants' suggested third alternative measure (trace-back) with the amended COOL measure?

58. (*Canada and Mexico*) To what extent do your existing trace-back schemes provide the livestock origin information required to meet US importers' recordkeeping and verification requirements under the amended COOL measure? Please describe any such information not provided under your existing trace-back scheme, and quantify the additional costs to provide that information.

59. (*Canada and Mexico*) Do the complainants' current or foreseen trace-back systems cover all cattle (and hogs for Canada) exported to the United States? In practice, how would origin information under the complainants' existing trace-back systems be transferred into the US trace-back system that the complainants suggest, including at and beyond the slaughterhouse phase? At what costs and to whom?

60. (*Canada and Mexico*) Do the complainants' current or foreseen trace-back systems cover production steps after delivery of the animals to the slaughterhouse? Please elaborate on the relevance, if any, of this for your Article 2.2 claims.

61. (*Canada and Mexico*) The European Union argues that trade restrictiveness should be assessed on the basis of the absolute impact of a regulation on imports, and not on the basis of the symmetry between costs for importers and domestic producers. Therefore, according to the European Union, a trace-back system could be more trade-restrictive because it could lead to higher costs for importers than the amended COOL measure. (European Union's third-party submission, para. 110). Please comment on the relevance of this for assessing the complainants' third alternative measure.

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[122] "The main objective of the SNIG to this day has been to guarantee the individual or group traceability of bovine cattle, from slaughterhouse to the farm of origin" and not through retail or to the ultimate consumer. (Uruguay's Experience in Beef Cattle Traceability, p.33 (Exh. CDA-131)).

62. (*all parties*) Please specify the current trace-back requirements in the United States, for instance for animal health purposes (FDA, APHIS, USDA, NAIS, etc.). What are the recordkeeping, segregation, and labelling requirements? What are the costs for the industry? How do these compliance costs compare to the costs of the amended COOL measure? Are there different requirements for Category B and C livestock relevant for costs and for providing COOL information?

134. The United States does not impose any "farm to fork" traceability systems on animal-derived products for animal health purpose or any other purpose covered by the WTO SPS Agreement.

135. USDA's Animal and Plant Health Inspection Service ("APHIS") does have a traceability system to track livestock when the animals move between states. This system was put in place on January 9, 2013, when APHIS issued its final rule on "Traceability for Livestock Moving Interstate" (hereinafter "Livestock Traceability Final Rule").[123] The purpose of the rule is to improve APHIS's ability to respond to animal disease issues,[124] but represents a significantly more modest approach to the problem than the previously contemplated National Animal Identification System ("NAIS"), which is discussed in response to question 63.

136. Under the Livestock Traceability Final Rule, cattle, hogs, and other animals that move inter-state are required to be officially identified and accompanied by an interstate certificate of veterinary inspection ("ICVI").[125] Animals that do not move interstate (*i.e.*, stay within the one state) are exempt from the requirements. For cattle, the animal must be identified at 18 months of age and must keep its identification until slaughter (*i.e.*, the last 0-4 months of a typical beef cow's life).[126] The identification requirements are provided in 86 C.F.R. § 86.4.[127]

137. The identification (whether by ear tag, tattoo, etc.) contains a unique number assigned to that animal. In the scenario where a particular animal (who has moved in interstate commerce) is showing signs of disease at a slaughter facility prior to slaughter, APHIS will be able to use that number to determine what state that animal was in when it received the identification at 18 months of age. APHIS can then "trace" the movement of that animal from that state to the

[123] 78 Fed. Reg. 2040 (Exh. CDA-93).

[124] 78 Fed. Reg. at 2040 (Exh. CDA-93) ("The purpose of the proposed rule was to improve our ability to trace livestock in the event that disease is found.").

[125] 78 Fed. Reg. at 2040 (Exh. CDA-93).

[126] There was significant opposition by the U.S. cattle industry to extending the traceability regime back to birth. These stakeholders argued that covering animals younger than 18 months would slow down the speed of commerce throughout the meat production chain. *See, e.g.*, Livestock Marketing Association Comments on Proposed Animal Traceability Rule (Dec. 6, 2011) (Exh. US-53); National Cattlemen's Beef Association Comments on Proposed Animal Traceability Rule (Dec. 9, 2011) (Exh. US-54); *see also* Livestock Traceability Final Rule, 78 Fed. Reg. at 2047 (Exh. CDA-93) ("Other commenters stated that the sheer number of animals that will be required to be identified and tracked under these regulations will make including feeder cattle very costly for producers, veterinarians, sale barns, and State agencies and that the volume of information that will need to be generated may swamp the whole system, for no significant benefit.").

[127] Livestock Traceability Final Rule, 78 Fed. Reg. at 2072 (Exh. CDA-93).

slaughter facility by following the paper trail that animal has created through ICVI's that are on record in the livestock facilities that the animal has resided in. At present, there is no searchable electronic data base at the national level of such documents that link back to the identification number. The vast majority of states do not have searchable electronic databases either. Despite these limitations, the Livestock Traceability Final Rule has reduced the time it takes APHIS to trace the past movement of animals from a period that could have taken several months to one that could take only several weeks.[128]

138. As to recordkeeping, 86 C.F.R. § 86.3 provides that the state, Native American Tribe, accredited veterinarian, or other person or entity who distributes official identification devices must maintain for 5 years a record of the names and addresses of anyone to whom the devices were distributed.[129] Further, section 86.3 provides that "[a]pproved livestock facilities must keep any ICVIs or alternate documentation that is required by this part for the interstate movement of covered livestock that enter the facility on or after March 11, 2013. For poultry and swine, such documents must be kept for at least 2 years, and for cattle and bison, sheep and goats, cervids, and equines, 5 years."[130]

139. Section 86.5(c) provides exceptions for cattle to the requirements that animals have an official identification number and be accompanied by an ICVI or other document for the interstate movement of the animals. In particular, cattle intended for slaughter that are under the age of 18 months do not need an official identification number.[131] Further, animals that are "moved directly to a recognized slaughtering establishment" (which includes all animals imported for immediate slaughter) are exempt from the system entirely in that they do not need an official identification number or an ICVI.[132]

140. As to segregation, there is no need to physically segregate different animals as all covered animals have an official identification number on an ear tag (or through some other means).

141. As discussed above, Canadian and Mexican feeder cattle are imported generally in the first year of their lives. They undergo a veterinarian check and enter the U.S. herd. The Livestock Traceability Final Rule does not require an animal to receive an official identification number until the animal is 18 months old. At the time the animal receives its identification

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[128] In addition, animal movements can be traced from the slaughter facility back to the state where the animal was identified using documents created by businesses in the ordinary course of business. In this regard, the current traceability regime for animal movements is considered a "book end" system.

[129] 78 Fed. Reg. at 2072 (Exh. CDA-93).

[130] 78 Fed. Reg. at 2072 (Exh. CDA-93).

[131] 86 C.F.R. § 86.5(c)(7)(ii) states: "The official identification number of cattle or bison must be recorded on the ICVI or alternate documentation unless: . . . (ii) The cattle and bison are sexually intact cattle or bison under 18 months of age or steers or spayed heifers; *Except that*: This exception does not apply to sexually intact dairy cattle of any age or to cattle or bison used for rodeo, exhibition, or recreational purposes." 78 Fed. Reg. at 2075 (Exh. CDA-93).

[132] 86 C.F.R. § 86.5(c)(1), (7)(i). 78 Fed. Reg. at 2075 (Exh. CDA-93).

number, all animals are treated the same, regardless of whether any particular animal has spent time outside the United States previously.[133] If the animal will move in interstate commerce in the future, the animal needs an official identification number. If the animal will not move in interstate commerce, it need not have such a number. As discussed above, C animals are generally exempt from the system as long as they are slaughtered within three days of arriving at the slaughter facility.[134]

142. As to labelling, the Livestock Traceability Final Rule only tracks the animal to the day of slaughter. The rule does not require slaughter facilities (or downstream entities) to keep track of which meat products came from which animals. The Livestock Traceability Final Rule does not require slaughter facilities to retain the official identification number for their records, and the number is typically discarded after slaughter. As such, there is no labelling associated with this rule.

143. The costs of the Livestock Traceability Final Rule primarily affects cattle operations and the final rule's regulatory impact analysis estimated the incremental costs of additional measures associated with the interstate traceability requirements for all dairy cattle and beef cattle at age 18 months or older.[135]

144. The costs of the Livestock Traceability Final Rule and the amended COOL measure are not comparable. For example, the costs of the two rules are incurred by different entities. The costs of the Livestock Traceability Final Rule are incurred primarily by ranches and feed lots while the amended COOL measure's regulatory costs are incurred by downstream entities, *i.e.*, slaughter facilities, processors, and retailers. Moreover, as the purpose of the amended COOL regime is consumer information, retailers must receive that origin information when they receive the meat products from their suppliers. The Livestock Traceability Final Rule will impose different types of costs as the regime does not require an entirely different type of recordkeeping.

63. (*United States*) Please explain why NAIS was abandoned, and describe any other traceability scheme that was introduced in its place.

145. The original goal for implementing the NAIS program was to identify and trace the history of animals linked to an animal disease problem within 48 hours.[136] In order to accomplish this task, NAIS would require rapid access to "reliable and complete data on both

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[133] *Cf.* Livestock Traceability Final Rule, 78 Fed. Reg. at 2048 (Exh. CDA-93) ("This rulemaking does not affect our import/export requirements. While brands may be used as official identification for cattle moving interstate in accordance with the provisions of this final rule, the branding of imported cattle from Canada and Mexico is not intended to provide official individual identification, but is rather a permanent mark used to designate the country that exported the animal.")

[134] 78 Fed. Reg. at 2041 (Exh. CDA-93).

[135] USDA, Animal and Plant Health Inspection Service (APHIS), Regulatory Impact Analysis & Final Regulatory Flexibility Analysis, "Traceability for Livestock Moving Interstate," APHIS-2009-0091 (July 2012), p. 34 (Exh. US-55).

[136] Joel L. Greene, "Animal Identification and Traceability: overview and issues," Congressional Research Service, at13 (November 29, 2010) (Exh. CDA-92) ("2010 CRS Report on Animal Identification and Traceability").

animal ID and movement history" of the animal.[137] These functions necessitate an up-to-date electronic animal movement database.

146. The three steps required to create the NAIS database would have been: (1) premises registration (geographic location and individual identification where livestock or poultry are raised, house and boarded);[138] (2) individual animal or group identification (for cattle individual identification would be required since cattle do not move in lots like swine);[139] and (3) animal movement (the tracking of animal movements from birth, auctions, feedlots, and other locations).[140]

147. USDA contemplated that a NAIS-compliant animal tracking database would have been maintained by either the U.S. states or private industry, such that each entry would be standardized with the minimum trace-back information including the premise, animal ID, date of the event and the event itself (movement to a new premise or movement out of a current premise).[141]

148. USDA abandoned plans to implement such a system due to serious concerns from U.S. cattle producers about the overall costs of such a system and its impact on commerce, based USDA's experience with a voluntary system. These concerns included the risk that forcing the industry to identify and record the movement of all individual animals from birth to slaughter would greatly slow down the speed of commerce in the selling and re-selling of animals throughout their lifespan. Since the overwhelming majority of cattle (85 percent) are sold and resold in local auctions several times,[142] imposing such a mandatory system risks greatly expanding the length of those auctions (and delaying the transportation of the animals) while the information regarding the animals next movement is put into a database. This is the same reason Canada appeared to identify at the Panels' meeting as being the reason that Canada has been unable to implement a "farm to slaughterhouse" traceability system. Canada's difficulty in this regard is further notable in that cattle appear to move much less in Canada than they do in the United States as Canada's herd is highly concentrated in Western Canada.[143]

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[137] 2010 CRS Report on Animal Identification and Traceability, p. 13 (Exh. CDA-92).

[138] 2010 CRS Report on Animal Identification and Traceability, p. 14 (Exh. CDA-92).

[139] 2010 CRS Report on Animal Identification and Traceability, p. 16 (Exh. CDA-92).

[140] 2010 CRS Report on Animal Identification and Traceability, p. 17 (Exh. CDA-92).

[141] 2010 CRS Report on Animal Identification and Traceability, p. 17 (Exh. CDA-92).

[142] U.S. Second Written 21.5 Submission, para. 160 (citing Interstate Livestock Movements, p. 6 (Exh. US-44)).

[143] U.S. Second Written 21.5 Submission, para. 160 (noting that Western Canada accounts for 78.2 percent of calves under one year, 73.9 percent of steers, and 81 percent of heifer for slaughter or feeding) (citing Canfax Research Services, Canadian Cattlemen's Association, "Economic Impacts of Livestock Production in Canada – A Regional Multiplier Analysis," Suren Kulshreshtha, Oteng Mondongo and Allan Florizone, pp.11-12 (Sept. 2012) (Exh. US-45)).

149. However, U.S. industry concerns did not just relate to the costs of NAIS, but also to the consequences of those costs on the U.S. meat industry, including that NAIS could reward "vertical integration at the expense of family farms," in that "large retailers and meat packers will exercise market power to shift compliance costs backward to farms and ranches, making it even more difficult for the smaller, independent ones to remain in business."[144]

150. The more modest Livestock Traceability Final Rule, as described in response to question 62, replaced the NAIS. Importantly, the Livestock Traceability Final Rule only allows the tracing of cattle moving in interstate commerce between 18 months in age and the day of slaughter (animals imported for immediate slaughter are generally exempt from the requirements). Further, there is no central database. Rather, when APHIS needs to trace the history of an animal it must do a paper-based search, which can take several weeks to complete. As such, Canada is wrong to argue that "[a]bsent the prohibition on the USDA to use a mandatory identification system to verify origin, records kept for the purpose of complying with the [Livestock Traceability Final Rule] could be used to verify designations under the proposed alternative measure."[145] The Livestock Traceability Final Rule sets out an entirely different system than the one Canada envisions as being the first stage (farm to slaughter facility) of its third or fourth alternatives.

64. (*Canada and Mexico*) Please explain whether you contend that the United States has a traceability scheme in place, and if yes, elaborate on the relevance of such current scheme for the third proposed alternative measure.

65. (*all parties*) The Hayes and Meyer paper refers to the "enormous costs and expense associated with traceback", and suggests that "most of the[se] costs … would be borne by the US pork industry." The paper adds that "this would give Canadian pork producers and export-oriented packers a cost-advantage in international markets". (Exhibit CDA-89, p. 10). Would the complainants' suggested trace-back system also create a cost advantage for Canadian hogs relative to US hogs? Can the same conclusion be drawn for cattle? What are the implications of a potential cost advantage for imported products when comparing an alternative with the challenged measure, in particular as regards trade restrictiveness?

151. Complainants rely on the Hayes and Meyer paper with regard to their third alternative.[146] Mexico, for its part, explicitly states that the analysis and conclusions performed by Hayes and Meyer would apply equally to the beef industry as to the pork industry.[147]

152. This paper states in no uncertain terms that the imposition of a "trace-back" system (*i.e.*, a "farm to fork" traceability system) would substantially affect U.S. industry, such that "most of

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[144] U.S. First Written 21.5 Submission, para. 191 (quoting 2010 CRS Report, p. 10 (Exh. CDA 92)).

[145] Canada's Second Written 21.5 Submission, para. 151.

[146] Mexico's First Written 21.5 Submission, para. 201; Canada's First Written 21.5 Submission, para. 170.

[147] Mexico's First Written 21.5 Submission, para. 201.

the costs associated with the change would be borne by the U.S. pork industry, and this would give Canadian pork producers and export-oriented packers in Canada a cost advantage in international markets."[148] The effect of implementing this system would add, as calculated by this paper, "10% to U.S. costs of production" which would eventually cause pork prices to rise, and would cause "consumers to REDUCE their purchases by 7%" (the calculated price elasticity of demand for pork in the United States).[149] The paper continues to assert that "in addition to causing U.S. exports to remain at current levels while Canadian exports grow, the trace-back system will cause a dramatic reduction in domestic U.S. pork consumption and eventually, production."[150]

153. The costs of a "farm to fork" traceability system, as detailed in this paper and adopted by complainants, would be substantially greater for the U.S. cattle industry. As detailed in our prior submissions, the U.S. cattle industry is far more complex than the hog industry, and would require the tracking of each individual head of cattle, while the hog industry is far more integrated and trace-back would be based on batches of swine instead of individual animals.[151]

154. Additionally, there is no reason believe that a "farm to fork" traceability system will be less trade restrictive than the amended COOL measure. And as noted question 39 above, it is not clear that "costs" – under whatever meaning complainants give that term – would be *per se* relevant to an assessment of trade restrictiveness, or, more precisely, whether an alternative measure is less trade restrictive than the challenged measure.

155. Even aside from the fact that Article 2.2 does not involve a comparison of costs, there is no reason to believe that greatly increasing the costs on U.S. purchasers of livestock will lead to those companies to purchase more B or C livestock in absolute numbers than those companies do now. Canada simply puts forward no evidence to substantiate this counter-intuitive leap of faith it urges the DS384 Panel to make. And Mexico had not even suggested the DS386 Panel to make such a leap of faith until the Panels' meeting in February, almost five months after it submitted its First Written 21.5 Submission. And the suggestion by the Hayes & Meyer paper that a "farm to fork" traceability system would put the U.S. industry at a competitive disadvantage *vis-à-vis* Canada and Mexico does not change this conclusion.

156. We would note, however, that an alternative measure that puts the domestic industry at a competitive disadvantage with respect to imported products would appear to pose an "undue burden" on the Member. To the extent that Canada and Mexico argue that Article 2.2 should be read as requiring Members to disadvantage their own industries, their proposed interpretation should be rejected. Furthermore, under Article 2.2, an alternative that disadvantages a Member's own industry could not be considered "reasonably available" to that Member.

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[148] Dermot J. Hayes and Steve R. Meyer, "Impact of Mandatory Country of Origin Labeling on U.S. Pork Exports," Center for Agricultural and Rural Development, Iowa State University, Spring 2003, p. 10 (Exh. MEX-37).

[149] Impact of Mandatory Country of Origin Labeling on U.S. Pork Exports, p. 12 (Exh. MEX-37).

[150] Impact of Mandatory Country of Origin Labeling on U.S. Pork Exports, p. 12 (Exh. MEX-37).

[151] *See* U.S. First Written 21.5 Submission, para. 192.

66. (*Canada and Mexico*) The Hayes and Meyer paper explains that in many cases the EU trace-back system does not necessarily ensure that consumers can trace an individual piece of meat back to a farmer. (Exhibit CDA-89, pp. 9-10). In light of this, what is the relevance of the EU system for comparing your suggested third alternative with the amended COOL measure?

67. (*Canada and Mexico*) Does the age at which livestock are imported into the United States have any cost implications for comparing your third alternative measure with the amended COOL measure?

68. (*third parties, Japan, Korea, and New Zealand in particular*) Please describe your trace-back system; in particular, what aspects of livestock and meat production it covers, how, and at what costs. To what extent does your trace-back system correspond to the complainants' suggested third alternative measure? In what way, if any, could your trace-back system be relevant for the reasonable availability of the complainants' third alternative measure?

69. (*Japan*) Please comment on the costs of trace-back in light of the United States' argument that:

> **Japan produced 1.3 million head of cattle and 17. 3 million hogs in 2012 (compared to 34.3 million head of cattle and 117.6 million hogs in the United States). As such, the Japanese meat industry is set up to process much less volume, and at a much slower speed than the U.S. industry, orienting itself more towards artisanal production than the assembly-line efficiency of the U.S. system. Not surprisingly, Japanese beef prices are much higher, with November 2013 retail sirloin per pound prices of approximately $27.38 in Japan compared to $6.80 in the United States. (United States' second written submission, para. 155 (footnotes omitted))**

Fourth alternative measure

70. (*United States*) Please describe any applicable requirements in the United States on the traceability or record-keeping of intra- and inter-state movements of livestock. Is the age of livestock a relevant factor in this regard? Please provide data or estimates on the volumes involved.

157. Please refer to the U.S. responses to questions 62 and 63 where the United States describes the Livestock Traceability Final Rule. Briefly, there are no record-keeping requirements for intra-state movement of livestock. There are record-keeping requirements for inter-state movement of livestock subject to certain exceptions. For cattle, all animals destined

for slaughter that are below 18 months in age are exempt from any record-keeping requirements whether they move inter- or intra-state during that time.[152]

158. As to the volumes of cattle that move interstate, USDA estimates that approximately 74 million cattle and calves were sold in 2007. Of those, 20 million head move interstate as breeding animals and feeders.[153] Of that 20 million, only a portion were assumed to be covered by the Livestock Traceability Final Rule, because beef cattle under 18 months of age will not require official identification. USDA does not have complete information on the number of cattle moved interstate directly to slaughter, but assume that it could be approximately 10 million head. The cost estimates in the rule therefore assume a maximum of 30 million cattle could be moving interstate (about 40 percent of all cattle and calves), although, given the exemptions to the rule, the number of head of cattle moving in interstate commerce in any particular year could be greater or less.

159. Traditionally, U.S. swine production has been concentrated in the upper Midwest, near abundant feed supplies and slaughtering facilities. However, since 1990, significant growth of swine production has occurred in North Carolina, Oklahoma, Colorado, Utah, and Texas. Modern production involves the routine interstate shipment of pigs as the various stages of production occur in different states.[154] There is very little excess capacity built into the production system for the uninterrupted movement of animals. Any change in management affecting animal flows for more than a few days could result in overcrowding conditions and disruptions of animal health schemes leading to animal welfare and animal health issues. Such transport disruptions may necessitate the euthanasia of pigs, abortions of pregnant sows, or the cessation of breeding programs.

160. The production of pigs is categorized into four production phases: breeding/gestation, farrowing, nursery, grow/finish.[155] Those require different housing, feeding and animal care needs. Traditionally those stages of production took place at a single location. Today, many modern swine farms often separate those stages in order to capture economies of scale.

161. That has required a larger amount of transportation of animals over time. In-shipments are the total number of animals moved into a state for feeding or breeding purposes, excluding

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[152] Livestock Traceability Final Rule, 78 Fed. Reg. at 2047 (Exh. CDA-93) ("Other commenters stated that the sheer number of animals that will be required to be identified and tracked under these regulations will make including feeder cattle very costly for producers, veterinarians, sale barns, and State agencies and that the volume of information that will need to be generated may swamp the whole system, for no significant benefit."); *see also* Livestock Marketing Association Comments on Proposed Animal Traceability Rule (Dec. 6, 2011) (Exh. US-53); National Cattlemen's Beef Association Comments on Proposed Animal Traceability Rule (Dec. 9, 2011) (Exh. US-54).

[153] USDA, Animal and Plant Health Inspection Service (APHIS), Regulatory Impact Analysis & Final Regulatory Flexibility Analysis, "Traceability for Livestock Moving Interstate," APHIS-2009-0091 (July 2012), p. 34 (Exh. US-55).

[154] USDA, APHIS, Foreign Animal Disease Preparedness & Response Plan (FAD PReP), "Swine Industry Manual," March 2011, p. 3 (Exh. US-57); Exh. US-44, p.4.

[155] Swine Industry Manual, p. 3 (Exh. US-57).

animals brought in for immediate slaughter. In 2009, hog in-shipments totaled 41 million head, making it the largest sector of livestock in-shipments in the United States.

162. For example, in 2001, North Carolina shipped between three and four million pigs to the Midwestern states for feeding. Iowa received over half of U.S. swine in-shipments in 2009, while Minnesota, Indiana, Missouri, and Illinois each received more than 1 million head. It is estimated that 71 percent of pigs in the U.S. enter the growing/finishing phase at a different location from which they were born. Many of these movements do not require interstate or intrastate health certificates as pig ownership is maintained and pigs stay within a state. Half of the annual pig crop is born on farms in only four states (NC, IA, MN, and IL). These same four states also account for 62 percent of the Nation's market hog inventory and about 56 percent of the slaughter capacity. In Iowa, 1.7 million pigs move into the state every month: approximately 67,000 pigs every day. Therefore, the efficient and timely movement of pigs is important for animal welfare and continuation of business for individual operations and the swine industry.[156]

71. (*Canada*) How would the fourth suggested alternative measure affect segregation, recordkeeping, and labelling? Please respond to the US arguments about frequent interstate movements and the concentration of Canadian cattle production. (United States' second written submission, paras. 161-162).

72. (*Mexico*) Do you propose the fourth alternative measure put forward by Canada in its second written submission? If yes, please elaborate how the Article 2.2 test should be applied to this alternative, and please also answer Question 71.

73. (*Canada*) Canada argues that the amended COOL measure already provides that state, regional, or locality label designations may be used in lieu of country of origin labelling for, inter alia, perishable agricultural commodities, and that abbreviations may be used for state, regional, or locality label designations for such commodities. (Canada's second written submission, para. 149). Has this voluntary labelling possibility under the amended COOL measure been put into practice?

74. (*Canada*) Would your fourth suggested alternative measure entail prohibitive costs or substantial technical difficulties? In particular, please specify how the 2013 Final Rule on Traceability for Livestock Moving Interstate should be "further developed to facilitate the verification of original designations by state", and at what costs. (Canada's second written submission, para. 151).

Non-violation claims (Article XXIII:1(b) of the GATT 1994)

75. (*all parties*) Please provide annual data on any change in North American livestock trade volumes as a result of the implementation of the concessions under NAFTA and the WTO Agreement.

[156] *See generally* Swine Industry Manual, 2011 (Exh. US-57).

163. On January 1, 1994 the North American Free Trade Agreement ("NAFTA") between the United States, Canada, and Mexico entered into force. Historically, live cattle (not purebred or imported for dairy purposes) entering the U.S. from Canada and Mexico were charged a tariff of 2.2 cents per kilogram. [157] Under the Canadian – US Free Trade Agreement ("CFTA") there was a gradual elimination of tariffs on cattle imports from Canada, which was completed in 1993.[158] At the start of NAFTA the original duty rate of 2.2 cents per kilogram for live cattle entering from Mexico was eliminated immediately. [159] In the Uruguay Round negotiations, the duty rate for live cattle entering the United States was cut to 1 cent per kilogram over a six year period.[160]

164. There are no tariffs on live hogs entering the United States from Canada prior to the NAFTA agreement. [161] However, with the exception of certain regions Mexico is considered hog-cholera endemic and any hogs exports to the United States are subject to a 90-day quarantine. This effectively precludes most hog imports from Mexico. [162]

165. As will be discussed in question 76, there are a variety of factors that may affect livestock trade volumes between the United States, Canada, and Mexico, including but not limited to, exchange rate fluctuations between the United States and other countries, feed costs, inventories of livestock, transportation costs, weather conditions, economic income growth (and recession), animal diseases and trends in other export markets for beef. As a result, with the large number of factors involved, the United States does not have estimates of what portions of the change in trade volumes were due to the effects of the tariff concessions compared to these other factors. See generally the graphs below and the tables provided in Exhibit US-67.

[157] USDA, Economic Research Service (ERS), "NAFTA Commodity Supplement," p.5 (March 2000) (Exh. US-56).

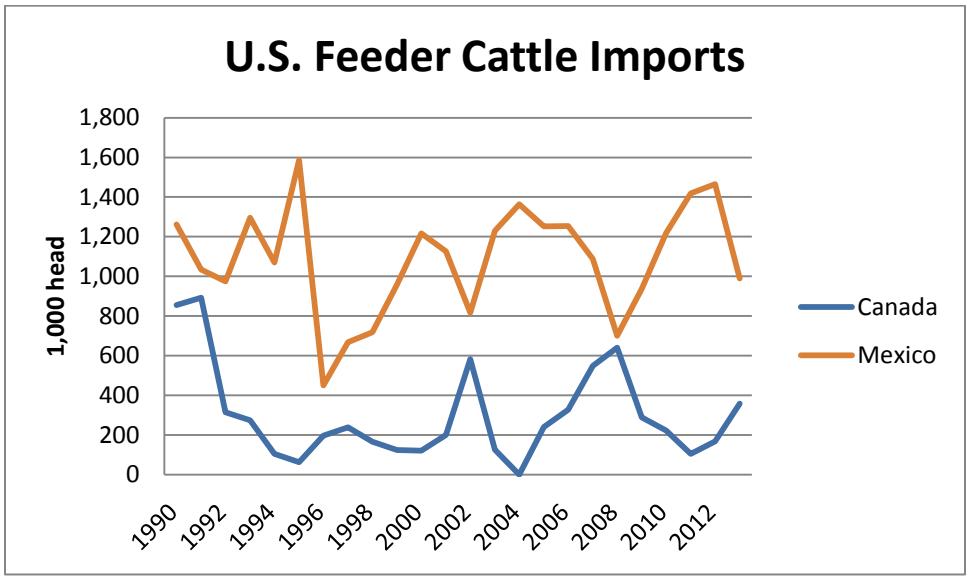
[158] NAFTA Commodity Supplement, p.5 (March 2000) (Exh. US-56).

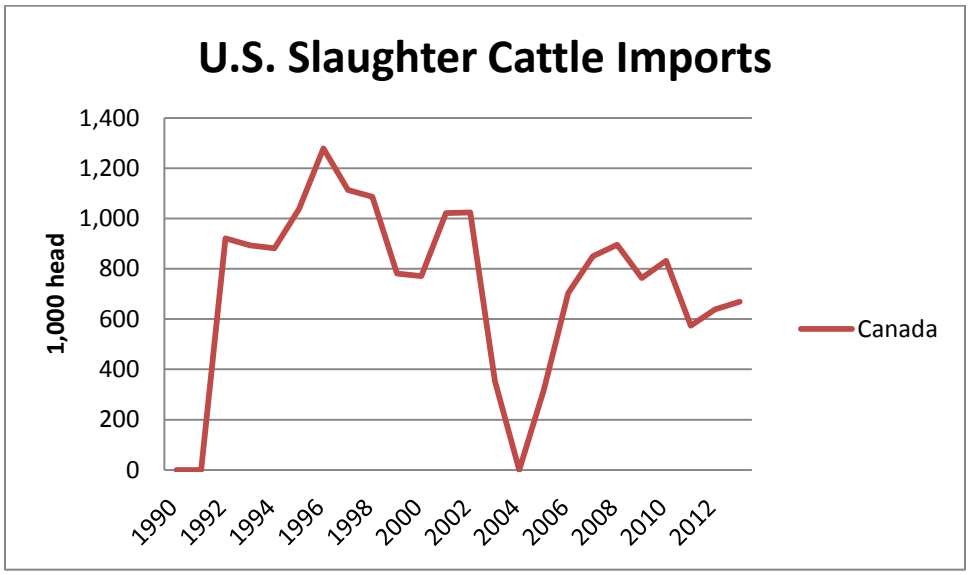
[159] NAFTA Commodity Supplement, p.5 (March 2000) (Exh. US-56)

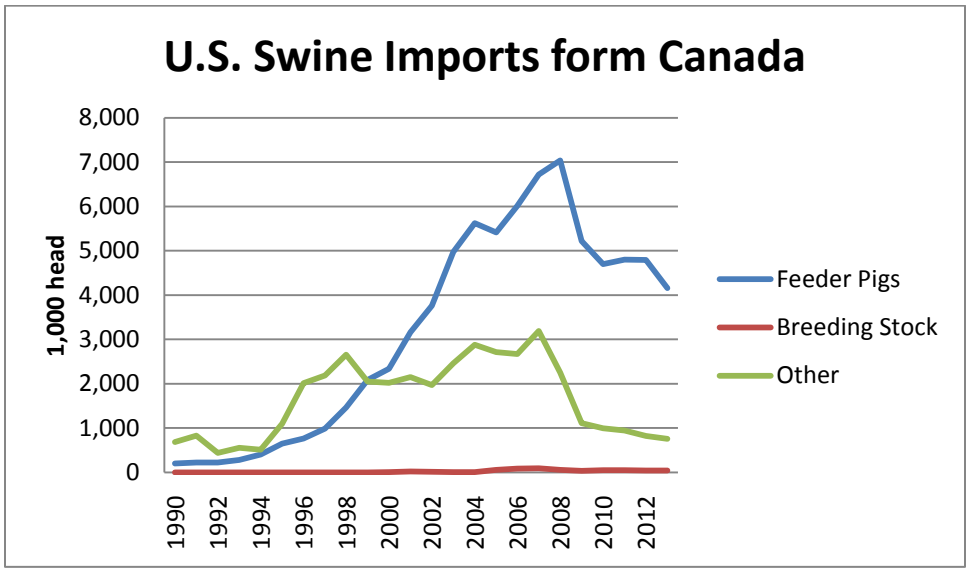
[160] http://www.wto.org/english/thewto_e/countries_e/usa_e.htm.

[161] NAFTA Commodity Supplement, p.12 (March 2000) (Exh. US-56).

[162] NAFTA Commodity Supplement, p.12 (March 2000) (Exh. US-56).


U.S. Feeder Cattle Imports
1,800
1,600
1,400
1,200
1,000
800
600
400
200
0
1,000 head
1990
1992
1994
1996
1998
2000
2002
2004
2006
2008
2010
2012
Canada
Mexico


U.S. Slaughter Cattle Imports
1,400
1,200
1,000
800
600
400
200
0
1,000 head
1990
1992
1994
1996
1998
2000
2002
2004
2006
2008
2010
2012
Canada



76. (*all parties*) What are the main factors (e.g. economic, regulatory, trade policy, etc.) that have affected North American livestock trade flows in the last 30 years?

166. The U.S, Canadian, and Mexican livestock markets are highly integrated. Trade in livestock takes advantage of the fact that the United States has the largest industrial scale processing facilities of the three countries. However, a multitude of factors may impact trade in livestock and meat between the United States, Canada, and Mexico. These factors fall within four broad categories: agricultural trade policy, food safety and animal health issues and associated government regulations, fluctuations in weather patterns, and changes in economic conditions within North America and globally. These factors, in combination and sometimes individually, have influenced live cattle and hog trade within North America over the last 30 years. The U.S. First Written Submission in the original dispute discussed numerous factors in detail, including exchange rates, feed costs, inventories, transportation costs, weather conditions, economic and income growth, and animal diseases, and we refer the Panels to that submission.[163] The U.S. Second Written Submission in the original dispute provided further detail on how the recent economic recession affected Canadian and Mexican livestock exports to the United States.[164] As we have discussed, COOL does restrict trade but it is just one of many factors affecting trade of livestock in North America.

[163] U.S. Original First Written Submission, paras. 86-125.

[164] U.S. Original Second Written Submission, paras. 84-87.

Live Cattle Imports

167. The United States imports live cattle from Canada for immediate slaughter, feeding, breeding, and dairy purposes. U.S. cattle imports from Mexico are primarily lightweight feeder cattle that are put on pasture or, if large enough, placed directly in feedlots.

168. The CFTA, which entered into force in 1989, allowed for the elimination of restrictions under meat import laws in both countries and expanded the opportunities for export of live animals between the United States and Canada. NAFTA, which entered into force in 1994, resulted in further expansion of the live feeder cattle and slaughter cattle imports from Canada and Mexico into the United States due to the elimination of tariffs on live cattle imports.

169. The integrated nature of the U.S. market for live cattle from Canada and Mexico may be aptly illustrated by the fluctuations in imports of feeder cattle, such that, when exports from Canada decline (due for example to inventory shortages or increased domestic processing capacity), the market responds by having a spike in the number of imported Mexican feeder cattle. For example, U.S. imports of Mexican cattle initially declined after implementation of NAFTA in 1994 but gradually increased, particularly in 2003-2005, when restrictions were placed on Canadian cattle following an outbreak of bovine spongiform encephalopathy ("BSE") in the Canadian herd.

170. Canadian exports of live cattle and beef to the United States were halted in May 2003 when the first case of BSE was found in Canada. Prior to the closure of the U.S. border due to an occurrence of BSE in the Canadian herd, Canadian cattle producers were heavily dependent upon the U.S. slaughter facilities and packers. The surplus in fed cattle due to BSE related restrictions in the United States caused Canada to further expand its slaughter capacity.[165] The additional slaughter capacity was utilized to process cattle domestically that, prior to the border closure, would have been exported for processing to the United States. In the fall of 2005, the United States reopened its border for cattle from Canada under 30 months of age.

171. The Canadian cattle industry shrank by 20 percent between 2005 and 2011 in response to BSE government regulations (by Canada and the United States) and the global economic recession.[166] In addition, Canada's expanded slaughter capacity reduced the number of live

[165] James Rude, Jared Carlberg, and Scott Pellow (2007) "Integration to Fragmentation: Post-BSE Canadian Cattle Markets, Processing Capacity, and Cattle Prices," Canadian Journal of Agricultural Economics 55(2), p. 199 (Exh. US-58).

[166] The global economic crisis, which officially began in the fall of 2007, resulted in a slowing of import growth and an overall contraction of the agricultural market in 2009. U.S. livestock markets were not spared. In 2009, total U.S. red meat and poultry production fell 3.2 percent and per capita disappearance fell 2.5 percent over the same period in 2008. Production of beef, pork, broilers and turkeys fell 2.2%, 1.5%, 3.8% and 9.3%, respectively. Average prices received by farmers also fell considerably with cattle, hogs, broilers and turkeys falling 10.0%, 11.9%, 2.6%, and 9.5% respectively. At the same time, U.S. currency was historical lows relative to other global currencies, which raised the relative cost of imports into the U.S. As a result, agricultural trade was affected due to reduced economic growth at home and abroad, declining U.S. consumer spending, and exchange rate movements. Since Canada and Mexico fed and feeder cattle complement the U.S. slaughter market and make up

cattle exported to the United States for slaughter. However, in response to Canadian herd rebuilding efforts following BSE, moderated feed prices and fuel costs, in 2011 live cattle imports from Canada to the United States began to increase.

Live Hog Imports

172. All live hog imports to the United States come from Canada; Mexico does not export hogs to the United States due to animal disease status. The U.S. and Canadian hog industries are closely integrated, this integration has resulted in a shift in the structure of U.S. hog production. For example, the U.S. industry has shifted toward increasingly vertically integrated systems for hog production, where producers are guaranteed the purchase of a fixed quantity of hogs at an agreed price, usually before raising is completed. Since 2005, more than 60 percent of live hog imports to the United States have been feeder pigs from Canada, to be fed to their slaughter weight and processed in the United States. These Canadian-born hogs are a major input in the U.S. production of pork.

173. In 2007, multiple hog processing plant closures in Canada caused exports of hogs from Canada to the United States to increase in 2007 and 2008. In order to stabilize the hog market, which had been undergoing major contraction, in 2008, the Canadian government launched a cull breeding swine program to reduce the hog breeding herd by 10 percent. In mid-August 2009, Canada introduced various government programs to further assist hog producers and stabilize the Canadian hog market by reducing the hog herd by an additional 250,000 sows. The effects of these programs included a lower numbers of hogs exported to the United States for slaughter in 2008 and a more significant drop in exports in 2009.

174. Over the past few years the Canadian hog industry has been experiencing dramatic restructuring and contraction. Since 2005 Canadian hog inventories have declined by 24 percent from a peak of 15.2 million in October, 2005 to 11.6 million on January 1, 2010. Also, continued low hog prices, high feed costs, and the appreciation of the Canadian dollar in the second half of 2009 impacted the Canadian hog imports to the United States. During this same time the U.S. hog sector faced similar financial troubles and demand in the United States for live hogs fell. Hog prices were also affected by the world-wide outbreak of the H1N1 influenza virus in 2009, which prompted many countries to ban pork imports from both Canada and the United States. The worldwide economic recession also affected the demand for meat products generally. Despite these adverse factors, Canada's high slaughter rate maintained pork production and global pork exports at record levels in 2009.

175. The bottom-line is that live animal imports from the Canada to the United States have fluctuated widely over the past 25 years. No single factor is the sole reason for these fluctuations. However, the global economic recession, food safety issues (and government regulations), increased slaughter capacity (for hogs and cattle) in Canada, contraction of the Canadian hog industry, the strengthening of the Canadian currency have all played a role in

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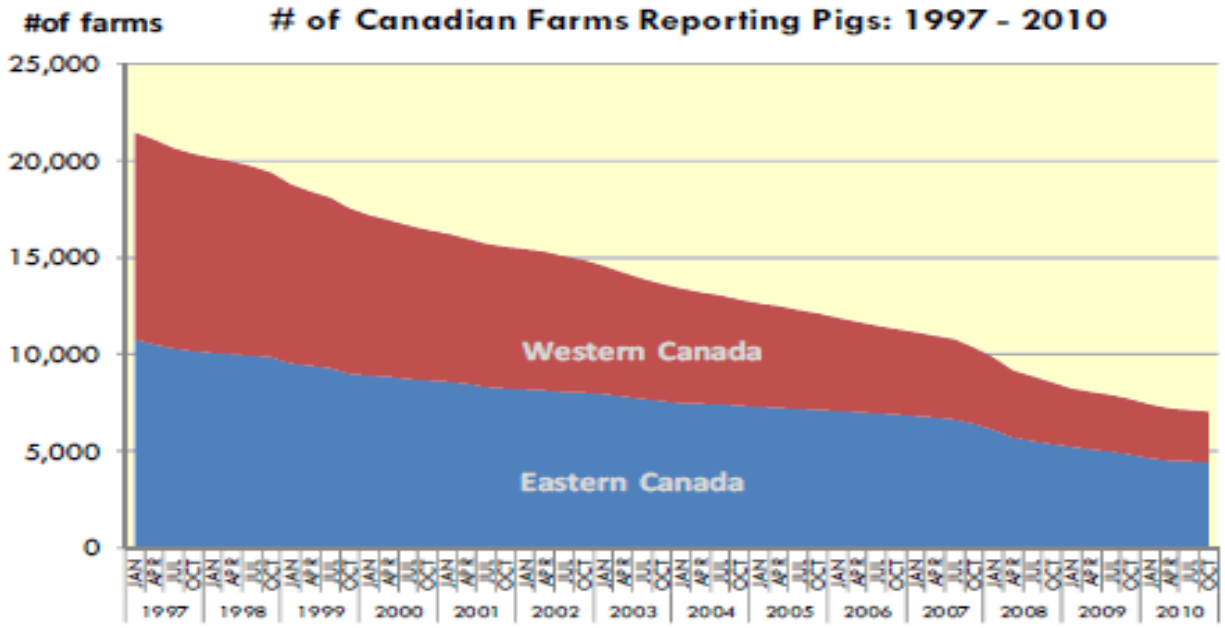
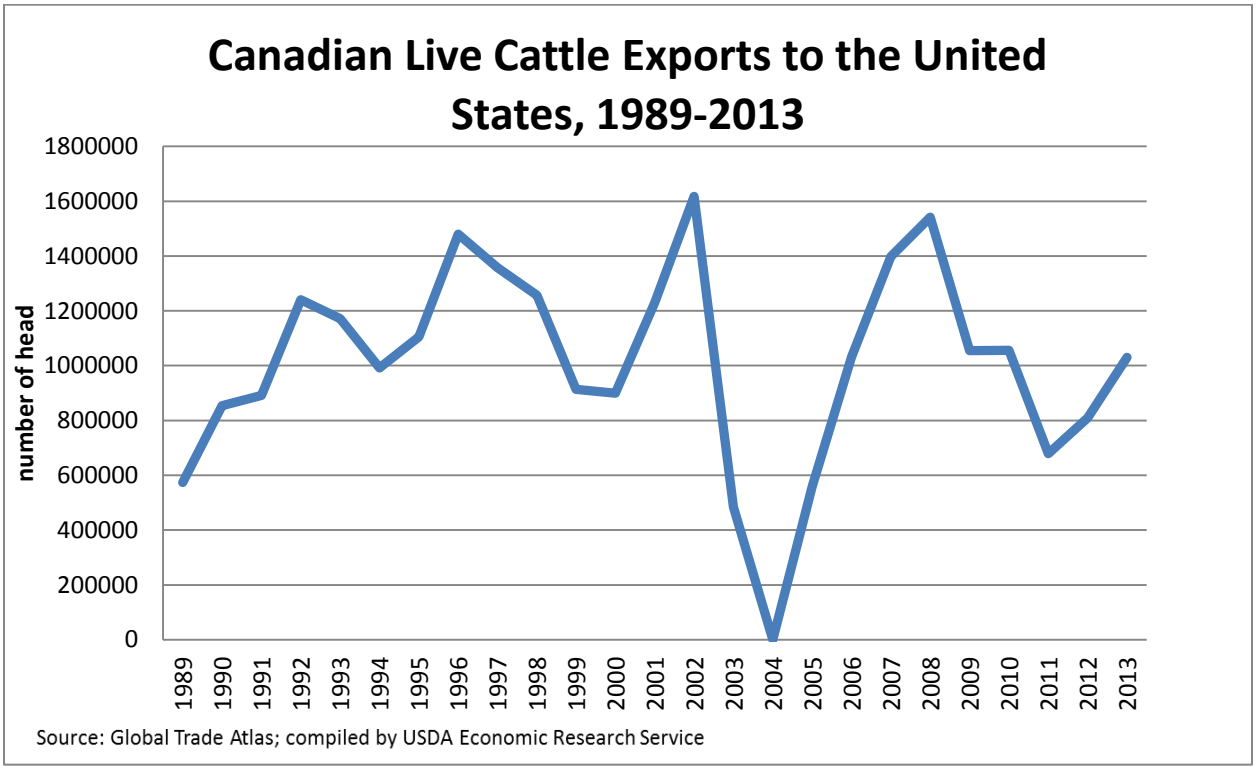
part of the U.S. commercial production, it is expected that the reduction in U.S. commercial production would result in similar reductions in imports.

effecting trade in live animals between the United States and Canada. In fact, as the United States has previously submitted the difference in the price paid for United States and Canadian cattle has actually narrowed[167] and the quantity exported has remained relatively constant, accounting for normal fluctuations.[168]



[167] Exh. US-42.

[168] Exh. US-43.



77. (*Canada and Mexico*) Please explain whether "compliance … with [a] finding [on the complainants' violation claims] would necessarily remove the basis of the … claim of nullification or impairment" in the sense of the GATT Panel Report, *EEC – Oilseeds I*.

78. (*all parties*) Which party(ies) bear(s) the burden of showing whether the amended COOL measure could reasonably have been anticipated? In this regard, do you agree with the principle articulated in paragraphs 8.281 and 8.282 of the panel report in *EC – Asbestos*? To what extent is this principle applicable to measures that might be based on "legitimate regulatory distinctions" or pursuing "legitimate objectives" under Articles 2.1 and 2.2 of the TBT Agreement?

176. Complainants bear the burden of proving that they could not have reasonably anticipated that the United States would pursue the amended COOL measure at the time of the tariff negotiations under the Uruguay Round. Article 26.1(a) of the DSU and panel reports confirm that an Article XXIII:1(b) claim should be treated with caution and is an "exceptional remedy for which the complaining party bears the burden of providing a *detailed justification*"[169] for its claims in order to establish "a presumption that what is claimed is true."[170]

[169] *Japan – Film*, para. 10.30 (emphasis in the original).

[170] *Japan – Film*, para. 10.32.

177. The text of Article XXIII:1(b) of the GATT 1994 refers to a "benefit accruing, directly or indirectly," under that Agreement and past panel reports have interpreted such benefits to include "those that a Member reasonably expects to obtain from a tariff negotiation."[171] In order for a Member to prevail on an NVNI claim, the "challenged measures must not have been reasonably anticipated at the time the tariff concessions were negotiated. If the measures were anticipated, a Member could not have had a legitimate expectation of improved market access to the extent of the impairment caused by these measures."[172] Furthermore, the burden of proof for a claim concerning a concession made many years ago "must be all the heavier inasmuch as the intervening period has been so long."[173]

178. The United States required imported meat, along with many other agricultural and non-agricultural goods, to be labeled at the retail level with its country of origin since 1930,[174] decades before the conclusion of the Uruguay Round or NAFTA.[175] Additionally, the U.S. Congress, since the 1960's has considered various pieces of legislation that would have required additional requirements for country of origin labeling for meat at the retail level.[176] Under these circumstances and in light of the many years since the Uruguay Round, Canada and Mexico "could not assume, that over such a long period, there would not be" changes to the U.S. labeling regime, such that meat products derived from imported livestock would have to be labeled.[177]

179. The principle articulated in paras. 8.281-82 of the panel report in *EC – Asbestos*, is that when considering a complainant's reasonable expectations in relation to its Article XXIII:1(b) claim, one should take into account the fact that the covered agreements specifically recognize the rights of Members to take measures to pursue certain objectives. In that case, it will be more difficult for a complaining party to demonstrate that it could not have reasonably expected another Member to adopt a measure pursuing one of those objectives. After all, the covered agreements explicitly contemplate that Members will adopt measures to pursue those objectives, and thus one might reasonably expect Members to do so.

180. Similar reasoning would apply with respect to the "legitimate objectives" listed under Article 2.2, which include the prevention of deceptive practices. And it is also relevant that

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[171] *Japan – Film*, para. 10.72.

[172] *Japan – Film*, para. 10.76.

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

[174] U.S. First Written 21.5 Submission, para. 122.

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

[176] *See* U.S. Original First Written Submission, para. 25.

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

Article IX:2 of the GATT 1994 explicitly contemplates that Members will adopt and enforce "laws and regulations relating to marks of origin" and calls for "due regard being had to the necessity of protecting consumers against fraudulent or misleading indications."

181. Therefore, the panel report in *EC – Asbestos* also supports the fact that complainants have failed to establish they had a reasonable expectation that the United States would not adopt a measure like the COOL measure.

79. (*United States*) The United States suggests that the complainants have not provided "a detailed justification in support" of their non-violation claims, as required by Article 26(1)(a). (United States second written submission, para. 172). In practical terms, what kind or quantity of evidence would satisfy this standard?

182. As an initial matter, the United States would reiterate that complainants' NVNI claims are outside the terms of reference of these Article 21.5 panel proceedings and should be dismissed. As noted previously,[178] an Article 21.5 proceeding is meant to resolve the issues of whether a measure taken to comply exists (an issue not presented in the current proceeding); or whether a measure taken to comply is inconsistent with a covered agreement. The first question is inapplicable since the United States has taken a measure to comply.[179] The second question by definition concerns the inconsistency of a measure with a covered agreement, and therefore excludes a claim of *non-violation* nullification and impairment by a measure that does *not* conflict with the provisions of a covered agreement. For these reasons, the NVNI claims put forward by complainants are not properly within the terms of reference of these Article 21.5 proceedings.

183. Separately, as a threshold matter, complainants have not met their obligation to provide a "detailed justification" in support of their complaint that the amended COOL measure presents the situation in Article XXIII:1(b) of the GATT 1994. Specifically, complainants have not "explain[ed] in detail that the benefits accruing to [them] under a tariff concession have been nullified or impaired" by the claimed measure. Indeed, complainants have not specified precisely which "tariff concessions" are at issue; how they had a legitimate expectation to the benefit accrued from these concessions; and how the measure at issue nullifies or impairs this benefit. In fact, Canada and Mexico concede that their market access relies on tariff concessions secured under the NAFTA, not the GATT 1994.

184. Furthermore, even aside from the fact that complainants have not provided a "detailed justification" as a threshold matter for their NVNI claim, complainants must also establish three elements to make out a cognizable claim under Article XXIII:1(b): (1) application of a measure by a WTO Member that was not reasonably anticipated; (2) a benefit accruing as a result of a

[178] U.S. First Written 21.5 Submission, paras. 199-203; U.S. Second Written 21.5 Submission, paras 166-171.

[179] It would be a different situation in a dispute where the original panel had found NVNI to exist. In that case, an Article 21.5 compliance panel may be called to review a disagreement as to whether a measure addressing the recommendation resulting from the NVNI exists.

concession under the GATT 1994; and (3) nullification or impairment of the benefit as a result of the application of the measure.

185. Panels have found that in order for complainants to meet their burden of proof, complainants must show that the challenged measure could not have reasonably been anticipated at the time the relevant tariff concessions were negotiated. Furthermore, complainants must demonstrate that the challenged measure has directly upset the competitive relationship between domestic and imported products which existed as a consequence of the relevant tariff concessions.

186. Complainants have neither met their threshold obligation of putting forth a "detailed justification" of why their NVNI claims are true nor have they satisfied the three elements required to make a cognizable claim under Article XXIII:1(b).

80. (*Canada and Mexico*) Please specify how evidence under your GATT/TBT claims is also relevant for your Article XXIII:1(b) claims. (Canada's first written submission, para. 188; Mexico's second written submission, para. 160).

81. (*all parties*) Under Article XXIII:1(b) of the GATT 1994, is it sufficient for a particular good to be entitled, as a matter of law, to a GATT concession, or must that good actually be benefiting at some point in time from the access provided by that concession?

187. As noted in our previous submissions before the Panels,[180] in order to substantiate a claim under Article XXIII:1(b) of the GATT 1994, complainants have the burden of proof to show that a benefit accruing to them from a particular and specific concession under the GATT 1994 is being nullified or impaired as a result of the challenged measure. Previous panels have found:

> Thus, under Article XXIII:1(b), the [complainant] may *only* claim impairment of benefits related to improved market access conditions *flowing from relevant* tariff concessions by [respondent] to the extent that the [complainant] could not have reasonably anticipated that such benefits would be offset by the subsequent application of a measure by the [respondent].[181]

188. The complainants in this case have not explained how the amended COOL measure can nullify or impair benefits under unspecified tariff concessions, when they concede their trade is governed by and benefiting from tariff concessions under the NAFTA.

189. Canada attempts to define "accrue" to mean benefits whether or not they "actually apply between Canada and the United States"[182] due to the NAFTA agreement. This is not correct. An NVNI claim is not based on benefits that are hypothetical rather than accruing to a Member. An

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[180] U.S First Written 21.5 Submission, para. 208; U.S. Second Written Submission, para. 172-173.

[181] *Japan –Film*, para. 10.77 (emphasis added).

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

NVNI claim concerns nullification or impairment of actual benefits accruing to a Member from a concession. Where a Member is not receiving a benefit from a concession, that benefit cannot be being nullified or impaired. Article 26.1(c) confirms this understanding when it speaks of "a determination of the *level* of benefits which have been nullified or impaired"; there can be no level of benefits being impaired if the relevant tariff concession is not being utilized.

190. It is complainants' burden to prove that a specific benefit is accruing under the GATT 1994 due to a particular concession and that the challenged measure was not reasonably anticipated and "nullifies or impairs" this specific benefit. Complainants have not met this burden.

82. (*all parties*) The United States submits that country-of-origin labelling requirements have been imposed by the United States since 1930. (United States' first written submission, para. 212). Please clarify the connection of the amended COOL measure to any pre-Uruguay Round country-of-origin labelling requirements, including the application and practical operation of any such previous country-of-origin labelling requirements. (See Panel Reports, *Japan – Film*, para. 10.79; and *EC – Asbestos*, para. 8.291(a)).

191. As the United States has previously stated, imported meat, along with many other agriculture and non-agricultural goods, has been required to be labeled at the retail level with its country of origin since 1930.[183] However, these previous labeling requirements did not apply to many of the products covered by the amended COOL measure, including meat derived from animals slaughtered in the United States.

192. The United States has been considering legislation on country of origin labeling to address this gap in the previous law since the early 1960s, decades prior to the conclusion of the Uruguay Round or the NATFA.[184] The panel report in *Japan – Film* indicated that when a respondent had shown that measures were introduced "prior to the conclusion of the tariff negotiations at issue, it is [the panel's] view that [the respondent] has raised a presumption that the [complainant] should be held to have anticipated those measures and it is for the [complainant] to rebut that presumption."[185] Moreover, the panel in *EC – Asbestos* found that for tariff concessions, completed decades prior, the complainant must overcome the presumption that due to the span of time following tariff concessions they could still legitimately expect the respondent not to adopt measures that would affect these concessions.[186]

193. As a result, this is not a situation of the type described in paragraph 8.291(a) of the panel report in *EC – Asbestos*. The United States is not asserting that Canada and Mexico should have

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[183] U.S. First Written 21.5 Submission, para. 212; *see also* U.S. Original First Written Submission, paras. 18-19.

[184] U.S. First Written 21.5 Submission, para. 213; *see also* U.S. Original First Written Submission, paras. 24-26.

[185] *Japan – Film*, para. 10.80.

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

reasonably anticipated the COOL measure solely because it is a continuation of a general government policy. Rather, not only were there earlier measures on country of origin labeling for food, but the U.S. Congress on multiple occasions prior to the completion of the Uruguay Round negotiations considered legislation to require greater labeling requirements for imported meat products sold at retail.

ECONOMIC AND ECONOMETRIC QUESTIONS

A. (*all parties*) In Tables A-1 and A-2 below, please provide detailed figures for each element of the pie charts in Figure 1. In doing so, please specify the respective amounts and shares of US cattle/hogs production and beef/pork consumption, the units of measure, the year of reference and the source of the data. Please also explain separately any underlying assumptions used to derive the relevant figures. (At the end of this document, and without prejudice to the Panel's position or review of these data, background Tables B-1 and B-2 compile certain data reported by the parties in these proceedings. Please clarify or complement these data, as well as underlying assumptions, to provide the Panel with the information as requested in the cells in Tables A-1 and A-2.)

194. Please see Exhibit US-59.

i. (*all parties*) Please clarify whether the share of beef/pork products subject to the amended COOL measure in the US beef/pork supply is equivalent to the share of beef/pork products subject to the amended COOL measure in US beef/pork consumption. In other words: is US beef/pork supply the same as US beef/pork consumption?

195. Yes. For purposes of these proceedings, the United States has used the term U.S. beef/pork supply interchangeably with the term U.S. beef/pork consumption.

ii. (*all parties*) What is the rationale for using carcass weight, instead of retail weight, to determine the share of beef/pork products subject to the requirements of the amended COOL measure in total US beef/pork consumption?

196. USDA calculates retail-weight using a fixed-proportion relationship between carcass and retail-weight. The two measures will be directly proportional. (The carcass-to-retail conversion is occasionally updated to reflect changes in retail cutting.) USDA considers retail-weight as the appropriate measure of the amount of product actually moving through the retail stage of the supply and marketing chain.

iii. (*all parties*) Please elaborate on any overlap between the three main exemptions under the amended COOL measure, and any implications for calculating the shares of exempted products.

197. Tables A.1.iii and A.2.iii illustrate how the processed food exemption can be accounted for without over counting. For example, in 2013 total beef consumption in the United States was

17.9 billion pounds of retail weight. Approximately 6.8 billion pounds are served in food service establishments, approximately 2.7 billion pounds are exempt under PACA; and approximately 1.8 billion pounds are processed. However, a certain percentage of that processed beef is served in food establishments or sold in a PACA exempt store. As such the processed beef that is covered by the amended COOL measure is approximately 842 million pounds (or 47 percent of the total amount of processed beef). That leaves 42.3 percent of all beef (or 7.6 billion pounds) that is subject to the amended COOL measure.

iv. (*United States*) How were the annual average price of 4.693 USD for all fresh retail beef and the annual average price of 3.467 USD for all fresh retail pork for 2012 computed? (United States' Second Written Submission, paragraph 92; Exhibit US-13). Please provide the underlying data.

198. The average retail price figures come from the USDA's Economic Research Service ("ERS"), which is the part of USDA responsible for producing composite retail prices. The retail pork composite is meant to measure what an entire "standard" pig would be worth if its meat were sold at U.S. average retail prices. The standard pig is one that matches the 51-52 percent lean hog price as reported by USDA-AMS.[187] It does not include the value of pork sold from cull sows or boars. The all-fresh beef price is not based on a standard animal. It is an estimate of what all beef sold in the United States would cost at supermarket prices. It excludes beef exports and includes beef imports. The source of this data can be found at http://www.ers.usda.gov/data-products/meat-price-spreads.aspx.

v. (*all parties*) Please indicate which label(s) are expected to be the most common (by order of ranking) under the amended COOL measure. Have you observed or do you foresee any changes in the distribution among the types of labels after the full implementation of the amended COOL measure? Are the figures related to the distribution of type of labels prior to the amendments of the COOL measure relevant to infer the potential change in the distribution of the types of labels under the amended COOL measure?

199. USDA expects the distribution of labels to be consistent with the composition of the U.S. cattle and hog supplies and with the ultimate composition of U.S. beef and pork supplies. Those compositions have not changed since Canada and the United States submitted evidence on this point in the original disputes and, as such, the United States does not expect that the distribution of labels will differ materially from evidence provided in Exhibits US-3 and US-27, and recounted in the original panel report.[188]

vi. (*United States*) Does the term "all meat being labelled" refer to muscle cuts and ground meat or only muscle cuts?

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[187] USDA, Economic Research Service, "Standard Pig Calculation," (Exh. US-60). *See also* USDA Market News, "National Daily Base Lean Hog Carcass Slaughter Cost" http://marketnews.usda.gov/gear/browseby/txt/LM_HG213.TXT (Exh. US-61).

[188] *See US – COOL (Panel)*, n.941.

200. The term "all meat being labelled" is not contained in any U.S. submission. As a general matter, the United States has referred to "muscle cuts" in our submissions when we are referring to categories A, B, C, and D label meat.

B. (*all parties*) What was the number or share of operators commingling prior to the amended COOL entered into force? Have you observed or do you foresee any changes in commingling after the full implementation of the amended COOL measure?

201. In the original proceedings, the United States provided estimates on the number of operators that might be utilizing the commingling provisions, but was unable to provide precise numbers.[189] However, when industry was asked about commingling directly in the 2013 Proposed Rule, only three cattle slaughter facilities stated in that they have been using the commingling flexibility afforded by the 2009 Final Rule.[190] No hog slaughter facilities stated that they have been commingling.[191] In light of this, in the 2013 Final Rule, USDA determined that the evidence submitted by commenters "was insufficient to enable the Agency to determine the extent to which industry is making use of commingling flexibility."[192]

202. USDA's conclusion is consistent with the conclusion of the original panel,[193] as well as the D.C. District Court in *AMI v. USDA*, which found that "[t]he current record is not clear regarding the number of packing companies that commingle livestock."[194] As noted previously, U.S. law required USDA to do a cost benefit analysis for the 2013 Final Rule, and pursuant to that legal obligation, USDA estimated the use of commingling in the industry.[195] As noted in the 2013 Final Rule, those estimates were not based on verifiable data provided by the entities that would actually be commingling.[196]

203. Any entities that had been commingling under the 2009 Final Rule had to stop that practice pursuant to the 2013 Final Rule.[197]

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[189] *See, e.g.*, U.S. Responses to Original Panel Questions, question No. 91, paras. 12-14.

[190] U.S. First Written 21.5 Submission, para. 30 (citing Comments of Dallas City Packing on 2013 Proposed Rule (Exh. CDA-63); Comments of Agri Beef on 2013 Proposed Rule (Exh. CDA-13); Comments of FPL Food on 2013 Proposed Rule (Exh. CDA-32)).

[191] U.S. First Written 21.5 Submission, para. 30.

[192] U.S. First Written 21.5 Submission, para. 31 (citing 2013 Final Rule, 78 Fed. Reg. at 31,368, 31,373).

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

[194] D.C. Court PI Opinion, at n.33 (Exh. US-4).

[195] *See* U.S. First Written 21.5 Submission, para. 31.

[196] *See* U.S. First Written 21.5 Submission, para. 31.

[197] *See* U.S. First Written 21.5 Submission, para. 26.

C. (*Canada*) Why are the model specifications used in Dr. Sumner's Econometrics Study Update different than the one used in the original Sumner Econometric Study? (Exhibit CDA-71 and original Exhibit CDA-152). In particular:

i. Why has the dynamic feature of the econometric model (dropping the lagged dependent variable) been eliminated?

ii. Why have the 11-month dummy variables used previously to account for seasonal effects in the weekly data been replaced with three event dummies to account for Independence Day, Thanksgiving, and Christmas? To what extent can these three event dummies pick up seasonal fluctuation in the cattle and hog markets? Do the omissions of these three event dummies alter the findings?

iii. Why has the BSE dummy variable been replaced with a variable named "Rule 2"?

iv. Why has the lagged exchange rate variation been dropped in the basis price specification?

D. (*Canada*) Do the findings of the Sumner Update remain valid if:

i. the exact same specifications (lagged dependent variable, month dummies) are used in the original proceedings?

ii. the sample period is extended from 2003/2005-2010 to 2003/2005-2012 to address the BSE ban?

iii. the unemployment variable is replaced with a recession dummy?

iv. the model is estimated using monthly data?

E. (*Canada*) Would the main findings of the Sumner Update change if one extended the sample period with more recent data, to take into account any actual effects of the amended COOL measure?

F. (*United States*) What were the underlying data used to compute the US fed steer to Canadian fed steer price basis? (United States' second written submission, para. 143; Exhibit US-41) Please provide the actual tables with sources.

204. The United States refers the Panels to Exhibit US-62.

G. (*Canada*) Please explain why the Sumner Update's price basis calculation relied on the data referenced in question F.

H. (*Canada*) Please specify (i) the actual data used (including price and quantities and econometric estimates of the impact of COOL); (ii) the details of the calculations

(formulas used and how they were derived); as well as (iii) the assumptions considered in the economic model, to reach the findings of Exhibit CDA-126.

I. (*Canada*) In Exhibit CDA-126, why is the calibration of the model done using previous econometric estimations (based on data up to the end of 2010 in original Exhibit CDA-152), and not more recent updated estimates found in Exhibit CDA-71?

J. (*Canada*) Was a sensitivity analysis performed to determine to what extent the assumptions used to derive the partial equilibrium model in Exhibit CDA-126 affect the findings? Please provide detailed results of the sensitivity analysis.

K. (*all parties*) Please explain whether Dr. Sumner's findings in Exhibit CDA-126 can be used to infer the magnitude of compliance costs required for a non-discriminatory alternative measure to cause trade effects equivalent to those of the original COOL measure.

205. No, Dr. Sumner's calculations cannot be used for this purpose. Dr. Sumner proceeds from a novel and seriously flawed premise, uses a definition of "non-discriminatory" that contradicts the Appellate Body's findings in these disputes, and does not even use correct numbers.

206. As an initial matter, the United States notes that, as explained above, "trade-restrictive" is a distinct concept from "costs" and Canada and Mexico err in trying to equate the two concepts.

207. Even aside from this fundamental error, Dr. Sumner's analysis is incorrect. Dr. Sumner appears to define "non-discriminatory" to mean "causing an equal reduction in market share." However, that is not correct, and it is not an approach that has ever been used. In the original proceeding, the Appellate Body explicitly explained that it disagreed with a legal approach "requiring that imported livestock be 'equally competitive' with domestic livestock."[198] And the Appellate Body explained that a measure will be non-discriminatory even though it has a detrimental impact as long as that detrimental impact stems exclusively from legitimate regulatory distinctions.

208. Canada and Mexico now appear to seek to have the Panels contradict these Appellate Body findings. They argue that a non-discriminatory measure is one where domestic and imported livestock are equally competitive, and that a non-discriminatory measure cannot have any detrimental impact on imports. This is incorrect, and Dr. Sumner is using a legally incorrect comparison as the basis for his analysis.

209. Dr. Sumner's analysis in Exhibit CDA-126 is flawed in several other ways as well. In particular, the analysis provides an inflated estimate of reduced export revenue and an erroneous calculation of the potential compliance cost.

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[198] *US – COOL (AB)*, para. 291.

Background

210. Dr. Sumner states that his analysis in Exhibit CDA-126 calculates "…the magnitude of added compliance costs necessary for a non-discriminatory alternative measure to cause export losses (trade effects) equivalent to those of the original COOL measure." Dr. Sumner claims to do that by finding a "…compliance cost per unit that an alternative measure must impose in order to…" cause revenues in the U.S. cattle and pork sector to fall by the same percentage as he has calculated for the Canadian export sectors under COOL. Dr. Sumner's inflated calculation of lost export revenue finds that to be approximately 40 percent. By imposing a large processing and marketing cost on all cattle and hogs slaughtered for sale in the United States, Dr. Sumner seeks to determine what reduction in U.S. demand for beef and pork, and subsequently lower demand for cattle and hogs, would lead to the same reduction in Canadian export revenue to the United States as the original COOL measure.

Non-discriminatory Alternative Measure

211. The United States disagrees that a "non-discriminatory alternative measure" must be one that equates percent revenue losses in the market of the Member maintaining the measure with percent export revenue losses from an exporting Member.

212. Any detrimental impact from the amended COOL measure stems exclusively from legitimate regulatory distinctions. These distinctions are designed and applied on an even-handed basis. The amended COOL measure's costs are well documented in the rulemaking record. Accordingly, the amended COOL measure *is* a non-discriminatory alternative to the original COOL measure, and the amended COOL measure does not require anything like the overall reduction in demand for beef and pork that Dr. Sumner's analysis relies on.

Exhibit CDA-126 Uses Inflated Estimates

213. By using inflated estimates, any subsequent analysis will necessarily be biased upwards.

214. With respect to Dr. Sumner's price-gap approach, Dr. Sumner establishes a price-gap only for slaughter cattle and not for the other classes of livestock that Canada exports to the United States. And even there, Dr. Sumner's methodology for estimating changes to prices and export volumes is incorrect. Using Dr. Sumner's data, COOL has had no significant effect on the U.S.-Canadian slaughter-cattle basis. The United States has also presented data showing narrowing bases post-COOL for cattle.[199]

215. Exhibit CDA-126 adopts inflated estimates of COOL impacts from earlier submissions of Canada, namely Exhibit CDA-71. In those, Dr. Sumner has changed his model and the parameters several times, which makes it difficult to discern how he is actually getting to his results. For example, Dr. Sumner now is including monthly variables and holiday variables to account for seasonal fluctuations in prices and exports. Certainly some of those variables were

[199] U.S. Response to Panels' question F.

not included in earlier submissions, and so it is unclear why Dr. Sumner is now including them, or what the effect of their inclusion is on his results.

216. The United States again notes that the trade effects identified in Dr. Sumner's analysis do not include an appropriate variable to represent the U.S. economy (*i.e.*, a recession variable) which helps explain why U.S. demand for beef fell before the original COOL measure and why recent trends in prices and export volumes from Canada have shown increases.

Exhibit CDA-126 Uses an Incorrect Representation of the Cattle and Hog Sectors

217. This incorrect representation drastically inflates any estimates of the costs that would need to be imposed on the beef and pork industries in order to reduce total consumer demand by the amount stipulated by Dr. Sumner.

218. The method Dr. Sumner has utilized to determine what an equivalent cost might be to mimic a trade revenue or trade volume impact of the amended COOL measure is flawed. Dr. Sumner has modeled the cattle and hog supply and demand in a one country context. That is inappropriate in this case, since the fundamental reason for the model is to equate the effects of one country's measure on another country's export sector and its own domestic sector.

219. In Exhibit CDA-126, Dr. Sumner has modeled a percent change in revenue to a livestock sector as a function of a domestic demand elasticity, a domestic supply elasticity, the share of livestock cost in retail meat products and a percent change in cost of marketing and retailing due to a regulatory cost. His one-country model examines processing and marketing costs necessary to reduce revenues in the U.S. cattle sector by 40 percent. Apparently his logic is that if the U.S. cattle sector loses 40 percent of revenue that would imply that the Canadian (and presumably the Mexican) export supply sectors would also lose 40 percent of revenue as well. Of course, that means Dr. Sumner is assuming that the Canadian livestock export sectors are just as responsive to changes in economic returns as are the U.S. domestic feeder and fed cattle supply sectors.

220. For an illustration of how a one-country model will lead to incorrect results, take the case of Dr. Sumner's estimate of fed cattle changes. While he has estimated the change in the basis between Canadian and U.S. cattle, due to the original COOL measure, it is also apparent that the price for Canadian cattle has increased substantially since 2009. According to Dr. Sumner, the change in the slaughter cattle basis of $40 per head (about 2.5 percent) has led to a reduction in slaughter cattle imports by 140,000 per year (17 percent of pre-COOL volumes), accounting for other factors. That implies a much more elastic supply than the United States or Canadian supply elasticity for cattle.[200] Simply assuming that the Canadian export supply sector will

[200] Brester and Smith (1999) also estimate Canadian and U.S. fed cattle supply elasticities and find a much more elastic Canadian export supply elasticity than U.S. and Canadian supply elasticities (*see generally* Gary Brester and Vincent Smith (1999) "Evaluating the Impacts of the US Department of Commerce's Preliminary Imposition of Tariffs on US Imports of Canadian Live Cattle," Trade Research Center discussion paper No. 34, Montana State University, Bozeman, MT (Exh. US-63); Gary Brester, John Marsh, and Vincent Smith (2005) "The Impacts on U.S. and Canadian Slaughter and Feeder Cattle Prices of a U.S. Import Tariff on Canadian Slaughter Cattle," Canadian Journal of Agricultural Economics 50(1) (Exh. US-64)). *See also* Canadian supply elasticity estimate in James Rude, Jared Carlberg, and Scott Pellow (2007) "Integration to Fragmentation: Post-BSE Canadian

respond in the same way as the U.S. domestic supply sector is incorrect and will yield meaningless results.

221. By making that seriously flawed assumption, Dr. Sumner arrives at an estimate, at what he considers the low end, of $608 per head of cattle processed in the United States as the amount by which overall costs must be increased in order to reduce total consumer demand by an equivalent amount to the amount he estimates should be attributed to the original COOL measure. Even aside from the reliance on an incorrect standard of a non-discriminatory alternative, the flaw in that logic should be readily apparent by thinking about it practically. Would a $608 per head cost imposed in the United States really cause the U.S., Canadian, and Mexican cattle suppliers to react similarly and lead to a decrease in trade revenue for the Canadian cattle sector equal to the decrease in the revenue for the U.S. cattle sector? Of course it would not. Canadian and Mexican exporters would react swiftly to such a cost and would limit their sales to U.S. processors immediately. They would prefer to escape such a charge by selling their cattle to their own domestic processors. Indeed, U.S. cattle producers would also seek to escape such a charge by sending their cattle to Canadian and Mexican processors.

222. Further, as Dr. Sumner himself has written,[201] when beef trade is not an issue (*i.e.*, the market for beef and pork has remained open and duty free) basic economics suggests that taxing trade in an input (*i.e.*, a COOL discount), while trade in the final product is open would have only minimal effects on the price of the input (cattle and hogs). That is because any tax on live cattle, for example, could only affect where the cattle are slaughtered (*i.e.*, U.S. or Canada) and would not affect the supply of or demand for beef. Dr. Sumner also noted that Canada, in an antidumping and countervailing duty case in 1999, argued that live cattle were an input into the production of beef and that the border for beef trade was open between the U.S. and Canada. As such, Dr. Sumner argued that any countervailing duty would simply lead to Canada increasing the export of beef rather than live cattle.

223. As another example, Brester, Marsh, and Smith model how the imposition of a tariff will reduce U.S. imports of Canadian fed cattle and increase U.S. fed cattle prices.[202] They find a 5.57 percent tariff could lead to a decline of Canadian fed cattle exports to the U.S. by nearly 19 percent, a change in the basis of $2.76 per hundredweight ("CWT"). However, the authors note that it is "unlikely that these large long-run effects would have been realized because the proposed tariff on imports of Canadian slaughter cattle would not have applied to U.S. imports of Canadian beef carcasses or boxed beef." Hence they argue that beef imports would have

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Cattle Markets, Processing Capacity, and Cattle Prices," Canadian Journal of Agricultural Economics 55(2) (Exh. US-58).

[201] Richard Barichello, Timothy Josling and Daniel Sumner (2004) "Agricultural Trade Relations between Canada and the United States," Working paper 2004-03, Food and Resource Economics, University of British Columbia (January 2004) (Exh. US-65); and Daniel Sumner, Richard Barichello, and Mechel Paggi (2004) "Economic Analysis in Disputes over Trade Remedy and Related Measures in Agriculture with Examples from Recent Cases," Working Paper No. 2004-01, Food and Resource Economics, University of British Columbia (January 2004) (Exh. US-66).

[202] The Impacts of U.S. and Canadian Slaughter and Feeder Cattle Prices of a U.S. Import Tariff on Canadian Slaughter Cattle," pp.1-13 (Exh. US-64).

increased offsetting reductions in the slaughter cattle imports, thereby mitigating the effects of the tariff.

L. (*all parties*) In the context of Exhibit CDA-126, to what extent does the concept of "lost export revenue" capture trade restrictiveness?

224. "Lost export revenue," as described in Exhibit CDA-126, captures both a price effect and a quantity effect. Dr. Sumner's use of "lost export revenue" as a measure of trade restrictiveness has no basis in the text of the covered agreements or in past reports and appears unrelated to the description of trade restrictiveness provided by the Appellate Body, which is "having a limiting effect on trade."[203]

M. (*all parties*) What are the reasons for exporting livestock to the United States? For instance, to what extent do they relate to the respective efficiency or capacity in Canada, Mexico, and the United States of livestock production, slaughter operations, and/or meat processing?

225. All three countries are large producers of cattle and hogs reflecting natural advantages in livestock production: extensive land resources, developed transportation infrastructure, and access to low cost feed and an efficient meat processing sector (in particular in the United States and Canada). Canada and Mexico export cattle and beef to the United States (and Canada exports hogs and pork) because of the large size of the U.S. market. Demand for livestock, domestic and imported, in the United States is driven by the demand for beef and pork.

226. The relative productivity of the meat processing sector plays an important role in the demand for livestock: since much of the meat is destined for the U.S. market, processing will occur where production costs are lowest. For example, Mexican cattle exports to the United States have expanded dramatically since NAFTA, reflecting in part the fact that more efficient U.S. feed lots and meat processors can pay better prices and handle larger volumes than alternatives in Mexico. In the case of Canada, prior to the BSE outbreak in 2003, U.S. processing facilities were able to largely out-compete their Canadian counterparts. After the BSE outbreak Canadian processors expanded their capacity by more than 25 percent to handle the surplus livestock denied access to the U.S. market. This expansion has continued through the present, Canadian livestock producers now have the ability to field prices from competitive U.S. and Canadian processors keen to maintain product flow and limit excess capacity.

[203] *US – COOL (AB)*, para. 375.