**** As Delivered ****

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)**

Opening Oral Statement of
the United States of America

February 18, 2014

**** As Delivered ****

I. INTRODUCTION

1. Mr. Chairman and members of the Panels: on behalf of the United States, thank you for your ongoing work in these panel proceedings.

2. The crux of this dispute remains whether the United States, consistent with its WTO obligations, can provide consumers information about the country of origin of meat they purchase at retail. As should come as no surprise, the United States believes it can. Providing consumers information is an important, legitimate governmental objective. This is particularly true here where a substantial amount of meat produced in the United States is derived from animals that have been born and raised abroad, many of which live their entire lives – save for the day that they are imported – in a foreign country. The original panel found this objective to be legitimate. And nothing in the WTO Agreement bars the United States from pursuing it.

3. Complainants disagree. They note that those requirements impose costs on the U.S. industry, and argue that those costs disproportionately impact their imports. And that, in complainants' view, should be the end of the examination. For them, the WTO Agreement forbids the United States from imposing any technical regulation – no matter how legitimate the distinctions it makes – if it has a detrimental impact on imports. That is, a technical regulation may be judged to be discriminatory without any analysis of whether those costs stem exclusively from legitimate regulatory distinctions.

4. Complainants further argue that the only WTO-consistent option that permits the United States to inform consumers where the animal was born, raised, and slaughtered is to adopt a complex, expensive regulatory regime that tracks individual animals from the ranch, to the

feedlot, to the slaughterhouse, to the retailer – a regime that other Members have generally only adopted to achieve an entirely different objective – health and safety.

5. Further, complainants have put forward no evidence as to what effect the imposition of such a "trace-back" regime would have on the United States and its rural economy. Canada, for its part, suggests that the effect could be a significant consolidation of U.S. industry.[1] Other effects could include a steep rise in meat prices and a dramatic change in how meat is produced in the United States.[2] Apparently, neither complainant has any idea what the *trade effect* of trace-back would be, including whether it would eliminate the import of foreign livestock entirely.

6. Indeed, Canada has considered imposing this very same regulatory regime on its own industry – which is smaller and less complex than the U.S. one – for over a decade and has yet to even produce a complete cost estimate, much less make the (obviously) difficult political decision to impose such costs on its own industry and consumers, even to address animal health or food safety concerns. Yet, according to complainants, the United States must impose such a regime *immediately* or face the suspension of concessions. Complainants' proposed alternative is not a reasonable option.

7. As we have discussed, and will continue to discuss during this meeting, USDA's 2013 Final Rule amended the COOL measure such that the current requirements draw legitimate, even-handed distinctions between beef and pork products sold at retail. The measure further

[1] *See* Canada's Second Written 21.5 Submission, para. 136.

[2] *See* U.S. Second Written 21.5 Submission, para. 154; U.S. First Written 21.5 Submission, para. 191.

provides origin information regarding where the animal was born, raised, and slaughtered in a manner that is not more trade restrictive than necessary. The amended COOL measure is WTO-consistent, and we ask these Panels to come to these same conclusions.

II. LEGAL ARGUMENT

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

8. The United States has taken a measure to comply that directly addresses the concerns in the DSB recommendations and rulings. The amended COOL measure substantially increases the information provided to consumers by setting out what is in effect a single label – disclosing the country of birth, raising, and slaughter – for the three categories of meat (A, B, and C) that impact complainants' livestock imports. The single label affixed to those categories of meat provides the same amount of information in the same meaningful and accurate way for each category. The measure is even-handed – any detrimental impact now stems exclusively from legitimate regulatory distinctions. As such, any detrimental impact does not "reflect discrimination,"[3] and the amended COOL measure is, as a whole, non-discriminatory.

9. Complainants contest this conclusion, walking through a long list of complaints against various parts of the measure that they find objectionable. We disagree with this open-ended approach. In the three recent disputes under the *Agreement on Technical Barriers to Trade* ("TBT Agreement") the Appellate Body has made clear that the appropriate inquiry is whether *the detrimental impact* resulting from regulatory distinctions made by the measure at issue

[3] *US – COOL (AB)*, para. 271.

reflects discrimination.[4] For purposes of this dispute, that means the relevant distinctions are between the A, B, and C categories of meat and the single label that is affixed to that meat. Regulatory distinctions that have no relationship to the detrimental impact simply do not answer the question before the Panels.

10. In its first submission, Canada appeared to reject this approach in its entirety.[5] In its second submission, Canada moderated its view, arguing instead that while the Panels should examine the regulatory distinctions that cause the detrimental impact "to determine the consistency with TBT Article 2.1," panels are not precluded from considering other "elements" that demonstrate that *the regulatory distinctions* reflect discrimination.[6] Now, in its appellant submission in *EC – Seal Products*, Canada finally completes the turnaround, arguing that a panel *commits reversible error* when it analyzes regulatory distinctions that do not cause the detrimental impact.[7]

11. Mexico, for its part, appears to reject this framework entirely.

1. Any Detrimental Impact Caused by the Amended COOL Measure Stems Exclusively From Legitimate Regulatory Distinctions

12. Complainants fail to establish that any detrimental impact does not stem exclusively from legitimate regulatory distinctions. And the reason for this is obvious – the amended COOL measure increases the origin information provided, and now provides equally meaningful and

---

[4] *US – COOL (AB)*, para. 327; *US – Tuna II (Mexico) (AB)*, para. 231; *US – Clove Cigarettes (AB)*, para. 224.

[5] *See generally* Canada's First Written 21.5 Submission, paras. 66-89.

[6] Canada's Second Written 21.5 Submission, para. 49.

[7] Canada's Appellant Submission in *EC – Seal Products*, paras. 93-94 (Jan. 24, 2014) (quoting *US – Tuna II (AB)*, para. 286).

accurate origin information for all labeled muscle cuts derived from animals slaughtered in the United States (which accounts for approximately 99.7 percent of COOL-labeled muscle cuts). The "disconnect" in the original COOL measure between the information required to be collected and that provided to consumers has now been remedied. The 2013 Final Rule raises the level of information provided without increasing the recordkeeping and verification requirements that were already in place. The information provided is now "commensurate" with any burden the measure causes to the U.S. meat industry through the recordkeeping and verification requirements.

13. Complainants disagree, and raise a series of objections to the revised single label that is affixed to A, B, and C category muscle cuts. As we have discussed, the vast majority of these objections do not even allege that the regulatory distinctions between the three categories are not even-handed, and, therefore, not legitimate.

14. Where complainants do complain about a perceived lack of even-handedness, they are reduced to alleging that the label affixed to B and C meat could be "potentially ambiguous" under certain hypotheticals.[8] What complainants do not contest is that the amended COOL measure is even-handed in its treatment of *actual* livestock imports compared to *actual* livestock produced wholly in the United States. That is to say, there is no doubt that meat produced from imported feeder cattle, is accurately labeled as "Born in Canada [or born in Mexico], Raised and

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

Slaughtered in the U.S." And such meat is certainly not labeled in a less accurate or meaningful way than A category meat.[9]

15. Likewise, there appears to be no doubt that meat produced from fed cattle imported into the United States for immediate slaughter, which are generally killed on the very day of import, is accurately labeled as "Born and Raised in Canada, Slaughtered in the U.S.," or, alternatively, "Born and Raised in Mexico, Slaughtered in the U.S." And such meat is certainly not labeled in a less accurate or meaningful way than A category meat.[10]

16. The same holds true for the equivalent labels for hogs. Complainants' hypothetical-based claims cannot succeed where the facts in *the real world* demonstrate the legitimacy of the measure.

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

17. Complainants either concede – or at least do not contest – that the regulatory distinctions regarding the D Label, the three exemptions, the ground meat rule, and the statutory prohibition on trace-back have no nexus to any detrimental impact. As such, all of these arguments fall outside the scope of the national treatment analysis as none of them can answer the question of

[9] U.S. Second Written 21.5 Submission, para. 32.

[10] U.S. Second Written 21.5 Submission, para. 36.

whether the detrimental impact "reflect[s] discrimination" or not,[11] a point on which Canada now appears to agree with the United States.[12]

18. With regard to the D Label, it is uncontested that this label provides origin information regarding imported *meat*, and does not cause any detrimental impact on imported *livestock*. It is also clear that the D Label is entirely even-handed in that the D Label does not disadvantage complainants' products vis-à-vis U.S. products. Moreover, the D Label – which accounts for only 0.3 percent of COOL-labeled meat – provides accurate information on origin. As we have explained, "Product of Country X" means, for all practical purposes, "born, raised, and slaughtered in Country X" since, as a general matter, the countries that export muscle cuts of meat to the United States do not process their meat from livestock that are born, raised, and slaughtered in more than one country. [13] Indeed, the United States differs from many other producers in that it does import a significant amount of livestock for slaughter, which underscores the reason for providing consumer information regarding where the animal was born, raised, and slaughtered.

19. With regard to the scope of the measure, all three parties appear to be in agreement with the original panel's finding that the "exact proportion or magnitude of the exceptions and exclusions is irrelevant" for purposes of the detrimental impact analysis.[14] As such, it would appear uncontested that the three exemptions are unrelated to any detrimental impact resulting

[11] *US – COOL (AB)*, para. 327.

[12] *See supra* (citing Canada's Appellant Submission in *EC – Seal Products*, paras. 93-94).

[13] U.S. Second Written 21.5 Submission, para. 59.

[14] *US – COOL (Panel)*, para. 7.417.

from the measure. Moreover, it appears uncontested that the exemptions themselves are even-handed. As we have discussed, the exemptions to the amended COOL measure do not disadvantage Canadian and Mexican livestock vis-à-vis U.S. born, raised, and slaughtered livestock. The three exemptions at issue are therefore entirely different from how the Appellate Body considered the exemptions at issue in *US – Clove Cigarettes* and how the panel considered the exemptions at issue in *EC – Seal Products*.[15] Simply put, the United States does not act inconsistently with its national treatment obligations by not requiring all companies and all products to be covered where doing so does not disadvantage foreign livestock.

20. And while complainants continue to argue that exemptions reduce the amended COOL measure to some sort of nullity, the numbers tell a different story. The fact is that the measure requires meat to be labeled in over 30,000 grocery stores and other retailers – and covers nearly 10 billion pounds of beef and pork sold annually. This is hardly a nullity. That fact alone should demonstrate that there is no "disconnect" between the coverage and costs.

21. Of course, as discussed in response to complainants' Article III:4 claim, their criticism of this alleged "disconnect" is merely a formality in complainants' view. Complainants consider not only scope – but all of these objections to the amended COOL measure – as entirely irrelevant to whether the measure is discriminatory (and thus whether the measure brings the United States into compliance).

22. With regard to the ground meat label, the three parties appear to agree that the ground meat rule does not cause a detrimental impact on imported livestock. Moreover, complainants

[15] *See* U.S. Second Written 21.5 Submission, para. 63-64.

do not appear to contest that the regulatory distinction is even-handed. Quite frankly, we are at a loss as to how to respond to the criticisms of the ground meat rule, which has already been upheld as not being discriminatory.[16] Indeed, the original panel has already found that the ground meat rule does not even cause a detrimental impact on imports. While Canada claims that it "is not challenging the consistency of the ground meat label,"[17] it seems to make an argument that, in fact, does just that. Mexico takes a different track, appearing to argue that Members may not set different origin rules for different products. This is wrong, of course. And to make such an argument Mexico is forced to ignore the facts on the record as well as erroneously contend the national treatment obligation contains a free-standing arbitrariness standard.[18]

23. Finally, the statutory prohibition of trace-back (7 U.S.C. § 1638A(f)(1)) neither causes the detrimental impact nor is in any way not even-handed. Rather, as stated in the Appellate Body's report, the detrimental impact of the original measure stems from the distinctions between the production steps and the distinctions between the different types of labels.[19] Those are the distinctions that are relevant to this inquiry as it is those distinctions that mandate what categories of muscle cuts will exist and how those different categories will be labeled, *irrespective* of whether the statutory prohibition of trace-back exists or not.

---

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

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

[18] *See* U.S. Second Written 21.5 Submission, para. 73.

[19] *US – COOL (AB)*, para. 341.

24. What is really going on here – the reason for this and many of complainants' arguments – is their attempt to convince the Panels that a measure is discriminatory simply because it has a detrimental impact on imports. The *reasons* for the detrimental impact are, in complainants' view, entirely irrelevant. As discussed, complainants are incorrect.

25. Complainants fail to prove that the amended COOL measure accords less favorable treatment to imported livestock than domestic livestock within the meaning of Article 2.1 of the TBT Agreement.

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

26. Complainants also fail to establish that the amended COOL measure is inconsistent with Article III:4 of the GATT 1994. The crux of complainants' argument is that these Panels should, when analyzing the exact same technical regulation, interpret the same language – "treatment no less favourable" – differently in Article III:4 of the GATT 1994 than in Article 2.1 of the TBT Agreement. Complainants cannot explain how their approach results in "a coherent and consistent" interpretation of the two agreements,[20] because, of course, it will not. Rather, complainants insist on this overly narrow interpretation of Article III:4 to carve out for themselves an easier path to success on their claims (rather than accuracy of interpretation), while rendering the provision specifically addressing technical regulations, Article 2.1, inutile.

27. Under complainants' approach to Article III:4, the *sole* relevant consideration is the trade effect of the measure. Any examination of whether the technical regulation draws legitimate,

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

even-handed distinctions is deferred to the analysis of whether the "discrimination" is "arbitrary or unjustified" under Article XX. Where a measure pursues an objective not listed in Article XX – as is the case here – the legitimacy – *even the correctness* – of the requirements imposed are wholly immaterial to the national treatment analysis.

28. As we have discussed, complainants' overly narrow interpretation of Article III:4 greatly undermines a Member's ability to regulate in the public interest, putting at risk a whole host of measures involving standards or technical regulations, including those that: provide consumer information; prevent deceptive, misleading, and fraudulent practices; and ensure the compatibility and efficiency of telecommunication goods.[21] For example, if one were to accept complainants' approach, a measure setting standards for deceptive practices could be found inconsistent with Article III:4 simply on the basis that the domestic products satisfied the standard and the complaining products did not satisfy the standard.[22] In complainants' view, it would be simply irrelevant that the measure set forth legitimate distinctions between deceptive and non-deceptive products. For complainants, the measure would be in breach simply because it was a complaining party's products that did not meet the standard even if they were deceptive.

29. The clear result of complainants' approach is to take away from Members regulatory discretion that has always existed under Article III:4. Under this approach, regulators would be under pressure to lower their standards to a "least common denominator" level, which has never been the case before. Rather, the traditional Article III:4 analysis has always provided regulatory

[21] U.S. Second Written 21.5 Submission, paras. 84-87.

[22] U.S. Second Written 21.5 Submission, para. 84 (citing *US – Tuna II (Mexico) (AB)*, para. 234-235).

space for the Member to take otherwise legitimate measures, even if such measures burden trade unevenly across the membership.[23]

30. The consequences for this dispute are clear enough. What complainants seek is that these Panels affirm that detrimental impact *equals* discrimination for all facts and in all cases. The vigorous debate between the parties over whether the different categories of meat and scope of the measure are even-handed is simply meaningless in complainants' view, and should be swept into the realm of academic papers and dusty tomes. WTO panels need not consider them at all. Indeed, there would be no reason for a complaining Member to even bring an Article 2.1 claim and thus engage on the issue of whether the distinctions are legitimate – a trend that has already begun in *EC – Seal Products*.[24]

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

31. Complainants' TBT Article 2.2 claims fail. Neither party has established a *prima facie* case that any one of the four alternatives is a reasonably available, less trade restrictive alternative measure that provides an equivalent level of origin information to what the amended COOL measure provides.

32. Perhaps sensing that failure, complainants – in contrasting ways – attempt to muddle the analysis with extraneous steps, factors, and balancing tests. The sum result of these arguments appears to be an attempt to convince the Panels that Article 2.2 requires the WTO to step into the

[23] *See* U.S. Second Written 21.5 Submission, paras. 82-83; U.S. First Written 21.5 Submission, paras. 132-134.

[24] *See* U.S. Second Written 21.5 Submission, n.159.

shoes of a respondent government and determine whether the challenged measure is an effective public policy tool. As we have discussed, this is not the correct approach.

33. Nothing in the text of Article 2.2 or its relevant context suggests that a WTO panel should make such a far-reaching and intrusive judgment about a Member's measure. The question for the Panels is not whether the amended COOL measure is "reasonable" or pursues an "important" goal; those are questions reserved for the Member. Rather, the question for these Panels is whether the challenged measure is more trade restrictive than necessary. And to determine whether that is so, the Panel must examine whether an alternative exists "that is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available."[25]

34. Of course, it should be abundantly clear that complainants carry the burden of proof for the alternatives that they *themselves* put forward. Previous analyses by the Appellate Body, including in this very dispute, could not be clearer on this point.[26] Moreover, this burden does not wax and wane depending on the degree of difficulty, but remains constant.[27] That complainants find it difficult to piece together a *prima facie* case for any one of their alternatives is simply another way of saying that the amended COOL measure is consistent with Article 2.2.

1. The Objective and Contribution to That Objective

[25] *US – COOL (AB)*, para. 379.

[26] *See* U.S. Second Written 21.5 Submission, paras. 114-119; U.S. First Written 21.5 Submission, para. 145.

[27] *See* U.S. Second Written 21.5 Submission, paras. 111-112.

35. The first step in the assessment of a claim under Article 2.2 is to make the threshold determination as to what degree of contribution to the objective that the measure actually achieves.[28] As the United States has discussed, 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.[29]

36. As such, complainants' criticisms of the U.S. characterization of its objective fall apart. The amended COOL measure makes the *same* contribution to its objective whether the objective is characterized more generally, "to provide consumer information on origin,"[30] or more specifically, "to provide consumers with information on the countries in which the livestock from which the meat they purchase is produced were born, raised, and slaughtered."[31] In other words, and contrary to complainants' approach, it is simply not possible to compare the challenged measure with an alternative without reference to the information that the challenged measure *actually* provides – *i.e.*, information regarding where the animal was born, raised, and slaughtered.

2. Complainants' First and Second Alternatives Fail

37. In light of this analytical framework, it should be readily clear why complainants' first two alternatives fail. Neither alternative – substantial transformation with voluntary production step labeling or the ground meat rule – provides anywhere close to the same amount of

[28] *US – COOL (AB)*, para. 426 (emphasis in original); *see also id.*, para. 390 (citing *US – Tuna II (Mexico) (AB)*, para. 316).

[29] U.S. Second Written 21.5 Submission, para. 105; U.S. First Written 21.5 Submission, paras. 158-160.

[30] *US – COOL (AB)*, para. 433.

[31] *US – COOL (AB)*, para. 453.

information with regard to where the animal was born, raised, and slaughtered as the amended COOL measure provides. As such, both alternatives contribute to the objective at a substantially lesser degree than the amended COOL measure does.

38. Consistent with the Appellate Body's guidance in *US – Tuna II (Mexico)*, the examination of these two alternatives should end here. An alternative that contributes to the objective to a lesser degree than the challenged measure cannot prove the challenged measure inconsistent with Article 2.2.[32] If it were otherwise, a Member could not take "measures necessary to achieve its legitimate objectives 'at the levels it considers appropriate.'"[33] Complainants' inability to square their arguments with either the text of the TBT Agreement or the Appellate Body's interpretation of that text in *US – Tuna II (Mexico)* makes clear that neither of these alternatives prove that the amended COOL measure is inconsistent with Article 2.2. Other "considerations" put forward by complainants, such as whether the ground meat label "fulfils" its objective, are not relevant to this discussion and should be rejected.[34]

3. Complainants' Third Alternative Fails

39. Complainants have further failed to establish a *prima facie* case that the trace-back alternative establishes that the amended COOL measure is inconsistent with Article 2.2. In particular, complainants have failed to prove that trace-back is less trade restrictive than the amended COOL measure and that it is reasonably available to the United States.

---

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

[33] *US – COOL (AB)*, para. 373 (quoting the sixth preambular recital of the TBT Agreement).

[34] *See* U.S. Second Written 21.5 Submission, paras. 123-125; 129.

a. Trace-Back Is Not a Less Trade Restrictive Alternative

40. Complainants continue to argue that trace-back is less trade restrictive than the amended COOL measure based on the assumption that trace-back would be less discriminatory. As discussed previously, such an interpretation runs contrary to both the text of the TBT Agreement and the complainants' own positions in this and other disputes.

41. First, complainants cannot square their position with the Appellate Body's view that the term "trade restrictive" "means something having a limiting effect on trade."[35] In the Appellate Body's view, the obligation does "allow[] for some trade-restrictiveness."[36] But it simply cannot be the case that Article 2.2 allows for "some" discrimination.[37] The fact is that Article 2.2 only makes sense when the term "trade restrictive" is understood to refer to limiting trade effects, *i.e.*, limiting market access. Again, the entire point of having a TBT Agreement is based on the recognition that technical regulations often serve as barrier to market access for imported products.

42. Second, complainants' interpretation also leads to incorrect results. As a matter of law, the approach merges Articles 2.2 and 2.1.[38] A finding of inconsistency with Article 2.2 does not depend on a finding that the Member has acted inconsistently with Article 2.1.

---

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

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

[37] *See, e.g.*, U.S. Second Written 21.5 Submission, para. 107.

[38] *See* U.S. First Written 21.5 Submission, para. 156 (citing *US – Tuna II (Mexico) (AB)*, para. 286).

43. Third, complainants cannot square their interpretation with their own positions in this and other disputes. For example, Mexico argues that its first and second alternatives in this dispute are less trade restrictive because Mexico would sell more cattle (and at a higher price) under either of those two alternatives.[39] Similarly, in *US – Tuna II (Mexico)*, Mexico argued both before the panel and the Appellate Body that its suggested alternative was less trade restrictive because Mexican producers could sell more tuna products in the United States under such regime.[40] And in *EC – Seal Products*, Canada argued for (and the panel accepted) precisely the same interpretation – that the Canadian alternative should be considered less trade restrictive because it would allow Canadian producers to sell more seal products in the European Union.[41]

44. Neither party provides any cogent explanation as to why the phrase "trade restrictive" should be interpreted differently in this dispute than in *US – Tuna II (Mexico)*, *EC – Seal Products*, or any future TBT case. Rather, complainants appear to have constructed this interpretation in order to ease their own burden of having to prove that their market access would increase under the trace-back regime. Complainants' interpretation should be rejected.

45. Finally, complainants put forward no evidence that a trace-back regime would increase Canadian and Mexican livestock exports to the United States. For its part, Canada relies on Dr. Sumner's inflated estimation that the original COOL measure has lowered the price for Canadian fed cattle relative to U.S. cattle by approximately US$3 per hundredweight (or about US$40 per head). Canada goes on to allege that such a change in the price basis caused trade revenue losses

[39] *See* Mexico's Second Written 21.5 Submission, paras. 101, 104, 126, 133; Mexico's First Written 21.5 Submission, paras. 183, 194.

[40] *See US – Tuna II (Mexico) (AB)*, paras. 56, 88, 90; *US – Tuna II (Mexico) (Panel)*, para. 7.568.

[41] *EC – Seal Products (Panel)*, paras. 7.472, 7.482.

to the Canadian fed cattle and feeder cattle industry equivalent to those that would result from imposing processing and marketing costs of US$608 for every head of cattle processed and sold in the United States. Moreover, while there has been no measurable change in the price for Canadian hogs or feeder pigs, Canada nevertheless concludes that trade revenue losses to the Canadian hog sector are equivalent to those that would result from imposing processing and marketing costs of US$116 for every hog processed and sold in the United States. [42] Yet Canada fails to establish how those figures correlate to a reduction in Canadian exports, what the corresponding costs would be under a trace-back regime, and how those costs would relate to an increase in trade under such an alternative.

46. Canada's allegations appear to be wildly off the mark. If accurate, the Canadian live cattle and hog export market to the United States should have disappeared entirely given Canada's view that since 2009 the original COOL measure has allegedly imposed costs on the Canadian cattle industry equivalent to 39 percent of the average wholesale steer price and 68 percent of the wholesale hog price. It is not surprising therefore that Canada has found it impossible to prove that a trace-back regime would be less trade restrictive than the amended COOL measure. All Canada can do is throw up its hands and exclaim that a trace-back regime "could not possibly entail" the same amount of costs to the Canadian industry as the original COOL measure has allegedly imposed. [43]

47. Yet Canada has previously taken the exact contrary position, arguing that the much less intrusive segregation resulting from the original COOL measure imposed "tremendous" and

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

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

"extraordinary" burdens on U.S. processors and retailers.[44] Canada provides no explanation as to why it considers the much more intrusive and complete segregation required under trace-back regime to have a much lesser impact on U.S. processors and retailers.

48. Mexico, for its part, submits no data, preferring to rely on its view that it does not carry the burden of proof for the alternatives it "identif[ies]."[45]

49. These are clear examples where complainants have failed to establish their burden of proof.

b. Trace-Back Is Not a Reasonably Available Alternative

50. Complainants have similarly failed to establish that adopting a trace-back regime is a reasonably available alternative to the United States. As we have discussed, an alternative measure is not "reasonably available" where it "imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties" on the respondent Member.[46] In this case, neither Canada nor Mexico has provided an analysis of the "magnitude of the costs that would be associated with the proposed alternative, as compared to the current system" that proves that the costs of implementing a trace-back regime would not be prohibitively high, and

[44] Canada's First Written Submission in the Original Proceeding, paras. 97-98.

[45] Mexico's Second Written 21.5 Submission, para. 117.

[46] U.S. First Written 21.5 Submission, paras. 162-163 (quoting *US – Gambling (AB)*, para. 308); U.S. Second Written 21.5 Submission, para. 147 (quoting same).

therefore constitute an undue burden, or evidence that a trace-back regime would not present substantial technical difficulties for the current U.S. supply chain.[47]

51. Mexico merely relies on the ten year old Hayes & Meyer article, which provides outdated information on the U.S. pork industry and zero information on the cattle industry, and therefore is wholly inadequate for the purpose Mexico assigns to it. Canada claims that a cost estimate associated with the proposed (but rejected) National Animal Identification System ("NAIS") can serve as such a basis, but the NAIS Study only looked at costs that would be incurred up to slaughter, which is the least expensive of the three stages of meat production. As to those more expensive stages (slaughter and retail), Canada provides no cost estimates.

52. Of course, it is quite understandable why Canada and Mexico have thus far been unable to estimate the costs of the trace-back alternative. Complainants' alternative is an exceedingly complex regulatory regime that will without a doubt impose significant costs on a highly complex and diverse U.S. meat industry, which may very well lead to changes in the industry that are very difficult to predict, including increased consolidation and a dramatic slowdown in the slaughtering process.[48] To this point, Canada has already conceded that "[g]iven the size of U.S. slaughter houses, it is imperative that these facilities have a constant and consistent supply of cattle and hogs for slaughter. Any pause or delay in production is *prohibitively expensive*."[49]

---

[47] *China – Publications and Audiovisual Products (AB)*, para. 328.

[48] *See* U.S. Second Written 21.5 Submission, paras. 152-153; U.S. First Written 21.5 Submission, paras. 190-191.

[49] Canada's First Written Submission in the Original Proceeding, para. 41 (emphasis added).

53. And again, it is notable that while Canada has debated adopting such a regime for many years now, it has been unable to do so. And that debate is far from over. The furthest Canada was willing to say in its two submissions was that it is "working towards a practical phased-in strategy for tracking animal movements."[50] In fact, we understand that Canada has never even completed an analysis of the costs of Canada adopting such a regime.

54. The fact is that it is very difficult for a government to decide to adopt a trace-back regime. To be sure, some countries have decided to incur these costs in order to respond quickly to a food safety or animal health crisis, but that fact alone does not mean that such a regime is reasonably available to the United States for purposes of providing consumer information. That is particularly true when you look at the sheer size of the U.S. cattle and hog herds and the related industry.

55. For these reasons, complainants' third alternative does not prove the amended COOL measure is inconsistent with Article 2.2.

4. Canada's Fourth Alternative Fails

56. Canada puts forward no (or virtually no) evidence to support its fourth alternative – state/province labeling. However, based on the general description that Canada provides, we do not view this alternative to be substantively any different from the trace-back regime in that both alternatives would require the tracking of individual animals. That is, in the United States cattle (and to a lesser extent hogs) move through multiple states during their lifetimes while being sold

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

and re-sold in different auctions.[51] Because animals born in a particular state will not move as a group, but as individuals, any record-keeping regime associated with this alternative would be no different than from the record-keeping needed for trace-back. The only difference in the two regimes would appear to be in the content of the label, rather than in the record-keeping burden.

57. In light of that, Canada's fourth alternative fails to prove the amended COOL measure inconsistent with Article 2.2 for the same reasons that complainants' trace-back alternative fails. In particular, Canada does not establish a *prima facie* case that the fourth alternative is less trade-restrictive than the amended COOL measure is and is a reasonably available alternative for the United States.

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

58. Finally, complainants' non-violation nullification or impairment ("NVNI") claims fail.

59. First, it is plain that the NVNI claims fall outside the terms of reference of this Article 21.5 proceeding, where the DSB recommendations and rulings did not include an element of NVNI. An Article 21.5 proceeding is limited to answering either: (1) whether a measure taken to comply with the DSB recommendations and rulings exists; or (2) whether a measure taken to comply is inconsistent with a covered agreement.

60. Complainants' attempt to unreasonably stretch the definitions of "inconsistency" and "consistency" to fit their erroneous arguments falls flat. It simply cannot be the case that the term "inconsistent" encompasses measures that are both consistent and inconsistent with the

[51] U.S. Second Written 21.5 Submission, para. 160.

covered agreements. Moreover, by arguing their NVNI claims in the alternative, complainants undermine their own position. Thus, in complainants' own view, their NVNI claims only become relevant in the event the Panels find that there is no longer a disagreement as to consistency. Yet it is at this point that the terms of reference of these Article 21.5 Panels close.

61. Second, complainants NVNI claims fail on the merits as well.

62. In this regard, complainants continue to fail to abide by Article 26.1(a) and "present a detailed justification in support" of their claims. Moreover, complainants cannot explain how the amended COOL measure can nullify or impair any benefits under these unspecified tariff concessions when they concede that currently their trade is governed by, and benefitting from, tariff concessions under the North American Free Trade Agreement ("NAFTA"), and not any covered agreement.

63. Finally, complainants have not proven that they could not have reasonably anticipated the COOL measures at the time the WTO tariff concessions were negotiated. As the United States has explained, this is clear from our own long history of labeling laws and policy discussion on meat and other products, the proliferation of similar labeling regimes by other WTO Members, prior to the time the Uruguay Round was concluded.[52] And in response to the Panels' question, we believe that it is plain that it is the complainants that bear the burden of proving that the amended COOL measure could *not* have reasonably been anticipated.[53]

64. For these reasons, complainants' NVNI claims fail.

---

[52] U.S. First Written 21.5 Submission, paras. 211-216.

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

65. Mr. Chairman, members of the Panel, this concludes our opening statement. We look forward to discussing questions from the Panels.