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

(DS384/386)

Answers of the United States of America to the First Set of Questions from the Panel to the Parties

October 4, 2010

Table of Reports

Short Form	Full Citation
Australia – Salmon (AB)	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998
Chile – Alcohol (AB)	Appellate Body Report, *Chile – Taxes on Alcoholic Beverages,* WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000
EC – Biotech	Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, adopted 21 November 2006
EC – Sardines (AB)	Appellate Body Report, *European Communities – Trade Description of Sardines,* WT/DS231/AB/R, adopted 23 October 2002
Japan – Alcohol (AB)	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages,* WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November, 1996

General Matters

Measures at Issue

Q3. (all parties) The parties referenced various oral and written communications made by US legislators during the development of the COOL requirements. Please elaborate on their status in light of how the panel in *EC - Biotech* treated statements by representatives of legislative and executive bodies of the European Union and its member States. In particular, do these communications reflect the intent of the U.S. legislator and therefore indicate the objective of the COOL requirements?

1. To determine the objective of the COOL statute, the Panel should start with its text, and may also consider its design, architecture, and structure.[1] The same approach is appropriate in determining the objective of the Final Rule. As the United States explained in its First Written Submission, the text, design, architecture, and structure of the statute, along with the 2009 Final Rule, all clearly indicate that the objective is to provide consumer information about the country of origin of the covered commodities at the retail level and to prevent consumer confusion regarding the origin of meat.[2]

2. Comments made by an individual legislator may reflect the intent of that individual. The intent of a particular individual cannot, however, be equated with the objective of a measure. This is consistent with the reasoning of the Appellate Body, in *Chile – Alcohol*, when it stated that "it is not necessary for a panel to sort through the many reasons legislators and regulators often have for what they do and weigh the relative significance of those reasons to establish legislative or regulatory intent."[3] In this dispute, individual comments by legislators – particularly the misleading selection of comments cited by Canada and Mexico – do not provide meaningful insight into the objective of the statute. Nor is it practicable to establish the statute's objective by sifting through all of the statements made in connection with it to divine the reasons for one or another legislator's action, and then to weigh the relative significance of those reasons.

---

[1] *Chile – Alcohol (AB)*, para. 62 (citing *Japan – Alcohol (AB)*, p. 29).

[2] U.S. First Written Submission ("FWS"), para. 206-211.

[3] *Chile – Alcohol (AB)*, para. 62. In determining the intent of a Member's measure, the weight to be placed on evidence such as statements of individual legislators will depend on that Member's domestic legal system. The Appellate Body's position in *Chile – Alcohol* is also consistent with how U.S. courts have treated such statements in previous cases interpreting U.S. law. *Garcia v. United States*, 469 U.S. 70 (1984) ("We have eschewed reliance on the passing comments of one member, *Weinberger v. Rossi*, 456 U.S. 25, 35, 102 S. Ct. 1510, 71 L. Ed. 2d 715 (1982), and casual statements from the floor debates.") (Exhibit US-60). Under U.S. law, while it is possible to consult legislative history of the statute in determining its purpose, not all material qualifies as legislative history and not all material that qualifies has equal weight.

3. This position is fully consistent with the position of the panel in *EC – Biotech*. In that dispute, the panel relied in part on statements of high ranking European Union and member State officials as evidence to determine whether or not an unwritten measure *existed*, not its intent or objective.[4] As the panel noted, the parties agreed that this was an appropriate use of such statements. In this dispute, there is no question as to the existence of the statute and regulations at issue.

4. Whereas it may be reasonable to refer to official statements by a Member to establish whether or not a measure exists, using individual legislators' statements to determine the objective of a measure is much more difficult – as noted above, even if the statements accurately describe that particular legislator's intent, they would not necessarily indicate the intent of the *legislature*. With 535 Members of Congress, there could be 535 different individual views as to the objective of a measure, with different views even among those voting in favor of legislation as well as different views among those voting in opposition to legislation. Indeed, in this case, the text of the measures, as well as their design, architecture, and revealing structure confirm a different objective than that Canada and Mexico attempt to infer from the individual statements they reference.

5. Finally, to the extent that the Panel were to conclude that statements made by U.S. legislators are relevant to an inquiry about the statute's objective, the comments cited by Canada and Mexico vastly oversimplify the debate surrounding the enactment of the COOL statute. For example, Canada and Mexico ignore the fact that U.S. consumers and consumer groups were a driving force behind the enactment of the COOL statute,[5] and ignore the numerous comments submitted during the development of the 2009 Final Rule indicating that the objective of the statute is consumer information.[6]

Vilsack Letter

Q4. (United States) Please explain the nature of the Vilsack letter within the US legal and political system. Is it common practice for the head of a US government agency to send this type of letter to industry? If yes, please provide other examples. If not, for what specific reasons and purposes did Secretary Vilsack decide to send his letter, but not initiate the amendment of the 2009 Final Rule?

---

[4] *EC – Biotech*, para. 7.514-7.540.

[5] *See, e.g.*, 107th Cong. Rec. S13270-75 (daily ed. Dec. 14, 2001) (statement from Senator Tim Johnson) (discussing the support of consumers and consumer groups for country of origin labeling) (Exhibit US-61).

[6] *E.g.*, Exhibit CDA-5, p. 2677 (stating that "the intent of the law and this rule is to provide consumers with additional information on which to base their purchasing decisions."); Exhibit US-11, p. 93-94; Exhibit US-12, p. 198; Exhibit US-13; Exhibit US-14.

6. The Vilsack Letter was issued in connection with the transition from the Administration of President George W. Bush to the Administration of President Barack H. Obama. On January 20, 2009, the first day of the Obama Administration, the new Administration issued a memorandum requesting the heads of all executive departments and agencies to review regulations developed by the previous Administration that had not yet taken effect to determine whether they should take effect without changes or should be modified to reflect the priorities of the new Administration.[7] Among the regulations pending before the U.S. Department of Agriculture (USDA) was the 2009 Final Rule, which had been issued on January 15, 2009 and was scheduled to go into effect on March 16, 2009.

7. USDA Secretary Thomas J. Vilsack reviewed the 2009 Final Rule in accordance with the White House directive and issued the Vilsack Letter to inform industry of the results of his review. In the letter, Secretary Vilsack indicated that the 2009 Final Rule would not be modified, but would take effect (as developed by the Bush Administration) as scheduled. The letter also included non-binding suggestions that companies could follow, if they chose to do so on a voluntary basis, to provide even more information to consumers. The Secretary chose to issue the Vilsack Letter instead of amending the 2009 Final Rule because he did not intend to change U.S. law but to allow the regulations to go into effect as drafted by the previous Administration.

8. Other U.S. Secretaries and high ranking Administration officials have sent letters to industry or made similar announcements to interested parties. For example, on May 8, 2009, U.S. Secretary of the Interior Ken Salazar announced that the Interior Department would retain a Bush Administration regulation related to the protection of the polar bear under the Endangered Species Act, and, like Secretary Vilsack, indicated that the Department would continue to monitor the situation to determine whether a new rule would be necessary.[8] In addition, other Administration officials have sent letters making non-binding suggestions to industry in similar situations.[9]

Q6. (United States) Please clarify whether the COOL requirements have ever been reviewed by USDA in line with the suggestions made by Secretary Vilsack in his letter. In particular, in light of the last two paragraphs of the Vilsack letter, has USDA ever assessed the level of compliance with this letter? If not, why not?

---

[7] Memorandum for the Heads of Executive Departments and Agencies from Rahm Emanuel, Assistant to the President and Chief of Staff, the White House (Jan. 20, 2009) (Exhibit US-62).

[8] "Salazar Retains Protection Rule for Polar Bears, Orders Monitoring," U.S. Department of the Interior Podcast (May 8, 2009) (Exhibit US-63) ("As we keep the current protections on the polar bear in place, [Department of the Interior] scientists will closely monitor the status of the polar bear's recovery and determine if a new rule needs to be put in place to better protect the polar bear and its habitat.").

[9] U.S. Food and Drug Administration Letter to Industry Concerning Liquid Vitamin D Supplements (Jun. 15, 2010) (Exhibit US-64); "Sebelius Sends Letter to Insurance Company CEOs, Calls on Executives to Publicly Justify Premium Hikes," U.S. Department of Health and Human Services News Release (Mar. 8, 2010) (Exhibit US-65).

9. USDA has not reviewed the COOL requirements in line with the suggestions made by the Secretary and has not assessed the level of compliance with the suggestions, nor does the agency have any plans to take either of these steps in the future. USDA has not done so because it is focused on monitoring compliance with the requirements of the 2009 Final Rule itself.

Q8. (all parties) Please clarify whether and, if so, on what basis, voluntary compliance with the suggestions contained in the Vilsack letter is expected.

10. Canada and Mexico have failed to present any evidence suggesting that industry is following the voluntary suggestions contained in the Vilsack Letter, nor is the United States aware that any such evidence exists. In fact, USDA's review of compliance with the 2009 Final Rule indicates that U.S. retailers are following the requirements of the 2009 Final Rule and are putting Category A, B, C, and D labels on the meat products they sell without adding any additional information. The United States has no reason to believe that this situation will change.

Q9. (all parties) Please clarify whether and, if so, how well the previous voluntary COOL scheme of the United States was complied with. Does such compliance or non-compliance have any implication for the nature of the Vilsack letter?

11. As the United States has noted, industry did not follow the 2002 Voluntary Guidelines established by USDA.[10] Likewise, Canada and Mexico have failed to present evidence indicating that industry is following the suggestions contained in the Vilsack Letter. The nature of the Vilsack letter is evident from the text of the letter itself. While the Vilsack Letter is not related to the 2002 Voluntary Guidelines, both are voluntary.

Country-of-origin labelling requirements

Q10. (United States) In paragraphs 38-40 of its first written submission, the United States explains that the 2002 COOL statute, as amended, provides flexibility regarding the use of category A and B labels, as a retailer is not required to use labels A and B for selling meat falling within the scope of categories A or B.

(a) Please explain the nature and implication(s) of this alleged flexibility in complying with the COOL requirements. For example, does this mean that meat derived exclusively from animals that were born, raised, and slaughtered in the United States does not need to be labelled as category A ("Product of United States")?; and

[10] U.S. FWS, para. 252.

12. As a threshold matter, to understand the implications of the flexibility afforded in the statute for categories A and B, it is important to understand the relationship between the statute and the 2009 Final Rule. The COOL statute sets forth the broad framework for U.S. country of origin labeling requirements but does not include the details necessary to implement these requirements.[11] The statute assigns to USDA the responsibility of developing the necessary implementing regulations, and it is these implementing regulations (the 2009 Final Rule) that USDA is enforcing in the marketplace.[12]

13. With respect to category labels, the COOL statute creates four different categories of meat labels, but does not specify all necessary details related to these categories, such as the precise circumstances in which a Category A or B label is required to be used or when flexibility between the use of the different labels is permitted. For example, the statute states that "A retailer of a covered commodity ... *may* designate the covered commodity as exclusively having a United States country of origin if the covered commodity is derived from an animal that was..." born, raised, and slaughtered in the United States.[13] Thus, the statute does not specify that all products meeting those criteria must be labeled as products of the United States, but rather permits retailers to so designate these products.

14. The 2009 Final Rule provides that when U.S. origin animals and animals with multiple countries of origin are commingled on a single production day, a Category B or C label may be used instead of a Category A label.[14] In this respect, the 2009 Final Rule provides flexibility for producers. However, the 2009 Final Rule specifies that this is the only circumstance in which meat derived from an animal born, raised, and slaughtered in the United States may be affixed with a label other than Category A.[15] If a retailer is selling meat that is derived from solely U.S. origin animals that have not been commingled, the 2009 Final Rule requires the retailer to use a Category A label. This aspect of the 2009 Final Rule reflects USDA's effort to balance the goal of providing as much clear and accurate information as possible to the consumer, against the desire to minimize compliance costs by providing flexibility to producers.

(b) 7 U.S.C. 1638a (2)(B)(ii) ("Relation to General Requirement") states that "[n]othing in this subparagraph alters the mandatory requirement to inform consumers of the country of origin of covered commodities under paragraph (1)"). How should the alleged flexibility in using categories A and B labels be understood in light of this subparagraph?

---

[11] U.S. FWS, para. 21-23.

[12] 7 U.S.C. § 1638c(b).

[13] 7 U.S.C. § 1638a(a)(2)(A).

[14] Exhibit CDA-5, p. 2706 (7 C.F.R. § 65.300 (d)-(e)).

[15] Exhibit CDA-5, p. 2659, 2706 (7 C.F.R. § 65.300 (d)-(e)).

15. This statutory provision simply makes clear that a retailer must affix a country of origin label to meat with multiple countries of origin. It does not specify the particular label that must be used or the order in which the countries must be listed. This provision does not affect the flexibility available under the 2009 Final Rule with respect to the use of the Category A and B labels.

Q11. (all parties) Is there an overlap between the categories of meat that can carry labels B and C under the COOL requirements? In what circumstances may US meat processors flexibly choose between these two labels? What is the actual practice of US meat processors in regard to any such flexibility and overlap?

16. The 2009 Final Rule permits retailers to affix a Category C label to meat derived solely from Category B animals even when those animals are not commingled.[16] In addition, the 2009 Final Rule permits a retailer to use a Category B or C label when any combinations of Category A, B, and/or C animals are commingled on a single production day.[17] USDA included these flexibilities in the 2009 Final Rule to reduce compliance costs.

17. The United States does not have information on the actual practice of U.S. meat processors and the extent to which they have taken advantage of the flexibilities included in the 2009 Final Rule. USDA is not monitoring the choices individual U.S. meat processors are making between available alternative labels.

Q12. (United States) In light of any flexibility and potential overlap between Labels B and C, please explain why the United States decided to have two labels (B and C) rather than one label for commingled meat products?

18. The COOL statute establishes four categories of meat for labeling purposes to reflect the four types of meat found in the marketplace: (A) meat from U.S. origin animals; (B) meat from animals born in another country and fed to slaughter weight in the United States ("feeder animals"); (C) meat from animals born and raised in another country and only slaughtered in the United States ("slaughter animals"); and (D) meat from animals that were born, raised, and slaughtered outside of the United States ("foreign-origin animals").[18] The life of an animal and the way in which it was raised for each of these categories may differ significantly. In addition, the amount of time that an animal spends in the United States may also differ significantly between the categories.

---

[16] Exhibit CDA-5, p. 2706.

[17] Exhibit CDA-5, p. 2706.

[18] 7 U.S.C. § 1638a(a)(2)(A)-(D).

19. For example, a Category B animal that was exported to the United States shortly after birth and spent most of its life in the United States as a feeder animal does not have the same origin as a Category C animal that spent its entire life in another country and was only in the United States for a very short period of time (less than 14 days) to be slaughtered. Different categories were created for feeder animals (Category B) and animals imported for immediate slaughter (Category C) to convey this information to consumers.

20. While the flexibilities contained in the 2009 Final Rule may result in consumers receiving less specific information about meat from Category B and C animals in some circumstances, they do not cover every circumstance in which meat derived from Category B or C animals is labeled and thus the two labels continue to have value in providing information. Further, in every instance in which meat is derived from a mixed-origin animal, the 2009 Final Rule ensures that a U.S. consumer will be informed of the countries in which at least one processing step occurred even if the order of the countries does not directly correspond to the amount of time that the animal spent in each country. Finally, it is important to recall that many of these flexibilities were adopted at the request of foreign and domestic interested parties to minimize compliance costs to the extent practicable while seeking to provide consumer information in line with the objective of the statute.

Q13. (all parties) Are there any economic incentives for retailers and suppliers throughout the meat production chain for choosing a particular retail label to the extent that they are allowed to choose between different labels under the COOL requirements?

21. The particular economic incentives for any individual retailer or supplier for choosing one label over another for meat products depends on that individual entity's own particular business model and situation. The United States added flexibility to the 2009 Final Rule to allow market participants in a variety of situations to minimize their potential costs while still ensuring that consumers were provided with meaningful information.

22. For example, in the 2009 Final Rule, USDA stated as follows regarding the design of the commingling provisions:

> The Agency recognizes that the multitude of different production practices and possible sales transactions can influence the value determinations made throughout the supply chain resulting in instances of commingling of animals or covered commodities, which will have an impact when mixing occurs. However, the Agency feels it is necessary to ensure information accurately reflects the origin of any group, lot, box, or package in accordance with the intent of the statute while recognizing that regulated entities must still be allowed to operate in a manner that does not disrupt the normal conduct of business more than is necessary. Thus, allowing the marketplace to establish the demand of categories

> within the bounds of the regulations will provide the needed flexibility while maintaining the structure needed to enforce these clearly defined categories.[19]

Q14. (United States) The United States argues that the costs related to the COOL requirements are merely costs that typically arise when governments implement a technical regulation. Please elaborate on these typical costs.

23. Any government's decision to implement a technical regulation is likely to create costs as well as benefits. Some of these costs directly impact actors within that particular industry while others may be impacted indirectly.

24. The costs of regulating are well recognized. For example, in its Reference Checklist for Regulatory Decision-Making, the Organisation for Economic Co-operation and Development (OECD) encourages regulators within different countries to "estimate the total expected costs and benefits of each regulatory proposal"[20] to ensure that the costs justify the benefits. The typical costs of regulating to which the United States refers is discussed at length in many of OECD studies and reports.[21]

25. Also well recognized is the fact that the costs of regulating may not be distributed equally across society. The 1995 Recommendation of the Council of the OECD on Improving the Quality of Government Regulation noted the following:

> Often, costs are not imposed on the same segment of society that benefits from regulation. Labor regulations, for example, may benefit workers with jobs, but may make it harder for the unemployed to find jobs. There may be disproportionate effects on particular groups, such as small and medium-sized enterprises, or on certain regions. Such effects may not mean that action is undesirable for society as a whole, but rather, that policy officials should consider the issue explicitly to determine, for example, if compensation is needed for disadvantaged groups.[22]

26. Further, in its Reference Checklist for Regulatory Decision-Making, the OECD also encourages regulators to "make transparent the distribution of regulatory costs and benefits

---

[19] Exhibit CDA-5, p. 2670.

[20] The OECD Reference Checklist for Regulatory Decision-Making (1997) (Exhibit US-66).

[21] *E.g.*, OECD, Introductory Handbook for Undertaking Regulatory Impact Analysis (RIA) (October 2008), pp. 7-8 (discussing "direct" and "indirect" costs of regulating, competition related costs, and substitution effects); *id*., 10-11 (listing examples of common regulatory costs); *see also*, *e.g.*, *Regulatory Impact Analysis: Best Practices in OECD Countries* (1997), available at: http://www.oecd.org/document/49/0,3343,en_2649_34141_35258801_1_1_1_1,00.html.

[22] Exhibit US-45, p. 17.

across social groups,"[23] indicating that these costs and benefits are not always spread evenly among market actors.

Q15. (United States) Please explain how, in a post-BSE, post-H1N1 environment, US government ensures farm-to-table traceability of meat for the purposes of protecting human life and health.

27. USDA's Animal and Plant Health Inspection Service (APHIS) and Food Safety and Inspection Service (FSIS) maintain programs to ensure the safety of the U.S. meat supply. APHIS regulations focus on animal disease issues while FSIS regulations focus on the safety of the meat derived from those animals. While APHIS's and FSIS's programs do not achieve full farm-to-table traceability, they provide traceability over significant portions of the meat production process.

28. APHIS maintains traceability through the identification methods used in specific animal health program efforts, such as brucellosis and tuberculosis eradication programs,[24] as well as programs intended to address bovine spongiform encephalopy (BSE).[25] For example, due to concerns about brucellosis, APHIS requires all cattle from Mexico be individually identified with a numbered, blue metal ear tag issued by the Mexican Ministry of Agriculture and Water Resources to address brucellosis issues.[26] Due to concerns about tuberculosis, APHIS also requires a distinct "M" or "Mx" brand on imported steers and spayed heifers from Mexico, which are the predominant feeder animals imported from Mexico.[27]

29. Similarly, due to its BSE concerns, APHIS requires all livestock imported from Canada to be officially identified with unique individual identification that is traceable to the farm. This unique individual ID is generally an ear tag on applicable livestock.[28] Canadian animals (except those imported for immediate slaughter) must also bear a distinct or legible mark identifying the exporting country, such as a brand or tattoo "CAN."[29]

30. FSIS helps ensure the safety of the U.S. meat supply. FSIS is responsible for being able to trace packaged meat back to a processing facility or slaughter house to respond to contamination issues. This is accomplished primarily by requiring that the establishment number or other identifying mark of the firm that produced the packaged product be included on the

---

[23] Exhibit US-66.

[24] 9 C.F.R. § 93.427 (c)-(d).

[25] 9 C.F.R. § 93.436.

[26] 9 C.F.R. § 93.427(d).

[27] 9 C.F.R. § 93.427(c).

[28] 9 C.F.R. § 93.436(a).

[29] 9 C.F.R. § 93.436(b).

label.[30] For example, if a packer slaughters an animal and sends the carcass to the processor/fabricator for further processing into packaged product, the processor's establishment number will appear on the product label.

31. In addition, FSIS requires packers to maintain various records, including records that document certain information regarding each transaction in which any livestock or carcass, part thereof, meat or meat food product is purchased, sold, shipped, received, transported, or otherwise handled by the packer.

Q16. (all parties) Please specify the extra costs, if any, for operators to follow the COOL requirements in addition to complying with health-related traceability requirements.

32. The extra costs, if any, a particular operator incurs to implement COOL requirements – beyond the costs already incurred to comply with health-related regulations – depend on facts and circumstances unique to that operator. As the United States explained in its First Submission, the economic studies submitted by Canada and Mexico fail to account for pre-existing costs of compliance with health-related regulations, among other factors, and therefore do not reflect these extra costs.[31]

Q17. (United States) Were any food safety issues raised in the legislative process leading to the adoption of the COOL requirements? Did any events relating to food safety issues coincide with, and possibly influence, the development of the COOL requirements?

33. During the legislative and regulatory process, some individuals and groups noted food safety issues when discussing their support for the COOL statute and 2009 Final Rule. However, as noted previously, the objective of the COOL requirements contained in the statute and 2009 Final Rule is consumer information, not food safety. As the 2009 Final Rule states, "the intent of the law and this rule is to provide consumers with additional information on which to base their purchasing decisions. COOL is a retail labeling program and as such does not provide a basis for addressing food safety."[32]

Q18. (United States) Please explain what types of stores fall within the definition of "retailer" under the COOL requirements. Can you confirm that if a store does not carry "fruits and vegetables", it falls outside the scope of the COOL requirements?

---

[30] 9 C.F.R.§ 317.2(g).

[31] U.S. FWS, para. 180-189.

[32] Exhibit CDA-5, p. 2677.

34. Yes, the United States can confirm that if a store does not carry "fruits and vegetables", it falls outside the scope of the COOL requirements. The COOL statute and 2009 Final Rule both define "retailer" as that term is defined in the Perishable Agricultural Commodities Act of 1930 ("PACA"). Under this definition, a "retailer" is anyone whose invoice cost of perishable agricultural commodities (fruits and vegetables) is more than $230,000 in a calendar year.[33]

35. This definition encompasses the types of stores that sell the majority of food products bought by U.S. consumers at the retail level, including full-line grocery stores, supermarkets, and club warehouse stores. Stores with an invoice cost of less than $230,000 for fruits and vegetables in a given year, including stores that do not buy or sell fruits and vegetables, are not covered by this definition. Thus, these stores fall outside the scope of the COOL requirements. This definition ensures that the COOL requirements have a minimal impact on small retailers that may find it more difficult to afford the costs of compliance.

Q19. (United States) According to 7 C.F.R. § 60.500(b), "any person engaged in the business of supplying a covered commodity to a retailer, whether directly or indirectly" is subject to the COOL requirements. Please elaborate on the scope of this requirement by listing examples of such suppliers.

36. For meat, these suppliers include slaughterhouses and intermediaries between the slaughterhouse and retailer, such as processors, food distributors, brokers and/or wholesalers.

Q20. (United States) What is the reason for exempting food service establishments from the scope of the COOL requirements? Are consumers in the United States not interested in information on the country-of-origin of meat they consume at food service establishments?

37. The United States exempted food service establishments from the COOL requirements to reduce compliance costs for entities that, like the retailers not covered by PACA, are often small businesses unable to absorb those costs. While consumers may be interested in information on the country of origin of meat they consume at food service establishments, as explained in the U.S. First Written Submission, the United States sought to provide as much information to consumers as possible while minimizing the costs of compliance.

Q23. (all parties) Please provide photos of the various labels that meat products carry throughout the entire production process under both the COOL requirements and the pre-COOL labelling regime.

[33] 7 U.S.C. § 499a(b)

38. Exhibit US-67 includes photos of Category A, B, C, and D labels for muscle cuts of meat at the retail level.[34] The COOL statute and 2009 Final Rule do not require labeling at any other stage of the production process.

39. While retailers were not required to include origin labels on the food products they sold prior to the enactment of the COOL measures, pre-packaged food products that were sold in the form in which they were imported were required to carry a label indicating their country of origin immediately under the name or descriptive designation of the product.[35] Exhibit US-67 also includes a photo of this type of product.

40. In addition, the United States had other retail labeling requirements in place before the COOL measures were enacted. Before USDA issued regulations implementing the COOL statute, FSIS regulations alone governed the labeling of meat products at the retail level.[36] These regulations required meat labels to show the name of the product, an official inspection legend, the number of the official establishment conducting the inspection, the ingredients (if fabricated from two or more ingredients), the name and place of business of the manufacturer, packer or distributor for whom the product is prepared, and the net quantity of content.

Q24. (all parties) Please comment on the practical situation and arguments developed in paragraphs of 31-36 of the European Union's oral statement at the first substantive meeting with the Panel.

41. As a threshold matter, the United States agrees with the EU's suggestion in paragraphs 31-32 of its statement that, due to the flexibilities afforded by commingling, Canada and Mexico significantly overstate the costs of complying with the requirements.

42. With regard to the EU's discussion of the objective of the measure in paragraphs 33-36, however, the EU's position appears to be premised on the suggestion that the U.S. legitimate objective of providing consumer information was in fact eviscerated because, in the EU's example, the "part of the measure" addressing Category A and Category B animals does not meet the stated objective by virtue of the ability to commingle between Category A and Category B animals.

43. First, the U.S. objective was to provide consumers with as much clear and accurate information as possible about the origin of the meat products that they buy at the retail level and to prevent consumer confusion. In deciding how to fulfill that objective, the United States conducted a lengthy regulatory process that took into consideration the costs of compliance for market participants, including specific cost concerns identified by Canada and Mexico during the

[34] Photos of Labels for Muscle Cuts of Meat (Exhibit US-67).

[35] 9 C.F.R. § 327.14(b).

[36] *E.g.*, 9 C.F.R. § 317.2 and 319.

public comment periods. The United States adopted a 2009 Final Rule that provides a significant amount of new information to consumers but includes certain labeling flexibilities to ensure that its requirements do not impose overly burdensome costs on foreign or domestic industry participants.

44. As the European Union implies in its oral statement, the United States could have designed the 2009 Final Rule to require that very specific origin information be provided to U.S. consumers in all cases. For example, the United States could have required retailers to list each specific production step on the label, similar to the approach USDA proposed in the 2003 Proposed Rule.[37] However, the United States chose not to adopt this proposal based on its assessment of the compliance costs that this approach would impose on market participants. Indeed, many interested parties, including Canada and Mexico, strongly opposed this approach because, they argued, it would be overly costly to implement. Thus, instead of requiring every production step to be listed, the United States created four categories of meat labels and added commingling flexibility between them, again at the request of interested parties like Canada and Mexico.

45. TBT Article 2.2 does not preclude a Member from striking a balance between the level at which a technical regulation achieves a particular legitimate objective and the costs that technical regulation imposes on market participants. Indeed, such an interpretation would undermine considerable work undertaken to date by the WTO TBT Committee on regulatory impact analysis and good regulatory practice. Moreover, when TBT Article 2.2 refers to the "legitimate objective" of a "technical regulation," it is not an all-or-nothing proposition. A Member can decide at what level to achieve that objective. The COOL measures ensure that millions of U.S. consumers have more information available to them than was previously available. As such, these measures fulfill their objective within the meaning of TBT Article 2.2 at the level chosen by the United States.[38]

Q25. (United States) Please provide detailed information on your argument that "over forty [WTO] Members maintain one or more country-of-origin labelling requirements on products ranging from fruits and vegetables, meat, and other food products, to alcohol and consumer goods" and that "[t]hese notifications generally indicate that the principal rationale for such measures is consumer information." (United States' first written submission, para. 16 and United States' opening oral statement, para. 42)

---

[37] U.S. FWS, para. 62-66.

[38] Indeed, even in the EU's example, the customer receives information about the product and made an informed choice — the fact that that particular customer did not change his mind about the steak he was consuming on the basis of the information received does not mean that no information was provided or that another consumer, faced with that same information, might have chosen differently.

46. In its First Written Submission, the United States noted that over 40 WTO Members have some form of country of origin labeling requirements. The United States obtained this information by reviewing WTO Member notifications to the TBT and SPS Committees and by reviewing the laws of other Members.

47. Exhibit US-68 contains a list of mandatory country of origin labeling requirements for the 67 WTO Members that the United States has identified that have some form of such requirements for food and alcohol products.[39] This list is not exhaustive. It does not include mandatory country of origin labeling requirements that apply to consumer goods and other products, nor does it capture the requirements of all Members (since some may not have been notified and could not otherwise be located). Exhibit US-69 contains all of the related TBT Committee notifications for the labeling requirements listed in Exhibit US-68.[40]

Q26. (United States) When 1% of US-origin cattle and 99% of Mexican-origin cattle are commingled in the same production day, what label is the resulting meat required to carry according to the COOL requirements?

48. The 2009 Final Rule allows a processor who decides to commingle U.S. origin and foreign origin cattle on a single production day to use either a Category B or C label on the meat derived from those animals. As the United States has noted, this level of flexibility was added to the 2009 Final Rule in direct response to requests made by the complaining parties, among others, and is intended to reduce compliance costs for foreign and domestic industry participants and to provide those participants with maximum flexibility on how they choose to respond to the COOL requirements. It is important to note, however, that this processor could also choose to process U.S. origin cattle and Mexican origin cattle on different production days or on the same day without commingling.

Q27. (Canada and the United States) In paragraph 11 of its first written submission, Canada addresses the issue of a USD 1,000 fine. Does this fine apply to each single animal or piece of meat affected by a violation, or does it apply collectively all livestock/meat processed during the same production day? Is a violation involved when, by accident, a slaughterhouse or processor happens to commingle one imported animal/piece of meat with domestic animals/pieces of meat on the same production day? Does Canada consider USD 1,000 a severe fine in such a situation? Can the United States elaborate on its practice with regard to assessing violations and imposing fines under the COOL requirements?

---

[39] The 67 WTO Members that the United States has identified include the 27 member states of the European Union (EU) as well as the 6 member states of the Gulf Cooperation Council (GCC), which share the same labeling requirements.

[40] The United States was unable to identify a TBT or SPS Committee notification for some of the measures listed in Exhibit US-68. The United States would be pleased to provide copies of these measures upon request.

49. To date, USDA has not assessed any fines on retailers or other industry participants for failure to comply with the 2009 Final Rule. While USDA has identified a few violations of the COOL requirements at the retail level during its normal review of compliance with the implementing regulations, all of the retailers that USDA has cited for non-compliance were able to demonstrate to USDA that they had addressed their violation within 30 days. Accordingly, none of these retailers received a fine.

50. Because USDA has not had to impose a fine under the 2009 Final Rule, it has not made a determination as to how to apply the fines. In the event that USDA determines to impose a fine, the size of the fine would depend on the particular facts and circumstances of a violation. The fine would not automatically apply to each individual package that is not labeled or mis-labeled, and in general, USDA does not intend to use its authority in this manner.[41]

Q28. (United States) Please confirm whether no fines have been imposed under the COOL requirements so far. If so, is this an indication that the industry readily complies with these requirements?

51. Please see the U.S. answer to Question 27 above. As the above suggests, industry is complying with the requirements.

Q29. (United States) Under 7 CFR 65.300 (2) and (4), meat commingled in "one single production day" can be labelled as either label A or label B. How does the United States define a "single production day"? Is there an economic or practical rationale for the COOL requirements to allow meat to be commingled only in "one single production day"?

52. As a threshold matter, the United States understands the question to pertain to the flexibility provided under 7 C.F.R. § 65.300 (2) and (4) to use a Category B or C label (the regulations do not permit meat derived from animals commingled in a single production day to use a Category A or B label).

53. As to the definition of a single production day, this is based on industry practice. U.S. packers tend to operate one or two production shifts each day followed by a clean up shift. A single production day is generally understood in the industry as the period of production between the two clean up shifts. The United States chose this particular period of time in an effort to provide slaughterhouses with the flexibility to comply with the 2009 Final Rule in the most cost effective way possible while still ensuring that U.S. consumers would receive meaningful

[41] Regardless of the violation, the 2009 Final Rule provides offending retailers with a 30-day period to take corrective action. At the end of the 30-day period, USDA may only impose a fine if the Secretary determines that the retailer or supplier has not made a good faith effort to comply with the rule and continues to willfully violate the rule. Further, before the fine would actually be imposed, the individual would also be afforded an opportunity for a hearing before the Secretary to dispute this determination.

country of origin information about the products that they buy at the retail level. In addition, a period of a single production day is easily understood by industry.

Q30. (United States) Does the United States export livestock or meat to Canada and Mexico? (paragraphs 141 of Canada's first written submission) Has US meat industry experienced any difficulties with any Canadian or Mexican labelling schemes?

54. The United States is a major exporter of beef and pork, to both Canada and Mexico. In 2009, the United States exported 111,400 metric tons of beef[42] and 133,800 metric tons of pork to Canada.[43] The United States also exported 184,500 metric tons of beef[44] and 484,000 metric tons of pork to Mexico last year.[45]

55. The United States also exports some live animals to Canada and Mexico. In 2009, the United States exported approximately 27,000 head of cattle to Canada and 18,000 head of cattle to Mexico.[46] The United States also exported approximately 10,000 head of swine to Canada and 2,500 head of swine to Mexico in 2009.[47]

56. Canada and Mexico maintain some inspection and labeling requirements.[48] On occasion, U.S. meat exporters report difficulties in exporting meat to Mexico or Canada, generally for failing to meet all labeling requirements.

Q31. (United States) Please clarify whether the order of the countries of origin under labels B and C is determined based on the length of time that an animal spends in various countries before being slaughtered.

57. Categories B and C generally refer to meat derived from animals that were born in another country and fed to slaughter weight in the United States and animals that were imported for immediate slaughter, respectively. An animal imported for immediate slaughter will have

---

[42] U.S. Export Data, Table 1 (Exhibit US-70).

[43] Exhibit US-70, Table 2.

[44] Exhibit US-70, Table 3.

[45] Exhibit US-70, Table 4.

[46] Cattle: Annual and cumulative year-to-date U.S. trade (head), USDA Economic Research Service Data (2005-2010) (Exhibit US-71).

[47] Hogs: Annual and cumulative year-to-date U.S. trade (head),USDA Economic Research Service Data (2005-2010) (Exhibit US-72).

[48] U.S. Department of Agriculture, Food Safety and Inspection Service, Export Requirements for Canada (Exhibit US-73); U.S. Department of Agriculture, Food Safety and Inspection Service, Export Requirements for Mexico (Exhibit US-74).

spent nearly its entire life in another country and may only be in the United States for as little as a few days before being slaughtered. Accordingly, the name of the foreign country is placed on the label before the United States.

58. A feeder animal spends a significant longer period of time in the United States and placing the name of the United States first on a Category B label reflects that. However, a retailer may change the order of the names on a Category B label, flexibility that was included in the 2009 Final Rule in order to reduce the costs of compliance.

Q32. (United States) Is the link, if any, between the length of time that an animal spends in various countries before being slaughtered and the sequence of the countries of origin under labels B, C and D clearly conveyed to consumers under the current COOL requirements?

59. The 2009 Final Rule ensures that consumers receive information about the origin of the muscle cuts of meat they buy, including all of the different countries in which the animal from which the meat was derived spent its life. Placing the name of the foreign country first on a Category C label indicates to a consumer that the animal spent a greater period of time outside the United States than in the United States. Placing the name of the United States first on a Category B label may convey the opposite to consumers.

60. The 2009 Final Rule does not require more than one country to appear on a Category D label. However, if a retailer chose to include the name of more than one country, the 2009 Final Rule does not specify the order in which they must appear. As a factual matter, the United States would note that, because relatively few countries other than Canada, Mexico, and the United States export live animals to each other, it is unlikely that a significant quantity of meat sold in the United States would be eligible to carry a Category D label listing more than one country.

Q33. (all parties) Do purchasers of various types of livestock and meat products (i.e. feedlots, slaughter houses, final meat consumers, etc.) have discernable preferences in regard to the various labels that the meat they purchase is carrying? (paragraphs 83 of Canada's first written submission)

61. To clarify, feedlots and slaughter houses purchase livestock rather than meat – COOL requirements do not apply to livestock. With respect to purchasers of meat, the United States has not conducted any studies to determine whether consumers prefer meat products carrying one label as compared with products carrying another label. However, USDA stated in the 2009 Final Rule that it found "little evidence that consumers are likely to increase their purchase of food items bearing the United States origin label as a result of this rulemaking. Current evidence does not suggest that United States producers will receive sufficiently higher prices for United States-labeled products to cover the labeling, recordkeeping, and other related costs."[49]

[49] Exhibit CDA-5, p. 2682.

62. The United States also has not conducted any studies to determine whether feedlots or slaughterhouses are favoring one type of livestock over another. However, as the United States noted in response to Question 21 from the Panel, the 2009 Final Rule was specifically designed to allow meat producers to comply with the regulations in whichever manner they determined was most cost effective.

Q34. (United States) Have the different labels under the COOL requirements resulted in commanding different prices for meat products at the retail level? (paragraph 54 of the United States' first written submission, the table)

63. The United States is not aware of any industry research on this topic. Further, the United States has not collected any data or conducted any studies or analyses on pricing levels of the various COOL labels at the retail level. Given the many factors that affect retail prices, especially sales and promotions that result in widely differing prices for different cuts of meat in different parts of the country, it would be difficult to ascertain any potential impact of COOL on retail prices. Further, as the United States noted in our answer to Question 33 above, we do not expect that COOL will lead to increased consumer demand or higher prices for U.S.-origin labeled products.

Q35. (United States) Please explain with supporting evidence why the United States decided to exclude hazelnuts from the COOL requirements. (paragraph 217 of the United States' first written submission and paragraphs 19 and 167-170 of Canada's first written submission)

64. The COOL statute and 2009 Final Rule covers most of the fruit, vegetables, meat and seafood that U.S. consumers purchase at the retail level. However, some commodities, such as hazelnuts, were not included as covered commodities in the statute or 2009 Final Rule.

65. The scope of coverage of the COOL measures was originally set forth by Congress in the statute. The legislative history does not indicate why Congress excluded hazelnuts from the coverage of the statute. The 2009 Final Rule adheres to the coverage prescribed by law.

66. Given that hazelnuts face significant import competition,[50] the fact that they were excluded from the statute contradicts Canada and Mexico's argument that the design of the measures – and in particular their scope – suggests a protectionist motive. In fact, an analysis of

[50] U.S. imports of hazelnuts as a proportion of domestic production was 46.2 percent over the past 13 years (Exhibit US-47).

both included and excluded commodities reveals no consistent pattern with regard to import competition.[51]

Q36. (United States) Please provide examples of retailers, if any, that provided country-of-origin information before the COOL requirements.

67. The United States is not aware of any retailers providing this information before the adoption of the COOL measures. However, since 1930, U.S. law has required that every *imported* item be marked to indicate its country of origin to its "ultimate purchaser."[52] Thus, pre-packaged products labeled for customs purposes may have conveyed country of origin to consumers at the retail level in limited circumstances, although the requirement was not imposed directly on retailers.[53]

68. In addition, some U.S. producers and processors chose to voluntarily include a "Product of the U.S.A." label on their products under FSIS's program.[54] Other producers may have included origin information on their products because of the positive attributes associated with the origin of their product (as is the case with Australian and New Zealand lamb or Japanese or Argentine beef).[55] As the United States has noted, the use of these voluntary labels was limited, and in some cases, the information that was provided may have been misunderstood by consumers. Thus, U.S. consumers rarely knew the origin of the meat that they purchased at the retail level.

Q37. (United States) If consumers were interested in country-of-origin information, why did meat retailers not provide such information before the COOL requirements? (paragraph 252 of the United States' first written submission)

69. It is impossible to state with certainty why U.S. retailers did not more readily provide country of origin information on all of the products they sold before the COOL statute and 2009 Final Rule were adopted, but a few possible explanations are as follows: First, even though consumers wanted this information, retailers may have concluded that consumers would not be

---

[51] *See* U.S. FWS, para. 217-218 (noting that some covered commodities, such as beef (11.4 percent) and swine (4.6 percent), face little import competition and that some covered commodities, such as lamb (72.5 percent), face significant import competition, and that a similar trend holds for non-covered commodities).

[52] Section 304 of the Tariff Act of 1930.

[53] This includes consumer goods such as electronics and clothing as well as some food items that were imported into the United States in "ready to sell" containers.

[54] *See* U.S. FWS, para. 30-31 (discussing FSIS's "Product of the U.S.A." program, which allowed retailers to request the right to label their products in this manner, but which allowed the "Product of the U.S.A." label to be used when only minimal processing steps took place in the United States).

[55] U.S. FWS, para. 141.

willing to pay extra money for the few products that included it so as to cover the cost of providing the information. Second, some retailers may have found it difficult to obtain this information from their suppliers in the absence of the COOL requirements, and thus, could not have ensured that origin labeling would be accurate.

70. Thus, the mere fact that retailers typically did not provide this information before the regulations were issued does not support the conclusion that consumers did not want it. Markets often fail to provide information that consumers want, including vital information regarding health and safety, as evidenced by the range of labeling regulations that Members routinely adopt to address these issues.

Q38. (United States) Please clarify whether and, if so, how the United States took into account other WTO Members' country-of-origin labelling requirements when developing the COOL requirements at issue in this dispute.

71. During its consideration of country of origin labeling legislation, the U.S. Congress did take into account the labeling requirements of other WTO Members. For example, in a House Committee on Agriculture hearing, Senator Tim Johnson, one of the principal sponsors of the COOL statute, stated the following:

> Opponents of meat labeling always overlook the fact that other nations around the globe either already impose country-of-origin meat labeling mandates or plan to in the very near future. On July 1, 2000, Japan implemented a law mandating that all retail stores show the country-of-origin on many perishable items. The Japanese plan will eventually include all meats, fresh fruits, vegetables, and seafood. The Japanese government is reported to state the new labeling will improve information provided to consumers at the point of sale. The EU is imposing retail country-of-origin labeling this year as well. The European Commission launched a compulsory beef labeling regime for EU partners beginning September 1, 2000. Their mandatory labeling system will be implemented in two stages, resulting in retail labeling stating the country-of-origin - including birth and traceback of cattle used for beef production - of all beef products sold at retail levels. Thirty nations on the globe require some form of country-of-origin labels for processed meat and meat cuts while 22 require fresh meat carcasses and cuts to have country-of-origin labels.[56]

[56] Exhibit MEX-49, p. 17.

72. Further, Congress asked both USDA's Foreign Agricultural Service (FAS) and the U.S. Government Accounting Office (GAO) to evaluate the labeling practices of U.S. trading partners for meat and other food products at different times during the legislative process.[57]

73. During its design of the implementing regulations, USDA was aware of these other laws, but focused its efforts on drafting implementing regulations that followed the guidance provided by the statute and provided consumers with as much information as possible without imposing unduly burdensome costs on industry.

Q39. (United States) How does the United States determine the origin of the meat products and livestock that it exports to other WTO Members?

74. The exporter is responsible for ensuring that the product meets the labeling requirements of the country of destination, including any requirements on how to determine and label origin.

TBT Agreement

Article 2.1

Q42. (all parties) Canada and Mexico submit that the Panel should interpret the obligations under Article 2.1 of the TBT Agreement in light of Article III:4 of the GATT 1994. Is the fact that Article 2.1 of the TBT Agreement sets forth not only the national treatment obligation, but also the MFN obligation, relevant in any manner to the Panel's interpretation of the scope of the terms "like products" and "treatment no less favourable" in the context of Article 2.1?

75. As the United States indicated in its First Written Submission and Oral Statement at the Panel meeting, there are textual differences between GATT Article III:4 and TBT Article 2.1 that are relevant to the "less favorable treatment" analysis under TBT Article 2.1, such as the clarification that TBT Article 2.1 only prohibits less favorable treatment that is "in respect of" the technical regulation in question.[58] However, in the instant dispute, the MFN obligation is not directly relevant to the interpretation of the scope of the terms "like products" or "treatment no less favourable."

Q43. The United States argues (paragraph 169 of the United States' first written submission and paragraph 23 of the United States' opening oral statement)

---

[57] *See, e.g.*, Country of Origin Labeling for Certain Foods - Survey Results (GAO-03-781SP) (2003) (Exhibit US-75) (indicating that at the time of the study, 35 countries indicated that they maintained labeling requirements for muscle cuts of meat at the retail level). The full results of the 2003 GAO Study are available at the following website: http://www.gao.gov/special.pubs/gao-03-781sp/toc.html.

[58] U.S. Oral Statement, para. 34; U.S. FWS, para. 196-199.

that many US processors have long segregated their production lines to meet grade labelling requirements and for other marketing programs.

(a) (United States) Please indicate the extent, duration and legal basis of this practice.

76. U.S. processors have long segregated their production lines for various purposes, including participation in marketing programs, to meet export requirements, and to respond to animal disease issues.[59] This pre-existing segregation proves two important points. First, any segregation in the marketplace that Canada and Mexico cite in their submissions is not necessarily related to the COOL measures.[60] Second, to the extent that U.S. processors choose to segregate to comply with the COOL measures, the cost imposed by this practice is not nearly as high as the complaining parties assert.[61] In the paragraphs that follow, the United States will detail further the various marketing programs that have led to segregation in the market irrespective of the COOL measures.

77. *USDA Grade Labels*: Since 1916, USDA has conducted a voluntary quality grading program for various agricultural commodities, including beef.[62] Under this program, AMS assesses the quality and yield attributes of beef carcasses and assigns them quality grades, such as USDA Prime, USDA Choice, or USDA Select. Packers that want to carry the official USDA grade forward in the marketing chain must segregate and process graded beef carcasses under an approved grade labeling program that is monitored by FSIS.

78. Although USDA grade labeling is a voluntary service, nearly 95 percent of the federally inspected steer and heifer slaughter is graded by USDA. The majority of beef graded as USDA Choice or Prime is subsequently labeled at retail.

79. *Private Premium Label Programs*: In addition to the federal grading program, packers have established their own "value added" or "premium" programs for higher quality meat that they market to retailers under the packers' "premium" labels. Packers generally pay a fee to AMS to independently verify that the meat products labeled under the packer's premium label meet the packer-established terms and conditions. These premium programs also require

---

[59] *See*, *e.g.*, U.S. FWS, para. 169-170 (explaining the reasons why many processors already engage in segregation); .

[60] *See* Canada's FWS, para. 95; Mexico's FWS, para. 155 (asserting that the COOL measures necessitate segregation throughout the production process).

[61] *See* U.S. FWS, para. 183 (discussing the implications of ignoring pre-existing segregation on Canada's and Mexico's cost estimates)

[62] *See* U.S. FWS, para. 29; Exhibit US-15; *United States Standards forGrades of Carcass Beef*, United States Department of Agriculture, Agricultural Marketing Service, Livestock and Seed Division (Jan. 31, 1997) (discussing the history of U.S. grade labeling) (Exhibit US-76).

separate labels and segregation of the meat processed under the premium label from the packer's non-premium meat processing.[63]

80. AMS currently provides voluntary certification services for over 100 private premium beef programs. From October 1, 2008 - September 30, 2009, approximately 7 million carcasses were certified under one of these programs.[64] The duration of these private premium programs varies by each individual program, but many have been in place for several years. For example, the Certified Angus Beef program has been active since 1978.[65] Other programs such as Sterling Silver have been certified since the early 1990's.[66]

81. *Export Requirements*: At least 22 countries maintain specific age, source, specified risk material (SRM) or disease verification requirements for accepting meat products exported from the United States.[67] In order to market their products in these countries, producers must get their products approved by USDA's Export Verification (EV) Program. In general, slaughter houses are required to segregate their supply of meat destined to these markets from the supply destined for domestic consumption and maintain very specific records on the products. Some testing may also be required for specific disease, residues, or other factors.

82. Many of these EV Programs have been in place for several years. For instance, Japan has had export requirements since July, 27, 2006.[68] Similarly, Korea has required verification of origin and age since October 5, 2007.[69]

---

[63] *See* Exhibit CDA-36 (Letter from Tyson Foods regarding its premium programs stating that its pre-existing "premium programs already require separate labels and segregation in our plants, warehouses, and in most cases, at retail.").

[64] Data from USDA's Meat Grading and Certification Branch.

[65] *Certified Angus Beef Program: Making History Since 1978* (Exhibit US-78).

[66] *Sterling Silver Premium Beef: It's Not Just Meat, It's An Experience* (Exhibit US-79).

[67] *See* "Export Requirements for Countries with an Approved USDA Export Verification Program" (listing Belize, the Cayman Islands, Chile, Colombia, the Dominican Republic, Egypt, El Salvador, Hong Kong, Japan, Korea, Lebanon, Malaysia, Mexico, Peru, Russia, Singapore, St. Lucia, Taiwan, Thailand, Ukraine, the United Arab Emirates, and Vietnam.) (Exhibit US-80) A complete list of the requirements for all 22 countries can be accessed at: www.fsis.usda.gov/Regulations_&_Policies/Export_Requirements_EV_Countries/index.asp.

[68] U.S. Department of Agriculture, Food Safety and Inspection Service, Export Requirements for Japan (Exhibit US-81).

[69] U.S. Department of Agriculture, Food Safety and Inspection Service, Export Requirements for Korea (Exhibit US-82); *See also* Exhibit CDA-90 (Tyson Foods noting that its decision to accept direct Canadian cattle at the Pasco plant and not its Lexington and Dakota City plants "has to do with Korean shipments.")

83. *Animal Production and Raising Labeling Programs*: FSIS must approve meat product labels before the products can enter commerce.[70] As part of its prior approval process for label claims, FSIS evaluates label claims that highlight certain aspects of the way in which animals used as the source for meat and poultry products are raised. Examples of animal raising claims that the Agency has approved include "raised without antibiotics," "not fed animal by-products," "free range," "vegetarian fed diet," and "raised without added hormones."

84. FSIS typically evaluates such claims by reviewing testimonials, affidavits, animal production protocols, and other relevant documentation provided by packers, slaughterhouses, processors, distributors, or wholesalers under FSIS jurisdiction and/or animal producers. When FSIS evaluates a meat or poultry product label that includes an animal raising claim, it reviews the animal production protocol, affidavits, and testimonials submitted by the producer in support of the label claim to ensure that it describes practices that are accurately reflected in the claim being made. For most animal production claims, producers must submit, among other things, a detailed written protocol explaining controls for assuring the production claim including a product tracing and segregation mechanism from time of slaughter and/or further processing through packaging and wholesale or retail distribution as well as a protocol for the identification, control, and segregation of non-conforming animals/product.

85. Since the 1970s, AMS has offered a Process Verified Program that allows individuals and companies to highlight production and marketing practices in advertisements and promotions to distinguish their products in the marketplace.[71] Companies with approved USDA Process Verified Programs are able to make marketing claims associated with their process verified points — these include age, source, feeding practices, or other raising and processing claims — and market themselves as "USDA Process Verified" with use of the "USDA Process Verified" shield and term. Companies with USDA Process Verified Programs must ensure that non-conforming product (raw material and/or finished product) is identified and controlled to prevent its unintended use or delivery. The company must have a documented procedure that defines: (1) the identification of non-conforming product; (2) the controls used to ensure the segregation of non-conforming product; and (3) the related responsibilities and authorities for ensuring the segregation and disposition of nonconforming product.

Q46. (all parties) The complainants appear to accept that country-of-origin labelling, whether mandatory or voluntary, is not per se inconsistent with the covered agreements. Is a mandatory or voluntary COOL scheme in principle capable of providing sufficiently accurate information for consumers on the country-of-origin of meat without effectively requiring partial or full segregation throughout the production chain and without necessarily

[70] 21 U.S.C. § 601, 607. *See also* U.S. FWS, para. 30 (indicating that "FSIS has primary authority within the U.S. government for ensuring that meat and meat food products are safe, wholesome, and accurately labeled.").

[71] USDA's Processed Verified Program (Exhibit US-83) A list of approved programs can be found on the program website at http://www.ams.usda.gov/AMSv1.0/processverified.

resulting in higher costs for processors who accept imported livestock and meat? If this is not the case, when arguing that the COOL requirements discriminate against imported livestock, is it sufficient for the complainants to demonstrate merely that the COOL requirements might de facto require segregation and might result in higher costs for imported livestock?

86. The COOL measures provide accurate country of origin information for consumers without requiring segregation throughout the production chain and without necessarily resulting in higher costs for processors who accept imported livestock. Indeed, as the United States noted in its First Written Submission and Oral Statement, U.S. processors who accept only imported livestock or those who commingle do not need to segregate and will not accrue any additional costs by accepting imported livestock.[72]

87. Assuming *arguendo* Canada and Mexico's erroneous assertions that the COOL measures *de facto* require segregation and result in higher costs for imported livestock, this would not establish less favorable treatment within the meaning of GATT Article III:4 or TBT Article 2.1. The national treatment provisions do not require Members to ensure that every technical regulation they adopt affects every market participant and every product in the exact same way. Compliance costs may and often do vary among market participants based on their pre-existing makeup (*i.e.*, size, business structure, etc.) and market participants may respond to new costs in different ways, including by changing their sourcing patterns.[73] A measure that on its face treats domestic and foreign products identically and does not require market participants to respond to new requirements in a way that disadvantages foreign products does not provide less favorable treatment, even if some market participants may choose to respond in a manner that disproportionately affects imported products.

88. Were the national treatment provisions to be interpreted to require technical regulations to affect all market participants and products identically, this would significantly impair the ability of a Member to maintain a technical regulation. In this regard, as noted previously, the OECD has noted that the effects of regulations may not be distributed across society equally, but at the same time has emphasized that "disproportionate effects on particular groups...may not mean that action is undesirable for society as a whole."[74]

Q47. (all parties) Please define the scope of imported and domestic products to be compared for the purposes of the current dispute. Assuming that cattle and hogs fall within the scope of the products at issue in this dispute, how do you define "imported cattle and hogs" and "domestic cattle and hogs"?

---

[72] U.S. FWS, para. 152-159; U.S. Oral Statement, para. 22-26.

[73] Exhibit US-45, para. 33.

[74] Exhibit US-45, para. 33.

89. As a threshold matter, based on Canada and Mexico's description of the issue in their Panel requests and their submissions, the only products at issue in this dispute are cattle and hogs from Canada and cattle from Mexico.[75] The application of COOL to other covered commodities is not before the Panel.

90. With regard to the livestock described above, for purposes of a like product analysis, imported livestock includes livestock born and raised in a foreign country, and the domestic like product includes livestock that is born and raised in the United States. In addition, the like product analysis must account for livestock born in one country and raised in a different country. As the Panel's question suggests, when these livestock are included in the like product analysis, the purported discrimination arising from the COOL measures treatment of the domestic like product *vis-a-vis* the imported product becomes even more obscure.

91. If all animals born in the United States are considered the "domestic like product," livestock born in the United States and raised in Canada or Mexico before being slaughtered in the United States would be part of the "domestic like product," not the "product of the territory" of Canada or Mexico. Yet, Canada and Mexico do not contend that these livestock receive preferential treatment when compared with livestock born and raised in Canada or Mexico when exported to the United States for slaughter. Conversely, if all animals raised in the United States are the "domestic like product," livestock born in Canada or Mexico and raised in the United States would be part of the "domestic like product," not a product of Canada or Mexico. Thus, this livestock would not be part of the class of livestock that Canada and Mexico are arguing have received less favorable treatment under the national treatment provisions.

Q48. (all parties) Do US consumers prefer meat with the US-origin label (i.e. "Product of United States") and/or perceive such meat as higher in quality compared to meat with the foreign-origin label? If so, is there any evidence showing such preference or perception? Do US consumers understand a "Product of the United States" label to mean that the meat they purchase is derived exclusively from an animal that was "born, raised, and slaughtered" in the United States or also from an animal that was not born in the United States, but spent most of its life in the United States?

92. The United States has not conducted studies on whether U.S. consumers as a whole prefer U.S.-origin meat or perceive U.S.-origin meat as higher in quality than meat with a foreign-origin label. Some consumers may have this preference or perception, and others may have the opposite preference or perception. For example, some consumers may believe that certain

[75] *See*, *e.g.*, Canada's FWS, para. 1 (noting that "Canada's complaint concerns, specifically, the application of the COOL measure to beef and pork produced in the United States from cattle and hogs imported from Canada."); Mexico's FWS, para. 1 (stating that "This dispute concerns a mandatory country of origin labeling measure (hereinafter the COOL measure) that is applied in a manner and in circumstances such that it unjustifiably discriminates against and restricts imports of Mexican cattle into the United States.").

imported products, such as Australia or New Zealand lamb or Japanese or Argentine beef, are of excellent quality, and may choose to buy more of these products as a result.

93. According to information that was submitted by consumers and consumer organizations during various opportunities for comment during the process for developing the COOL regulations and related issues, consumers believe that meat products that are designated as U.S. origin are and should be derived from animals born, raised, and slaughtered in the United States and that other definitions of U.S. origin would be misleading. A few examples are as follows:

- In a letter to the U.S. Senate, three major U.S. consumer groups – the Consumer Federation of America, Public Citizen, and the National Consumers League – stated that an industry proposal that "allows meat from cattle that have been in this country for a few as 100 days to be labeled U.S. beef...could mislead consumers into thinking a product is of U.S. origin, when, in fact, it is not. Meat products identified as "U.S. beef" or "Made in the U.S.A." should originate from animals born, raised, and slaughtered and processed here."[76]

- In a letter to FSIS, the Consumer Federation of America stated that "Only cattle born, raised, slaughtered, and processed in this country should be considered products of the United States for labeling purposes. This is what most consumers would assume from either 'Product of the USA' or 'USA Beef' on a label."[77]

- Numerous individual consumers, such as Danila Oder of Los Angeles, California, made similar comments. In a letter to FSIS, Ms. Oder stated: "It is misleading to consumers to allow 'Product of the US.' labeling for animals that are born in another country and live in the U.S. for as little as 100 days."[78]

Q50. The United States submits that Canadian and Mexican livestock exports have increased significantly during the first seven months of 2010.

(b) (all parties) Please confirm whether this trend has been continuing since July 2010. Can the parties also elaborate on the development of the share of Canadian and Mexican imports in the US market during the same period and since July 2010?

94. The U.S. Bureau of the Census has not released updated trade data since the July data submitted by the United States. This data showed that Mexican cattle exports were up 31 percent over last year and Canadian cattle exports were up six percent for the first seven months of the

[76] Exhibit US-60, p. 13275.

[77] Letter from the Consumers Federation of America to FSIS (Sept. 17, 2001) (Exhibit US-84).

[78] Letter from Danila B. Oder to FSIS (Aug. 28, 2001) (Exhibit US-85).

year as compared with last year's levels.[79] The United States fully expects that these trends will continue throughout the year as the global economy continues to recover from recessionary conditions.

95. Throughout this period of recovery, Canadian and Mexican cattle imports, as a share of U.S. placements or slaughter, continue near historical levels.[80]

Article 2.2

Q51. (all parties) Do the parties agree that the first sentence of Article 2.2 of the TBT Agreement should be read as containing a general rule, a violation of which can be found based on the establishment of the elements contained in the second sentence? If so, what is the legal basis for such interpretation?

96. The United States agrees that the first sentence of Article 2.2 should be read as establishing the general rule that "Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade." The second sentence then explains what the first sentence means, stating that "For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create." The basis for this interpretation is the text of the provision itself. In particular, the second sentence starts with the words "For this purpose," which indicate that the second sentence is explaining the rule articulated in the first sentence.

Q52. (all parties) Is there a particular sequence that the Panel should follow in analyzing the elements of the obligations under the second sentence of Article 2.2 of the TBT Agreement? In other words, assuming that the elements include "not more trade-restrictive than necessary", "fulfil a legitimate objective", and "taking into account of the risks non-fulfilment would create", is there any particular order in which these elements should be considered in examining a claim under Article 2.2?

97. As a threshold matter, the United States would note that the complaining parties must first establish that the measures they are challenging are trade restrictive. If the measures are not trade restrictive, they will not breach a Member's obligations under TBT Article 2.2.

98. Assuming *arguendo* that the complaining parties are able to make this showing, the Panel should continue its analysis under the second sentence. Among the three elements identified in the Panel's question, the Panel should first analyze whether the measure or measures in question

[79] Exhibit US-59.

[80] Canadian and Mexican Livestock Market Share, Data from U.S. Department of Commerce and USDA National Agricultural Statistic Service (Exhibit US-86).

fulfill a legitimate objective. It is appropriate to analyze this element first because an analysis of whether a measure is more trade restrictive than necessary will often include a consideration of whether an alternative measure put forward by a complaining party fulfills the Member's legitimate objective at the level that Member considers appropriate, an analysis that would be impossible without first establishing the responding party's objective.

99. The element characterized as "taking into account the risks that non-fulfillment would create" is an element that Members take into account in determining what level is appropriate for the particular legitimate objective at issue. And the preamble confirms that Members are free to determine the level that is appropriate for a particular legitimate objective. In assessing the risks that may arise from non-fulfillment of a legitimate objective, a Member may consider a number of elements, including available scientific and technical information, related processing technology, or the intended end uses of a product. This element should therefore help to understand what level a Member considers appropriate in achieving a particular legitimate objective.

Q56. (United States) The United States submits that preventing consumers from being misled about the origin of meat could be linked to the prevention of deceptive practices, one of the specifically enumerated legitimate objectives under Article 2.2.

(a) Please elaborate on the exact nature of consumer confusion that the United States intended to avoid by introducing the COOL requirements.

100. As the United States indicated in its First Written Submission, many U.S. consumers mistakenly believed that meat products affixed with a USDA grade label were derived from animals born, raised, and slaughtered in the United States when this was not the case.[81] In addition, many U.S. consumers may also have been misled by FSIS's "Product of the U.S.A." labeling system, which allowed producers to voluntarily use this label if the meat products received minimal processing in the United States.[82]

101. The Consumers Federation of America's explanation during FSIS's rule making on "Product of the U.S.A." perhaps best explains the situation:

> CFA's policy resolutions have long supported country-of-origin and state-of-origin labeling of meat, poultry, seafood and fresh produce. As a matter of choice, many consumers may wish to purchase meat from animals born and raised in the United States. Without mandatory country of-origin labeling, these consumers are unable make an informed choice. In fact, under other USDA

[81] U.S. FWS, para. 29.

[82] U.S. FWS, para. 30-31.

> regulations, consumers could be misled into thinking some imported meat is produced in this country. That is because imported meat can also receive a USDA inspection seal and grade stamp under the voluntary meat grading program.
>
> As spelled out in the ANPR, the Agriculture Department's geographic labeling policies are confusing at best. Under FSIS regulations, beef products can be labeled "USA Beef" or "American Beef" only if they originate from cattle born, raised, slaughtered, and prepared in this country. But there is no requirement that they be so labeled. At the same time, under export rules, beef products prepared in this country apparently can be labeled "Product of the USA" even though they originate from cattle born beyond our borders. Under yet another set of regulations, meat and meat products purchased for the school lunch program must be "US produced." But, contrary to the voluntary "USA Beef" rules, meat from cattle fed here but born elsewhere qualifies as US. produced under the school lunch program. Finally, imported beef or beef products sold to consumers intact must note on their packaging their country of origin and even the plant in which they were produced. But if the product is further processed in this country, the country-of-origin labeling requirement disappears.
>
> Under such inconsistent and contradictory rules, consumer confusion is unavoidable. If the label says "USA Beef," consumers can be assured the originating cattle were born and raised in this country. But little beef has this label and a label saying "Product of USA" offers no such assurance. If an imported beef product includes a country-of-origin statement, consumers can be assured the product is from that country. But the absence of a foreign label is no assurance that the product originated here. Perhaps the most common occurrence is no country label at all and that gives consumers no guidance, except that, as noted, the grade stamp and inspection seal may mislead them into thinking the product came from domestic cattle when in fact it did not.[83] (Footnotes omitted)

(b) Did the United States encounter incidences where deceptive practices were found with respect to the origin of meat under the previous labelling regime? If yes, please elaborate on such incidences. If not, can the United States then confirm that the objective of the COOL requirements is not related to the prevention of deceptive practices?

102. The United States does not assert that the COOL statute and 2009 Final Rule were enacted in direct response to deceptive practices. Rather, the United States has stated that the objective of its measures – providing consumer information and preventing consumer confusion – are objectives that are related to the prevention of deceptive practices in that they help ensure that consumers receive accurate and non-misleading information about the products that they

[83] Exhibit US-84.

buy. This relationship provides further support for the conclusion that the objectives of the U.S. measures are legitimate. (Of course, as the United States has also noted, the TBT provision at issue contains a non-exhaustive list of possible legitimate objectives, and therefore even if the Panel were to conclude that the COOL measures are not related to deceptive practices, the U.S. objective is nonetheless legitimate).

(c) Please comment on New Zealand's view that "an important distinction should be drawn between the objective of consumer information and that of preventing deceptive practices" and that "while consumer information can be a tool through which a Member seeks to counter or prevent deceptive practices, they are not interchangeable terms." (paragraph 36 of New Zealand's third party written submission)

103. The United States agrees with New Zealand that there is a distinction between the objective of consumer information and the prevention of deceptive practices and that these terms are not interchangeable. However, as explained above, providing consumers with information can help prevent deceptive practices and thus there is a relationship between the two objectives. And in this instance, there was a particular practice – the use of grade labels – that posed the potential to mislead or "deceive" the consumer, even though that was not the intent.[84]

(d) Can the United States explain in detail how the COOL requirements prevent consumers from being misled about the origin of meat?

104. The COOL requirements help prevent consumers from being misled about the origin of meat in two different ways. First, by ensuring that all meat sold at the retail level has an origin label, the COOL requirements prevent consumer confusion related to the appearance of a USDA grade label on meat that is not U.S. origin while also allowing both domestic and imported products to benefit from the use of these grade labels. Second, the COOL requirements prevent the confusion that may have occurred when products that were derived from animals born and/or raised in another country and then slaughtered in the United States were labeled as a "Product of the U.S.A." Under the COOL requirements, these products will now be labeled as mixed origin products and consumers will not mistakenly believe that they are products derived from animals born, raised, and slaughtered in the United States when that is not the case.

Q57. (United States) How does the United States define the "origin of meat" for customs purposes and under the COOL requirements? For example, under the COOL requirements why is meat not "product of the US" if it is derived from a cow that was brought to the United States right after its birth (calf

[84] Indeed, other Members have identified both consumer information and prevention of deceptive practices in their notifications of mandatory country of origin labeling requirements. *See* Exhibit US-69 (notifications of Australia, Brazil, Chile, the EU, and Chinese Taipei).

stage) and spent the rest of its life in the United States until being slaughtered?

105. For customs purposes, the origin of meat products is defined as the country in which the product was last substantially transformed. Under COOL, the origin of meat products is defined based on the countries in which the animal from which the meat is derived was born, raised, and slaughtered. Meat derived from an animal born, raised, and slaughtered in the United States is considered to be U.S. origin and meat derived from an animal, born, raised, and slaughtered in a single foreign country is considered foreign origin. Meat derived from an animal that had production steps occur in the United States and another country is defined as having several countries of origin.

106. The meat derived from a cow that was brought to the United States shortly after its birth is not defined as solely U.S. origin because a significant step in this animal's life (namely, its birth) occurred in another country. Similarly, meat derived from a cow that was raised in Canada or Mexico before being sent to the United States for immediate slaughter is not defined as Canadian or Mexican because a significant step in its life (namely, its slaughter) occurred in another country. The meat derived from both of these types of animals is mixed origin, and thus, both countries are listed on the label.

Q58. (United States) Please clarify the exact consumer information that the United States purports to provide to consumers of meat products. For example, the United States refers to the following in its written submission:

(a) "to provide consumers with country of origin information" (paragraph 12 of the United States' first written submission);

(b) to provide "more information" to consumers on countries of origin (paragraphs 222 and 241-242 of the United States' first written submission); and

(c) to "provid[e] meaningful information to consumers" (paragraphs 63, 132 and 268 of the United States' first written submission).

Please elaborate on the nature of consumer information as listed above, including whether and, if so, on what basis, there is a hierarchy between the types of information as mentioned in (a)-(c).

107. The U.S. country of origin labeling system provides information to consumers about the country or countries of origin of the covered commodities that they buy at the retail level. For meat products, this includes information on the countries where the animal from which the meat was derived was born, raised, and slaughtered.

108. The type of information described in (a), (b), and (c) are not different from each other and there is no hierarchy between the different characterizations of this information. In paragraphs 222 and 241, the United States was indicating the information available to consumers under the COOL measures was "more" information than what was available to them before the COOL measures were enacted. In paragraph 32, the United States was indicating that country of origin information is meaningful to consumers and in paragraph 267, the United States characterized this information as meaningful to distinguish it from the misleading information that would be provided about meat products under a labeling system solely based on substantial transformation.

Q61. (all parties) The United States argues that an alternative measure that could fulfil the measure's objective must also be significantly less trade restrictive. Is there a legal basis for suggesting that the word "significantly", which does not appear in Article 2.2 of the TBT Agreement, should nevertheless form part of the interpretation of that provision?

109. Yes. In determining whether the U.S. measures are "more trade restrictive than necessary," the Panel should consider whether there is an alternative measure that fulfills the U.S. objective and is significantly less trade restrictive. This interpretation is supported by the context in which the provision appears in the WTO agreements. Article 5.6 of the SPS Agreement, which mirrors TBT Article 2.2, requires a Member to ensure that its measures "are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection"[85] while TBT Article 2.2 prohibits measures that are "more trade-restrictive than necessary to fulfill a legitimate objective."[86] Given the similarities between these provisions, it is appropriate to interpret them consistently. This conclusion is supported by past Appellate Body reports that have noted the similarity between the TBT and SPS Agreements.[87]

110. A footnote to Article 5.6 clarifies that "a measure is not more trade restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade."[88] Article 5.6 provides relevant context for the interpretation of Article 2.2 of the TBT Agreement within the meaning of Article 31.2 of the Vienna Convention and confirms that determining whether a measure is "more trade-restrictive than necessary" within the meaning of Article 2.2 of the TBT Agreement involves determining whether there is an alternative measure that could fulfill the measure's objective that is *significantly* less trade-restrictive.

---

[85] SPS Agreement, Article 5.6.

[86] TBT Agreement, Article 2.2.

[87] *EC – Sardines (AB)*, para. 274.

[88] SPS Agreement, Footnote 3.

111. This interpretation is confirmed by a December 15, 1993 letter from the Director-General of the GATT to the Chief U.S. Negotiator concerning the application of Article 2.2 of the TBT Agreement.[89] This letter explains that while "it was not possible to achieve the necessary level of support for a U.S. proposal [concerning a clarifying footnote to Article 2.2 and 2.3 of the TBT Agreement]...it was clear from our consultations at expert level that participants felt it was obvious from other provisions of the [TBT] Agreement that the Agreement does not concern itself with insignificant trade effects nor could a measure be considered more trade restrictive than necessary in the absence of a reasonably available alternative."

112. This interpretation is also logical from a practical standpoint – panel findings should not lead to a responding party redoing an entire regulatory process in order to adopt an alternative measure if it makes only an insignificant difference in terms of trade. Based on the ordinary meaning of the second sentence of Article 2.2, and its relevant context, in order for a WTO Member to show that another government's technical regulation is more trade restrictive than necessary for purposes of the second sentence of TBT Article 2.2, the complaining parties must show that (1) there is another measure that is reasonably available to the government, taking into account economic and technical feasibility; (2) that measure fulfills the legitimate objective at the level that the government has determined is appropriate; and (3) is significantly less trade restrictive.[90]

Q62. (all parties) Assuming that the standard under Article 2.2 is "significantly less trade restrictive", as opposed to "less trade restrictive", would this then mean the alternative measures suggested by the complainants fail to meet the standard under Article 2.2?

113. Regardless of the standard used to analyze the alternative measures that were proposed by the complaining parties – voluntary labeling and labeling based solely on substantial transformation – are not reasonable alternatives. Both fail to meet the U.S. objective of providing information to consumers about the countries of origin of the covered commodities and preventing consumer confusion at the appropriate level.[91] Further, it is unclear how a system based on substantial transformation would be less trade restrictive than the system adopted by the United States.

Q63. (all parties) Under the rules of interpretation codified in the Vienna Convention on the Law of Treaties, what is the relevance of "a December 15, 1993 letter from the Director-General of the GATT to the Chief US Negotiator concerning the application of Article 2.2 of the TBT Agreement" in interpreting Article 2.2?

---

[89] Exhibit US-53.

[90] *Australia – Salmon (AB)*, para. 194.

[91] U.S. FWS, para. 250-258; U.S. Oral Statement, para. 50-53.

114. The December 15, 1993, letter from the Director General of the GATT to the Chief U.S. Negotiator provides supplementary means of interpretation under Article 32 of the Vienna Convention on the Law of Treaties. This letter confirms the meaning derived from the ordinary meaning of the provision, in context, and in light of its object and purpose.

Q64. The United States explains that a regime based on substantial transformation would not convey accurate information regarding livestock that may have spent only a short period of its life in the United States before being slaughtered and that this must be a key part of any labelling regime that it adopts (paragraphs 255-257 of the United States' first written submission).

(b) (United States) Do the COOL requirements convey accurate information in light of the provisions on commingled commodities covered under the 2009 Final Rule. Under the 2009 Final Rule, for example, when categories A and B, categories A and C, or categories A, B, and C animals are commingled in a single production day, meat produced from those animals may interchangeably be labelled as category B or C. Is this understanding correct? If yes, given that category C, not category B, covers meat derived from animals that were imported into the United States for immediate slaughter, how does the 2009 Final Rule convey accurate information regarding livestock that may have spent only a short period of its life in the United States, which the United States alleges must be a key part of any labelling regime?

115. Yes, the Panel's understanding of the commingling provisions is correct.

116. Designing the 2009 Final Rule in this manner ensures that the COOL requirements squarely addresses the problem that the United States discussed in paragraphs 255-257 of its First Written Submission. Under the rule, meat derived from livestock that was imported for immediate slaughter will not be labeled as solely U.S. origin regardless of whether the animal was commingled with other animals on a single production day. For example, if a U.S. slaughterhouse processes only animals imported for immediate slaughter from Canada, for example, the resulting muscle cuts of meat must be labeled as a "Product of Canada and the United States." If the U.S. slaughterhouse commingles these Canadian animals imported for immediate slaughter with other animals on a single production day, the resulting meat must be labeled as either a "Product of Canada and the United States" or a "Product of the United States and Canada." Thus, in no circumstance will animals that spent their entire life in another country before being imported to the United States for immediate slaughter be listed as a "Product of the United States." Consistent with the expectations of the U.S. consumer, only meat derived from animals that were born, raised, and slaughtered in the United States will be designated as U.S. origin.

117. The United States agrees that requiring all meat derived from animals imported for immediate slaughter to be labeled as "Product of Country X and the United States" instead of allowing this meat to also be labeled as "Product of the United States and Country X" when it is commingled would convey more complete information to consumers about the amount of time that the animal spent in each country. However, as the United States has noted, USDA strove throughout the rule making process to provide as much flexibility as possible to the industry on how to comply with the COOL measures in an effort to reduce costs, while at the same time providing a quantity of information to consumers that was greater than the information made available to them before. The fact that the COOL measures could have provided more complete information if they were designed in a more costly manner does not establish a breach of TBT Article 2.2.

Q65. (all parties) Let's suppose there are two separate packages of beef, one labelled as "Product of the United States, Product of Canada, and Product of Mexico" and another labelled as "Products of Mexico, Product of Canada, and Product of the United States". Do the parties have any evidence showing that average consumers in the United States are able to tell the difference between these two labels?

118. According to the 2009 Final Rule, there are two types of beef could be labeled as a "Product of Mexico, Canada, and the United States" or "Product of the United States, Canada, and Mexico": (1) ground beef from a processor who had all three types of beef in its inventory in the last 60 days; (2) a muscle cut of beef derived from an animal that spent time in all three countries (i.e. born in Canada, raised in Mexico, and slaughtered in the United States); or (3) a muscle cut of beef from a processor who commingled multiple types of animals in a single production day. In none of these circumstances does the 2009 Final Rule require the names of these countries to be listed in a particular order. However, generally speaking, the United States believes that a consumer is likely to believe that the meat is most closely affiliated with the name of the country that appears first on the label.

Q67. (United States) Please clarify the exact risks of the non-fulfilment of the COOL requirements' objective? How should the Panel take into account such risks in the context of Article 2.2 of the TBT Agreement?

119. The risks of non-fulfilment for the COOL statute and 2009 Final Rule are that consumers would not receive information about the origin of the beef and pork they purchase and may be misled by the USDA grade label.

120. As explained in response to Question 52 from the Panel, the element in Article 2.2 characterized as "taking into account the risks that non-fulfillment would create" is an element that Members take into account in determining what level is appropriate for the particular legitimate objective at issue. As also noted, the preamble confirms that Members are free to determine the level that is appropriate for a particular legitimate objective. The Panel could

verify that a Member has taken these risks into account as one of a number of elements that Member considers in determining the level that is appropriate. In this case, the United States took account of the risks of consumers not having information about the origin of the food products they buy and the risk of consumer confusion with regard to muscle cuts of meat.

Q68. (United States) Please explain the source of consumer confusion prior to the COOL requirements, in particular whether any pre-existing US labelling regime might have contributed to such confusion in any manner. In particular, how does the USDA grading label affect consumer perception? Does the USDA grading label continue to apply following the entry into force of the COOL requirements, and if so how?

121. The COOL measures do not impact the USDA grade labeling program. USDA continues to provide both foreign and domestic products with the benefit of having their meat graded. However, because of the enactment of the COOL measures, USDA grade labels are less likely to cause consumer confusion. For a discussion of the consumer confusion that existed prior to the enactment of the COOL measures, please see the U.S. response to Question 56 from the Panel.

Q69. (United States) In para. 17 of its first written submission the United States argues that "[c]onsumers widely support mandatory country of origin labelling". In light of this statement, please provide evidence on consumers' willingness to pay for the additional information provided under the COOL requirements? How does the United States quantify consumers' willingness to pay? Were there any debates in the US Congress or Senate on consumers' willingness to pay?

122. As a threshold matter it is important to distinguish between a consumer's desire for country of origin information and a consumer's willingness to pay for that information. There may be instances in which a consumer greatly desires certain information but is not willing to pay a premium for the product that provides that information *vis-a-vis* a product that does not or is not willing to pay more for all food products in order to have that information uniformly provided.

123. With regard to the view of the U.S. consumer, it is quite clear that they support country of origin labeling.[92] In addition, academic research indicates that consumers in the United States (as well as many other countries) are willing to pay extra money for products in order to know where they came from. Exhibit US-87 contains a paper providing an overview of thirteen studies of the

[92] *See* U.S. Answer to Question 75 below (discussing consumer support for the U.S. country of origin labeling legislation.).

premium consumers in the United States, Europe, and elsewhere are willing to pay for products with country-of-origin labeling.[93]

124. The United States is not aware of any debates in the U.S. Congress on this specific topic.

Q71. (United States) Please clarify and elaborate on any past or current programmes that the United States provide to US consumers to educate them on the content of the COOL requirements.

125. The COOL requirements provide clear and accurate information to consumers about the origin of the covered commodities they buy at the retail level, information that was not previously available to them in the absence of the COOL requirements. To ensure that this information is of maximum utility to consumers when they make their purchasing decisions, USDA has undertaken several efforts to educate consumers on the COOL requirements. In particular, USDA has provided a significant amount of information on the COOL measures on its website, much of which is directed toward consumer education.[94] Among the different types of information that can be found on the website are a brochure for consumers and retailers to educate them about the different COOL labels,[95] a question and answer page for consumers,[96] and an explanatory YouTube video about the program.[97] Information about the COOL requirements, such as the brochure for consumers and retailers, has also been passed out at different events around the country and provided to consumers inquiring about the program.

Q73. (United States) Do the COOL requirements satisfy the United States' definition of the "origin of meat"? If yes, please explain whether and, if so, how the specific labelling scheme under the 2009 Final Rule, particularly the rules on commingling, provides the intended information on the origin of meat? For example, do consumers in the United States know what the labels indicating "Product of the United States and Country X" (for label B products) and "Product of Country X and Product of the United States" (for label C products) respectively mean and that, in certain situations, labels B and C can be used interchangeably? How does the fact that there are two labels for meat that is both domestic and foreign relate to the stated objectives of the COOL requirements of ensuring accuracy of information and avoiding consumer confusion?

---

[93] Mariah Tanner Ehmke, *International Differences in Consumer Preferences for Food Country-of-origin: A Meta-Analysis*, Selected Paper prepared for presentation at the American Agricultural Economics Association Annual Meeting, Long Beach, California, 23-26 July, 2006 (May 2006)(Exhibit US-87).

[94] For more information, visit the USDA web site on COOL: www.ams.usda.gov/cool.

[95] U.S. Department of Agriculture Brochure for Retailers and Consumers (Oct. 2009) (Exhibit US-88).

[96] The question and answer page is available at the USDA web site on COOL: www.ams.usda.gov/cool.

[97] The YouTube video is available at the following link: http://www.youtube.com/usda?v=3vQrfzkXBKs.

126. In general, the COOL requirements satisfy the U.S. definition of origin. Under the 2009 Final Rule, meat derived from an animal born, raised, and slaughtered in the United States will almost always be labeled U.S. origin (unless it is commingled) and meat derived from an animal born, raised, and slaughtered outside the United States will always be labeled foreign origin. Likewise, meat derived from mixed origin animals will always receive either a Category B or C mixed origin label that informs consumers of all the countries in which the animal from which the meat is derived had spent time.

127. While it is certainly true that the U.S. COOL requirements could have been designed to provide even more specific information in certain circumstances, such as requiring retailers to label each production step or not permitting commingling, measures designed in this way would also have been much more burdensome. Accordingly, the United States altered the measures in response to the comments that it received from interested parties, including Canada and Mexico, and added flexibilities to help reduce compliance costs. While others might have made a different decision and struck a different balance between how much information to require retailers to make available in certain circumstances and the costs of those requirements, the U.S. measures still ensure that consumers have much more information available to them about origin than they previously did and they reduce the likelihood of consumer confusion in certain circumstances. Thus, they achieve the U.S. objective.

Q74. (United States) Please comment on Mexico's view in paragraph 38 of Mexico's opening statement that the objective of the COOL requirements is to provide information on where the animal was born.

128. The United States does not agree with Mexico's assessment of the objective of the COOL requirements with regard to the origin of muscle cuts of meat. As the United States indicated in its First Written Submission and Oral Statement, the objective of the COOL measures is to provide information to consumers about the origin of the covered commodities they buy at the retail level, which for meat products includes listing the names of the countries in which the animal was born, raised, and slaughtered. In doing so, the COOL measures also help prevent consumer confusion.

129. Providing only the country where an animal is born would not fulfill COOL's objective since it would not provide this level of information to consumers and would be misleading. For example, meat derived from an animal that was born in Mexico and then spent its entire life in the United States and was slaughtered in the United States is not solely Mexican origin meat any more than it is solely U.S. origin meat. Where an animal was raised and slaughtered is relevant to its origin just as where it is born is relevant. Meat derived from an animal for which these steps occur in more than one country is mixed origin meat and the COOL measures reflect that.

Q75. (all parties) Please provide evidence showing that US consumers are satisfied with origin information provided under the COOL requirements.

130. Individual consumers and consumer groups strongly support the U.S. COOL requirements and were instrumental in advancing the legislative and regulatory process. For example, the Consumer Federation of America, Public Citizen, and National Consumers League – three of the largest consumer groups in the United States – wrote multiple letters to Members of Congress during consideration of the COOL statute, encouraging legislators to support the bill and to ensure that only meat derived from an animal born, raised, and slaughtered in the United States could be labeled U.S. origin. Further, the consumer groups also opposed a voluntary system as insufficient. For example, the Consumer Federation of America, Public Citizen, and National Consumers Union stated as follows:

> When the Senate takes up the 2001 farm bill, please support legislation to require country-of-origin labeling at retail for meat products and fresh fruits and vegetables. Senator Tim Johnson (D–S.D.) has introduced this legislation as S. 280, the Consumer Right to Know Act of 2001. Please oppose efforts to water down country-of-origin labeling legislation by allowing domestic origin labels on beef that has been slaughtered and processed—but not born—in this country.
>
> ...
>
> Several food industry trade associations and two farm organizations have proposed a voluntary ''Made in the USA'' label for retailers who want to promote and market U.S. beef. Their effort falls short on two counts. First, industry already has voluntary labeling authorization and it has not resulted in country-of-origin labeling for beef. In addition, the industry proposal allows meat from cattle that have been in this country for a few as 100 days to be labeled ''U.S. Beef.'' This could mislead consumers into thinking a product is of U.S. origin when, in fact, it is not. Meat products identified as ''U.S. Beef'' or ''Made in the U.S.A.'' should originate from animals born, raised, slaughtered and processed here.[98]

131. These same consumer groups have indicated their support for the version of the bill that was finally enacted. For example, in the days leading up to the COOL statute's effective date, the Consumers Union and Consumer Federation of America, among other leading consumer advocate groups, sent out press releases heralding the occasion. The Consumers Union press release stated:

> The Consumers Union today hailed the long-awaited implementation of mandatory federal country of origin labeling (COOL) on all meats, fish, poultry and produce sold in retail stores in the United States beginning September 30, 2008. Mandatory COOL for meats, fish, produce and peanuts became law in the United States in 2002. But under pressure from industry, Congress delayed

[98] Exhibit US-61, p. S13275.

> implementation of all but the seafood labeling until October 2008. A Consumer Reports poll released last year found that 92 percent of Americans agree that imported foods should be labeled by their country of origin.[99]

132. Likewise, the Consumer Federation of America stated the following:

> Today is a good day for consumer right-to-know. After a long six-year delay, consumers will finally be able to know the origin of much of their food when they're shopping in the supermarket. Today, mandatory country of origin labeling (COOL) goes into effect for a range of foods, including: beef, pork, lamb, chicken, goat meat, fresh fruits and vegetables, ginseng, peanuts, pecans, and macadamia nuts.
>
> Consumers have repeatedly and overwhelmingly expressed their support for mandatory COOL over the years. Poll after poll has demonstrated strong consumer support for this important information. Now, mandatory COOL is finally a reality and consumers will be able to identify where much of their food comes from.[100]

133. Although these consumer groups uniformly praised the COOL requirements for ensuring that country origin information would be provided to consumers, they did express some concern that the 2009 Final Rule would not provide as much information as the groups had originally sought due to the breadth of some of the exceptions, such as the exemption for processed foods. This reflects the fact that these groups support requirements that provide as much information as possible and would have supported a final rule that did not lean as far in the direction of minimizing compliance costs as the United States ultimately selected in response to the concerns of various industry organizations. On the other hand, the United States is not aware of any information to suggest that these consumer groups would support less information than the 2009 Final Rule provides, which is what would be provided by the alternatives that Canada and Mexico suggest.

Article 2.4

Q76. (United States) The United States argues that, for an international standard to be considered "a relevant international standard" within the meaning of Article 2.4 of the TBT Agreement, it must be adopted by a body whose membership is open to the relevant bodies of at least all Members. What is the basis for the United States' view? Does the United States object to the

---

[99] "Consumers Union Lauds Mandatory Country of Origin Labeling Finally Implemented on All Fresh Produce, Meat & Poultry in the United States," Consumers Union Press Release (Sep. 12, 2008) (Exhibit US-89).

[100] "Statement of CFA's Chris Waldrop on the Implementation of Country of Origin Labeling," Consumer Federation of America Press Release (Sep. 30, 2008) (Exhibit US-90).

characterization of the Codex Alimentarius Commission as an international standardization body?

134. The U.S. view is that is that for a standard to be considered an "international" standard it must be adopted by a body whose membership is open to the relevant bodies of at least all Members and be based on consensus.[101] The United States bases this view on the text of the TBT Agreement. The chapeau of Annex 1 of the TBT Agreement states that terms used in the agreement "have the same meaning as given" in "the sixth edition of the ISO/IEC Guide 2: 1991, General Terms and Their Definitions Concerning Standardization and Related Activities."[102] The ISO/IEC Guide defines "international standard" as a standard that "is adopted by an international standardizing/standards organization and made available to the public."[103] In turn, an "international standardizing organization" is a standardizing organization "whose membership is open to the relevant national body from every country." Further, "organization" is defined as a "body" and paragraph 4 of Annex 1 of the TBT Agreement clarifies that an "international" body is a "body...whose membership is open to the relevant bodies of at least all Members."[104] A "standardizing body" under the ISO/IEC Guide is one "that has recognized activities in standardization," and a "standards body" is one that has, as a principal function, by virtue of its statutes, the preparation, approval or adoption of standards that are made available to the public. Further, Annex 1 of the TBT Agreement provides that "[s]tandards prepared by the international standardization community are based on consensus."[105] Thus, an international standard is one that is adopted by a body with recognized activities in standardization (indeed, one that has, as a principal function, by virtue of its statutes, the preparation, approval or adoption of standards that are made available to the public) whose membership is open to the relevant bodies of at least all Members and is based on consensus.

Q77. (United States) Please explain whether the lack of consensus on the adoption of an international standard necessarily makes the standard irrelevant in the context of Article 2.4 of the TBT Agreement.

135. Based on the text of the TBT Agreement, an international standard is one that is adopted by a body whose membership is open to the relevant bodies of at least all Members and is based

[101] Whether an "international standard" is "relevant" is a separate inquiry from whether a standard is international. For example, a standard may be "international" but not relevant to the objective the Member is seeking to achieve or conversely a standard may be relevant to the objective the Member is seeking to achieve but not "international."

[102] TBT Agreement, Annex 1.

[103] ISO/IEC Guide 2: 1991, para. 3.2.1.

[104] TBT Agreement, Annex 1.

[105] TBT Agreement, Annex 1 (para. 2, explanatory note).

on consensus.[106] Thus, if it is not based on consensus, a standard is not an international standard.

Q79. (all parties) CODEX-STAN 1-1985 is entitled "CODEX General Standard for The Labelling of Prepackaged Foods". How is this standard relevant for livestock and meat that is not pre-packaged? Is pre-packaged meat actually covered by the COOL requirements? What is the relevance of the amendments and revisions of CODEX-STAN 1-1985 in 1991 and 1999?

136. As a threshold matter, the United States notes that Mexico, as the complaining party, has the burden of proving that CODEX-STAN 1-1985 is a relevant international standard. On this point, it is worth noting that the scope of CODEX-STAN 1-1985 differs from the COOL measures in a number of respects, which raise questions about its relevance. For example, the CODEX standard applies to "prepackaged foods" but does not apply to muscle cuts of meat that are not pre-packaged. The COOL measures apply to ground and muscle cuts of meat but do not apply to processed foods, a type of food that is pre-packaged. The COOL measures do apply to other types of pre-packaged foods. In any event, because the CODEX standard is based on substantial transformation, it does not achieve the legitimate objective of the United States and is therefore not effective or appropriate.[107]

137. The amendments to CODEX-STAN 1-1985 that were adopted in 1991 and 1999 pertaining to labeling for irradiated and compound ingredients do not have direct relevance to the issues presented in this dispute.

Q80. (United States) Before adopting the COOL requirements, had the United States applied CODEX-STAN 1-1985 with respect to the country-of-origin of livestock/meat?

138. The U.S. labeling requirements that were in place before the COOL measures were adopted pre-dated CODEX-STAN 1-1985[108] but are not inconsistent with the CODEX standard.

Q81. (all parties) How were consumer interests in general and US consumer interests in particular articulated and represented when developing the relevant CODEX standard?

---

[106] TBT Agreement, Annex 1 (para. 2, explanatory note) ("[s]tandards prepared by the international standardization community are based on consensus.").

[107] U.S. FWS, para. 267-269.

[108] The U.S. Tariff Act was adopted in 1930.

139. As a threshold matter, the United States would note that it is up to the complaining party to establish the existence of a relevant international standard, and that Mexico has not met that burden in this dispute.

140. With regard to the standard that Mexico has identified — CODEX-STAN 1-1985 — the International Organization of Consumers Unions (IOCU) participated as an observer in the discussions of the standard; U.S. consumer groups were not directly involved. The IOCU representative did not take a position on how origin should be defined for purposes of CODEX-STAN 1-1985, though provided views on other aspects of the standard, such as the criteria for irradiated foods and the scope of coverage.[109]

Articles 12.1 and 12.3

Q82. (Mexico and the United States) What kind of evidence would be sufficient to show that a Member implementing a technical regulation did "take into account" the special needs of developing country Members under Article 12.3 of the TBT Agreement?

141. As a threshold matter, it is important to note that the developing country Member bears the burden of establishing that it had communicated its special needs to the developed country Member and that the developed country Member did not take those special needs into account, as is the case with any other claim in dispute settlement. However, a developed country Member may be able to rebut this showing (if the developing country Member makes a prima facie case) by producing evidence that it did take the developing country Member's special needs into account where they were communicated.

142. The ordinary meaning of the term "account" is to "Reckon, estimate (to be so and so), consider, regard as."[110] Thus, to show that it did "take account of" the special needs of a developing country Member, a developed country Member could provide evidence to show that it "considered" the developing country Member's special development, financial and trade needs.

Q83. (Mexico and the United States) What is the relationship, if any, between the obligations under Articles 2.2 and 12.3 of the TBT Agreement? What is the relationship between Articles 12.2 and 12.3 of the TBT Agreement?

---

[109] *E.g.*, Joint FAO/WHO Food Standards Programme, Codex Alimentarius Commission, Report of the Fifteenth Session of the Codex Committee on Food Labelling (29 June - 10 July 1981), para. 107 (discussing coverage) (Exhibit US-91); Joint FAO/WHO Food Standards Programme, Codex Alimentarius Commission, Report of the Eighteenth Session of the Codex Committee on Food Labelling (11-18 March 1985), paras. 107-108 (discussing irradiation) (Exhibit US-92).

[110] *The New Shorter Oxford English Dictionary* (4th ed. 1993), p. 15 (Exhibit US-93).

143. TBT Articles 2.2 and 12.3 address similar concepts, but impose different obligations on WTO Members.

144. First, Article 2.2 applies to the preparation, adoption, and application of technical regulation while Article 12.3 only applies to the preparation and application. Second, Article 2.2 requires a Member to "ensure that technical regulations are not prepared, adopted or applied with a view *or with the effect of* creating unnecessary obstacles to international trade," while Article 12.3 simply requires a Member to act "*with a view* to ensuring that such technical regulations...do not create unnecessary obstacles to exports..." The words "with the effect of" are notably absent from Article 12.3, indicating that this Article does not require Members to ensure that their technical regulations do not create an unnecessary obstacle to the exports of a developing country Member, but simply that they are prepared and applied with a view toward this end.

145. Because the obligation contained in TBT Article 2.2 is broader than that contained in TBT Article 12.3, a measure that is in compliance with TBT Article 2.2 would also be in compliance with TBT Article 12.3. On the other hand, a Member may violate TBT Article 2.2 without breaching TBT Article 12.3.

146. With respect to Article 12.2, that provision addresses a different issue. Article 12.2 requires Members to give particular attention to the needs of developing country Members "in the implementation of this Agreement, both nationally and in the operation of this Agreement's institutional arrangements", while Article 12.3 requires Members to take account of these needs "in the preparation and application of technical regulations, standards and conformity assessment procedures." The measures at issue do not "implement" the TBT Agreement, nor do they pertain to the Agreement's institutional arrangements.

Q84. (United States) During the development of the COOL requirements, did the United States accord any special treatment to Mexico and, if so, how? In particular, did the United States modify the COOL requirements during the latter's development in response to Mexico's request?

147. In developing the COOL requirements, the United States took Mexico's needs into account in a number of ways. First, the United States provided Mexico with numerous opportunities to comment on the development of the 2009 Final Rule. Second, U.S. officials met with Mexican officials on multiple occasions to discuss their concerns.[111] Furthermore, USDA changed its regulations to reduce the record keeping burden in response to a concern that Mexico expressed in its comments on the implementing regulations.[112]

---

[111] *See* U.S. FWS, para. 274 (noting that Mexico had at least four formal opportunities to comment on the implementing regulations and that USDA met with Mexico on multiple occasions, including August 27 and September 11, 2008).

[112] *See* Exhibit US-19 (a letter from Mexico requesting that the United States reduce the record keeping burden on suppliers by eliminating).

GATT 1994

Q87. (United States) The Vilsack letter states that it "pertains to the implementation of the mandatory Country of Origin Labelling (COOL) Final Rule. ..." Does this indicate that the Vilsack letter was applying the COOL requirements or putting them into practical effect?

148. The language in the Vilsack Letter stating that it "pertains to the implementation of the mandatory Country of Origin Labelling (COOL) Final Rule" does not indicate that the letter "applies" the requirements or "put them into practical effect." Rather, it simply indicates that the letter addresses the topic of implementation of the Final Rule. Among other things, the letter reports that the Secretary intends to promulgate the regulations, and that they would be going into effect on March 16, 2009. In this respect, the letter "pertains" to implementation of the regulations.

149. However, the Vilsack Letter does not "apply" the regulations – it has no legal effect, and the suggestions it contains are clearly identified as distinct from the 2009 Final Rule. Nor does it put the requirements into practical effect. The Vilsack Letter makes voluntary suggestions to industry not included in the statute or Final Rule. USDA applied and put into effect the COOL regulations by issuing and enforcing the 2009 Final Rule at the conclusion of the normal U.S. regulatory process.

List of U.S. Exhibits

Exhibit US-60	*Garcia v. United States*, 469 U.S. 70 (1984)
Exhibit US-61	107th Cong. Rec. S13270-75 (daily ed. Dec. 14, 2001)
Exhibit US-62	Memorandum for the Heads of Executive Departments and Agencies from Rahm Emanuel, Assistant to the President and Chief of Staff, the White House (Jan. 20, 2009)
Exhibit US-63	"Salazar Retains Protection Rule for Polar Bears, Orders Monitoring," U.S. Department of the Interior Podcast (May 8, 2009)
Exhibit US-64	U.S. Food and Drug Administration Letter to Industry Concerning Liquid Vitamin D Supplements (Jun. 15, 2010)
Exhibit US-65	"Sebelius Sends Letter to Insurance Company CEOs, Calls on Executives to Publicly Justify Premium Hikes," U.S. Department of Health and Human Services News Release (Mar. 8, 2010)
Exhibit US-66	The OECD Reference Checklist for Regulatory Decision-Making (1997)
Exhibit US-67	Photos of Labels for Muscle Cuts of Meat
Exhibit US-68	List of WTO Members with Labeling Requirements
Exhibit US-69	TBT Notifications on Labeling Requirements
Exhibit US-70	U.S. Export Data on Beef and Pork, USDA Data
Exhibit US-71	Cattle: Annual and cumulative year-to-date U.S. trade (head), USDA Economic Research Service Data (2005-2010)
Exhibit US-72	Hogs: Annual and cumulative year-to-date U.S. trade (head), USDA Economic Research Service Data (2005-2010)
Exhibit US-73	U.S. Department of Agriculture, Food Safety and Inspection Service, Export Requirements for Canada
Exhibit US-74	U.S. Department of Agriculture, Food Safety and Inspection Service, Export Requirements for Mexico

Exhibit US-75	Country of Origin Labeling for Certain Foods - Survey Results (GAO-03-781SP) (2003)
Exhibit US-76	*United States Standards for Grades of Carcass Beef*, United States Department of Agriculture, Agricultural Marketing Service, Livestock and Seed Division (Jan. 31, 1997)
Exhibit US-77	Exhibit Intentionally Omitted
Exhibit US-78	*Certified Angus Beef Program: Making History Since 1978*
Exhibit US-79	*Sterling Silver Premium Beef: It's Not Just Meat, It's An Experience*
Exhibit US-80	"Export Requirements for Countries with an Approved USDA Export Verification Program"
Exhibit US-81	U.S. Department of Agriculture, Food Safety and Inspection Service, Export Requirements for Japan
Exhibit US-82	U.S. Department of Agriculture, Food Safety and Inspection Service, Export Requirements for Korea
Exhibit US-83	USDA's Process Verified Program
Exhibit US-84	Letter from the Consumers Federation of America to FSIS (Sept. 17, 2001)
Exhibit US-85	Letter from Danila B. Oder to FSIS (Aug. 28, 2001)
Exhibit US-86	Canadian and Mexican Livestock Market Share, Data from U.S. Department of Commerce and USDA National Agricultural Statistic Service
Exhibit US-87	Mariah Tanner Ehmke, *International Differences in Consumer Preferences for Food Country-of-origin: A Meta-Analysis*, Selected Paper prepared for presentation at the American Agricultural Economics Association Annual Meeting, Long Beach, California, 23-26 July, 2006 (May 2006)
Exhibit US-88	U.S. Department of Agriculture Brochure for Retailers and Consumers (Oct. 2009)

Exhibit US-89	"Consumers Union Lauds Mandatory Country of Origin Labeling Finally Implemented on All Fresh Produce, Meat & Poultry in the United States," Consumers Union Press Release (Sep. 12, 2008)
Exhibit US-90	"Statement of CFA's Chris Waldrop on the Implementation of Country of Origin Labeling," Consumer Federation of America Press Release (Sep. 30, 2008)
Exhibit US-91	Joint FAO/WHO Food Standards Programme, Codex Alimentarius Commission, Report of the Fifteenth Session of the Codex Committee on Food Labelling (29 June - 10 July 1981)
Exhibit US-92	Joint FAO/WHO Food Standards Programme, Codex Alimentarius Commission, Report of the Eighteenth Session of the Codex Committee on Food Labelling (11-18 March 1985)
Exhibit US-93	*The New Shorter Oxford English Dictionary* (4th ed. 1993), p. 15