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

(DS384/386)

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

January 6, 2011

Table of Reports

Short Form	**Full Citation**
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 – IT Products	Panel Report, European Communities – Tariff Treatment of Certain Information Technology Products, WT/DS375/R, WT/DS376/R, WT/DS377/R, adopted 21 September 2010
EC – Sardines (Panel)	Panel Report, *European Communities – Trade Description of Sardines,* WT/DS231/R, adopted 23 October 2002, as modified by the Appellate Body Report, WT/DS231/AB/R
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

Q89. (All parties) Please comment on the statements in paragraphs 3-6 of Brazil's third party oral statement at the second meeting concerning the relevance of Article 3.3 of the DSU and the specific WTO dispute reports referenced therein for determining whether the Panel should analyse the COOL requirements as a single measure.

1. While in some circumstances it may be appropriate to treat multiple legal instruments as a single measure, Brazil's reliance on Article 3.3 of the DSU is misplaced. The use of the plural "measures" suggests at most that more than one measure may be the subject of a given dispute – it does not address the question of whether and in what circumstances multiple legal instruments should be treated as a single measure.[1] Likewise, a closer review of the cited paragraphs of the *EC – IT Products* report confirms that the panel in that case did not treat multiple measures as a single measure in its findings – rather, it made findings against the EU's Combined Nomenclature Explanatory Notes (CNEN), and as part of those findings stated that this measure operates in conjunction with another measure, the Combined Nomenclature (CN).[2] Neither Article 3.3 of the DSU nor the findings of the panel in *EC – IT Products* provide support for the proposition that the disparate measures challenged by Canada and Mexico should be viewed as a "single measure" in the context of this dispute.

2. To establish that a particular measure breaches an obligation, a complaining party must explain how it does so and provide sufficient evidence to support its claim. To the extent that there are circumstances in which two legal instruments operate together to breach of the obligations at issue, the complaining party bears the burden of establishing that this is the case. In this case, Canada and Mexico have failed to establish that each of the individual instruments is inconsistent with the obligations at issue or that the instruments operate in conjunction with each other to give rise to a breach.

3. Also importantly, where the claims at issue involve provisions of the covered agreements that only apply to certain types of measures, the complaining party has the burden of proving that

[1] Third Party Statement of Brazil at the Second Substantive Meeting of the Panel, para. 3 (citing DSU Article 3.3, which states in full that "The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.").

[2] *EC – IT Products*, para. 8.3, 8.6. Brazil also overlooks the fact that, while the Panel noted that the CNENs were non-binding, it concluded that they could validly form the basis of an "as such" claim with respect to GATT Article II. *See, e.g. EC – IT Products*, para. 7.160.

each of the legal instruments at issue fit within the relevant definition of the type of measure to which the provision at issue applies. Brazil's response does not address this issue and the complaining parties have failed to establish that the different instruments they cite are subject to the WTO provisions in question.

4. With respect to the Vilsack Letter, Canada and Mexico have failed to demonstrate that it is a technical regulation and therefore subject to Article 2 of the TBT Agreement.[3] In particular, Canada and Mexico have failed to show that under U.S. law the Vilsack Letter is a legal instrument that can be enforced or that United States is enforcing it. They have also failed to show that any individual market actor is complying with the suggestions contained therein. For this reason alone it is not appropriate to conduct an Article 2 analysis on some "unified measure" that includes the Vilsack Letter.

5. Additionally, Canada and Mexico fail to explain how the Vilsack Letter operates in conjunction with any other measure to breach the obligations in question. The Vilsack Letter provides suggestions regarding labeling that are substantively different from, and in some cases inconsistent with, the requirements contained in the 2009 Final Rule.[4] This stands in sharp contrast to the situation in *EC – IT Products,* where the evidence demonstrated (and indeed the EU did not dispute), based on the text of the measures themselves and evidence regarding how those measures were interpreted under EU law, that the CNENs operate in conjunction with the CN to establish the duty treatment the EU accords to imported products.[5] The CNENs provided guidance to EU customs authorities regarding how to administer the CN and this guidance was in fact being followed by EU customs authorities when doing so.[6]

6. Similarly, the complaining parties fail to explain how the 2009 Final Rule operates in conjunction with the statute to give rise to a breach. Indeed, there are significant legal and substantive differences between the statute and regulations that have implications for how the WTO obligations at issue in this dispute apply.[7] For example, the 2008 Interim Rule and 2009 Final Rule provide retailers with different rules regarding the use of the four categories of meat labels (A, B, C, D), indicating that the regulations, and not the COOL statute, prescribe in detail the labeling methods that must be followed. Further, the regulations themselves specify the label that must be applied to a product, unlike the CNENs at issue in the *EC – IT Products* case, which had to be read in conjunction with the CN in order to determine the relevant duty treatment.

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[3] U.S. Second Written Submission ("U.S. SWS"), para. 13-16.

[4] *See* U.S. SWS, para. 18 (discussing substantive differences between the suggestions contained in the Vilsack Letter and the requirements contained in the 2009 Final Rule).

[5] *See*, *e.g.*, *EC – IT Products*, paras. 7.989-7.991.

[6] *EC – IT Products*, para. 8.3-8.6.

[7] *See* U.S. SWS, para. 11-28 (discussing the differences between the various U.S. instruments as well as Canada and Mexico's failure to explain how the COOL statute, 2008 Interim Rule, FSIS Interim Rule, or FSIS Final Rule breach the WTO obligations of the United States).

Here, the measures are distinct, and complainants have failed to offer evidence demonstrating that it is appropriate to analyze them as a "single measure."

Country-of-origin labelling requirements

Q90. (All parties) Please specify the percentage of the meat in the market respectively carrying labels A, B, C, D, and E under the COOL requirements since the introduction of the COOL requirements and up to November 2010.

7. Since the 2009 Final Rule took effect on March 16, 2009, USDA has focused its resources on overall compliance and not on tracking the amount of meat products that carry each individual label at the retail level. As such, USDA has not conducted a representative nationwide study of the different labels being used on beef or pork muscle cuts and is unable to provide any statistically reliable information of this type to the Panel. However, in July 2009, USDA conducted a limited survey of the labels being placed on covered commodities at 152 retail stores.

8. For muscle cuts of beef, USDA's survey showed that approximately 71 percent were being labeled as Category A ("Product of the United States"), 27.5 percent were being labeled as Category B ("Product of the United States and Canada"; "Product of the United States and Mexico"; or "Product of the United States, Canada, and Mexico"), 0.5 percent were being labeled as Category C ("Product of Canada and the United States"), and 0.3 percent were being labeled as Category D ("Product of Canada," "Product of Mexico, etc.).[8] Likewise, for pork, USDA's survey showed that approximately 70 percent were being labeled as Category A, 27 percent Category B, 0.2 percent Category C, and a small percentage Category D. It is not appropriate to compare Category E meat directly with these other categories since it refers to ground meat, not muscle cuts. All ground meat subject to the 2009 Final Rule receives a Category E label.

9. While USDA's survey is not a statistically reliable nationwide survey, there are a few important points that can be discerned from the data. First, it is important to note that the percentage of beef and pork in the market receiving a Category B label appears to be higher than the percentage of Category B meat actually sold in the United States. For example, USDA's survey shows that 27.5 percent of beef muscle cuts are being labeled Category B while only 3-4 percent of the beef sold in the United States is actually Category B.[9] For pork, the data shows a similar trend: 4-5 percent of the pork products sold in the United States are actually Category B, but 27 percent of pork products are receiving a Category B label according to USDA's survey. Thus, to the extent that this data can be relied upon, it directly undermines Canada and Mexico's claim that the COOL measures are pressuring companies to avoid Category B and C meat. To

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[8] USDA Country of Origin Labeling Survey (July 2009) (Exhibit US-145).

[9] 2010 U.S. Beef and Pork Supply By Category, Source: National Agricultural Statistics Service & Economic Research Service (Exhibit US-146).

the contrary, it shows that companies subject to the labeling requirements are actually selling products with Category B and C labels at very high levels.

10. Second, USDA's survey shows that a significant number of companies are commingling U.S. origin livestock with mixed origin livestock. According to the survey, 22 percent of beef muscle cuts and 4 percent of pork muscle cuts were labeled as a product of the United States, Canada, and Mexico.[10] Given the negligible amount of cattle or hogs that are born in either Canada or Mexico, raised in the other country, and then slaughtered in the United States (*i.e.*, born in Mexico, raised in Canada, slaughtered in the United States), it is safe to assume that nearly all of this meat is commingled. Thus, it appears that the commingling provisions are being used by a significant number of feed lots and slaughterhouses in order to reduce compliance costs.

11. Third, it is important to note the limited amount of meat labeled as Category D meat and sold in the U.S. market. The reason for this is that most meat that would otherwise be labeled as Category D if sold at retail is being sold in restaurants, sold as part of a processed food, or sold as ground meat (where origin information is being reflected as part of a Category E label).[11] This further illustrates the U.S. point that it would not have made sense from a cost/benefit standpoint to require multiple countries to be listed on Category D meat given the limited amount of product covered by this scenario.[12]

Q91. (All parties) Please specify, if necessary using estimates, what proportion of the meat that could qualify for label A according to the COOL requirements is actually being labelled under the commingling provisions as labels B or C in the market.

12. The United States does not have a precise figure for the amount of Category A meat that is being labeled as Category B or C meat using the commingling provisions. However, the limited data that the United States has available to it illustrates two important points regarding commingling that help to provide a reasonable estimate in response to the Panel's question.

13. First, it appears that the commingling provisions are being utilized by a significant number of companies. As the United States indicated in its Second Written Submission, there is direct evidence that feed lots and slaughterhouses are taking advantage of the commingling

[10] Exhibit US-145.

[11] Exhibit US-144.

[12] Opening Statement of the United States of America at the Second Substantive Meeting of the Panel ("U.S. Second Opening Oral Statement"), para. 45; Exhibit US-144.

provisions.[13] USDA's survey mentioned in response to Question 90 confirm this fact.[14] According to USDA's survey, 22 percent of beef muscle cuts and 4 percent of pork muscle cuts are receiving a label that lists the United States, Canada, and Mexico as the countries of origin.

14. Second, despite the significant amount of commingling that is occurring, it appears that the vast majority of Category A meat is receiving a Category A label. As the United States has noted, approximately 85-90 percent of the U.S. beef supply is Category A,[15] and USDA's survey estimates that approximately 71 percent of the beef sold at the retail level is being labeled as Category A.[16] Likewise, for pork, approximately 90 percent of the U.S. pork supply is Category A,[17] and USDA's survey estimates that 70 percent of the pork sold at the retail level is being labeled as Category A.[18] Although it is impossible to derive a precise estimate from these comparisons, the data suggests that up to 14 percent of Category A beef muscle cuts might be labeled as Category B or C beef and up to 20 percent of Category A pork muscle cuts might be labeled as Category B or C pork.[19]

Q92. (All parties) Please specify, or provide estimates of, what percentage of the meat consumed in the United States is sold at the retail stores covered by the COOL requirements and what percentage is sold through other channels (restaurants and other establishments, etc) excluded from the scope of the COOL requirements.

15. During its development of the 2009 Final Rule, USDA estimated that "47.0 percent of U.S. food sales occur through retailers subject to this rule, with the remaining 53.0 percent sold by retailers not subject to the rule or sold as food away from home."[20] The percentage of beef and pork sold through establishments subject to the COOL requirements is likely similar. For example, approximately 65 percent of beef is purchased for at home use in retail stores, and of this beef, approximately 85 percent is either muscle cuts or ground beef not subject to the processed foods exemption.[21] This suggests that slightly more than half of the beef consumed in

[13] U.S. SWS, para. 57; Exhibit CDA-41; Exhibit MEX-67; Exhibit US-95; Exhibit US-96; Exhibit US-98; Exhibit US-101; Exhibit US-102.

[14] Exhibit US-145.

[15] Exhibit US-146.

[16] Exhibit US-145.

[17] Exhibit US-146.

[18] Exhibit US-145.

[19] This estimate is derived by taking the difference between the amount of Category A meat that is sold in the market and the amount of meat being sold at the retail level that bears a Category A label.

[20] Exhibit CDA-5.

[21] "Factors Affecting U.S. Beef Consumption," Christopher G. Davis and Biing-Hwan Lin, Electronic Outlook Report from the Economic Research Service, U.S. Department of Agriculture (Oct. 2005) (Exhibit US-147), p. 13.

the United States is covered by the 2009 Final Rule's requirements.[22] The percentage is similar for pork products, but likely a bit lower, since a larger percentage of pork products are processed.[23]

Q93. (All parties) Please explain how meat operators in the distribution chain distinguish meat products subject to the COOL requirements from those products not subject to the COOL requirements (e.g. meat products supplied to restaurants). For example, are meat products systematically separated throughout the production chain depending on whether the products are supplied to retailers within the scope of the COOL requirements and to restaurants outside the scope of the COOL requirements? If yes, please explain how. For instance, are ear tags used for this purpose?

16. The United States is not aware of any evidence to suggest that meat producers in the distribution chain – feed lot operators and slaughterhouses – are systematically separating source animals or meat products depending on whether the ultimate meat products derived from those animals are subject to the 2009 Final Rule. This is due to the fact that the ultimate disposition of a meat product is often not known at any particular stage of the production chain.

Q94. (All parties) In paragraph 171 of its second written submission, the United States presents certain examples of labelling regimes from other WTO Members arguing that these regimes do not solely define origin using substantial transformation principles. Please elaborate on the specific similarities and differences between the measures mentioned in that paragraph, in particular those of Australia, the European Union, Korea and Japan, and the COOL requirements.

17. The 2009 Final Rule establishes mandatory country of origin labeling requirements that are similar to the requirements maintained by other WTO Members. In fact, nearly 70 Members maintain mandatory requirements,[24] many of these requirements apply at the retail level,[25] and many Members have similar product coverage as the United States.[26] Like the United States, at least four other countries (Australia, the EU, Japan, and Korea) do not define country of origin for meat solely based on the concept of substantial transformation.[27] In the following paragraphs,

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[22] 85 percent of 65 percent is 55.25 percent.

[23] "Factors Affecting U.S. Pork Consumption," Christopher G. Davis and Biing-Hwan Lin, Electronic Outlook Report from the Economic Research Service, U.S. Department of Agriculture (May 2005) (Exhibit US-148), p. 9.

[24] U.S. SWS, para. 115.

[25] U.S. SWS, para. 115.

[26] U.S. SWS, para. 156.

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

the United States will briefly discuss these four labeling systems and their similarities to the U.S. labeling requirements as established by the 2009 Final Rule.

18. Like the United States, Australia's definition of origin for pork, among other commodities, does not depend solely on where the animal is slaughtered. According to the information submitted by Australia, its requirements permit a retailer to label pork as a "Product of Australia" only if Australia is the origin for each significant ingredient, and virtually all the processes of production or manufacture of the pork product occur in Australia.[28] This is similar to the requirement under the 2009 Final Rule that requires all production steps to occur in the United States to label meat as a "Product of the United States." To label pork as "Made in Australia" under Australia's system, the pork product must have been substantially transformed in Australia and more than 50 percent of the costs of production must have been carried out in Australia. Finally, if the 50 percent threshold is not reached, Australia allows the pork to be labeled as "Made from Imported and Local Ingredients" or a similar label. Thus, while Australia's system is somewhat different from the 2009 Final Rule for pork derived from an animal that spends time in more than one country, in both cases, pork derived from a hog that was imported for immediate slaughter or at late stage in the feeding process (*i.e.*, that would otherwise qualify as domestic origin under a substantial transformation rule) could not be labeled as domestic origin.

19. The EU's definition of origin for meat products does not rely on substantial transformation concepts. Rather, retailers must list all of the countries in which a production step took place.[29] This is more specific information than what the 2009 Final Rule requires, but under both systems, an animal born in Canada, raised in Mexico, and slaughtered in the United States would list all three countries on the label. Similarly, if an animal was born and raised in Canada, for example, and then slaughtered in the United States, under the EU system and the 2009 Final Rule, the label would list both the United States and Canada. Both systems would also list the United States and Mexico for cattle born in Mexico and then raised and slaughtered in the United States.

20. Japan's definition of origin for fresh meat products is not solely based on where the animal is slaughtered. When an animal is raised in only one country, Japan's system defines origin in the same way as the 2009 Final Rule.[30] On the other hand, when an animal is raised in more than one country, Japan's system defines origin based on where the animal spent more time. In this sense, Japan's system provides less information than the 2009 Final Rule. For example, an animal imported for immediate slaughter from Canada into Japan would be labeled

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

[29] Exhibit EU-4; Replies to the Questions from the Panel Following the First Hearing by the European Union, para. 27, Question 2.

[30] Japan's Replies to Questions from the Panel Following the First Substantive Meeting, para. 5, Question 1.

as a "Product of Canada" under the Japanese system whereas an animal imported for immediate slaughter from Canada into the United States would be labeled as a "Product of Canada and the United States" under the 2009 Final Rule. Likewise, an animal imported from Mexico early in its life into Japan would be a "Product of Japan" under the Japanese system and an animal imported from Mexico early in its life into the United States would be a "Product of the United States and Mexico" under the 2009 Final Rule.

21. Korea's definition of origin for beef and pork is not solely based on substantial transformation, and in some cases would render the same or similar results as the 2009 Final Rule. Korea only permits a domestic label to be used for beef if the source animal was in Korea six months before slaughter and for pork if the source animal was in Korea for two months before slaughter.[31] Thus, under both Korea's system and the 2009 Final Rule, cattle or hogs imported into the country less than six or two months before slaughter, respectively, would not be classified as domestic origin. Under Korea's system, these products would be labeled as "Domestic Product" and would indicate the name of the exporting country in parentheses. Similarly, the 2009 Final Rule would require the product to list the United States and the other country in which the animal was born and/or raised.

22. As these examples illustrate, not all Members base their definition of origin for meat products on substantial transformation and may require all or nearly all production steps to take place domestically in order to receive a domestic label. Further, the differences between the different systems show that Members do not define origin for labeling purposes in the exact same way and should not be required to do so. This is consistent with the TBT Agreement, which explicitly permits Members to fulfill their legitimate objectives, such as providing country of origin information, at the level they consider appropriate.[32]

TBT Agreement

Q97. (All parties) Please comment on the following sentence in paragraph 3 of the European Union's third party oral statement at the second meeting:

"With respect to the Vilsack letter, we believe it may be of assistance to the Panel to recall the relevant provisions of Articles 4, 5 and 7 of the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts."

23. Articles 4, 5, and 7 of the International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts are not relevant to this dispute. They have no legal

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[31] Republic of Korea Public Gazette Issue 16786, July 7th 2008 (available in Korean, 4~6 pages), Issue 16787, July 8th 2008 (available in Korean, 30~37 pages), available at the following web site: http://www.gwanbo.korea.go.kr. English translation of Korean labeling law provided by the European Union (Exhibit US-139).

[32] Preamble to the TBT Agreement.

status in the WTO, are not part of the covered agreements, and are not relevant to the matters at issue.

24. With respect to the Vilsack Letter, this instrument has no status under U.S. law, it is not mandatory, and it contains suggestions that are substantively different from the labeling requirements contained in the 2009 Final Rule. The Draft Articles referenced by the EU pertain to circumstances in which conduct may be attributed to a state; they do not address the question of whether the Vilsack Letter is a technical regulation or whether a regulation and a letter containing non-mandatory suggestions substantively different from the requirements contained in the regulation should be considered together as a single measure. Putting aside the legal status of the Vilsack Letter under U.S. law, this instrument should not be analyzed as a part of a "single COOL measure" based on the fact that it is not a technical regulation and its substantive differences from the 2009 Final Rule, the only instrument that is being enforced and followed in the market place.

Q99. (All parties) In connection with Panel question No. 91 above, please explain with appropriate evidence whether, and if so how, the Vilsack letter resulted in any change in the relevant figures.

25. The United States is not aware of any evidence to suggest that industry has responded to the Vilsack Letter by modifying its practices with regard to the sourcing of livestock or with regard to the labels being placed on beef and pork products at the retail level. Canada and Mexico have failed to present any evidence to suggest a change in U.S. industry practice either. In fact, the two exhibits that the complaining parties cite to in an attempt to show that U.S. industry has modified its practice in response to the Vilsack Letter do not show this at all. The first exhibit, Exhibit MEX-33, pre-dates the issuance of the Vilsack Letter by six months.[33] The second exhibit, Exhibit MEX-67, demonstrates that industry views the Vilsack Letter as voluntary.[34]

Q100. (All parties) In paragraph 7 of its third party oral statement at the second meeting, Brazil stated that "a document which may not in itself constitute a technical regulation could nevertheless be relevant to an examination under Article 2.2, insofar as it is relevant to the *application* of the technical regulation itself." Please comment.

26. Without prejudice to the question of whether an instrument that is not on its own a technical regulation may be relevant to the application of a technical regulation, the Vilsack

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[33] *See* U.S. First Written Submission ("U.S. FWS"), para. 136 (discussing Mexico's citation to an October 2008 letter from Tyson Foods regarding its sourcing policies as evidence that industry is somehow following the Vilsack Letter).

[34] *See* U.S. SWS, para. 16 (pointing out that the AMI letter introduced by Mexico states that whether or not to follow the Vilsack Letter is "an individual company's decision," and thus, not mandatory by definition).

Letter does not represent the "administration"or "application" of the 2009 Final Rule or any other of the COOL instruments.[35] It does not "put into practical effect" or "apply" the 2009 Final Rule. To the contrary, the Vilsack Letter makes voluntary suggestions that industry may choose to follow outside the requirements of the 2009 Final Rule itself.

General

Q102. (All parties) Please comment on the European Union's statement that it "see[s] more regulatory space under the *TBT Agreement*" than under the SPS Agreement. (European Union's third party oral statement at the second meeting, paragraph 13)

27. The United States agrees with the EU that it is not necessary for the Panel to "opine on the relative degree of regulatory space under the SPS and TBT Agreements."[36] To the extent that this issue is relevant, it is notable that the TBT Agreement explicitly recognizes the right of Members to enact technical regulations to fulfill legitimate objectives, and inherent in the adoption of any technical regulation are compliance costs on market actors, which may vary significantly based on each market actor's particular circumstances.[37]

28. Further, in the design of a technical regulation, consistent with good regulatory practice, Members weigh the costs and benefits of the decisions they make and the views of interested parties.[38] Members may not all make the same decisions and they may not choose to fulfill a shared legitimate objective in the same way – nor do the WTO Agreements require them to do so.

Q103. (All parties) Please comment on the on-going discussions, if any and to the extent relevant, among the WTO Members in the TBT Committee regarding mandatory country of origin labelling requirements.

29. The United States is not aware of any on-going discussions of mandatory country of origin labeling requirements in the TBT Committee that are directly relevant to the issues raised in this dispute. However, numerous WTO Members have notified mandatory country of origin labeling requirements for food products to the TBT Committee, and many of these requirements share similar characteristics as the U.S. labeling requirements as established by the 2009 Final Rule.[39]

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[35] U.S. SWS, para. 188.

[36] Third Party Statement of the European Union at the Second Substantive Meeting of the Panel, para. 13.

[37] U.S. FWS, para. 190-195.

[38] Answers of the United States of America to the First Set of Questions from the Panel to the Parties ("U.S. First Answers"), para. 24-25, Question 14.

[39] U.S. SWS, para. 115-117, 156, 171.

Q104. (All parties) Do the parties agree that the obligations under Articles 2.1 and 2.2 of the TBT Agreement are separate and cumulative? If yes, can a measure found to be in violation of the obligations under Article 2.1 still be found consistent with the obligations under Article 2.2? Please explain your response in connection with the trade restrictiveness element of Article 2.2.

30. The obligations under TBT Articles 2.1 and 2.2 are separate, and a measure's consistency with each of these provisions needs to be examined on its own terms. However, there is no textual basis to suggest that TBT Articles 2.1 and 2.2 impose cumulative or consequential obligations.

31. In some instances, the same facts that inform a less favorable treatment analysis under Article 2.1 may also inform a trade restrictiveness analysis under Article 2.2; however, even in these instances, the analysis would not be the same under each provision. Under Article 2.1, the complaining party bears the burden of demonstrating that a measure accords less favorable treatment to imported products than like domestic products. Under Article 2.2, the complaining party bears the burden of demonstrating that a measure restricts trade more than is necessary to fulfill its legitimate objective.[40] If under Article 2.2 a measure is found to fulfill a legitimate objective, the complaining party must put forward a reasonably available alternative that fulfills this objective at the level that Member considers appropriate and is significantly less trade restrictive. Thus, a violation of Article 2.1 will not necessarily result in a violation of TBT Article 2.2 if, for example, the complaining party does not suggest a reasonably available alternative that meets the required criteria.

Economic data and information

The Canadian and US econometric analyses should, to the extent possible, be made comparable so that the Panel can objectively assess the impact, if any, of all relevant factors on imported livestock (hogs and cattle). It would therefore be essential that the parties make every effort to streamline their studies. Although data sources may be different, the methodology used has to be similar. This means the following: (i) there should be an analysis of both price and quantities; (ii) the same variable definitions should be used; (iii) the time frame should be the same; and (iv) the same data type should be used (monthly or weekly). In addition, at least one model specification should be the same for comparison purposes (benchmark). This is of course without prejudice to the parties' respective interpretations of the results. In this regard, if the parties need additional time to complete the necessary analyses, the Panel may consider granting a *limited* extension of the deadline for this specific purpose.

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[40] U.S. SWS, para. 103; Canada's Second Written Submission ("Canada's SWS"), para. 46.

32. When considering the use of economic models in this dispute, including Canada's suggestion made pursuant to a letter sent to the Panel on December 15, 2010 that the United States and Canada attempt to make their econometric analyses comparable, it is important to recall a few points. As a threshold matter, the appropriate legal analysis under TBT Article 2.1 and Article III:4 of the GATT 1994 does not focus on trade effects, but rather on whether a measure accords less favorable treatment to imports.[41] And the question of what treatment is accorded to a product by a measure is a question of the measure itself – how does the measure "treat" a product. It is not a question of what changes to trade flows may or may not be attributed to the measure. Neither Article 2.1 of the TBT Agreement nor Article III:4 of the GATT 1994 provide for any particular level of trade, but rather they are about the treatment (that is, the trade opportunities) accorded by a measure. Indeed, a complaining party should be able to bring a claim against a measure even before it has gone into effect if the measure mandates WTO inconsistent treatment.

33. It is also useful to recall that econometric analysis has traditionally been employed in a very different context – in arbitrations under Article 22.6 of the DSU to determine the level of nullification or impairment of benefits as a result of a WTO-inconsistent measure. Canada's approach appears to risk conflating these two very different inquiries and processes and raise significant systemic concerns. For example, would panel findings with respect to such an econometric model prejudice any findings by the same panelists sitting as arbitrators under Article 22 of the DSU?

34. Thus, to the extent that Dr. Sumner's models measure the "trade effects" of the COOL measures (*i.e.* the effects of the 2009 Final Rule on Canadian livestock exports and prices), they are not relevant to the legal inquiry. It is important to frame the inquiry appropriately in order to place any discussion of the many flaws in Canada's econometric models in perspective. While there is much that can be said about these flawed attempts to model "trade effects," the models proceed from the wrong premise and the United States did not want its discussion of them to divert the analysis from the appropriate questions presented.

35. In addition, it is important to note that Canada as the complaining party in this dispute bears the burden of proving its claims, and the econometric models at issue are ones that Canada introduced as exhibits in an attempt to do so.[42] The United States notes the difficulty in producing a reliable model to examine one factor (*i.e.* the COOL measures) in the context of a

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[41] *See, e.g., Japan – Alcohol (AB)*, p.16 (stating that "Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products."); Canada's Opening Oral Statement at the Second Substantive Meeting of the Panel ("Canada's Second Opening Oral Statement"), para. 33.

[42] To the extent that Canada and Mexico's argument during the Second Substantive Meeting of the Panel that the Consumers Union poll (Exhibit US-138) is of questionable value based on the fact that the Consumers Union sent the poll to the Panel to support the U.S. position, the same argument would apply with even greater force to Dr. Sumner's models, including Exhibits CDA-78, CDA-79, and CDA-152. After all, Canada hired Dr. Sumner to prepare his models in order to try to support their arguments in this dispute.

highly complex market, and the United States has repeatedly pointed out flaws in Dr. Sumner's methodological approach that render his models particularly ill-equipped to do so in support of Canada's case. Canada has not adequately responded to the vast majority of these critiques and with its letter instead attempts to shift the burden to the United States to produce a competing model in order to avoid addressing the deficiencies in its case.

36. Among the serious critiques presented by the United States include the fact that the type of model used by Dr. Sumner in Exhibits CDA-79 and CDA-152 – a reduced form model – is far too simplistic and simply not adequate to accurately isolate and quantify any potential effects of the COOL measures.[43] The results produced by a reduced form model are highly dependent upon the variables chosen and this model requires a large number of variables to produce results with any level of confidence. Thus, the fact that Exhibit CDA-152 identifies only seven significant variables out of 18 in total does not provide a solid foundation for accepting the model's results. Canada has not responded to this critique, has not attempted to fix its model, and has not attempted to produce a more reliable structural model, which would not suffer from many of the same shortcomings.

37. While the United States also produced a model using Dr. Sumner's inadequate approach and included this model with its First Written Submission (Exhibit US-42), the United States did so to demonstrate how easily Dr. Sumner's model could be adjusted by including other more relevant variables, and how easily contradictory results could be obtained.[44] Although the United States continues to believe that a structural model is the more appropriate way to analyze the trade effects of any particular factor in the market place (to the extent this inquiry were appropriate in the first instance), the U.S. version of a reduced form model is clearly an improvement over Dr. Sumner's model in that it makes more realistic assumptions, uses more reliable data, and accounts for the economic recession.

38. Another serious flaw with Exhibits CDA-79 and CDA-152 is their use of an import ratio that does not account for any changes in the Canadian market, changes which may have significant impacts on the export level and prices of Canadian livestock.[45] Because they use an import ratio, these models do not do what Canada and Dr. Sumner claim – they do not illustrate the differential effects of the COOL measures. Instead, they merely show how the ratio between Canadian exports and either total U.S. slaughter or placements change in response to a limited and inadequate set of variables. They do not account for any developments in the Canadian market that could affect Canadian livestock prices and export levels. The United States has repeatedly noted this shortcoming in the models, yet Canada has merely responded that "it would be a mistake to include in the econometric analysis factors that are also in part caused by the

[43] U.S. SWS, para. 92; U.S. FWS, para. 189; Exhibit US-43.

[44] Exhibit US-42.

[45] U.S. SWS, para. 93; U.S. FWS, para. 189; Exhibit US-43.

COOL measure such as quantity of livestock in Canada."[46] The fact that Canada's models do not include inventory size, when the size of a country's inventory bears a direct relationship to the amount of animals available to export, is reason alone to reject these models.

39. When analyzing the effect of the COOL measures on prices, Dr. Sumner's model in Exhibit CDA-78 is also highly flawed in fundamental respects. Among numerous problems, it makes the erroneous assumption that it would be impossible for feed lots or slaughter houses to pass on any compliance costs to consumers, to distribute these costs throughout the supply chain, or to simply absorb them because their business model relies on imported livestock.[47] Instead, Dr. Sumner assumes that all costs will be imposed directly on Canadian livestock in the form of large price discounts, a conclusion so radical that it would cause Canadian livestock producers to stop selling their products to the United States, an outcome that is directly rebutted by the increase in Canadian livestock prices as well as the increase in Canadian livestock exports to the United States in 2010.[48] Canada has not addressed this issue either, despite multiple opportunities to do so throughout this proceeding.

40. Under any interpretation of TBT Article 2.1 and GATT Article III:4, it is clear that Canada bears the burden of proving that the 2009 Final Rule somehow discriminates against its livestock based on origin, and that it does so in a way that provides less favorable treatment to Canada's products. Canada cannot avoid responding to critiques that undermine its models by asking the United States to produce models based on a flawed foundation. It is Canada that bears the burden of fixing its models, not the burden of the United States to develop a competing model based on a foundation that is inadequate to examine the effects of the 2009 Final Rule to the extent that this is the appropriate inquiry in the first place.

41. Putting aside the United States' broad concerns with relying on models of this nature in the examination of a national treatment claim, the United States has provided answers to the Panel's questions related to this topic and updated Exhibit US-42 to include both an economic recession and COOL dummy variable in the same analysis (Exhibit US-149).[49]

Q107. (United States) Please answer the following questions in regard to the econometric study presented by the United States. (Exhibit US-42)

(a) The United States argues that it is the economic recession and not COOL that had a negative impact on the share of Canadian livestock in the US market. (United States' first written submission, paragraphs 189-190; United States' second written submission,

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[46] Canada's Second Opening Oral Statement, para. 52.

[47] U.S. SWS, para. 95; Exhibit US-43.

[48] Exhibit US-143; U.S. SWS, para. 68-83.

[49] Updated USDA Results from Exhibit US-42 (Exhibit US-149).

paragraphs 84-86.) Why was the COOL variable not included together with the recession variable in the model specification?

42. As the United States noted above, it has broad concerns with Dr. Sumner's modeling approach. However, despite these concerns, the United States produced models based on Dr. Sumner's approach to illustrate that the economic recession was more likely the cause of any temporary decline in Canadian livestock prices and export levels than the COOL measures.[50] In doing so, the United States ran the model once using the COOL measures as a dummy variable and another time using the economic recession as a dummy variable. These results confirmed that the economic recession was the cause of the temporary decline in Canadian livestock and prices, not any of the COOL measures.

43. The United States did not include an economic recession dummy variable and a COOL dummy variable in the same model due to concerns about multi-collinearity,[51] and therefore, less robust results. The ideal circumstances for measuring the effects of both the recession and the 2009 Final Rule would be to have a large number of months without either, a large number of months with only one (the recession or the 2009 Final Rule), and a large number of months with both. Since the 2009 Final Rule and the recession overlap almost entirely, their respective effects cannot easily be dis-aggregated using a reduced form model. Rather, all that one can accurately estimate is their total effect of both without being able to determine the proportion that results from the recession and the proportion that allegedly results from the adoption of the 2009 Final Rule.

44. Despite these ongoing concerns with Dr. Sumner's approach, the United States has attempted to re-estimate the fed and feeder cattle ratio models as specified in Exhibit US-42 using both variables at the same time. The new results are attached as Exhibit US-149. The new results test the addition of a COOL dummy variable to the model in addition to including an economic recession dummy variable. As Exhibit US-149 illustrates, adding the COOL variable to the model provides no added information in explaining changes in the fed and feeder cattle ratios. The main evidence that the COOL variable does not change the outcome is the fact that the coefficient of determination (R^2)[52] does not increase when compared to the results in Exhibit

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[50] Exhibit US-42.

[51] Multi-collinearity is a statistical phenomenon in which two or more predictor variables in a multiple regression model are highly correlated. In this situation the coefficient estimates may change erratically in response to small changes in the model or the data. Multi-collinearity does not reduce the predictive power or reliability of the model as a whole, at least within the sample data themselves; it only affects calculations regarding individual predictors. That is, a multiple regression model with correlated predictors can indicate how well the entire bundle of predictors predicts the outcome variable, but it may not give valid results about any individual predictor, or about which predictors are redundant with respect to others.

[52] The coefficient of determination, R^2, is used in the context of statistical models whose main purpose is the prediction of future outcomes on the basis of other related information. It is the proportion of variability in a data set that is accounted for by the statistical model. It provides a measure of how well future outcomes are likely to be predicted by the model.

42.[53] The coefficient of determination is a well-known statistic that shows the explanatory power of the model. This further confirms that it is the economic recession, not the 2009 Final Rule, that was the most important factor in the temporary decline of Canadian livestock exports and prices in 2008 and 2009.

(b) In respect of the data used, why did not the United States rely on the weekly data used by Dr. Sumner to show whether the omission of the BSE and recession variables affects the main results?

45. The United States did not use the weekly data used by Dr. Sumner in his analysis because it is not the official trade data of the United States. Instead of relying on the official trade data collected by the U.S. Bureau of the Census, Dr. Sumner primarily relies on data derived from veterinary certificates collected by USDA's Animal and Plant Health Inspection Service (APHIS) and published by the Agricultural Marketing Service (AMS). APHIS's responsibility is to ensure that health certificates are in order, not to track import numbers for official purposes. These data are not collected through surveys or robust statistical sampling techniques. Instead, they are merely provided on a weekly basis as an indicator of market developments to assist the relevant industry in judging current developments. Thus, the use of this data is not appropriate.[54]

46. It is also worth noting that for periods when this weekly data is not available for slaughter and placements, Dr. Sumner merely takes available monthly data from the USDA's National Agricultural Statistics Service (NASS) and divides it by four in order to obtain weekly results.[55] This type of "adjustment" to the data in order to fit the model renders it unreliable for modeling purposes. Rather than use unofficial weekly or inappropriately "adjusted" monthly data, Exhibits US-42 and US-149 use official data based on valid statistical surveys.

(c) Unlike in Dr. Sumner's study, the US empirical analysis presents first the results of COOL on quantities then on prices. In the two last tables of the US study, the empirical results suggest a positive and significant impact of COOL on the Canadian fed steers and fed heifer price specification, which is not further discussed. (Exhibit US-42, Tables A7 and A8) Why has the interpretation of the positive COOL variable in the price specification omitted?

47. As a threshold matter, it is worth reiterating that Dr. Sumner only estimated price effects for fed cattle (cattle imported for immediate slaughter).[56] His models did not find price effects on the other three categories of livestock – feeder cattle, fed hogs, and feeder hogs. This result is

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[53] Compare Exhibit US-149 Tables 1-3 with Exhibit US-42 Tables A1-A4.

[54] U.S. SWS, para. 74.

[55] Exhibit CDA-160.

[56] Exhibit US-42, p.4.

inconsistent with Canada's claim that the COOL measures have depressed prices for Canadian livestock as a general matter.

48. With regard to Exhibit US-42, a negative sign on the COOL variable in Tables A7 and A8 implies that the difference between U.S. and Canadian prices widen while a positive sign implies that the difference in prices become smaller. A positive sign on the COOL variables on the fed steer and heifer basis is consistent with data the United States has presented in this dispute.[57] The average basis in the pre-2008 Interim Final Rule period was U.S.$8.95 while the average basis in the post-2009 Final Rule period was $8.56, a decline of 4.3%. This suggests that the price basis actually declined after the 2009 Final Rule was adopted.

49. There are a number of possible reasons for this result. One explanation is that the period coinciding with implementation of the 2009 Final Rule was a recessionary period when U.S. consumers reduced beef demand and substituted lower priced cuts or grades of meat for higher priced cuts or grades. As a result, lower grades of beef (Select) were often substituted for the more expensive grades (Choice). This increased the demand for Select grades and caused their price to increase. Because a higher proportion of Alberta fed steers are graded at the Select level than Nebraska fed steers, the price of Alberta fed steers would have increased relative to Nebraska fed steers. As this demonstrates, there are many factors, such as the recession, that have a significant effect on prices in the North American livestock market. Thus, Dr. Sumner's decision to omit many of these factors cannot be justified.

(d) According to the United States, an econometric analysis of Canadian hogs exports is not necessary because a pre-existing and continued trend in declining Canadian hogs inventory explains why Canadian exports decreased. (United States' second written submission, paragraph 95; Exhibit US-42, page 4) However, it could be argued that simply looking at the evolution of hogs inventory and inferring an impact of COOL might be misleading. Considering this, why was no econometric analysis undertaken for Canadian hogs exports and prices? Could such an analysis, if undertaken, show an impact (positive or negative) of the COOL requirements on Canadian hogs exports and prices?

50. To recall, the Canadian hog industry has been undergoing a period of significant restructuring in the wake of a significant overbuilding of the industry. In fact, Canada's hog inventory has declined by over 25 percent in recent years. Given this significant decline, it is unrealistic for Canada to assert that Canadian exports to the United States should not have declined when they have much fewer hogs to export.

51. Further, it is Canada that bears the burden of proving its claim that the COOL measures

[57] U.S. SWS, para. 82-83.

provided less favorable treatment to its hogs, not the burden of the United States to produce a competing model, in particular, in light of U.S. concerns about the type of models produced by Dr. Sumner. In addition to these issues, it is also worth noting that the structure of the U.S.-Canadian component of the North American hog sector effectively precludes a meaningful modeling exercise because a unique "Canadian hog price" does not exist *per se*. Rather, all Canadian hogs are priced off of American hog prices reported daily by USDA. Dr. Sumner even referenced this issue in Exhibit CDA-79, noting that price effects may not be observable.[58] Because the Canadian hog industry is in the pure sense a "price-taker," all sales and purchases of hogs in Canada are made in reference to U.S. price series such as the National Daily Base Lean Hog Carcass Slaughter Cost.

52. Given these facts and the limited time available between Canada's First Submission and the U.S. First Submission, the United States did not conduct this type of analysis.

Q108. (United States) Please comment on the four reasons Canada advanced in paragraph 35 of its oral statement at the second meeting arguing that it is incorrect to claim that the decline in hog inventories in Canada fully explains any negative effects of the COOL requirements on the conditions of competition.

53. As a threshold matter, the United States notes that the parties are in agreement that TBT Article 2.1 and GATT Article III:4 do not require a trade effects test, and thus, the overall export levels of Canadian hogs are of limited relevance.[59] Putting this aside, Canada's specific critiques are not persuasive.

54. First, Canada asserts that the United States has not challenged its evidence for COOL impacts on hog exports.[60] This is not accurate. The United States has pointed to larger economic trends – such as the increase in Canadian hog prices – which indicate that, to the extent that any individual market actors chose to discount the price paid for Canadian hogs after the adoption of the 2009 Final Rule, it is not as widespread as Canada asserts.[61] Next, the United States has pointed to the fundamental restructuring of the Canadian industry in the midst of an economic recession as a much more plausible reason for why exports and prices temporarily declined.[62] Finally, in Exhibits US-42 and US-43, the United States provided a full critique of Dr. Sumner's analysis, including with respect to hogs. On this point, the United States would note that it is not its burden to produce an accurate model, but rather Canada's burden to demonstrate that the

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[58] Exhibit CDA-79, p. 10-11.

[59] Canada's Second Opening Oral Statement, para. 33.

[60] Canada's Second Opening Oral Statement, para. 35.

[61] U.S. SWS, para. 80.

[62] U.S. FWS, para. 118-125.

COOL measures accord less favorable treatment to their products.

55. Second, Canada asserts that the decline in its hog inventories began in 2005 and that exports did not drop until 2008.[63] The United States previously explained the anomalous occurrence of declining Canadian hog inventories and rising hog exports in 2007 and 2008 in its First Written Submission.[64] To recall, as Canadian hog production became highly unprofitable beginning in 2006, Canadian producers began selling off their breeding herd. As prices plummeted, packing plants began losing money and some plants shut down.[65] With reduced demand for live hogs in Canada, hog producers' best option was to send their hogs to the United States. This increased flow of hogs began well in advance of the 2009 Final Rule and had nothing to do with the adoption of this measure. Further, Canada cannot tie the onset of the decline in January 2008 to any action related to any of the COOL measures.[66] In fact, by the time the 2009 Final Rule was adopted, Canadian hog exports has been trending down for over a year. As such, the dynamics of the Canadian hog sector fully explain the trend in exports.

56. Third, Canada argues that Canadian exports as a percentage of U.S. slaughter declined more than Canadian inventories.[67] However, this comparison by itself proves nothing. Given the complex nature of the market, there is not necessarily a fixed relationship between inventories and exports. Many factors can affect the level of trade and a simple comparison of exports to slaughter provides no explanation of what is affecting the market.

57. Finally, Canada argues that inventories in the United States also declined.[68] This too proves nothing. This decline in U.S. inventories merely shows that after the United States was heading into an economic recession, U.S. producers cut back on their inventories in response to the depressed demand for pork, including by reducing imports of fed and feeder hogs.

Q109. (All parties) Please specify figures and sources of livestock imports to the United States as well as figures and destination of livestock exports from the United States between 2000 and 2010.

58. Please see Exhibit US-150[69] and Exhibit US-151.[70] As Exhibit US-150 indicates,

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[63] Canada's Second Opening Oral Statement, para. 35.

[64] U.S. FWS, para. 123.

[65] *See* Exhibit CDA-79, p. 15 (noting the shutdown of a plant in Saskatoon in June 2007); Exhibit US-30, Chart 13 (showing the declining profitability of Canadian hog production, starting around mid-2006).

[66] *See* Exhibit US-30, Chart 15 (showing the decline in Canadian hog exports beginning in January 2008).

[67] Canada's Second Opening Oral Statement, para. 35.

[68] Canada's Second Opening Oral Statement, para. 35.

[69] U.S. Cattle Imports and Exports by Country, U.S. Bureau of the Census Data (2000-2010) (Exhibit US-150).

[70] U.S. Hog Imports and Exports by Country, U.S. Bureau of the Census Data (2000-2010) (Exhibit US-151).

Canadian and Mexican cattle exports are both increasing rapidly in 2010. In addition, Exhibits US-150 and US-151 shows that U.S. cattle and hog exports decreased in 2009 before rebounding this year. This trend is consistent with that experienced by Canadian and Mexican cattle exports in 2008-2010 and is consistent with what is to be expected during a period of economic recession and recovery. These fluctuations further support the notion that the economic recession, and not the 2009 Final Rule or any other U.S. measure, was responsible for the temporary decline in Mexican and Canadian livestock exports.

Q110. (United States) The United States argued in paragraph 25 of its oral statement at the second meeting that "USDA has verified that at least one major livestock producer is commingling". Please specify the market share of such processor in the US beef market and, if possible, examples of other processors and the market shares of all processors.

59. The United States has submitted exhibits demonstrating that two of the four largest beef producers in the United States are commingling.[71] In addition, Canada submitted an exhibit demonstrating that the other two largest beef producers are accepting both U.S. origin and foreign origin livestock.[72] Given that these companies are accepting both forms of livestock, and other evidence submitted by the United States indicates that up to 22 percent of the beef being sold at the retail level is commingled,[73] it is likely that all four of the top beef producers in the United States are commingling in at least some of their plants. Exhibit US-152 contains more detailed information on this issue.[74]

Article 2.1

Q113. (All parties) Please explain whether the proper assessment of the impact of a government regulation on the market requires a certain period of implementation time. If yes, please explain the length of this period in regard to the COOL requirements.

60. As a threshold matter, an Article 2.1 less favorable treatment analysis should not focus on market effects, but on whether a measure accords less favorable treatment based on origin.[75] Article 2.1 (and Article III:4 of the GATT 1994) does not guarantee a particular level of trade, but simply provides for no less favorable treatment. Aside from the factual matter that neither Canada nor Mexico have shown that any temporary declines in exports are due to any of the

[71] Exhibit US-101; Exhibit US-102.

[72] Exhibit CDA-41.

[73] Exhibit US-145.

[74] Market Share of Major U.S. Slaughterhouses Who Are Commingling or Accepting Both Domestic and Mixed-Origin Livestock (Exhibit US-152) **(Contains BCI)**.

[75] U.S. SWS, para. 31-40.

COOL measures, there is nothing in Article 2.1 that says that if trade declines after a measure is adopted, then the measure breaches Article 2.1.

61. In this instance, the COOL measures do not provide different or less favorable treatment based on origin. The COOL measures are origin-neutral, requiring all covered commodities to be labeled at the retail level regardless of origin and subjecting all livestock to the same requirements regardless of origin. Any less favorable treatment provided to Canadian and Mexican cattle by one or more U.S. private market actors is the result of the independent decisions of these market actors on how to respond to the measures. Indeed, feed lots and slaughterhouses have numerous legal and economically viable options for responding to the COOL measures without discriminating against imported livestock in any way.[76]

62. While market effects are not relevant, because Canada and Mexico claimed that the measures had market effects, the United States responded with other evidence demonstrating that Canada and Mexico's arguments were not consistent with the facts. For example, the overall trade data indicates that both Canadian and Mexican livestock are being imported to the United States at high levels and are receiving high prices.[77] This demonstrates that, to the extent that any feed lots or slaughterhouses have decided to change their sourcing patterns or offer price discounts, this is not occurring on a widespread basis.

63. In looking at these market effects for the purpose of rebutting Canada and Mexico's flawed effects-based arguments, it is important to recall that there will be a period of adjustment after the adoption of any new technical regulation. Market actors may need some time to determine the most economically viable way to respond to a particular measure, and in the short term, they may have to modify their business practices to ensure compliance. The costs of ensuring compliance in the short term may fall disproportionately on some market actors versus others based on numerous factors, such as their size and existing practices; however, once these businesses have had the time to adjust, the costs and effects of the measure may be distributed in a very different way. The adjustment costs are not the same thing as the conditions of competition – the question with respect to the conditions of competition is whether a measure interferes with the ability of products to compete based on their national origin.

64. With regard to the COOL measures, it is difficult to assess how long it took for businesses to adjust to the 2009 Final Rule. However, nearly all of the evidence that Canada and Mexico have put forward relates to the period between the issuance of the 2008 Interim Rule in August 2008 and the months immediately after the 2009 Final Rule was adopted in March 2009.[78] This is the period over which one would expect the market to be going through the

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[76] U.S. SWS, para. 42-43.

[77] U.S. SWS, para. 68-83.

[78] *E.g.*, Exhibits CDA-21, CDA-22, CDA-23, CDA-24, CDA-34, CDA-36, CDA-37, CDA-38, CDA-39, CDA-40, CDA-41, CDA-72 (all of which date from 2008 or early 2009).

largest adjustment, in particular during that part of the period in which the regulations were not final and USDA continued to consider changes in response to input from interested parties, including Canada, Mexico, and consumer groups. By contrast, the recent economic data demonstrates that Canadian and Mexican producers are sending significant amounts of livestock to the United States and receiving high prices for their products.

Q117. (United States) Please clarify whether the United States agrees that Canadian, Mexican and US livestock at issue in this dispute are "like" for the purpose of Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994. If not, please explain why and how they are *not* "like".

65. Canada and Mexico bear the burden of demonstrating that their livestock are "like" U.S. livestock for purposes of the Panel's analysis of their claims under TBT Article 2.1 and Article III:4 of the GATT 1994. Canada and Mexico both addressed this issue in their first written submissions,[79] and the United States has not contested the arguments put forward by the complaining parties.

Q118. (United States) The United States refers to several options other than segregation for domestic meat producers to be able to meet the COOL requirements. Is it also the case for meat producers who wish to use both imported and domestic livestock and at the same time want to sell meat derived from US born, raised and slaughtered livestock with the "Product of U.S.A" label (label A)?

66. As the United States indicated in previous submissions, meat producers may process both imported and domestic livestock and sell Category A meat without segregating their production lines.[80] One option for meat producers to do this is to accept different types of meat on different production days and label the meat accordingly. Alternatively, meat producers can commingle both imported and domestic livestock during the first production run of the day and label the resulting product Category B and then process the remaining domestic livestock as Category A meat in the second production run of the day. Neither option would result in less favorable treatment for imported livestock *vis-à-vis* domestic livestock.

Q120. The United States argues that any segregation cost additionally caused by the COOL requirements is minimal because the industry had already been segregating livestock prior to the COOL requirements.

(a) (United States) What is the extent or magnitude of the additional costs of the COOL requirements? For example, does the United

[79] Canada's First Written Submission ("Canada's FWS"), para. 79-85; Mexico's First Written Submission ("Mexico's FWS"), para. 199-205.

[80] U.S. SWS, para. 43.

States agree to the figures provided by Canada? If not, please provide relevant figures or at least a reasoned estimate.

67. The COOL measures do not require segregation. While the United States has not produced any independent estimate of the cost of segregation for those producers who choose to segregate animals in response to the COOL measures,[81] the United States does not agree with Canada's inflated estimates. As the United States has noted, Canada's estimates fail to account for the commingling provisions and fail to account for synergies related to pre-existing segregation practices, among other flaws.[82] More fundamentally, if segregation costs were as high as Canada asserts they are – up to $35 to $40 per head of cattle[83] – the export of Canadian cattle to the United States would drop precipitously as would the price paid for these animals. To the contrary, the economic data presented by the United States directly contradicts this fact and shows that both Canadian livestock exports and prices are rising in 2010, and prices are at levels consistent with U.S. prices.[84]

(b) (United States) In paragraph 25 of its oral statement at the second meeting, Canada argued that "[t]he United States has not provided any of the synergies [with pre-existing segregation] it alleges - not even evidence from a single company." Please comment.

68. As the complaining party, Canada bears the burden in this dispute of proving its claims, including its claim that the COOL measures somehow provide its livestock with less favorable treatment as compared with U.S. livestock. Among the claims that Canada has made in an attempt to meet its burden is that the costs of segregation are extremely high for those producers who choose to segregate in response to the 2009 Final Rule. Canada's argument about compliance costs is premised on the notion that setting up a method of segregation is extremely costly in and of itself. However, the fact that segregation is not an uncommon practice in the industry and the fact that many U.S. producers have significant experience with segregation, including segregation based on origin, suggests that the cost of segregating would not be as high for these firms as Canada suggests. The reason for this is that Canada and its models fail to acknowledge that this expertise could be utilized to segregate for another purpose at reduced cost compared with a firm that had never before segregated for any reason at all. The United States does not have specific evidence of the precise reduction in overall compliance costs as a result of this fact, but it is not the U.S. burden to produce that evidence.

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[81] The 2009 Final Rule included a total cost estimate for the implementation of the COOL requirements, but this estimate reflects the cost on all segments of the industry, including all of those entities that are not segregating. *See* Exhibit CDA-5, p. 2682-2700.

[82] U.S. SWS, para. 58-61.

[83] Canada's FWS, para. 98.

[84] U.S. SWS, para. 68-83.

(c) (All parties) Apart from the costs, please explain whether, and if so how, segregation required in the meat production process differs depending on its purpose, such as meat quality, safety control, export specifications and country of origin. Particularly, is it more difficult for the industry to segregate livestock based on country of origin than based on other factors such as meat quality and safety.

69. To the extent that meat producers segregate – whether to meet export requirements, for grade labeling, or in response to the 2009 Final Rule – Canada and Mexico have failed to establish that doing so in response to the COOL measures would be more difficult or costly than for any other purpose. For example, if a feed lot or slaughterhouse contains animals whose meat will be exported, the age and origin of certain animals may need to be tracked for export verification purposes. Such tracking would be quite similar to that which could be used to track origin for purposes of responding to the 2009 Final Rule if a company decided to do so. Similarly, after a carcass is graded at the slaughterhouse, a records or labeling system would need to be in place to ensure the integrity of the grade claims at retail. The same would be applicable to meat of a particular origin for purposes of meeting the 2009 Final Rule.

Q123. (United States) Please explain the economic rationale for mandatory country-of-origin labelling. Does government intervention in the specific case of the COOL requirements serve to solve any specific market failure? If yes, to what extent?

70. The United States adopted the COOL measures to provide country of origin information to consumers about the food products they buy at the retail level to help these consumers make informed purchasing decisions. At the same time, the United States sought to prevent consumer confusion with regard to the origin of the meat products due to USDA grade labels. The U.S. rationale for adopting the COOL measures was to fulfill these objectives, not for economic reasons.

71. The United States adopted mandatory instead of voluntary labeling requirements because voluntary requirements were unsuccessful at conveying origin information to consumers or at preventing consumer confusion. When given the option of providing origin information to consumers on a voluntary basis, U.S. retailers chose not to do so.

72. This choice was not premised on consumers' lack of interest in this information – U.S. consumers widely support country of origin labeling and strenuously lobbied Congress and USDA to adopt mandatory labeling requirements.[85] Rather, this choice was based on the fact that U.S. retailers did not believe that providing county of origin information to consumers would

[85] U.S. SWS, para. 111-114, 130-136.

increase their sales *vis-à-vis* their competitors enough in order to offset the costs.[86]

73. When markets fail to provide information that consumers want, governments often adopt measures in response. This is evidenced by the fact that many WTO Members have adopted mandatory labeling requirements regarding country of origin, in addition to other information that consumers desire, such as health and safety information.

Q124. (United States) Canada argues in its second written submission (paragraph 9) that the *OECD Checklist for Regulatory Decision Making* (US-66) does *not* support the assertion that the COOL measure is consistent with its national treatment obligation. Canada further claims that the OECD Checklist *only* provides guidelines for OECD members to consider when developing regulations. The Panel notes that the Checklist asks the questions whether the benefits of regulation justify the costs (Point 6) and whether the distribution of effects across society are transparent (Point 7).

In light of this and assuming that any regulation creates costs and these costs may not always be equally spread as pointed out by the United States in its response to Panel question No. 14, please explain how the costs of the US government intervention in the case of the COOL requirements were assessed across social groups and specifically what consideration was given to costs faced by Canadian and Mexican exporters of hogs and livestock.

74. Canada misses the point of the U.S. citation to the OECD Checklist for Regulatory Decision Making. The United States cited to this document to support its assertion that weighing the costs and benefits of a proposed measure and modifying it in light of that assessment (*e.g.* to provide less benefits in light of the costs associated with those benefits) is a well-established, expected, and recommended approach to regulation. The United States did not argue that Members have an explicit obligation under the WTO Agreement to conduct such an analysis or to apply the OECD regulatory checklist. However, conducting such an analysis may serve as a useful mechanism to help ensure that a Member's technical regulations are no more trade-restrictive than necessary to fulfill a legitimate objective, in particular by helping ensure that the costs of a measure are balanced against its expected benefits. Further, weighing and balancing costs and benefits can inform a Member's decision about what level it considers appropriate for the fulfillment of its objectives.

75. With regard to the 2009 Final Rule, USDA conducted an economic impact analysis that examined how this particular measure might affect different market actors. This analysis is available at pages 2682-2700 of the 2009 Final Rule.[87]

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[86] U.S. SWS, para. 143-145.

[87] Exhibit CDA-5, p. 2682-2700.

76. In designing the 2009 Final Rule, USDA took concrete steps to attempt to reduce the effect of the measure on both U.S. market actors and on Canadian and Mexican livestock.[88] In particular, the commingling provisions that were adopted at the behest of the Government of Canada and the Canadian Pork Council have made it easier for U.S. feed lots and slaughterhouses to accept both foreign and domestic livestock without segregating. Additionally, the 2009 Final Rule's reduced record keeping requirements have contributed to this end.

Article 2.2

Q125. (All parties) Please confirm that, in order to find a violation of Article 2.2, a complainant need not establish a violation of the first sentence separately from that of the second sentence.

77. As evidenced by the use of the phrase "[f]or this purpose," it is clear that the second sentence of TBT Article 2.2 explains what the first sentence means.[89] Accordingly, a complaining party is not required to separately demonstrate a breach of the first sentence in addition to the second sentence.

Q126. (All parties) Does the term "a legitimate *objective*", in particular the word "objective", in Article 2.2 of the TBT Agreement refer to a WTO Member's policy objective that should be somehow distinguished from the technical regulation adopted to fulfil that objective?

78. Yes. The objective and the measure are distinct. One is the objective or goal that is sought to be achieved and the other is the means for doing so. In conducting an analysis under TBT Article 2.2, the Panel should first assess whether the Member's legitimate objective is what the Members asserts it is and then whether the technical regulation fulfills that objective.

Q129. (United States) The legislative process relating to the COOL requirements allegedly started in 2002. Can the United States refer to a policy, social norm or consumer demand prior to that date that had called for the information on the origin of meat products as defined by the United States?

79. The United States has had some form of mandatory country of origin labeling requirements in place since at least 1930, and Members of Congress introduced legislation to further enhance these requirements for meat products since at least the 1960s.[90] Further, Canada

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[88] U.S. FWS, para. 72-83.

[89] U.S. FWS, para. 202.

[90] U.S. FWS, para. 24-26.

refers to legislative events dating back to at least 1997[91] and Mexico refers to events dating back to at least 2000.[92]

80. The United States has submitted a substantial amount of evidence showing that consumers want country of origin information at the retail level for meat products and believe that origin should not be determined solely on where the animal was slaughtered.[93] Some of this information pre-dates 2002, including all of the exhibits submitted by the United States related to FSIS's rule making regarding the meaning of "Product of the USA" as well as the letter sent to all 100 Members of the U.S. Senate by three leading consumer organizations in the United States. For example:

- On August 28, 2001, Danila Oder of Los Angeles, California wrote to FSIS: "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."[94]

- On October 2, 2001, Ross Vincent of Pueblo, Colorado wrote to FSIS: "As a consumer who is concerned about what I feed my family, I strongly support the definition of U.S. cattle and beef products for labeling purposes as "born, raised, slaughtered and processed in the United States." All other definitions mislead consumers... [c]attle and beef products that were born and partially raised in another country should not be labeled as a product of the U.S." Later on, the letter states: "I strongly support a mandatory labeling program with a uniform, consistent definition for domestic origin as born, raised, slaughtered and processed in the United States."[95]

- On October 4, 2001, Vickie Allbritten wrote to FSIS: "Cattle and beef products that were born and partially raised in another country should not be labeled as a product of the United States."[96]

- On October 9, 2001, Public Citizen wrote to FSIS: "[a]llowing cattle that were born and partially raised in another country to qualify for a label that signifies it is a product of the U.S. would be offensive to U.S. producers, not to mention

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91 Canada's FWS, para. 13.

92 Mexico's FWS, para. 179.

93 *E.g.*, Exhibit US-113; Exhibit US-114; Exhibit US-115; Exhibit US-119; Exhibit US-120; Exhibit US-121; Exhibit US-122; Exhibit US-123; Exhibit US-124; Exhibit US-125; Exhibit US

94 Exhibit US-85.

95 Exhibit US-115.

96 Exhibit US-49.

misleading to consumers."[97]

- In 2001, the Consumers Federation of America, National Consumers League, and Public Citizen wrote to the U.S. Senate: "When the Senate takes up the farm bill, please support legislation to require country of origin labeling at retail for meat and fresh fruits and vegetables...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."[98]

81. Thus, the evidence suggests that U.S. consumers have long desired country of origin labeling and have long believed that the definition of origin should be based on where the animal is born, raised, and slaughtered, and that they continue to hold these views to this day.

Q130. (United States) Please comment on the following excerpt on page 8 of Exhibit CDA-192:

"Each year FMI asks shoppers to volunteer suggestions for 'improving your primary supermarket.' In more than 10 years of asking this open-ended question, shopper requests for country of origin labelling have never reached the 1 percent mark."

82. The United States has submitted multiple pieces of evidence showing that U.S. consumers support country of origin labeling. Although consumers desire this information, there may be other issues that they are concerned about more. For example, consumers may consider the price and safety of food as more important than country of origin labeling, particularly during an economic recession. For example, the 2010 Food Marketing Institute survey indicates that U.S. consumers are overwhelmingly focusing on price and value.[99] However, this in no way impugns the evidence that the United States has submitted, which clearly shows that U.S. consumers strongly support country of origin labeling.

Q131. (United States) In your opinion, is there an order of preference of US consumers in regard to the following: (a) the price of beef and pork; (b) the quality of beef and pork; (c) the type of country of origin information required by the COOL measure; (d) the safety of beef and pork; and (e) other considerations, e.g. organic, race, name of the producer, etc.?

83. The United States does not have information available to it on consumers' relative

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[97] Exhibit US-17.

[98] Exhibit US-61.

[99] "FMI Grocery Shopper Trends 2009: Recession Changing Consumers Shopping Behavior at the Supermarket," Food Marketing Institute (Exhibit US-153).

preferences in regard to the considerations specified. The United States has presented significant evidence showing that U.S. consumers strongly desire country of origin information for the food products they buy in order to make informed purchasing decisions and that these consumers and the organizations that represent them lobbied vigorously for the COOL measures.[100] While consumers may view other issues relatively more or less important than country of origin labeling, this is not relevant to an analysis of whether the measures are consistent with the obligations at issue in this dispute. Moreover, a Member remains free to establish different priorities for its objectives, including in light of what a Member perceives as the proper role of a government.

Q132. (United States) Is the objective of providing "consumer information" on country of origin always legitimate within the meaning of Article 2.2? If yes, please explain the legal basis for such a position. If not, assuming that consumers generally appreciate *more* information on products they purchase at the retail level, what should be the criteria for determining whether or not the objective of mandating consumer information on country of origin in a given set of circumstances is "legitimate" within the meaning of Article 2.2?

84. As an initial matter, while a panel under Article 2.2 should review whether the stated objective of a measure is in fact the measure's objective and not for example protectionism, it is not the role of the WTO or a panel to decide which policy objectives a Member may otherwise pursue. Indeed, the TBT Agreement includes a non-exhaustive list of examples of legitimate objectives that Members might pursue, leaving open for Members to decide to pursue those or other objectives when adopting technical regulations. The panel in *EC – Sardines* reached this same conclusion when it stated: "Article 2.2 and [the] pre-ambular text [of the TBT Agreement] affirm that it is up to the Members to decide which policy objectives they wish to pursue and the levels at which they wish to pursue them."[101] Any consideration of whether an objective is "legitimate" must respect Members' right to decide which policy objectives to pursue

85. With respect to whether consumer information is always a legitimate objective, providing consumers with country of origin information about the food products they buy in order to help them make informed purchasing decisions is always a legitimate objective within the meaning of TBT Article 2.2.

86. The legal basis for this conclusion begins with the text of TBT Article 2.2, which contains a non-exhaustive list of legitimate objectives, as confirmed by the use of the term "*inter alia.*"[102] Thus, objectives not explicitly included in the list may also be legitimate. For example, the *EC – Sardines* panel found two objectives not listed in TBT Article 2.2 to be legitimate –

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[100] U.S. SWS, para. 111-114, 130-136.

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

[102] TBT Article 2.2.

market transparency and consumer protection.[103]

87. The legitimacy of this objective is supported by its connection to the prevention of deceptive practices, which is explicitly listed in TBT Article 2.2. While the United States does not assert that providing consumer information about origin and preventing deceptive practices are the same objective, these objectives relate to the same end – namely, ensuring that consumers are not misled or mistaken about the products they buy. The *EC – Sardines* panel recognized the link between this explicitly enumerated legitimate objective and other objectives related to the provision of consumer information.[104]

88. Strong consumer support for country of origin labeling, both in the United States and around the world, strengthens the conclusion that providing consumer information about origin is a legitimate objective. In particular, it is noteworthy that nearly 70 Members have country of origin labeling requirements, and many of these Members listed "consumer information" as the objective in the notification of these measures to the TBT Committee.[105]

89. The United States also notes that Article IX of the GATT, "Marks of Origin," refers to providing consumers information on country of origin. Article IX acknowledges the legitimacy of labeling imported products with their country of origin, marks which are meant to inform the purchaser of these products of their origin and notes that in balancing the difficulties and inconveniences of laws relating to marks of origin, WTO Members may give "due regard . . . to the necessity of protecting consumers against fraudulent or misleading indications." This objective is of the exact same nature as the COOL statute and 2009 Final Rule's objective of informing retail consumers of all covered commodities, both domestic and imported, of these products' origin.

Q133. (United States) To the extent that a USDA grade label is issued based on meat quality and safety control regardless of the origin of meat, what is the value consumers receive from the country of origin information on meat products? Are consumer organizations and consumers aware of the costs of additional information; what is their readiness to pay for such information? How do consumers benefit from knowing the country of origin of meat under the COOL requirements?

90. Consumers benefit from country of origin labeling because it helps them make informed purchasing decisions about the food products that they buy at the retail level. Consumers may find this additional information about origin valuable for a variety of reasons, such as the fact that it may allow them to purchase food from countries that they associate with a reputation for

[103] *EC – Sardines (Panel)*, para. 7.123.

[104] *EC – Sardines (Panel)*, para. 7.123.

[105] U.S. SWS, para. 116.

high quality or safety, among other considerations. As the Trans-Atlantic Consumer Dialogue noted:

> Country of origin labeling can provide consumers with additional information to make informed choices about the food they wish to purchase and consume. Many consumers may wish to purchase food from producers in their own country or may wish to purchase food products from another country known for producing a particular food. Reasons for this vary from environmental and ethical principles to food quality and food standard choices.
>
> Without labeling that identifies where that food has been produced, consumers are unable to make those choices in an informed manner when they are at the point of purchase.[106]

91. While a consumer's desire for information and willingness to pay are very different issues, there is evidence to suggest that consumers are aware of the costs of providing this additional information and that they may be willing to pay more for this information. For example, John and Rita Lesch of Bloomington, Minnesota wrote to USDA: "We support the implementation of country of origin labeling (COOL). U.S. consumers have the right to know the origin [of] their beef, lamb, and pork meat. The cost will be outweighed by the benefit of knowing the origin of the beef we are eating."[107] Likewise, the United States submitted an academic paper discussing thirteen studies on the premium that consumers in the United States, Europe, and elsewhere are willing to pay for products with country of origin labeling.[108]

Q134. (United States) Can the United States point to any evidence demonstrating that the United States has always defined the country of origin concerning meat products for purposes other than customs as the place where the animal from which meat was derived was born, raised, and slaughtered? In this regard, is there any evidence showing that this has also always been the US consumers' understanding of the country of origin of meat products?

92. As a legal matter, the United States has not always defined country of origin for labeling purposes based on where an animal was born, raised, and slaughtered. In fact, as the United States has described, this was a source of confusion for many U.S. consumers and led to an FSIS rulemaking prior to the enactment of the COOL statute to determine the best way to define U.S. origin for consumers.[109]

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[106] Exhibit US-111, p. 2.

[107] Exhibit US-123.

[108] Exhibit US-87.

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

93. Consumers who wrote to FSIS concerning this rule almost unanimously suggested that USDA should require the source animal to be born, raised, and slaughtered in the United States in order for the resulting meat product to be labeled "U.S. origin." This indicates that consumers typically understand the origin of meat as including where that animal was born and raised, and not just where the animal was slaughtered. For example, one consumer wrote: "As a consumer who is concerned about what I feed my family, I strongly support the definition of U.S. cattle and beef products for labeling purposes as 'born, raised, slaughtered and processed in the United States.' All other definitions mislead consumers... [c]attle and beef products that were born and partially raised in another country should not be labeled as a product of the U.S."[110]

Q136. (All parties) The resolution of the Trans Atlantic Consumer Dialogue ("TACD"), provided in Exhibit US-111 (page 2), on country of origin labelling states, *inter alia*, that "many consumers may wish to purchase food from producers in their own country or may wish to purchase food products from another country known for producing a particular food." Does this type of consumers' wish provide a sufficient basis for a government's policy to introduce a mandatory country of origin labelling requirement?

94. The desire of consumers for country of origin information is relevant to the inquiry into whether the U.S. objective is what the United States asserts it is – consumer information – rather than what the complaining parties assert that it is – protectionism. Consumers' desire for this information, both in the United States and world wide, supports the conclusion that providing country of origin information is the legitimate objective. The specific reasons why a consumer wants information about origin and how they respond to it are not relevant to the inquiry of whether providing that information is the measure's legitimate objective, nor does the WTO require any particular basis for government's policy.

Q139. (United States) Is it the United States' view that US consumers are misled or confused as to the origin of meat they buy at the retail level if the meat had the country of origin label based on substantial transformation? If so, does that view apply only to meats produced from Canadian and Mexican livestock?

95. The United States does not believe that consumers would be misled or confused in *all* cases if the U.S. country of origin labeling requirements were based on substantial transformation. For example, an animal that was born, raised, and slaughtered in the United States would still be labeled "U.S. origin" consistent with consumer expectations. However, consumers would continue to be confused with regard to animals that were born and/or raised in another country and then brought into the United States for slaughter and affixed with a U.S. origin label at the retail level. With regard to animals imported for immediate slaughter, U.S. consumers simply do not consider these animals to be of U.S. origin. This confusion would be

[110] Exhibit US-115.

heightened further by the presence of the USDA grade label.

96. This confusion arises almost exclusively with regard to meat produced in the United States from Canadian and Mexican livestock. The only meat that would be misleadingly labeled "U.S. origin" is meat derived from an animal slaughtered in the United States, and the only significant exporters of livestock to the United States are Canada and Mexico.[111] While in theory some confusion could also potentially arise with regard to meat slaughtered outside the United States and labeled under the rules for Category D, it is very unlikely that any of this meat is produced from animals not wholly born, raised, and slaughtered in the exporting country.[112] Further, much of this meat would already have been labeled under the Tariff Act of 1930 as of foreign origin since this type of product is generally imported in the form it is sold to the ultimate purchaser. Thus, the primary confusion in the market place is presented by meat derived from a source animal born and/or raised in Canada or Mexico and then raised and/or slaughtered in the United States.

Q141. (All parties) Please comment on the European Union' statement in its response to Panel question No. 2 (paragraph 27) that in the situation where there is more than one country concerned in the production of beef (i.e. birth, raising and slaughter), there is no use of the term "origin" and it is possible to require labelling about where certain production processes occur, without prejudging the question of what the origin rule is.

97. The United States does not share the EU's position on this matter. Rather, the United States believes that an animal that has processing steps occur in more than one country should be considered a mixed-origin animal for purposes of providing origin information to consumers at the retail level.

Q142. (United States) The United States explains that certain flexibilities in the COOL requirements, such as the commingling provisions, were the results of the US government's effort to strike a balance between fulfilling the stated objectives and reducing compliance costs on industry.

(a) Does this mean that the United States lowered the level at which it decided to fulfil the stated objectives? If so, please define the United States' objective(s) pursued by the COOL requirements according to the adjusted level of fulfilment.

98. Taking these costs into consideration does not reflect a lowering of the level at which the United States decided to fulfill its objectives of providing consumer information about origin and

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[111] Exhibit US-144.

[112] Exhibit US-144; U.S. Second Opening Oral Statement, para. 45.

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

(b) What is the extent of the reduction in compliance costs resulting from such flexibilities in the COOL requirements?

99. USDA's overall cost estimate for the implementation of the COOL regulations fell from an original estimate of up to $3.9 billion[113] in the 2003 Proposed Rule to $2.6 billion in the 2009 Final Rule.[114] There were many changes made to the 2003 Proposed Rule as a result of the modified 2008 COOL statute in addition to flexibilities that USDA added to the implementing regulations, such as commingling, the elimination of the requirement to label each production step, and reduced record keeping requirements, among others.[115] It is difficult to quantify the portion of the cost reduction that resulted from each individual policy change, since many different changes were made at the same time, but at least a portion of this reduction resulted from the change to the commingling rules.

(c) Is there a relationship between the importance of an objective and the risks non-fulfilment of the objective would create?

100. No. A TBT Article 2.2 analysis does not involve a weighing of the importance of an objective. Among other things, there is nothing in the agreed text of the TBT Agreement to indicate there is intended to be a comparison between objectives, nor did Members agree on anything on which to base any such weighing. Taking into account the risks that non-fulfillment would create refers to the fact that a Member should take into account what would happen if a measure were not adopted.[116]

Q144. (All parties) The European Union stated in paragraph 14 of its third party oral statement at the second meeting that a less trade-restrictive alternative measure that equally fulfils the stated objective "would be to permit the use of label B in all cases, even if commingling did not occur, or occurred over an extended period of time (such as a year, for example)". Please comment on

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[113] Exhibit CDA-11, p. 61953.

[114] Exhibit CDA-5, p.

[115] U.S. SWS, para. 72-83.

[116] U.S. SWS, para. 158.

this statement.

101. The alternative suggested by the European Union, which was originally included in the 2008 Interim Rule, would fail to fulfill the objectives of the United States at the level the United States considers appropriate. In particular, this alternative would fall short because nearly all meat sold at the retail level in the United States could be labeled as Category B meat even though the vast majority of the meat produced in the United States is Category A meat.

Q146. (All parties) Please explain whether there is any discrepancy between a trace back system and traceability. If so, please define the concept "traceability".

102. Although the terms "trace back system" and "traceability" may mean different things in other contexts, in the instant dispute it appears these terms are being used in the same way – to refer to a process that requires that a muscle cut of meat be traceable back to the individual animal from which the meat was derived in order to provide to retailers the information necessary to accurately label their products with their country of origin. The United States notes that to its knowledge, mandatory traceability systems have been almost exclusively used to pursue human and animal health objectives. For example, the EU's trace back system for beef was originally implemented in response to the outbreak of BSE to help assure EU consumers that beef came from animals slaughtered at less than two years of age, and only later did the EU adopted country of origin labeling requirements.[117] By contrast, the United States is not aware of any countries who have adopted a trace back system solely for labeling purposes.

103. Canada and Mexico have failed to establish that a traceability system would be significantly less restrictive than the record keeping system under the 2009 Final Rule. Just the contrary is true. As was discussed at the Second Panel Hearing, a traceability system is significantly costly to implement and would increase overall compliance costs. Indeed, for Canada and Mexico increasing costs is the purpose of adopting a traceability system. Yet they have complained that the costs of complying with the 2009 Final Rule is what makes it trade restrictive. They cannot have it both ways. Furthermore, it appears that they propose to add traceability as an additional layer of requirements in addition to, rather than in place of, the COOL measures. It is difficult to understand how adding additional requirements not necessary to fulfill the U.S. legitimate objective can be a less trade restrictive alternative within the meaning of Article 2.2 of the TBT Agreement.

Q147. In paragraph 71 of its oral statement at the second meeting, Canada refers to a system of compulsory labelling in regard to the place of slaughtering and

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[117] *See* The Council of the European Union, Council Directive 97/12/EC, amending and updating Directive 64/432/EEC on health problems affecting intra-Community trade in bovine animals and swine (17 March 1997) (stating that the directive is being adopted "for the purpose of rapid and accurate tracing of animals for animal health reasons each Member State should create a computerized database which shall record the identity of the animals, all holdings on their territory and the movements of the animals:) (Exhibit US-154).

voluntary labelling with regard to the place of birth and raising.

(b) (All parties) How does this system differ from the substantial transformation concept?

104. This type of system would not be significantly different from a system based on substantial transformation. As experience shows, U.S. market actors have not voluntarily provided country of origin labeling, and thus, there is no reason to expect they would respond differently to this proposal. Accordingly, the only information that this type of system would provide to U.S. consumers would be information based on substantial transformation, information the United States and U.S. consumers regard as misleading with regard to meat products.[118]

(c) (All parties) Please explain whether, and if so to what extent, this system fulfils the objective of the United States of providing information about the place where livestock was born, raised and slaughtered.

105. This system would fail to fulfill the objectives of the United States for the same reasons that a system based on substantial transformation would do so – it would fail to provide information about where mixed-origin animals were born and raised and it would be confusing to U.S. consumers.[119]

Q149. (All parties) What is the meaning of the term "necessary" in the second sentence of Article 2.2 of the TBT Agreement? Would different legal standards apply if the question involved whether a given technical regulation is "*necessary* to fulfil" rather than "to fulfil" a legitimate objective?

106. The meaning of the term "necessary" in TBT Article 2.2 should be based on the ordinary meaning of the term, interpreted in the context in which it is used. The ordinary meaning of the term "necessary" is "that which is required for a given situation."[120] In the context of TBT Article 2.2, the term "necessary" is qualified by the preceding language "more trade restrictive than..." This implies that there must first be trade restrictiveness of some magnitude so that the Panel can determine whether the level of trade restrictiveness is more than is required given the situation. As explained in previous U.S. submissions, this should be determined by examining whether there is a reasonably available alternative measure that is significantly less trade restrictive and would fulfil the Member's objective at the level the Member considers

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[118] U.S. SWS, para. 167-168.

[119] U.S. SWS, para. 165-166.

[120] *The New Shorter Oxford English Dictionary* (4th ed. 1993), p. 1895 (Exhibit US-155).

appropriate.[121]

107. With respect to the second part of the Panel's question, the United States understands the comparison to be between:

> (1) "technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective," and
>
> (2) "technical regulations shall not be more trade-restrictive than to fulfil a legitimate objective."

The United States does not believe that the meaning of the provision would be altered significantly by the omission of the word "necessary." Perhaps a better way to express this is that a descriptor such as "necessary," "needed," "required" or "it takes" would be implicit in the provision. In other words, without the term "necessary," the appropriate analysis would still involve examining whether a particular Member's measure restricts trade more than needed/required/necessary/it takes to fulfill an objective of that Member.

> **Q151. (United States) The United States argues that the interpretive approach undertaken in connection with the term "necessary" under Article XX of the GATT 1994 should not be applied to the analysis under Article 2.2 of the TBT Agreement because, *inter alia*, there is no textual basis for such an application (United States' second written submission, paragraphs 104-105). Please elaborate on this argument by addressing in particular the similarities between these two provisions, including the term "necessary to" and the types of objectives listed in both provisions (e.g. to protect human health or safety, animal or plant life or health, or the environment, to prevent deceptive practices).**

108. As the United States has noted, these two provisions differ in important respects. First and foremost, the term "necessary" is used in a different context in GATT Article XX ("necessary" to achieve a particular objective) than in TBT Article 2.2 ("more trade restrictive than necessary" to fulfill an objective). Under GATT Article XX, the question is whether a WTO-inconsistent measure is required to accomplish one of the enumerated objectives, such as to protect human, animal or plant life or health or public morals or to secure compliance with laws or regulations. By contrast, under TBT Article 2.2, the question is whether a measure a Member has adopted to achieve a legitimate objective (a measure which may or may not be WTO-consistent), restricts trade more than required to fulfill that legitimate objective.

109. In both cases, a panel compares alternatives. However, the comparison is different. Under GATT Article XX, the panel has already concluded that a particular measure is WTO-

[121] U.S. SWS, para. 103.

inconsistent and is comparing this measure with a WTO-consistent one to see if that measure still achieves the Member's objective. The panel does this to determine if breaching its WTO obligations is required to achieve the Member's objective. By contrast, under TBT Article 2.2, a panel is comparing an alternative that may be WTO-consistent with another measure that may be WTO-consistent to see if the latter measure also fulfills the Member's objective, but in a less trade-restrictive way. Further, the burden is different under these provisions, with the responding party bearing the burden under GATT Article XX and the complaining party bearing the burden under TBT Article 2.2. Given these differences, the same analysis is not appropriate.

110. This conclusion is not altered by the fact that Article XX and TBT Article 2.2 both refer to a few of the same or similar possible objectives for a Member's measures. For example, both provisions include the protection of "human, animal, and plant life and health" and reference the "prevention of deceptive practices.

Articles 12.1/12.3

Q152. (Mexico and United States) What is the relevance, if any, for Mexico's S&D claims of the findings of the Panel in *EC - Approval and Marketing of Biotech Products* with regard to Article 10.1 of the SPS Agreement? (WT/DS291-292-293/R, paras. 7.1605-7.1626.)

111. Based on the similarities between the provisions, SPS Article 10.1 provides relevant context for the interpretation of TBT Article 12.3.[122] Accordingly, past WTO reports examining the meaning of SPS Article 10.1, such as the *EC – Biotech* report, may be instructive to the Panel in this dispute.

112. When examining a claim under SPS Article 10.1, the *EC – Biotech* panel concluded that the developing country Member had the burden of demonstrating that the developed country Member did not take its special needs into consideration.[123] In addition, the *EC – Biotech* panel clarified that a developing country Member is not required to adopt every suggestion put forward by the developing country Member, but rather may balance the developing country Member's

[122] TBT Article 12.3 obligates developed country Members to "in the preparation and application of technical regulations...take account of the special development, financial and trade needs of developing country Members, with a view to ensuring that such technical regulations...do not create unnecessary obstacles to exports..." Similarly, SPS Article 10.1 obligates developed country Members to "in the preparation and application of sanitary and phytosanitary measures...take account of the special needs of developing country Members..."

[123] *EC – Biotech*, para. 7.1622 (stating that "it is incumbent on Argentina as the Complaining Party to adduce evidence and argument sufficient to raise a presumption that the European Communities has failed to take into account Argentina's special needs as a developing country Member.").

views with the views of other interested parties.[124] The *EC – Biotech* panel also concluded that the developed country Member is not required to provide the developing country Member with special and differential treatment vis-à-vis other developed country exporters.[125]

113. The Panel in this dispute should adopt a similar interpretation of TBT Article 12.3 as the *EC – Biotech* panel adopted for SPS Article 10.1. Based on this interpretation, Mexico has clearly failed to establish that the United States has breached TBT Article 12.3 since Mexico has failed to even identify what its special needs are or to adduce evidence to show that it made the United States aware of these special needs.[126]

114. Even aside from these considerations, the United States has put forward significant evidence to show that it considered Mexico's views throughout the process of developing the 2009 Final Rule.[127]

Q153. (Mexico and United States) Are there any reasons to approach Article 12.3 of the TBT Agreement differently in the context of the Farm Bill 2002 and the Final Rule 2009?

115. In both instances, Mexico would need to establish that the measure at issue fell within the terms of Article 12.3 of the TBT Agreement. In addition, in both instances, the Panel should approach TBT Article 12.3 in the same manner and employ the reasoning adopted by the Panel in *EC – Biotech*. Under this interpretation, Mexico has clearly failed to demonstrate a breach of TBT Article 12.3 with regard to any of the instruments at issue.[128]

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[124] *EC – Biotech*, para. 7.1621 (stating that "[t]here is nothing in Article 10.1 to suggest that in weighing and balancing the various interests at stake, the European Communities must necessarily give priority to the needs of Argentina as a developing country.").

[125] *EC – Biotech*, para. 7.1621.

[126] U.S. SWS, para. 183.

[127] U.S. SWS, para. 183-184.

[128] U.S. SWS, para. 177-185.

List of U.S. Exhibits

Exhibit US-145	USDA Country of Origin Labeling Survey (July 2009)
Exhibit US-146	U.S. Beef and Pork Supply By Category, Source: National Agricultural Statistics Service & Economic Research Service
Exhibit US-147	"Factors Affecting U.S. Beef Consumption," Christopher G. Davis and Biing-Hwan Lin, Electronic Outlook Report from the Economic Research Service, U.S. Department of Agriculture (Oct. 2005)
Exhibit US-148	"Factors Affecting U.S. Pork Consumption," Christopher G. Davis and Biing-Hwan Lin, Electronic Outlook Report from the Economic Research Service, U.S. Department of Agriculture (May 2005)
Exhibit US-149	Updated USDA Results from Exhibit US-42
Exhibit US-150	U.S. Cattle Imports and Exports by Country, U.S. Bureau of the Census Data (2000-2010)
Exhibit US-151	U.S. Hog Imports and Exports by Country, U.S. Bureau of the Census Data (2000-2010)
Exhibit US-152	Market Share of Major U.S. Slaughterhouses Who Are Commingling or Accepting Both Domestic and Mixed-Origin Livestock **(Contains BCI)**
Exhibit US-153	"FMI Grocery Shopper Trends 2009: Recession Changing Consumers Shopping Behavior at the Supermarket," Food Marketing Institute
Exhibit US-154	The Council of the European Union, Council Directive 97/12/EC, amending and updating Directive 64/432/EEC on health problems affecting intra-Community trade in bovine animals and swine (17 March 1997)
Exhibit US-155	*The New Shorter Oxford English Dictionary* (4th ed. 1993), p. 1895