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

(DS384/386)

Comments of the United States of America
on the Answers of Canada and Mexico
to the Second Set of Questions from the Panel to the Parties

January 14, 2011

Table of Reports

Short Form	Full Citation
Brazil – Tyres (Panel)	Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, adopted 17 December 2007, as modified by the Appellate Body Report, WT/DS332/AB/R
Canada – Autos (Panel)	Panel Report, *Canada – Certain Measures Affecting the Automotive Industry,* WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by the Appellate Body Report, WT/DS139/AB/R, WT/DS142/AB/R
Canada – Wheat Exports (Panel)	Panel Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/R, adopted 27 September 2004, as modified by the Appellate Body Report, WT/DS276/AB/R
Chile – Alcohol (AB)	Appellate Body Report, *Chile – Taxes on Alcoholic Beverages,* WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000
China – Auto Parts (AB)	Appellate Body Report, *China – Measures Affecting Imports of Automobile Parts* WT/DS339/AB/R, WT/DS340/AB/R, WT/DS340/AB/R, adopted 12 January 2009
Dominican Republic – Cigarettes (AB)	Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005
EC – Asbestos (AB)	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/AB/R, adopted 5 April 2001
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 – Large Civil Aircraft	Panel Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R, adopted 21 September 2010
EEC – Oilseeds	GATT Panel Report, *EEC – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins,* BISD 37S/86, adopted 25 January 1990

EEC – Parts and Components	GATT Panel Report, *EEC – Regulations on Imports of Parts and Components,* BISD 37S/132, adopted 16 May 1990
India – Autos	Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS/146/R, WT/DS175/R, adopted 5 April 2002
Italian Agricultural Machinery	GATT Panel Report, *Italian Discrimination Against Imported Agricultural Machinery,* L/833 BISD, 7S/60, adopted 23 October, 1958
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
Japan – Film	Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998
Korea – Beef (AB)	Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001
US – FSC (Article 21.5) (Panel)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002
US – Gasoline (Panel)	Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, adopted 20 May 1996, as modified by the Appellate Body Report, WT/DS2/AB/R
US – Section 337	GATT Panel Report, *United States – Section 337 of the Tariff Act of 1930*, BISD 36S/345, adopted 7 November 1989
US – Textiles Rules of Origin	Panel Report, *United States – Rules of Origin for Textiles and Apparel Products*, WT/DS243/R, adopted 21 July 2003

1. The United States appreciates this opportunity to comment on Canada's and Mexico's replies to the questions posed by the Panel following the second substantive meeting with the parties. Many of the points Canada and Mexico raise have already been addressed by the United States in prior written and oral submissions or are not relevant to the resolution of this dispute. In the comments below the United States will focus primarily on new points that Canada and Mexico raise that are pertinent to the resolution of this dispute or that have not been addressed in prior U.S. submissions. The United States does not comment on each of Canada's and Mexico's replies to every question that the Panel posed to them following the second substantive meeting with the parties. The U.S. decision not to comment on Canada's or Mexico's reply to any particular question should not be understood as agreement with those replies.

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.

2. Contrary to Canada's and Mexico's responses,[1] the Panel should analyze each of the COOL instruments separately. While the different COOL instruments all relate to country of origin labeling in some manner, there are substantive and legal differences between them that have implications for how the WTO obligations at issue in this dispute apply.[2] Canada asserts without support that "the U.S. instruments have operated and continue to operate in conjunction with each other,"[3] but neither Canada nor Mexico attempt to explain how this is the case with regard to most of the instruments. Complainants ignore the 2008 Interim Rule, the FSIS Interim Rule, and the FSIS Final Rule altogether, failing to substantively address these instruments in any of their submissions. They also fail to explain how the COOL statute breaches U.S. WTO obligations alone or in conjunction with the 2009 Final Rule, in particular in light of the fact that the implementing regulations could have been designed in a manner that at least Canada appears to concede would be WTO-consistent; namely, by allowing a Category B label to be used on

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[1] Canada's Responses to Questions to the Parties From the Panel in Connection with the Second Substantive Meeting ("Canada's Second Responses"), para. 1-5, Question 89; Mexico's Responses to the Panel's Questions From the Second Substantive Meeting ("Mexico's Second Responses), para. 2-4, Question 89.

[2] U.S. Second Written Submission ("U.S. SWS"), para. 11-28. *See also* Mexico's Second Responses, para. 3, Question 89 (conceding that the measures' "legal nature is different" and that "each instrument differs as per its own nature").

[3] Canada's Second Responses, para. 1, Question 1.

Category A meat as proposed in the 2008 Interim Rule.[4] Thus, Canada's and Mexico's arguments essentially boil down to arguments against the 2009 Final Rule and the Vilsack Letter.

3. With regard to these two instruments, neither DSU Article 3.3 nor the *EC – IT Products* report provides support for the notion that they should be examined as a single measure. DSU Article 3.3 suggests that more than one measure may be the subject of a given dispute, but it does not address in which circumstances it is appropriate to analyze different instruments as a single measure.[5] Likewise, the *EC – IT Products* panel did not conclude that the measures at issue were a "single measure." Rather, the panel found that CNENs operated in conjunction with the CN to establish the duty treatment that the EU was actually according to imported products.[6] The evidence demonstrated that the provisions of these different instruments were consistent with each other, and indeed, worked together to impose duties on the products at issue in that dispute. By contrast, complainants have failed to demonstrate that the Vilsack Letter operates in conjunction with the 2009 Final Rule. In fact, the letter's suggestions are inconsistent with the 2009 Final Rule's requirements, and complainants have failed to adduce evidence of even a single U.S. market participant that is following the letter's suggestions.[7] Based on the fact that these instruments do not operate in conjunction with each other, and the fact that the Vilsack Letter have any operative effect at all, they should be examined separately.

4. The 2009 Final Rule and Vilsack Letter should also be examined separately because the Vilsack Letter does not fall within the scope of the WTO provisions under which Canada and Mexico challenge the so-called "COOL measure."[8] The Vilsack Letter is not a technical regulation within the meaning of the TBT Agreement and it is not a "law, regulation, or requirement" within the meaning of GATT 1994.[9] Therefore, it does not make sense to examine

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[4] *See* Canada's Second Responses, para. 115, Question 144 (conceding that the Interim Final Rule is a less trade-restrictive alternative measure); Canada's Second Responses, para. 116, Question 144 (stating that the 2008 Interim Rule "might...materially reduce the negative effects on the conditions of competition..."). Canada also stated that it did not have a problem with the 2008 Interim Rule during the second substantive meeting of the Panel. Mexico, for its part, states that this option "may be a less trade restrictive alternative" while not taking a position on the 2008 Interim Rule's consistency under TBT Article 2.1. (Mexico's Second Responses, para. 98-99, Question 144)

[5] Answers of the United States of America to the Second Set of Questions from the Panel to the Parties ("U.S. Second Answers"), para. 1, Question 89.

[6] *EC – IT Products*, para. 7.989-7.991.

[7] U.S. SWS, para. 18-19.

[8] U.S. Second Answers, para. 3-4, Question 89.

[9] Canada's citations to *Canada – Autos* and *India – Autos* do not provide support for its claim that the Vilsack Letter is a requirement within the meaning of GATT Article III:4. The *Canada – Autos* report merely notes that non-mandatory instruments may be considered within the scope of the provision if they set forward "conditions that an enterprise accepts in order to receive a benefit," but Canada has not identified a relevant benefit related to following the Vilsack Letter or identified a single enterprise that has accepted the Vilsack Letter's "conditions." *Canada – Autos (Panel)*, para. 10.73; *India – Autos*, para. 7.183-7.186. *See also* U.S. First Written Submission ("U.S. FWS"),

this instrument under provisions that do not apply to it along with an instrument that falls within the scope of these provisions.

Country-of-origin labelling requirements

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.

5. Canada's response confirms a significant number of companies in the United States are taking advantage of the commingling provisions and the majority of Category A meat being sold in the United States is being labeled as a "Product of the United States."[10] In this way, the 2009 Final Rule is fulfilling its objective of providing information to consumers about the origin of the meat products they buy at the retail level and preventing consumer confusion while keeping down compliance costs for market participants.

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.

6. As the United States indicated in its response, approximately 50 percent of the beef and 30 percent of the pork products sold at the retail level are covered by the 2009 Final Rule.[11] Canada erroneously states that warehouse clubs and superstores are not subject to the COOL requirements.[12] To the contrary, these are the type of large retailers that the 2009 Final Rule was specifically designed to cover. In light of this misunderstanding, Canada states that only 4,040 out of 42,318 stores are subject to the 2009 Final Rule,[13] but the 4,040 firms Canada refers to represent 36,392 stores.[14] As such, a much higher percentage of stores than Canada implies are subject to the COOL requirements. Indeed, the United States noted in its response that "47.0

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para. 283-285.

[10] *See* Canada's Second Responses, para. 8, Question 90 (indicating that up to 95 percent of the meat that should be labeled as Category A is being labeled as such and that at least 5 percent of this meat is being commingled).

[11] U.S. Second Answers, para. 15, Question 92.

[12] Canada's Second Responses, para. 9, Question 92.

[13] Canada's Second Responses, fn. 13, Question 92.

[14] Exhibit CDA-5, p. 2684, Table 1.

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."[15]

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.

7. Canada and Mexico continue to misunderstand the significance of other Members' labeling systems, and the systems of Australia, the EU, Korea, and Japan in particular.[16] Like the United States, these Members' mandatory labeling systems do not define origin for meat products based solely on substantial transformation principles.[17] While there may be certain differences between these systems and the 2009 Final Rule, they are alike in the sense that they require a retailer to have more information available to it than where the source animal was slaughtered in order to convey the required information to consumers.[18] Therefore, to the extent a system of this nature might impose higher costs on industry in general or require more information to be maintained and provided to consumers than a system based on substantial transformation, this is also true with regard to all of these Members' systems.

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[15] Exhibit CDA-5, p. 2696.

[16] Canada's Second Responses, para. 12, Question 94 (arguing that "the country-of-origin labelling regimes of other WTO Members have limited relevance for purposes of resolving this dispute"); Mexico's Second Responses, para. 17, Question 94 (arguing that other Members' systems are not relevant to this dispute).

[17] Canada's response implies that Australia's labeling requirements for pork are based on substantial transformation. (Canada's Second Responses, para. 14, Question 94) However, Canada appears to have overlooked the fact that Australia's mandatory requirements to label pork products as "Product of Australia" are that: "the country of origin claimed must be the country of origin of each significant ingredient of the food, and virtually all the processes of production or manufacture of the goods must have happened in the country of origin claimed." (Australia's Responses to the First Set of Questions from the Panel, Question 1) Further, Australia's mandatory requirements to label pork products as "Made in Australia" are that: "Goods must have been substantially transformed in the country claimed to be the origin, and more than 50 per cent of the costs of production must have been carried out in the country claimed to be the origin." Thus, if Canada imported cattle for immediate slaughter to Australia, it could not be labeled "Product of Australia" or "Made in Australia" under Australia's system just as it could not be labeled "Product of the United States" under the 2009 Final Rule. Canada's response also attempts to distinguish Korea's labeling system from the 2009 Final Rule by stating that meat derived from an animal that is imported into Korea and raised for a period of longer than six months is still identified as Korean meat on the label. (Canada's Second Responses, para. 17, Question 94) That is also true with the 2009 Final Rule, which would identify the meat as from the United States and the country in which it was born. Mexico appears to have similarly misread the Australian and Korean measures. (Mexico's Second Responses, paras. 18-19, 21, Question 94)

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

8. As a result of these similarities, many of the arguments that Canada and Mexico make with respect to the 2009 Final Rule apply equally to the labeling systems maintained by Australia, the EU, Japan, and Korea. This means, for example, that if the Panel accepted Canada and Mexico's argument that substantial transformation is a reasonably available alternative to the 2009 Final Rule, this would suggest that it is also be a reasonably available alternative to these other systems. Accepting the complainants' arguments would lead to the conclusion that the labeling systems of Australia, the EU, Korea, and Japan, and potentially other Members, are "more trade restrictive than necessary" under TBT Article 2.2.

TBT Agreement

Q95. (Canada and Mexico) What is the specific meaning of the terms "mandatory" and "with which compliance is mandatory" within the definition of technical regulation under Annex 1.1 of the TBT Agreement?

Q96. (Canada and Mexico) Please explain whether, and if so how, in your view, the Vilsack Letter, considered on its own, satisfies the specific meaning of the phrase "with which compliance is mandatory" under Annex 1.1 of the TBT Agreement.

9. In order for compliance with a document to be mandatory within the meaning of the TBT Agreement, market participants must be *required* to label the products in accordance with the prescribed requirements in order to sell, import, distribute, or otherwise market the product in the territory of the Member who adopts the requirements. This is consistent with the Appellate Body report in *EC – Asbestos*, which stated that a technical regulation concerning product characteristics must "regulate the 'characteristics' of products in a binding or compulsory fashion."[19]

10. Despite the fact that the Vilsack Letter explicitly characterizes its suggestions as voluntary,[20] Canada and Mexico continue to erroneously assert that it is a technical regulation.[21] While there may be limited circumstances in which a document that is voluntary on its face actually has mandatory effect, this is not the case with regard to the Vilsack Letter because U.S. industry is *not required* to follow its suggestions. Indeed, Canada and Mexico have been unable to adduce a single piece of evidence showing that a U.S. market participant is following the Vilsack Letter's suggestions, let alone demonstrate that the U.S. industry as a whole is *required* to follow the letter.[22]

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[19] *EC – Asbestos (AB)*, para. 68.

[20] U.S. FWS, para. 134.

[21] Canada's Second Responses, para. 20-23, Question 95; Mexico's Second Response, para. 26-31, Question 96.

[22] U.S. FWS, para. 136; U.S. SWS, para. 15.

11. The Vilsack Letter's lack of an enforcement mechanism that could bind industry participants in the United States further supports its voluntary status.[23] Even Canada admits that the Vilsack Letter is "not binding in U.S. law."[24] This is correct, and the United States also agrees that one must look to the domestic legal system of the Member concerned to ascertain whether a measure is "mandatory." In fact, because the Vilsack Letter was not adopted through the procedures established by the Administrative Procedure Act (APA), USDA could not enforce this letter as a matter of U.S. law even if it wanted to do so.[25] The fact that the Vilsack Letter was issued by the head of a U.S. agency and may have a "high level of importance to the industry" is irrelevant since the letter did not go through the normal U.S. rule making process.[26]

12. Finally, Canada and Mexico's argument that the Vilsack Letter derives its mandatory nature from being part of a broader "COOL measure" does not survive scrutiny.[27] In short, the fact that the Vilsack Letter's recommendations are inconsistent with the 2009 Final Rule,[28] an instrument that is indisputably binding and whose provisions are required to be followed, precludes the possibility that the Vilsack Letter is somehow implementing the 2009 Final Rule and therefore derives its mandatory nature from its relationship to the rule.[29]

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:

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[23] U.S. FWS, para. 135.

[24] Canada's Second Responses, para. 20, Question 95.

[25] *See* 5 USC 552 § (a)(1) of the Administrative Procedure Act, which contains the requirement to publish all agency rules:

§ 552. Public information; agency rules, opinions, orders, records, and proceedings
(a) Each agency shall make available to the public information as follows:
(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—
...
(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and
(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published.

[26] Canada's Second Responses, para. 21, Question 95; Mexico's Second Responses, para. 29-31, Question 96.

[27] Canada's Second Responses, para. 20, Question 95; Mexico's Second Responses, para. 26, Question 96.

[28] *See*, *e.g.*, U.S. SWS, para. 18 (explaining that the Vilsack Letter's suggested time period for which countries of origin should be listed for ground meat, the Letter's suggested labeling of certain exempt processed foods, and suggestions to list additional countries on the label at retail differ from the requirements of the 2009 Final Rule).

[29] Canada's Second Responses, para. 20, Question 95; Mexico's Second Responses, para. 26, Question 96.

"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."

13. The United States agrees with Canada that "not all Articles necessarily represent codified customary international law."[30] Putting aside the international legal status of the Draft Articles, they are simply not relevant to this dispute. These Articles do not address the question of whether the Vilsack Letter is mandatory within the meaning of the TBT Agreement or whether a set of legally and substantively different instruments should be considered as a single measure.[31]

Q98. (Canada and Mexico) Please reference any former WTO panel or Appellate Body reports that might be relevant for the issue of a senior government official allegedly trying to influence the behavior of private market participants, in particular in regard to the type of action mentioned in paragraph 40 of Mexico's second written submission.

14. Canada and Mexico's attempt to analogize the status of the Vilsack Letter with the status of the administrative guidance examined in the *Japan – Film* dispute is legally inapposite.[32] In particular, as both Canada and Mexico admit, the relevant question in *Japan – Film* was whether administrative guidance issued by the Japanese government was a measure under the GATT 1994.[33] That report is simply not relevant to determining whether the Vilsack Letter is a technical regulation within the meaning of the TBT Agreement.

15. Additionally, on its facts, the situation in *Japan – Film* is distinguishable from the situation regarding the Vilsack Letter. In *Japan – Film,* Japan conceded that its administrative guidance "effectively substitutes for formal government action"[34] while the United States makes no such concession here because this is not the case. The *Japan – Film* panel also relied on "the effect [the government action] has on private market actors,"[35] while complainants in this dispute have been unable to show any effect of the Vilsack Letter. Further, the Japanese government had routinely issued administrative guidance that it expected market actors to follow,[36] whereas the issuance of the Vilsack Letter was an isolated event that Secretary Vilsack did not intend to bind industry. Based on these significant differences between the situations, the situation in *Japan –*

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[30] Canada's Second Responses, fn. 25, Question 97 (citing to Exhibit CDA-202).

[31] U.S. Second Answers, para. 24, Question 97.

[32] Canada's Second Responses, para. 36-43, Question 98; Mexico's Second Responses, para. 33-33, Question 98.

[33] Canada's Second Responses, para. 37, Question 98; Mexico's Second Responses, para. 33-34, Question 98.

[34] *Japan – Film*, para. 10.44.

[35] *Japan – Film*, para. 10.46.

[36] *Japan – Film*, para. 10.49.

Film is distinguishable from the situation regarding the Vilsack Letter to the extent it is even relevant to this dispute at all.

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.

16. Neither Canada nor Mexico have adduced evidence to demonstrate that U.S. industry is following the Vilsack Letter's suggestions or shifting away from Category B meat as a result of the letter.[37] Canada refers to four exhibits (none related to cattle) to support its claim that "the issuance of the Vilsack Letter led directly to slaughter house decisions to no longer accept Canadian livestock,"[38] but these exhibits do not demonstrate what Canada claims they do. In fact:

- Exhibit CDA-92 does not even mention the Vilsack Letter.
- [[BCI Redacted]]
- [[BCI Redacted]]
- [[BCI Redacted]]

17. Mexico likewise does not provide evidence to support the assertion that the Vilsack Letter led to a shift away from Category B livestock. In fact, the Washington Trade Daily article Mexico cites does not provide support for this assertion at all, but rather provides additional evidence that U.S. meat packers are using the commingling provisions included in the 2009 Final Rule.[39]

18. On this topic, it is also worth noting that the Vilsack Letter does not suggest that industry shift away from processing Category B meat, but only that industry consider point-of-production labeling, consider using a different definition for processed foods than provided in the 2009 Final Rule, and consider using a different definition of origin for ground meat than is provided by the 2009 Final Rule.[40] Canada and Mexico have never contended that industry is following the

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[37] Canada's Second Responses, para. 44, Question 99; Mexico's Second Responses, para. 37, Question 99.

[38] Canada's Second Responses, para. 44, Question 99 (citing Exhibit CDA-67, paras. 8, 12; Exhibit CDA-83, para. 8; Exhibit CDA-86, para. 9; and Exhibit CDA-92).

[39] *See* Mexico's Second Responses, para. 37, Question 99 (citing to a Washington Trade Daily article that notes "meat packers had been taking advantage of Bush Administration rules which opened the door to marking most processed beef and pork as originating in either the United States, Canada, or Mexico").

[40] Exhibit CDA-6.

letter's specific suggestions, but rather assert that industry has taken an action not included in the letter at all.

General

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.

19. Mexico's response misstates the appropriate legal test under TBT Article 2.1. Mexico asserts that a measure will not violate Article 2.1 if the measure's "restrictive effect is the same on both imports and domestic products."[41] This interpretation of TBT Article 2.1 conflates the meaning of trade restrictiveness with less favorable treatment.

20. Neither TBT Article 2.1 nor GATT Article III:4 are effects tests that focus on a measure's trade effects, and these provisions do not compare the trade restrictiveness on imports with the trade restrictiveness on domestic like products.[42] As the Appellate Body stated in *Japan – Alcohol*, "Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products."[43]

21. Rather, a measure accords imported products less favorable treatment than like domestic products within the meaning of TBT Article 2.1 and GATT Article III:4 if it the treatment it accords imported products is less favorable than the treatment it accords like domestic products. This analysis necessarily involves determining both what treatment the measure accords and whether the basis for that treatment is origin. Neither one may be sufficient in and of itself. For example, a measure could accord like products different treatment based on origin, but such treatment might not be less favorable.[44] In addition, a measure cannot be found to modify the conditions of competition between imported and domestic like products merely because imported products lose market share.[45] Market effects are not the same as conditions of competition.

22. Conditions of competition go to whether like products compete under the same conditions – there is no guarantee that those conditions will yield any particular market result.

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[41] Mexico's Second Responses, para. 57, Question 104.

[42] U.S. Second Answers, para. 53, Question 108; Canada's Second Responses, para. 77, Question 113 (stating that "violations of TBT Article 2.1 and GATT Article III:4 do not depend on a finding that there have been negative trade effects.").

[43] *Japan – Alcohol (AB)*, p. 16.

[44] *Korea – Beef (AB)*, para. 135.

[45] *Japan – Alcohol (AB)*, p. 16; *Dominican Republic – Cigarettes (AB)*, para. 96.

To put it another way, a measure will not run afoul of the national treatment provisions merely because it has trade effects or happens to impose a higher cost on some imports than some domestic like products, especially when it does not treat domestic and imported like products differently.[46] Instead, it must be examined whether any different treatment the measure accords based on origin modifies the conditions of competition to the detriment of imported products.[47]

Q105. (Canada and Mexico) In connection with Question 103 above, Canada mentioned at the second substantive meeting that removing the commingling flexibilities from the current COOL requirements would make them better fulfil the objectives of the United States and thus move closer to being in compliance with Article 2.2. Canada further stated that, however, this would at the same time make the COOL requirements more likely to be inconsistent with Article 2.1 of the TBT Agreement. In the complainants' view, can the United States equally comply with both Articles 2.1 and 2.2? If yes, explain how.

23. In their responses, both complainants acknowledge that it is possible for the United States (and other Members) to enact mandatory country of origin labeling requirements that are consistent with TBT Articles 2.1 and 2.2.[48] The United States agrees with this position.

24. Where the parties differ is on whether the measures at issue, and the 2009 Final Rule in particular, are consistent with these provisions. Canada and Mexico put forward four suggested alternatives to the 2009 Final Rule that they claim would be consistent with TBT Articles 2.1 and 2.2. As the United States will describe, none of these alternatives is a reasonably available alternative that would fulfill the objectives of the 2009 Final Rule in a less trade-restrictive manner:

- *Voluntary Labeling*:[49] Voluntary labeling would fail to fulfill the U.S. objectives at the level that the United States considers appropriate. In particular, a voluntary labeling system would not provide consistent and reliable country of origin information to consumers about the covered commodities they buy at retail, as evidenced by the fact that the United States already tried this option without success.[50] Further, Canada has not identified any "programs that already exist to trace back to farm of origin"[51] that would allow retailers to provide consumers

[46] *Dominican Republic – Cigarettes (AB)*, para. 96.

[47] *E.g.*, *Korea – Beef (AB)*.

[48] Canada's Second Responses, para. 53, Question 105; Mexico's Second Responses, para. 59, Question 105.

[49] Canada's Second Responses, para. 54(a), Question 105.

[50] U.S. SWS, para. 161.

[51] Canada's Second Responses, para. 54(a), Question 105.

with this voluntary information if this information was not maintained by producers under a mandatory system, such that this alternative could possibly fulfill the U.S. objectives.

- *Substantial Transformation*:[52] A labeling system based on substantial transformation would also fail to fulfill the U.S. objectives at the level that the United States considers appropriate because it would not provide consumers with information on where an animal was born and raised when it was slaughtered in the United States.[53] Further, this system would be misleading to consumers because meat that was derived from an animal that spent significant periods of its lifetime in another country would still be labeled U.S. origin merely because it was slaughtered in the United States.[54]

- *Trace back System*:[55] A trace back system is significantly more trade restrictive than the 2009 Final Rule. Indeed, the entire reason Canada and Mexico are suggesting this alternative is because it would increase costs on market participants in a way that they contend would somehow equalize costs across industry and therefore eliminate the discrimination they allege is occurring in the market place.[56] In making this argument, complainants appear to be confusing the concept of discrimination under TBT Article 2.1 with trade restrictiveness under TBT Article 2.2. Even if a trace back system was somehow "less discriminatory" because it increased costs for U.S. livestock producers *vis à vis* foreign livestock producers, it is difficult to see how a measure that would be significantly more costly for *both* U.S. and foreign market participants could possibly be a significantly less trade restrictive one.

  Not only would adopting a trace back system increase costs on the U.S., Canadian, and Mexican livestock industries, it would also increase the costs on the livestock and meat packing industries of all countries that export livestock *or meat* to the United States. For example, a trace back system would impose new costs on Members who export Category D *meat* to the United States as this meat would have to be tracked all the way back to its place of origin. It would also increase costs on countries like Guatemala, who may export a small number of cattle to Mexico, the meat from which is then exported to the United States. This aspect of a trace back system in particular could be export prohibitive for less

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[52] Canada's Second Responses, para. 54(b), Question 105.

[53] Exhibit US-146.

[54] U.S. SWS, para. 165-169.

[55] Canada's Second Responses, para. 54(c), Question 105; Mexico's Second Responses, para. 59, Question 105.

[56] Canada's Second Responses, para. 54(c), Question 105; Mexico's Second Responses, para. 59, Question 105.

developing country Members around the world that do not have similar resources as developed country Members, and thus, are less able to absorb higher costs.

In addition to the fact that a trace back system is not less trade restrictive than the 2009 Final Rule, accepting this type of system as a reasonably available alternative would set a standard for labeling that would make it difficult for any country that does not have the resources available for such a system to adopt country of origin labeling requirements in the first place. Many other Members who maintain country of origin labeling requirements share the same objectives as the United States.[57] If this Panel determined that adopting a trace back system was a reasonably available alternative to the 2009 Final Rule, this finding could be used against these Members to challenge their labeling requirements under TBT Article 2.2 and could prevent these countries from adopting any labeling requirements at all if they were not willing to expend the significant resources necessary to adopt a trace back system.

In this context, it is worth reiterating that the only Member that has a trace back system related to its labeling requirements at all is the EU. And the EU did not adopt this system in order to achieve the same objective that the United States is attempting to achieve with the 2009 Final Rule. Rather, the EU adopted a trace back system in order to address health issues.[58] For this reason as well, it is not appropriate to consider trace back as an alternative to a measure adopted for an entirely different purpose.

- *2008 Interim Rule*:[59] Canada's suggestion that the United States restore the flexibility that was included in the 2008 Interim Rule and allow a Category B label to be used on Category A meat is not a reasonably available alternative either. The United States modified the 2008 Interim Rule to eliminate this flexibility because it would have allowed the vast majority of the meat sold in the United States to be labeled as mixed origin. In other words, it would have essentially created a North American label for meat that is processed in the United States, Canada, and/or Mexico, and this would provide less information about the origin of a source animal than the 2009 Final Rule. While the United States does believe that some flexibility is appropriate to reduce costs, and thus, adopted the commingling provisions to do so, this proposal goes too far and jeopardizes the ability of the United States to fulfill its objectives at the level it considers appropriate.

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[57] U.S. SWS, para. 116-117.

[58] U.S. Second Answers, para. 102, Question 146.

[59] Canada's Second Responses, para. 54(d), Question 105.

Economic data and information

Q106. (Canada) Please answer the following questions in regard to the econometric study presented by Canada (Exhibit CDA-79)

(a) In its oral statement at the second meeting (para. 55, 2nd sentence) Canada argues that there is no reason to include a factor to take into account the recession in Dr. Sumner's analysis. Nevertheless, would it not be possible to include a recession variable in order to verify that the recession does not affect the robustness of the results? Can Canada provide additional analysis that would shed light on this matter? In particular, it would be useful if Canada could use a specific economic recession "dummy variable" so as to make the Canadian study comparable to the US study.

25. The United States has explained in some detail its concerns with Canada's approach to TBT Article 2.1 and GATT Article III:4, and in particular, Canada's attempt to turn the legal analysis into a question of trade effects as embodied by Dr. Sumner's models.[60] The United States will not repeat these arguments again here, but would respectfully refer the Panel to the comments it made in paragraphs 32-41 of its Answers to the Second Set of Questions from the Panel, where it described how Canada's approach was faulty.

26. Putting this aside, the United States appreciates the difficulty of adding a recession variable to Dr. Sumner's existing model. As the United States has noted on several occasions, it does not believe that Dr. Sumner's model is the appropriate way to analyze North American livestock markets for trade effects, even if this were the appropriate legal inquiry.[61] The United States has also explained that it made the decision to adjust Dr. Sumner's model in several key ways and produce a model of its own, not because it believed that these adjustments solved the model's deficiencies, but because this demonstrated how easily one could tweak Dr. Sumner's model by adding more relevant variables and produce contradictory results.[62] As a result, the United States and Canada agree that producing a reduced form model that includes both a COOL variable and economic recession variable is not the appropriate way to analyze this issue.[63] But the United States and Canada disagree on why this is so. Canada thinks the recession is not relevant and the United States is concerned about the overlap of the "COOL" and recession periods of analysis.[64]

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[60] U.S. Second Answers, para. 32-41, Question 106.

[61] *E.g.*, U.S. SWS, para. 91-94.

[62] U.S. Second Answers, para. 37, Question 106.

[63] Canada's Second Responses, paras. 55, 60, Question 106(a).

[64] U.S. Second Answers, para. 43, Question 107(a).

27. In its response, Canada notes that "to put it in technical terms, in order to define a specification consistent with a meaningful economic model, one needs a well-developed economic rationale for including explanatory variables relating the state of the general economy to differential demand for imports in a fully integrated North American market for livestock and meat."[65] This has been exactly the U.S. criticism of Dr. Sumner's model – the way that he chose to model the effects of the COOL measures was not based on a fully integrated approach.[66]

28. Canada's choice of differential unemployment rates to serve as a proxy for the economic recession in its new model (Exhibit CDA-206) is not based on a solid foundation in terms of economic theory to explain a drop in demand for Canadian livestock. Canada premised its choice on the fact that unemployment is a continuous variable.[67] However, of the many possible continuous variables that could have been chosen, differential unemployment rates are of questionable value as an explanatory variable. As Canada notes, unemployment is often a lagging indicator of economic activity.[68] In the United States, high unemployment rates have persisted beyond the end of the recession, and thus, by choosing unemployment as the explanatory variable, Dr. Sumner is able to show continued effects of the COOL measures.[69] A further question concerns how Canada estimated weekly unemployment rates, which appear to be derived from monthly unemployment data.[70]

29. Canada's criticism of the U.S. choice to use the recession as a dummy variable in Exhibit US-42 because it is not a continuous variable is off the mark.[71] The U.S. choice of a recession dummy variable reflects the fact that there is an official start and end date for the U.S. recession as specified by the National Bureau of Economic Research – December 2007 and June 2009, respectively.[72] A dummy variable that is specified for when an economy is officially in a recession represents the structural ramifications of such an event better than differential unemployment rates.

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[65] Canada's Second Responses, para. 59, Question 106(a).

[66] U.S. Second Answers, para. 36, Question 106.

[67] Canada's Second Responses, para. 61, Question 106(a).

[68] Canada's Second Responses, para. 58, Question 106(a).

[69] Surprisingly, according to Canada's recent model, the inclusion of an unemployment differential appears to have intensified the effect of the COOL measures, but reduced the multiple R^2, which raises further questions about the mis-specification of the model. Typically, the addition of a variable to a model will, at worst, maintain the same R^2, and in most cases will actually improve it. Thus, the new variable does not improve the explanatory power of the model.

[70] Exhibit CDA-206, p. 64.

[71] Canada's Second Responses, para. 61, Question 106(a).

[72] National Bureau of Economic Research Press Release (Sep. 20, 2010) (Exhibit US-156).

30. Indeed, if Canada was set on using a continuous variable to model the recession, a better variable would have been overall trade in agricultural commodities.[73] Overall agricultural trade better tracks economic conditions, and as the United States has already pointed out, Canadian exports of livestock to the United States fell and rose consistent with overall U.S. agricultural trade flows.[74]

31. In reconstructing its model and producing Exhibit CDA-206,[75] Canada again appears to have missed the point of the U.S. original recession dummy variable argument. The United States argued that the COOL dummy variable could have been replaced by a recession dummy variable and the same results obtained because what Dr. Sumner's COOL dummy variable was actually capturing was the result of the recession.[76] Finally, Canada has still not addressed numerous other concerns raised by the United States, including Canada's misaligned weekly data.[77]

(b) The United States argues that Dr. Sumner's analysis should include the post-BSE period between May 2003 and August 2005 during which the US banned live cattle imports from Canada, because it had lasting effects on the Canadian market until March 2010 (United States' first written submission, paragraph 104; United States' second written submission, paragraph 95) If the post-BSE recovery period (2003-2005) is taken into account, would the results of Dr. Sumner's study be affected? If so, please explain how.

32. Contrary to Canada's response, the United States did not complain that "Canada inappropriately included the period during which cattle imports from Canada were suspended..."[78] The U.S. concern was that starting the analysis in July 2005 assumed that U.S. and Canadian cattle markets were entirely back to normal at this time even though trade had not resumed for cattle over 30 months. The U.S. ban on older animals, continuing U.S. restrictions on beef from older animals, and Mexico's restriction on U.S. and Canadian beef and cattle continued to disrupt markets for several years following this date. Thus, the period used by Canada for its regression analysis could not be considered normal or representative. Although

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[73] Using trade (or imports) as a proxy for the recession, rather than unemployment, provides an explanation of the differential impact of the recession. Imports are a residual of domestic production and domestic consumption. If domestic consumption declines because of lower demand, with little change in domestic production, then imports would be expected to decline. At the same time, the share of imported to domestic demand would also be reduced.

[74] U.S. Second Answers, para. 58, Question 109.

[75] With regard to Exhibit CDA-206, the United States notes that its results are not significantly different from Canada's previous modeling exercises.

[76] U.S. Second Answers, para. 37, Question 106.

[77] U.S. SWS, para. 82.

[78] Canada's Second Responses, para. 65, Question 106(b).

Canada used a dummy variable to account for the resumption of trade in older animals starting in November 2007, this would not fully account for the market effects being felt during this time period as a result of BSE.

33. Additionally, the United States notes that Dr. Sumner has used many dummy variables in his models.[79] In many cases, the dummy variables are used to account for a specific event (for example, the resumption of trade in older cattle), but the direction of causation is not necessarily explained. The more dummy variables are used to account for vague or undefined effects – BSE regulations, for example – rather than a more targeted use, such as using a dummy for the specified dates of the U.S. recession, the more uncertainty is associated with interpreting the variable. Further, many of the dummy variables in Dr. Sumner's results were not statistically significant, calling into question their usefulness.

(c) According to the United States, Canadian livestock exports to the United States thrived during the first months of 2010, corroborating the fact that the economic recession was the main factor for the collapse of Canadian exports. (United States' second written submission, paragraph 9) Is the COOL evidence robust to the extension of data up to 2010? In other words, can Canada demonstrate that COOL continues to have a negative and significant impact on the import price and quantities if data up to November 2010 is used?

34. Given all of the issues with Dr. Sumner's models that the United States has already explained, there is no reason to accept these new results. A longer time series does not address the serious concerns about Dr. Sumner's flawed reduced form models.

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

35. In its response to this question, Mexico erroneously attempts to tie the decline in exports during 2008 to the implementation of the COOL measures.[80] As the United States has explained, the 2009 Final Rule did not take effect until March 2009. The decline in Mexican exports in 2008 had nothing to do with the 2009 Final Rule or any of the COOL measures, but rather with the economic recession in the United States, high feed prices, and unusual weather conditions.[81]

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[79] Exhibit CDA-79, p. 14-15.

[80] Mexico's Second Responses, para. 61, Question 109.

[81] U.S. FWS, para. 110-114.

In 2009, the same year that the 2009 Final Rule was implemented, Mexican cattle exports rose 34 percent.[82] Mexico's exhibits are again up nearly 30 percent in 2010.[83]

Q111. (Canada) In paragraph 22 of its oral statement at the second meeting, Canada argued that "the exclusive label 'A' distribution chain...has little or no segregation costs." Please elaborate on the reasons for this and explain why any "little" segregation costs of label A are lower than the same costs for each of the other labels.

36. The United States has clearly demonstrated that the COOL measures do not require segregation and that the costs of segregation are not nearly as high as Canada and Mexico assert for those private market actors who choose to segregate in response to the COOL measures.[84] The United States will not repeat its arguments on this issue again. In addition to continuing to advance these fallacies in its response to this question, Canada's response completely ignores other arguments previously advanced by the United States as well as evidence that undermines its points.

37. First, Canada ignores the fact that for those producers who choose to segregate, the cost of doing so will fall equally on both Category A and Category B meat, which appears to be the question that the Panel was driving at (obviously, if a processor chooses to produce only one type of meat it will not have to segregate this meat from another type). Canada ignore this issue entirely because it cannot conform its arguments about segregation costs with the fact that when a processor chooses to segregate, it is not only separating its Category B meat from its Category A meat, but it is also separating its Category A meat from its Category B meat.[85] Therefore, the cost of segregation falls on more than just the mixed origin product. These costs can and are being distributed among all types of product that are being processed and all along the supply chain.

38. Second, Canada ignores evidence in its own exhibit that indicates that it is economically feasible for slaughter houses to process only Category B meat and for retailers to sell only Category B meat if they choose to do so, among the numerous other ways that they can respond to the 2009 Final Rule. In particular, the National Meat Case Study reveals that 14 percent of

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[82] Exhibit US-104.

[83] Exhibit US-143.

[84] *See, e.g.,* U.S. FWS, para. 152-159; U.S. SWS, para. 42-44 (explaining that the COOL measures do not require segregation). *See, e.g.,* U.S. SWS, para. 58-61 (explaining why Canada and Mexico's segregation cost estimates are inflated).

[85] *E.g.*, U.S. SWS, para. 55.

U.S. retail stores carried only Category B meat.[86] Thus, to argue that processing or carrying only Category B meat is an impossibility is entirely without merit.[87]

Q112. (Canada) Please provide evidence for the "tight market conditions" referenced in paragraphs 27 and 50 of Canada's oral statement at the second meeting.

39. The United States appreciates Canada's submission of evidence that attests to "tight market conditions" in livestock markets in 2010[88] because this information goes to the heart of the U.S. point that the main reason Canadian livestock exports and prices declined in 2008 and 2009 was the severe economic recession in the United States. Beginning in 2008 and continuing through much of 2009 market conditions were extremely slack – falling demand, reduced trade flows in all commodities, declines in prices. These conditions (which had nothing to do with the COOL measures) worked their way through the various livestock and meat markets and had a differential effect on the demand for Canadian livestock.[89]

40. In addition, Canada now seems willing to admit that any compliance costs associated with the 2009 Final Rule, are not necessarily absorbed by the Canadian livestock producer alone.[90] Rather, as Canada admits, these costs can be distributed along the supply chain in different ways depending on the prevailing market conditions. This directly undermines Dr. Sumner's models, and Canada's fundamental arguments that U.S. slaughter houses severely discount Canadian livestock, all the costs of complying with the 2009 Final Rule are passed back to the Canadian livestock producer, and U.S. slaughter houses are forced to stop accepting mixed origin livestock due to the high cost of doing so.

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.

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[86] Exhibit CDA-211, p.2.

[87] Canada's Second Responses, para. 74, Question 111.

[88] Exhibit CDA-212; Exhibit CDA-213l Exhibit CDA-214; Exhibit CDA-215; Exhibit CDA-216; Exhibit CDA-217; Exhibit CDA-218.

[89] U.S. SWS, para. 95.

[90] Canada's Opening Oral Statement at the Second Substantive Meeting of the Panel ("Canada's Second Opening Statement"), para. 27.

41. The United States agrees with Canada that "violations of both *TBT Article 2.1* or *GATT* Article III:4 do not depend on a finding that there have been negative trade effects."[91] However, because both Canada and Mexico raised trade effects in an attempt to demonstrate that the 2009 Final Rule breaches the national treatment provisions, the United States has explained that with the 2009 Final Rule, as with any technical regulation, there is a period of adjustment in the marketplace.[92] And in this instance, an examination of broad trade effects shows that after a short period of adjustment that coincided with a severe economic recession, Canadian and Mexican livestock exports are at high levels and the prices paid for their livestock have increased significantly.[93]

42. In addition, Mexico mis-characterizes the U.S. position in *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (WT/DS381) dispute. In that dispute, the challenged measures prohibit the voluntary labeling of tuna products dolphin safe if they contain tuna caught by intentionally chasing and encircling dolphins with purse seine nets, a fishing technique that is harmful to dolphins. Mexico claims that while the U.S. measures do not on their face accord less favorable treatment to imported tuna products, they use the manner in which tuna is caught to do so in fact. Mexico seeks to dismiss evidence showing that at the time the measure was adopted that approximately the same number of U.S. and Mexican vessels fished in the same ocean using the same technique of chasing and encircling dolphins. The United States argues that there is no basis to dismiss such evidence; such evidence is relevant to the question of whether, in basing eligibility to label tuna product dolphin safe on whether they contain tuna caught by chasing and encircling dolphins, the measures in fact base eligibility to label tuna products dolphin safe on the product's origin. In any *de facto* case, it is the facts that must be examine to determine whether a measure in fact affords imports less favorable treatment than like domestic products; there is no basis to *a priori* dismiss certain facts owing to whether they stem from the time the measure was adopted or some time later. When Mexico first challenged the U.S. measures in a 1991 GATT dispute it, for example, it relied on facts stemming from the time the measures were adopted; it is not clear why, if those facts were relevant to showing whether the U.S. measures (which were the same in the key respect then as now) afforded imported products less favorable treatment in 1991, they would not also be relevant today.

Q114. (Canada) Does Canada agree with Mexico that, in order to establish a claim under Article 2.1 and Article III:4, it is sufficient for a complainant to demonstrate the modification by a measure of the conditions of competition?

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[91] Canada's Second Responses, para. 77, Question 113. On the other hand, the United States does not agree with Canada that "All that is necessary is a finding that the market place has changed so that less favourable treatment is afforded to imported products." Rather, as the United States explained in its response to Question 104 above, a finding of less favorable treatment requires that there is different treatment accorded to domestic products and imported like products, and that the different treatment is less favorable to imported products based on origin.

[92] U.S. Second Answers, para. 63, Question 113.

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

If so, are factors relating to "trade effects" such as price and trade volumes irrelevant to the assessment of "conditions of competition"?

43. The United States does not agree with Canada or Mexico that it is sufficient for a complainant to show that a measure modifies the conditions of competition in order to establish a claim under TBT Article 2.1 and GATT Article III:4.[94] While a modification in the conditions of competition is a relevant inquiry in any national treatment analysis, but it is not and cannot not be the only question before the Panel in determining whether a measure breaches TBT Article 2.1 or GATT Article III:4.

44. The reason for this is that any technical regulation will have effects in the marketplace, and in most cases, these market effects will not be distributed equally among all market participants.[95] Some market participants may be impacted more than others, and as a result, simply looking at whether the conditions of competition have been somehow modified does not truly look at the question of whether a measure itself breaches the national treatment provisions, provisions whose "broad fundamental purpose is to avoid protectionism in the application of internal tax and regulatory measures."[96]

45. As the United States discussed in its comments on Question 104, the appropriate legal inquiry under TBT Article 2.1 and GATT Article III:4 should focus on the text of these provisions and consider whether the treatment a measure accords imported products is less favorable than the treatment it accords like domestic products. This analysis necessarily involves determining both what treatment the measure accords and whether the basis for that treatment is origin. If the measure accords like products different treatment based on origin, such treatment

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[94] *E.g.*, Canada's Second Responses, para. 79, Question 114. Canada and Mexico over-simplify the analysis of the Appellate Body and of WTO panels that have examined this issue and over-look the fact that nearly all of the disputes they have cited in which a WTO panel or Appellate Body found a GATT Article III:4 violation, there was distinct treatment between imports and domestic products as well as less favorable treatment: *Brazil – Tyres (Panel)* (import ban); *Canada – Autos (Panel)* (domestic content requirement); *Canada – Wheat Exports (Panel)* (measures on the receipt of foreign grain and mixing and transport of domestic grain); *China – Auto Parts (AB)* (additional administrative procedures for users of imports); *India – Autos* (domestic content requirement); *Korea – Beef (AB)* (retail system required different marketing channels for product based on origin); *Turkey – Rice Licensing* (domestic purchase requirement); *US – FSC (Art. 21.5) (Panel)* (domestic value requirement); *US – Gasoline (Panel)* (different compliance standards for imported and domestic products); *EEC – Parts and Components* (requirements to limit the use of imports); *EEC – Oilseeds* (domestic content subsidy); *Italian Agricultural Machinery* (domestic purchase subsidy); *US – Section 337* (additional enforcement regime for infringing imports). On the other hand, no national treatment violation was found in the two disputes cited by Canada and Mexico in which there was no different treatment: *Dominican Republic – Cigarettes (AB)* and *Japan – Film*. Thus, the fact that the COOL measures are origin-neutral and do not treat imported and domestic like products differently argues strongly in favor of the fact that they do not provide less favorable treatment to Canadian and Mexican livestock.

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

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

may be less favorable or it may not be. This treatment must be examined to determine whether it modifies the conditions of competition to the detriment of imported products.[97]

46. On the other hand, the United States does agree with Canada that to establish a claim under TBT Article 2.1 or GATT Article III:4, "WTO Members are not required to show that there have been negative trade effects on imported products, such as lower import volumes or reduced prices for imported products."[98] A measure cannot be found to modify the conditions of competition merely because a measure's adoption may ultimately lead to detrimental effects on imported products in the market or because it happens to impose a higher cost on some imports than some domestic like products due to external factors, especially when it does not treat domestic and imported like products differently. Putting this aside, the United States introduced effects-based evidence in response to the flawed effects-based arguments made by Canada and Mexico. And as this evidence demonstrates, Canadian and Mexican livestock exports are at high levels and their products are receiving high prices in the market place.[99]

Q115. (Mexico) Please confirm whether Mexico considers econometric evidence unnecessary for assessing a claim under Article 2.1 and Article III:4.

47. The United States disagrees with Mexico's claim that it has presented "direct evidence of the change in conditions of competition."[100] Rather, as with other evidence that Canada and Mexico have presented throughout this dispute, Mexico's evidence of the actions of individual U.S. market participants is merely effects-based evidence that does not prove its claims under TBT Article 2.1 or GATT Article III:4. Further, the broad economic data that the United States submitted shows that to the extent that private market actors are making the independent decision to respond to the COOL measures by buying less Canadian and Mexican livestock, this is occurring quite infrequently.

Q119. (Canada) Please explain, by breaking down the elements comprising the costs, how the compliance costs relating to the COOL requirements in each step of the production process, as referred to by Canada in its first written submission (paras. 95, 97, 101, 105) have been calculated. Please also explain whether there is any overlapping cost element among the compliance costs that incur throughout the meat production process. Please also provide specific examples of evidence demonstrating such costs.

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[97] *Korea – Beef (AB)*, para. 135.

[98] Canada's Second Responses, para. 80, Question 114.

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

[100] Mexico's Second Responses, para. 70, Question 115.

48. The United States has explained the flaws with the Informa Report and the implausibility of its inflated cost estimates and will not repeat them again here.[101] However, it is important to note that Informa's estimates remain impossible to verify for accuracy because Informa has not released any information about its cost data.

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.

(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.

49. As a threshold matter, it is important to emphasize that market participants are not required to segregate to comply with the 2009 Final Rule.[102] Putting this aside, Canada and Mexico both provide misleading answers to the Panel in an attempt to demonstrate that it is somehow more difficult for the industry to segregate livestock for country of origin labeling purposes (if they choose to comply in this manner) than for any other purpose.

50. Contrary to Mexico's response, segregation based on origin and place of birth of the animal did exist prior to the adoption of any of the COOL measures.[103] In particular, feed lots, slaughter houses, and other facilities have been long segregating based on origin to meet the import requirements of other countries and to respond to BSE concerns.[104]

51. Contrary to Canada's response, there is no reason that segregation under a mandatory program is inherently more costly than segregation under a voluntary program and there is no reason why tracking pursuant to a federal regulation would be any different than tracking pursuant to a state law.[105] In all cases in which a feed lot or slaughter house were to choose to segregate, this involves keeping products separate from each other. And if a slaughter house were to choose to segregate in response to the 2009 Final Rule, there is no reason why this would be any more or less difficult than the decision to segregate in order to participate in U.S. export

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[101] U.S. FWS, para. 181-185; U.S. SWS, para. 89-90.

[102] U.S. FWS, para.152-159 ; U.S. SWS, para. 42-43.

[103] Mexico's Second Responses, para. 75, Question 120(c).

[104] U.S. FWS, para. 169; U.S. SWS, para. 59.

[105] Canada's Second Responses, para. 88, Question 120(c).

programs, U.S. premium programs, or to respond to BSE concerns related to Canadian cattle imported for immediate slaughter.

Q121. (Canada and Mexico) Please provide evidence clearly demonstrating the incidences where US feedlots and/or slaughterhouses have declined to extend contracts with Canadian and Mexican livestock exporters that had been entered into prior to the implementation of the COOL requirements. For example, do the complainants have copies of contracts entered into between livestock exporters and US industry participants prior to the COOL requirements, which have not been renewed since the adoption or implementation of the COOL requirements.

Q122. (Canada and Mexico) Please provide evidence clearly demonstrating instances where US feedlots or slaughterhouses have changed the contractual terms, including restrictions or price discounts, in respect of imported livestock as a result of the COOL requirements

52. As a threshold matter, the evidence that Canada and Mexico have presented in their responses is evidence of trade effects that are not directly relevant to the question of whether the 2009 Final Rule modified the conditions of competition to the detriment of Canadian and Mexican livestock products. It is also important to note that much of the evidence complainants have presented is not directly tied to the 2009 Final Rule or other COOL instruments in any way; thus, it is not clear that any of these decisions of U.S. private market actors to modify their contracts with Canadian and Mexican suppliers is related to any of the COOL measures. Rather, it is quite plausible that these actions took place as a result of a severe economic recession in the United States that significantly reduced the need for imports. To the extent that the Panel considers trade effects of this nature to even be relevant to the legal inquiry, the broad trade data showing that both Canadian and Mexican livestock exports and prices are at high levels directly undermines Canada and Mexico's argument that these types of actions are occurring on a widespread basis.

53. In addition to these broad points about Canada and Mexico's approach to these questions, the United States would also like to make a few points with regard to the exhibits they cite:

- Exhibits CDA-55, CDA-56, CDA-57, CDA-66, CDA-88, CDA-107, and CDA-109, among others, largely refer to events that took place well in advance of the adoption of the 2009 Final Rule.

- Exhibit CDA-108, as well as most of the exhibits mentioned in the previous bullet, do not tie any of the market effects they reference to the COOL measures; rather, these exhibits merely state what market conditions were before the date that the 2009 Final Rule was adopted and what they were after the 2009 Final Rule was adopted.

- The United States addressed the limited relevance of Exhibits CDA-67 and CDA-86 in its comments on Canada's response to Question 99.

Article 2.2

Q127. (Canada) In paragraph 69 of its second written submission, Canada argues that if the objective is to provide information to consumers, the objective must be defined with higher specificity. Please elaborate on the legal basis to conclude that an objective not specifically listed in a treaty provision should be defined with a higher degree of specificity than the listed ones.

54. There is nothing in the TBT Agreement to support Canada's argument that an objective not listed in TBT Article 2.2 must be defined with a higher degree of specificity than listed ones or that the legitimacy of an objective turns on the specificity with which it is defined.[106]

55. Regardless of whether the objective that the responding Member asserts is one of the enumerated objectives or not, the relevant inquiry is the same. In both instances, a TBT Article 2.2 analysis involves confirming that the measure's objective is what the responding Member asserts it is, including that the objective is not protectionism or to use Canada's words to "limit[] competition from foreign imports,"[107] and determining whether the Member's measure is "more trade restrictive than necessary" to fulfill the objective. The Panel's analysis may differ slightly depending on how the responding Member decides to define its objective, but nothing in the TBT Agreement requires the Member to define its objective in either a narrow or broad fashion.

56. Canada's arguments to the contrary are not persuasive.[108] First, the principle of *ejusdem generis* is not a customary rule of interpretation of public international law, which are reflected in the Vienna Convention. Putting that aside, the United States does not understand how Canada's reliance on this principle supports its conclusion – requiring a determination of whether an unlisted objective is of the same "type" as an explicitly listed objective has nothing to do with the level of specificity at which that unlisted objective must be defined.[109] Second, assuming *arguendo* that the "explicit listing of certain objectives in Article 2.2 in the context of the TBT Agreement as a whole shows the omission of unlisted objectives requires greater justification,"[110] this too does not relate to the level of specificity at which those unlisted objectives must be defined, but only whether the objective is legitimate. Third, the United States does not understand how the need to ascertain the objective of a measure at a sufficient level of detail is

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[106] Canada's Second Written Submission ("Canada's SWS"), para. 69.

[107] Canada's Second Responses, para. 98, Question 127. Any consideration of whether an objective is legitimate must respect Members' right to decide which policy objectives to pursue.

[108] Canada's Second Responses, para. 97-100, Question 127.

[109] Canada's Second Responses, para. 98, Question 127.

[110] Canada's Second Responses, para. 99, Question 127.

analogous to the need to identify the objective of the measure in the first place.[111] The latter is explicitly required in order to demonstrate that a measure has a legitimate objective while the former is not included anywhere in the WTO Agreements.

Q128. (Canada and Mexico) For the purposes of interpreting your national legislation in your domestic courts, what is the legal value, if any, of statements made by Members of your country's Parliament for the purposes of interpreting national legislation?

57. The United States does not understand how the interpretation of Canadian and Mexican courts is relevant to the interpretation of any of the U.S. COOL measures in U.S. law or in the WTO. It is the domestic legal system of the Member involved that is relevant. Under U.S. law, the text of the measure and to a lesser extent, the Committee Reports, are where courts look to determine the objective or intent of a measure.[112] Likewise, the Appellate Body has indicated that panels should focus on the text, design, architecture, and revealing structure, and should not place an over-reliance on legislative history.[113] These are the principles that should be followed in confirming that the objectives of the COOL measures are what the United States asserts they are – providing consumer information about origin and preventing consumer confusion.

Q135. (Canada and Mexico) Please comment on the European Union's statement in its response to Panel question No. 19 (paragraph 67) that "the complaining parties have not referred to any provision of the TBT Agreement that requires defending Members to assert that their consumers want a particular technical regulation and to adduce evidence to that effect. Governments adopt technical regulations for a variety of reasons, and not just because consumers want them...Just because consumers might not want it does not mean that it is inconsistent with the TBT Agreement."

58. The United States agrees with Mexico that "the TBT Agreement does not require defending Members to assert that their consumers want a particular technical regulation and that they adduce evidence to that effect."[114]

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[111] Canada's Second Responses, para. 100, Question 127.

[112] Exhibit US-60.

[113] *Chile – Alcohol (AB)*, para. 62; *See also EC – Biotech*, para. 7.2558 (noting that "[...]our approach is consistent with the view expressed by the Appellate Body that in identifying the purposes of a measure, panels need not seek to determine the subjective intent of the legislators or regulators who adopted the measure."); *US – Textiles Rules of Origin*, para. 6.93 (indicating that the legislative history, statements by legislators, and statements from outside parties advocating for the measure were insufficient to establish the measure's objective).

[114] Mexico's Second Responses, para. 86, Question 135.

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?

59. The WTO Agreements do not impose a burden on the responding Member to provide evidence that consumers generally perceive a quality difference between different types of products.[115] The reason that consumers may want information is not relevant as long as the objective of providing consumers with information about country of origin is a legitimate objective within the meaning of the TBT Agreement, which the United States has clearly demonstrated is the case.[116]

60. The United States would also like to point out a factual inaccuracy in Mexico's response to this question. It is simply not accurate to state that "the COOL Measure was first introduced by the US producers and not by the consumers."[117] Only Members of Congress have the ability to introduce legislation under the U.S. system of governance. However, the U.S. decision to introduce the COOL statute and adopt the 2009 Final Rule was in large part driven by U.S. consumers and consumer organizations.[118]

Q137. (Canada) In paragraph 66(c) of its oral statement at the second meeting, Canada argues that the survey provided by the United States in Exhibit US-138 is flawed because it "asks consumers for an opinion based on a completely unrealistic scenario: the labelling of meat obtained from a Mexican "cow" that spent two months in the United States".

(a) Please explain why this is a completely unrealistic scenario.

61. Canada's argument that the Consumers Union survey concerns a completely unrealistic scenario is untrue, and more importantly, misses the point.[119] Canada's assertion is untrue because the United States does in fact import some fed cattle from Mexico (albeit at a lower rate than it imports feeder cattle).[120] As such, there is meat sold in the United States that meets the

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[115] Canada's Second Responses, para. 105, Question 136.

[116] U.S. FWS, para. 226-233; U.S. SWS, para. 106-117.

[117] Mexico's Second Responses, para. 89, Question 136.

[118] U.S. SWS, para. 130-136.

[119] Canada's Second Responses, para. 106, Question 137(a).

[120] Exhibit US-104.

exact scenario described in the Consumers Union survey. From a more fundamental standpoint, Canada fails to understand that the survey's importance is not based on how many times the particular scenario it describes occurs, but that U.S. consumers believe that meat derived from an animal who has processing steps occur in more than one country should include more information on the label than the place of slaughter. The survey confirms that U.S. consumers believe that its is more accurate to list all of the countries where processing steps occurred than only where the source animal was slaughtered. This result applies equally to an animal that was born in Canada and exported to the United States two months before being slaughtered, a scenario that occurs very frequently,[121] as it does to an animal that was born in Mexico and exported to the United States two months before being slaughtered, a scenario that also occurs, if somewhat less frequently.

Q138. (Canada and Mexico) Setting aside the objective of providing consumer information or preventing consumer confusion in general, do the complainants consider that the COOL requirements help prevent the specific type of consumer confusion allegedly caused by the pre-COOL system as identified by the United States (i.e. USDA grade label without indication of the origin of meat and the "Product of U.S.A. label based on substantial transformation)?

62. Contrary to Canada's and Mexico's responses,[122] the 2009 Final Rule will help reduce the consumer confusion that previously resulted from USDA's grade labeling and FSIS's "Product of the USA" program.[123] In fact, as a result of the 2009 Final Rule, U.S. consumers will no longer mistakenly believe that meat derived from an animal that had processing steps occur in more than one country was born, raised, and slaughtered in the United States as a result of that meat having only a USDA grade label and no other designation. In addition, consumers will not be confused by meat products that are labeled "Product of the USA" despite the fact that they had processing steps occur in other countries. These types of confusion were previously expressed by numerous U.S. consumers.[124]

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[121] Exhibit CDA-223.

[122] Canada's Second Responses, para. 109, Question 138; Mexico's Second Responses, para. 91, Question 138.

[123] U.S. SWS, para. 151.

[124] Contrary to Canada's claim that "the evidence cited by the United States relating to alleged consumer confusion is from Senator Johnson and a letter from one individual whose principal concern was health," (Canada's Second Responses, para. 108, Question 138), the United States submitted numerous pieces of evidence regarding consumer confusion. With regard to USDA grade labeling, the United States cited to the two exhibits Canada mentioned and a letter from the Consumers Federation of America that states "under other USDA regulations, consumers could be mislead into thinking some imported meat is imported meat is produced in this country. This is because imported meat can also receive a USDA inspection seal and grade stamp under the voluntary meat grading program." (Exhibit US-84). Additionally, there was also consumer confusion related to FSIS's labeling program, which lead to an entire FSIS rule making that was eventually subsumed by the COOL rule making. The United States submitted numerous exhibits related to this rule making and potential consumer confusion including Exhibit US-115 and Exhibit US-85,

63. While there may still be circumstances in which a consumer does not know with certainty the origin of the meat that he or she consumes due to the commingling provisions, nothing in the WTO Agreements requires that a Member fulfill its legitimate objective without regard to costs. To the contrary, the TBT Agreement specifically permits a Member to fulfill its objectives at the level it considers appropriate.[125] And in this instance, the level that the United States considered appropriate was the level at which it could provide as much information as possible while reducing compliance costs.[126] The commingling provisions requested by the complaining parties help ensure that the United States fulfills its objective at this level.

Q140. (Mexico) In paragraph 49 of its oral statement at the second meeting, Mexico argues that "[t]he COOL Measure...misleads consumers when labels other than the 'A' label are used." In paragraph 50, Mexico elaborates on this argument with regard to label B. Please elaborate on this point in the same way for labels C, D, and E.

64. Most of the scenarios Mexico refers to in its table do not occur on a regular basis in the market place.[127] Thus, even if some of the labels may theoretically apply to more than one situation, in practice it is not nearly as difficult as Mexico implies to discern what a particular label means.

65. For example, it is very rare to have an animal born in the United States and raised and slaughtered in Mexico (Scenario 1); to have an animal born in the United States, raised in Mexico, and slaughtered in the United States (Scenario 2); to have an animal born in the United States, raised in Mexico, and slaughtered in the United States (Scenario 5); or to have an animal born and raised in the United States and slaughtered in Mexico (Scenario 6). Rather, the most common scenarios are to have an animal born, raised and slaughtered in the United States (Category A); to have an animal born in either Canada and Mexico and raised and slaughtered in the United States (Category B); to have an animal born and raised in Canada or Mexico and slaughtered in the United States (Category C); or to have an animal born, raised, and slaughtered entirely in another country (Category D). Because these are the most common scenarios, the United States designed its labeling systems to correspond with them and thereby provide clear and consistent information to consumers. While it is theoretically possible that other scenarios, such as those described in Scenarios 1,2,5, and 6 could occur, in practice, this is almost never the case. Thus, Mexico attempts to make the labels established by the COOL measures much more difficult to understand than they actually are.

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among others.

[125] Preamble to the TBT Agreement.

[126] U.S. Second Answers, para. 98, Question 142(b).

[127] Mexico's Second Responses, para. 92, Table, Question 140.

Q143. (Canada and Mexico) Let's assume for a moment that the United States' stated objectives are stated as declared. In such a case, if the flexibilities currently existing in the COOL requirements, including commingling provisions and exceptions, were removed, would the COOL requirements be then considered as fulfilling, or at least better fulfilling, the stated objectives than the current COOL requirements? If not, please explain why not and what kind of measures would then achieve the objectives of informing consumers of the places of birth, raising and slaughter.

66. As a threshold point, it is important to note that the COOL measures ensure that consumers in the United States have significantly more information about the origin of the meat products they buy at the retail level than they did before these measures were enacted.[128] Most of the Category A meat sold in the United States will be labeled as Category A, and consumers who buy Category B and C meat will know all of the countries where this meat could have originated from. Further, consumers who purchase Category D meat will know where the source animal was slaughtered. At the same time, consumers will not be misled into believing that the meat they purchase is derived from an animal that was born, raised, and slaughtered in the United States when that was not the case. In this sense, the COOL measures fulfill the legitimate objectives of the United States.

67. While it is certainly possible that the United States could have designed the COOL measures to provide even more information to consumers, there is nothing in the TBT Agreement that requires Members to fulfill their legitimate objectives to the maximum extent possible without regard to cost. Rather, Members are permitted to fulfill their objectives at the level they consider appropriate. This is consistent with good regulatory practice, which encourages Members to take other issues into consideration when they design their measures, such as cost on various market participants and the views of other interested parties.[129]

68. In this instance, the United States designed the 2009 Final Rule such that it provides as much consumer information as possible and reduces consumer confusion as much as possible, while also striving to make sure that compliance costs were not prohibitive, and taking into account the views of interested parties. These actions to balance the objectives of the United States with cost considerations and the expressed views of the complaining parties should not be used against the United States to argue that its measures do not fulfill their objectives. If these arguments were to be accepted, the incentive for Members to follow good regulatory practice or to take into account the view of other Members during the design of their measures would be significantly diminished.

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[128] U.S. SWS, para. 147-151.

[129] U.S. SWS, para. 101.

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 this statement.

69. The option that the EU describes mirrors the 2008 Interim Rule. The fact that Canada concedes that this is a less trade restrictive alternative measure[130] (Mexico believes that it "may be a less trade restrictive option"[131]) and concedes that it would be consistent with TBT Article 2.1 "without additional interference,"[132] argues in favor of examining the COOL statute and 2008 Interim Rule separately from the 2009 Final Rule. Indeed, if it is possible to implement the COOL statute in a WTO-consistent manner, then the COOL statute cannot be WTO-inconsistent on its face. As such, a finding by the Panel regarding the WTO-consistency of the 2009 Final Rule and the Vilsack Letter need not include either the 2008 Interim Rule or the COOL statute.

70. Putting this aside, the United States explained in its comments on this question why it does not consider the 2008 Interim Rule, or a slightly modified version of this rule, to fulfill its legitimate objectives.[133] In addition, the United States has explained throughout this dispute why both the 2009 Final Rule and Vilsack Letter are consistent with its WTO obligations.

Q145. (Canada and Mexico) Assuming that a trace back system can fulfil the United States' stated objectives at the same level as the COOL requirements, is it less trade restrictive than the COOL requirements? If so, please explain how it is less trade restrictive than the COOL requirements.

71. The United States respectfully refers the Panel to its comments on Canada's and Mexico's responses to Question 105, where the United States explained in detail why a trace back system is more trade restrictive than the 2009 Final Rule.

72. With regard to Canada's and Mexico's specific responses to this question, Canada seems to misunderstand the meaning of an origin-neutral measure.[134] As the United States has explained, the 2009 Final Rule is origin-neutral because it does not discriminate on its face and

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[130] Canada's Second Responses, para. 115, Question 144.

[131] Mexico's Second Responses, para. 98, Question 144.

[132] Canada's Second Responses, para. 116, Question 144.

[133] U.S. Second Answers, para. 101, Question 144.

[134] Canada's Second Responses, para. 118, Question 145. Mexico, on the other hand, routinely acknowledges that its claim is a *de facto* one. (*E.g.*, Mexico's Opening Oral Statement at the First Substantive Meeting of the Panel, para. 22-24)

applies equally to imported and domestic like products.[135] It requires all products to be labeled at the retail level regardless of where these products originate from and it imposes the exact same record keeping requirements on producers regardless of where they are located.

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

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

73. Canada's suggestion that the United States adopt a hybrid substantial transformation/voluntary system is no different than Canada's suggestion that the United States adopted a system based on substantial transformation.[136] Combining two alternatives that do not fulfill the U.S. legitimate objectives does not produce an alternative that does.

74. In this context, Canada's claim that "those who want mandatory labeling for imports would get it, and any consumer who wants more information could also obtain it by using available voluntary programs that are being actively followed,"[137] does not withstand scrutiny. First, Canada does not explain which available voluntary programs that provide information on all the countries in which an animal was born, raised, and slaughtered are being actively followed, and the United States is not aware of any. Second, it is the retailer's choice whether to use existing voluntary programs, not the consumer's choice; therefore, it is not clear how the consumer could use the available voluntary programs in the first place. They only receive additional information if retailers and producers decide to participate in these programs, which to date, they have not.

Q148. (Mexico) Please comment on the arguments in paragraph 34 of the United States' oral statement at the second meeting that the Hayes/Meyer report submitted in Mexico's second written submission (Exhibit MEX-88) is "outdated".

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[135] U.S. FWS, para. 142-143. At an earlier point in this dispute, both complaining parties conceded that the COOL measures were origin-neutral. Canada stated that the COOL measure "does not explicitly require that imported commodities be treated less favorably than domestic commodities." (Canada's FWS, para. 89) Likewise, Mexico conceded that "the COOL measure by itself does not *de jure* distinguish between domestic and imported like products nor do the measures *de jure* distinguish between like Mexican and U.S. feeder cattle." (Mexico's FWS, para. 218).

[136] U.S. Second Answers, para. 104, Question 147(b).

[137] Canada's Second Responses, para. 122, Question 147(b). *See also* Canada's Second Responses, para. 54(b), Question 105.

75. As the United States has explained, the Hayes/Meyer report discusses the 2003 Proposed Rule, which is no longer in effect, is significantly different from the 2009 Final Rule, and is not an instrument at issue in this dispute.[138] As such, this outdated report has little relevance to this dispute.

76. In addition, while the United States disputes Mexico's erroneous claim that the 2009 Final Rule contains a compliance and audit mechanism,[139] the United States agrees with Mexico that there "is a less stringent alternative to the trace back mechanism as is the mechanism implemented by the COOL measure."[140] Indeed, as the United States has explained, the mechanism implemented by the 2009 Final Rule is less stringent than trace back, which would impose significant costs on both foreign and domestic industry.

77. Finally, the United States does not understand how the Hayes/Meyer report could possibly provide "*prima facie* evidence that a trace back system is technically and economically feasible in the United States..."[141] Whether or not the United States has the ability and resources necessary to implement a system primarily used for animal health reasons and then manipulate this system such that it could also be used for country of origin labeling purposes is not addressed by the Hayes/Meyer report.

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?

78. Canada's response misconstrues the text of the TBT Agreement and attempts to introduce a proportionality test into the consideration of alternative measures under TBT Article 2.2. When considering whether the complaining party has provided a reasonably available alternative, a Panel need not and should not weigh the contributions of the challenged measure and the alternative measure to the fulfillment of the legitimate objective against its level of trade restrictiveness, in light of the importance of the interests or values at stake.[142] The Panel need only determine whether the proposed alternative measure also fulfills the objective at the level

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[138] U.S. Opening Oral Statement at the Second Substantive Meeting of the Panel ("U.S. Second Opening Statement"), para. 34.

[139] USDA enforces the requirements of the 2009 Final Rule through a random surveillance system conducted to determine if suppliers possess records necessary to substantiate country of origin claims, and can make available records maintained in the normal course of business to do so.

[140] Mexico's Second Responses, para. 111, Question 148.

[141] Mexico's Second Responses, para. 113, Question 148.

[142] Canada's Second Responses, para. 126, Question 149.

the responding Member considers appropriate and does so in a manner that is "significantly" less trade restrictive.[143]

79. Canada's concern that any other interpretation would be inconsistent with the "object and purpose of the TBT Agreement, and Article 2.2 in particular, to allow WTO Members to institute trade-restrictive technical regulations as long as the requirements of the Agreement are otherwise met"[144] is completely ameliorated by an appropriate interpretation of TBT Article 2.2. In particular, ensuring that a suggested alternative measure will be accepted only if it is "significantly less trade restrictive" and permitting Members to fulfill their objectives at the level they consider appropriate, will avoid a situation where a marginally less trade restrictive measure that does not fulfill the Member's objective at the level the Member considers appropriate could be accepted as a reasonably available alternative.

Q150. (Canada and Mexico) Should the fact that Article XX of the GATT 1994 is a provision providing for general exceptions to the obligations under the GATT 1994 affect the question whether the legal interpretation undertaken under Article XX is relevant for Article 2.2 of the TBT Agreement?

80. In its response to this question, Canada again describes an incorrect legal approach to TBT Article 2.2. Article 2.2 does not require a "weighing and balancing of the importance of the objective of a measure, the degree that a measure contributes to achieving that objective, and the trade-restrictiveness of the measure,"[145] and indeed, this is the first time in this dispute that Canada has advocated such an approach. Instead of weighing and balancing these matters, a Panel should confirm whether or not a measure's objective is what the responding party asserts that it is[146] and determine whether the measure fulfills its legitimate objective. If the Panel decides these issues in the affirmative, it should then consider whether the complaining Members have presented any reasonably available alternatives. This inquiry does not involve a weighing and balancing either. In this regard, the United States agrees with Mexico that the differences between the context provided by TBT Article 2.2 and GATT Article XX must be considered.[147]

Articles 12.1 and 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*

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[143] U.S. SWS, para. 103-105.

[144] Canada's Second Responses, para. 126, Question 149.

[145] Canada's Second Responses, para. 130, Question 150.

[146] Any consideration of whether an objective is legitimate must respect Members' right to decide which policy objectives to pursue.

[147] Mexico's Second Responses, para. 119, Question 150.

Products **with regard to Article 10.1 of the SPS Agreement? (WT/DS291-292-293/R, paras. 7.1605-7.1626.)**

81. Contrary to Mexico's argument, TBT Article 12.3 and SPS Article 10.1 share significant similarities that argue in favor of interpreting them in the same way. The fundamental thrust of both provisions is that they require Members, in the preparation and application of the type of measure covered by the relevant agreement, to take into account the special needs of developing country Members. The difference between the provisions is that TBT Article 12.3 elaborates somewhat on what it means to take these special needs into account, clarifying that it requires taking account of these needs "with a view to ensuring [that the applicable measures] do not create unnecessary obstacles to export from developing country Members."[148] The absence of this clarifying language in SPS Article 10.1 does not mean that Members should not do this, but simply that the drafters did not decide to provide as much clarity on the topic.

82. The United States also disagrees with Mexico that the Panel should ignore the relevant analysis done by the *EC – Biotech* panel on SPS Article 10.1, a very similar provision, and instead rely on the analysis done by the *EC – Large Civil Aircraft* panel in a very different context. However, even if the Panel in this dispute adopts an interpretation based on the *EC – Large Civil Aircraft* report, the United States has met its burden. According to that panel, "to take something into account means to take something into reckoning or consideration; to take something on notice."[149] The United States clearly took Mexico's comments into consideration, or on notice, as evidenced by the extensive evidence that the United States has submitted into the record to show that the United States received comments from Mexico, responded to these comments urging Mexico to continue to share its views, and even adopted some of the suggestions that Mexico made during the rule making process.[150] Thus, regardless of the interpretation that this Panel takes, the United States did not breach TBT Article 12.3.

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?

83. In its response to this question, Mexico tries to have it both ways.[151] On one hand, Mexico urges the Panel to characterize the measures at issue as a single "COOL measure." On the other hand, Mexico argues that the United States should have provided Mexico with separate opportunities to comment on each of the separate instruments that make up the single "COOL measure." The United States has already explained in detail why the Panel should examine each of the COOL instruments separately rather than as a single "COOL measure" due to the

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[148] TBT Article 12.3.

[149] *EC – Large Civil Aircraft*, para. 7.969.

[150] U.S. SWS, para. 183-184; Exhibit US-19; Exhibit US-127; Exhibit US-141; Exhibit US-142.

[151] Mexico's Second Responses, para. 130, Question 153.

significant substantive and legal differences between these instruments. Regardless of whether the Panel agrees, Mexico has failed to establish its claim under TBT Article 12.3.

84. Under Mexico's proposed approach that there is only a single "COOL measure" at issue, there can be no dispute over whether Mexico had the opportunity to comment on this measure. After all, the United States presented extensive evidence of the opportunity provided to Mexico to formally and informally comment on the rule during its development, evidence of the comments that Mexico actually did submit, and evidence of the U.S. response to these comments.[152] Mexico attempts to argue that these numerous opportunities were somehow not "complete and real,"[153] but this is not the case. After all, Mexico had the opportunity to comment very early in the rule making process such that it comments could, and in fact, did shape the 2009 Final Rule.

85. However, since the COOL statute and 2009 Final Rule are separate instruments, it is also indisputable that Mexico had the opportunity to comment on each of these instruments. First, Mexico's claim that it "did not have the opportunity to comment on the Farm Bill 2002" is entirely erroneous.[154] Mexico and all other WTO Members have ample opportunity to comment on legislation as it is being developed by the U.S. Congress and often do provide comments that are taken into consideration. For both the 2002 and 2008 Farm Bill, the situation was no different. Second, the provisions contained in the 2002 Farm Bill were modified in significant ways by the 2008 Farm Bill. Thus, the relevant piece of legislation is the 2008 Farm Bill, which was enacted long after Mexico had begun commenting on the U.S. consideration of country of origin labeling requirements.

86. Finally, it is important to note that the United States as the responding party does not bear the burden of providing "evidence demonstrating that it gave Mexico an opportunity to comment during the creation of the Farm Bill 2002."[155] It is the responsibility of Mexico as the complaining party to establish a *prima facie* case by demonstrating that it did not have the opportunity to comment, and in this instance, it failed to do so.[156]

Q154. (Mexico) What specific "special development, financial and trade needs" did Mexico convey to the United States during the development of the COOL requirements? What specific "special development, financial and trade needs" that Mexico claims the United States has not taken account of in developing the COOL

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[152] U.S. SWS, para. 183-184; Exhibit US-19; Exhibit US-127; Exhibit US-141; Exhibit US-142.

[153] Mexico's Second Responses, para. 130, Question 153.

[154] Mexico's Second Responses, para. 131, Question 153.

[155] Mexico's Second Responses, para. 130, Question 153.

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

requirements? How do two sets of needs relate to each other in the context of Article 12.3 of the TBT Agreement?

87. Mexico, as the complaining party, bears the burden of establishing its *prima facie* case with regard to its claim that the United States breached Article 12.3.[157] Among other issues, this requires explaining what exactly its "special development, financial, and trade needs" actually are. If the United States is not aware of Mexico's "special development, financial, and trade needs," it is unclear how it could possibly take them into account. Since Mexico has never identified these needs despite being given ample opportunity to do so throughout this dispute, let alone communicating them to the United States, they have failed to establish a *prima facie* case under Article 12.3.

Q155. (Mexico) In the context of its Article 12.3 claim, Mexico does not seem to contest that Mexico had an opportunity to express its views during the development of the Final Rule 2009. Mexico, argues, however, that it did not have the same opportunity with regard to the Farm Bill 2002. How does Mexico reconcile such a separate treatment of the various instruments constituting the COOL requirements with its request that the Panel to look at a single COOL measure.

88. Mexico's position is internally inconsistent. Mexico cannot on the one hand argue that all of the COOL instruments are a single measure and on the other hand argue that the United States has an obligation to allow it to provide comments on each of the individual instruments that allegedly make up this single measure. Putting this aside, Mexico had ample opportunity to comment on both the COOL statute and all of the other COOL instruments.

GATT 1994

Article XXIII:1(b)

Q156. (Canada) Canada explains that the duty-free imports of hogs into the United States pre-date the WTO Agreement (and even the Canada-United States Free Trade Agreement, of 1988, and the NAFTA, of 1992). (Canada's second written submission, paragraph 114) Please specify the legal basis of such pre-1988 duty-free hog imports.

89. As the United States has noted, Canada and Mexico have failed to present "a detailed justification in support" of their complaint that the COOL measures nullify or impair benefits

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

accruing to them within the meaning of Article XIII:1(b) of the GATT 1994 as is required by Article 26.1(a) of the DSU.[158]

[158] U.S. Second Opening Statement, para. 60.

List of U.S. Exhibits

Exhibit US-156 National Bureau of Economic Research Press Release (Sep. 20, 2010)