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

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

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

Comments of the United States of America
on Responses of the Parties to the Questions Posed by the Panels

March 21, 2014

TABLE OF EXHIBITS

Exhibit	Description
US-75	FDA, "Food Labeling: Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments Notice of Proposed Rulemaking, Preliminary Regulatory Impact Analysis (March 2011) ("FDA RIA on Nutrition Labeling")
US-76	Sebastien Pouliot and Daniel Sumner, "Differential Impacts of Country of Origin Labeling: COOL Econometric Evidence from Cattle Markets," Structure and Performance of Agriculture and Agri-Products Industry Network (2012)
US-77	Richard Green, William Hahn, and David Rocke, "Standard Errors for Elasticities: A Comparison of Bootstrap and Asymptotic Standard Errors," Journal of Business & Economic Statistics, Vol. 5, No. 1 (Jan., 1987)
US-78	Revised Econometric Exhibit F (Exhibit US-62)
US-79	U.S. Response to Canada's and Mexico's Question A
US-80	Volumetric Assessment of Pork in Foodservice: 2013 Update, Technomic Inc. Project #14655 (May 2013)

TABLE OF REPORTS

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EC – Asbestos (AB)	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001
EC – Trademarks and Geographical Indications (Australia)	Panel Report, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, Complaint by Australia*, WT/DS290/R, adopted 20 April 2005
EEC – Oilseeds I (GATT)	GATT Panel Report, *European Economic Community – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, L/6627, adopted 25 January 1990, BISD 37S/86
Japan – Film	Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998
US – Clove Cigarettes (AB)	Appellate Body Report, United States – Measures Affecting the Production and Sale of Clove Cigarettes, WT/DS406/AB/R, adopted 24 April 2012
US – COOL (AB)	Appellate Body Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012
US – COOL (Panel)	Panel Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R / WT/DS386/R, adopted 23 July 2012, as modified by Appellate Body Reports WT/DS384/AB/R / WT/DS386/AB/R
US – Tuna II (Mexico) (AB)	Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012

Terms of reference

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

Factual questions

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

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

1. Neither complainant appears to disagree with the U.S. response to this question.[1]

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

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

2. Neither complainant provides any evidence of muscle cuts sold under the D Label from livestock that were born or raised in a country other than the country in which they were slaughtered.[2] Even aside from the fact that this is *not* relevant to complainants' Article 2.1

[1] *See* U.S. Responses to the Panels' Questions No. 3, paras. 7-9.

[2] *See* Canada's Responses to the Panels' Questions No. 5, para. 4; Mexico's Responses to the Panels' Questions, No. 7, para. 5.

claims,[3] complainants fail to prove that muscle cuts sold under the D Label are inaccurately labeled.

3. Canada in its answer comes back to the same assertion it has previously made that "[i]t is likely that some" beef exported to the United States was derived from animals born and raised in the United States. As is clear, Canada has *no evidence* that this actually happens, nor can Canada say whether any exported beef is actually sold as Label D meat by a retailer. We have already explained that any beef sold under a D Label from Canada would represent a truly miniscule percentage of COOL labeled muscle cuts, a point Canada does not contest.[4]

4. Canada also suggests, for the first time in this proceeding, that there is "a high likelihood of misinforming U.S. consumers" as to Canadian veal exported to the United States. Canada bases this argument on the claim that U.S. exports to Canada of calves intended for veal production constitutes somewhere between 10-18 percent to total annual Canadian veal production.[5] Again, Canada cannot substantiate that *even one piece* of veal exported to the United States was produced from an animal born or raised in the United States. And, of course, Canada can also not prove that *even one piece* of veal sold under the D Label was produced from an animal born or raised in the United States.

5. Further, and similar to the point above, if any veal sold under the "Product of Canada" label is produced from an animal born or raised in the United States, it would truly represent a very small percentage of muscle cuts sold with a COOL label. Overall, veal constituted only 0.48 percent of total U.S. beef consumption in 2013. Based on Canada's estimate (10 to 18 percent) of Canadian veal exports to the United States produced from U.S born calves,[6] Canada is claiming that a maximum of 284 tons of veal, representing 0.003 percent of U.S. beef consumption may be so labeled.[7] As has been discussed, the actual percentage of Canadian veal that is produced from a U.S. born animal and then sold at retail under a "Product of Canada" D Label could only be smaller still.

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[3] *See, e.g.*, U.S. Second Written 21.5 Submission, paras. 54, 124.

[4] *See* U.S. Second Written 21.5 Submission, para. 58; *see also* U.S. Responses to the Panels' Questions No. 5, para. 11. Canada appears to concede that there is no likelihood that pork sold under a "Product of Canada" label at retail would be produced from animal born or raised in the United States. *See* Canada's Responses to the Panels' Questions, No. 5, para. 7.

[5] Canada's Responses to the Panels' Questions No. 5, para. 5.

[6] Canada's Responses to the Panels' Questions No. 5, para. 5.

[7] Trade data is based on USDA World Agricultural Supply and Demand Estimates and USDA Global Agricultural Trade System online (Include HS codes 0201101010, 0202101010). Consumption Data is based USDA World Agricultural Supply and Demand Estimates.

6. Canada simply cannot establish a *prima facie* case of discrimination based on such hypothetical, *de minimis* amounts.[8]

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

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

7. Canada asserts that the C Label has the "potential" to mislead consumers where it is affixed to meat produced from "animals raised in a country other than Canada that spend a short time in Canada prior to export for slaughter to the United States."[9] Yet, Canada now concedes it has *no evidence* that any cattle imported for immediate slaughter from Canada were born or raised outside of Canada. Likewise, Mexico puts forward *no evidence*. Complainants thus fail to satisfy their burdens of proof in this regard.

8. Moreover, in response to Question 5, Canada concedes that it also has no evidence in regard to hogs.[10] The United States has fully responded to this unsupportable assertion of complainants previously.[11]

9. We would further note there remains a fundamental inconsistency between Canada's argument here and Canada's argument that the second alternative it proposes under Article 2.2 proves the amended COOL measure inconsistent with that article. Simply put, how is it that a measure is inconsistent with Article 2.1 because its labels have the "potential" to mislead (which, as explained above, they do not), yet an alternative measure can prove that same challenged measure inconsistent with Article 2.2 where the alternative provides less accurate information than the challenged measure does? Indeed, Canada claims that the second alternative only

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[8] *See* U.S. Second Written 21.5 Submission, para. 58. We would further point out, once again, the incoherence of Canada's argument here compared to where it argues that changing the information affixed to B and C meat, which accounts for approximately 30 percent of COOL labeled muscle cuts, affects such a "minimal" amount of meat, that such a change in information is worthless for the Article 2.1 analysis. *Id.* n.92; *see also* U.S. First Written 21.5 Submission, paras. 71-73. Again, Canada fails to provide any explanation for this incoherency in its argument.

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

[10] *See* Canada's Responses to the Panels' Questions No. 5, para. 7.

[11] *See* U.S. Second Written 21.5 Submission, paras. 30-36; U.S. Responses to the Panels' Questions No. 6, paras. 12-17.

provides "potential origin" information.[12] Canada simply has no explanation as to how it reconciles its inconsistent arguments.

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

10. Complainants again put forward *no evidence* of animals being exported twice in their short lifetimes (*e.g.*, born in the United States, exported to Canada as feeder cattle, then re-exported to the United States as either feeder or fed cattle, and slaughtered in the United States). As we noted in our previous response to Question 6 (regarding C animals), this is a highly improbable situation so it is no surprise that complainants have no evidence regarding volume.[13] The fact that in the years of bilateral trade in livestock at the volumes seen between the United States, Canada, and Mexico *one* isolated shipment involving Quebec may have occurred does not change this conclusion.

11. However, even if such an improbable scenario has occurred, and the resulting muscle cuts were sold with a COOL label, as we explained in response to Question 6, the labels would be accurate. Where the twice exported animal was imported for immediate slaughter, the label could read: "Born in U.S., raised in Canada, Slaughtered in U.S." *or* "Born and Raised in U.S., Raised in Canada, Slaughtered in U.S."[14] If the twice exported animal was imported into the United States as a feeder cattle, the label would read: "Born in U.S., Raised in Canada, Raised and Slaughtered in U.S."

12. As discussed in the 2013 Final Rule, it would not be permissible to drop the production step occurring in Canada in this scenario as this would give list the animal as inaccurately being of entirely U.S. origin (*i.e.*, "Born, Raised, and Slaughtered in U.S.").[15] Canada appears to attribute some nefarious intent behind this requirement,[16] but the requirements contained in the 2013 Final Rule merely mandated that the label be accurate. It is unclear why Canada would want such muscle cuts to be *inaccurately* labeled as "Born, Raised, and Slaughtered in the U.S."

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[12] *See* Canada's Responses to the Panels' Questions No. 52, paras. 113 ("Under Label E, if it were extended to muscle cuts from animals slaughtered in the United States, the information provided to U.S. consumers would go to *the potential origin* of the product as recorded in a 60-day product inventory.") (emphasis added).

[13] *See* U.S. Responses to the Panels' Questions No. 6, paras. 14-17.

[14] *See* U.S. Responses to the Panels' Questions No. 6, para. 14.

[15] 7 C.F.R. § 65.300(e) (Exh. US-2) ("If an animal is raised in the United States as well as another country (or multiple countries), the raising occurring in the other country (or countries) may be omitted from the origin designation except if the animal was imported for immediate slaughter as defined in § 65.180 *or where by doing so the muscle cut covered commodity would be designated as having a United States country of origin (e.g., ''Born in Country X, Raised and Slaughtered in the United States'' in lieu of ''Born and Raised in Country X, Raised in Country Y, Raised and Slaughtered in the United States''*) (emphasis added).

[16] *See* Canada's Responses to the Panels' Questions No. 7, para. 10 ("The impermissibility of omitting the raising occurring in a foreign country in this situation is attributable to the United States' concern that allowing for the omission would result in the muscle cut "having a United States country of origin.").

if, in fact, the animal was raised in Canada – unless there were some benefit to Canadian producers from obscuring Canada's contribution to the meat's origins.

13. But Canada's desire in this regard is perfectly consistent with its first alternative for its Article 2.2 claims, in which "all" muscle cuts sold at retail derived from animals slaughtered in the United States would be labeled as "Product of the U.S."[17] In fact, complainants consider that the amended COOL measure to be inconsistent with Article 2.2 because the United States prohibits mixed origin muscle cuts from being misleadingly labeled as "Product of the U.S."[18]

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

14. The data presented by the parties as to the age at which time feeder cattle are imported are roughly equivalent. It is not in dispute that Mexico's exports to the United States are lighter (and younger) than Canada's exports.[19] The United States sees no reason to dispute Mexico's statement that the average age of its feeder cattle exports is 6-7 months.

15. Similarly, the United States does see a material difference between the U.S. and Canadian responses. The United States noted that animals reach slaughter weight, on average, somewhere between 18 and 22 months of age and that the average age of exports from Canada is approximately 12 months.[20] Canada states that "the average lifespan for slaughter-weight cattle of 22 months" and concludes that "most Canadian feeder cattle that are exported to the United States spend a minimum of approximately nine months, and probably more than a year, in Canada."[21]

16. What the parties do differ on is the legal implications of these more or less undisputed facts. As the Panels will recall, the United States raised the issue of when Canadian and Mexican feeder cattle were exported to the United States in response to certain hypotheticals raised by Canada that indicated, in Canada's view, that the label affixed to B and C meat is "potentially ambiguous."[22] The United States disputes that conclusion and in response made the point that the single label affixed to muscle cuts produced from feeder animals *actually traded* by complainants is accurate, and certainly not less accurate than the information provided for A category meat.[23] In other words, there is nothing special about 12 months – if Canada exports

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[17] Canada's Responses to the Panels' Questions No. 51, para. 112.

[18] *See, e.g.*, Canada's Second Written 21.5 Submission, para. 101; Mexico's Second Written 21.5 Submission, para. 132.

[19] *Compare* U.S. Responses to the Panels' Questions No. 9, second table following para. 21, *with* Mexico's Responses to the Panels' Questions No. 9, para. 7.

[20] U.S. Responses to the Panels' Questions No. 9, para. 21.

[21] Canada's Responses to the Panels' Questions No. 9, paras. 13, 14.

[22] U.S. Second Written 21.5 Submission, para. 30.

[23] *See* U.S. Second Written 21.5 Submission, para. 33.

cattle at 13 or 14 months of age, the point is still the valid. The label "Born in Canada, Raised and Slaughtered in the U.S." is entirely accurate.

17. Again, as noted above, the label could read "Born and Raised in Canada, Raised and Slaughtered in the U.S." Owing to the length of the label, and the fact that it is understood that the country of birth will also be a country of raising, the amended COOL measure does not require the longer label, but it is permitted.[24] We therefore do not understand Canada's criticism that the B label prevents U.S. consumers from being informed as to the period of "raising" in Canada, which, according to Canada, accounts for 45-68 percent of the animals' life.[25]

18. The United States would further note that Canada's belief that this 45-68 percent of the animals' life must be accounted for on the label raises serious questions about the accuracy of complainants' answers to the Panels' questions regarding the third alternative. For example, Mexico assumes that their producers would only need to provide the location of birth to the U.S. purchasers of feeder (and fed) livestock, and, as such, would have "zero" costs under their third alternative as the ear tags already have the location of birth on it.[26] However, given Canada's view that the amended COOL measure does not draw legitimate regulatory distinctions for purposes of Article 2.1 because the measure does not *require* the listing of all countries where the animal was raised, it must be the case that the proposed third would *require* that the consumer be informed of the place of birth, *all* locations of feeding (inside and outside the United States), and the location of slaughter. But complainants do not take that position – they argue the opposite, in fact.[27] And this incoherence cannot be explained.

19. This is just another example of the fundamental inconsistency between complainants' Article 2.1 argument and their Article 2.2 argument regarding their third alternative, which the Panels probe in later questions.

20. Briefly, and as we have discussed previously, the amended COOL measure provides consumers accurate and meaningful information on origin *but does not do so at any cost or at any burden*. The amended COOL measure thus strikes a certain balance and provides for certain cost mitigation measures (exemptions, Label E, and abbreviations), and other reasonable accommodations (D Label). Complainants claim that these distinctions are illegitimate and

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[24] 2013 Final Rule, 78 Fed. Reg. at 31,368 (Exh. CDA-1) ("As discussed in the preamble of the January 15, 2009, final rule and in the March 12, 2013, proposed rule, if animals are born and raised in another country and subsequently further raised in the United States, only the raising that occurs in the United States needs to be declared on the label, as it is understood that an animal born in another country will have been raised at least a portion of its life in that other country. Because the country of birth is already required to be listed in the origin designation, and to reduce the number of required characters on the label, the Agency is not requiring the country of birth to be listed again as a country in which the animal was also raised.").

[25] *See* Canada's Responses to the Panels' Questions No. 9, paras. 13, 14 ("U.S. consumers are not informed about this period of the raising of Canadian feeder cattle.").

[26] Mexico's Responses to the Panels' Questions Nos. 57-58, paras. 118, 119.

[27] *See, e.g.*, Mexico's Response to the Panels' Questions No. 57, para. 118.

render the amended COOL measure inconsistent with Article 2.1. However, under Article 2.2, complainants are trying to establish that a very trade restrictive and expensive regime, a "farm to fork" traceability system, is a less trade restrictive, reasonably available measure alternative to the amended COOL measure. As such, complainants want to take advantage of the same cost mitigations (and other reasonable accommodations) of the amended COOL measure that they criticize under Article 2.1. Thus, complainants insist that the different rules for D and E meat proves that the amended COOL measure draws illegitimate regulatory distinctions for purposes of Article 2.1 while at the same time proposing a third alternative that draws these same (allegedly) illegitimate regulatory distinctions for purposes of Article 2.2. Complainants simply cannot explain the incoherence in their arguments.

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

21. Neither complainant provides any evidence to contradict the U.S. position that animals imported for immediate slaughter into the United States are almost all slaughtered on the day they arrive in the United States.[28]

22. Canada simply alleges that there have been examples where Canadian producers have exported cattle as "B" animals that normally would have been exported as "C" animals in response to the alleged business decision of Tyson to not accept C animals any further.[29] (Canada makes no mention that such examples have occurred for hog exports.) We do not understand why Canada considers this relevant to the question, given that the question is directed at C animals, not B animals. In any event, we have already addressed Tyson's alleged business decision in the U.S. First Written Submission and neither complainant has responded to the U.S. argument.[30]

23. Moreover, Canada appears to imply that the mean produced from an animal exported 55 days prior to slaughter would be inaccurately labeled.[31] As discussed above, that is simply not true. Muscle cuts derived from such an animal may be labeled as either: "Born in Canada, Raised and Slaughtered in the U.S." or "Born and Raised in Canada, Raised and Slaughtered in the U.S."[32] The United States considers that both labels are accurate, and Canada provides no reason to question that conclusion.

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

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[28] *See* U.S. Responses to the Panels' Questions No. 10, para. 22.

[29] *See* Canada's Responses to the Panels' Questions No. 10, paras. 15-16.

[30] *See* U.S. First Written 21.5 Submission, para. 110.

[31] Canada's Responses to the Panels' Questions No. 10, paras. 16-17.

[32] *See supra*, Question 9.

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

24. As further discussed in the response to Question A, the United States disputes Mexico's assertion in paragraph 10 that only 30 percent of U.S. beef consumption is covered by the amended COOL measure and that only 50 percent of that amount is subject to the labeling rules for muscle cuts. However, the United States notes Mexico's concession in paragraph 11 that "the evidence indicates that the distribution of beef products made from Mexican cattle as between products covered by the Amended COOL Measure and those that are not should be same as for beef products generally."

25. Thus, Mexico concedes that, just as is the case with cattle of exclusively U.S. origin, the same proportion of the beef derived from cattle of Mexican origin likely will end up in both products that are subject to the labeling requirements as well in products and market segments that are not subject to the labeling requirements. That is, according to Mexico, the COOL measure does not result in a skewing in the uses of beef from Mexican cattle in the U.S. marketplace. If there were a detrimental impact to the competitive opportunities for Mexican livestock from the COOL measure, one would expect to see processors and distributors handling and selling the product differently to recover the allegedly greater cost of dealing with that livestock. In this answer, Mexico's own statement demonstrates that the evidence does not support a finding of such a detrimental impact.

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

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

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

26. Throughout the original and Article 21.5 proceedings, the United States provided a substantial amount of evidence demonstrating the strong support of U.S. consumers for country of origin labeling in the United States.[33] Among the evidence provided by the United States is

[33] *See., e.g.*, U.S. Responses to the Panels' Questions No. 13, paras. 25-29 (citing Exhs. US-46, US-47, US-48, US-68, US-69, US-70, US-71, US-72, US-73, US-74). The United States also notes that the hundreds of

evidence that U.S. consumers support labels that provide information on where source animals were born, raised, and slaughtered and do not support labeling based on substantial transformation principles.[34]

27. In their responses to this question, complainants conflate the issue of consumer demand with other issues, including consumer willingness to pay and the question of whether country of origin labeling has changed consumers' purchasing decisions.[35] As the United States has explained, consumer demand and willingness to pay are different issues and the complainants' return to this issue in this context does not appear to be responsive to the Panels' question.[36] Canada and Mexico also fail to explain how a change in a consumer's purchasing patterns is probative of consumer demand for the provision of certain information, which only constitutes one element of decision making. Finally, Canada submits a study that compares demand for country of origin information with other "food values,"[37] which again is not relevant to the question of consumer support for country of origin generally. Indeed, it would be surprising if consumers valued origin information more than food safety in making purchasing decisions, either in the United States or elsewhere.

28. Complainants' critiques of the U.S. evidence and their claims that their evidence is "more credible" or carries greater weight than the U.S. evidence do not have support.[38] For example, Mexico critiques the Consumer Reports Survey as providing an inapplicable scenario,[39] but Mexico misses the survey's main point, which is that consumers do not associate origin merely with country of slaughter – this answer ranked third – but rather consider place of birth and raising as equally important, if not more important characteristics. Whether the foreign country used in the example was "Canada" or "Mexico" is immaterial.

29. Likewise, Mexico makes an unsupported claim that the Consumer Federation Study "was commissioned and designed to support the trade association's political position."[40] Even if this were true, which Mexico has not established, the United States wonders whether Mexico would

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comments in support of the 2013 Amended COOL measure can be found at www.regulations.gov under Docket ID AMS-LS-13-0004-0001. Similarly, the United States received thousands more comments in support of COOL during its development of the original COOL measure.

[34] *See*, *e.g.*, Exh. US-46.

[35] *See* Canada's Responses to the Panels' Questions No. 15, para. 19; Canada's Responses to the Panels' Questions No. 15, paras. 19-22.

[36] *See* U.S. Responses to the Panels' Questions No. 13, para. 24. The United States notes that the Panels also appear to recognize this distinction based on their phrasing of Question No. 13, which explicitly distinguishes consumer demand from consumer willingness to pay.

[37] Canada's Responses to the Panels' Questions No. 15, para. 19.

[38] Canada's Responses to the Panels' Questions No. 15, para. 19; Mexico's Responses to the Panels' Questions No. 15, para. 23.

[39] Mexico's Responses to the Panels' Questions No. 15, para. 15.

[40] Mexico's Responses to the Panels' Questions No. 15, para. 18.

also summarily dismiss allegedly scientific studies "commissioned and designed" to support their position in this dispute. Finally, it is worth noting that Canada and Mexico's critiques only even attempt to address a small portion of the evidence submitted by the United States in this regard.

30. Both Canada and Mexico claim that evidence regarding consumer demand is relevant to the question of the "risks non-fulfillment would create" under Article 2.2. As the United States has explained, and Canada agrees,[41] consumer demand is only one of the factors to consider in evaluating this issue.

31. Additionally, more important in this context than the studies of consumer demand cited by any of the parties is evidence as to how the U.S. Government views these risks, as it is the U.S. Government that is imposing these requirements. In this regard, providing information to consumers about the products they purchase is a key objective of the U.S. Government. And the evidence on the U.S. Government interest in providing such information is clear – Congress has passed legislation to implement a COOL regime in 2002 and 2008, and the current Administration has ensured it is implemented appropriately.

32. Further, equating consumer demand for certain information with the "risks non-fulfillment would create" as complainants do, and then using the consideration of "the risks non-fulfillment would create" to justify alternative measures that do not fulfill a Member's objective at the level it considers appropriate raises considerable systemic problems. In particular, such an approach could make it very difficult for any Member to exercise its prerogative to regulate in the public interest, such as including health warnings on tobacco, alcohol and other products or nutrition labeling, where that Member is not able to fully demonstrate strong consumer demand for such information.[42]

33. As the United States has stated in our previous submissions, a more appropriate understanding of the "risks non-fulfilment would create" is the recognition that Members are to take into account such risks when deciding how to regulate, rather than forming an independent element of complainants' burden of proof.[43] To the extent that the phrase is relevant to the Panels' analysis, the phrase indicates that panels should be particularly cautious in evaluating the evidence where the risks non-fulfilment would create are particularly high. In particular, panels should be extremely thorough in their assessment of the evidence to ensure that an alternative measure would provide the same level of fulfillment as the Member's measure being examined.

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[41] Canada's Responses to the Panels' Questions No. 15, para. 18.

[42] *See* U.S. Responses to the Panels' Questions No. 15, para. 37.

[43] *See* U.S. Responses to the Panels' Questions No. 15, para. 34. *See also US – COOL (AB)*, para. 379 (not listing "risks non-fulfilment would create" as a separate element that complainants must prove as part of their *prima facie* case).

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

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

Article 2.1 of the TBT Agreement

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

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

34. Complainants erroneously argue that the incentive to rely exclusively on domestic livestock has increased under the 2013 Final Rule.

35. First, both parties argue that the elimination of commingling increases this incentive, continuing their about-face from the original proceeding where they consistently down-played the impact of this allowance.[44] As explained previously, complainants put forward no evidence to support such an assertion. Rather, to make such a showing, complainants would need to prove at least: (1) which companies were actually making use of the commingling flexibility; (2) whether *those companies* have changed their purchasing policies to the detriment of Canadian and Mexican livestock *because* commingling has been eliminated; and (3) that these changes in purchasing policies are significant such that the detrimental impact increases for Canadian and Mexican suppliers as a whole.[45] Complainants submit no evidence on any of these points.[46] The *only* relevant point any of the parties has made is the United States, which has noted that three beef processors (and no pork processors) stated that they commingle different origin animals in response to USDA's request for comment on the use of commingling in the 2013 Proposed Rule.[47] Complainants have failed to prove this assertion.

36. Second, Mexico (but not Canada) argues that the length and complexity of the label affixed to B meat (as opposed to the label affixed to A meat) has also increased the incentive to

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[44] Canada's Responses to the Panels' Questions No. 19, para. 20; Mexico's Responses to the Panels' Questions No. 19, para. 24.

[45] *See, e.g.*, U.S. Responses to the Panels' Questions No. 18, paras. 53-54.

[46] *See, e.g.*, Canada's Responses to the Panels' Questions B, paras. 215-216; Mexico's Responses to the Panels' Questions B, paras. 210-217.

[47] U.S. Responses to the Panels' Questions No. 18, para. 54; *see also* U.S. First Written 21.5 Submission, paras. 29-30 (citing Comments of Dallas City Packing on 2013 Proposed Rule (Exh. CDA-63); Comments of Agri Beef on 2013 Proposed Rule (Exh. CDA-13); Comments of FPL Food on 2013 Proposed Rule (Exh. CDA-32)).

source domestically.[48] The crux of Mexico's argument is that the label "Born in Mexico, Raised and Slaughtered in the U.S." is so much longer and complex than the label "Born, Raised, and Slaughtered in the U.S." that retailers will not want to use the label, with a rippling effect up the stream of commerce. Given that the label affixed to B meat in this scenario is only 9 characters longer than the label affixed to A meat (50 vs. 41), and appears no more "complex" than the label affixed to A meat, it is difficult to see why this would be. Certainly, Mexico provides no explanation. Is there some important number of characters beyond 41 that causes some difference for retailers? If so, retailers may use abbreviations to lower the character count. (Of course, Mexico contends that the allowance to abbreviate is itself illegitimate.[49]) Also, it is difficult to understand why Mexico considers the longer label to "increase" the incentive as the previous B label was longer than the previous A label ("Product of U.S., Mexico" versus "Product of U.S."). We would further note that Mexico puts forward no actual data to support its argument. Mexico has failed to prove this assertion.

37. Canada (but not Mexico) argues that "the fact that the price basis between Canadian and U.S. fed cattle has recently increased to its widest margin since the original COOL measure's implementation" supports its argument.[50] Again, Canada's assertions are incorrect.

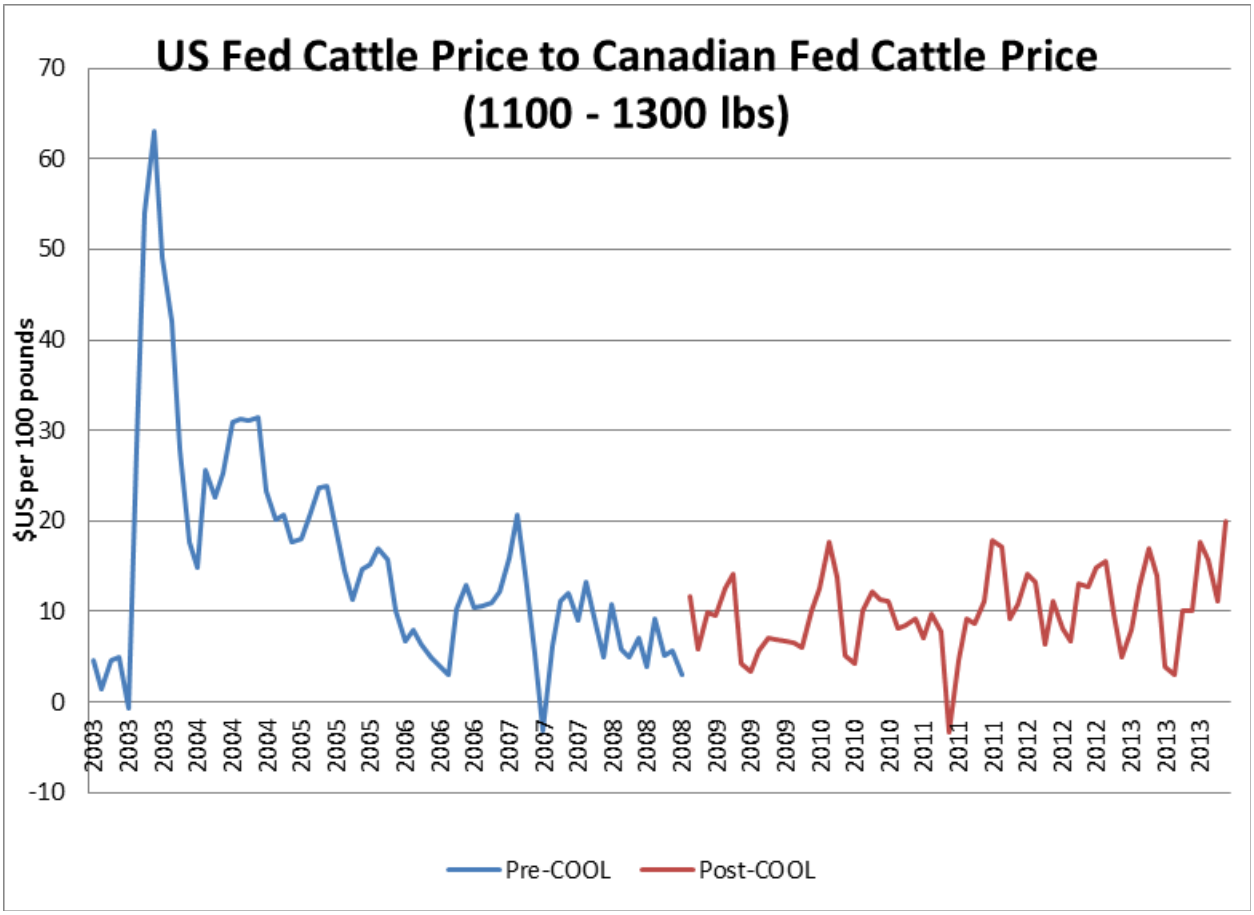
38. The price basis between Canadian and U.S. fed cattle has narrowed post-COOL (see figure below from U.S. corrected response to Question F in this submission). The basis is calculated in U.S. dollars by taking the U.S. price for fed cattle in the U.S. state of Nebraska minus the price for fed cattle in the Canadian province of Alberta. Prices are compiled by the Livestock Marketing Information Center (LMIC) – using the CANFAX price series for Alberta and the Nebraska weekly weighted average price provided by USDA Agricultural Marketing Service.[51] Canadian prices are adjusted by the U.S.-Canada exchange rate, reported by the International Monetary Fund. A positive price indicates that the U.S. price is above the Canadian price, which we would expect to reflect transportation costs amongst other factors.

[48] Mexico's Responses to the Panels' Questions No. 19, para. 24.

[49] Mexico's First Written 21.5 Submission, para. 129.

[50] Canada's Responses to the Panels' Questions No. 19, para. 21.

[51] Nebraska prices come from LS214 series up to 1/2/00 and from the WHLS722 series from 1/2/99/ to 12/28/01. From 02/22/01 until present the weighted average 65-80% choice for steers and heifers (live dressed) is used.



39. To compare a pre-COOL basis to a post-COOL basis, it is not appropriate to compare the basis post-COOL with that of 2008 *only*, as Canada has done (in 2008 the basis was approximately 7 cents per pound, or $7 per hundredweight (CWT)). That is because, as can be seen in the figure above, the basis fluctuates on a monthly basis. In early-2007 (Pre-COOL period), for example, the basis was 21 cents per pound but by mid-2007, the basis was -4 cents per pound, implying that Canadian fed cattle was sold at a premium to U.S. fed cattle. However, by the end of 2007, the basis had increased back to 11 cents per pound. A similar situation occurred in 2011 where at the beginning of the year the basis was at 10 cents per pound then by mid-2011 the basis was -3 cent per pound before moving to 17 cents per pound by the end of 2011.

40. Those examples highlight two points. First, the basis is influenced by a seasonal component, where the basis tends to be lower during the middle of the year. Second, it would be best to compare basis for two time periods based on averages over similar time spans. Our calculations (and depicted in the chart below) show that prior to the implementation of COOL, in 2009, the Nebraska/Alberta fed cattle basis averaged 17 cents per pound. Post-COOL, the basis has averaged 10 cents per pound.

41. Alternatively, we can simply use the Canadian submission data from Question F, but add pre-COOL prices going back further in time (see table below). Canada calculates the basis as

Canadian price minus the U.S. price and reports the basis in Canadian dollars; whereas the United States is calculating the basis as the U.S. price minus the Canadian price and reports the basis in U.S. dollars. Therefore the sign of the difference will be opposite from the two methods and may differ slightly in magnitude depending on the exchange rate. Here we can see that using monthly or weekly data for steers and heifers from Exhibits CDA-179 and CDA-180 that the basis has narrowed post-COOL, meaning that the Canadian price has risen relative to the U.S. price. Simply put, Dr. Sumner's own calculations directly contradict Canada's assertions.

Average Alberta-Nebraska fed cattle basis from CDA-179 & 180

	monthly		weekly	
	pre-COOL	post-COOL	pre-COOL	post-COOL
steers	-0.12	-0.09	-0.17	-0.10
heifers	-0.13	-0.10	-0.17	-0.10
start date	January 2005	October 2008	May 5, 2001	October 4, 2008
end date	September 2008	December 2012	September 27, 2008	February 8, 2014

42. As noted in the U.S. comment on Mexico's answer to Question 12, one new factual element related to detrimental impact is Mexico's statement that "the evidence indicates that the distribution of beef products made from Mexican cattle as between products covered by the Amended COOL Measure and those that are not should be same as for beef products generally." Thus, Mexico concedes that, just as is the case with cattle of exclusively U.S. origin, the same proportion of the beef derived from cattle of Mexican origin likely will end up in both products that are subject to the labeling requirements as well in products and market segments that are not subject to the labeling requirements. That is, according to Mexico, the COOL measure does not result in a skewing in the uses of beef from Mexican cattle in the U.S. marketplace. If there were a detrimental impact to the competitive opportunities for Mexican livestock from the COOL measure, one would expect to see processors and distributors handling and selling the product differently to recover the allegedly greater cost of dealing with that livestock. Mexico's own statement demonstrates that the evidence does not support a finding of such a detrimental impact.

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

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

43. The statutory provision, 7 U.S.C. § 1638A(f)(1), prevents USDA from employing a "mandatory identification system to verify the country of origin of a covered commodity." The parties are in agreement that the effect of this provision is that USDA is prevented from instituting a "farm to fork" traceability system, as such a system would need to incorporate a

mandatory identification system for animals as part of the "first stage" any such traceability system.[52] However, the parties are in dispute as to the legal conclusions that should be drawn from the existence of this statutory provision.[53]

44. First, Mexico argues that the statutory provision constitutes a "disguised restriction on trade" on the basis that a "farm to fork" traceability system is less trade restrictive than the amended COOL measure. As we have discussed, complainants have failed to prove that such a regime would be less trade restrictive than the amended COOL measure, and, as such, Mexico's assertion fails.[54] However, even if Mexico could make such a showing, this would not prove that the amended COOL measure is a "disguised restriction on trade." For what Mexico is saying is that the amended COOL measure a "disguised restriction on trade" if there is *any* less trade restrictive alternative.

45. As should be clear, there a number of alternatives to choose from. Mexico, for example, argues that applying substantial transformation or the ground meat rule to be less trade restrictive. 7 U.S.C. § 1638a(2)(A)-(C), and the corresponding regulatory provisions (*i.e.*, 7 C.F.R. § 65.300(d)-(e)), clearly prevent the imposition of either regime. Under Mexico's erroneous theory, these statutory provisions thus prove that the amended COOL measure is a "disguised restriction on trade." Similarly, it is undisputed that repeal of the amended COOL measure would be less trade restrictive than the amended COOL measure. Yet section 1638a(a)(1) imposes COOL as a mandatory program in the United States.[55] Again, under Mexico's theory, the amended COOL measure is a "disguised restriction on trade" based on section 1638a(a)(1). In fact, under Mexico's view, *every* technical regulation that restricts trade should be considered a "disguised restriction on trade" as there will *always* be an alternative that is less trade restrictive alternative (*e.g.*, repeal of the measure).

46. Mexico's theory has no basis in the text of the TBT Agreement, nor can Mexico find support in the analyses of the Appellate Body in *US – COOL*, *US – Tuna II (Mexico)*, and *US – Clove Cigarettes*. Mexico's theory also raises interesting questions about how effective Mexico considers Article XX of the GATT 1994 to be, given that that the article purports to provide an affirmative defense for *trade restrictive* measures that do not constitute "disguised restriction on international trade."

47. Second, Mexico argues that 7 U.S.C. § 1638A(f)(1) is "arbitrary" because the statutory provision "was put in place without an objective study of the cost of implementing a trace-back

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[52] *See* U.S. Second Written 21.5 Submission, para. 152; U.S. Responses to the Panels' Questions No. 54, para. 127-133.

[53] *See* U.S. Second Written 21.5 Submission, paras. 74-77.

[54] *See* U.S. Second Written 21.5 Submission, para. 134; U.S. Responses to the Panels' Questions No. 39, para. 120.

[55] 7 U.S.C. § 1638a(a)(1) (Exh. US-1) ("Except as provided in subsection (b) of this section, a retailer of a covered commodity shall inform consumers, at the final point of sale of the covered commodity to consumers, of the country of origin of the covered commodity.").

system."[56] Yet, the TBT Agreement does not provide for a parallel provision to SPS Article 5.1 that requires such a study. Under Mexico's theory, all policy decisions made by Members would be "arbitrary" unless supported by a cost study.[57] If true, the United States finds it difficult to believe that any measure that imposes a detrimental impact could be upheld under Article 2.1. But, of course, that is the central point of complainants' argument – detrimental impact is enough to prove discrimination under the covered agreements.[58]

48. Finally, as we have discussed previously, complainants' entire argument in this regard is misplaced:

> The prohibition contained in 7 U.S.C. § 1638A(f)(1) is not the cause of the detrimental impact. The original panel made no such finding, and neither did the Appellate Body. Rather, the Appellate Body determined that the detrimental impact stemmed from the distinctions between the production steps and the distinctions between the different types of labels. Those distinctions are set out in other parts of the statute and the 2009 Final Rule, and it is those parts – not 7 U.S.C. § 1638A(f)(1) – that are relevant to this inquiry. In other words, it is plain that 7 U.S.C. § 1638a(2)(A)-(C), and the corresponding regulatory provisions (*i.e.*, 7 C.F.R. § 65.300(d)-(e)), mandate what categories of muscle cuts will exist and how those different categories will be labeled, *irrespective* of whether 7 U.S.C. § 1638A(f)(1) exists or not.[59]

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

49. Mexico, for the first time, now concedes that this argument derives from the *original* COOL measure, *not* the amended COOL measure.[60] Essentially, Mexico's argument is that the *original* COOL measure is "intentionally discriminatory" (*i.e.*, the measure is designed to achieve a protectionist purpose) and that the amended COOL measure does not alter this objective.[61] The United States has already fully responded to this erroneous argument.[62]

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[56] Mexico's Responses to the Panels' Questions No. 21, para. 28.

[57] As we have noted previously, Mexico appears to misunderstand what the term "arbitrary" means. U.S. Second Written 21.5 Submission, n.122.

[58] *See, e.g.*, U.S. Second Written 21.5 Submission, paras. 5-6.

[59] U.S. Second Written 21.5 Submission, para. 76 (citing *US – COOL (AB)*, para. 341; *US – Tuna II (Mexico) (AB)*, para. 286).

[60] Mexico's Responses to the Panels' Questions No. 22, para. 29 ("This statement arises from one of the justifications raised by the United States for the original COOL Measure.").

[61] Mexico's First Written 21.5 Submission, para. 139.

50. This is just another example where complainants have recycled old, failed arguments against unchanged parts of the measure. The original panel has already rejected Mexico's argument, and the panel's finding was upheld on appeal.[63] Moreover, as we have noted previously, Mexico does not even attempt *to prove* this assertion with any evidence at all.[64] Indeed, Mexico only argues that this argument is valid "to the extent" it is true.[65] And, of course, Mexico does not even identify a regulatory distinction in this regard, much less establish that such a regulatory distinction is designed or applied in a non-evenhanded manner.[66]

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

51. Both complainants state that the same facts that underlie a finding that a measure results in a detrimental impact can be used to determine that that same detrimental impact does not exclusively stem from legitimate regulatory distinctions.[67] This answer is entirely consistent with complainants' position that detrimental impact is enough to prove a measure discriminatory, whether under TBT Article 2.1 or GATT Article III:4, a point that the United States has addressed previously.[68]

52. Complainants' argument is unsupportable in the text of these two articles and in previous dispute settlement reports. In *US – COOL*, the Appellate Body was clear that a panel could not conclude that a technical regulation was inconsistent with Article 2.1 based on the finding that the measure produced a detrimental impact. Complainants cannot square their arguments with

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[62] U.S. First Written 21.5 Submission, paras. 102-104; U.S. Second Written 21.5 Submission, paras. 78-79.

[63] U.S. First Written 21.5 Submission, para. 102 (citing *US – COOL (AB)*, paras. 424, 433, 453; *US – COOL (Panel)*, paras. 7.620, 7.651, 7.685).

[64] U.S. Second Written 21.5 Submission, para. 79.

[65] Mexico's First Written 21.5 Submission, para. 139; Mexico's Second Written 21.5 Submission, para. 67.

[66] U.S. Second Written 21.5 Submission, para. 79.

[67] *See* Mexico's Responses to the Panels' Questions No. 23, para. 32 ("Thus, while the distribution of costs may primarily be relevant to assessing whether there is a detrimental impact on imports (e.g., a denial of competitive opportunities vis-à-vis like domestic products), it is possible that, in some circumstances, it could also be relevant to the assessment of even-handedness and whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction."); Canada's Responses to the Panels' Questions No. 23, para. 23 ("An asymmetry in the distribution of costs may provide an indication that neither the regulatory distinction nor the technical regulation is designed and applied in an even-handed manner.").

[68] *See* U.S. First Written 21.5 Submission, para. 68, 133-135; U.S. Second Written 21.5 Submission, paras. 9-13, 82-86.

this clear finding of the Appellate Body.[69] As we have discussed, complainants' legal theory would significantly undermine the Members' ability to regulate in the public interest by rendering a whole host of measures discriminatory that have never been considered discriminatory previously.[70]

53. For the same reason, neither complainant is able to provide a direct answer to the Panels' question as to how to draw the boundaries for the legitimate exercise of regulatory autonomy.[71] The fact of the matter is that complainants – incredibly – seek a result whereby the Members' regulatory autonomy is as curtailed as possible. As such, they are reticent to even suggest that a boundary to such autonomy exists. As the United States has discussed, such a boundary does exist and that boundary can be found in the TBT Agreement, as discussed in previous Appellate Body interpretations of that Agreement.[72]

Article 2.2 of the TBT Agreement

Legal test

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

54. Brazil, Canada, the EU, Mexico, and the United States responded to this question. Of the five Members, only Brazil considers that a more trade restrictive measure could prove a challenged measure inconsistent with Article 2.2.[73] The United States has already explained why such a theory is unsupportable.[74]

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[69] *US – COOL (AB)*, para. 293 ("The Panel seems to have considered its finding that the COOL measure alters the conditions of competition to the detriment of imported livestock to be dispositive, and to lead, without more, to a finding of violation of the national treatment obligation in Article 2.1. In this sense, the Panel's legal analysis under Article 2.1 is incomplete.").

[70] *See* U.S. Responses to the Panels' Questions No. 23, para. 61 (citing U.S. Second Written 21.5 Submission, paras. 85-87).

[71] *See* Mexico's Responses to the Panels' Questions No. 23, para. 33; Canada's Responses to the Panels' Questions No. 23, para. 24.

[72] U.S. Responses to the Panels' Questions No. 23, para. 65.

[73] *See* Brazil's Responses to the Panels' Questions No. 24.

[74] *See* U.S. Second Written 21.5 Submission, para. 153; U.S. Responses to the Panels' Questions No. 24, para. 71.

55. Canada also suggests a definition of trade-restrictiveness that is contrary to the approach taken by prior panels and the Appellate Body. Canada suggests that: "An alternative measure is less trade-restrictive than the challenged measure if its impact on imports is not as significant as the impact of the challenged measure."[75] However, this appears to ignore whether there has been any impact on the conditions of competition. "Impact on imports" would not appear to be the same as the detrimental impact on the conditions of competition – there could be an impact on imports that is due to factors other than the conditions of competition, such as exchange rates, cost-efficiency, distance from the market, and economies of scale.

56. Leaving aside the skirmish over whether an alternative measure that is *de minimis* less trade restrictive proves a challenged measure inconsistent with Article 2.2 (a situation that does not appear to arise here),[76] the main point of contention among the remaining four Members is whether an alternative that falls within quadrant C (*i.e.*, a measure that makes a lesser contribution to the objective) could prove a measure inconsistent with Article 2.2. As discussed in our response to this question, the United States concurs with the EU that such a measure could never prove a challenged measure inconsistent with Article 2.2.[77] Complainants disagree, as they have throughout this proceeding, and urge the Panels to adopt an opaque balancing test whereby alternatives that provide origin information that is much less specific and much less accurate than the amended COOL measure does proves the amended COOL measure inconsistent with Article 2.2.

57. As we have discussed, complainants' argument has no basis in the text of the TBT Agreement, which expressly recognizes that nothing in the TBT Agreement prevents a Member "from taking measures" to pursue its objectives "at the levels it considers appropriate,"[78] nor in the analysis of the Appellate Body, which found that Mexico's alternative measure did not prove the challenged measure inconsistent with Article 2.2 because the measure contributed to the objective at "a lesser degree" than the challenged measure.[79] The United States has already fully addressed this issue, and will not repeat those arguments.[80]

58. We would, however, make the following additional observation. Under complainants' theory there is *no limit* to how much less of a degree of contribution the alternative could make and still prove a challenged measure inconsistent with Article 2.2. In terms of the graph, complainants appear to argue that an alternative measure could fall anywhere in quadrant C if, in the judgment of a panel, the "risks non-fulfilment would create" are "low." Notably, there is nothing in the TBT Agreement that provides a means of ranking the risks non-fulfillment would

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[75] Canada's Responses to the Panels' Questions No. 24, para. 28.

[76] *See* U.S. Responses to the Panels' Questions No. 24, para. 72; U.S. First Written 21.5 Submission, n.293.

[77] U.S. Responses to the Panels' Questions No. 24, para. 74; U.S. Second Written 21.5 Submission, para. 121-122, 128; U.S. First Written 21.5 Submission, paras. 157-161.

[78] Sixth recital to the preamble of the TBT Agreement.

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

[80] *See, e.g.*, U.S. First Written 21.5 Submission, paras. 157-161.

create, and complainants' view appears to be that one should apply one's own subjective judgment. Canada tries to cabin in its analysis by re-imagining the Panels' quadrant C as only containing alternative measures that "fulfil[] the objective to a degree that is generally equivalent or comparable to the degree achieved by the challenged measure," or alternatively there is "a difference in the degrees of fulfilment that is not considerable."[81] And that, in any event, "the first and second alternative measures would fall on a point or points that is/are close to the vertical line in Quadrant C."[82] Of course, Canada cannot explain why the Appellate Body – *in this very case* – has noted that it is Canada's burden to prove that the alternative makes "an equivalent contribution,"[83] rather than a "generally equivalent or comparable" contribution, as Canada puts it. Canada's own position is that "it would be inappropriate" for the Panels to depart from the Appellate Body's stated approach in this compliance proceeding "in the absence of more recent guidance from the Appellate Body."[84] Consequently, Canada's approach suggests that the Panels must reject complainants' erroneous arguments regarding the degree of contribution and alternatives falling in Quadrant C.

59. But even aside from Canada's incorrect standard of "generally equivalent or comparable" contribution, it is clear that that Canada considers that *every* conceivable consumer origin information measure would qualify under this standard. That is, Canada claims its first alternative qualifies even though it concedes that "all" muscle cuts sold at retail would be labeled "product of the U.S.," and essentially no, or very little, additional information as to the first two production steps would be provided.[85] Canada also argues that the second alternative, which allows the same label to be put on all muscle cuts based on what was in inventory in the last 60 days, qualifies under this standard even though no production steps would be listed and a significant amount of muscle cuts would be labeled inaccurately (*e.g.*, muscle cuts produced entirely in the United States would be labeled "Product of the U.S., Canada" or some equivalent).

60. Canada (and Mexico) are, of course, wrong. There is a limit as to the minimum contribution that an alternative must contribute to the objective to prove a challenged measure

[81] Canada's Responses to the Panels' Questions No. 24, paras. 40, 42.

[82] Canada's Responses to the Panels' Questions No. 24, para. 42. Mexico does not engage in this re-imagining of the Panels' graph, but seems to agree with Canada – the first and second alternatives fall somewhere within quadrant C, and, as such, prove the amended COOL measure inconsistent with Article 2.2 because the "risks non-fulfilment would create" are "small." Mexico's Responses to the Panels' Questions No. 24, para. 37.

[83] *US – COOL (AB)*, para. 379 (stating that it is complainants' burden to prove that an alternative measure exists that "is less trade restrictive, *makes an equivalent contribution to the relevant objective*, and is reasonably available") (emphasis added).

[84] Canada's Responses to the Panel's Questions No. 30, para. 57.

[85] Canada's Responses to the Panel's Questions No. 51, para. 112; *see also* Mexico's Responses to the Panel's Questions No. 51, para. 105.

inconsistent with Article 2.2. The alternative must "make[] an equivalent contribution to the relevant objective."[86]

61. The United States has fully addressed the meaning of the phrase "risks non-fulfilment would create" in response to Question 24, and refers the Panels to that response.[87]

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

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

62. As discussed in response to the Panels' question, there is no correlation between a technical regulation's trade restrictiveness and the risks non-fulfilment would create. Such a correlation and implied limitation are nowhere in the text of Article 2.2. The alternative must be less trade restrictive than the challenged measure regardless of whether these risks are high or low.[88]

63. Complainants disagree, and both argue that a correlation exists between a technical regulation's trade restrictiveness and the risks non-fulfillment would create.[89] However, complainants also accept in general that only a *less* trade-restrictive alternative could prove a challenged measure inconsistent with Article 2.2.[90]

64. Mexico's position, while in error, is the more understandable position of the two. Mexico takes the position that the DS386 Panel can find the amended COOL measure inconsistent with Article 2.2 *without* reference to an alternative measure. This is a point that Mexico made in its First Written 21.5 Submission, and which it makes repeatedly in its most recent submission.[91] In Mexico's view, the correlation between the trade restrictiveness of the

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[86] *US – COOL (AB)*, para. 379 (stating that it is complainants' burden to prove that an alternative measure exists that "is less trade restrictive, *makes an equivalent contribution to the relevant objective*, and is reasonably available") (emphasis added).

[87] *See* U.S. Responses to the Panels' Questions No. 24, paras. 75-76.

[88] U.S. Responses to the Panels' Questions No. 24, paras. 75-76.

[89] Canada's Responses to the Panels' Questions No. 25, para. 45; Mexico's Responses to the Panels' Questions No. 25, paras. 40-42.

[90] *See* Canada's Responses to the Panels' Questions No. 24, paras. 31-32 (rejecting alternatives in quadrants A and B); Mexico's Responses to the Panels' Questions No. 24, para. 35 (same). *But see* Canada's qualification that in some instances a slightly more trade-restrictive alternative may still suffice (Canada's Responses to the Panels' Questions No. 24,, para. 31).

[91] *See* Mexico's First Written 21.5 Submission, paras. 177-178; Mexico's Responses to the Panels' Questions No. 32, para. 51 ("A similar approach should be used in the examination of the proposed alternative measures, *if a comparative analysis is needed*.") (emphasis added); *see also id.* paras. 71, 73, 85.

challenged measure and the risks non-fulfillment would create can be addressed in the first step (of two) in its proposed balancing test.[92] The United States has explained why Mexico's proposed "two-step" analysis is in error,[93] and why it is necessary in this dispute to conduct a comparison with an alternative.[94]

65. Canada's position is that an alternative that is within Quadrant C may establish a breach of Article 2.2, using a complicated formula weighing a number of different factors. This is a fundamental error since it contradicts the guarantee in the TBT Agreement that Members can pursue their objectives at the levels they consider appropriate.

66. Furthermore, Canada's test appears problematic even on its own terms. Canada claims that one formulation of the correlation would be that "the lower the risk of harm related to a failure to fulfil the objective, the greater the difficulty of accepting the higher level of trade-restrictiveness of the challenged measure compared to the proposed alternative measure."[95] It is difficult to understand precisely what Canada is attempting to say. Presumably, what Canada is saying is that as the risks non-fulfillment would create increase, the complainants must prove an inconsistency with a less and less trade restrictive alternative. Such an analysis – which has no basis in the text or in the Appellate Body's reports – calls out for a much more complex calculation than Canada has ever put forward before. [96]

67. In any event, both complainants are in error. The analysis is actually quite straightforward. Only a significantly less trade restrictive alternative that is reasonably available and provides at least an equivalent degree of contribution can prove the challenged measure inconsistent with Article 2.2. However, a complainant need not prove that its alternative is drastically less trade restrictive when the risks non-fulfilment would create are "high."

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

68. As we have discussed, there is no correlation between the risks non-fulfillment would create and the degree of contribution to the objective, and complainants are incorrect to argue that there are circumstances where a complainant need not have to prove that its alternative makes an equivalent contribution to the objective.[97] That is *always* the case, as demonstrated by

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[92] Mexico's Responses to the Panels' Questions No. 25, para. 40 (citing Mexico's First Written 21.5 Submission, paras. 161-162).

[93] U.S. First Written 21.5 Submission, paras. 147-148; U.S. Second Written 21.5 Submission, paras. 97-101.

[94] U.S. First Written 21.5 Submission, para. 146; U.S. Second Written 21.5 Submission, paras. 111-112.

[95] Canada's Responses to the Panels' Questions No. 25, para. 45.

[96] *See* Canada's Responses to the Panels' Questions No. 25, para. 48 ("In this case, the correlations described above *do not apply* in the comparison with the third and fourth alternative measures proposed by Canada, because these measures fall within Quadrant D.") (emphasis added).

[97] U.S. Responses to the Panels' Questions No. 25, paras. 80-82.

the text of the TBT Agreement and further supported by the Appellate Body's analysis in both *US – COOL* and *US – Tuna II (Mexico)*. Complainants' position is entirely contradictory.

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

69. As the United States has explained, no correlation exists. It is up to the Member to decide at what degree it wants a measure to contribute to its objective. Then, under Article 2.2, the question becomes whether a reasonably available alternative measure existed that was significantly less trade restrictive that made the same contribution.[98]

70. Complainants disagree, alleging that a correlation exists, although neither explains their position.[99] Complainants' positions under this sub-question suffer from the same errors as described in the U.S. comments on complainants' responses to sub-question (i).

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

71. As discussed above, no correlations exist.

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

72. The parties appear to agree that there is no correlation between "costs," which may be relevant to whether the alternative is "reasonably available," and the risks non-fulfillment would create.[100]

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

73. China explains in its response that: "The reduction of trade flows itself can serve as a useful indicator, but not a necessary condition for the examination of trade-restrictiveness." The United States agrees that the reduction of trade flows is not a necessary condition in the context of Article 2.2. The United States refers to its previous explanations of how to interpret the term

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[98] U.S. Responses to the Panels' Questions No. 25, paras. 83-84.

[99] *See* Canada's Responses to the Panels' Questions No. 25, para. 47; Mexico's Responses to the Panels' Questions No. 25, paras. 40-42.

[100] *See* U.S. Responses to the Panels' Questions No. 26, paras. 86-88.

"trade-restrictive," in particular, the analysis needed to determine whether an alternative is less trade-restrictive than a challenged measure.[101]

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

74. For the reasons explained previously, the complainant must prove that an alternative measure makes at least an equivalent contribution to the objective. If the complainant is unable to do so, then that alternative does not prove the challenged measure inconsistent with Article 2.2.[102]

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

75. Brazil explains that "Brazil's argument regarding Article 2.1 analysis centers on the effect of the challenged measure in the conditions of competition prevailing between domestic and imported products in the domestic market." As indicated above, the United States agrees that the analysis under Article 2.1 is to take into consideration the effect of the challenged measure on the conditions of competition.

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

76. The United States refers to its response to this question.[103] We would further note that we have fully responded to Mexico's continued erroneous assertion that the Article 2.2 analysis

[101] *See* U.S. First Written 21.5 Submission, paras. 153-156; U.S. Second Written 21.5 Submission, paras. 106-112.

[102] *See supra*, Question 25; *see also* U.S. Second Written 21.5 Submission, paras. 111-112; U.S. First Written 21.5 Submission, paras. 146.

[103] *See* U.S. Responses to the Panels' Questions No. 30, paras. 89-90.

can be reduced to a mere proportionality test – a position that has no support in the text of the TBT Agreement and the Appellate Body's interpretation of that agreement.[104]

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

77. For the reasons explained above and previously, the United States concurs with Japan's response to the Panels' question.[105]

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

78. The United States responded to this question by stating that the degree of accuracy of label information is not a factor in assessing the reasonable availability of the measure in this case.[106] Complainants appear to take the same position. The United States did so in the context of the alternatives proposed by complainants. However, after considering Canada's new arguments regarding the (alleged) deficiencies of the amended COOL measure and the EU's response to this question, we have the following additional comments.

79. As discussed above, Canada appears now to argue that the amended COOL measure does not draw legitimate regulatory distinctions because the measure does not *require* the listing of *every* country of "raising."[107] As such, Canada's revised position raises serious questions as to what information the labels under complainants' third alternative will provide. As noted previously, animals (particularly cattle) can be moved multiple times during their lifetimes.[108] As such, Canada's position seems to imply that any "farm to fork" traceability system would require a label to list *all* locations where the animal was "raised" during its lifetime, greatly expanding the number of characters on the label (and space on a package) needed to provide the (allegedly) required information.[109] The practicality (or, rather, impracticality) of producing this *extremely* accurate label would, in fact, need to be considered a factor in determining whether the alternative is reasonably available.

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[104] *See, e.g.*, U.S. First Written 21.5 Submission, paras. 149-152.

[105] *See supra*, Question 24; *see also* U.S. Second Written 21.5 Submission, paras. 121-122; U.S. First Written 21.5 Submission, paras.128.

[106] *See* U.S. Responses to the Panels' Questions No. 32, para. 91.

[107] *See* Canada's Responses to the Panels' Questions No. 9, paras. 13-14.

[108] *See* U.S. Second Written 21.5 Submission, para. 160.

[109] Signs and placards would likely not be available under such a system as head of cattle typically move individually, not as part of lots, and individual labels affixed to individual muscle cuts would be the only practical method of providing accurate information on origin to consumers.

80. The United States would further note that it continues to consider complainants' assumption that a "farm to fork" traceability system will not have a detrimental impact on complainants' livestock remains just that, *an assumption*, not backed up by any evidence.[110] In fact, Mexico argues that the length of the label itself has increased the detrimental impact of the COOL measure.[111] If true, an adoption of the third alternative would provide an incentive for retailers to source from the most vertically integrated suppliers that move the animals as little as possible to render as short a label as possible. Such an incentive would obviously work *against* suppliers of foreign livestock, which, as Mexico correctly points out, will produce muscle cuts that will need longer labels than meat produced from large, vertically-integrated U.S. companies dealing exclusively in animals born, raised, and slaughtered in the United States.

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

81. The parties appear to agree that the responding Member would not be required to adopt the alternative where that alternative has proved the challenged measure inconsistent with Article 2.2.[112]

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

82. The United States respectfully requests the DS386 Panel to reject Mexico's new arguments or any new evidence going to Mexico's affirmative case that Mexico has now submitted in its March 7, 2014 submission to the Panels as being inconsistent with paragraph 7 of the Working Procedures of the Panel and Article 12.4 of the DSU.[113] As we have discussed, Mexico had a full five months to prepare its first submission, and then had an additional three weeks to respond to the U.S. First Written 21.5 Submission. The fact that Mexico (apparently) now considers the evidence it put forward in those submissions to be insufficient to make out a *prima facie* case is the consequence of Mexico's own argument. Certainly, Mexico has had a fair opportunity to put forward the exact case it wanted to. The United States now asks the DS386 Panel to ensure that the United States be afforded a fair opportunity to respond to that case. In order for that to happen, Mexico must not be allowed to correct the errors and omissions of its first two submissions at the very end of the arguments phase of the proceeding, thereby depriving the United States of a fair opportunity to make a full response to this new exhibit.

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[110] *See* U.S. Responses to the Panels' Questions No. 39, para. 115.

[111] *See* Mexico's Responses to the Panels' Questions No. 19, para. 24.

[112] *See* U.S. Responses to the Panels' Questions Nos. 32-33, paras. 91-94.

[113] U.S. Responses to the Panels' Questions No. 34, paras. 100-102.

83. Given the time available to review Mexico's untimely evidence and arguments, the United States would limit its observations to the following key points.

84. First, Mexico incorrectly alleges Canada's Exhibit CDA-126 provides "evidence that establishes that a trace-back alternative would be less trade-restrictive than the original COOL measure."[114] As we have discussed, the findings proposed by Exhibit CDA-126 are based on a flawed economic model, are not a comparison to any less trade-restrictive alternative, uses a definition of "non-discriminatory" that contradicts the Appellate Body's findings in this dispute, and are based on incorrect econometric data which provide an inflated estimate of reduced export value and an erroneous calculation of compliance costs.[115] Further, the econometric model contained in Exhibit CDA-126 is based on the alleged responses of Canadian importers to the original COOL measure.[116] But these responses are inapplicable to Mexico, which has an entirely different cattle market, and does not export live hogs to the United States.

85. Second, Mexico is wrong to assert that, using the methodology underlying the economic model in Exhibit CDA-126, the "comparable figure for Mexican cattle is $249 per head." Mexico is also incorrect to claim "that if the adverse price impact increases from 10 percent to 20 percent, which is approximately what is expected to happen with the amended COOL measure, the additional costs that would have to be created by a trace-back alternative increase to $498 per head." Those figures are incorrect for the same reasons that $608 per head of cattle, or the newer figure of more than $1000 per head from Canada's most recent submission.

86. As stated previously, the model being used by Dr. Sumner is inappropriate for estimating any impact on export suppliers; *i.e.*, Mexican suppliers of cattle and Canadian suppliers of hogs and cattle to the United States. That is because, among other things, any U.S. regulatory cost applied to the processing and marketing system will lead to relative larger export responses compared to U.S. domestic supply responses. Indeed, Exhibit MEX-87 even points out that given "the nature of Mexican supply conditions and a lack of local feeding and slaughter availability, the impact seems to be mainly in the import price rather than import quantity." Of course, that simply emphasizes the need to use appropriate export supply elasticities for both Canada *and* Mexico in any sort of Exhibit CDA-126 exercise.

87. Third, Exhibit MEX-87 argues that it is Mexican feeder cattle prices, and not quantities, that have been affected by COOL. It is not surprising that Mexico has adopted that approach since feeder cattle exports to the United States have increased since COOL was implemented. In contrast, Canada argues that it is feeder cattle quantities that are affected by COOL, not prices (Exhibits CDA-78 and CDA-79). Neither party makes any attempt to reconcile this difference. Moreover, an increase in feeder cattle exports from Mexico to the United States should be

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[114] Mexico's Responses to the Panels' Questions, para. 54.

[115] U.S. Responses to the Panels' Questions K, paras. 205-223.

[116] Dr. Sumner states that "[t]hese econometric estimates of [trade] impacts are […] calibrated to prices and quantities using base data" from prices and quantities "from official USDA and Canadian government sources." Exhibit CDA-126, p. 2, n.3.

reflected as increased trade revenues. However, Dr. Sumner has conveniently avoided calculating such an increase in trade revenues, but has instead relied on public reports of price changes for Mexican feeders. Apparently, such changes are all attributed to COOL; which is inconsistent with the entire Canadian effort to isolate the COOL effect from other confounding factors such as the recession or changes to transportation prices.

88. Fourth, Exhibit MEX-87 does not establish that a $249 or a $498 per head regulatory cost represents a "non-discriminatory" alternative measure. Such an approach is problematic as Canada is arguing that a $1086 to a $2445 per head cost on all slaughtered cattle in the United States represents a "non-discriminatory" alternative measure.

89. In fact, neither analysis actually is of any particular alternative measure. There is no alternative measure that is identified that is being analyzed in terms of its actual trade effect. Rather, the model is asking what trade effect would a measure, undefined and unspecified, need to have in order to impact U.S. producers as much as COOL has allegedly impacted Canadian producers. The measure is not related to country of origin labeling – the measure ("unrelated measure") could be an internal tax or other measure that increases costs for U.S. producers by the specified amount.

90. Aside from the fact that any substantial cost such as those being proposed as "non-discriminatory" would result in larger trade impacts than the former or current COOL measure, the fact that Mexico's unrelated measure is half the cost of the Canadian unrelated measure illustrates the U.S. critiques of this simplified one-country model that is used in Exhibit CDA-126. By construction, adopting the Canadian "non-discriminatory" unrelated measure would lead to trade impacts on Mexico that are twice as large as the alleged COOL measure. The United States finds it difficult to believe that Mexico would prefer such a measure and would embrace the analysis that supports it.

91. Furthermore, as the United States has previously emphasized, Exhibit CDA-126 does not in fact show that the trace-back alternative proposed by Canada and Mexico is a less trade restrictive and reasonably available alternative for the United States to the amended COOL measure.

92. Finally, Mexico asserts that "Dr. Sumner used a 'COOL discount' of $40 per head. The expected COOL discount from the amended COOL Measure is between $80-$100 per head."[117] Mexico is incorrect.

93. It is unclear where Mexico derives the "$80-$100" amended COOL measure discount figures. Neither of the citations Mexico provides (First Written 21.5 Submission or the Exhibits MEX-18 or MEX-19) substantiate that claim. Even within Mexico's own exhibits the highest figure estimated is a $90 amended COOL measure discount, and that figure is provided without any evidence to justify its calculation.[118] Furthermore, Mexico's "$80-$100" appears to be

[117] Mexico's Responses to the Panels' Questions No. 34, para. 56.

[118] Exh. MEX-23, at 6.

contradicted by the only other evidence provided by Mexico to substantiate its "COOL discount" argument, particularly, that Mexican cattle producers predict that "discounting of Mexican cattle will be increased by $2.00/cwt after full implementation of the Amended COOL Measure" or approximately $24.[119] In either case, providing two affidavits from Mexican cattle producers and a single affidavit from a U.S. cattle producer is insufficient evidence to substantiate the claim that Mexico makes with regards to an "amended COOL discount."

94. For example, the original panel relied on multiple exhibits containing direct evidence of major slaughterhouses applying a COOL discount in order to find that "at least *some* additional costs of the COOL measure" are passed to imported livestock.[120] Mexico has provided no such evidence in this proceeding. Furthermore, the Appellate Body, in reviewing the original panel's findings regarding the COOL discount, did not find that "a COOL discount [was] material to [the Panels] overall legal findings under Article 2.1."[121] However, it still is unclear how the assertions and estimations of two Mexican cattle producers and one U.S. cattle producer have any relationship to Mexico adopting and endorsing Exhibit CDA-126.

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

95. Mexico insists that it acts consistently with the Working Procedures and the DSU when it adopted a Canadian argument regarding the fourth alternative for the first time at the Panels' meeting. Mexico further claims the DS386 Panel should accept Exhibit MEX-87, which purports to use Mexican data as inputs into Dr. Sumner's calculations contained in Exhibit CDA-126. The United States has already explained why Mexico's requests should be rejected as being inconsistent with both the Working Procedures of these disputes and the DSU.[122]

96. Mexico makes several arguments in support of its position. All are incorrect.

97. First, Mexico states that it "endorsed and adopted the arguments and evidence at the first available opportunity."[123] This is clearly false. The "first available opportunity" was in Mexico's First Written 21.5 Submission, which it submitted on October 31, 2013. As discussed previously, and not contested by either complainant, each complainant bears its own burden of proof with respect to its own claims. And, in fact, each complainant has put forward its own arguments to support its own claims and these arguments have often differed from one another. Canada's offer of Exhibit CDA-126 (which is specific to the Canadian cattle and hog markets)

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[119] Mexico's First Written 21.5 Submission, para. 105 (citing Exh. MEX-18).

[120] *US – COOL (Panel)*, para. 7.356 (emphasis added).

[121] *US – COOL (AB)*, para. 323.

[122] U.S. Responses to the Panels' Questions No. 35, paras. 95-102.

[123] Mexico's Responses to the Panels' Questions No. 35, para. 66 (first bullet).

and Canada's fourth alternative are just two examples of this theme.[124] As such, there is no reason Mexico could not have developed a fourth alternative or retained Dr. Sumner to create Exhibit MEX-87 in the five months between May 23, 2013 and October 31, 2013.

98. In this regard, Mexico cites a variety of cases, which it claims support its argument. They do not. In particular, none of the cases support the proposition that a complainant can simply "adopt" evidence and argumentation with little to no explanation at the panel's last meeting, and none of the cases support the proposition that a complainant can put in entirely new evidence following that panel meeting.[125]

99. Second, Mexico argues that the argument and evidence was already on the record at the time of the Panels' meeting.[126] But, again, this statement is clearly false. Among other things, it fails to recognize the fact that there are separate panels involved in this proceeding, and therefore evidence submitted by Canada to the DS384 Panel is not submitted to the DS386 Panel. *None* of the argument or supporting evidence was on the record for the DS386 Panel prior to the Panel meeting. Moreover, Mexico did not submit Exhibit MEX-87 until March 7, 2014, two weeks *after* the Panels' meeting.

100. Third, Mexico argues that its case "regarding the third and fourth alternative are very similar, if not identical."[127] We fail to see how this point, if true, is relevant. Mexico has already conceded that it carries its *own* burden of proof for its own claims. Moreover, the fact that Mexico considers that *its case* is identical to Canada's does not mean that *the U.S. response* to that argument would be identical. For example, part of the U.S. response to Canada's fourth alternative addresses cattle movement in Canada. But we have not been afforded a similar opportunity to research the movement of Mexican cattle and provide a formal response to Mexico's fourth alternative. Indeed, Mexico has never explained its alternative except to briefly refer to Canada's alternative in one paragraph of Mexico's opening statement.

101. Finally, Mexico's *evidence* is *very different* from Canada's. Exhibit MEX-87 suggests a different "minimum trade-restrictive cost" from Canada's "minimum trade-restrictive cost," and the two weeks the United States has been given does not constitute sufficient time to fully

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[124] *See, e.g.*, U.S. Second Written Submission, paras. 37-40 (responding to the argument Canada makes (but not Mexico) regarding whether the change to the label for B and C can be regarded as "significant" or not); *id.* paras. 41-43 (responding to the argument Mexico makes (but not Canada) regarding abbreviations and size of labels).

[125] For example, *EC – Trademarks and Geographical Indications (Australia)* does not establish that a complainant has unfettered discretion to forward entirely new arguments at the end of the very end of its case, as Mexico wrongly implies. Noting that the timing of a complaining party's endorsement of an argument "raises an issue of due process," the *EC – Trademarks* panel rejected Australia's bid to amend its arguments at the final panel meeting, finding that Australia had "ample opportunity to make its case." Mexico has had the same "ample opportunity." The fact that Mexico has regrets as to how it used its opportunity should not be an excuse to undermine the U.S. ability to mount a defense to the claims against it. *See EC – Trademarks and Geographical Indications (Australia)*, paras. 7.70-7.82.

[126] Mexico's Responses to the Panels' Questions No. 35, para. 66 (second bullet).

[127] Mexico's Responses to the Panels' Questions No. 35, para. 66 (third bullet).

evaluate Exhibit MEX-87, examine why these differences exist, and consider the legal implications of any such differences.

102. Fourth, Mexico contends that the United States had opportunities during the substantive meeting to ask Mexico questions and express views about Canada's argument and evidence.[128] But as discussed above, the United States was not truly afforded an opportunity to rebut. Mexico's position was new, and therefore the United States had no opportunity to prepare any analysis of that position. Moreover, the United States *did not* have Exhibit MEX-87, and therefore was not given such an "opportunity" "to ask questions and express views." Mexico, for its own reasons, chose not to prepare this exhibit for submission to the Panel at the meeting even though it had been arguing that its third alternative is a less trade-restrictive alternative, *since October 31, 2013*.

103. Finally, Mexico contends that "[t]he United States can avail itself of further opportunities to make submissions and comments in response to the written questions from the Panel."[129] Presumably, Mexico is referring just to this submission, due now on March 21, 2014. As should be obvious, the United States has two weeks to comment on all of the answers provided by both of the parties and all the third parties. Canada and Mexico responded to over 80 questions the Panels posed and their submissions run 171 pages collectively. The time afforded to comment is simply not sufficient to comment on these responses *and* evaluate entirely new evidence of Mexico.

Risks non-fulfilment would create

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

104. As the United States discussed in response to this question, Article 2.2 provides an open list of "relevant elements of consideration" for assessing the risks non-fulfilment would create. For country of origin labeling, the United States considers that no particular factor would necessarily be irrelevant. We do not read complainants' responses as disagreeing with this proposition.

105. As noted above, we consider that consumer confidence and impact on consumer demand to be relevant as well as the U.S. Government's own actions in requiring this information be provided and its defense of challenges to this labelling regime both at the WTO and in U.S. Federal Court (as discussed in response to Question 17).

106. The parties remain in disagreement over the legal consequences of the risks non-fulfilment would create. Again, we concur with the EU[130] that an analysis of such "risks" would

[128] Mexico's Responses to the Panels' Questions No. 35, para. 66 (sixth bullet).

[129] Mexico's Responses to the Panels' Questions No. 35, para. 66 (seventh bullet).

[130] *See* EU's Responses to the Panels' Questions No. 36, paras. 35-38.

not provide a basis for the Panels finding that a measure that makes a lesser contribution to the objective than the amended COOL measure does proves the amended COOL measure inconsistent with Article 2.2 for the reasons explained above.[131]

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

107. The United States refers to its responses and comments on Questions 24, 25, and 36.

Appropriate level of protection

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

108. Although complainants quote the language in their responses, it is clear that their approach is completely incompatible with this text.

109. As the United States has explained, what the amended COOL measure actually achieves is that it provides meaningful and accurate information on origin for muscle cuts sold at retail as to where the animal was born, raised, and slaughtered.[132] Neither complainant disputes that characterization. In fact, complainants *concede* that the first two alternatives, which do not provide production step information, contribute to the objective to a "lesser extent."[133] Yet complainants still urge the Panels to find that either of these two alternatives proves the amended COOL measure inconsistent with Article 2.2.

110. The clear lesson here is that complainants *disagree* that it is up to the Member to decide at what degree that Member should pursue its objectives. Indeed, the entire point of the "weighing and balancing" tests complainants urge the Panels to adopt is that *it is for a WTO panel* to determine the level *a WTO panel* considers appropriate that the responding Member

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[131] *See supra*, Question 24.

[132] U.S. First Written 21.5 Submission, para. 160; U.S. Second Written 21.5 Submission, para. 105.

[133] Canada's Responses to the Panels' Questions No. 37, para. 69; *see also* Mexico's Responses to the Panels' Questions No. 37, para. 108.

should pursue its objective.[134] And it is for this reason complainants consider that an alternative proves the amended COOL measure inconsistent with Article 2.2 where it is, in the view of a panel, more "reasonable," more "appropriate," or less "disproportionate."[135] That is, of course, wrong; only an alternative "that is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available" proves the challenged measure inconsistent with Article 2.2.[136]

Costs

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

111. As the United States has previously explained, there is no basis to using "costs" – however defined – to assess whether an alternative is less trade restrictive than the challenged measure. As we noted in response to this question,[137] engaging in such an analysis would raise a number of questions that have no answer in the provision. For example, does one look only to average costs? The costs of the most efficient producers? The costs of the least efficient producers? The costs of the largest producers? Only the costs of those actually exporting? How are costs related to any effect the measure is alleged to have on the conditions of competition? Not surprisingly, complainants have never addressed such questions in their respective legal theories.

112. Rather, Canada continues to argue that there are cases, such as this one, where trade effects are irrelevant to the comparison. We have previously explained why Canada's position in error as a matter of law.

113. Moreover, we would note that Canada's focus on "lost export revenue" as a measure of trade restrictiveness appears to be a very unusual approach as a matter of economics with a high

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[134] *See, e.g.*, Mexico's Responses to the Panels' Questions No. 51, para. 107 ("Any difference between the degree of contribution of this alternative measure and the Amended COOL Measure does not undermine the fact that this alternative *is appropriate* and its existence establishes that the Amended COOL Measure is more trade-restrictive than necessary within the meaning of Article 2.2.") (emphasis added); Canada's Responses to the Panels' Questions, para. 97 (The "more flexible" ground meat rule proves that the amended COOL measure is "excessive.").

[135] Canada's First Written 21.5 Submission, para. 167 ("Additional considerations demonstrate the *reasonableness* of the extension of the 60-day inventory allowance to muscle cuts of pork and beef as a less trade-restrictive alternative to the amended COOL measure.") (emphasis added); Mexico's Responses to the Panels' Questions, para 107 ("Any difference between the degree of contribution of this alternative measure and the Amended COOL Measure does not undermine the fact that this alternative *is appropriate* and its existence establishes that the Amended COOL Measure is more trade-restrictive than necessary within the meaning of Article 2.2.") (emphasis added); Mexico's First Written 21.5 Submission, para. 162 ("This interpretation is consistent with the concept of *proportionality*.") (emphasis added); *see also* Canada's Responses to the Panels' Questions, para. 97 (The "more flexible" ground meat rule proves that the amended COOL measure is "excessive.").

[136] *US – COOL (AB)*, para. 379.

[137] *See* U.S. Responses to the Panels' Questions No. 39, paras. 109-112.

potential for distorted outcomes. There, of course, has been a great deal of work in the field of economics on developing practical measures of the restrictiveness of trade policies. But the focus of the work has been on measuring price gaps.[138]

114. The larger the price gap between the (potential) importer and exporter the more restrictive economists consider the policies to be. In theory, a tariff equal to the price-gap would have the same effect as the entire array of measures that could affect trade, such as regulatory costs. Price gaps allow us to summarize the total effects of such measures. The other advantage of price-gap methods is that they do not require any sophisticated economic modeling; price gap methods are simply based on the insight that free trade will tend to equalize prices.

115. There are several drawbacks to using percent export-revenue loss as a measure of trade restrictiveness. First, both import demands and export supplies tend to be extremely elastic (as described in U.S. response to Question K); large changes in imports and exports in response to small changes in conditions are possible. Second, while price-gap measures are based on a basic economic insight, revenue-loss measures require sophisticated economic modeling. All economic models are based on assumptions, and small changes in assumptions can have large effects on the estimated impacts. A narrow range of supply and demand elasticities can provide a huge range of cost changes. For these reasons, a revenue loss approach carries with it a high potential for distorted outcomes that do not shed light on an alleged trade restriction.

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

116. Canada fails to provide any new explanation or evidence regarding how the additional costs of its four alternatives would not exceed the minimum trade-restrictive cost calculated in Exhibit CDA-126. That is to say, even if the Panels did consider Exhibit CDA-126 to be relevant in determining whether the original COOL measure is trade restrictive, and accepted, completely, all of Dr. Sumner's calculations contained in that exhibit, Canada still would not establish a *prima facie* case that its third or fourth alternatives are *less trade restrictive* than the amended COOL measure. As the United States has noted previously, Canada puts forward *no evidence* as to the trade restrictiveness of the third alternative.[139] As such, Canada fails to prove that either alternative proves that the amended COOL measure is inconsistent with Article 2.2.

117. Canada's unsupportable and unverifiable reference to the costs of Uruguay's system does not prove their case. First, Uruguay does not have a system that requires consumers to be able to

[138] If a product is freely traded between two countries the prices for the product in the two countries will converge. In simple models of international trade we will see that two countries' prices for a traded good are the same. In more realistic models, they will differ by transport costs.

[139] U.S. Responses to Panels' Questions No. 39, para. 120.

trace back particular meat products to the ranch, so we fail to understand how these cost estimates are relevant to this claim.[140] Moreover, as we have explained, Uruguay has a much smaller, less complex industry than exists in the United States, which impacts the costs of implementing such a system. For example we understand that Uruguay has 38 slaughterhouses while the United States had 627 federally inspected plants that processed cattle in 2012.[141]

118. Again, we do not make this statement to prove that large Members should be allowed to operate under different rules than smaller Members. Rather, Member may determine for themselves what objectives to pursue and to what degree to purse those objectives. The fact that Uruguay has determined that a particular traceability system works best for Uruguay is absolutely within Uruguay's purview to decide.[142] But the fact that Uruguay has decided to adopt a particular measure does not prove that such a measure is reasonably available to the United States, *particularly where the circumstances of the two Members are so very different.*

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

119. The United States has fully responded to the alleged relevance of "minimum trade-restrictive cost levels" to the Article 2.2 analysis. Canada provides nothing new in this regard in their response to this Question, and we refer the Panels to our previous statements on this issue.[143]

120. Notwithstanding Mexico's purported "adopting" of Exhibit CDA-126, Mexico takes the position here that the TBT Agreement "does not require" such an analysis, and that the challenged measure would be judged to more trade restrictive than necessary or not based on a comparison with an alternative. The United States agrees with Mexico, and notes that this is exactly the opposite of what Canada and (purportedly) Mexico are trying to do. Instead of proving their claims through a comparison of the trade restrictiveness of the challenged measure and the alternative, Canada and (purportedly) Mexico are trying to prove their case by creating a wildly inflated calculation regarding the impact of the original COOL measure and then concluding, without evidence, that it simply would not be "plausible" for the third or fourth

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[140] *See* U.S. Responses to Panels Questions No. 54, para. 133, n. 120 (Uruguay's "[National Livestock Information System] does not yet mandate further traceability to consumers, although this is under consideration." (quoting Congressional Research Service, "Animal Identification and Traceability: Overview and Issues," p. 41 (Nov. 29, 2010) ("2010 CRS Report") (Exh. CDA-92))); *see also*, Ministry of Livestock, Agriculture and Fishery, National Meat Institute, Inter-American Institute for Cooperation on Agriculture, Office in Uruguay, Horizontal Technical Cooperation Division, "Uruguay's Experience in Beef Cattle Traceability," December 2009 p. 33 ("The main objective of the SNIG to this day has been to guarantee the individual or group traceability of bovine cattle, from slaughterhouse to the farm of origin" and not through retail or to the ultimate consumer.) (Exh. CDA-131)).

[141] Uruguay's Experience in Beef Cattle Traceability, p. 19 (Exh. CDA-131).

[142] *See* U.S. Responses to the Panels' Questions No. 48, para. 126 (making the same point with regard to New Zealand's voluntary labeling scheme).

[143] U.S. First Written 21.5 Submission, paras. 154-155; U.S. Second Written 21.5 Submission, para. 107; U.S. Opening Statement, para. 41; U.S. Responses to Panels' Questions No. 39, paras. 109-121.

alternatives to have an equivalent impact.[144] As Mexico itself appears to concede, this type of analysis is wholly in error.

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

121. As is clear from complainants' responses, neither complainant has submitted any cost estimate as to the more expensive stages of meat production (slaughter and retail). Rather, complainants (mainly Canada) provides a series of arguments that are either incorrect as a matter of fact or law or simply irrelevant to the Panels' question.

122. First, Canada attempts to relieve itself of its own burden of proof when it argues that "[t]he United States cannot establish that a trace-back system would impose an undue burden on it simply by asserting that Canada has not provided a cost estimate for the second and third stages of that system."[145] But as we have explained previously, the burden is on Canada and Mexico, *as complainants*, to prove that the alternatives they propose are "reasonably available" to the United States.[146]

123. Second, Canada is incorrect to allege that it has submitted evidence in response to Question 40 that substantiates "the likely magnitude of the compliance costs that would be associated with a trace-back system." Canada has done no such thing. All of the "evidence" Canada submits in response to that question is derived from Dr. Sumner's calculations in Exhibit CDA-126 and in Canada's expanded response to Questions H and J and none of it has anything to do with calculating the costs associated with the second two stages of a "farm to fork" traceability system in the United States. And this is no surprise – we understand that Canada has not even estimated the costs *in Canada* of implementing the less expensive first stage of such a system. As the United States has pointed out in its earlier response to Question K, the methodology used in Exhibit CDA-126 does not provide any information to infer the costs of measures such as COOL or trace-back because it does not incorporate information about exporters of livestock to the US. As such, the United States would agree that the costs resulting from Exhibit CDA-126 and Canada's response to Question J are vastly biased upwards due to the flawed economic method.

124. Third, Canada claims that "[t]he U.S. industry would remain profitable under [a "farm to fork" traceability system]." Canada has no support for this statement, and the Panels should disregard. Moreover, Canada's conclusion as to profitability appears to be based on the theory that the U.S. industry would undergo "some contraction" as a result of a reduction in consumer

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[144] *See, e.g.*, Canada's Responses to the Panels' Questions No. 41, para. 89.

[145] Canada's Responses to the Panels' Questions No. 41, para. 94.

[146] *See, e.g.*, U.S. Second Written 21.5 Submission, paras. 114-119, 147-157.

demand (due to higher meat prices).[147] As the United States has noted previously, the United States considers any alternative measure that would lead to the consolidation of U.S. industry to the detriment of the family farm and other small businesses to be *per se* an undue burden, and thus not "reasonably available" to the United States.[148] Complainants do not contest this position.

125. Fourth, Canada makes the curious argument that if the third alternative is "prohibitively costly", then "the amended COOL measure is even more prohibitively costly to Canadian producers."[149] But the question is not whether the amended COOL measure is reasonably available to Canada. Rather, the question is whether the third and fourth alternatives are reasonably available *to the United States*.

126. Fifth, Canada inappropriately collapses Article 2.2 with Article 2.1. Canada states flatly that: "[t]he amended COOL measure is discriminatory. A trace-back system is not," as if this was the entirety of inquiry. Mexico appears to concur, stating that "[t]he objective of the alternative measures is to substantially reduce or eliminate the detrimental impact on imports."[150] Complainants misunderstand the Article 2.2 inquiry, which is whether the challenged measure is "more trade restrictive than necessary." And complainants make this showing only by proving that an alternative measure exists that "is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available."[151] Complainants *do not* prove a measure inconsistent with Article 2.2 by proposing an more trade-restrictive, not reasonably available alternative, even if the alternative does not cause a detrimental impact.

127. Finally, Mexico simply relies on Canada's reference to the Uruguayan traceability system.[152] As we have already explained, Uruguay does not have a "farm to fork" traceability system.[153] In any event, Uruguay has an entirely different, much less complex industry than exists in the United States. Complainants do not prove that a system is reasonably available to the United States with brief references to the systems of the entirely different countries.

Ground meat

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[147] *See* U.S. Second Written 21.5 Submission, para. 150 (citing Canada's Second Written Submission, para. 136).

[148] *See* U.S. Second Written 21.5 Submission, para. 150.

[149] Canada's Responses to the Panels' Questions No. 42, para. 95.

[150] Mexico's Responses to the Panels' Questions No. 42, para. 94; *see also* Canada's Responses to the Panels' Questions No. 42, paras. 96, 104.

[151] *US – COOL (AB)*, para. 379.

[152] Mexico's Responses to the Panels' Questions No. 42, para. 86.

[153] *See supra* Question 40.

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

128. Complainants argue that the ground meat label should be taken into account in assessing the degree that the amended COOL measure contributes to its objective, and repeat erroneous arguments that the ground meat label proves that the amended COOL measure inconsistent with Article 2.2 because it "shows that the United States is prepared to accept a less trade restrictive rule in respect of ground meat than it applies in respect of muscle cuts."[154]

129. First, the United States has already explained why the amended COOL measure has different labeling requirements ground meat than for muscle cuts.[155] Neither complainant has disagreed with the United States on this point.

130. Second, the essence of complainants' position is that a measure is inconsistent with Article 2.2 if it sets different (less trade restrictive) rules for different products. Complainants' position is clearly in error, and their arguments of devoid of support, as should be of no surprise. The TBT Agreement generally, and Article 2.2 specifically, does not require that a technical regulation treat different products in the same manner. In fact, complainants cannot maintain this erroneous argument for even more than a paragraph or two. In response to the very next question, complainants insist that, in fact, muscle cuts and ground meat will operate under different labeling requirements under their first alternative, without explanation.

131. Finally, as discussed previously, the United States has described the degree to which the amended COOL measure contributes to the objective. As this dispute is over the labeling requirements for muscle cuts (complainants repeatedly insist they are not challenging the ground meat rule), this characterization is limited to how the amended COOL measure contributes to its objective for muscle cuts. Again, what the amended COOL measure actually achieves is that it provides meaningful and accurate information on origin for muscle cuts sold at retail as to where the animal was born, raised, and slaughtered.[156] Neither complainant disputes that characterization.

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

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[154] *See* Canada's Responses to the Panels' Questions No. 43, para. 97; Mexico's Responses to the Panels' Questions No. 43, para. 89 ("The fact that the United States considers the objective of the measure to be fulfilled by labels that say "product of X" for ground meat is pertinent to the evaluation of the contribution of the measure and the equivalence of the alternative measures.").

[155] *See* U.S. First Written 21.5 Submission, n.198.

[156] *See supra* Question 38 (citing U.S. First Written 21.5 Submission, para. 160; U.S. Second Written 21.5 Submission, para. 105).

132. As noted above, complainants take the internally inconsistent position that, on the one hand, the fact that the amended COOL measure provides for different rules for muscle cuts and ground meat proves the amended COOL measure inconsistent with Article 2.2 while at the same time insisting that their first alternative maintain different rules for the two groups of products. Neither complainant provides any explanation as to this inconsistency in their position.

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

133. In response to this question, complainants confirm that the second alternative, which would apply the ground meat rules to muscle cuts, would not have any exemptions, although ground meat currently exempted would remain exempted. Complainants put forward no explanation of their odd position. The United States has explained previously why the measure contains each of the three exemptions. These exemptions apply equally to all categories of meat (categories A-E). But complainants put forward no explanation as why the United States would define the scope of the measure differently for different products.

134. This is just another example of the fundamental incoherence of complainants' arguments.

Exemptions

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

135. In response to this question, Canada claims that the removal of the three exemptions would not impose an undue burden on the United States.[157] Mexico has made this same assertion previously.[158] Neither complainant puts forward *any evidence* for this assertion, a point that the United States made in its First Written 21.5 Submission. Nevertheless, complainants have never provided such cost analysis, even though both Canada and Mexico concede that the costs of an alternative are a key basis for determining whether an alternative is "reasonably available."

136. As the United States has explained, the three exemptions are important mechanisms that policy makers use to control costs of measures in pursuit of legitimate government objectives. And these costs are significant. In terms of the costs of eliminating the "food service

[157] *See* Canada's Responses to the Panels' Questions No. 46, para. 101.

[158] *See* Mexico's Second Written 21.5 Submission, paras. 129, 135.

establishment" exception,[159] one point of reference is preliminary regulatory impact analysis conducted by the U.S. Food and Drug Administration (FDA) for nutrition labeling of standard menu items in restaurants and similar retail food establishments.[160] FDA identified three major elements of cost for its proposed rule: (1) collecting and managing records of nutritional analysis for each standard menu item; (2) revising or replacing existing menus, menu boards and other affected displays; and (3) training employees to understand nutrition information in order to help ensure compliance with the proposed requirements.[161] While implementation of COOL in restaurants and other exempt businesses would not entail nutritional analysis, foodservice establishments would incur costs for collecting and managing records needed to substantiate and convey COOL information.

137. FDA evaluated the costs of updating restaurant menus to reflect food nutrition information. To meet those requirements, about 95,500 restaurants (a fraction of the total number of food service establishments in the United States) would incur on average $182 in annual costs for replacing menus once per year. COOL would require menu replacement more often to reflect changes in country-of-origin information. Suppose that each establishment kept on hand 4 types of menus to reflect A, B, C, and D label meat (of course various combinations of those would be required in combination with different menu items). There are an estimated 634,361 food service establishments in the United States (Economic Census, 1997). Having 3 additional menus on hand for each of those could cost approximately 3 x $182 x 634,361 = $350 million per year.

138. In this regard, complying with COOL is significantly more burdensome for restaurants than for retailers, such as supermarkets, which individually label each package of meat. Changing origin information between A, B, C, and D requires that the supermarket employee type a new code into the labeling machine. In contrast, restaurants preprint their menus, and reprinting a menu is a significant cost, as discussed above. In practical terms, requiring restaurants to list a particular origin information on the menu may pre-commit the restaurant to sourcing exclusively that origin.

139. Given the differences between the first and second alternatives, the costs of eliminating the exemptions would differ depending on which alternative was adopted.

140. Because the first alternative will declare "all" meat produced from animals slaughtered in the United States as "Product of the U.S.,"[162] and such meat represents the overwhelming majority of meat supplied in the United States, restaurants would have a strong incentive to

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[159] 7 U.S.C. § 1638a(4) (Exh. US-1).

[160] FDA, "Food Labeling: Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments Notice of Proposed Rulemaking, Preliminary Regulatory Impact Analysis (March 2011) (Exh. US-75) ("FDA RIA on Nutrition Labeling"). The comment period for this preliminary rule ended on July 5, 2011, and FDA has issued a final rule as of the date of this submission.

[161] FDA RIA on Nutrition Labeling, p. 10 (Exh. US-75).

[162] Canada's Responses to the Panels' Questions No. 47, para. 105.

source only meat labeled "Product of the U.S.," and not use voluntary labels indicating where the animal was born, raised, and slaughtered or source Label D muscle cuts. Doing so would avoid the costs of re-printing menus, as discussed above. In practical terms, ranchers in Canada would likely benefit under this alternative while slaughterhouses in Canada, Australia, etc. would likely be harmed.

141. Under complainants' second alternative, the muscle cuts would be labeled based on the origin of the cattle in a particular slaughterhouse's inventory during the last 60 days. It is reasonable to assume that a particular slaughterhouse's label will change over time as the availability of supplies change. Moreover, the label would very likely change between different slaughterhouses as businesses will naturally have different sources of supply.

142. Canada suggests that it will be "relatively easy" for purchasers of meat "to find a steady supply of meat with the same origin," and suggests that that "relatively easy" origin would be "product of the U.S. and Canada."[163] But this is surely a false statement. Such a label will not be available for all suppliers and those suppliers that are producing meat under that label in one month cannot guarantee that they will be producing meat under that label the next month. Given that economic uncertainty, the most economic rational strategy for restaurants to take would be to source only from those slaughterhouses that produce exclusively A meat as restaurants could seek a guarantee from their suppliers that they will not change their labels (which would require a reprinting of the menu) in the future.

143. Presumably, complainants continue to want ground meat exempted under the second alternative (even though, ironically, this alternative would apply the ground meat rule to muscle cuts) out of a concern over the market consequences for their producers of trimmings resulting from this alternative. Neither complainant explains its position in this regard.[164]

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

144. Complainants concede that the removal of the three main exemptions would increase record-keeping, verification, and segregation costs for all products covered by these two alternatives.[165] Yet neither complainant has detailed what those costs would be. As we have

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[163] Canada's Responses to the Panels' Questions No. 46, para. 102.

[164] *See* Canada's Responses to the Panels' Questions No. 45, paras. 99-100; Mexico's Responses to the Panels' Questions No. 45, paras. 91-92.

[165] Canada's Responses to the Panels' Questions No. 47, para. 103; Mexico's Responses to the Panels' Questions No. 47, para. 96.

repeatedly noted, complainants do not satisfy their respective burdens of proof with mere assertions.[166] For example, Canada provides no proof for the claim that the "segregation costs would be lower under the [second alternative] than under the amended COOL measure."[167] The elimination of the exemptions greatly expands the number entities covered by COOL and would require those entities to track and segregate differently labeled muscle cuts ("Product of the U.S." versus "Product of the U.S., Canada") from one another, or, alternatively, simply stop carrying the meat with the mixed origin label.[168] Without any sort of cost analysis as to the expected consequences of eliminating the exemptions, complainants do not prove their claims in this regard.

145. Finally, we would note that the United States strongly disputes complainants' position that "[t]he objective of the alternative measures is to substantially reduce or eliminate the detrimental impact on imports."[169] Rather, the "objective" of the alternative measure is to determine whether the challenged measure is "more trade restrictive than necessary." And complainants make this showing only by proving that an alternative measure exists that "is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available."[170] Yet complainants cannot square their arguments with their burden of proof. In particular, complainants cannot square the first two alternatives with the requirement that the alternative must make an equivalent contribution to the objective, and cannot square the latter two alternatives with being less trade restrictive or being reasonably available to the United States.

146. In this regard, it is notable that the Appellate Body did not require that complainants' Article 2.2 claim succeed by merely proving the existence of an alternative that "eliminate[s] the detrimental impact on imports."[171] Complainants arguments are fundamentally in error because they are based on serious misunderstanding of complainants' own burden of proof in this dispute.

48. (*United States*) New Zealand observes that "[w]ell-designed voluntary COOL can make an equivalent (or even better) contribution to the objective of providing consumers with information as to origin than a mandatory COOL regime that is peppered with exceptions." (New Zealand's third-party submission, para. 23). The

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[166] *See, e.g.*, U.S. Second Written 21.5 Submission, para. 43.

[167] Canada's Responses to the Panels' Questions No. 47, para. 104.

[168] *See supra* Question 46. Note that in the case of processed food items, these costs would extend to both processors and retails fabricating and marketing items currently subject to COOL as well as additional establishments that make or sell only processed items and that are not currently covered by COOL.

[169] Mexico's Responses to the Panels' Questions No. 47, para. 94; *see also* Canada's Responses to the Panels' Questions Nos. 42, 47, paras. 96, 104.

[170] *US – COOL (AB)*, para. 379.

[171] Mexico's Responses to the Panels' Questions No. 47, para. 94; *see also* Canada's Responses to the Panels' Questions Nos. 42, 47, paras. 96, 104.

United States affirms that the "U.S. industry strongly disagrees with the COOL program and will not voluntarily provide their consumers origin." Did the United States test this approach or any alternative approaches with the US industry in revising the 2009 Final Rule?

Label D

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

147. Canada first claims that the "accuracy" of the labels affixed to muscle cuts under the second alternative would be "comparable" to the accuracy of the D Label.[172] But in the very same paragraph, Canada backtracks, stating that while the D Label "cannot be regarded as invariably complete," the labels under the second alternative "would not be regarded as invariably *reliable*."[173] Mexico avoids answering the question all together, and never addresses the accuracy of the labels under the second alternative.[174]

148. The fact of the matter is that the second alternative would not produce labels as accurate as those affixed on imported muscle cuts now. The D Label requires that the country of slaughter to be listed on the label. As such, the label "Product of Canada" is accurate that the labeled muscle cut was produced from an animal slaughtered in Canada. The United States also takes the position, unrebutted by complainants,[175] that that the D Label provides accurate information as to where the animal was born and raised (as well as slaughtered).[176] In other words, "Product of Canada" means, for all practical purposes, means "born, raised, and slaughtered in Canada."

149. Labels under the second alternative would provide a very different level of accuracy. The only "invariably" accurate label would be the one that reads "Product of the U.S." Under the second alternative, muscle cuts sold with this label must have been produced from animals born, raised, and slaughtered in the United States. There would no guarantee as to the accuracy of any other label provided for under the second alternative (*e.g.*, "Product of the U.S., Mexico, Product of the U.S., Canada, Product of the U.S., Canada, Mexico") as the labeled muscle cut could be entirely of U.S. origin. In fact, given that most meat sold in the United States is

[172] Canada's Responses to the Panels' Questions No. 49, para. 108.

[173] Canada's Responses to the Panels' Questions No. 49, para. 108 (emphasis added).

[174] *See* Mexico's Responses to the Panels' Questions No. 49, paras. 99-103.

[175] *See* Canada's Responses to the Panels' Questions No. 5, para. 4 (failing to provide any evidence that muscle cuts imported into the United States were not produced from animals born and raised in the country of slaughter); Mexico's Responses to the Panels' Questions No. 7, para. 5 (same).

[176] *See* U.S. Second Written 21.5 Submission, para 59; U.S. First Written 21.5 Submission, para 86.

produced from animals born, raised, and slaughtered in the United States, it is likely that the any label other than "Product of the U.S." would be significantly less accurate.

150. The second alternative is thus vulnerable to the same criticism of the labels under the 2009 Final Rule, but to a much more heightened degree. Both the original panel and the Appellate Body found the B and C labels to be less accurate than the A label because the 2009 Final Rule allowed for commingling *in one production day*.[177] The second alternative would produce less accurate labels because it would allow a particular label to be used if there were different origin cattle (commingled or not) at any time *during the last 60 days*.

151. Finally, both complainants consider that the ground meat rule "fulfils" the U.S. objective, and as such, the second alternative proves the amended COOL measure inconsistent with Article 2.2.[178] The United States has already responded to this erroneous argument.[179] Whether a complaining Member considers that a particular requirement "fulfils" the responding Member's objective is irrelevant for purposes of Article 2.2.[180] The question rather is whether the challenged measure is "more trade restrictive than necessary," and to prove that the complainant must prove that an alternative exists that "is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available."[181]

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

152. With regard to Article 2.1, Canada argues that Label D is relevant because the labeling of imported meat proves that: 1) the amended COOL measure results in a detrimental impact on Canadian livestock; and 2) that this detrimental impact does not stem exclusively from legitimate regulatory distinctions.[182] Mexico appears to disagree with Canada, and considers the D Label to be irrelevant to the Article 2.1 analysis.[183]

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[177] *US – COOL (AB)*, para. 343; *US – COOL (Panel)*, paras. 7.702-7.703.

[178] *See* Canada's Responses to the Panels' Questions No. 49, para. 108; Mexico's Responses to the Panels' Questions No. 49, para. 102.

[179] U.S. Second Written 21.5 Submission, para. 129.

[180] *US – COOL (AB)*, para. 390.

[181] *US – COOL (AB)*, para. 379 (stating that it is complainants' burden to prove that an alternative measure exists that "is less trade restrictive, *makes an equivalent contribution to the relevant objective*, and is reasonably available") (emphasis added).

[182] Canada's Responses to the Panels' Questions No. 50, para. 110 ("In respect of TBT Article 2.1 (and GATT Article III:4), the unchanged requirements regarding Label D under the amended COOL measure shows that the rules of the amended COOL measure in respect of muscle cuts derived from animals slaughtered in the United States are not even-handed and have a serious detrimental impact on the competitive position of Canadian cattle and hogs in the U.S. market.").

[183] *See* Mexico's Responses to the Panels' Questions No. 50, para. 104 (not mentioning Article 2.1).

153. This is the first time Canada has ever argued that the labeling requirements for imported *meat* cause a detrimental impact on imported *livestock*, and provides no explanation for it. In fact, the United States has explained in both of its written submissions why this is not the case,[184] and Canada has never responded to the U.S. argument. The United States requests the DS384 Panel to disregard this unsupportable argument.

154. Canada has argued that the D Label is relevant to whether the detrimental impact stems exclusively from legitimate regulatory distinction, and the United States has fully responded to those erroneous arguments.[185] In particular, the United States has noted that the requirements for imported meat are irrelevant to any detrimental impact that results from the amended COOL measure, and, as such, not relevant to the Article 2.1 analysis under the approach of the Appellate Body.[186] Although Canada urges the DS384 Panel "not [to] disregard Label D in its [Article 2.1] analysis,"[187] before the Appellate Body it is taking a much different approach, urging the Appellate Body to find that the *Seals Products* panel committed reversible error by analyzing regulatory distinctions that do not cause the detrimental impact.[188]

155. With regard to Article 2.2, complainants appear to agree that the D Label is relevant to the analysis because it "fulfils" the objective of the United States.[189] The United States has responded to this erroneous argument in our comments to complainants' responses to Question 49.

First and second alternative measures

51. (*Canada and Mexico*) Please quantify the proportion of meat that would be labelled "Product of the U.S." (or some variant indicating only US origin) under your first alternative measure. What is the relevance, if any, of this for assessing the degree of contribution of this alternative measure?

[184] *See* U.S. First Written 21.5 Submission, paras. 82-83; *See* U.S. Second Written 21.5 Submission, para. 54.

[185] *See* U.S. Second Written 21.5 Submission, paras. 53-59; U.S. First Written 21.5 Submission, paras. 82-86.

[186] *See US – Tuna II (Mexico) (AB)*, para. 286.

[187] Canada's Responses to the Panels' Questions No. 50, para. 110.

[188] U.S. Responses to the Panels' Questions, n.76 (quoting paragraphs 93-94 of Canada's Appellant Submission in *EC – Seal Products*).

[189] *See* Canada's Responses to the Panels' Questions No. 50, para. 111; Mexico's Responses to the Panels' Questions No. 50, para. 104.

156. Complainants state that under the first alternative "all" muscle cuts produced from animals slaughtered in the United States would be labeled "Product of the U.S." or some equivalent.[190] The United States agrees with this conclusion.

157. Neither complainant is able to answer the Panels' question as to what the relevance of this fact is for assessing the degree of contribution of the first alternative, although complainants have conceded at various times that this alternative makes a lesser degree of contribution to the objective for this very reason.[191] Obviously, the fact the label under this alternative does not provide any production step information (and, indeed, indicates that a muscle cut produced from an animal slaughtered on the day it is exported from Canada as a "Product of the U.S.") is *highly relevant* to the degree that the alternative contributes to the objective, as we have noted previously.[192]

158. The fact that more muscle cuts would be covered under the first alternative does not change that conclusion, as Canada appears to imply. It simply means that the first alternative provides a lesser degree of contribution over a greater tonnage of products. This approach is entirely consistent with the original panel's finding under TBT Article 2.4 that that substantial transformation "does not have the function or capacity of accomplishing the objective of providing information to consumers about the countries in which an animal was born, raised and slaughtered."[193] The validity of the original panel's finding does not depend on how many labels are at issue – it is equally valid for one label as it is for one million labels.

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

159. Complainants agree that the second alternative would not provide information as to where the animal was born, raised, and slaughtered.[194] Indeed, as the Panels point out, Canada itself describes the benefit of the alternative as providing entities to have "have sufficient

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[190] Canada's Responses to the Panels' Questions No. 51, para. 112 ("Under Canada's first alternative measure, *all* muscle cuts consumed in the United States would be labeled so as to provide information on the place of slaughter.") (emphasis added); Mexico's Responses to the Panels' Questions No. 51, para. 105 ("Under the first alternative, *all* muscle cuts made from cattle slaughtered in the United States would be labelled "product of US".") (emphasis added).

[191] Canada's Responses to the Panels' Questions No. 37, para. 69 ("Canada indicated above that only the first two alternative measures could be considered to fulfil the United States' objective to a 'lesser extent.'"); *see also* Mexico's Responses to the Panels' Questions No. 51, para. 107 ("Any difference between the degree of contribution of this alternative measure the Amended COOL Measure…").

[192] *See, e.g.*, U.S. Second Written 21.5 Submission, paras. 102-105.

[193] *US – COOL (Panel)*, paras. 7.734-7.735 (rejecting Mexico's Article 2.4 claim).

[194] Canada's Responses to the Panels' Questions No. 52, para. 113; Mexico's Responses to the Panels' Questions No. 52, para. 108.

flexibility to handle and process animals and muscle cuts derived therefrom according to market conditions *and with little regard to the location of the production steps*."[195]

160. The United States agrees with complainants' conclusion in this regard, although it would note that meat could not be labeled "Product of the U.S." (or some equivalent) unless the meat was produced from an animal that was born, raised, and slaughtered in the United States.

161. As was the case in the preceding question, complainants do not provide a direct answer to the question of what relevance the fact that the second alternative does not provide production step information is for assessing the degree of contribution of the alternative. For the reasons discussed in the previous question (and elsewhere), the United States considers this fact to be highly relevant to the analysis.

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

162. Neither complainant is able to answer whether a majority of muscle cuts will carry a single label and, if so, what this label would state. Mexico merely states that: "[f]or plants that process Mexican cattle, the majority of the meat processed by those plants would likely be labeled Product of the United States and Mexico."[196] Canada appears to concur with this sentiment as to plants that process Canadian cattle, noting that, under the second alternative, "there would likely be an increase in the number of labels baring a Canadian designation."[197] The reason for this increase, of course, is that under the second alternative, many muscle cuts of purely U.S. origin would no longer be labeled as such but be *inaccurately* labeled as "Product of the U.S., Canada." Canada's attempt to whitewash the critical fact by avoiding referencing the term "accuracy," and describing the labels as providing information as to "potential origin," fails.[198]

Third alternative measure

[195] Panels' Question 53 (quoting Canada's First Written 21.5 Submission, para. 167) (emphasis added).

[196] Mexico's Responses to the Panels' Questions No. 53, para. 111.

[197] Canada's Responses to the Panels' Questions No. 53, para. 116.

[198] Canada's Responses to the Panels' Questions No. 52, para. 113.

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

163. The United States does not understand that there are any material differences in the parties' responses to this question.[199] As noted previously, the United States has been referring to a "farm to fork" traceability system in lieu of "trace-back" to be more clear as to what type of system complainants are actually proposing as their third alternative.

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

164. Complainants contend that the third alternative would only apply to animals slaughtered in the United States and would not apply to exported meat as the EU system does. Mexico simply states that this is so because animals slaughtered in the United States are "the focus of the Amended COOL Measure," without any further elaboration.[200]

165. Yet complainants cannot explain the inherent contradiction of their arguments where they rely heavily on the fact that the amended COOL measure provides for different requirements for foreign slaughtered muscle cuts than it does for domestically slaughtered muscle cuts to prove that the amended COOL measure is inconsistent with Article 2.1.

166. As noted above, complainants want to have it both ways. They want to have the freedom to criticize any differences in requirements the United States has incorporated into the amended COOL measure except where doing so would increase the trade restrictiveness of an already very trade restrictive alternative. It is difficult to understand why it would not be legitimate for a measure to set forth different requirements *except* when proposed by complainants.

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

167. Canada claims that the current methods of establishing country of origin "would be insufficient to establish the location in Canada where the relevant production steps took place" for either the third or fourth alternative.[201] As such, we understand Canada to be conceding that the third and fourth alternative would entail additional record-keeping and verification requirements for Canadian producers not required under the amended COOL measure.

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[199] *See* U.S. Responses to the Panels' Questions No. 54, paras. 127-133.

[200] Mexico's Responses to the Panels' Questions No. 55, para. 114.

[201] Canada's Responses to the Panels' Questions No. 55, para. 127.

168. Canada appears to claim that it will be able to put in place a system to satisfy such requirements through its own animal traceability program. In response to Question 57, Canada claims to have this system in place for hogs, but not for cattle.[202] As discussed, despite years of study, Canada has been unable to implement such a system for cattle due to the high costs of tracking the animal movement (even though it is the least expensive stage of a "farm to fork" traceability system). Canada cannot say when it will ask its producers to incur the significant extra costs of implementing such a system. All Canada can say is that "Federal, Provincial and Territorial Ministers have reaffirmed their commitment" to complete this decade-long project,[203] and that the government and its stakeholders "are working towards a practical phased-in strategy for tracking animal movements."[204]

169. In contrast, Mexico claims that it would not incur any additional requirements under the third alternative because the ear tag has information as to where the animal was born.[205] But this is clearly incorrect. The third alternative would require record-keeping for *all* stages of production occurring in Mexico, which is not limited to just location of birth, but includes every location of where the animal was "raised." As such, like Canada, the third and fourth alternatives would require additional record-keeping for Mexican producers that is not required under the amended COOL measure. Moreover, Mexico does not appear to have any system in place to verify the accuracy of this new (and old) record-keeping. And, unlike Canada, Mexico does not appear to have *even contemplated* putting such a system in place.

170. The apparent inability of complainants to have in place record-keeping and verification systems to satisfy the minimum requirements of the proposals that complainants themselves puts forward is just another reason to doubt complainants' *assumption* that these alternatives would be less trade-restrictive than the amended COOL measure is (where the record-keeping and verification requirements only apply to U.S. entities), *regardless* on how the Panels define the term "trade-restrictive."

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

171. Canada now claims the United States need not incorporate a third pillar into the proposed U.S. adoption of the third alternative "in all cases."[206] Canada does not explain what cases it would be necessary for the United States to do so, and what cases it would not be. Canada's

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[202] Canada's Responses to the Panels' Questions No. 57, para. 131.

[203] Canada's Responses to the Panels' Questions No. 57, para. 131.

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

[205] Mexico's Second Written 21.5 Submission, para. 116.

[206] Canada's Responses to the Panels' Questions No. 57, para. 130.

position is particularly difficult to understand given its criticism that the United States did not implement the U.S. National Animal Identification System (NAIS):

> Finally, with respect to the third pillar, the NAIS also involved tracking the movements of the animals in one of the NAIS-compliant animal tracking databases.
>
> In short, the United States once had a comprehensive voluntary animal identification and traceability system that could have been maintained and made mandatory to provide information to consumers. The United States failed to do so. And now, it wants its trading partners to bear the costs of providing the information to consumers.[207]

172. If tracking animal movements is not "strictly necessary" why does Canada refer to the NAIS with regard to the third pillar? And if this third pillar is not "strictly necessary," why does Canada consider the cost estimates of the NAIS to be relevant to whether the third alternative is a less trade restrictive alternative?[208] All of this left unsaid. As we explained in our First Submission, complainants have presented their third alternative more as a concept than as an actual measure.[209] That characterization remains as valid today as it was in November.

173. To be clear, the United States considers that any "farm to fork" traceability system would need to track the movement of animals prior to slaughter in such a way that consumers would be able to know the location(s) of the animals' raising. In this regard, Canada claims that the veterinary health certificate accompanying exported animals would allow the reader to know the location of the animal for the 60 days before import. However, as Canada has emphasized in responses to the Panels' questions, Canadian animals spend a long time *in Canada* – 9-12+ months for feeder cattle and 22 months for fed cattle.[210] Accordingly, the veterinary health certificate would not provide complete information as to the "raising" of the animal in Canada – *i.e.*, where the animal was located between birth and export to the United States. Moreover, we understand the relevant APHIS rules to only require that the certificate denote *the region* that the animal has been in during the 60 days preceding import, not the specific locations.[211]

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[207] Canada's Second Written 21.5 Submission, paras. 115-116; *see also id.* para. 111 ("The NAIS could have been used as a building block for a trace-back system to verify designations on labels, just as the NAIS was used to verify U.S. origin claims under the 2009 Final Rule.").

[208] Canada's Second Written 21.5 Submission, para. 124 ("With respect to the first stage of a trace-back system, it has been documented that implementing full animal traceability under the NAIS would have added about $5.97 per head to the cost of cattle and $0.06 per head to the costs of hogs) (citing USDA, Animal and Plant Health Inspection Service (APHIS), "Benefit-Cost Analysis of the National Animal Identification System" (APHIS cost analysis), 14 January 2009, Exhibit CDA-133, pp. 68, 98).

[209] U.S. First Written 21.5 Submission, para. 179.

[210] *See* Canada's Responses to the Panels' Questions No. 9, para. 13.

[211] 7 C.F. R. § 93.405 -- Health certificate for ruminants:

174. In this regard, we note again that the amended COOL measure defines the term "raising" for feeder cattle as "the period of time from birth until slaughter."[212] For fed cattle, it is "the period of time from birth until date of entry into the United States."[213] As such, Mexico is incorrect when it states that "Mexican feeder cattle are per se raised in the United States."[214] They are not. It is just that the amended COOL measure does not require all countries of "raising" to be listed on every label (something Canada, however, considers to be illegitimate). Under complainants' third alternative, producers would need to keep record-keeping as to the locations of where the animal was raised, which would include all the feedlots that Mexican cattle are fattened in until export. As explained earlier, Mexican producers would incur costs under this alternative, and these are costs that Mexico does not appear to be in a position to easily adapt to given that Mexico has no traceability system to track animal movements as is (at least) being contemplated in Canada.

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

175. As noted previously, complainants do not have existing traceability schemes. As we understand, Canada plans to implement its first traceability regime to track animal movements for hogs, but will not do so until July 2014. Canada has no firm date when it will institute a similar system for cattle owing to the high costs of tracking animal movements. We understand Canada has not even produced a cost estimate for tracking the movement of animals in Canada. As such, it is not surprising that Canada does not provide any cost information in response to this question. Mexico has no such traceability system for the tracking of animal movements.

> (a) All ruminants intended for importation from any part of the world, except as provided in §§93.423(c) and 93.428(d), shall be accompanied by a certificate issued by a full-time salaried veterinary officer of the national government *of the region of origin*, or issued by a veterinarian designated or accredited by the national government *of the region of origin* and endorsed by a full-time salaried veterinary officer of the national government *of the region of origin*, representing that the veterinarian issuing the certificate was authorized to do so.
>
> (1) That the ruminants have been kept *in that region during the last 60 days immediately preceding the date of shipment to the United States*, and that during this time the region has been entirely free from foot-and-mouth disease, rinderpest, contagious pleuropneumonia, and surra; provided, however, that for wild ruminants for exhibition purposes, the certificate need specify only that the district of origin has been free from the listed diseases; and provided further, that for sheep and goats, with respect to contagious pleuropneumonia, the certificate may specify only that the district of origin has been free from this disease;

[212] 7 C.F.R. § 65.235 (Exh. US-3).

[213] 7 C.F.R. § 65.235 (Exh. US-3).

[214] Mexico's Responses to the Panels' Questions No. 57, para. 118.

176. As Canada correctly notes, it is *U.S.* slaughterhouses that are responsible for initiating the COOL claim for beef and pork, and it is *U.S.* slaughterhouses (and downstream entities) that must maintain those records.[215] USDA accepts a variety of documents as proof of country of origin. Such documents do not depend on any particular traceability system in Canada or Mexico. The amended COOL measure does not require Canadian and Mexican producers to keep records, nor does USDA ever verify records kept in Canada and Mexico.

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

177. We understand from complainants' responses to the Panels' questions that neither has a current "trace-back" regime (*i.e.*, a "farm to fork" traceability system), nor does either country foresee having one. Canada expects to implement the first stage of such a system for hogs in July 2014 and states that it will do so for cattle but cannot say when it will do despite years of study. Counsel for Canada was clear at the Panels' meeting that Canada is *not* planning on implementing a system akin the third alternative. Mexico, apparently, has no plans to implement any stage of such system.

178. It is difficult to answer the Panels' question regarding how information would be transferred into a U.S. "farm to fork" traceability system because complainants have not provided a detailed explanation of what such system would be nor do complainants have such systems for their own domestic markets.

179. Again, we are not surprised that complainants have refused (once again) to estimate the costs of in response to this Question. As the Panels are aware, complainants have steadfastly refused to provide any estimates of the costs of the third alternative. Mexico states that it is "extremely telling" that the United States has not provided any cost estimates. USDA has never produced an analysis of the costs of implementing such a system. To do so would be a complex undertaking in of itself, requiring extensive stakeholder outreach as it is U.S. industry that best understands their own businesses and what the burdens would be to adapt to a mandatory "farm to fork" traceability system. In this regard, we note once again that while complainants have obviously coordinated with U.S. industry in putting together their case, complainants are unable to provide any cost estimates from those companies or trade associations to support complainants' position that such a system is less trade restrictive and reasonably available.

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

[215] *See* Canada's Responses to the Panels' Questions No. 58, para. 134.

180. As noted in our response to Question 59, neither complainant has a current "trace-back" system (as that term has been used in this dispute), nor does either complainant foresee having such a system. As such, complainants have no traceability system (nor foresee having one) that would cover the production steps after delivery of the animals to the slaughterhouse.

181. The United States has previously noted that the fact that Canada has not even been able to implement the first stage of a "farm to fork" traceability system is relevant to complainants' argument that the third alternative is a "reasonably available" alternative for the United States.[216]

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

182. The United States has already explained its approach to the interpretation of the term "trade restrictive," and has fully explained the errors of complainants' approach.[217] We would further note that Canada appears to have completely abandoned defining "trade restrictive" in terms of discrimination as it has done throughout this proceeding,[218] and is now focusing on "the impact of a particular measure on imports."[219] However, Canada still steadfastly refuses to prove what the "impact" of the third alternative would be on Canadian livestock exported to the United States. And for this reason, Canada is unable to prove that the third alternative is a less trade restrictive alternative to the amended COOL measure.

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

183. The parties appear to agree that the United States does not have a "farm to fork" traceability system as they are proposing in their third alternative. The parties also appear to agree that the most relevant regulation is the final rule issued by USDA's Animal and Plant

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[216] *See, e.g.*, U.S. Second Written 21.5 Submission, para. 156.

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

[218] *See* U.S. First Written 21.5 Submission, para. 153; U.S. Second Written 21.5 Submission, para. 106.

[219] Canada's Responses to the Panels' Questions No. 61, para. 142.

Health Inspection Service ("APHIS") on "Traceability for Livestock Moving Interstate." The United States has already fully explained this rule and its relevance to this dispute.[220]

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

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

184. The parties appear to agree that the United States does not have a "farm to fork" traceability system in place.

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

185. Even though complainants rely on the Hayes and Meyer paper to support their claim that the third alternative is a less trade restrictive, reasonably available alternative, it is clear that the paper supports no such thing.

186. As the Panels correctly points out, the paper concludes that implementation of the third alternative would impose "enormous costs" on the U.S. pork industry, giving a cost advantage to Canadian pork producers. Canada claims that this conclusion "has no implication" for whether the third alternative could be considered a less trade restrictive alternative for Canadian livestock.[221] Mexico avoids answering the question entirely.[222]

187. The Hayes and Meyer paper is entirely supportive of the U.S. position that the third alternative would impose enormous costs on the U.S. industry, which would drive up the price of meat produced in the United States. Such a scenario will lower demand for meat produced in the United States and encourage U.S. meat purchasers to purchase foreign slaughtered meat. In response to lower demand for U.S. produced meat, U.S. slaughterhouses consequently will purchase *fewer* animals from their suppliers, including those suppliers of *foreign* livestock. As discussed previously, the consequences felt by the U.S. pork producers as result of the

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[220] *See* U.S. Responses to the Panels' Questions No.62, paras. 134-150.

[221] Canada's Responses to the Panels' Questions No. 65, para. 164.

[222] *See* Mexico's Responses to the Panels' Questions No. 65, paras. 145-146.

imposition of the third alternative would be multiplied in U.S. cattle industry where the costs of implementing such a system would be significantly greater than in the pork industry.[223]

188. Accordingly, we simply do not understand why complainants continue to *assume* that their livestock producers will be in a better competitive position if the United States imposed the third alternative on U.S. industry. There is absolutely no evidence that this is so. Rather, the evidence suggests that just the opposite – the entire U.S. industry will suffer greatly, which will assuredly result in fewer livestock imports. The costs we are discussing are quite extreme, and it is difficult to predict what the overall consequences of the imposition of such a system would be, particularly based on the dearth of evidence that complainants have submitted on this point. However, it would certainly appear conceivable to consider that one of the effects of imposing such an enormously expensive regime on the United States would be that, not only would trade in livestock be drastically reduced, but the United States would cease to be a viable market for Canadian and Mexican livestock entirely.

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

189. While complainants acknowledge that the EU system does not necessarily ensure that consumers can trace an individual piece of meat back to the location of birth, complainants imply it has no relevance to their argument. As Canada says, it "is not referring to the EU system and its every characteristic as a model for a trace-back system the United States could implement without any modification."[224] Yet complainants' entire argument as to whether their third alternative (and Canada's fourth alternative) are reasonably available is based entirely on references to other country's systems.

190. Neither complainant proves that these alternative would not constitute an undue burden to the United States with any direct evidence, such as a cost estimate of what a third alternative would actually mean for the United States and its rural economy. Indeed, complainants cannot provide cost estimates of their own parallel systems as they have do not have such a system, and, in fact, do not even contemplate ever implementing such a system. We consider that complainants' argument in this regard to be fundamentally flawed. The fact that they both point toward the regimes put in place by both the EU (which apparently has not historically ensured

[223] *See* 2010 CRS Report, p. 9-10 (Exh. CDA-92) ("Studies have shown that the cattle industry is expected to bear the brunt of the costs of implementing a national ID program, in large part because each individual animal will have to be tagged, unlike in the large, vertically integrated pork and poultry industries, where animals are usually raised and moved in lots. Critics claim that this added cost factor would unfairly disadvantage cattle producers in domestic and international meat markets. For small operators who are unable to spread such new costs over large operations, ID costs would likely erode an already thin profit margin."); *see also* U.S. First Written 21.5 Submission, para.191.

[224] Canada's Responses to the Panels' Questions No. 66, para. 166.

that consumers can trace individual meat) and Uruguay (which does not have a "farm to fork" traceability system[225]) simply highlights the flaws of complainants' approach.

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

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

191. Australia, the EU, Japan, and New Zealand responded. All have different traceability systems. Based on their responses, it would appear that Australia and New Zealand have more limited traceability systems,[226] while the EU and Japan appear to have (or will soon have) more fulsome traceability systems. Further, each has a particular market and domestic industry, which is not easily analogized to the markets of other Members. The Hayes and Meyer paper makes this point when it states that "EU plants are smaller in size, and use slower line speeds [than U.S. plants] and could be more easily adapted to the changes required" to implement a full traceability system than U.S. pork processors could.[227] We have already discussed the differences between the U.S. and Japanese markets and meat industries.

192. It is notable that *none* of the third parties state that their particularly traceability systems could be relevant to the question of whether the third alternative is a reasonable available alternative for the United States. In this regard, we wholly agree with the EU that "simply because a measure is reasonably available to one Member that does not necessarily mean that it is reasonably available to another Member, within the meaning of Article 2.2 of the TBT Agreement and/or that it fulfils the level of protection chosen by the Member concerned."[228] As

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[225] *See supra*, Question 40.

[226] *See, e.g.*, New Zealand's Responses to the Panels Questions No. 68, para. 7 ("As to the second and third stages, the NAIT scheme is not designed to provide traceability past death or live export."). Under Australia's National Livestock Identification System (NLIS) livestock are tracked until slaughter and no further tracking is required under the NLIS system. Furthermore, Australia continually asserts the purpose of the NLIS system is "food safety" and not consumer information (Australia's Responses to Panels Questions No. 68, p. 3).

[227] Dermot J. Hayes and Steve R. Meyer, "Impact of Mandatory Country of Origin Labeling on U.S. Pork Exports," Center for Agricultural and Rural Development, Iowa State University, Spring 2003, p. 9 (Exh. CDA-89).

[228] *See* EU's Responses to the Panels Questions No. 68, para. 45; Japan's Responses to the Panels Questions No. 68 ("Since production and distribution systems vary from country to country, we are not in a position to be able to express a view regarding the extent to which Japan's Cattle Identification and Traceability System corresponds to the complainants' suggested trace-back system and in what way, if any, it could be relevant for the reasonable availability of the trace-back system."); New Zealand's Responses to the Panels Questions No. 68, para. 8 ("The complainants' proposed measure is targeted at providing information to consumers. While the NAIT scheme could form the first part of a full traceability system for consumers if traceability systems from slaughter to

it is, the only parties that consider that the particular experiences of different Members in imposing domestic traceability systems are relevant to this dispute are the complainants, neither of which have a system that is anywhere as close to as comprehensive (or as expensive) as the third alternative that they propose in this dispute.

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

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

Fourth alternative measure

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

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

193. As to record-keeping, both complainants state that the record-keeping would be "the same" under the fourth alternative as it is under the amended COOL measure.[229] Given the lack of details complainants have provided, it is difficult for the United States to comment with any certainty. One could speculate, however, that while the type of documents may be the same, the information provided in those documents, the entity maintaining those documents, and the sheer

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consumer were also in place, New Zealand does not have information as to the costs and technical requirements this would involve. Accordingly, while the NAIT scheme works well for New Zealand's purposes and in the New Zealand context, New Zealand is unable to comment on the extent to which this experience can inform the reasonable availability of a trace-back measure in the United States to provide origin information to consumers.").

[229] Canada's Responses to the Panels' Questions No. 71, para. 169; Mexico's Responses to the Panels' Questions No. 71, para. 150.

number of documents, would be quite different (and more burdensome) under the fourth alternative than it is under the amended COOL measure.[230]

194. Consider the case of the Canadian fed cattle imported into the United States. Under the amended COOL measure, it is the *U.S.* slaughterhouse that must maintain the record that it purchased the C animal from a Canadian supplier. Under the fourth alternative, however, the U.S. slaughterhouse will need to know all the province of birth in Canada and all provinces that animal resided in prior to export. As Canada correctly notes, that information would not be contained on the ear tag.[231] Rather, *Canadian* entities would need to maintain those records and transfer those records with each sale of the animal, including the sale of the animal to the U.S. slaughterhouse.

195. Moreover, complainants suggest that the recordkeeping required under the APHIS final rule on Traceability for Livestock Moving Interstate could be used.[232] As noted in our response to Question 62, records kept pursuant to this rule do not accompany the animal and only apply to animals that are moving in inter-state commerce and that are 18 months or older. As such, the record kept pursuant to this rule cannot be used for a consumer information measure as contemplated by complainants.

196. As to labelling, Canada again suggests that the actual label need not provide the same information that entities would be required to keep, but could provide much less information regarding where the animal was raised, including just "the last state or province in which that production step took place (*i.e.* where the animals were 'finished' before slaughter)."[233] As discussed previously, we find it difficult to believe that this is Canada's position given how critical complainants are of the original COOL measure for making the same differences between the record-keeping and the information provided on the label. Indeed, this is the "disconnect" that both the Appellate Body and the original panel found so troubling and it is this "disconnect" that the amended COOL measure corrects. And to be sure, Canada disagrees that the United States has, in fact, corrected the disconnect, arguing that animals spending 55 days in the United States would be labeled as "raised" in the United States.[234] For the reasons explained, Canada's argument is in error on the merits, but it is difficult to understand why Canada would want a COOL regime that allows labels that it considers so problematic.

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[230] For example, affidavits could conceivably be used to convey the required information, but it would be much more complicated than it is under the amended COOL measure for those cattle that are "raised" in states in other than the one they were born is. That is, under the current rules entities can track a lot of animals using one affidavit if the entire lot has the same origin. This would likely be impossible under the fourth alternative as different animals would have passed through different states or provinces during their lifetime, requiring the tracking of individual animals as would be required under the third alternative.

[231] Canada's Responses to the Panels' Questions No. 71, para. 169.

[232] *See* U.S. Responses to the Panels' Questions No. 62, paras. 134-144.

[233] Canada's Responses to the Panels' Questions No. 71, para. 173.

[234] Canada's Responses to the Panels' Questions No. 10, paras. 16-17.

197. As to segregation, neither complainant mentions the issue. However, as discussed previously, animals (particularly cattle) move individually throughout the United States (as opposed to in lots) so the fourth alternative would require the same intensive, animal by animal segregation that would be required under the fourth alternative than is under the third alternative. We do not read complainants' responses to this Question as disputing this point. And it is for this reason, that the United States considers that the fourth alternative fails to prove the amended COOL measure inconsistent with Article 2.2 for the same reasons that the third alternative does.

198. As to the movement of cattle, we understand Canada not to dispute the statements that the United States has made regarding movement of cattle both inside the United States and inside Canada. Canada simply claims such evidence is irrelevant without explaining why. The United States has provided responded to the fourth alternative in our Second Submission.[235]

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

199. Mexico "endorses and adopts" adopts the fourth alternative that Canada first put forward in its Second Written 21.5 Submission. For the reasons explained in our comments on Mexico's response to Questions 34-35, the United States objects to this late stage ploy of Mexico's to add to their argument. Mexico's submission of March 7, 2014 is the first time Mexico has ever provided any sort of description of the fourth alternative. This description comes two weeks after the Panels' meeting and the United States has not been afforded sufficient time to evaluate Mexico's new argument. The United States has had time to evaluate Canada's fourth alternative, and our response to that alternative is provided for in our Second Written Submission,[236] as well in various sections of this submission.

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

200. We agree that the requirements in the amended COOL measure referenced in the Panels' questions do not apply to meat, and are therefore not relevant to this proceeding. We understand that Canada and its producers have no interest in providing origin information on a voluntary basis.[237] This position is consistent with the view of the U.S. industry who has generally opposed all country of origin labelling, voluntary or otherwise. It is because of this history, we do not consider that complainants' first alternative will provide much, if any, information

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[235] *See* U.S. Second Written 21.5 Submission, paras. 159-164.

[236] *See* U.S. Second Written 21.5 Submission, paras. 159-164.

[237] *See* Canada's Responses to the Panels' Questions No. 73, para. 177.

regarding where the animal was born and raised. We understand complainants to agree with this point.[238]

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

201. The United States has previously explained that the fourth alternative fails to prove the amended COOL measure inconsistent with Article 2.2 for the same reasons that the third alternative does not prove the amended COOL measure inconsistent with Article 2.2. Canada appears to ignore those arguments in their entirety.

202. In particular, Canada appears to claim that the fourth alternative would not be prohibitively costly, even though it steadfastly refuses to provide any estimate of what those costs would be. As such, Canada fails to prove that the fourth alternative is reasonably available. Canada also provides no evidence as to the trade restrictiveness of the alternative and therefore does not prove that the fourth alternative is less trade restrictive than amended COOL measure.

203. In fact, none of Canada's arguments have any basis at all. For example, Canada states that "U.S. slaughterhouses could commingle all animals that have been born in the same state and/or province and raised in the same state(s) and/or province(s)."[239] Yet Canada makes no effort to discover how many animals could be commingled into one group by a typical slaughterhouse. Thus, even if one accepts Canada's statement as true, what real effect would that have on U.S. industry? Would such an allowance really provide a material cost savings to the company? And if so, what would it be? All of these questions are simply left unanswered. Again, Canada's third and fourth alternatives are more concepts than actual, concrete proposals.

204. Finally, it remains unclear how Canada anticipates that the APHIS final rule on Traceability for Livestock Moving Interstate could be "further developed" to be used for this fourth alternative. As the United States has explained, this final rule does not require records to accompany the livestock, and it cannot be used for a measure that provides consumer information.[240]

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

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

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[238] *See, e.g.*, Mexico's Responses to the Panels' Questions No. 51, para. 106.

[239] Canada's Responses to the Panels' Questions No. 73, para. 177.

[240] *See* U.S. Responses to the Panels' Questions No. 62, paras. 134-144.

205. The responses of Canada and Mexico confirm that it is not possible to provide data on any change in trade volumes as a result of the implementation of the concessions under the NAFTA and the WTO Agreement.

206. As a separate matter, Canada appears to misstate its own submission when it asserts that during "the period of 1991-1994, the United States gradually reduced its MFN rate in respect of live cattle from U.S. $ 0.022 per kilogram to the current rate of U.S. $ 0.01 per kilogram, as a result of the Uruguay Round." The Uruguay Round negotiated tariff reductions did not operate during the period 1991-1994. They instead began to be phased in on January 1, 1995 and were gradually implemented over a six year period following this date.[241]

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

207. Mexico alleges that the only factors affecting North American livestock trade flows in the last 30 years are the NAFTA, the WTO Agreements and the COOL measure.[242] Mexico's response thus fails to acknowledge multiple factors affecting North American livestock trade flows, some of which Canada has identified in its response.

208. Canada's response refers to a number of the same factors as the United States did in its response. However, Canada failed to provide any information with regards to changes in its own live cattle and live hog industries over the last 30 years focusing instead exclusively on changes in the U.S. livestock industries. Specifically, Canadian live cattle and hog markets have seen significant structural changes over the last 30 years including an expansion of slaughter facilities, contraction in cattle markets in response to BSE and governmental regulations due to BSE, consolidation of the live hog markets due to economic factors and governmental intervention in the live hog market and general fluctuations in response to a multitude of factors that affect livestock trade.[243]

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[241] Canada refers to its First Written Submission in the Original Panel, n.265. However, that footnote stated:

> The current U.S. MFN rate for cattle imported for purposes other than dairy or breeding is US $0.01 per kilogram. In the period of 1991-1994, the United States applied a rate of US $ 0.022 per kilogram. From 1995 until 2000, the United States gradually reduced the 1994 rate to the current rate of US $0.01 per kilogram.

[242] Mexico's Responses to the Panels' Questions No. 76, para. 161.

[243] *See generally* U.S. Responses to the Panels' Questions No. 76, paras. 166-175. We would note, however, that Canada's statement that "[g]enetics contributed to the superior animal disease status for Canada, in particular in respect of hogs," appears to be incorrect. (Canada's Responses to the Panels' Questions No. 76, para. 191.) Hog genetics in the United States and Canada are very similar and are not likely the reason for superior animal disease status in Canada. There has historically been significant trade of breeding stock between the two countries. Canada is the top supplier of purebred breeding hogs to the United States, with U.S. imports of up to 21,000 head from Canada. There are also continued U.S. breeding swine exports to Canada, up to 3,000 head. The breeds used are also similar between the two countries. The actual reason for Canada's superior disease status likely has more to do with lower concentration of farms lessening disease spread and lower temperatures in the summer

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

209. Mexico and Canada both accept that were the DSB to rule that the amended COOL measure is in breach of a covered agreement, compliance by the United States may remove the basis for their non-violation nullification or impairment ("NVNI") claims.[244] As a result, even aside from the fact that these claims are outside the Panel's terms of reference, as the United States has discussed previously, the Panel need not make findings on these claims.

210. Canada questions the correctness of the approach of the panel in *EEC – Oilseeds I*,[245] claiming that it conflicts with the Appellate Body report in *EC – Asbestos*. However, that report does not support Canada's argument. In *EC – Asbestos*, far from disagreeing with the *EEC – Oilseeds I* panel, the Appellate Body cites to the *EEC – Oilseeds I* panel report with approval.[246] And contrary to Canada's argument, in *EC – Asbestos* the Appellate Body is not addressing the approach of the *EEC – Oilseeds I* panel with respect to whether it may be unnecessary to make a finding on an NVNI claim if there were a finding of a breach, and compliance with the finding of a breach would necessarily remove the basis for the NVNI claim. In fact, Canada appears to misunderstand the approach of the panel in *EEC – Oilseeds I* as well as the issue being addressed by the Appellate Body in *EC – Asbestos*. The issue in *EEC – Oilseeds I* involved judicial economy, whereas the issue in *EC – Asbestos* involved whether a measure was precluded from review.

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

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benefitting sow conception rates. Also there have been a number of diseases that affected the U.S. pig herd before the Canadian herd (PRRS, Circo virus, PED). These diseases especially impact sow conception and farrowing rates (PRRS and Circo virus). Often U.S. producers figure out how to manage the disease or develop a vaccine as for circovirus mitigating the impact of the disease in Canada.

[244] Mexico's Responses to the Panels' Questions No. 77, para. 164, Canada's Responses to the Panels' Questions No. 77, para.199.

[245] *EEC – Oilseeds I (GATT).*

[246] *See, e.g., EC – Asbestos (AB),* paras. 185, 187.

211. Both Mexico and Canada acknowledge that they bear the burden of proof to show that the amended COOL measure could not have reasonably been anticipated. And they have failed to meet their burden.[247]

212. In fact, Mexico explicitly states that it "could have anticipated [the United States would enact] labelling measures" such as country of origin labeling of meat. Mexico's response appears to be that it is not the measure in this case that was not reasonably anticipated, but the extent of any "adverse impact" such a measure would have on Mexico.[248] But the issue is not the reasonable anticipation of the trade impact, but the reasonable anticipation of the measure.

213. Both Canada and Mexico appear not to understand the Panel's question as it relates to the principle articulated in paragraphs 8.281 and 8.282 of the panel report in *EC – Asbestos* and Articles 2.1 and 2.2 of the TBT Agreement. Complainants appear to consider that Articles 2.1 and 2.2 would only be relevant to an NVNI claim under the TBT Agreement. However, as the United States has explained,[249] similar reasoning would apply to the "legitimate objectives" and "legitimate regulatory distinctions" as the panel applied in paragraphs 8.281 and 8.282 of *EC – Asbestos*.

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

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

214. Complainants have the burden of proof to show that a benefit accruing to them from a particular and specific concession under GATT 1994 is being nullified or impaired as a result of the challenged measure.[250] Neither Canada nor Mexico have put forward evidence under their GATT/TBT claims that would meet their burden of proof under Article XXIII:1(b).[251]

81. (*all parties*) Under Article XXIII:1(b) of the GATT 1994, is it sufficient for a particular good to be entitled, as a matter of law, to a GATT concession, or must

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[247] *See* U.S. Second Written 21.5 Submission, paras. 174-175; U.S. First Written 21.5 Submission, paras. 211-213.

[248] Mexico's Responses to the Panels' Questions No. 78, paras. 165-166.

[249] U.S. Responses to the Panels' Questions No. 78, paras. 179-181.

[250] U.S. Responses to the Panels' Questions No. 81, paras. 187-190; *see also* U.S. Second Written 21.5 Submission, paras. 172-176.

[251] Mexico's Responses to the Panels' Questions No. 80, para. 172; Canada's Responses to the Panels' Questions, para. 203.

that good actually be benefiting at some point in time from the access provided by that concession?

215. Mexico alleges that Mexican cattle are currently benefiting "in law and *in fact* from the WTO concession," and that this tariff concession is being "nullified or impaired."[252] However, Mexico concedes that Mexican live cattle enter the United States under NAFTA's tariff concessions, which are lower than the current WTO bound rates. It is unclear how Mexican live cattle can currently "benefit" from the Uruguay Round higher tariffs or how that "benefit" can be "nullified or impaired" when these live cattle actually enter the United States under the lower zero-tariff rate under the NAFTA.

216. Canada, on the other hand, argues that the text of Article XXIII:1(b) "does not require that the benefit is actively being enjoyed by a complaining Member in these proceedings."[253] Surprisingly, Canada supports this assertion with the same argument as Mexico, that the MFN rates under Uruguay Round "would become relevant" if NAFTA were suspended. This answer appears to indicate that a benefit is currently "accruing" to Canada under the GATT 1994. And as Canada recognizes, the text of Article XXIII:1(b) refers to a benefit "accruing" (present tense), not a benefit "that might accrue at some point in the future if certain changes in the applicable trade agreement provisions were to change."

217. Article 26.1 of the DSU also refers to a benefit "accruing." There is no benefit "accruing" if the relevant tariff concession is not being utilized.

218. Complainants have not met their burden in proving that a specific benefit accruing under the GATT 1994 is actually being nullified or impaired by the challenged measure.

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

219. Canada states that legislation concerning "the labelling of imported products as to their origin" since the 1930s is irrelevant to Canada's NVNI claim. However, the panel in *Japan – Film* in considering NVNI claims measures introduced prior to the conclusion of tariff negotiations raised the "presumption that the [complainant] should have anticipated" later measures.[254] For example, the U.S. Congress on multiple occasions prior to either the NAFTA or the Uruguay Round agreements considered greater labeling requirements for imported meat

[252] Mexico's Responses to the Panels' Questions No. 81, para. 173 (emphasis added).

[253] Canada's Responses to the Panels' Questions No. 81, para. 204.

[254] *Japan – Film*, para. 10.80.

products sold at retail.[255] The burden falls on Canada to establish that it could not have reasonably anticipated the United States to adopt a labeling law on country of origin such as amended COOL. Canada has not met this burden.

220. Similarly, Mexico repeats its position that it is the trade effect that could not be reasonably anticipated, but that is not the question presented for purposes of an NVNI claim. Mexico also argues that it could not reasonably anticipate a change from the use of substantial transformation to determine origin. But there is no basis for Mexico to anticipate no changes to the basis for determining origin. As explained above, approaches other than substantial transformation had been under active consideration before the conclusion of the Uruguay Round.

ECONOMIC AND ECONOMETRIC QUESTIONS

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

221. The United States refers the Panels to Exhibit US-79, which addresses certain errors of the complainants.

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

222. Please refer to our earlier response to this question.

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

223. The calculation of shares or proportions is not affected by the choice of units of measure, provided that the same units of measure are used throughout the calculations. Nonetheless, Canada is mistaken when it states that "'Boneless retail weight' is the most accurate

[255] U.S. Responses to the Panels' Questions No. 82, para. 193.

measurement of the amount of pork and beef that is purchased for consumption at retail and in foodservice establishments."[256] There are many muscle cut items that are sold bone-in at retail and in foodservice establishments, such as beef, pork ribs, beef T-bone steaks, and bone-in pork chops. Therefore, USDA uses retail-weight rather than *boneless* retail weight to account for this fact.

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

224. In terms of pork products, Canada demonstrates the pitfalls of failing to use the same unit of measure throughout the calculation of shares. Exhibit CDA-9 purports to use boneless retail weight as the unit of measure throughout the calculations needed to estimate the share of pork products subject to the requirements of the amended COOL measure. However, Canada incorrectly references the units of measure in its estimate of 9.3 billion pounds of boneless retail weight pork products sold through foodservice. Canada used information contained in a press release reporting a study released by the Pork Checkoff and incorrectly ascribes a boneless retail weight unit of measure to a value that actually represents carcass weight equivalents. The full study reported by the Pork Checkoff estimated the foodservice pork market at 9.249 billion pounds in *carcass weight* equivalents or 5.479 billion pounds in *retail weight* equivalents.[257] On a retail weight basis then, the estimated foodservice pork market from Pork Checkoff study cited by Canada is on par with USDA's estimated foodservice shares of 5.433 billion pounds retail weight in 2012 and 5.553 billion pounds in 2013.

225. For Canada to make an apples-to-apples comparison using its preferred boneless retail weight measure, the retail weight equivalent from the Pork Checkoff study must be converted to a *boneless* retail weight. Using USDA conversion factors for converting pork carcass weight to retail weight (0.78) and for converting pork carcass weight to boneless weight (0.729) yields a 0.729/0.78 = 0.935 factor for converting pork retail weight to boneless weight. On a boneless weight measure, the Pork Checkoff estimate of pork in foodservice is 0.935 x 5.479 = 5.123 billion pounds, which is 4.2 billion pounds less than the carcass weight measure incorrectly applied by Canada.

226. Mexico's critique of the U.S. methodology for calculating the share of beef products subject to the amended COOL measure is flawed. In particular, Mexico takes issue with USDA's evidence that 62.2 percent of food was sold in retail establishments and 37.8 percent was sold in foodservice establishments in 2006, as published in the 2009 Final Rule. As support for its assertion, Mexico cites in paragraph 182 of its response data currently available from USDA, "Monthly retail sales for food at home and food away from home (formerly Table

[256] Canada's Responses to the Panels' Questions A(ii), para. 208.

[257] *See* Volumetric Assessment of Pork in Foodservice: 2013 Update, Technomic Inc. Project #14655 (May 2013) (Exh. US-80).

36)."[258] However, Mexico inappropriately applies percentages of 52 percent of sales for food at home and 48 percent for sales of food away from home (*i.e.*, food service). These percentages apply to food expenditures, which paints a distorted picture of the quantities of food sold through retail versus food service channels. On average, restaurant prices are much than retail store prices, as shown in "Table 11—Relative prices of food at three stages of the system."[259] For example, in 2012, restaurant prices were 177.3 percent of retail store prices and were 178.3 percent higher in 2006. Thus, a given expenditure amount for foodservice represents a much smaller quantity of food relative to the same expenditure at retail stores.

227. To arrive at an appropriate measure of the quantity of food sold at retail stores versus foodservice establishments, USDA examined the share of total food dollars at current prices, which adjusts food-away-from-home expenditures for food costs only, as shown in "Table 10—Food away from home as a share of food expenditures."[260] Currently, USDA reports that in 2012, the share of total food dollars at current prices was 37.2 percent and in 2006, it was 36.7 percent. For food only, then, the share of food at home was 62.8 percent in 2012 and 63.3 percent in 2006.

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

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

228. Please refer to our earlier response to this question.

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

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

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[258] http://www.ers.usda.gov/data-products/food-expenditures.aspx.

[259] *Id.*

[260] *Id.*

229. The United States has noted that only three beef processors, and no pork processors, have stated for the record that they were commingling under the original COOL measure.[261] Neither complainant submits any evidence that the actual extent of commingling was any more (or less) than what the evidence in this dispute suggests.

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

230. Please see the U.S. response to Question E.

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

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

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

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

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

231. Please see the U.S. response to Question E.

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

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

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

iv. the model is estimated using monthly data?

[261] *See, e.g.*, U.S. Responses to the Panels' Questions B, paras. 201-203.

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

232. The United States has the following comments on complainants' responses to questions C, D, and E.

233. With regard to Exhibits CDA-179, 180, and 181, the so-called COOL effect on the price basis can be said to be negative in all the Sumner regressions on basis. However, the extent to which the COOL effect is found to be statistically different from zero varies by specification of the model used and the variables included. That is important, since even though a model may show a negative coefficient for some explanatory variable (on the COOL variable, for example), statistically that effect may be no different from zero depending on the confidence the model shows for that result.

Omitting Important Variables

234. Dr. Sumner does include variables that the United States has argued are important to disentangle the COOL effect on prices, however, he does so in a one-by-one fashion rather than including them all. As the United States has argued, it is important to include a recession variable, transportation variable, and a feed cost variable. The latter has not been included in any of Dr. Sumner's regressions, and in no cases does Dr. Sumner include all these important variables in the same model. The net result will be what is known as "omitted variable bias." Omitted variable bias is a term that means that the results from a particular regression will be biased by the fact that some important variable that helps explain an effect (in this case the change in prices for fed cattle) is missing from the model specification. Where an omitted variable bias is present, it draws into question the entirety of these results.

Models For Trade Volume

235. The United States still objects to evaluating the change in volumetric trade by using import ratios for cattle and hogs. The omitted variable problem is more severe with Dr. Sumner's export quantity regressions. Exports of livestock from Canada to the United States are going to be affected by all the factors that will change livestock demand and livestock supply in both countries. The United States has already noted a number of significant demand shifters for both the United States and Canada. The recession, which hit the United States more severely than Canada, started contemporaneously with COOL. The loss of income would reduce consumer demand in the United States, lowering the demand for both imported and domestic livestock.

236. In the years since the implementation of the 2009 Final Rule, Canada has considerably expanded its cattle-slaughter capacity. That has allowed Canada to raise its beef exports generally, and to the United States in particular. Higher Canadian beef and pork exports raise the demand for livestock in Canada; the increase in meat exports to the United States would decrease U.S. demand for livestock. When one omits important variables from regression analysis, the remaining explanatory variables have to account for their own effects and the missing variables' effects. Dr. Sumner's quantity regressions only account for the recession. The shifts in

Canadian capacity and meat exports would also tend to decrease exports, and the COOL dummy will pick up some of those effects as well as its own. The variables we have listed would tend to boost the apparent effect of COOL in lowering exports. However, some other excluded variables may end up reducing the measured COOL effect.

Confidence in the Estimates

237. Knowing what the standard errors are for the various coefficients is important for developing confidence in the model results. As is mentioned, Dr. Sumner generally finds a negative effect of COOL on the price for fed cattle in Canada. To develop confidence intervals around that estimate, Dr. Sumner continues to use asymptotic standard errors. That method for determining standard errors may be less appropriate in this case due to the fact that data is limited. There are other methods for developing standard errors for these types of models. For example, in a recent Sébastien Pouliot and Daniel Sumner paper, the authors examine the same COOL models as presented in Exhibits CDA-179, 180, and 181.[262] However, in the Pouliot and Sumner models the authors used a different and arguably more appropriate method for developing standard errors and found that the estimated COOL impacts on the basis.[263] The results from those models had larger standard deviations than those presented in Exhibits CDA-179, 180, 181. That implies that the confidence of the estimated coefficients in these exhibits are likely lower than Dr. Sumner suggests.

238. Research generally shows that the asymptotic standard deviations for problems such as Dr. Sumner addressed are too low, which means the accuracy of the estimates is overstated.) Dr. Sumner's estimates have two problems. First, all his models have lagged dependent variables. For example, he uses last week's cattle basis to help explain this week's basis. The standard errors a computer program calculates for these cases are inaccurate. The ultimate COOL impact in all his models is a non-linear function of the COOL-dummy coefficients and the lagged variable coefficients. Green, Rocke, and Hahn (1987) examined the properties of these types of estimates and found that the asymptotic standard errors provided by econometric software were much smaller than the more accurate standard errors produced by numerical techniques.[264]

239. In addition, as we have pointed out in earlier submissions, constructing weekly data from quarterly or monthly data will increase the degrees of freedom in the econometric specification, which may artificially inflate the confidence one draws from the results. The confidence in the results decrease in general when Dr. Sumner changes from the weekly to the monthly specification. There are many ways to incorporate data from different time periods into

[262] Sebastien Pouliot and Daniel Sumner, "Differential Impacts of Country of Origin Labeling: COOL Econometric Evidence from Cattle Markets," Structure and Performance of Agriculture and Agri-Products Industry Network (2012) (Exh. US- 76).

[263] *See generally*, Richard Green, William Hahn, and David Rocke, "Standard Errors for Elasticities: A Comparison of Bootstrap and Asymptotic Standard Errors," (Standard Errors for Elasticities) Journal of Business & Economic Statistics, Vol. 5, No. 1 (Jan., 1987) (Exh. US-77).

[264] *See* Standard Errors for Elasticities, pp. 145, 150 (Exh. US-77).

econometric regressions. Typically when data is limited for some variables to a longer time period, but other data is available on a more frequent basis, the model is specified using the lower periodicity. In this case that implies a monthly regressions, rather than a weekly regressions. There are means to convert monthly data into weekly data that are more or less appropriate. It is unclear how Dr. Sumner has converted monthly data into weekly data for these submissions, but it would be more appropriate to convert the weekly data to monthly data. Similarly, the addition of new data through from 2013 and 2014 make some of the specifications less significant relative to the initial estimates.

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

240. We are submitting Exhibit US-78, which is a revised version of Exhibit US-62. In Exhibit US-62, we mistakenly compared the Alberta (Canada) *feeder* steer prices with the Omaha, Nebraska (United States) *fed* steer prices. The corrected basis compares the Alberta Canada fed steer price with the Omaha, Nebraska fed steer price. Please also see our comments above to complainants' responses to Question 19 with regard to the accurate price basis.

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

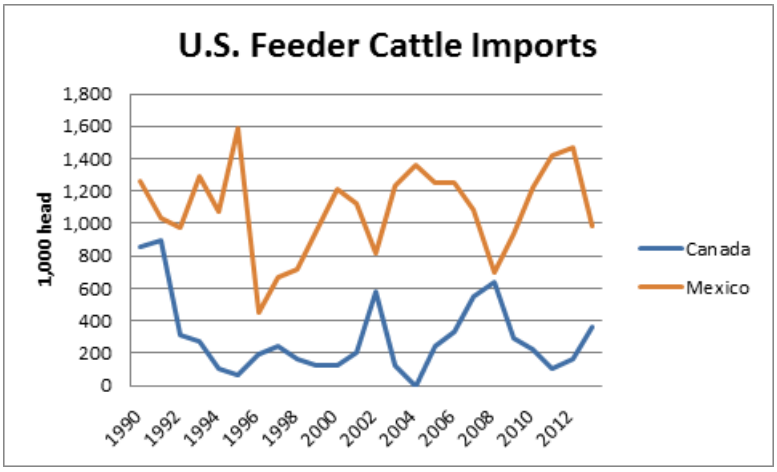
241. Canada claims that because it is a low-cost supplier to the U.S. market, the price in Canada will be below the price in the United States. This is not strictly correct. The price basis for the Canadian data is often negative (when calculated as the Canadian price minus the U.S. prices), which we would expect is due to transportation costs, but not always. That indicates that Canadian cattle can be sold into the United States at a premium at times. As discussed in response to Question 19 (see above), using the Canadian data submissions in CDA-179 and CDA-180, on average the price basis has narrowed post-COOL, indicating that the Canadian price has improved relative to the U.S. price since 2008.

Average Alberta-Nebraska fed cattle basis from CDA-179 & 180				
	monthly		weekly	
	pre-COOL	post-COOL	pre-COOL	post-COOL
steers	-0.12	-0.09	-0.17	-0.10
heifers	-0.13	-0.10	-0.17	-0.10
start date	January 2005	October 2008	May 5, 2001	October 4, 2008
end date	September 2008	December 2012	September 27, 2008	February 8, 2014

H. (*Canada*) Please specify (i) the actual data used (including price and quantities and econometric estimates of the impact of COOL); (ii) the details of the calculations (formulas used and how they were derived); as well as (iii) the assumptions considered in the economic model, to reach the findings of Exhibit CDA-126.

242. On March 20, 2014, Canada submitted additional information and argumentation in response to this question. The United States has not had sufficient time to evaluate the new information or arguments (which Canada has now had almost four weeks to develop). As such, the United States cannot respond to this new information in these comments. We do note the irony of Canada strongly objecting to the recent U.S. extension request, stating that "the timetable for this compliance proceeding is already unduly long," while in effect granting itself two separate and unilateral extensions to the March 7, 2014, deadline to supplement its apparently incomplete Responses to the Panels' Questions.

243. As noted previously, the economic model used in Exhibit CDA-126 will not provide meaningful information to judge the impacts of alternative measures based on increasing the cost to U.S. processing and marketing of all hogs or cattle slaughtered for sale in the United States. One significant flaw (of many) is that the model assumes that Canadian and Mexican suppliers will react similarly to U.S. producers regarding an increased cost of processing and marketing. Indeed, we see that after the original COOL measure was implemented imports of Canadian feeder cattle fell while imports of Mexican feeder cattle rose.



Source: U.S. Department of Commerce, Bureau of Census.

There are many reasons for those trends, which now appear to be reversing; *i.e.*, increasing Canadian imports and receding Mexican imports (see figure).

244. Although the United States in the primary consumer of live cattle in North America, the three NAFTA markets are highly integrated and each country has its relative comparative advantage. Mexico has the relative comparative advantage of producing feeder cattle while Canada can be said to have the relative advantage of producing fed cattle. Since the U.S. imports a relatively stable amount of live cattle each year, when conditions exist such that causes fed cattle imports to decline, feeder cattle imports tend to increase. The reverse is true when conditions exist that limit feeder cattle imports.

245. As noted previously, the response of Canadian suppliers to a U.S. domestic regulation that imposes costs on all cattle slaughtered in the US, for example, will result in a proportionately larger response by the Canadian exporters as compared to the U.S. domestic

sector. By omitting such behavior in Exhibit CDA-126 any information drawn from the exercise will be misleading.[265]

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

246. The estimates provided by the new Canadian econometric submissions continue to suffer from omitted variable bias and misleading calculation of statistical significance.

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

247. Canada's new calculations for their submission continue to highlight the problems that the United States has outlined in its earlier submission. Conducting sensitivity analyses on the U.S. domestic sector supply and demand for cattle, hogs, beef, and pork, without considering the responsiveness of Canadian and Mexican suppliers is not correct if the intent is to determine what cost might lead to the trade revenue impacts that Canada has estimated from the COOL measure. The facts that Mexican exports to the US since COOL have increased as have Canadian cattle prices relative to U.S. prices further underline this point.

248. Aside from those economic considerations, however, it is clear that imposing a $600 to $2400 per head charge on a steer (that sells for $1600 at slaughter), will have dramatic impacts on the sector.[266] Faced with such a fee, Canadian and Mexican suppliers would *cease* exporting to the United States and would export increased quantities of beef to the United States at a much lower price than could be met by U.S. processors. The same observation obviously holds for imposing a processing and marketing charge on hog slaughtered in the United States of between $116 to $1200 per hog for a hog that currently sells for $170 at slaughter. Such numbers strain credulity on their face and cannot be reconciled with the *actual* trade data, as discussed in response to Question H (above) and elsewhere in previous U.S. submissions. Due to the response of exporting countries to regulatory costs imposed on U.S. processors, it is likely that any trade impacts being observed today are due to the much lower processing and marketing costs of COOL outlined in the USDA regulatory impact analyses that accompany the 2009 and 2013 final rules. These analyses apply to all cattle and hogs equally.[267]

K. (*all parties*) Please explain whether Dr. Sumner's findings in Exhibit CDA-126 can be used to infer the magnitude of compliance costs required for a non-

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[265] *See, e.g.*, U.S. Responses to the Panels' Questions K, paras. 205-223.

[266] *See, e.g.*, U.S. Responses to the Panels' Questions K, para. 221.

[267] *See* 2013 Final Rule (Exh. CDA-1); 2009 Final Rule (Exh. CDA-2).

discriminatory alternative measure to cause trade effects equivalent to those of the original COOL measure.

249. As discussed previously, the approach used in Exhibit CDA-126 is flawed for several reasons and cannot be used to infer the magnitude of compliance costs required for a non-discriminatory alternative trade measure. For example, CDA-126 presumes the price difference between Canadian and U.S. cattle is due to discriminatory regulatory costs. There are, of course, other reasons for price differences between US and Canadian cattle, including difference transportation costs.

250. Using Dr. Sumner's approach of a single-country, single-product model to "show" that an extremely expensive policy would have the exact same effect on imports as COOL is misleading.[268] Those results presume that an extremely high processing-cost increase for cattle slaughtered in the United States would decrease total, domestic livestock revenues by 40 percent as well as Canadian trade revenues by the same percentage. Such an approach is unsupported by either economic theory or practice.

251. While we disagree with Canada over the magnitude of the effects caused by COOL implementation costs, we do not argue that COOL does not have any effect on the market. However, we consider that the small effects in trade volume and prices that are observable are well within seasonal and yearly variations due to such things as transportation fuel cost changes, exchange rate variations, and economic well-being. Any remaining COOL effect from equal regulatory costs on processors and marketers would be expected to widen the basis relative to the small cost associated with COOL implementation. Such effects would mitigate over time as the sector adjusts to the new regulatory regime.

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

252. As the United States pointed out in our response to Question L in our earlier submission and Question 39 above, using "lost export revenue" as a measure of trade restrictiveness has no basis in the text of the covered agreements or in past reports and appears unrelated to the description of trade restrictiveness provided by the Appellate Body, which is "having a limiting effect on trade."

253. In addition to being a unique measure in terms of trade agreements, using "lost export revenue" as a measure of trade restrictiveness is somewhat unique in the economics literature. There has been a great deal of work on developing practical measures of the restrictiveness of trade policies. The vast majority of those focus on measuring price gaps and welfare losses to the countries involved. If a product is freely traded between two countries the prices for the product in the two countries will converge. In simple models of international trade

[268] *See* U.S. Responses to the Panels' Questions K, paras. 218-220.

we will see that two countries' prices for a traded good are the same. In more realistic models, they will differ by transport costs.

254. The larger the price gap between the (potential) importer and exporter the more restrictive economists consider the policies to be and the larger the welfare loss will be. Price-gap measures focus on the effective restrictiveness of policies. In theory, a tariff equal to the price-gap would have the same effect as the entire array of measures that could affect trade, such as regulatory costs. Price gaps allow us to summarize the total effects of such measures in calculating the welfare losses. The other advantage of price-gap methods is that they do not require any sophisticated economic modeling; price gap methods are simply based on the insight that free trade will tend to equalize prices.

255. There are several drawbacks to using percent export-revenue loss as a measure of trade restrictiveness. First, both import demands and export supplies tend to be extremely elastic (as described in U.S. answer to Question K); large changes in imports and exports in response to small changes in conditions are possible. Second, while price-gap measures are based on a basic economic insight, revenue-loss measures require sophisticated economic modeling. All economic models are based on assumptions, and small changes in assumptions can have large effects on the estimated impacts. A narrow range of supply and demand elasticities can provide a huge range of cost changes.

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

256. Please refer to the previous U.S. response to Question M and Question 76.