

BEFORE THE WORLD TRADE ORGANIZATION

**UNITED STATES – CERTAIN COUNTRY OF ORIGIN LABELLING
(COOL) REQUIREMENTS**

(DS386)



**MEXICO'S RESPONSES TO THE PANEL'S QUESTIONS
FROM THE SECOND SUBSTANTIVE MEETING**

Geneva

6 January 2011

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

(WT/DS384, 386)

Questions of the Panel to the Parties Following the Second Substantive Meeting with the Panel

General matters

Measures at issue

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

1. We agree with Brazil's view that the fact that separate instruments or measures differ in their substance or legal status does not preclude that they, *operating together*, violate specific provisions of the WTO Agreements. As Brazil explains, "*nothing in Article 3.3 precludes a claim that a set of measures working together, impair benefits accruing to a Member under the Covered Agreements*".

2. As Mexico has explained, the COOL Measure comprises several legal instruments which, operating together, violate WTO rules. These include the Statute (i.e. the Agricultural Marketing Act of 1946, as amended by the 2002 and 2008 Farm Bills) creating the country of origin labelling rules for meat, including, among other things, the labelling categories and the exceptions to the rules; the regulations (i.e. the AMS and FSIS Interim and Final Rules) which implement the Statute; and the Vilsack letter which relates to the application of the Measure.

3. Although their legal nature is different, i.e. the Statute was created by the Congress, the regulations were created by the USDA as required by the Statute, and the Vilsack letter was issued by the head of the USDA, all of those instruments serve the same purpose which is the implementation of the COOL Measure. Also, although the content of each instrument differs as per its own nature, they operate together and are clearly aimed at the same purpose.

4. A key point is that the legal instruments are directly and legally related to each other. In particular, neither the regulations nor the Vilsack letter would exist but for the Statute. Accordingly, the Panel should analyse the instruments, and their implementation by USDA, as a single measure.

Country-of-origin labelling requirements

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

5. Mexico does not have access to this information because it pertains to the actions of private actors in the US market and therefore it is out of the reach of the Mexican cow-calf industry.

6. Mexico would like to refer to Canada's answer to this question.

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

7. Mexico does not have access to this information because it pertains to the actions of private actors in the US market and therefore it is out of the reach of the Mexican cow-calf industry. Based on the behaviour of the U.S market for Mexican-born cattle, it appears that very little, if any, meat that could qualify for label A is being labelled as B or C.

8. Mexico would like to refer to Canada's answer to this question.

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

9. There is not precise information available to Mexico on this issue.

10. According to a 2005 USDA report based on data collected in the 1990s, nearly 65 per cent of all beef was purchased at retail stores, and approximately 50% of ground beef and 25% of steak was purchased at restaurants and similar facilities.¹ No distinction is made between retail stores covered by the COOL requirements and those excluded from the COOL requirements.

11. According to the Cattlemen's Beef Board and the National Cattlemen's Beef Association, in 2008, 4.2 billion pounds of fresh beef was sold at retail by those supermarkets having annual sales of more than USD \$2 billion, and the foodservice sector purchased 8.18 billion pounds of beef.² No distinction is made between retail stores covered by the COOL requirements and those excluded from the COOL requirements.

12. The data does not indicate the sales of those small stores not covered by COOL, and those larger stores covered by the COOL Measure, but which did not have sales or more than USD\$2 billion.

13. A senior Wal-Mart executive, in an interview about the COOL Measure, stated that 53% of U.S. food is consumed in restaurants and food service facilities.³

¹ Davis, Christopher G., Lin, Biing-Hwann, "Factors Affecting U.S. Beef Consumption", Electronic Outlook Report from the Economic Research Service of the USDA, October 2005. Exhibit MEX-99.

² Cattlemen's Beef Board and National Cattlemen's Beef Association, "Beef Market at A Glance Fact Sheet", available at http://www.explorebeef.org/CMDocs/ExploreBeef/FactSheet_BeefMarketAtAGlance.pdf Exhibit MEX-100.

³ Beef Magazine, "Beef Chat: The Wal-Mart Way" (June 1, 2003), available at http://beefmagazine.com/mag/beef_walmart/. Exhibit MEX-101.

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

14. To Mexico's knowledge, meat products are not systematically segregated based on their destination market.

15. Under normal practice, there is no systematic separation based on end use before processing in the slaughterhouses. The backgrounders and feedlots typically would not know which animals are destined for the production of meat for restaurants and small stores and which animals are destined for the production of meat for those stores covered by the COOL Measure. Accordingly, they must keep track of the origin of all of the cattle.

16. The meat processing companies slaughtered at least an average 2,812,200 head of cattle each month in 2009 and 2010⁴, and the production process is so intensive that the plants will not stop the production chain during the day for the purpose of separating the meat according to the type of establishment for which it is destined. For this reason, the slaughterhouses must be able to determine the origin of the cattle with respect to all of their production even though not all of their downstream customers are covered by the measure.

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

17. Mexico has suggested three less trade restrictive alternatives and the examples presented by the United States do not provide credible reasons to reject those alternatives. Moreover, the WTO-consistency of a measure depends on the facts and circumstances specific to that measure not those specific to other measures. Whether or not measures of other WTO Members are WTO-consistent is immaterial to the WTO-consistency of the COOL Measure.

18. Mexico has established that Mexican cattle are imported into the United States at a young age, and spend the great majority of their lives in the United States before they are slaughtered and processed into beef products. Accordingly, if the United States were to apply the rules used by Australia, Japan and Korea, beef products produced from Mexican cattle could be labelled as "made in United States."

19. For example, under Korea's system, if cattle spends six months in the country before slaughter the beef product is considered domestic. Under the COOL measure, no amount of time spent in the United States, regardless of its length, can confer origin; the U.S. system is designed to block any possibility that products derived from a foreign born cattle, even if it arrives at the United States the day after birth, may qualify for label A.

⁴ See Exhibits MEX -102 and MEX-103, USDA's National Agricultural Statistics Service "Livestock Slaughter" reports released on January 22 and December 23, 2010, page 2 and 5, respectively.

20. Similarly, Japan's system provides that, where meat was produced from livestock raised in two countries, "the country of origin is the country with a longer raising period", and therefore, if this rule were applied in the United States, meat produced from Mexican cattle also would qualify to be labelled as domestic. The COOL measure completely disregards the amount of time livestock have spent in a country.

21. Australia requires substantial transformation with 50% value added. Again, if this rule were applied by the United States, meat produced from Mexican cattle would easily qualify.

22. As Mexico has previously explained, trace back systems such as that of the European Union impose equal burdens on all products, regardless of the origin of their inputs. Because it does not discriminate, that type of system does not change the conditions of competition. Accordingly, Mexico has already proposed that type of system as a less trade restrictive alternative to the COOL measure.

TBT Agreement

Vilsack letter

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

23. Mexico has addressed the meaning of "mandatory" in its prior submissions.⁵

24. The Appellate Body has recognized that, with respect to Article 2.2 of the TBT, in order to be "mandatory", the technical regulation must regulate the characteristics of products "in a binding or compulsory fashion"⁶.

25. The term "with which compliance is mandatory" means that compliance with the product characteristics laid down in the document is mandatory, i.e. binding or compulsory.

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

26. The Vilsack letter derives its mandatory nature from being part of the COOL Measure which is, on its face, mandatory under both U.S. domestic law and under Article 1.1 of the TBT Agreement. Viewed independently, the Vilsack letter may not be mandatory under U.S. domestic law. However, for the reasons set out in Mexico's previous submissions, it is mandatory within the meaning of Article 1.1 of the TBT Agreement.⁷

27. It is Mexico's position that Vilsack letter, even if it is considered on its own, satisfies the specific meaning of the phrase "with which compliance is mandatory" under Annex 1.1 of the TBT Agreement.

⁵ First Written Submission of Mexico, paragraphs 246-260; Mexico's Responses to the Panel's Questions from the First Substantive Meeting, paragraphs 22-27.

⁶ Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, ¶ 68.

⁷ First Written Submission of Mexico, paragraphs 251-259; Mexico's Responses to the Panel's Questions from the First Substantive Meeting, paragraphs 22-27.

28. Although the letter was characterized as including voluntary suggestions, it is not enough for a document to include the term voluntary in its language, in order to be considered non-mandatory. If the inclusion of the term "voluntary" could be enough to determine that a document is not mandatory, this would create an easy way to circumvent the rules regarding technical regulations in the TBT Agreement.

29. As previously explained, it is Mexico's position that the Vilsack letter has a mandatory nature for the following reasons:

- a) It was issued by the head of the USDA, a high official of the executive branch whose direct superior is the head of the executive (i.e. the President), and who has the regulatory power to define the agricultural policy in the United States.
- b) It was issued to the representatives of industries regulated by the USDA, industries whose actions can easily be identified by the authority regulating them, and which would obviously prefer to maintain good relations with that authority.
- c) It contains language indicating that the USDA "*will be closely reviewing industry compliance with the regulation and its performance in relation to these suggestions for voluntary actions*", and went on to say that Secretary Vilsack "*will carefully consider whether modifications to the rule will be necessary to achieve the intent of Congress.*" This is an explicit threat that additional modifications will depend on the industry's compliance with the suggested practices.

30. For these reasons, the Vilsack letter when viewed independently is mandatory i.e. binding or compulsory.

31. Although the letter might have been characterized by USDA as voluntary, it is difficult to understand how a letter issued by the head of the USDA to the industries regulated by the USDA, and with a language containing an explicit threat of a "close review" of their actions, and a "consideration whether modifications of the rules will be necessary" depending on those actions could not be considered as mandatory. If the Vilsack letter is not considered as having a mandatory nature, any similar type of action from a relevant authority could easily avoid the WTO disciplines on technical regulations no matter how WTO inconsistent it might be.

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

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

32. These articles of the International Law Commission's *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, which represent a codification of customary international law, are helpful in clarifying that the Vilsack Letter is part of the COOL measure. They confirm Mexico's position that the United States is responsible at international law for the Vilsack Letter, under this under the GATT 1994 and TBT Agreement regardless of the status of the letter in U.S. law.

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

33. There are no relevant previous Panel or Appellate Body reports specifically addressing the term “mandatory” within the meaning of Annex 1.1 in relation to senior government official trying to influence the behaviour of private actors.

34. However, in the context of interpreting the term “measure” for purposes of different WTO rules, the Panels and Appellate Body have recognized that this type of action can amount to a measure subject to scrutiny under the WTO rules.

35. The Appellate Body has recognized that any act or omission, regardless of legal status, attributable to a WTO Member can constitute a “measure”.⁸

36. The Panel in *Japan-Film* explained its position as follows:

[I]n cases where there is a high degree of cooperation and collaboration between government and business, e.g. where there is substantial reliance on administrative guidance and other more informal forms of government-business cooperation, that even non-binding, hortatory wording in a government statement of policy could have a similar effect on private actors to a legally binding measure or what Japan refers to as regulatory administrative guidance.⁹

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

37. Mexico does not have any first hand evidence demonstrating that the Vilsack letter resulted in a change on the relevant figures. However, Mexico has explained that the Vilsack letter confirmed the USDA's strict interpretation of the COOL Measure and created a disincentive to use the commingling rules, and thus, foreign born cattle, which was one of the main purposes of Secretary Vilsack, as evidenced from his public statements. For example, on March 10, 2009, the Washington Trade Daily reported that, at a meeting with the National Farmers Union, Secretary Vilsack announced that he intended to move ahead with a more stringent country-of-origin marking program. The article observed, *inter alia*, that:

Mr. Vilsack said he intends to move ahead with a more stringent country-of-origin marking program, which was part of last year's farm bill renewal (WTD, 2/26/09). But in remarks to the press, House Agriculture Committee Chair Peterson criticized the Administration for going beyond a hard-won compromise deal reached last year between consumer advocates and meat packers and processors. He admitted, however, that meatpackers had been taking advantage of Bush Administration rules which opened the door to marking most processed beef and pork as originating in either the United States, Canada or Mexico – instead of being more specific on the actual country of origin.

⁸ Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998 at footnote 47 [*Guatemala – Cement*].

⁹ *Japan – Film*, *supra* note 4 at paragraph 10.49.

38. Additionally, Mexico wishes to recall paragraphs 258 to 260 of its First Written Submission, where it provided evidence of how actions such as the Vilsack letter are taken seriously by the industry.

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

39. Mexico has explained how the Vilsack letter, included in the COOL Measure as a single measure, constitutes a technical regulation within the meaning of TBT Article 2.2., and why, even if viewed in isolation, Vilsack letter is a technical regulation within the meaning of TBT Article 2.2. Mexico has also explained that the Vilsack letter is also evidence of the interpretation and application of the COOL Measure.

40. Brazil has further explained that a document which may not in itself constitute a technical regulation could be relevant to the application of the technical regulation itself. Mexico agrees with Brazil.

101) (Canada and Mexico) Please explain whether, and if so how, the level of alleged less favourable treatment, trade restrictiveness and (non-)achievement of objectives varies depending on whether the COOL requirements as contained in the US statute and implementing regulations are considered separately from the Vilsack letter.

41. It is Mexico's position that the COOL Measure is inconsistent with Article III:4 of the GATT and Articles 2.1 and 2.2 of the TBT with or without the Vilsack letter. The level of less favourable treatment, trade restrictiveness and non-achievement of objectives does not vary depending on whether the Vilsack letter is considered separately.

42. In its first written submission, Mexico analysed the inconsistency of the COOL Measure with those provisions, considering the language of the Farm Bill and the Final Rule, and also explaining the effect of the Vilsack letter. As Mexico has explained, the COOL provisions as they stand without the Vilsack letter are discriminatory and constitute an unnecessary obstacle to trade. The Vilsack letter simply confirms USDA's strict interpretation of the country of origin labelling provisions contained in the Statute and Regulations and discourages the industry from using mixed origin labels.¹⁰

43. Because the COOL Measure prohibits the implementation of any tracing system, the easiest way to comply with the strict requirements that are confirmed by the Vilsack letter is to avoid using cattle from foreign origin. In this way, the meat production participants are able to label all the meat as born, raised and slaughtered in the United States without having to use a trace back system.

¹⁰ Second Written Submission of Mexico, paragraph 35.

General

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

44. This comment by the European Union is made in the context of its submissions that the "objective of consumer information is legitimate". Mexico is concerned about the approach that the European Union is taking to the interpretation and application of Article 2.2 and cautions the Panel to avoid that approach.

45. The European Union adopts a simplistic approach to analyzing the objective of the measure—i.e., "the provision of consumer information".¹¹ As explained in detail in Mexico's response to Question 54 of the Panel, the objective of a technical regulation is not self-judging and is part of the Panel's objective assessment of the facts.¹² Moreover, the Panel must determine *all relevant details* of the objectives of the technical regulation. It is not enough for the Panel to simply classify the objective at a high level of generality as proposed by the European Union. Clearly in many if not most circumstances the provision of consumer information will be legitimate; however, as explained by Mexico in its first written submission, it will not be legitimate in all circumstances.¹³

46. The objective of the COOL Measure is not simply the provision of consumer information. Rather, it is a particular type of consumer information, namely country of origin labelling information and a particular type of country of origin labelling information, namely where the cattle which were processed into the beef were born, raised, slaughtered and processed. The Panel can only assess whether an objective of a technical regulation is "legitimate" if it first objectively determines that objective to this necessary level of specificity.

47. The European Union's statement at paragraph 13 of its oral statement reads as follows:

Whilst we agree that not all objectives will necessarily be legitimate, we do not consider that it would be necessary or appropriate in this case for the Panel to address this question. We think it both unnecessary and incorrect to opine about the relative degree of regulatory space under the SPS and TBT Agreements—if anything we see more regulatory space under the TBT Agreement.

48. Mexico disagrees with this statement. For the reasons set out above, it is essential that the Panel address this question and that the Panel provide an objective framework for identifying and analyzing the objective of technical regulations and then assessing whether that objective is legitimate.

49. Mexico also disagrees with the comment that there is more "regulatory space" under the TBT Agreement. Like all WTO Agreements, the TBT Agreement must be interpreted and applied in accordance with the well-developed rules of treaty interpretation. The concept of "regulatory space", whatever that term may mean, is irrelevant to this exercise.

¹¹ Second Third Party Oral Statement by the European Union, paragraph 10.

¹² Mexico's Responses to the Panel's Questions from the First Substantive Meeting, paragraphs 142-149.

¹³ First Written Submission of Mexico, paragraphs 284-295.

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

50. Canada and New Zealand, as well as Mexico, have expressed during the TBT Committee Meetings opposition to the imposition of mandatory COOL on the basis of its trade-restrictive effect, its irrelevance to food safety requirements and the high implementation costs involved. Those countries also stressed that a policy allowing for voluntary COOL would be far less trade restrictive and would not impose the same potential barrier to international trade; they also expressed that it was preferable to leave country of origin labelling to be implemented on a voluntary basis by industry and not to impose it by way of prescriptive regulation.

51. During the TBT Committee Meeting of July 2007 New Zealand expressed that "...For blended products sourced from many countries, the cost of listing the countries of origin were significant and this could lead to de facto discrimination towards sourcing from domestic products so as to ease the administrative burden...".¹⁴

52. During the TBT Committee Meeting of November 2008 Canada stressed that "...the US had yet to provide evidence that the mandatory COOL program would benefit consumers as a retail labelling program. On the contrary, domestic support for the program did not appear to be consumer-driven, but rather, producer-driven...".¹⁵

53. Previous discussions in the TBT Committee are illustrative that the WTO Members have expressed concerns regarding the imposition of mandatory country of origin labelling requirements that could be in breach of the TBT Agreement provisions.

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

54. Yes. The obligations in the two provisions are separate and cumulative.

55. Although it would depend on the facts and circumstances, in theory a measure could be found to violate the non-discrimination obligation in Article 2.1 and yet be found consistent with the obligation in Article 2.2. Similarly, a measure could be found to violate Article 2.2 but not Article 2.1.

56. The relationship between Articles 2.1 and 2.2 is an important one. Article 2.2 is notable because it imposes disciplines on the trade restrictive effects of an *internal* measure. In the GATT 1994, such effects are disciplined on imports (e.g., Article XI) but not on internal measures. For those measures, the obligations are limited to non-discrimination (e.g., Articles I and III). This, in part, may explain the complexity of the obligation in Article 2.2. By contrast, the language of Article 2.1 is straightforward.

57. Many technical regulations will have a trade restrictive effect in the sense that they will restrict commerce in a particular product for example by stopping commerce altogether or by imposing additional costs on commerce. Often that restrictive effect will be the same on both imports

¹⁴ G/TBT/M/42; paragraph 72.

¹⁵ G/TBT/M/46; paragraph 204.

and like domestic products. In other words, the technical regulation will equally restrict commerce in all like products irrespective of origin. Even in such circumstances, to the extent commerce is restricted for imported products that effect will be "trade" restrictive within the broad meaning given to this term.¹⁶ Provided that the technical regulation is not more trade restrictive than necessary to fulfil a legitimate objective taking into account the risks non-fulfilment would create, it would not violate Article 2.2. Moreover, if its restrictive effect is the same on both imports and like domestic products, it would not violate Article 2.1.

58. The cumulative application of the discipline in Article 2.1 is important because a trade restrictive technical regulation could comply with all of the requirements of Article 2.2 yet it could impose its trade restrictive effects in a discriminatory fashion whereby imports are disproportionately or solely adversely affected. In such circumstances, the restriction will modify the conditions of competition in the relevant market to the detriment of imported products and therefore violate Article 2.1.

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

59. Yes. Although the COOL Measure as it is currently designed, structured and implemented is inconsistent with Articles 2.1 and 2.2 of the TBT Agreement, mandatory country of origin labelling could be implemented in a manner consistent with these two provisions. A fairly implemented trace back system could achieve this. It could accurately and comprehensively fulfil the stated objective, assuming *arguendo* that the objective is not protectionist, and yet not discriminate against imports in the sense that it could eliminate the option of restricting trade in imports as the most commercially viable option to comply with the measure. See also Mexico's response to Question 145 of the Panel, below.

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

60. Attached you will find Exhibit MEX-104, where you will find the statistics available in the website of the United States International Trade Commission.

61. According to these statistics, the 2000-2009 U.S. livestock average imports were 2'094,582 heads, from which 52.6 per cent were from Mexico and 47.4 per cent from Canada. Imports from Mexico decreased 23 percent in the same period, from 1,222,231 to 940,851 heads. The lowest import s were registered on 2008, following the implementation of COOL, with 702,651heads.

62. On the other side, US average livestock exports were 189,617 between 2000 and 2009, from which 54.1 per cent were exported to Canada and 44.8 per cent to Mexico. During the same period, total U.S. livestock exports fell 92.6 per cent, from 466,348 to 34,359 heads.

¹⁶ See discussion of the meaning of "trade restrictive" in paragraphs 305-307 of the First Written Submission of Mexico.

Article 2.1

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

63. It is important to clarify what is meant by the “impact of a government regulation”. Does it mean “trade effects” or does it mean “modification of the conditions of competition”? These are two different aspects of the impact of a government regulation.

64. Since the focus of Mexico's claims is not on trade effects but on the modification of conditions of competition, Mexico interprets this question to be “explain whether the proper assessment of the modification of conditions of competition from a government regulation requires a certain period of implementation time”?

65. The answer is that it will depend on the circumstances. A measure may immediately modify the conditions of competition or, alternatively, it may take some time to ascertain the effect. In the case of the COOL Measure, the modification of the conditions of competition became apparent at the time of publication of the Interim Final Rule. This is what prompted Mexico to initiate consultations with the United States and, ultimately, initiate this dispute.

66. Mexico would like to clarify that this answer does not address the issue of over which time frame this Panel should assess the facts relating to the modification of the conditions of competition. Mexico has addressed that issue in its second written submission.¹⁷ On this point it is interesting to note that in the current dispute *United States— Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (WT/DS381), the United States is arguing that the panel should examine facts from 20 years ago when assessing whether today the challenged measures *de facto* discriminate against imports of Mexican tuna products.¹⁸ Under the combined arguments of the United States in that dispute and the EU in this dispute, a *de facto* discrimination claim could not succeed unless such discrimination is proven to exist historically, currently and in the future. If accepted, these arguments will fundamentally undermine the *de facto* application of the WTO disciplines which prevents Members from doing indirectly what they cannot do directly. This would open the door to untold inconsistencies with fundamental WTO obligations throughout the WTO-based multilateral trading system.

67. The *de facto* discriminatory and trade restrictive effects are clearly occurring today and it is the existence of those effects that gives rise to Mexico's request that the Panel rule upon its claims of *de facto* discrimination in this dispute.

68. While it is true that any new regulation will take time to implement, the COOL regime continues to have a negative effect upon imported Mexican cattle and will do so into the foreseeable future. As Mexico has demonstrated, the discount for Mexican cattle *vis-à-vis* the U.S.-born cattle will always be present in varying amounts until the COOL Measure is modified in a manner consistent with U.S. obligations under the TBT and the GATT. The initial discount for Mexican cattle may have been previously larger than it is today because U.S. packers had no way of accurately estimating

¹⁷ Second Written Submission of Mexico, paragraphs 112-115.

¹⁸ *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (DS381), U.S. First Written Submission, paragraphs 92-93, 117 (see http://www.ustr.gov/webfm_send/1888); U.S. Answers to Panel's First Set of Questions, paragraphs 53-55 and 158 (see http://www.ustr.gov/webfm_send/2375).

segregation costs by country of nativity. This initial period of uncertainty lasted for only a few months and, in Mexico's belief, the discount rate now reflects the approximate costs of segregation, tempered by U.S. demand. The discount is generally larger when prices for cattle are lower, and slightly less when cattle prices improve. Nevertheless, as can be seen from the statistics provided by Mexico, the discount persists, and will continue to depress prices for imported Mexican cattle.

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

69. Econometric evidence can assist in assessing a claim under Articles 2.1 and III:4 insofar as it can confirm and corroborate the modification of conditions of competition. In certain situations, it can also form the factual basis for proving that conditions of competition have been modified. Whether or not it is necessary in a particular case will depend on the circumstances.

70. In the case of Mexico's claims in this dispute, it is not necessary because Mexico has presented direct evidence of the modification of conditions of competition. Canada's econometric evidence does, however, confirm and corroborate Mexico's evidence regarding the modification of conditions of competition by the COOL Measure.

116) (Canada and Mexico) Colombia states that for the purposes of Article 2.1, the Panel should "assess the way in which the impact over cattle and hog producers in Canada, Mexico and the United States, affects the conditions of competition between imported and domestic products subject to the COOL Measure [beef and pork produced from imported and domestic livestock]."

(a) Please confirm that the complainants' claims under Article 2.1 are not based on any negative impact on beef or pork sold at the retail level in the United States that is produced from imported Canadian or Mexican livestock.

71. Confirmed. Mexico's legal claims are not based on any negative impact on beef sold at the retail level in the United States. However, even though Mexico is not basing its legal claims on such impacts, some of the adverse effects of the COOL Measure on Mexican cattle may be transmitted downstream to beef produced from Mexican cattle.

(b) Please comment on Colombia's statement and whether you agree with this view.

72. Mexico disagrees with Colombia's view. Mexico's claims concern the effect of the COOL Measure in modifying the conditions of competition between Mexican cattle and like U.S. cattle and its trade restrictive effect on Mexican cattle. Therefore, there is no reason why the Panel should assess the change in conditions of competition between beef produced from imported and domestic livestock.

73. Furthermore, as Mexico has mentioned in previous submissions, the COOL Measure explicitly applies to *both* beef and cattle. This is evident from the text of the Statute and the Final Rule which links the relevant label for beef to the country in which the cattle were born, raised and slaughtered. Moreover, Mexico's challenge of the COOL Measure relates to its effect on imported inputs (i.e., Mexican cattle). The relevant like product is therefore domestic inputs (i.e., U.S. cattle). Mexican and U.S. cattle are clearly like.

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

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

74. Prior to the COOL Measure, segregation was made after the processing of the cattle in the slaughterhouses and was based on quality. The segregation for the purpose of complying with the COOL Measure is independent and additional to other types of segregation, and must be implemented by backgrounders and feedlots as well as slaughterhouses. This type of segregation therefore imposes additional costs.

75. Mexico has already explained in its response to Question 43 from the Panel that to the extent that segregation existed prior to COOL, that segregation was not based in origin or place of birth or the animal.¹⁹

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

76. This question assumes the existence of long term supply contracts between Mexican cattle exporters and U.S. slaughterhouses which were interrupted by the COOL Measure. There are no such contracts in the case of Mexican cattle exports to the United States. As explained in Mexico's evidence, Mexican cattle are sold at a young age to U.S. backgrounders and feedlots and not to slaughterhouses. To the extent that there are contracts between U.S. slaughterhouses and their cattle suppliers, that information is confidential and Mexico does not have access to that information.

77. The implementation of the COOL measure resulted in a change in the terms and conditions offered by U.S. slaughterhouses to sellers of livestock that originated in Mexico and not in the interruption of long term supply contracts between Mexican exporters and those slaughterhouses. These changes are described in Mexico's submissions as follows:

- reduction in processing plants accepting Mexican cattle;
- reduction in the number of days per week Mexican cattle are processed;
- reduction in backgrounders and feedlots that will accept Mexican cattle; and
- additional requirements imposed on Mexican cattle in the form of advanced notification requirements for processing.

78. Mexico has included documentary proof of these changes in the form of invoices and other documentation from U.S. slaughterhouses.²⁰ These changes are also corroborated in principle by the

¹⁹ See answer 43 of Mexico's responses to the Panel's First Set of Questions, paragraphs 78-89.

²⁰ See the following exhibits: MEX-33, MEX-37, MEX-42, MEX-46, MEX-64, MEX-67, BCI MEX-97. See also the following new exhibits: BCI MEX-105, BCI MEX-106

predictions set out in the Hayes/Meyer report (Exhibit Mex-88) which, themselves were based on the fundamental economics surrounding the implementation of the COOL Measure. As described in the report, the lowest cost alternative for compliance with the COOL Measure is to exclude all non-U.S. animals from the processing stream or, alternatively, segregate those animals in the processing stream which is exactly what has happened.²¹

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

79. Mexico's evidence which clearly demonstrates the modification of conditions of competition to the detriment of cattle born in Mexico is described in Mexico's response to Question 121. Mexico's evidence primarily relates to the top three U.S. beef producers (Cargill, Tyson and JBS) which together account for approximately 65% of the U.S. beef market and are therefore representative of the market.²²

80. Mexico has also explained that this modification of conditions of competition has been reflected in the reduction of the price paid by U.S. packing plants for fed cattle that were born in Mexico and raised in the United States.

81. The price discount is evidenced in the invoices Mexico has presented from U.S. slaughterhouses as well as in the aggregate pricing statistics for Mexican and like U.S. feeder cattle.²³

82. Exhibit BCI MEX-105 shows, with a supporting invoice, that on 6 December 2010 a large U.S. slaughterhouse was still demanding a \$40 price discount for fed cattle that were born in Mexico.

Article 2.2

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

83. Correct. As explained in Mexico's response to Question 51 of the Panel, the phrase "[f]or this purpose" in the second sentence of Article 2.2 refers to the purpose set out in the first sentence.²⁴ By virtue of this phrase, the second sentence elaborates upon the meaning of the general obligation in the first sentence and establishes elements upon which a violation of that obligation can be established.²⁵

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

²¹ See discussion at paragraphs 76-78 of Mexico's second written submission.

²² See *Tyson, Barclays Capital – Back to School Consumer Conference*, September 8, 2010, p. 5. Exhibit MEX-111

²³ See Exhibits: MEX-33, MEX-37, MEX-42, MEX-46, MEX-48, MEX-64, BCI MEX-97, BCI MEX-105, BCI MEX-106

²⁴ Mexico's Responses to the Panel's Questions from the First Substantive Meeting, paragraphs 129-134.

²⁵ It is not necessary for the purpose of this dispute for the Panel to assess whether a violation of the general rule in the first sentence can be found in circumstances other than those elaborated upon in the second sentence.

84. The “objective” at issue is the objective of the technical regulation. This objective may be reflected in the design, structure and application of the technical regulation as well as in the policy objectives of the WTO Member in question and other facts and circumstances.

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

85. Statements that are part of the Mexican Diary of Debates (Diario de los Debates) of each Legislative Chamber are “indispensable to determine the legislator’s will for official effects.”²⁶ In turn, legislator’s “thoughts and will” are the very first source –called the “authentic” source- for legal interpretation in Mexico²⁷.

²⁶ First Chamber of the Mexican Supreme Court decision, registry number 181318 published in the *Semanario Judicial de la Federación y su Gaceta XIX*, page 235 under the following heading and text (emphasis added):

“IRREGULARIDADES FORMALES EN EL PROCESO LEGISLATIVO. PARA DETERMINAR SU EXISTENCIA ES NECESARIO REMITIRSE AL DIARIO DE LOS DEBATES DE LAS CÁMARAS, Y NO SOLAMENTE A LO PUBLICADO EN LA GACETA PARLAMENTARIA O AL CONTENIDO DE LA VERSIÓN ESTENOGRÁFICA DE LAS SESIONES DE LAS CÁMARAS.

La versión estenográfica de las sesiones de las Cámaras es parte integrante del Diario de los Debates de las mismas, pero este último incluye elementos adicionales cuya consulta es imprescindible para determinar la voluntad de los legisladores para efectos oficiales. Como se establece en los artículos 133, fracción I, de la Ley Orgánica del Congreso General de los Estados Unidos Mexicanos, y 194 del Reglamento para el Gobierno Interior del Congreso General de los Estados Unidos Mexicanos, el órgano oficial de discusión de las Cámaras es el Diario de los Debates. La Gaceta Parlamentaria no es, por el contrario, un instrumento reconocido en los preceptos legales que disciplinan los trabajos legislativos, por lo que no es correcto tomar su contenido como referencia básica a la hora de determinar la existencia de irregularidades formales en el proceso legislativo.”

Amparo en revisión 62/2004. World Express Cargo de México, S.A. de C.V. 31 de marzo de 2004. Unanimidad de cuatro votos. Ausente: Humberto Román Palacios. Ponente: José Ramón Cossío Díaz. Secretario: Raúl Manuel Mejía Garza. See Exhibit MEX-107

²⁷ First Chamber of the Mexican Supreme Court decision, registry number 301701 published in the *Semanario Judicial de la Federación XCVIII*, page 2038 under the following heading and text (emphasis added):

“INTERPRETACION DE LA LEY, REGLAS DE LA.

Ante la ineludible necesidad de interpretar contenidos y alcances de leyes en pugna, hay que ocurrir, por exclusión y en su orden rigurosamente jerárquico, a las cuatro grandes fuentes de la interpretación legal: a) a la fuente “auténtica”, que es aquélla en donde el legislador expresa de manera concreta su pensamiento y su voluntad; b) a falta de ella, a la fuente “coordinadora”, buscando una tesis que haga posible la vigencia concomitante y sin contradicciones de los preceptos en posible antítesis; c) a falta de las dos; a la fuente “jerárquica”, en donde, al definirse el rango superior, ético, social y jerárquico, de una ley sobre la otra, se estructura, de acuerdo con aquélla, la solución integral del problema; d) y a falta de las tres, a la fuente simplemente “doctrinal” que define cual de las disposiciones a debate ha de conservar la vigencia, por su adecuación a los principios generales del derecho, a la filosofía y a las corrientes del pensamiento contemporáneo jurídico-penal.”

Amparo penal directo 2877/46. Palma Moreno Guillermo. 23 de Agosto de 1948. Mayoría de tres votos. Disidentes: Carlos L. Angeles y José Rebolledo. See Exhibit MEX-108

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

86. The European Union is correct that the TBT Agreement does not require defending Members to assert that their consumers want a particular technical regulation and that they adduce evidence to that effect. It is also correct that just because consumers do not want a technical regulation does not mean that it is inconsistent with the TBT Agreement.

87. Consumer demand for the type of country of origin labelling information provided by the COOL Measure is relevant to assessing the legitimacy of the objective of the COOL Measure and whether the measures fulfils that objective. As explained in Mexico's second written submission, consumer demand for the specific type of information provided by the COOL Measure is relevant to the circumstances in which the measure was introduced and therefore to the protectionist intent of the measure.²⁸

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

88. As noted in the answer to question 135, whether the TACD resolution provides a sufficient basis for government policy or not is irrelevant. Even without this resolution (or other indicia of consumer preference), a government might be free to impose mandatory country of origin labeling requirements. The issue is not whether consumers have expressed a desire to see the origin of their meat; it is whether the COOL regime is constructed in such a way as to accomplish that goal within the strictures of the TBT Agreement and the GATT.

89. As Mexico has fully explained, the COOL Measure was first introduced by the US producers and not by the consumers.²⁹

90. On the other hand, while it is true that in general terms many consumers may wish to purchase food from any particular country of origin, the problem is when a government, by establishing a measure that provides the consumer with a particular type of information on some products, shapes the consumer expectations to justify the legitimacy of that same regulatory measure.

138) (Canada and Mexico) Setting aside the objective of providing consumer information or preventing consumer confusion in general, do the complainants consider that the COOL requirements help prevent the specific type of consumer confusion allegedly caused by the pre-

²⁸ Second Written Submission of Mexico, paragraphs 67-69.

²⁹ First Written Submission of Mexico, paragraphs 177-183.

COOL system as identified by the United States (i.e. USDA grade label without indication of the origin of meat and the "Product of U.S.A." label based on substantial transformation)?

91. No. The USDA label remains on the meat; therefore, to the extent there is any confusion that confusion is not alleviated. To the extent that the COOL Measure might reduce confusion it would only be in the case of meat which uses label A. As explained in Mexico's response to Question 140 (below), it clearly does not alleviate any confusion with respect to other labels for beef that is processed in the United States. Furthermore, it creates confusion with respect to labels other than label A.

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

92. Mexico has already explained³⁰ that consumers would need a matrix (below) to determine, even roughly, where their beef originated under the COOL regime.

Born	Raised	Slaughtered	Label
US	MX	MX	D
MX	US	MX	D
MX	MX	US	C
MX	US	US	B
US	MX	US	C
US	US	MX	D
US	US	US	A

93. Further, but for label A status which can only be "acquired" when beef is derived from an animal born, raised and slaughtered in the US, all other labels could be used when different scenarios are present. For the different combinations possible under all labels, but for label A which accepts no combinations, see text and charts from paragraph 12 of Canada's First Written Submission.

141) (All parties) Please comment on the European Union's statement in its response to Panel question No. 2 (paragraph 27) that in the situation where there is more than one country concerned in the production of beef (i.e. birth, raising and slaughter), there is no use of the term

³⁰ See Mexico's Responses to the Panel's Questions from the First Substantive Meeting, paragraph 188.

"origin" and it is possible to require labelling about where certain production processes occur, without prejudging the question of what the origin rule is.

94. The European Union's comment relates to a specific EU measure (Regulation 1760/2000) and to an issue that does not arise in this dispute (e.g., the specific content of the label and whether the term "origin" is used in the label). The modification of the conditions of competition and trade restrictive effects that Mexico is challenging in this dispute would not change if the content of the label referred to the labelling of where certain production processes occurred.

95. Paragraph 27 of the EU statement also omits an important part of Article 3(b) of the *Agreement on Rules of Origin* which reads as follows:

under their rules of origin, the country to be determined as the origin of a particular good is either the country where the good has been wholly obtained or, when more than one country is concerned in the production of the good, **the country where the last substantial transformation has been carried out;**

96. Thus, under this provision, the "origin" of beef would be the country where the last substantial transformation has been carried out—i.e., the United States.

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

97. Yes, the COOL Measure could be considered as better fulfilling the stated objective. However, the COOL Measure would still have an illegitimate protectionist objective and would still be more trade-restrictive than necessary to fulfil that objective. Moreover, the elimination of such flexibility would not remedy the modification of conditions of competition which underlies the violations of the non-discrimination obligations raised by Mexico.

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

98. This option may be a less trade restrictive alternative. However, it would not necessarily remedy the modification of conditions of competition which underlies the violations of the non-discrimination obligations raised by Mexico.

99. In Mexico's view, this alternative is not a feasible solution because of the pressure applied by the U.S. government on the industry to label all beef products produced from U.S. born cattle with label A, even when label B could be permissible.

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

100. A fairly implemented trace back system would fulfil the stated objectives at a much higher level than the COOL Measure and it would be less restrictive on international trade than the COOL Measure. This is explained, in part, in Mexico's second written submission as follows:

A trace back system would impose the same requirements on both domestic and imported animals and therefore would not give rise to the discriminatory lowest cost compliance solution referred to in the first option (i.e., there would be no incentive to exclude non-U.S. animals). In Mexico's view, if there were trace back to the originating farm, there would likely be no incentive to exclude imported Mexican cattle or shift the cost of compliance solely to Mexican animals. This is because all farmers would be treated the same and it would be immaterial where they were located. Because U.S. beef processors would still have to trace U.S. cattle to individual farms, there would be no cost saving associated with excluding Mexican cattle. Thus, the economic incentive to discriminate against Mexican cattle would likely be eliminated.³¹

101. A trace back system under which the U.S. producers incur similar costs would place domestic and foreign producers on equal ground and ultimately be less restrictive on international trade than the current COOL requirements. Thus, a fairly implemented trace back system would eliminate the modification of conditions of competition that Mexico is complaining about. See also Mexico's response to Question 105 of the Panel, above and Mexico's opening oral statement at the second meeting of the Panel (paragraphs 55-56).

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

102. "Traceability" refers to the ability to trace or track something. Different levels of traceability can be accommodated within a system. A trace back system can provide the highest level of traceability if it traces back to the original sources of all components and inputs of a product.

103. In the beef industry, the term "traceability" refers to the ability to track where an individual animal has been during its life from the time it was born through the time it was slaughtered. In other words, animal traceability means "the ability to follow an animal or group of animals during all stages of its life."³² By comparison, a trace back system refers to the means which would be used in order to accomplish the trace back of the individual animal.

104. Some countries have implemented animal trace back systems with the use of technology such as Radio Frequency Identification ("RFID") tags which are attached to each individual animal and allow information to be collected about where the animal has been to trace each animal's location during its life from birth to slaughter.³³ The United States does not have such a system, and indeed the implementation of a trace back system for U.S.-born cattle is prohibited by the Statute.

147) In paragraph 71 of its oral statement at the second meeting, Canada refers to a system of compulsory labelling in regard to the place of slaughtering and voluntary labelling with regard to the place of birth and raising.

³¹ Second Written Submission of Mexico, paragraph 78. See also Mexico's response to the first set of questions from the Panel, paragraph 107.

³² World Organization for Animal Health, "Terrestrial Animal Health Code 2010" Exhibit MEX-110

³³ Walker, Julie, "Radio Frequency Identification for Beef Cattle", See Exhibit MEX-109

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

105. It does not appear to differ from the substantial transformation concept. Under Canada's proposal, the place of slaughter would be the country of origin and, thus, would recognize that the slaughter of the animal is substantial transformation that confers origin. The difference is that under Canada's proposal, marking in this manner would be mandatory while marking on the basis of the place of birth or raising of the animal would be voluntary.

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

106. Yes, the parallel voluntary scheme would provide information on where livestock was born, raised and slaughtered and, where employed, would fulfil the objective of the United States.

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

107. Paragraph 34 of the United States' oral statement reads as follows:

Finally, the Hayes/Meyer report that Mexico submitted with its second written submission is outdated. It is based on the obsolete COOL provisions in the 2002 Farm Bill and the 2002 Voluntary Guidelines and it fails to account for the significant restructuring of the Canadian hog industry. Further, it does not support Mexico's erroneous claims that the United States maintains a "certification and audit" system for ensuring compliance with the COOL Measures.

108. Mexico's cites the Hayes/Meyer report in paragraphs 76-78 of its second written submission for the following conclusions:

(i) the compliance mechanism implemented in the COOL Measure — i.e., certification and audit — is designed so that the lowest cost alternative for compliance is to exclude all non-U.S. animals from the processing stream or, alternatively, segregate those animals in the processing stream both of which would cause the foreign animals to be heavily discounted due to increased costs and would impose enormous economic strain on foreign producers;

(ii) the trace back system is used in the EU and it is technically and economically feasible in the United States; and

(iii) A trace back system would impose the same requirements on both domestic and imported animals and therefore would not give rise to the discriminatory lowest cost compliance solution referred to in the first option (i.e., there would be no incentive to exclude non-U.S. animals.

109. The Hayes/Meyer report pre-dates the Final Rule. However, with respect to the conclusions for which Mexico cites the report, the report is not outdated. These conclusions are not affected by

the provisions introduced by the Final Rule nor are they affected by the conditions in the Canadian hog industry.

110. The United States also argues that the Hayes/Meyer report does not support Mexico's erroneous claims that the United States maintains a "certification and audit" system for ensuring compliance with the COOL Measures. The paper describes a certification and audit system as follows:

- require that certificates be backed up by some proof that meat came only from animals born, raised and slaughtered in the U.S. This one is feasible under current marketing practices³⁴
- allow each participant in the marketing channel to certify that the product comes only from U.S. sourced animals. When audited under this system the farmer or packer would simply have to prove that all of the animals or products in a particular batch were U.S.-sourced and they would not need to maintain identity³⁵

111. This closely describes the compliance mechanism implemented in the COOL Measure. While it may not exactly describe that mechanism, what is important is that it is a less stringent alternative to a trace back mechanism as is the mechanism implemented by the COOL Measure.

112. Finally and most relevant to this proceeding, the Hayes/Meyer report proves *in principle* what Mexico has proven in fact and thereby constitutes strong corroborating evidence of Mexico's case—i.e., that the compliance mechanism implemented in the COOL Measure is designed so that the lowest cost alternative for compliance is to exclude all non-U.S. animals from the processing stream or, alternatively, segregate those animals in the processing stream both of which would cause the foreign animals to be heavily discounted due to increased costs and would impose enormous economic strain on foreign producers.

113. The Hayes/Meyer report also provides *prima facie* evidence that a trace back system is technically and economically feasible in the United States and that it would be less trade restrictive (see elaboration on “less trade restrictive” in Mexico's responses to Questions 105 and 145, above).

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

114. Mexico addresses the meaning of the term “necessary” in detail in paragraphs 308-310 of its first written submission.

115. The second question is difficult to understand. It appears to ask whether the removal of the word “necessary” from the second sentence of Article 2.2 would change the meaning of the sentence and, if so, how. The relevant part of the second sentence reads as follows:

“technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective”

116. The word “necessary” is an integral part of the phrase “not be more trade-restrictive than necessary”. Thus, if the word “necessary” is removed, the remainder of that phrase would also have to

³⁴ Exhibit MEX-88, p. 7.

³⁵ *Ibid.*, p. 10.

be removed. This is made clear by removing the words “than necessary” and reading the resulting sentence:

“technical regulations shall not be more trade-restrictive to fulfil a legitimate objective”

117. A more workable revision would be to cut back the sentence to the following:

“technical regulations shall fulfil a legitimate objective”

118. This revision clearly has a different meaning than the actual text in that the less trade restrictive aspect of the sentence has been removed.

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

119. Insofar as the meaning of the word “necessary” is concerned, it is well established that the interpretation of the term must take into account, *inter alia*, its context. Since the context of Articles XX and 2.2 are different, those differences must be considered. Thus, provided that the different contexts are taken into account, a legal interpretation undertaken in Article XX is relevant to a legal interpretation of the same term undertaken in Article 2.2. Mexico has taken the different contexts into consideration in its interpretation of the word “necessary”.³⁶

Articles 12.1 and 12.3

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

120. The above-noted findings of the Panel in *EC – Biotech*, in particular paragraphs 7.1618-7.1625, are not relevant to Mexico's claims under Articles 12.1 and 12.3 of the TBT Agreement for several reasons.

121. First, there are significant differences between the texts of Article 12.3 of the TBT Agreement and Article 10.1 of the SPS Agreement:

Article 12.3, TBT Agreement

Members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, **take account of the special development, financial and trade needs of developing country Members, with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members.** [emphasis added]

³⁶ First Written Submission of Mexico, paragraphs 308-310.

Article 10.1, SPS Agreement

In the preparation and application of sanitary or phytosanitary measures, Members shall **take account of the special needs of developing country Members**, and in particular of the least-developed country Members.

122. Under Article 12.3, the United States must take into account the special “development, financial and trade” needs of Mexico “with a view to ensuring that such technical regulations... do not create unnecessary obstacles to exports” from Mexico. As discussed in Mexico’s response to Question 82 of the Panel, this means that the United States must take into account the needs of Mexico with the aim of making certain that the COOL Measure does not create unnecessary obstacles to Mexico’s exports.³⁷ This latter requirement does not exist in Article 10.1 of the SPS Agreement and, therefore, this additional obligation was not considered by the Panel in *EC - Biotech*.

123. Second, the Panel in *EC – Biotech* interpreted the obligation to “take into account of” as simply to “consider along with other factors before reaching a decision” without further elaborating upon what such “consideration” entails.³⁸ In Mexico’s view, this simplistic interpretation essentially robs Article 10.1 of any practical effect in favour of developing country Members. As discussed in Mexico’s response to Question 82, “taking into account” must mean more, particularly in the context of special and differential treatment for developing country Members.

124. The Panel in *EC – Large Civil Aircraft* interpreted the phrase “account shall be taken of” in Article 2.1(c) of the SCM Agreement as follows:

To take something into account means to take something into reckoning or consideration; to take something on notice. Therefore, in the context of the third specificity factor, the last sentence of Article 2.1(c) requires that the length of time during which the relevant subsidy programme has been in operation must form part of the consideration or reckoning of whether the amount of a subsidy granted to certain enterprises pursuant to that same subsidy programme is disproportionately large.³⁹

125. In the context of Article 3.7 of the Anti-Dumping Agreement and Article 15.7 of the SCM Agreement, the Panel in *US – Softwood Lumber VI*, the Panel found that, in order to conclude that the investigating authorities have “considered” the factors set out in Articles 3.7 and 15.7, it must be apparent from the determination that the investigating authorities have given attention to and taken into account those factors.⁴⁰ That consideration must go beyond a mere recitation of the facts in question, and put them into context.⁴¹ In the context of Article 2.2.1.1 of the Anti-Dumping Agreement, the Appellate Body in *Softwood Lumber V* stated that the term “consider” means reflect on and to weigh the merits of evidence and not simply to receive and take notice of evidence.⁴²

³⁷ Mexico’s Responses to the Panel’s Questions from the First Substantive Meeting, paragraph 218.

³⁸ Panel Report, paragraph 7.160.

³⁹ Panel Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R, adopted 21 September 2010, paragraph 7.969.

⁴⁰ Panel Report, *United States - Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/R, adopted 26 April 2004, paragraph 7.67

⁴¹ *Ibid.*

⁴² Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004, paragraph 133.

126. In Mexico's view, "take into account of" in both Article 12.3 of the TBT Agreement and Article 10.1 of the SPS Agreement means that a developed country Member must take into account the needs of developing country Members by putting them into context, reflecting on them and weighing their merits. Moreover, it must be apparent that the developing country Member has given attention to those needs.

127. Third, in *EC – Biotech*, Argentina argued that the obligation in Article 10.1 of the SPS Agreement should have required the EC to grant it preferential access or provide it with more beneficial or less detrimental approval process.⁴³ Mexico is not seeking preferential access or other benefits. It is simply seeking the removal of an unnecessary obstacle to trade and the restoration of the market access it has maintained for many years.

128. Finally, unlike Argentina in the *EC – Biotech* dispute, Mexico has presented a *prima facie* case that the United States has not complied with its obligations under Articles 12.1 and 12.3 of the TBT Agreement. The United States has not rebutted that case.

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

129. Mexico wishes to clarify its position with respect to its claims under article 12.3 of the TBT Agreement. Mexico claims that in the preparation and application of the COOL Measure, the United States did not take into account the special development, financial and trade needs of Mexico as a developing country, with a view to ensuring that such technical regulation did not create unnecessary obstacles to exports from developing country Members. This claim is with respect to the COOL Measure as a whole, and therefore, includes the Farm Bill 2002 and the Final Rule 2009.

130. The United States has argued that it gave opportunities to Mexico to comment of the Final Rule 2009, and this is why Mexico has explained that the United States has not provided any evidence demonstrating that it gave Mexico an opportunity to comment during the creation of the Farm Bill 2002. This is important because the Farm Bill 2002 constitutes the starting point of the COOL Measure, and the Final Rule 2009 is an advanced point in time, so the opportunity to comment on the COOL Measure cannot be complete and real, if that opportunity was not given during the starting point of the COOL Measure.

131. In any case, the claim of Mexico with respect to article 12.3 include not only the fact that Mexico did not have an opportunity to comment on the Farm Bill 2002, but also that the United States made no meaningful effort to take into account the special development, financial and trade needs of Mexico as a developing country as elaborated upon in Mexico's response to Question 152 above.

132. Therefore, although there is no reason to approach Article 12.3 of the TBT Agreement differently in the context of the Farm Bill 2002 and the Final Rule 2009, it is important to point out that Mexico did not have an opportunity to comment on the starting point of the COOL Measure, i.e. the Farm Bill 2002.

154) (Mexico) What specific "special development, financial and trade needs" did Mexico convey to the United States during the development of the COOL requirements? What are the specific "special development, financial and trade needs" that Mexico claims the United States has not taken account of in developing the COOL requirements? How do two sets of needs relate to each other in the context of Article 12.3 of the TBT Agreement?

⁴³ Panel Report, paragraph 7.1619.

133. Article 12.3 of the TBT Agreement contains the positive obligation on the United States that, in the preparation and application of technical regulations account must be taken to the special development, financial and trade needs of Mexico as a developing country, with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members.

134. Nothing in Article 12.3 of the TBT Agreement imposes an obligation on a developing country to first identify and convey in a specific way to the developed country Member the nature and character of those needs. Moreover, on the facts of this dispute, given that Mexico is a significant exporter of cattle to the United States, it is a given that a measure such as the COOL Measure will adversely affect Mexico because it is directly aimed at such exports.

135. Article 12.3 recognizes that developing countries always have special development, financial and trade needs that have to be taken into account where measures affect imports and imports are originating from such countries. Those needs have to be seen in the context of the technical regulation that is being prepared and applied, and the impact that the technical regulation will have on the developing country Member. Therefore, when Mexico explained to the United States during the preparation of the regulations that the COOL Measure was going to have a disproportionate impact on Mexican cattle, Mexico identified and conveyed its special development, financial and trade needs.

136. With respect to the question of how two sets of needs relate to each other in the context of Article 12.3 of the TBT Agreement, the special development, financial and trade needs are interrelated concepts. An impact on trade will bring an impact on finances and an impact on finances will bring an impact on trade.

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

137. As explained in Mexico's response to Question 82 of the Panel and in its response to Question 152 above, in the case of the Final Rule 2009, providing Mexico with an opportunity to express its views and taking notice of those views is not enough to fulfil the obligation in Article 12.3.

138. In the case of the Farm Bill 2002, the United States did not even provide an opportunity for Mexico to express its views.

139. The obligation in Article 12.3 applies to the preparation and application of technical regulations, and therefore it applied throughout the development of the COOL Measure. The United States was under an obligation to comply with Article 12.3 with respect to each legal instrument that makes up the COOL Measure. The fact that this process occurred over an extended period is simply a reflection of how the United States chose to prepare this particular technical regulation. It does not change the fact that the COOL Measure is a single measure.

140. The failure of the United States to comply with Article 12.3 with respect to the Farm Bill 2002 is particularly prejudicial to Mexico because that legal instrument created the foundation for the technical regulation.