

**UNITED STATES – CERTAIN COUNTRY OF ORIGIN
LABELLING REQUIREMENTS**

(AB-2012-3/DS386)



Other Appellant Submission of Mexico

28 March 2012

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	FACTUAL BACKGROUND.....	2
	A. The Measure.....	4
	B. Impact Of The Measures On Imports Of Mexican Cattle.....	5
	C. Lack Of Effectiveness Of The Measure.....	8
III.	CONDITIONAL APPEALS CONCERNING ARTICLE 2.2 OF THE <i>TBT</i> <i>AGREEMENT</i>	9
	A. The Objective of the COOL Measure is Not “Legitimate”	9
	1. Identification of the Objective Pursued by the United States through the COOL Measure.....	9
	a. The Approach of the Panel	9
	b. Legal and Factual Errors in the Panel’s Approach	10
	c. Application of the Correct Approach.....	13
	d. Legitimacy of the Identified Objective within the Meaning of Article 2.2	14
	B. An Alternative Measure Exists that is Less Trade Restrictive and that Fulfils the Legitimate Objective Taking into Account the Risks Non-fulfilment Would Create	14
	a. “Necessity Test”	15
	b. “Trade Restrictiveness”	16
	c. “Taking Account of the Risks Non-fulfilment Would Create”	17
	d. Application to the Facts of this Dispute.....	18
IV.	CONDITIONAL APPEAL CONCERNING ARTICLE III:4 OF THE <i>GATT 1994</i>	21
	A. The Authority of the Appellate Body to Complete the Analysis of Mexico’s Claim under Article III:4	21

B.	The COOL Measure is Inconsistent with Article III:4	22
1.	Like Products	23
2.	Laws, Regulations And Requirements Affecting Their Internal Sale, Offering For Sale, Purchase, Transportation, Distribution Or Use.....	23
3.	Less Favourable Treatment.....	25
V.	CONDITIONAL APPEAL CONCERNING ARTICLE XXIII:1(B) OF THE <i>GATT</i> 1994	29
VI.	CONCLUSIONS.....	30

CASES CITED IN THIS SUBMISSION

TABLE OF WTO DISPUTES CITED IN THIS SUBMISSION

<i>Short Title</i>	<i>Full Case Title and Citation</i>
<i>Argentina – Hides and Leather</i>	Panel Report, <i>Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather</i> , WT/DS155/R and Corr.1, adopted 16 February 2001, DSR 2001:V, 1779
<i>Australia – Salmon</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327
<i>Brazil – Retreaded Tyres</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, 1527
<i>Canada – Aircraft (Article 21.5 – Brazil)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU</i> , WT/DS70/AB/RW, adopted 4 August 2000, DSR 2000:IX, 4299
<i>Canada – Autos</i>	Appellate Body Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, 2985
<i>Canada – Periodicals</i>	Appellate Body Report, <i>Canada – Certain Measures Concerning Periodicals</i> , WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, 449
<i>Canada – Wheat Exports and Grain Imports</i>	Panel Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/R, adopted 27 September 2004, as upheld by Appellate Body Report WT/DS276/AB/R, DSR 2004:VI, 2817
<i>China – Auto Parts</i>	Panel Reports, <i>China – Measures Affecting Imports of Automobile Parts</i> , WT/DS339/R, WT/DS340/R, WT/DS342/R and Add.1 and Add.2, adopted 12 January 2009, upheld (WT/DS339/R) and as modified (WT/DS340/R, WT/DS342/R) by Appellate Body Reports WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R
<i>Dominican Republic – Import and Sale of Cigarettes</i>	Appellate Body Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV, 7367
<i>EC – Asbestos</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243
<i>EC – Asbestos</i>	Panel Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/R and Add.1, adopted 5 April 2001, as modified by Appellate Body Report WT/DS135/AB/R, DSR 2001:VIII, 3305
<i>EC – Bananas III</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591
<i>EC – Bananas III (Article 21.5 – Ecuador II)</i>	Panel Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador</i> , WT/DS27/RW2/ECU, adopted 11 December 2008, as modified by Appellate Body Report WT/DS27/AB/RW2/ECU
<i>EC – Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products</i>

	<i>(Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
<i>EC – Poultry</i>	Appellate Body Report, <i>European Communities – Measures Affecting the Importation of Certain Poultry Products</i> , WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, 2031
<i>India – Autos</i>	Panel Report, <i>India – Measures Affecting the Automotive Sector</i> , WT/DS146/R, WT/DS175/R and Corr.1, adopted 5 April 2002, DSR 2002:V, 1827
<i>Japan – Agricultural Products</i>	Appellate Body Report, <i>Japan – Measures Affecting Agricultural Products</i> , WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, 277
<i>Japan – Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97
<i>Korea – Beef</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, 5
<i>US – Clove Cigarettes</i>	Panel Report, <i>United States – Measures Affecting the Production and Sale of Clove Cigarettes</i> , WT/DS406/R, circulated to WTO Members 2 September 2011 [adoption/appeal pending]
<i>US – COOL</i>	Panel Report, <i>United States – Certain Country of Origin Labelling (COOL) Requirements</i> , WT/DS384/R (Canada) and WT/DS386/R (Mexico), 18 November 2011
<i>US – FSC</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations"</i> , WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, 1619
<i>US – FSC (Article 21.5 – EC)</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, 55
<i>US – Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, 5663 (Corr.1, DSR 2006:XII, 5475)
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
<i>US – Lamb</i>	Appellate Body Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, 4051
<i>US – Section 211 Appropriations Act</i>	Appellate Body Report, <i>United States – Section 211 Omnibus Appropriations Act of 1998</i> , WT/DS176/AB/R, adopted 1 February 2002, DSR 2002:II, 589
<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755
<i>US – Tuna II</i>	Panel Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/R, circulated to

	WTO Members 15 September 2011 [adoption/appeal pending]
<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717

TABLE OF GATT DISPUTES CITED IN THIS SUBMISSION

Short Title	Full Case Title and Citation
<i>Italy – Agricultural Machinery</i>	GATT Panel Report, <i>Italian Discrimination Against Imported Agricultural Machinery</i> , L/833, adopted 23 October 1958, BISD 7S/60

TABLE OF ACRONYMS USED IN THIS SUBMISSION

Acronym	Full Name
2002 Farm Bill	The Farm Security and Rural Investment Act of 2002
2008 Farm Bill	Food, Conservation, and Energy Act of 2008
2009 Final Rule (AMS)	Final Rule on Mandatory Country of Origin Labelling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, published on 15 January 2009 as 7 CFR Part 65
BCI	Additional procedures for the protection of business confidential information
AMS	Agriculture Marketing Service (of the United States Department of Agriculture)
C.F.R.	Code of Federal Regulations
COOL	Country of Origin Labelling
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
FSIS	Food Safety and Inspection Service (of the United States Department of Agriculture)
GATT 1994	General Agreement on Tariffs and Trade 1994
Interim Final Rule (AMS)	Interim Final Rule on Mandatory Country of Origin Labelling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, published on 1 August 2008 as 7 CFR Part 65
Interim Final Rule (FSIS)	Interim Final Rule on Mandatory Country of Origin Labelling of Muscle Cuts of Beef (including Veal), Lamb, Chicken, Goat, and Pork, Ground Beef, Ground Lamb, Ground Chicken, Ground Goat, and Ground Pork, published on 28 August 2008 as 9 CFR Parts 317 and 381
NAFTA	North American Free Trade Agreement
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT Agreement	Agreement on Technical Barriers to Trade
U.S.C.	United States Code
USDA	United States Department of Agriculture
Vilsack letter	Letter to “Industry Representative” from the United States Secretary of Agriculture, Thomas J. Vilsack, of 20 February 2009

WTO	World Trade Organization
-----	--------------------------

I. INTRODUCTION

1. This dispute concerns a mandatory country of origin labelling measure (hereinafter the “COOL measure”) that is applied in a manner and in circumstances such that it unjustifiably discriminates against and restricts imports of Mexican cattle into the United States.
2. Historically, Mexico has been an important supplier of cattle to the United States and one of the largest importers of U.S. beef. This is a reflection of the integrated nature of the cattle and beef markets in the two countries.
3. The COOL measure has disrupted this integrated market and has modified the conditions of competition to the disadvantage of Mexican cattle compared to like U.S. cattle. It has also reduced the export opportunities available to, increased the handling cost of, and reduced the price of Mexican cattle. The adverse effect of the COOL measure on the Mexican cattle industry has been substantial.
4. On the border between the United States and Canada, the COOL measure has had similar adverse effects on the Canadian cattle and swine industries.
5. This dispute concerns a particularly egregious type of country of origin labelling measure as it applies to specific facts and circumstances. It does not concern country of origin labelling in general nor does it concern all aspects and applications of the challenged COOL measure.
6. By virtue of its design, architecture and structure, the mandatory country of origin labelling regime implemented in the COOL measure is discriminatory, creates an unnecessary obstacle to trade, constitutes arbitrary and unjustifiable discrimination between countries where the same conditions prevail, and amounts to a disguised restriction on international trade. The Panel correctly found that the COOL measure violates Articles 2.1 and 2.2 of the TBT Agreement.
7. The U.S. appeal of these findings is without merit and should be rejected. In its Appellee Submission, Mexico will address in detail the arguments in the U.S. appeal as well as the Panel’s legal reasoning regarding these two provisions.
8. The grounds raised by Mexico in this Other Appeal are conditional upon the Appellate Body modifying the Panel’s findings that the COOL measure is inconsistent with Article 2.1 and/or Article 2.2 of the TBT Agreement. In such circumstances, Mexico conditionally appeals the following:
 - a) Should the Appellate Body reverse the Panel’s finding that the COOL measure is inconsistent with Article 2.1, Mexico appeals the Panel’s decision to exercise judicial economy in respect of Mexico’s claim under Article III:4 of the GATT 1994 and requests that the Appellate Body complete the analysis of this claim and find that the COOL measure is inconsistent with Article III:4.

- b) Should the Appellate Body reverse the Panel’s finding that the COOL measure is inconsistent with Article 2.2:
- i) Mexico appeals the Panel’s finding regarding the identification of the COOL measure and the examination of its legitimacy, and instead Mexico requests that the Appellate Body find, based on a proper identification of the objective, that the objective is not legitimate and thereby find that the COOL measure is inconsistent with Article 2.2.
 - ii) If the Appellate Body confirms the Panel’s finding that the objective of the COOL measure is legitimate, Mexico appeals the Panel’s decision to exercise judicial economy in respect of the existence of an alternative measure that is less trade restrictive and that fulfils the legitimate objective taking into account the risks non-fulfilment would create. It further requests that the Appellate Body complete the analysis of this claim and find that the COOL measure is inconsistent with Article 2.2.
- c) Finally, should the Appellate Body determine that the COOL measure is consistent with Article 2.1 of the TBT Agreement and does not complete the analysis and find that the measure is inconsistent with Article III:4 of the GATT 1994, Mexico appeals the Panel’s decision to exercise judicial economy with respect to Mexico’s claim of non-violation nullification or impairment under Article XXIII:1(b) of the GATT 1994. It further requests that the Appellate Body complete the analysis of this claim and find that the COOL measure nullifies and impairs benefits accruing to Mexico in terms of Article XXIII:1(b).

II. FACTUAL BACKGROUND

9. For purposes of this appeal, the principal measures at issue are as follows:

- The COOL statutory provisions, known as the Agricultural Marketing Act of 1946, as amended by the Farm Security and Rural Investment Act of 2002 (“2002 Farm Bill”) and the Food, Conservation, and Energy Act of 2008 (“2008 Farm Bill”);
- the Final Rule on Mandatory Country of Origin Labelling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, published by the U.S. Department of Agriculture (“USDA”) on 15 January 2009 as 7 CFR Part 65 (the “2009 Final Rule (AMS)”).

Other measures were at issue in the Panel proceedings, including a letter sent by the U.S. Secretary of Agriculture to “Industry Representatives” in 2009 (the “Vilsack letter”). Because the regulations and other U.S. administrative actions were taken to implement the statute, they are inextricably tied together. Mexico refers to these measures collectively as the “COOL measure.”

10. The COOL measure is an internal measure that does not directly apply to products in the form in which they are imported into the United States. It applies to processed products (i.e., beef) that are manufactured and sold within the United States from domestic and/or imported inputs (i.e., cattle). By virtue of its design, architecture and structure, it creates an unnecessary obstacle to trade in those imported inputs (i.e., Mexican cattle) and it discriminates against those imports.

11. Key features of the COOL measure include:

- i) it is mandatory;
- ii) it applies only to some commodities;
- iii) it applies only to some retailers as defined by U.S. law;
- iv) it excludes small retailers (e.g., butcher shops and specialty meat stores), restaurants and processed foods from the rules for meat products;
- v) it applies only to some parts of the animal (i.e. muscle cuts);
- vi) it contains rules and conditions related to place of birth, development and processing of the input used to produce the final food product (i.e., born, raised and slaughtered) for determining the origin for labeling purposes, which depart from the prior rules for determining origin for customs purposes;
- vii) there is a difference between the rules applied to beef products that are imported into the United States and beef products that are manufactured in the United States (for imported beef products, the country of origin is determined based on the place of processing (“substantial transformation”), and for the same products manufactured within the United States from domestic and imported cattle, origin is granted *per se*, where the cattle used to make the beef product were born, raised, and slaughtered);
- viii) it expressly prohibits any kind of tracing system for purposes of verifying the origin of the products, and instead, it employs a certification and audit compliance mechanism;
- ix) it *de facto* discriminates between domestic and imported cattle; and
- x) it was designed in such a way that it avoids any cost on U.S. cattle producers and instead transfers all costs to the Mexican cattle producers.¹

¹ See e.g. Panel Report, paras. 7.78, 7.81, 7.87, 7.88, 7.89, 7.101, 7.106, 7.107, 7.108, 7.121, 7.404 and 7.420.

12. As is discussed below, these and other distinguishing factors significantly narrow the scope of this dispute which, in turn, will narrow the potential future application of the Appellate Body's findings to exclude most other country of origin labeling measures.

13. Mexico's claims do not concern country of origin labeling in general. Moreover, they do not concern all of the country of origin labeling provisions created in the Farm Bill 2002 and Farm Bill 2008 as currently implemented by the AMS Final Rule. Mexico's claims concern only the U.S. country of origin labeling provisions applicable to muscle cuts of beef.

A. The Measure

14. The main requirement of the statutory COOL provisions is that retailers must notify consumers of the country of origin of the covered commodities.² However, businesses that supply covered commodities to a retailer must provide the required origin information to retailers, so the legal obligations extend to meat processors.³

15. Not all food retailers, however, are required to comply with the labelling requirements. For example, retailers that do not sell fruits and vegetables are exempt,⁴ meaning that butcher shops are not covered. Restaurants are also excluded.⁵

16. As summarized by the Panel, the COOL statute establishes four categories for muscle cuts of meat:

(A) United States country of origin ("U.S. origin" – Category A) – meat derived from animals:

(1) "exclusively born, raised, and slaughtered in the United States";

* * *

(B) Multiple countries of origin (Category B) – meat derived from animals:

(1) "not exclusively born, raised, and slaughtered in the United States"; or

(2) "born, raised, or slaughtered in the United States"; and

(3) "not imported into the United States for immediate slaughter".

The retailer may designate the country of origin as all of the countries in which the animal may have been born, raised, and slaughtered.

² Panel Report, para. 7.87.

³ Panel Report, para. 7.88.

⁴ Panel Report, para. 7.101.

⁵ Panel Report, paras. 7.106-107.

(C) Imported for immediate slaughter (Category C) – meat derived from animals

– “imported into the United States for immediate slaughter”.

(D) Foreign country origin (Category D) – meat derived from animals

– “not born, raised, or slaughtered in the United States”.⁶ [footnotes omitted]

17. The 2009 Final Rule (AMS) set forth rules governing how the labels under Categories A, B and C can be used when meat products of different origins are commingled in the production process. The Panel summarized as follows:

When meat falling under categories A, B or C is commingled on a single production day, the resulting meat might carry a different label from the one it should in principle be subject to under the categories set out in the COOL measure. As shown in the above provisions, the first possibility is the commingling of meat under categories A and B, which allows the resulting meat to use Label B even if a particular piece of meat may have been derived from a category A animal. Under the second provision, when meat under categories B and C are commingled during a single production day, the meat derived therefrom may use Label B.

The 2009 Final Rule (AMS) further provides that the labelled countries may be listed in any order when the meat is derived from animals classified as category B, or when meat falling under categories A and B, as well as B and C, is commingled during a single production day.

In essence, the 2009 Final Rule (AMS) allows the use of Label B or C when meat falling under category A, B, and/or C is commingled in a single production day.⁷ (footnotes omitted)

B. Impact Of The Measures On Imports Of Mexican Cattle

18. The United States did not dispute that Mexican cattle and U.S. cattle are like products.⁸

19. Mexico generally exports “feeder cattle” immediately after the cow-calf stage to U.S. backgrounding and feeding operations.⁹ The exported Mexican cattle typically weighs

⁶ Panel Report, para. 7.89.

⁷ Panel Report, paras. 7.96-7.98.

⁸ Panel Report, para. 7.253.

⁹ Panel Report, para. 7.141. For a description of the cow-calf, backgrounding, feeding and processing stages, see the Panel Report, paras. 7.129-7.133.

between 300 to 400 pounds.¹⁰ After importation, they are grown to approximately 1,200 pounds in the United States before being slaughtered and processed in U.S. slaughterhouses.¹¹

20. A key factual issue in the Panel proceedings was the impact of the COOL measure on the behavior of U.S. purchasers of Mexican cattle. Under the initial version of the implementing regulations (the Interim Final Rule (AMS)), it was possible to use Label B for muscle cuts eligible for Label A even without commingling.¹² Accordingly, major U.S. meat processors were able to comply by offering the majority of their products under the multi-country Category B label, thereby avoiding “the complexity, costs, and incremental record keeping associated with sorting livestock and finished product into [separate categories].”¹³ In other words, they could commingle Mexican-born cattle with U.S.-born cattle without incurring extra administrative costs.

21. The 2009 Final Rule (AMS) ended this flexibility, stating that “[i]t was the never the intent of the Agency [i.e. USDA] for the majority of product eligible to bear a U.S. origin declaration to bear a multiple origin designation”.¹⁴ The 2009 Final Rule (AMS) therefore removed the possibility of using Label B for Label A muscle cuts, except when the two categories of meat are commingled on a single production day.¹⁵

22. The Panel found that the COOL measure requires an “unbroken chain of reliable country of origin information with regard to every animal and muscle cut.”¹⁶ The Panel noted that a practical way to ensure compliance was to segregate meat and livestock according to origin, and that this approach was confirmed by a compliance guide published by USDA in 2009 after the entry into force of the 2009 Final Rule (AMS).¹⁷

23. After reviewing the relevant evidence, including a report by the U.S. Congressional Research Service, the Panel concluded that “for all practical purposes, the COOL measure necessitates segregation of meat and livestock according to origin”¹⁸

24. The Panel next turned to the question whether segregation of livestock imposes higher costs on imported livestock than on like domestic livestock. It analyzed the various potential scenarios and found that processing exclusively livestock of a single origin imposed lower

¹⁰ Mexico’s First Written Submission, paras. 166-121.

¹¹ Mexico’s First Written Submission, paras. 137-148.

¹² Panel Report, para. 7.290.

¹³ Panel Report, para. 7.291.

¹⁴ Panel Report, para. 7.293.

¹⁵ Panel Report, para. 7.294.

¹⁶ Panel Report, para. 7.317.

¹⁷ Panel Report, para. 7.320-7.321.

¹⁸ Panel Report, para. 7.327.

costs than processing livestock with multiple origins.¹⁹ It also concluded that “the least costly way of complying with the COOL measure is to rely on exclusively domestic livestock.”²⁰

25. In this regard, the Panel found that:

there is direct evidence of major slaughterhouses applying a considerable COOL discount of USD 40-60 per head for imported livestock. This proves that major processors are passing on at least some of the additional costs of the COOL measure upstream to suppliers of imported livestock. We have no evidence of a similar discount being applied to suppliers of domestic livestock, nor has the United States responded to the evidence submitted by Canada and Mexico in this respect.²¹

26. In light of the evidence, the Panel found that the COOL measure negatively affected competitive conditions for imported cattle. It stated:

The Interim Final Rule (AMS) of August 2008 did not completely disrupt this pattern, even if it introduced certain compliance costs. This is because, under the Interim Final Rule (AMS), it remained possible to process domestic and imported livestock together on a large scale and to affix one single label, Label B, on these products. As regards the magnitude of this flexibility, it is telling that the National Farmers Union criticised it as “a loophole big enough to drive a truck through”. Since a single-label approach is in general less costly than business scenarios involving more labels, as explained above, industry chose to follow a predominantly Label B approach for all livestock, including both imported livestock and the majority of livestock that would have otherwise qualified for Label A.

The 2009 Final Rule (AMS) changed this by reducing the unqualified possibility of affixing Label B on meat otherwise eligible for Label A to the limited flexibility of commingling on a single production day. Indeed, the 2009 Final Rule (AMS) indicates that the majority of meat eligible for Label A should be carrying that label: “[i]t was never the intent of the Agency for the majority of product eligible to bear a U.S. origin declaration to bear a multiple origin designation”.

As a result of the 2009 Final Rule (AMS), the meat supply chain is faced with the requirement to affix Label A on the majority of meat eligible for that label, which involves a significant reduction in the amount of domestic meat and livestock being processed together with imported meat and livestock. This, in turn, creates the necessity for the supply chain to choose between a single-origin, Label A

¹⁹ Panel Report, paras. 7.333–7.347.

²⁰ Panel Report, para. 7.350.

²¹ Panel Report, para. 7.356.

business scenario and the scenario of processing both Label A and imported meat and livestock. A single-origin approach is less costly, and given the high market share of domestic livestock, it is also generally viable.

It is the result of the COOL measure, in particular the 2009 Final Rule (AMS), that in the circumstances of the US market, market participants, when faced with the choice between a scenario involving exclusively domestic livestock and a scenario involving both domestic and imported livestock, opted predominantly for the former. While the small market share of imported livestock influenced this choice, that very choice was made necessary by the COOL measure. Indeed, as the history of the COOL measure shows, market participants would not have opted this way, and the small market share of imported livestock per se did not dictate such an option either.

Thus, in the circumstances of the US market, the COOL measure, in particular the 2009 Final Rule (AMS), creates an incentive in favour of domestic livestock and negatively affects the competitive conditions of imported livestock. Hence, we disagree with the United States that this effect is attributable exclusively to factors distinct from the COOL measure.²² (Footnotes omitted.)

C. Lack Of Effectiveness Of The Measure

27. The Panel also made factual findings that the COOL measure does not provide consumers with meaningful information, stating as follows:

[W] agree with the complainants that origin information on labels as prescribed by the measure does not ensure meaningful information for consumers, except origin information on Label A. Specifically, considered in light of the origin definition as determined by the United States for meat products, the description of origin for Label B and Label C is confusing in terms of the meaning of multiple country names listed in these labels. Moreover, the possibility of interchangeably using Label B and Label C for all categories of meat based on commingling does not contribute in a meaningful way to providing consumers with accurate information on origin of meat products.²³

²² Panel Report, paras. 7.400-7.404.

²³ Panel Report, para. 7.718.

III. CONDITIONAL APPEALS CONCERNING ARTICLE 2.2 OF THE *TBT* AGREEMENT

A. The Objective of the COOL Measure is Not “Legitimate”

28. Should the Appellate Body reverse the Panel’s finding that the COOL measure is inconsistent with Article 2.2, Mexico appeals the Panel’s finding that the objective of the COOL measure is to “provide as much clear and accurate information as possible to consumers”²⁴ and that “providing consumer information on origin is a legitimate objective within the meaning of Article 2.2”.²⁵ The Panel correctly identified as part of the steps in the analysis of Article 2.2 the identification of the objective pursued by the technical regulation in question and the examination of its legitimacy.²⁶ However, the Panel applied an incorrect legal approach to determine the objective and, by doing so, incorrectly identified that objective. Had it applied the correct legal approach it would have found that the true objective of the COOL measure was the protection of the U.S. domestic industry and, on that basis, it would have found that the objective was not legitimate.

1. Identification of the Objective Pursued by the United States through the COOL Measure

a. The Approach of the Panel

29. The Panel started its analysis by clarifying that the burden was on Mexico and Canada to identify the objective of the COOL measure, even if normally the implementing Member would be in a position to identify the objective.²⁷ The Panel then clarified that the objective sought to be identified for purposes of Article 2.2 was the policy objective pursued by a government as opposed to the specific technical regulation adopted by a Member to pursue that objective.²⁸ The Panel explained that “whether a Measure pursues a “legitimate objective” [...] is a separate issue from whether the measure in question was in fact adopted to fulfil and does fulfil that objective.”²⁹

30. The Panel considered that what needs to be identified for purposes of Article 2.2 is the objective that preceded and led to the adoption by the United States of the COOL Measure.³⁰ Referring to Article 5.6 of the SPS Agreement, the Panel compared this distinction with the

²⁴ Panel Report, para. 7.620.

²⁵ Panel Report, para. 7.651.

²⁶ Panel Report, para. 7.555.

²⁷ Panel Report, para. 7.592.

²⁸ Panel Report, para. 7.602.

²⁹ Panel Report, para. 7.602.

³⁰ Panel Report, para. 7.603.

distinction between the appropriate level of protection and an SPS measure, and concluded that the objective of the technical regulation cannot necessarily be implied from the technical regulation itself.³¹ It found that the complainants' arguments based on the design, architecture and structure of the COOL measure "do not have a particular bearing on our analysis of the identification of the objective that gave rise to the COOL measure" and that such considerations "may be more properly addressed in the context of whether the COOL measure fulfils the identified objectives".³² The Panel concluded that it was "inapposite to address at this stage of our analysis the complainants' arguments in support of their position that trade protectionism is the objective of the COOL measure" and that it would "address those arguments, to the extent necessary, in the context of our analysis of whether the COOL measure fulfils the identified objective".³³

31. In the Panel's view, "the objective pursued through a technical regulation, clearly distinguished from the technical regulation chosen to attain that objective, is a prerogative of the Member concerned and not of a Panel".³⁴

32. The Panel then identified the objective pursued by the United States through the COOL measure based *solely* on the descriptions, formulations and elaborations provided by the United States.³⁵ It concluded that the objective pursued by the United States through the COOL measure "is to provide as much clear and accurate origin information as possible to consumers".³⁶

b. Legal and Factual Errors in the Panel's Approach

33. The Panel's approach is legally erroneous. Moreover, because the legal errors led to the exclusion of relevant facts, the approach is factually erroneous.

34. Mexico agrees that, generally, there is an objective behind the adoption of a technical regulation and that the identification of the objective of a technical regulation is the prerogative of the Member establishing the measure. It also agrees that there is a presumption of good faith in favour of a Member in regards to the objective identified in its notification of the Measure to the TBT Committee (i.e., consumer information). However, Mexico disagrees with the Panel's approach to determine the objective solely on this basis. Under the Panel's approach, the determination of the objective of the measure is completely self-judging. In Mexico's view, the Panel made an erroneous interpretation of how to determine the objective and how to examine its legitimacy which lead the Panel to find that the COOL measure had the

³¹ Panel Report, para. 7.604.

³² Panel Report, paras. 7.607-7.608.

³³ Panel Report, para. 7.610.

³⁴ Panel Report, para. 7.612.

³⁵ Panel Report, paras. 7.615-7.619.

³⁶ Panel Report, para. 7.620.

objective stated by the United States and that objective was legitimate. This could undermine the effectiveness of the disciplines in Article 2.2 and open them to circumvention.

35. As recognized by the Panel, the presumption of good faith is rebuttable.³⁷ The design, architecture and structure of a technical regulation as well as its legislative history and surrounding circumstances can provide insight into the objective of the measure, and an examination of these facts is an essential element of an “objective assessment of the facts” by the Panel within the meaning of Article 11 of the DSU. Among other things, it can be used to verify the objective and to assess whether there is congruency between the policy objective stated by the Member and the objective actually being pursued by the measure. This is particularly important where the parties disagree on the objective of the technical regulation as they have in this dispute.

36. Mexico’s approach is supported by the Panel Report in *US – Tuna Dolphin II*. The Panel took into account the objectives identified by the United States, but it did not stop there. In determining the objectives of the measures its analysis was “guided by the description of the objectives of the measures by both parties, as well as by the structure and design of the U.S. dolphin-safe provisions”.³⁸ Mexico’s approach also finds support in the Panel Report in *US – Clove Cigarettes*. In that report the Panel acknowledged that the parties agreed that the ban on clove cigarettes was aimed at reducing youth smoking.³⁹ Notwithstanding this agreement, the Panel went on to confirm the objective by examining the legislation, a report prepared by the legislators, and the agency guidance to confirm the objective and clarify that “youth” referred to “persons under the age of 18”.⁴⁰

37. The Panel relied in part on Article 5.6 of the SPS Agreement and the Appellate Body report in *Australia – Salmon* to support its view that the objective should be determined by the Member and “cannot necessarily be implied from that the technical regulation itself”.⁴¹ Article 5.6 of the SPS Agreement is different from Article 2.2 of the TBT Agreement and is not clearly applicable in the latter context. For example, while Article 5.6, 5.4 and 5.5 of the SPS Agreement specifically require Members to determine their appropriate level of sanitary or

³⁷ Panel Report, para. 7.605.

³⁸ Panel Report, *US – Tuna II*, para. 7.406. With respect to the first objective of the U.S. measures (i.e., consumer information), the Panel assessed the objective identified by the United States against the title of the relevant statute and U.S. Congress findings that underlie the enactment of the provisions, and determined that the “structure and design of the US dolphin-safe provisions support the view that one of their objectives is to ensure accurate information to consumers” (para. 7.412). With respect to the second objective of the U.S. measures (i.e., dolphin protection), the Panel assessed the objective identified by the United States against the title of the relevant statute, U.S. Congressional findings, and the text of the U.S. dolphin-safe provisions, and determined that the “structure and design of the US measures suggest that the US dolphin-safe provisions do not seek to discourage only setting on dolphins. They rather seem directed to discouraging, more generally, the use of fishing techniques that have harmful effects on dolphins” (para. 7.424).

³⁹ Panel Report, *US – Clove Cigarettes*, para. 7.336.

⁴⁰ Panel Report, *US – Clove Cigarettes*, paras. 7.336-7.343.

⁴¹ Panel Report, para. 7.604.

phytosanitary protection with sufficient precision, Article 2.2 refers to "legitimate objectives" and includes a description of what the nature of some such objectives can be. Moreover, the Appellate Body in *Australia – Salmon* recognized that, even under Article 5.6 of the SPS Agreement, in cases where a Member does not determine its appropriate level of protection, or does so with insufficient precision, the appropriate level of protection may be established by panels on the basis of the level of protection reflected in the SPS measure actually applied.⁴²

38. Also, in rejecting Mexico's argument regarding the protectionist intent of the COOL measure, the Panel linked it to the general principle stated in the first sentence of Article 2.2, namely that Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade.⁴³ The Panel stated that "[a]s we clarified above, and as the parties agree, the first sentence of Article 2.2 sets out a general principle, a separate violation of which is not required".⁴⁴ Previously in its report the Panel found that "the parties further agree, that the conformity of a measure with the general principle reflected in the first sentence of Article 2.2 *must be established* based on the elements of the second sentence" (emphasis added) and that "the second sentence explains what the first sentence means".⁴⁵ Mexico disagrees with the Panel's understanding of Mexico's position on the first sentence as well as the interpretation and application of the first sentence of Article 2.2 to the protectionist intent of the COOL measure.⁴⁶

39. For these reasons, the Panel committed a legal error when it failed to take into account when assessing the objective of the measure the design, architecture and structure of a technical regulation as well as its legislative history and surrounding circumstances.

40. As a consequence of this legal error, the Panel did not take into account the facts presented by Mexico regarding the protectionist character of the COOL measure.⁴⁷ In this

⁴² Appellate Body Report, *Australia – Salmon*, para. 207.

⁴³ Panel Report, para. 7.607.

⁴⁴ Panel Report, para. 7.607.

⁴⁵ Panel Report, para. 7.552.

⁴⁶ With respect to the former, Mexico's position was that "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". See Mexico's response to Panel Question 125, para.83. Mexico did not agree that "the second sentence explains what the first sentence means", nor did it agree that a violation of the first sentence can be established solely on the basis of the second sentence. Rather, Mexico clarified that "[i]t 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". See Mexico's response to Panel Question 125, footnote 25. With respect to the latter, the first sentence of Article 2.2 is a general obligation that informs the remainder of the provision. The fact that the first sentence of Article 2.2 includes the verbs "prepare, adopt and apply" has to be given some meaning. To fail to give them meaning, as the Panel has done, renders this language a nullity and is a legal error.

⁴⁷ Mexico's First Written Submission, paras. 168-191, 279-283 and 296-302; Mexico's Second Written Submission, paras. 70-83; Exhibit MEX-49; Exhibit MEX-50; Exhibit MEX-51; Exhibit MEX-87; Exhibit MEX-88,

Footnote continued on next page

sense, the Panel failed to make an objective assessment of the matter before it and thereby acted inconsistently with Article 11 of the DSU. The Panel's statement that it had not been presented with solid evidence demonstrating trade protectionism⁴⁸ must be viewed in the light of this factual deficiency. The Panel focused on the objective solely as it was identified by the United States and deliberately disregarded and excluded⁴⁹ Mexico's arguments and evidence based on the design, architecture and structure of the COOL measure as well as its legislative history and surrounding circumstances.

c. Application of the Correct Approach

41. In Mexico's view, given that the complainants were challenging the objective as stated by the United States, the Panel should have verified that objective and ensured that it was congruent with the design, structure and architecture of the COOL measure as well as its legislative history and surrounding circumstances. Its failure to do this was a legal error and was inconsistent with its obligations under Article 11 of the *DSU*.

42. Had the Panel taken into account the relevant evidence, it would have been able to identify the genuine objective of the COOL measure.

43. During the Panel proceedings, Mexico presented evidence demonstrating that the cattle producers in the United States wanted country of origin labeling as a means to regain market share captured by Mexican cattle producers and discourage use of foreign born cattle.⁵⁰ This objective was confirmed by the statements by legislators that their goal was to help U.S. cattle producers.⁵¹ Moreover, the design, structure and architecture of the measure confirm its protectionist intent. The fact that the measure arbitrarily targets only some commodities, only some retailers, only some meat products and specifically prohibits the creation of any tracing system for the U.S. cattle, confirms its protectionist intent.⁵²

Footnote continued from previous page

Exhibit MEX-89; Exhibit MEX-91; Exhibit MEX-92; Exhibit MEX-93; Exhibit MEX-94; Exhibit MEX-95; and Exhibit MEX-96.

⁴⁸ Panel Report, para. 7.605 ("The presumption of good faith can, of course, be rebutted by solid evidence, in this case demonstrating that trade protectionism is indeed the objective pursued by the United States through the COOL measure. However, we have not been presented with such evidence").

⁴⁹ The Appellate Body has found that "[t]he deliberate disregard of, or refusal to consider, the evidence submitted to a panel is incompatible with a panel's duty to make an objective assessment of the facts" under DSU Article 11. Appellate Body Report, *EC – Hormones*, para. 133.

⁵⁰ Mexico's First Written Submission, paras. 168-191, 280-283; Mexico's Second Written Submission, paras. 79-83; Exhibit MEX-49; Exhibit MEX-50; Exhibit MEX-51; Exhibit MEX-89; Exhibit MEX-91; Exhibit MEX-92; Exhibit MEX-93; Exhibit MEX-94; Exhibit MEX-95; and Exhibit MEX-96.

⁵¹ Mexico's First Written Submission, paras. 168-191, 280-283; Mexico's Second Written Submission, paras. 79-83; Exhibit MEX-49; Exhibit MEX-50; Exhibit MEX-51; Exhibit MEX-89; Exhibit MEX-91; Exhibit MEX-92; Exhibit MEX-93; Exhibit MEX-94; Exhibit MEX-95; and Exhibit MEX-96.

⁵² Mexico's First Written Submission, 279-280 and 296-302; Mexico's Second Written Submission, paras. 70-78, Exhibit MEX-87, Exhibit MEX-88.

44. Mexico respectfully requests that the Appellate Body find that the Panel's interpretation of Article 2.2 and its consequent refusal to consider relevant evidence was in error and modify that finding. Mexico further requests that the Appellate Body complete the analysis by considering that evidence and concluding that the real policy objective was not consumer information, but to regain the U.S. market for the commodities covered by the COOL measure. In other words, the objective was the protection of the U.S. domestic cattle industry.

d. Legitimacy of the Identified Objective within the Meaning of Article 2.2

45. If the Panel accepts Mexico's conditional appeal on the definition of the objective of the measure, and conclude that the objective of the COOL Measure is trade protectionism, it would automatically follow that trade protectionism cannot be a legitimate objective.

B. An Alternative Measure Exists that is Less Trade Restrictive and that Fulfils the Legitimate Objective Taking into Account the Risks Non-fulfilment Would Create

46. The Panel found that the COOL measure did not fulfil the identified objective within the meaning of Article 2.2 and thereby was inconsistent with that provision. As a consequence of that finding, the Panel did not consider it necessary to proceed to the next step of the analysis under Article 2.2 and determine whether the COOL measure was more trade restrictive than necessary based on the availability of a less trade-restrictive alternative measures.⁵³

47. Should the Appellate Body reverse the Panel's finding that the COOL measure is inconsistent with Article 2.2 and confirm the Panel's finding that the objective of the COOL measure is legitimate, Mexico appeals the Panel's decision to exercise judicial economy in respect of the existence of an alternative measure that is less trade restrictive and that fulfils the legitimate objective taking into account the risks non-fulfilment would create. It further requests that the Appellate Body complete the analysis of this claim and find that the COOL measure is inconsistent with Article 2.2. With a view to facilitating the prompt settlement of the dispute pursuant to Article 3.3 of the DSU,⁵⁴ the Appellate Body may, upon reversing the Panel's finding on a particular legal issue, proceed to examine and determine a further issue that was not specifically addressed by the Panel,⁵⁵ provided there are sufficient factual findings

⁵³ Panel Report, para. 7.719.

⁵⁴ Appellate Body Report, *EC – Asbestos*, para. 78 (“In previous appeals, we have, on occasion, completed the legal analysis with a view to facilitating the prompt settlement of the dispute, pursuant to Article 3.3 of the DSU. However, we have insisted that we can do so only if the factual findings of the panel and the undisputed facts in the panel record provide us with a sufficient basis for our own analysis”).

⁵⁵ Appellate Body Report, *Australia – Salmon*, para. 117. See also Appellate Body Reports, *EC – Poultry*, para. 156 (“In certain appeals, however, the reversal of a panel's finding on a legal issue may require us to make a finding on a legal issue which was not addressed by the panel”) and *US – Shrimp*, paras. 123-124 (“Having reversed the Panel's legal conclusion ..., we believe it is our duty and responsibility to complete the legal analysis ... in order to properly resolve this dispute between the parties”).

by the Panel and undisputed facts on the Panel Record to provide a basis for the analysis.⁵⁶ There are sufficient factual findings by the Panel and undisputed facts in the Panel Record to enable the Appellate Body to complete the analysis in the present appeal.

48. The Appellate Body has not yet ruled on the meaning of the phrase “more trade-restrictive than necessary to fulfil a legitimate objective taking into account the risks non-fulfilment would create”.

a. “Necessity Test”

49. The ordinary meaning of “necessary” is “requiring to be done, achieved; requisite, essential”.⁵⁷ Analysis of this word in the context of Article 2.2 of the TBT Agreement informs that “technical regulation shall not be more trade-restrictive than necessary to fulfil a legitimate objective”, so the focus is on the technical regulation at issue. The necessity test in Article 2.2 of the TBT Agreement reflects the balance between the freedom of Members to set and achieve their legitimate objectives through technical regulations and the goal of discouraging Members from preparing, adopting and applying technical regulations that create unnecessary obstacles to international trade.⁵⁸ The necessity test in Article 2.2 achieves this balance by requiring that a technical regulation which restricts trade is permissible only if it is “necessary” to fulfil the Member’s legitimate objective, taking account of the risks non-fulfilment would create.

50. Panels’ and the Appellate Body legal interpretative approach under Article XX of the GATT 1994 and Article XIV of the GATS is relevant for the interpretation of Article 2.2 of the TBT Agreement. In particular, jurisprudence on the term “necessary” in the context of Articles XX(b) and (d) of the GATT 1994 and Article XIV of the GATS is useful for interpretation of the same term in Article 2.2 of the TBT Agreement. In these contexts, the following statements have been made about the meaning of this term:

- “[I]n order to determine whether a measure is ‘necessary’ within the meaning of Article XX(b), a panel must consider the relevant factors, particularly the importance of the interests or values at stake, the extent of the contribution to the achievement of the measure’s objective, and its trade restrictiveness. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the

⁵⁶ See e.g. Appellate Body Reports, *US – Section 211 Appropriations Act*, paras. 342-345, 352 and fn 248; *US – Gasoline*, para. 58 ff; *Canada – Periodicals*, paras. 76-79; *EC – Hormones*, para. 222; *EC – Poultry*, paras. 154-157 and 171; *Australia – Salmon*, paras. 117, 193 and 227 ff; *US – Shrimp*, paras. 123-124; *Japan – Agricultural Products*, para. 112; *US – FSC*, para. 133; *Canada – Aircraft (Article 21.5 Brazil)*, para. 43; *US – Wheat Gluten*, paras. 80 and 127; *EC – Asbestos*, paras. 78-83, 133; and *US – Lamb*, paras. 150 and 172.

⁵⁷ The Concise Oxford English Dictionary, Ninth Edition, p. 910. Exhibit MEX-54.

⁵⁸ It follows from the first and second sentences of Article 2.2 of the TBT Agreement and the second, fifth and sixth recitals in the preamble of the TBT Agreement.

achievement of the objective. This comparison should be carried out in the light of the importance of the interests or values at stake.”⁵⁹

- “As used in Article XX(d), the term ‘necessary’ refers[...] to a range of degrees of necessity. At one end of this continuum lies ‘necessary’ understood as ‘indispensable’ and, at the other end, is ‘necessary’ taken to mean as ‘making a contribution to’. [...] A ‘necessary’ measure is, in this continuum, located significantly closer to the pole of ‘indispensable’ than to the opposite pole of simply ‘making a contribution to’.”⁶⁰
- “Determination of whether a measure, which is not ‘indispensable’, may nevertheless be ‘necessary’, involves in every case a process of weighing and balancing a series of factors.⁶¹ [The question is] whether a WTO-consistent alternative measure which the Member concerned could ‘reasonably be expected to employ’ is available, or whether a less WTO-inconsistent measure is ‘reasonably available’.”⁶²

51. Accordingly, to determine whether the COOL measure is more trade-restrictive than necessary to fulfil the legitimate objective, the following factors must be examined: the importance of the interests or values at stake; the extent of the contribution of the measure to the achievement of the measure's objective; the trade restrictiveness of the measure; and whether there are reasonably available alternative measures which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective. Importantly, Article 2.2 of the TBT Agreement has an additional requirement – to take into account the risks of non-fulfilment of the legitimate objective. The risk analysis requirement is considered below.

b. “Trade Restrictiveness”

52. The ordinary meaning of “restrictive” is “imposing restrictions”⁶³ “[i]mplying, conveying or expressing restriction or limitation” and “[h]aving the nature or effect of a restriction; imposing a restriction.”⁶⁴ The term “restriction” is defined as “the act or an instance of

⁵⁹ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 178.

⁶⁰ Appellate Body Report, *Korea – Beef*, para. 160-161.

⁶¹ Appellate Body Report, *Korea – Beef*, para. 164.

⁶² Appellate Body Report, *Korea – Beef*, para. 166. In the context of Article XIV(a) of the GATS, the assessment of the necessity of a measure involves a weighing and balancing of the relative importance of the interests or values furthered by the challenged measure, along with other factors, which will usually include the contribution of the measure to the realization of the ends pursued by it and the restrictive impact of the measure on international commerce. See Appellate Body Report, *US – Gambling*, paras. 304-311.

⁶³ The Concise Oxford English Dictionary, Ninth Edition, p. 1174. Exhibit MEX-54.

⁶⁴ The Shorter Oxford English Dictionary, Sixth Edition, p.2553.

restricting; the state of being restricted”⁶⁵ and as “[a] thing which restricts someone or something, a limitation on action, a limiting condition or regulation.”⁶⁶ The term “restrict” is defined as “confine, bound, limit”.⁶⁷

53. The meaning of “restriction” has been elaborated upon in jurisprudence concerning other WTO provisions. The term “restriction” should not be given a narrow meaning.⁶⁸ A “disguised restriction” in the context of Article XX of the GATT 1994 has been interpreted to include “disguised discrimination in international trade”.⁶⁹ In the context of Article XI and other non-discrimination provisions of the GATT 1994, it has been found that GATT disciplines on the use of restrictions are not meant to protect “trade flows”, but rather the “competitive opportunities of imported products”.⁷⁰ In *Argentina – Hides and Leather*, the Panel found that in determining whether a measure makes effective a restriction in the context of Article I, II, III and XI:1 of the GATT 1994 the focus is on the competitive opportunities of imported products, not the trade effects. That panel considered that the complaining party claiming the existence of a restriction need not prove actual trade effects.⁷¹

54. On the basis of the foregoing, measures that are “trade restrictive” are those that deny competitive opportunities to imports. The Panel agreed with this interpretation.⁷²

c. “Taking Account of the Risks Non-fulfilment Would Create”

55. In assessing the necessity of technical regulations in the context of Article 2.2 of the TBT Agreement, panels and the Appellate Body shall take “account of the risks non-fulfilment would create.”⁷³ The relevant part of Article 2.2. of the TBT Agreement states:

... technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.... In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products.

⁶⁵ The Concise Oxford English Dictionary, Ninth Edition, p. 1174. Exhibit MEX-54.

⁶⁶ The Shorter Oxford English Dictionary, Sixth Edition, p.2553.

⁶⁷ The Concise Oxford English Dictionary, Ninth Edition, p. 1174. Exhibit MEX-54.

⁶⁸ Panel Report, *EC – Asbestos*, para. 8.235.

⁶⁹ Appellate Body Report, *US – Gasoline*, para. 66.

⁷⁰ Panel Report, *EC – Bananas III (21.5 – Ecuador II)*, para. 7.330.

⁷¹ Panel Report, *Argentina – Hides and Leather*, para. 11.20. Panel Report, para. 7.572.

⁷² Panel Report, para. 7.575.

⁷³ Article 2.2 of the TBT Agreement.

56. The ordinary meaning of “risk” is “a chance or possibility of danger, loss, injury, or other adverse consequences”.⁷⁴ The phrase “risks non-fulfilment would create” refers to the chance or possibility of adverse consequences should the legitimate objective not be carried out. Obviously, the risks of non-fulfilment of technical regulations applied with the goal to protect human health or safety, animal or plant life or health will be different from the risks of non-fulfilment of technical regulations applied with the goal to provide consumer information.

57. In assessing such risks, the Appellate Body should consider, in particular, available scientific and technical information.

58. Mexico also notes that Article 2.3 of the TBT Agreement requires periodical re-assessment of the necessity of technical regulations. Article 2.3 reads:

Technical regulations shall not be maintained if the circumstances or objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be addressed in a less trade-restrictive manner.

Mexico submits that consideration of whether the circumstances giving rise to the adoption of the COOL measure exist or changed and can be addressed in a less trade-restrictive manner should be a part of a process of “weighing and balancing” a series of factors.

d. Application to the Facts of this Dispute

59. On the basis of the foregoing and in the context of the facts of this dispute, the phrase “technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create” means that the COOL measure should not be more “trade-restrictive” (i.e., should not deny competitive opportunities to imports of Mexican feeder cattle) than “necessary” (i.e., in light of the objective of providing consumer information on the country of origin of inputs in products manufactured or obtained in the United States and the contribution of the COOL measure to the achievement of that objective, there are no reasonably available less trade-restrictive measures that provide an equivalent contribution to the achievement of the objective), “taking account of the risks non-fulfilment would create” (i.e., in light of the available scientific and technical information, the chance or possibility of adverse consequences should the consumer-information objective not be carried out).

60. The importance of the legitimate objective at issue and the risks of non-fulfilment of that objective would create help define the parameters of the “necessity” test that is incorporated in this provision. The value of the information provided and its contribution to the needs of a U.S. consumer is minimal and restricted to a limited sub-set of U.S. consumers.⁷⁵ Thus, the importance of the objective of providing consumer information is low. Likewise, the possibility of adverse consequences arising should the objective not be carried out is low and to

⁷⁴ The Concise Oxford English Dictionary, Ninth Edition, p. 1189. Exhibit MEX-54.

⁷⁵ See Mexico's First Written Submission, paras. 106-107. See also Exhibit-MEX 7, pp. 2681-2683.

the extent that those consequences arise they will be restricted to a limited sub-set of U.S. consumers.

61. It is clear that the COOL measure is more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. The measure is highly trade restrictive as evidenced by its adverse effect on imports of Mexican feeder cattle that are discussed above. There are at least four other alternative measures that are reasonably available that provide the equivalent contribution to the objective.

62. The first alternative is a *voluntary* country of origin labelling requirement. Depending on how it is designed and implemented, such a requirement can maintain the strict labeling criteria (i.e., born, raised and slaughtered) and yet remain consistent with applicable WTO provisions. This alternative would allow market forces to recognize and fill the consumer need for additional information about the sources of products to the extent that such a need actually exists. Prior to the COOL measure, origin labelling was indeed voluntary for U.S.-produced beef products.⁷⁶

63. A second alternative is to modify the labelling criteria to conform to the country of origin pre-existing criteria. In the case of muscle cuts of beef, the pre-existing rules followed the criteria used for determining the country of origin of products- for purposes of rules of origin (change of tariff classification and processing, both including the rule of substantial transformation or a change in nature). According to those rules, the meat derived from an animal born in Mexico and raised and slaughtered in the United States, would be labelled as a product of the United States.⁷⁷ This would eliminate the discrimination and trade restrictions affecting imports of Mexican feeder cattle. It would also be consistent with the origin rules applied under the COOL measure to imported meat products and to most other types of products in the U.S. market, and therefore would avoid confusion.

64. A third alternative would be to combine the first and second alternatives, so that origin labelling based on the traditional substantial transformation test would be mandatory, and retailers would be free to include additional information about where the inputs were born, raised and slaughtered on a voluntary basis. This option would both ensure that consumers were aware of the origin of meat products in accordance with the traditional standard, and that retailers could provide additional information if consumers indicated an interest.

65. A fourth alternative is a trace back regime. 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. In their paper entitled *Impact*

⁷⁶ See Panel Report, para. 7.411 (“Further, unlike the COOL measure, the pre-existing segregation programmes evoked by the United States are voluntary and exist to the extent that they meet consumer demand, i.e. they are also contingent upon consumers’ willingness to pay for the type and quality of beef covered by such programmes”).

⁷⁷ See Panel Report, para. 7.674 and Mexico’s First Written Submission, paras. 95-99.

of Mandatory Country of Origin Labeling on U.S. Pork Exports, Dermot J. Hayes and Steve R. Meyer discuss two alternative compliance mechanisms that could be employed by the COOL measure: (i) certification and audit; and (ii) trace back.⁷⁸

66. The authors describe the first option — certification and audit — as requiring that certificates of origin be backed up by some proof that the meat came only from animals born, raised and slaughtered in the United States.⁷⁹ In their view, the easiest way of complying with this option would be to exclude all non-U.S. animals.⁸⁰ Another compliance option would be strict segregation of foreign-produced animals.⁸¹ The authors observe that either option would cause the foreign animals to be heavily discounted due to increased costs and would impose enormous economic strain on foreign producers.⁸² This is the option that the United States chose to implement the COOL measure and the effect of the measure is exactly as predicted by the authors. The costs are being disproportionately born by Mexican animals compared to like U.S. animals.

67. The authors describe the second option — trace back — as requiring that a retailer be able to trace a piece of meat back to the original animal.⁸³ The authors recognize that this option is used in the EU and suggest that it is technically and economically feasible in the United States.⁸⁴ 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).⁸⁵ In Mexico's view, if there were trace back to the originating cattle-producing location, 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 cattle producers 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 cattle-producing locations, there would be no cost saving associated with excluding Mexican cattle. Thus, the economic incentive to discriminate against Mexican cattle would likely be eliminated.⁸⁶ Consumers could be provided with much more precise information than is possible under the COOL measure.

⁷⁸ Dermot J. Hayes & Steve R. Meyer, "Impact of Mandatory Country of Origin Labeling on U.S. Pork Exports", Exhibit MEX-88, p. 7.

⁷⁹ Exhibit MEX-88, p. 7.

⁸⁰ Exhibit MEX-88, p. 7.

⁸¹ Exhibit MEX-88, p. 7.

⁸² Exhibit MEX-88, p. 7.

⁸³ Exhibit MEX-88, p. 7.

⁸⁴ Exhibit MEX-88, p. 7.

⁸⁵ Exhibit MEX-88, pp. 9-10.

⁸⁶ Mexico observes that whether or not discrimination still existed under this second option would depend on the specific facts and circumstances relating to the design and implementation of the compliance mechanism.

68. Accordingly, there are four less trade restrictive alternative measures that fulfil the legitimate objective of providing information to consumers about origin taking into account the risks non-fulfilment would create. As a consequence, the COOL measure is more trade restrictive than necessary within the meaning of Article 2.2 of the TBT Agreement and is thereby inconsistent with that provision.

IV. CONDITIONAL APPEAL CONCERNING ARTICLE III:4 OF THE *GATT 1994*

A. The Authority of the Appellate Body to Complete the Analysis of Mexico's Claim under Article III:4

69. Should the Appellate Body reverse the Panel's finding that the COOL measure is inconsistent with Article 2.1, Mexico appeals the Panel's decision to exercise judicial economy in respect of Mexico's claim under Article III:4 of the *GATT 1994* and requests that the Appellate Body complete the analysis of this claim and find that the COOL measure is inconsistent with Article III:4.

70. The Panel found that "given the close connection between Article 2.1 of the TBT Agreement and Article III:4 of the *GATT 1994* with respect to the nature of the obligations and in light of our finding under Article 2.1 of the TBT Agreement, we consider it unnecessary to examine the complainants' claims in respect of the COOL measure under Article III:4 of the *GATT 1994*".⁸⁷ On this basis, it concluded that it did not need to make a finding under Article III:4.⁸⁸

71. The Panel's decision not to address Mexico's Article III:4 claim was contingent upon its finding that the COOL measure violated Article 2.1 of the TBT Agreement. If that finding is reversed, the Panel's legal basis for exercising judicial economy with respect to Mexico's claim under Article III:4 will no longer exist. As previously noted,⁸⁹ the Appellate Body has found that in circumstances where it reverses a finding of a Panel, it may then proceed to examine and determine an issue that was not specifically addressed by the panel, in order to complete the legal analysis and properly resolve the dispute between the parties.⁹⁰

72. Accordingly, if the Panel's finding of inconsistency with Article 2.1 is reversed, Mexico requests that the Appellate Body complete the analysis of Mexico's claim under Article III:4 because it is necessary to facilitate the prompt settlement of this dispute pursuant to Article 3.3 of the DSU. There are sufficient factual findings by the Panel and undisputed facts on the Panel Record to enable the Appellate Body to complete the analysis.

⁸⁷ Panel Report, para. 7.807.

⁸⁸ Panel Report, para. 8.4(a).

⁸⁹ See section III(B), above, para. 47 and fn 55-567.

⁹⁰ See e.g. Appellate Body Reports, *US – Section 211 Appropriations Act*, paras. 342-345, 352 and fn 248; *Australia – Salmon*, paras. 117-119; *EC – Poultry*, paras. 154-157, 171; *US – Shrimp*, paras. 123-124; and *EC – Asbestos*, para. 78.

B. The COOL Measure is Inconsistent with Article III:4

73. The COOL measure accords Mexican feeder cattle treatment less favourable than that accorded to U.S. feeder cattle in a manner that is inconsistent with Article III:4 of the GATT 1994.

74. Article III:4 of the GATT provides:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

75. Article III of the GATT 1994 establishes that WTO Members must accord national treatment to imported products, i.e. treatment no less favourable than that accorded to products of national origin. As stated by the Appellate Body in *Japan – Alcoholic Beverages*, “[t]he broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures”.⁹¹ The Appellate Body also declared that “Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products”.⁹²

76. Article III:4 is informed by the general principle in Article III:1 to ensure that internal measures not be applied to imported and domestic products so as to afford protection to domestic production.⁹³ This general principle seeks to prevent Members from applying internal regulations in a manner which affects the competitive relationship in the marketplace between the domestic and imported products so as to afford protection to domestic production.⁹⁴ The COOL measure has both the purpose and effect of affording protection to U.S. cattle producers. It is, therefore, fundamentally incompatible with this general principle.

77. In *Korea – Beef*, the Appellate Body explained that a Member’s measure violates Article III:4 if three elements are met:

- i. imported and domestic products at issue are “like products”;
- ii. the measure at issue is a law, regulation or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use.

⁹¹ Appellate Body Report, *Japan – Alcoholic Beverages II*, para. 35.

⁹² Appellate Body Report, *Japan – Alcoholic Beverages II*, para. 35.

⁹³ Appellate Body Report, *US – FSC (Article 21.5 – EC)*, paras. 204-205.

⁹⁴ Appellate Body Report, *EC – Asbestos*, para. 98. However, a determination of whether there has been a violation of Article III:4 does not require a separate consideration of whether a measure affords protection to domestic production. See Appellate Body Report, *EC – Bananas III*, para. 216.

- iii. the imported products are accorded “less favourable” treatment than that accorded to like domestic products.⁹⁵

78. Mexico will address each element in turn.

1. Like Products

79. In the context of its analysis under Article 2.1 of the TBT Agreement, the Panel found that the relevant imported and domestic products, namely Mexican and U.S. feeder cattle, were “like”.⁹⁶ The United States has not appealed this finding. Although this finding was made in the context of Article 2.1, the analytical approach of the Panel is equally applicable to the determination of “like products” within the meaning of Article III:4 of the GATT 1994.⁹⁷ Accordingly, for the purpose of Mexico’s claim under Article III:4, the imported and domestic products at issue are “like products”.

2. Laws, Regulations And Requirements Affecting Their Internal Sale, Offering For Sale, Purchase, Transportation, Distribution Or Use

80. Article III:4 applies to “laws, regulations and requirements” that affect “the internal sale, offering for sale, purchase, transportation, distribution or use”.

81. The COOL measure clearly falls within the category of “laws, regulations and requirements”. It is undisputed that the COOL measure comprises a series of laws and regulations that set out the mandatory country of origin labeling requirement. For the purpose of this conditional appeal on the consistency of the COOL measure with Article III:4, the relevant law and regulation are the COOL statute and the 2009 Final Rule (AMS) which are the law and regulation that were subject to the findings of the Panel.⁹⁸

82. These laws, regulations and requirements “affect the internal sale, offering for sale, purchase, transportation, distribution or use” of feeder cattle.

83. With regard to the term “affecting” used in Article III:4, the Appellate Body has explained:

[T]he word “affecting” operates as a link between identified types of government action (“laws, regulations and requirements”) and specific transactions, activities

⁹⁵ Appellate Body Report, *Korea – Beef*, para. 133.

⁹⁶ Panel Report, para. 7.156.

⁹⁷ Panel Report, para. 7.254.

⁹⁸ Panel Report, para. 7.34. For the purpose of the conditional appeal of its Article III:4 claim, Mexico is not including in the COOL measure the Vilsack letter, a separate element of the COOL measure that was found by the Panel to be inconsistent with GATT Article X:3(a).

and uses relating to products in the marketplace (“internal sale, offering for sale, purchase, transportation, distribution or use”). It is, therefore, not any “laws, regulations and requirements” which are covered by Article III:4, but only those which “affect” the specific transactions, activities and uses mentioned in that provision. Thus, the word “affecting” assists in defining the types of measure that must conform to the obligation not to accord “less favourable treatment” to like imported products, which is set out in Article III:4.⁹⁹

84. The term “affecting” contained in Article III:4 has been interpreted as having a broad scope of application.¹⁰⁰ The GATT Panel in *Italy – Agricultural Machinery* observed that the word “affecting”, as employed in Article III:4, covers “not only the laws and regulations which directly govern[...] the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between domestic and imported products on the internal market”¹⁰¹

85. In *EC - Bananas III*, the Appellate Body noted that “[t]he ordinary meaning of the word ‘affecting’ implies a measure that has ‘an effect on’, which indicates a broad scope of application”.¹⁰²

86. Prior WTO panels have concluded that Article III:4 encompasses measures that (i) provide an incentive to purchase local products;¹⁰³ (ii) provide a disincentive to accept and distribute the imported product to end-users;¹⁰⁴ and (iii) that influence a manufacturer’s choice between domestic and imported products.¹⁰⁵

87. The COOL measure applies to a specified group of “covered commodities”, among which is beef.¹⁰⁶ The Final Rule defines beef as “meat produced from cattle, including veal”.¹⁰⁷ The COOL measure imposes a requirement on certain retailers to notify their customers of the country of origin of beef in accordance with the detailed criteria specified in the Final Rule.¹⁰⁸ The measure also imposes record keeping and verification requirements to substantiate the origin claims that apply to all persons engaged, either directly or indirectly, in

⁹⁹ Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 208.

¹⁰⁰ Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 210.

¹⁰¹ GATT Panel Report, *Italy – Agricultural Machinery*, para. 12.

¹⁰² Appellate Body Report, *EC – Bananas III*, para. 220.

¹⁰³ Panel Report, *India – Autos*, para. 7.197.

¹⁰⁴ Panel Reports, *Canada – Wheat Exports and Grain Imports*, para. 6.267.

¹⁰⁵ Panel Reports, *China – Auto Parts*, para. 7.256.

¹⁰⁶ Panel Report, para. 7.91.

¹⁰⁷ 7 C.F.R. § 65.110; Exhibit MEX-7, p. 2704.

¹⁰⁸ Panel Report, paras. 7.87-7.88.

the supply of beef to retailers including stockbreeders, backgrounders, feedlot operators and meat processors and packers.¹⁰⁹

88. While the COOL measure does not directly regulate feeder cattle, it *affects* the internal sale, offering for sale, purchase, transportation, distribution or use of feeder cattle because it regulates retail beef, which is derived from those cattle. The Panel found that while the labels at issue must be affixed on muscle cuts of meat and ground meat, the labels are difficult to dissociate from upstream stages of meat production because the labels are intended to convey information on the origin of the meat.¹¹⁰ For the four muscle cut labels, country of origin is determined by the country in which specific livestock production and processing steps, namely birth, raising and slaughtering, took place.¹¹¹ All three of these steps precede the meat retail stage; indeed, they cover the period back to the birth of the animal from which meat is produced.¹¹² The Panel then made several findings which confirm that the COOL measure affects the internal sale, offering for sale, purchase, transportation, distribution or use of Mexican feeder cattle, for example: (i) costs are incurred as a result of the country of origin labelling requirements at the various livestock and meat processing stages;¹¹³ (ii) for all practical purposes, the COOL measure necessitates segregation of meat and livestock according to origin;¹¹⁴ (iii) the COOL measure creates an incentive for participants to process domestic rather than imported livestock because, under the COOL measure;¹¹⁵ and (iv) the COOL measure creates an incentive to use domestic livestock and a disincentive to handle imported livestock.¹¹⁶

89. The COOL measure is therefore a law, regulation and requirement that *affects* the internal sale, offering for sale, purchase, transportation, distribution or use of Mexican feeder cattle within the meaning of Article III:4. Thus, the national treatment obligation in that Article applies.

3. Less Favourable Treatment

90. Article III:4 stipulates that WTO Members shall accord imported products “treatment no less favourable” than the treatment accorded to products of national origin. In *Korea – Beef*, the Appellate Body articulated that “[w]hether or not imported products are treated ‘less favourably’ than like domestic products should be assessed [...] by examining whether a measure modifies the *conditions of competition* in the relevant market to the detriment of

¹⁰⁹ Panel Report, paras. 7.116-7.120.

¹¹⁰ Panel Report, paras. 7.282-7.283.

¹¹¹ Panel Report, para. 7.283.

¹¹² Panel Report, para. 7.283.

¹¹³ Panel Report, para. 7.310.

¹¹⁴ Panel Report, para. 7.327.

¹¹⁵ Panel Report, para. 7.357.

¹¹⁶ Panel Report, para. 7.372.

imported products.”¹¹⁷ In *Dominican Republic – Import and Sale of Cigarettes*, the Appellate Body confirmed that this was the question that a panel must answer and it clarified that “a measure accords less favourable treatment to imported products if it gives domestic like products a competitive advantage in the market over imported like products”.¹¹⁸

91. The COOL measure requires that beef sold at the retail level be labeled with information indicating the place where the cattle are born, raised and slaughtered and impose record keeping and verification requirements to support the labels. The COOL measure by itself does not *de jure* distinguish between domestic and imported like products nor do the measures *de jure* distinguish between like Mexican and U.S. feeder cattle. However, GATT Article III:4 applies to both *de jure* and *de facto* inconsistency.¹¹⁹ A formal difference in treatment between imported and like domestic products is not necessary to show a violation of this provision.¹²⁰ The focus is whether the measure modifies the conditions of competition.¹²¹

92. In this dispute, the pertinent question is whether the COOL measure denies competitive opportunities to Mexican feeder cattle compared to like U.S. feeder cattle. The answer to this question is “yes”.

93. The following factual findings of the Panel clearly demonstrate that the COOL measure denies competitive opportunities in such a manner:

- a) The COOL measure creates an incentive for participants to process domestic rather than imported livestock because, under the COOL measure, processing meat from exclusively domestic livestock is less costly than other business scenarios. Passing on these costs at least in part to imported livestock in turn creates a reduction in the competitive opportunities of imported livestock, relative to domestic livestock.¹²²
- b) The COOL measure creates an incentive to use domestic livestock – and a disincentive to handle imported livestock – by imposing higher segregation costs on imported livestock than on domestic livestock. Consequently, the COOL measure affects competitive conditions in the US market to the detriment of imported livestock.¹²³
- c) The competitive opportunities of imported livestock are reduced as the additional costs of compliance with the COOL measure incurred when handling imported

¹¹⁷ Appellate Body Report, *Korea – Beef*, para. 137. (emphasis original)

¹¹⁸ Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 93.

¹¹⁹ Appellate Body Report, *Canada – Autos*, para. 140.

¹²⁰ Appellate Body Report, *Korea – Beef*, para. 137.

¹²¹ Appellate Body Report, *Korea – Beef*, para. 137.

¹²² Panel Report, para. 7.357.

¹²³ Panel Report, para. 7.372.

livestock are, at least in part, passed on to suppliers of imported livestock. We referenced in this regard direct evidence of a considerable COOL discount being applied by several major processors to imported livestock and the absence of evidence of a similar discount being applied to domestic livestock.¹²⁴

- d) Further evidence of the reduction of competitive opportunities for imported livestock includes statements by imported livestock suppliers that some plants and companies are simply refusing to process any imported livestock any more.¹²⁵
- e) As a result of the COOL measure, fewer US processing plants are accepting imported livestock than before.¹²⁶
- f) As a result of the reduction of available processing plants, certain suppliers had to transport imported livestock longer distances than before the COOL measure. Further, several plants that continue to process imported livestock do so at specific, limited times, namely only on specific days of the week (typically at most one or two days per week), or only after specific hours of the day.¹²⁷
- g) Processing imported livestock only at specific times as a result of the COOL measure has created logistical problems and additional costs for certain imported livestock suppliers. Due to the congestion resulting from limited specific-time deliveries, certain imported livestock suppliers find it more difficult to obtain trucks for their deliveries or to use their trucks in an efficient way. Congestion has also increased waiting time for imported livestock crossing the border, and thus created transportation delays for certain suppliers of imported livestock. In turn, these have increased the transportation costs of certain suppliers of imported livestock, and have had a negative impact on the welfare and quality of imported livestock as a result of long waiting times in extreme temperatures and shrinkage, sometimes leading even to increased mortality.¹²⁸
- h) Transportation of imported livestock has become less efficient in that certain suppliers
- i) can make fewer deliveries due to longer distance transport and less turn-around time.¹²⁹

¹²⁴ Panel Report, para. 7.374.

¹²⁵ Panel Report, para. 7.375.

¹²⁶ Panel Report, para. 7.376.

¹²⁷ Panel Report, para. 7.377.

¹²⁸ Panel Report, para. 7.377.

¹²⁹ Panel Report, para. 7.377.

- j) Certain slaughterhouses accepting imported livestock only on Monday has resulted in increased costs for veterinary checks of imported livestock on Sunday.¹³⁰
- k) Contractual terms for suppliers of imported livestock have also changed as a result of the COOL measure. We have evidence that several major processors introduced a COOL opt-out clause allowing them to unilaterally terminate or amend their contracts with suppliers of imported livestock. In certain other situations, supply contracts for imported livestock have been cancelled or terminated, or simply not renewed. Sometimes, the contractual relationship has survived the COOL measure, although at terms less favourable for imported livestock suppliers. For instance, in certain cases, former long-term contracts have been replaced with spot contracts at lower purchase prices. In at least one case, a former automatically renewed, "evergreen" contract was replaced with a contract involving less favourable terms. Further, we have evidence of 14 days' advance notice being required for supplies of Mexican cattle at various US processing facilities.¹³¹
- l) Certain suppliers of imported livestock have also suffered significant financial disadvantages resulting from the COOL measure. Several suppliers reported that the price difference between imported and domestic livestock has become larger to the detriment of domestic livestock, and that discounts for imported livestock appeared or existing ones increased as a result of the COOL measure. Further, in several cases, financial institutions are reported to have refused to provide credits and loans to Canadian livestock producers due to the risks resulting from the COOL measure.¹³²
- m) Imported cattle have been excluded from premium beef programmes, such as the Certified Angus Beef programme and other programmes, as a result of the COOL measure. In general, these premium programmes are particularly profitable for operators in the supply chain, including livestock suppliers.¹³³ In the context of the muscle cut labels, the COOL measure creates an incentive in favour of processing exclusively domestic livestock and a disincentive against handling imported livestock. The COOL measure *de facto* discriminates against imported livestock by according less favourable treatment to Mexican cattle, especially Mexican feeder cattle, than to like domestic livestock.¹³⁴

¹³⁰ Panel Report, para. 7.377.

¹³¹ Panel Report, para. 7.378

¹³² Panel Report, para. 7.379.

¹³³ Panel Report, para. 7.380.

¹³⁴ Panel Report, para. 7.420.

94. In this way, the COOL measure gives U.S. feeder cattle a competitive advantage over like Mexican feeder cattle in the U.S. feeder cattle market and thereby violates the national treatment obligation in Article III:4.

V. CONDITIONAL APPEAL CONCERNING ARTICLE XXIII:1(B) OF THE GATT 1994

95. Mexico presented a claim under Article XXIII:1(b) of the GATT 1994 that the COOL measure nullifies and impairs tariff concessions made by the United States and inscribed in its WTO tariff bindings. The Panel declined to rule on that claim, on the basis that U.S. compliance with the its finding of violation of TBT Agreement 2.1 would remove the basis of the non-violation claims of nullification or impairment.¹³⁵ In effect, the Panel exercised judicial economy.

96. Should the Appellate Body decide that the Panel erred in finding a violation of TBT Agreement Articles 2.1 and does not make a finding of a violation by the United States under GATT Article III:4, Mexico appeals the Panel's decision to exercise judicial economy in respect of Mexico's claim under Article XXIII:1(b) of the GATT 1994 and requests that the Appellate Body complete the analysis of this claim and find that the COOL measure is inconsistent with Article XXIII:1(b). Again, as previously noted,¹³⁶ the Appellate Body may, upon reversing a particular legal finding of the Panel, proceed to examine and determine an issue that was not specifically addressed by the panel in order to complete the legal analysis and properly resolve the dispute between the parties.

97. The U.S. bound tariff is 1 cent per kilogram,¹³⁷ which is about \$1.36 to \$1.81 for a 300 to 400 pound animal. Based on this WTO tariff binding, Mexico could legitimately expect that its cattle would have a competitive disadvantage of \$1.36 to \$1.81 per animal compared to like US products. The actual price discount created by the COOL measure has been up to \$60 for the same 300-400 pound animal. Moreover, the COOL measure reduced the number of U.S. plants processing U.S. cattle, limited the days on which the remaining plants would accept cattle from Mexico, and introduced new requirements for advance notice of delivery. The competitive disadvantage or level of protection reflected in the price discount and other restrictions vastly exceeds Mexico's legitimate expectation of a \$1.36 to \$1.81 tariff disadvantage per animal.¹³⁸ The COOL accordingly measure nullifies or impairs benefits accruing to Mexico under the WTO tariff bindings of the United States.

98. In this regard, Mexico emphasizes that its complaint is not with origin marking requirements in general, but with the particular features of the COOL measure that are

¹³⁵ Panel Report, para. 7.907.

¹³⁶ See section III(B), above, para. 47 and fns 55-567., and section IV(A), above, para. 71 and fns 90-91.

¹³⁷ Exhibit MEX-84.

¹³⁸ Panel Report, para. 7.898.

discriminatory and arbitrary. It is those features that could not reasonably have been anticipated at the time the tariff concessions were negotiated.

99. In light of the Panel's findings that the COOL measure has the effect of discouraging use of Mexican cattle, the Appellate Body has a sufficient basis to complete the analysis and find that the COOL measure results in a non-violation nullification or impairment that is inconsistent with Article XXIII:1(b).

100. Mexico observes that the Panel also stated that compliance by the United States with its findings of violation of TBT Agreement Article 2.2 and Article X:3(a) of the GATT 1994 would eliminate the basis of the non-violation nullification or impairment claim¹³⁹. This statement is erroneous, as measures taken to comply with those findings would not necessarily eliminate all of the discrimination and resulting nullification and impairment of tariff concessions. Accordingly, Mexico requests a finding under Article XXIII:1(b), regardless of the Appellate Body's decision regarding the TBT Agreement Article 2.2 claim, if the Appellate Body does not uphold the Panel's finding of violation by the United States in respect of TBT Agreement Article 2.1 and does not make a finding of a violation by the United States under GATT Article III:4.

VI. CONCLUSIONS

101. If the conditions of the appeals are triggered, Mexico respectfully requests that the Appellate Body:

- a) Modify the Panel's legal conclusions and findings in paragraph 8.4 (a) and paragraph 7.807 of the Panel Report, complete the analysis of Mexico's claims under Article III:4 of the GATT 1994, and find that the COOL Measure is inconsistent with Article III:4 of the GATT 1994;
- b) Modify the Panel's legal conclusions and findings in paragraphs 7.620, 7.651, *inter alia*, of the Panel Report, and apply the correct analysis to identify the objective of the COOL Measure and examine its legitimacy, and find that the objective of the COOL Measure is not legitimate and therefore is inconsistent with Article 2.2 of the TBT Agreement.
- c) Complete the analysis in respect of the existence of an alternative measure and find that the COOL measure is inconsistent with Article 2.2 of the TBT agreement, on the basis that there are alternative measures that are less trade restrictive and that fulfill the legitimate objective taking into account the risk non-fulfilment would create; and
- d) Modify the Panel's legal conclusions and findings in paragraph 8.5 and paragraph 7.907, *inter alia*, of the Panel Report, and complete the analysis of Mexico's claim, and find that the COOL measure nullifies or impairs benefits accruing to Mexico under the GATT 1994 within the meaning of Article XXIII:1(b) of the GATT 1994.

¹³⁹ Panel Report, para. 7.907.