

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

**(WT/DS386)**



**First Written Submission of the United Mexican States**

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### CASES CITED IN THIS SUBMISSION

Short title	Full case title
<i>Argentina – Bovine Hides</i>	Panel Report, <i>Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather</i> , WT/DS155/R and Corr.1, adopted 16 February 2001
<i>Australia – Salmon</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998
<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
<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
<i>Canada – Pharmaceutical Patents</i>	Panel Report, <i>Canada – Patent Protection of Pharmaceutical Products</i> , WT/DS114/R, adopted 7 April 2000
<i>Canada – Wheat Exports</i>	Panel Reports, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/R, adopted 27 September 2004, as modified by the Appellate Body Report, WT/DS276/AB/R
<i>China – Autos</i>	Panel Reports, <i>China – Measures Affecting Imports of Automobile Parts</i> , WT/DS339/R, WT/DS340/R, WT/DS342/R, adopted 12 January 2009, as modified by the Appellate Body, WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R
<i>Chile – Alcoholic Beverages</i>	Appellate Body Report, <i>Chile – Taxes on Alcoholic Beverages</i> , WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000
<i>Dominican Republic - 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
<i>Dominican Republic - Cigarettes</i>	Panel Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/R, adopted 19 May 2005, as modified by the Appellate Body Report, WT/DS302/AB/R
<i>EEC – Oilseeds</i>	Panel Report, <i>European Economic Community – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins</i> , adopted 25 January 1990, BISD 37S/86
<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
<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 the Appellate Body Report, WT/DS135/AB/R
<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
<i>EC – Bananas III (Article 21.5 – II – Ecuador)</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 17 December 2008, as modified by the Appellate Body Reports, WT/DS27/AB/RW2/ECU, WT/DS27/AB/RW/USA
<i>EC – Sardines</i>	Appellate Body Report, <i>European Communities – Trade Description of Sardines</i> , WT/DS231/AB/R, adopted 23 October 2002
<i>EC – Sardines</i>	Panel Report, <i>European Communities – Trade Description of Sardines</i> , WT/DS231/R and Corr.1, adopted 23 October 2002, as modified by the Appellate Body Report, WT/DS231/AB/R
<i>EC – Selected Customs Matters</i>	Appellate Body Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/AB/R, adopted 11 December 2006
<i>EC – Tariff Preferences</i>	Panel Report, <i>European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries</i> , WT/DS246/R, adopted 20 April 2004, as modified by the Appellate Body Report, WT/DS246/AB/R
<i>EC – Trademarks and Geographical Indications (Australia)</i>	Panel Report, <i>European Communities – Protection for Trademarks and Geographical Indications for Agricultural Products and Foodstuffs (Complaint by Australia)</i> , WT/DS290/R and Add.1, 2 and 3, adopted 20 April 2005
<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
<i>Italy – Agricultural Machinery</i>	GATT Panel Report, <i>Italian Discrimination Against Imported Agricultural Machinery</i> , adopted 23 October 1958, BISD 7S/60
<i>Japan – Alcoholic Beverages</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
<i>Japan – Film</i>	Panel Report, <i>Japan – Measures Affecting Consumer Photographic Film and Paper</i> , WT/DS44/R, adopted 22 April 1998
<i>Korea – Various Measures on 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
<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
<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 and Corr.1, adopted 20 April 2005
<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
<i>US – Section 110(5) Copyright Act</i>	Panel Report, <i>United States – Section 110(5) of the US Copyright Act</i> , WT/DS160/R, adopted 27 July 2000

<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
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## **I. INTRODUCTION**

1. This dispute concerns a mandatory country of origin labeling 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 the largest importer 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 Northern border between the United States and Canada, the COOL measure has had similar adverse effects on the Canadian cattle and swine industries.
5. While country of origin labeling measures may be permissible under certain circumstances, they are inherently protectionist and discriminatory and are not permissible under all circumstances.
6. In this submission Mexico will prove that the COOL measure is a mandatory internal country of origin labeling measure that, by virtue of its design, structure and application, unjustifiably discriminates against and restricts imports of Mexican cattle into the United States. Its purpose and effect is to protect the U.S. cattle industry and other domestic industries that produce covered commodities against competition with like imported products and it has achieved that purpose and effect in the case of cattle from Mexico.
7. It is important to clarify that this dispute is not about a country of origin labeling measure that is applied at the border on Mexican cattle and is governed by Article IX of the GATT 1994.<sup>1</sup> Rather, this dispute concerns an internal measure that imposes mandatory country of origin labeling requirements on beef, the downstream processed product derived from cattle, when the cattle have been processed into beef within the United States and that beef is sold by a subset of U.S. retailers to U.S. consumers. This internal measure has a discriminatory and trade restrictive effect on imports of Mexican cattle. Thus, it is a measure that is governed by Article III:4 of the GATT 1994 and by the provisions of the TBT Agreement.
8. For the reasons discussed below, the COOL measure violates the provisions of GATT Article III:4 and X:3 and Articles 2.1, 2.2, 2.4 and 12 of the TBT Agreement, and cannot be justified under other WTO provisions. It also nullifies or impairs benefits accruing to Mexico under the GATT 1994 within the meaning of Article XXIII:1(b) of the GATT 1994.

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<sup>1</sup> Certain elements of the COOL measure may be subject to GATT Article IX, for example the labeling requirement imposed at the border on imported covered products (7 U.S.C. § 1638(a)(2)(D)). However, Mexico's claims concern elements of the COOL measure that are internal measures.

## II. LEGAL BACKGROUND

### A. THE MEASURE AT ISSUE

9. The measure at issue in this dispute – the COOL measure – comprises the following legal instruments:

- i. the Agricultural Marketing Act of 1946<sup>2</sup>, as amended by the Farm, Security and Rural Investment Act of 2002 (hereinafter Farm Bill 2002)<sup>3</sup> and the Food, Conservation and Energy Act of 2008 (hereinafter Farm Bill 2008);<sup>4</sup>
- ii. the Interim Final Rule on Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Gingseng, and Macadamia Nuts, issued by the Agricultural Marketing Service (hereinafter AMS) of the United States Department of Agriculture (hereinafter USDA) on 1 August, 2008;<sup>5</sup>
- iii. the Interim Final Rule on Mandatory Country of Origin Labeling of Muscle Cuts of Beef (including Veal), Lamb, Chicken, Goat and Pork, Ground Beef, Ground Lamb, Ground Chicken, Ground Goat, and Ground Pork, issued by the Food Safety and Inspection Service (hereinafter FSIS) of the USDA on 28 August 2008,<sup>6</sup> and its affirmation, issued on 20 March 2009;<sup>7</sup>
- iv. the Final Rule on Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Gingseng and Macadamia Nuts, issued by the AMS of the USDA on 15 January 2009;<sup>8</sup>
- v. the Letter from the United States Secretary of Agriculture, Thomas J. Vilsack, to Industry Representatives, of 20 February 2009;<sup>9</sup>
- vi. any modifications, amendments, administrative guidance, directives or policy announcements issued in relation to items i through v above.

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<sup>2</sup> 7 U.S.C. §§ 1621 *et seq.* (Exhibit MEX-1).

<sup>3</sup> Public Law 107-171, 116 Stat. 134, 13 May 2002 (Exhibit MEX-2).

<sup>4</sup> Public Law No. 110-234, 122 Stat. 923, 22 May 2008 (Exhibit MEX-3).

<sup>5</sup> 73 Fed. Reg. 45106 (1 August 2008), codified as 7 CFR Part 65 (Exhibit MEX-4)

<sup>6</sup> 73 Fed. Reg. 50701 (28 August 2008), codified as 9 CFR Parts 317 and 381 (Exhibit MEX-5).

<sup>7</sup> 74 Fed. Reg. 11837 (20 March 2009) (Exhibit MEX-6).

<sup>8</sup> 74 Fed. Reg. 2658 (15 January 2009), codified as 7 CFR Parts 60 and 65 (Exhibit MEX-7).

<sup>9</sup> Exhibit MEX-8.

## **B. THE STATUTORY COOL PROVISIONS**

### **1. Agricultural Marketing Act of 1946**

10. The Agricultural Marketing Act of 1946 is part of the permanent legal framework governing agricultural activities in the United States. It contains provisions regulating the system for distributing and marketing agricultural products in the country.

11. The U.S. Congress regularly enacts legislation that amends provisions of the permanent legal framework. The latest amendments to the permanent legal framework were the Farm Bill 2002 and the Farm Bill 2008.

### **2. The Farm Bill 2002**

1. The Farm Bill 2002 amended provisions of the permanent legal framework governing the agricultural activities in the United States, and was in effect from 2002 until 2008. As part of those amendments, the Farm Bill 2002 amended the Agricultural Marketing Act of 1946, adding Subtitle D-*Country of Origin Labeling*.<sup>10</sup>

2. Thus, the country of origin labeling provisions appeared first in the 2002 Farm Bill's amendments to the Agricultural Marketing Act of 1946.

### **3. The Farm Bill 2008**

3. The Farm Bill 2008 entered into force on May 22, 2008. Among other amendments to the Agricultural Marketing Act of 1946, it modified some of the statutory country of origin labeling provisions that were first introduced by the Farm Bill 2002.<sup>11</sup>

4. Those amendments included, as detailed hereinafter (i) the widening of the scope of the commodities covered by COOL; (ii) the introduction of provisions regarding multiple countries of origin, foreign country of origin, animals imported for immediate slaughter and ground meat; and (iii) certain changes in the audit verification system and enforcement.

### **4. The Contents of the Statutory COOL Provisions**

5. As previously explained, the statutory COOL provisions are contained in the Agricultural Marketing Act of 1946, as amended by the Farm Bill 2002 and Farm Bill 2008. These provisions were codified in the United States Code (U.S.C.), in Title 7 (Agriculture), Chapter 38 (Distribution and Marketing of Agricultural Products), Subchapter IV (Country of Origin Labeling).

#### **a. Country of Origin Labeling Requirement**

6. The main requirement of the statutory COOL provisions is that retailers must notify consumers of the country of origin of the covered commodities. This requirement was set out in 7 U.S.C. §1638a(a)(1) as follows:

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<sup>10</sup> Public Law No. 107-171, 116 Stat. 134, 13 May 2002 (Exhibit MEX-2).

<sup>11</sup> Public Law No. 110-234, 122 Stat. 923, 22 May 2008 (Exhibit MEX-3).

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*[A] retailer of a covered commodity shall inform consumers, at the final point of sale of the covered commodity to consumers, of the country of origin of the covered commodity.*<sup>12</sup>

**b. Retailers**

7. The Statutory COOL provisions indicate that the term “retailer” has the meaning given in the Perishable Agricultural Commodities Act of 1930, 7 U.S.C. § 499a(b).<sup>13</sup>

8. 7 U.S.C. § 499a(b)(11) defines “retailer” as follows:

*(11) The term “retailer” means a person that is a dealer engaged in the business of selling any perishable agricultural commodity at retail.*<sup>14</sup>

9. In defining “dealer,” 7 U.S.C. § 499a(b)(6) states:

*(B) no person buying any such commodity solely for sale at retail shall be considered as a “dealer” until the invoice cost of his purchases of perishable agricultural commodities in any calendar year are in excess of \$230,000.*<sup>15</sup>

10. Thus, in order for an entity to be considered a “retailer” for purposes of COOL, it must sell perishable agricultural commodities (i.e. fruits and vegetables, including cherries in brine<sup>16</sup>) at a level above a \$230,000 per year threshold. Entities that make sales below the threshold or do not sell any fruits and vegetables are not covered by COOL provisions.

11. Therefore, the COOL provisions introduced mandatory country of origin labeling with respect to a subset of retailers.

**c. Covered Commodities**

12. The commodities covered by COOL requirements in the statutory provisions, pursuant to 7 U.S.C. §1638(2)(A), are:

*(i) muscle cuts of beef, lamb and pork;*

*(ii) ground beef, ground lamb and ground pork;*

*(iii) farm raised fish;*

*(iv) wild fish;*

*(v) a perishable agricultural commodity;*

*(vi) peanuts; and*

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<sup>12</sup> 7 U.S.C. §1638a(a)(1) (Exhibit MEX-9).

<sup>13</sup> 7 U.S.C. §1638(6) (Exhibit MEX-9).

<sup>14</sup> 7 U.S.C. § 499a(b)(11) (Exhibit MEX-10).

<sup>15</sup> 7 U.S.C. § 499a(b)(6) (Exhibit MEX-10).

<sup>16</sup> 7 U.S.C. § 499a(b)(4) (Exhibit MEX-10).

- vii) *meat produced from goats*
- (viii) *chicken, in whole or in part;*
- (ix) *ginseng;*
- (x) *pecans; and*
- (xi) *macadamia nuts*<sup>17</sup>

13. Therefore, the COOL provision introduced mandatory country of origin labeling with respect to only certain commodities.

**d. Exclusions and Exemptions**

14. The statutory provisions exclude from the scope of the COOL requirements those covered commodities used as an ingredient in a further processed food item.<sup>18</sup>

15. In addition, the statutory provisions exempt from the COOL requirements commodities that are:

- (1) prepared or served in a food service establishment; and*
- (2)(A) offered for sale or sold at the food service establishment in normal retail quantities; or*
- (B) served to consumers at the food service establishment.*<sup>19</sup>

**e. United States Country of Origin**

16. Under the statutory COOL provisions, in order for a muscle cut to be labeled as having a U.S. country of origin, it has to derive from (i) an animal exclusively born, raised and slaughtered in the United States; (ii) an animal present in the United States on or before July 15, 2008, or (iii) an animal born and raised in Alaska and Hawaii and transported to the United States through Canada within 60 days.

17. Specifically, pursuant to 7 U.S.C. § 1638a(a)(2)(A), a covered commodity may be designated as having a U.S. country of origin exclusively if it meets the following requirements:

- (2) United States Country of Origin.- A retailer of a covered commodity that is beef, lamb, pork, chicken or goat may designate the covered commodity as exclusively having a United States country of origin, only if the covered commodity is derived from an animal that was---*
- (i) exclusively born, raised, and slaughtered in the United States*

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<sup>17</sup> 7 U.S.C. § 1638(2)(A) (footnote omitted) (Exhibit MEX-9).

<sup>18</sup> 7 U.S.C. § 1638(2)(B) (Exhibit MEX-9).

<sup>19</sup> 7 U.S.C. § 1638a(b) (Exhibit MEX-9).

*(ii) born and raised in Alaska or Hawaii and transported for a period of not more than 60 days through Canada to the United States and slaughtered in the United States; or*

*(iii) present in the United States on or before July 15, 2008, and once present in the United States, remained continuously in the United States.<sup>20</sup>*

**f. Multiple Countries Of Origin**

18. Under the statutory COOL provisions, meat derived from an animal that was not exclusively born, raised and slaughtered in the United States, or that was either born, raised or slaughtered in the United States and not imported for immediate slaughter, must be labeled indicating all of the countries in which the animal may have been born, raised, or slaughtered.

19. In this regard, 7 U.S.C. § 1638a(a)(2)(B) states:

*(B) Multiple countries of origin.--*

*(i) In general.—A retailer of a covered commodity that is beef, lamb, pork, chicken, or goat meat that is derived from an animal that is –*

*(I) not exclusively born, raised and slaughtered in the United States,*

*(II) born, raised or slaughtered in the United States, and*

*(III) not imported into the United States for immediate slaughter,*

*may designate the country of origin of the meat as all of the countries in which the animal may have been born, raised, or slaughtered.<sup>21</sup>*

**g. Imported for Immediate Slaughter**

20. 7 U.S.C. § 1638a(a)(2)(C) establishes that meat products derived from animals imported for immediate slaughter must be labeled indicating both the country from which the animal was imported, and also the United States:

*(C) Imported for immediate slaughter.-- A retailer of a covered commodity that is beef, lamb, pork, chicken, or goat meat that is derived from an animal that is imported into the United States for immediate slaughter shall designate the origin of such commodity as—*

*i) the country from which the animal was imported and*

*(ii) United States.<sup>22</sup>*

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<sup>20</sup> 7 U.S.C. § 1638a(a)(2)(A) (Exhibit MEX-9).

<sup>21</sup> 7 U.S.C. § 1638a(a)(2)(B) (Exhibit MEX-9).

<sup>22</sup> 7 U.S.C. § 1638a(a)(2)(C) (Exhibit MEX-9).



**h. Foreign Country of Origin**

21. Under 7 U.S.C. § 1638a(a)(2)(D), meat products with a foreign country of origin must be labeled indicating the country of origin of the meat:

*(D) Foreign country of origin.-- A retailer of a covered commodity that is beef, pork, lamb, chicken, or goat meat that is derived from an animal that is not born, raised, or slaughtered in the United States shall designate a country other than the United States as the country of origin of such commodity.*<sup>23</sup>

22. Thus, meat products produced from cattle not slaughtered in the United States are labeled in accordance with the normal rules of origin that apply in the customs and international trade context.

**i. Ground Meat**

23. For ground meat, 7 U.S.C. § 1638a(a)(2)(E) states that the meat must be labeled indicating a list of all countries of origin of such ground meat, or a list of all reasonably possible countries of origin of such ground meat:

*(E) Ground beef, pork, lamb, chicken, and goat.—*

*The notice of country of origin for ground beef, ground pork, ground lamb, ground chicken, or ground shall include—*

*(i) a list of all countries of origin of such ground beef, ground pork, ground lamb, ground chicken, or ground goat; or*

*(ii) a list of all reasonably possible countries of origin of such ground beef, ground pork, ground lamb, ground chicken, or ground goat.*<sup>24</sup>

**j. Audit Verification System**

24. The statutory COOL provisions give the USDA authority to conduct audits of any person that prepares, stores, handles, or distributes a covered commodity for retail sale. It also imposes the obligation for any person subject to an audit to provide the USDA with verification of the country of origin of covered commodities through records maintained in the course of the normal conduct of the business.

25. In this regard, 7 U.S.C. § 1638a(d) states as follows:

*(d) Audit Verification System.—*

*(1) In general.—The Secretary may conduct an audit of any person that prepares, stores, handles, or distributes a covered commodity for retail sale to verify compliance with this subtitle (including the regulations promulgated under section 1638c(b)).*

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<sup>23</sup> 7 U.S.C. § 1638a(a)(2)(D) (Exhibit MEX-9).

<sup>24</sup> 7 U.S.C. § 1638a(a)(2)(E) (Exhibit MEX-9).

(2) *Record requirements.*—

(A) *In general.*— A person subject to an audit under paragraph (1) shall provide the Secretary with verification of the country of origin of covered commodities. Records maintained in the course of the normal conduct of the business of such person, including animal health papers, import or customs documents, or producer affidavits, may serve as such verification.

(B) *Prohibition on requirement of additional records.*—The Secretary may not require a person that prepares, stores, handles, or distributes a covered commodity to maintain a record of the country of origin of a covered commodity other than those maintained in the course of the normal conduct of the business of such person.<sup>25</sup>

**k. Informational Obligations for Suppliers**

26. The statutory COOL provisions include, in 7 U.S.C. § 1638a(e), the obligation for the suppliers of the retailers of covered commodities to provide retailers with information about country of origin, as follows:

*Any person engaged in the business of supplying a covered commodity to a retailer shall provide information to the retailer indicating the country of origin of the covered commodity.*<sup>26</sup>

**l. Enforcement**

27. The enforcement procedure in case the USDA determines a violation of the statutory COOL provisions covers not only retailers, but also any person engaged in the business of supplying a covered commodity to a retailer. The fine (not more than \$1,000 per violation) can be imposed not only on those who willfully violate the statutory COOL provisions, but also to those who do not make a good faith effort to comply.

28. 7 U.S.C. § 1638b states as follows:

(a) *Warnings.*—If the Secretary determines that a retailer or person engaged in the business of supplying a covered commodity to a retailer is in violation of section 282, the Secretary shall—

(1) *notify the retailer of the determination of the Secretary; and*

(2) *provide the retailer a 30-day period, beginning on the date on which the retailer receives the notice under paragraph (1) from the Secretary, during which the retailer may take the necessary steps to comply with section 1638a.*

(b) *Fines.*—If, on completion of the 30-day period described in subsection (a)(2), the Secretary determines that the retailer or person engaged in the business of supplying a covered commodity to a retailer has—

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<sup>25</sup> 7 U.S.C. § 1638a(d) (Exhibit MEX-9).

<sup>26</sup> 7 U.S.C. § 1638a(e) (Exhibit MEX-9).

*(1) not made a good faith effort to comply with section 1638a, and*

*(2) continues to willfully violate section 1638a with respect to the violation about which the retailer or person received the notification under subsection (a) (1),*

*After providing notice and an opportunity for a hearing before the Secretary with respect to the violation, the Secretary may fine the retailer or person in an amount of not more than \$1,000 for each violation.<sup>27</sup>*

**m. Guidelines and Regulations**

29. Under the statutory COOL provisions, the USDA was to issue guidelines for the voluntary country of origin labeling not later than 30 September 2002, and regulations for the mandatory country of origin labeling not later than 30 September 2004<sup>28</sup>.

30. The deadline for issuing regulations was delayed twice.

31. Section 749 of the Consolidated Appropriations Act 2004<sup>29</sup> amended Section 285 of the Agricultural Marketing Act of 1946 (codified as 7 U.S.C. § 1638c(b)), delaying the applicability of the country of origin labeling from 30 September 2004 until 30 September 2006, except for “farm-raised fish and “wild fish”. As a result, the issuance of the regulations was originally delayed until 2006.

32. Thereafter, Section 792 of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 2006<sup>30</sup> again amended Section 285 of the Agricultural Marketing Act, delaying the applicability of the country of origin labeling, from 30 September 2006, until 30 September 2008. Thus, the issuance of the guidelines was further delayed until 2008.

**C. THE GUIDELINES AND REGULATIONS**

**1. Voluntary Guidelines and Proposed Rule**

33. Pursuant to 7 U.S.C. § 1638c(a),<sup>31</sup> on 11 October 2002, the USDA’s AMS published the guidelines for voluntary country of origin labeling.<sup>32</sup>

34. Those voluntary guidelines entered into force on 11 October 2002, and served as the starting point for the further issuance of the mandatory country of origin labeling regulations.

35. Also, on 30 October 2003, the AMS published a proposed rule for the mandatory country of origin labeling program.<sup>33</sup>

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<sup>27</sup> 7 U.S.C. § 1638b (Exhibit MEX-9).

<sup>28</sup> 7 U.S.C. § 1638c (Exhibit MEX-9).

<sup>29</sup> Public Law 108-199, 118 Stat. 3, 23 January 2004 (Exhibit MEX-11).

<sup>30</sup> Public Law 109-97, 119 Stat. 2120, 10 November 2005 (Exhibit MEX-12).

<sup>31</sup> Exhibit MEX-9.

<sup>32</sup> 67 Fed. Reg. 63367 (11 October 2002) (Exhibit MEX-13).

## **2. The Interim Final Rule on Mandatory Country of Origin Labeling for Fish and Shellfish**

36. In order to comply with 7 U.S.C. § 1638c(b),<sup>34</sup> which imposed on the USDA the obligation of issuing regulations for the mandatory country of origin labeling not later than 30 September 2004, the AMS published on 5 October 2004 the interim final rule for fish and shellfish.<sup>35</sup>

37. The interim final rule was further reopened for comments on 27 November 2006, to address issues regarding the costs and benefits of the interim final rule<sup>36</sup>, and on 20 June 2007, to address all other aspects of the rule.<sup>37</sup>

38. The interim final rule for fish and shellfish entered into force on 4 April 2005, and expired when the final rule came into effect.

## **3. Interim Final Rule on Mandatory Country Of Origin Labeling Of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, And Macadamia Nuts**

39. In order to comply with 7 U.S.C. § 1638c (b), as delayed by the Fiscal Year Consolidated Appropriations Act and by the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 2006, the AMS published on 1 August 2008 the interim final rule for covered commodities other than fish and shellfish, with a 60-day comment period.<sup>38</sup>

40. This interim final rule entered into force on 30 September 2008, but the AMS provided a six-month period to allow for the education of the industry following the rule's effective date. It expired when the final rule came into effect on 16 March 2009.

41. The regulations defined some of the concepts included in the statutory COOL provisions and set out the recordkeeping requirements.

## **4. Interim Final Rule with Request for Comments on Mandatory Country of Origin Labeling of Muscle Cuts of Beef (including**

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<sup>33</sup> 68 Fed. Reg. 61944 (30 October 2003), (Exhibit MEX-14). This proposed rule included a 60-day comment period, which was extended for 60 additional days until 27 February 2004 (68 Fed. Reg. 71039 (22 December 2003) (Exhibit MEX-15)), and reopened on 20 June 2007 (72 Fed. Reg. 33917) (Exhibit MEX-16).

<sup>34</sup> Exhibit MEX-9.

<sup>35</sup> 69 Fed. Reg. 59708 (5 October 2004). (Exhibit MEX-17 ). This interim final rule included a 90-day comment period, which was extended for 60 additional days on December 2004 (69 Fed. Reg. 77609 (28 December 2004)) (Exhibit MEX-18).

<sup>36</sup> 71 Fed. Reg. 68431 (27 November 2006) (Exhibit MEX-19).

<sup>37</sup> 72 Fed. Reg. 33851 (20 June 2007) (Exhibit MEX-20).

<sup>38</sup> 73 Fed. Reg. 45106, (1 August 2008) (Exhibit MEX-4).

**Veal), Lamb, Chicken, Goat and Pork, Ground Beef, Ground  
Lamb, Ground Chicken, Ground Goat, and Ground Pork**

42. On 28 August 2009, the FSIS published an interim final rule with request for comments. With this rule, the FSIS amended its previous regulations in order put them in conformity with the AMS interim final rule on mandatory country of origin labeling. Particularly, the FSIS stated the following:

*... FSIS is amending its regulations to require that a country of origin statement on the label of any meat or poultry product that is a covered commodity, as defined in AMS' interim final regulations (73 FR 45106), and is to be sold by a retailer, as also defined in AMS' interim final regulation, must comply with AMS' interim final regulations. FSIS is also amending its regulations to provide that the addition of country of origin statements on labels of meat or poultry product covered commodities that are to be sold by covered retailers and that comply with the country of origin labeling requirements will be considered to be generically approved. FSIS is not amending its regulations or labeling policies for meat or poultry products that are non-covered commodities. The effective date of AMS' interim final rule for country of origin labeling is September 30, 2008. Therefore, in order to meet the deadline, FSIS is issuing this interim final rule.<sup>39</sup>*

43. On 20 March, 2009, this interim final rule was affirmed without any change, and thus, became a final rule.<sup>40</sup>

**5. Final Rule on Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts.**

44. On 15 January 2009 the AMS published the final rule for the mandatory country of origin labeling for all covered commodities,<sup>41</sup> which came into effect on 16 March 2009.

45. The final rule made some changes to the interim final rule. In general, it introduced provisions regarding the commingling of origins for muscle cuts and added some provisions in the recordkeeping requirements section.

46. The final rule divided the regulations into Part 60 –*Country of Origin for Fish and Shellfish*, and Part 65 –*Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Macadamia Nuts, Pecans, Peanuts and Ginseng*-. The following explanation will deal exclusively with Part 65 of the final rule, which is the part encompassing the regulations challenged by Mexico in the case at issue.

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<sup>39</sup> 73 Fed. Reg. 50701 (28 August 2008) (Exhibit MEX-5).

<sup>40</sup> 74 Fed. Reg. 11837 (20 March 2009) (Exhibit MEX-6).

<sup>41</sup> 74 Fed. Reg. 2658 (15 January 2009) (Exhibit MEX-7).

## **6. The Contents of the Regulations Implementing the Statutory COOL Provisions**

47. The Regulations implementing the statutory COOL provisions were codified in the Code of Federal Regulations (hereinafter CFR) in Title 7 (Agriculture), Chapter 1 (Agricultural Marketing Service, Department of Agriculture), Part 65 (Country of Origin Labeling of Beef, Pork, Lamb, Goat Meat, Perishable Agricultural Commodities, Macadamia Nuts and Peanuts).

### **(i) The Covered Commodities**

48. As set out in the statutory COOL provisions, the covered commodities were defined in Part 65 of the regulations, as follows:

*(a) Covered commodity means:*

*(1) Muscle cuts of beef, lamb, chicken, goat, and pork;*

*(2) Ground beef, ground lamb, ground chicken, ground goat, and ground pork;*

*(3) Perishable agricultural commodities;*

*(4) Peanuts;*

*(5) Macadamia nuts;*

*(6) Pecans; and*

*(7) Ginseng.<sup>42</sup>*

### **(ii) Exclusions and Exemptions**

49. The regulations clarified the statutory exclusions and exceptions, introducing the following definitions of food service establishment and processed food item:

#### *i. Food Service Establishment*

*Food service establishment means a restaurant, cafeteria, lunch room, food stand, saloon, tavern, bar, lounge, or other similar facility operated as an enterprise engaged in the business of selling food to the public. Similar food service facilities include salad bars, delicatessens, and other food enterprises located within retail establishments that provide ready-to-eat foods that are consumed either on or outside of the retailer's premises.<sup>43</sup>*

#### *ii. Processed food item*

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<sup>42</sup> 7 CFR § 65.135 (Exhibit MEX-21).

<sup>43</sup> 7 CFR § 65.140 (Exhibit MEX-21).

*Processed food item means a retail item derived from a covered commodity that has undergone specific processing resulting in a change in the character of the covered commodity, or that has been combined with at least one other covered commodity or other substantive food component (e.g., chocolate, breading, tomato sauce), except that the addition of a component (such as water, salt, or sugar) that enhances or represents a further step in the preparation of the product for consumption, would not in itself result in a processed food item. Specific processing that results in a change in the character of the covered commodity includes cooking (e.g., frying, broiling, grilling, boiling, steaming, baking, roasting), curing (e.g., salt curing, sugar curing, drying), smoking (hot or cold), and restructuring (e.g., emulsifying and extruding). Examples of items excluded include teriyaki flavored pork loin, roasted peanuts, breaded chicken tenders, and fruit medley.<sup>44</sup>*

**(iii) United States Country of Origin for Meat Products**

50. The U.S. origin for meat was defined in the regulations as the meat derived from animals exclusively born, raised<sup>45</sup> and slaughtered<sup>46</sup> in the United States.

51. In this regard, 7 CFR § 65.260 defines United States Country of Origin for meat as follows:

*(1) A covered commodity may bear a declaration that identifies the United States as the sole country of origin at retail only if it meets the definition of United States country of origin as defined in Sec. 65.260.<sup>47</sup>*

*(...)*

*United States country of origin means in the case of:*

*(a) Beef, pork, lamb, chicken, and goat:*

*(1) From animals exclusively born, raised, and slaughtered in the United States;*

*(2) From animals born and raised in Alaska or Hawaii and transported for a period of not more than 60 days through Canada to the United States and slaughtered in the United States; or*

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<sup>44</sup> 7 CFR § 65.220 (Exhibit MEX-21).

<sup>45</sup> According to 7 CFR § 65.235, raised means: "...in the case of beef, pork, chicken, goat, and lamb, the period of time from birth until slaughter or in the case of animals imported for immediate slaughter as defined in Sec. 65.180, the period of time from birth until date of entry into the United States." Exhibit MEX-21.

<sup>46</sup> According to 7 CFR § 65.250, slaughter means: "the point in which a livestock animal (including chicken) is prepared into meat products (covered commodities) for human consumption..." Exhibit MEX-21.

<sup>47</sup> 7 CFR § 65.300(d) (Exhibit MEX-21).

*(3) From animals present in the United States on or before July 15, 2008, and once present in the United States, remained continuously in the United States.*<sup>48</sup>

**(iv) Multiple Countries Of Origin**

52. The provisions for the labeling of muscle cuts with multiple countries of origin were further developed in the regulations. There, it is stipulated that the muscle cuts with multiple countries of origin “may” be labeled indicating first the United States, and second, the country or countries of foreign origin.

53. Also, according to the regulations, if the muscle cut covered commodities derived from animals born in a foreign country, and raised and slaughtered in the United States (multiple countries of origin) are commingled in a single production day with animals born raised and slaughtered in the United States (United States origin), the origin “may” be designated as Product of the United States, Country X, and (as applicable) Country Y. This last rule was introduced in the Final Rule.

54. In this regard, 7 CFR § 65.300 (e) (1) and (2) state:

*(e) Labeling Muscle Cut Covered Commodities of Multiple Countries of Origin that include the United States.*

*(1) For muscle cut covered commodities derived from animals that were born in Country X or (as applicable) Country Y, raised and slaughtered in the United States, and were not derived from animals imported for immediate slaughter as defined in Sec. 65.180, the origin may be designated as Product of the United States, Country X, and (as applicable) Country Y.*

*(2) For muscle cut covered commodities derived from animals born, raised, and slaughtered in the U.S. that are commingled during a production day with muscle cut covered commodities described in Sec. 65.300(e)(1), the origin may be designated as Product of the United States, Country X, and (as applicable) Country Y.*<sup>49</sup>

**(v) Imported For Immediate Slaughter**

55. The regulations clarified the statutory provisions for the labeling of muscle cuts derived from animals imported for immediate slaughter with the following definition:

*Imported for immediate slaughter means imported into the United States for “immediate slaughter” as that term is defined in 9 CFR 93.400, i.e., consignment directly from the port of entry to a recognized slaughtering establishment and slaughtered within 2 weeks from the date of entry.*<sup>50</sup>

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<sup>48</sup> 7 CFR § 65.260 (Exhibit MEX-21).

<sup>49</sup> 7 CFR § 65.300(e)(1) and (2) (Exhibit MEX-21).

<sup>50</sup> 7 CFR § 65.180 (Exhibit MEX-21).



56. The regulations stipulated that the muscle cuts derived from animals that were imported for immediate slaughter “shall” be labeled indicating first the country of foreign origin, and second, the United States.

57. Also, according to the regulations, if the muscle cut covered commodities derived from animals imported into the United States for immediate slaughter are commingled in a single production day with animals born in a foreign country, and raised and slaughtered in the United States (multiple countries of origin), the origin may be designated as Product of the United States, Country X, and (as applicable) Country Y. This last rule was introduced in the Final Rule.

58. In this regard, 7 CFR § 65.300 (e) (3) and (4) state:

*(3) If an animal was imported into the United States for immediate slaughter as defined in Sec. 65.180, the origin of the resulting meat products derived from that animal shall be designated as Product of Country X and the United States.*

*(4) For muscle cut covered commodities derived from animals that are born in Country X or Country Y, raised and slaughtered in the United States, that are commingled during a production day with muscle cut covered commodities that are derived from animals that are imported into the United States for immediate slaughter as defined in Sec. 65.180, the origin may be designated as Product of the United States, Country X, and (as applicable) Country Y.<sup>51</sup>*

59. For both multiple countries of origin and imported for immediate slaughter, the regulations specify that the origin declaration “may” include more specific information related to production steps<sup>52</sup>, and that except for imported for immediate slaughter without commingling, the countries of origin may be listed in any order:

*In each case of paragraphs (e)(1), (e)(2), and (e)(4) of this section, the countries may be listed in any order. In addition, the origin declaration may include more specific information related to production steps provided records to substantiate the claims are maintained and the claim is consistent with other applicable Federal legal requirements.<sup>53</sup>*

#### **(vi) Foreign Country Of Origin**

60. The regulations provide that the normal customs border labeling requirements continue to apply to muscle cuts of foreign origin – that is, muscle cuts for which the processing of the cattle took place in a foreign country:

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<sup>51</sup> 7 CFR § 65.300(e)(3) and (4) (Exhibit MEX-21).

<sup>52</sup> According to 7 CFR § 65.230, production step means “... in the case of beef, pork, goat, chicken, and lamb, born, raised, or slaughtered.” Exhibit MEX-21.

<sup>53</sup> 7 CFR § 65.300(e)(4) (Exhibit MEX-21).

*(f) Labeling imported covered commodities. Imported covered commodities for which origin has already been established as defined by this law (e.g., born, raised, slaughtered or grown) and for which no production steps have occurred in the United States, shall retain their origin, as declared to U.S. Customs and Border Protection (CBP) at the time the product entered the United States, through retail sale.*<sup>54</sup>

**(vii) Ground Products**

61. The provisions for ground products were developed by the regulations, specifying that the labeling of ground meat, including ground beef<sup>55</sup>, must list all countries of origin contained in it, or all countries that may be reasonably contained in it. Regarding the term “reasonable”, the regulations state that when a raw material from a specific origin is not in a processor's inventory for more than 60 days, that country cannot be included on the label as a possible country of origin:

*(h) Labeling ground beef, ground pork, ground lamb, ground goat, and ground chicken. The declaration for ground beef, ground pork, ground lamb, ground goat, and ground chicken covered commodities shall list all countries of origin contained therein or that may be reasonably contained therein. In determining what is considered reasonable, when a raw material from a specific origin is not in a processor's inventory for more than 60 days, that country shall no longer be included as a possible country of origin.*<sup>56</sup>

**(viii) Recordkeeping Requirements**

62. Regarding the authority given to the USDA by the statutory provisions for the audit verification system and enforcement, the regulations include a section describing the recordkeeping requirements.

63. The regulations indicate the required format for the records, and give a 5-day period of time to provide the records to the USDA, once they are requested:

*(a) General.*

*(1) All records must be legible and may be maintained in either electronic or hard copy formats. Due to the variation in inventory and accounting documentary systems, various forms of documentation and records will be acceptable.*

*(2) Upon request by USDA representatives, suppliers and retailers subject to this subpart shall make available to USDA representatives, records maintained in the normal course*

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<sup>54</sup> 7 CFR § 65.300(f) (Exhibit MEX-21).

<sup>55</sup> 7 CFR § 65.155 defines ground beef as “...chopped fresh and/or frozen beef with or without seasoning and without the addition of beef fat as such, and containing no more than 30 percent fat, and containing no added water, phosphates, binders, or extenders, and also includes products defined by the term ‘hamburger’ in 9 CFR 319.15(b).” Exhibit MEX-21.

<sup>56</sup> 7 CFR § 65.300(h) (Exhibit MEX-21).

*of business that verify an origin claim. Such records shall be provided within 5 business days of the request and may be maintained in any location.<sup>57</sup>*

64. The regulations impose on suppliers of the covered commodities the obligation of making available to buyers information about the country of origin of the covered commodity, and of maintaining records to establish and identify the immediate previous source and immediate subsequent recipient of a covered commodity for a period of one year from the date of the transaction.

65. In the case of imported covered commodities, the regulations impose on importers obligations to (i) ensure that records provide clear product tracking and accurately reflect the country of origin of the item, and (ii) maintain such records for a period of one year from the date of the transaction.

66. Also, the regulations state that an intermediary supplier that is found to have incorrectly designated the country of origin of a covered commodity shall not be held liable for a violation of the statutory COOL provisions by reason of the conduct of another, if the intermediary supplier relied on the designation provided by the initiating supplier or other intermediary supplier. This last provision was introduced in the Final Rule.

67. Thus, the responsibilities of suppliers in the regulations read as follows:

*(b) Responsibilities of suppliers.*

*(1) Any person engaged in the business of supplying a covered commodity to a retailer, whether directly or indirectly, must make available information to the buyer about the country(ies) of origin of the covered commodity. This information may be provided either on the product itself, on the master shipping container, or in a document that accompanies the product through retail sale. In addition, the supplier of a covered commodity that is responsible for initiating a country(ies) of origin claim, which in the case of beef, lamb, chicken, goat, and pork is the slaughter facility, must possess records that are necessary to substantiate that claim for a period of 1 year from the date of the transaction. For that purpose, packers that slaughter animals that are tagged with an 840 Animal Identification Number device without the presence of any additional accompanying marking (i.e., “CAN” or “M”) may use that information as a basis for a U.S. origin claim. Packers that slaughter animals that are part of another country's recognized official system (e.g., Canadian official system, Mexico official system) may also rely on the presence of an official ear tag or other approved device on which to base their origin claims. Producer affidavits shall also be considered acceptable records that suppliers may utilize to initiate origin claims, provided it is made by someone having first-hand knowledge of the origin of the covered commodity and identifies the covered commodity unique to the transaction. In the case of cattle, producer affidavits may be based on a visual inspection of the animal to verify its origin. If no markings are found that would indicate that the animal is of foreign origin (i.e., “CAN” or “M”), the animal may be considered to be of U.S. origin.*

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<sup>57</sup> 7 CFR § 65.500(a) (Exhibit MEX-21).

*(2) Any intermediary supplier handling a covered commodity that is found to be designated incorrectly as to the country of origin shall not be held liable for a violation of the Act by reason of the conduct of another if the intermediary supplier relied on the designation provided by the initiating supplier or other intermediary supplier, unless the intermediary supplier willfully disregarded information establishing that the country of origin declaration was false.*

*(3) Any person engaged in the business of supplying a covered commodity to a retailer, whether directly or indirectly (i.e., including but not limited to growers, distributors, handlers, packers, and processors), must maintain records to establish and identify the immediate previous source (if applicable) and immediate subsequent recipient of a covered commodity for a period of 1 year from the date of the transaction.*

*(4) For an imported covered commodity (as defined in Sec.65.300(f)), the importer of record as determined by CBP, must ensure that records: provide clear product tracking from the port of entry into the United States to the immediate subsequent recipient and accurately reflect the country of origin of the item as identified in relevant CBP entry documents and information systems; and must maintain such records for a period of 1 year from the date of the transaction.<sup>58</sup>*

68. The regulations impose on retailers of covered commodities the obligations of providing the USDA the records and documentary evidence relied upon to establish the country of origin, and of maintaining those records for a period of 1 year from the date the origin declaration is made at retail.

69. The regulations also specify that the retailers must convey the country of origin information provided by their suppliers, except when they commingle products for retail sale.

70. In addition, the regulations state that the retailer that is found to have incorrectly designated the country of origin of a covered commodity shall not be held liable for a violation of the statutory COOL provisions by reason of the conduct of another, if the retailer relied on the designation provided by the supplier. These two last provisions were introduced in the Final Rule.

71. In this regard, 7 CFR § 60.500(c) stipulates:

*(c) Responsibilities of retailers.*

*(1) In providing the country of origin notification for a covered commodity, in general, retailers are to convey the origin information provided by their suppliers. Only if the retailer physically commingles a covered commodity of different origins in preparation for retail sale, whether in a consumer-ready package or in a bulk display (and not discretely packaged) (i.e., full service meat case), can the retailer initiate a multiple country of origin designation that reflects the actual countries of origin for the resulting covered commodity.*

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<sup>58</sup> 7 CFR § 60.500(b) (Exhibit MEX-21).

*(2) Records and other documentary evidence relied upon at the point of sale to establish a covered commodity's country(ies) of origin must either be maintained at the retail facility or at another location for as long as the product is on hand and provided to any duly authorized representative of USDA in accordance with Sec. 65.500(a)(2). For pre-labeled products, the label itself is sufficient information on which the retailer may rely to establish the product's origin and no additional records documenting origin information are necessary.*

*(3) Any retailer handling a covered commodity that is found to be designated incorrectly as to the country of origin shall not be held liable for a violation of the Act by reason of the conduct of another if the retailer relied on the designation provided by the supplier, unless the retailer willfully disregarded information establishing that the country of origin declaration was false.*

*(4) Records that identify the covered commodity, the retail supplier, and for products that are not pre-labeled, the country of origin information must be maintained for a period of 1 year from the date the origin declaration is made at retail.<sup>59</sup>*

**(ix) The Meat Labeling Categories According to the Administrative Guidance and Practice**

72. According to the administrative guidance given by the USDA<sup>60</sup> and the practice that has been followed by the industries, the labeling rules can be summarized as follows:

<b>CATEGORY</b>	<b>PRODUCTIONS STEPS</b>	<b>LABELING</b>
Category A: U.S. Origin	Born, Raised and Slaughtered in the United States	Product of U.S.
Category B: Multiple Countries of Origin	Born in Country X and Raised and Slaughtered in the U.S.	Product of U.S. and Country X
Category C: Imported for Immediate Slaughter	Born and Raised in Country Y and Slaughtered in the U.S.	Product of Country Y and the U.S.
Category D: Foreign Origin	Born, Raised and Slaughtered in Country X	Product of Country X

<sup>59</sup> 7 CFR § 60.500(c) (Exhibit MEX-21).

<sup>60</sup> See USDA's *Guidance: Labeling Options*, available at: <http://www.ams.usda.gov/AMSV1.0/COOL> (Exhibit MEX-22).

73. Also, the rules for commingling different categories in a single production day, according to the administrative guidance and practice,<sup>61</sup> can be summarized as follows:

CATEGORY COMBINATION	LABELING
A + B = B	Product of U.S. and Country X
B + C = B	Product of U.S. and Country X

#### D. THE VILSACK LETTER AND COMMENTS

##### 1. The News Release

74. On 20 February 2009, Thomas Vilsack, Secretary of Agriculture of the United States, issued a news release announcing that he had sent a letter inviting stakeholders to follow additional voluntary labeling practices.<sup>62</sup>

75. The news release stated the following:

*“I strongly support Country of Origin Labeling – it’s a critical step toward providing consumers with additional information about the origin of their food,” said Vilsack. “The Department of Agriculture will be closely reviewing industry compliance with the rule and will evaluate the practicality of the suggestions for voluntary action in my letter.”*

*During the regulatory review process, Secretary Vilsack determined that allowing the rule to go into effect and carefully monitoring implementation and compliance by retailers and their suppliers would provide the best avenue to evaluate the program. This evaluation period will inform the Secretary's consideration of whether additional rulemaking may be necessary to provide consumers with adequate information.*<sup>63</sup>  
(emphasis added)

##### 2. The Letter to the Industry Representatives

76. Mr. Vilsack’s letter was addressed to industry representatives, and it suggested that, after the effective date of the final rule, the industry voluntarily follow the practices contained in his letter.<sup>64</sup>

77. The letter expressed the following:

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<sup>61</sup> *Id.*

<sup>62</sup> Vilsack Announces Implementation of Country of Origin Labeling Law, Release No.0045.09 (Exhibit MEX-23).

<sup>63</sup> *Id.*

<sup>64</sup> Exhibit MEX-8.

*Though it is important for the COOL Final Rule to go into effect in a timely manner and for the rule to proceed with the March 16, 2009, implementation date, there are certain components of the Final Rule promulgated by the previous administration that raise legitimate concerns.*

*In particular, I am concerned about the regulation's treatment of product from multiple countries, exemption provided to processed food, and time allowances provided to manufacturers for labeling ground meat products.*

*In light of these concerns, I am suggesting, after the effective date of the final rule, that the industry voluntarily adopt the following practices to ensure that consumers are adequately informed about the source of food products.<sup>65</sup>*

### **3. The Suggested Practices**

78. Mr. Vilsack's suggested practices concerned (i) the subjects of multiple countries of origin, (ii) processed foods, and (iii) inventory allowance for ground meat.

79. When multiple countries of origin appear on the label, the suggested practice is that processors voluntarily include information about the production steps that occurred in each country. The letter stated as follows:

#### *Labeling of product from multiple countries of origin*

*In order to provide consumers with sufficient information about the origin of products, processors should voluntarily include information about what production step occurred in each country when multiple countries appear on the label. For example, animals born and raised in Country X and slaughtered in Country Y might be labeled as "Born and Raised in Country X and Slaughtered in Country Y". Animals born in Country X but Raised and Slaughtered in Country Y might be labeled as "Born in Country X and Raised and Slaughtered in Country Y".<sup>66</sup>*

80. The suggested practice for processed food consists in voluntarily labeling the products that are subject to curing, smoking, broiling, grilling, or steaming. The letter states as follows:

#### *Processed Foods*

*The definition of processed foods contained in the Final Rule may be too broadly drafted. Even if products are subject to curing, smoking, broiling, grilling, or steaming, voluntary labeling would be appropriate.<sup>67</sup>*

81. The suggested practice regarding inventory allowance for ground meat consists in reducing from 60 to 10 days the time a raw material must be in a processor's inventory in order to be included in the notice of country of origin. The letter states as follows:

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

*Inventory Allowance*

*The language in the Final Rule allows a label for ground meat product to bear the name of a country, even if product from that country was not present in a processor's inventory, for up to 60 days. This provision allows for labels to be used in a way that does not clearly indicate the product's country of origin. Reducing the time allowance to ten days would limit the amount of product with these labels and will enhance the credibility of the label.*<sup>68</sup>

**4. Review of Industry Compliance**

82. Mr. Vilsack's letter included a warning, stating that based on industry compliance with his suggestions, the USDA would consider whether or not it is necessary to modify the regulations:

*The Department of Agriculture will be closely reviewing industry compliance with the regulation and its performance in relation to these suggestions for voluntary action. Depending on this performance, I will carefully consider whether modifications to the rule will be necessary to achieve the intent of Congress.*<sup>69</sup>

**E. THE ESTIMATED COSTS AND PROJECTED IMPACT OF COOL**

83. The estimated costs and projected impact of COOL were also published in the Federal Register notice for the Final Rule, which includes the following comments:

*USDA "believes that firms and establishments throughout the supply chain for affected commodities will incur costs associated with the implementation of COOL. This includes producers, intermediaries, and retailers. Increased costs are likely to be absorbed by all firms and establishments throughout the supply chain and some costs may be passed on to consumers".*<sup>70</sup>

*"The estimated first-year incremental costs for growers, producers, processors, wholesalers, and retailers are \$2.6 billion".*<sup>71</sup>

*"Costs per firm are estimated at \$370 for producers, \$48,219 for intermediaries (such as handlers, importers, processors, and wholesalers), and \$254,685 for retailers".*<sup>72</sup>

84. According to its analysis of costs and impact, the USDA was aware that the participants throughout the supply chain would incur high costs associated with COOL compliance. The USDA also estimated that the participants incurring on the highest costs would be the retailers.

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> 74 Fed. Reg. 2658 (15 January 2009) (Exhibit MEX-7).

<sup>71</sup> *Id.*, p. 2682.

<sup>72</sup> *Id.*, p. 2683.



85. In the case of the cattle and beef production sector, the USDA estimated the following costs:

*Considering all producer segments together, we have estimated a \$9 per head cost to cattle producers to implement the rule. This estimate reflects the expectation of relatively small implementation costs at the cowcalf level of production, but relatively higher costs each time cattle are resold. Typically, fed steers and heifers change hands two, three, or more times from birth to slaughter, and each exchange will require the transfer of country of origin information. Thus, total costs for beef producers are estimated at \$305 million.<sup>73</sup>*

86. According to this statement, the USDA estimated that the beef producers would bear higher costs than the cattle producers. However, as is explained below, in the case at issue, the beef producers in the United States have transferred those costs to the Mexican cattle producers. This was foreseen by one commenter on the final rule who “*was concerned that cattle owners will end up paying all costs as other sectors of the supply chain work on margin*”.<sup>74</sup>

87. The USDA also admitted that processors handling only products of U.S. origin would have lower implementations costs compared with processors handling products of multiple origin:

*Processors handling only domestic origin products or products from a single country of origin may have lower implementation costs compared with processors handling products from multiple origins, although such costs would be likely to be mitigated in those cases where firms are only using covered commodities which are multiple-origin.*<sup>75</sup>

88. In the case at issue, as will be explained below, because beef producers can not complete their stocks only with Mexican born cattle, the easiest way to reduce the costs of COOL compliance is to handle only U.S. origin cattle.<sup>76</sup>

89. Even though the COOL measure was supposedly intended to benefit consumers, the USDA recognized that consumers would not be willing to pay the costs for this information:

*While USDA recognizes that there appears to be consumer interest in knowing the origin of food based on the comments received, USDA finds little evidence that private firms are unable to provide consumers with country of origin labeling (COOL) consistent with this*

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<sup>73</sup> *Id.*, p. 2687.

<sup>74</sup> *Id.*, p. 2680.

<sup>75</sup> *Id.*, p. 2685.

<sup>76</sup> A recent study from Informa Economics indicates that: “[t]he extra costs associated with handling Canadian and/or Mexican cattle and beef as opposed to just US origin cattle would be about \$50/head at the mid point of the estimated per head cost range which translates into about 6.5 cents per pound on a carcass weight basis. Costs relative to those estimated in 2003 would be roughly the same or a little higher for mixed origin utilization but substantially less for companies that choose the US product only supply chain configuration.” Informa Economics, Update of Cost Assessments for Country of Origin Labeling–Beef & Pork (2009), available at <http://www.informaecon.com/COOLStudyUpdate2010.pdf> (Exhibit MEX-24).

*regulation, if consumers are willing to pay a price premium for it. USDA also finds little evidence that consumers are likely to increase their purchase of food items bearing the United States origin label as a result of this rulemaking. Current evidence does not suggest that United States producers will receive sufficiently higher prices for United States-labeled products to cover the labeling, recordkeeping, and other related costs. The lack of widespread participation in voluntary programs for labeling products of United States origin provides evidence that consumers do not have strong enough preferences for products of United States origin to support price premiums sufficient to recoup the costs of labeling.*<sup>77</sup>

90. Regarding this last assertion, the interest of the USDA in analyzing whether consumers would increase the purchase of products bearing a U.S. origin labeling denotes a protectionist intent to encourage the consumption of U.S. origin only products.

#### **F. PRE-EXISTING U.S. COUNTRY OF ORIGIN LABELING REQUIREMENTS**

91. The United States has long had country of origin labeling requirements for imported meat products under its customs law. Pursuant to Section 304(a) of the Tariff Act of 1930, as amended (19 U.S.C. § 1304(a)):

*every article of foreign origin ... imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article.*<sup>78</sup>

92. For these purposes, the “ultimate purchaser” is defined generally as “the last person in the United States who will receive the article in the form in which it was imported” (for imports from non-NAFTA countries) and “the last person in the United States who purchases the good in the form in which it was imported”<sup>79</sup> (for imports from NAFTA countries). If a product qualifies as U.S. origin, there is no requirement to mark it with its country of origin under 19 U.S.C. 1304.<sup>80</sup> However, if a seller chose to place an indication of geographic origin on the label, that label had to be approved by the USDA.

93. Under the U.S. customs law, certain types of commodities are exempt from the requirement to be individually marked with their country of origin, although if the items are packaged, the outermost container must be appropriately marked. This list of exempted items includes the following:

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<sup>77</sup> 74 Fed. Reg. 2682 (Exhibit MEX-7).

<sup>78</sup> 19 U.S.C. § 1304(a) (Exhibit MEX-25).

<sup>79</sup> 19 C.F.R. § 134.1(d) (Exhibit MEX-26).

<sup>80</sup> Exhibit MEX-25.

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*Natural products, such as vegetables, fruits, nuts, berries, and live or dead animals, fish and birds; all the foregoing which are in their natural state or not advanced in any manner further than is necessary for their safe transportation.*<sup>81</sup>

94. Accordingly, under the customs law, such items as live cattle, frozen fish, and bulk fruits and vegetables need not be marked with their country of origin, although the outermost containers in which they are shipped must be marked as the product moves through the distribution chain, including the packing in which the product is sold to the ultimate purchaser.<sup>82</sup>

95. To determine whether an imported product that has been further processed such that it is no longer in the form in which it was imported and therefore does not have to be marked with a foreign country of origin (i.e., whether it has lost its foreign origin), the United States, in general, applies one of two sets of rules: (i) for imports from Mexico and Canada, the NAFTA Marking Rules; and (ii) for imports from all other countries, the “substantial transformation” test.

96. The NAFTA Marking Rules are based on the tariff-shift principle. Thus, the tariff classification of the imported product is compared to the tariff classification of the finished product to determine whether a sufficient “shift” has occurred. There are specific tariff-shift requirements for each tariff classification.

97. In the case of muscle cuts of beef (which are classified under tariff items 0201.20 (fresh) and 0202.20 (frozen)) and ground beef (classified under 0201.30 (fresh) and 0202.30 (frozen)), the NAFTA Marking Rules are as follows:

*A change to heading 0201 through 0209 from any other chapter.*<sup>83</sup>

98. As indicated by the first two digits of its tariff classification, muscle cuts of beef and ground beef are classified in Chapter 2 of the Harmonized Commodity Description and Coding System (“Harmonized System”); in turn, live bovine animals under tariff item 0102.90, are classified in Chapter 1 of the Harmonized System. Therefore, according to the NAFTA Marking Rule transcribed in the aforementioned paragraph, beef processed from imported live cattle is deemed to have lost its foreign origin and therefore does not have to be marked with a foreign country of origin when sold to the ultimate customer.

99. Similarly, under the substantial transformation test the country of origin of meat is the country in which the animal was slaughtered, even if the meat is further processed in another country.<sup>84</sup>

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<sup>81</sup> 19 C.F.R. § 134.33 (Exhibit MEX-31).

<sup>82</sup> The precise origin of cattle is tracked pursuant to regulations of the USDA unrelated to COOL. For example, cattle must bear tags identifying their source. Letter from USDA to *Secretaría de Agricultura, Ganadería, Desarrollo Rural, Pesca y Alimentación* (March 10, 2009); U.S.-Mexico Protocols for Imports of Steers and Spayed Heifers (April 2009) and Sexually Intact Bovines (March 2010) (Exhibit MEX-52).

<sup>83</sup> 19 C.F.R. § 102.20 (Exhibit MEX-27).

<sup>84</sup> See, e.g., U.S. Customs Ruling NY E89452 (Nov. 16, 1999) (Beef from cattle slaughtered in Argentina and later boned and boxed in Uruguay held to be product of Argentina) (Exhibit MEX-28).

100. There are overlapping labeling requirements implemented under the Federal Meat Inspection Act, 21 U.S.C. § 601 et seq., which are implemented by the FSIS. Under the pertinent FSIS regulations, imported beef products must be marked with the country of origin (among other information relating to inspection standards) at the time of importation.<sup>85</sup> Those regulations do not impose requirements for imports of live cattle.

101. The rules require that FSIS pre-approve all labels for meat products, for which there are specific requirements for content and design.<sup>86</sup> FSIS previously explained its policy on geographic labeling as follows:

*FSIS regulations ... permit fresh beef products to be labeled with terms such as “U.S. (Species),” “U.S.A. Beef,” and “Fresh American Beef.” Such terms are viewed by the Agency as geographic claims associated with animal raising and production. FSIS interprets these terms to mean that the cattle to which the terms are applied were born, raised, slaughtered, and prepared in the United States or in specific geographic locations in the United States.*

*Producers and processors voluntarily may label products with such geographic claims and other production claims as long as those claims are substantiated. To substantiate labeling claims, producers must provide testimonials and affidavits that include the producer’s operational protocol that supports the labeling claim that the food product was derived from animals that were born, raised, slaughtered, and prepared in the United States.*

\* \* \*

*For many years, “Product of the U.S.A.” has been applied to product that is exported to other countries to meet those countries’ country-of-origin labeling requirements .... Products that meet all FSIS requirements for domestic products also may be distributed in U.S. commerce with such labeling. No further documentation is required. “Product of the U.S.A.” has been applied to products that, at a minimum, have been prepared in the United States. It has never been construed by FSIS to mean that the product is derived only from animals that were born, raised, slaughtered, and prepared in the United States. The only requirement for products bearing this labeling statement is that the product has been prepared (i.e., slaughtered, canned, salted, rendered, boned, etc.). No further distinction is required. In addition, there is nothing to preclude the use of this label statement in the domestic market, which occurs, to some degree.*

*This term has been used on livestock products that were derived from cattle that originated in other countries and that were slaughtered and prepared in the United States. Also, the cattle could have been imported, raised in U.S. feed lots, and then slaughtered and prepared in the United States. The beef products from these cattle can*

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<sup>85</sup> 9 C.F.R. § 327.14 (Exhibit MEX-29).

<sup>86</sup> See 9 C.F.R. § 317.4 (Exhibit MEX-30).

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*be labeled as “Product of the U.S.A.” for domestic and export purposes.*<sup>87</sup> (Emphasis added).

102. Thus, prior to the U.S. implementation of COOL, muscle cuts of meat from animals born in a foreign country and slaughtered in the United States were treated as U.S. origin and did not have to be marked with their country of origin when sold to consumers. If a retailer voluntarily chose to label the meat as “product of USA,” it would have to seek prior approval from the FSIS, but the product would qualify if the cattle had been slaughtered in the United States. Only if a retailer voluntarily chose to make geographic claims with terms such as “U.S. (Species),” “U.S.A. Beef,” or “Fresh American Beef,” would FSIS impose a stricter origin standard.

103. The COOL measure does not contain any provisions that purport to repeal or amend the U.S. customs law or the NAFTA. Rather, the normal customs rules continue to apply at the border. The COOL measure creates a new, internal legal regime that mandates that muscle cuts and ground beef processed in the United States be labeled with a foreign-made country of origin when sold to consumers. Moreover, the prior, independent policy of the FSIS to allow such products to be labeled “Product of USA” has been cancelled.<sup>88</sup>

104. At the same time, COOL measure has no effect on muscle cuts and ground beef processed in foreign countries. The normal border labeling rules continue to apply to those products. Thus, for example, if cattle born in Brazil were slaughtered and processed into muscle cuts in Argentina, under U.S. law those muscle cuts could be labeled as a product of Argentina.

#### **G. THE STATED RATIONALE FOR COOL**

105. The stated rationale for the COOL provisions is published in the Federal Register notice for the Final Rule:<sup>89</sup>

*“The intent of this law is to provide consumers with additional information on which to base their purchasing decisions.”*<sup>90</sup>

*“The COOL program is neither a food safety or traceability program, but rather a consumer information program.”*<sup>91</sup>

106. The USDA explained that the intent of the COOL measure is to provide consumer information. However, it also recognized that even though there appears to be some consumer interest in knowing the country of origin of the food, and COOL may provide benefits to these

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<sup>87</sup> FSIS, Product Labeling: Defining United States Cattle and United States Fresh Beef Products, 66 Fed. Reg. 41160 (7 August, 2001) (Exhibit MEX-32).

<sup>88</sup> The FSIS regulations on labeling were amended to provide that the addition of the country of origin statement on labels of meat products in conformance with the COOL regulations is considered “generically approved” and therefore it was unnecessary to seek new label approvals.

<sup>89</sup> 74 Fed. Reg. 2658 (15 January 2009) (Exhibit MEX-7).

<sup>90</sup> *Id.*, p. 2693.

<sup>91</sup> *Id.*, p. 2679.

consumers, the economic benefits of COOL “*will be small and will accrue mainly to those consumers who desire country of origin information*”.<sup>92</sup> Accordingly, the stated rationale – to provide consumer information – targets a very small segment of U.S. consumers.

107. Moreover, the USDA stated that “*the lack of widespread participation in voluntary programs for labeling products of United States origin provides evidence that consumers do not have strong enough preferences for products of United States origin to support price premiums sufficient to recoup the costs of labeling.*”<sup>93</sup>

108. From any perspective, the stated rationale of providing consumer information is misleading. As will be explained below, the true intent of the COOL measure is to protect domestic producers of cattle.

### **III. FACTUAL BACKGROUND: THE IMPACT OF COOL ON IMPORTS OF MEXICAN CATTLE**

#### **1. Overview**

109. The cattle and beef industries of Mexico and the United States have been historically integrated and interrelated. Mexico produces and exports feeder cattle to the United States where it is raised in grasslands and feedlots and subsequently slaughtered. The beef derived from this process is sold as a final product in the United States or exported to Mexico and other countries for final consumption.<sup>94</sup>

110. This integration started many years ago when the Mexican cow-calf operators, particularly those from the Northern Mexican States started to look at the U.S. market as a potential source of clients for their feeder cattle.

111. The Mexican cow-calf operators, with the help and coordination of the different regional associations, initiated a process to obtain the required certifications from the U.S. Government, in order to be able to export their cattle to the United States. This process represented a substantial investment for the Mexican industry. It cost the industry considerable time and resources to obtain and retain the required certifications, and to comply with inspections carried out by the U.S. Government.<sup>95</sup>

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<sup>92</sup> *Id.*, p. 2681-2682.

<sup>93</sup> *Id.*, p. 2682.

<sup>94</sup> “In recent years, about one million head of cattle per year have entered the United States from Mexico through ten ports of entry in Arizona, New Mexico, and Texas. The imported cattle tend to weigh 300-500 pounds and are destined for pasture, backgrounding, finishing, and slaughter within the United States. The cattle primarily originate in the northern Mexican states and are mostly English or mixed English Breeds, with some Brahma and English crosses.” R. Skaggs, R. Acuña, L. Allen Torell, L. Southard Live Cattle Exports from Mexico into the United States: Where Do the Cattle Come From and Where Do They Go, Choices (1<sup>st</sup> Quarter 2004), p. 25 (Exhibit MEX- 34).

<sup>95</sup> For example: “To help ensure that sanitary requirements are met, Mexican cattle rancher associations own and operate inspection facilities at each port of entry along the U.S. border. Each facility is staffed by inspector employed by USDA’s Animal and Plant Health Inspection Service (APHIS), which collects user fees for its

112. When the Mexican cow-calf operators were able to export their cattle to the United States, U.S. ranchers, especially those from the Southern and Western Region of the United States, were offered another source of supply for quality feeder cattle that could help them complete their stocks of cattle in the grassland and feedlots. Some of them built long standing buyer-seller relationships with the Mexican cow-calf operators or their brokers. Then, some of the Mexican cow-calf operators shifted part or the entirety of their business into the production of feeder cattle for export to the United States.<sup>96</sup>

113. Thus, Mexico exploited its comparative advantage in the production of feeder cattle, and the United States exploited its comparative advantage in the feeding of cattle and production of beef. The cattle and beef industries of Mexico and the United States became integrated and interrelated.

114. The industry of feeder cattle for export became of such importance for Mexico, that from 2003 to 2007, the years prior to COOL implementation, Mexico exported an average of over 1,200,000 head of cattle per year, with a value of over USD\$500 million dollars per year.<sup>97</sup>

115. Although the COOL provisions challenged in this dispute apply to beef that is sold at retail level in the United States, their implementation affects the entire production process of beef derived from cattle that were born in Mexico. As will be explained below, the COOL provisions ultimately affect Mexican exports of live cattle to the United States.

## **2. The Production Process Of Beef Conducted In The United States Derived From Livestock Born In Mexico**

### **a. Steps That Occur In Mexico: Breeding and Minimal Raising**

116. The Mexican industry dedicated to the production of feeder cattle for export is composed by a large number of independent cow-calf operators (in Spanish are known as “ganaderos” or “criadores de ganado”).

117. The industry is diversified. The size of the cow-calf operators vary from those who own only a few cows to others with a large herd. Selling feeder cattle for export is the source of income of a large number of independent Mexican cow-calf operators.<sup>98</sup>

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inspections from cattle brokers –who in turn change the fee to Mexican cattle producers.” W. Hahn, M. Haley, D. Leuck, J. Miller, J. Perry, F. Taha, S. Zahniser, Market Integration of the North American Animal Products Complex, Electronic Outlook Report from The Economic Research Service (USDA May 2005), p. 8 (Exhibit MEX-35).

<sup>96</sup> “Northern Mexico’s producers traditionally focused and continue to focus on supplying beef calves to the U.S. market.” W. Hahn, et.al. Op.cit. p. 4 (Exhibit MEX-35).

<sup>97</sup> Data obtained from the U.S. Department of Commerce and the U.S. International Trade Commission, available at <http://dataweb.usitc.gov> (Exhibit MEX-36).

<sup>98</sup> See Affidavit, ¶10 (Exhibit MEX-37).

118. The production process of beef starts in Mexico where Mexican cow-calf operators raise bulls and cows in order to generate the birth of calves.<sup>99</sup> Calves are classified as steers—male bovines and heifers—female bovines.

119. From the time they are born, the calves have a short raising period of approximately seven months during which the calves acquire a weight of 300 pounds and grow large enough to be weaned.

120. By the time the calves reach an approximate weight of 300-400 pounds, the Mexican cow-calf operator is ready to put them on sale. Usually, the cow-calf operators prefer to sell the calves as soon as they reach the weight of 300-400 pounds for several commercial reasons. For example, they want to avoid incurring additional expenses for the maintenance and feeding of the calves, and they do not have adequate grasslands for maintaining both cows and calves.<sup>100</sup>

121. In general terms, the core business of the cow-calf operators is to generate the birth of calves and then raise them until they are weaned and ready to be sent to the grasslands. Therefore, the usual commercial practice is to sell calves at an age of approximately 7 months and at a weight ranging between 300 and 400 pounds.<sup>101</sup>

122. In addition, prices paid for for-export feeder cattle are taken as a “ceiling” reference for feeder cattle sold domestically within Mexico.

**b. Sale of the Calves**

**(i) Selling Mexican Calves For Export**

123. There are different ways through which Mexican cattle for export are sold to the U.S. market. Depending on a cow-calf operator’s capacity, it can either sell calves directly to the buyer in the United States, or sell calves to a broker who will complete the transaction with the buyer in the United States.

124. One part of the Mexican cow-calf industry, usually small operators, sells calves to the U.S. market through a broker. The broker buys the cattle directly from the cow-calf operator’s farm and then selects and gathers herds of calves with similar characteristics from different farms. These groups of calves are transported to the Mexican side of the Mexico–U.S. border.

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<sup>99</sup> *Id.* ¶ 3.

<sup>100</sup> “Given strong U.S. demand for grain-fed beef and Mexico’s general lack of well-developed feed grains and cattle-feedlot sectors, it makes economic sense for Mexico to export feeder cattle (and import beef) rather than produce beef from grain-fed cattle for export or to the domestic market.” W. Hahn, et.al. *Op.cit.* p. 5 (Exhibit MEX-35).

<sup>101</sup> “The cattle that the United States imports from Mexico tend to be young – weighing 300-500 pounds (feeder calves) – and are destined for further pasturing and feedlot finishing, and then slaughtered in the United States”. *Id.* p. 4.



There, the broker performs the sanitary tests and relevant procedures required for the calves to be exported,<sup>102</sup> and then takes the cattle across the border, completing the sale with the U.S. buyer.

125. The other part of the Mexican cow-calf industry, usually large operators, selects and gathers the herds of calves with similar characteristics and transport them to the Mexican side of the Mexico–U.S. border on their own without the use of a broker. The cow-calf operators also perform the sanitary tests and relevant procedures required for the calves to be exported and take the cattle across the border to complete the sale with the U.S. buyer.

126. In some instances, the cow calf-operator or broker transports the cattle across the border to either its own or a rental property in the United States before selling it to the U.S. buyer.

127. There are other situations where the brokers or cow-calf operators, depending on the market demand and the cost of feeding the calves, decide to initiate the feeding in Mexican grasslands and wait until the calves have gained more weight. Then, the calves are sold to the U.S. buyer with some part of the feeding process done in Mexico.

128. The sale of the calves from the broker or cow-calf operator to their clients in the U.S. usually takes the form of a direct transaction between them. The buyer and the seller usually agree on the terms of sale and the selling price before the cattle crosses the Mexico-U.S. border.

#### **(ii) Determining The Price Of The Calf**

129. As noted above, the selling price of Mexican calves for export is usually determined in advance by the buyer and the seller before the cattle crosses the Mexico-U.S. border.

130. The selling price is negotiated between the buyer and the seller taking into account several factors, which include the market demand for calves, the quality of the calves determined by the USDA grading system, the reference prices used in the livestock auctions in the United States, the costs for transporting the calves, the future prices and the costs of feeding.

131. Because the feeder cattle are a commodity product, Mexican sellers must maintain a competitive price in order to retain their clients in the United States. A small increase in the cost of the cattle can result in lost clients.<sup>103</sup>

132. Mexican feeder cattle for export are graded according to their breed and health. Animals from European or U.S. breeds that are in good health are classified as export Grade #1, crosses of European or U.S. breeds with the Zebu breed that do not have a hump are classified as export Grade #2. Other crosses are classified as export Grade #3.<sup>104</sup>

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<sup>102</sup> The USDA inspects Mexican cattle on the Mexican side of the border. Thus, before entering the United States, the cattle are cleared by the veterinarian-in-charge. They are then transported to their destination pasture or feedlot by truck. *Id.* p. 8.

<sup>103</sup> Affidavit, ¶ 3 (Exhibit MEX-37).

<sup>104</sup> Cattle and Beef: Impact of the NAFTA and Uruguay Round Agreements on U.S. Trade, *supra*, p. 3-2 (Exhibit MEX-38).

133. U.S. cattle grading standards are identical for Mexican born cattle and U.S. born cattle (beginning with “#1” being the best quality and in half a point increments as quality decreases, i.e. “#1 ½”, “#2”, “#2 ½”, etc.). The grading standards are prescribed in the *U.S. Standards for Grades of Feeder Cattle*.<sup>105</sup>

134. Because Mexican calves for export derive from breeds developed in the U.S. and Europe, they are usually classified as Grades #1 or #2.<sup>106</sup>

135. In general, the calves from the Mexican exporting states, mostly located in the Northern region of Mexico, have the same genetic features as the calves from the Southwestern regions of the United States. There are no qualitative differences between the Mexican calves for export and calves that are born in the United States, i.e. there is no substantial difference between a Grade #1 calf that was born in Mexico and a Grade # 1 calf that was born in the United States. They are substitutable.<sup>107</sup> This is demonstrated by the fact that before COOL, Mexican and U.S. born cattle were commingled throughout the entire production process that finalized with fed cattle being processed, i.e. grass feeding, grain feeding and slaughtering, and also by the fact that the USDA has only one grading system depending on the characteristics of the animals, regardless of its place of birth.

136. Cattle of the two highest grades (# 1 and # 2) are imported regularly into the United States. However, only statistics that describe the price of cattle of a particular grade are available. Statistics that describe the volume of cattle of a particular grade imported into the United States during a particular time period are not available because they are not collected by U.S. authorities.

**c. Steps That Occur In The United States: Weight gaining in grasslands and feedlots and slaughtering**

**(i) Raising The Cattle In The Grasslands**

137. Once the cattle are exported to the United States, they are shipped throughout U.S. territory. Even when the majority of the cattle might remain in the U.S. southern states, such as Texas and New Mexico, there is evidence suggesting that Mexico cattle were shipped as far as Mississippi, Idaho, Oregon, Washington and Iowa.<sup>108</sup>

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<sup>105</sup> AMS, USDA, United States Standards for Grades of Feeder Cattle (1 October 2000) (Exhibit MEX-39).

<sup>106</sup> “Northern Mexico raises the same breeds of beef-type cattle as Southwest U.S. cattle producers: mostly English or mixed-English beef breeds, with some Brahma and English crosses.” W. Hahn, et.al. Op.cit. p. 4 (Exhibit MEX-35).

<sup>107</sup> “In general, the beef-type cattle in the Northern Mexican States are similar to cattle raised in the Southwestern United States. Feeder animals imported from Mexico are typically pastured on grass or winter wheat ... and thereafter are reportedly highly substitutable for Southwestern feeder animals.” Cattle and Beef: Impact of the NAFTA and Uruguay Round Agreements on U.S. Trade, supra, p. 3-2 (Exhibit MEX-38).

<sup>108</sup> See R. Skaggs, et.al. Op. cit., p. 26 (Exhibit MEX-34).

138. The cattle are sent to grasslands where they are raised and fed with grass. This stage is known as the yearling or stocker stage. During this stage, the animals remain grazing on the grasslands until they reach a weight ranging between 600 to 700 pounds.

139. The cattle gain approximately two pounds per day and thus remain in the grasslands between four to five months.<sup>109</sup>

**(ii) Feeding And Finishing The Cattle In Feedlots**

140. Once the livestock reaches 600 to 700 pounds, it is sent to feedlots where it receives intensive feeding based on grains. This stage is known as the feeder stage. During this stage, the livestock remains confined in the feedlots until it reaches a weight between 1,100 to 1,200 pounds.

141. The cattle gain approximately three pounds per day and thus remain in the feedlots between six to seven months.

142. It is important to mention that both in the yearling and feeder stages, the animals born in Mexico and the animals born in the United States were kept together before COOL. After the COOL measure was implemented, Mexican and U.S. born cattle have had to be segregated, as will be explained below.

143. Mexican cattle are easily identified by their ear tag and “M” firebrand, which are traditional methods used by the stockbreeders to identify their animals for health purposes. No other segregation system is used, or at least was used before COOL, for identifying the place of birth of the cattle.<sup>110</sup>

**(iii) Slaughtering, Cutting And Packing**

144. When the animals reach 1,200 pounds, they are considered as fed cattle ready for slaughter, and thus, the animals are sent to the slaughterhouses.

145. After the animal is slaughtered, the carcass is obtained by separating the body from the head, the hide and the internal organs. The carcass is then chilled for 24 hours before being broken down to obtain pieces of meat.

146. Once the animal is slaughtered and turned into a carcass, it is no longer possible to use the ear tag or the firebrand to distinguish between cattle born in Mexico and cattle born in the United States. Carcasses may differ in quality classification but they are otherwise the exact same product regardless of the place of birth of the animal from which they came.

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<sup>109</sup> For an explanation of the production steps occurring in the United States, see *Cattle and Beef: Impact of the NAFTA and Uruguay Round Agreements on U.S. Trade*, *supra*, p. 2-1 (Exhibit MEX-38). See also Investigations Nos. 701-TA-836 (Preliminary) and 731-TA-812-813 (Preliminary), *Live Cattle from Canada and Mexico*, International Trade Commission Pub. 3155 (February 1999), p. 6 (Exhibit MEX-40).

<sup>110</sup> *Id.*

147. The chilled carcass is broken down into pieces of meat that are placed in boxes. The boxed meat is then transported to distribution centers, and subsequently to retail markets.<sup>111</sup>

148. For the purpose of this submission, the following chart provides a summary of the different steps in the production process of the United States, of muscle cuts obtained from cattle that are born in Mexico:

1	2	3	4	5	6	7
<i><b>Cattle Producer (MEX)</b></i>	<i><b>Broker (MEX)</b></i>	<i><b>Backgrounder (Grasslands) (US)</b></i>	<i><b>Feedlot Operator (US)</b></i>	<i><b>Meat Processors &amp; Packers (US)</b></i>	<i><b>Retailers (US)</b></i>	<i><b>Consumers (US)</b></i>
Feeder calves (from birth to 300-400 lbs)	Feeder calves (between 300-400 lbs)	From Stocker/Yearling cattle to feeder cattle (from 300- 400 lbs to 600- 700 lbs)	From feeder cattle to finished or fed cattle for slaughter (from 600- 700 lbs to 1100 – 1200 lbs)	From finished cattle to muscle cuts of beef	Muscle cuts of beef	Final point of sale

### 3. Changes In The Beef Production Process After The Implementation Of The Cool Provisions

#### a. Before The Implementation of the COOL Provisions

149. As discussed above, the implementation of the COOL provisions disrupted the well integrated cattle-beef market between Mexico and the United States, particularly with respect to the processing of beef derived from animals that were born in Mexico but raised and slaughtered in the U.S.

150. Under the pre-COOL rules, meat derived from an animal born in Mexico was considered substantially transformed for labeling purposes, so long as it was at least slaughtered in the United States. Therefore, before COOL, beef labeled as “Product of the U.S.” could refer to beef derived from an animal that was born in Mexico but slaughtered in the United States. This allowed Mexican-born cattle and U.S.-born cattle to be fed, slaughtered and processed together without having to segregate them in each of those steps.

151. Thus, in the grasslands and the feedlots, cattle born in Mexico and cattle born in the United States were put together and fed together without any need to differentiate them, even though they could be differentiated by the ear tag or “M” firebrand on the Mexican-born cattle.

<sup>111</sup> For an explanation of this production step, see Cattle and Beef: Impact of the NAFTA and Uruguay Round Agreements on U.S. Trade, supra, p. 2-2 (Exhibit MEX-38).

152. In the slaughterhouses, once the ear tag and firebrand was no longer visible, the processors were free to break down cattle from both origins at the same time. As there was no need to differentiate the origin of the carcasses and cuts, they could be boxed together and be sent together to the retail market.

**b. After the Implementation of COOL Provisions**

153. The implementation of the COOL measure has resulted in significant changes that adversely affect Mexican-born cattle used in U.S. beef production.

154. The COOL measure makes it impossible for the cattle born in Mexico to be slaughtered and processed in U.S. plants together with cattle born and raised in the United States.<sup>112</sup> Implementation of the COOL measure necessarily requires that cattle be segregated during beef production.

155. The U.S. beef processors must now incur additional costs to segregate cattle throughout the production process of beef and keep evidentiary records of such segregation.<sup>113</sup>

156. To limit those costs, each of the four major U.S. beef processors has decided to slaughter and process Mexican cattle at only one of their plants. This represents a substantial reduction of processing capacity for Mexican cattle. For example, in the case of Tyson this means that only one of its 11 plants is now allowed to accept Mexican cattle.<sup>114</sup>

157. The following chart illustrates the number of plants currently taking in Mexican feeder cattle as compared to the total number of plants that, before the COOL measure, processed Mexican feeder cattle without restriction.

Company	Total number of plants	Number of plants accepting Mexican cattle after COOL
Tyson	11 plants <sup>115</sup>	1 plant (Amarillo, Texas) <sup>116</sup>
Cargill	5 plants <sup>117</sup>	1 plant (Plainview, Texas) <sup>118</sup>
JBS	8 plants <sup>119</sup>	1 plant (Greeley, Colorado) <sup>120</sup>

<sup>112</sup> In an effort to provide examples of records and responsibilities to verify compliance with the COOL measure in relation to “Cattle, Beef, Muscle Cuts of Beef, Ground Beef”, the USDA posted on its website a chart outlining what is expected from stockbreeders, backgrounders, feeders, slaughter plants, processors and distributors. See: [www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3103374](http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3103374) (Exhibit MEX-41).

<sup>113</sup> *Id.*

<sup>114</sup> Tyson Letter, 24 December 2008 (Exhibit MEX-42); see also Affidavit, ¶¶ 6, 8 (Exhibit MEX-37).

<sup>115</sup> <http://www.tyson.com/Corporate/AboutTyson/Locations/ListPage.aspx> (Exhibit MEX-43).

<sup>116</sup> Tyson Letter, 24 December 2008 (Exhibit MEX-42); see also Affidavit ¶¶ 6, 8 (Exhibit MEX-37).

<sup>117</sup> <http://www.cargill.com/company/businesses/cargill-beef/index.jsp> (Exhibit MEX-44).

<sup>118</sup> Affidavit, ¶¶ 6, 8 (Exhibit MEX-37).

158. The reduction of processing plants directly translates into a reduction in commercial opportunities for Mexican feeder cattle.

159. In the case of Cargill, its facilities may process Mexican born cattle only limited days per week and with a 14-day advance notice.<sup>121</sup> This constitutes a further reduction in commercial opportunities for Mexican-born cattle.

160. Even though Mexican-born animals can be differentiated from U.S.-born animals in the feedlots and grasslands by their ear tag and/or their firebrand, the COOL measure has nevertheless affected these two steps of the production process, and cattle has to be segregated as well.<sup>122</sup>

161. Also, considering that the few processing facilities that accept Mexican-born livestock for slaughtering and processing are located near the U.S.–Mexico border in the States of Texas and Colorado, it has become economically unviable for grasslands and feedlots other than those located near the border to acquire Mexican calves. It is too expensive to send Mexican-born calves – herds of animals weighing 1,200 pounds – to grasslands and feedlots farther inland in U.S. territory to return them afterwards– to the processing facilities near the border for slaughtering and processing. As a result, Mexican cow-calf operators have lost a significant part of the market for their products, as Mexican-born animals are limited to be fed in grasslands and feedlots that are near processing plants in the States of Texas and Colorado.<sup>123</sup>

162. Thus, some backgrounders and feedlot operators who formerly purchased Mexican-born cattle have simply decided to suspend those purchases, in order to avoid the costs of compliance with the COOL measure and also to adjust to the new policies of the U.S. processors.<sup>124</sup>

163. As reported by the U.S. Government, imports of Mexican cattle declined precipitously as a result:

*A closer look at the USDA data indicates that imports of Canadian feeder cattle for the July 14 through December 27, 2008, period, at nearly 188,000 head, were 38% lower than the during the same period in 2007. Imports of Canadian slaughter cattle (steers and heifers), at nearly 263,000 head, were 35% lower. Imports of Mexican feeder cattle from July 14 through December 20, 2008, were more than 323,000 head, 39% lower than prior-year levels for the period. [footnote omitted] CattleFax, an industry-funded data*

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<sup>119</sup> See JBS Press Release, 3 March, 2010, available at: <http://www.jbsswift.com/media/releases/2010/JBS%20USA%20Beef%20Division%20Food%20Safety%20Announcement.pdf> (Exhibit MEX-45).

<sup>120</sup> Affidavit ¶¶ 6, 8 (Exhibit MEX-37).

<sup>121</sup> Cargill's Cattle Procurement Documents (Exhibit MEX-46).

<sup>122</sup> See [www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3103374](http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3103374) (Exhibit MEX-41).

<sup>123</sup> Before COOL, cattle imports were shipped as far as Mississippi, Idaho, Oregon, Washington and Iowa. R. Skaggs et.al. Op.Cit., p. 26 (Exhibit MEX- 34).

<sup>124</sup> Affidavit, ¶ 8 (Exhibit MEX-37).

*and analysis service based in Colorado, concluded that 2008 declines in imports of both feeder cattle (those destined for feedlots) and fed (slaughter-ready) cattle were due to mandatory COOL regulations, and that imports “face a big wild card in 2009” for the same reason.*<sup>125</sup>

164. In addition to the aforementioned described effects, the need to segregate has caused a price decrease of Mexican feeder cattle relative to comparable U.S. cattle. According to USDA reports<sup>126</sup> from cattle auctions in Texas and New Mexico, the average price differential between Mexican feeder cattle and comparable U.S. cattle has increased from US\$3.16 to US\$39.12 per head of cattle since the entry into force of the Interim Final Rule.<sup>127</sup> In particular, Tyson firstly estimated the price discount to Mexican cattle to be up to US \$ 60 dollars. After the final implementation of COOL the price discount was adjusted to US \$ 40 dollars per head.<sup>128</sup> In the case of Cargill, the discount in the price has been up to US \$ 45 dollars.<sup>129</sup>

165. U.S. processors have explained that the additional price discount is a result of the costs of segregating that must be borne during beef processing. In a letter to its customers, Tyson stated that “[t]he complexity, costs, and incremental record keeping associated with sorting livestock and finished products into both categories [“A”] and [“B”] is extremely costly”.<sup>130</sup>

166. Keeping separate track of production means abandoning the traditional production method through which all cattle, domestic and imported, were fed, transported, slaughtered and processed jointly. The additional costs arise when processors need to designate, track and document separate shifts for slaughtering domestic and imported cattle. The separation continues on to the next steps of the process, i.e. obtaining the carcass, chilling it and breaking it down into meat pieces.

167. For an industry that has historically operated using domestic and imported cattle without distinction, the enactment of the COOL measure signifies a drastic modification of its operations, which in turn has resulted in significant losses in the volume and value of the Mexican exports of cattle to the United States.<sup>131</sup>

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<sup>125</sup> G. Becker, Congressional Research Service, *Country-Of-Origin Labeling For Foods*, (Feb. 24, 2009), p. 10 (Exhibit MEX-53).

<sup>126</sup> Prices for Mexican cattle were taken from USDA AL LS 626 report. U.S. prices and volumes were obtained from <http://marketnews.usda.gov/portal/lg>. Exhibit MEX-47.

<sup>127</sup> Price Comparison Table (Exhibit MEX-48). The price comparison is based on a 300 pound animal. See also Affidavit, ¶ 6 (Exhibit MEX-37).

<sup>128</sup> Tyson Letter, 09 April 2009 (Exhibit MEX-64).

<sup>129</sup> See Cargill’s Cattle Procurement Documents (Exhibit MEX-46). See also Affidavit, ¶ 6 (Exhibit MEX-37).

<sup>130</sup> Tyson Country of Origin Labeling April 2009, Tyson Open Letter, 29 July 2008 p. 26, available at <http://www.tyson.com/images/Landing/PDF/COOL.pdf> (Exhibit Mex-33).

<sup>131</sup> See comparison of data from 2003-2007 with data from 2008-2009 in Exhibit MEX-36.

#### IV. THE PROTECTIONIST OBJECTIVE OF COOL

168. Notwithstanding the stated rationale of COOL described above, the true purpose of the COOL measure by virtue of its design, structure and application is to protect domestic producers in the United States by altering the operation of the U.S. beef industry in favour of U.S. feeder cattle.

169. This protective effect is inherent in the design and structure of the COOL measure<sup>132</sup>. By targeting the principal downstream products (i.e., muscle cuts of beef) and distribution network (i.e., large diversified retailers), the COOL measure has the maximum adverse effect on imports of Mexican feeder cattle. By excluding small retailers and the U.S. processed food industry from the COOL measure, the adverse effect on U.S. domestic participants is minimized.

170. The protective effect of the COOL measure is confirmed in several facts.

171. *First*, the COOL measure is limited to certain commodities: (i) muscle cuts of beef, lamb and pork; (ii) ground beef, ground lamb and ground pork; (iii) farm raised fish; (iv) wild fish; (v) a perishable agricultural commodity; and (vi) peanuts (vii) meat produced from goats; (viii) chicken, in whole or in part; (ix) gingseng; (x) pecans; and (xi) macadamia nuts.

172. There is no rational or legitimate objective for limiting the scope of the COOL measure to these specific commodities and not applying it to other similar commodities that are produced in the United States, such as turkey, duck, goose, pheasant, venison or deer, bison, buffalo, caribou, boar, ostrich, rabbit, almonds, pistachio, cashews, chestnuts, pine nuts, sesame, sunflower seeds, and walnuts. The only conclusion that can be drawn from the application of the measures to these specific commodities is that the U.S. domestic producers of the covered commodities are being protected from competition with imports.

173. *Second*, the COOL measure only governs certain retailers, namely, those that sell fresh fruits and vegetables and cherries in brine in excess of \$230,000 dollars per year. There is no legitimate objective in excluding other retailers such as specialty meat stores from the measure.

174. *Third*, processed food items otherwise falling within the covered commodities are excluded from the coverage of the COOL measure.

175. *Fourth*, the United States has long had a comprehensive system in place for regulating the information provided to consumers on packaging of food products, including meat products. As discussed above, the Food Safety and Inspection Service must pre-approve all labels for meat products, for which there are specific requirements for content and design. The COOL measure was adopted independently of that existing system.

176. In sum, a measure that creates a new system, independent from an existing one, and provides information on the country of origin of inputs of a product manufactured in the United States but only for *some* products that are purchased in *certain* retail stores and that excludes

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<sup>132</sup> In *Chile – Alcoholic Beverages*, the Appellate Body stated: “Although it is true that the aim of a measure may not be easily ascertained, nevertheless its protective application can most often be discerned from the design, the architecture, and the revealing structure of a measure.” Appellate Body Report, *Chile – Taxes on Alcoholic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000, ¶ 62.



such information for inputs into *certain* processed products cannot reasonably be characterized as being designed and structured to achieve a legitimate consumer information objective. Instead, the COOL measure has been designed, structured and implemented in a way that minimizes the domestic economic and political cost of the measure and maximizes the adverse effect on foreign cattle to the benefit of U.S. domestic cattle.

177. The protective effect of the COOL measure is confirmed by its legislative history and the actions of the Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of America (R-CALF), the main proponents and supporters of the COOL measure. R-Calf members are primarily beef cattle producers in the mountain states of Idaho, Montana and the Dakotas.

178. In 1998, the American organization R-CALF commenced an effort to protect U.S. ranchers from foreign competition, when it realized that Mexican and Canadian cattle had begun to be imported in somewhat greater quantities.

179. Fearful of this increased trade, R-CALF members initially tried to slow the flow of imported cattle by filing an antidumping action against both Canadian and Mexican producers. R-CALF's efforts to impose higher duties on imported cattle were thwarted, however, when the U.S. International Trade Commission determined that the U.S. industry had not been injured by reason of dumped cattle from either Mexico or Canada.<sup>133</sup>

180. R-CALF's attempts to restrain imports continued in the political arena. Given that ranching is the most important industry in these sparsely-populated states, R-CALF had substantial influence with its Congressional representative. In 2000, it persuaded a Congressional representative from Idaho to introduce legislation that R-CALF hoped would have an effect similar to higher tariffs: the Country-of-Origin Meat Labeling Act, H.R. 1144. Although this law was not enacted originally, the provisions of this proposed legislation were incorporated into the 2008 Farm Bill, which is the subject of the current proceeding.

181. During the hearings on H.R. 1144 (hereinafter 2000 Hearings), R-CALF and its supporters were frank about their intent.<sup>134</sup> The president of R-CALF testified that imported cattle were responsible for lowering prices in the U.S. market. He went on to note that "Country-of-origin labeling would greatly help improve the return we get for our product". Another representative of the ranchers testified that, "Trade agreements like NAFTA and GATT are providing for more imports into our country at cheaper prices than our own producers can even afford".<sup>135</sup>

182. As late as 2009, R-CALF continued to tout COOL as a protectionist measure. In a letter to USDA Secretary Vilsack and USTR Ambassador Ron Kirk, it expressed its continued view that:

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<sup>133</sup> Live Cattle from Canada and Mexico, *supra*, p. 6. (Exhibit MEX- 40).

<sup>134</sup> Hearings before the Subcommittee on Livestock and Horticulture, Committee on Agriculture, U.S. House of Representatives, September 26, 2000. (Exhibit MEX-49).

<sup>135</sup> Testimony of Caren Cowan, Executive Secretary, New Mexico Cattle Grower's Association. *Id.* p. 66.

*... trade with Canada and Mexico in live cattle, beef, beef variety meats and processed beef products result in the loss of domestic cattle sales by U.S. cattle farmers and ranchers in excess of \$1 billion annually and has caused the accumulation of a horrendous trade deficit in these products that averaged over \$1.3 billion annually during the past five years and cumulatively exceeded \$6.6 billion during this period..*<sup>136</sup>

*Lacking any affirmative action on the part of USDA or USTR to mitigate this untenable but prolonged trade imbalance that continues to drive tens of thousands of U.S. cattle farmers and ranchers out of business each year, COOL is the only available tool that the U.S. cattle industry has to even begin to rebalance the lopsided trade relationships with Canada and Mexico.*<sup>137</sup>

183. Country of origin labeling was seen by R-CALF and its supporters as a means to protect the U.S. cattle industry from foreign competition. No evidence was presented that any phytosanitary, safety or any other health concerns justified this provision. In fact, the USDA representative testified that “I must stress at the outset that FSIS feels that the broad issue of country-of-origin labeling primarily is a marketing issue, not a food safety issue”.<sup>138</sup> She went on to say that, “H.R. 1144 would have no safety benefits for consumers”.<sup>139</sup>

184. At the 2000 hearings, concern was expressed that the proposed legislation would violate U.S. obligations under the NAFTA or the WTO TBT Agreement.<sup>140</sup> Ms. Wilcox commented:

*[T]here are obviously ways that one could make a WTO label that would be appropriate and legal. Some of the factors you would have to look at, though, would be that that not be overly complex so as to raise an inordinate burden on another country's products. ...The problem that emerges is then you have to be able to verify in your own country and verify what the appropriate segregation and tracking of that product from birth to table.*

185. The USDA representative amplified this point, saying “A requirement for mandatory country of origin labeling for all meat to the retail level would be disruptive.”<sup>141</sup>

186. With regard to the alleged “consumer protection” justification for this bill, USDA was also unequivocal:

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<sup>136</sup> Letter from R-CALF USA to Secretary Vilsack and Ambassador Kirk, *Re: Canada's WTO Complaint Against U.S. COOL Law*, 16 October 2009, p. 2 (Exhibit MEX-50).

<sup>137</sup> *Id.*, p. 5.

<sup>138</sup> Testimony of Caren A. Wilcox, Deputy Undersecretary for Food Safety, Hearings before the Subcommittee on Livestock and Horticulture, Committee on Agriculture, U.S. House of Representatives, 26 September 2000 at 33 (Exhibit MEX-49). Ms. Wilcox went on to note that, “FSIS requires imported meat to be inspected under a system that FSIS has determined through a rigorous and comprehensive process to be equivalent to the U.S. System. Then upon arrival at a U.S. port of entry FSIS subjects these meat shipments to another review.” *Id.* p. 35.

<sup>139</sup> *Id.* p. 99.

<sup>140</sup> *Id.* p. 37.

<sup>141</sup> *Id.* p. 99.

*[W]hile some circumstantial evidence suggests the possibility that consumers in the United States distinguish domestic meat from imported meat, there is no direct or empirical evidence to suggest that a price premium engendered by country of origin labeling will be large or persist over the long term. Indeed, if consumers do distinguish goods depending on their country of origin, strong incentives exist for industries to act without government intervention on a voluntary basis.<sup>142</sup>*

187. For several years preceding the adoption of COOL, USDA administered a voluntary program whereby U.S. producers could promote certified U.S.-origin beef to consumers. Foreign-bred or raised beef products were excluded from this program. It had been assumed that if consumers were influenced by the birthplace of the cattle used to make beef products, they would be attracted to goods marked in this manner. The program collapsed by 2001 because no producers asked to participate.<sup>143</sup>

188. Numerous U.S. government-sponsored studies indicated the costs of COOL to be in the billions of dollars<sup>144</sup>. Processors testified that COOL costs would be shifted to producers such as Mexican cattlemen.<sup>145</sup>

189. Members of Congress and the executive branch recognized that it would raise serious questions of GATT and TBT compliance at the time it was being considered, but brushed aside these concerns because of domestic political considerations.

190. The real intent of this legislation was to raise the cost of handling imported cattle *vis-à-vis* those born in the United States, thus conferring a comparative advantage to domestic cattlemen and ranchers. In this, the COOL measure has been successful.

191. Thus, the true objective of the COOL measure is the protection of domestic industry and not the provision of information to consumers.

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<sup>142</sup> *Id.* p. 99. This conclusion was echoed by subsequent testimony before the House Agriculture Committee in 2003. Mr. Keith Collins, Chief Economist, USDA testified that “[T]here is evidence that consumer preference for domestic product is weak”. Mandatory Country of Origin Labeling, Hearing Before the Committee on Agriculture, House of Representatives, 108<sup>th</sup> Congress, 26 June 2003 (Exhibit MEX-51).

<sup>143</sup> Hearings before the Subcommittee on Livestock and Horticulture, Committee on Agriculture, U.S. House of Representatives, 26 September 2000, p. 60. (Exhibit MEX-49).

<sup>144</sup> Keith Collins testified, “USDA and the Office of Management and Budget have determined that the rule for mandatory Country of Origin labeling is economically significant under Section 3(f) (1) of Executive Order 12886.... AMS estimated the annual recordkeeping costs of creating and maintaining a voluntary country-of-origin system to be nearly \$2 billion. These costs did not include any other resource, labeling or enforcement cost.” “Several studies have estimated costs for the cattle/beef and hog/pork sectors at between \$1-\$3 billion annually after examining costs for the entire supply chain including identifying and tracking animals, reconfiguring processing plants and retail tracking and labeling.” Mandatory Country of Origin Labeling, Hearing Before the Committee on Agriculture, House of Representatives, 108<sup>th</sup> Congress, 26 June 2003, p. 164 (Exhibit MEX-51).

<sup>145</sup> See testimony of Ken Bull, Vice President, Cattle Procurement, Excel Corporation, *id.*, p. 142.

## V. LEGAL ARGUMENT

192. The measure at issue in this dispute is inconsistent with the obligations of the United States under the following provisions: (i) Articles III and X of the GATT 1994, and (ii) Articles 2 and 12 of the TBT Agreement. It also nullifies or impairs benefits that accrue to Mexico under the GATT 1994 within the meaning of GATT Article XXIII:1(b).

### A. Article III Of The GATT 1994

193. Mexico submits that 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.

194. 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.*

195. 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”.<sup>146</sup> 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”.<sup>147</sup>

196. 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.<sup>148</sup> 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.<sup>149</sup> As described in the factual section of this submission, the COOL measure has both the purpose and

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<sup>146</sup> Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, ¶ 35.

<sup>147</sup> *Id.*

<sup>148</sup> Appellate Body Report, *United States – Tax Treatment for “Foreign Sales Corporations” – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002, ¶¶ 204-205.

<sup>149</sup> Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, ¶ 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: Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, ¶ 216.

effect of affording protection to U.S. cattle producers. It is, therefore, fundamentally incompatible with this general principle.

197. In *Korea – Beef*, the Appellate Body explained that a Member's measure is deemed to breach 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.
- iii. the imported products are accorded “less favourable” treatment than that accorded to like domestic products.<sup>150</sup>

198. Mexico will address each element in turn.

### 1. Like Products

199. Although the COOL measure imposes labeling requirements on various commodities, including beef that is offered for sale in the United States, Mexico's claims relate to the treatment accorded to Mexican exports of live feeder cattle produced by Mexican cow-calf operators. As noted in the factual description, for purposes of COOL, “beef” is defined as “meat produced from cattle, including veal”.<sup>151</sup> Mexican feeder cattle are exported to U.S. backgrounding operations and feedlots to be finished to the appropriate weight prior to slaughter and processing into beef.

200. With respect to the issue of whether imported and domestic products are “like products” in terms of Article III, it has been established that such a determination must be made on a case-by-case basis<sup>152</sup> and that “there can be no one precise and absolute definition of what is ‘like’”.<sup>153</sup> Nonetheless, Panels and the Appellate Body have consistently relied on four criteria for purposes of analyzing the issue of “likeness” between products:

- i) the properties, nature and quality of the products;
- ii) the end-uses of the products;
- iii) consumers' tastes and habits – more comprehensively termed consumers' perceptions and behaviour – in respect of the products; and

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<sup>150</sup> Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, ¶ 133.

<sup>151</sup> 7 C.F.R. § 65.110.

<sup>152</sup> Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, ¶ 41.

<sup>153</sup> Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, ¶ 43.

iv) the tariff classification of the products.<sup>154</sup>

201. As discussed above, the physical properties of Mexican feeder cattle are equivalent if not identical to U.S. feeder cattle. Feeder cattle, whether from Mexico or the United States, meet the same standards and industry requirements.

202. With regard to end-uses, Mexico wishes to stress that its claims in this dispute relate to one particular end-use, that is, beef production. Feeder cattle, whether from Mexico, the United States or another country are used principally to produce beef. Prior to the COOL measure, Mexican and U.S. cattle were employed without distinction in the production and processing of beef. Both Mexican-born and U.S.-born feeder cattle were typically fed, slaughtered and processed together in the United States by the same backgrounders, feedlots and plants.

203. As Mexico described in Section III.2.b and III.2c above and relating to the perceptions and behavior of consumers, the consumers of feeder cattle are the U.S. backgrounders, feedlots and, ultimately, the packing plants in which the cattle are slaughtered and processed. Prior to the COOL measure, such plants perceived and treated Mexican and U.S. feeder cattle identically as did the U.S. backgrounders and feedlots.<sup>155</sup>

204. Concerning tariff classification, both Mexican cattle and U.S. cattle are classified under subheading 0102.90 of the Harmonized System (live bovine animals – other).

205. Accordingly, by all relevant criteria, Mexican and U.S. feeder cattle are like products.

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

206. By its express terms, Article III:4 applies only to those “laws, regulations and requirements” that affect “the internal sale, offering for sale, purchase, transportation, distribution or use”.

207. The COOL measure pertains to the category of “laws, regulations and requirements”. The COOL measure comprises a series of laws and regulations that set out the country of origin labeling requirement. These instruments include (i) the Agricultural Marketing Act of 1946; (ii) the Farm Bill 2002; (iii) the Farm Bill 2008; (iv) the Interim Final Rule; and (v) the Final Rule.

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

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<sup>154</sup> See Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, 101 (citing the GATT Working Party Report on *Border Tax Adjustments* and the Appellate Body Report in *Japan – Alcoholic Beverages*).

<sup>155</sup> See also Investigations Nos. 701-TA-836 (Preliminary) and 731-TA-812-813 (Preliminary), *Live Cattle from Canada and Mexico*, International Trade Commission Pub. 3155 (February 1999), pp. 4-9 (Exhibit MEX-40).

209. 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 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.*<sup>156</sup>

210. The term “affecting” contained in Article III:4 has been interpreted as having a broad scope of application.<sup>157</sup> 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”<sup>158</sup>

211. 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”.<sup>159</sup>

212. Prior WTO panels have concluded that Article III:4 encompasses measures that (i) provide an incentive to purchase local products;<sup>160</sup> (ii) provide a disincentive to accept and distribute the imported product to end-users;<sup>161</sup> and (iii) that influence a manufacture’s choice between domestic and imported products.<sup>162</sup>

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<sup>156</sup> Appellate Body Report, *United States – Tax Treatment for “Foreign Sales Corporations” – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002, ¶ 208.

<sup>157</sup> *Id.*, ¶ 210.

<sup>158</sup> GATT Panel Report, *Italian Discrimination Against Imported Agricultural Machinery*, adopted 23 October 1958, BISD 7S/60, ¶ 12.

<sup>159</sup> Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, ¶ 220.

<sup>160</sup> Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R and Corr.1, adopted 5 April 2002, ¶ 7.197.

<sup>161</sup> Panel Reports, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/R, adopted 27 September 2004, as modified by the Appellate Body Report, WT/DS276/AB/R, ¶ 6.267.

<sup>162</sup> Panel Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/R, WT/DS340/R, WT/DS342/R, adopted 12 January 2009, as modified by the Appellate Body, WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R, ¶ 7.256.

213. The COOL measure applies to a specified group of “covered commodities”, among which is beef. The Final Rule defines beef as “meat produced from cattle, including veal”.<sup>163</sup> The COOL measure imposes a requirement on retailers to notify their customers of the country of origin of beef in accordance with the detailed criteria specified in the Final Rule. 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 the supply of beef to retailers including stockbreeders, backgrounders, feedlot operators and meat processors and packers. 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.

214. The fact that the COOL measure affects all stages in beef production is confirmed by the USDA. In an effort to provide examples of records and responsibilities to verify compliance with the COOL measure in relation to “Cattle, Beef, Muscle Cuts of Beef, Ground Beef”, the USDA posted on its website a chart outlining what is expected from stockbreeders, backgrounders, feeders, slaughter plants, processors and distributors.<sup>164</sup>

215. By establishing a requirement that beef sold at the retail level in the United States must be labeled in accordance with criteria relating to the place where the cattle were born, raised and slaughtered and imposing record keeping and verification requirements, the COOL measure has created a disincentive for U.S. cattle backgrounders, feeders and processors to purchase, transport, distribute or use Mexican cattle within the relevant U.S. market. As discussed in greater detail below under “less favourable treatment”, this stems from the increased record keeping, verification and segregation costs associated with Mexican feeder cattle as a result of the COOL measure.

216. The COOL measure therefore pertains to the category of laws, regulations and requirements that *affect* 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

217. 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 imported products.”<sup>165</sup> In *Dominican Republic – 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

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<sup>163</sup> 7 C.F.R. § 65.110.

<sup>164</sup> See [www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3103374](http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3103374) (Exhibit MEX-41).

<sup>165</sup> Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, ¶ 137 (emphasis in original).



products if it gives domestic like products a competitive advantage in the market over imported like products”.<sup>166</sup>

218. 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.<sup>167</sup> A formal difference in treatment between imported and like domestic products is not necessary to show a violation of this provision.<sup>168</sup> The focus is whether the measure modifies the conditions of competition.<sup>169</sup>

219. In this dispute, the pertinent question is does the COOL measure give U.S. feeder cattle a competitive advantage over like Mexican feeder cattle in the U.S. feeder cattle market? The answer is unequivocally “yes”.

220. The following key facts<sup>170</sup> underlie the *de facto* discriminatory effect of the COOL measure:

- i. **Commodity product**- Feeder cattle like other agricultural products are a commodity product that competes on price. The profit margins of the participants in the market are thin and the market is very sensitive to increased costs. A small increase in the relative cost of certain feeder cattle can make those cattle uncompetitive in the market.
- ii. **Cost increases are passed on to cow-calf operators** - Cost increases associated with handling feeder cattle will be passed on to the cow-calf operators in the form of lower prices.
- iii. **Mexican born cattle are a small portion of the cattle destined for slaughtering in the United States** - The U.S. market for feeder cattle destined for beef production is approximately 33 million head per year. Prior to COOL, an average of over 1,200,000 head of Mexican feeder cattle were imported annually from 2003 through 2007; post-COOL, such imports dropped to 702,651 head in 2008 and 940,851 head in 2009.<sup>171</sup> Therefore, it is very easy for the U.S. market to drop the Mexican born cattle from the distribution chain, if handling them begins to

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<sup>166</sup> Appellate Body Report, Dominican Republic - Measures Affecting the Importation and Internal Sale of Cigarettes, WT/DS302/AB/R, adopted 19 May 2005, ¶ 93.

<sup>167</sup> Appellate Body Report, *Canada - Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, ¶ 140.

<sup>168</sup> Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, ¶ 137.

<sup>169</sup> *Id.*

<sup>170</sup> Affidavit ¶¶ 3, 5, 6, 7 (Exhibit MEX-37).

<sup>171</sup> Exhibit MEX-36.

represent additional costs.

- iv. ***Stocks are normally commingled*** - Given the small proportion of total demand that Mexican feeder cattle account for and the need to minimize costs, prior to COOL Mexican feeder cattle were commingled with U.S. cattle at all stages of the beef production process including backgrounding, feedlots, slaughter, processing and distribution.
- v. ***Only some market participants handle both Mexican and domestic feeder cattle*** - Not all U.S. backgrounders, feedlots and packing plants handle both domestic and imported feeder cattle. Due to the small proportion of total feeder cattle that Mexican cattle account for, many participants handle only U.S. feeder cattle.
- vi. ***The cost of compliance is higher for participants who handle Mexican feeder cattle*** – Compared to participants who handle only U.S. feeder cattle, participants who handle Mexican feeder cattle must create and maintain additional records and, due to the aforementioned higher risk of non-compliance, must take greater care in records management. Accordingly, they have higher compliance costs.
- vii. ***The risk of non-compliance is higher for participants who handle Mexican feeder cattle*** – The risk of not complying with the record keeping and verification requirements of the COOL measure are higher for participants who handle Mexican feeder cattle, whether solely or in combination with U.S. feeder cattle, than for participants who handle only U.S. feeder cattle.
- viii. ***The risk of non-compliance and the cost of compliance are highest for packing plants that handle fed cattle that were born in Mexico and raised in the United States*** – Up until cattle enter a packing plant for slaughter, they are marked with ear tags and/or firebrands that identify their origin. To some extent, these markings reduce the compliance costs because they make the physical tracking of the cattle easier. However, once the cattle are slaughtered and processed, these identifiers are lost and additional record keeping and verification actions must be undertaken. This increases the risk of non-compliance and the cost of compliance for packing plants that handle fed cattle born in Mexico and raised in the United States. Packing plants that handle only U.S. cattle do not face these risks and increased costs.

221. In the light of these facts, the COOL measure has caused U.S. packing plants to cease commingling fed cattle born in Mexico and raised in the United States with fed cattle born and raised in the United States and instead segregate by:

- i. Reducing the number of plants that slaughter and process fed cattle that was born in Mexico and raised in the United States.
- ii. Reducing the number of days per week that such cattle are slaughtered and processed;
- iii. Reducing the overall number of such cattle that are slaughtered and processed; and
- iv. Requiring advance notice prior to accepting such cattle.

222. The COOL measure has also caused U.S. packing plants to reduce the price paid for fed cattle that was born in Mexico and raised in the United States, by means of applying an additional discount to the purchase price. The U.S. packing plants have transferred the additional discount to the backgrounders and feedlot operators, and the backgrounders and feedlot operators have ultimately transferred the discount to the Mexican cow-calf operators.

223. These actions have, in turn, had the following direct adverse upstream effects:

- i. Some backgrounders and feedlots have simply stopped buying feeder calves born in Mexico.
- ii. The only backgrounders and feedlots that are willing to receive feeder calves that were born in Mexico are those that are close to the packing plants that are still receiving finished cattle that were born in Mexico.
- iii. Finished cattle that were born in Mexico and raised in the United States are segregated from finished cattle born in the United States for shipping and transportation to packing plants and, in some cases, at backgrounding and feedlot facilities.
- iv. The discount applied by packing plants against the purchase price of finished cattle that were born in Mexico and raised in the United States has been passed on to feedlots, backgrounders and ultimately to the Mexican cow-calf operators that produce the Mexican feeder calves.

224. It is clear that those actions were not taken by the U.S. packing plants, backgrounders and feedlots, for any reason other than the implementation of the COOL measure. It was not a spontaneous commercial decision of the U.S. packing plants, but the consequence of implementation of the COOL provisions in the least possible onerous way to their commercial operations.

225. In addition, the uncertainty created by Secretary Vilsack's letter<sup>172</sup> inviting stakeholders to follow additional voluntary labeling practices has had the effect of encouraging the U.S. packing plants, backgrounders and feedlots to make the actions described above even stricter. The uncertainty regarding the correct way to comply with the COOL measure and the awareness of Secretary Vilsack's powers to modify the COOL measure and make it even stricter, has given the U.S. market participants additional reasons to take those actions.

226. As discussed below in the context of Article 2.2 of the TBT Agreement, threats such as those made in the Vilsack letter are taken seriously in the market.<sup>173</sup>

227. Similar actions have not been taken in respect of the stockbreeding, backgrounding, feeding and transport of like U.S. born cattle.

228. These actions were foreseen by the USDA. The USDA Chart (Exhibit MEX- 41) expressly contemplates the segregation of imported and domestic stocks at all stages of the beef

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<sup>172</sup> Exhibit MEX-8.

<sup>173</sup> See discussion at Section V.B.1.c below.

production process. Also, as part of its cost-benefit analysis of the Final Rule, the USDA recognized that implementation of the COOL measure would necessarily lead to segregation during the beef production:

*For packers and processors handling products sourced from multiple countries, there may also be a desire to operate separate shifts for processing products from different origins, or to split processing within shifts. In either case, costs are likely to increase.*<sup>174</sup>

[...]

*It is believed that the major cost drivers for the rule occur when livestock or other covered commodities are transferred from one firm to another, when livestock or other covered commodities are segregated in the production or marketing process when firms are not using a multiple-origin label, and when products are assembled and then redistributed to retail stores. In part, some requirements of the rule will be accomplished by firms using essentially the same processes and practices as are currently used, but with information on country of origin claims added to the processes. This adaptation generally would require relatively small marginal costs for recordkeeping and identification systems. In other cases, however, firms may need to revamp current operating processes to implement the rule. For example, a processing or packing plant may need to sort incoming products by country of origin and, if applicable, method of production, in addition to weight, grade, color, or other quality factors. This may require adjustments to plant operations, line processing, product handling, and storage. Ultimately, it is anticipated that a mix of solutions will be implemented by industry participants to effectively meet the requirements of the rule. Therefore, it is anticipated that direct, incremental costs for the rule likely will fall within a reasonable range of the estimated total of \$2.6 billion.<sup>175</sup> (Emphasis added)*

[...]

*It is expected that intermediaries will face increased costs associated with tracking cattle and the covered beef commodities produced from these animals and then providing this information to subsequent purchasers, which may be other intermediaries or covered retailers. Incremental costs for beef packers may include additional capital and labor expenditures to enable cattle from different origins to be tracked for slaughter, fabrication, and processing.*<sup>176</sup>

[...]

*For packers and processors handling products from multiple origins and/or methods of production, there may also be a need to separate shifts for processing products from different origins, or to split processing within shifts, or to alter labels to correctly identify*

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<sup>174</sup> 74 Fed. Reg. 2696 (Exhibit MEX-7).

<sup>175</sup> *Id.* p. 2689.

<sup>176</sup> *Id.* p. 2687.

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*the country or countries of origin and method or methods of production, as applicable. However, in the case of meat covered commodities, there is flexibility in labeling covered commodities of multiple origins under this final rule. In the case where products of different origins are segregated, our analysis indicates costs are likely to increase.*<sup>177</sup>  
(Emphasis added)

229. The logistical adjustments necessary for segregating cattle during beef production entail: (i) separating the cattle at the grasslands; (ii) separating the cattle at the feedlots; (iii) separating the cattle while transporting them to the processing plant; (iv) separating the cattle during slaughter; (v) separating carcasses that derived from those cattle; and (vi) separating the resulting muscle cuts of beef. These adjustments, and their consequent costs, are now being experienced in the U.S. feeder cattle market.

230. As part of its cost-benefit analysis of the Final Rule, the USDA acknowledged the likelihood of additional costs generated by the segregation. Specifically, the USDA's analysis states that "there may also be a desire to operate separate shifts for processing products from different origins, or to split processing within shifts. In either case, costs are likely to increase".<sup>178</sup>

231. These additional costs have led to the above-noted price discount that has been imposed on Mexican feeder cattle.

232. These actions, which are a direct result of the COOL measure and would not have occurred but for the measures, have modified the conditions of competition in the U.S. market to the detriment of Mexican feeder cattle. 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 violate the national treatment obligation in Article III:4.

## **B. Agreement On Technical Barriers To Trade**

233. Mexico takes note that during consultations, the United States indicated that the COOL measure is not a sanitary measure. Mexico also takes note that according to the stated rationale contained in the Final Rule, "the COOL program is neither a food safety or traceability program, but rather a consumer information program".<sup>179</sup> This submission is without prejudice to the ability of Mexico to respond any arguments raised by the United States that the COOL measure is a sanitary measure.

234. The COOL measure is a technical regulation within the meaning of Annex 1.1 of the TBT Agreement that is inconsistent with Articles 2.1, 2.2, 2.4, 12.1 and 12.3 of the Agreement.

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<sup>177</sup> *Id.* p. 2685.

<sup>178</sup> *Id.* p. 2696.

<sup>179</sup> *Id.*, p. 2679.

## **1. The COOL Measure Is A “Technical Regulation” For Purposes Of The TBT Agreement**

235. The obligations in Articles 2.1, 2.2 and 2.4 of the TBT Agreement apply to technical regulations. Annex 1.1 of the TBT Agreement defines “technical regulation” as follows:

*[D]ocument which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.*

236. A “document” is “any medium with information recorded on it”.<sup>180</sup> The COOL measure is contained in a set of published legal instruments, namely, the (i) Agricultural Marketing Act of 1946; (ii) the Farm Bill 2002; (iii) the Farm Bill 2008; (iv) the Interim Final Rule; (v) the Final Rule; and (vi) Agricultural Secretary Vilsack’s Letter to the Industry Representatives and its related news release. These are undoubtedly “documents” within the meaning of Annex 1.1 of the TBT Agreement.

237. The Appellate Body has set forth three criteria that a document must meet for it to be considered a “technical regulation”:

- i) the document must apply to an identifiable product or group of products;
- ii) the document must lay down one or more characteristics of the product;
- iii) compliance with the product characteristics must be mandatory.<sup>181</sup>

238. As explained below, the COOL measure is a technical regulation, since it fulfills the three interpretative criteria articulated by the Appellate Body.

### **a. The COOL Measure Applies To An Identifiable Product Or Group Of Products**

239. The Agricultural Marketing Act of 1946, as amended, the Farm Bill 2002, the Farm Bill 2008, the Interim Rule, and the Final Rule expressly state that the country of origin labeling

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<sup>180</sup> The Sixth Edition of the ISO/IEC Guide 2:1991 states that a document “is understood as any medium with information recorded on it”: see Note 2 to paragraph 3.1 of the Guide. Pursuant to the chapeau to Annex 1 of the TBT Agreement, “the terms presented in the sixth edition of the *ISO/IEC Guide 2: 1991, General Terms and Their Definitions Concerning Standardization and Related Activities*, shall, when used in this Agreement, have the same meaning as given in the definitions in the said Guide taking into account that services are excluded from the coverage of this Agreement”.

<sup>181</sup> See Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, ¶¶ 66-70; Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, ¶ 176.

requirements apply to a specific group of “covered commodities”.<sup>182</sup> Muscle cuts of beef and ground beef are included among those covered commodities.

240. Mexico notes that Secretary Vilsack’s letter to industry representatives and its related press release apply to the same group of “covered commodities”. Secretary Vilsack’s letter explicitly mentions that “[t]his letter pertains to the implementation of the mandatory Country of Origin Labeling (COOL) Final Rule (74 FR 2658)”.<sup>183</sup> The letter, thus, also applies to an identifiable group of products.

241. Thus, the COOL measure expressly applies to an identifiable group of products.

**b. The COOL Measure Lays Down One Or More Characteristics Of The Product**

242. Regarding the second criterion, the definition of “technical regulation” expressly includes “marking or labelling requirements”. The Appellate Body in *EC – Asbestos* clarified that a “labeling requirement” is a product characteristic. It observed:

*The heart of the definition of a ‘technical regulation’ is that a ‘document’ must ‘lay down’ — that is, set forth, stipulate or provide — ‘product characteristics’. [...] In the definition of a ‘technical regulation’ in Annex 1.1, the TBT Agreement itself gives certain examples of ‘product characteristics’ — ‘terminology, symbols, packaging, marking or labelling requirements’. These examples indicate that ‘product characteristics’ include, not only features and qualities intrinsic to the product itself, but also related ‘characteristics’, such as the means of identification, the presentation and the appearance of a product. In addition, according to the definition in Annex 1.1 of the TBT Agreement, a ‘technical regulation’ may set forth the ‘applicable administrative provisions’ for products which have certain ‘characteristics’. Further, we note that the definition of a ‘technical regulation’ provides that such a regulation ‘may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements’. (emphasis added) The use here of the word ‘exclusively’ and the disjunctive word ‘or’ indicates that a ‘technical regulation’ may be confined to laying down only one or a few ‘product characteristics’.*<sup>184</sup> (Original emphasis; underlining added)

243. The Appellate Body has further clarified that a “product characteristic” includes not only features and qualities intrinsic to the product itself, but related “characteristics”, such as the means of identification, the presentation and the appearance of the product.<sup>185</sup> Under this

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<sup>182</sup> 7 U.S.C. §1638(2)(A) (Exhibit MEX-9); Section 282(a)(1) of the Farm Bill 2002 (Exhibit MEX-2), Section 1638(2) of the Farm Bill 2008 (Exhibit MEX-3), Section 65.135 of the Interim Final Rule (Exhibit MEX-6), and Section 65.135 of the Final Rule (Exhibit MEX-7).

<sup>183</sup> Exhibit MEX-8.

<sup>184</sup> Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, ¶ 67.

<sup>185</sup> *Id.*

interpretation, a “means of identification” is itself a product characteristic.<sup>186</sup> Thus, the label on a product is itself a product characteristic.<sup>187</sup>

244. The COOL measure imposes on retailers the obligation of informing consumers of the country of origin of the covered commodities.<sup>188</sup> It further describes the method for identifying the country of origin of the covered commodities, namely, by means of a label, stamp, mark, placard, or other visible sign.<sup>189</sup> In the case of some covered commodities, such as muscle cuts of beef, the COOL measure lays down rules for determining when this product can be labeled as having a U.S origin, multiple countries of origin or foreign countries of origin.

245. These features contained in the COOL measure leave no doubt that they fulfill the second criterion of laying down product characteristics consisting of marking or labeling requirements.

**c. Compliance With The Product Characteristics Required By  
COOL Is Mandatory**

246. The last criterion refers to the mandatory nature of the measures. The Appellate Body has recognized that a technical regulation must regulate the characteristics of products “in a binding or compulsory fashion”.<sup>190</sup> It has clarified that product characteristics may be prescribed or imposed in either a positive or negative form.<sup>191</sup>

247. The COOL measure imposes a mandatory obligation on retailers to inform consumers about the country of origin of the covered commodities by means of a label, stamp, mark, placard or other clear and visible sign. It is clear from the statutory COOL provisions that the United States imposes a mandatory scheme. Indeed, the USDA refers to COOL as MCOOL or “Mandatory” COOL.

248. The Agricultural Marketing Act of 1946, as amended, states, in relevant part:

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<sup>186</sup> Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, ¶ 191.

<sup>187</sup> Panel Report, *European Communities – Protection for Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* (Complaint by Australia), WT/DS290/R and Add.1, 2 and 3, adopted 20 April 2005, ¶ 7.449.

<sup>188</sup> 7 U.S.C. §1638a(a)(1) (Exhibit MEX-9); Section 282(a)(1) of the Farm Bill 2002 (Exhibit MEX-2), Section 1638a(a)(1) of the Farm Bill 2008 (Exhibit MEX-3), Section 65.300 of the Interim Final Rule (Exhibit MEX-6), and Section 65.300 of the Final Rule (Exhibit MEX-7) .

<sup>189</sup> 7 U.S.C. §1638a(4)(a)(c)(1) (Exhibit MEX-9); Section 282(c)(1) of the Farm Bill 2002 (Exhibit MEX-2), Section 1638a(c)(1) of the Farm Bill 2008 (Exhibit MEX-3), Section 65.400 of the Interim Final Rule (Exhibit MEX-6), and Section 65.400 of the Final Rule (Exhibit MEX-7).

<sup>190</sup> Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, ¶ 68.

<sup>191</sup> *Id.*, ¶ 69; see also Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, ¶ 176; Panel Report, *European Communities – Trade Description of Sardines*, WT/DS231/R and Corr.1, adopted 23 October 2002, as modified by the Appellate Body Report, WT/DS231/AB/R, ¶¶ 7.44-7.45; and Panel Report, *European Communities – Protection for Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* (Complaint by Australia), WT/DS290/R and Add.1, 2 and 3, adopted 20 April 2005, ¶¶ 7.454-7.456.



(1) REQUIREMENT.- Except as provided in subsection (b) of this section, a retailer of a covered commodity shall inform consumers, at the final point of sale of the covered commodity to consumers, of the country of origin of the covered commodity.<sup>192</sup> [Emphasis added]

249. The use of the word “shall” indicates that the COOL measure is applied in a binding and compulsory fashion. Indeed, no covered commodity may be sold at covered retail stores without labeling such commodity with its country of origin pursuant the COOL measure.

250. The mandatory nature of the COOL measure is further evidenced by the fact that there is an enforcement procedure applicable to retailers and any person engaged in the business of supplying a covered commodity to a retailer. This procedure may lead to the imposition of a fine (maximum of \$1,000 dollars per violation) for those who willfully violate the COOL provisions or do not make a good faith effort to comply with them.<sup>193</sup>

251. With respect to the letter of Secretary Vilsack to industry representatives and its related press release, it is Mexico’s position that these documents also have a mandatory nature.

252. In his letter, Secretary Vilsack gives the following message to the industry representatives:

*[I] am suggesting, after the effective date of the final rule, that the industry voluntarily adopt the following practices to ensure that consumers are adequately informed about the source of food products.*<sup>194</sup>

253. After setting out the suggested practices, Secretary Vilsack announced:

*The Department of Agriculture will be closely reviewing industry compliance with the regulation and its performance in relation to these suggestions for voluntary action. Depending on this performance, I will carefully consider whether modifications to the rule will be necessary to achieve the intent of Congress.*<sup>195</sup> [Emphasis added.]

254. Mexico is of the view that a determination of whether product characteristics are prescribed in a mandatory fashion should not be decided based on the characterization given by the issuing authority to its own measures. To conclude otherwise would mean that a WTO Member can avoid the disciplines of the TBT Agreement concerning technical regulations by merely defining its own measures as “voluntary”.

255. By stating that the USDA “will be closely reviewing compliance with the regulation and its performance in relation to these suggestions”, and that “[d]epending on this performance” the head of the USDA “will carefully consider whether modifications to the rule will be necessary”, the letter makes such possible modifications contingent on whether the industry will comply with the suggested practices.

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<sup>192</sup> 7 U.S.C. § 1638a(a)1 (Exhibit MEX-9).

<sup>193</sup> 7 U.S.C. § 1638b(b)2 (Exhibit MEX-9).

<sup>194</sup> Exhibit MEX-8.

<sup>195</sup> *Id.*

256. It is worth recalling that the practices suggested by Secretary Vilsack consist of providing consumers with additional information that go beyond what is required by the COOL measure.

257. The mandatory nature of Secretary Vilsack's letter and its related press release is evident from the clear threat implied therein, specifically, that additional modifications will depend on the industry's compliance with the suggested practices.

258. Threats such as these are taken seriously by the U.S. beef industry. Statements made by the leading U.S. beef and No. 2 pork producer just prior to the issuance of Secretary Vilsack's letter evidence the persuasive nature of such threats:

*Tyson Foods Inc. said it will comply with federal mandatory country-of-origin labeling law by labeling most of its retail, fresh meat cuts as a product of the United States.*

*The Springdale, Ark.-based protein giant originally stated intentions to avert the high costs associated with segregating livestock and products by labeling most of its beef and pork cuts, including those derived from U.S.-born livestock, under the multi-country Category B level.*

*As USDA intends it, however, the law seeks to differentiate U.S. meat products from those of other countries. The agency quickly said it would work to close that "loophole." In a letter to customers and producers, Tyson Fresh Meats Senior Group Vice President James Lochner said, "If we do not take measures to more fully meet the desires of mCOOL advocates and many lawmakers, and label a large percentage of retail, fresh meat cuts as a product of the U.S., it is likely some flexibility included in the current regulations will be eliminated."*

*Tyson now says it aims to label almost all beef and pork from livestock born, raised and processed in the U.S. with the Category A label by the middle of 2009.*<sup>196</sup>

The quote from Tyson comes from a letter it sent to its packers in April 2009.<sup>197</sup> JBS indicated similar reactions from the U.S. government to its Category B label on most of its meat products.<sup>198</sup>

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<sup>196</sup> *Tyson Cool With Federal Labeling Law*, by Tom Johnston, 10/16/2008 (Exhibit MEX-55). See also *NFU Comments on Tyson's COOL Labeling Measure*, downloaded from <http://www.thepigsite.com/swinenews/19365/nfu-comments-on-tysons-cool-labeling-measure> (Exhibit MEX-56).

<sup>197</sup> *Tyson Country of Origin Labeling April 2009*, pg. 24, available online at <http://www.tyson.com/images/Landing/PDF/COOL.pdf> (Exhibit MEX-33).

<sup>198</sup> See: JBS Letter to Customers: COOL Regulations, pg. 1, available online at [http://www.ontariopork.on.ca/User/Docs/Producers/Cool/US\\_Transition\\_Letter\\_2008-10-22.pdf](http://www.ontariopork.on.ca/User/Docs/Producers/Cool/US_Transition_Letter_2008-10-22.pdf) (referring to "government support" to change its initial approach, which was labeling all of its non-imported-for-immediate-slaughter meat (i.e. beef derived from either Mexican-born or American-born cattle) as category B meat, "Product of USA and Mexico"). Exhibit MEX-57.

259. Therefore, the COOL measure, including Secretary Vilsack's letter and its related press release, are mandatory documents and therefore fulfill the third criterion of a "technical regulation" for purposes of the TBT Agreement.

260. In conclusion, the COOL measure falls within the scope of the TBT Agreement, for it constitutes a "technical regulation" pursuant to the definition contained in Annex 1.1 of the TBT Agreement.

## **2. The COOL Measure Is Inconsistent With Article 2.1 Of The TBT Agreement**

261. The COOL measure accords Mexican feeder cattle treatment less favourable than that accorded to U.S. feeder cattle, contrary to Article 2.1 of the TBT Agreement.

262. Article 2.1 of the TBT Agreement states:

*2.1. Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.*

263. Mexico notes that there is a close resemblance between the terms used in Article 2.1 of the TBT Agreement with those of Article III:4 of the GATT 1994. Both provisions contain the same fundamental principle of national treatment. This similarity has been recognized by prior WTO panels.<sup>199</sup> Like Article III:4 of the GATT 1994, Article 2.1 prohibits both *de jure* discrimination and *de facto* discrimination.<sup>200</sup>

264. The essential elements of an inconsistency with Article 2.1 are: (i) that the measure at issue is a "technical regulation"; (ii) that the imported and domestic products at issue are "like products" within the meaning of that provision; and (iii) that the imported products are accorded "less favourable" treatment than that accorded to like domestic products.<sup>201</sup>

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<sup>199</sup> See- Panel Report, *European Communities – Protection for Trademarks and Geographical Indications for Agricultural Products and Foodstuffs (Complaint by Australia)*, WT/DS290/R and Add.1, 2 and 3, adopted 20 April 2005, ¶ 7.464. The panel in that dispute observed that there is "similarity in the terms used in Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994, which also refers to the 'treatment no less favourable'"; see also Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, adopted 1 February 2002, ¶ 242.

<sup>200</sup> In *Canada – Autos*, the Appellate Body observed that Article III:4 of the GATT 1994 covered both *de jure* and *de facto* inconsistency and, on this basis, found that a similar provision that disciplined measures that favoured the use of domestic over imported goods (i.e., Article 3.1(a) of the SCM Agreement) would also apply not only to *de jure* inconsistency but to *de facto* inconsistency. The same reasoning applies to Article 2.1 of the TBT Agreement which is even more analogous to Article III:4 than Article 3.1(a) of the SCM Agreement. See Appellate Body Report, *Canada - Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, ¶ 140.

<sup>201</sup> Panel Report, *European Communities - Protection for Trademarks and Geographical Indications for Agricultural Products and Foodstuffs (Complaint by Australia)*, WT/DS290/R and Add.1, 2 and 3, adopted 20 April 2005, ¶ 7.444.

265. With respect to the first element, as discussed above, the COOL measure indeed is a “technical regulation”.<sup>202</sup>

266. With respect to the second element, the meaning of the term “like products” in Article 2.1 has not been elaborated upon in WTO jurisprudence. Given that the language in Article 2.1 is similar to that in Article III:4 of the GATT 1994, it is reasonable to use the four criteria used to determine likeness under Article III:4 discussed above<sup>203</sup>, reviewed in the proper context and in consideration of the object and purpose, to assist in determining likeness under Article 2.1. This approach has been previously adopted in the context of the national treatment obligation under the TRIPS Agreement. In Mexico’s view, the same reasoning applies with respect to Article 2.1 of the TBT Agreement.<sup>204</sup>

267. As discussed above at paragraph 199 through paragraph 205, all criteria indicate that Mexican and U.S. feeder cattle are like products.

268. With respect to the third element, for the same reasons set out above regarding “like products”, it is reasonable to apply the test for “less favourable treatment” under Article III:4 of the GATT 1994 when determining whether imported products are accorded “less favourable” treatment under Article 2.1.

269. As discussed above at paragraph 217 through paragraph 232, the COOL measure accords products imported from the territory of any Member (namely, Mexico) treatment less favourable than that accorded to like products of national origin.<sup>205</sup>

270. For these reasons, the COOL measure is inconsistent with Article 2.1 of the TBT Agreement.

### **3. The COOL Measure Is Inconsistent With Article 2.2 Of The TBT Agreement**

271. The COOL measure is inconsistent with Article 2.2 of the TBT Agreement because it was prepared, adopted and applied with a view to, and with the effect of, creating unnecessary obstacles to international trade, and is more trade restrictive than necessary to fulfill a legitimate objective taking account of the risks non-fulfillment would create.

272. Article 2.2 of the TBT Agreement provides:

*2.2 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.*

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<sup>202</sup> See Section V.B.1, paragraphs 235-260 above.

<sup>203</sup> See Section V.A.1 Like Products, paragraphs 199-205 above.

<sup>204</sup> See Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, adopted 1 February 2002, ¶ 242. The Appellate Body stated that “[t]he Panel was correct in concluding that, as the language of Article 3.1 of the TRIPS Agreement, in particular, is similar to that of Article III:4 of the GATT 1994, the jurisprudence on Article III:4 of the GATT 1994 may be useful in interpreting the national treatment obligation in the TRIPS Agreement”.

<sup>205</sup> See Section V.A.3 Less Favourable Treatment, paragraphs 217-232 above.

*For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. 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.”*

273. As discussed above and below in the context of “legitimate objective”, the COOL measure was prepared, adopted and applied with a view to *and* with the effect of creating unnecessary obstacles to trade, in Mexico’s case to trade in Mexican feeder cattle.

274. A technical regulation creates an unnecessary obstacle to international trade if its objective is not legitimate or if the regulation is more trade-restrictive than necessary to fulfil a legitimate objective taking account of the risks non-fulfilment would create. Accordingly, two issues must be addressed under this provision, specifically, whether the technical regulation:

- i) fulfills or is capable of fulfilling a legitimate objective;
- ii) is not more trade-restrictive than necessary to fulfil such objective taking account of the risks non-fulfilment would create.

275. Mexico submits that the COOL measure does not fulfill a legitimate objective nor is it capable of fulfilling such an objective. If the Panel disagrees with Mexico’s submissions and concludes that the COOL measure fulfils or is capable of fulfilling a legitimate objective, Mexico submits that the measure is certainly more trade restrictive than necessary to fulfil that objective, taking account of the risks non-fulfilment would create. Therefore, the COOL measure constitutes an unnecessary obstacle to international trade.

**a. The COOL Measure Does Not Fulfil A Legitimate Objective**

276. The term “fulfil” means “bring to consummation; perform, carry out (a task); comply (with conditions)”.<sup>206</sup> The term “objective” means “something sought or aimed at; an objective point”.<sup>207</sup>

277. While Article 2.2 provides a non-exhaustive list of examples of “legitimate objectives” it does not define the term. The term “legitimate” means, *inter alia*, “conformable to, sanctioned or authorized by, law or principle; lawful; justifiable; proper”.<sup>208</sup> In the context of the term “legitimate interests” under Article 13 of the TRIPS Agreement, a panel has observed that the term “legitimate” relates to lawfulness from a legal positivist perspective, but it has also the connotation of legitimacy from a more normative perspective, in the context of calling for the protection of interests that are justifiable in the light of the objectives that underlie them.<sup>209</sup>

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<sup>206</sup> The Concise Oxford English Dictionary, Ninth Edition, p. 547 (Exhibit MEX-54)

<sup>207</sup> *Id.*, p. 938.

<sup>208</sup> Panel Report, *United States – Section 110(5) of the US Copyright Act*, WT/DS160/R, adopted 27 July 2000, ¶ 6.224.

<sup>209</sup> *Id.*

Another panel has interpreted the term “legitimate interests” in the context of Article 30 of the TRIPS agreement as a normative claim calling for protection of interests that are “justifiable” in the sense that they are supported by relevant public policies or other social norms.<sup>210</sup>

278. In the case at issue, the objective of the COOL measure is not legitimate for the following reasons:

**b. The Objective of the COOL Measure is not to Provide Consumer Information but Rather to Protect the U.S. Industry, Which is not a “Legitimate Objective” within the Meaning of Article 2.2**

279. Mexico submits that the COOL measure does not pursue a legitimate objective since the real objective of the measure is to protect domestic producers in the United States by altering the operation of the U.S. beef industry in favour of U.S. feeder cattle to the disadvantage of like Mexican feeder cattle. Country of origin labeling measures are inherently protectionist and foster discrimination between imported and domestic like products. A Panel must therefore exercise great care when scrutinizing a claim that such a measure has a legitimate objective. In this instance, the objective of the measure is clearly protectionist.

280. This is made clear in the facts that are set out in detail in Section IV of this submission (above). The main points in that section can be summarized as follows:

- 1) The protective effect of the COOL measure is inherent in its design and structure. By targeting the principal downstream products (i.e., muscle cuts of beef) and distribution network (i.e., large diversified retailers), the COOL measure has the maximum adverse effect on imports of Mexican feeder cattle. By excluding small retailers and the U.S. processed food industry from the COOL measure, the adverse effect on U.S. domestic participants and therefore the domestic political cost of the measure is minimized.
- 2) The fundamental characteristics of the COOL measure contradict the U.S. position that the measure has a legitimate consumer information objective and support Mexico’s position that the objective of the measure is the protection of certain U.S. domestic producers from competition with imports:
  - a. The COOL measure is limited to certain commodities. There is no rational or legitimate consumer information objective that justifies limiting the required information to the covered commodities and not to other similar commodities that are produced in the United States, such as turkey, duck, goose, pheasant, venison or deer, bison, buffalo, caribou, boar, ostrich, rabbit, almonds, pistachio, cashews, chestnuts, pine nuts, sesame, sunflower seeds, walnuts.
  - b. The COOL measure is limited in its application to a sub-set of retailers, namely, those that sell fresh fruits and vegetables and cherries in brine in excess of

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<sup>210</sup> Panel Report, *Canada – Patent Protection of Pharmaceutical Products*, WT/DS114/R, adopted 7 April 2000, ¶ 7.69.

\$230,000 dollars per year. There is no rational or legitimate consumer information objective that justifies excluding other retailers, in particular specialty meat stores, from the measure.

- c. Certain processed food items otherwise falling within the covered commodities are excluded from the coverage of the COOL measure. There is no rational or legitimate consumer information objective for such an exclusion.
- 3) The United States already had consumer information measures in place prior to the implementation of the COOL measure and, in this light, the introduction of the COOL measure was for a protectionist purpose:
- a. The United States has long had a comprehensive system in place for regulating the information provided to consumers on packaging of food products, including meat products. As discussed above, the Food Safety and Inspection Service must pre-approve all labels for meat products, for which there are specific requirements for content and design. The COOL measure was adopted independently of that existing system.
  - b. A measure that creates a new system, independent from an existing one, and provides information on the country of origin of inputs in a product manufactured in the United States but only for some products that are purchased in certain retail stores and that excludes such information for inputs into certain processed products cannot reasonably be characterized as designed and structured to achieve legitimate consumer information objectives.
- 4) The protectionist objectives and effects of the COOL measure is confirmed by its legislative history and the actions of the Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of America (R-CALF), main proponents and supporters of the COOL measure. R-Calf members are primarily beef cattle producers in the states of Idaho, Montana and the Dakotas:
- a. In 1998, the American organization R-CALF commenced an effort to protect U.S. ranchers from foreign competition, when its members realized that Mexican and Canadian cattle had begun to be imported in greater quantities.
  - b. Fearful of this increased trade, R-CALF members initially tried to slow imports of cattle by filing an antidumping action against both Canadian and Mexican producers. R-CALF's efforts to impose higher duties on imported cattle were thwarted, however, when the U.S. International Trade Commission determined that the U.S. industry had not been injured by reason of dumped cattle from either Mexico or Canada.
  - c. R-CALF's attempts to restrain imports continued in the political arena. Given that ranching is the most important industry in these sparsely-populated states, R-CALF had substantial influence in its members' Congressional delegations. In 2000, it prompted the introduction of legislation which was hoped to have an effect similar to higher tariffs: the Country-of-Origin Meat Labeling Act, H.R. 1144. Although not enacted, the provisions of this proposed legislation were incorporated into the 2008 Farm Bill which is the subject of this dispute.

- d. During the hearings on H.R. 1144, R-CALF and its supporters were frank about their intent. The President of R-CALF testified that imported cattle were responsible for lowering prices in the U.S. market. Citing the U.S. International Trade Commission, Leo McDonnell quoted the Commission's chairman as saying, "The concentration of packers provides packers the ability to use imports to reduce domestic live cattle prices or prevent price increases". He went on to note that "Country-of-origin labeling would greatly help improve the return we get for our product". Another rancher testified that, "Trade agreements like NAFTA and GATT are providing for more imports into our country at cheaper prices than our own producers can even afford".
- 5) As late as 2009, R-CALF continued to tout COOL as a protectionist measure. In a letter to USDA Secretary Vilsack and USTR Ambassador, it expressed its continued view that:
  - a. "trade with Canada and Mexico in live cattle, beef, beef variety meats and processed beef products result in the loss of domestic cattle sales by U.S. cattle farmers and ranchers in excess of \$1 billion annually and has caused the accumulation of a horrendous trade deficit in these products that averaged over \$1.3 billion annually during the past five years and cumulatively exceeded \$6.6 billion during this period".
  - b. "Lacking any affirmative action on the part of USDA or USTR to mitigate this untenable but prolonged trade imbalance that continues to drive tens of thousands of U.S. cattle farmers and ranchers out of business each year, COOL is the only available tool that the U.S. cattle industry has to even begin to rebalance the lopsided trade relationships with Canada and Mexico".
- 6) Country of origin labeling was seen by R-CALF and its supporters as a means to protect the United States industry from foreign competition and to prevent cheaper foreign-born cattle from depressing prices for domestic livestock. No evidence was presented that indicated any phytosanitary, safety or any other health concerns as justification for this provision. In fact, the USDA representative testified that, "I must stress at the outset that FSIS feels that the broad issue of country-of-origin labeling primarily is a marketing issue, not a food safety issue". She went on to say that, "H.R. 1144 would have no safety benefits for consumers".
- 7) The trade disruptive, WTO-inconsistent and costly nature of the COOL measure were recognized throughout its development:
  - a. At the 2000 hearings, concern was expressed that the proposed legislation would violate U.S. obligations under the TBT or NAFTA. The USDA representative referred to testimony apparently provided by USTR to the Committee on this point, but also commented that:

*"[T]here are obviously ways that one could make a WTO label that would be appropriate and legal. Some of the factors you would have to look at, though, would be that that not be overly complex so as to raise an inordinate burden on another country's products. ... The problem that emerges is then you have to be*



*able to verify in your own country and verify what the appropriate segregation and tracking of that product from birth to table.”*

- b. Members of Congress, the executive branch, and even proponents of this legislation recognized that it would raise serious questions of GATT and TBT compliance at the time it was being considered, but brushed aside these concerns because of domestic political considerations.
  - c. The USDA representative stated that “a requirement for mandatory country of origin labeling for all meat to the retail level would be disruptive.”
  - d. Numerous U.S. government-sponsored studies indicated the costs of COOL to be in the billions of dollars. The government itself concluded that these costs would likely be passed along to producers – especially Mexican cattle ranchers.
- 8) With regard to the alleged “consumer protection” justification for the Bill, USDA was unequivocal:

*“[W]hile some circumstantial evidence suggests the possibility that consumers in the United States distinguish domestic meat from imported meat, there is no direct or empirical evidence to suggest that a price premium engendered by country of origin labeling will be large or persist over the long term. Indeed, if consumers do distinguish goods depending on their country of origin, strong incentives exist for industries to act without government intervention on a voluntary basis.”*

- 9) Finally, for several years preceding the adoption of COOL, USDA administered a voluntary program whereby U.S. producers could tout certified U.S.-origin beef to consumers. Foreign-bred or raised beef products were excluded from this program. It had been assumed that if consumers were influenced by the birthplace of beef products, they would be attracted to goods marked in this manner. The program collapsed by 2001 since no producers asked to participate.
281. Providing useful information to consumers has been an excuse – not a reason – for the COOL measure. COOL has encouraged retailers and processors to handle only products of U.S. origin, thus limiting consumer choice.
282. The real intent of the measure was to raise the cost of handling imported cattle *vis-à-vis* those born in the United States, thus conferring a comparative advantage to domestic cattlemen and ranchers.
283. On the basis of these facts, the true objective of the COOL measure is the protection of domestic industry. This is clearly not a “legitimate objective” within the meaning of Article 2.2.

**c. If the Objective of the COOL Measure is to Provide Consumer Information, in the Circumstances of this Dispute, the Provision of Consumer Information is Not a Legitimate Objective**

284. If this Panel finds that the objective of the COOL measure is the provision of consumer information, Mexico is of the view that while in certain circumstances providing consumer information can be a legitimate objective within the meaning of the provision, it is not a

legitimate objective in *all* circumstances. Whether the objective is legitimate will depend on the specific type of information being provided to consumers and whether the provision of that information is “justifiable” in the light of all relevant circumstances relating to that information.

285. For example, the provision of consumer information concerning the net quantity of a product (e.g., one pound of beef) is clearly a legitimate objective. It is justifiable on the grounds that consumers need to understand the quantity of a product they are buying for both purchasing and consumption needs. At the other end of the spectrum is information that has no value to the needs of a consumer such as the name of the transportation company that shipped the product from the place of manufacture to the place of sale. While this information may be of interest to a limited subset of consumers (i.e., those that care which shipping company transports products that they purchase) it is not of interest to consumers in general and does not fulfil a consumer need.

286. In this sense, it is important to assess the character and the intrinsic value of the information given to the consumers. Sometimes, the type of information is required for health or safety purposes (e.g., indications of whether the food may contain traces of nuts, or whether it has phenylalanine). The disclosure of such information is usually mandatory, and the fact that it is required for health and safety purposes makes it a sanitary measure. The cost of complying with this type of measure goes to the entire production chain. The COOL measure does not fall within this category because it does not provide information which is necessary for health or safety purposes.

287. The *character* of the information given to consumers is that U.S. origin beef is produced from cattle that are “born, raised, slaughtered and processed” in the United States. Such detailed and specific information has only one purpose which is inherently protectionist. In the case of beef it is to distinguish between: (i) beef produced from cattle that are handled by U.S. domestic industry over their entire lifespan and processing; and (ii) beef produced from cattle that are handled by a foreign industry at some point during their lifespan and processing. The provision of information of this character cannot be legitimate since it goes against a fundamental objective of the WTO Agreements – i.e., the elimination of protectionism.

288. The *intrinsic value* of consumer information is illustrated by the type of information that is required for health or safety purposes (e.g., indications of whether the food may contain traces of nuts, or whether it has phenylalanine). The disclosure of such information is usually mandatory, and the fact that it is required for health and safety purposes makes it a sanitary measure. The cost of complying with this type of measure goes to the entire production chain. The COOL measure does not fall within this category because it does not provide information which is necessary for health or safety purposes.

289. Another example is the type of information that will help consumers make their purchasing decisions according to cultural or religious beliefs, or dietary choices (e.g., indications whether the food is halal, kosher, organic or vegetarian). In such cases, the information is voluntarily given by the processor because the value added to the product will appeal to the specific type of consumer that the processor aims to reach. The processor, and ultimately, the consumer, must bear the additional costs of tracing the inputs in order to use those indications. There is no burden for the processor who chooses not to fabricate those types of

products, or for the consumer who chooses not to consume them. This is not the case of the COOL measure.

290. The COOL measure provides a type of information whose value to the consumer is solely protectionist.

291. This type of consumer value cannot form the basis for a legitimate objective.

292. There is another reason why the provision of consumer information in the circumstances of this dispute cannot be a legitimate objective.

293. Prior to the initiation of the process that led to the COOL measure, there is no evidence that U.S. consumers viewed the origin of beef from the strict perspective of “born, raised, slaughtered and processed” in the United States.<sup>211</sup> Prior to the COOL measure, U.S. rules (e.g., the NAFTA rules of origin and marking rules<sup>212</sup>) provided that cattle that were slaughtered and processed in the United States produced “U.S. origin” beef even if the cattle were imported. Those rules were in accordance with the “substantial transformation” test which provides that whenever a product is subject to processing in a second country, and provided that such processing results in a change of nature, the country of origin shall be the country where the processing took place. The United States is trying to use the standard created by the COOL measure to justify itself.

294. The strict standard on country of origin at issue in this dispute was introduced by the COOL measure. Regarding the creation of consumer expectations, the Panel in *EC – Sardines* stated:

*[T]he danger is that Members, by shaping consumer expectations through regulatory intervention in the market, would be able to justify thereafter the legitimacy of that very same regulatory intervention on the basis of governmentally created consumer expectations.*<sup>213</sup>

295. In this dispute, through the COOL measure, the United States is trying to shape consumer perception through regulatory intervention, and justify the legitimacy of this intervention on the basis of a governmentally created consumer perception. In such circumstances, it cannot be said

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<sup>211</sup> A 2000 study by the Economic Research Service, U.S. Department of Agriculture carried its conclusion in its title: *Country of Origin Labeling Costs Outweigh Benefits for Firms Producing Beef and Lamb*. The study noted:

“Is commingling of domestic and imported beef and lamb leading to a situation in which U.S. consumers make choices they would reject if given the opportunity to do so? Would some consumers choose to buy domestic products over imports if given the opportunity to do so? Probably not.”

*Economics of Food Labeling*, p. 32, available at <http://www.ers.usda.gov/publications/aer793/aer793h.pdf> (Exhibit MEX-58).

<sup>212</sup> See Section II.F, Pre-existing U.S. Country of Origin Labeling Requirements,.

<sup>213</sup> Panel Report, *European Communities – Trade Description of Sardines*, WT/DS231/R and Corr.1, adopted 23 October 2002, as modified by the Appellate Body Report, WT/DS231/AB/R, ¶ 7.127.

that the provision of consumer information conforming to this regulatory intervention is a “legitimate objective” within the meaning of Article 2.2.

**d. If The Panel Finds That, In The Circumstances Of This Dispute, The Provision Of Consumer Information Is A Legitimate Objective, The COOL Measure Does Not Fulfil That Legitimate Objective**

296. If the Panel finds that the provision of such information to consumers in the circumstances of this dispute is a legitimate objective, the COOL measure does not fulfil that legitimate objective. In examining whether the measures fulfil the objective, the panel must consider not only the express legal provisions of the measures, but also their design, architecture and structure.<sup>214</sup>

297. The COOL measure does not fulfil a consumer information objective because of the substantial gaps in its coverage and because of the ambiguity and uncertainty that it creates.

298. The gaps in the coverage of the COOL measure have already been described:

1) The COOL measure is limited to certain commodities: (i) muscle cuts of beef, lamb and pork; (ii) ground beef, ground lamb and ground pork; (iii) farm raised fish; (iv) wild fish; (v) a perishable agricultural commodity; and (vi) peanuts (vii) meat produced from goats; (viii) chicken, in whole or in part; (ix) ginseng; (x) pecans; and (xi) macadamia nuts. There is no rational “consumer information” purpose to limit the required information to these specific commodities and not to other similar commodities that are produced in the United States, such as turkey, duck, goose, pheasant, venison or deer, bison, buffalo, caribou, boar, ostrich, rabbit, almonds, pistachio, cashews, chestnuts, pine nuts, sesame, sunflower seeds, walnuts.

2) The COOL measure only governs certain retailers, namely, those that sell fresh fruits and vegetables and cherries in brine in excess of \$230,000 dollars per year. There is no rational “consumer information” purpose to exclude other retailers such as specialty meat stores from the measure. Why would consumers who buy from other retailers be less interested in knowing the country of origin of the products than those consumers that buy from retailers meeting the threshold? From a consumer information perspective, it is irrational that consumers may end up with different information about the same commodity for the mere reason that one consumer purchased that product at a retail store covered by the COOL measure while another consumer purchased it at retail store not covered by the COOL measure.

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<sup>214</sup> Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R, adopted 20 April 2004, as modified by the Appellate Body Report, WT/DS246/AB/R, ¶ 7.200. Although the panel made this statement in the context of Article XX of the GATT 1994, it is equally applicable to the examination of whether a technical requirement fulfils a legitimate objective within the meaning of Article 2.2. of the TBT Agreement. See also *Japan - Alcoholic Beverages*, where the Appellate Body stated that although the aim of a measure may not be easily ascertained, its protective application can most often be discerned from its design, architecture and revealing structure: Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, ¶¶ 67.

3) Certain processed food items otherwise falling within the covered commodities are excluded from the coverage of the COOL measure. There is no rational “consumer information” purpose to exclude such food items from the measure. A measure that provides information on the country of origin of inputs in a product manufactured in the United States but only for *some* products that are purchased in *certain* retail stores and that excludes such information for inputs into *certain* processed products cannot reasonably be characterized as intended to “fulfil” a consumer information objective.

299. The ambiguity and uncertainty created by the COOL measure arises in two ways.

300. First, the United States has long had a comprehensive system in place for regulating the information provided to consumers on packaging of food products, including meat products. As discussed above, the Food Safety and Inspection Service must pre-approve all labels for meat products, for which there are specific requirements for content and design. The COOL measure was adopted independently of that existing system. The COOL measure creates new rules for determining the origin of beef for labeling purposes that differ from pre-existent criteria (i.e. the NAFTA Marking Rules for imports of Mexico and Canada, and the “substantial transformation” test for imports from all other countries) and, in this way, it confuses consumers instead of informing them.

301. Second, as already explained, muscle cuts derived from an animal that is born in Mexico, and then raised and slaughtered in the United States, must be labeled as “Product of U.S.A. and Mexico” under the COOL measure. This labeling, in itself, is confusing because consumers will not know that the entire process of meat production took place in the United States while only the birth and minimal raising of the animal occurred in Mexico. Consumers will not know that Mexican cattle were imported into the United States as calves (at the age of seven months) complying with all U.S. health and safety regulations, and thereafter sent to grasslands and feedlots together with U.S.-born cattle. Consumers will also not know that there is no difference between Mexican-born cattle and U.S.-born cattle such that they have both received the same grade designation according to the grading rules of the USDA. Consumers might think that a package of beef contains muscle cuts of beef produced in the United States and muscle cuts of beef produced in Mexico, which is clearly not the case.

302. A measure such as the COOL measure that has substantial gaps in coverage and that imposes such confusing labels cannot fulfil a legitimate consumer information objective.

**e. Even If The COOL Measure Was Considered To Fulfil A Legitimate Objective, The Measure is More Trade-Restrictive Than Necessary To Fulfil That Objective, Taking Account Of The Risks Non-Fulfillment Would Create**

303. In the event that the Panel concludes that the COOL measure fulfills a legitimate objective, Mexico submits that the COOL measure is more trade restrictive than necessary to fulfil that objective, taking account of the risks non-fulfillment would create.

304. There is no WTO jurisprudence on the meaning of the phrase “more trade-restrictive than necessary to fulfil a legitimate objective taking into account the risks non-fulfillment would create”.

**(i) “Trade Restrictive”**

305. The ordinary meaning of “restrictive” is “imposing restrictions”; “restriction” is “the act or an instance of restricting; the state of being restricted”; and “restrict” is “confine, bound, limit”.<sup>215</sup>

306. The meaning of “restriction” has been elaborated upon in jurisprudence concerning other WTO provisions. The term “restriction” should not be given a narrow meaning.<sup>216</sup> A “disguised restriction” in the context of Article XX of the GATT 1994 has been interpreted to include “disguised discrimination in international trade”.<sup>217</sup> Any form of limitation imposed on, or in relation to importation constitutes a restriction on importation within the meaning of Article XI:1 of the GATT 1994.<sup>218</sup> 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”.<sup>219</sup>

307. On the basis of the foregoing, measures that are “trade restrictive” include those that impose any form of limitation of imports, discriminate against imports or deny competitive opportunities to imports.

(ii) “Necessary”

308. The ordinary meaning of “necessary” is “requiring to be done, achieved; requisite, essential”.<sup>220</sup> Although the term “necessary” has not been interpreted by a WTO panel or the Appellate Body in the context of Article 2.2 of the TBT Agreement, it has been interpreted in the context of Articles XX(b) and XX(d) of the GATT 1994 and Article XIV of the GATS. 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 achievement of the objective. This comparison should be carried out in the light of the importance of the interests or values at*

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<sup>215</sup> The Concise Oxford English Dictionary, Ninth Edition, p. 1174. Exhibit MEX-54.

<sup>216</sup> Panel Report, *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R and Add.1, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS135/AB/R, ¶ 8.235.

<sup>217</sup> Appellate Body Report, *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, ¶ 66.

<sup>218</sup> Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R and Corr.1, adopted 5 April 2002, ¶ 7.265.

<sup>219</sup> Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/RW2/ECU, adopted 17 December 2008, as modified by the Appellate Body Reports, WT/DS27/AB/RW2/ECU, WT/DS27/AB/RW/USA, ¶ 7.678.

<sup>220</sup> The Concise Oxford English Dictionary, Ninth Edition, p. 910. Exhibit MEX-54.

stake.”<sup>221</sup>

“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’.”<sup>222</sup>

“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.<sup>223</sup> [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’.”<sup>224</sup>

309. In the context of Article 5.6 of the SPS Agreement, a similar interpretation has been applied to the phrase “not more trade restrictive than required”. The Appellate Body has established a three-pronged test for compliance with this requirement. The test is not met if there is an alternative measure that: (1) is reasonably available taking into account technical and economic feasibility; (2) achieves the Member's appropriate level of sanitary or phytosanitary protection; and (3) is significantly less restrictive to trade than the SPS measure contested.<sup>225</sup>

310. Accordingly, for a measure to be “necessary”, 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.

### (iii) “Risks Non-fulfilment Would Create”

311. The relevant part of Article 2.2. of the TBT Agreement states:

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<sup>221</sup> Appellate Body Report, *Brazil - Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007, ¶ 178.

<sup>222</sup> Appellate Body Report, *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, ¶ 160-161.

<sup>223</sup> *Id.*, ¶ 164.

<sup>224</sup> *Id.*, ¶ 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, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R and Corr.1, adopted 20 April 2005, ¶¶ 304-311.

<sup>225</sup> Appellate Body Report, *Australia - Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, ¶ 194.

*... 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.*

312. The ordinary meaning of “risk” is “a chance or possibility of danger, loss, injury, or other adverse consequences”.<sup>226</sup> The phrase “risks non-fulfilment would create” refers to the chance or possibility of adverse consequences should the legitimate objective not be carried out. In assessing this chance or possibility, the Panel should consider available scientific and technical information.

#### **(iv) Application to the Facts of this Dispute**

313. 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: the COOL measure should not be more “trade-restrictive” (i.e., deny competitive opportunities to imports of Mexican feeder cattle) than “necessary” (i.e., in light of the importance of the objective of providing consumer information on the country of origin of inputs in products manufactured or obtained in the U.S. 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).

314. The importance of the legitimate objective at issue and the risks non-fulfilment of that objective would create help define the parameters of the “necessity” test that is incorporated in this provision. As noted above, the USDA has found that 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. 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 the extent that those consequences arise they will be restricted to a limited sub-set of U.S. consumers.

315. 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 other alternative measures that are reasonably available that provide the equivalent contribution to the objective.

316. The first alternative is a *voluntary* country of origin labeling requirement. Depending on how it is designed and implemented, such a requirement can maintain the strict labeling criteria

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<sup>226</sup> The Concise Oxford English Dictionary, Ninth Edition, p. 1189. Exhibit MEX-54.



(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.

317. A second alternative is to modify the labeling criteria to conform to the 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 labeled as product of the United States. This would likely eliminate the discrimination and trade restrictions affecting imports of Mexican feeder cattle.

318. In this way, the U.S. measures are inconsistent with Article 2.2 of the TBT Agreement.

#### **4. The COOL Measure Is Inconsistent With Article 2.4 Of The TBT Agreement**

319. The COOL measure is not based on an existing relevant international standard, contrary to the obligation contained in Article 2.4 of the TBT Agreement.

320. Article 2.4 of the TBT Agreement states:

*Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.*

321. The COOL measure is inconsistent with Article 2.4 of the TBT Agreement because: (a) a relevant international standard exists; (b) the United States failed to base its regulation on that international standard; and (c) the relevant international standard is not an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued.

##### **a. CODEX-STAN 1-1985**

322. One of the main purposes of the CODEX Alimentarius Commission is the preparation of international food standards and their publication in the CODEX Alimentarius.<sup>227</sup> CODEX-STAN 1-1985 is the “General Standard For The Labelling Of Prepackaged Foods.” CODEX-STAN 1-1985 was published in 1985 and amended in 2008.

323. The “Scope” of the standard is described in Section 1, which states:

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<sup>227</sup> See “Understanding the Codex Alimentarius”  
[http://ftp.fao.org/codex/Publications/understanding/Understanding\\_EN.pdf](http://ftp.fao.org/codex/Publications/understanding/Understanding_EN.pdf). Exhibit MEX-62.

*This standard applies to the labelling of all prepackaged foods to be offered as such to the consumer or for catering purposes and to certain aspects relating to the presentation thereof.*

The standard therefore applies to prepackaged muscle cuts of meat.

324. Section 4.5 provides as follows:

*4.5 Country of origin*

*4.5.1 The country of origin of the food shall be declared if its omission would mislead or deceive the consumer.*

*4.5.2 When a food undergoes processing in a second country which changes its nature, the country in which the processing is performed shall be considered to be the country of origin for the purposes of labelling.*

325. The conversion of live cattle into packaged, muscle cuts of meat and ground meat changes the nature of the cattle. That a conversion takes place has long been recognized under the U.S. trade laws, as reflected in its customs rules of origin, as well as under the laws of other countries.

326. Other countries consider that the conversion of cattle into retail cuts of beef changes the nature of the cattle. Japan's origin requirements depend on the country in which the animal was predominately raised.<sup>228</sup> Mexico's origin requirements explicitly reference the Codex Alimentarius, which employs a substantial transformation standard.<sup>229</sup>

**b. CODEX-STAN 1-1985 Is A Relevant International Standard**

327. According to the reasoning followed by the panel in *EC – Sardines*, before addressing the question of whether an international standard is relevant, it must first be determined that an international standard exists.

**(i) International Standard**

328. An international standard exists if such document: (i) meets the definition of “standard” provided in Annex 1.2 of the TBT; and (ii) was approved by an international body.<sup>230</sup>

329. Annex 1.2 of the TBT Agreement defines “standard” as a:

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<sup>228</sup> Notification No. 514 of the Ministry of Agriculture, Forestry, and Fisheries, *Quality Labeling Standards for Fresh Foods*, March 31, 2000, Art. 4(2)(b)(ii) & Attached Table 2, available at <http://www.maff.go.jp/e/jas/labeling/pdf/fresh01.pdf>. Exhibit MEX-59.

<sup>229</sup> See Secretaría de Economía, Norma Oficial Mexicana NOM-051-SCFI/SSA1-2010, “Especificaciones generales de etiquetado para alimentos y bebidas no alcohólicas preenvasados-Información comercial y sanitaria”, *Diario Oficial de la Federación*, 5 April 2010, números 4.2.5.1 and 4.2.5.11, available at [http://dof.gob.mx/nota\\_detalle.php?codigo=5137518&fecha=05/04/2010](http://dof.gob.mx/nota_detalle.php?codigo=5137518&fecha=05/04/2010). Exhibit MEX-60.

<sup>230</sup> See Panel Report, *European Communities – Trade Description of Sardines*, WT/DS231/R and Corr.1, adopted 23 October 2002, as modified by the Appellate Body Report, WT/DS231/AB/R, ¶ 7.63.

*[D]ocument approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.*

330. Mexico submits that the General Standard for the Labeling of Pre-packaged Food (CODEX-STAN 1-1985) is a standard for purposes of Annex 1.2 of the TBT Agreement for the following reasons:

- a. The CODEX-STAN 1-1985 is a document approved by a recognized body. The CODEX-STAN 1-1985 was prepared and approved by a recognized body for purposes of the TBT Agreement, namely, the CODEX Alimentarius Commission (“Codex Commission”). This recognized body was established jointly in 1963 by the Food and Agriculture Organization of the United Nations (“FAO”), and the World Health Organization. By 2006, the Codex Commission was composed of by 174 Member Countries and one Member Organization (the European Communities), representing 99 percent of the world’s population.<sup>231</sup> Both Mexico and the United States are Members of the Codex Commission. In *EC-Sardines*, the panel and Appellate Body determined that a standard prepared and approved by the CODEX Commission is as a relevant international standard. In that dispute, neither the panel, the Parties or the United States (which participated as a third party) disputed that the CODEX Commission is an internationally recognized standard setting body for purposes of the TBT Agreement.
- b. CODEX-STAN 1-1985 provides for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods. CODEX-STAN-1-1985 provides rules expressly dealing with the labelling of prepackaged food products with their country of origin, which is a characteristic of the product. Very similar to the Codex standard at issue in *EC – Sardines* – which provided guidelines for the labelling of sardines – CODEX-STAN-1-1985 provides guidelines on the labelling of products to provide appropriate information to consumers on country of origin.
- c. Compliance with CODEX-STAN 1-1985 is not mandatory. As recognized by the Codex Commission, all of its standards are “voluntary and not binding”.<sup>232</sup>

331. For these reasons, CODEX-STAN 1-1985 falls within the definition of “standard” contained in Annex 1.2 of the TBT Agreement.

## **(ii) Relevant**

332. As to the characteristic of “relevant”, in *EC – Sardines*, the panel articulated that for a international standard to be considered relevant it “must *bear upon, relate to or be pertinent*” to

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<sup>231</sup> See “Understanding the Codex Alimentarius” [http://ftp.fao.org/codex/Publications/understanding/Understanding\\_EN.pdf](http://ftp.fao.org/codex/Publications/understanding/Understanding_EN.pdf). Exhibit MEX-62.

<sup>232</sup> Codex Alimentarius, FAQs – General Questions, available at [http://www.codexalimentarius.net/web/faq\\_gen.jsp#G11..](http://www.codexalimentarius.net/web/faq_gen.jsp#G11..) Exhibit MEX-63.

the challenged measure.<sup>233</sup> Hence, the issue that must be addressed is whether the CODEX-STAN 1-1985 bears upon, relates to or is pertinent to the COOL measure.

333. As noted above, Article 1 of CODEX-STAN 1-1985 defines its scope of application to include “the labelling of all prepackaged foods to be offered as such to the consumer”. CODEX-STAN 1-1985 applies to all prepackaged foods, thereby including within its scope muscle cuts of beef.

334. Article 2 of CODEX-STAN 1-1985 defines “prepackaged” as follows:

*“Prepackaged” means packaged or made up in advance in a container, ready for offer to the consumer, or for catering purposes.*

335. Retail stores that are regulated by the COOL measure offers muscle cuts of beef to consumers in a presentation which is either packaged or otherwise made up in advance. Ground meat sold at those retail stores is presented in the same way to consumers.

336. The COOL measure imposes a mandatory country of origin labeling system which include rules regarding how to determine the country of origin of the covered commodities and rules regarding how to label or mark those products.

337. CODEX-STAN 1-1985 contains rules for the labeling of pre-packaged foods, including rules regarding the country of origin for labeling such foods. Muscle cuts of beef and ground beef are within the scope of the CODEX-STAN 1-1985. Therefore, the CODEX-STAN 1-1985 bears upon, relates to, and is pertinent to the COOL measure as regards muscle cuts of beef and ground beef.

338. Consequently, CODEX-STAN 1-1985 is a relevant international standard for purposes of article 2.4 of the TBT.

**c. The United States Failed To Base Its Regulation On The Relevant International Standard**

339. Article 2.4 of the TBT Agreement recognizes the importance of relevant international standards and sets out the obligation that Members “shall use them, or the relevant parts of them, as a basis for their technical regulations”.

340. In interpreting the meaning of the phrase “as a basis for”, the Appellate Body observed:

*From these various definitions, we would highlight the similar terms ‘principal constituent’, ‘fundamental principle’, ‘main constituent’, and ‘determining principle’ – all of which lend credence to the conclusion that there must be a very strong and very close relationship between two things in order to be able to say that one is ‘the basis for’ the other.*<sup>234</sup>

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<sup>233</sup> See Panel Report, *European Communities – Trade Description of Sardines*, WT/DS231/R and Corr.1, adopted 23 October 2002, as modified by the Appellate Body Report, WT/DS231/AB/R, ¶ 7.68.

<sup>234</sup> Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, ¶ 245.

341. Article 4.5 of CODEX-STAN 1-1985, which is the relevant part of the standard in the case at issue, contains the following rules:<sup>235</sup>

*Country of origin*

*4.5.1 The country of origin of the food shall be declared if its omission would mislead or deceive the consumer.*

*4.5.2 When a food undergoes processing in a second country which changes its nature, the country in which the processing is performed shall be considered to be the country of origin for the purposes of labelling.*

342. Article 4.5.2 of CODEX-STAN 1-1985 incorporates the “substantial transformation” test by providing that whenever a product is subject to processing in a second country, and provided that such processing results in a change of nature, the country of origin shall be the country where the processing took place.

343. According to the CODEX-STAN 1-1985, if labeling with a country of origin is considered necessary, meat that is derived from cattle that are born in Mexico and subsequently raised and slaughtered in the United States should be labeled as having a U.S. country of origin. The process whereby cattle are transformed into muscle cuts of beef and ground beef changes the nature of such cattle.

344. In direct contradiction to this international standard, the COOL measure confers the United States country of origin only to muscle cuts of beef and ground beef that derive from cattle that are exclusively born, raised, and slaughtered in the United States. Muscle cuts of beef and ground beef derived from cattle born in Mexico and later raised and slaughtered in the United States cannot be labeled as U.S. origin under the COOL measure, whereas they should be labeled as U.S. origin under CODEX-STAN 1-1985.

345. In *EC – Sardines*, the Appellate Body explained that when a technical regulation that conflicts with an international standard, the technical regulation is not “based” on that standard. It stated specifically:

*In our view, it can certainly be said—at a minimum—that something cannot be considered a “basis” for something else if the two are contradictory. Therefore, under Article 2.4, if the technical regulation and the international standard contradict each*

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<sup>235</sup> Article 2.4 of the TBT Agreement contains the requirement that Members use relevant international standards “or the relevant parts of them” as a basis for their technical regulations. Addressing this issue, the Appellate Body in *EC — Sardines* held: “In making this determination, we note at the outset that article 2.4 of the TBT Agreement provides that “Members” shall use [relevant international standards], or the relevant parts of them, as a basis for their technical regulations”. In our view, the phrase ‘relevant parts of them’ defines the appropriate focus of an analysis to determine whether a relevant international standard has been used ‘as a basis for’ a technical regulation. In other words, the examination must be limited to those parts of the relevant international standards that relate to the subject-matter of the challenged prescriptions or requirements. In addition, the examination must be broad enough to address all of those relevant parts; the regulating Member is not permitted to select only some of the ‘relevant parts’ of an international standard. If a part is relevant, then it must be one of the elements which is a basis for the technical regulation.” *Id.* ¶ 250.

*other, it cannot properly be concluded that the international standard has been used “as a basis for” the technical regulation.*<sup>236</sup>

346. In view of the fact that the COOL measure stipulates rules for labeling muscle cuts of beef and ground beef that directly contradict the guidelines contained in CODEX-STAN 1-1985, Mexico claims that the United States did not use the CODEX-STAN 1-1985, or the relevant parts thereof, as a basis for the COOL measure.

**d. The Relevant International Standard Does Not Constitute An Ineffective Or Inappropriate Means For The Fulfillment Of The Legitimate Objectives Pursued**

347. As part of Mexico’s claim under Article 2.2 of the TBT Agreement, Mexico has explained why the COOL measure does not pursue a legitimate objective. Mexico hereby reaffirms this conclusion, for purposes of describing the violations of article 2.4 of the TBT Agreement.<sup>237</sup>

348. However, in the event that the Panel concludes that the COOL measure pursues a legitimate objective, Mexico submits that the rule in CODEX-STAN 1-1985 is an effective and appropriate means for the fulfillment of a legitimate objective.

349. The United States has stated that the objective of COOL measure is to inform consumers and give them accurate information pertaining to the country of origin, for the purposes of making purchasing decisions.

350. With respect to the meaning of the terms “ineffective” or “inappropriate”, the Panel in *EC – Sardines* explained:

*Concerning the terms “ineffective” and “inappropriate”, we note that “ineffective” refers to something which is not “having the function of accomplishing”, “having a result”, or “brought to bear”, whereas “inappropriate” refers to something which is not “specially suitable”, “proper”, or “fitting”. Thus, in the context of Article 2.4, an ineffective means is a means which does not have the function of accomplishing the legitimate objective pursued, whereas an inappropriate means is a means which is not*

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<sup>236</sup> *Id.*, ¶ 248.

<sup>237</sup> Regarding “legitimate objectives”, the Appellate Body in *EC – Sardines* concluded: “As to the second question, we are of the view that the Panel was also correct in concluding that the ‘legitimate objectives’ referred to in Article 2.4 must be interpreted in the context of Article 2.2”, which refers also to “legitimate objectives”, and includes a description of what the nature of some objectives can be. Two implications flow from the Panel’s interpretation. First, the term ‘legitimate objectives’ in Article 2.4, as the Panel concluded, must cover the objectives explicitly mentioned in Article 2.2, namely: ‘national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment.’ Second, given the use of the term ‘inter alia’ in Article 2.2, the objectives covered by the term ‘legitimate objectives’ in Article 2.4 extend beyond the list of the objectives specifically mentioned in Article 2.2. Furthermore, we share the view of the Panel that the second part of Article 2.4 implies that there must be an examination and a determination on the legitimacy of the objectives of the measure.” *Id.*, ¶ 286.

*specially suitable for the fulfilment of the legitimate objective pursued.*<sup>238</sup> (Emphasis added)

351. Mexico argues that CODEX-STAN 1-1985 is an effective means for achieving the pursued objective because it seeks to protect consumers from deceptive practices, and information on the country of origin is conveyed through a label.<sup>239</sup> Mexico sees no reason why the CODEX-STAN 1-1985 is an ineffective means for accomplishing the stated objective of the COOL measure.

352. Indeed, during the revision of the Interim Final Rule and the Final Rule, the USDA received comments suggesting that the CODEX-STAN 1-1985 should continue to apply instead of the proposed COOL measure.

353. In relation to the proposed Interim Final Rule, the USDA received the following comment:

*Other commenters expressed concern that the concept of substantial transformation, which is the basis for determining origin under CBP regulations, the World Trade Organization's Rules of Origin, and the Codex General Standard for the Labeling of Prepackaged Food [(CODEX-STAN 1-1985)], is being overwritten.*<sup>240</sup>

354. With respect to the proposed Final Rule, the USDA received the following comment:

*One commenter pointed out that the Codex General Standard for the Labeling of Prepackaged Food [(CODEX-STAN 1-1985)] was considered adequate in the U.S. system for a number of years and will continue to remain the standard for retailers outside of the U.S. The commenter further stated that it remains the most practical, and also the most adaptable, to evolving commercial practice and growing international trade; and yet it is not the standard adopted in the COOL regulations.*<sup>241</sup>

355. The USDA did not provide any explanation of its reasons for not basing the COOL measure on CODEX-STAN 1-1985.

356. Therefore, it can be concluded that the CODEX-STAN 1-1985 is an effective means for accomplishing the objective of informing consumers about the country of origin of the covered commodities.

357. Mexico also contends that CODEX-STAN 1-1985 is an appropriate means for informing consumers of the country of origin of the covered commodities because the rules regarding country of origin contained therein are specially designed, and thus suitable, for achieving the

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<sup>238</sup> Panel Report, *European Communities – Trade Description of Sardines*, WT/DS231/R and Corr.1, adopted 23 October 2002, as modified by the Appellate Body Report, WT/DS231/AB/R, ¶ 7.116.

<sup>239</sup> Article 2 of the CODEX-STAN 1-1985 defines “label” as “any tag, brand, mark, pictorial or other descriptive matter, written, printed, stencilled, marked, embossed or impressed on, or attached to, a container of food.”

<sup>240</sup> Interim Final Rule, 73 Fed. Reg. at 45116 (Exhibit MEX-4).

<sup>241</sup> 74 Fed. Reg. 2678 (Exhibit MEX-7).

purpose of informing consumers about the country of origin of prepackaged foods. Mexico sees no reason why the CODEX-STAN 1-1985 is an inappropriate means for accomplishing the stated objective of the COOL measure.

358. For these reasons, Mexico is of the view that the existing relevant standard, the CODEX-STAN 1-1985, constitutes an effective and appropriate means for the fulfillment of the objective of informing consumers.

**5. The COOL Measure Is Inconsistent With Articles 12.1 And 12.3 Of The TBT Agreement**

359. Mexico submits that the COOL measure is contrary to the obligations of the United States under articles 12.1 and 12.3 of the TBT Agreement of providing special and differential treatment to developing countries.

360. Article 12.1 of the TBT Agreement reads:

*12.1 Members shall provide differential and more favourable treatment to developing country Members to this Agreement, through the following provisions as well as through the relevant provisions of other Articles of this Agreement.*

361. Article 12.3 of the TBT Agreement states:

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

362. The obligation set forth in Article 12.3 can be divided into two elements: (1) the obligation of the United States to take into account the special development, financial and trade needs of Mexico as a developing country in the preparation and application of technical regulations; and (2) the obligation of the United States to ensure that the COOL measure does not create unnecessary obstacles to exports from Mexico as a developing country.

363. As explained below, neither of those two actions was carried out by the United States.

**a. The United States Did Not Take Into Account The Special Development, Financial And Trade Needs Of Mexico As A Developing Country**

364. Mexico claims that the United States, in the preparation and application of the COOL measure, did not take into account the special development and financial trade needs of Mexico as a developing country.

365. Within the Mexican territory, 110 million hectares (56%) are used for cattle production. This activity employs over 1 million direct jobs and over 2 million indirect jobs at 1.132 million



bovine-production facilities,<sup>242</sup> 65 Federal inspected (TIF) and 940 Municipal slaughterhouses and approximately 100 packing plants specialized in processing beef.

366. Mexican domestic cattle inventory is approximately 30 million head, out of which approximately 6 million are destined for domestic consumption and 1.2 million for exports to the United States. Cattle production represents approximately 33% of the Mexican agriculture and animal production Gross Domestic Product, and 1.3% of the Mexican global Gross Domestic Product. Export sales of feeder cattle to the United States amount up to 400 and 600 million USD annually.

367. During the preparation process of the COOL measure, both the United States Congress and the USDA were made aware that the COOL measure would harm imports of Mexican feeder cattle.

368. Additionally, in the Final Rule's Summary of Comments, the following concerns were expressed:

*The commenter warned that by establishing these categories, the value of finished Mexican cattle will be discounted at the packing plant because they will have to be sorted on the line in the plant, which costs the packer money. Another commenter stated that COOL has effectively cut off U.S.-Mexican cattle trade and that because of COOL the packers have advised producers that they will not buy Mexican cattle.*<sup>243</sup>

369. There is no doubt that the United States was cognizant of the possible negative effects on Mexican exports of feeder cattle. The United States Congress and the USDA, however, did not address those comments and consequently made no effort to take into account the special development and financial trade needs of Mexico in its capacity of developing country.

370. Thus, the United States failed to comply with its obligation under article 12.3 of the TBT Agreement of taking into account the special development and financial trade needs of Mexico as a developing country.

**b. The United States Created An Unnecessary Obstacle To Exports From Mexico As A Developing Country**

371. As part of Mexico's arguments under Article 2.2 of the TBT Agreement, Mexico mentioned why the COOL measure has the effect of creating unnecessary obstacles to trade.

372. In light of the foregoing, Mexico submits that the United States also failed to comply with its obligation of ensuring that the technical regulations do not create unnecessary obstacles to exports from Mexico as a developing country Member.

373. For these reasons, that the United States acted inconsistently with Articles 12.1 and 12.3 of the TBT Agreement.

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<sup>242</sup> See Affidavit, ¶ 10 (Exhibit MEX-37).

<sup>243</sup> 74 Fed. Reg. 2669 (Exhibit MEX-7).

**C. Article X:3(a) of the GATT 1994**

374. Mexico submits that the COOL measure is inconsistent with Article X:3(a) of the GATT 1994.

375. The relevant parts of Article X of the GATT 1994 read:

1. *Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any Member, pertaining to ... requirements, restrictions or prohibitions on imports or exports ... or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. ...*

3. *(a) Each Member shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.*

376. The COOL measure falls within the category of “laws, regulations... and administrative rulings... affecting [the] sale, distribution, transportation [or] processing... or other use” of imports within the meaning of paragraph 1 of Article X. It therefore must be administered in a “uniform, impartial and reasonable manner”.

377. The term “administer” in Article X:3(a) refers to putting into practical effect, or applying, a legal instrument of the kind described in Article X:1.<sup>244</sup> “Uniform” administration requires that Members ensure that their laws are applied consistently and predictably.<sup>245</sup> The ordinary meaning of “predictable” is “that can be predicted or is to be expected”.<sup>246</sup> The ordinary meaning of the word “reasonable”, refers to notions such as “in accordance with reason”, “not irrational or absurd”, “proportionate”, “having sound judgment”, “sensible”, “not asking for too much”, “within the limits of reason, not greatly less or more than might be thought likely or appropriate”, “articulate”.<sup>247</sup>

378. The administration of the COOL measure has been anything but predictable and reasonable. The administration of the details of the measure changed over the course of the interim final rule and the final rule and the associated guidelines issued by USDA over this period. These uncertainties continued with the letter by the U.S. Secretary of Agriculture of February 20, 2009. That letter suggested additional practices for industry participants and threatened to modify the COOL measure if such suggestions were not followed. Administration

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<sup>244</sup> Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006, ¶ 224.

<sup>245</sup> Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R and Corr.1, adopted 16 February 2001, ¶ 11.83.

<sup>246</sup> *The Concise Oxford Dictionary*, Ninth Edition, p. 1076. Exhibit MEX-54.

<sup>247</sup> Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/R, adopted 19 May 2005, as modified by the Appellate Body Report, WT/DS302/AB/R, ¶ 7.385.

of a law or regulation in such a manner cannot amount to uniform (i.e., predictable) and reasonable administration.

**D. Non-Violation Nullification or Impairment**

**1. Article XXIII:1(b) of the GATT 1994**

379. The COOL measure also nullifies or impairs benefits accruing to Mexico based on tariff concessions made by the U.S. in respect of live cattle at the end of successive multilateral rounds of trade negotiations, in a manner that is inconsistent with Article XXIII:1(b) of the GATT 1994.

380. Article XXIII:1 of the GATT 1994 reads:

If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of

(a) the failure of another contracting party to carry out its obligations under this Agreement, or

(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or

(c) the existence of any other situation,

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

381. The Article provides that a Member may have recourse to WTO dispute settlement if it considers that any benefit accruing to it *directly or indirectly* under the GATT 1994 is being nullified or impaired as the result of the application by another Member of any measure, whether or not it conflicts with the provisions of the GATT 1994.

382. Article XXIII:1(b) protects, *inter alia*, the legitimate market access expectations of WTO Members. Although non-violation cases under GATT 1947 have mostly dealt with the introduction or modification of a subsidy following the grant of a tariff concession, the remedy applies to governmental actions such as the COOL measure.

383. The purpose of Article XXIII:1(b) is described as follows:

*The idea underlying [the provisions of Article XXIII:1(b)] is that the improved competitive opportunities that can legitimately be expected from a tariff concession can be frustrated not only by measures proscribed by the General Agreement but also by measures consistent with that Agreement. In order to encourage contracting parties to make tariff concessions they must therefore be given a right of redress when a reciprocal*

*concession is impaired by another contracting party as a result of the application of any measure, whether or not it conflicts with the General Agreement.*<sup>248</sup>

384. The following paragraph from the GATT panel in *EEC – Oilseeds* (quoted by the panel in *Japan-Film*) provides further insight into the rationale of a non-violation claim:

*The Panel considered that the main value of a tariff concession is that it provides an assurance of better market access through improved price competition. Contracting parties negotiate tariff concessions primarily to obtain that advantage. They must therefore be assumed to base their tariff negotiations on the expectation that the price effect of the tariff concessions will not be systematically offset. If no right of redress were given to them in such a case they would be reluctant to make tariff concessions and the General Agreement would no longer be useful as a legal framework for incorporating the results of trade negotiations.*

385. The Panel in *Japan – Film* dispute summarized the elements of a non-violation nullification and impairment claim. The Panel in that dispute stated that in order to make out a cognizable claim under article XXIII:1(b) the complaining party must demonstrate the following three elements<sup>249</sup>:

- a. an application of any measure by a WTO Member;
- b. a benefit accruing under the relevant agreement; and
- c. nullification or impairment of the benefit as a result of the application of the measure.

## **2. Application of any Measure**

386. The first element relates to the phrase “the application by another Member of *any* measure.” The inclusion of the word “any” indicates that Article XXIII:1(b) does not distinguish between, or exclude, certain types of measures.<sup>250</sup>

387. As Mexico has described in Section II, the United States enacted and implemented the COOL measure through a series measures including statutory provision, regulations and other implementing guidance, directives of policy announcements issued in relation to those measures. The application of such measures by the United States meets this element of Mexico’s claim under Article XXIII:1(b).

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<sup>248</sup> Panel Report, *European Economic Community – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, adopted 25 January 1990, BISD 37S/86, ¶ 144, as quoted in Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, ¶ 185.

<sup>249</sup> Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998, ¶ 10.41.

<sup>250</sup> Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, ¶ 188.

### 3. The Benefits Accruing to Mexico Under the GATT 1994

388. The second element consists in demonstrating the existence of a “benefit accruing” to the complaining Member. This benefit can be measured in terms of “legitimate expectations” of improved market-access opportunities.<sup>251</sup> An expectation is considered to be legitimate if the challenged measure could not have been “reasonably anticipated” at the time the tariff concession was negotiated.

389. Although the tariff concessions between Mexico and the United States are currently based on the NAFTA, Mexico is entitled under Article XXIII:I(b) of the GATT 1994 to expect market access to the United States for its feeder cattle that is related to the tariff concessions that would apply, on a Most-Favoured-Nation (MFN) basis, between Mexico and the United States under the WTO Agreement. Mexico does not view these tariff concessions as creating a guarantee of trade volumes, but rather as creating trade expectations as to the competitive relationship between Mexican and U.S. feeder cattle.

390. While it is arguable whether certain regulations on country of origin labeling could have been reasonably expected, the extent of the restrictions on market access resulting from the COOL measure clearly could not have been expected. Through the COOL measure the U.S. has nullified or impaired the unhindered market access that Mexico was entitled to expect for exports of its feeder cattle.

### 4. Nullification and Impairment of the Benefits Resulting from the Application of the COOL Measure

391. The Panel in *Japan – Film* found that the third required element of a non-violation claim under Article XXIII:1(b) is that the benefit accruing to the WTO Member (e.g., improved market access from tariff concessions) is *nullified or impaired as the result of* the application of a measure by another WTO Member. In this sense, the Panel affirmed that “...it must be demonstrated that the competitive position of the imported products subject to and benefitting from a relevant market access (tariff) concession is being *upset by* (“nullified or impaired ... as the result of”) the application of a measure not reasonably anticipated.”<sup>252</sup>

392. Given the low MFN rates of the United States in respect of feeder cattle, Mexico reasonably expected that its access to the U.S. market for feeder cattle would be virtually unrestricted. The COOL measure drastically restricts this access in a manner that could not have been anticipated at the time of the conclusion of the Uruguay Round. It therefore nullifies and impairs the benefits under the GATT 1994 that Mexico negotiated during the Round.

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<sup>251</sup> See Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998, ¶ 10.61.

<sup>252</sup> See *id.*, ¶ 10.82.

## **VI. CONCLUSIONS**

393. On the basis of the foregoing, Mexico respectfully requests that the Panel find that U.S. measures are inconsistent with Articles III:4 and X:3 of the GATT 1994 and Articles 2.1, 2.2, 2.4 and 12 of the TBT Agreement. Mexico also requests that Panel find the U.S. measure also nullifies or impairs benefits accruing to Mexico under the GATT 1994 within the meaning of Article XXIII:1(b) of the GATT 1994.