

BEFORE THE WORLD TRADE ORGANIZATION

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

(DS386)



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

Geneva
4 October 2010

United States – Certain Country of Origin Labelling (COOL) Requirements
(WT/DS384, 386)

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

General matters

Measures at issue

1. **(Canada and Mexico) Do Canada and Mexico consider that the measures at issue, as identified together, form one single COOL measure? If yes, does that mean that the 2002 statute, as amended, the 2008 Interim Final Rule, the 2009 Final Rule, the FSIS Final Rule, and the Vilsack letter are not separate and distinct instruments?**

1. Yes, Mexico considers that there is a single COOL measure.

2. The instruments identified by Mexico that make up this measure –i.e., the 2002 Farm Bill, 2008 Farm Bill, 2008 AMS Interim Final Rule, 2008 FSIS Interim Final Rule, 2009 AMS Final Rule, 2009 FSIS Final Rule, Vilsack Letter, and administrative guidance, directives and policy announcements – are elements or components of the measure.¹

3. A measure can be made of up more than one instrument. It is common in the domestic legal systems of many WTO Members for a single measure to comprise legislative provisions, regulatory provisions and administrative guidelines.

4. Mexico agrees with the statement of the European Union that the complaining Member has the discretion to identify the “measure at issue”.²

5. Whether the subject matter of a dispute involves a single measure or multiple measures will depend on the facts and circumstances. This must be assessed on a case-by-case basis.

6. In this dispute, the COOL measure comprises various closely connected instruments. Each instrument is dependent upon others, starting with the 2002 Farm Bill. It is the collection of the instruments as a whole that creates the measure that is being challenged by Mexico. The Vilsack Letter, administrative guidance, directives and policy announcements build on the 2009 Final Rules which in turn build on the relevant provisions of the 2008 and 2002 Farm Bills.

7. The United States cites passages from the panel reports in *Japan – Film* and *Turkey – Rice Licensing* in support of its argument that the COOL measure is not a single measure.³ These passages are not applicable to the facts of this dispute. In *Japan – Film* and *Turkey – Rice Licensing* each of the measures at issue had an autonomous existence and independent effect. This is not the case in this dispute for the various instruments that comprise the COOL measure.

¹ First Written Submission of Mexico, paragraph 9.

² Third Party Written Submission of the European Union, paragraph 12.

³ First Written Submission of the United States, paragraph 130 and footnote 155.

2. **(Canada and Mexico) Do Canada and Mexico agree that the 2008 Interim Final Rules (adopted, respectively, by AMS and FSIS) were both superseded by the 2009 Final Rules and therefore have no legal effect under US law? If yes, please explain whether and, if so, why the Panel should nonetheless examine the Interim Final Rules. Provide your responses based on the specific requirements under these Interim Final Rules.**

8. Mexico agrees that the 2008 Interim Final Rules adopted by AMS and FSIS have been superseded by the 2009 Final Rules and therefore currently have no legal effect under US law.

9. However, these Interim Final Rules were the foundation for the initial implementation, operation and administration of the COOL measure. It is Mexico's position that the COOL measure is applied in a manner and in circumstances such that it unjustifiably discriminates against and restricts imports of Mexican cattle into the United States.⁴ The discriminatory and trade restrictive effects of the COOL measure on Mexican cattle that are demonstrated in the evidence filed by Mexico began as a result of the issuance of the 2008 AMS Interim Final Rule, prior to the issuance of the 2009 AMS and FSIS Final Rules. Even prior to the 2008 AMS Interim Final Rule, there was some adjustment by the US industry in anticipation of the COOL measure.

10. USDA data evidence that imports of Mexican feeder cattle from July 14 through December 20, 2008 were 39 percent lower than the prior year levels for the same period and CattleFax, an industry-funded data and analysis service based in Colorado, attributed this decline to the mandatory COOL regulations.⁵ The average price differential between Mexican and like US cattle (i.e., the discounted price for Mexican cattle compared to US cattle) that was created by the COOL measure first developed in the latter part of 2008 after the issuance of the Interim Rule when the average price differential increased from US\$3.16 to US\$39.12 per head of cattle.⁶ Announcements of the reduction in plants accepting Mexican cattle as a consequence of the COOL measure were also made at the end of 2008.⁷

11. The 2009 AMS and FSIS Final Rules and the other elements of the COOL measure continued and maintained these discriminatory and trade restrictive effects.

12. For the purposes of Mexico's challenge, the 2008 Interim Final Rules are evidence of the implementation, operation and administration of the COOL measure in a manner that unjustifiably discriminates against and restricts imports of Mexican cattle into the United States.⁸ Mexico recognizes that these instruments are not currently nullifying or impairing benefits accruing to Mexico under the WTO Agreements since they have been superseded by

⁴ First Written Submission of Mexico, paragraph 1.

⁵ *Ibid.*, paragraph 163 citing the February 24, 2009 report by the Congressional Research Service (Exhibit MEX-53).

⁶ *Ibid.*, paragraph 164 citing USDA price data summarized in Exhibit MEX-48.

⁷ *Ibid.*, paragraph 157 citing Tyson Letter of 24 December 2008 (Exhibit MEX-42) and Affidavit (Exhibit MEX-37).

⁸ The difference between measures and evidence to substantiate claims is discussed in the Appellate Body Report in *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006, paragraph 188.

the 2009 Final Rules. However, they are part of the supporting evidence for Mexico's claims regarding the COOL measure.

3. **(all parties) The parties referenced various oral and written communications made by US legislators during the development of the COOL requirements. Please elaborate on their status in light of how the panel in EC – Biotech treated statements by representatives of legislative and executive bodies of the European Union and its member States. In particular, do these communications reflect the intent of the U.S. legislator and therefore indicate the objective of the COOL requirements?**

13. Yes, these communications reflect the intention of US lawmakers as well as the factual understanding of officials responsible for administration of the measure and are therefore indicative of the objective of the COOL measure.

14. In *EC – Biotech* there was no disagreement among the parties that statements similar to the communications relied on by Mexico could constitute evidence of a measure, only about whether they supported the existence of the facts at issue.⁹ The Panel found the statements supportive of a *de facto* moratorium.

15. Although the proper weight to be given to particular statements can only be determined on a case-by-case basis,¹⁰ the Panel invoked four general characteristics in finding the statements supportive:

- with few exceptions the statements were made by the highest-ranking officials of the relevant entity or by or on behalf of key parliamentary committees;
- the statements were corroborated by a variety of sources such that they could not be said to represent an outsider's perspective;
- for the most part the statements were given due planning and foresight so that they could not be considered casual statements; and,
- the statements consistently used the same terminology in describing the facts at issue.¹¹

16. These characteristics are also found in the current case.

- the USDA is the highest policy making body responsible for formulating the COOL Measure, Ms. Wilcox was the next to highest-level official in the relevant section of the USDA, Mr. Collins was the Chief Economist for the USDA, and both of their testimony was given in the key Congressional sub-committees tasked with drafting the COOL measure.
- the communications mutually corroborated one another such that none of them could be described as an outsider's perspective;

⁹ Panel Reports, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, Corr.1 and Add.1, 2, 3, 4, 5, 6, 7, 8 and 9, adopted 21 November 2006, paragraph 7.522.

¹⁰ *Ibid.*

¹¹ *Ibid.*

- none of the communications could be described as a casual statement as they were all made during Congressional hearings characterized by a relatively scripted and thoroughly briefed question and answer format; and,
- although no particular term is at issue in the current case, the communications use consistent language that demonstrates a shared understanding of the relevant facts.

17. The presence of the *EC - Biotech* characteristics is indicative of a finding that the statement by Congresswoman Chenoweth-Hage,¹² the question of Congressman Pombo,¹³ and the testimony of Ms. Wilcox¹⁴ and Mr. Collins¹⁵ reflect the protectionist objective of the COOL measure.

5. Please provide examples, if any, from your jurisdictions of letters similar to the Vilsack letter.

18. Ministers or Officials in Mexico are entitled to issue official communications, limited by their own competence and authority and by the provisions under Mexican laws and regulations. Under normal administrative practice in Mexico, official communications can take several forms: (i) “actos administrativos”¹⁶ (i.e. licenses, permits or other specific authorizations, administrative circulars¹⁷); and (ii) official letters or other communications (for example, diplomatic communications, official communications in response with a specific consultation or request, guidelines or assistance to comply with specific laws and regulations, opinions from the administrative authority, among others).

19. Administrative acts issued by Ministers and other key Senior Officials can have an internal or external impact. For example, administrative circulars (that are also considered as “administrative acts”) could have binding effect in the agency in which is issued. This is the case when they are related to domestic budget or the improvement in the administration of

¹² Mexico First Written Submission, paragraph 181, fn 134.

¹³ *Ibid.*, fn. 140.

¹⁴ *Ibid.*, paragraphs 183 – 186.

¹⁵ *Ibid.*, paragraphs 188.

¹⁶ In accordance with Mexico's legal regime, Ministers and other relevant Senior Officials (who usually are responsible as the head of government agencies) are entitled to issue administrative acts in order to enforce laws, regulations and other administrative instruments. The administrative act is limited by the provisions established under the law and regulations. In this light, it is well known under Mexico's jurisdiction that: “*El acto administrativo proviene de la potestad que tiene la autoridad administrativa en la ley. Esto significa que el acto administrativo está sometido al principio de la legalidad, conforme al cual la autoridad administrativa sólo puede realizar los actos que la ley le autorice.*” See Instituto de Investigaciones Jurídicas, *Diccionario Jurídico Mexicano*, Editorial Porrúa, Universidad Nacional Autónoma de México. México 2005, MEX -65 , p. 90.

¹⁷ “Administrative circular” is been defined as follows: “*Son las comunicaciones o avisos expedidos por las autoridades fiscales superiores jerárquicamente en la esfera administrativa, y por las que se emiten instrucciones a sus inferiores, bien para indicar el régimen interior de las oficinas y su funcionamiento en relación con el público, o bien para aclarar, precisar o definir el criterio interpretativo acerca de la aplicación que la dependencia respectiva seguirá en relación con determinados preceptos legales, caso en el que adquieren especial relevancia, pero sin que, en ningún supuesto, puedan imponer obligaciones o restricciones a los particulares...*” MEX-66 *Ibid.*, p. 545.

resources in a particular agency. Other administrative acts could have an external impact, including legal interpretations of regulations.

20. Nonetheless, we have not found examples of guidelines or extra-procedural rulemaking that has taken the form of a communication from a Minister to the private sector instructing them to follow a set of practices additional to what has been established under laws and regulations. In the hypothetical case that a similar letter to that of Mr. Vilsack were issued by a Minister in Mexico, whether or not is published in an official gazette, it would be taken very seriously by the Mexican private sector.

21. In summary, Mexico does not have samples of letters similar to the Vilsack letter.

7. (Canada and Mexico) Can the complainants point to any evidence showing that industry followed, attempted to follow or reacted in any manner to the suggestions contained in the Vilsack letter? If not, please explain how the language and the content of the concerned letter can be considered "mandatory" in nature?

22. The Vilsack letter is part of the COOL measure and is mandatory as such.

23. When viewed independently of the COOL measure, it is important to note that the Vilsack letter was not an isolated act of the government, but a letter that reflected the pressure that USDA already had been putting on the market participants to comply with the COOL measure in a certain manner and to which the industry had already been responding. In particular, the evidence presented by Mexico in Exhibit MEX-33 shows that, even before the Vilsack letter was issued, USDA was pressuring the industry not to use the commingling rules and the industry was complying.

24. The least cumbersome and expensive way for the US industry to comply with the Vilsack letter is to entirely avoid using the B label. The evidence indicates that US processors have chosen to comply with the letter in that manner.

25. For example, the U.S. packing industry responded to the Vilsack Letter with a press release the same day the letter was issued. The American Meat Institute stated:

When the final rule becomes effective, we anticipate that almost 95 percent of beef and pork products eligible to bear a "Product of the USA" will bear such labeling.

To the extent that companies are able and elect to go beyond these federal labeling requirements, as requested today by Agriculture Secretary Vilsack, is an individual company decision, which will have to be made in collaboration with a company's retail grocery customers, which ultimately are the entities that provide country of origin information to their consumers.¹⁸

26. To comply with the implicit threats of the Vilsack letter, packing plants almost unanimously chose to continue to abide by USDA's conservative reading of the statute rather than a more liberal interpretation, thus seeking to avoid legal liability for violations while not incurring the huge additional costs the Vilsack "suggestions" would have imposed.

¹⁸ American Meat Institute, Press Release (Feb. 20, 2009). Exhibit MEX-67 .

27. Finally, as explained in paragraphs 251 to 259 of Mexico's First Written Submission, the language and the content of the Vilsack letter can be considered as "mandatory" in nature.

8. (all parties) Please clarify whether and, if so, on what basis, voluntary compliance with the suggestions contained in the Vilsack letter is expected.

28. The legal authority of the issuing officer and the language of the letter demonstrate that compliance with the suggestions contained in the letter is expected.

29. First, the letter is signed by the head of the USDA, the authority that coordinates and regulates the agricultural activities in the US. The letter represents the point of view of the US Executive Branch relating to the correct implementation of the COOL measure.

30. Secondly, through the letter USDA warned the industry that it would be closely reviewing the compliance with the "voluntary" suggestions, and depending on the performance of the industry, that USDA would carefully consider whether modifications to the rule would be necessary to achieve the intent of the Congress, an intent that, in opinion of Secretary Vilsack, was for stricter and more burdensome rules.

31. Indeed, as described above, the US industry immediately reacted to the Vilsack letter by announcing that it would take no chances on violations which might occur under the B label.

9. (all parties) Please clarify whether and, if so, how well the previous voluntary COOL scheme of the United States was complied with. Does such compliance or non-compliance have any implication for the nature of the Vilsack letter?

32. Mexico understands that the US market participants showed no interest in voluntary labelling because there was no economic incentive to do so. Accordingly, there were few if any instances in which "compliance" with the criteria would have been relevant.

33. That voluntary scheme was different from the Vilsack letter, because the Vilsack letter is not proposing a voluntary scheme, rather it is pressuring the industry to comply with the Final Rule in the way the USDA wanted it to comply, and it warned the industry of the consequences of non-compliance.

34. The voluntary scheme was actually voluntary. The Vilsack letter is characterized by the US as voluntary, but it has a mandatory nature.

35. The fact that the industry participants decided not to adopt the voluntary scheme should not be seen as a justification of the Vilsack letter.

Country-of-origin labelling requirements

11. (all parties) Is there an overlap between the categories of meat that can carry labels B and C under the COOL requirements? In what circumstances may US meat processors flexibly choose between these two labels? What is the actual practice of US meat processors in regard to any such flexibility and overlap?

36. Yes, there are several instances in which there can be an overlap between the categories of meat that can carry labels B and C.

37. In paragraph 55 of its First Written Submission, the US explains the “flexibilities” of the COOL measure, and explained the following instances of overlap:

- Meat entitled to label B can be labelled as B or C, if the processor chooses to put in the label first the country of birth of the animal, and then the country of raising and slaughter.
- When category A and B animals are commingled in a single production day, the meat may be labelled as B or C.
- When category A and C animals are commingled in a single production day, the meat may be labelled as B or C.
- When category B and C animals are commingled in a single production day, the meat may be labelled as B or C.
- When category A, B and C animals are commingled in a single production day, the meat may be labelled as B or C.

38. Accordingly, Labels B and C are interchangeable under the circumstances described above.

39. However, despite some theoretical flexibility in the Final Rule, the industry is not using this flexibility because the higher costs and burdens, due mainly to segregation requirements, of using imported animals and also because the US government has pressured on the US industry to label all meat products produced from US beef only with the A label.¹⁹

13. (all parties) Are there any economic incentives for retailers and suppliers throughout the meat production chain for choosing a particular retail label to the extent that they are allowed to choose between different labels under the COOL requirements?

40. Mexico wishes to note that the fact that the upstream producers (i.e. backgrounders, feedlot operators and slaughterhouses) have been compelled to choose only one label (i.e. label A) has limited the decision of retailers and suppliers, which end up receiving only label A meat.

41. To the extent that the retailers and suppliers might at some point be able to choose between labels, there are no economic incentives to choose between one label and the other, but there are economic disincentives to use both types of labels. Using two types of labels imposes additional costs and burdens for the suppliers and retailers. For example, the suppliers cannot box together the cuts of meat derived from animals with different origins, and need precise recordkeeping procedures. The retailers also need to have mechanisms to differentiate the meat that will be labelled as A from the meat that will be labelled as B.

42. In conclusion, even though there is no economic incentive to use one or the other label, there is an economic disincentive to use both labels. It is much easier and less costly to drop label B and use only label A.

¹⁹ See Exhibit MEX-33.

16. (all parties) Please specify the extra costs, if any, for operators to follow the COOL requirements in addition to complying with health-related traceability requirements.

43. The US does not have a national, mandatory health-related traceability program for its own cattle. Indeed, reflecting the political opposition to tracing, the COOL measure expressly prohibits the use of a mandatory identification system to verify the country of origin of the covered commodities.²⁰ Thus, the use of only US born cattle bears no additional cost for the market participants, as long as they do not use also cattle from a foreign origin, which would oblige them to implement additional recordkeeping and segregation.

44. A recent attempt was made by the US to put into place a mandatory national identification program under the NAIS (National Animal Identification System) program but this failed. As explained by the USDA:

Under the previous Administration, USDA tried to implement NAIS. USDA spent more than \$120 million, but only 36 percent of producers participated. It is no secret that there are concerns about and opposition to NAIS.²¹

45. The USDA has recently announced that it will be developing a new identification system for animal disease traceability, but it has not yet done so.²² Under the current US system, once a carcass is inspected, the identity of the animal is lost.

46. Contrary to US born cattle, Mexican born cattle can be identified by the ear tag and the "M" firebrand, which are health-related means for identification of the foreign born cattle that cross the border.

47. Numerous U.S. government studies have analyzed the additional costs of COOL compliance. Among these are:

- General Accounting Office: Report to the Chairman, Subcommittee on Livestock and Horticulture, Committee on Agriculture, House of Representatives (January, 2000).²³
- Economic Research Service, U.S. Department of Agriculture, "Country-of-Origin Labeling: Theory and Observation" (January, 2004).²⁴

48. Although these studies may vary in terms of the distributional impact of COOL to various sectors of the industry (i.e. producer > grazing > feedlots > packers > retailers), all acknowledge that there are substantial costs that exceed \$1 billion-. Obviously, all sectors of the industry wish to avoid as many costs as possible, and retailers in particular have refused to pay anything additional for marking, so these compliance costs have been shifted almost

²⁰ Farm Bill 2002 (Exhibit MEX-2), codified at 7 U.S.C. § 1638a(f)(1):

"(1) MANDATORY IDENTIFICATION.—The Secretary shall not use a mandatory identification system to verify the country of origin of a covered commodity."

²¹ USDA, "Questions and Answers: New Animal Disease Traceability Framework (February 2010), p. 1. Exhibit MEX-68 .

²² <http://www.aphis.usda.gov/traceability/> (Exhibit MEX -69).

²³ Exhibit MEX-49,

²⁴ Exhibit MEX- 70

exclusively to cattle producers, resulting in the price margin differences between cattle born in Mexico and those born in the US.

21. **(Canada and Mexico) Please quantify the changes, if any, in the market shares of your livestock exports to the United States (other than for breeding purposes) that are covered by the COOL requirements and those that fall outside the scope of the COOL requirements.**

49. As Mexico explained in paragraph 217 of its First Written Submission, a measure that modifies the conditions of competition to the detriment of imported products could be considered inconsistent with GATT Article III and Article 2.1 of the TBT Agreement. These WTO rules protect conditions of competition and not trade volumes. Thus, it is not necessary to prove that the COOL measure has affected trade volumes. What is necessary to prove is that the COOL measure has affected conditions of competition and Mexico has done this.

50. In this regard, Mexico has presented clear evidence demonstrating that, *inter alia*, the US processors have applied a discount ranging from \$45 USD to \$60 USD per head to the purchases of cattle born in Mexico compared to like cattle born in the US, in order to comply with the COOL requirements.

51. Furthermore, to the extent that market share has been maintained, it has been because the Mexican cow-calf operators have absorbed the price discount applied against their exports, losing profits in order to retain market share taking into account their need to sell the calves, which can not be sold in Mexico, due to the lack of backgrounders with the capacity to raise and feed the calves.

23. **(all parties) Please provide photos of the various labels that meat products carry throughout the entire production process under both the COOL requirements and the pre-COOL labelling regime.**

52. Exhibit MEX-71 contains samples of labels from two of the largest grocery chains in the United States. As is illustrated, rather than labeling individual packages of muscle cuts, one store displays a sign that says "IMPORTANT INFO All ... Beef is a Product of USA Unless Otherwise Marked". A sample of a package of a veal chop displays "Product of US". A sample of a package of a muscle cut from another store displays "Product of USA". Mexico has not yet found a current example of a B label for muscle cuts, but will submit one with its second written submission if one is located.

24. **(all parties) Please comment on the practical situation and arguments developed in paragraphs of 31-36 of the European Union's oral statement at the first substantive meeting with the Panel.**

53. The European Union, in its Oral Statement, has presented a scenario in which a consumer has knowingly accepted that a Label B steak can come from three types of animals: born outside the United States but raised in the United States; born and raised outside the US but slaughtered in the United States; or born, raised and slaughtered in the United States. The COOL measure permits the use of the Label B for meat from the first two types of animals. Label B can be used for the third type of meat (born, raised and slaughtered in the US) only if the US-born cattle (label A) is commingled with the other two types of cattle on the same production day.

54. The EU is correct in understanding the practical consequences for the consumer of the COOL measure. The consumer in the EU's scenario is not interested in whether commingling had occurred on a particular production day but has assumed that the steak may possibly come from the three types of cattle. In this scenario, the consumer's confusion is attributable to the ambiguous labelling information provided by the B label.

55. In Mexico's view, the practical situation described in the EU's oral statement at paragraphs 31-36 highlights that because the B label has alternative meanings, it does not convey clear or useful information to consumers, and therefore does not fulfil the US stated objective of providing "meaningful" information to consumers. The example does not address the more common situation in which neither label B nor label C meat products are available at all.

33. (all parties) Do purchasers of various types of livestock and meat products (i.e. feedlots, slaughter houses, final meat consumers, etc.) have discernable preferences in regard to the various labels that the meat they purchase is carrying? (paragraphs 83 of Canada's first written submission)

56. Mexico agrees with Canada's statement in paragraph 83 of its First Written Submission.

57. Before the COOL measure, the end consumers of livestock (i.e. backgrounders, feedlot operators and slaughterhouses) saw Mexican born cattle as another source of supply that could be used interchangeably with the US born cattle, and therefore price, quality and availability were the main factors in determining which animals to buy.

58. After implementation of the COOL measure, those same end consumers of livestock have preferred to purchase US born cattle, in order to be able to comply with COOL in the least burdensome and least costly way. If those end consumers buy Mexican born cattle, they impose a price discount ranging from USD \$45 to \$60 compared to the prices paid for like cattle born in the US.

59. Before COOL, the end consumers of meat products – i.e., purchasers of muscle cuts sold in stores– did not have available to them labels to differentiate the meat derived from US born raised and slaughtered cattle from the meat derived from Mexican born cattle, but raised and slaughtered in the US. Also, the end consumers of meat could not notice any difference in price, quality or safety between those two types of meat, because there is no difference.

60. After implementation of the COOL measure, although the COOL provisions purport to allow end consumers of meat products to choose between labels, the fact that the upstream participants in the production chain (i.e. backgrounders, feedlot operators, slaughterhouses) have been compelled to choose only one label (i.e., label A), has limited the decisions of retailers and suppliers, who end up receiving mostly label A meat. Thus, retail consumers have little choice in what they are now able to purchase.

61. To the extent that the end consumers of meat might at some point be able to choose between a label A and a label B, it is not clear whether they have a preference for label A. If their preference is label A, it would be because the government has shaped consumer perception through its manipulation of the meaning of "Product of US".

40. (Canada and Mexico) Please provide information about any mandatory country-of-origin labelling scheme you maintain. Please reference the relevant notification to the TBT Committee

62. Mexico has in place a mandatory country of origin labelling requirement for food and non-alcoholic beverages. This requirement is contained in the technical regulation called NOM-051-SCFI-1994, "*Especificaciones generales de etiquetado para alimentos y bebidas no alcohólicas preenvasados*".²⁵

63. Article 4.2.5.1 of this technical regulation indicates that all prepackaged foods and non-alcoholic beverages, whether of national or foreign origin, must incorporate a label identifying the country of origin of the product. It does not specify the rules for determining country of origin for labeling purposes, but rather states that the rule is subject to the provisions of the international treaties to which Mexico is a Party.

64. Thus, article 4.1.5.1 states as follows:

4.2.5 País de origen

4.2.5.1 *Los alimentos y bebidas no alcohólicas preenvasados nacionales o de procedencia extranjera deben incorporar la leyenda que identifique el país de origen de los productos, por ejemplo: "Hecho en..."; "Producto de ..."; "Fabricado en ...", u otras análogas, seguida del país de origen del producto, sujeto a lo dispuesto en los tratados internacionales de que los Estados Unidos Mexicanos sean parte. Se permite el uso de gentilicios y otros términos análogos, siempre y cuando sean precisos y no induzcan a error en cuanto al origen del producto. Por ejemplo: "Producto español", "Producto estadounidense", entre otros.*

65. Article 10 of this technical regulation expressly indicates that it is in conformity with CODEX STAN 1-1985.

66. Further, on 5 April 2010, Mexico published a revised technical regulation called NOM-051-SCFI/SSA 1-2010, *Especificaciones generales de etiquetado para alimentos y bebidas no alcohólicas pre envasadas - Información comercial y sanitaria*.²⁶

67. This revised technical regulation will supersede NOM-051-SCFI-1994 on January 2011, and it contains some amendments from the previous regulation. However, none of the amendments refer to the country of origin labelling requirement, which remained unchanged.

68. This technical regulation was notified to the WTO on 7 April, 2010 as G/TBT/N/MEX/Add.2.²⁷

69. Article 11 of this revised regulation expressly indicates that was issued considering CODEX STAN 1-1985.

70. Finally, in addition to NOM-051-SCFI-1994, Mexico has also issued NOM-194-SSA1-2004, "*Productos y servicios. Especificaciones sanitarias en los establecimientos dedicados al sacrificio y faenado de animales para abasto, almacenamiento, transporte y*

²⁵ See Exhibit MEX-60.

²⁶ Exhibit MEX - 72.

²⁷ Exhibit MEX - 73.

expedio. Especificaciones sanitarias de productos", which was published in the *Diario Oficial de la Federación* of September 18, 2004 and entered into force 365 days later.²⁸

71. NOM-194 should be interpreted and applied along with NOM-051 (they are of equal hierarchy); NOM -194 was issued by the Secretariat of Health and thus it mainly covers the sanitary handling of "products" (as defined in article 3.32: "*Producto, a la canal, carne, carne molida, vísceras y demás estructuras y tejidos aptos para consumo humano*"). NOM-194 article 9 covers the labelling of products, particularly article 9.1 which reads: "*Todos los productos, a excepción de los que se comercializan a granel, deberán incluir la siguiente información: ... v) país de origen.*"

41. (Canada and Mexico) Did Canada and Mexico request that the United States develop the COOL requirements in a way that would reduce the costs of compliance? If so, please explain what was the outcome of any such requests and what implications do such requests have for the complainants' claims under Articles 2.1 and 2.2 of the TBT Agreement?

72. Given the adverse implications of mandatory COOL for Mexico-US trade, Mexico has been commenting and consulting with the United States on this issue from the outset. Official communications have included requests to eliminate the discriminatory and trade restrictive effects of mandatory COOL.

73. Mexico's requests have been unsuccessful and the discriminatory and trade restrictive effects of the COOL measure continue. It is the failure of these requests that prompted the initiation of this dispute.

74. Since the COOL measure was first proposed, the United States has made some changes to the program intended to reduce the cost of compliance for certain of the domestic participants in the US market. However, these changes have not eliminated the discriminatory and trade restrictive effects of the COOL measure on imports of Mexican cattle.

Article 2.1

42. (all parties) Canada and Mexico submit that the Panel should interpret the obligations under Article 2.1 of the TBT Agreement in light of Article III:4 of the GATT 1994. Is the fact that Article 2.1 of the TBT Agreement sets forth not only the national treatment obligation, but also the MFN obligation, relevant in any manner to the Panel's interpretation of the scope of the terms "like products" and "treatment no less favourable" in the context of Article 2.1?

75. Yes. Both the national treatment and MFN obligations are part of the immediate context of the terms "like product" and "treatment no less favourable" in Article 2.1. Thus, they are of equal importance to the interpretation of those terms.

76. In interpreting Article 2.1, Mexico has focused on the national treatment element of this provision and therefore has compared the meaning of the terms "like product" and "treatment no less favourable" to the similar terms used in Article III:4 of the GATT 1994.

²⁸

Exhibit MEX-74.

77. It is appropriate for the Panel to also consider the meaning of similar terms used in the MFN obligation in GATT Article I:1. However, given the relevant facts in this dispute, the Panel's conclusion will be no different. Mexican and US cattle are "like products" and the COOL measure has *de facto* accorded less favourable treatment to Mexican cattle.

43. The United States argues (paragraph 169 of the United States' first written submission and paragraph 23 of the United States' opening oral statement) that many US processors have long segregated their production lines to meet grade labelling requirements and for other marketing programs.

(b) (Canada and Mexico) Please specify the extra costs for operators to follow the COOL requirements in addition to any pre-existing segregation.

78. As Mexico has explained, the costs created by the COOL measure are new for the participants in the US beef industry. The segregation that existed before the implementation of COOL related to other requirements that were not based on the origin of the animal.

79. It is important to clarify the types of segregation that existed before the implementation of COOL:

(i) Segregation for grade labelling

80. The "segregation" referred to in the U.S. submission relates to the quality of the meat and not to the origin of the meat. Because of their different purpose, the costs associated with this prior segregation could not in any way reduce the costs of complying with the COOL measure.

81. This segregation relates not only to processors, but to feedlots. Cattle of all origins have been, and continue to be segregated on the basis of age, weight, and feed. Cattle are weighed and given diets in the feedlot to bring them to optimal weight and quality in the shortest possible time. The cattle are segregated by pens in the feedlots, with pens having cattle of different maturity being separated. Feedlots deliver batches of cattle of the same quality to the packers, depending upon the packers' needs. Prior to the COOL measure, Mexican born cattle were freely commingled with US born cattle for these purposes.

(ii) Segregation for export markets

82. The "segregation" referred to by the US in paragraph 169 of its first written submission, in footnote 203, relates to the rules of certain export markets – Korea, Japan, Taiwan, and Mexico. However, these countries do not require meat products produced from Mexican cattle to be segregated; rather, meat products produced from Mexican cattle are treated as products of the US under those rules. Following are the relevant excerpts from descriptions of the export requirements of Japan, Taiwan and South Korea as published by USDA:

83. Japan – eligible meat products:

Cattle slaughtered for the production of the exported beef to Japan (hereinafter referred to as "the slaughtered cattle") have been born and raised only in the USA, or legally imported from Canada, or legally imported from the third free countries listed here and raised in the USA. Third free countries are: Norway,

Hungary, Iceland, Mexico, Belize, Guatemala, Honduras, El Salvador, Nicaragua, Costa Rica, Panama, Dominican Republic, Chile, Commonwealth of the Northern Mariana Islands, New Zealand, Vanuatu, New Caledonia, Australia.²⁹

Because Mexican cattle is a “third free country” under the Japanese rules, US beef produced from Mexican cattle are fully eligible for export from the US to Japan and need not be segregated to comply with the Japanese requirements.

84. Taiwan – eligible meat products:

Deboned and bone-in beef derived from (1) cattle born and raised in the United States, (2) cattle raised in the United States for at least 100 days prior to slaughter, or (3) cattle legally imported into the United States from a country deemed eligible by Taiwan to export deboned beef to Taiwan. (Presently, Australia and New Zealand can export to directly to Taiwan with no restrictions.)³⁰

Because Mexican cattle are raised in the US for at least 100 days prior to slaughter, US beef produced from Mexican cattle are fully eligible for export from the US to Taiwan and need not be segregated to comply with the Taiwanese requirements.

85. Korea – eligible meat products:

Beef or beef products derived from (1) cattle born and raised in the United States, (2) cattle imported into the United States, for example from Canada, and raised in the United States for at least 100 days prior to slaughter, or (3) cattle legally imported into the United States from a country deemed eligible by the Korean government to export beef or beef products to Korea. Presently limited to Mexico, Australia, and New Zealand.³¹

Because Mexican cattle are raised in the United States for at least 100 days prior to slaughter, and in any event Mexico is deemed eligible by Korea to export beef to Korea, US beef produced from Mexican cattle is fully eligible for export from the US to Korea, and need not be segregated to comply with the Korean requirements.

86. Mexico determines the origin of US meat products for customs purposes in accordance with the NAFTA tariff rules of origin and country-of-origin marking rules.

87. There is no need to segregate beef produced in the US from cattle born in Mexico, Canada or the US for beef that will be exported to Mexico.

88. Furthermore, the criteria imposed by importing countries apply for the purpose of implementing SPS measures, and not with respect to labelling of the origin of the meat for consumer information.

89. Under the COOL measure, country of origin-based segregation is required because imported cattle must be tracked through the entire production process and must be accompanied by documentation that proves their country of origin. It is therefore more cumbersome, and expensive, than pre-COOL grade-based segregation. Moreover, pre-COOL

²⁹ Exhibit MEX- 75.

³⁰ Exhibit MEX- 76.

³¹ Exhibit MEX- 77.

segregation allowed meat packers to recoup the costs of that segregation because U.S. consumers place a premium on higher quality beef.

44. (Canada and Mexico) Please comment on the argument in paragraph 158 of the United States' first written submission that complying with the COOL requirements does not necessitate segregation of livestock or meat in the production process.

90. The USDA itself recognized that segregation would be necessary to comply with the COOL requirements, and conducted numerous studies which estimated costs of such segregation. These studies and testimony are cited in Mexico's First Written Submission (inter alia paragraphs 83-88).

91. There is no other practical way for processors to comply with the COOL regulations other than segregation, and the USDA acknowledged this. See, e.g., Exhibit MEX-51, page 13, Testimony of Keith Collins, Chief Economist, U.S. Department of Agriculture before the Committee on Agriculture, U.S. House of Representatives, June 26, 2003: "Several studies have estimated costs for the cattle/beef and hog/pork sectors at up to several billion dollars annually, after examining all costs for the entire supply chain, including segregation and identity preservation." (emphasis added) .

92. In 2000, the General Accounting Office (GAO) stated that "According to USDA officials, the Department did not develop an estimate of the cost to enforce H.R. 1144. However, the USDA had determined, on the basis of a 1998 proposal to label imported beef and lamb at the retail level, that enforcement "would require extensive record keeping, segregation and tracking of both imported animals and meat."³² -

93. In other testimony before the Subcommittee on Livestock and Horticulture, House Agriculture Committee, (Sept. 26, 2000) Caren A. Wilcox, Deputy Undersecretary for Food safety, U.S. Department of Agriculture said: "The major costs associated with country of origin labeling requirements are related to the cost of (1) segregating and preserving product identity; (2) the direct cost of labels; (3) enforcement costs; and (4) market disruption costs"³³

94. A 2005 Congressional Research Service Report to Congress noted "Under the COOL law, meats labeled as U.S. origin must come from animals that are born, raised, and slaughtered in the United States. The COOL law prohibits USDA from establishing a mandatory ID system to verify country of origin, but it does permit USDA to require persons supplying covered commodities to maintain a "verifiable audit trail" to document compliance."³⁴ The report added:

Animal ID prior to slaughter, and product tracking after slaughter and processing, generally now are within practical reach, most industry observers agree. However, the meat industry essentially has argued, notably in the context of COOL, that linking the two systems will be difficult and costly.

³² Report to the Chairman, Subcommittee on Livestock and Horticulture, Committee on Agriculture, House of Representatives: Beef and Lamb: Implications of Labeling by Country of Origin, January, 2000) (emphasis supplied). Exhibit MEX-49,

³³ Exhibit MEX-49

³⁴ Congressional Research Service, "Animal Identification and Meat Traceability", p. 3. Exhibit MEX – 78.

Industry officials said new costs will be incurred in identifying and segregating animals, physically reconfiguring plants and processing lines, and labeling and tracking the final products.³⁵

95. Unlike the European country-of-origin (and processing) labelling system, the U.S. law prohibits USDA from requiring that individual animals be identified. This prohibition effectively means that entire lots of cattle must be segregated rather than comingled as is the case in Europe. This segregation – based entirely on the country of birth of the animal – necessarily discriminates against cattle of Mexican origin.

96. In paragraph 158 of its First Written Submission, the US gives some options in order to comply with the COOL measure without the need to segregate. The only of those options that is feasible is the first:

(1) the slaughter house may process cattle of exclusively domestic origin, in which case one label could be used for all meat derived from such cattle;

In fact, as Mexico has demonstrated, the main US processors of meat have been using cattle of exclusively domestic origin.

97. The second option given by the US is as follows:

(2) the slaughter house may process cattle of exclusively foreign origin, in which case one label could be used for all meat derived from such cattle;

This option is impossible and impracticable because of the conditions of the US market and the limited market share of Mexican exports.

98. The third option is as follows:

(3) the slaughter house may process domestic cattle and imported cattle during the same production day when producing muscle cuts, in which case labels “B” or “C” could be used for all meat derived from such cattle

Contrary to what the US has mentioned this option requires segregation because there is still a need to identify the origin of the animal. Also this option is limited, if any, use because of pressure by the USDA on the US industry.

45. (Canada and Mexico) What are the additional time and cost implications of the COOL requirements for the transportation of Canadian and Mexican livestock to US processors?

99. Even though the COOL measure might have not caused actual transportation costs to increase, at least from the perspective of the Mexican cow-calf operators, it has created additional time and thus cost elements to Mexican cattle exports, since they are less attractive to all processing plant locations and create more burdensome record keeping obligations.

100. As a result of the COOL measure, only 3 out of the 24 slaughtering operations of the major packing plants (Tyson, JBS and Cargill), are currently taking Mexican born cattle.³⁶ The location of these 3 slaughterhouses has a direct relationship with the prior steps in the cattle-to-beef chain, namely, feedlots and backgrounder operations.

³⁵ *Ibid.* p. 11.

³⁶ See paragraph 157 of Mexico's First Written Submission and BCI MEX-37.

101. Prior to the COOL measure, Mexican born cattle travelled throughout the United States to locations where there was abundant grass, in order to afterwards be corn fed and slaughtered. After COOL, Mexican born cattle exclusively travel to backgrounding operations where it makes economic sense to grass-feed an animal and then sell it to a feedlot that is willing to take it -- depending on the cost of feeding, maintenance, the Mexican cattle discount and the futures board -- because it knows that a nearby processing plant would be interested in such cattle.

102. Therefore, the COOL measure has resulted in reduced demand for Mexican born cattle in the sense that it can only be sold to backgrounders and feedlots that can still make a profit selling them to a limited number of slaughterhouses.

46. (all parties) The complainants appear to accept that country-of-origin labelling, whether mandatory or voluntary, is not per se inconsistent with the covered agreements. Is a mandatory or voluntary COOL scheme in principle capable of providing sufficiently accurate information for consumers on the country-of-origin of meat without effectively requiring partial or full segregation throughout the production chain and without necessarily resulting in higher costs for processors who accept imported livestock and meat? If this is not the case, when arguing that the COOL requirements discriminate against imported livestock, is it sufficient for the complainants to demonstrate merely that the COOL requirements might de facto require segregation and might result in higher costs for imported livestock?

Not per se inconsistent

103. Mexico accepts that country-of-origin labelling, whether mandatory or voluntary, is not *per se* inconsistent with the covered agreements. Consistency must be determined on a case-by-case basis in the light of all relevant facts.

Partial or full segregation throughout the production chain and attendant costs

104. Yes. A mandatory or voluntary COOL scheme is, in principle, capable of providing sufficiently accurate information for consumers on the country-of-origin of meat without effectively requiring partial or full segregation throughout the production chain and without necessarily resulting in higher costs for processors who accept imported livestock and meat.

105. A complete answer to this question is dependent on what is meant by “sufficiently accurate information for consumers” and “partial or full segregation throughout the production chain”.

106. If the meaning of “sufficiently accurate information for consumers” refers to the strictness of the substantial transformation rule that is applicable to the origin claim then the content of that rule will affect whether partial or full segregation throughout the production chain is required. This point is illustrated in the context of this dispute by contrasting the COOL measure's born, raised, slaughtered and processed rule with the substantial transformation rule applied by the US customs authorities at the border to beef imported from other countries. The former requires segregation throughout the production chain while the latter does not. Under the normal customs rules, processors who accept imported livestock and meat will not necessarily incur higher costs. Under the COOL measure, processors who accept imported livestock and meat may incur higher costs.

107. It should be noted that the requirement to trace the country of birth will not necessarily result in higher costs for processors who accept imported livestock and meat. If, for example, the measure required that inputs to all meat products be precisely traced back to specific sources (e.g., the farm source as in the EU) then it is possible that the same costs would be incurred for all inputs regardless of national origin and, in principle, there would be no discrimination.

108. The meaning of “partial or full segregation throughout the production chain” also has a bearing on the answer to this question. Under a voluntary labelling scheme, producers incur costs only when they determine that there is economic value to do so. Thus, a subset of producers in the production chain may choose to segregate while others do not. In such circumstances, segregation will not be “throughout the production chain” but rather will be limited to certain producers operating within that chain. Processors who accept imported livestock and meat will not necessarily incur higher costs because those particular processors may choose not to implement the voluntary scheme.

Actual or potential segregation and discrimination/restriction on trade

109. Segregation, in itself, is not inconsistent with the prohibitions against discrimination and restrictions on trade. The segregation must, in whole or in part, result in WTO-inconsistent discrimination or a restriction on trade.

110. In this dispute, the COOL measure *de facto* creates actual segregation, discrimination and restrictions on trade. Mexico has presented *prima facie* evidence on these key factual elements of its claims. These are not “potential” *de facto* effects (i.e., “might *de facto* require segregation and might result in higher costs for imported livestock”).

47. (all Parties) Please define the scope of imported and domestic products to be compared for the purposes of the current dispute. Assuming that cattle and hogs fall within the scope of the products at issue in this dispute, how do we define “imported and domestic cattle and hogs” and domestic cattle and hogs?

111. As explained in paragraph 199 of Mexico's First Written Submission, although the COOL measure imposes labelling 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. Thus, in Mexico's case, the imported and domestic products to be compared for the purposes of the current dispute are imported and domestic cattle.

112. In Mexico's case, the term “imported cattle” refers to cattle that were born in Mexico, and then raised and slaughtered in the United States, including the cattle for which a portion of the feeding was done in Mexico and were then transported into the United States for raising and slaughtering.

113. The term “domestic cattle” refers to cattle that were born in the United States.

48. (all parties) Do US consumers prefer meat with the US-origin label (i.e. "Product of United States") and/or perceive such meat as higher in quality compared to meat with the foreign-origin label? If so, is there any evidence showing such preference or perception? Do US consumers understand a "Product of the United States" label to mean that the meat they purchase is derived exclusively from an animal that was "born, raised, and slaughtered" in the United States or also from an animal that was not born in the United States, but spent most of its life in the United States?

114. Mexico has no evidence of consumer preference or perception after the COOL measure. Before the COOL measure, US origin meat products derived from US born cattle and Mexican born cattle were perceived as the same.

115. After the COOL measure, to the extent that the end consumers of meat might at some point be able to choose between a label A and a label B, it is not clear whether they have a preference for label A. If their preference is label A, it is because the government has shaped a consumer perception by labelling one product as "Product of US", and other product "Product of US and Mexico", when both meat products derive from cattle that have complied with the same stringent sanitary regulations, were fed in the same grassland, and were later fed with the same grain, were slaughtered in the same facilities, and assigned the same grade by the USDA.

116. Further, it is clear that the average consumer will not be able to understand the exact meaning of the information contained in the label.

117. Finally, with regard to the question whether consumers perceive beef labelled "product of US" as higher quality, USDA itself stated as follows:

USDA finds little evidence that consumers are willing to pay a price premium for country of origin labeling (COOL). 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.³⁷

50. The United States submits that Canadian and Mexican livestock exports have increased significantly during the first seven months of 2010.

(b) (all parties) Please confirm whether this trend has been continuing since July 2010. Can the parties also elaborate on the development of the share of Canadian and Mexican imports in the US market during the same period and since July 2010?

118. As Mexico explained in paragraph 217 of its First Written Submission, a measure that modifies the conditions of competition to the detriment of imported products is inconsistent

³⁷ 73 Fed. Reg. 45106, 45126 (1 August 2008) (Exhibit MEX-4).

with GATT Article III and Article 2.1 of the TBT Agreement. It has been recognized by panels and the Appellate Body that the WTO rules protect conditions of competition and not trade volumes. Thus, it is not necessary to prove that the COOL measure has affected trade volumes; what is necessary is to prove is that the COOL measure has affected conditions of competition.

119. Since the COOL implementation, the price gap between US and Mexican cattle has broadened. Thus, even though prices for Mexican calves are going up, they are increasing less than proportionally compared to American cattle, and this has affected the absolute volume of exports.

120. In this regard, Mexico has presented clear evidence demonstrating that the US processors have applied a discount ranging from \$45 USD to \$60 USD per head to the purchases of cattle born in Mexico to compensate for the costs of the COOL requirements.

121. In any event, trade volumes were plainly affected by the COOL measure, and even though the export volumes of Mexican cattle have recently increased, they have not reached the average level they had before COOL.

122. Furthermore, to the extent that the export volumes have increased, it has been because the Mexican cow-calf operators have absorbed the price discount applied against their exports, losing profits in order to retain market share taking into account their need to sell the calves, which cannot be sold in Mexico due to the lack of backgrounders with the capacity to raise and feed them.

123. Mexican customs data³⁸ (Mexican Harmonized System 0102.90.99 Other live animals) indicates that exports in 2007 were 1,087,784 head, and in 2008, the first year of the COOL measure, exports diminished 32% to 737,504 head.

124. From 2008 on, Mexican cattle exports have been slowly recovering; 2009 exports were 959,406 head, and for the first 7 months of 2010, 648,143 head have been exported, an 11% increase from the first 7 months of 2007 (583,829 heads for those 7 months).

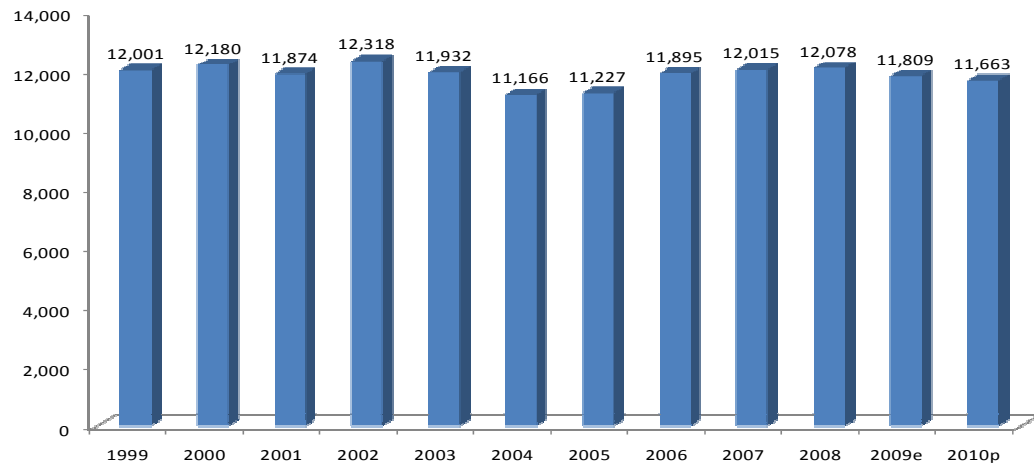
125. Even though there has been an increase in numbers, the US dollar value per head in 2007 was \$355, and in 2010 it has been reduced to \$299 (the value was \$316 in 2008 and \$268 in 2009).

126. Mexican calves represent just a small fraction of the US cattle market. Thus, the Mexican industry is considered to be a "price taker" in the market and is highly sensitive to the ups and downs of US demand and supply of beef products. US production is shown in figure 1 below.

127. During the last two years, exports of Mexican calves to the US have been favorably influenced by the tightness of the meat supply in the US and by the increased US exports to markets such as Japan, Russia, South Korea and Egypt (figure 2 below). According to the USDA's projections, livestock herd numbers in the US are expected to decline in the following years. This has boosted the price of calves in the U. S. market, and higher prices have lead to increased Mexican exports.

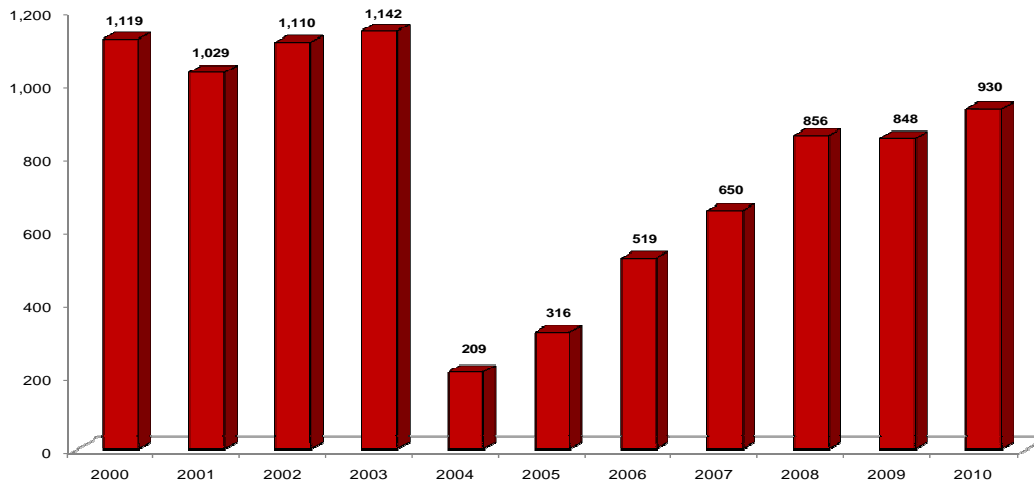
³⁸ See Exhibit MEX – 79

FIGURE 1: TOTAL U. S. BEEF PRODUCTION
(Thousand tonnes)



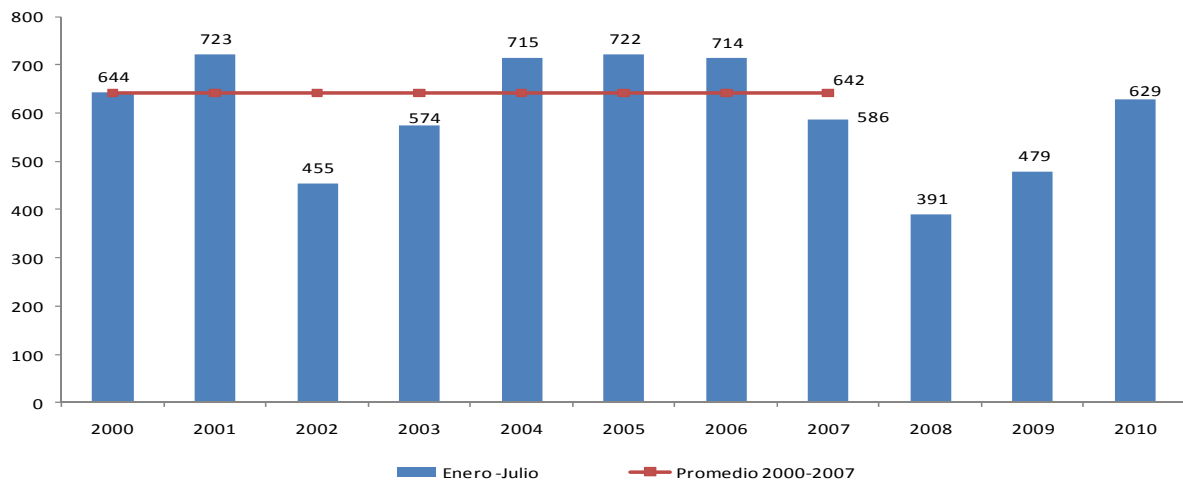
Source: USDA.

FIGURE 2: TOTAL U. S. EXPORTS OF BEEF
(Thousand tonnes)



128. Nevertheless, it is important to highlight that, even though during the period January to July 2010 the number of Mexican calves exported to the US reached 629,000 head, that figure is well below the average for the same months during the pre-COOL (2000-2007) period (figure 3).

FIGURE 3: EXPORTS OF MEXICAN CALVES TO THE U. S., 2000-2010 */
(Thousands of Heads)



*/ for each year, the amount represents accumulated exports from January through July.

Source: U. S. International Trade Commission.

Article 2.2

51. (all parties) Do the parties agree that the first sentence of Article 2.2 of the TBT Agreement should be read as containing a general rule, a violation of which can be found based on the establishment of the elements contained in the second sentence? If so, what is the legal basis for such interpretation?

129. Yes. Mexico agrees that the first sentence of Article 2.2 of the TBT Agreement should be read as containing a general rule, a violation of which can be found based on the establishment of the elements contained in the second sentence.

130. Article 2.2 reads as follows:

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. 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.

131. The first sentence of Article 2.2 sets out the general obligation in the provision. It is derived from the first and third sentences of Article 2.1 of the 1979 Tokyo Round *Agreement*

on *Technical Barriers to Trade* (also referred to as the Standards Code). Those sentences read as follows:

2.1 Parties shall ensure that technical regulations and standards are not prepared, adopted or applied with a view to creating obstacles to international trade. [...] They shall likewise ensure that neither technical regulations nor standards themselves nor their application have the effect of creating unnecessary obstacles to international trade.

132. Insofar as these two distinct obligations from the Standards Code were combined into a single sentence in Article 2.2 of the TBT Agreement, that single sentence is itself a distinct obligation.

133. The second sentence of Article 2.2 begins with the phrase “[f]or this purpose” which refers to the purpose set out in the first sentence. By virtue of this phrase, the second sentence elaborates upon the meaning of the general obligation in the first sentence and establishes elements upon which a violation of that obligation can be established.

134. The third and fourth sentences elaborate upon the meaning of “legitimate objectives” and “risks” in the second sentence and, thereby, further elaborate upon the meaning of the general obligation in the first sentence.

52. (all parties) Is there a particular sequence that the Panel should follow in analyzing the elements of the obligations under the second sentence of Article 2.2 of the TBT Agreement? In other words, assuming that the elements include "not more trade-restrictive than necessary", "fulfil a legitimate objective", and "taking into account of the risks non-fulfilment would create", is there any particular order in which these elements should be considered in examining a claim under Article 2.2?

135. In its first written submission Mexico presents a logical sequence for considering the elements of its claim under Article 2.2.³⁹ Once it is determined that the measure is a technical regulation that restricts trade (see discussion in Mexico's response to Question 66), the starting point is necessarily whether the COOL measure fulfils a legitimate objective since that element must be established before assessing whether that technical regulation is more trade-restrictive than necessary... taking into account of the risks non-fulfilment would create. This first element can be broken into three components. What is the objective of the technical regulation? Is that objective a legitimate objective? If it is a legitimate objective, does the technical regulation fulfil that objective?

136. Once the first element is determined, the remaining elements can be considered—i.e., whether the technical regulation is more trade-restrictive than necessary... taking into account of the risks non-fulfilment would create.

³⁹ First Written Submission of Mexico, paragraphs 274-318.

54. (Canada and Mexico) In their first written submissions, Canada and Mexico allege that an objective of the COOL requirements is trade protectionism. The United States argues that the COOL requirements were adopted, in essence, to provide consumer information. How should the Panel take into account the United States' stated objective in assessing the complainants' claim under Article 2.2? Please answer the question in light of the Appellate Body's statement in *EC – Sardines* that "the TBT Agreement acknowledges the right of every WTO Member to establish for itself the objectives of its technical regulations while affording every other Member adequate opportunities to obtain information about these objective..." (paragraph 276). Please comment on the argument in para. 61 of Australia's third party written submission that "the 'stated objective' of the measure must be accepted in 'good faith'."

Appellate Body statement in *EC – Sardines*

137. The cited passage from *EC – Sardines* concerns the allocation of the burden of proof under Article 2.4 of the TBT Agreement. Specifically, the Appellate Body held that the complaining Member seeking the ruling on the inconsistency with Article 2.4 had the burden of establishing that the international standard in question had not been used as a basis for the technical regulation and that the international standard was not effective and appropriate to fulfil the legitimate objectives pursued by the respondent Member.⁴⁰ The Appellate Body's statement in paragraph 276 of its report was made in the context of the challenges facing a complaining Member in obtaining information on the legitimate objectives and the appropriateness of the international standard to fulfil those objectives. It rejected the argument that such challenges justified assigning the burden to the responding rather than the complaining Member.

138. The burden of proof is not at issue in this dispute. Mexico acknowledges that it bears the burden of proof to establish a *prima facie* case for each element of its claims. This includes the "fulfil a legitimate objective" element of its claim under Article 2.2 of the TBT Agreement.

139. Australia relies on paragraph 278 of the Appellate Body report for the proposition that it is "for the complainant to accept the respondent's 'stated objectives' in 'good faith'".⁴¹ That paragraph of the Appellate Body Report does not support this proposition. The Appellate Body was referring to the adequacy of a Member's response to a request for information under Article 2.5 of the TBT Agreement. A complaining Member must assume that the responding Member will respond fully and adequately to a request under Article 2.5. It was not referring to accepting the respondent's stated objective in good faith.

140. Mexico has not made a request under Article 2.5 of the TBT Agreement and that provision is not at issue in this dispute.

141. If anything, the Appellate Body Report contradicts Australia's proposition that the stated objective of the measure must be accepted in good faith. At paragraph 280 of the Report the Appellate Body specifically noted that a complainant could "develop arguments

⁴⁰ Appellate Body Report, paragraph 275.

⁴¹ Third Party Written Submission of Australia, paragraph 59.

related to the objectives of the measure". If the stated objective had to be accepted in good faith there would be no need to develop arguments concerning that objective.

The objective of a technical regulation is not self judging and is part of a Panel's objective assessment of the facts

142. As discussed in Mexico's response to Question 52, the starting point in the application of the obligation in Article 2.2 is necessarily whether the technical regulation fulfils a legitimate objective. The "objective" of the technical regulation therefore forms the foundation for this obligation.

143. If the determination of the "objective" of a technical regulation was completely self judging, a Member could establish an objective in a manner that completely circumvents the obligation in Article 2.2 and renders it a nullity. For example, assume that it can be argued that a technical regulation is capable of two objectives—i.e., consumer information and the protection of domestic industry. If the true objective is the protection of the domestic industry but the claimed objective is consumer information, the measure could be insulated from challenge under Article 2.2 simply by the responding Member formally acknowledging the consumer information objective without acknowledging (or even denying) the objective to protect the domestic industry. It may be that a technical regulation has more than one objective such as both consumer information and the protection of the domestic industry. Determining that the technical regulation has more than one objective could have a material bearing on the analysis of the other elements of Article 2.2 in particular the determination of the legitimacy of the objectives.

144. Article 11 of the DSU requires a Panel to make an objective assessment of the facts of the case. In this dispute, part of that objective assessment includes the facts pertaining to the objective of the COOL measure. Nothing in the TBT Agreement removes this important factual determination from the scope of the Panel's assessment of facts.

145. Mexico acknowledges the right of every WTO Member to establish for itself the objectives of its technical regulations but this does not mean that another Member cannot question the "stated" or "acknowledged" objectives and cannot challenge those stated or acknowledged objectives before a Panel and request an objective assessment of the relevant facts.

146. Ascertaining the true objectives of a technical regulation rather than just the stated or acknowledged objectives is an important part of the interpretation and application of Article 2.2.

The Panel must determine all of the relevant details of the objectives of the technical regulation

147. As part of its objective assessment of the facts, the Panel must determine all relevant details of the objectives of the technical regulation. The necessity of this determination is illustrated by the facts of this dispute.

148. Assuming that the objective of the COOL measure is consumer information as argued by the United States (as stated at paragraphs 279-283 of its First Written Submission Mexico's position is that the objective is not to provide consumer information but rather to protect the US industry), it is not enough to identify the objective of the COOL measure simply as "consumer information". Rather, it is a particular type of consumer information,

namely country of origin labelling information and a particular type of country of origin labelling information, namely where the cattle which were processed into the beef were born, raised, slaughtered and processed.

149. The Panel can only assess whether an objective of a technical regulation is “legitimate” if it first objectively determines that objective to this necessary level of specificity.

55. (Mexico) Does Mexico agree that consumer information is never a legitimate objective when the information supplied pertains to origin? If that is not Mexico's position, please explain the circumstances, if any, in which consumer information pertaining to origin may be a legitimate objective under Article 2.2.

150. It is not Mexico's position that consumer information is never a legitimate objective when the information supplied pertains to origin. However, because origin labelling inherently distinguishes foreign from domestic products in the marketplace, assertions that the information benefits consumers should be subject to a higher level of scrutiny than objectives involving the provision of other types of information.

151. First, Mexico's challenge applies to a specific type of internal measure and not to country of origin marking at the border. It does not encompass consumer information in the form of marks of origin applied at the border in accordance with Article IX of the GATT 1994.

152. Second, with respect to internal measures in the form of technical regulations governed by Article 2.2 of the TBT Agreement, as explained in Mexico's response to Question 54, all of the relevant details of the objectives of a technical regulation must be determined in order to define the “objective” of a technical regulation. It is not just information on country of origin, it is a specific type of country of origin information.

153. Mexico's position is that the provision of the *specific type of country of origin information* at issue in this dispute is never a legitimate objective.

154. The information purportedly given to consumers by the COOL measure 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, as required by the COOL measure, has only one purpose which is inherently protectionist. In the case of meat products it is to distinguish between: (i) beef produced from cattle that are handled by US domestic industry over their entire lifespan; and (ii) beef produced from cattle that are handled by a foreign industry at some point during their lifespan. 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.⁴²

155. Mexico notes that under the U.S. customs law, certain types of commodities are exempt from the requirement to be individually marked with their country of origin. This list of exempted items includes the following:

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

⁴² See First Written Submission of Mexico, paragraphs 284-295.

advanced in any manner further than is necessary for their safe transportation.⁴³

156. Accordingly, under the customs law, such items as frozen fish and bulk fruits and vegetables need not be marked with their country of origin when sold in bulk (that is, unpackaged). Aspects of the COOL measure not at issue in this dispute have the effect of requiring such items to be labelled in some manner when sold in grocery stores. Mexico is not challenging those aspects of the COOL measure in this proceeding. Mexico is also not challenging the COOL measure's requirement that Mexican meat products imported into the US be labelled with the country of origin required by the customs law.

157. As applied to meat products produced in the US, however, the COOL measure applies a different rule of origin that the one it applies at the border, as well as special labelling rules that have the effect of discouraging US processors from using imported cattle. In Mexico's view, the objective of the COOL measure, as applied to muscle cuts and ground beef produced in the US, is to discourage the use of Mexican cattle by requiring tracking of the birthplace of cattle that is not otherwise required for SPS or other reasons.

59. (Canada and Mexico) Please describe the NAFTA marking and labelling requirements for US imports from Mexico and Canada.

158. The US has long had country of origin labelling 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.⁴⁴

159. 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"⁴⁵ (for imports from NAFTA countries).

160. 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.

161. 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.

⁴³ 19 C.F.R. § 134.33 (Exhibit MEX-31).

⁴⁴ 19 U.S.C. § 1304(a) (Exhibit MEX-25).

⁴⁵ 19 C.F.R. § 134.1(d) (Exhibit MEX-26).

162. 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.⁴⁶

163. 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, 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.

164. 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.⁴⁷

165. The COOL measure itself incorporates the normal customs rules of origin for imported meat products by stating that the origin declared upon importation to the customs authorities is the required origin under the COOL measure (i.e., for the D label). Accordingly, the COOL measure applies a different rule of origin for imported meat products than is applied to US domestic meat products.

60. (Canada and Mexico) In examining the trade-restrictiveness of the COOL requirements under Article 2.2 of the TBT Agreement, should the Panel refer to the arguments and evidence raised by Canada and Mexico in the context of their claims under Article 2.1 of the TBT Agreement ("treatment no less favourable")?

166. Yes.

167. An obstacle to international trade is a measure that obstructs, prevents, retards or impedes trade.⁴⁸ In Mexico's view, such obstacles could be reflected in a reduction of competitive opportunities for imported products as well as in restrictions on trade flows. This is consistent with the view that the GATT disciplines on the use of restrictions are meant to protect the competitive opportunities of imported products.⁴⁹

168. The arguments and evidence raised by Canada and Mexico in the context of their claims under Article 2.1 of the TBT Agreement demonstrate the reduction in competitive opportunities for imported cattle and hogs that, therefore, also demonstrate the trade restrictiveness of the COOL measure.

⁴⁶ 19 C.F.R. § 102.20 (Exhibit MEX-27).

⁴⁷ 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).

⁴⁸ According to *The Concise Oxford English Dictionary*, Ninth Edition, an "obstacle" means a "thing that obstructs progress". "Obstruct" means to "block up; make hard or impossible to pass along or through; prevent or retard the progress of; impede".

⁴⁹ Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States*, WT/DS27/RW/USA and Corr.1, adopted 22 December 2008, as upheld by the Appellate Body Reports, WT/DS27/AB/RW2/ECU, WT/DS27/AB/RW/USA, paragraph 7.677.

61. (all parties) The United States argues that an alternative measure that could fulfil the measure's objective must also be significantly less trade restrictive. Is there a legal basis for suggesting that the word "significantly", which does not appear in Article 2.2 of the TBT Agreement, should nevertheless form part of the interpretation of that provision?

169. Although Article 5.6 and footnote 3 of the SPS Agreement provide guidance for the interpretation of the phrase “shall not be more trade restrictive than necessary to fulfil a legitimate objective” in Article 2.2 of the TBT Agreement, there is no legal basis for suggesting that the qualifying term “significantly” from footnote 3 should form part of the interpretation of Article 2.2.

170. The first two sentences of Article 2.2 of the TBT Agreement read as follows:

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. 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...

171. The relevant phrase “shall not be more trade-restrictive” is not qualified by the term “significantly” or any other term relating to the magnitude of the trade-restrictive effect.

172. Although instructive in the interpretation of Article 2.2, the language of Article 5.6 and footnote 3 of the SPS Agreement uses different terminology and wording. The Appellate Body has made it clear that the use of different terms in the texts of the WTO Agreements implies a difference in meaning.⁵⁰ The fact that a particular treaty provision is silent on a specific issue (in the case the magnitude of the trade-restrictive effect) must be given some meaning.⁵¹

173. There is no indication in the text of Article 2.2 of the TBT Agreement or other provisions of that Agreement that a “significance” qualification was intended to be included in Article 2.2 by implication.

174. Accordingly, there is no legal basis to suggest that the word “significantly” should form part of the interpretation of Article 2.2.

175. This being said, the alternative measures identified by Mexico in its First Written Submission are significantly less trade restrictive than the COOL measure and therefore would still meet the threshold under this provision if the qualifying word “significantly” was added.

⁵⁰ Appellate Body Report, EC Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, paragraph 164.

⁵¹ Appellate Body Report, United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, paragraph 65.

62. (all parties) Assuming that the standard under Article 2.2 is "significantly less trade restrictive", as opposed to "less trade restrictive", would this then mean the alternative measures suggested by the complainants fail to meet the standard under Article 2.2?

176. As explained in Mexico's response to Question 61, Mexico believes that there is no legal basis to use the word "*significantly*" as part of the interpretation of the Article 2.2 of TBT. Nevertheless, assuming *arguendo* that the word *significantly* forms part of the interpretation of the TBT Article 2.2, it is clear that the reasonably available alternatives identified by Mexico in its First Written Submission – i.e. a voluntary country of origin labelling requirement or a mandatory labelling requirement based in a substantial transformation test – are indeed "*significantly*" less trade restrictive compared with the COOL measure.

63. (all parties) Under the rules of interpretation codified in the Vienna Convention on the Law of Treaties, what is the relevance of "a December 15, 1993 letter from the Director-General of the GATT to the Chief US Negotiator concerning the application of Article 2.2 of the TBT Agreement" in interpreting Article 2.2?

177. In accordance with Article 3.2 of the DSU, WTO Members recognized that the dispute settlement mechanism under the WTO "... serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law."⁵²

178. The customary rules of treaty interpretation codified in the Vienna Convention prescribe under Article 31 that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". This principle has been followed by panels and the Appellate Body in past disputes, in which WTO provisions have been interpreted according to the "ordinary meaning of the words in the relevant provision", viewed in their context and in the light of the object and purpose of the agreement. The ordinary meaning of a term in a provision is to be discerned on the basis of the plain text.

179. In accordance with article 32 of the Vienna Convention, supplementary means of interpretation, including the preparatory work of a treaty and the circumstances of its conclusion, can be used when an ordinary meaning of the treaty is ambiguous or obscure; or leads to a result which is manifestly absurd or unreasonable.

180. Mexico does not consider it necessary for purposes of TBT article 2.2 to have recourse to supplementary means of interpretation. There is nothing in the plain text of article 2.2 of the TBT that is ambiguous or obscure or leads to a result manifestly absurd or unreasonable. A panel in *India – Quantitative Restrictions* declined to resort to supplementary means of interpretation, finding "...that the meaning resulting from the application of Article 31 is neither ambiguous nor obscure, and does not lead to a manifestly

⁵² See Article 3.2 of the DSU.

absurd or unreasonable result. We therefore do not need to consider the preparatory work as reflected in the negotiating history to determine the meaning of the terms"⁵³.

181. In the event that the letter provided in Exhibit US-53 has some relevance for the interpretation of the TBT, the panel will realize from the plain reading of the letter that during the TBT negotiations the US government proposed the inclusion of a footnote under article 2.2 and 2.3. of the TBT Agreement. This footnote would have been equivalent to the footnote under article 5.6 of the SPS Agreement. Specifically, the proposed text by the US included the following:

...is not more trade restrictive than necessary, and the changed circumstances or objectives cannot be addressed in a less trade-restrictive manner, unless there is another technical regulation, including alternative versions of the technical regulations, reasonably available taking into account technical and economic feasibility, that fulfills the legitimate objective and is significantly less restrictive to trade.

182. This proposed text was not adopted by the negotiators. As the Director General of the GATT explained to the US government, "it was not possible to achieve the necessary level of support for the US proposal to add a new footnote to Article 2.2 and 2.3 of the Agreement".

183. In Mexico's view the letter provided by the US demonstrates that (i) the drafters of the TBT Agreement decided to not include a provision equivalent to footnote of Article 5.6 of the SPS Agreement; and (ii) accordingly there is no legal basis to suggest that the word "significantly" should form part of the interpretation of Article 2.2 of the TBT.

64. The United States explains that a regime based on substantial transformation would not convey accurate information regarding livestock that may have spent only a short period of its life in the United States before being slaughtered and that this must be a key part of any labelling regime that it adopts (paragraphs 255-257 of the United States' first written submission).

(a) (Canada and Mexico) Do the COOL requirements convey accurate information in this regard?

184. The COOL measure provides information on the labels with regard to the possible origin of the product. Several countries can be named, suggesting that meat products may come from more than one country. In this instance, specific information as to the amount of time that the animal spent in the United States is not provided. As a matter of fact, cattle born in Mexico spend most of their life in the US. The COOL measure does not provide this kind of information.

185. It is Mexico's position that labelling based on substantial transformation would convey more accurate information to the consumer. Consumers would be informed that a particular meat product was derived from an animal slaughtered in the United States, without being confused by having more than one country on a label.

⁵³ Panel Report, India – Quantitative Restrictions on Imports of Agricultural, textile and Industrial Products, WT/DS90, adopted 22 September 1999, paragraph 5.110.

- 65. (all parties) Let's suppose there are two separate packages of beef, one labelled as "Product of the United States, Product of Canada, and Product of Mexico" and another labelled as "Products of Mexico, Product of Canada, and Product of the United States". Do the parties have any evidence showing that average consumers in the United States are able to tell the difference between these two labels?**

186. While there have been no studies done on the extent of consumers' knowledge about the COOL labels, it is clear that these labels are *prima facie* incomplete and misleading. The two hypothetical labels proposed will be referred to as "the first label" and "the second label." The first label, "Product of the U.S., Canada, and Mexico," is a category B label and denotes that the animal from which the beef cut was derived was born in Canada or Mexico and raised and slaughtered in the U.S. The second label, "Product of Mexico, Canada, and the U.S." is a category C label and denotes that the animal from which the beef product was derived was born and raised in Mexico or Canada and slaughtered in the US. This type of beef cut is also known as beef derived from cattle "imported for immediate slaughter."

187. There is no evidence that US consumers either can or do perceive the vast implications of this minute change in word order. Moreover, even if a US consumer did perceive such a small change and even if a US consumer knew the particulars of the COOL Final Rule, that consumer still could not be completely sure about the implications of the label because beef that would qualify for the Category B label may be labeled with a Category C label in compliance with the Final Rule.⁵⁴ However, beef that only qualifies for the Category C label may not be labeled with the Category B label (but there is no way to tell whether that beef could have qualified for a Category B label). Therefore, with respect to Category B and C labels, the most the US consumer can know is that he does not know where the animal from which his beef is derived was born or raised.⁵⁵

188. In fact, consumers would need a matrix to determine even roughly where their beef (or other meat products) originated under the COOL regime. Even with the help of the matrix (below), some items would not be marked at all. This scheme does not, indeed, cannot enlighten consumers. Its only purpose has been, and remains, to create extra costs for foreign cattle.

⁵⁴ See COOL Final Rule, 74 Fed. Reg. 2658, 2706 at §65.300(e)(4) ("In each case of paragraphs (e)(1), (e)(2), and (e)(4) of this section, the countries may be listed in any order").

⁵⁵ This is all the more true considering the unusual circumstance of an animal born in the U.S., raised in Mexico, and slaughtered in the U.S. would result in either a Category B or Category C label.

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

189. Note in particular that there is no way for a US consumer to tell if the animal from which his beef was derived was born and raised in the US, and then slaughtered in Mexico. Such beef would be labeled with the Category D label ("Product of Mexico").

66. (Canada and Mexico) Are all technical regulations by definition "trade restrictive" under Article 2.2 of the TBT Agreement. If not, please explain how the COOL requirements are trade restrictive within the meaning of Article 2.2 of the TBT Agreement.

190. No. Technical regulations are not by definition "trade restrictive" under Article 2.2 of the TBT Agreement. Certain technical regulations could in fact facilitate trade. The COOL measure is, however, a technical regulation that restricts trade.

191. As discussed in Mexico's response to Question 60, an "obstacle to international trade" or "trade restriction" is a measure that obstructs, prevents, retards or impedes trade. In Mexico's view, such obstacles could be reflected in a reduction of competitive opportunities for imported products as well as in restrictions on trade flows. This is consistent with the view that the GATT disciplines on the use of restrictions are meant to protect the competitive opportunities of imported products.⁵⁶

192. The COOL measure has altered the US beef production process so as to restrict the access Mexican feeder cattle have to the US market and deny competitive opportunities to Mexican feeder cattle in that market.

193. Compliance with the COOL measure by participants in the US beef industry has caused the differentiation and segregation of cattle and beef by the nationality of birth of the feeder cattle during the entire production process. Participants are required to make available to retailers the necessary records to substantiate such segregation.

⁵⁶ See citations in Mexico's response to Question 60.

194. This has resulted in:

- the reduction of the number of plants that slaughter and process finished cattle derived from Mexican feeder cattle;
- the reduction of the number of days per week that such cattle are slaughtered and processed;
- the reduction of the overall number of such cattle that are slaughtered and processed;
- a requirement that advance notice be given to processors prior to accepting such cattle; and
- the reduction of the price paid for such cattle by means of applying a discount to the purchase price.

195. Accordingly, the COOL measure creates an obstacle to international trade and is trade restrictive.

72. (Mexico) Does Mexico agree that the COOL requirements create an incentive to process cattle and meat in Mexico? If so, what prevents Mexican industry from conducting these value-added operations at home?

196. COOL does not create an incentive to process cattle and meat in Mexico.

197. For-export cattle, breeding in Mexico is concentrated in the Northern Mexican States of Sonora, Chihuahua, Coahuila, Tamaulipas and Durango. These states consist mainly of desert and semi-desert ecosystems

198. Mexico does not have the backgrounding and feedlot operations to sustain, within its borders, the cost-effective processing of the cattle that are currently exported to the US. The Northern Mexican states receive less rain than their Southern and mid-US counterparts, which causes a lesser availability of grass and grains.

199. Ecosystems within the Mexican Northern States ordinarily sustain grass and grain production exclusively for the breeding operations aimed at producing for export cattle to the US.

200. In the northern states of Mexico, cattle have traditionally been sold to US buyers for pasturage and finishing. This is because of both geographic and climatic conditions in these areas are unsuited to pasturing cattle for long periods, while there are good grazing areas in the Southern and middle part of the US. Further, feedlots use large quantities of corn and soy for feeding operations. Mexico also lacks sufficient feed to handle large quantities of cattle from its northern states. It is much more efficient to ship US origin feed to feedlots in locations such as Texas than to Mexico. It is also less expensive to ship cattle than it is to buy the feed necessary to fatten them.

201. Mexico would have developed a larger meat processing industry many years ago if it were economically feasible to do so. Although the COOL regime lowers the selling price for Mexican cattle sold to the US, there are simply insufficient pastures, feedlots and grain to handle the Mexican cattle within its borders. Mexico is trapped by geography, climate, and history into dependency upon the US market for much of its cattle production in the northern Mexican states.

202. Beef consumption in Mexico is largely satisfied through grass feeding operations in the Southern Mexican States; this type of operation yields muscle cuts with a stronger flavor and yellow-colored and less abundant fat content, in comparison to grain-finishing (feeding lots), which yields a milder flavor and more abundant and white-colored fat content. Domestic beef consumption is also satisfied, to a lesser extent, with grass and then grain feeding operations in the Northern Mexican States; this type of production has a much greater cost to the consumer and does not ordinarily travel throughout Mexico and remains in the areas of production and larger cities.

75. (all parties) Please provide evidence showing that US consumers are satisfied with origin information provided under the COOL requirements.

203. As explained above, the average consumer will not be able to understand the exact meaning of the information contained in the label. Mexico is unaware of any study which shows "satisfaction" with the COOL labeling – but even if there were such evidence, it would indicate that consumers were unaware of what the COOL labels actually meant.

78. (Mexico) Please elaborate on how the rules regarding the country-of-origin contained in CODEX-STAN 1-1985 are specially designed and suitable for achieving the purpose of informing consumers about the country-of-origin of pre-packaged foods.

204. CODEX-STAN 1-1985 is an effective means for achieving the pursued objective because its purpose is -to protect consumers from deceptive practices, and information on the country of origin is conveyed through a label. Mexico sees no reason why the CODEX-STAN 1-1985 is an ineffective means for accomplishing the stated objective of the COOL measure.

205. 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.

206. CODEX-STAN 1-1985 is also 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 purpose of informing consumers about the country of origin of prepackaged foods.

207. 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.

79. (all parties) CODEX-STAN 1-1985 is entitled "CODEX General Standard for The Labelling of Prepackaged Foods". How is this standard relevant for livestock and meat that is not pre-packaged? Is pre-packaged meat actually covered by the COOL requirements? What is the relevance of the amendments and revisions of CODEX-STAN 1-1985 in 1991 and 1999?

208. The CODEX-STAN 1-1985 refers to the labelling of prepackaged food. Although the standard is not directly relevant to livestock, it is relevant for the meat that derives from that livestock.

209. Although the standard does not apply to meat that is not prepackaged, it would be relevant if that meat were to be prepackaged at some point. Furthermore, most of the stores covered by the COOL measure have their meat products already prepackaged for the end consumer. Many specialty butcher stores likely cut beef to order for individual consumers, but they are not covered by the COOL measure because they do not sell fruits and vegetables. Thus, even though the standard might not apply to meat that is not prepackaged, it is relevant for most of the meat products covered by the COOL measure.

210. For purposes of this dispute, it is our understanding that the amendments of 1991 and 1999 have no substantial relevance in relation with the country of origin labeling contained in the CODEX-STAN 1-1985.

211. CODEX-STAN 1-1985 and its amendments still constitute an effective and appropriate means for the fulfillment of the objective of informing consumers of the country of origin.

81. (all parties) How were consumer interests in general and US consumer interests in particular articulated and represented when developing the relevant CODEX standard?

212. It is important to note that “[s]ince its beginning, the [CODEX] Commission has welcomed the participation of consumers, whose organizations have been represented at its sessions since 1965.”⁵⁷

213. Although representations at CODEX sessions are on a country basis, “[d]elegations may, and often do, include representatives of industry, consumers’ organizations and academic institutes.” Furthermore, “organizations and international NGOs also attend in an observer capacity. Although they are “observers”, the tradition of the Codex Alimentarius Commission allows such organizations to put forward their points of view at every stage except in the final decision, which is the exclusive prerogative of member governments.”⁵⁸

214. Therefore, consumer interests are articulated and represented when the CODEX standards are developed, either through the inclusion of consumers’ organizations in the delegations, or through the participation of consumers NGOs as “observers” allowed to put forward their points of view.

215. During the 16th Session of the CODEX Alimentarius Commission, held on July 1985, during which the text of CODEX STAN 1-1985 was approved, the minutes indicate that the International Organization of Consumers Unions (IOCU) participated as an “observer”.⁵⁹ This organization, now known today as Consumers International, “is the world federation of consumer groups that, working together with its members, serves as the only independent and authoritative global voice for consumers.”⁶⁰ It has over 220 member organizations in 115 countries, and in the United States, it represents the American Council on Consumer Interests and the Consumers Union of the United States Inc.⁶¹ This organization has been present in

⁵⁷ See Exhibit MEX-62 p. 28.

⁵⁸ *Ibid.* p. 15.

⁵⁹ Exhibit MEX-80

⁶⁰ Exhibit MEX-81 (Consumers International webpage).

⁶¹ *Ibid.*

every Session of the CODEX Committee on Food Labelling since 1971. This organization was joined by the International Organization of Consumer Food Organizations since 2003.

82. (Mexico and the United States) What kind of evidence would be sufficient to show that a Member implementing a technical regulation did “take into account” the special needs for developing country Members under Article 12.3 of the TBT Agreement?

216. To answer this question it is necessary to include Article 12.1 of the TBT Agreement. Article 12.1 is relevant whenever there is a violation of one of the other provisions of Article 12 including Article 12.3.⁶² Article 12.3 must therefore be interpreted and applied together with Article 12.1.

217. Articles 12.1 and 12.3 concern actions to be taken or avoided by Members so as to safeguard the interests of developing country Members such as Mexico.⁶³

218. Article 12.1 requires that the United States provide *differential and more favourable* treatment to Mexico through, *inter alia*, Article 12.3. Article 12.3 requires the United States to *take into account* of the special development, financial and trade needs of Mexico *with a view to ensuring* that technical regulations do not create unnecessary obstacles to exports from Mexico. The following terms require further elaboration:

- The ordinary meaning of “differential” is “constituting a specific difference; distinctive”.⁶⁴ In the context of special and differential treatment of developing country Members, this means treatment that is different and distinctive from the treatment accorded to developed country Members.
- The term “more favourable treatment” can have many meanings depending on its context. In general terms, it connotes discrimination in favour of developing country Members. In this instance, Article 12.3 is important context for the meaning of the term. That provision requires the taking into account of certain information for the achievement of a specific result (discussed below) which is to make certain that the COOL measure does not create unnecessary obstacles to exports from Mexico. As discussed in Mexico's response to Question 60, the arguments and evidence raised by Canada and Mexico in the context of the “treatment no less favourable” claims under Articles III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement can be used to demonstrate obstacles to trade or trade restrictiveness. These arguments and evidence are therefore relevant to defining the meaning of “more favourable treatment” in the context of an obligation not to create unnecessary obstacles to exports.
- The meaning of “take into account of” is elaborated upon by the Panel in *EC – Biotech* in the context of Article 10.1 of the SPS Agreement. The Panel stated that “the obligation laid down in Article 10.1 is for the importing Member to ‘take account’ of developing country Members' needs... the dictionary defines the expression ‘take account of’ as ‘consider along with other factors before reaching a

⁶² Panel Reports, *EC – Biotech*, paragraph 7.47, subparagraph 77.

⁶³ Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions, Note by Secretariat, WT/COMTD/W/77, 25 October 2000, paragraphs 9-10 and p. 39.

⁶⁴ The *Concise Oxford Dictionary, Ninth Edition*, p. 376. See Exhibit MEX-82

decision’".⁶⁵ The meaning of the term “consider” was elaborated upon by the Appellate Body in *US – Softwood Lumber* in the context of Article 2.2.1.1 of the Anti-Dumping Agreement:

The ordinary meaning of the term "consider" is, *inter alia*, to "look at attentively", "reflect on", or to "weigh the merits of ". In the context of the second sentence of Article 2.2.1.1, we read the term "consider" to mean that an investigating authority is required, when addressing the question of proper allocation of costs for a producer or exporter, to "reflect on" and to "weigh the merits of" "all available evidence on the proper allocation of costs". As we stated above, the requirement to "consider" evidence would not be satisfied by simply "receiving evidence" or merely "tak[ing] notice of evidence."⁶⁶

- The Panel in *US – Softwood Lumber VI* also elaborated upon the meaning of “consider” in the context of Article 15.7 of the SCM Agreement. The Panel stated “in order to conclude that the investigating authorities have ‘considered’ the factors set out in Articles 3.7 and 15.7, it must be apparent from the determination before us that the investigating authorities have given attention to and taken into account those factors... consideration must go beyond a mere recitation of the facts in question, and put them into context”.⁶⁷
- The ordinary meaning of “with a view to” is “with the aim of attaining”⁶⁸ and the ordinary meaning of “ensure” is “make certain”.⁶⁹ In interpreting the meaning of the phrase “with a view to ensuring”, the obligation in Article 12.3 of the TBT Agreement must be distinguished from that in Article 10.1 of the SPS Agreement. Article 10.1 of the SPS Agreement states “[i]n the preparation and application of sanitary or phytosanitary measures, Members shall take account of the special needs of developing country Members, and in particular of the least-developed country Members”. As observed by the Panel in *EC – Biotech*, Article 10.1 does not prescribe a specific result to be achieved.⁷⁰ Notably, Article 10.1 does not provide that the importing Member must invariably accord special and differential treatment in a case where a measure has lead, or may lead, to a decrease, or a slower increase, in developing country exports.⁷¹ Article 12.3 differs in this respect because it prescribes a specific result, namely “*with a view to ensuring* that technical regulations do not create unnecessary obstacles to exports from developing country Members”.

⁶⁵ Panel Reports, *EC – Biotech*, paragraph 7.1620.

⁶⁶ Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004, paragraph 133.

⁶⁷ Panel Report, *United States - Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/R, adopted 26 April 2004, paragraph 7.67.

⁶⁸ The *Concise Oxford Dictionary, Ninth Edition*, p. 1562. See Exhibit MEX-82

⁶⁹ The *Concise Oxford Dictionary, Ninth Edition*, p. 450. See Exhibit MEX-82

⁷⁰ Panel Report, paragraph 7.1620.

⁷¹ *Ibid.*

219. Accordingly, Article 12.3 requires that the United States consider the special development, financial and trade needs of Mexico with the aim of making certain that the COOL measure does not create unnecessary obstacles to exports from Mexico.

220. In the light of the foregoing, the following conclusions can be made regarding the kind of evidence that would be sufficient to show that a Member implementing a technical regulation did "take into account" the special needs of developing country Members under Article 12.3 of the TBT Agreement:

- Evidence that the United States has "looked at attentively", "reflected on", or "weighed the merits of" the special development, financial and trade needs of Mexico and not merely received evidence and taken notice of those needs. Evidence that, in undertaking these steps, the United States has made certain that the COOL measure does not create unnecessary obstacles to exports from Mexico.
- Public comments during the preparation process of the COOL Measure made Congress and the USDA cognizant of the possible negative effects on Mexican exports.⁷² Neither Congress nor the USDA responded to these comments.⁷³ This failure to respond is demonstrative of a lack of compliance with Article 12.3.
- U.S. domestic law provides an example of the steps required to properly "take into account" special needs. The *Regulatory Flexibility Act* (RFA)⁷⁴ requires U.S. agencies to consider the impact of their regulatory proposals on small entities, analyze effective alternatives that minimize the impact, and make their analyses available for public comment. The purpose of the RFA is essentially the same as Article 12.3, i.e., to be sure that regulatory actions (RFA) or measures (Article 12.3) take into account the special needs of small businesses (RFA) or developing countries (Article 12.3).
- Mexico suggests that evidence that the "special needs" referred to in Article 12.3 have been taken into account would require a showing that consideration was given to the following: (1) how the measure may impact developing countries; (2) steps considered/taken to minimize the impact of the measure on developing countries; (3) a discussion of less onerous alternatives considered, and reasons for not adopting them. Mexico further suggests that the above must be in writing, to ensure transparency, and to ensure that a Member did "take into account" the special needs of developing countries when promulgating a TBT measure.

83. (*Mexico and the United States*) What is the relationship, if any, between the obligations under Articles 2.2 and 12.3 of the TBT Agreement? What is the relationship between Articles 12.2 and 12.3 of the TBT Agreement?

221. Articles 2.2, 12.2 and 12.3 are independent obligations that apply cumulatively to the United States.

⁷² 74 Fed. Reg. 2669 (Exhibit MEX-7).

⁷³ Mexico First Written Submission, paragraph 369.

⁷⁴ *Regulatory Flexibility Act*, 5 U.S.C. §601.

85. (Canada and Mexico) In light of the Appellate Body's clarification of the term "administer" under Article X:3(a), please clarify what is the "administration" of the US government that the complainants claim is inconsistent with the United States' obligation under Article X:3(a).

222. In *European Communities – Selected Customs Matters*, the Appellate Body stated that:

In its broadest sense, an administrative process may be understood as a series of steps, actions, or events that are taken or occur in relation to the making of an administrative decision. ... This Article [X:3] contains an obligation to administer in a uniform manner legal instruments of the kind described in Article X:1—laws, regulations, judicial decisions, and administrative rulings of general application pertaining to the subject matters set out in that provision. We agree with the Panel that 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....⁷⁵

223. The administration of the COOL measure has been characterized by shifts in interpretation and guidance by USDA on the planned implementation of the statutory provisions, as reflected in the guidelines, non-public pressure of individual companies (such as illustrated in Exhibit MEX-33), and the Vilsack letter.

224. The nature of the inconsistent administration is described in an article in *Farm and Dairy* dated September 30, 2008, which stated:

The latest brouhaha stems from the USDA's interpretation of COOL.

The USDA's Agricultural Marketing Service issued guidance Sept. 11 that said meat products from livestock "born, raised and slaughtered in the United States" can be labeled as "mixed origin," or as products from the U.S., Canada and Mexico.

That led to the announcement by several large beef packers of their intent to label all beef products under the multiple products category, such as "Product of the United States, Canada and Mexico," ignoring the exclusively U.S. born, raised and processed category. And that, some say, was the whole point of country-of-origin labeling in the first place.

Packers and processors said they simply don't have the physical capacity to segregate those animals in the handling and processing steps.⁷⁶

225. As described in Mexico's First Written Submission at paragraph 258, USDA then pressured major US processors such as Tyson not to use the Category B label. That pressure culminated in the Vilsack letter, which stated publicly that USDA expected US companies seeking to use the Category B label to bear additional burdens beyond those set out in the regulations. The continuing changes in USDA policy – first indicating that commingling

⁷⁵ Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 13 November 2006, paragraph 224.

⁷⁶ *Farm and Dairy*, "Country-of-origin labeling rule gets chilly reception", available at <http://www.farmanddairy.com/news/country-of-origin-labeling-rule-gets-chilly-reception/10250.html>. Exhibit MEX-83.

would be allowed, then discouraging it – significantly contributed to the disruptions experienced by the Mexican cow-calf industry.

86. (Mexico) In support of its position that the United States acted inconsistently with Article X:3(a), Mexico argues that the administration of the details of the COOL requirements changed over the course of the interim final rule and the final rule and the associated guidelines issued by USDA. Can Mexico explain whether and, if so, how the Panel should distinguish a Member's legislative/rule-making process from its administrative process in the context of a claim under Article X:3(a)? Can Mexico point to any specific incidences where the United States "appl[ied]" or "put into practical effect" the COOL requirements in an inconsistent and unpredictable manner?

226. The inconsistent and unpredictable guidance from USDA, described in Mexico's response to question 85, was not part of the legislative/rulemaking process. It was agency action not reflected in statutes or regulations.

88. (Canada and Mexico) Please specify the tariff concessions (NAFTA or WTO) on the basis of which you claim that benefits are being nullified or impaired under Article XXIII:1(b) of the GATT 1994. If it is the tariff concessions under NAFTA, explain whether the non-violation claim under Article XXIII:1(b) encompasses such concessions.

227. Mexico is claiming that tariff concessions made by the United States and inscribed in its WTO tariff schedule are being nullified or impaired under Article XXIII:1(b) of the GATT 1994.⁷⁷

228. The US MFN bound tariff is 1 cent per kilogram,⁷⁸ which is about \$1.36 to 1.81 for a 300 to 400 pound animal. Based on this WTO tariff binding, Mexico could legitimately expect that its cattle would have a competitive disadvantage of \$1.36 to 1.81 per animal compared to like US products. The actual price discount created by the COOL measure is from \$40 to \$60 for the same 300-400 pound animal. The competitive disadvantage or level of protection reflected in this price discount vastly exceeds Mexico's legitimate expectation of \$1.36 to 1.81 per animal.

229. Thus, the COOL measure nullifies or impairs benefits accruing to Mexico under the WTO tariff bindings of the United States.

230. The fact that the COOL measure also nullifies or impairs benefits accruing to Mexico under the NAFTA tariff bindings of the United States is immaterial to Mexico's claims that benefits accruing to it under the GATT 1994 are being nullified or impaired.

⁷⁷ This is discussed in Mexico's oral statement at the first substantive meeting of the panel.

⁷⁸ Exhibit MEX- 84.