**BEFORE THE WORLD TRADE ORGANIZATION**

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

## RECOURSE TO ARTICLE 21.5 OF THE DSU

## (DS386)

## MEXICO'S COMMENTS ON THE RESPONSES TO THE PANEL'S QUESTIONS OF THE OTHER PARTIES

Geneva
**21 March 2014**

1. Mexico's comments are restricted to specific points raised in the United States' and Third Parties' responses to the questions of the Panel. The absence of comments by Mexico on a particular response or element of a response does not mean that Mexico agrees or disagrees with the points made in that response and no inferences should be made where comments are absent. To the extent that Mexico does not comment on a particular response or element of a response, its position on issues raised in a question are set out in Mexico's written submissions, written responses to the Panel's questions and oral statements to the Panel.

## Terms of reference

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

2. The United States has not introduced any new legal arguments in its response to Question 1. Mexico has provided a complete response to the United States' submissions on this issue in Mexico's Second Written Submission.[1] Mexico reaffirms that it is not challenging the WTO-consistency of the ground beef rule and the prohibition of trace-back. Mexico is referring to these aspects of the Amended COOL Measure as facts and circumstances related to the design and application of the relevant regulatory distinctions in the context of its claim under Article 2.1 of the Agreement on Technical Barriers to Trade (TBT Agreement).

3. The United States is incorrect to claim that in substance Canada and Mexico are challenging the consistency of the ground meat label under Article 2.1. As Mexico has previously explained, the United States conflates the term "claims" with "arguments".[2] Arguments are the means whereby a party progressively develops and support its claims.[3]

## Factual questions

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

4. Mexico disagrees with the characterization of the United States that the country of origin of ground meat is determined "in exactly the same manner that the country of origin of muscle cuts are determined".[4] The Amended COOL Measure's labelling rules for ground meat expressly allow commingling, and do not require the identification of where animals

1 Mexico's Second Written Submission, paras. 8-22 and 144-152.

2 United States' response to Questions 1, para. 4.

3 Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 121.

4 United States' response to Question 4, para. 10.

were born, raised and slaughtered. Moreover, the rules allow the use of labels with multiple countries listed.

5. There is no distinction between category "B" and "C" for trimmings or ground meat, so Mexico does not see how, as asserted by the United States, there could be category "B" and "C" trimmings.

6. The United States omits to discuss how the countries of origin of imported trimmings and ground meat are determined. That issue has been the subject of rulings by U.S. Customs and Border Protection (CBP). For example, in Headquarters Ruling 968007 (Feb. 2, 2006), CBP considered a request for a ruling on the proper origin marking of frozen hamburger patties imported from Mexico. The ground beef was manufactured in Mexico using frozen beef trimmings from the United States, Canada and Australia. The processing of trimmings into hamburger patties did not constitute a substantial transformation under the North American Free Trade Agreement (NAFTA) tariff preference or marking rules, because both the trimmings and hamburger patties are classified under the same tariff heading (0202). Accordingly, for tariff purposes the patties retained the origin of the trimmings.

7. The trimmings were fungible goods that were commingled in inventory and during the production process. Under the rules of the NAFTA, the importer was allowed to use an "inventory management method" (i.e., Specific Identification, First-in-First-Out, Last-in-First Out, or Average) to determine the source of the trimmings used in specific lots of hamburger patties. Thus, since 80 percent of the trimmings were from the United States or Canada, 80 percent of the patties could be treated as "originating" under the NAFTA and were eligible for the NAFTA's tariff preference.[5] Also under the NAFTA's rules, those products that could be deemed "originating" products were subject to the NAFTA's Marking Rules, under which, when an originating good cannot be determined to be a good of a single country, the origin is the last country in which the good underwent processing. Accordingly, CBP ruled that the origin marking for hamburger patties deemed made from U.S. and Canadian trimmings should be Mexico – *notwithstanding that none of the trimmings were from Mexico*.

8. Because inventory management methods could only be used for products originating in a NAFTA Party for the remaining portion deemed to be a product of Australia, which is not a member of NAFTA, it was required to list all of the countries from which the trimmings originated.[6]

9. For imported ground meat products, therefore, the origin designation may be totally disconnected from any information about where the cattle were born, raised and slaughtered.

10. The United States imported about 4.4 million kilograms of ground beef in 2013.[7]

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[5] To determine whether a product is "originating" under the NAFTA, all of the content from the NAFTA parties (Mexico, Canada and the United States) is cumulated.

[6] HQ 968007 (Feb. 2, 2006), p. 5 (Exhibit MEX-88). See also NY 801411 (Sept. 16, 1994), involving a situation in which beef patties were produced in Canada from beef that was 50 percent from Australia and New Zealand and 50 percent from Canada. CBP ruled that "Meat which has been processed as described above remains a product of that country in which the animal was slaughtered", but also held that the patties should be marked as products of Canada under the NAFTA Marking Rules. Exhibit MEX-89.

[7] International Trade Commission, Dataweb, HTS 02023030 (Exhibit MEX-90).

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

11. Although presented in a different format, the statistics on imports submitted by the United States match those submitted by Mexico. The U.S. figures combine imports of male and female animals in the weight categories.

12. The United States refers to a 12 month average age for the category of feeder cattle that weigh more than 320 kilograms.[8] In the case of Mexico, the main exports to the United States are feeder cattle that are not in this category, but rather animals that weigh between 160 to 300 kilograms per head and have an age in the range of six to seven months. In general, the U.S. estimates provided in its chart regarding the age of cattle in the different categories are consistent with Mexico's information.

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

13. Mexico has already commented on the unscientific, biased surveys that the United States submitted as Exhibits US-46, 47 and 48.[9] Mexico also demonstrated that public comments supporting the Amended COOL Measure were in cases motivated by protectionism and the mistaken belief that U.S. meat products made from animals born outside the United States are somehow of lesser quality or safety than products made from U.S.-born animals.[10]

14. The United States now submits evidence from the original proceedings to support its claim that there was substantial consumer support for the Amended COOL Measure. But Exhibit US-68 (describing a 2005 poll that asked about whether respondents favored origin labelling) did not pose any question about points-of-production information on muscle cuts. Whether or not consumers express interest in having a label that says "product of ___" on a label is not relevant to the issues in this proceeding.

15. The United States also submitted as evidence comments by two individuals who mistakenly believed that the original COOL Measure was designed to provide information about the safety or quality of products.[11]

16. With regard to consumers' willingness to pay for COOL information, the United States submits an Australian study that cross-references other studies but does not explain

8 United States' response to Question 9, para. 21.

9 Mexico response to Question 15, paras. 14-18.

10 See Mexico's First Written Submission, footnote 101 and Exhibit MEX-20.

11 Exhibits US-73 and US-74.

them in detail.[12] There is no suggestion that the analyses involved asking consumers about labels with "born, raised and slaughtered" information.

17. The U.S. claim that consumers are willing to pay a premium of $2.57 per pound for meat labelled with its country of origin, or alternatively a premium of 58 percent, is simply not credible.[13] With a premium of those amounts available, it would be expected that every retailer would voluntarily include origin information on labels.

18. The U.S. Department of Agriculture (USDA) itself, when publishing the Amended COOL Measure, stated as follows:

> As described in the 2009 final rule, the conclusion remains that there does not appear to be a compelling market failure argument regarding the provision of country of origin information. Comments received on the 2009 final rule and previous requests for comments elicited no evidence of significant barriers to the provision of this information other than private costs to firms and low expected returns. Thus, from the point of view of society, such evidence suggests that market mechanisms could ensure that the optimal level of country of origin information would be provided to the degree valued by consumers.[14]

19. Thus, it is readily apparent that U.S. consumers will not pay extra for country of origin information.

20. The United States refers to comments on the 2013 Proposed Rule submitted by unnamed "consumer groups and community organizations" and asserts they speak on behalf of tens of thousands of individuals. Absent evidence that those tens of thousands of individuals were actually consulted about this issue, the U.S. assertion is not supportable. Also, given that the U.S. population is over 300 million people, the fact that 396 comments (out of a total of more than 900) supported the measure is not probative of public interest in points-of-production labelling.

21. The United States also alleges that consumers want origin information based on quality and safety concerns.[15] But it is undisputed that the Amended COOL Measure is not a safety or quality measure. As Mexico has explained, using the Amended COOL Measure to override the positive impression given by USDA's quality label on muscle cuts is one of a number of indications that the measure is arbitrary.[16]

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

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12 Exhibit US-52.

13 United States' response to Question 13, para. 28 and footnote 29.

14 2013 Final Rule, p. 31377 (Exhibit MEX-3).

15 United States' response to Question 13, para. 29.

16 Mexico's response to Question 22.

22. Mexico already analyzed the evidence submitted by the United States, including Exhibit US-48, in Mexico's response to Question 15 and its comments on the response of the United States to Question 13 above. Mexico re-affirms its position that the U.S. evidence of consumer demand and willingness to pay for COOL information is weak.

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

23. The United States used its response to this question to present arguments regarding the meaning of "risks non-fulfillment would create." Mexico responds to the U.S. position on this issue in its comments on the U.S. responses to Questions 24 and 25 below.

24. In paragraph 37 of its response to this question, the United States attempts to equate the Amended COOL Measure with health warnings on tobacco products and nutrition labelling on food products. Mexico repeats that the Amended COOL Measure is not a health or safety measure and is not comparable to health warnings on tobacco products or nutrition information on food products.

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

25. The United States asserts that Mexico raised the issue of the placement of origin information on meat packs for the first time during the meeting of the Panel.[17] Also the United States repeatedly asserts that Mexico has not put forward evidence to support its claim.[18] But Mexico raised this issue in both its first and second written submissions, and submitted evidence at those times of packages on which the origin information was hidden.[19] Mexico also pointed out that USDA has undertaken no effort to educate consumers about the meaning of the abbreviations or where to look for the origin information.[20]

26. The United States repeats its prior claim that Mexico has not presented evidence that consumers are not able to find or understand the origin information on labels. Mexico submitted substantial evidence in the form of labels and packages themselves on which the information is obscured or hidden.[21] The Panel is fully able to review this evidence and determine whether the design and implementation of the Amended COOL Measure, as it is actually applied, is calculated to provide information to consumers on where the animals were born, raised and slaughtered.

27. The United States argues that if the labels are equally unintelligible regardless of the source of the animals, the measure must be even-handed. That conclusion ignores the

[17] United States' response to Question 16, para. 38.

[18] United States' response to Question 16, para. 40.

[19] Mexico's First Written Submission, para. 131; Mexico's Second Written Submission, para. 57.

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

[21] Moreover, as proven by Mexico, in a substantial portion of the U.S. retail market, there has not been implementation of the requirement to provide points-of-production information on labels.

Appellate Body's rulings on the meaning of even-handedness and the relevant evidence. With regard to the sample labels submitted by Mexico, the key point is that the Amended COOL Measure has not corrected the first information asymmetry identified by the Appellate Body. Specifically, most consumers are still not receiving information on where the animals were born, raised and slaughtered, while the costs of the measure continue to be borne disproportionately by imported animals.

28. As Mexico has established, consumers are not receiving the information because (i) many retailers have not implemented the requirements of the 2013 Final Rule and (ii) some have complied but are hiding or obscuring the information.

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

29. The United States' summary of the domestic lawsuit involving the Amended COOL Measure emphasizes the U.S. arguments in that case, so Mexico will supplement the description.

30. The first part of the domestic law challenge relies on a well-established U.S. legal doctrine that the government is limited in its power to tell commercial enterprises what they must say. Specifically, the U.S. Supreme Court has held that compelled speech is consistent with the U.S. Constitution only when it advances a substantial governmental interest to a material degree and is no more extensive than necessary.[22]

31. A key issue in that case, which determines the level of scrutiny the courts can apply to the measure, is whether the 2013 Final Rule is directed at "misleading commercial speech" and "reasonably related to the interest in preventing deception of consumers."[23] The plaintiffs argue that the 2013 Final Rule does not in any manner state that requiring information on where animals were born, raised and slaughtered was needed to prevent deception, and that it is impermissible for a court to rely on *post-hoc* justifications provided by the government for purposes of the litigation.[24] The plaintiffs also argue that "misleading commercial speech" in this legal context refers only to voluntary advertising statements, not a governmental entity's revisions of its own disclosure requirements.[25]

32. The second part of the challenge argues that USDA exceeded its statutory authority in issuing the 2013 Final Rule, and in particular (i) that USDA is not authorized to regulate production practices by prohibiting commingling, and (ii) that the COOL Statute allows only origin labelling and not points-of-production labelling.[26]

33. The decision of the Court of Appeals for the D.C. Circuit remains pending.

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22 American Meat Institute et al. v. United States Department of Agriculture, et al., USCA Case 13-5281, Opening Brief for Appellants, p. 16 (September 23, 2013) (Exhibit MEX-91).

23 *Ibid*., p. 16.

24 *Ibid*,, pp. 20-27.

25 *Ibid*., p. 28.

26 *Ibid*., pp 40-51.

## Article 2.1 of the TBT Agreement

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

34. In paragraph 50 of its response to this question, the United States submits that the Dispute Settlement Body (DSB) recommendations and rulings found that the original COOL measure breached Article 2.1 of the TBT Agreement solely because of what Mexico refers to as the "first information asymmetry". As explained in Mexico's written submissions, the Appellate Body's determination of inconsistency under Article 2.1 was based on the existence of two information asymmetries.[27] The United States has consistently ignored the existence of the second information asymmetry – i.e., the asymmetry caused by the exclusions for processed food items, food service establishments and other establishments that are not a "retailer" within the meaning of the Amended COOL Measure – in the presentation of its case, including in its response to this question. Also, Mexico has identified additional factors that demonstrate the detrimental impact does not stem exclusively from a legitimate regulatory distinction.[28]

35. The United States has confirmed at paragraph 51 of its responses that the Amended COOL Measure was not designed to remove the detrimental impact on Mexican imports created by the original COOL measure. The United States tries to argue that the Amended COOL Measure is consistent with the Appellate Body final report. However, for the reasons explained in Mexico's previous submissions, the Amended COOL Measure does not ensure that any detrimental impact stems exclusively from a legitimate regulatory distinction.

36. In paragraph 53 of its responses, the United States alleges that Mexico is incorrect to claim that the elimination of the commingling flexibility exacerbates the detrimental impact. Logically, it is obvious that by eliminating *any* "flexibility" provided by the measure will increase the detrimental impact. Mexico has submitted evidence from U.S. processors explaining how the elimination of commingling will result in increased needs for segregation and higher costs for handling imported cattle. This constitutes an increase in detrimental impact.[29]

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[27] Mexico's First Written Submission, para. 122; Mexico's Second Written Submission, paras. 49-50.

[28] *See* Mexico's Oral Statement, paras. 31- 35.

[29] *See* for example Exhibits MEX-20, MEX-21, and MEX-22. Exhibit MEX-21 contains a letter from Tysons that states:

> …eliminating commingling will have a significant impact on our plants that use that system, as well as the rest of the downstream supply chain. Since "B" label products will not be recognized under the proposal, we and other meat producers will be forced to segregate production in greater amounts than is required today. More specifically, the proposal would require Tyson's plants to employ new and expanded product segregation systems so that the meat derived from an "all American" animal, i.e. born, raised, and slaughtered in the U.S., is not mixed with muscle cuts requiring labeling declaring the product to be, for example, beef derived from an animal "born and raised in Canada, slaughtered in the United States." The muscle cuts from these various "types" of animals would have to be kept separate as the carcasses proceed down the line, enter the coolers, as the meat proceeds through the fabrication process, and ultimately as the meat is stored and distributed.

37. The United States also submits at paragraph 55 of its response to this question that "there is no evidence showing, and complainants have failed to prove, that the 2013 Final Rule worsens any detrimental impact". This is untrue. The evidence of the doubling of the "COOL discount" clearly substantiates that the 2013 Final Rule worsens the detrimental impact on Mexican feeder cattle.[30]

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

38. The United States argues that there is no evidence on the record that demonstrates that costs have increased under the Amended COOL Measure. That is incorrect. Paragraphs 107 to 114 of Mexico's First Written Submission exhaustively detailed the evidence that the incentive to rely exclusively on domestic livestock will increase under the 2013 Final Rule.

39. As Mexico has previously pointed out, the United States unilaterally extended the Reasonable Period of Time (RPT) deadline by six months. In light of the very late implementation of the Amended COOL Measure, any evidence submitted by Mexico regarding the expected effects of the Amended COOL Measure is sufficient to meet its burden.

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

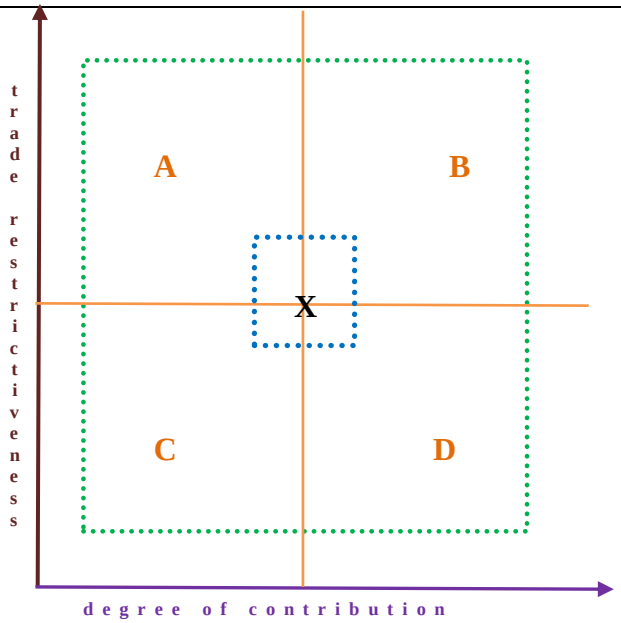
40. The United States asserts that the Amended COOL Measure does not impose increased recordkeeping requirements. The United States has never responded, however, to Mexico's evidence that retailers will have an increased need to track the source of the animals used to produce beef that is delivered to them by processors. In particular, the United States does not address the fact that the commingling flexibility was available not only to slaughterhouses, but also to retailers who process beef cuts at their stores. Those retailers now have a further disincentive to purchase beef made from imported cattle.[31]

***Legal test***

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

30 Mexico's First Written Submission, paras. 104-106.

31 *See* Mexico's response to Question B, paras. 212-214.




Comment on Response of the United States

41. The United States misinterprets Article 2.2 of the TBT Agreement as it disregards the fact that the text of Article 2.2 does *not* require an alternative measure to be significantly less trade restrictive.[32] Contrary to the United States' view, there is no language on "a significant" or "a *de minimis* amount" of trade-restrictiveness in Article 2.2. The second sentence of Article 2.2 explicitly states, in particular, that "technical regulations shall not be more trade-restrictive than necessary". In its second written submission and response to the Panel's Question 38, Mexico has stressed that the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), including footnote 3 to Article 5.6 of that Agreement, does not apply to technical regulations.[33] Therefore, in the context of Article 2.2 of the TBT Agreement, an inquiry to whether the trade-restrictiveness of an alternative measure is significant or *de minimis* would be a legal error. Thus, the dotted squares on the graph are irrelevant.

42. In paragraphs 69, 76 and 77 of its response, the United States seems to argue that the phrase "the risks non-fulfilment would create" either does not play a role or plays a limited role in the Panel's analysis. In its written submissions and responses to the Panel's questions, Mexico has demonstrated that the respondent's view is incorrect.[34] The United States' argument is unsupported by the text of Article 2.2 and the Appellate Body's interpretation[35].

43. While Mexico agrees with the United States that a hypothetical alternative measure that falls within quadrant D satisfies such requirements as being less trade-restrictive and providing a degree of contribution equal to or more than the challenged measure, Mexico

[32] *See* United States' response to Question 24, paras. 70, 72, 74.

[33] Mexico's Second Written Submission, paras. 120 -124; Mexico's response to Question 38.

[34] *See* Mexico's First Written Submission, paras. 158-163, 174-176; Mexico's Second Written Submission, paras. 106, 108 and 110; and Mexico's responses to Questions 24 (in particular, para. 39 and 36).

[35] Appellate Body Reports, *US – COOL*, para. 377.

disagrees with the United States' view with respect to an alternative measure that falls within quadrant C.[36] Depending on circumstances of the case, an alternative measure that falls within quadrant C can be accepted. In its explanation of a comparative analysis, the Appellate Body explicitly stated that it may be relevant to consider, in particular, whether the proposed alternative measure "would make an equivalent contribution to the relevant legitimate objective, *taking account of the risks non-fulfilment would create*".[37]

44. It appears that the United States' explanation regarding "discretion as to where to place the X" may be interpreted as a suggestion to use a Member's desired *abstract* level of contribution to the objective for a comparison with an alternative measure's level of contribution.[38] Such interpretation is incorrect.[39] Article 2.2 of the TBT Agreement does not require that the Panel make finding on an abstract level of protection.[40] Instead, the Panel should consider the measure at issue as *a whole* and determine "*to what degree*, if at all, the challenged technical regulation, *as written and applied*, *actually contributes* to the achievement of the legitimate objective pursued by the Member".[41]

45. The United States argues that "the complainant carries the burden of proving an alternative measure exists "that is less trade-restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available".[42] In its first and second written submissions, and opening statement, Mexico described its position, with reference to the Appellate Body's explanation, on the legal test for an alternative measure in the context of Article 2.2 and allocation of the burden of proof under this provision.[43]

Comment on Response of the European Union

46. At paragraphs 13 and 14 of this response, the European Union provides a hypothetical example involving capital costs and then submits that what "Canada and Mexico appear to be arguing is that if they do not raise their prices (in order to account for their increased costs), then, all other things being equal, they lose volume". This hypothetical and the characterization of Mexico's argument bear no relationship to the facts in this dispute. The key point made by Mexico in respect of the adverse impact of the measure is that competitive

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36 *See* Mexico's First Written Submission, para. 162; Mexico's Opening Statement, para. 51; Mexico's response to Question 24, para. 37.

37 Mexico's response to Question 24, para. 37 (referring to Appellate Body Reports, *US – COOL*, para. 378, (emphasis added)).

38 United States' response to Questions 24, paras. 70 and 75, and 25, para. 79.

39 In the original proceedings in *US – COOL*, the Appellate Body explicitly stated: "Neither Article 2.2 in particular, nor the *TBT Agreement* in general, requires that, in its examination of the objective pursued, a panel must discern or identify, in the abstract, the level at which a responding Member wishes or aims to achieve that objective". Appellate Body Reports, *US – COOL*, para. 390.

40 Mexico's First Written Submission, para. 168 (Mexico stated, in particular, "the Panel must determine the degree of contribution actually made by the Amended COOL Measure" to the objective of providing consumer information on origin.); Mexico's responses to Question 32, para. 50, and 38.

41 Appellate Body Reports, *US – COOL*, para. 373 (footnotes omitted, emphasis added).

42 *See* United States' response to Question 24, para. 75.

43 Mexico's First Written Submission, paras. 151 and 162; Mexico's Second Written Submission, paras. 114 -119; Mexico's Opening Statement, paras. 48 and 55.

opportunities have been denied Mexican cattle both in terms of opportunities to sell (e.g., less processing facilities taking Mexican cattle) and reduced prices (e.g., COOL discount). This denial of competitive opportunities has both discriminatory (Article 2.1) *and* trade-restrictive (Article 2.2) effects. The statement "if they do not raise their prices" reflects a fundamental misunderstanding of the facts. Mexican exporters of cattle are *price takers*. They cannot raise their prices and are at the mercy of the COOL discount.

47. At paragraphs 17 and 18, the European Union submits that Canada and Mexico read Article 2.2 "as if it refers to the *consequences* that non-fulfilment would create" (emphasis in original) and argues that this is incorrect. At the same time, at paragraph 15, the European Union itself cites the Appellate Body's interpretation of the obligation under Article 2.2 to consider "the risks non-fulfilment would create": "the nature of the risks at issue" and "the gravity of the consequences that would arise from non-fulfilment of the legitimate objective".[44] In the opening phrase of paragraph 16, the European Union indicates its agreement with the interpretation developed by the Appellate Body. As explained in Mexico's written submissions, the Appellate Body interpreted the phrase "taking account of the risks non-fulfilment would create" as referring to the "nature of the risks at issue" and the "consequences that would arise from the non-fulfilment of the legitimate objective".[45]

48. With respect to the European Union's reference to the appropriate level of protection (ALOP), please see Mexico's response to Question 38.

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

> **(i) between a technical regulation's trade restrictiveness and the risks of non-fulfilment of its objective(s)? (For instance, should more trade-restrictive measures be tolerated under Article 2.2 if the risks of non-fulfilment are higher?)**
>
> **(ii) between the risks of non-fulfilment and the degree of contribution to the objective?; and**
>
> **(iii) between the degree of contribution and trade restrictiveness?**
>
> **For any correlation that you see, please explain how it should be applied in the context of comparing the amended COOL measure and the complainants' four suggested alternatives.**

49. In paragraph 78 of its response to this question, the United States misreads[46] the Appellate Body's explanation on instances where a comparison between the challenged measure and a proposed alternative will not be required. The Appellate Body explicitly stated

[44] Appellate Body Reports, *US – COOL*, para. 377 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 321.

[45] Mexico's First Written Submission, para. 159; Mexico's Second Written Submission, para. 106.

[46] The United States argues that there are only two scenarios where the comparison between a technical regulation at issue and a proposed alternative measure will not be required: (i) the challenged measure is not trade-restrictive; (ii) the challenged measure makes no contribution to its objective.

that "there are '*at least* two instances' where such a comparison might not be required" [47]. Mexico has explained that the United States' argument is in error.[48]

50. It is clear from the legal test described by the Appellate Body in paragraph 378 of its Report in *US – COOL*, that, besides the trade-restrictiveness of the technical regulation and the degree of contribution it makes to the achievement of a legitimate objective, the relational analysis includes the factor of "risks" ("the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the measure").[49] Therefore, absence of one of these factors, required for the assessment of "necessity" in the context of Article 2.2, will not allow performing "a relational analysis", as well as "a comparative analysis".

51. Mexico has explained the meaning of the word "risks" in the context of Article 2.2 and stressed that "[t]he Amended COOL Measure does not protect anyone from risk of loss or injury", and that the United States did not present any evidence of consumer confusion or deceptive practices.[50] Moreover, as explained in Mexico's comments on the United States' response to Question 78, the Amended COOL Measure is not aimed at either preventing deceptive practices or protecting consumers against fraudulent or misleading indications.

52. With respect to the United States' response in paragraph 79, Mexico notes that the Appellate Body had already explained the meaning of the requirement to consider "the risks non-fulfilment would create."[51] In particular, the Appellate Body stated that the Panel should consider "the nature of risks at issue".[52]

53. In paragraphs 79 and 84 of the United States' response to this question, it seems that the United States implies that an alternative measures' level of contribution should be compared against a Member's desired *abstract* level of contribution to the objective.[53] In its comment to the United States' response to Question 24, Mexico explained that this interpretation is in error.

54. In paragraphs 83 and 84, with respect to the United States' reference to "*significantly* less trade restrictive alternative", please see Mexico's comment to the United States' response to Question 24. Also, Mexico has explained that, depending on the circumstances of

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47 Appellate Body Reports, *US – COOL*, footnote 748 to para. 376 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, footnote 647 to para. 322).

48 See Mexico's First Written Submission, paras. 153-155.

49 Appellate Body Reports, *US – COOL*, para. 378.

50 *See* Mexico's Opening Statement, paras. 45-46.

51 Appellate Body Reports, *US – COOL*, paras. 377 and 378.

52 Appellate Body Reports, *US – COOL*, para. 378.

53 In particular, the United States stated that the "risk non-fulfilment would create" refers to "the risks that would arise if the legitimate objective is not fulfilled at the level *chosen* by the Member" and that "the proposed alternative measure must be significantly less trade restrictive and reasonably available while making the *required* degree of contribution" (emphasis added). (United States' response to Question 25, paras.79 and 84).

the case, and taking account of the risks non-fulfilment would create, a lesser degree of contribution may be justified.[54]

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

55. As Mexico has explained in its response to this question, the fact that in this case two of the four proposed alternative measures have higher costs does not prevent them from being valid alternatives under Article 2.2 of the TBT Agreement. When examining proposed alternative measures, the Panel should take into account the Appellate Body's explanation that "the mere fact that an alternative measure would entail some additional cost does not, alone, mean that such a measure is not reasonably available to a Member".[55]

56. With respect to allocation of the burden of proof, please see Mexico's comment to the United States' response to Question 24.

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

57. Mexico agrees that in general the reduction of trade flows *itself* can serve as an indicator in the context of Article 2.2, but is not a necessary condition for the examination of trade-restrictiveness.[56] Mexico also agrees with Canada's view that: "an actual reduction in trade flows is not the *condition sine qua non* for a measure to be considered "trade-restrictive".[57]

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

58. We agree with China that the phrase "the risks of non-fulfillment would create" implies that providing a lesser degree of contribution to fulfill a legitimate objective is permissible to a certain extent.[58] As noted in Mexico's response to Question 24, Mexico considers that alternatives that have a lesser contribution can be approved where the risks non-fulfillment would create are small.[59]

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54 *See* Mexico's First Written Submission, para. 162.

55 Appellate Body Reports, *US – COOL*, footnote 1013 to para. 490; *Korea – Various Measures on Beef*, para. 181; *US – Gambling*, para. 308; *China – Publications and Audiovisual Products*, para. 327.

56 *See* China's response to Question 57, paras. 6–7.

57 *See* Canada's Second Written Submission, para 73.

58 *See* China's response to Question 28, para. 10.

59 *See* Mexico's response to Question 24, para.37.

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

59. The United States' response to this question, in particular, its interpretation that "there is only one analysis available" under Article 2.2 and that it is "whether complainants have proved that at least one of their alternatives 'is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available", contains several legal errors.

60. First, although the United States agrees that the Panel should determine the degree of contribution of the challenged measure to the legitimate objective, it disregarded "a relational analysis"[60] which is the first step in consideration of whether the technical regulation at issue is "more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create".

61. Second, the test for an alternative measure is different, namely: "whether the proposed alternative is less trade restrictive, whether it would make an equivalent contribution to the relevant legitimate objective, taking account of the risks non-fulfilment would create, and whether it is reasonably available".[61]

62. Finally, with respect to allocation of the burden of proof, please see Mexico's comment to the United States' response to Question 24.

63. Mexico also disagrees with the United States' position on the concept of proportionality[62] and recalls its explanation, in particular, in paragraphs 158-161 of its First Written Submission. In addition, Mexico considers that the contextual analysis of Article 2.2, in particular, Article 2.3 of the TBT Agreement, indicates that proportionality between trade-restrictiveness and the nature of risks *underlie* both Articles. Considering the preamble of the TBT Agreement, Mexico notes that the *balance* set out between, on the one hand, the desire to avoid creating unnecessary obstacles to international trade (the firth recital) and, on the other hand, the recognition of Members' right to regulate (the sixth recital).[63] This *balance* also suggests that negotiators considered that the trade-restrictiveness of technical regulations, aimed at achieving listed in the sixth recital objectives, should be proportional to the existing risks.

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

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60 Appellate Body Reports, *US – COOL*, paras. 374 and 378.

61 Appellate Body Reports, *US – COOL*, para. 378.

62 United States' response to Question 30, para. 90.

63 Appellate Body Reports, *US – Clove Cigarettes*, para. 96.

64. In paragraph 92 of its response to this question the United States implies that the degree of accuracy of label information is a determining factor in evaluation of the degree of contribution. That is not true. While accuracy of label information is a factor in assessment of the degree of contribution, there are also other factors of the measure at issue that should be taken into account. In assessing the degree of contribution of the Amended COOL Measure, the Panel should objectively examine this measure and determine to what degree the challenged measure as a whole, with its exemptions and exceptions, actually contributes to the objective of "provid[ing] consumer information on origin"[64].

65. In the original proceedings, the Appellate Body explicitly stated that "what a panel *is* required to do, under Article 2.2, is to assess the degree to which a Member's technical regulation, as adopted, written, and applied, contributes to the legitimate objective pursued by that Member".[65] The Panel should follow the Appellate Body's guidance.

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

66. The Panel should reject the United States' request and arguments in paragraphs 101 and 102. The evidence was submitted to the Panel prior to the first substantive meeting and Mexico endorsed and adopted the evidence of Canada at the first available opportunity during the substantive meeting. Exhibit MEX-87 was submitted in response to the Panel questions. Mexico has explained its position in responses to Questions 34, 35, and 72.

***Risks non-fulfilment would create***

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

67. As Mexico has explained, the meaning of the word "risk" is exposure to the possibility of loss, injury, or other adverse circumstance.[66] Assessment of the risks requires evaluation of existing risks and potential adverse effects. The relevant elements of consideration in conducting risks assessment are listed in the final sentence of Article 2.2. which provides the following: "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." These elements are all *technical* in nature. The Panel's assessment should be objective. During the course of this proceeding, Mexico has stressed

64 Appellate Body Reports, *US – COOL*, paras. 433 and 453.

65 Appellate Body Reports, *US – COOL*, para. 390.

66 Mexico's Opening Statement, para. 45.; *The Oxford English Dictionary*, OED Online, Oxford University Press, accessed 17 March 2011, http://www.oed.com/search?searchType=dictionary&q=risk&_searchBtn=Search.

that the Amended COOL Measure does not protect anyone from risk of loss or injury.[67] The United States did not present any actual evidence of consumer confusion.[68]

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

68. In paragraph 105, the United State implies that an alternative measures' level of contribution should be compared against a Member's desired *abstract* level of contribution to the objective.[69] In its comment to the United States' response to Question 24, Mexico explained that this interpretation is erroneous.

***Appropriate level of protection***

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

69. Mexico addressed the arguments of the European Union and the United States in its own response to this question.

***Costs***

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

70. In its response to this question, the United States argues that the term "trade-restrictive" should be interpreted as "limiting market access" and that "an analysis of whether an alternative is less trade restrictive than the challenged measure would focus on whether the alternative measure would provide *expanded market access* to the complainants' producer".[70] The United States misinterprets the term "trade-restrictive", and the Panel should reject the United States' arguments.

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67 See Mexico's First Written Submission, paras. 174-176; Mexico's Second Written Submission, para. 106; Mexico's Opening Statement, para. 45.

68 *Ibid.*

69 In particular, the United States stated that it "considers that the risks non-fulfilment would create speaks to what would happen if the objective is not fulfilled at the level the Member *has chosen* to fulfil the objective". (emphasis added) (United States' response to Question 37, para. 105).

70 United States' response to Question 39, paras.109 and 111 (emphasis added).

71. Mexico has explained that the scope of the term "trade-restrictive" is broad, and that the concept of "trade-restrictiveness" does not require the demonstration of any actual trade effects, as the focus is on the competitive opportunities available to imported products.[71]

72. The Panel should not adopt a narrow interpretation of the term "trade-restrictive" because it would allow Members to escape the obligations of Article 2.2 of the TBT Agreement. The first sentence of Article 2.2 of the TBT Agreement explicitly states that "Members shall ensure that technical regulations *are not prepared, adopted* or applied with a view to or with the effect of creating unnecessary obstacles to international trade".[72] Based on this provision, a Member can challenge even a *draft* technical regulation, i.e. long before of any actual trade effects.[73] Thus, the United States' narrow interpretation of the term "trade-restrictive" is not supported by the text of Article 2.2.

73. In its analysis, the United States referred to the Appellate Body Report, *US – Tuna II (Mexico)* and the Panel Report, *EC – Seals Products*.[74] In *US – Tuna II (Mexico)*, the Appellate Body referred to the meaning of this term as similar to that in the context of Article XI of the GATT 1994.[75] This was also reflected by the Panel in *EC – Seals Products*.[76] In footnote 688 to paragraph 7.425 the Panel made explicit reference to the Panel Report in *Colombia – Port of Entry*. Moreover, in original proceedings in *US – COOL*, the Panel also considered interpretation of this term in *Colombia – Port of Entry* and other relevant jurisprudence and concluded:

> 7.571. As highlighted by the panel in *Colombia – Port of Entry*, previous WTO and GATT panels also determined a measure's restrictiveness based on the impact of the measure on the competitive opportunities available to imported products. In particular, the panel in *Argentina – Hides and Leather* found that, in determining whether a measure makes effective a restriction in the context of Article I, II, III and XI:1 of the GATT 1994, the focus is on the competitive opportunities of imported products, not the trade effects. That panel therefore considered that the complaining party claiming the existence of a restriction need not prove actual trade effects.[77]

Therefore, the United States' narrow interpretation of the term "trade-restrictive" is erroneous and is not supported by previous panel and Appellate Body reports.

**48. (*United States*) New Zealand observes that "[w]ell-designed voluntary COOL can make an equivalent (or even better) contribution to the objective of providing consumers with information as to origin than a mandatory COOL regime that is**

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71 *See* Mexico's Second Written Submission, paras. 101-105; Mexico's Opening Statement, para. 44 and Mexico's response to Question 39, paras. 82-84.

72 Article 2.2 of the TBT Agreement (emphasis added).

73 Mexico's Second Written Submission, footnote 147 to para. 104.

74 United States' response to Question 39, para. 111.

75 Appellate Body Report, *US – Tuna II (Mexico)*, para. 319.

76 Panel Report, *EC – Seal Products*, para. 7.425.

77 Panel Reports, *US – COOL*, para.7.571 (footnotes omitted).

**peppered with exceptions." (New Zealand's third-party submission, para. 23). The United States affirms that the "U.S. industry strongly disagrees with the COOL program and will not voluntarily provide their consumers origin." Did the United States test this approach or any alternative approaches with the US industry in revising the 2009 Final Rule?**

74. In paragraph 126 of its response to this question, the United States notes with reference to the TBT Agreement that "the Member may determine for itself what objective to pursue and to what degree to pursue those objective". However, as pointed out by New Zealand, by referring to the preamble of the TBT Agreement and the text of Article 2.2, this right is "subject to the requirement that they are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade".[78] Mexico agrees with New Zealand that based on the circumstances of this dispute a "voluntary COOL has the ability to provide the same information to the consumer, where there is consumer demand for such information. It is responsive to market demand, and does not distort the market."[79]

75. With respect to the United States' argument about a Member's determination of a degree of contribution to the legitimate objective, please see Mexico's response to Question 38 and Mexico's comment to the United States' response to Question 24. Mexico has explained that the Panel should determine the degree of *actual* contribution of the Amended COOL Measure to the objective of providing consumer information on origin.

76. In paragraph 125 of its response to Question 48, the United States derides the U.S. plaintiffs in the lawsuit for basing their legal challenge on constitutional rights, putting the words in italics to suggest that their position is extreme. As explained in Mexico's comments on the United States' response to Question 17 above, the plaintiffs' legal challenge relies on a well-established U.S. legal doctrine that the government can require companies to make statements only when the requirement advances a substantial governmental interest to a material degree and is no more extensive than necessary. Their legal challenge does not mean that the companies would never want to put points of production information on their labels if they believed it was in their commercial interest to do so.

77. On the other hand, as explained in Mexico's comments below on the United States' response to Question 63, USDA cancelled the NAIS – a measure actually adopted for health and food safety reasons – because of political opposition from the U.S. ranching industry that cited privacy, religious, and constitutional objections to registering their premises with the government so that cattle could be traced to their source. This is another indication of the arbitrariness of the U.S. measures.

***Third alternative measure***

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

[78] New Zealand's Third-Party Submission, para. 20.

[79] New Zealand's Third-Party Submission, para. 23.

78. In paragraphs 131 through 133 of its response to this question, the United States in essence argues that the fact that some Members, including Uruguay, use trace-back systems to achieve objectives related to health and safety or to trade prevents the United States from adopting a trace-back system to provide consumer information. The United States' position is wrong.

79. In consideration of the third alternative measure, the Panel should determine, *inter alia*, whether it is reasonably available. Mexico has demonstrated that a trace-back is a reasonably available alternative measure for the United States.[80] A trace-back system can be used and is currently used by several Members, including Japan,[81] for different purposes, including for providing consumer information.

80. The use of identification and traceability of cattle to achieve the objective of providing consumer information was discussed in "Review: Identification and Traceability of Cattle in Selected Countries Outside of North America".[82] The authors of this review explained:

> Modern animal identification utilizes some of the same practices that were used in ancient times to identify animals (i.e., tattooing and branding). Additionally, the reasons for animal identification (i.e., public health, animal health, animal management, trade, and *consumer demand*) remain the same (Marchant, 2002). However, technologies exist today that allow for more precise identification of individual animals and for the tracing of those animals throughout their lives from birth *until purchase by a consumer*.[83]

Moreover, "[t]his review has demonstrated that, regardless of the methods used and the motivation behind implementation, *individual animal identification is possible on a large scale*".[84] Therefore, the third alternative measure proposed by Canada and Mexico is reasonably available for the United States.

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

81. The United States says that USDA abandoned NAIS because of concerns over costs and the potential for slowing down "the speed of commerce," but did not cite a source for this

80 *See* Mexico's First Written Submission, paras. 208-212.

81 Mexico's First Written Submission, para. 208; *See* Exhibit MEX-41, p. 5. (p. 291 of the Professional Animal Scientist 24 (2008)).

82 M. B. Bowling, D. L. Pendell, D. L. Morris, Y. Yoon, K. Katoh, K. E. Belk, and G. C. Smith, "Review: Identification and Traceability of Cattle in Selected Countries Outside of North America", Professional Animal Scientist 2008 24:287-294 (Exhibit MEX-41, p. 7) ("Review: Identification and Traceability of Cattle in Selected Countries", p. 293).

83 Review: Identification and Traceability of Cattle in Selected Countries, p. 287 (Exhibit MEX-41, p.1).

84 Review: Identification and Traceability of Cattle in Selected Countries, p, 293, (emphasis added) (Exhibit MEX-41, p. 7); Mexico's First Written Submission, para. 209.

statement about USDA's motivation for cancelling the program.[85] When USDA withdrew the NAIS program in 2010, it explained the political opposition as follows:

> Some of the concerns and criticisms raised included confidentiality, liability, cost, privacy, and religion. There were also concerns about NAIS being the wrong priority for USDA, that the system benefits only large-scale producers, and that NAIS is unnecessary because existing animal identification systems are sufficient.[86]

82. The trade association R-CALF USA, representing a group of U.S. cattle producers, aggressively opposed NAIS and published criticisms of NAIS that focused on the alleged intrusion of privacy and constitutional rights that would arise from allowing USDA to register the premises where cattle are raised.[87]

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

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

83. At paragraph 177 of its response to this question, the United States cites paragraph 8.292 of the Panel Report in *EC – Asbestos* and submits that the "burden of proof for a claim concerning a concession made many years ago 'must be all the heavier inasmuch as the intervening period has been so long'". The facts in *EC – Asbestos* are very different from this dispute. The time elapse between the concessions and the adoption of the decree in question was 35-50 years and the subject matter of the decree was the protection of public health which fell under Article XX of the GATT 1994.[88] In this dispute, the tariff concession was made only 14 years before the original COOL Measure and it concerns a measure that the United States acknowledges does not fall under Article XX.[89]

84. In *Japan – Film*, the Panel found that, in the case of measures introduced *subsequent* to the conclusion of the tariff negotiations at issue, there is a *presumption* that the complaining Member should not be held to have anticipated the measures and it is then for responding Member to rebut that presumption.[90] In Mexico's view, given that the original COOL Measure and Amended COOL Measure were introduced after the tariff concession

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85 United States' response to Question 63, para. 148.

86 USDA, Questions and Answers: New Animal Disease Traceability Framework (February 2010), p. 1. (original Exhibit MEX-68), Exhibit MEX-92.

87 R-CALF USA, Top 10 Reasons to Oppose NAIS' Premises Registration, available at http://www.r-calfusa.com/animal%20id/090218-10ReasonsOppPremisesReg.pdf (Exhibit MEX-93).

88 Panel Report, *EC – Asbestos*, paras. 8.291-8.292.

89 United States Opening Statement, para. 27.

90 Panel Report, *Japan – Film*, para. 10.79.

was negotiated and none of the distinguishing facts addressed by the Panel in *EC – Asbestos* are relevant, this presumption applies.

85. At paragraph 180 of its response to this question, the United States refers to the legitimate objectives of preventing deceptive practices and protecting consumers against fraudulent or misleading indications. The Amended COOL Measure is not aimed at either of these objectives because it does not simply prohibit the communication of misleading labelling information. It goes a step further to mandate the provision of information related to where cattle were born, raised and slaughtered. This element of the Amended COOL Measure – i.e., the mandatory labelling element – has nothing to do with consumer deception. If the COOL measure were simply a consumer protection measure, it could be voluntary and only apply where terms such as "Product of USA" or "Born, Raised and Slaughtered in the USA" are used. There would be no need to mandate the application of a label indicating where the cattle in question were "Born, Raised and Slaughtered".

**81. *(all parties)* Under Article XXIII:1(b) of the GATT 1994, is it sufficient for a particular good to be entitled, as a matter of law, to a GATT concession, or must that good actually be benefiting at some point in time from the access provided by that concession?**

86. At paragraph 188 of its response to this question, the United States submits that Mexico has not explained how the amended COOL measure can nullify or impair benefits under Mexico's WTO Schedule when trade in feeder cattle between Mexico and the United States is governed by and benefitting from tariff concessions under the NAFTA.

87. Although this issue is already addressed in Mexico's submissions and response to this question, Mexico would like to further clarify that it has two "layers" of tariff bindings protecting its feeder cattle exports to the United States: NAFTA tariff bindings and WTO tariff bindings. The adverse effect of the Amended COOL Measure is so great that it nullifies and impairs both layers of tariff bindings. At the very least, Mexico should have the protection of the WTO tariff bindings and it does not. Those tariff bindings are being nullified or impaired as described in Mexico's submissions.[91]

## ECONOMIC AND ECONOMETRIC QUESTIONS

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

[91] Mexico's First Written Submission, paras. 239-243; Mexico's Second Written Submission, paras. 158 - 162.

88. The United States presented data in its Exhibit US-59.

89. Regarding the figures on cattle supply, the internet link provided by the United States does not indicate the specific source of the information. It appears the United States may have used information on "calf crop", to which it states it made unexplained adjustments. Mexico is unable to determine why the information provided by the United States on calf births is different than the information provided by Mexico, as Mexico's data was sourced from USDA's website.

90. Regarding beef production, the data provided by Mexico, which was sourced from USDA's website, was presented in pounds, while the United States' data was presented in metric tons. When converted into equivalent units of measures, the figures appear to be generally the same.

91. Regarding beef consumption, the United States did not share the source of its starting figures and therefore it is not possible to analyze that information.

92. The notes indicate that the United States applied the same allocation percentages as previously. Mexico has already established that the U.S. percentage allocation for products sold at retail versus products sold in food service establishments is unsupported.[92] Mexico also established that the U.S. figure for products sold at covered retailers reflected a mathematical error.[93]

93. Finally, Mexico has established that the most recent data available demonstrates that ground beef represents about 50 percent of beef consumption, rather than 42 percent as the United States asserts.[94] It is noteworthy that the source of the information used by the United States is the same as Mexico, but that Mexico's figures are for much more recent periods.

94. Mexico presented data from multiple sources, using alternative methodologies, to demonstrate the share of beef products that is covered by the Amended COOL Measure. As Mexico explained, the points-of-production labelling requirements for muscle cuts apply to a range of 12.5 percent to 17.5 percent of total beef consumption, and these figures in fact are likely exaggerated because the level of implementation of the labelling requirements by retailers is significantly limited.[95]

92 Mexico's response to Question A, paras. 180 and 181.

93 Mexico's response to Question A, para. 180.

94 Mexico's response to Question A, para. 201.

95 Mexico's response to Question A, para. 201.

# LIST OF EXHIBITS

| Number | Title |
|---|---|
| MEX-1 | Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts; Proposed Rule 78 Fed. Reg. 15645 (March 12, 2013) |
| MEX-2 | Letter from Mexico to the Agricultural Marketing Service of the U.S. Department of Agriculture (11 April 2013) |
| MEX-3 | Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts; Final Rule, 78 Fed. Reg. at 31367 to 31370 (24 May 2013) |
| MEX-4 | Administrative Procedures Act, 5 U.S.C. § 706(2)(C) |
| MEX-5 | *Bowen v. Georgetown Univ. Hosps.*, 488 U.S. 204, 208 (1988) |
| MEX-6 | 7 U.S.C. § 1638 |
| MEX-7 | Perishable Agricultural Commodities Act of 1930, 7 U.S.C. § 499 |
| MEX-8 | 7 C.F.R. § 46.2(x) |
| MEX-9 | USDA, Country of Origin Labeling (COOL) Webinar for Retailers and Suppliers (April 11, 2012 & April 17, 2012) |
| MEX-10 | U.S. Customs Ruling NY E89452 (November 16, 1999) |
| MEX-11 | 19 C.F.R. § 102.20 |
| MEX-12 | Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts; Final Rule |
| MEX-13 | USDA Economic Research Service (ERS), Statistics and Information: U.S. Cattle and Beef Industry, 2002 – 2011 |
| MEX-14 | USDA, Frequently Asked Questions (FAQs) – COOL Labeling Provisions Final Rule (September 20, 2013) |
| MEX-15-A | Sample Label |
| MEX-15-B | Sample Label |
| MEX-15-C | Sample Label |
| MEX-16 | Affidavit of the Confederación Nacional de Organizaciones Ganaderas (CNOG) |
| MEX-17 **BCI** | Affidavit on Behalf of Mexican Industry |
| MEX-18 **BCI** | Affidavit of Producer from the Unión Ganadera Regional de Sonora |
| MEX-19 **BCI** | Affidavit of Producer from the Municipality of Guerrero, Tamaulipas |
| MEX-20 | Comment by J. Mullins (March 28, 2013); Letter from Kansas Cattlemen's Association to USDA |
| MEX-21 | Letter from Tyson Foods, Inc. to USDA (April 11, 2013) |
| MEX-22 | Letter from Cargill, Incorporated to USDA |

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| MEX-23 | Declaration of Rogers & Sons, Ltd. in support of Plaintiffs' Motion for a Preliminary Injunction, Case No. 13-cv-1033-KBJ (filed July 11, 2013); Declaration of Rogers & Sons, Ltd. in support of Plaintiffs' Partial Opposition to Proposed Defendant-Intervenors' Motion to Intervene, Case No. 13-cv-1033-KBJ (August 16, 2013) |
| MEX-24 | Letter to USDA from Agri Beef Co., Central Valley Meat Co., Preferred Beef Group, Walt's Wholesale Meats, Inc., Schenk Packing Co., Inc., Harris Ranch Beef Company, Dallas City Packing, Inc., Caviness Beef Packers, Ltd., and Sam Kane Beef Processors, Inc. (April 11, 2013) |
| MEX-25 | Letter from National Grocers Association (NGA) to USDA (April 11, 2013) |
| MEX-26 | Letter from Food Marketing Institute (FMI) to USDA (April 11, 2013) |
| MEX-27 | Declaration of Runnells Peters Feedyard LLC in Support of Plaintiffs' Partial Opposition to Proposed Defendant-Intervenors' Motion to Intervene, Case No. 13-cv-1033-KBJ (August 16, 2013) |
| MEX-28 | Declaration of Rolando Peña Hinojosa in Support of Plaintiffs' Motion for a Preliminary Injunction, Case No. 13-cv-1033-KBJ (August 15, 2013) |
| MEX-29 | Exhibit US-147 in *US – COOL*: Christopher G. Davis and Biing-Hwan Lin, "Factors Affecting U.S. Beef Consumption", Electronic Outlook Report from the Economic Research Service, USDA, LDP-M-135-02 (October 2005) |
| MEX-30 | Cattlemen's Beef Board & National Cattlemen's Beef Association, "Beef Market At a Glance" |
| MEX-31 | Congressional Research Service, "Country-of-Origin Labeling for Foods and the WTO Trade Dispute on Meat Labeling" (September 16, 2013) |
| MEX-32 | National Cattlemen's Beef Association, "Average Annual Per Capita Consumption Beef Cuts and Ground Beef" |
| MEX-33 | Congressional Research Service, "Animal Identification and Meat Traceability" |
| MEX-34 | Glynn T. Tonsor, Ted C. Schroeder and Jayson L. Lusk, "Consumer Valuation of Alternative Meat Origin Labels", *Journal of Agricultural Economics*, doi: 10.1111/1477-9552.12010 (November 2012) |
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