ANNEX C

THIRD PARTY SUBMISSIONS

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ANNEX C-1

**EXECUTIVE SUMMARY OF THE
THIRD PARTY WRITTEN SUBMISSION OF AUSTRALIA**

I. INTRODUCTION

1. The US country of origin labelling requirements (the "COOL measure") at issue in these proceedings raise significant systemic issues concerning the legal obligations and rights of WTO Members under the Agreement on Technical Barriers to Trade (TBT Agreement) and the General Agreement on Tariffs and Trade 1994 (GATT 1994).

II. THE MEASURE AT ISSUE

2. Canada and Mexico have broadly identified the measure at issue to encompass the 2008 Interim Final Rule and the Vilsack Letter[1] in addition to the 2009 Final Rule and the 2002 COOL Statute, as amended. Mexico has also included the Food Safety and Inspection Service Interim Rule. The COOL measure thus identified covers many commodities and affects every stage of the supply chain. Relevantly (given Australia's large exports of muscle cuts and manufactured ground beef), Australia notes ground beef (along with other ground meats) is subject to very particular COOL requirements under §65.300(h) of the 2009 Final Rule.

3. Australia disagrees with the US contention that Canada and Mexico have failed properly to identify the measure at issue because they have not addressed the WTO consistency of all elements of the COOL measure. In this regard, Australia notes the Panel's statement in *EC-Sardines* that a complaining party may elect to "identify and challenge only those offending provisions of the measure it deems central to its interest in resolving the dispute".[2]

4. Like Canada and Mexico, Australia also regards the Vilsack Letter as a measure which can be challenged in WTO dispute settlement proceedings. It is an act directly attributable to the executive of a WTO Member. The Vilsack Letter is an official document that sets out the official position of the US Department of Agriculture as mandated by the Secretary of the Department and is characterised by the Secretary as representing the will of the US Congress.

III. THE AGREEMENT ON TECHNICAL BARRIERS TO TRADE

A. DEFINITION OF TECHNICAL REGULATION

5. Australia considers the COOL measure meets the three criteria identified by the Appellate Body in *EC – Asbestos* required to fall within the definition of a "technical regulation" under Annex 1 of the TBT Agreement,[3] as it relates to named "covered commodities", provides for labelling requirements (as referred to in the definition of a technical regulation in Annex 1), and is of binding or compulsory nature.

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[1] US Secretary of Agriculture Thomas J. Vilsack's letter to Industry Representatives dated 20 February 2009.

[2] Panel Report, *EC – Sardines*, para. 7.34.

[3] Appellate Body Report, *EC – Asbestos*, paras. 66-70, cited also in Appellate Body Report, *EC – Sardines*, para. 176. See Canada's first written submission, paras. 71-74 and Mexico's first written submission, paras. 238-260.

6. Australia notes Mexico directly addresses the mandatory nature of the Vilsack Letter. The United States challenges Mexico's characterisation of the letter as mandatory. In Australia's view, Mexico is correct in asserting that how the US Department of Agriculture characterises the Vilsack Letter should not be determinative of its character. Instead, a critical question for the Panel is whether industry views this letter as mandating action.

B. ARTICLE 2.1 OF THE TBT AGREEMENT

7. There is limited direct guidance from WTO Panel and Appellate Body Reports on the application of Article 2.1 of the TBT Agreement. However, Australia believes the Panel can be informed by the interpretation of the phrases "like product" and "treatment no less favourable" in GATT Article III:4.

8. Australia notes the US argument that Canada and Mexico's "like product" analysis is deficient because the subject of the COOL measure is meat and not livestock. Australia disagrees with this interpretation and believes Article 2.1 should be applied to country of origin labelling requirements, so as to encompass "like products" that, at whatever point of the supply process, are required to be identified for the purposes of labelling the end product. In other words, the application of the COOL measure to all early stage products, whether livestock, muscle cuts or beef trimmings used in ground beef, should be subject to Article 2.1.

9. In Australia's view, both Canada and Mexico have clearly established that live cattle, and in the case of Canada, live hogs, are "like products" to US live cattle and hogs.

10. Australia also submits that imported beef trimmings used for processing or grinding into ground beef in the United States are like products to domestic (US) beef trimmings. Imported beef trimmings have the same properties, nature and quality as the US product, and the same end uses as US beef trimmings, as both are processed into ground beef. Finally, Australia also notes that imported beef trimmings and US beef trimmings that are processed into ground beef are classified under the same subheading 0201 and 0202 under the Harmonised System of Tariff Classification.

11. The objective of the "treatment no less favourable" requirement is to provide "equality of opportunities" for imported goods.[4] As part of this analysis, it is necessary to examine whether the COOL measure "modifies the conditions of competition in the relevant market to the detriment of imported products".[5]

12. On its face, the COOL measure provides for formally identical treatment of imported product as the same requirements to identify the origin of the product apply equally to domestic product. However, the COOL measure has the potential to accord different treatment to imported product that amounts to less favourable treatment within the meaning of Article 2.1 of the TBT Agreement because it results in additional operational costs on imported product.

13. Australia does not object to identifying imported product on labels and does not agree with Mexico's claim that country of origin labelling measures "are inherently protectionist and discriminatory".[6] As the United States submits, "there is nothing about country of origin labelling that

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[4] *US – Section 337 of the Tariff Act*, para. 5.11: see Canada's first written submission, paras. 87 and 88 and Mexico's first written submission, para. 217, with reference to the Appellate Body Report, *Korea – Various Measures on Beef*, para. 137 and Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 93.

[5] Appellate Body Report, *Korea – Various Measures on Beef*, para. 137.

[6] Mexico's first written submission, para. 5.

is inherently unfavourable to imported products".[7] At times it may even favour imported product. Australia maintains its own mandatory country of origin labelling requirements and as an exporter of many products to countries with country of origin labelling requirements seeks to ensure such requirements do not hinder international trade. Australia notes many WTO Members maintain country of origin labelling requirements.

14. However, Australia agrees with Mexico's claim that the COOL measure discriminates "by virtue of its design, structure and application".[8] Australia's concerns focus on the higher cost burdens the requirements place on the use of imported product throughout the chain of supply. The COOL requirements applicable to ground beef are an example of such *de facto* discrimination, as labelling of all possible countries of origin in accordance with the 60 day inventory allowance could distort the market in favour of domestic product and is likely to result in discrimination against imported product.

15. Should the Vilsack Letter be found to be a "technical regulation", Australia agrees with Canada's assessment that the effect of the labelling practices in the letter "would severely curtail the ability to commingle meat from various countries of origin".[9] Both production step labelling and extending coverage to processed meats would impose higher costs where imported product is used. Further, a reduction in the ground meat inventory allowance to *10 days* as set out in the Vilsack Letter (from the 60 day requirement contained in the 2009 Final Rule) would reduce the minimal flexibility currently available to processors. There would be a corresponding increase in compliance costs relating to traceability, record keeping and packaging or other forms of labelling as labels would have to be changed more frequently.

C. ARTICLE 2.2 OF THE TBT AGREEMENT

16. Article 2.2 of the TBT Agreement grants Members the right to adopt technical regulations for the purpose of fulfilling legitimate objectives. Australia submits the correct analysis under Article 2.2 involves examination of:

- whether the objective of the measure at issue is a legitimate objective;
- whether the measure at issue is more trade-restrictive than necessary to fulfil a legitimate objective, which in turn involves an assessment of:
- whether the measure is trade-restrictive;
- whether the measure is to fulfil a legitimate objective; and
- whether there are other reasonably available alternatives that may be less trade-restrictive while still fulfilling the legitimate objective at the level of protection the Member considers appropriate; and
- the risks non-fulfilment [of the legitimate objective] would create.

17. Firstly, Australia submits that an examination of the legitimacy of an objective is confined to an examination of whether the objective put forward by the respondent is legitimate within the meaning of Article 2.2. The text of Article 2.2 provides that legitimate objectives include, among

[7] United States' first written submission, para. 141.
[8] Mexico's first written submission, para. 5.
[9] Canada's first written submission, para. 28.

other things, the prevention of deceptive practices and the protection of human health and safety. Article 2.2 does not expressly restrict what might be legitimate objectives; the list is not exclusive. The United States has put forward the provision of consumer information so as to minimise consumer confusion as the legitimate objective of the COOL measure.[10] Australia regards enabling consumers to identify the source of a product a legitimate objective for the purposes of Article 2.2.

18. Second, Australia considers that Article 2.2, in requiring that a challenged measure must be necessary "to fulfil a legitimate objective", means that the measure must fulfil or at least have the capacity to fulfil, the legitimate objective. The relevant question in this dispute is whether the COOL measure does carry out, or has the capacity to carry out, its stated objective of providing accurate additional consumer information.

19. In Australia's view, Canada has identified aspects of the COOL measure that do not appear to achieve that stated objective, particularly in the labelling of ground beef.[11] In some respects, the COOL measure can in fact result in misleading and inaccurate information. In particular, the 60 day inventory allowance could result in inaccuracy, as the label could identify the origin of products not in fact used in the ground beef.

20. Third, as noted by Canada and Mexico, GATT disciplines on the use of restrictions are meant to protect not "trade flows", but rather the "competitive opportunities of imported product".[12] Trade-restrictive measures therefore include those that impose any form of limitation, discriminate against or deny competitive opportunities to imported product. In Australia's view, the COOL measure limits trade by imposing recordkeeping and segregation costs which are likely to be greater when imported product is used and thus impact on the competitive opportunities of imported product.

21. Australia notes that elements of the "necessity" analysis developed under GATT Article XX are similar to the elements contained in the language of Article 2.2 of the TBT Agreement. Applied to Article 2.2, establishing the necessity of the trade-restrictive elements of the COOL measure may require consideration of the extent to which the trade-restrictive elements make a contribution to the legitimate objective or contribute to the realisation of the end pursued: the greater the contribution the more easily the trade-restrictive elements of the measure might be considered necessary.[13]

22. Thus, with respect to ground beef, the COOL measure does not appear to fulfil its objective and further, may be more trade-restrictive than necessary given the reasonable availability of other alternatives.

23. One possible alternative would require labels to identify "domestic" or "imported" product (without specifying the particular country of origin). This greater flexibility would enable processors to use imported product without needing to segregate product by country of origin or adjust recordkeeping practices to avoid financial penalties under the COOL measure.

24. In summary, Australia considers that the trade-restrictive aspects of the COOL measure are not necessary to fulfil the stated objective of providing accurate consumer information and that the

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[10] United States' first written submission, para. 206. The United States notified the "objective and rationale" as "consumer information" in its amended Notification to the Committee on Technical Barriers to Trade: G/TBT/N/USA/281/Add.1, 7 August 2008.

[11] Canada's first written submission, paras. 178-180.

[12] Canada's first written submission, para. 184 and Mexico's first written submission, para. 306 citing Panel Report, *EC – Bananas III (Article 21.5 – Ecuador II)*, at para. 7.330 and Panel Report, *EC – Bananas III (Article 21.5 – US)*, at para. 7.677.

[13] Appellate Body Report, *Korea – Various Measures on Beef*, paras. 160-163.

objective of providing consumer information could be fulfilled by the less trade-restrictive alternative for ground beef outlined above.

D. ARTICLE 2.4 OF THE TBT AGREEMENT

25. Mexico identifies the *Codex General Standard for the Labelling of Prepackaged Foods* ("CODEX-STAN 1-1985") prepared by the Codex Commission as a "relevant" international standard upon which the COOL measure should be based. Australia queries whether the purpose of the CODEX-STAN 1-1985 is relevant or bears upon the COOL measure, which is not intended directly to address misleading or deceptive labelling practices (though it may complement such practices).

26. In the alternative, should the Panel find that CODEX-STAN 1-1985 is a relevant standard that should have provided the basis for the COOL measure, Australia considers that CODEX-STAN 1-1985 is unlikely to be effective or appropriate in all cases to fulfil the legitimate objective of providing accurate consumer information.

IV. THE GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT 1994)

27. Australia notes the three elements that must be satisfied to establish a violation of GATT Article III:4: that the imported and domestic products are "like products"; that the measure at issue is a "law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use"; and that the imported products are accorded "less favourable treatment" than that accorded to like domestic products.[14]

28. As under Article 2.1 of the TBT Agreement, Australia considers that the COOL measure has the potential to impose higher cost burdens on the use of imported product throughout the chain of supply and therefore provides less favourable treatment to imported product contrary to Article III:4 of GATT 1994.

V. CONCLUSION

29. In Australia's view, contrary to the national treatment obligations in Article 2.1 of the TBT Agreement and Article III:4 of GATT 1994, the COOL measure has the potential detrimentally to affect the conditions of competition so as to discriminate against imported product, resulting in treatment less favourable for such products.

30. Furthermore, Australia believes the COOL measure is inconsistent with the obligation set out in Article 2.2 of the TBT Agreement, in that the trade-restrictive nature of the COOL measure is not necessary to fulfil its objective of providing accurate consumer information, given less trade-restrictive and reasonably available alternatives, including that identified by Australia in relation to ground beef.

[14] Appellate Body Report, *Korea – Various Measures on Beef*, para. 133.

ANNEX C-2

THIRD PARTY ORAL STATEMENT OF AUSTRALIA AT THE FIRST SUBSTANTIVE MEETING

I. INTRODUCTION

1. Mr Chairman, members of the Panel. Thank you for the opportunity to present Australia's views on this dispute, which raises important issues of legal interpretation. Australia highlighted some of these issues in its written submission. We will not repeat all of those arguments today.

2. Instead, in this statement we will identify some of the key questions which Australia believes the Panel should address in relation to the claims by Canada and Mexico that the US COOL measure is inconsistent with Articles 2.1 and 2.2 of the TBT Agreement; and in relation to the arguments put by the United States to the contrary.

3. Whilst noting the claims of Canada and Mexico extend beyond Articles 2.1 and 2.2, Australia has chosen to focus on these articles, and on these questions, because many of the questions have not yet been specifically addressed by a panel or the Appellate Body.

II. QUESTIONS FOR THE PANEL'S CONSIDERATION

A. WHAT IS THE NATURE OF THE COOL MEASURE?

4. Canada and Mexico have broadly identified the COOL measure to encompass a number of individual measures, which together make up the measure at issue in these proceedings.

5. Australia submits that the Panel must decide whether the COOL measure, as identified by Canada and Mexico, is a measure for the purposes of dispute settlement under the DSU and a technical regulation for the purposes of the TBT Agreement.

6. Of particular interest in this calculus, is the Panel's characterisation of the so-called Vilsack Letter, sent by US Secretary of Agriculture Thomas J. Vilsack to Industry Representatives on 20 February 2009.

7. In Australia's view, the Vilsack Letter is an act directly attributable to the executive of a WTO Member, and therefore, consistent with the Appellate Body's comments in *US – Corrosion-Resistant Steel Sunset Review*, challengeable in WTO dispute settlement proceedings. The letter is an official document that sets out in detail the official position of the US Department of Agriculture as mandated by the Secretary of that department and is characterised by the Secretary as representing the will of the US Congress.

8. For the purposes of the definition of a technical regulation in Annex 1 of the TBT Agreement, a further consideration is whether the Vilsack Letter is a mandatory element of the COOL measure. This issue is addressed by Mexico in its submission. Australia notes the argument by the United States that compliance with the Vilsack Letter is in fact voluntary. However, Australia believes that none of the factors set out by the United States in support of this contention are necessarily determinative of whether the Vilsack Letter is in fact mandatory, or "binding or compulsory". Nor is the US Department of Agriculture's characterisation determinative. Rather, the critical question for the Panel to examine is whether industry views the letter as mandating action.

B. TO WHAT PRODUCTS DOES THE COOL MEASURE RELATE?

9. Canada and Mexico have based their claims under Article 2.1 of the TBT Agreement (and Article III:4 of GATT 1994) on an analysis of 'like product' between Canadian and Mexican live cattle on the one hand, and US live cattle on the other; and between Canadian and US live hogs.

10. Australia notes that the COOL measure applies broadly to a range of covered commodities, including beef trimmings for which Australia has a particular export interest. In its third party submission, Australia also submits that imported beef trimmings are a like product to US domestic beef trimmings used in ground beef.

11. In addressing this issue, the Panel should consider whether Canada and Mexico (with what appears to be agreement from the United States) are correct in applying the GATT Article III:4 analysis of like product to the analysis of like product under Article 2.1 of the TBT Agreement.

12. Further, the Panel ought to reject the US argument that the subject of the COOL measure is in fact meat and not livestock, and therefore Canada and Mexico's claim fails, as they have not demonstrated that Canadian and Mexican meat is a like product to US meat.

13. In this respect, Australia notes that such a narrow interpretation of the phrase "in respect of technical regulations" in Article 2.1 would in fact undermine the application of the Article. It would allow, for example, a country to actively discriminate against a broad range of source products, simply because those source products are not the subject of, or "in respect of" the actual technical regulation.

14. Australia submits the better view, in particular with respect to country of origin labelling requirements, is that Article 2.1 should be applied so as to encompass like products that, at whatever point of the supply process, are required to be identified for the purposes of labelling the end product. Applied to the COOL measure, all early stage products, whether livestock, muscle cuts or beef trimmings used in ground beef, would be subject to the disciplines of Article 2.1.

C. DOES THE COOL MEASURE PROVIDE FOR TREATMENT LESS FAVOURABLE?

15. Australia notes the approach taken by Canada and Mexico drawing upon the analysis developed under GATT Article III:4 in determining whether the COOL measure provides for less favourable treatment to like products of non-national origin. Should the Panel agree with this approach, then Australia believes the critical question for the Panel to examine is whether the COOL measure "modifies the conditions of competition in the relevant market to the detriment of imported products" (as articulated by the Appellate Body in the *Korea – Various Measures on Beef* dispute).

16. In this case, where the measure provides for formally identical treatment on its face, the Panel should also consider whether the measure has the potential to accord de facto less favourable treatment. Canada and Mexico both seek to demonstrate the COOL measure accords differential treatment to imported livestock that amounts to less favourable treatment within the meaning of Article 2.1 of the TBT Agreement. Put simply, Canada and Mexico contend that the COOL measure results in additional operational costs on imported product, in particular with respect to segregation and recorC-keeping, than the costs it imposes when domestic product is used.

17. Should the Panel agree with Canada and Mexico on this point, then Australia would submit this does constitute differential (and less favourable) treatment for the purposes of Article 2.1 of the TBT Agreement.

18. Australia also believes this differential (and less favourable) treatment extends to ground beef, as another covered commodity of the COOL measure. As the ground beef market in the United States is currently structured, it is more likely that US beef trimmings used in ground beef will be present in the inventory of a production plant compared to imported beef trimmings from any one country. Accordingly, the impact of the COOL measure would be felt most heavily when imported product is used, creating an incentive for processors to favour domestic product (and to discriminate against imported product).

19. Australia does not believe that country of origin labelling schemes generally are "inherently protectionist and discriminatory", as claimed by Mexico in its submission. Rather, the question for the Panel is whether the US COOL measure provides (or has the potential to provide) treatment less favourable by virtue of its "design, structure and application".

D. IS THE COOL MEASURE'S OBJECTIVE LEGITIMATE?

20. For the purposes of Article 2.2 of the TBT Agreement, Australia submits the Panel must first determine whether the objective of the measure at issue is legitimate.

21. Consistent with the findings of the Appellate Body in the *EC-Sardines* dispute, Australia believes that an examination of legitimacy is confined to whether an examination of the stated objective, as put forward by the United States, is legitimate within the meaning of Article 2.2. It does not extend to an examination of whether the stated objective is actually the objective of the measure. Rather, Australia invites the Panel to determine, with regard to the text of Article 2.2, whether the United States' stated objective of the COOL measure – to provide consumer information so as to minimise consumer confusion – is in fact legitimate.

22. In Australia's view, the United States, through the COOL measure, is seeking to provide consumers with additional useful information. Australia considers that such an objective is a legitimate objective, and accepts the US view that this objective is "closely related" to preventing deceptive practices.

E. DOES THE COOL MEASURE FULFIL ITS LEGITIMATE OBJECTIVE?

23. Australia considers the Panel must then separately decide whether the COOL measure fulfils the stated objective. Australia submits the Panel must determine whether the COOL measure actually carries out, or at least has the capacity to carry out, its stated objective of providing accurate additional consumer information. Should the Panel conclude that a complainant has demonstrated that a measure does not or could not achieve its stated objective, it would be open to conclude the measure does not meet the terms of the second sentence of Article 2.2 and therefore amounts to an unnecessary obstacle to trade within the meaning of the first sentence of Article 2.2.

24. In this regard, Australia notes Canada's arguments in particular, that the COOL measure does not appear to achieve its stated objective of providing accurate consumer information, with respect to the labelling of meat products derived from livestock and of ground beef.

F. ARE THERE ANY REASONABLY AVAILABLE ALTERNATIVES?

25. Australia submits that the correct analysis called for under Article 2.2 also requires the Panel to decide whether there are other reasonably available alternatives that may be less trade-restrictive while still fulfilling the legitimate objective at the level the respondent considers appropriate.

26. Australia notes that the complainants, as well as a number of third parties to this dispute, have highlighted a number of reasonably available alternatives, including: voluntary labelling schemes; labelling schemes based on substantial transformation; and, in Australia's case, mandatory labelling which identifies imported or domestic product (without specifying the particular country of origin).

27. Australia submits if the alternative of marking product with 'imported' or 'domestic' were adopted, this would achieve greater accuracy with respect to the labelling of ground beef and be less trade-restrictive than the existing requirements under the COOL measure. Nonetheless, the objectives of the COOL measure would still be met: accurate, additional information would be available to consumers, in particular whether the source of the product was domestic or foreign. Adopting this approach would reduce associated segregation and recordkeeping costs, as processors would not need to segregate product by each particular country of origin. Notably, processors would always have the option of voluntarily identifying specific countries of origin if consumer demand justified the additional cost.

III. CONCLUSION

28. In conclusion, Australia considers the Panel should pay careful attention to the following questions, amongst others, in assessing the consistency of the COOL measure:

- What is the nature of the COOL measure?
- To what products does the COOL measure relate?
- Does the COOL measure provide for treatment less favourable?
- Is the COOL measure's objective legitimate?
- Does the COOL measure fulfil its legitimate objective?
- Are there any reasonably available alternatives?

29. Australia considers, in general, that mandatory country of origin labelling regimes must be designed and implemented in the least trade-restrictive manner possible so that imported products are not subject to less favourable treatment than like domestic products due to labelling requirements.

30. In Australia's view, contrary to the national treatment obligations in Article 2.1 of the TBT Agreement and Article III:4 of GATT 1994, the COOL measure has not been designed in such a manner. It has the potential to detrimentally affect the conditions of competition so as to discriminate against imported product, resulting in treatment less favourable for such product.

31. Furthermore, in Australia's view, the COOL measure does not appear to be consistent with the obligation set out in Article 2.2 of the TBT Agreement in that the trade-restrictive nature of the COOL measure is not necessary to fulfil its objective given the less trade-restrictive and reasonably available alternatives identified by the parties and third parties, including by Australia in relation to ground beef.

32. Australia would be pleased to provide answers to any questions from the Panel, including as requested on Australia's mandatory country of origin labelling regime.

ANNEX C-3

THIRD PARTY ORAL STATEMENT OF AUSTRALIA AT THE SECOND SUBSTANTIVE MEETING

I. INTRODUCTION

1. Mr Chairman, members of the Panel, thank you for this further opportunity to present Australia's views in this dispute, and in particular, for the opportunity to participate in this second panel hearing.

2. In this statement we have chosen to focus on some of the key questions the Panel may wish to address in its consideration of Article 2.2 of the TBT Agreement.

II. QUESTIONS FOR THE PANEL'S FURTHER CONSIDERATION

A. HOW SHOULD THE PANEL APPROACH ITS INTERPRETATION OF ARTICLE 2.2 OF THE TBT AGREEMENT?

3. One such question is *how* the Panel should approach its interpretation of this Article.

4. Australia submits that the second sentence of Article 2.2 elaborates on the meaning of the fundamental discipline in the first sentence. Thus the elements in the second sentence must be considered in the context of the overarching commitment to ensure that technical regulations are not unnecessary obstacles to international trade.

5. Accordingly, Australia agrees with the principal parties that the first threshold question for the Panel to address under Article 2.2 is whether a technical regulation is 'trade restrictive' or an 'obstacle to international trade'.

6. Australia notes that GATT disciplines on the use of restrictions are meant to protect the competitive opportunities of imported products rather than trade flows.[1] Given this, Australia agrees with Canada and Mexico that a measure may be trade restrictive if it imposes any form of limitation on imports, discriminates against imports or denies competitive opportunities to imports.

7. If the measure is found to be trade restrictive, Australia submits that the Panel must then determine whether it is more trade restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create, in accordance with the second sentence of Article 2.2. In other words, the Panel must assess whether the measure is an *unnecessary* obstacle to international trade.

B. HOW SHOULD THE PANEL APPROACH ITS ASSESSMENT OF THE LEGITIMACY OF THE OBJECTIVE OF THE COOL MEASURE?

8. The next question Australia would like to address is how the Panel should approach its assessment of the legitimacy of the objective of the COOL measure.

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[1] See citations in Australia's third party written submission, para. 71.

9. Australia considers that the correct approach is first to establish the objective of the measure and then to consider the legitimacy of that objective, taking into account the fundamental obligation in the first sentence of Article 2.2.

10. In making its preliminary determination of the objective of the measure, Australia agrees with the United States that the Panel should start with the text of the measure.[2]

11. Broader evidence relevant to the development of a measure may be considered by the Panel in making this determination. However, in Australia's view, the Panel should not lightly overturn the stated objective of a measure.

12. Australia notes that some parties and third parties have argued that for objectives not specifically listed in Article 2.2, including, in this case, the provision of consumer information, a Member must provide 'clear and compelling evidence'[3] of its legitimacy. This includes evidence of a wider intent to implement a particular policy goal.

13. The inclusion of the term *inter alia* before the list of objectives in Article 2.2 clearly indicates this list is non-exhaustive. Further, the TBT Agreement affords flexibility to Members to implement technical regulations to pursue any number of legitimate domestic policy objectives.

14. Setting high thresholds for objectives not listed in Article 2.2 runs the risk of curtailing this flexibility. It may also result in Members attempting to artificially adjust the 'official' objective of a regulation so that it fits neatly within one of the listed objectives.

15. Australia believes the objective of providing consumer information is closely related to the prevention of deceptive practices. Providing additional accurate information about a product also assists consumers to make informed purchasing decisions. In Australia's view, the provision of consumer information is clearly a legitimate objective for the purposes of Article 2.2.

C. How should the Panel approach the question of whether the COOL measure fulfils the legitimate objective?

16. Moving on to the next question, Australia submits that the Panel must assess whether the COOL measure 'fulfils' its legitimate objective. In this regard, assuming that the objective of the measure is to provide information to consumers and prevent consumer confusion, the COOL measure must actually carry out, or at least have the capacity to carry out, this objective.

17. Although we agree that a Member has some discretion to pursue legitimate objectives at the levels it considers appropriate, this discretion does not extend to a Member being able to introduce measures that do not actually fulfil, or are not capable of fulfilling, the legitimate objective.

18. In this case, evidence that may be relevant to this enquiry includes whether the information provided to consumers under the COOL measure is potentially inaccurate or misleading. Australia notes the example of the application of the COOL measure in relation to ground beef where a country of origin may potentially be listed on the label of a product that does not in fact include any product from that country.

[2] United States' second written submission, para. 119.
[3] Canada's second written submission, para. 70; New Zealand's written submission, para. 32.

D. TO WHAT EXTENT IS IT UP TO THE RELEVANT MEMBER TO STRIKE A BALANCE BETWEEN FULFILLING THE LEGITIMATE OBJECTIVE AND REDUCING TRADE RESTRICTIVENESS?

19. The United States emphasises that the TBT Agreement allows Members to design measures to achieve legitimate objectives at the level they consider appropriate.[4] Given this, the United States argues that the COOL measure was specifically designed to strike what it considers to be an appropriate balance between achieving its objective of providing consumer information whilst reducing the costs of compliance.[5]

20. Australia agrees that a Member can exercise some discretion in pursuing measures that achieve its legitimate objectives at the levels it considers appropriate. However, there is a limit to that discretion. The panel in *EC – Sardines* emphasised that although the TBT Agreement accords a degree of deference with respect to the policy objectives Members may wish to pursue, 'it shows less deference to the means which Members choose to employ to achieve their domestic policy goals'[6].

21. This is reflected in the preamble to the TBT Agreement which includes the caveat that a measure must not be applied in a manner which would constitute a 'means of arbitrary or unjustifiable discrimination'. In the specific context of Article 2.2, the check on a Member's discretion is borne out in the question of whether the measure is an *unnecessary* obstacle to international trade. And, as discussed, this may in turn necessitate a consideration of the factors set out in the second sentence of Article 2.2.

22. It is Australia's view that although it is up to the United States to decide which policy objectives they wish to pursue and the levels at which they wish to pursue them, it is for the Panel to determine whether the means by which the United States has chosen to achieve this – the COOL measure – are more trade restrictive than necessary to fulfil the legitimate objective to the extent identified by the United States.

E. HOW 'IMPORTANT' IS THE OBJECTIVE OF PROVIDING CONSUMER INFORMATION AND TO WHAT EXTENT SHOULD THE PANEL SHOULD TAKE THIS INTO CONSIDERATION?

23. Australia submits that a finding as to whether a technical regulation is 'more trade restrictive than necessary to fulfil a legitimate objective' must be weighed against the risks non-fulfilment of the particular legitimate objective would create. If the risks associated with non-fulfilment of a particular objective are high, a measure may still be justified regardless of its trade-restrictiveness.

24. Australia agrees that such risks may differ depending on the *nature* or, as suggested by Canada, the *importance* of the legitimate objective the measure is designed to fulfil.[7]

25. Australia is however concerned by any implication that the COOL measure's objective of providing additional consumer information is of low importance.

26. Australia emphasises that providing consumer information can be an important objective. This is particularly the case given the increasingly globalized and complex supply chains for products such as beef and other consumables. The importance of providing consumer information is evidenced by the significant number of Members which maintain, or intend to maintain, a COOL scheme of some description.

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[4] United States' second written submission, para. 154.
[5] United States' first written submission, para. 238.
[6] Panel Report, *EC – Sardines*, para. 7.120.
[7] Canada's second written submission, para. 86.

27. The parties have acknowledged that COOL schemes are not *per se* WTO inconsistent.[8] Australia would therefore caution that a finding that the objective of providing consumer information is of such a low order that only limited trade restrictiveness would be justifiable may have the practical effect that no Member can maintain or implement COOL measures for the purpose of providing information to its consumers.

F. WHAT IS THE RELEVANT EVIDENTIARY THRESHOLD WHEN CLAIMING *DE FACTO* DISCRIMINATION?

28. Finally, Australia also wishes to briefly comment on the evidentiary threshold that must be met when claiming *de facto* discrimination under the national treatment principle in Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement.

29. In particular, Australia notes the submission by the European Union that there is a 'high threshold and a need for particular rigour' in proving a *de facto* discrimination case.[9] In addition, the European Union has suggested that it may be necessary for a complainant to wait for an undefined period of time to accurately assess the impacts of the regulation to determine whether there are equal opportunities for the different goods concerned.[10]

30. Australia wishes to emphasise that the national treatment principle 'protects expectations' of the equality of the competitive relationship between imported and domestic products.[11] This approach is necessary to avoid the situation where a Member is only able to challenge regulations after the event and not in order to forestall less favourable treatment.[12]

31. Australia recalls its argument in relation to ground beef that the COOL measure has the potential to impact on the competitive opportunities of imported products to the detriment of those products.

III. CONCLUSION

32. To conclude, in this statement we have sought to highlight some of the key issues of interpretation surrounding Article 2.2 of the TBT Agreement, a provision on which there has been limited guidance to date.

33. In particular, Australia submits that the Panel's assessment of the trade-restrictiveness inherent in the COOL measure's structure and design, and its ability to fulfil its legitimate objective, may be particularly relevant considerations in determining whether the COOL measure is inconsistent with Article 2.2.

34. Australia would be pleased to answer any questions from the Panel.

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[8] See, for example, Canada's responses to the Panel's questions from the first substantive meeting, para. 73; Mexico's Responses to the Panel's questions from the First Substantive Meeting, para. 103.

[9] Replies to the First Questions by the European Union, para. 32.

[10] *Ibid*, para. 29-30.

[11] Appellate Body Report, *Japan – Alcoholic Beverages II, page 16*; GATT Panel Report, *US – Section 337 Tariff Act,* para. 5.13; Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215; Panel Report, *Korea – Various Measures on Beef*, paras. 623-, 627.

[12] GATT Panel Report, *US – Section 337 Tariff Act,* para. 5.13.

ANNEX C-4

THIRD PARTY WRITTEN SUBMISSION OF BRAZIL

I. INTRODUCTION

1. Brazil welcomes this opportunity to provide its views in these proceedings. As one of the largest producers and exporters of some of the commodities covered by the measures at issue in this dispute, Brazil has significant interests in the outcome of this dispute, the factual analysis to be conducted by the panel and the legal interpretation to be developed. Moreover, not only the United States but also many other large markets for Brazilian products have been applying a growing number of technical barriers to trade, of increasing complexity.

2. Brazil believes that better consumer information may be beneficial to the economy and to the society at large, as it may allow more informed purchasing decisions by consumers. However, Brazil is especially concerned with the risk posed by some measures, such as labelling requirements, which might open a new avenue for disguised protectionism if not properly disciplined. Therefore, their consistency with the covered agreements should be evaluated with utmost caution by panels.

3. One of the critical aspects when dealing with technical regulations is the difficulty in determining whether a specific measure responds primarily to a public interest or to protectionist interests. Sometimes the problem is compounded by the fact that both motives may be combined in a single technical regulation. Thus, a panel should always carefully analyse not only the alleged justification, but also the design and operation of specific measures in this domain.

II. INTERPRETATION OF TBT ARTICLE 2.2

4. Both complainants claim that the COOL measure violates, among others, Article 2.2 of the Agreement on Technical Barriers to Trade ("TBT Agreement"). In this connection, Brazil would like to offer its views on some elements that it believes should be taken into account in the panel's interpretation of Article 2.2.

5. Article 2.2 establishes 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. 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 enC-uses of products."

6. The reading of this article suggests that the following sequence of analysis may be useful in assessing compliance with Article 2.2 of the TBT Agreement: (i) first, the Panel should assess whether the objective stated by the regulating Member is "legitimate"; (ii) second, if the stated objective is found to be legitimate, the Panel should evaluate whether the actual measure at issue bears a rational link with the stated objective. If that is the case, then (iii) the measure at issue should be subject to the "necessity test" that is provided under Article 2.2. Such a test entails an assessment of whether the technical regulation in question is more trade-restrictive than necessary to fulfil the

legitimate objective in point. This assessment may include, inter alia, consideration of the degree of trade-restrictiveness of the technical regulation; its effectiveness in fulfilling the given objective; and possible less trade-restrictive alternative measures which might be reasonably available.

A. "MORE TRADE-RESTRICTIVE THAN NECESSARY"

7. The interpretation of the phrase "more trade-restrictive than necessary " in Article 2.2 can draw – as relevant context and as acknowledged by the parties – on the interpretation of the term "necessary" in Article XX of the GATT 1994 and on the combined reading of Article 5.6 and footnote 3 of the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement"). Although Brazil agrees with the contextual importance of these provisions, one should be cautious with the US approach regarding the importation of the "significantly" less trade restrictive standard from footnote 3 to Article 5.6 of the SPS Agreement into Article 2.2 of the TBT Agreement, as that term is found only in that specific agreement.

8. The letter sent by the GATT Director-General to the U.S Chief Negotiator, mentioned by the United states in Paragraph 248 of its submission, does not serve – in Brazil's view – as confirmation that the standard set out in footnote 3 to the SPS Agreement applies to the TBT Agreement. Brazil disagrees that a letter sent by the then Director-General to only one WTO Member may, by itself, inform the meaning of a multilateral agreement. Moreover, as that same letter acknowledges in the passage immediately preceding the citation made by the U.S., "…it was not possible to achieve the necessary level of support for a US proposal [concerning a clarifying footnote to Article 2.2 and 2.3 of the TBT Agreement]…"[1]

9. In addition, Article 2.2 expressly provides that this "necessity test" must take account of, and thus be informed by, the risks that could be created by non-fulfilment of the legitimate objective contemplated by the measure. Brazil comments on some of these elements below.

B. ASSESSMENT OF THE PURSUED OBJECTIVES

10. The first two elements of the sequence indicated above are, first, whether the objectives stated by the regulating Member are "legitimate" and, second, if the stated objectives are found to be legitimate, whether the actual measures at issue bear a rational link with the stated objectives. Both questions involve factual issues that the Panel must assess based on the evidence before it.

11. In the present dispute, the United States claims that its "COOL measures" qualify as technical regulations, have the stated objective of providing information to consumers and are an adequate means to achieve that objective, which the United States deems legitimate under Article 2.2.[2]

12. A Member imposing a technical regulation is entitled to define its objective or objectives. This does not mean, however, that a panel has no role to play in determining whether the actual objectives of the technical regulation are "legitimate." In EC – Sardines, with respect to article 2.4 of the TBT, the Appellate Body agreed with the panel that it was "required to determine the legitimacy of [the] objectives" for claims asserted under Article 2.4 of the TBT Agreement:[3]

[1] Exhibit US-53.
[2] United States' first written submission, para. 131.
[3] Panel Report, *EC – Sardines*, para. 7.121.

> … we share the view of the Panel that the second part of Article 2.4 implies that there must be an examination and a determination on the legitimacy of the objectives of the measure.[4]

13. The same reasoning is equally valid under Article 2.2.

C. "TAKING INTO ACCOUNT THE RISKS THAT NON-FULFILMENT WOULD CREATE"

14. Another interpretative issue raised by Article 2.2 is the meaning and scope of the ending clause of the second sentence: "… technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create." This phrase must be read together with an illustrative list of factors in the last sentence of Article 2.2 that regulating Members must "tak[e] account" "in assessing such risks". Together, these Article 2.2 provisions require that a Member proposing a technical regulation must assess the risks that would arise if the legitimate objective in question were not fulfilled. This involves assessing the importance of the objective and the harm that could arise if the legitimate objective were not met.

15. Such risks would have to be assessed qualitatively and/or quantitatively by the Member. In Brazil's view, an essential part of this aspect of the risk assessment would be to assess the importance of the legitimate objective.[5] For example, if the legitimate objective were the protection of human life and health, then the risks of non-fulfilment would likely be extremely high. If the objectives were different, the risks could be lower. The result of such risk assessment would then have to be brought to bear on the inquiry as to the necessity of the technical regulation in light of its degree of trade-restrictiveness and thus as to whether it is more trade restrictive than necessary to fulfil the given objective.

16. These risk assessment provisions in Article 2.2 are an integral part of the core obligation in Article 2.2, i.e., that a "technical regulation [not be] more trade-restrictive than necessary to fulfil a legitimate objective." Where an assessment of the risks of non-fulfilment shows that these would be negligible, the proposed technical regulation may likely be not "necessary", or more trade restrictive than necessary, within the meaning of Article 2.2.

17. Translating these considerations into the circumstances of the present case, it seems that the question to be asked would be about the risks, or consequences, of consumers in the United States not being informed, in all instances, of the origin of the covered commodities. The underlying issue here would also revolve around what confers "origin", according to consumers' perception, to, for example, processed beef. On a more fundamental level, it may become relevant to consider what the concept of "origin" implies in multinational or regional integrated economic sectors. With relation to the covered commodities, it may be important to understand how and to what extent place of birth, feeding, slaughtering and processing (and even the geographic origin of the genetic material) have a bearing on the assignation of "origin".

18. Additionally, the panel may also want to assess the added value provided by the information given to consumers, relative to products that, according to the United States, do not seem to represent very significant import shares[6]. On the basis of the specific facts of the present dispute, the Panel may want to consider whether the trade-restrictiveness caused by the COOL measure bears any correlation with the importance of the objective and the alleged commercial impact the measure is having.

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[4] Appellate Body Report, *EC – Sardines*, para. 286.
[5] *See, e.g.,* Appellate Body Report, *Korea – Various Measures on Beef*, para. 164.
[6] United States' first written submission, paras. 90 and 108.

19. Furthermore, the complainants submit, as alternative less trade-restrictive measures, the possibility of voluntary country-of-origin labelling. The United States rebuts this allegation affirming that such an option has already been attempted, with little adhesion, and therefore, in its view, the objective of informing consumers was not achieved[7]. It may be relevant to inquiry whether this absence of participation of producers and retailers is not due to perceived considerable costs and insufficient consumer interest in labelling information.

20. In the light of the above considerations, it must also be noted that the wording of Article 2.2, by linking the legitimacy of objectives, the need to avoid unnecessary trade restrictions and the need to assess the risks of non-fulfilment of a legitimate objective, follows a rationale that suggests the search for a balance between ends and means of a technical regulation vis-à-vis its effects on trade. Therefore, when assessing conformity with Article 2.2, the Panel should ascertain whether this balance has been met by the technical regulation at issue, on the basis of the evidence before it.

III. CONCLUSION

21. Brazil appreciates the opportunity to comment on the issues at stake in this dispute, and hopes this submission may assist the Panel in examining the matter.

[7] United States' first written submission, paras. 252-253.

ANNEX C-5

THIRD PARTY ORAL STATEMENT OF BRAZIL AT THE FIRST SUBSTANTIVE MEETING

1. Mr. Chairman, distinguished Members of the Panel, Brazil appreciates the opportunity to appear before you and present its views as a Third Party in the current proceedings. Our statement today will be very brief and concentrate on a few issues related to the interpretation of the TBT Agreement – in particular its Article 2.2.

2. It has been noted that the list of "legitimate objectives" contemplated by Article 2.2 is not a closed one. It is precisely for this reason that, in Brazil's view, the interpretation of Article 2.2 should be approached with a high degree of caution. Even though it may be open to a Member to elect which objectives it considers "legitimate" and adopt technical regulations in order to fulfil those objectives, such discretion is not unbounded. Otherwise, highly trade-restrictive measures could be put in place to meet objectives that, no matter how unreasonable under generally accepted criteria, could be unilaterally deemed "appropriate" by the Member implementing the regulation.

3. The United States asserted that "each Member has the right to decide for itself which legitimate objectives to pursue and to take measures to meet those objectives 'at the levels it considers appropriate'."[1] Brazil would first note that, while the United States takes the reference to the "levels it considers appropriate" from the preamble to the TBT Agreement, this expression appears in the preamble – unlike Article 2.2 – in connection with only a limited set of objectives, which include the protection of human, animal or plant life or health and the prevention of deceptive practices, but not, for example, the provision of information to consumers. Thus the assertion that a Member may take measures "at the levels it considers appropriate" to meet any legitimate objective it elects to pursue does not have a direct legal basis in the TBT Agreement.

4. Second, as stated in its third party submission, Brazil considers that the Panel has a role to play in determining whether the actual objectives of the technical regulation in question are "legitimate". Brazil does not take a position as to whether the specific objectives pursued by the United States with the COOL measures are legitimate or not within the meaning of Article 2.2 of the TBT Agreement. In any event, Brazil agrees with Mexico that, for the purposes of the assessment of a measure under Article 2.2, an objective should not be defined at such level of generality that would render it always necessarily "legitimate", but rather at a level of specificity that corresponds to the measure in point.[2]

5. As I noted a moment ago, although the list of objectives envisaged by Article 2.2 is not exhaustive, this does not mean that there are no limits to the discretion of Members implementing technical regulations . In addition to the issue of the legitimacy of the objectives pursued – an issue that can, and should, be addressed by the Panel -, a further check is provided by the clause "taking account of the risks non-fulfilment would create". As Brazil indicated in its third party submission, this provision invites an assessment of the importance of the (presumably legitimate) objectives being pursued and the harm that could arise if those objectives were not fulfilled.

6. In the circumstances of the present dispute, the United States seems to be arguing that, if the objectives being pursued by the COOL measures were not fulfilled, consumers would be confused about the origin of the products at issue. In Brazil's view, this is an important part of the analysis

[1] United States' opening statement at the first Panel meeting, para. 36.
[2] Mexico's opening statement, para. 36.

under Article 2.2 – one that should be subject to careful scrutiny by the Panel. Some relevant questions would be (i) whether consumers would indeed be left in a state of confusion if the specific objectives sought with the COOL measures were not fulfilled; and (ii) what would be the extent and nature of such confusion. An inquiry into these questions would help reveal the "risks non-fulfilment would create". Such risks, in turn, would then be brought to bear on the assessment of the necessity of the technical regulation in light of its degree of trade-restrictiveness and thus on whether it is more trade restrictive than necessary to fulfil the given objectives.

7. As a final and more general remark, Brazil would urge the Panel to look with special care at arguments which seek to attribute views, desires or tastes to consumers. Such views, desires or tastes should not be lightly assumed but rather substantially backed by evidence. It is also in this connection that Brazil takes issue with the European Union's statement that "if a domestic political process leads to mandatory origin labelling, that may reasonably be taken as an indication that consumers want it."[3] This would seem extreme, since the mandatory labelling scheme – or any technical regulation justified on the grounds of consumer demand, for that matter – would constitute itself the evidence that consumers want it. Such a view should be rejected.

8. Mr Chairman, Members of the Panel, this concludes our brief statement. Thank you for your attention.

[3] European Union's third party written submission, para.41.

ANNEX C-6

THIRD PARTY ORAL STATEMENT OF BRAZIL AT THE SECOND SUBSTANTIVE MEETING

1. Mr Chairman, distinguished members of the Panel, it is a pleasure to appear before you today. In our statement this morning we will briefly address two issues: (i) the question of whether different instruments could be considered together as a single measure; and (ii) the treatment that the Panel should give to the unsolicited letter addressed to it by the Consumers Union.[1]

2. With regard to the first issue, the United States asserts that the Panel should not make findings with regard to a single "COOL measure", since the separate instruments that the complainants identify as composing that measure are substantively and legally distinct. The United States thus affirms that the Panel is effectively required to examine those instruments separately.[2]

3. In Brazil's view, the fact that separate instruments or measures differ in their substance or legal status does not preclude the possibility that they, *operating together*, violate specific provisions of the WTO agreements. Article 3.3 of the DSU provides that one of the purposes of the dispute settlement system is to address "situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by *measures* taken by another Member". Nothing in Article 3.3 precludes a claim that a set of measures, working together, impair benefits accruing to a Member under the covered agreements.

4. In that respect, the legal nature and the substantive content of the individual instruments that operate together may well be different. One of the instruments could, for example, provide an interpretation of a legal norm to which it relates. Such an interpretation could or could not be of a mandatory nature (as the Appellate Body has clarified, in general, the fact that an instrument is not mandatory does not prevent it from being the subject of dispute settlement proceedings[3]). If that interpretation sheds light on the norm in a way that gives rise to an inconsistency with a WTO provision, a panel would be entirely justified in concluding that the norm and the interpretation, considered *together*, are inconsistent with that provision.

5. In fact, this was exactly one of the conclusions of the panel in the dispute brought against the European Union concerning tariff treatment of information technology products. In a report that has been adopted by the Dispute Settlement Body, that panel found that CNENs, which are Explanatory Notes to the Combined Nomenclature of the European Union – interpretive instruments under the EU law with no legally-binding force -, *operating in conjunction with* a Council Regulation of the European Union, violated provisions of the GATT 1994.[4]

6. Therefore, in Brazil's view, regardless of the differences among separate instruments, as long as a complainant claims that the combined operation of those instruments results in a violation of WTO provisions, a panel should not be precluded from examining that claim and should not instead be obliged to separately verify the consistency of each instrument with those provisions.

7. It is true that, under the TBT Agreement, the measures at issue are normally technical regulations – documents which lay down characteristics, methods or provisions with which

[1] Letter by the Panel dated 26 November 2010.
[2] United States' opening statement at the second Panel meeting, paras. 12-15.
[3] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review* (DS244), para. 89.
[4] See, for instance, *EC – IT Products (US)* (DS375), paras. 8.4 and 8.6.

compliance is mandatory. In this regard, Brazil notes however that Article 2.2 of the TBT Agreement – one of the provisions at issue in this dispute – sets out 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". In that context, a document which may not in itself constitute a technical regulation could nevertheless be relevant to an examination under Article 2.2, insofar as it is relevant to the *application* of the technical regulation itself.

8. Finally, Brazil wishes to comment briefly on the unsolicited letter received by the Panel. Article 13.2 of the DSU provides in part that "Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter." In this regard, Brazil respectfully submits – and in fact has been reiterating this position for quite a long time now – that the right to *seek* information from any relevant source should not be confused with a right – not provided for under the DSU – to consider information *not sought* by the Panel.

9. It is Brazil's view that, in accepting and considering unsolicited documents such as *amicus curiae* briefs, WTO adjudicators may step beyond the rights ascribed to them under the DSU. They may also potentially open participation in WTO dispute settlement proceedings to any individual or institution that is not represented by a Member which is a party to the dispute. Beyond disrupting the inter-governmental nature of the WTO dispute settlement system, this may represent a burden that cannot be met equally by all Members. Indeed, developing Members are likely to be the most adversely affected by such decisions, since their more limited resources would have to be used not only to address factual and legal claims and arguments made by other Members in a dispute, but also by a potentially large number of other interested parties whose participation in proceedings was not foreseen in the DSU.

10. The inclusion of this issue in the DSU Review discussions is a recognition both of the importance Members attach to the matter and that the special session of the DSB is the appropriate forum for its consideration.

11. In the specific instance of this dispute, Brazil would suggest that the Panel only consider the unsolicited letter if it is made part of a submission by one of the parties (as an exhibit, for example). Such party would then have to respond for the contents of the brief and assume the responsibility of making it part of its own case. This is an approach that would be the least disruptive and would still allow for a substantive discussion of the unsolicited contribution.

12. In closing, Brazil thanks the Panel for the further opportunity to present its views in this dispute.

ANNEX C-7

THIRD PARTY ORAL STATEMENT OF CHINA AT THE SECOND SUBSTANTIVE MEETING

1. Mr. Chairman, distinguished members of the Panel, China appreciates this opportunity to present our opinion before you on this dispute. We refrain ourselves from making statement on the merits of the case, and would like to comment briefly on the issue of *amicus curiae* briefs.

2. *Amicus curiae* brief is an old issue. During the Uruguay Round, some relevant proposals were raised, negotiated and rejected. Similar proposals were again raised by a few Members during the DSU review, but did not produce any consensus results. In the ongoing DSU negotiations, there are great disagreements among Members on *amicus curiae* briefs. Some Members propose to explicitly give panels and the Appellate Body the right to accept and consider unsolicited information and advice provided that this information or advice is directly relevant to the factual and legal issues under consideration. On the contrary, some other Members submitted textual proposals that would explicitly prohibit panels and the Appellate Body to consider such information and advice.

3. In the practice of dispute settlement, the Appellate Body found itself and the Panel had the authority to accept so called *amicus curiae* briefs in some cases. These findings are based on the assessment of the facts and conditions in the specific cases, which would not directly bound the Panels in other cases. For all this, members expressed their strong concerns in the General Council special meeting on 22 November 2000.

4. Article 13 of the DSU provides "each Panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate". This provision literally gives the Panel authority to seek information and technical advice, but does not grant individuals and institutions outside the WTO the right to submit briefs to be considered by the Panel. When it is necessary to seek information in a dispute, the Panel could do on its own initiative. If the Panel passively accepts *amicus curiae* briefs, it would possibly bring about injustice to the other organizations who do not submit such kind of briefs and the Members who are not participants or third parties to the dispute, and cause adverse effect on the fact finding. The great disagreements among Members and the ongoing negotiation also indicate that there is no agreement among Members on the acceptance of *amicus curiae* briefs.

5. China believes the issue of *amicus curiae* briefs has systemic influence in the dispute settlement, and should be settled by negotiations among Members. China would like to advise the Panel follow its terms of reference and function, interpret the relevant provisions in DSU according to the customary rules of interpretation of public international law, ignore such *amicus curiae* briefs and do not take them into consideration.

ANNEX C-8

EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF COLOMBIA

I. INTRODUCTION

1. Colombia thanks the Panel and the Parties for this opportunity to present its views in the present proceeding. Colombia intervenes in this case given its systemic interest in the application of several provisions of the WTO covered agreements discussed in this dispute.

2. While not taking a final position on the specific facts of this case, Colombia will provide its views on some of the legal claims advanced by the Parties to the dispute. First, Colombia will address the issue of whether an apparently voluntary measure can be deemed mandatory under the definition of technical regulation provided for in Annex 1.1 of the Agreement on Technical Barriers to Trade (the "TBT Agreement"). Then, Colombia will comment on the definition of *treatment no less favourable* in Articles 2.1 of the TBT Agreement and III:4 of the GATT. As a third issue, Colombia will present its comments on the definition of the term *legitimate objective,* within the relevant provisions of the WTO covered agreements. Another issue that will be addressed by Colombia is related to the scope of the Members obligations with respect to special and differential treatment to developing countries, under Article 12 of the TBT Agreement. Finally, Colombia will close its submission with some comments on the conditions that must be met for a claim under Article XXIII:1(b) of the GATT. In virtue of the foregoing, this document is divided in five sections where each of the mentioned issues will be addressed.

II. THE MANDATORY CHARACTER OF TECHNICAL REGULATIONS

3. One of the complaining parties' claims is that the country of origin labelling measures (the "COOL measures")[1], are technical regulations subject to the TBT Agreement. In response, the United States of America (the "USA") claimed that Secretary Vilsack's letter is not a measure whose *compliance is mandatory*, in the terms of Annex 1.1 of the TBT Agreement[2].

4. Under the definition of a technical regulation as provided in Annex 1.1 of the TBT Agreement, one of the elements of a technical regulation is that its compliance is mandatory. Regarding the interpretation of Annex 1.1 of the TBT Agreement, only one WTO Panel has directly addressed the issue of how the term *mandatory*[3] should be construed. That Panel concluded that a measure can be deemed mandatory when it is obligatory as a consequence of a command.[4]

5. Given the limited amount of cases that have dealt with the interpretation of "*with which compliance is mandatory*" under the definition of Annex 1.1 of the TBT Agreement, Colombia submits to the Panel the question of whether it would be appropriate to analyze a measure's mandatory character in order to determine if it is a technical regulation, pursuant to the standard of application under Article XI:1 of the GATT. Hence, the Panel could take this opportunity to clarify if in any

[1] In Mexico's first written submission, para. 9, Mexico lists the measures that it considers are part of the COOL measures; and in Canada's first written submission, para. 1 footnote 1, Canada lists the measures that it considers are part of the COOL measures. Both claiming parties agree that the letter that the Secretary of Agriculture of the United States of America, Thomas J. Vilsack, sent to the representatives of the industry on February 20 2009, is part of the COOL measures.

[2] United States' first written submission, paras. 133-137.

[3] The case was *EC – Trademarks and Geographical Indications (Australia).*

[4] *EC – Trademarks and Geographical Indications (Australia)*, para. 7.453.

given circumstances, the standard set forth in the GATT case *Japan – Semi-conductors*[5] in relation to a measure's mandatory nature pursuant to Article XI:1 of the GATT, would be useful to construe the term "*with which compliance is mandatory*" in Annex 1.1 of the TBT Agreement. In consequence, the Panel should conclude if Secretary Vilsack's letter is mandatory and thus a technical regulation.

III. LESS FAVOURABLE TREATMENT UNDER ARTICLES 2.1 OF THE TBT AGREEMENT AND III:4 OF THE GATT 1994

6. The claimants allege that the COOL measures implemented by the USA are inconsistent with Article 2.1 of the TBT Agreement, since such measures accord a less favourable treatment to the feeder cattle from Canada and Mexico and the hog from Canada than that provided to the like products from the USA.[6] In response, the USA claims that the COOL measures provide an identical treatment both to the feeder cattle and hogs from Canada and Mexico than the one provided to the like products from the USA, given that the measures at issue require the same labelling conditions for national and foreign products.[7] In this case, the USA holds that the COOL measures do not affect the conditions of competition for the sale of these products, as well as the fact that such measures have no direct adverse effect over trade. Therefore, the USA argues that the COOL measures are consistent with Article 2.1 of the TBT Agreement.

7. Article 2.1 of the TBT Agreement, provides that technical regulations shall not accord treatment less favourable to imported products than the one accorded to like imported products. Some panels[8] have analyzed the above mentioned provision, and have concluded that Article 2.1 of the TBT Agreement should be interpreted in light of the principles set forth in Article III:4 of the GATT 1994, given that the obligation not to accord a *treatment less favourable* has been understood in the same sense in both provisions. Following what has been said by prior panels[9], Colombia recalls that for there to be a breach of the national treatment obligation, the following aspects of the measure at issue should be assessed: i) if it is a technical regulation; i) if it accords any differential treatment to the domestic products with respect to the imported ones; iii) if the domestic products are like to the imported ones; and iv) the effects that the differential treatment have over the competitive conditions between domestic and imported products.

8. Based on the foregoing, Colombia requests the Panel to determine whether the challenged measures imply a less favourable treatment to imported products in the USA market; and to what extent, this means a modification of the competition conditions between domestic and imported products, in such a manner that suffices the standard under which Articles III:4 of the GATT 1994 and 2.1 of the TBT Agreement could be breached.

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[5] GATT Panel Report in the case *Japan – Semi-Conductors*, para. 109.

[6] Mexico's first written submission, paras. 268 – 269 y 217 – 232 (with respect to Article III:4 of the GATT) and Canada's first written submission, paras. 86-154.

[7] United States' first written submission, paras. 138-200.

[8] *EC – Trademarks and Geographical Indications (Australia)*, para. 7.464; *EC-Sardines*, para. 5.27; and *EC – Asbestos*, para. 3.410.

[9] *EC – Trademarks and Geographical Indications (Australia)*, para. 7.444. A similar analysis was undertaken in the following cases with respect to Article III:4 of the GATT 1994: *EC – Asbestos*, para. 3.410; *Canada – Autos,* para. 6.231; *US – Gasoline*, para. 6.5. Appellate Body Report in the case of *Korea – Various Measures on Beef*, para. 133.

IV. LEGITIMATE OBJECTIVES UNDER THE WTO COVERED AGREEMENTS

9. Canada and Mexico claim that the COOL measures do not fulfil a legitimate objective under article 2.2 of the TBT Agreement, since their purpose is not to pursue such an objective[10]. The USA claims that providing information to consumers is in itself a legitimate objective.[11]

10. According to Article 2.2 of the TBT Agreement, for there to be a breach of the Member's obligations under such provision, it is necessary to analyze if the measure at issue is a technical regulation adopted to fulfil a legitimate objective, and whether it has been implemented in a manner that does not create unnecessary obstacles to trade. This kind of reasoning should be carried out in light of the necessary measures to fulfil the legitimate objective under Article 2.2 of the TBT Agreement.

11. Colombia considers that in order to determine what is a legitimate objective under the definition of Article 2.2 of the TBT Agreement, the Panel should take into account the relevant panel and Appellate Body reports[12] and other WTO provisions[13], relative to the protection of Member's central societal values.

V. MEMBERS' OBLIGATIONS TO PROVIDE SPECIAL AND DIFFERENTIAL TREATMENT, ACCORDING TO ARTICLE 12 OF THE TBT AGREEMENT

12. Mexico submits[14] that the COOL measures are contrary to the obligations of the USA under Articles 12.1 and 12.3 of the TBT Agreement, since it did not take due account of its special development, financial and trade needs as a developing country. In response the USA submits[15] that Mexico did not satisfy the test of inconsistency arising from Articles 12.1 and 12.3 of the TBT Agreement.

13. Colombia considers that Article 12.1 of the TBT Agreement implies an obligation as such,[16] and that Article 12.3 of the TBT Agreement should be read in light of the provisions of Article 12.2 of the TBT Agreement.[17] In addition, it seems clear to Colombia that Article 12.2 places the burden of proof on the Members that are developed countries. Therefore, the satisfaction of the burden of proof is not up to the developing country that is alleging the breach of a (developed country) Member's obligations under Article 12. Instead, it is the developed country Member that has placed a potential technical barrier to trade, the one who has to meet the burden of proving whether it has complied with its obligations under Article 12 of the TBT Agreement, in particular, regarding its duties of *taking into account the special development, financial and trade needs of* the developing countries.

14. Hence, the developed country implementing the measure: i) should prove that it took into account the special development, financial and trade needs of a developing country partner, when

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[10] Mexico's first written submission, paras. 276-302 and Canada's first written submission, paras. 158-176.

[11] United States' first written submission, paras. 226-233.

[12] Panel Report in *EC – Sardines*, para. 7.118, this position was confirmed by the Appellate Body in its report on the same case *EC – Sardines* (Appellate Body Report), para. 286; Panel Report in *EC – Sardines*, paras. 7.120 and 7.121.

[13] Articles XX of the GATT 1994, XIV of the GATS, 17 and 30 of the TRIPS Agreement. Also see: Panel Report in *Canada – Pharmaceutical Patents*, para. 7.69 and Panel Report in *EC – Trademarks and Geographical Indications (Australia)*, paras. 7.662 and 7.663.

[14] Mexico's first written submission, paras. 359-373.

[15] United States' first written submission, paras. 271-277.

[16] *EC – Approval and Marketing of Biotech Products*, para. 74.7 sub 75.

[17] Panel Report, *EC – Approval and Marketing of Biotech Products,* para. 74.7 sub 77.

adopting a measure with the potential of affecting bilateral trade; and ii) is obliged to prove its due diligence with respect to special an differential treatment, when adopting technical regulations, standards and conformity procedures.

15. In view of the foregoing comments, Colombia kindly requests the Panel to complete the standard set forth by other panels, regarding the extent of the members' special and differential treatment obligations, in accordance to Article 12 of the TBT Agreement.

VI. CLAIMS UNDER ARTICLE XXIII:1(B) OF THE GATT 1994

16. The claiming parties hold that the COOL measures nullify and impair the advantages derived from the tariff concessions granted by the USA to them on feeder cattle and hogs, as a result of the negotiations of the Uruguay Round[18]. Thus, the measures at issue are inconsistent with Article XXIII:1(b) of the GATT 1994. Based on the report of the Appellate Body in the case *EC – Asbestos*, the USA holds that recourse to Article XXIII:1(b) of the GATT should be done in a cautious and exceptional manner.[19] Moreover, the USA focuses its assessment in the lack of evidence presented by the claiming parties in relation to their claim of nullification and impairment pursuant to Article XXIII:1(b) of GATT 1994.[20]

17. There have been few claims under Article XXIII:1(b), both under the GATT 1947 as under the WTO. Only eight cases were considered by working groups as well as panels under GATT 1947.[21] In two of those cases, the panels found that the non-violation complaint was justified, but the report was not adopted. [22] In three cases, the non-violation complaints were rejected.[23] Only in three cases the non-violation complaints were accepted and adopted. [24] Since the establishment of the WTO, only four cases have dealt with non violation claims. [25] These cases have identified some requirements for claims under Article XXIII:1(b) of the GATT 1994: non-violation complaints must be exceptional[26], there has to be an application of a measure by a Member,[27] there must be a benefit accruing under the relevant agreement,[28] and there must be a nullification or impairment of that benefit as a result of the application of the measure at issue[29].

18. In order to undertake a complete assessment of the claims advanced by the complaining parties and the responding party reply, the Panel in this case should examine the *de iure* and *de facto* evidence presented by the Parties with respect to the COOL measures in light of the elements of nullification or impairment without violation construed from the different cases under the GATT and the WTO.

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[18] Mexico's first written submission, para. 379 and Canada's first written submission, paras. 234-235.

[19] Appellate Body Report *EC – Asbestos*, para. 186.

[20] United States' first written submission, paras. 305-316.

[21] *Australia – Subsidy on Ammonium Sulphate*; *Germany – Sardines*; *Uruguayan Recourse*; *EEC – Citrus Products; EEC – Canned Fruit; Japan – Semi-Conductors; EEC – Oilseeds I;* and *US – Sugar Waiver*.

[22] *EEC – Citrus Products* and *EEC – Canned Fruit*.

[23] *Uruguayan Recourse*; *Japan – Semi-Conductors*; and *United States – Sugar Waiver*.

[24] *Australia – Subsidy on Ammonium Sulphate*; *Germany – Sardines;* and *EEC – Oilseeds I.*

[25] *Japan – Film*; *EC – Computer Equipment*; *Korea – Procurement*; and *EC – Asbestos*.

[26] *Japan – Film,* para. 10.36.

[27] *Japan – Film,* para. 10.43.

[28] *Japan – Film,* paras. 10.61, 10.71-10.74, 10.77, and 10.79-10.81.

[29] *Japan – Film*, paras. 10.41 and 10.83.

VII. CONCLUSION

19. Colombia considers that this case raises important questions on the interpretation of Articles III:4 of the GATT 1994, various provisions of the TBT Agreement as well as Article XXIII:1(b) of the GATT 1994. While not taking a final position on the merits of the case, Colombia requests this Panel to carefully review the scope of the claims in light of the observations made in its submission. Colombia reserves its right to make further comments at the third party session of the first substantive meeting with the Panel.

ANNEX C-9

**THIRD PARTY ORAL STATEMENT OF COLOMBIA
AT THE FIRST SUBSTANTIVE MEETING**

I. INTRODUCTION

1. Mr. Chairman, distinguished Members of the Panel, on behalf of the Government of Colombia, I thank you for giving us the opportunity to express our views in this dispute.

2. Our participation as a third party is based on our systemic interest in the proper interpretation of several provisions of the WTO covered agreements, discussed in this case. In its written submission, Colombia set out its understanding of some of the major legal issues arising from this dispute. I will therefore not repeat all the content of the submission, but will rather focus on a few specific comments regarding the interpretation of the obligations of special and differential treatment under Article 12 of the TBT Agreement and the *necessity* requirement under Article 2.2 of the TBT Agreement.

3. Colombia recognizes that many of the issues in this dispute are factual in nature. In that regard, Colombia would like to emphasize that it does not take a position as to whether the USA has or has not complied with its obligations under the TBT Agreement.

II. SPECIAL AND DIFFERENTIAL TREATMENT TO DEVELOPING COUNTRIES

4. Mexico submits that the COOL measures are contrary to the obligations of the USA under Articles 12.1 and 12.3 of the TBT Agreement, since the latter did not take due account of the former's special development, financial and trade needs as a developing country. In response, the USA submits that Mexico did not satisfy the test of inconsistency arising from Articles 12.1 and 12.3 of the TBT Agreement.

5. Following the reasoning of the Panel in *EC – Approval and Marketing of Biotech Products*[1], Colombia considers that Article 12.1 of the TBT Agreement implies, in itself, the obligation to provide developing country Members differential and more favourable treatment with respect to measures subject to the TBT Agreement.

6. In addition, Colombia considers that Article 12.3 of the TBT Agreement should be read in light of the provisions of Article 12.2 of the TBT Agreement.[2] Therefore, it seems clear to Colombia that Article 12.2 places the burden of proof, with respect to the obligation to take due account of the special development, financial and trade needs of developing country Members, on the developed country Member imposing the potential technical regulation.

7. Hence, the developed country implementing the measure: i) should prove that it took into account the special development, financial and trade needs of a developing country partner, when adopting a measure potentially affecting bilateral trade; and ii) is obliged to prove its due diligence with respect to special and differential treatment to developing country Members, when adopting technical regulations, standards and conformity procedures.

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[1] Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 74.7 sub 75.
[2] Panel Report, *EC – Approval and Marketing of Biotech Products,* para. 74.7 sub 77.

8. In view of the foregoing comments, Colombia kindly requests the Panel to complete the standard set forth by other panels, regarding the extent of the Members' special and differential treatment obligations, in accordance with Article 12 of the TBT Agreement.

III. NECESSITY TEST UNDER ARTICLE 2.2 OF THE TBT AGREEMENT

9. Canada and Mexico claim that the COOL measures do not pursue a legitimate objective, but in case they were considered to do so, such measures are more trade restrictive than necessary to fulfil the legitimate objective, taking account the risk non-fulfilment would create. The USA responds by arguing that the COOL measures are not more trade restrictive than necessary under Article 2.2 of the TBT Agreement.

10. The debate regarding the *necessity* of a measure, in light of its trade restrictiveness and the risk of non-fulfilment has not been directly dealt with in WTO disputes. In Colombia's view, this represents an opportunity for this Panel to contribute to the analysis of the standard that must be followed under Articles 2.2 and 12.3 of the TBT Agreement, in order to conclude if a measure is more trade restrictive than necessary to fulfil the legitimate objective pursued in light of the risks of non-fulfilment.

11. Colombia submits that Article 2.2 of the TBT Agreement entails a *necessity* test of the measure according to its trade restrictiveness, which should be weighed with respect to the risk that non-fulfilment would create. Hence, for there to find a breach of Article 2.2, the Panel should determine that the measure at issue is more trade restrictive than necessary, and that not complying with such a measure does not pose a risk to the protection of the legitimate objective pursued. This also requires the demonstration that the objective pursued by the measure is a legitimate one.

12. In Colombia's view, the *necessity* test under the TBT provisions mentioned above should be construed taking into account the *necessity* test used by several Panels and the Appellate Body in cases involving the application of Articles XX:(b) and XX:(d) of the GATT 1994. Additionally, Colombia calls the attention of the Panel to the crucial role of a *necessity* test in weighing the trade restrictiveness of a measure and the policy goals pursued by Members' through their national regulations. Thus, Colombia considers that this type of test can provide transparent and clear elements, for the compatibility analysis of national measures with various provisions of the WTO covered agreements. For example, SPS Agreement Article 5.6 and GATS Article VI.4 both provide for necessity tests. However, only the former has been analyzed by WTO panels and the Appellate Body.

13. As established by the Appellate Body in the case of EC- Asbestos, a measure would be deemed necessary under Article XX(b) of the GATT 1994, if there are no more GATT consistent reasonable alternatives available for the Member implementing the measure. The Appellate Body followed this same line of thought when applying Article XX(d) of the GATT in the case of Korea – Various Measures on Beef.

14. Colombia respectfully requests the Panel to construe a clear necessity test for the proper application of Articles 2.2 and 12.3 of the TBT Agreement by the Members.

15. The Panel could take the aforementioned analysis as a reference to determine when a measure is more trade restrictive than necessary. In that sense, and as proposed by the complaining parties, the Panel could use as an element of the necessity test under Article 2.2 of the TBT Agreement the reasonably available alternatives approach.

16. On the other hand, Colombia also invites the Panel to clarify the sense in which the risks of non-fulfilment should be weighed with respect to the trade restrictiveness of the measure.

17. This is of great relevance, since notwithstanding the pre-eminent protection of the Members' right to exercise their sovereignty over their territory; Members are also called to respect their international obligations under the covered agreements. This balance is usually clear, but there are cases like the ones referred to above in which the dispute settlement system can achieve its objective pursuant to the DSU to provide security and predictability to the multilateral trading system.

18. Mr. Chairman, distinguished Members of the Panel, with these comments, Colombia expects to contribute to the legal debate of the parties in this case, and would like to express again its appreciation for this opportunity to share its points of view on this relevant debate, regarding the application of Articles 12.1, 12.3 and 2.2 of the TBT Agreement. We thank you for your kind attention and remain at your disposal for any question you may have, including as requested on Colombia's mandatory country of origin labelling provisions.

ANNEX C-10

THIRD PARTY ORAL STATEMENT OF COLOMBIA AT THE SECOND SUBSTANTIVE MEETING

1. Mr. Chairman, distinguished Members of the Panel, on behalf of the Government of Colombia, I thank you for giving us the opportunity to express our views in this dispute.

2. This case has raised a legal debate on the conformity of country of origin labelling (the "COOL") requirements with the Agreement on Technical Barriers to Trade (the "TBT Agreement") and the WTO covered agreements in general.

3. It is Colombia's view that COOL requirements are not, as such, contrary to WTO Members' obligations under the covered agreements. Rather, Colombia invites the Panel to consider that the conformity assessment of the COOL measures adopted by the United States has to be done in light of the particular circumstances of the present dispute.

4. As has been mentioned by Colombia both in its written submission and its oral statement in the first session, this case is an opportunity for the Panel to clarify several issues related to the TBT Agreement.

5. In particular, Colombia recalls the importance of this case for the following issues: defining how to construe if a measure is mandatory for the purposes of the definition of a technical regulation; the way in which a measure applied to a processed good (i.e. beef) can render a treatment less favourable to the conditions of sale of a non-processed good (i.e. cattle); the definition of a legitimate objective under Article 2.2 of the TBT Agreement; the application of a necessity test under Article 2.2 of the TBT Agreement; the scope of application of the obligations of special and differential treatment under Article 12 of the TBT Agreement; and the conditions for claims of nullification and impairment under Article XXIII:1(b) of the GATT 1994.

6. In addition, Colombia would like to make a brief comment on the issue of the acceptance of certain *amicus curiae* writing. In line with what has been said by several panel and Appellate Body reports, Colombia considers that it is a decision of the Panel to accept or not such writing. However, when taking such decision, the Panel must ensure that the right of defence, in the context of the due process, is not impaired in any way through the Panel's decision on the matter.

7. Mr. Chairman, distinguished Members of the Panel, Colombia expects that the report of the Panel in this case will contribute to the security and predictability of the multilateral trading system, by clarifying the legal issues involved in the present dispute. We will be pleased to answer any questions from the Panel.

ANNEX C-11

**EXECUTIVE SUMMARY OF THE
THIRD PARTY WRITTEN SUBMISSION OF THE EUROPEAN UNION**

I. THE MEASURE OR MEASURES AT ISSUE

1. Pending a response from Canada and Mexico with respect to these US arguments, the European Union observes that a complaining Member has a certain discretion when it comes to identifying what it considers to be the "measure at issue". In particular, faced with more than one document, a complaining Member may identify each document as a measure at issue; or may identify the documents together as a measure at issue; or may argue that the documents are evidence of an unwritten measure. This discretion, like any discretion, is not entirely unfettered, although precisely why Canada and/or Mexico might have exceeded the bounds of their discretion in this case is not yet entirely clear to the European Union.

2. Insofar as the 2008 Interim Final Rule has not been in force since 16 March 2009, that is, prior to the panel requests on 7 and 9 October 2009, then the European Union would not normally expect it to constitute a measure at issue, or part of a measure at issue. However, it might still constitute evidence of facts that the complaining Members might consider relevant to their cases.

II. ANNEX 1, PARAGRAPH 1 OF THE TBT AGREEMENT: DEFINITION OF "TECHNICAL REGULATION"

3. Referring to past cases, the European Union concludes that, whilst the Appellate Body has not been called upon to deal with a case concerning origin labelling, the panel in *EC – Trademarks and Geographical Indications* was confronted with such an issue. Furthermore, with respect to this issue, the approach of the panel in *EC – Trademarks and Geographical Indications* was consistent with the approach of the Appellate Body in the *Asbestos* and *Sardines* cases when it comes to interpreting and applying Annex 1, paragraph 1 of the TBT Agreement. That approach involves interpreting the second sentence of Annex 1, paragraph 1 as setting out examples, and reasoning that if one example is present then the document is a technical regulation. The particular example in this case is "labelling requirements". Thus, the reasoning is that if a document includes "labelling requirements" (and the other requirements of Annex 1, paragraph 1 are met), then the document is a technical regulation. The further reasoning is that the second sentence of Annex 1, paragraph 1 does not limit the term "labelling requirements" by reference to the substantive content of the label. It requires only that the "labelling requirements" "apply" to a "product, process or production method". Consequently, according to this line of reasoning, there is no need to consider whether or not "origin" is a "product characteristic" within the meaning of the first sentence of Annex 1, paragraph 1. If there is a requirement that the product bear a label stating the origin of the product, then the measure is a technical regulation. The European Union would conclude that if this Panel follows the approach of the panel in *EC – Trademarks and Geographical Indications* (specifically with respect to origin labelling) and the approach of the Appellate Body in the *Asbestos* and *Sardines* cases then it would conclude that the measure is a technical regulation. That being said, the specific issue raised in this case has not previously been directly considered, and the European Union reserves its further observations pending additional clarifications from the Parties.

4. One might also observe that perhaps the question of whether or not the measure is a technical regulation within the meaning of the TBT Agreement may not be critical to the outcome of the assessment, at least in this particular case. One might think that whether one conducts the assessment through the prism of Article III:4 (especially when dealing with an in fact claim as in the present case)

and the general exceptions in Article XX of the GATT 1994; or the through the prism of Articles 2.1 and 2.2 of the TBT Agreement, the outcome should be broadly similar or the same.

5. With respect to the Vilsack Letter and the subsequent press statement, the European Union observes that the assessment may be different depending upon whether one assesses those documents in isolation, or whether one assesses them together with other documents cited by Canada and Mexico. For example, it is possible that documents are not in themselves mandatory, but nevertheless might be relevant for a domestic court's interpretation and application of other measures that are mandatory. In the latter case, it would not necessarily be correct to conclude that the non-mandatory documents would be irrelevant to a panel's assessment under the TBT Agreement. Since this is to some extent a question of the domestic law of the United States, the European Union reserves its further comments pending additional clarifications from the Parties.

III. ARTICLE 2.1 OF THE TBT AGREEMENT: TREATMENT NO LESS FAVOURABLE TO LIKE PRODUCTS OF NATIONAL ORIGIN

A. LIKE PRODUCTS

6. The European Union agrees with Canada and Mexico that in interpreting and applying the term "like products" in Article 2.1 of the TBT Agreement it is appropriate to have regard to the way in which the term "like products" in Article III:4 of the GATT 1994 has been interpreted and applied. The treaty terms are obviously the same. Furthermore, the GATT 1994 and the TBT Agreement are each context for the interpretation of the other. Finally, the second recital of the TBT Agreement refers to the desire to further the objectives of the GATT 1994, so the object and purpose of the TBT Agreement would appear to be co-extensive with or at least limited by the object and purpose of the GATT 1994.

B. TREATMENT NO LESS FAVOURABLE

7. For the reasons indicated above, the European Union agrees with Canada and Mexico that in interpreting and applying the term "no less favourable" in Article 2.1 of the TBT Agreement it is appropriate to have regard to the way in which the same term in Article III:4 of the GATT 1994 has been interpreted and applied.

8. Canada and Mexico would appear to acknowledge that the measure does not explicitly require less favourable treatment for imports. Nevertheless, Canada and Mexico argue that the measure has that effect. In other words, Canada's and Mexico's case is not an "in law" case but rather an "in fact" case. The difference between an in law case and an in fact case is not the standard, but the evidence. In an in law case the evidence is the text of the measure itself. In an in fact case the text of the measure is not adduced or does not expressly provide for less favourable treatment. However, other evidence is adduced to support factual assertions, and the complaining Member explains how such facts and other evidence, working together in reasoned and logical ways, demonstrates the existence and precise content of a measure inconsistent with the relevant standard. This is a high threshold and a difficult task, requiring the exercise of particular rigour, and not a result to be lightly assumed.

9. That a measure may have an adverse effect on trade is not in itself enough to establish that it is WTO inconsistent. All regulatory measures by definition at least potentially affect different firms differently, even if they produce like products, both within the regulating Member and as between the regulating Member and other Members. Neither the GATT 1994 nor the TBT Agreement set out to eliminate regulatory diversity in itself. Just because a new regulation disrupts existing trade flows or structures does not necessarily mean that there is less favourable treatment of imports.

10. In this context, notions of intent need to be approached with caution. The contested measure may have an object and purpose either expressly stated or objectively apparent from its overall design and architecture, and that may be relevant to understanding how the measure is to be interpreted and applied in particular cases, which may in turn be relevant to understanding whether or not there is less favourable treatment. However, the assessment cannot usefully focus on the subjectively deemed "intent" of unspecified persons connected in some way with the adoption or application of the measure.

11. In such an assessment an adjudicator will reference the framework of Article III:4 of the GATT 1994 and any relevant provisions of Article XX of the GATT 1994. Similarly, an adjudicator may reference both Article 2.1 of the TBT Agreement (which Canada and Mexico would appear to agree echoes Article III:4 of the GATT 1994) and Article 2.2 of the TBT Agreement (which Canada and Mexico would appear to agree echoes Article XX of the GATT 1994) – although the European Union is not suggesting that the relationships between these different provisions are necessarily the same.

12. Turning to the substantive point of dispute, without prejudice to the development of our position concerning the interpretation of the definition of "technical regulation", and recognizing that these observations may relate to some extent to both Article 2.1 and 2.2 of the TBT Agreement, the European Union considers that the provision of information to consumers about origin may, in itself, generally be a legitimate objective within the meaning of Article 2.2 of the TBT Agreement. In particular, mandatory origin rules and declarations (as distinct from labelling) may be required to ensure that the correct customs duties are applied, including in order to permit distinctions between goods subject to different tariffs. The European Union recognizes that origin *labelling* might also facilitate choices by consumers. Depending upon one's perspective, one might consider some of these choices to be rational and in harmony with the WTO agreements, or one might consider some of these choices to be irrational or economically inefficient. For example, choices might reflect actual or perceived risk associated with food from a particular region or Member; or actual or perceived positive qualities of food from a particular region or Member; or ethical considerations about a particular region or Member; or a desire to foster sustainable development in a particular region or Member; or a desire to economically support a regional or domestic industry; or considerations of taste and personal judgment. One cannot hope to have perfect information about why such choices are made – that is the whole point of the label – it empowers the consumer.

13. The European Union might have an issue with measures adopted by a Member that would initiate, encourage or amplify such choices in a manner that would be inconsistent with the covered agreements. However, the European Union does not consider that the covered agreements set out to preclude origin labelling in itself, nor the making of such choices by consumers, nor that they could hope to do so effectively in the long term. If it is true that one of the basic objectives of the WTO is to facilitate the operation of market forces in the global economy, it is equally true that consumers *are* the market, it being up to firms to persuade consumers to prefer their products. One could hardly imagine *firms* being precluded from identifying products as their own. From this perspective, origin labelling may not be obstructing market forces, but facilitating their operation.

14. The essential difference between voluntary and mandatory labelling is that an individual consumer in a supermarket is hardly in a position to demand labelling with respect to particular information. They are only able to do that through organisation, notably through their domestic political processes. Thus, if a domestic political process leads to mandatory origin labelling, that may reasonably be taken as an indication that consumers want it, so that they are in a position to make the kinds of choices outlined above.

15. With these observations in mind, the European Union has not yet fully understood, based on Canada's and Mexico's First Written Submissions, how the facts and evidence are said to work together in specific and logical ways in order to demonstrate less favourable treatment. As indicated above, the European Union considers that origin labelling may be generally legitimate. The European Union also considers that in some cases, and particularly where relevant economic activity straddles borders, rules may be necessary to determine the origin of a product – and the Agreement on Rules of Origin sets out WTO rules that relate to that matter. The European Union has not yet understood why it might be that a rule of origin based on specific production points would necessarily be WTO inconsistent. Nor has the European Union understood why it might be that, if such rules of origin would be WTO consistent, requiring labelling on that same basis would necessarily be WTO inconsistent. This being so, the European Union has not yet understood why the less restrictive labelling rules in the measure are necessarily WTO inconsistent.

16. Similarly, the European Union has not yet understood, for example, the following matters: why the rules preclude the existence or the coming into existence of slaughter houses that deal only with cattle and hogs born in Canada or Mexico but raised and slaughtered in the United States; why, if the rules disfavour mixed activities, they necessarily tip slaughterhouses back to pure US meat based activity and never to pure Canadian or Mexican meat based activity; and why it is impossible to pass *any* of the additional costs to US meat producers or US consumers. With respect to Canada's tables showing US imports as a proportion of domestic production, the European Union would have been interested to see those numbers placed in the context of all imported US products, in order to see whether or not the products subject to the measure are all grouped at the top of such a list. Finally, the European Union has not yet understood how, if the Panel were to agree with Canada and Mexico, one could avoid the conclusion that all mandatory origin labelling would be WTO inconsistent, or how one could objectively distinguish, with security and predictability, between those measures that would be WTO consistent and those that would be WTO inconsistent.

IV. ARTICLE 2.2 OF THE TBT AGREEMENT: UNNECESSARY OBSTACLES TO INTERNATIONAL TRADE – NOT MORE TRADE RESTRICTIVE THAN NECESSARY

17. The European Union does not agree with Canada that merely demonstrating that the objective of a technical regulation is not "legitimate" is sufficient to support a finding of inconsistency with Article 2.2 of the TBT Agreement. For example, if such a regulation would not be restrictive of trade, then it would not be inconsistent with Article 2.2 – although this example may be relatively hypothetical. Similarly, the European Union does not agree with Canada that merely demonstrating that a technical regulation fails to fulfil its objective is sufficient to support a finding of inconsistency with Article 2.2 of the TBT Agreement. The European Union would invite the Panel to interpret and apply the treaty text in Article 2.2 directly, rather than paraphrasing it in the terms set out by Canada.

18. The European Union observes that the second sentence of Article 2.2 of the TBT Agreement begins with the phrase "For this purpose". The European Union understands the "purpose" referred to here to be the purpose indicated in the first sentence of Article 2.2. That purpose is to 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. The European Union therefore sees a connection between the first and second sentences. Thus, the European Union considers that the focus of the assessment should be on whether or not the technical regulation is more restrictive than necessary to fulfil the legitimate objective, taking into account the risk that non-fulfilment would create. This confirms the view that merely demonstrating that the objective of the measure is protectionism is not sufficient to establish an inconsistency with Article 2.2 of the TBT Agreement.

19. With respect to Canada's argument that the measure does not fulfil its purported objective, the European Union has not yet understood how the existence of some approximate elements in the measure would necessarily support a finding of inconsistency. With respect to voluntary labelling, the European Union has not yet understood how US consumers would pay for such costs, in light of Canada's explanations that in practice no such costs would be born by US meat. Finally, with respect to "substantial transformation", the European Union has not yet understood to what extent Canada and Mexico are advocating for a change in origin rules, as opposed to a change in labelling requirements.

V. ARTICLE 2.4 OF THE TBT AGREEMENT: FAILURE TO BASE THE MEASURE ON AN INTERNATIONAL STANDARD (MEXICO ONLY)

20. The European Union has not yet understood to what extent Mexico is advocating for a change in origin rules, as opposed to a change in labelling requirements. Aside from that, the European Union has not yet understood how labelling processed meat as of US origin would inform consumers about the origin of the animal from which such meat was obtained.

VI. ARTICLE III:4 OF THE GATT 1994: LESS FAVOURABLE TREATMENT THAN LIKE PRODUCTS OF NATIONAL ORIGIN

21. The observations of the European Union with respect to Article III:4 of the GATT 1994 are in essence an analogue of its prior observations.

ANNEX C-12

EXECUTIVE SUMMARY OF THE THIRD PARTY ORAL STATEMENT OF THE EUROPEAN UNION AT THE FIRST SUBSTANTIVE MEETING

I. THE VILSACK LETTER

1. One point on which we would like to comment further is the Vilsack Letter, which has attracted a certain amount of interest from the Third Parties. There seems to be a reasonable consensus that this is a measure for the purposes of these proceedings, and one that is imputable to the US. That said, although the US may be responsible for the content of the Vilsack Letter and may have to account for it to this Panel, as far as the EU is able to ascertain, the procedures for its adoption and its status as a matter of US domestic law may be different from those relevant to US statute or regulation. On the face of the document, it appears to have been issued only under the authority of the Secretary for the US Department of Agriculture. Thus, it remains unclear to the EU whether or not the balance struck between the various competing interests is the same in the 2008 Farm Bill and the Final Rule on the one hand, and the Vilsack Letter on the other hand.

2. In its Oral Statement the US describes the statute as the product of "a long and thoughtful legislative process" and the Final Rule as the result of "an equally deliberative regulatory process". The US informs us that "in crafting these rules" the US made "substantial efforts" "to strike the right balance", "formally soliciting input … on at least four occasions". Are these statements equally true, we wonder, of the Vilsack Letter? And Mr. Chairman we are particularly reflecting on this issue from the point of view of Article 12.3 of the TBT Agreement, which relates to special and differential treatment for developing countries, and which we agree is an important provision. It states that Members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, take account of the special development, financial and trade needs of developing country Members, with a view to ensuring that such technical regulations, standards and conformity assessment procedures to not create unnecessary obstacles to exports from developing country Members. In particular, we are reflecting on whether or not the Vilsack Letter should be considered to be consistent with Article 12.3.

3. Disagreement remains, however, on the question of whether or not the Vilsack Letter is "mandatory" for the purposes of the TBT Agreement. We have two comments on that issue. First, it is not entirely clear to the EU that the answer to that question would necessarily be determinative for the case, given the legal framework that is also available under the GATT 1994 (although it might be if Article 2.2 of the TBT Agreement were to become the focus of the Panel's assessment). Second, reviewing the content of the Vilsack Letter, there would appear to be two types of statement that are interwoven. One type of statement is the suggestion that it may be necessary to modify the Final Rule if the suggested voluntary steps are not taken – and it is this on which the Third Parties have tended to focus. However, the second type of statement would rather appear to relate to the implementation, interpretation and/or application of the Final Rule as currently drafted. Just to illustrate this with one example, the first paragraph of the Vilsack Letter states that the Final Rule is "important to providing consumers with additional information about the source of food products and to helping producers differentiate their products." This appears to be a statement about the object and purpose of the Final Rule. The EU is not in a position to express a view on whether or not such statement duplicates, broadens or narrows the object and purpose as it would result from an examination of the Final Rule. However, and this is the important point, we cannot rule out the possibility that the Vilsack Letter *might* be also relevant to the interpretation or application of the Final Rule, as a matter of US domestic law. And Mr. Chairman, the precedent that we have in mind is the US Statement of Administrative Action, a measure that accompanied the adoption of the US Uruguay Round Agreements Act

(URAA), implementing the WTO Agreement in the US. The Statement of Administrative Action it not "mandatory" in US domestic law, but is relevant, as a matter of US domestic law, to the interpretation and application of the URAA in the US jurisdiction. The US Statement of Administrative Action has been referenced in past WTO disputes.

4. As we have indicated in our written submission, if this would be the case, we could not rule out the possibility that the measure at issue consists of the Final Rule and the Vilsack Letter taken together, or the possibility that these two documents together evidence the measure at issue. If that were the case, it may be that these two documents form an indivisible package that is the measure at issue, and from which it might not be possible to extract the threat of modification of the Final Rule. Considered as a whole, it may be that this package could be construed as mandatory within the terms of the TBT Agreement. In short, if the Vilsack Letter is, in effect, leveraging the Final Rule, then, from a WTO compliance point of view, would it be entirely inappropriate if the nullification or impairment associated with the Final Rule would leverage the Vilsack Letter (in the event that it would be WTO inconsistent), at least until the Vilsack Letter would be withdrawn? After all, one good turn deserves another. The EU does not express a view on whether or not this is in fact the case, that being a matter for the Panel.

5. And Mr. Chairman, there is one treaty term in Article 2.2 of the TBT Agreement to which we would like to draw your particular attention, and that is the term "prepared". Thus, it appears that some obligations in the TBT Agreement might also apply to the preparation of technical regulations. We are reflecting on how the term "mandatory" might be interpreted and applied having regard to the context of the use of the term "prepared", and particularly whether or not issues regarding the preparation of what is destined to be a mandatory measure might or might not be subject to disciplines in the TBT Agreement. We are reflecting whether the Vilsack Letter might be considered to fall with the concept of preparation.

II. SUBJECTIVE INTENT DISTINGUISHED FROM THE EXPRESS OR IMPLIED OBJECT AND PURPOSE OF THE MEASURE AT ISSUE

6. The second point on which we would like to comment relates to a matter already touched on in our written submission, and also the subject of comments from the other Third Parties. It is the distinction between the notion of subjective intent on the one hand, and the objective notion of the object and purpose of the measure at issue, as it results from the terms of that measure (such as its preamble) or from its overall design and architecture. For the EU, in an "in fact" assessment, there is no fact or piece of evidence that is excluded as a matter of principle from the analysis. Of course, to be of any interest or value, the complaining party will have to explain how such fact or evidence is *relevant* to the assessment. That is, how, when taken together with other facts or evidence, it permits further factual inferences, leading to the conclusion that the complaining Member has demonstrated the existence and precise content of a WTO inconsistent measure.

7. From this perspective, the EU would not necessarily seek to exclude from the assessment as a matter of principle factual assertions or evidence that relate to the alleged subjective state of mind (or intent) of a particular natural person associated in some way with the legislative process. However, it remains far less clear to the EU how such factual assertion or evidence would be relevant to the assessment. There may be many natural persons associated in some degree with a legislative procedure, and it appears highly problematic to the EU to accord any substantial weight, or indeed any weight at all, to assertions about their alleged state of mind at some point in the process. On the other hand, the EU does consider that as part of its assessment it may well be very important for a panel to consider the objective concept of the object and purpose of the measure at issue. The Appellate Body has correctly confirmed that the *meaning* of a measure at issue is a question of law, even if the existence and content of a document addressing such meaning is a question of fact. In

considering what is the meaning of a measure at issue, a panel will need to look to the rules of interpretation and other relevant legal rules applicable in the domestic jurisdiction (as opposed to the rules of interpretation applicable in WTO dispute settlement). However, the EU finds it difficult to conceive of a system of interpretation in which object and purpose has no role whatsoever. Thus, the object and purpose of the measure at issue is a matter that it is legitimate or even necessary for the Panel to consider. It will form part of the overall framework that will allow the Panel to correctly ascertain how the measure at issue is interpreted and applied (and thus also what effects it may have). This is an appropriate and even necessary part of considering any "in fact" claim.

III. LEGISLATIVE HISTORY OR PREPARATORY WORK

8. The third related point on which we would like to comment concerns the legislative history or preparatory work of the measure at issue, to which some of the other Third Parties have also referred. Similar observations apply. Such considerations might be relevant to understanding how the measure at issue is to be interpreted and applied, and should be approached from the perspective of the interpretative rules applicable in the domestic jurisdiction (as opposed to the WTO, recalling that the *Vienna Convention* refers to preparatory work as a supplementary means of interpretation). That said, preparatory work is often something of a two edged sword: does the meaning apparent from the preparatory work confirm the meaning apparent from the final text; or disprove it? Furthermore, as indicated above, insofar as the documents referenced merely speak to the intent of particular natural persons at a particular time, they may be of limited if any value to the assessment.

IV. THE 60 DAY FLEXIBILITY AND FULFILMENT OF THE LEGITIMATE OBJECTIVE

9. The fourth point on which we would like to comment relates to the 60 day flexibility provided for in the Final Rule for ground meat, and the observations by the complaining Members and some Third Parties that this confirms that the measure at issue does not fulfil its stated objective. The EU – like the US – is somewhat puzzled by this line of argument. It seems to us that the objective of the measure might fairly be stated to be informing consumers *whilst at the same time avoiding unnecessary costs for importers*. Furthermore, it appears to the EU that the 60 day flexibility is an aspect of the measure that is designed to reasonably accommodate the interests of importers. For the importers to attack it appears both to ignore the mixed nature of the measure's objectives, and to be at least potentially counter-productive.

V. ALTERNATIVE PROPOSED MEASURE: DOMESTIC AND IMPORTED

10. The next point on which we would like to comment relates to an alternative measure proposed by some of the other third parties. The EU is not at this stage persuaded by the proposal of a measure that would merely distinguish between domestic and imported products. It seems to us that this would only risk to further disconnect consumer choices from rational and potentially WTO consistent considerations. It would seem to exacerbate and accentuate the nature of the problem, driving consumers only towards domestic production, without regard to the relative merits or disadvantages of meat imported from various other countries, appropriately differentiated.

VI. LABEL B FOR LABEL A SCENARIOS

11. Listening to the Parties' oral submissions, one issue that we are carefully considering – and that appears to us to be of particular importance for the parties -is the question of whether or not Label B (US and Canada\Mexico) should be available also for products derived only from US animals. We are considering this issue from the perspective of the arguments of both parties. Looking at the complainants' arguments, there are three specific points on which we are reflecting. First, we are

reflecting on why it might be unreasonable to require Label A if the steak (for example) is in fact made from 100% US cattle (born, raised and slaughtered in the US). It is not immediately apparent to us why such a requirement, viewed in isolation, would be, *per se*, unreasonable. Second, we are puzzled by the assertion that daily segregation between Label A and Label B would not be possible because Canadian\Mexican livestock might "inadvertently slip in to a Label A day" (Canada's Oral Statement, paragraph 15). We wonder if it would be excessively costly to prevent this happening. Third, if slaughterhouses would really wish to use Label B, we do not understand why it would be excessively expensive for them to always add one cut of Canadian\Mexican meat to each daily production run. Thus, there would never be a Label A issue.

12. In general terms, we appreciate that relatively small import volumes (compared to domestic production) may likely incur higher unit costs for complying with new regulations, but, like the US, we hesitate to see this, in itself, as sufficient to find WTO inconsistency. On the other hand, looking at the same issue from the point of view of the US arguments, there are still issues that are not clear to us. First, we take the US at their word and posit a "perfect" consumer – that is, one that understands what the labels mean. Second, we take the three specific explanations provided by the US that refine and explain what the "legitimate objective" is: to avoid confusion (US Oral Statement, paragraph 9); to provide something "meaningful" (US Oral Statement, paragraph 9); and to provide additional information to assist in purchasing and consumption decisions.

13. Now, I imagine myself on my next trip to the US purchasing a Label B (US <u>and</u> Mexico) steak to eat. In doing so, I have no idea whether or not commingling on the same production day occurred with respect to that steak. All I know is that my steak (which being a steak must reasonably be considered to have come from one animal) comes from one of three types of animal: born in Mexico, raised and slaughtered in the US; born, raised and slaughtered in the US (and commingled); or born and raised in Mexico and slaughtered in the US. As an informed consumer I have consented to and chosen all three of these possibilities. So far, so good. I cook my steak (medium rare) and settle down to eat it with some salad and French fries (if I'm allowed to use that term). At this point a helpful gentleman from the US Department of Agriculture appears at my side and enjoins me to stop – because I am making a terrible error (or should I say, mistake). I am confused, he informs me. Things are not what they seem. That steak in fact comes from an animal born, raised and slaughtered in the US, *and there was no commingling* – it should have been labelled "A". I am misled. But I would politely reply that I am not confused – and that with respect I think that he might be confused. I would remind him that when I purchased the steak I had no idea whether or not commingling had occurred, and could not care a less. I had already accepted the possibility that the steak might be from an animal born, raised and slaughtered in the US when I made my decision to purchase and consume it. The helpful gentleman might try a different variation on the same theme, telling me that he is providing me with something meaningful – to which I would respectfully reply that I know it already, so it is no more meaningful to me than the information that I am sitting on a chair and holding a knife and fork. Finally, he might try to suggest that on the basis of this additional information I might care to change my purchase and consumption decision – and again I would respectfully decline, because I had already taken it into account when I made my original decision. In other words, Mr. Chairman, to coin a phrase, I think I would have my steak … and eat it.

14. Perhaps one could understand the helpful gentleman's concern if my purpose in buying a Label B (US and Mexico) steak was the hope that I might make a contribution to the development of Mexico – an objective apparently thwarted by the fact that I have been misled into purchasing a pure US steak. However, the EU has not yet located on the file any evidence to support the proposition that the object and purpose of the measure at issue includes providing consumers with the opportunity of discriminating in favour of imports for positive reasons – but perhaps we are overlooking it. To conclude, if it would turn out that, *taking the parameters of the measure as they are* (including the commingling rules), *and based on the US' own specific clarifications of what it means by legitimate*

objective, this part of the measure does not, in the "real world", plausibly meet the stated objective, then we would have to further reflect about Article 2.2 of the TBT Agreement.

VII. ORIGIN RULES VERSUS ORIGIN LABELLING

15. Finally, Mr. Chairman, we would like to re-iterate a point that we have already alluded to in our submissions. We make a distinction between the issue of origin rules on the one hand, and the issue of labelling (including as regards origin) on the other hand. This case is not about origin rules. It is about labelling. And we are concerned that it should not spill-over into a case about origin rules. Article IX of the GATT 1994 addresses marks of origin and the Agreement on Rules of Origin, which cross-references Article IX of the GATT 1994, contains provisions about origin rules that are permissive. We wonder about the extent to which, if a rule of origin would be permitted pursuant to these provisions, labelling on the same basis should be precluded by the TBT Agreement, which we recall does not refer expressly to origin. We note that one can have mandatory labelling about anything (we refer to dumping or subsidies as an example), and it seems to us that it might be problematic to dissociate any assessment of such matters from the covered agreements that specifically regulate the substantive issue.

ANNEX C-13

EXECUTIVE SUMMARY OF THE THIRD PARTY ORAL STATEMENT OF THE EUROPEAN UNION AT THE SECOND SUBSTANTIVE MEETING

1. Mr. Chairman, distinguished Members of the Panel. We have the following brief observations at this time, particularly in light of the responses to questions, rebuttals and second oral statements.

I. ARTICLE IX OF THE GATT 1994 AND THE AGREEMENT ON RULES OF ORIGIN

2. We note that notwithstanding the Panel's questions[1], neither Canada[2] nor Mexico[3] pursues any claims under Article IX of the GATT 1994 or the Agreement on Rules of Origin; and the US does not reference these provisions in its defence.[4] Consequently there is no basis for the Panel to make findings with respect to these provisions. Accordingly, we ask the Panel to state clearly in its Report that any findings it makes are without prejudice to the relevance of such provisions in any future dispute.

II. THE VILSACK LETTER

3. With respect to the Vilsack Letter,[5] we believe it may be of assistance to the Panel to recall the relevant provisions of Articles 4,[6] 5[7] and 7[8] of the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts,[9] which have been

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[1] European Union's third party written submission, para. 3; European Union's first oral statement, para. 42; European Union's reply to questions 2 and 18.

[2] Canada's second written submission and replies to first set of questions (no reference to Article IX or the *Agreement on Rules of Origin*).

[3] Mexico's second written submission (no reference to Article IX or the *Agreement on Rules of Origin*) and reply to question 55, para. 151.

[4] United States' second written submission and replies to first set of questions (no reference to Article IX or the *Agreement on Rules of Origin*).

[5] European Union's third party written submission, para. 24; European Union's first oral statement, paras. 10 to 18; European Union's reply to question 7, paras. 40 to 43.

[6] "1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State."

[7] "The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance."

[8] "The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions."

[9] Draft Articles on Responsibility of States for Internationally Wrongful Acts, Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10). Yearbook of the International Law Commission, 2001, vol. II, Part Two, as corrected.

referenced in a number of WTO disputes as reflecting customary public international law, also with respect to the question of imputability.[10]

4. We remain unpersuaded by the latest US submissions[11] that, in construing the Final Rule and the Vilsack Letter together as a single measure or evidence of a single measure, Canada[12] and Mexico[13] have exceeded their (fettered) discretion in relation to such matters; nor that the Panel would do so if it would proceed in the same manner. We do not see the (un-evidenced and thus uncertain) status of the Vilsack Letter under US domestic law as determinative of this question. Rather, it appears to us that, considered in isolation, the Vilsack Letter would be meaningless. It only takes on meaning when considered together with the other document(s) to which it refers, particularly the Final Rule.

III. ALLEGED LESS-FAVOURABLE TREATMENT "IN FACT" (ARTICLE III:4 OF THE GATT 1994 AND ARTICLE 2.1 OF THE TBT AGREEMENT)

5. Without entering into the facts, as indicated in our prior submissions,[14] we remain un-persuaded by the Complainants' arguments and their general methodological approach to the problem of demonstrating less favourable treatment "in fact".[15] We agree with them that the US "like product"[16] and "private actor"[17] arguments are unconvincing; and that the position in other Members is not relevant.[18] Furthermore, it might or might not be that the introduction of this new regulatory measure has increased costs, and that this has been felt more keenly, either temporarily or as a result of lower volumes and higher unit costs, by importers.[19] But these are common features of regulatory change and do not, in our view, in themselves, demonstrate less

[10] Appellate Body Report, *US – Cotton Yarn*, para. 120 and footnote 51; Appellate Body Report, *US –Line Pipe*, para. 259 and footnotes 255 to 257; Panel Report, *US-Gambling*, paras. 6.128 to 6.129 and footnotes 697 to 701; Panel Report, *Mexico – Taxes on Soft Drinks*, para. 8.180 and footnotes 404 and 405; Panel Report, *EC-Selected Customs Matters*, para. 7.552 and footnote 932; Panel Report, *Brazil – Retreaded Tyres*, para. 7.305 and footnote 1480; Appellate Body Reports, *Canada/US – Continued Suspension*, paras. 382; Panel Report, *Thailand – Cigarettes*, para. 7.120 and footnote 533. See also: Arbitration Panel Report *EC – Bananas III (US) (Article 22.6 – EC)*, footnote 67; Arbitration Panel Report, *Brazil – Aircraft (Article 22.6 – Brazil)*, para. 3.44 and footnotes 45, 46 and 48; and Arbitration Panel Report, *US – FSC (Article 22.6 – US)*, footnote 52 and paras. 5.58 to 5.60 and footnotes 67 to 69.

[11] United States' second written submission, paras. 11 to 19.

[12] Canada's second written submission, paras. 102 to 107; Canada's reply to question 1.

[13] Mexico's second written submission, paras. 35 to 42; Mexico's reply to question 1.

[14] European Union's third party written submission, paras. 31 to 43; European Union's reply to question 3, paras. 29 to 32.

[15] In particular, Canada's second written submission, paras. 5 to 45; Mexico's second written submission, paras. 108 to 145; Canada's second oral statement, paras. 9 to 57. See also: United States' second written submission, paras. 29 to 96.

[16] European Union's third party written submission, paras. 25 to 30; Canada's second written submission, paras. 11 to 14; Mexico's second written submission, paras. 116 to 120; United States' reply to question 47.

[17] Canada's second written submission, paras. 15 to 16; Mexico's second written submission, paras. 121 to 129.

[18] Canada's second written submission, paras. 17 to 23; Canada's Second Oral Statement, paras. 58 to 59.

[19] Canada's second written submission, paras. 24 to 45; Mexico's second written submission, paras. 125 to 145.

favourable treatment.[20] Nor do we agree that origin labelling rules that apply equally to all cannot, by definition, be characterised as neutral technical regulations.[21]

6. We are not positing a higher evidential burden for "in fact" cases.[22] We are just recalling the basic fact that if you have the text of a measure that is expressly discriminatory it is a simple matter to adduce it to a panel. If you do not, you necessarily have to adduce evidence of other facts (at least two or more) and explain how they work together to support the finding of further facts, of which there is no direct evidence, so as to build a reasoned and adequate explanation between the facts thus established and any finding of inconsistency. We think this is something more than "aims and effects", and we just don't find it clearly set out in the Complainants' submissions.

7. The covered agreements pursue a trade objective, but they do not set out to eliminate regulatory diversity; and mutual recognition is only a stable operational approach if the costs implied by different regulatory systems do not differ excessively.

8. Finally, we observe that an alleged "in fact" breach of Article 2.1 of the TBT Agreement is a particularly serious matter, to the extent that it would be the case that Article XX of the GATT 1994, for example, would not be available as a defence.

IV. PROPORTIONALITY (ARTICLE 2.2 OF THE TBT AGREEMENT)

9. As we have indicated in our submissions, we consider that proportionality probably offers the best approach in this case. We agree with the US that the importing Member sets its own ALOP, and that panel's should exercise restraint on the questions of whether the objective is as stated and whether it is legitimate.[23] However, we do think that the Panel can and should enquire into the question of whether or not the Complaining Members have demonstrated that there are less trade restrictive measures that equally fulfil the legitimate objective.

A. THE OBJECTIVE OF THE MEASURE IS CONSUMER INFORMATION

10. We do not believe that it would be necessary or appropriate in this case for the Panel to find that – objectively – the objective of the measure is something other than the provision of consumer information.[24] As we have indicated in our submissions, we think that the Panel can provide a satisfactory resolution of the dispute without calling into question that aspect of the US submissions.

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[20] European Union's third party written submission, paras. 31 to 43; United States' reply to questions 14 and 46.

[21] Canada's second oral statement, para. 12.

[22] Mexico's second written submission, para. 110.

[23] United States' second written submission, paras. 98 to 105.

[24] European Union's third party written submission, para. 37; European Union's first oral statement, paras. 19 to 23; European Union's reply to question 10, paras. 50 to 51 and Question 19, paras. 66 to 69; Canada's second written submission, paras. 50 to 54 and 57 to 68; Mexico's second written submission, paras. 149 to 161; United States' second written submission, paras. 118 to 146 and reply to question 3; Canada's second oral statement, paras. 62 to 67.

11. We do not agree with Canada that the TBT list of objectives is closed by reference to other provisions of the covered agreements;[25] nor do we agree that such objectives have to be "specific".[26]

B. THE OBJECTIVE OF CONSUMER INFORMATION IS LEGITIMATE

12. We consider that the objective of providing consumer information about origin is a legitimate one.[27] We fail to see how the Complainants can reasonably argue that the reference to "labelling" in the TBT Agreement also refers to origin labelling;[28] and yet at the same time that origin labelling is not a legitimate objective. We do not agree that the defending Member has to provide "clear and compelling" evidence of legitimacy.[29]

C. THE IMPORTANCE OF THE OBJECTIVE AND THE RISKS OF NON-FULFILMENT

13. Whilst we agree that not all objectives will necessarily be legitimate, we do not consider that it would be necessary or appropriate in this case for the Panel to address this question. We think it both unnecessary and incorrect to opine about the relative degree of regulatory space under the SPS and TBT Agreements – if anything we see more regulatory space under the TBT Agreement.[30] We think that the Panel can provide a satisfactory resolution of the dispute on the basis of other reasoning.

D. LABEL B IN LABEL A SCENARIOS: A LESS TRADE RESTRICTIVE MEASURE THAT EQUALLY FULFILS THE STATED OBJECTIVE

14. We have already explained why we think that the Complainants have identified a measure that is less trade restrictive, or *significantly* less trade restrictive, and that *equally* fulfils the stated objective.[31] That measure would be to permit the use of label B in all cases, even if co-mingling did not occur, or occurred over an extended period of time (such as a year, for example). This would be less trade restrictive because US slaughter houses would no longer be fettered by the COOL measure in their decisions to take Canadian and Mexican cattle and hogs. It would *equally* fulfil the stated objective because the overall design and architecture of the measure reveals that it is premised on the assumption that US consumers do not care if their steak is *a bit more likely* to be American than one might imagine, given the indication on the label (US and Canada/Mexico).[32] Conversely, there is no evidence to support the view that the measure was designed so as to enable US consumers to prefer *imported* meat.[33] Finally, nothing would prevent slaughterhouses using label A if consumers would want it. We think this would largely address the concerns raised by Canada and Mexico, whilst leaving the essence of the measure, *as it is already designed*, in place.[34]

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[25] Canada's second written submission, paras. 70 to 76.
[26] Canada's second written submission, paras. 55 to 56 and para. 69.
[27] United States' second written submission, paras. 106 to 117.
[28] See the discussion at paras. 15 to 22 of the European Union's third party written submission.
[29] Canada's second written submission, para. 70.
[30] Canada's second written submission, para. 86 and paras. 91 to 95.
[31] European Union's first oral statement, paras. 27 to 41.
[32] United States' reply to question 48.
[33] United States' reply to question 56.
[34] Canada's second written submission, paras. 77 to 83; Canada's reply to question 24; Mexico's second written submission, paras. 87 to 98; Mexico's reply to question 24; US Replies to Questions 10, 24 and 29.

E. THE VILSACK LETTER

15. We have explained that we consider the Vilsack Letter – which apparently "reflects the priorities of the new Administration"[35] – to be more trade restrictive than the Final Rule, and thus by definition inconsistent with Article 2.2 of the TBT Agreement. We think that such a finding would preclude reversion to a measure of that substantive content in the context of compliance.[36]

F. VOLUNTARY LABELLING

16. We have explained why we consider that voluntary labelling would not necessarily achieve the stated objective.[37]

G. SUBSTANTIAL TRANSFORMATION

17. We have explained why we consider that the Complainants' arguments about substantial transformation are not persuasive.[38]

V. CONCLUSION

18. On the basis of the foregoing, we consider that the Panel could reasonably find that the measure is inconsistent with Article 2.2 of the TBT Agreement insofar as it does not permit the use of label B in *other* situations where the meat may in fact be of pure US origin; and insofar as the Vilsack Letter is more trade restrictive than necessary to fulfil a legitimate objective. With the possible exception of Article 12 of the TBT Agreement,[39] the Panel could judicially economise on the remainder of the claims.

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[35] United States' reply to question 4, para. 6.

[36] European Union's reply to question 6, paras. 40 to 43; Canada's second written submission, paras. 102 to 111; Mexico's second written submission, paras. 35 to 42.

[37] European Union's third party written submission, paras. 41 and 56; Canada's second written submission, paras. 96 to 98; Mexico's second written submission, paras. 165 to 169; United States' reply to question 37.

[38] European Union's third party written submission, para. 57; European Union's reply to question 17, paras. 63 to 64 and Question 2, para. 27; Canada's second written submission, paras. 99 to 101; Mexico's second written submission, paras. 165 to 169.

[39] European Union's first oral statement, para. 12; European Union's reply to question 16, paras. 59 to 62.

ANNEX C-14

THIRD PARTY ORAL STATEMENT OF GUATEMALA AT THE FIRST SUBSTANTIVE MEETING

1. Mr. Chairman, Members of the Panel, delegations representing the Parties and Third Parties to this dispute, staff of the WTO Secretariat, good morning.

2. At the outset, on behalf of the delegation of Guatemala, I would like express our appreciation for this opportunity to present our views during this proceeding.

3. Guatemala is a small country with limited resources. Nevertheless, Guatemala makes every effort to actively participate in those disputes, where it has a systemic interest. In this case, Guatemala has a systemic interest in all the issues raised by the Parties and my delegation would like to take this opportunity to offer some comments to the Panel.

4. Guatemala recognizes that all WTO Members have the right to adopt mandatory country of origin labelling requirements. That is, any Member may require meat or any other product to have its origin indicated when it arrives at its border. None of the Parties or the Third Parties appear to disagree on this. The question then, is whether by adopting such origin labelling requirements, a particular Member (in this case, the United States) is, or is not, acting in a manner contrary to its obligations under the WTO Agreements.

5. Canada and Mexico argue that this case is about protectionism and discrimination. According to the complainants, the US country of origin requirements impose significantly greater costs and burdens on the use of Canadian and Mexican cattle and hogs in the production of beef and pork, mainly because it is required to segregate the products to effectively comply with the COOL measure.

6. In addition, as a part of the legal instruments that conform the COOL measure, Canada and Mexico include an open letter from the US Secretary of Agriculture, Mr. Tom Vilsack, on which he asked the industry to "voluntarily" adopt labelling in a manner more restrictive than that provided in the COOL legislation and the Final Rule. As an alternative, Mr. Vilsack stated in his letter that he would "carefully consider whether modifications to the rule will be necessary to achieve the intent of Congress".

7. On the other hand, the United States argues that the objective of its labelling requirements is to ensure that consumers are provided information about the meat and other food products they buy at the retail level and to prevent "consumer confusion" with regard to the origin of the products. According to the US, among other aspects, nothing in the regulations requires segregation. The US has the position that the legal instruments identified by the complainants do not conform one COOL measure and that the Vilsak Letter is not a technical regulation nor is it mandatory.

8. None of the parties to the dispute appear to deny that COOL requirements (independently whether it is a single measure or a set of measures) are technical regulations. Therefore, in Guatemala's view, the Panel should ascertain first, whether the technical regulation or regulations fulfil a legitimate objective.

9. Guatemala agrees with the US that Article 2.2 of the TBT Agreement contains a nonexhaustive list of legitimate objectives, as confirmed by the use of the term "inter alia". However, Guatemala is not persuaded that, in this particular case, the measure or measures at issue are designed

in a manner to fulfil the alleged legitimate objective (i.e., among others, to prevent "consumer confusion").

10. We all heard yesterday that there could be cases where commingling 1% meat from the United States with 99% of meat from Canada (or Mexico) may allow the use of the label stating that the product is from the United States and Canada (or Mexico). We also heard from Mexico the example that cattle coming from Guatemala and being simply slaughtered in Mexico would be classified in the United States as Mexican beef. However, it would not be the same case for Mexican cattle that was slaughtered in the United States, as the beef would not be classified as from the United States, but as Mexican.

11. Therefore, Guatemala is of the view that the United States has not offered sufficient evidence as to how the COOL measure or measures fulfil the alleged legitimate objective of giving accurate information to the consumer regarding the origin of the products and, in this manner, to prevent confusion.

12. In the event that the Panel considered that the COOL measure or measures fulfil a legitimate objective, in Guatemala's view, the second question would be to ascertain whether the technical regulation or regulations are not "prepared, adopted or applied" with a view to or with the effect of creating unnecessary obstacles to international trade. Here, the analysis of the legal value of the Vilsak Letter might be relevant. Guatemala considers that this letter should be considered as a measure for purposes of this dispute.

13. In particular, not only because any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings, but also because the letter, although requests "voluntary" actions from the industry, appears not to give any other option but to comply with such "voluntary" actions (making this measure, de facto, mandatory).

14. In the remote event that the Panel determined that the technical regulation or regulations were not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade, Guatemala is of the view that the Panel then needs to examine whether the conditions of competition where modified. This examination should be, in Guatemala's view, linked to the question of whether products imported from the territory of any Member are accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country. To this end, the Panel may need to ascertain whether the alleged costs of segregation effectively modified the conditions of competition.

15. Finally, Mr. Chairman, regarding the question you posed to the third parties about any mandatory country-of-origin labelling scheme that our countries could maintain, I can inform that we have just received a considerable amount of information from our Capital. We are in the process of examining this information. Provisionally, I can advance that we have some mandatory rules for country-of-origin labelling. However, we would submit further detailed information in writing within the delays established by the Panel foreseen to that end.

ANNEX C-15

EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF JAPAN

I. INTRODUCTION

1. Japan's third party submission focuses on the consistency with Article 2.1 of the Agreement on Technical Barriers to Trade (the "TBT"), Article III.4 of the General Agreement on Tariffs and Trade 1994 (the "GATT") and Second Sentence of Article 2.2 of the *TBT*, of the country-of-origin labelling requirements (the "COOL measure") imposed by the United States on certain covered commodities including beef and pork when they are sold to final consumers.

II. THE PANEL SHOULD CAREFULLY SCRUTINIZE WHETHER THE COOL MEASURE ACCORDS LESS FAVOURABLE TREATMENT TO IMPORTED PRODUCTS THAN TO LIKE PRODUCTS OF NATIONAL ORIGIN WITHIN THE MEANING OF ARTICLE 2.1 OF THE TBT AND ARTICLE III.4 OF THE *GATT*

2. The first question to be examined by the Panel is whether the COOL measure, which is applied only to *beef* and *pork*, is considered as according less favourable treatment to Canadian/Mexican *cattle* and *hogs* than that to those of the United States, and constitutes the violation of Article 2.1 of the *TBT* and Article III.4 of the *GATT*.

A. ARTICLE 2.1 OF THE *TBT*

3. Canada and Mexico consider that the COOL measure constitutes a technical regulation defined in ANNEX 1, paragraph 1 of the *TBT*.[1] On this basis, they claim that Canadian/Mexican *cattle* and *hogs* are accorded treatment less favourable than that to *cattle* and *hogs* of the United States, and that the COOL measure is in violation of Article 2.1 of the *TBT*.

4. The United States, on the other hand, considers that the phrase "in respect of" in this provision is interpreted as meaning "be directed to; refer to; related to; deal with; be concerned with" in accordance with the Oxford Dictionary[2] and argues that the scope of the national treatment obligation is restricted to the products which are "related to" or "directed to" a technical regulation concerned on the basis of "in respect of technical regulations" in Article 2.1 of the *TBT*. In other words, the United States argues that, since the COOL measure merely regulates the labelling related to *beef* and *pork* in the retail market of the United States, this measure is not considered as being "related to" to the labelling of livestock such as *cattle* and *hogs*, and thus falls outside the regulatory scope of Article 2.1 of the *TBT*. However, neither Canada nor Mexico refers to this regard[3].

5. Since there is no jurisprudence regarding the phrase "in respect of" in Article 2.1 of the *TBT*, and since Article 2.1 of the *TBT* places no limiting words on "technical regulations" in contrast to Article III:4 of the *GATT*, where "all laws, regulations and requirements" are limited by the words "affecting their internal sale, offering for sale, purchase, transportation, distribution or use", Japan would respectfully ask the Panel to carefully examine the interpretation and argument by the United States regarding the phrase "in respect of", which is spelled out in the previous paragraphs in this submission.

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[1] Canada's first written submission, paras. 69-74; Mexico's first written submission, paras. 239-260.
[2] United States' first written submission, para. 197.
[3] United States' first written submission, para. 198.

B. ARTICLE III.4 OF THE *GATT*

6. The claim by Canada and Mexico that the COOL measure, which is applied only to *beef* and *pork*, accords less favourable treatment to Canadian/Mexican *cattle* and *hogs* than that to those of the United States needs to be examined in relation to "affecting" and "less favourable treatment" under Article III.4 of the *GATT*.

7. Regarding the word "affecting", the Appellate Body held that this requirement 'serves to define the scope of application of Article III:4'.[4] In this regard, Mexico claims that, while the COOL measure does not directly regulate *cattle*, it affects the internal sale of *cattle*.[5] Thus, it concludes that the COOL measure violates the national treatment obligation in Article III.4 of the *GATT*. Canada also makes similar arguments to Mexico.[6]

8. There are not a few precedents regarding the term "affecting" under Article III.4 of the *GATT*. For example, the panel in *Canada – Autos* held that '[t]he word "affecting" in Article III:4 of the GATT has been interpreted to cover not only laws and regulations which directly govern the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between domestic and imported products'.[7]

9. Moreover, the panel's reasoning in *Mexico – Taxes on Soft Drinks* with respect to Article III.4 of the *GATT* may offer a suggestion for the present case. In this case, the United States claimed that the soft drink tax and the distribution tax, both of which are imposed on *soft drinks and syrups* when they are sold in retail, affected not only the internal sale of *soft drinks and syrups* but also the internal sale of sweeteners which are used to produce soft drinks, in the Mexican market, and accorded less favourable treatment to US *beet sugar* than that to Mexican *cane sugar* under Article III.4 of the *GATT*. In this regard, the panel concluded that the internal sale of *beet sugar* of the United States in the Mexican retail market was also affected by the soft drink tax and the distribution tax.[8]

10. Thus, there is no doubt for the Panel to conclude that the COOL measure is considered as affecting internal sale of Canadian/Mexican *cattle* and *hogs* in the retail market of the United States. Moreover, this issue should also be examined in relation to "less favourable treatment". In this regard, the United States points out that the detrimental effects to import *cattle/hogs* in the market alleged by Canada and Mexico are caused by "factors not related to the COOL measures", and thus concludes that the COOL measures do not modify the condition of competition.[9]

11. Japan is of the view that the question whether the COOL measure modifies the condition of competition in livestock trade, that is Canadian *cattle* and *hogs*, should be carefully examined by the Panel, because this measure does only regulates the labelling requirement for *beef* and *pork* and does not directly regulate internal sale of livestock.

12. Lastly, Japan points out that the reason is not that clear why the United States cites the paragraphs from 196 to 199 of its Written Submission, which are about the interpretation of the phrase "in respect of" in Article 2.1 of the *TBT*, in the footnote 331 of its written submission in the context of "less favourable treatment" of Article III.4 of the *GATT*. Should the United States consider that there is a link between two phrases, the reason for such link needs to be further clarified.

[4] United States' first written submission, para. 198.

[5] Mexico's first written submission, para. 213.

[6] Canada's first written submission, paras. 221-222.

[7] Panel Report, *Canada – Autos*, para. 10.80. See also Appellate Body Report, *US – FSC (Article 21.5 – EC)*, paras. 208-209.

[8] See Panel Report, *Mexico – Taxes on Soft Drinks*, para. 8.109.

[9] United States' first written submission, para. 150.

III. THE PANEL SHOULD CAREFULLY EXAMINE WHETHER THE COOL MEASURE IS TRADE-RESTRICTIVE THAN NECESSARY TO FULFIL A LEGITIMATE OBJECTIVE

13. The next question to be examined by Japan is whether the COOL measure, which is applied as a technical regulation only to *beef* and *pork*, is determined to be more restrictive to trade of Canadian/Mexican *cattle* and *hogs* than necessary to fulfil a legitimate objective under Article 2.2 of the *TBT*.

A. The Panel Should Carefully Examine Whether the COOL Measure Restricts Trade

14. Canada and Mexico also allege a violation of the second sentence of Article 2.2 of the *TBT*. In order to find that a measure is considered more trade-restrictive than necessary to fulfil a legitimate objective, Canada argues that the following two elements need to be established: first, a technical measure must restrict trade; and second, the trade-restrictiveness of the technical regulation must be greater than necessary to fulfil its legitimate objective.[10] With respect to the first requirement, Canada argues that the COOL measure has restricted trade in Canadian *cattle* and *hogs*, while the COOL measure is applied only to *beef* and *pork*.[11]

15. Thus, Japan respectfully asks the Panel to carefully examine whether the COOL measure is considered as restricting trade of Canadian/Mexican *cattle* and *hogs* to the United States under second sentence of Article 2.2 of the *TBT*. The legal relationship between the first sentence and the second sentence of Article 2.2 of the *TBT* might shed some lights on the assessment of this question. The first sentence reads that "[m]embers 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*." (Italic Added) Since the second sentence begins with the phrase of "[f]or this purpose", and as also confirmed by the United States and Canada that 'the second sentence explains what the first sentence means'[12], the interpretation of the phrase "international trade" in the first sentence could provide for some clues to the regulatory scope of "trade" under the phrase "trade-restrictive" in the second sentence.

B. The United States needs to demonstrate in its rebuttal that the alternative measures raised by Canada and Mexico are not less restrictive to trade of Canadian/Mexican *cattle* and *hogs* than the COOL measure

16. Both Canada and Mexico claim that the COOL measure is more restrictive to trade of Canadian/Mexican *cattle* and *hogs* than necessary to fulfil its legitimate objective. In this context, they raise the following alternative measures; first, a Voluntary Labelling Scheme; and second, a Labelling System Based on Substantial Transformation.[13]

17. In this regard, Canada enumerates the three elements to be established for determining whether a measure is "more trade-restrictive than necessary" under the second sentence of Article 2.2 of the *TBT* as follows: first, an alternative measure exists that would meet the Member's legitimate objective; second, the alternative measure is reasonably available taking into account technical and

[10] Canada's first written submission, para. 183. Mexico also refers to "trade-restrictive" as one of the requirements. Mexico's first written submission, paras. 305-307.

[11] Canada's first written submission, para. 186. Mexico also considers that the meaning of "trade-restrictive" is to "deny competitive opportunities to imports of Mexican feeder cattle". Mexico's first written submission, para. 313.

[12] United States' first written submission, para. 202.

[13] Canada's first written submission, para. 191.

economic feasibility; and third, the alternative measure is less restrictive to trade than the measure being challenged.[14] With respect to the third requirement, Canada claims that the COOL measure has resulted in a significant reduction in exports of Canadian *cattle* and *hogs* to the United States.[15]

18. While the United States does not attempt to rebut the case by Canada and Mexico concerning this regard, it is to be noted that the United States, if necessary, would need to show in its rebuttal that the alternative measures raised by Canada and Mexico are not less restrictive to trade of Canadian/Mexican *cattle* and *hogs* to the United States than the COOL measure, not trade of Canadian/Mexican *beef* and *pork*.

C. THE PANEL SHOULD CAREFULLY INTERPRET THE SECOND SENTENCE OF ARTICLE 2.2 OF THE *TBT*

19. Regarding how to prove "more trade-restrictive than necessary" under the second sentence of Article 2.2 of the *TBT*, the United States argues that one of the elements to be established by a complainant is whether an alternative measure is *significantly* less trade-restrictive to trade.[16] In support of incorporating the term "significantly" into this provision, it relies on the contextual similarities between Article 2.2 of the *TBT* and Article 5.6 and Footnote 3 of the Agreement on the Application of Sanitary and Phytosanitary Measure (the "*SPS*").[17] It also invokes the December 15, 1993 letter from the Director-General of the GATT to the Chief United States Negotiator concerning the application of Article 2.2 of the *TBT* in order to support its own contextual interpretation[18].

20. However, the United States seems to misunderstand the ordinary meaning of the terms in interpreting the WTO Agreement. It is already established that Article 31 of the Vienna Convention on the Law of Treaties has attained the status of a rule of customary or general international law in interpreting the WTO Agreement.[19] The fact that there is neither "significant" nor "significantly" in Article 2.2 of the *TBT* must be taken into account, and the difference in the wording between Article 2.2 of the *TBT* and Article 5.6 and Footnote 3 of the *SPS* must be read on the contextual basis. Thus, Japan would request the Panel to examine carefully the above assertion of the United States in this light.

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[14] Canada's first written submission, para. 190. See also Mexico's first written submission, para. 310.

[15] Canada's first written submission, para. 199. See also Mexico's first written submission, para. 317.

[16] United States' first written submission, para. 249 (italic original).

[17] United States' first written submission, paras. 246-247.

[18] United States' first written submission, para.248.

[19] See also Article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

ANNEX C-16

EXECUTIVE SUMMARY OF THE THIRD PARTY ORAL STATEMENT OF JAPAN AT THE FIRST SUBSTANTIVE MEETING

I. INTRODUCTION

1. Due to its systemic interest in the sound interpretation of the legal obligations at issue, Japan's third party oral statement focuses on two points regarding Article 2.1 of the Agreement on Technical Barriers to Trade ("TBT Agreement"), especially the following issues.

(1) Whether the COOL measure accords less favourable treatment to Canadian/Mexican cattle and hogs than to the like products of the United States; and

(2) the interpretation of the phrase "in respect of" under Article 2.1 of the TBT Agreement in its consideration of the views expressed by the United States and other third parties.

II. WHETHER THE COOL MEASURE ACCORDS LESS FAVOURABLE TREATMENT TO CANADIAN/MEXICAN CATTLE AND FOGS THAN TO THE LIKE PRODUCTS OF THE UNITED STATES UNDER ARTICLE 2.1 OF THE TBT AGREEMENT

2. It is established that a measure in question is considered to be according less favourable treatment to foreign products than to the like products of domestic origin if this measure modifies the *conditions of competition* in the relevant market to the disadvantage of the imported product.[1]

3. In *Korea – Various Measures on Beef*, the Korea's dual retail system promulgated in 1990 restricted a 'Specialized Imported Beef Store' from selling *domestic beef*, and other small retailers from selling *imported beef* in the Korean retail market. As the result of this, 'the existing small retailers had to choose between, on the one hand, continuing to sell domestic beef and renouncing the sale of imported beef or, on the other hand, ceasing to sell domestic beef in order to be allowed to sell the imported product. Apparently, the vast majority of the small meat retailers chose the first option'.[2] Accordingly, while the dramatic reduction in number of retail outlets for imported beef occurred by the decisions of individual retailers who could choose freely to sell the imported beef, the Appellate Body stated that '<u>[t]he legal necessity of making a choice</u> was…imposed by the measure itself. The restricted nature of that choice should be noted…The choice was limited to selling domestic beef only or imported beef only'.[3] The Appellate Body also held that '[w]hat is addressed by Article III:4 is merely the *governmental intervention* that affects the conditions under which like goods, domestic and imported, compete in the market within a Member's territory'.[4]

4. In this regard, Canada asserts that the COOL measure requires US feeding operations and slaughter houses to segregate livestock at each stage of the production process.[5] On the other hand, the United States argues that '[i]n law and in fact, the 2002 COOL Statute, as amended, 2009 Final Rule,

[1] Appellate Body Report, *Korea – Various Measures on Beef*, para. 144; Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 91.

[2] Appellate Body Report, *Korea – Various Measures on Beef*, para. 145.

[3] *Korea – Various Measures on Beef*, Appellate Body Report, para. 146. (underline added)

[4] *Korea – Various Measures on Beef*, Appellate Body Report, para. 149. (italic original)

[5] Canada's written submission, para. 95.

and FSIS Final Rule do not require US processors to segregate livestock'.[6] According to the United States, US processors are not legally prevented from buying Canadian/Mexican cattle and hogs in the US retail market and explained several options available for US processors.

5. Japan notes that, in *Korea – Various Measures on Beef*, the dual distribution system based on the origins of products was directly imposed by Korea's law and regulation. However, there may be a possibility that the COOL regulations are still regarded as governmental intervention that *de facto* compels US feeding operations and slaughter houses to make a choice to purchase US cattle and hogs.[7] While admitting that "U.S. feeding operations and slaughter houses do, in theory, have ability to 'choose' whether to use Canadian cattle and hogs, and US retailers have, in theory, the ability to 'choose' to sell Canadian-origin beef and pork", Canada still asserts that "the COOL measure imposes the 'necessity of making a choice'" on US industry to use exclusively US-origin livestock.[8] The United States responds that, while contrasting with the Appellate Body in *Korea – Various Measures on Beef* which referred to "the *legal* necessity of making a choice", "the COOL leads to some producers experiencing a *commercial* necessity to segregate products."[9] (Italic Original)

6. Thus, there appear to be divergent views among the parties on whether the COOL measures at issue impose a kind of "legal necessity of making a choice" referred to by the Appellate Body in *Korea – Various Measures on Beef*. Japan considers that resolving this issue would turn on a factual analysis as to whether the measures at issue requires segregation and whether segregation costs are such a high level that they compel US processors to use only US-origin animals.

III. THE INTERPRETATION OF THE PHRASE "IN RESPECT OF" UNDER ARTICLE 2.1 OF THE TBT AGREEMENT IN CONSIDERATION OF THE VIEWS EXPRESSED BY OTHER THIRD PARTIES

7. Regarding the phrase "in respect of" under Article 2.1 of the *TBT*, the United States argues in its written submission that, since the COOL Statute and 2009 Final Rule merely regulate the labelling related to *beef* and *pork* in the retail market of the United States, this measure is not considered as being "related to" to the labelling of livestock such as *cattle* and *hogs*, and thus falls outside the regulatory scope of Article 2.1 of the *TBT*.[10]

8. On this issue, Australia provides its view that the phrase "in respect of" should mean that "where technical regulations are applied by a WTO Member".[11] The EU seems to argue that

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[6] United States' written submission, paras. 153, 159.

[7] In this regard, New Zealand also argues in its third party submission that 'there may be a violation [of Article 2.1 of the *TBT*] where those private actions are compelled, *de facto* or *de jure*, by the measure at issue'. New Zealand submits that 'the Panel should consider whether governmental actions have created the situation where private actors are compelled to act in a certain way because of a "necessity of making a choice"'. From these observations, New Zealand seems to argue that, even in case that private actors are *de facto* compelled to act in a certain way through governmental actions, it might be decided that the condition of competition is modified to the disadvantage of the imported product. According to New Zealand, 'although a technical regulation may not explicitly require a specific action, it nevertheless unduly influences the actions of private entities so as to adversely affect "the conditions under which like goods, domestic and imported compete in the market"' (New Zealand, third party written submission, paras. 26-27.).

[8] Canada's written submission, para. 91.

[9] United States' written submission, para. 171.

[10] United States' first written submission, para. 198.

[11] Australia's third party submission, paras. 39-44.

Article III.4 of the *GATT* provide relevant context for the interpretation of this phrase under Article 2.1 of the *TBT*. [12]

9. While Article III.4 of the *GATT* reads "in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use", Article 2.1 of the *TBT* reads "in respect of technical regulations". Given the similarity of, and close relation between, those two provisions, as agreed among parties,[13] Article III.4 of the *GATT* should provide guidance for the interpretation of Article 2.1 of the *TBT*, including the phrase "in respect of".

[12] European Union's third party submission, paras. 27-30.

[13] See Canada's first written submission, para. 78; Mexico's first written submission, para. 263; United States' first written submission, para. 145.

ANNEX C-17

**THIRD PARTY ORAL STATEMENT
OF JAPAN AT THE SECOND SUBSTANTIVE MEETING**

I. INTRODUCTION

1. Mr. Chairman and distinguished members of the Panel, Japan appreciates the opportunity to present its brief views as a third party in this important dispute. Today, we will not reiterate what we have already said in our written submission and first oral statement. Rather, we will focus on different issues regarding Article 2.2 of the Agreement on Technical Barriers to Trade ("TBT Agreement").

II. ARTICLE 2.2 OF THE TBT AGREEMENT

2. The parties claim that whether the COOL measure "fulfils" the legitimate objective of providing consumer information and preventing consumer confusion depends on the factors including the following ones.

- What kind of information US consumers want from a country-of-origin labelling;
- Whether US consumers can understand the differences between Label "A", "B", and "C" meat products; and
- Whether the COOL measure provides US consumers with accurate information about the origin of meat products.

3. First, according to Canada,[1] "[t]he COOL measure provides information that US consumers generally are not interested in knowing and it is therefore not meaningful."[2] It also argues that "the vast majority of consumers express no interest in country-of-origin labelling[…]much less in the kind of information required to be provided by the COOL measure."[3] Mexico also argues that "[t]o the extent some US consumers stated they wanted information on the country in which the cattle used to produce beef products were born and raised, the proportion of those consumers to the entire population of US beef consumers was very small."[4] In response, the United States claims that the US consumers want information about the country-of-origin of the meat products they buy, including information about where the source animals were born, raised, and slaughtered.[5] As a matter of fact, it may occur to any society that the scope of information that a labelling measure in question provides to its domestic consumers does not correspond exactly to the one they actually desire. In other words,

[1] Canada argues that "in order to fulfil the objective of providing consumers with information, the information must be 'meaningful'. In other words, it must provide consumers with information that is desired by them, or at least information on which they are willing to act." (Canada's second written submission, para. 81, Underline Added).

[2] Canada's second written submission, para. 82.

[3] Canada's second written submission, para. 82. See also Canada's responses to the Panel's questions from the first substantive meeting, para. 82 ("There may be a small sub-set of consumers who are interested in whether their meat comes from animals born and raised in the United States").

[4] Mexico's second written submission, para. 68.

[5] United States' second written submission, paras. 111-114. The United States also states that "[US] consumers believe that meat products that are designated as US origin are and should be derived from animals born, raised, and slaughtered in the United States and that other definitions of US origin would be misleading." (United States' answers to Panel's first set of questions, para. 93).

information to be provided by a labelling measure may cover information other than domestic consumers actually want. Does this fact lead a panel to decide that this measure does not fulfil the legitimate objective of providing consumers information? Given that its objective is to provide consumers with information, we do not believe that a government should always be free to enforce any labelling measure irrespective of what kind of information domestic consumers actually desire. However, in Japan's view, only the evidence showing the minor gap between consumers' desire and a labelling measure in terms of the scope of information does not always lead a panel to rule that the measure does not fulfil the legitimate objective of providing consumers information.

4. This view is also supported by the following reasoning. As also explained in its answer to the Panel's question 15, Japan is of the view that the term "origin" in the context of the customs law is different from the one in the context of a labelling.[6] Therefore, the Agreement on Rules of Origin does not provide clear guidance for the term "origin" in the context of a labelling. Moreover, it is provided in the preamble of the TBT Agreement that "no country should be prevented from taking measures necessary[…]at the levels it considers appropriate". On this basis, there exists no clear provision in the WTO Agreement specifying what information should be attached to a country-of-origin labelling. In other words, the question as to what extent of information a country-of-origin labelling system should include falls within the discretion of WTO Members. However, this labelling system should not be more trade-restrictive than necessary to fulfil its legitimate objectives.

5. Second, according to Canada,[7] "[t]he meaning of the labels [in the COOL measure] is not easily deciphered by [US] consumers. The average consumer would not be able to appreciate the difference between the various labels",[8] and "[m]ost consumers do not understand the subtle differences between Label 'A', 'B', and 'C' meat." [9] Mexico also states that "it is clear that the average consumer [in the United States] will not be able to understand the exact meaning of the information contained in the label."[10] However, no party submits any convincing evidence that shows the consumer's ability or disability to distinguish the differences between these Labels. It might be true that US consumers are sometimes not able to perfectly understand what the difference between Label "B" and "C" means without additional information. While the consumers' perception may play a certain role to a panel in examining whether a labelling measure fulfils its legitimate objective of providing consumers information about the country-of-origin for meat products, the Panel should carefully examine whether the alleged disability of consumers to recognize the distinctions between Label "A", "B", and "C" is sufficient to decide that the COOL measure does not fulfil such an objective.

6. Third, the COOL measure aims at providing US consumers with information about the country-of-origin where the animal from which the meat was derived was born, raised, and slaughtered.[11] In addition, the United States claims that the objective of the COOL measure is to prevent US consumers from being confused with the wrong use of labelling "Product of U.S.", which, according to the United States, should be used only when the source animals were born, raised, and slaughtered in the United States.[12] Thus, it needs to be examined whether the COOL measure is structured so that US consumers are informed of and not confused with the country-of-origin of meat products.

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[6] Japan's replies to questions from the Panel following the first hearing, paras. 3-5.

[7] Canada argues that "to fulfil its purported objective, the information available as a result of the COOL measure would have to be accurate." (Canada's first written submission, para. 178).

[8] Canada's first written submission, para. 181.

[9] Canada's second written submission, para. 79.

[10] See also Mexico's responses to the Panel's questions from the first substantive meeting, para. 116.

[11] United States' answers to Panel's first set of questions, paras. 105, 107; United States' opening statement at the first substantive meeting, para. 38.

[12] See also United States' answers to Panel's first set of questions, paras. 100-101,104.

7. As to the multiple-origin labelling for *muscle cuts of meat* under the COOL measure such as Label B and Label C, Mexico claims that Label B, "in itself, is confusing because consumers will not know that the entire process of meat production took place in the United States while only the birth and minimal raising of the animal occurred in Mexico."[13] Japan agrees with this Mexico's view to some extent. As long as the objective of the COOL measure is to provide US consumers with three specific pieces of information about where the source animals were (1) born, (2) raised, and (3) slaughtered, Label B "Product of US and Country X" and Label C "Product of Country X and U.S." would not be able to provide US consumers with information the COOL measure intends to provide unless further and specified information were added to these Labels. Only the description "Product of US and Mexico" *itself* under Label "B" provides US consumers with no exact information about where the source animals were born, raised, and slaughtered.[14]

8. Even as to the single-origin labelling for muscle cuts of meat under the COOL measure, Mexico argues that, in addition to the case where the animal sources were born, raised, and slaughtered in Country X, and imported into the United States, there are three more cases where Label D "Product of Country X" may be used under the COOL measure.[15] If so, US consumers would not be able to identify the four different cases from Label "D" itself.

9. However, it should be noted that the multiple-origin labelling for muscle cuts of meat such as Label "B" and Label "C" may fulfil the other objective of the COOL measure, that is to prevent US consumers from being confused with the wrong use of labelling "Product of U.S." for meat products, the animal resources of which were actually born and raised in a foreign country and immediately slaughtered in the United States.[16] In this regard, both Label "B" and Label "C" at least inform US consumers that muscle cuts of meat labelled with Label "B" or "C" are different from Label "A" and that the source animals were not exclusively born, raised, and slaughtered in the United States. However, the COOL measure is still subject to the review as to whether it is not more trade-restrictive than necessary to fulfil its legitimate objectives.

10. As to the labelling rules under the COOL measure for meat products that are derived from the *commingling* of various livestock, there exists the flexibility under the 2009 Final Rule that permits a retailer to use either Label "B" or "C" on any combination of Label A, B, and C livestock in case that they are commingled during a single production day.[17] In this regard, Canada argues that "even a consumer who ardently wished to purchase meat that went through a particular life-cycle (say 'Canadian-born, U.S.-raised and – slaughtered') would not be able to determine from the Labels whether the meat came from such an animal." [18] As also questioned by the Panel to the United States,[19] even when 1% of Label A livestock (i.e. born, raised and slaughtered in the United States) and 99% of Label C livestock (e.g. born and raised in Country X and immediately slaughtered in the

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[13] Mexico's first written submission, para. 301.

[14] It is also noted that, as Mexico also points out, Label "C" may also be used for two occasions under the COOL measure; first, where the source animals were born and raised in Mexico, and immediately slaughtered in the United States; and second, where they were born in the United States, raised in Mexico, and slaughtered in the United States (Mexico's responses to the Panel's questions from the first substantive meeting, para. 188). If so, US consumers are not able to recognize the difference between above two cases from Label "C" itself.

[15] Mexico's responses to the Panel's questions from the first substantive meeting, paras. 188-189.

[16] United States' answers to Panel's first set of questions, paras. 100-101,104.

[17] As to the labelling rules for commingling under the COOL measure, see United States' answers to Panel's first set of questions, para. 16; United States' second written submission, para. 42; Mexico's second written submission, para. 47; Mexico's responses to the Panel's questions from the first substantive meeting, para. 37.

[18] Canada's second written submission, para. 80.

[19] United States' answers to Panel's first set of questions, para. 48.

United States) are commingled in a single production day, the meat product based on these livestock may still be labelled as Label B "Product of US and Country X". In this case, while 99% of meat products are actually based on cattle born and raised in Country X, the name of the United States may come first under Label "B".[20] In this regard, according to the United States, "a consumer [in the United States] is likely to believe that the meat is most closely affiliated with the name of the country that appears first on the label".[21] As already explained above, we raise a question to the Panel whether such consumers' perception is not sufficient for the Panel to reach a conclusion. In addition to this, if the United States measures are designed to misguide US consumers who act on such a perception, Japan is of the view that the COOL measure is more likely not to fulfil the objective of preventing US consumer confusion to this extent.

11. Moreover, there is no disagreement that there are two cases where Label "B" may be used; first, for *muscle cuts of meat*[22]; and second, for meat products that are derived from the commingling of any combination between Label A, B, and C livestock. Japan agrees with Canada, Mexico and the EU that US consumers are not able to identify which case the meat products labelled with Label B actually indicate without further information.

12. This concludes our statement today. We would be pleased to respond to any questions that the Panel may have.

[20] Even when Label B livestock (i.e. born in Country X, and raised and slaughtered in the United States) and Label C livestock (e.g. born and raised in Country Y, and immediately slaughtered in the United States) are commingled in a single production day, the meat product may also be labelled with Label B, that is for example "Product of US and Country X and Country Y".

[21] United States' answers to Panel's first set of questions, para. 118.

[22] When the source animals were born in a foreign country, and raised and slaughtered in the United States.

ANNEX C-18

EXECUTIVE SUMMARY OF THE THIRD PARTY WRITTEN SUBMISSION OF KOREA

I. INTRODUCTION

1. This dispute arises from the United States' recent introduction of country-of-origin labelling requirements (the "COOL Measure") for certain covered commodities. The complainants assert that the COOL Measure violates various provisions of the TBT Agreement and the GATT 1994.

2. As Korea has systemic interests in the interpretation and application of various provisions of the TBT Agreement and the GATT 1994, it has reserved its third party rights pursuant to Article 10.2 of the DSU. Korea appreciates this opportunity to present its views to the Panel.

II. LEGAL ARGUMENTS

A. THE COOL MEASURE SEEMS TO BE A SPECIFIC RESPONSE TO US CONSUMERS' INCREASING DEMAND FOR ACCURATE COUNTRY OF ORIGIN INFORMATION FOR CERTAIN PRODUCTS

3. One of the controversial issues raised in this dispute is whether the COOL Measure is a consumer information provision measure or a disguised protectionist measure to drive out certain designated foreign products from the respondent's market. Korea notes that a large number of Members have respective country of origin labelling systems already in place. The wide permeation of the country of origin labelling system may indicate that there is nothing inherently wrong about a Member's effort to introduce a measure setting forth country of origin labelling requirements in response to specific demand from its own consumers for such information.

4. In addition, in this dispute the "likeness" analysis of a product alone may not necessarily provide an accurate barometer in determining whether a Member's decision to provide certain information to its own consumers is appropriate under the circumstances. While a "like product" analysis usually focuses on the product characteristics, a consumer information appropriateness inquiry would have to look into the demand and preference for certain specific information from a distinct group of consumers within a Member's jurisdiction, which may or may not be the same as the demand or preference from the group of consumers from another Member even though the products at issue may be considered "like" in that particular instance.

B. INCURRENCE OF "ADDITIONAL COSTS" ALONE MAY NOT BE SUFFICIENT TO CONSTITUTE MODIFICATION OF "CONDITIONS OF COMPETITION" UNDER ARTICLE 2.1 OF THE TBT AGREEMENT AND ARTICLE III:4 OF THE GATT 1994

5. The complainants' main argument in the competition-of-condition modification claim pretty much hinges on the alleged burden of additional "segregation costs" that they have been forced to bear as a result of the introduction of the COOL Measure. The complainants' first written submissions, however, do not seem to have provided sufficient evidence to prove that the US business entities' alleged reluctance to trade foreign product can be single-handedly attributed to the alleged "segregation costs" attendant to the COOL Measure. In the course of the future proceedings, the Panel would have to look into the record in this dispute carefully to determine (i) whether other factors than additional "segregation costs" contributed to the US business entities' decision to curtail

their transactions with the product from the complainants; and (ii) if so, whether additional "segregation costs" have played a predominant role among others in their decision making process.

6. Likewise, the complainants' claim that the COOL Measure has caused "drastic reduction of commercial opportunities" also warrants an in-depth inquiry from the Panel. As the complainants argue, the "segregation costs" span over various expenditures including costs accruing from differentiated inventory and stock controls, training of staff, and time to monitor each product is appropriately labelled. And as complainants seem to agree, these are in fact costs to ensure *accuracy* of the information to be contained in the label including information on country of origin. An argument can be made that costs to ensure *accuracy* of information may accompany any sort of governmental regulation and that such costs may not be unique characteristics of country of origin labelling in general or the COOL Measure in particular.

C. A MEMBER'S LEGISLATIVE HISTORY SHOULD BE CAREFULLY EXAMINED WITH A FULL PICTURE IN MIND

7. In order for a panel to accurately discern objectives of laws and regulations of a Member, the entire spectrum of the discussions on the record should be examined and contemplated. Only then could we confirm the existence of protectionist intent, if there is any. Reference to only certain chosen statements from industry officials or legislative members may not be able to convey the background and legislative intent accurately.

8. An important piece of evidence raised in this regard is the letter from the US Secretary of Agriculture to the US domestic industry officials. The exact nature of the US Secretary's letter can only be confirmed through a careful scrutiny into the entire situations involving the interactions between the US government and US industries at that particular point in time.

D. A MEMBER CLAIMING NULLIFICATION AND IMPAIRMENT UNDER ARTICLE XXIII:1(B) OF THE GATT 1994 IS REQUIRED TO SHOW MORE THAN MERE COMMERCIAL LOSS AS A RESULT OF INTRODUCTION OF A MEASURE

9. Korea submits that the nullification and impairment provision contained in Article XXIII:1(b) of the GATT 1994 is not intended to protect business entities of other WTO Members from all instances of commercial loss. Thus, in *EC – Asbestos* the Appellate Body stated that "the remedy in Article XXIII:1(b) should be approached *with caution* and should remain an *exceptional remedy*."[1]

10. As such, the Appellate Body precedents make clear that this is an exceptional remedy that can be considered only in exceptional situations in which a Member's legitimate expectation of benefit from a trade agreement has been seriously harmed because of a measure and the Member were not reasonably able to anticipate such a measure at the time of the conclusion of the agreement. This provision therefore should not be expanded to cover all the instances of unexpected business loss, foregone commercial opportunities or deteriorating business performance of entities of a Member in the domestic market of another Member.

11. The questions posed in this dispute, therefore, are whether the alleged harm is so severe that a drastic remedy under Article XXIII:1(b) of the GATT 1994 is warranted and whether complainants could not have reasonably anticipated the COOL Measures at the time the tariff concessions were negotiated during the Uruguay Round. These questions merit the Panel's careful examination of the factual record and consideration of the parties' arguments.

[1] Appellate Body Report, *EC – Asbestos*, at para. 186. (emphasis added).

ANNEX C-19

THIRD PARTY ORAL STATEMENT OF KOREA AT THE FIRST SUBSTANTIVE MEETING

1. Mr. Chairman and members of the Panel. The Republic of Korea ("Korea") appreciates this opportunity to present its views on the key issues included in Korea's third party submission.

A. THE COOL MEASURE SEEMS TO BE A SPECIFIC RESPONSE TO US CONSUMERS' DEMAND FOR ACCURATE COUNTRY OF ORIGIN INFORMATION FOR CERTAIN PRODUCTS

2. The core controversial issue raised in this dispute is whether the COOL Measure is an appropriate consumer information provision measure or a disguised protectionist measure to drive out certain designated foreign products from the respondent's market. Korea would like to offer two observations concerning this issue. Korea first notes that a large number of Members have respective country of origin labelling systems already in place. The wide permeation of the country of origin labelling system may indicate that there is nothing wrong about a Member's effort to introduce a measure setting forth country of origin labelling requirements in response to specific demand from its own consumers for such information. Korea further notes that in this dispute the "likeness" analysis of a product alone may not necessarily provide an accurate barometer to determine whether a Member's decision to provide certain information to its own consumers is appropriate under the circumstances.

B. INCURRENCE OF "ADDITIONAL COSTS" ALONE MAY NOT BE SUFFICIENT TO CONSTITUTE MODIFICATION OF "CONDITIONS OF COMPETITION" UNDER ARTICLE 2.1 OF TBT AGREEMENT AND ARTICLE III:4 OF GATT 1994

3. The complainants argue that the COOL Measure modifies "conditions of competition" in the market. The complainants' main argument in the competition-of-condition modification claim pretty much hinges on the alleged burden of additional "segregation costs" that they have been forced to bear as a result of the introduction of the COOL Measure. Korea notes discrepancy in parties' factual accounts in this regard. In Korea's view, in the course of the first substantive meeting, the Panel would have to look into the record in this dispute carefully to determine (i) whether other factors than additional "segregation costs" contributed to the US business entities' decision to curtail their transactions with the product from the complainants; and (ii) if so, whether additional "segregation costs" have played a predominant role among others in their decision making process.

4. Likewise, in our view much of the costs mentioned by the complainants seem to be in fact costs to ensure *accuracy* of the information to be contained in the label including information on country of origin. An argument can be made that costs to ensure *accuracy* of information may accompany any sort of governmental regulation and that such costs may not be unique characteristics of country of origin labelling in general or the COOL Measure in particular.

C. A MEMBER'S LEGISLATIVE HISTORY SHOULD BE CAREFULLY EXAMINED WITH A FULL PICTURE IN MIND

5. Next, Korea would like to draw the Panel's attention to the importance of considering the entire evidence on the record in exploring objectives of laws and regulations of a Member. Only then could the Panel confirm the existence of protectionist intent, if there is any. The Panel should be mindful that reference to only certain chosen statements from industry officials or legislative members may not be able to convey the background and legislative intent accurately. The controversial letter

from the US Secretary of Agriculture to the US domestic industry officials should also be put into proper perspective. Mere communication with the industry officials through an "open letter" and remarks on the possibility of exercising statutory authority may not necessarily turn the letter into a document issuing mandatory requirements.

D. A MEMBER CLAIMING NULLIFICATION AND IMPAIRMENT UNDER ARTICLE XXIII:1(B) OF THE GATT 1994 IS REQUIRED TO SHOW MORE THAN MERE COMMERCIAL LOSS AS A RESULT OF THE INTRODUCTION OF A MEASURE

6. As regards the nullification and impairment claim, Korea submits that the nullification and impairment provision contained in Article XXIII:1(b) of the GATT 1994 is not intended to protect business entities of WTO Members from *all* instances of commercial loss. We note that the Appellate Body precedents make clear that this is indeed an exceptional remedy that can be considered only in exceptional situations in which a Member's legitimate expectation of benefit from a trade agreement has been seriously harmed because of a measure and the Member were not reasonably able to anticipate such a measure at the time of the conclusion of the agreement. This provision therefore should not be expanded to cover all instances of unexpected business loss, foregone commercial opportunities or deteriorating business performance of entities of a Member in the domestic market of another Member.

7. Mr. Chairman and members of the Panel, Korea realizes that determination of these issues much depends on the development and clarification of factual issues to be made through the present substantive meeting of the Panel. Korea respectfully requests the Panel to discharge its obligation under Article 11 of the DSU by reviewing the facts on the record carefully and by applying appropriate jurisprudence.

8. Korea again thanks the Panel for the opportunity to present its views in this proceeding.

ANNEX C-20

**EXECUTIVE SUMMARY OF THE
THIRD PARTY WRITTEN SUBMISSION OF NEW ZEALAND**

I. INTRODUCTION

1. New Zealand's participation as a Third Party in this dispute reflects both its interest in the systemic legal issues arising from the country of origin labelling (COOL) measure, and its trade interest in the United States beef market. As an agricultural exporting nation, the proper implementation of the WTO Agreement on Technical Barriers to Trade (the TBT Agreement) is of fundamental importance to New Zealand.

II. THE TBT AGREEMENT

A. GENERAL

2. New Zealand recognizes the rights of WTO Members to take measures necessary to ensure, *inter alia*, the protection of human, plant, or animal health, the environment, or for the prevention of deceptive practices, at the levels they consider appropriate. However, any such measures are subject to the disciplines of the WTO Agreements. With respect to technical regulations and standards, and procedures for assessment of conformity with technical regulations and standards, New Zealand notes the particular importance the TBT Agreement places on ensuring that such measures do not create unnecessary obstacles to trade. The United States' COOL measure raises several questions regarding compliance with the provisions of the TBT Agreement.

B. WHETHER THE VILSACK LETTER IS A TECHNICAL REGULATION

3. Canada and Mexico claim that an open letter from the United States' Secretary of Agriculture, Thomas J. Vilsack, to industry representatives dated 20 February 2009 (the "Vilsack letter"), and a related press release, constitute a technical regulation within the meaning of Annex 1.1 of the TBT Agreement. The letter suggests that industry "voluntarily adopt" certain labelling practices in addition to those required in regulations. To determine that the Vilsack letter constitutes a technical regulation within the meaning of Annex 1.1, the Panel will have to find that compliance with the letter is mandatory. This raises the question whether compliance is required to be mandatory on the face of the document, or whether it can also be deemed *de facto* mandatory due to surrounding circumstances.

4. New Zealand takes the view that Annex 1.1 does not exclude the possibility of a measure being deemed a technical regulation even though compliance with it is not mandatory on its face. It is important to recognize this possibility in order to prevent WTO Members from circumventing their obligations under the TBT Agreement by designing measures that appear on their face to be voluntary, but are in fact mandatory.

5. New Zealand recognizes, however, that the Panel should not make such a finding lightly. To do so would risk rendering null and void the intended distinction between mandatory technical regulations and voluntary standards provided for in the TBT Agreement. To find a technical regulation *de facto* mandatory, there must be some factor present in the nature of the document and its surrounding context that is sufficient to transform the measure from one that is intended to be adhered to on a voluntary basis to one that is truly compulsory. New Zealand submits that a measure should only be deemed *de facto* mandatory where industry or other market participants have no real choice as

to whether or not to comply. The Panel must be satisfied that the practices are in effect compulsory and that this is due to the exertion of Government power.

C. ARTICLE 2.1: LESS FAVOURABLE TREATMENT OF LIKE PRODUCTS

6. Article 2.1 of the TBT Agreement obliges WTO Members to accord imported products "treatment no less favourable than that accorded to like products of national origin." In accordance with jurisprudence on Article III:4 of GATT, New Zealand submits that *de facto* as well as *de jure* discrimination falls within the scope of the "less favourable treatment" obligation.[1] As the Appellate Body has stated, the focus should be on whether a measure "modifies the conditions of competition in the relevant market to the detriment of imported products."[2] New Zealand submits that even though the COOL measure is "facially neutral",[3] the measure could still result in less favourable treatment.

7. At issue in the dispute is whether any detriment to imported products is the result of the COOL measure, or whether it is due to market-driven private actions . This issue is raised particularly in the context of the additional costs of segregating animals of different origin throughout the supply chain. New Zealand accepts that there is no violation of Article 2.1 where market-driven practices of private entities result in detriment to imports. However, New Zealand submits that even if a measure does not expressly require private actors to act in a certain way, government actions may have created a situation that compels private actors to act in that way because of the "necessity of making a choice". [4] In New Zealand's view, such compulsion could be found to violate the less favourable treatment obligation, if it results in domestic like products being given a competitive advantage in the market over imported like products. This will be a matter for the Panel to determine on the facts of the dispute.

D. ARTICLE 2.2: IS THE COOL MEASURE MORE TRADE RESTRICTIVE THAN NECESSARY?

8. Article 2.2 and the Preamble of the TBT Agreement affirm the rights of WTO Members to decide which policy objectives they wish to pursue and the levels at which they wish to pursue them. However, it also places limits on the means employed to achieve those objectives: they must be consistent with a Member's obligations under the Agreement.

9. New Zealand submits that there are three steps in assessing compliance with Article 2.2: (i) there must be a legitimate objective; (ii) if the purported objective is found to be legitimate, the measure must also fulfil this objective; and (iii) the Panel should consider whether the technical regulation is more trade restrictive than necessary to fulfil the objective, taking into account the risks non fulfilment would create.

1. Is there a legitimate objective?

10. The United States claims that the legitimate objective of the COOL measure is to provide consumer information.

11. Article 2.2 provides an illustrative list of legitimate objectives. As the list in Article 2.2 is non-exhaustive, New Zealand recognizes that a Member may demonstrate that other legitimate objectives also justify technical regulations. However, New Zealand notes that in the context of a

[1] Appellate Body Report, *Canada – Autos*, para. 57.

[2] Appellate Body Report, *Korea – Various Measures on Beef*, para. 137.

[3] United States' first written submission, para. 144.

[4] Canada's first written submission, para. 90, citing the GATT Panel Report, *US – Section 337 Tariff Act,* para. 5.11.

WTO dispute, a panel has a role to play in determining whether a given objective is legitimate, in light of the context and circumstances of the case. New Zealand submits that, where a purported objective is not listed in Article 2.2, a WTO Member must provide particularly clear and compelling evidence of its legitimacy.

12. New Zealand takes no position as to whether there is a legitimate objective at play in this dispute. However, in light of the United States' argument that the COOL measure is also required "so as to reduce consumer confusion", New Zealand comments on the distinction between the concepts of consumer information and deceptive practices.

13. New Zealand submits that an important distinction should be drawn between the objective of consumer information and that of preventing deceptive practices. While consumer information can be a tool through which a Member seeks to counter or prevent deceptive practices, the prevention of deceptive practices is a narrower concept. This interpretation is supported by the context of Article 2.2. The other legitimate objectives that are provided as examples in Article 2.2 are potentially of a particularly important or high-risk nature. The nature of these objectives should therefore colour the interpretation of the objective of preventing deceptive practices, which is included alongside them.

2. Does the technical regulation fulfil the legitimate objective?

14. In the event that the Panel considers that consumer information does constitute a legitimate objective on the facts of this dispute, the next element to consider is whether the COOL measure fulfils this objective. The respondent must demonstrate why the COOL measure is necessary for consumer information purposes, and explain how it will influence consumer purchasing decisions. The design and structure of a measure will be essential in determining whether the objective is fulfilled. For example, the Panel may find it helpful to consider whether there are any arbitrary gaps in coverage of the COOL measure and also whether information conveyed to consumers is accurate and useful.

3. Whether the technical regulation is more trade restrictive than necessary to fulfil the objective, taking into account the risks non fulfilment would create

15. The final determination in assessing whether a measure is consistent with Article 2.2 is whether the technical regulation is more trade restrictive than necessary to fulfil the legitimate objective, taking into account the risks non-fulfilment would create.

16. In considering whether a measure is necessary, New Zealand refers to the Appellate Body's guidance in *Brazil – Tyres*[5] on the necessity test under Article XX(b) of the GATT. New Zealand submits that, as identified in *Brazil – Tyres,* the Panel should consider the importance of the interests or values at stake.[6] Such a consideration is pertinent to the Article 2.2 requirement that a Member must bear in mind "the risks non-fulfilment would create". In New Zealand's view, where the importance of the interest or value is higher, the risks from non-fulfilment must weigh more heavily in the consideration. As discussed above, New Zealand considers that, in identifying specific legitimate objectives in Article 2.2, the TBT Agreement recognizes the particular importance of the interests or values behind these objectives. The risks of non-fulfilment would therefore justify more restrictive measures being taken when those objectives are at stake.

[5] Appellate Body Report, *Brazil –Retreaded Tyres*.

[6] *Ibid.,* at para. 178.

17. Finally, in determining whether a measure is necessary, the Panel must consider whether less trade restrictive options exist. In the context of mandatory COOL, particular attention should be paid to the alternative of a voluntary scheme. This is particularly so where there is no health or safety justification behind the regulation. Voluntary COOL has the ability to provide the same information to the consumer, where there is the consumer demand for such information.

E. THE EXISTENCE OF A RELEVANT INTERNATIONAL STANDARD UNDER ARTICLE 2.4

18. The TBT Agreement does not define the term "international standard". However, New Zealand considers that, to constitute an international standard under Article 2.4, a standard must be a document approved by a recognized body, such body being an international standardizing body within the definition provided by the ISO/IEC Guide 2:1991, and whose membership is open to the relevant bodies of at least all WTO Members. [7]

19. New Zealand submits that the Codex Alimentarius Commission is a "recognized body" for the purposes of Annex 1.2 of the TBT Agreement and that CODEX-STAN 1-1985 is an international standard within the context of Article 2.4. The Codex Alimentarius Commission meets the principles of transparency, openness, impartiality, effectiveness and relevance and coherence set out by the TBT Committee in relation to international standardising bodies.

III. THE GATT 1994

A. ARTICLE III:4: LESS FAVOURABLE TREATMENT

20. New Zealand refers to its arguments in respect of Article 2.1 of the TBT Agreement and notes that the same considerations will apply with respect to GATT Article III.4.

B. ARTICLE X: UNIFORM, IMPARTIAL AND REASONABLE ADMINISTRATION OF REGULATIONS

21. GATT Article X:3(a) provides that Members must "administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings". In assessing Canada and Mexico's claims in respect of Article X:3(a), the Panel must distinguish between the measure itself and its *administration*. The Appellate Body has emphasized that Article X:3 applies solely to the *administration* of laws, regulations, decisions and rulings.[8]

22. Article X.3 is important as it recognizes that matters of governance, including uniform and reasonable administration of laws and regulations, can have just as significant a trade restrictive effect as border measures and domestic regulations. A claim under this provision ought therefore to be taken seriously. However, New Zealand recognizes that a certain amount of caution in the interpretation of the scope of this provision is desirable, given the potentially intrusive nature of a determination that a Member has violated Article X.3(a). Allegations that the conduct of a WTO Member is unreasonable are serious, and should not be taken lightly.[9] Therefore in reaching a decision on the facts, the Panel ought to seek a balance between the promotion of good governance and trade liberalisation, while recognizing that countries do have very different systems of administration of laws and not every difference or difficulty faced by traders ought to result in a finding of violation of Article X.3(a).

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[7] *Decision on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 of the TBT Agreement,* G/TBT/9, 13 November 2000, para. 20 and Annex 4.

[8] Appellate Body Report, *EC – Bananas III*, para. 200.

[9] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 217.

ANNEX C-21

THIRD PARTY ORAL STATEMENT OF NEW ZEALAND AT THE FIRST SUBSTANTIVE MEETING

1. Mr Chairman, Members of the Panel, New Zealand's views on the issues raised in this dispute are set out in our third party submission of 18 August. In light of the time available today, I will focus on only a few key issues. As with our written submission, New Zealand is not seeking to address the specific facts of the case, but rather seeks to provide the panel with its views on the legal interpretation of various relevant aspects of the TBT Agreement and the GATT.

2. New Zealand joined this dispute because of its systemic interests, and desire to ensure that the delicate balance of rights and obligations set out in the WTO Agreements, especially the TBT Agreement, is maintained. New Zealand also has a trade interest in the dispute, given its pattern of beef exports into the US market.

3. **First**, turning to the threshold issue of whether the letter from the Secretary of Agriculture, Thomas Vilsack, constitutes a technical regulation under the TBT Agreement. A key question in this regard is whether compliance with the letter is 'mandatory', within the meaning of Annex 1.1 of the TBT Agreement. In essence, the question is whether on the face of the document compliance is required, or whether compliance can be deemed to be mandatory given the surrounding circumstances.

4. New Zealand's view is that Annex 1.1 does not exclude the possibility of a measure being deemed a technical regulation even though compliance with it is not mandatory on its face. It is important to recognize this possibility in order to prevent WTO Members from circumventing their TBT obligations by designing measures that appear on their face to be voluntary, but that are in fact mandatory. In other words, it is New Zealand's view that the Panel should allow for the possibility of a measure being *de facto* mandatory.

5. New Zealand recognizes, however, that such a finding should not be made lightly. To do so would risk rendering null and void the TBT Agreement's intended distinction between mandatory technical regulations and voluntary standards. The Agreement contains different sets of obligations in respect of mandatory regulations and voluntary standards. New Zealand submits that a measure should only be deemed *de facto* mandatory where industry or other market participants have no real choice as to whether or not to comply. The Panel must be satisfied that the practices are in effect compulsory and that this is in some way a result of the exercise of Government power.

6. **Second**, New Zealand submits that similar considerations should be taken into account under Article 2.1 of the TBT Agreement and Article III.4 of the GATT, when determining whether a measure modifies the conditions of competition to the detriment of imported products. New Zealand submits that even if a measure, on its face, does not require private actors to act in a certain way, government actions may create a situation where private actors are compelled to act in that way because of a "necessity of making a choice." In New Zealand's view, such compulsion could be found to violate the no less favourable treatment obligation in the TBT Agreement and GATT. This would be the case if it results in domestic like products being given a competitive advantage in the market over imported like products.

7. **Third**, New Zealand would also like to comment on Article 2.2 of the TBT Agreement. The Preamble and Article 2.2 of the TBT Agreement make clear the right of WTO Members to take measures to advance domestic policy, including to pursue national security purposes, to prevent

deceptive practices, and to protect human health or safety, animal plant life or health or the environment. However, in adopting measures to achieve these ends, WTO Members must comply with the disciplines of the TBT Agreement. These are designed to ensure that TBT measures are legitimate and are not more trade restrictive than necessary.

8. As you are aware, in this dispute the United States has put forward consumer information as its legitimate objective. This is not a legitimate objective listed in Article 2.2 of the TBT Agreement. New Zealand recognizes that a WTO Member may demonstrate that other legitimate objectives do exist, beyond those listed in Article 2.2. However, New Zealand submits that where an objective is not listed in Article 2.2, a WTO Member must provide particularly clear and compelling evidence of its legitimacy.

9. In the event the Panel accepts that consumer information does amount to a legitimate objective on the facts of the dispute, the Panel should next consider whether the technical regulation fulfils this legitimate objective. In asking whether this is the case on the facts in this dispute, New Zealand submits that the Panel should consider the consistency of coverage of the goods subject to the COOL requirement, as well as the accuracy, clarity and usefulness of the information obtained by consumers.

10. The final step in the assessment of whether there has been a violation of Article 2.2 is whether the measure is more trade restrictive than necessary, taking into account the risks non-fulfilment would create. As part of determining whether a measure is necessary, the Panel must consider whether less trade restrictive alternatives exist. New Zealand would like to emphasise the relevance of voluntary country of origin labelling as an alternative to a mandatory regime, particularly where a consumer information objective is concerned. Voluntary COOL has the ability to provide the same information to the consumer, where there is the consumer demand for such information. It is responsive to market demand as opposed to creating or distorting the market. Voluntary COOL therefore allows the design and operation of the labelling system to be developed in response to supply and demand needs. As such, it is a relevant alternative to mandatory COOL, particularly where there is no compelling evidence of market failure.

11. **Finally**, New Zealand would like to provide a general comment on Article X.3 of GATT. Article X.3 importantly recognizes that matters of governance, including the uniform and reasonable administration of laws and regulations, can have just as significant a trade restrictive effect as border measures and domestic regulations. Traditionally, trade barriers were imposed at the border in the form of tariffs or quotas. As these barriers were brought down, behinC-the-border barriers in the form of technical regulations and the like gained prominence. It was recognized by the negotiators of the GATT in the 1940s that administration could also form a trade barrier. However, for a long time, not a lot of attention was paid to Article X. Since 1994 it has become an increasing area of focus for WTO Members, and New Zealand wishes to emphasize the importance of the discipline and development of jurisprudence with respect to it.

12. New Zealand does however recognize the potentially intrusive nature of a determination that a Member has violated Article X.3(a). Allegations that the conduct of a WTO Member is unreasonable are serious, and should not be taken lightly. New Zealand therefore submits that, in reaching a decision on the facts, it is necessary to seek a balance between the promotion of good governance and trade liberalisation, while recognizing that countries have different administrative systems and not every difference or difficulty faced by traders should result in a finding of a violation of Article X.3(a).

13. With respect to the Panel's question regarding any mandatory country of origin labelling requirements in place in third parties, we have passed the request back to capital and would be pleased to provide a response in writing in due course.

14. Mr Chairman, members of the Panel, New Zealand respectfully thanks you for your attention.

ANNEX C-22

THIRD PARTY ORAL STATEMENT OF NEW ZEALAND AT THE SECOND SUBSTANTIVE MEETING

1. Mr Chairman, Members of the Panel. New Zealand appreciates the opportunity to be present at this second hearing and to be able to make a brief oral statement in accordance with the enhanced rights third parties have been granted in this dispute. Access to this open hearing, and the opportunity to receive the Parties' second written submissions improves the ability of third parties to be able to follow and meaningfully participate in the dispute.

2. Having read Canada, Mexico and the United States' second written submissions, New Zealand wishes to focus its comments today on the interpretation of Article 2.2 of the TBT Agreement. More specifically, we wish to comment on the relevance of Article 5.6 of the SPS Agreement and Article XX of GATT in determining whether, under Article 2.2, a measure is more trade restrictive than necessary, taking account of the risks non-fulfilment would create.

I. GATT ARTICLE XX (B) AND (D)

3. In its written submission and replies to questions from the Panel following the first hearing, New Zealand expressed its view that the jurisprudence concerning the necessity requirement under GATT Articles XX(b) and (d) *is* relevant to the determination under Article 2.2 of the TBT Agreement. Recent jurisprudence around the Article XX necessity test is particularly pertinent in light of the Article 2.2 requirement to take account of the "risks of non-fulfilment". New Zealand considers that Article 2.2 requires balancing factors such as the interests and values at stake (that is, the importance of the objective and, as a corollary, the risks that non-fulfilment would create), the contribution of the measure to the achievement of the objective and the degree of trade-restrictiveness of the measure. This is similar to the 3-way weighing and balancing exercise that panels and the Appellate Body have undertaken when determining if a measure is "necessary" under GATT Article XX(b).

II. SPS ARTICLE 5.6

4. In its written statement and replies to the Panel's questions, New Zealand also explained that many, but not all, elements of Article 5.6 of the SPS Agreement and its jurisprudence are relevant to interpreting Article 2.2 of the TBT Agreement. Because of the important differences in language in the two provisions, interpreters of the agreements should be careful not to read in specific phrases and/or additional requirements that are not present in Article 2.2, but which are explicit in Article 5.6

5. In addition to the points made in its written submission and replies to questions, New Zealand would like to comment on another important difference between Articles 2.2 and 5.6. This is that unlike Article 5.6, Article 2.2 does not refer to the concept of "appropriate level of protection". Instead, Article 2.2 refers to fulfilment of a legitimate objective. This difference is important because the SPS Agreement makes clear that Members have the right to set their own "appropriate level of protection", although measures must still take into account scientific evidence and other prescribed factors. However, a similar level of Member discretion is not present in Article 2.2 of the TBT Agreement, where a panel has a clear role in determining both whether the stated objective is legitimate and whether the measure fulfils such objective. Neither the concept of "appropriate level of protection" nor the important additional SPS Agreement requirements around science are included elsewhere in the text to ensure that a Member's discretion to determine what is "appropriate" is not used as a disguised restriction on trade.

6. New Zealand recognizes that the Preamble to the TBT Agreement refers to Members taking measures "at the levels [they] consider appropriate". However this discretion relates to measures taken in the pursuit of a specific list of objectives. Furthermore, the content of a preamble to a treaty does not comprise an independent obligation in and of itself. Instead, under Article 31(2) of the Vienna Convention on the Law of Treaties, it provides relevant context particularly when determining the object and purpose of the rest of the text. New Zealand therefore considers that a panel should be careful when looking to add to rights and obligations in the main text of the TBT Agreement based on language found only in the preamble.

7. In sum, there are clear similarities between the tests in Article 2.2 of the TBT Agreement, Article 5.6 of the SPS Agreement and Article XX of the GATT. There are also key differences. It is appropriate for a panel to look to the requirements and jurisprudence under all three articles, but panels must be conscious, and cautious, of the differences.

8. Mr Chairman, Members of the Panel, New Zealand respectfully thanks you for your attention.

ANNEX C-23

**THIRD PARTY ORAL STATEMENT OF PERU
AT THE FIRST SUBSTANTIVE MEETING**[1]

1. Mr. Chairman, distinguished Members of the Panel, representatives of the parties and third parties, Peru welcomes this opportunity granted by the Panel to present its views on the dispute between Canada and Mexico, on the one hand, and the United States (US), on the other, with respect to certain Country of Origin Labelling (COOL) requirements.[2]

2. Peru's participation as a third party to this dispute is based on a systemic interest related to the proper interpretation and application of the provisions of the agreements of the World Trade Organization (WTO), particularly the Agreement on Technical Barriers to Trade (TBT), considering the importance of the legal debate raised by Canada and Mexico.

3. In our view, the claims submitted by Canada and Mexico are very similar as both Members claim that the mandatory provisions of the COOL measure are contrary to Articles 2.1, 2.2 of the TBT Agreement, Article III: 4, X and XXIII of the General Agreement on Tariffs and Trade (GATT 1994). In addition, Mexico makes a reference to Articles 2.4 and 12.1 and 12.3 of the TBT Agreement.

4. Firstly, we would like to refer to the main argument outlined by the US which seeks to justify the alleged compatibility of its measures with the articles mentioned in the preceding paragraph. The US bases such measures on the right to information for consumers and, therefore, totally rejects that COOL is a protectionist measure.

5. In this regard, Peru considers that providing better information to consumers is beneficial as it provides them with the necessary tools to make informed decisions about the products they are going to buy. However, Peru would like to draw attention to its concerns about the implementation of compulsory labelling schemes in different countries which, as has been raised by Canada and Mexico, might not be used properly and could become trade-restrictive measures.

6. Secondly, Peru would like to refer to the suppositions of Article 2.2 of the TBT Agreement, which establishes the analysis to be followed to determine whether a technical regulation is contrary to the TBT Agreement: First, the panel must verify whether the objective pursued by the technical regulation is legitimate. Secondly, if it is determined that it is a legitimate objective, it will have to be determined whether the technical regulation restricts trade more than necessary to achieve that legitimate objective, taking into account the risks non-fulfilment would create.

7. In this regard, we believe that the panel has the special task to determine if the basis outlined by the US, providing information to consumers, is a legitimate objective within the scope of Article 2.2 of the TBT Agreement, and particularly if it does not restrict trade more than necessary to achieve the legitimate objective pursued, taking into account the arguments provided by Canada and Mexico.

8. Furthermore, Mexico argues that the measure is inconsistent with Article 2.4 of the TBT Agreement, because an international standard (CODEX-STAN 1-1985) already exists on which

[1] This oral statement was originally made in Spanish.

[2] The measures that are included on the mandatory provisions of the COOL measure are established in Mexico's first written submission in para. 9, and in para. 1, footnote 1, in Canada's submission.

the US should base its measure. However, the US argues that it would be inappropriate to apply this standard as it would not allow the legitimate objectives pursued to be fulfilled given that it would not provide consumers with information on the origin of meat, and it is in this way that the US justifies the non-application of the international measure.

9. Peru understands that when there are relevant international standards such as CODEX STAN 1-1985, Standard for the Labelling of Pre-packaged foods, Members shall use such standards or relevant parts as a basis for technical regulations, unless such international standards are not effective or appropriate for achieving the desired objectives. In other words, international standards should always be used in the formulation of technical regulations. The reference to "the basis" of Article 2.4 allows each Member to adapt this international standard to their reality or their particular circumstances, but not to alter the objectives and substance of the international standard in question.

10. It should be noted that Article 2.4 provides for an exception, when it says: "... except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued ...." In that sense, if despite the existence of an international standard, the Member considers that it is not an effective or appropriate means for achieving the desired objectives, the Member must explain why the international standard does not permit the desired objectives to be achieved. The question that therefore arises is whether the CODEX STAN 1-1985, is an effective and appropriate means for achieving the objectives pursued by the US.

11. In this regard, our interest is that the panel should address this issue in depth so as to interpret the scope of this provision, especially with regard to the term "ineffective or inappropriate standard" to try to identify the type of elements that would permit non-implementation by a Member of this international standard and not justify non-application of the standard simply by stating that it is ineffective or inappropriate for the achievement of the legitimate objective.

12. Finally, along these lines, and considering the systemic interest expressed by several Member Countries in this dispute, we would like to submit that a very important element is the means of implementing the recommendation of the panel that we understand must obviously begin from the assumption of the existence of a violation of multilateral commitments and therefore the formula must be fully compatible with them. That is, if the arguments outlined by Canada and Mexico on the incompatibility of the measure with the TBT Agreement are accepted, the panel report must be implemented through a measure which is compatible with the Multilateral Agreements.

13. These are the elements that Peru would like to contribute to this debate, as well as underlining the importance of this controversy due to its content, its scope and its implications for market access.

14. Finally, and regarding the panel's question on mandatory country of origin labelling schemes, Peru has identified among its Technical Regulations, a mandatory scheme of labelling of country of origin. This is the Supreme Decree 019-2005-PRODUCE, Technical Regulations on tires for cars, light trucks, buses and trucks, notified to the WTO through document G/TBT/N/PER/7 (dated 5 July 2004), which establishes mandatory technical features and labelling for new tires for general use on cars, light trucks, buses and trucks, whether domestic or imported, in order that their use does not endanger life and personal safety.

15. To ensure compliance, domestic manufacturers or importers must submit a Certificate of Conformity, the requirements and tests established in the regulations, including the requirement for country of origin labelling. To fulfil this requirement, the country of origin must be stamped or engraved in the tires, at least on one side, in a clear, visible and permanent manner, in Spanish or

English. Under this regulation, country of origin is understood to refer to the country of manufacture of the tire and not the country of shipment.

16. This technical regulation was formulated in the framework of international standards on the subject, among which we can mention the FMVSS[3] 109 (49CFR571.109), the FMVSS 119 (49CFR571.119) and FMVSS 139 (49CFR571.139).

[3] Federal Motor Vehicle Safety Standards.