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Journal of
WORLD TRADE

US–COOL: How the Appellate Body Misconstrued the National Treatment Principle, Severely Restricting Agency Discretion to Promulgate Mandatory, Pro-Consumer Labeling Rules

Juscelino F. COLARES* & William P. CANTERBERRY*

In United States–Certain Country of Origin Labeling Requirements[1] *the Appellate Body (AB) of the World Trade Organization (WTO) ruled that the United States' country-of-origin labeling regulations (COOL) on beef and pork products violated the Agreement on Technical Barriers to Trade's (TBT) National Treatment (NT) Principle.*[2] *Aimed at promoting informed consumer choice, COOL required retailers to disclose the covered products' origin. In prior decisions under the General Agreement on Tariffs and Trade (GATT) Article III:4, the AB correctly rejected protectionist rules that unnecessarily encumbered consumer choice, while adversely affecting conditions of competition for imports. In* US–COOL, *however, the AB formalistically transposed such GATT jurisprudence into TBT analysis, equating private action in compliance with neutral,* transparency-promoting *labeling rules to private action in compliance with capricious,* opacity-inducing *distribution rules. This article argues that, while GATT NT-jurisprudence should enlighten analysis under the TBT, WTO adjudicators should not allow exporting Members' perceived entitlement to trade volumes – which may well be premised on continued opacity and uninformed consumer choice – to interfere with importing Members' origin-neutral regulations. (JEL: F13, F53, K23, K41, Q13, Q17).*

1 INTRODUCTION

Traditionally, US law excluded products like beef and pork from COOL requirements.[3] In 2002, the US Congress ended this carve-out in a farm

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1 Appellate Body Report, *United States–Certain Country of Origin Labeling (COOL) Requirements,* WT/DS384/AB/R, WT/DS386/AB/R (adopted 29 June 2012) [hereinafter *US–COOL*].

2 *Ibid.,* at ¶ 496.

3 *See* Tariff Act of 1930, Ch. 497, Title III, Part I, § 304,46 Stat. 687 (1930); Ch. 679, § 3, 52 Stat. 1077 (1938); Ch. 397, § 4(c), 67 Stat. 509 (1953); Pub.L. No. 98-573, Title II, Subtitle A, § 207, 98 Stat. 2976 (1984); Pub.L. No. 99-514, Title XVIII, Subtitle B, Ch. 3, § 1888(1), 100 Stat. 2924 (1986); Pub. L. No. 100-418, Title I, Subtitle H, Part 1, § 1907(a)(1), 102 Stat. 1314 (1988); Pub. L. No. 103-182, Title II, § 207(a), 107 Stat. 2096 (1993); Pub. L. No. 104-295, § 14(a), (b), 110 Stat. 3521 (1996);

Colares, Juscelino F. & Canterberry, William P. '*US–COOL*: How the Appellate Body Misconstrued the National Treatment Principle, Severely Restricting Agency Discretion to Promulgate Mandatory, Pro-Consumer Labeling Rules'. *Journal of World Trade* 51, no. 1 (2017): 105–130.

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bill.[4] The US Department of Agriculture (USDA) would publish final labeling standards on 15 January 2009,[5] following a long notice-and-comment period that resulted in amendments to the original Farm Bill.[6] The new regulation – henceforth referred to as COOL – mandated retailers to identify beef and pork product origin according to where certain steps of production took place.[7] COOL required that meat be labelled in one of four categories: wholly US origin; mixed origin; imported for immediate slaughter; and wholly foreign.[8] These requirements met with immediate resistance from importers of livestock and the highly concentrated US meatpacking industry,[9] who filed an unsuccessful First Amendment, commercial speech suit in federal court with the support of foreign livestock-producer trade associations and governments (Canada and Mexico).[10] Before that, however, the latter, reportedly, in coordination with US meatpackers 'use[d] the WTO process as an end-run around a domestic debate'.[11] This became the six-year *US–COOL* dispute.

Canada and Mexico ('Complainants') challenged the Interim COOL measure before a WTO panel[12] under the Technical Barriers to Trade (TBT)[13] and GATT.[14] They claimed the measure violated TBT Article 2.1 and GATT Article III:4 because it altered the conditions of competition to the detriment of

Pub.L. No. 106-36, Title II, Subtitle B, § 2423(a), (b), 113 Stat. 180 (1999) (currently codified at 19 U.S.C. §1304(3)(J) (excepting COOL requirements for products not covered by the original Tariff Act of 1930, including beef and pork products).

4 *See* Farm Security and Rural Investment Act of 2002, P.L. 107-171, 116 Stat. 134, 533–535 (2002) (requiring imported and domestic products to bear their country of origin information) [the 'Farm Bill of 2002' or 'original Farm Bill'].

5 See Final Rule on Mandatory COOL of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, 74 Fed. Reg. 2,658-2,707 (15 Jan. 2009) [hereinafter 'Final Rule'] (codified at 7 C.F.R. pt. 65, § 65.300–500 (2009)).

6 *See* Food, Conservation, and Energy Act of 2008, P.L. 110–234, 122 Stat. 923, 1351–1354 (2008) [the Farm Bill of 2008' or 'amended Farm Bill'], 7 U.S.C. §§ 1638-38d (2008).

7 *See* 7 C.F.R. 65, § 65.300(d)–(f).

8 *See ibid*.

9 *See* Llewellyn Hinkes-Jones, Meatpackers Struggle to Sell Import-Labeled Beef, Bloomberg BNA WTO Rep. 1 (2 Feb. 2016) (quoting an industry expert comment that 'four companies – Cargill Inc., Tyson Food Inc., JBS SA, and National Beef Packing Co. LLC – control 80% of the market'.) [hereinafter 'Hinkes-Jones'], http://news.bna.com/wtln/WTLNWB/split_display.adp?fedfid=82512206&vname=wtobulallissues&wsn=493831500&searchid=29135203&doctypeid=1&type=date&mode=doc&split=0&scm=WTLNWB&pg=0 (last visited 11 Jan. 2017).

10 *See Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F. 3d 18, 19 (DC Cir. 2014). The governments of Canada and Mexico filed amici briefs before the DC Circuit. *See ibid*.

11 *See* Hinkes-Jones, *supra* n. 9, at 1 (quoting Food & Water Watch expert).

12 *See* Panel Report, *United States–Certain Country of Origin Labeling (COOL) Requirements*, WT/DS384/Panel/R, WT/DS386/Panel/R (18 Nov. 2011) [hereinafter *US–COOL (Panel)*].

13 Agreement on Technical Barriers to Trade, Art. 2.1, 15 Apr. 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1, 1868 U.N.T.S. 120, [hereinafter TBT]; General Agreement on Tariffs and Trade 1994, Art. 3.4, 15 Apr. 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1, 1867 U.N.T.S. 187 [hereinafter GATT Art. III:4].

14 GATT Art. III:4.

foreign producers, thereby affording an unfair advantage to domestic industry.[15] The United States responded by challenging the alleged causal relationship between COOL and the disparate impact on foreign producers. It maintained that private actor response to market circumstances accounted for any additional, incidental costs to foreign livestock, not COOL itself.

The panel agreed with Complainants that COOL, as implemented by the domestic industry, disparately affected foreign producers by imposing greater compliance costs, which it deemed unfair.[16] The Appellate Body (AB) affirmed, ruling that COOL affected the conditions of competition to the detriment of foreign producers and, as such, was discriminatory.[17] Both panel and AB declined to consider Complainants' GATT claims because any finding under TBT Article 2.1 was sufficient to dispose of the case in favour of Complainants.[18]

This article makes two basic arguments. First, AB's National Treatment (NT)-analysis under TBT 2.1 misattributed to COOL the results of market-driven processes responsible for punctual, *disparate impacts* on foreign meat products. Structural market conditions and greater US consumer preference for domestic product accounted for the loss of the foreign product's appeal to US meatpackers. Thus, *US–COOL* represents a departure from prior WTO rulings not only because it unjustifiably imputed the incidental impact of private actors' compliance decisions to a Respondent, but because it also ignored contemporaneous market trends that had a much larger role in influencing importing industry preferences and, thus, import volumes. Second, this article argues that the AB's *discrimination* analysis is flawed because it never demonstrated how any 'disparate impact' to imported livestock could be attributed to their *foreignness*. Prior in-point GATT/TBT jurisprudence had established the principle that, to find discrimination, one must find more than a burden on foreign producers. Specifically, Complainants had to establish that any burden occurred by reason of the imported product's *foreign* origin and not some alternative, legitimate regulatory reason. In *US–COOL*, however, the AB did not conduct this analysis. It focused, unjustifiably, on what it perceived as problems with COOL's 'confusing' labeling scheme, only to then make a conclusory finding of discrimination.

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15 *See US–COOL (Panel), supra* n. 12, at ¶¶ 7.2, 7.4. Complainants also argued COOL violated TBT Art. 2.2, because it was allegedly ineffective in attaining its stated objective: providing accurate country-of-origin information to consumers without restricting trade more than necessary. *See ibid.,* at ¶ 7.3. For reasons of brevity, we shall focus only on the TBT Art. 2.1 challenge.

16 *US–COOL (Panel), supra* n. 12, at ¶ 7.403.

17 The AB held that the intention of a measure, or the degree of autonomy for private actors is irrelevant. Instead, the inquiry is whether the measure adversely affects competitive opportunities to the detriment of the import. *See US–COOL, supra* n. 1, at ¶ 288.

18 Complainants' GATT Art. III:4 appeal was conditional upon reversal of the panel's TBT Art. 2.1 findings. Because the AB did not overrule the panel in regards to its ruling on TBT Art. 2.1, the appeal concerning GATT Art. III:4 was not considered. *See US–COOL, supra* n. 1, at ¶492–493.

Section 1 sketches the operation of COOL from its inception, explains how US processors complied with its requirements and makes sense of the totality of factors shaping the US market for livestock, both before and after COOL. Section 2 provides a NT analysis under GATT Article III:4. It establishes that *Korea–Beef* provided the parameters for such analysis under GATT, a framework that *US–Clove Cigarettes* and *US–Tuna II* (Section 3) later extended to TBT Article 2.1. Section 4 reviews the AB's *aberrant* Article 2.1 analysis in *US–COOL* by providing a critique that applies the then-prevailing NT analysis to the facts and legal issues of *US–COOL*. Section 5 presents a brief discussion of the aftermath of *US–COOL*. The article concludes by sounding the alarm on the potential impact of this decision: henceforth, Member discretion to impose pro-consumer choice, labeling requirements will be vehemently second-guessed by an AB that places unjustified weight on trade effects regardless of a measure's neutral purposes and intent.

2 INTO THE COOL

The 2008 Farm Bill amended previous legislation setting the rules for the labeling of covered meat products' country-of-origin information[19] and laid different standards for what products could carry the US country-of-origin label.[20] Pursuant to this legislation, USDA published its final rule in 2009,[21] with the ostensible purpose of better informing consumers on the origin of covered meat products.[22]

2.1 BACKGROUND

The US is one of the largest producers, consumers, importers and exporters of beef.[23] Because beef production occurs in different stages, it is also likely to occur across national borders. For instance, Canada usually breeds and raises livestock domestically and exports livestock for immediate slaughter to the United States. Mexico also breeds and exports livestock to the US; Mexican livestock tend to be exported while still young. Canada and Mexico are the top two beef and pork exporters to the US market.[24]

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19 2008 U.S. Farm Bill, Pub. L., 110–234, §11002, 122 Stat. 923, 471–473 (2008).

20 *See ibid*. (The 2008 Farm Bill differed from its successors in requiring covered products' labels to reflect where certain steps of production occurred, rather than merely indicating where the product was processed [slaughtered], as had previously been the case.)

21 Final Rule, *supra* n. 5, at 2,658.

22 During the interim-rule-commenting period, USDA explained that, '[t]he intent of the statute is to require retailers to provide specific origin information to consumers'. *See ibid*.

23 Oklahoma State University, Cow-Calf Corner, *Why Does the US Both Import and Export Beef*, BEEF (29 Sept. 2015 5:38 pm), http://beefmagazine.com/cowcalfweekly/0611-why-does-us-import-export-beef

24 *Ibid*.

US regulators adopted COOL to reflect the reality of this cross-border activity. Before 2009, cattle imported for immediate slaughter received a 'US Beef' designation, despite the fact that such cattle might have spent most their lives outside the United States. The new regulation gave consumers relatively more precise information about whether a particular cut of meat was domestic, foreign or mixed-origin.[25] For instance, starting in 2009, meat obtained from Canadian-born cattle that were raised and slaughtered in the US would be labelled 'Product of the United States and Canada.'

While seeking to provide consumers more accurate origin information, USDA also took into account domestic importing industry's objections regarding compliance costs. To address these concerns, USDA amended its Interim Rule in a number of significant ways.[26] First, it exempted producers from keeping additional records, so long as extant records were sufficient to identify livestock origin.[27] Second, it also gave retailers a safe-harbour: retailers did not have to independently verify COOL information; they were allowed to rely solely on their suppliers' representations.[28] Third, it allowed comingling meat during processing, but required that labels list such meats' countries of origin.[29] Such flexibility did not fully satisfy the US meatpacking industry's continued objections, however.[30]

2.2 Cool operation

2.2[a] *The New Classification Scheme*

COOL required processors and retailers to label covered products in one of four ways.[31] Although not referring expressly to category names, COOL used exactly the same definitions contained in a separate memorandum on labeling options, which, for purposes of clarity, the WTO adjudicators retained, and so

[25] *See* Final Rule, *supra* n. 5, at 2,659.

[26] These changes from the interim rule to the final rule, adjusted before the AB decision, were designed to address importing industry concerns. *See ibid.,* at 2,680 ('This rule provides flexibility in how the required country of origin information is conveyed along the supply chain, thus enabling firms to implement the requirements with the least possible disruption to cost-efficient production methods and trade flows'.).

[27] *See ibid.,* at 2,659.

[28] *Ibid.*

[29] *Ibid.*

[30] *See, e.g., Consumer Reports–Food Safety & Sustainability Center: Beef Report*7 (2015) ('Since COOL went into effect, those countries and trade groups representing large international beef corporations have opposed it.') (citation omitted) [hereinafter 'Consumer Reports–Beef Report'], http://www.consumerreports.org/content/dam/cro/magazine-articles/2015/October/Consumer%20Reports%20Food%20%26%20Sustainability%20Center%20Beef%20Report_8-15.pdf

[31] Final Rule, *supra* n. 5, at 2,659.

do we.[32] Meat received a 'Category A' designation if all stages of production occurred within the United States.[33] 'Category B' applied to meet with multiple countries of origin.[34] 'Category C' described meat coming from livestock imported to the United States for immediate slaughter.[35] Finally, 'Category D' meat was produced entirely outside the country.[36]

By itself, COOL did not seem to impose excessively burdensome record-keeping costs.[37] Some exporting countries and major domestic processing/meat-importing groups did complain about increased compliance costs and the need to segregate foreign livestock.[38] To regulators, the added record-keeping obligations did not differ much from business-as-usual, ordinary reporting practices.[39] Experts from watchdog organizations suggested that processors 'already segregate[d] and labele[d] on a number of different factors'.[40] Clearly, two groups disagreed on the effects of the measure: foreign producers, joined by domestic importers and regulators, joined by pro-consumer groups.

2.2[b] *Making Sense of Declining Livestock Market Trends, Declining Exports and New Compliance Costs*

Early scholarly work on compliance costs reached mixed results. One study predicted US processors would be burdened because COOL imposed compliance costs on meat processed in the US, while foreign processors would become more competitive by virtue of not having to track country-of-origin information in their own countries.[41] Accordingly, foreign livestock producers could stand to benefit from having their product processed abroad and then exported into the US.

A study commissioned by foreign livestock producers found that US processors could avoid increased compliance costs only by designating themselves

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32 *Compare* Memorandum from Agricultural and Marketing Service on Labeling Options 1, 2 (updated 20 Sept. 2013) [hereinafter 'AMS Classification Memo'], https://www.ams.usda.gov/sites/default/files/media/LabelingOptions%5B1%5D.pdf *with* Final Rule, *supra* n. 5, at 2,659 *with See US–COOL (Panel), supra* n. 12, at ¶ 7.89; *US–COOL, supra* n. 1, at ¶ 243. Incidentally, this letter-based classification traces back to the original set-up in the authorizing statute. *See* 7 U.S.C. § 1638a(2)(A)-(D) (emphasis added).

33 *See* 7 U.S.C. § 1638a(2)(A), AMS Classification Memo, *supra* n. 32, at 2.

34 *See ibid*., at (B).

35 *See ibid*., at (C).

36 *See ibid*., at (D).

37 While the party supplying a covered product to retailers was ultimately responsible for the accuracy of COOL information, the statute specifically forbade the implementing regulation from requiring record-keeping beyond that collected 'in the normal conduct of business'. *See ibid.,* at 2,659.

38 *See* Consumer Reports–Beef Report, *supra* n. 30, at 7.

39 *See* Final Rule, *supra* n. 5, at 2,689 ('This adaptation generally would require relatively small marginal costs for recordkeeping and identification systems'.).

40 *See* Hinkes-Jones, *supra* n. 9, at 3 (quoting Food & Water Watch expert).

41 *See* Keithly G. Jones et al., *Country of Origin Labeling: Evaluating the Impacts on U.S. and World Markets*, 38 Agric. & Resources Econ. Rev. 397, 401 (2009).

as 'US-only' facilities, or by limiting production of foreign meat batches to certain production days (e.g., Sundays and Thursdays).[42] However, the same study allowed the inference that US processors who produced imported meats from a single foreign country faced costs no different than those choosing to operate as 'US-only' facilities.[43] This study revealed that processors responding to COOL requirements did have an incentive to source only single-country livestock (either permanently or in certain dedicated days) to reduce record-keeping costs. It also explained that the lower on-tap availability of foreign livestock could not meet certain major processors' daily demands,[44] which could factor into processors' cost calculations.

A 2009 USDA Grain Inspection, Packers and Stockyards Administration (GIPSA) report recognized that the greater transparency promoted by COOL and prevailing consumer perceptions were partly responsible for difficulties in selling foreign-origin meat to country-of-origin-sensitive US consumers.[45] Recent data from Statistics Canada and USDA, suggest that other variables had a more significant role in the drop of Canadian exports than any marginal rise in record-keeping and segregating costs.

Figure 1 shows that Canadian livestock exports had been declining at significant rate for at least four years *prior* to COOL implementation.[46] Such decline seems to track Canadian producers' decision to liquidate a significant portion of their 'inflated inventory following the 2003 BSE [i.e., bovine spongiform encephalopathy] investigation'.[47] The continued drop in Canadian exports during the

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[42] Informa Economics, Update of Cost Assessments for Country of Origin Labeling – Beef & Pork, 6 (2010) [hereinafter 'Informa Economics'] ('For a packer/processor that has made the determination to slaughter only US cattle with their output being sold to retailers that specify only US origin beef and/ or to food service customers where origin is immaterial, the costs for the slaughter operation are sharply reduced[.]'); *Ibid.,* at 6–7 (explaining that facilities that do accept foreign livestock are likely to designate specific production days or batches for foreign-origin supply).

[43] *See ibid.,* at 6 (stating that separating cattle into separate pens reduces processor costs, but that due to a deeper discount for foreign origin products at the buyer/packer level, there would be a cost differential between United States and foreign product).

[44] *See ibid.,* at 8.

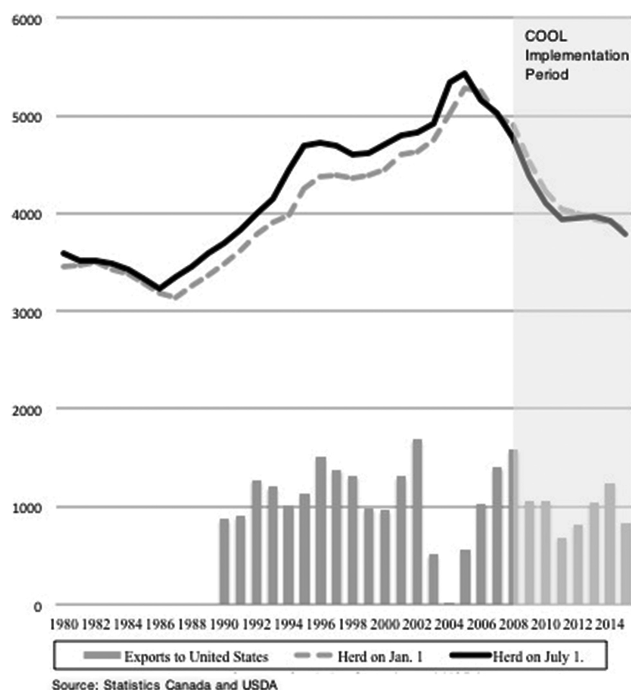
[45] *See* GIPSA, Investigative Report, at 248 of 348 (concluding that while producers had a justification for discounting imported cattle, processors/packers could not explain the deep discounts for foreign cattle other than by including lack of consumer demand of foreign beef and lower availability of foreign product) [hereinafter 'GIPSA Report'], http://www.usda.gov/oce///about_oce/corrective_action/ Attachment14USDAGIPSACOOLInvestigation.pdf.

[46] *See* USDA–ERS, *Cattle: Annual and Cumulative Year-to-Date U.S. Trade* – All years and countries (2015) [hereinafter 'USDA–ERS Cattle Import Data'], http://www.ers.usda.gov/data-products/live stock-meat-international-trade-data.aspx#25995. We thank BNA journalist Llewellyn Hinkes-Jones for directing our attention to this table.

[47] *See* Hinkes-Jones, *supra* n. 9, at 2.

early implementation period (2009–2011) also coincides with the unabated reduction in the Canadian cattle herd.[48]

Figure 1 Canadian Beef Cattle Herd and Exports to United States (x 1,000)



Thus, the fall in Canadian exports – notably, offset by the rise in Mexican imports during the early COOL implementation period[49] – can be at least be partially attributed to a diminished herd size. In fact, CanFax, the research arm of the Canadian Cattlemen's Association, reportedly stated to Bloomberg's Bureau of National Affairs ("BNA") that 'while labeling may have had an effect, the major cause of declining Canadian cattle exports was a liquidation phase in the Canadian

[48] *See* Statistics Canada, Cattle on Farms Table 1-1, http://www.statcan.gc.ca/pub/23-012-x/2011002/t001-eng.pdf. Note that, although COOL was finalized and implemented in 2009, USDA implemented an interim COOL rule in 2008. *See generally* Interim Rule on Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, 73 Fed. Reg. 50,701 (9 Sept. 2008). This distinction did not seem to affect major preexisting and continuing trends in Canadian cattle herd reduction and export decline.

[49] *See* USDA–ERS Cattle Import Data.

cattle cycle from 2005–2011'.[50] Besides 'an inflated inventory' (i.e., relative to declining demand for import-labelled beef), the report also mentions 'a high US dollar [and] rising feed costs'.[51] A 2015 study by Farm Credit Canada, confirms the sell-off of Canadian beef cows by mentioning the 'glut of cattle' resulting from the 2003 BSE events.[52] According to Farm Credit Canada, Canadian livestock exports could have scarcely been any higher in a period of significant herd liquidation: 'Since 2009 [i.e., the initial year of the finalized COOL rule], Canada's trade surplus for live cattle has grown 21% to USD 1.34 billion'.[53]

Remarkably, higher record-keeping and segregation costs, even if significant, appear to be dwarfed by (1) structural market conditions (e.g., lower on-tap supply of imported livestock, substantial liquidation of Canadian inventory starting in the pre-COOL implementation period, etc.); and (2) greater US consumer preference for the domestic product. The GIPSA report provided detailed evidence of processors refusing imported livestock because retailers – responding to consumer tastes – were reducing orders of imported product.[54] Indeed, greater consumer preference for domestic beef did coincide with the implementation of COOL.

In a redacted USDA questionnaire, one US importer of Canadian livestock – one likely not sympathetic to COOL – coyly stated: 'he was not certain whether US packers exploited the COOL regulations to profit from Canadian cattle feeders'.[55] He also indicated knowledge of the then-upcoming WTO 'hearings concerning the COOL' and explained that the Canadian estimates of losses in the dispute 'were based on the USD 3/cwt [carcass-weight ton] discount' that US packers applied onto Canadian livestock following COOL implementation.[56] In another questionnaire, an importer of Mexican cattle candidly attributed lower prices to (1) a smaller customer base for Category B product (i.e., comingled beef); and (2) 'customer demand for category B product is smaller than the available supply of category B product produced each week'.[57]

[50] *See* Hinkes-Jones, *supra* n. 9, at 2.
[51] *Ibid.*
[52] *See* Farm Credit Canada, The 2015 Beef Sector Report1, 10 (2015) [hereinafter 'FCC AG REPORT'], https://www.fcc-fac.ca/fcc/about-fcc/corporate-profile/reports/beef-sector/beef-sector-report-2015.pdf.
[53] *See ibid.,* at 11.
[54] *See* GIPSA Report, *supra* n. 45, at 348 of 348 (stating that 'the number of potential customers for Label B or C beef is shrinking, and packers represented they were unsure of the future of Label B or Label C beef'.).
[55] *See* GIPSA Report, *supra* n. 45, at 263 of 348. A cynical bystander could marvel at the sophistication of the highly concentrated US meatpacking industry: it offset compliance costs by discounting foreign cattle and leveraged the support of two foreign governments to eliminate an unwelcome regulation in a more sympathetic forum (WTO-DSB) than US courts, where judges operate under firm principles of administrative review and stare decisis.
[56] *See ibid.*
[57] *See ibid.*, at 272 of 348.

In light of these market-based factors, could one consider COOL discriminatory merely because it marginally increased meatpackers' compliance costs? A rational and fair *legal* answer to this question requires consideration of AB analysis of the NT-Principle (under both GATT and TBT), a discussion to which we now turn.

3 AB'S INTERPRETATION OF THE NT-PRINCIPLE

3.1 GATT ARTICLE III:4 PROVIDES THE CONTEXT FOR NT ANALYSIS UNDER TBT

TBT Article 2.1 mandates that 'products imported from the territory of any Member shall be accorded treatment no less favourable [(TNLF)] than that accorded to like products of national origin and to like products originating in any other country'.[58] AB rulings have equated according TNLF under TBT Article 2.1 to according TNLF under GATT Article III:4, which applies to internal regulations pertaining to sale, distribution, use and transportation of imported products.[59] Analysis of discrimination (i.e., not according imports TNLF) under GATT focuses particularly on understanding a regulation's impact on the competitive relationship between domestic and foreign products. Explaining the importation of this analysis to TBT Article 2.1, the AB explained: 'a panel examining a claim of violation under article 2.1 should … ascertain whether the technical regulation at issue modifies the conditions of competition in the market of the regulating Member to the detriment of the group of imported products'.[60] *US–COOL* was supposed to be no different. Indeed, the AB explained its purported reliance on *Korea–Beef*–another GATT Article III:4 case – on grounds that the NT provision in both agreements is nearly identical, and the facts under both cases are deceptively similar.[61]

58 TBT Art. 2.1.

59 *US–COOL,*, *supra* n. 1, at ¶ 269 (citing Appellate Body Report, *United States – Measures Affecting the Production of Clove Cigarettes,* ¶¶ 100, 176–180, WT/DS406/AB/R (4 Apr. 2012) [hereinafter *US–Clove Cigarettes*]; *See also* Appellate Body Report, *United States–Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶¶ 214–215, 236–239, WT/DS381/AB/R (16 May 2012) [hereafter '*US–Tuna II*'].

60 *US–Clove Cigarettes*, *supra* n. 59, at ¶ 180.

61 *See US–COOL*, *supra* n. 1, at ¶ 288. Incidentally, the AB cited *Korea–Beef* fifty times in *US–COOL*. As we demonstrate throughout s. 1.2 *infra*, future cases would refer to *Korea-Beef*'s GATT Art. III:4 analysis to interpret disputes arising under TBT Art. 2.1. *See also US–COOL*, *supra* n. 1, at ¶ 269 ('The Appellate Body recognized in *US–Clove Cigarettes* and *US–Tuna II* (Mexico) that relevant guidance for interpreting the term 'treatment no less favorable' in Art. 2.1 may be found in the jurisprudence relating to Art. III:4 of the GATT 1994'.) (citation omitted).

3.1[a] Korea–Beef: *Proving Actionable Discrimination Under GATT*

3.1[a][i] The Korean Dual Retail System

In *Korea–Measures Affecting Imports of Fresh, Chilled and Frozen Beef*,[62] the AB analysed a measure that compelled segregation of imported and domestic beef in retail locations.[63] South Korean regulations required small retailers to sell exclusively foreign *or* exclusively domestic beef.[64] Larger retailers could sell both domestic and foreign beef, so long as they displayed foreign and domestic beef in separate retail sections (i.e., not side-by-side). Facing an 'either/or' requirement, smaller retailers mostly opted for the more familiar domestic product.[65] Larger retailers continued to sell foreign beef, yet consumers – unable to engage in side-by-side comparisons – had less opportunity to take advantage of potentially less expensive beef imports. As such, these measures caused not only a 'dramatic reduction' of retail outlets available to foreign producers, but also 'alter[ed] the conditions of competition in the Korean market in favor of domestic beef'.[66] Their purpose was not to inform consumers, but to encumber consumer decisions by either taking away their ability to shop in different outlets (smaller retailers), or by removing their ability to easily compare foreign and domestic products, which, under ordinary circumstances, would be displayed side-by-side.[67] This 'lack of equality of competitive competitions',[68] the AB ruled, was be inconsistent with GATT Article III:4.[69]

3.1[a][ii] Requisite Discrimination in *Korea–Beef*

In *Korea–Beef*, the United States argued that the Korean measure impeded imported beef from being 'physically present with 'like' domestic beef at the point of sale to the consumer'.[70] The panel agreed this dual distribution system amounted to de facto discrimination against imports 'based exclusively on criteria related to the origin of a product'.[71] Korea challenged this determination, arguing

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[62] Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled, and Frozen Beef*, ¶133, WT/DS/ 171/AB/R (11 Dec. 2000) [hereinafter *Korea–Beef*].

[63] *Korea–Beef*, *supra* n. 62, at ¶ 143 (citing *Guidelines Concerning Registration and Operation of Specialized Imported Beef Stores*, (61550-81) 29 Jan. 1990, modified on 15 Mar. 1994; and the *Regulations Concerning Sales of Imported Beef* (51550-100), modified on 27 Mar. 1993, 7 Apr. 1994, and 29 June 1998.)

[64] Small retailers that choose to sell the imported product exclusively had to display a sign that read: 'Specialized Imported Beef Store'. *See Korea–Beef*, *supra* n. 62, at ¶ 143.

[65] *See ibid.*, at ¶145.

[66] *Ibid.*, at ¶ 139 (referring to the panel decision, which the AB upheld).

[67] Before the measure, there was a unitary distribution system where the new imported product shared the same 'conditions of competition' as the domestic product. *Ibid.*, at ¶ 145.

[68] *Ibid.*, at ¶ 145.

[69] *Ibid.*, at ¶ 148.

[70] *Ibid.*, at ¶ 50.

[71] *Ibid.*, at ¶ 130.

that its dual retail system 'assured[ed] perfect regulatory symmetry between imports and domestic products[,]' a system that offered 'total freedom on the part of retailers to switch from one category of shops to the other'.[72]

The AB agreed that the measure had created separate distribution channels on the basis of a product's domestic or foreign origin, but stated that was not enough to find an Article III:4 violation.[73] Before finding a violation, the AB explained, the panel must 'undertake[] an analysis of the market as part of an examination of the "total configuration of the facts"' and demonstrate 'that the treatment thus accorded to imported beef is less favorable than the treatment accorded to domestic beef'.[74]

As far as the retail sector was concerned, the AB found that 'limitation[s] on the ability to compare visually two products, local and imported'[75] did not, per se, amount to the detrimental treatment proscribed under GATT Article III:4. The AB explained that such segregation does *not* have 'decisive implications for the issue of consistency with Article III:4', even where such measures introduce opacity to consumer decisions.[76] Such limitations could be 'simply *incidental* effects of the dual retail system',[77] a strikingly generous, if not altogether naïve assumption. Clearly, when considering the upstream (distribution) and downstream (retail) impact of segregation measures, what matters is 'the fundamental *thrust and effect* of the measure itself',[78] introduction of differential treatment alone is not dispositive.

3.1[a][iii] The AB's Disparate Impact Analysis in *Korea–Beef*

The AB then considered the causal nexus between the Korean measure and its alleged trade effects in what we shall refer henceforth to as the 'disparate impact' stage of its NT analysis.[79] Here, the AB set out to determine whether the dual retail measures had modified conditions of competition to the *detriment* to the imported product.[80] Finding that they led to 'the virtual exclusion of imported beef from the retail distribution channels through which domestic beef was distributed', the AB held that such modification of the conditions of competition

72 *Ibid.,* at ¶ 17.
73 *Ibid.,* at ¶ 144.
74 *Ibid.,* at ¶¶ 18 & 144.
75 *See ibid., at* ¶ 141.
76 *See ibid.*
77 *See ibid.* (emphasis added).
78 *Ibid.,* at ¶ 142 (emphasis added).
79 *Ibid.,* at ¶¶ 144–151.
80 *Ibid.,* at ¶ 144.

clearly disadvantaged – not merely distinguished – the foreign product.[81] The AB explained: having to 'establish[] and gradually buil[d] from the ground up' a 'new and separate retail system' *drastically* reduced 'the commercial opportunity to reach … the same consumers served by the traditional retail channels for domestic beef'.[82] By introducing limitations that effectively restricted US beef access to consumers, Korea's imposition of the dual retail system proved *detrimental* to imports and thus violated the NT-principle.[83]

3.1[b] *Boiling down* Korea–Beef

Since *Korea–Beef*, the AB has required two conditions be met before finding that a measure violates GATT Article III:4 or TBT Article 2.1. First, the challenged measure must *discriminate* against foreign products *because of their foreign origin* – but even such discrimination, if based on legitimate regulatory reasons that do not alter the conditions of competition, will not trigger disapproval. In the AB's words: 'Circumstances like limitation of "side-by-side" comparison and "*encouragement" of consumer perception of "differences"* may be simply incidental effects of the dual retail system without decisive implications for the issue of consistency with Article III:4'.[84] Second, the 'foreignness-focused' measure must contain restrictions that directly reduce import market access by *disparately* impacting imports relative to the domestic product.[85] The following cases document how the AB administered this two-step inquiry.

4 POST-*KOREA–BEEF* NT ANALYSIS

4.1 *US–CLOVE CIGARETTES*

In *US–Clove Cigarettes*, the AB reviewed a US ban on flavoured cigarettes that exempted menthol-flavoured cigarettes.[86] Among flavoured cigarettes, the US industry manufactured mostly menthol cigarettes.[87] Indonesian manufacturers

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[81] *Ibid.,* at ¶¶ 145–148.
[82] *Ibid.,* at ¶ 145.
[83] *Ibid..,* at ¶ 147.
[84] *Ibid.,* at ¶ 141 (emphasis added). *See also US–Tuna II, supra* n. 59, at ¶ 225; Appellate Body Report, *Thailand–Customs and Other Fiscal Measures on Cigarettes From the Philippines*, ¶ 137, WT/DS371/AB/R (17 June 2011).
[85] *See Korea,* at ¶ 141*; US–Clove Cigarettes*, *supra* n. 59, at ¶ 283 (finding the US's *ban* on clove cigarettes discriminatory because it disparately impacted foreign like products).
[86] Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. §301, §907(a)(1)(A) (2009); *US–Clove Cigarettes*, *supra* n. 59, at ¶ 168.
[87] *US–Clove Cigarettes*, *supra* n. 59, at ¶ 223 ('between 94.3 and 97.4 per cent' of cigarettes sold in the United States are domestically produced, and … menthol cigarettes accounted for about 26 per cent of the total US cigarette market'.).

produced primarily clove-flavoured cigarettes, and, thus, were directly affected by the ban.[88]

The United States argued that the distinction between clove and menthol cigarettes was not based on clove cigarettes' *foreign* provenance. Because a large segment of cigarette smokers preferred menthol cigarettes, the US argued, banning menthol cigarettes would cause an unmanageable burden on the US healthcare system: a large number of consumers would suffer withdrawal symptoms.[89]

Aware that three domestic brands dominated the menthol cigarette segment – the one segment exempted from the ban – the AB was skeptical.[90] The United States could not persuade the AB that ostensible concerns with public health – the purported justification for the flavoured cigarette ban – were in fact legitimate.[91] Clearly, the only explanation for the distinction was clove cigarettes' foreign origin.[92] In this case, both *discrimination by reason of foreignness* and *disparate impact* could not be starker. The US measure was a ban, which, by construction, *discriminated* between domestic and foreign products *on the basis of foreign origin.*[93] Further, *without a legitimate regulatory reason*, this ban effectively eliminated imports from the competition, because of their foreignness, thus having the most *disparate impact* possible on imports.[94]

4.2 *US–Tuna II*

In *US–Tuna II*, the AB considered a measure that regulated when tuna products could be labelled 'dolphin-safe'.[95] Specifically, US regulations prohibited producers who used a 'setting on' method of catching tuna from using a 'dolphin-safe' label, despite the fact that, in many areas, such method was dolphin-safe, because the harvesting occurred in dolphin-free waters.[96] The AB framed its NT-analysis under TBT Article 2.1 thusly: (1) whether the measure altered the conditions of competition to the detriment of the foreign product (i.e., disparate impact); and (2) whether such adverse impact could be attributed to the imported product's foreignness (i.e., discrimination).[97]

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88 *Ibid.,* at ¶ 222.
89 *Ibid.,* at ¶ 225.
90 *See ibid.,* at ¶ 223.
91 *Ibid.,* at ¶ 222–223.
92 *See ibid.,* at ¶ 224.
93 *See ibid.,* at ¶ 222 (stating that the measure disproportionately affected imports, as virtually all non-menthol flavoured cigarettes were imports).
94 *See ibid.,* at ¶ 220 (upholding the panel's findings that 'the disproportionate allocation of costs between Indonesian and US entities evidence *de facto* discrimination against imports'.).
95 *See* Dolphin Protection Consumer Information Act, 16 U.S.C. §1385 (1985); 50 C.F.R. §216.91; *US–Tuna II*, *supra* n. 59, at ¶ 172
96 16 U.S.C. §1385(c)(2); *US–Tuna II*, *supra* n. 59, at ¶ 172.
97 *US–Tuna II*, *supra* n. 59, at ¶ 231.

In its *disparate impact* analysis, the AB first noted that the 'dolphin-safe' label effectively bestowed an advantage: consumers favoured tuna products where such label appeared.[98] Because the measure controlling access to that advantage *arbitrarily established discriminatory criteria*, the AB concluded the measure was detrimental to the foreign product.[99] Domestic harvesters, operating in dolphin-populated waters, had access to the preferred label because they complied with regulations requiring dolphin-safe harvesting methods, yet foreign harvesters, operating in dolphin-free waters, would be denied access to the label – and thus the greater consumer appeal –[100]merely because they used the then harmless setting-on method.[101] Thus, the disparate regulatory distinction between domestic and foreign tuna products could not be explained by the measure's ostensible purpose – protecting dolphins – because banning the 'setting-on method' in dolphin-free waters did *not* advance that purpose.[102]

Finally, the case for discrimination was even more straightforward. Because US officials could not point to a legitimate reason for the measure's *detrimental impact* on dolphin-safe-caught, Mexican tuna, such impact could only be attributed to the product's *foreign provenance*, which, under the prevailing AB analysis, amounted to discrimination.[103]

4.3 GATT/TBT jurisprudence established the parameters for analysis of labeling measures in *US–COOL*

The above cases demonstrate that, prior to *US–COOL*, the AB had settled on a uniform test for determining NT violations. In *US–Clove*, the regulation was deemed a violation because it disparately affected foreign cigarettes and such impact could only be explained by clove cigarettes' foreignness.[104] The alleged clove/menthol distinction was not a legitimate health reason. In *US–Tuna II*, it was not enough to detect detrimental impacts on imports; the AB also had to find that the labeling distinction could not be justified by a legitimate regulatory reason: a preferred 'dolphin-safe' label was denied to tuna whose capture had not imposed harm to dolphins only because it was foreign.[105] Similarly, in *Korea–Beef*, the measure's 'flaw' was not the imposition of a domestic/foreign, segregated distribu-

[98] *Ibid.*, at ¶ 233 (the panel agreed with complainant that the label was an advantage—a finding not appealed before the AB).
[99] *Ibid.*, at ¶ 298.
[100] *Ibid.*, at ¶ 291.
[101] *Ibid.*, at ¶ 297.
[102] *See ibid.*, at ¶ 297.
[103] *US–Tuna II*, *supra* n. 59, at ¶ 298.
[104] *US–Clove Cigarettes*, *supra* n. 59, at ¶ 222.
[105] *US–Tuna II*, *supra* n. 59, at ¶ 226.

tion system,[106] but the concurrence of such differentiation with detrimental impacts to imported beef's distribution and sale that could not be justified by any alternative, legitimate regulatory reason.[107]

5 COOL MEETS A NOVEL AB INTERPRETATION OF THE NT-PRINCIPLE

As explained earlier, the COOL measure required all retailers to display country-of-origin labels *regardless of a product's origin* (i.e., domestic or otherwise).[108] Presumably, any adverse or positive impact on foreign products would be the result of consumer responses to product origin information, which, would be transmitted upstream to domestic processors and other market participants. As such, origin information could lead to greater trade volumes for some countries or losses for others.

5.1 NT-analysis in *US–COOL*

5.1[a] *Panel Analysis*

In *US–COOL*, the panel and AB focused on different aspects of the parties' arguments. Before the panel, Complainants argued that the Interim COOL measure incentivized meat processors to run batches consisting solely of domestic livestock because processors could comply more efficiently with record-keeping requirements if they segregated their facilities.[109] Complainants argued, and the panel agreed, that such incentive 'affected the conditions of competition in the US market to the detriment of imported livestock'.[110]

The United States countered that, unlike the *Korea–Beef* measure, Interim COOL did not mandate producers, distributors *or* retailers to choose between imported and domestic products.[111] Any change in livestock preference would merely reflect consumer and processor preferences, which would be incorporated as ordinary 'private business decisions'.[112] The panel disagreed. It found Interim COOL imposed a legal choice, because it 'does not allow non-compliance' in its

[106] *See Korea–Beef*, *supra* n. 62, at ¶ 141 and discussion *supra* s. 2.1[a][ii].
[107] *See ibid.*, at ¶¶ 148, 172.
[108] *See* 7 C.F.R. 65, § 65.300(a) (2009).
[109] *See US–COOL (Panel), supra* n. 15, at ¶ 7.370.
[110] *Ibid.*, at ¶ 7.372.
[111] *See ibid.*, at ¶ 7.386 ('The United States argues that the COOL measure does not create a legal necessity for differential and less favourable treatment; if individual market participants happen to process predominantly Label A meat, that is due to their private business decisions'.) (citations omitted).
[112] *See ibid*.

requirement to provide COOL information to consumers.[113] The panel 'explained': 'the COOL measure itself makes [tracking product according to country of origin] more costly than other business scenarios', i.e., not tracking.[114] To the panel, requiring tracking information was problematic because it imposed compliance costs that, once factored into business decisions, affected trade volumes.

That Interim COOL applied to both domestic and imported beef, without distinction, did not matter. The panel noted that, prior to Interim COOL, domestic and foreign livestock were processed together in greater volumes.[115] It interpreted the further segregation of feedlots and processor batches – in response to business assessment of costs in tracking domestic and foreign product – to be Interim COOL's fatal flaw: '[i]t is the COOL measure, and not solely the private decisions of market participants, that has had a decisive impact in changing this pattern [of integration], by creating an economic incentive to process exclusively domestic livestock'.[116] Thus, fixating on declining trade volumes, without considering alternative explanations, the panel imputed discriminatory intent to an otherwise neutral, disclosure measure.

5.1[b] *AB Analysis*

Before appealing, the United States introduced the Final COOL Rule (henceforth 'COOL'), containing changes that effectively reduced processors' record-keeping costs by simplifying requirements regarding commingling of foreign and domestic batches.[117] With diminished segregation effects, the argument for disparate impact became less compelling for Complainants. Accordingly, Complainants adjusted their focus from disparate impact – i.e., criticism that the measure led processors to reduce production of mixed batches in response to increasing compliance costs – to *discrimination* – i.e., criticism that the measure's record-keeping burden was discriminatory and unjustifiably arbitrary, because it could not stem 'exclusively from a legitimate regulatory distinction'.[118]

Like the panel, the AB, without considering alternative explanations, attributed the decline in import volumes to relative changes in record-keeping costs that disfavoured demand for imports.[119] The impact of COOL's record-keeping costs

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[113] *Ibid.,* at ¶ 7.391.
[114] *Ibid.*
[115] *Ibid.,* at ¶ 7.387.
[116] *Ibid.,* at ¶ 7.391
[117] *See supra* n. 27–30 and accompanying text.
[118] *See US–COOL*, *supra* n. 1, at ¶ 271.
[119] *Ibid.,* at ¶ 349.

was *unjustifiably discriminatory* because: (1) the COOL labels available to consumers conveyed 'far less detailed and accurate' information than was actually 'required to be tracked and transmitted by … producers and processors'[120]; and (2) processors were required to track COOL information for products that were exempted or excluded from COOL requirements, such as food service-oriented or processed foods.[121] According to the AB, if the measure had actually intended to provide consumers with comprehensive and accurate COOL information, then it should have required COOL labeling for processed and restaurant foods and provided consumers more detailed and accurate information. Without pondering whether requiring such detailed information to consumers would be desirable or whether increasing COOL's scope to other products or market segments would actually reduce any adverse impact to imported livestock,[122] the AB conclusorily determined that only *discrimination* could account for the measure's differential record-keeping costs in the muscle-cut meat segment.[123]

Turning to *disparate impact*, the AB upheld the panel's view that COOL's record-keeping burdens had in fact incentivized segregation to the detriment of imports.[124] The AB referred to the panel finding that processors had reduced the burden of record-keeping and verification requirements by processing at a given time only single-origin livestock.[125] In light of 'the particular circumstances of the US market', this compliance strategy led to segregating livestock by country of origin.[126] Such segregation, the AB found, harmed the foreign product because foreign beef could not be supplied in commercially viable processing volumes.[127] That, in turn, led processors to prefer US-origin beef and pork livestock, due to their greater, on-tap availability in higher volumes.[128] In sum, the AB took domestic processors' cost-reducing, compliance strategy – beef segregation by country of origin – and its alleged consequence – reduction of import flows – as

[120] *See ibid.*

[121] *See ibid.,* at ¶¶ 344 & 349 and 7 C.F.R. 65, § 65.300(b)–(c).

[122] A later compliance panel and the AB eventually engaged in the same criticism, though employing another novel analysis. *See* Art. 21.5 Appellate Body Report, *United States–Certain Country of Origin Labeling (COOL) Requirements*, ¶¶ 5.1, 5.18, WT/DS384/AB/RW; WT/DS386/AB/RW (May 18 May 2015).

[123] *See US–COOL*, *supra* n. 1, at ¶ 349 (stating the lack of legitimate explanation of COOL requirements constitutes discrimination).

[124] *Ibid.,* at ¶ 345 ('the least costly way of complying with the COOL measure is to rely exclusively on domestic livestock'.).

[125] *Ibid.*

[126] *Ibid.*

[127] In a footnote, the AB acknowledged that 'livestock imports are small in comparison to domestic livestock production, such that US demand cannot be satisfied with exclusively foreign livestock, and because US livestock are often geographically closer to US domestic markets than imported livestock'. *Ibid.,* at n. 678 (citation omitted).

[128] *Ibid.,* at ¶ 345.

proof of a detrimental impact attributable to COOL, establishing, thus, the grounds for an NT violation.[129]

5.2 A precedent-consistent critique of the AB's disparate impact analysis

The AB's *disparate impact* analysis is flawed for at least two reasons. First, it is premised on the exaggerated assertion that COOL incentivized processors to handle US livestock over foreign livestock. While COOL may have resulted in marginally higher record-keeping costs for producers who commingled domestic and imported meat, meatpackers processing single-country-origin, domestic or imported livestock for immediate slaughter bore the *same compliance* costs.[130] In the particular case of commingled beef, other than requiring information on origin, COOL did not impose any further requirement. Regulators even allowed facilities processing both US and foreign batches separately, on the same day, to bypass further record-keeping by simply using the commingled label category.[131] Finding favouritism under such circumstances illustrates the distorted view the AB adopted of the regulatory process that resulted in the COOL rules.

Second, despite acknowledging two structural reasons why processing US livestock is generally more economical – namely, (1) foreign producers' inability to meet US demand; and (2) the geographical proximity of US supply to processing facilities[132] – neither of which having a nexus with COOL – the AB went on to confuse these particular features of the US market with the operation of COOL, imputing solely to the latter the rise in costs for processing foreign livestock.

Yet, *ceteris paribus*, meatpackers normally chose to process domestic livestock because imports could not meet domestic volume requirements.[133] Indeed, as demonstrated in Section 1.2[b], the significant decline in the Canadian cattle herd constrained Canadian cattlemen's ability to export in the economically feasible scales favoured by US meatpackers. The decline in Canadian export capacity also explains why, despite a decline in consumer demand,[134] Mexican imports actually *increased* during the early COOL implementation period.[135]

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[129] *Ibid.,* at ¶ 349.

[130] *See* Informa Economics, *supra* n. 42, at 8 (noting that the costs associated with tracking livestock origin through the processing stage would be avoided by segregation).

[131] The regulators viewed this compromise as a method of reducing processor costs and not disturbing import trade flows. *See* Joel L. Greene, Cong. Research Serv., RS22955, Country-of-Origin Labeling for Foods and the WTO Trade Dispute on Meat Labeling 5 (2015).

[132] *US–COOL*, *supra* n. 1, at n.678.

[133] *See* Informa Economics, *supra* n. 42, at 9.

[134] *See supra* s. 1.2[b] and accompanying n. 57

[135] *See supra* s. 1.2[b] and accompanying n. 49.

Clearly, COOL was about providing country-of-origin information to consumers, not restricting foreign producers' trade flows or altering conditions of competition.[136] Private actors eventually ran separate production batches because the lower immediate availability of the foreign product made complying with the disclosure regulations more costly. Viewed in this light, compliance costs may have enhanced market effects at the margin; they did not, however, change conditions of competition or become a fundamental *cause* of imports' inability to compete in the US market under neutral, disclosure rules.

5.3 A precedent-consistent critique of the AB's discrimination analysis

Like its disparate impact analysis, AB's *discrimination analysis* is equivocated on two grounds. First, it fails to establish that the 'disparate impact' on imports occurred *by reason of* their *foreign origin*, the requisite element for a finding of discrimination. Second, it deems COOL as *unjustifiably discriminatory* by applying an ex post, record-keeping/labeling commensurability test that disregards the national regulator's goal of providing consumers information on meat origin while minimizing compliance costs. This new test is not only unreasonably non-deferential, but, if heeded, would require complicated labels that would (1) confuse consumers; (2) be costlier to processors; and (3) be much more difficult for national agencies to administer.

5.3[a] *Pre-US–COOL Rulings Establish that Discrimination Must Be Found by Reason of Foreignness*

As pre-*US–COOL* cases demonstrate, a NT violation requires tracing any untoward treatment of imports to their *foreign origin*.[137] Mere detection of over-inclusive, under-inclusive or burdensome requirements will *not* lead to a discrimination finding, when such requirements apply *regardless of foreign or domestic origin*.[138] That

[136] The AB and panel would consider the measure's objective intent when it evaluated COOL under TBT Art. 2.2. *See US–COOL, supra* n. 1, at ¶ 410. For brevity reasons, this article does not offer a critique of the AB review of this issue.

[137] *See, e.g., US-Tuna II, supra* n. 59, at ¶ 231.

[138] *See,* e.g., *Dominican Republic–Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R (25 Apr. 2005), ¶ 96 [hereinafter '*Dominican Republic–Measures*'] (the existence of a detrimental effect on a given imported product resulting from a [domestic] measure does not necessarily imply that this measure accords less favorable treatment to imports if the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product'); *accord European Communities–Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 100, WT/DS135/AB/R (¶ 100, WT/DS135/AB/R (25 Mar. 2012) (stating, in dicta, that 'a Member may draw distinctions between products which have been found to be "like," without, for this reason alone, according to the group of "like" imported products "less favorable treatment" than that accorded to the group of "like" domestic products'.).

GATT or, in this case, TBT impose no further constraints on how Members pursue regulatory objectives through labeling or other measures affecting trade *beyond non-discrimination* is firmly established in trade literature as well.[139]

For instance, take the less defensible, flagrantly protectionist fact pattern in *Korea–Beef*. The creation of a dual distribution system based solely on a product's foreign origin was not sufficient for the AB to find discrimination. Had the dual distribution system been merely incidental to the challenged measure (i.e., the result of market forces) – thus, not dictated by regulations that effectively foreclosed access of imported beef to the older, established distribution system – the AB would not have found that system discriminatory. The AB explained: 'We are not holding that a dual or parallel distribution system … is unlawful under Article III:4 of the GATT 1994'.[140] Unlike the outcome of a government-commandeered distribution system for foreign beef, the lower immediate availability of foreign beef in the United States was a feature of the market – one that *pre-existed* COOL implementation (*see* Figure 1) and influenced US meatpackers' calculus that it was more cost effective to process single-origin batches (i.e., domestic *or* foreign) over mixed batches.

Similarly, the challenged measure in *US–Clove Cigarettes* was adjudged discriminatory not because it created a distinction without justification, but because it banned a category of products consisting almost entirely of *imports*.[141] Finally, in *US–Tuna II*, the AB found the challenged measure discriminatory not because it refused a desirable label to imports, but because it did so after targeting an innocuous harvesting practice employed by *foreign producers*.[142] In sum, these cases stand for the principle that, to find discrimination, adjudicators must find more than a burden on foreign producers. Adjudicators must establish that a burden occurs *by reason of* the imported product's *foreign origin*. In other words, the challenged measure is discriminatory because it targets the import *because of its foreignness*.

5.3[b] *AB's Undue Focus on a 'Perfect' Measure Ignored Compromises that Made COOL a Legitimate Regulatory Undertaking*

Having found COOL to be discriminatory, the AB considered whether the objective of providing country-of-origin information to consumers constituted a

[139] *See*, e.g., Henrik Horn & Petros Mavroidis, *To B(TA) or Not to B(TA)? On the Legality and Desirability of Border Tax Adjustments from a Trade Perspective,* 34 World Economy1911, 1919 (2011) ('what matters is whether [a measure] is applied in non-discriminatory manner'.).

[140] *See Korea–Beef*, *supra* n. 62, at ¶ 149 and discussion in s. 4.4 *infra*.

[141] *US–Clove,* at ¶ 200.

[142] *See US–Tuna II*, *supra* n. 59, at ¶ 286.

'relevant [i.e., legitimate] regulatory distinction[]'[143] that justified its perceived deviation from TBT Article 2.1's anti-discrimination requirement.[144] To the AB, COOL's stated objective was not perfectly reflected in its labels,[145] because label categories did not convey specific information as to where each different production step had occurred.[146] Because of this so-called mismatch, the AB found the measure did not have a 'legitimate regulatory' purpose capable of justifying the alleged discrimination.[147]

While troubling news for those who will have to defend national, neutral regulations in Geneva, the AB's rejection of COOL on grounds of being 'confusing' to consumers[148] demonstrates a willingness to seize on COOL's imperfections only to distort its greater purpose.[149] Take the comment that the 'B' (i.e., mixed-origin) label did not indicate where production steps took place, nor accurately reflected information on a product's origin, because it allowed identifying as commingled, 'exclusively US[-]origin beef'[150] that had been produced in a facility processing foreign beef (separately) the same day.[151] To the panel and AB, this label 'conveye[d] confusing information to consumers' and revealed a method of regulation that was not 'even handed'.[152] However, this particular use of the 'B' label constituted an attempt at balancing consumer interest in having meat-origin information against reducing processor compliance costs – a regulatory *compromise* that did not necessarily favour domestic beef and may have even helped foreign beef (i.e., in this limited use of the 'B' label, imports would receive the same label as 'domestics').[153]

Clearly, requiring origin-tracking information for domestic and foreign meat was not about providing the most accurate information, but the most accurate information *with a view to making compliance costs reasonable*.[154] Consumers got more

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143 *US–COOL*, *supra* n. 1, at ¶ 341.

144 The reader should recall that COOL required disclosure of three production steps (i.e., born; raised; and slaughtered) with four categories of labels (i.e., A (solely US beef), B (imported for immediate slaughter in the United States); C (mixed origin); and D (solely foreign origin)). *See supra* s. 1.2[a] and ns. 33–36. s. I.

145 *Ibid.,* at ¶ 343.

146 *Ibid.,* at ¶ 344 ('COOL … requires the labels to list the country or countries of origin, but does not require the labels to mention production steps at all'.)

147 *See* ¶ 349.

148 *See* ¶ 343.

149 Indeed, the AB would later characterize COOL's pro-consumer purpose as 'secondary' in its TBT Art. 2.2 analysis. *See ibid.,* at ¶ 410.

150 *See ibid.*, at ¶ 343.

151 *See ibid.*, at ¶ 246 n. 399 (explaining that 'it was possible to label Category A meat as if it were Category B meat, *even without commingling*'.) (emphasis in the original).

152 *See ibid.*, at¶ 345.

153 *See supra* n. 131.

154 *See* Under Secretary of Agriculture Bruce Knight, USDA Officials Discuss Country of Origin Labeling Implementation with Reporters (30 Sept. 2008) ('[W]e have tried to find that right balance, provide the information that the consumers are desiring, limit the regulatory burden, but meet the intent and

information than in the past, while meatpackers—80% of which are importers—mitigated costs. Clearly, the AB's ex post, record-keeping/labeling commensurability test was blind to these goals, finding unjustified arbitrariness in the national regulator's attempt to reduce industry costs.

5.4 Synthesis

Unlike *Korea–Beef*, US labeling regulations did not impose a segregated distribution system for meat products.[155] COOL allowed the comingling of domestic and foreign products. Its only regulatory burden was tracking origin for purposes of labeling. That US processors would subsequently prefer running separate domestic and foreign batches—and, thus, produce less commingled batches—was an incidental decision, grounded on their own private assessment of costs in view of market realities. Reflecting due deference to Member discretion, the AB, in *Korea–Beef*, went out of its way to explain the outer limit of its *discrimination* inquiry, a limit that would expressly foreclose a finding of discrimination in *US–COOL*:

> We are not holding that a dual or parallel distribution system that is not imposed directly or indirectly by law or governmental regulation, but is rather solely the result of private entrepreneurs acting on their own calculations of comparative costs and benefits of differentiated distribution systems, is unlawful under Article III:4 of the GATT 1994.[156]

Obviously, COOL marginally increased record-keeping costs to *all* products, domestic and imports. Due to market forces, this made imports less desirable in some applications, not due to their *foreignness*, but due to the higher cost of processing product in lower, on-tap availability. Borrowing from *Korea–Beef*, private entrepreneurs acted, indeed, 'on their own calculations of comparative costs and benefits', in contemplation of market signals. If the statement that GATT Article III:4 jurisprudence provides 'relevant guidance for interpreting … [TBT] Article 2.1'[157] means what it says, one cannot reconcile *US–COOL* with AB precedent, certainly not with *Korea–Beef*.

letter of the law'.); http://www.usda.gov/wps/portal/usda/usdamediafb?contentid=2008/10/0249.xml&printable=true&contentidonly=true.

155 Instead, the measure had some flexibility that actually encouraged comingled distribution. *See* 7 C.F.R. §§ 65.300(e),(g).

156 *Korea–Beef, supra* n. 62, at ¶ 149.

157 *US–COOL, supra* n. 1, at ¶ 269; *see also US–COOL (Panel), supra* n. 15, at ¶ 7.275 ('Hence, we have concluded that Article III:4 of the GATT 1994 provides relevant context for interpreting Article 2.1 of the TBT Agreement – in particular, for interpreting the term "treatment no less favourable than that accorded to like products of national origin').

6 *US–COOL* AFTERMATH[158]

The Dispute Settlement Body adopted AB's COOL report on 23 July 2012.[159] Following USDA labeling revisions,[160] Canada and Mexico challenged the new measure as failing 'to address the lack of correspondence between the recordkeeping and verification requirements and the limited information conveyed to consumers'.[161] As before, the (compliance) panel and AB agreed with Complainants, construing shortcomings in some COOL labels as discriminatory, deviating, again, from established NT analysis under GATT Article III:4 and TBT Article 2.1.[162]

Canada and Mexico filed separate requests for retaliation[163] in the amounts of USD 2.41 billion/year and USD 713 million/year, respectively.[164] Partially accepting US substantive and methodological objections to the proposed level of retaliation,[165] the arbitrator authorized suspension of concessions for Canada and Mexico in the amounts of USD 781.77 million/year and 227.76 million/year, respectively.[166] To avoid retaliation, the US Congress acted swiftly and repealed the provisions requiring country-of-origin labeling for beef and pork in a last-

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158 For a full discussion of the subsequent stages in *US-COOL* adjudication *see* Juscelino F. Colares, *Gaming the System and Weakening the Administrative State: How Foreign Industry and Domestic Importers Used WTO Review to Destroy Country-of-Origin Labeling and Accomplish What They Couldn't in Federal Courts*, unpublished forthcoming manuscript, to be available at http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=522749.

159 WTO, DSB Meeting, WT/DSB/M/320, Agenda Item 6, ¶ 110.

160 *See* Final Rule on Mandatory COOL Labeling, 78 Fed. Reg. 31,367 (24 May 2013) (codified at 7 C.F.R. pt. 65, § 65.300-500 (2014)).

161 *See* Integrated Executive Summary of the Argument of Canada, at ¶¶ 29 & 30 *US–COOL (Art. 21.5 Panel)*, WT/DS384/RW/Add.1, WT/DS386/RW/Add.1 (Annex B-1) [hereinafter Canada Compliance Argument]; Integrated Executive Summary of the Argument of Mexico, at ¶¶ 38 & 39 *US–COOL (Art. 21.5 Panel)*, WT/DS384/RW/Add.1, WT/DS386/RW/Add.1 (Annex B-2) [hereinafter Mexico Compliance Argument].

162 *See* Panel Reports, *US–COOL (Art. 21.5 Panel)*, ¶ 8.3 & 8.4; Appellate Body Reports, *United States–Certain Country of Origin Labeling (COOL) Requirements (Art. 21.5–Canada and Mexico),* ¶¶ 6.2 &6.4, WT/DS384/AB/RW, WT/DS386/AB/RW (18 May 2015) [hereinafter *US–COOL (Art. 21.5 AB)*].

163 Arbitrator Decision, *United States–Certain Country of Origin Labeling (COOL) Requirements (Article 22.6–Canada and Mexico),* ¶¶ 1.5 & 1.6, WT/DS384/ARB, WT/DS386/ARB (7 Dec. 2015) [hereinafter *US–COOL (Arb.)*].

164 *See* Written Submission of the United States of America at ¶ 1, *US–COOL (Arb.)* (30 July 2015), https://ustr.gov/sites/default/files/files/Issue_Areas/Enforcement/DS/Pending/US.Sub1.%28DS384%29.Public.pdf [hereinafter US Written Sub. (Arb.)].

165 *See ibid*., at ¶ 15 *and* Executive Summary of the United States of America, at ¶ 33, *US–COOL (Arb.)* (15 Oct. 2015), https://ustr.gov/sites/default/files/files/Issue_Areas/Enforcement/WTO/Pending/US.Exec.Summ.fin.%28Public%29.pdf [hereinafter US Exec. Summ. (Arb.)]. For a full discussion of the US proposal *see* Colares *supra* n. 158.

166 *See US–COOL (Arb.), supra* n. 163, at ¶ 7.1 (reporting levels of retaliation in Canadian dollars (for Canada) and in US dollars for Mexico).

minute omnibus appropriations bill.[167] President Obama signed the bill into law on 18 December 2015.[168]

7 CONCLUSION

The TBT specifically recognizes 'no country should be prevented from taking measures necessary' to accomplish legitimate regulatory goals.[169] Subject to the TBT provisions against discrimination and unnecessary restrictions on trade, WTO adjudicators have acknowledged country-of-origin labeling as a legitimate regulatory objective.[170] Members do enjoy a certain 'policy space' in setting their regulatory objectives.[171]

The *US–COOL* Complainants argued, and the AB agreed, that TBT Article 2.1 proscribed COOL because some US processors and retailers decided to handle solely domestic product in certain applications, to the detriment of foreign products. This article highlighted the AB decision in *Korea–Beef*[172] and demonstrated that, in *US–COOL*, the AB was only able to find discrimination by mechanically (and unjustifiably) imputing the incidental choices of private actors to the government of the United States, with no regard to the distinction between what the measure effectively required and how private parties came to internalize its costs *in light of market realities*.

If the goal of the TBT Agreement is to balance Members' regulatory freedom against the interest in free trade, then it stands to reason that only regulations that *unduly* restrict international trade should be set aside. *US–COOL* is thus an important case because it changes where the line is drawn in this debate. Under prior GATT Article III:4/TBT Article 2.1 jurisprudence, the AB required that the contested measure itself directly or indirectly cause the restriction of competitive opportunities for the imported product, and that such restriction occur by reason of a product's foreignness.

Under *US–COOL*, however, the AB focused only on the occurrence of impacts detrimental to foreign products, regardless of whether such effects resulted from individual private actors adapting compliance strategies to market conditions

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[167] *See* Consolidated Appropriations Act of 2016, Pub. L. No. 114–113, § 759, 129 Stat. 2242, __ (not yet published by the Government Printing Office) (amending Agricultural Marketing Act, 7 U.S.C. 1638, § 1638(1)(A) (1948)).

[168] *See Signed Legislation,* WhiteHouse.Gov, https://www.whitehouse.gov/briefing-room/signed-legislation (last visited 3 Mar. 2016).

[169] *TBT Agreement* at *Preamble*.

[170] *US–COOL (Panel), supra* n. 15, at ¶¶ 7.641, 7.650.

[171] *Ibid.,* at ¶7.649.

[172] *See Korea–Beef, supra* n. 62, at ¶ 149 ('We are not holding a dual or parallel distribution system … is [necessarily] unlawful under Art. III:4 of GATT 1994'.).

or merely responding to protectionist mandates. Thus conceived, *US–COOL* imputes to Members the responsibility for voluntary decisions of private actors. Clearly, *US–COOL* severely curtails Member regulatory sovereignty to impose non-protectionist, pro-consumer choice labeling requirements. And while *US-COOL* does not foreclose voluntary (as opposed to mandatory) labeling, the reality of consumer purchasing habits is that the absence of mandatory labeling will leave consumers uninformed about the origin of some of the beef and pork they purchase. One wonders how *US–COOL* will impact other food labeling regulations in the future and what other administrative measures may be targeted and struck down next.