

WORLD TRADE ORGANISATION
Third Party Submission to the Panel

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

(WT/DS384; WT/DS386)

THIRD PARTY SUBMISSION OF NEW ZEALAND

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I.	INTRODUCTION	3
II.	THE TBT AGREEMENT	4
A	GENERAL.....	4
B	WHETHER THE VILSACK LETTER IS A TECHNICAL REGULATION	4
C	ARTICLE 2.1: LESS FAVOURABLE TREATMENT OF LIKE PRODUCTS.....	8
D	ARTICLE 2.2: IS THE COOL MEASURE MORE TRADE RESTRICTIVE THAN NECESSARY?.....	11
	(i) <i>Is there a legitimate objective?</i>	12
	(ii) <i>Does the technical regulation fulfil the legitimate objective?</i>	15
	(iii) <i>Whether the technical regulation is more trade restrictive than necessary to fulfil the objective, taking into account the risks non fulfilment would create</i>	16
E	THE EXISTENCE OF A RELEVANT INTERNATIONAL STANDARD UNDER ARTICLE 2.4	18
III.	THE GATT 1994	20
A	ARTICLE III:4: LESS FAVOURABLE TREATMENT	20
B	ARTICLE X: UNIFORM, IMPARTIAL AND REASONABLE ADMINISTRATION OF REGULATIONS	20

I. INTRODUCTION

1 New Zealand welcomes this opportunity to provide its views on matters at issue in this dispute.¹ New Zealand's participation as a Third Party reflects both its substantial interest in the systemic legal issues that arise 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. The potential for technical regulations, standards and conformity assessment procedures to constitute unnecessary obstacles to trade is of particular concern. Similarly, New Zealand maintains a strong interest in the ongoing development of jurisprudence around those provisions of the General Agreement on Tariffs and Trade 1994 (GATT) that discipline domestic laws and regulations and their administration.

2 With respect to the TBT Agreement, New Zealand offers comments on the definition/scope of 'technical regulations'; the issue of less favourable treatment; the question of whether the measure at issue is more trade restrictive than necessary to fulfil a legitimate objective; and the use of international standards. With respect to the GATT, New Zealand makes submissions on the issue of less favourable treatment and uniform and reasonable administration of regulations.

3 New Zealand notes the divergence in arguments between the United States, Mexico and Canada on the issue of whether this dispute relates to a single or multiple COOL measure/s. New Zealand takes no position on this question, but for the purposes of its submission will use the term 'COOL measure'.

¹ See Canada and Mexico's requests for consultations (WT/DS384/1, WT/DS386/1, WT/DS/384/1/Add.1 and WT/DS/386/1/Add.1) and Canada and Mexico's request for establishment of a Panel (WT/DS384/8 and WT/DS386/7 and Corr.1). New Zealand reserved its third party rights to participate in this proceeding at the meeting of the DSB on 19 November 2009.

II. THE TBT AGREEMENT

A General

4 New Zealand recognises 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.² 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.

5 In order to reduce the potential for unnecessary obstacles to trade, the TBT Agreement imposes disciplines on Members regarding the procedures that they must follow, and the requirements that they must meet, in preparing, adopting and applying technical regulations, standards, and conformity assessment procedures. The United States' measure raises several questions regarding compliance with a number of provisions of the TBT Agreement.

B Whether the Vilsack Letter is a technical regulation

6 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 constitutes a technical regulation within the meaning of Annex 1.1 of the TBT Agreement.

7 Whether or not a measure is a technical regulation is a threshold question that determines whether the obligations in Article 2 of the TBT Agreement apply to the measure. New Zealand has a systemic interest in the interpretation of the scope of the

² Preamble to the TBT Agreement.

TBT Agreement and takes this opportunity to provide the following views on the matter.

8 The Vilsack letter noted the Secretary’s concern regarding certain components of the Final Rule promulgated by the previous Administration. To this end, the letter suggested that the industry “voluntarily adopt” certain labelling practices to “ensure that consumers are adequately informed about the source of food products”. The final paragraph of the Vilsack letter noted that the “Department of Agriculture will be closely reviewing industry compliance with the regulation and its performance in relation to these suggestions for voluntary action. Depending on this performance, I will carefully consider whether modifications to the rule will be necessary to achieve the intent of Congress”.

9 Canada and Mexico note that the voluntary practices set out in the Vilsack letter are more stringent than the requirements found in the Final Rule.³

10 Canada and Mexico claim that the Vilsack letter is of a mandatory nature.⁴ Both complainants base their assertion on the wording of the final paragraph in the letter (which was repeated in the press release).⁵ Mexico claims that the wording constitutes a threat because it makes possible modifications to the rule contingent on whether the industry complies with the suggested practices.⁶

11 Mexico argues that “a determination of whether product characteristics are prescribed in a mandatory fashion should not be decided based on the characterization given by the issuing authority to its own measures. To conclude otherwise would mean that a WTO Member can avoid the disciplines of the TBT Agreement concerning technical regulations by merely defining its own measures as voluntary”.⁷

³ Canada FWS paragraph 28 and Mexico FWS paragraph 256.

⁴ Canada FWS paragraph 30 and Mexico FWS paragraph 251.

⁵ Canada FWS paragraph 30 and Mexico FWS paragraph 253.

⁶ Mexico FWS paragraphs 255 and 257.

⁷ Mexico FWS paragraph 254.

12 The United States argues in its First Written Submission that the Vilsack letter contains no requirements and sets forth no means of enforcing compliance with any of the suggestions contained in the letter.⁸ It argues that the letter and the press release are by their terms voluntary.⁹

13 Annex 1 of the TBT Agreement defines a ‘technical regulation’ as ‘a document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory.’

14 The Panel therefore has to decide whether compliance with the additional practices set out in the Vilsack letter is mandatory within the meaning of Annex 1.1 of the TBT Agreement. While neither Canada nor Mexico expressly uses the term *de facto* in their submissions, New Zealand considers that in essence they are asking the Panel to find that a document may satisfy the definition of ‘technical regulation’ where compliance with it is *de facto* mandatory. In other words, they are arguing that compliance does not have to be mandatory on the face of the document, but it may be deemed mandatory due to the surrounding circumstances.

15 In *EC-Asbestos*, the Appellate Body stated that a document that lays down product characteristics will be considered mandatory if it “regulates the characteristics of products in a binding or compulsory fashion”. The Appellate Body went on to say that it “follows that, with respect to products, a ‘technical regulation’ has the effect of prescribing or imposing one or more ‘characteristics’ – ‘features’, ‘qualities’, ‘attributes’, or other ‘distinguishing mark’”.¹⁰

16 The Panel in this case has to decide whether the request by Vilsack for the industry to voluntarily adopt the additional labelling practices referred to in the letter

⁸ United States FWS paragraph 85.

⁹ United States FWS paragraph 133.

¹⁰ *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WTO/DS135/AB/R, Appellate Body Report, adopted 5 April 2001, paragraph 68.

and the press release, combined with the “warning” that modification of the regulations might be required in the absence of such voluntary adoption, is enough to constitute a requirement of “compulsory” compliance with such practices. That is, are the practices regulated “in a binding or compulsory fashion”, or are they effectively “prescribed or imposed?”

17 New Zealand takes the view that Annex 1.1 of the TBT Agreement does not exclude the possibility of a technical regulation being found to exist even though compliance with it is *de facto* mandatory rather than *de jure*. New Zealand considers that it is important that the opportunity exists for a regulation to be found *de facto* mandatory in order to prevent WTO Members from circumventing their obligations under the TBT Agreement through designing TBT measures that, while voluntary on their face, are in fact mandatory.

18 However, New Zealand also notes that the TBT Agreement provides separate and distinct obligations with respect to technical regulations (mandatory) on the one hand, and standards (voluntary) on the other. Technical regulations are subject to the obligations in Article 2, while voluntary standards are subject to those in Article 4 and Annex 3. Article 2 imposes *direct* obligations on governments with respect to technical regulations, while the obligations regarding standards are *transitive* in that they regulate governments’ engagement with standardising bodies. A clear distinction is thus contemplated between what is mandatory and what is voluntary.

19 In general, it can be noted that voluntary standards exist in order to provide rules or guidelines for those that choose to adhere to the standard. A standard cannot be deemed mandatory simply because it provides a rule to be followed by those that choose to follow the standard. If this was to be the case, it would render null and void the intent of the TBT Agreement in applying distinct obligations with respect to regulations on the one hand, and standards on the other. New Zealand therefore submits that the Panel ought not lightly make a finding that a measure is *de facto* mandatory.

20 In order for a technical regulation to be found *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. This is unlikely to be the case unless the factors that are argued to impart such mandatory character are within the control of government. Where, as in the current instance, such factors are within the control of government, the Panel should consider the real possibility that a technical regulation is *de facto* mandatory.

21 New Zealand further submits that the key question for the Panel is therefore whether the Vilsack letter and press release has the effect of forcing industry participants to follow the practices set out therein. Such practices could only be considered *de facto* mandatory if the letter had such an effect. If industry participants chose to follow the practices because of the particular market forces at play, this should not in and of itself render the practices *de facto* mandatory. There must be a sense that the practices are in effect compulsory and that the power of the Government is being exerted to achieve such an outcome. The Panel's conclusion on this issue requires a factual finding on which New Zealand does not take a position.

C Article 2.1: less favourable treatment of like products

22 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." The Parties agree that the COOL measure does not explicitly provide for imported covered commodities to be treated less favourably than domestic commodities. However, in the context of Article III:4 of GATT, which also contains the no less favourable treatment obligation, the Appellate Body has accepted that *de facto* as well as *de jure* discrimination falls within the scope of the "less favourable

treatment” obligation.¹¹ As the Appellate Body has elaborated, the focus for the Panel should instead be on whether a measure “modifies the conditions of competition in the relevant market to the detriment of imported products.”¹²

23 This wider focus on whether a like domestic product is given a competitive, and not just a legal, advantage in the market is appropriate in light of the TBT Agreement’s objectives of ensuring that technical regulations do not create unnecessary barriers to trade and that measures are not applied in a manner that constitutes a disguised restriction on international trade.¹³ It would be contrary to these objectives if the Panel were to exclude from the coverage of the TBT Agreement measures that, while not explicitly requiring less favourable treatment of imported products, have the *de facto* effect of doing so. In the light of this interpretation of less favourable treatment, New Zealand submits that although the COOL measure is “facially neutral”,¹⁴ the measure could still result in less favourable treatment.

24 Mexico and Canada argue that an element of the detriment they experience flows from the requirement on industry participants to segregate animals throughout the supply chain depending on their country of origin (and the consequential costs involved in this activity).¹⁵ The United States contends that segregation is not a mandatory requirement of the COOL measure, but that it is the choice of feed lot operators or slaughter houses to adopt such practices.¹⁶ According to the United States, any

¹¹ Mexico FWS paragraph 263 and Canada FWS paragraph 87; *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, Appellate Body Report, adopted 19 June 2000, paragraph 57. New Zealand argues that the Appellate Body jurisprudence on Article III:4 of GATT is apposite in this context due to the textual similarities between the two articles. The interpretation of these terms under GATT Article III:4 can provide helpful guidance for the interpretation of these terms under the TBT Agreement.

¹² *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, Appellate Body Report, adopted 10 January 2001, [hereinafter referred to as *Korea – Beef Appellate Body Report*] paragraph 137; see also *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, Appellate Body Report, adopted 19 May 2005, paragraph 93.

¹³ Preamble to the TBT Agreement, 5th and 6th recitals.

¹⁴ United States FWS paragraph 144.

¹⁵ Canada FWS paragraph 92 and Mexico FWS paragraph 229.

¹⁶ United States FWS paragraph 154.

additional costs (and consequential detriment to imported products) result from the actions of private actors and other market forces, not from the COOL measure itself.¹⁷

25 These arguments raise the issue of the relationship between the choices and actions of private entities, as a result of technical regulations, and the inquiry under Article 2.1 as to whether a technical regulation has resulted in less favourable treatment of imported products.

26 New Zealand accepts that there is no violation of Article 2.1 where the practices of private entities due to market forces result in detriment to imports. However, there may be a violation where those private actions are compelled, *de facto* or *de jure*, by the measure at issue. As the Appellate Body has pointed out in the comparable context of GATT III:4, for a finding of no violation, private actions must be “solely the result of private entrepreneurs acting on their own calculations of comparative costs and benefits...”¹⁸ The corollary to the Appellate Body’s argument is that if there is an element of compulsion, a violation may be found. New Zealand submits that when determining whether private actors have acted alone, and not because of any governmental intervention, 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”.¹⁹

27 New Zealand considers that there are circumstances where, 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”.²⁰ In such circumstances, the lack of a real choice is due to governmental regulation and should not be described as “solely

¹⁷ United States FWS paragraph 176.

¹⁸ *Korea - Beef* Appellate Body Report, paragraph 149.

¹⁹ Canada FWS paragraph 90, citing *United States – Section 337 of the Tariff Act of 1930*, Report of the GATT Panel, BISD 36S/345, adopted 7 November 1989, paragraph 5.11.

²⁰ *Korea - Beef* Appellate Body Report paragraph 149.

the result of private [actions]”.²¹ Instead, there is a “necessity of making a choice”, and this could compel private actors to adopt practices that would increase costs for imported products, thereby giving domestic like products a competitive advantage in the market over imported like products.

28 In this dispute the United States argues that nothing in the COOL measure requires segregation, or requires “any processor who chooses to segregate production lines to favour domestic livestock over foreign livestock United States processors to segregate in order to comply with the law.” Any segregation is therefore the result of “independent decisions of these private actors and is not attributable to the United States.”²² While it may be legally correct that feeding operations and slaughter houses can choose how they meet the COOL measure’s requirements, the Panel should also consider whether this apparent legal flexibility equates to actual flexibility in practice. New Zealand reaches no conclusion in this regard, as it requires factual findings based on the evidence of the Parties. However, it wishes to highlight Canada’s arguments that in order for processors or feed lot operators to comply with the COOL measure’s record-keeping requirements or to be able to use specific labels (such as to be able to label beef as ‘Product of USA’), then segregation, or choosing to use only domestic or only foreign goods may be a necessity.

D Article 2.2: is the COOL measure more trade restrictive than necessary?

29 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.²³ However, while the TBT Agreement recognises that governments have the prerogative of setting objectives, it also places limits on the means employed to achieve those objectives. Legitimate objectives must be

²¹ *Ibid.*

²² United States FWS paragraph 151.

²³ *European Communities - Trade Description of Sardines*, Report of the Panel, WT/DS231/R adopted 23 October 2002, paragraph 7.120 [hereinafter *EC - Sardines* Panel Report].

implemented through measures that are consistent with a Member's obligations under the WTO Agreements.²⁴ In accordance with Article 2.2, measures therefore "shall not be more trade restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create."

30 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.²⁵

(i) Is there a legitimate objective?

Provision of consumer information

31 The United States claims that the legitimate objective of the measure is to provide consumer information. The United States also asserts that the measure is necessary to avoid confusion that could have resulted from other government-imposed, labelling programmes.²⁶ Canada takes no position as to whether this amounts to a legitimate objective under Article 2.2.²⁷ Mexico asserts that, in some circumstances the provision of consumer information can be a legitimate objective, but that this depends on the "specific type of information being provided to consumers and whether the provision of that information is "justifiable" in the light of all relevant circumstances relating to that information."²⁸ On the facts of the dispute, Mexico argues that consumer information is not a legitimate objective in this circumstance.²⁹

²⁴ *EC – Sardines* Panel Report paragraph 7.120.

²⁵ See Canada FWS paragraph 176.

²⁶ United States FWS paragraphs 201 and 228.

²⁷ Canada FWS paragraph 176.

²⁸ Mexico FWS paragraph 285.

²⁹ *Ibid.* at paragraph 278.

32 Article 2.2 provides an illustrative list of legitimate objectives that comprises national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. As the list in Article 2.2 is non-exhaustive, New Zealand recognises that a Member may demonstrate that other legitimate objectives also justify technical regulations. However, New Zealand notes that in the context of a 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. There are no bright lines in this determination. 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.

33 New Zealand also submits that the use of the phrase “legitimate objectives” implies that some objectives are illegitimate. The protection of domestic producers from foreign competition provides one example of an illegitimate objective under Article 2.2.

34 New Zealand takes no position as to whether there is a legitimate objective at play in this dispute. However, it does take the opportunity to comment further on the concepts of consumer information and deceptive practices.

Distinction between the concepts of consumer information and deceptive practices

35 The United States has also argued that the COOL measure is required “so as to reduce consumer confusion”.³⁰ The United States asserts that the pre-existing labelling regime in place in the United States, based in part on the concept of substantial transformation, led consumers to believe that an animal had spent its entire life in the United States, when in reality it may have only entered the United States in order to be slaughtered. The United States argues that this resulted in consumer confusion, and

³⁰ United States FWS paragraph 228.

could lead a consumer to “reasonably assume” that the meat they purchased came from the United States.³¹

36 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, they are not interchangeable terms. Consumer information may be provided because it is considered beneficial to consumers that they know certain information. It may also be provided to prevent consumers being confused in certain circumstances. However, neither of these situations equate to preventing deceptive practices. The set of circumstances in which it will be necessary to provide information for the purpose of preventing deceptive practices will be narrower than those envisaged by the aforementioned situations. No evidence has been cited in the present case that would suggest any element of deception behind the pre-existing USDA labelling regime so as to support an argument that the COOL measure is required to prevent deceptive practices. Rather it appears that the pre-existing labelling regime have had the unintended consequence of confusing consumers.

37 This narrower interpretation of the objective of preventing deceptive practices *vis-à-vis* a consumer information objective, is also supported by the context of Article 2.2. The other legitimate objectives that are provided as examples in Article 2.2 (national security requirements, protection of human health or safety, animal or plant life or health, or the environment) 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.

38 New Zealand also draws to the Panel’s attention the Panel’s comment in *EC-Sardines* around the dangers of “‘self-justifying’ regulatory trade barriers”.³² In that case, the Panel was referring to a situation in which a WTO Member creates consumer

³¹ United States FWS paragraph 210.

³² *EC-Sardines* Panel Report paragraph 7.127.

expectations via technical regulations and then seeks to rely on these regulations to justify a trade restrictive measure. New Zealand submits that a similar “self-justifying” regulatory trade barrier could be seen to exist here: a Member is seeking to rely on the confusion created by its own regulation to justify the need for further regulations that have the potential to restrict trade.

(ii) Does the technical regulation fulfil the legitimate objective?

39 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. In undertaking this assessment, the Panel may find it helpful to consider arguments such as whether there are any arbitrary gaps in coverage of the COOL measure. If the objective is to provide consumers with information about the food they purchase, then the Member imposing the measure should be able to set out clearly why COOL is required for certain commodities but not for others. From Canada and Mexico’s submissions, it appears that there are gaps in the coverage of commodities, and the Panel will have to make a factual determination as to the arbitrariness or otherwise of such gaps.³³

40 The accuracy and usefulness/clarity of the information conveyed to consumers should also be an important consideration in assessing whether the consumer information objective is met. Where information is inaccurate, the consumer is arguably left in a less informed position. It is not enough to simply provide consumers with information; such information must also be accurate in order for the objective to be fulfilled. The design and structure of a measure will be essential in determining whether the information it delivers is likely to be useful and accurate.

³³ Canada FWS paragraph 161 and Mexico FWS paragraphs 171-2.

41 For example, in the context of Label E for ground meat, New Zealand questions whether a requirement to list a country based only on a “reasonable” possibility that meat from that country is contained in the product can be considered to provide consumers with accurate and clear information that meets their information needs. This is particularly so where “reasonableness” is further defined as meaning where meat has been in the inventory of the processing plant within the last 60 days, regardless of whether the processor has reason to consider that meat from that country is actually contained in the final product being labelled. In this context at least, the COOL measure is therefore arguably not designed to deliver accurate consumer information, but only requires information to be ‘reasonably’ accurate. If the purported objective of the regulation is to inform consumers, then the Panel will need to consider whether information that, due to the very design of the measure, can only be relied on as being ‘reasonably’ accurate fulfils the stated objective.

(iii) Whether the technical regulation is more trade restrictive than necessary to fulfil the objective, taking into account the risks non-fulfilment would create

42 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.

43 In considering whether a measure is necessary, New Zealand refers to the helpful guidance set out by the Appellate Body in *Brazil – Tyres*.³⁴ This case related to the necessity requirement under Article XX(b) of the GATT. New Zealand submits that the Appellate Body’s guidance is also relevant to the determination under Article 2.2 of the TBT Agreement. Both provisions require panels to find a balance between a Member’s right to regulate and its obligation not to unnecessarily restrict trade. In *Brazil – Tyres* the Appellate Body held that:

³⁴ *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007, [hereinafter referred to as *Brazil – Tyres* Appellate Body Report].

“...in order to determine whether a measure is “necessary” within the meaning of Article XX(b) of the GATT 1994, a panel must consider the relevant factors, particularly the importance of the interests or values at stake, the extent of the contribution to the achievement of the measure’s objective, and its trade restrictiveness. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective. This comparison should be carried out in the light of the importance of the interests or values at stake. It is through this process that a panel determines whether a measure is necessary.”³⁵

44 A consideration of the importance of the interests or values at stake in the GATT Article III:4 jurisprudence is pertinent to the Article 2.2 requirement that a Member must bear in mind “the risks non-fulfilment would create”. It imports a balancing process to the determination of whether a measure is necessary, a key element of which will be assessing the risks that 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 recognises the particular importance of the interests or values behind these objectives. The risks of non-fulfilment would therefore justify more restrictive measures being taken.

45 New Zealand submits that there are various factors the Panel should consider in assessing the risks of non-fulfilment of a consumer information objective, including those of both an economic and societal nature. For example, what costs will be incurred should the objective not be fulfilled? What injuries are likely to result? Another relevant factor is the existence of other domestic legislation in the regulating country (such as consumer protection laws) that may soften the impact of non-fulfilment.

46 Finally, in determining whether a measure is necessary, the Panel must consider whether less trade restrictive options exist. In the context of mandatory country of

³⁵ *Ibid.* at paragraph 178.

origin labelling, particular attention should be paid to the alternative of voluntary country of origin labelling. 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. Voluntary COOL is an arrangement between industry and consumers and operates without government intervention or conditions (other than the government requirement for truth in labelling). 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, voluntary COOL is particularly relevant where there is no compelling evidence of market failure.

E The existence of a relevant international standard under Article 2.4

47 Pursuant to Article 2.4 of the TBT Agreement, Members must use international standards as a basis for their technical regulations except where such standards would be an “ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued”. Mexico contends that the United States should base its COOL requirements on CODEX-STAN 1-1985.³⁶ CODEX-STAN 1-1985 was prepared by the Codex Alimentarius Commission. In response, the United States argues that Mexico has failed to demonstrate that CODEX-STAN 1-1985 is an international standard within the meaning of Article 2.4. The United States asserts that Mexico has failed to prove that this standard would be effective and appropriate for the fulfilment of United States objectives.³⁷

48 The TBT Agreement does not include a definition of the term “international standard”. However, in accordance with relevant and related definitions used in the TBT Agreement and relevant ISO guidelines, New Zealand considers that, in order to constitute an international standard under Article 2.4, a standard must be a document

³⁶ Mexico FWS paragraph 332.

³⁷ United States FWS paragraph 260.

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.

49 The TBT Committee has provided a clear indication of the type of bodies that it considers to be international standardising bodies and the principles that such bodies should embrace.³⁸ New Zealand submits that the Codex Alimentarius Commission meets the principles of transparency, openness, impartiality, effectiveness and relevance and coherence: it is open to all WTO Members and provides a forum for them to participate in the discussion, development and adoption of standards. It is also listed as a “relevant international organization” under the WTO Agreement on the Application of Sanitary and Phytosanitary Measures.³⁹ Furthermore, New Zealand also notes that in *EC-Sardines*, the Appellate Body accepted that a Codex standard was a “relevant international standard” under Article 2.4 of the TBT Agreement.⁴⁰

50 In the light of these factors, New Zealand submits that the Codex Alimentarius Commission is a “recognized body” for the purposes of Annex 1.2 of the TBT Agreement. Furthermore, New Zealand also considers that the CODEX-STAN 1-1985 is an international standard within the context of Article 2.4. New Zealand makes no comment as to whether it is a relevant international standard on the facts of the dispute, or whether it would be an ineffective or inappropriate means for the fulfilment of the purported legitimate objective put forward by the United States. However, New Zealand submits that when determining whether an international standard would be ineffective or inappropriate, the Panel should consider whether the United States uses the standard

³⁸ *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, at paragraph 20 and Annex 4. See also Second TBT Triennial Review, G/TBT/9, *Second Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade Under Article 15.4*, 13 November 2000, at Annex 1, paragraph 2.

³⁹ Preamble to the SPS Agreement.

⁴⁰ *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, Appellate Body Report, adopted 23 October 2002, paragraph 315.

as a basis for regulation with respect to other commodities. If so, then the Panel must be satisfied that the United States can justify this divergence in approach.

III. THE GATT 1994

A Article III:4: less favourable treatment

51 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

52 GATT Article X:3(a) provides that Members must “administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings”.

53 Canada claims that the United States has violated Article X:3(a) by administering the COOL measure in an *unreasonable manner*.⁴¹ It claims that such unreasonableness is found in the Vilsack letter which prescribed requirements that are not found in laws and regulations, and backed these up by a threat of regulatory amendments.⁴² Mexico also claims that the COOL measure has not been *uniformly* administered. It refers to the fact that the administration of the details of the measure changed over the course of the interim final rule and the final rule and associated guidelines issued by the USDA. It also refers to the additional practices and alleged threat contained in the Vilsack letter.⁴³

54 Article X:3 is a good governance provision that encompasses the values of transparency and due process. The subparagraph invoked by Canada and Mexico

⁴¹ Canada FWS paragraph 225.

⁴² Canada FWS paragraph 231.

⁴³ Mexico FWS paragraph 378.

focuses on due process; it allows the Panel to review domestic administrative legal systems based on its interpretation of the terms uniform, reasonable and impartial.⁴⁴

55 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.⁴⁵ The United States contends that the Vilsack letter has nothing to do with the administration of the COOL measure because it refers only to voluntary measures.⁴⁶ A determination that Canada and Mexico have satisfied the threshold test for bringing the measure within the scope of Article X:3(a) in relation to the Vilsack letter will depend on factual findings as to whether that letter actually impacted the administration of the Final Rule and New Zealand does not make a submission on this matter. It does note, however, that Mexico's claim at least appears to focus on the actual administration of the United States laws and regulations and that the Panel will therefore have to consider the Article X.3(a) claim in regard to the alleged violation of lack of uniformity in administration.

56 WTO jurisprudence has determined that the requirements of uniformity, impartiality, and reasonableness are not cumulative requirements. A Member may be in breach of its obligations under Article X.3(a) even if it has only failed to comply with

⁴⁴ Note that impartiality is not at issue in the current dispute.

⁴⁵ *European Communities – Regime for the Importation, Sale and Distribution of Bananas (EC – Bananas III)*, WT/DS27/AB/R, Appellate Body Report, adopted 25 September 1997, paragraph 200. Confirmed in *European – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, Appellate Body Report, adopted 23 July 1998, paragraph 115. It should also be noted that in *EC-Customs Matters*, the Appellate Body found that there is a possibility of challenging the substantive content of a legal instrument that regulates the administration of a legal instrument of the kind described in Article X.1. At para 200 the Appellate Body said that: "While the substantive content of the legal instrument being administered is not challengeable under Article X.3(a), we see no reason why a legal instrument that regulates the application or implementation of that instrument cannot be examined under Article X.3(a) if it is alleged to lead to a lack of uniform, impartial, or reasonable administration of that legal instrument".

⁴⁶ United States FWS paragraph 293.

one of these requirements.⁴⁷ In this case, Canada and Mexico are claiming violation of the requirements to administer provisions in a uniform and reasonable manner.

57 The Panel thus has to decide whether or not the manner in which the United States has administered the COOL measure is uniform, and (depending on the finding as to the scope of the obligation), whether its administration has been reasonable. There is some, but limited, jurisprudence to guide the Panel in these determinations. On the matter of uniformity, the Panel in *Argentina – Hides and Leather* found that Article X:3(a) should not be read as a broad anti-discrimination provision.⁴⁸ Rather, uniform administration requires that Members ensure that their laws are applied consistently and predictably. The Panel stated that “every exporter and importer should be able to expect treatment of the same kind, in the same manner both over time and in different places and with respect to other persons. Uniform administration requires that Members ensure that their laws are applied consistently and predictably and is not limited, for instance, to ensuring equal treatment with respect to WTO Members.”⁴⁹ New Zealand notes that the Mexican submission does not make clear how it alleges that administration has not been consistent and unpredictable. The Panel will be required to make a factual finding based on further submissions and evidence given at the hearing.

58 In *EC – Customs Matters*, the Appellate Body found that in order to find that an administrative process has led to non-uniform administration of a measure under Article X.3(a), a panel cannot “merely rely on identifying the features of an administrative process that it may view as non-uniform; a panel must go further and undertake an analysis to determine whether those features of the administrative process necessarily lead to non-uniform administration of a legal instrument of the kind described in Article

⁴⁷ *Dominican Republic – Cigarettes*, WT/DS/302/, Panel Report, adopted 26 November 2004, paragraph 7.383.

⁴⁸ *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather* WT/DS121/R, Panel Report, adopted 16 February 2001 at paragraph 11.84.

⁴⁹ At paragraph 11.83.

X.1.”⁵⁰ Again, this task will require the Panel to closely analyse the evidence provided, and New Zealand does not comment further on this aspect of the determination.

59 The Panel in *Dominican Republic – Cigarettes* considered the meaning of ‘reasonable’ administration under Article X.3(a). It looked at the dictionary definition which includes concepts such as “in accordance with reason”, “not irrational or absurd”, “proportionate”, “having sound judgment”, “sensible”, “not asking for too much”, “within the limits of reason, not greatly less or more than might be thought likely or appropriate”, “articulate”.⁵¹ The Panel’s determination of whether the actions complained of by Canada and Mexico are unreasonable must be based on the specific facts alleged and as with lack of uniformity, New Zealand does not comment further on the factual determination.

60 Determination of the allegation concerning both lack of uniformity and unreasonableness should also be guided by the comments of the Panel in *Argentina – Hides and Leathers*, which recognised the protectionist potential of administrative actions. The Panel in that case said that “Article X.3(a) requires an examination of the real effect that a measure might have on traders operating in the commercial world.” This might, the Panel noted, involve an examination of whether there is a possible impact on the competitive situation due to alleged partiality, unreasonableness, or lack of uniformity in the application of customs rules, regulations, decisions, etc.⁵²

61 New Zealand submits that, 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).

⁵⁰ *European Communities – Selected Customs Matters*, WT/DS315/AB/R, Appellate Body Report, adopted 11 December 2006, paragraph 239.

⁵¹ At paragraph 7.385.

⁵² At paragraph 11.77.

62 New Zealand notes that while panels and the Appellate Body have interpreted the scope of Article X:3 broadly, they have to date been reluctant to find a measure inconsistent with the obligations of Article X:3(a).⁵³ New Zealand submits 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). As the Appellate Body noted in *United States – OCTG Sunset Reviews*, allegations that the conduct of a WTO Member is unreasonable are serious, and such allegations should not be brought lightly, or in a subsidiary fashion. It further found that a claim under Article X.3(a) must be “supported by solid evidence; the nature and scope of the claim, and the evidence adduced by the complainant in support of it, should reflect the gravity of the accusations inherent in claims under Article X.3(a)”.⁵⁴

63 However, New Zealand also wishes to observe that whereas GATT was initially concerned with reducing tariff levels but then expanded its areas of concern to include the discipline, reduction and prevention of behind-the-border barriers (in the form of domestic regulations), the prevention of administrative barriers to trade appears to be an increasing focus of countries. Increased invocation of Article X since 1994 is evidence that Members recognize 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.⁵⁵ New Zealand therefore submits that it is important that the Panel take this Article X.3 claim seriously and recognize the potential for administration to be a third line of protectionism that may be imposed in addition or instead of border measures and domestic regulations.

⁵³ See generally, Padideh Ala’i, “From the Periphery to the Center? The Evolving WTO Jurisprudence on Transparency and Good Governance” (2008) 11 *Journal of International Economic Law* 779.

⁵⁴ *United States – Oil Country Tubular Goods Sunset Reviews*, WT/DS268/AB/R, Appellate Body Report, adopted 17 December 2004, at paragraph 217.

⁵⁵ Ala’i notes that since the founding of the WTO, there have been at least twenty cases involving consideration of Article X. See note 53 above, at page 789.