



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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY CANADA AND MEXICO

AB-2014-10

*Reports of the Appellate Body*

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Note:

The Appellate Body is issuing these Reports in the form of a single document constituting two separate Appellate Body Reports: WT/DS384/AB/RW; and WT/DS386/AB/RW. The cover page, preliminary pages, sections 1 through 5, and the annexes are common to both Reports. The page header throughout the document bears the two document symbols WT/DS384/AB/RW and WT/DS386/AB/RW, with the following exceptions: section 6 on pages CDA-169 to CDA-172, which bears the document symbol for and contains the Appellate Body's conclusions and recommendation in the Appellate Body Report WT/DS384/AB/RW; and section 6 on pages MEX-173 to MEX-176, which bears the document symbol for and contains the Appellate Body's conclusions and recommendation in the Appellate Body Report WT/DS386/AB/RW.

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### ABBREVIATIONS USED IN THESE REPORTS

Abbreviation	Description
2002 Farm Bill	Farm Security and Rural Investment Act of 2002, Public Law No. 107-171, Section 10816, 116 Stat. 134 (Panel Exhibit CDA-4)
2008 Farm Bill	Food, Conservation, and Energy Act of 2008, Public Law No. 110-234, Section 11002, 122 Stat. 923 (Panel Exhibit CDA-5)
2009 Final Rule (AMS)	Final 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, <i>United States Federal Register</i> , Vol. 74, No. 10 (15 January 2009), pp. 2658-2707 (Panel Exhibits CDA-2 and MEX-12)
2013 Final Rule	Final 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, <i>United States Federal Register</i> , Vol. 78, No. 101 (24 May 2013), pp. 31367-31385 (Panel Exhibits CDA-1 and MEX-3)
amended COOL measure	COOL statute together with the 2009 Final Rule (AMS), as amended by the 2013 Final Rule
AMS	Agricultural Marketing Service of the USDA
BCI	business confidential information
COOL	country of origin labelling
COOL statute	Agricultural Marketing Act of 1946, 60 Stat. 1087, <i>United States Code</i> , Title 7, Section 1621 et seq., as amended by the 2002 Farm Bill and the 2008 Farm Bill (Panel Exhibit CDA-3)
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATS	General Agreement on Trade in Services
GATT 1994	General Agreement on Tariffs and Trade 1994
original COOL measure	COOL statute together with the 2009 Final Rule (AMS)
original panel	panel in the original proceedings in <i>US – COOL</i>
original panel reports	Panel Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements</i> , WT/DS384/R / WT/DS386/R
PACA	Perishable Agricultural Commodities Act of 1930, <i>United States Code of Federal Regulations</i> , Title 7, Section 499 (Panel Exhibits CDA-10 and MEX-7)
Panel Reports	Panel Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Canada and Mexico</i> , WT/DS384/RW and Add.1 / WT/DS386/RW and Add.1
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT Agreement	Agreement on Technical Barriers to Trade
USDA	United States Department of Agriculture
Working Procedures	Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

### PANEL EXHIBITS CITED IN THESE REPORTS

Exhibit No.	Short Title (if any)	Description
CDA-1 MEX-3	2013 Final Rule	Final 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, <i>United States Federal Register</i> , Vol. 78, No. 101 (24 May 2013), pp. 31367-31385
CDA-2 MEX-12	2009 Final Rule (AMS)	Final 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, <i>United States Federal Register</i> , Vol. 74, No. 10 (15 January 2009), pp. 2658-2707
CDA-3	COOL statute	Agricultural Marketing Act of 1946, 60 Stat. 1087, <i>United States Code</i> , Title 7, Section 1621 et seq., as amended by the 2002 Farm Bill and the 2008 Farm Bill
CDA-4	2002 Farm Bill	Farm Security and Rural Investment Act of 2002, Public Law No. 107-171, Section 10816, 116 Stat. 134
CDA-5	2008 Farm Bill	Food, Conservation, and Energy Act of 2008, Public Law No. 110-234, Section 11002, 122 Stat. 923
CDA-10 MEX-7	PACA	Perishable Agricultural Commodities Act of 1930, <i>United States Code of Federal Regulations</i> , Title 7, Section 499
CDA-17		United States District Court for the District of Columbia, <i>American Meat Institute v. United States Department of Agriculture</i> , Case No. 13-cv-1033, Declaration of Brad McDowell in Support of Plaintiffs' Motion for a Preliminary Injunction (25 July 2013)
CDA-83 MEX-35 MEX-62		M.R. Taylor and G.T. Tonsor, "Revealed Demand for Country of Origin Labeling of Meat in the United States" (2013) 38(2) <i>Journal of Agricultural and Resource Economics</i> , pp. 235-247
CDA-121		American Meat Institute (AMI) Fact Sheet, "Questions and Answers about Ground Beef, Hamburger and Patties" (June 2011)
CDA-154		Department of Agricultural Economics, Kansas State University entitled, "Food Values Applied to Livestock Products" (7 February 2014)
US-48		Results of a telephone survey conducted by the National Research Center, "Country of Origin Labeling Poll, Final Report" (4 October 2010)

### CASES CITED IN THESE REPORTS

Short Title	Full Case Title and Citation
<i>Argentina – Hides and Leather</i>	Panel Report, <i>Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather</i> , WT/DS155/R and Corr.1, adopted 16 February 2001, DSR 2001:V, p. 1779
<i>Argentina – Textiles and Apparel</i>	Appellate Body Report, <i>Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items</i> , WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, p. 1003
<i>Australia – Salmon</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, p. 3327
<i>Brazil – Retreaded Tyres</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, p. 1527
<i>Canada – Aircraft</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft</i> , WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, p. 1377

Short Title	Full Case Title and Citation
<i>Canada – Aircraft (Article 21.5 – Brazil)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU</i> , WT/DS70/AB/RW, adopted 4 August 2000, DSR 2000:IX, p. 4299
<i>Canada – Periodicals</i>	Appellate Body Report, <i>Canada – Certain Measures Concerning Periodicals</i> , WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, p. 449
<i>Chile – Price Band System</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3045 (Corr.1, DSR 2006:XII, p. 5473)
<i>Chile – Price Band System (Article 21.5 – Argentina)</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina</i> , WT/DS207/AB/RW, adopted 22 May 2007, DSR 2007:II, p. 513
<i>China – Auto Parts</i>	Appellate Body Reports, <i>China – Measures Affecting Imports of Automobile Parts</i> , WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R, adopted 12 January 2009, DSR 2009:I, p. 3
<i>China – Publications and Audiovisual Products</i>	Appellate Body Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/AB/R, adopted 19 January 2010, DSR 2010:I, p. 3
<i>China – Rare Earths</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum</i> , WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, adopted 29 August 2014
<i>Colombia – Ports of Entry</i>	Panel Report, <i>Colombia – Indicative Prices and Restrictions on Ports of Entry</i> , WT/DS366/R and Corr.1, adopted 20 May 2009, DSR 2009:VI, p. 2535
<i>Dominican Republic – Import and Sale of Cigarettes</i>	Appellate Body Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV, p. 7367
<i>EC – Approval and Marketing of Biotech Products</i>	Panel Reports, <i>European Communities – Measures Affecting the Approval and Marketing of Biotech Products</i> , WT/DS291/R, Add.1 to Add.9 and Corr.1 / WT/DS292/R, Add.1 to Add.9 and Corr.1 / WT/DS293/R, Add.1 to Add.9 and Corr.1, adopted 21 November 2006, DSR 2006:III, p. 847
<i>EC – Asbestos</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 3243
<i>EC – Bananas III</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, p. 591
<i>EC – Bed Linen (Article 21.5 – India)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, p. 965
<i>EC – Export Subsidies on Sugar</i>	Appellate Body Report, <i>European Communities – Export Subsidies on Sugar</i> , WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, adopted 19 May 2005, DSR 2005:XIII, p. 6365
<i>EC – Fasteners (China)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/AB/R, adopted 28 July 2011, DSR 2011:VII, p. 3995
<i>EC – Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
<i>EC – Poultry</i>	Appellate Body Report, <i>European Communities – Measures Affecting the Importation of Certain Poultry Products</i> , WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, p. 2031
<i>EC – Sardines</i>	Appellate Body Report, <i>European Communities – Trade Description of Sardines</i> , WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3359
<i>EC – Sardines</i>	Panel Report, <i>European Communities – Trade Description of Sardines</i> , WT/DS231/R and Corr.1, adopted 23 October 2002, as modified by Appellate Body Report WT/DS231/AB/R, DSR 2002:VIII, p. 3451

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<i>EC – Seal Products</i>	Appellate Body Reports, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014
<i>EC – Seal Products</i>	Panel Reports, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS400/R and Add.1 / WT/DS401/R and Add.1, adopted 18 June 2014, as modified by Appellate Body Reports WT/DS400/AB/R / WT/DS401/AB/R
<i>EC – Selected Customs Matters</i>	Appellate Body Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, p. 3791
<i>EC – Tube or Pipe Fittings</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, p. 2613
<i>EC and certain member States – Large Civil Aircraft</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
<i>Japan – Agricultural Products II</i>	Appellate Body Report, <i>Japan – Measures Affecting Agricultural Products</i> , WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, p. 277
<i>Japan – Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97
<i>Japan – Apples</i>	Appellate Body Report, <i>Japan – Measures Affecting the Importation of Apples</i> , WT/DS245/AB/R, adopted 10 December 2003, DSR 2003:IX, p. 4391
<i>Japan – Apples</i>	Panel Report, <i>Japan – Measures Affecting the Importation of Apples</i> , WT/DS245/R, adopted 10 December 2003, upheld by Appellate Body Report WT/DS245/AB/R, DSR 2003:IX, p. 4481
<i>Japan – DRAMs (Korea)</i>	Appellate Body Report, <i>Japan – Countervailing Duties on Dynamic Random Access Memories from Korea</i> , WT/DS336/AB/R and Corr.1, adopted 17 December 2007, DSR 2007:VII, p. 2703
<i>Korea – Alcoholic Beverages</i>	Appellate Body Report, <i>Korea – Taxes on Alcoholic Beverages</i> , WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I, p. 3
<i>Korea – Dairy</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, p. 3
<i>Korea – Various Measures on Beef</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, p. 5
<i>Philippines – Distilled Spirits</i>	Appellate Body Reports, <i>Philippines – Taxes on Distilled Spirits</i> , WT/DS396/AB/R / WT/DS403/AB/R, adopted 20 January 2012, DSR 2012:VIII, p. 4163
<i>Thailand – Cigarettes (Philippines)</i>	Appellate Body Report, <i>Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines</i> , WT/DS371/AB/R, adopted 15 July 2011, DSR 2011:IV, p. 2203
<i>US – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
<i>US – Clove Cigarettes</i>	Appellate Body Report, <i>United States – Measures Affecting the Production and Sale of Clove Cigarettes</i> , WT/DS406/AB/R, adopted 24 April 2012, DSR 2012:XI, p. 5751
<i>US – Clove Cigarettes</i>	Panel Report, <i>United States – Measures Affecting the Production and Sale of Clove Cigarettes</i> , WT/DS406/R, adopted 24 April 2012, as modified by Appellate Body Report WT/DS406/AB/R, DSR 2012:XI, p. 5865
<i>US – Continued Suspension</i>	Appellate Body Report, <i>United States – Continued Suspension of Obligations in the EC – Hormones Dispute</i> , WT/DS320/AB/R, adopted 14 November 2008, DSR 2008:X, p. 3507

Short Title	Full Case Title and Citation
US – Continued Suspension	Panel Report, <i>United States – Continued Suspension of Obligations in the EC – Hormones Dispute</i> , WT/DS320/R and Add.1 to Add.7, adopted 14 November 2008, as modified by Appellate Body Report WT/DS320/AB/R, DSR 2008:XI, p. 3891
US – COOL	Appellate Body Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements</i> , WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012, DSR 2012:V, p. 2449
US – COOL	Panel Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements</i> , WT/DS384/R / WT/DS386/R, adopted 23 July 2012, as modified by Appellate Body Reports WT/DS384/AB/R / WT/DS386/AB/R, DSR 2012:VI, p. 2745
US – COOL (Article 21.3(c))	Award of the Arbitrator, <i>United States – Certain Country of Origin Labelling (COOL) Requirements – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS384/24, WT/DS386/23, 4 December 2012, DSR 2012:XIII, p. 7173
US – COOL (Article 21.5 – Canada and Mexico)	Panel Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Canada and Mexico</i> , WT/DS384/RW and Add.1 / WT/DS386/RW and Add.1, circulated to WTO Members 20 October 2014
US – FSC	Appellate Body Report, <i>United States – Tax Treatment for “Foreign Sales Corporations”</i> , WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, p. 1619
US – Gambling	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (Corr.1, DSR 2006:XII, p. 5475)
US – Gasoline	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3
US – Lamb	Appellate Body Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, p. 4051
US – Large Civil Aircraft (2 <sup>nd</sup> complaint)	Appellate Body Report, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)</i> , WT/DS353/AB/R, adopted 23 March 2012, DSR 2012:I, p. 7
US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, p. 3257
US – Section 211 Appropriations Act	Appellate Body Report, <i>United States – Section 211 Omnibus Appropriations Act of 1998</i> , WT/DS176/AB/R, adopted 1 February 2002, DSR 2002:II, p. 589
US – Shrimp	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, p. 2755
US – Softwood Lumber VI (Article 21.5 – Canada)	Appellate Body Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865
US – Tuna II (Mexico)	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/AB/R, adopted 13 June 2012, DSR 2012:IV, p. 1837
US – Upland Cotton (Article 21.5 – Brazil)	Appellate Body Report, <i>United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil</i> , WT/DS267/AB/RW, adopted 20 June 2008, DSR 2008:III, p. 809
US – Wheat Gluten	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, p. 717
US – Wool Shirts and Blouses	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323

WORLD TRADE ORGANIZATION  
APPELLATE BODY

**United States – Certain Country of Origin Labelling (COOL) Requirements**

Recourse to Article 21.5 of the DSU by Canada and Mexico

United States, *Appellant/Appellee*  
Canada, *Other Appellant/Appellee*  
Mexico, *Other Appellant/Appellee*

Australia, *Third Participant*  
Brazil, *Third Participant*  
Canada, *Third Participant*<sup>1</sup>  
China, *Third Participant*  
Colombia, *Third Participant*  
European Union, *Third Participant*  
Guatemala, *Third Participant*  
India, *Third Participant*  
Japan, *Third Participant*  
Korea, *Third Participant*  
Mexico, *Third Participant*<sup>2</sup>  
New Zealand, *Third Participant*

AB-2014-10

Appellate Body Division:

Ramírez-Hernández, Presiding Member  
Chang, Member  
Van den Bossche, Member

## 1 INTRODUCTION

1.1. The United States, Canada, and Mexico each appeals certain issues of law and legal interpretations developed in the Panel Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Canada and Mexico*<sup>3</sup> (Panel Reports). The Panel was established pursuant to Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) to consider challenges by Canada and Mexico (the complainants) of measures taken by the United States to comply with the recommendations and rulings of the Dispute Settlement Body (DSB) in the original proceedings in *US – COOL* (DS384 and DS386).<sup>4</sup>

1.2. These disputes concern country of origin labelling (COOL) of meat products. The products at issue are imported Canadian cattle and hogs and imported Mexican cattle, which are used in the United States to produce beef and pork.<sup>5</sup> In the original proceedings, the Appellate Body upheld the panel's finding under Article 2.1 of the Agreement on Technical Barriers to Trade (TBT Agreement) that the "original COOL measure"<sup>6</sup> modified the conditions of competition in the US market to the detriment of imported livestock by creating an incentive in favour of processing exclusively domestic livestock and a disincentive against handling imported livestock. Furthermore, the Appellate Body upheld the original panel's ultimate conclusion that the original COOL measure was inconsistent with Article 2.1 of the TBT Agreement because it accorded less favourable

<sup>1</sup> In DS386.

<sup>2</sup> In DS384.

<sup>3</sup> WT/DS384/RW and WT/DS386/RW, 20 October 2014. The Panel issued its findings in the form of a single document containing two separate reports. The document comprises common sections containing the cover page, table of contents, and sections 1 to 7, and separate conclusions and recommendations in respect of the dispute initiated by Canada and of the dispute initiated by Mexico. (See Panel Reports, para. 1.14)

<sup>4</sup> The recommendations and rulings of the DSB resulted from the adoption, on 23 July 2012, by the DSB of the Appellate Body reports, WT/DS384/AB/R / WT/DS386/AB/R, and the panel reports, WT/DS384/R / WT/DS386/R, as modified, in *US – COOL*. In the present Reports, we refer to the panel that considered the original complaints brought by Canada and Mexico as the "original panel" and to its reports as the "original panel reports".

<sup>5</sup> Panel Reports, para. 2.2.

<sup>6</sup> In the present Reports, we refer to the COOL statute together with the 2009 Final Rule (AMS) as the "original COOL measure" (see *infra*, para. 1.7).

treatment to imported livestock than to like domestic livestock.<sup>7</sup> Moreover, the Appellate Body reversed the panel's finding that the original COOL measure was inconsistent with Article 2.2 of the TBT Agreement. The Appellate Body found that the panel properly identified the legitimate objective of the original COOL measure as being "to provide consumer information on origin".<sup>8</sup> However, it concluded that the panel had erred in its interpretation and application of Article 2.2 in finding the original COOL measure to be inconsistent with Article 2.2 of the TBT Agreement. Accordingly, the Appellate Body reversed the panel's finding that "the COOL measure does not fulfil the identified objective within the meaning of Article 2.2 because it fails to convey meaningful origin information to consumers."<sup>9</sup> Given the lack of sufficient undisputed facts on the panel record or factual findings by the original panel, the Appellate Body was unable to complete the legal analysis to determine whether the original COOL measure was more trade restrictive than necessary to fulfil a legitimate objective.<sup>10</sup>

1.3. The Appellate Body made no findings with respect to the complainants' conditional claims under Articles III:4 and XXIII:1(b) of the General Agreement on Tariffs and Trade 1994 (GATT 1994), because the conditions on which those appeals were based, namely, the reversal of the original panel's findings under Article 2.1 of the TBT Agreement, were not satisfied.<sup>11</sup>

1.4. The Appellate Body recommended that the DSB request the United States to bring its measures into conformity with its obligations under the GATT 1994 and the TBT Agreement.<sup>12</sup> On 23 July 2012, the DSB adopted the original panel and Appellate Body reports. At the meeting of the DSB held on 31 August 2012, the United States signalled its intention to comply with the recommendations and rulings of the DSB, and stated that it would need a reasonable period of time in which to do so. The reasonable period of time for implementation was determined through arbitration pursuant to Article 21.3(c) of the DSU to be ten months, expiring on 23 May 2013.<sup>13</sup>

1.5. Following the original proceedings, the Agricultural Marketing Service (AMS) of the US Department of Agriculture (USDA) issued a final rule, effective 23 May 2013, to make changes to the labelling provisions for muscle-cut covered commodities and certain other modifications. The Article 21.5 Panel found that this rule is the only regulatory change identified by the parties in the compliance proceedings as the "measure taken to comply" by the United States with the DSB's recommendations and rulings in the original disputes.<sup>14</sup>

1.6. On 24 May 2013, the United States informed the DSB that, by virtue of a final rule issued by the USDA making certain changes to the COOL requirements, the United States had complied with the DSB's recommendations and rulings in these disputes.<sup>15</sup> Canada and Mexico, however, considered that the "amended COOL measure"<sup>16</sup> did not bring the United States into compliance with the recommendations and rulings of the DSB.<sup>17</sup> Accordingly, on 19 August 2013, Canada and Mexico requested the establishment of a panel pursuant to Articles 6 and 21.5 of the DSU, Article 14 of the TBT Agreement, and Article XXIII of the GATT 1994.<sup>18</sup> The Panel was established by the DSB on 25 September 2013.<sup>19</sup>

<sup>7</sup> Appellate Body Report (DS384), *US – COOL*, para. 496(a); Appellate Body Report (DS386), *US – COOL*, para. 496(a).

<sup>8</sup> Appellate Body Reports, *US – COOL*, para. 433.

<sup>9</sup> Appellate Body Report (DS384), *US – COOL*, para. 496(b)(iv) and (v); Appellate Body Report (DS386), *US – COOL*, para. 496(b)(iv) and (v).

<sup>10</sup> Appellate Body Report (DS384), *US – COOL*, para. 496(b); Appellate Body Report (DS386), *US – COOL*, para. 496(b).

<sup>11</sup> Appellate Body Report (DS384), *US – COOL*, para. 496(c); Appellate Body Report (DS386), *US – COOL*, para. 496(c).

<sup>12</sup> Appellate Body Report (DS384), *US – COOL*, para. 497; Appellate Body Report (DS386), *US – COOL*, para. 497.

<sup>13</sup> Award of the Arbitrator, *US – COOL (Article 21.3(c))*, para. 123.

<sup>14</sup> Panel Reports, para. 7.8.

<sup>15</sup> WT/DSB/M/332, p. 22.

<sup>16</sup> In the present Reports, we refer to the COOL statute together with the 2009 Final Rule (AMS) and the 2013 Final Rule, and any modifications or amendments thereto, as the "amended COOL measure" (see *infra*, para. 1.7).

<sup>17</sup> WT/DSB/M/332, p. 22.

<sup>18</sup> WT/DS384/26 (Canada); WT/DS386/25 (Mexico).

<sup>19</sup> Panel Reports, para. 1.4.

1.7. In their panel requests, Canada and Mexico identified the amended COOL measure, comprising the following instruments, as the subject of their claims:

- a. the COOL statute – Agricultural Marketing Act of 1946<sup>20</sup>, as amended by the Farm Security and Rural Investment Act of 2002<sup>21</sup> (2002 Farm Bill) and the Food, Conservation, and Energy Act of 2008<sup>22</sup> (2008 Farm Bill);
- b. the 2009 Final Rule (AMS) – Final 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<sup>23</sup>;
- c. the 2013 Final Rule – Final 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<sup>24</sup>; and
- d. any modifications or amendments to the instruments listed in a. through c. above, including any further implementing guidance, directives, policy announcements, or any other document issued in relation to these instruments.

1.8. Canada and Mexico requested the Article 21.5 Panel to find that the United States has failed to comply with the recommendations and rulings adopted by the DSB on 23 July 2012 on the basis that the amended COOL measure violates Articles 2.1 and 2.2 of the TBT Agreement and Article III:4 of the GATT 1994. Furthermore, Canada and Mexico requested the Panel to find that the amended COOL measure nullifies or impairs benefits accruing to Canada and Mexico within the meaning of Article XXIII:1(b) of the GATT 1994.

1.9. The Panel Reports were circulated to Members of the World Trade Organization (WTO) on 20 October 2014. In its Reports, the Panel made procedural rulings regarding: (i) additional procedures for the protection of business confidential information (BCI); (ii) procedures for an oral hearing open to public observation; and (iii) enhanced third party rights.<sup>25</sup>

1.10. With regard to Canada's and Mexico's claims under the TBT Agreement, the Panel concluded<sup>26</sup> that:

- a. the amended COOL measure is a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement;
- b. the amended COOL measure violates Article 2.1 because it accords Canadian and Mexican livestock treatment less favourable than that accorded to like domestic livestock, in particular, because the amended COOL measure increases the original COOL measure's detrimental impact on the competitive opportunities of Canadian and Mexican livestock, and this detrimental impact does not stem exclusively from legitimate regulatory distinctions; and
- c. Canada and Mexico had not made a *prima facie* case that the amended COOL measure is more trade restrictive than necessary within the meaning of Article 2.2 of the TBT Agreement.

<sup>20</sup> 60 Stat. 1087, *United States Code*, Title 7, Section 1621 et seq., as amended (Panel Exhibit CDA-3).

<sup>21</sup> Public Law No. 107-171, Section 10816, 116 Stat. 134 (Panel Exhibit CDA-4).

<sup>22</sup> Public Law No. 110-234, Section 11002, 122 Stat. 923 (Panel Exhibit CDA-5).

<sup>23</sup> *United States Federal Register*, Vol. 74, No. 10 (15 January 2009), pp. 2658-2707 (Panel Exhibits CDA-2 and MEX-12).

<sup>24</sup> *United States Federal Register*, Vol. 78, No. 101 (24 May 2013), pp. 31367-31385 (Panel Exhibits CDA-1 and MEX-3).

<sup>25</sup> Panel Reports, paras. 1.10, 1.11, 1.15, and 1.16.

<sup>26</sup> Canada Panel Report (DS384), para. 8.3; Mexico Panel Report (DS386), para. 8.3.

1.11. Furthermore, regarding Canada's and Mexico's claims under the GATT 1994, the Panel concluded that the amended COOL measure violates Article III:4 because it has a detrimental impact on the competitive opportunities of imported livestock and, thus, accords less favourable treatment than that accorded to like domestic livestock, within the meaning of Article III:4 of the GATT 1994.<sup>27</sup>

1.12. Finally, in the light of these findings of violation, the Panel exercised judicial economy with regard to the non-violation claims under Article XXIII:1(b) of the GATT 1994 raised by Canada and Mexico.<sup>28</sup>

1.13. On 28 November 2014, the United States notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Reports and certain legal interpretations developed by the Panel, and filed a Notice of Appeal<sup>29</sup> pursuant to Rule 20 of the Working Procedures for Appellate Review<sup>30</sup> (Working Procedures). The notification was circulated and the Notice of Appeal filed in advance of a special meeting of the DSB scheduled for the same day to consider these Panel Reports. At the request of Canada and Mexico, the special meeting of the DSB proceeded as scheduled to consider these Panel Reports, notwithstanding the filing of a Notice of Appeal by the United States earlier in the day. This meeting was subsequently suspended in order to facilitate informal consultations about a joint request to the Appellate Body by Canada, Mexico, and the United States to modify the time-periods for filing written submissions in this appeal.

1.14. Such a request was filed later on the same day with the Appellate Body. The participants jointly submitted that "exceptional circumstances" present in these disputes meant that strict adherence to the regular deadlines for filing submissions would result in "manifest unfairness" within the meaning of Rule 16(2) of the Working Procedures. In particular, the participants submitted that the time-period set out in Rule 21 would not afford the United States as appellant sufficient time to present its arguments, and that this would impede the development of arguments in subsequent submissions, thereby impeding the orderly conduct of the appeal. In support of their request, the participants pointed to resource constraints due to concurrent work on other pending proceedings, as well as the constraints imposed by the contemporaneous holiday period, the multiple, complex issues at stake in these disputes, and the present workload of the Appellate Body.

1.15. On the same day, the Presiding Member of the Appellate Body Division hearing this appeal invited the third parties to comment on the joint request of the participants. In order to ensure orderly procedure in the conduct of the appeal in accordance with Rule 16(1) of the Working Procedures, the Division suspended the deadlines for the filing of any Notice of Other Appeal, and of written submissions, until the issuance of a ruling on the joint request for the extension of the deadlines for filing submissions.

1.16. Brazil, the European Union, India, and Japan submitted written comments. All of them considered it to be within the discretion of the Appellate Body to modify deadlines for filing written submissions. No third participant expressed objections to the extension of deadlines as requested by the participants. Brazil expressed no view as to whether the request met the conditions set out in Rule 16(2) of the Working Procedures, whereas the European Union and Japan submitted that the factors present in this case could give rise to "exceptional circumstances", without such factors necessarily setting a precedent for Rule 16(2) or being categorically accepted as constituting "exceptional circumstances" in future cases. India submitted that resource constraints, especially when experienced by developing countries, could constitute "exceptional circumstances" for modifying time-periods, and that what is considered to constitute "exceptional circumstances" in this case could be relevant factors in future appeals. Japan expected that, if the request of the participants was granted, the time-period for filing third participants' submissions would also be extended.

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<sup>27</sup> Canada Panel Report (DS384), para. 8.4; Mexico Panel Report (DS386), para. 8.4.

<sup>28</sup> Canada Panel Report (DS384), para. 8.4; Mexico Panel Report (DS386), para. 8.4.

<sup>29</sup> WT/DS384/29, WT/DS386/28 (attached as Annex 1 to these Reports).

<sup>30</sup> WT/AB/WP/6, 16 August 2010.

1.17. On 2 December 2014, the Division issued a Procedural Ruling extending the time-periods for filing written submissions in this appeal. These time-periods are set out in the Procedural Ruling, which is attached as Annex 4 to these Reports.<sup>31</sup> In accordance with these time-periods, the United States filed an appellant's submission on 5 December 2014.<sup>32</sup>

1.18. On 11 December 2014, the Division received a letter from Australia requesting that the deadline for filing third participants' submissions be further extended. Australia noted that, although the time-period between the filing of the appellees' submissions and the filing of the third participants' submissions set out in the Procedural Ruling of 2 December 2014 was in line with the standard time-periods set out in the Working Procedures, in this particular case this three-day period ran over a weekend, providing the third participants with only one working day to incorporate reactions to the appellees' submissions into their third participants' submissions. Australia further explained that the challenges it faced in preparing its submission were exacerbated by the decreased staffing capacity during the peak summer holiday period in Australia.

1.19. On 12 December 2014, the Division invited the participants and the other third participants to comment on Australia's request. Brazil, Colombia, and New Zealand supported Australia's request that the deadline for filing third participants' submissions be extended. Canada and the United States expressed no objection to an extension of the deadline. Mexico submitted that it had no objection if the timetable for the subsequent stages of the appellate proceedings was not affected and if the extension was granted to all third participants. Japan stated that it had no specific comment on Australia's request.

1.20. On the same day, in keeping with the time-periods set out in the Procedural Ruling of 2 December 2014, Canada and Mexico each notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the respective Panel Report and certain legal interpretations developed by the Panel, and each filed a Notice of Other Appeal<sup>33</sup> and another appellant's submission pursuant to Rule 23 of the Working Procedures.

1.21. On 17 December 2014, the Division issued a Procedural Ruling further extending the deadline for filing third participants' submissions in this appeal to 15 January 2015. The Procedural Ruling is attached as Annex 5 to these Reports.

1.22. On 18 December 2014, the Division received a joint communication from the participants. In that communication, Canada and the United States requested that the Appellate Body allow observation by the public at the oral hearing of the participants' answers to questions as well as statements of those third participants who agree to public observation in this appeal. This request was made on the understanding that any information that was designated as confidential in the documents filed by any party in the Panel proceedings would be adequately protected in the course of the oral hearing before the Appellate Body. For its part, Mexico did not object to allowing observation by the public of the oral hearing, but maintained that its position in these proceedings was without prejudice to its systemic views on the matter.

1.23. On 19 December 2014, the Division invited the third participants to comment on the request of Canada and the United States by 6 January 2015. By that deadline, only Japan had responded, indicating that it had no objection to the request.<sup>34</sup> On 7 January 2015, the Division issued a Procedural Ruling allowing public observation of the oral hearing and adopting additional procedures for the conduct of the hearing. The Procedural Ruling is attached as Annex 6 to these Reports.

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<sup>31</sup> In this Ruling, the date for filing Notice(s) of Other Appeal and other appellants' submissions was set for 12 December 2014, the date for filing appellee's submissions for 9 January 2015, and the date for filing third participants' submissions for 12 January 2015.

<sup>32</sup> Pursuant to Rule 21 of the Working Procedures.

<sup>33</sup> WT/DS384/30 (Canada) (attached as Annex 2 to these Reports); WT/DS386/29 (Mexico) (attached as Annex 3 to these Reports).

<sup>34</sup> In addition, Brazil and Australia responded in the afternoon of 6 January 2015 that they had no objection to this request.

1.24. In accordance with the time-periods set out in the Procedural Ruling of 2 December 2014, Canada, Mexico, and the United States each filed an appellee's submission on 9 January 2015.<sup>35</sup> In keeping with the time-period set out in the Procedural Ruling of 17 December 2014, Australia, Brazil, China, Colombia, the European Union, Japan, and New Zealand each filed a third participant's submission on 15 January 2015.<sup>36</sup> Guatemala<sup>37</sup> and Korea<sup>38</sup> each notified its intention to appear at the oral hearing as a third participant, and India notified that it would not be appearing at the oral hearing.

1.25. The oral hearing in this appeal was held on 16 and 17 February 2015. Public observation took place via simultaneous closed-circuit television broadcast to a separate room. Transmission was turned off during statements made by those third participants that had indicated their wish to maintain the confidentiality of their submissions. The participants and third participants made oral statements and responded to questions posed by the Members of the Appellate Body Division hearing the appeal.

1.26. By letter dated 26 January 2015<sup>39</sup>, the Chair of the Appellate Body notified the Chair of the DSB that the Appellate Body would not be able to circulate its Reports within the 60-day period pursuant to Article 17.5 of the DSU, or within the 90-day period pursuant to the same provision. The Chair of the Appellate Body explained that this was due to a number of factors, including the current workload of the Appellate Body, the number and complexity of the issues raised in this appeal, and the demands that this placed on the WTO Secretariat's translation services, as well as the extensions of the time-periods for filing written submissions granted at the request of the participants and third participants, the intervening year-end closure of the WTO Secretariat, and the scheduling difficulties arising from overlap in the composition of Divisions hearing appeals concurrently pending before the Appellate Body. The Chair of the Appellate Body explained that the date of circulation of the Reports in this appeal would be communicated to the participants and third participants shortly after the oral hearing.

1.27. By letter dated 20 February 2015, Canada, Mexico, and the United States requested to meet with the Appellate Body to discuss the date by which the Appellate Body intended to circulate its Reports. The participants stated that they would consider any reports circulated within the timeframe communicated to them during this meeting to have been circulated in accordance with Article 17.5 of the DSU. By letter dated 2 March 2015, the Division informed the participants that the Appellate Body Reports in this appeal would be circulated no later than 18 May 2015, and explained that the Appellate Body remained interested in exploring with the WTO Membership the issues addressed in the Communication from the Appellate Body of 30 May 2013 entitled, *The Workload of the Appellate Body*.<sup>40</sup>

## 2 ARGUMENTS OF THE PARTICIPANTS AND THIRD PARTICIPANTS

### 2.1 Claims of error by the United States – Appellant

#### 2.1.1 Article 2.1 of the TBT Agreement

2.1. The United States requests the Appellate Body to reverse the Panel's conclusion that the amended COOL measure is inconsistent with Article 2.1 of the TBT Agreement. In particular, the United States requests the Appellate Body to find that the Panel erred in concluding that the detrimental impact of the amended COOL measure on imported livestock does not stem exclusively from legitimate regulatory distinctions. According to the United States, this conclusion of the Panel is based on three intermediate findings that are in error, namely: (i) that the amended COOL measure "entails an increased recordkeeping burden"; (ii) that Labels B and C have a "potential for label inaccuracy"; and (iii) that the amended COOL measure "continues to exempt a large proportion of muscle cuts" from its scope.<sup>41</sup>

<sup>35</sup> Pursuant to Rules 16, 22, and 23(4) of the Working Procedures.

<sup>36</sup> Pursuant to Rules 16 and 24(1) of the Working Procedures.

<sup>37</sup> On 15 January 2015, pursuant to Rule 24(2) of the Working Procedures.

<sup>38</sup> On 11 February 2015, pursuant to Rule 24(4) of the Working Procedures.

<sup>39</sup> Contained in document WT/DS384/31, WT/DS386/30.

<sup>40</sup> See *Appellate Body Annual Report for 2013*, Annex 1.

<sup>41</sup> United States' appellant's submission, para. 53 (quoting Panel Reports, para. 7.282).

### 2.1.1.1 The increased recordkeeping burden entailed by the amended COOL measure

2.2. The United States appeals the Panel's conclusion that the detrimental impact of the amended COOL measure does not stem exclusively from legitimate regulatory distinctions, and alleges that the Panel erred in finding that this measure, as compared to the original COOL measure, entails an increased recordkeeping burden on upstream producers of livestock. The United States advances three claims of error in this regard.

2.3. First, the United States claims that the Panel erred in considering that its finding concerning the increased recordkeeping burden entailed by the amended COOL measure constitutes an independent basis for concluding that the detrimental impact of this measure does not stem exclusively from legitimate regulatory distinctions. The United States submits that, to the extent that the recordkeeping burden entailed by the amended COOL measure is at all relevant to the analysis of the legitimacy of regulatory distinctions under Article 2.1, it is relevant only to the question of whether there is a "disconnect" between, on the one hand, the amount of origin information collected by producers and processors of livestock and, on the other hand, the amount of origin information provided to consumers through mandatory labels. The information collected must be so disproportionate to the information provided that the collection of the information cannot be explained in the first place. In order to make such a finding, the Panel would have needed to examine what information is collected vis-à-vis what is provided by the labels that are actually used in the marketplace. The United States submits that the Panel failed to undertake this inquiry and, therefore, the Panel's reliance on any increase in the recordkeeping burden entailed by the amended COOL measure as a basis for its ultimate conclusion under Article 2.1 is in error.

2.4. Second, the United States asserts that the Panel erred in its analysis of the impact of point-of-production labelling, and the impact of the elimination of the country order flexibility, on the recordkeeping burden entailed by the amended COOL measure. The United States clarifies that it does not dispute that the elimination of the commingling flexibility that had been available under the original COOL measure increased segregation for those companies that had actually been commingling. However, the United States disputes that the introduction of point-of-production labelling and the elimination of the country order flexibility had a similar impact on segregation and recordkeeping.

2.5. As regards the Panel's finding that point-of-production labelling increases the recordkeeping burden in practice for US-slaughtered livestock, the United States claims that this finding is in error because it is not based on an examination of the actual trade in livestock between the three parties to the disputes but, instead, on "incorrect" hypothetical transactions.<sup>42</sup> More specifically, contrary to the various scenarios posited by the Panel, there is no evidence of trade in live animals between Canada and Mexico that would result in the "multiple origin" labels on which the Panel based its findings.<sup>43</sup> The lack of such evidence is explained by the fact that it is highly improbable, if not inconceivable, that the prices for energy, feed, and livestock would ever align such that it would be profitable to export animals between Canada and Mexico even once, much less twice, before exporting to the United States, as the Panel's hypothetical scenarios envision. The United States submits that it is, thus, clear that the Panel's finding that point-of-production labelling increases the recordkeeping burden in practice for US-slaughtered livestock has no basis and, therefore, reliance on such a finding to support a conclusion on detrimental impact constitutes legal error. The United States emphasizes that the scenarios that reflect actual livestock trade between the parties proves the opposite of what the Panel found, namely, that point-of-production labels do not increase the recordkeeping burden. Noting that in *Canada – Periodicals* the Appellate Body reversed the panel's "like product" analysis in the light of its reliance on an incorrect hypothetical, the United States submits that, in the present disputes, the Panel's analysis is similarly flawed due to its reliance on incorrect hypotheticals.<sup>44</sup>

2.6. Third, the United States claims that the Panel erred in finding that the removal of the country order flexibility increases the recordkeeping burden on producers and processors of livestock, and that this supports a conclusion that the detrimental impact of the amended COOL measure does not stem exclusively from legitimate regulatory distinctions. According to the United States, the

<sup>42</sup> United States' appellant's submission, para. 117.

<sup>43</sup> United States' appellant's submission, para. 119.

<sup>44</sup> United States' appellant's submission, para. 123 (referring to Appellate Body Report, *Canada – Periodicals*, pp. 20-23, DSR 1997:1, pp. 465-468).

removal of the country order flexibility creates more distinct labels, but does not alter the recordkeeping burden entailed by the amended COOL measure because, under the original COOL measure, different categories of muscle cuts already had different records. The United States explains that, under the original COOL measure, the country order flexibility allowed non-commingled Category B and C muscle cuts to have labels that could look the same in practice, i.e. Labels B and C could both read "Product of Canada, U.S." By contrast, those same muscle cuts are labelled differently under the amended COOL measure – i.e. Category B muscle cuts are labelled "Born in Canada, Raised and Slaughtered in the U.S.," while Category C muscle cuts are now labelled "Born and Raised in Canada, Slaughtered in the U.S." According to the United States, the fact that there are now two labels – where before there was one – does not mean that the recordkeeping burden has increased under the amended COOL measure, since the records required under the original COOL measure for Category B muscle cuts must have been able to substantiate that they were produced from an animal that was born in Canada and raised and slaughtered in the United States. Similarly, the records required for Category C muscle cuts must have been able to substantiate that they were produced from an animal that was born in Canada, raised in Canada, and exported to the United States for immediate slaughter. Thus, while the removal of the country order flexibility increases the distinct number of labels on non-commingled muscle cuts, it does not increase the recordkeeping burden. The United States submits that, because the Panel made no findings that the elimination of the country order flexibility changed the records required to substantiate Category B and C origin claims, the Panel erred in finding that the removal of this flexibility increases recordkeeping, and that this finding supports a conclusion that the detrimental impact of the amended COOL measure on imported livestock does not stem exclusively from legitimate regulatory distinctions.

#### **2.1.1.2 The accuracy of labels prescribed by the amended COOL measure**

2.7. The United States requests the Appellate Body to find that the Panel erred in finding that Labels B and C under the amended COOL measure convey potentially inaccurate information, and in finding that this supports the Panel's ultimate conclusion that the detrimental impact of that measure does not stem exclusively from legitimate regulatory distinctions. The United States advances two grounds for its claim.

2.8. First, the United States claims that the Panel's finding that Labels B and C are potentially inaccurate is in error because it is based on incorrect hypothetical transactions that do not reflect actual trade in livestock among the three parties to the disputes. The United States explains that the Panel's analysis of label accuracy turns on how information relating to where an animal was "raised" is communicated on Labels B and C in a number of livestock trade scenarios. According to the United States, some of these scenarios reflect actual trade in livestock among the three parties to the disputes, and others are purely hypothetical. As regards Label B, the Panel found that this label is potentially inaccurate in two scenarios: (i) where an animal had a "single foreign origin", e.g. born in either Canada or Mexico and then exported to the United States for further raising and slaughter; and (ii) where an animal had "multiple foreign origins", e.g. born in Mexico, exported to Canada for further raising, then exported to the United States for further raising and slaughter. As regards Label C, the Panel found that, although this label is accurate in practice, it is potentially inaccurate when affixed to muscle cuts produced from animals that have been the subject of at least one, and maybe two, transactions between Mexico and Canada, prior to being exported to the United States for immediate slaughter.<sup>45</sup>

2.9. The United States submits that, in determining whether Labels B and C are potentially inaccurate, the Panel treated each of the scenarios above as being equally persuasive, without regard for the improbability of the various scenarios. As regards Label B, the Panel treated the scenario where an animal was born in Canada and exported to the United States for further raising and slaughter – a scenario that the United States admits occurs – on equal terms with the scenario where an animal was born in Canada, exported to Mexico for raising, and then exported to the United States for further raising and slaughter – a scenario that the United States alleges does not occur. The United States claims that the Panel erred in this regard.

2.10. The United States further contends that, because the claim before the Panel was one of *de facto* discrimination under Article 2.1 of the TBT Agreement, the Panel was precluded from relying on hypothetical transactions that do not reflect actual trade in livestock among the three

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<sup>45</sup> United States' appellant's submission, para. 152.

parties to the disputes. The United States submits in this regard that, in a *de facto* case, a panel must base its finding of detrimental impact on the effect of the measure in the marketplace – "(i.e., the 'facts')".<sup>46</sup> Yet, the Panel drew its conclusion concerning the accuracy of labels under the amended COOL measure on the basis of hypothetical scenarios that have no basis in the factual circumstances of the US market. The United States, thus, submits that, as was the case in *Canada – Periodicals*, the Panel's reliance on such hypotheticals lacks "proper reasoning based on inadequate factual analysis" and, as such, constitutes legal error.<sup>47</sup>

2.11. Second, the United States claims that the Panel erred in considering that its finding that Labels B and C are potentially inaccurate supports its ultimate conclusion under Article 2.1 of the TBT Agreement. The United States submits, in this regard, that the Panel failed to make a determination of whether the labels prescribed by the amended COOL measure are even handed in their design and application, "including" whether a "disconnect" exists between, on the one hand, the origin information required to be kept by producers and processors of livestock and, on the other hand, the origin information that is ultimately conveyed to consumers through the labels. The United States explains that, pursuant to the DSB's recommendations and rulings in the original disputes, the question of whether the detrimental impact on imported livestock reflects discrimination hinges on a determination of whether the relevant regulatory distinctions – i.e. the three categories of muscle cuts derived from US-slaughtered livestock and their corresponding labels – are designed and applied in an even-handed manner. The United States submits that the Panel erred by failing to make this determination.

2.12. The United States asserts that the Panel's criticism of Labels B and C is based on its finding that, by permitting only the United States to be listed as the country in which an animal was raised, these labels could be considered "inaccurate" in circumstances where an animal was, in fact, raised in multiple countries.<sup>48</sup> The United States notes that the Panel appears to criticize the COOL requirements because they do not require the labels prescribed by the amended COOL measure to provide as much detail as the Panel considered optimal, and asserts that it is not the prerogative of panels to determine the level at which Members should seek to fulfil their legitimate objectives. The United States adds that the Panel's finding that Labels B and C are potentially inaccurate because they permit the omission of information regarding the countries in which an animal was raised cannot provide a basis for a finding that the COOL requirements are not even-handed.<sup>49</sup> In this regard, the inclusion of information with respect to all of the countries in which an animal was raised would not provide additional origin information because it is understood that an animal born in a country other than the United States will have been raised at least a portion of its life in that other country. The United States argues that the Panel failed to provide a reason as to why consumers would understand this differently.

2.13. The United States asserts that the "central criticism" of the Appellate Body with regard to the original COOL measure was that the origin information provided by Labels B and C was "far less detailed and accurate than the information required to be tracked and transmitted by ... producers and processors" of livestock that the tracking and transmission of such information "[could not] be explained by the need to convey ... [origin] information" on meat products to consumers.<sup>50</sup> The United States contends that the compliance Panel adopted a different analytical framework from that of the Appellate Body in the original disputes, because the Panel failed to address the question of whether there is a "disconnect" between the information required to be collected by producers and processors of livestock, and the information ultimately conveyed to consumers by the labels prescribed by the amended COOL measure. In this regard, although the Panel criticized the amended COOL measure on the basis of the omission of countries of raising where an animal was raised in multiple countries, the Panel did not make a finding that the amended COOL measure requires that producers and processors of livestock track and transmit any information that is not provided by the labels. As such, the Panel erred, as a matter of law, by finding that the informational "disconnect" that the Appellate Body found to exist under the original COOL measure continues to exist under the amended COOL measure.

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<sup>46</sup> United States' appellant's submission, para. 158.

<sup>47</sup> United States' appellant's submission, para. 159 (quoting Appellate Body Report, *Canada – Periodicals* p. 22, DSR 1997:1, p. 467).

<sup>48</sup> United States' appellant's submission, para. 165 (quoting Panel Reports, para. 7.243).

<sup>49</sup> United States' appellant's submission, para. 169.

<sup>50</sup> United States' appellant's submission, para. 172 (quoting Appellate Body Reports, *US – COOL*, para. 349).

### 2.1.1.3 The exemptions under the amended COOL measure

2.14. The United States requests the Appellate Body to find that the Panel erred in finding that the scope of the exemptions under the amended COOL measure constitutes a basis for concluding that the detrimental impact of that measure does not stem exclusively from legitimate regulatory distinctions. The three exemptions at issue preclude the application of the COOL requirements to muscle-cut commodities that are: (i) used as an ingredient in a "processed food item"; (ii) prepared or served at a "food service establishment"; or (iii) sold by entities not meeting the definition of the term "retailer".<sup>51</sup> The United States advances three main arguments in support of this claim of error.

2.15. First, the United States claims that the Panel erred in finding that the exemptions are relevant to the analysis of whether the detrimental impact of the amended COOL measure stems exclusively from legitimate regulatory distinctions. According to the United States, only regulatory distinctions that account for the detrimental impact on imported products can answer the question of whether such detrimental impact reflects discrimination. The United States points out that the original panel had found that the exemptions under the original COOL measure were not a source of detrimental impact on imported livestock. Thus, the compliance Panel should not have found the exemptions relevant to its analysis of whether the detrimental impact of the amended COOL measure stems exclusively from legitimate regulatory distinctions. For the United States, the Panel's "legal framework" is in error, because regulatory distinctions that are not relevant fall outside the scope of the analysis under Article 2.1 of the TBT Agreement.<sup>52</sup>

2.16. Second, the United States claims that, aside from the fact that the exemptions are not relevant to the Panel's analysis, the Panel erred in determining that they demonstrate that the detrimental impact of the amended COOL measure reflects discrimination prohibited by Article 2.1. In particular, because the Panel failed to take into account the three considerations elaborated on below, the Panel erred in finding that the exemptions support a conclusion that the detrimental impact of the amended COOL measure reflects discrimination.

2.17. The United States submits that the Panel failed to take account of the fact that the exemptions apply equally to meat derived from imported and domestic livestock, and are thus "perfectly even handed".<sup>53</sup> The United States asserts that it is uncontested that neither the design, nor the operation, of the exemptions disadvantage Canadian and Mexican livestock exports. In this regard, these exemptions are "wholly different" from the exemptions under the measures at issue in *US – Clove Cigarettes* and *EC – Seal Products*.<sup>54</sup> The United States explains that, in *US – Clove Cigarettes*, the Appellate Body found that the exemption of menthol cigarettes from the ban on flavoured cigarettes was not even handed because producers of menthol cigarettes – mainly US producers – could take advantage of the exemption notwithstanding the fact that menthol cigarettes presented a risk similar to that presented by the banned products.<sup>55</sup> Similarly, the panel in *EC – Seal Products* found that the indigenous community exemption was not even handed in the light of the fact that, while seal products from Greenland could benefit from that exemption, seal products from Canada could not, even though the hunts from which these seal products were derived "greatly approximated one another".<sup>56</sup> According to the United States, the same dynamic does not arise in the case of the exemptions under the amended COOL measure. By failing to take this into account, the Panel erred in finding that these exemptions support a conclusion that the detrimental impact of the amended COOL measure reflects discrimination.

2.18. The United States further submits that, in its assessment of the exemptions, the Panel failed to take into account the "legitimate desire of Members to adjust the scope of their technical regulations" for cost considerations.<sup>57</sup> As the Panel explicitly recognized, "it is not atypical for any kind of regulation to have exceptions in terms of the products and entities that are subject to it" and that "[s]ome of such exceptions might be justifiable for practical reasons and simply facilitate

<sup>51</sup> United States' appellant's submission, para. 184 (referring to Panel Reports, paras. 7.28-7.30).

<sup>52</sup> United States' appellant's submission, para. 201.

<sup>53</sup> United States' appellant's submission, para. 207.

<sup>54</sup> United States' appellant's submission, para. 208.

<sup>55</sup> United States' appellant's submission, para. 208 (referring to Appellate Body Report, *US – Clove Cigarettes*, para. 225).

<sup>56</sup> United States' appellant's submission, para. 208 (referring to Panel Reports, *EC – Seal Products*, para. 7.317).

<sup>57</sup> United States' appellant's submission, para. 187.

the implementation of the measure at issue without necessarily involving protectionist intent."<sup>58</sup> Moreover, in its analysis under Article 2.2 of the TBT Agreement, the Panel recognized that "there may be a variety of possible reasons unrelated to risks for exempting or treating differently certain product categories under a Member's technical regulation, such as regulatory or compliance costs."<sup>59</sup> The United States asserts that, consistent with these acknowledgements, the exemptions under the amended COOL measure constitute "important mechanisms that policy makers use to control costs of measures in pursuit of legitimate government objectives".<sup>60</sup>

2.19. The United States explains that, while its intent is to provide consumers with accurate and meaningful information on the origin of the meat that they purchase, it does not intend to do so "at any cost".<sup>61</sup> Accordingly, even if such information was, and remains, desired by consumers, the United States, ultimately, set a slightly lower level of fulfilment by including exemptions in the amended COOL measure, as is the prerogative of any regulator. Further, the cost savings provided by the exemptions under the amended COOL measure are real. In this regard, it is uncontested that removing these exemptions would increase recordkeeping, verification, and segregation costs in the United States. The United States highlights that it is not the only Member seeking to balance, on the one hand, the provision of information to consumers concerning the products that they purchase and, on the other hand, the costs of providing such information. Thus, the exemptions under the amended COOL measure reflect sound public policy, rather than arbitrary discrimination.

2.20. The United States further argues that, in its assessment of the exemptions, the Panel failed to take into account that, in the light of the enhanced accuracy of the labels prescribed by the amended COOL measure, the recordkeeping burden entailed by that measure can now be explained by the need to provide origin information to consumers. According to the United States, the scope of the exemptions under the original COOL measure further corroborated the problem under that measure that adequate information was not provided on Labels B and C to justify the recordkeeping required of producers and processors of livestock. However, under the amended COOL measure, this underlying problem has now been corrected so that more detailed and accurate information is provided to consumers on the labels. The United States further contends that, although the exemptions have not been eliminated, this alone cannot be determinative of whether the detrimental impact of the amended COOL measure on imported livestock stems exclusively from legitimate regulatory distinctions. In the United States' view, the Panel erred by failing to examine whether, in the light of the more detailed and accurate information provided on labels to consumers, the recordkeeping burden imposed on producers and processors of livestock can now be explained by the need to provide origin information to consumers, notwithstanding the continued existence of the exemptions.

2.21. In addition to the enhanced accuracy of the labels prescribed by the amended COOL measure, the United States also considers it important to highlight that the coverage of the amended COOL measure is hardly limited. These two factors – the origin information provided to consumers (in terms of detail and accuracy) and the sheer breadth of what is sold by the tens of thousands of retailers covered by the amended COOL measure – provide a sound basis for the recordkeeping required of producers and processors of livestock in order to substantiate where an animal was born, raised, and slaughtered. The United States submits that the exemptions, therefore, do not support a finding that the detrimental impact of the amended COOL measure reflects discrimination.

2.22. The United States also challenges the Panel's assessment of the exemptions on the ground that the Panel failed to undertake an evaluation of the operation of the exemptions in the US market. The United States asserts that the Panel drew a conclusion that distinct distribution channels for the sale of meat products to exempt entities do not exist simply by repeating a statement of the original panel that "the ultimate disposition of a meat product is often not known at any particular stage of the production chain"<sup>62</sup>, and a statement by the Appellate Body that

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<sup>58</sup> United States' appellant's submission, para. 210 (quoting Panel Reports, para. 7.275, in turn quoting Original Panel Reports, *US – COOL*, para. 7.684).

<sup>59</sup> United States' appellant's submission, para. 210 (quoting Panel Reports, para. 7.380).

<sup>60</sup> United States' appellant's submission, para. 211. (fn omitted)

<sup>61</sup> United States' appellant's submission, para. 212. (emphasis omitted)

<sup>62</sup> United States' appellant's submission, para. 233 (quoting Panel Reports, para. 7.272, in turn quoting Original Panel Reports, *US – COOL*, para. 7.417, in turn quoting United States' response to original panel question No. 93, para. 16).

"information regarding the origin of *all* livestock will have to be identified, tracked, and transmitted through the chain of production by upstream producers ... even though 'a considerable proportion' of the beef and pork derived from that livestock will ultimately be exempt from the COOL requirements and therefore carry no COOL label at all."<sup>63</sup> The United States points out that, in making this statement, the Appellate Body cited the statement of the original panel that "the ultimate disposition of a meat product is often not known at any particular stage of the production chain." This statement, in turn, is a quotation from an answer provided by the United States to a question from the original panel. The United States explains that the question was not whether distinct distribution channels exist for sales to exempt establishments but, instead, how operators in the distribution chain distinguish exempt and non-exempt meat. The United States contends that its answer spoke to that specific question, indicating that the United States was "not aware of any evidence" that operators "systematically separate[]" animals or meat products, and that this was due to the fact that "the ultimate disposition of a meat product is often not known at any particular stage of the production chain." Furthermore, this statement related to the situation at the time of the original proceedings.<sup>64</sup> The United States submits that, although its answer to the original panel's question may be understood, in isolation, as supporting a view that mixed distribution channels exist, it does not, on its face, support a conclusion that distinct distribution channels do not exist for sales to exempt establishments.

2.23. The United States contends that whether information regarding the origin of all livestock will have to be identified, tracked, and transmitted through the chain of production by upstream producers is critical to the weight that the Panel could have placed on the exemptions for the purpose of its analysis of whether the detrimental impact of the amended COOL measure reflects discrimination. The Panel should have considered whether the statement that it relied on is currently supported by the operation of the US market, or whether information regarding the origin of less than all livestock is being identified, tracked, and transmitted by producers and processors of livestock. Noting that the Panel did not undertake such an analysis, the United States submits that the Panel erred because it had no basis to conclude that all US slaughterhouses, wholesalers, and exempt retailers take on recordkeeping costs that they are not obligated to assume.

2.24. The United States asserts that record evidence suggests that distinct distribution channels for sales to exempt establishments do, in fact, exist. In the proposed, interim, and final rules, the USDA explained that channels of distribution to exempt establishments would not be subject to the COOL requirements, and that firms were engaged in distribution through such channels.<sup>65</sup> Moreover, in the 2013 Final Rule, one commenter argued that imported products would derive an advantage from the revised labelling requirements, as imported products would be sold through foodservice channels, like restaurants, where they would not have to be labelled.<sup>66</sup> Further, in examining estimated implementation costs of the 2013 Final Rule, the USDA excluded muscle cuts of beef from its estimate, noting that these typically are marketed through hotel, restaurant, or institutional channels, such that they would be covered by the exemptions of the amended COOL measure.<sup>67</sup> In addition, the USDA noted in the 2009 Final Rule (AMS) that most manufacturers of covered commodities will likely print country of origin and, if applicable, method of production information on retail packages supplied to retailers.<sup>68</sup>

2.25. Finally, the United States highlights that Canada, itself, presented evidence from a packer that, once cattle are slaughtered and the meat is processed, packers ship it in boxes to distributors, food service establishments, and retailers.<sup>69</sup> In each of these examples, the ultimate disposition of the meat is known at the slaughterhouse/packer or wholesaler stage of distribution.

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<sup>63</sup> United States' appellant's submission, para. 233 (quoting Panel Reports, para. 7.272, in turn quoting Appellate Body Reports, *US – COOL*, para. 344 (emphasis original), in turn quoting Original Panel Reports, *US – COOL*, para. 7.417).

<sup>64</sup> United States' appellant's submission, para. 242 (quoting United States' response to original panel question No. 93, para. 16).

<sup>65</sup> United States' appellant's submission, para. 240 (referring to 2009 Final Rule (AMS), p. 2696).

<sup>66</sup> United States' appellant's submission, para. 240 (referring to 2013 Final Rule, p. 31374).

<sup>67</sup> United States' appellant's submission, para. 240 (referring to 2013 Final Rule, p. 31380).

<sup>68</sup> United States' appellant's submission, para. 240 (referring to 2009 Final Rule (AMS), p. 2695).

<sup>69</sup> United States' appellant's submission, para. 240 (referring to United States District Court for the District of Columbia, *American Meat Institute v. United States Department of Agriculture*, Case No. 13-cv-1033, Declaration of Brad McDowell in Support of Plaintiffs' Motion for a Preliminary Injunction (25 July 2013) (Panel Exhibit CDA-17), para. 5).

Thus, there was evidence before the Panel that the ultimate disposition of a meat product is known at any particular stage of distribution. The question the Panel should then have asked is how often the ultimate disposition of meat products would not be known. Yet, the Panel simply did not examine this question. The United States notes that, although it is not aware of the extent of use of distinct distribution channels by US economic operators, neither Canada nor Mexico presented any evidence that slaughterhouses, wholesalers, and exempt establishments are not making use of the exemptions to establish lower-cost channels of distribution. The limited evidence on the record relating to this issue suggests that distinct distribution channels for sales to exempt establishments do exist. Thus, submits the United States, the Panel's conclusion is unsupportable.

### 2.1.2 Article 2.2 of the TBT Agreement

2.26. Conditional on Canada or Mexico appealing the Panel's findings on Article 2.2 of the TBT Agreement, the United States requests the Appellate Body to reverse certain aspects of the Panel's interpretation of Article 2.2. In particular, the phrase "taking account of the risks non-fulfilment would create" should not be interpreted to mean that providing less origin information for a significantly wider range of products might achieve an equivalent degree of contribution as the amended COOL measure.<sup>70</sup> Rather, the United States argues that the phrase "taking account of the risks non-fulfilment would create" is properly understood as a reflection that an individual Member takes into account such risks when setting its desired level of fulfilment of a legitimate objective.

2.27. In the United States' view, it is within a Member's discretion to determine what legitimate objectives it seeks to pursue, and to what degree it wishes to pursue those objectives.<sup>71</sup> In that regard, the United States points to the sixth preambular recital of the TBT Agreement, which states that it is a Member's right to pursue legitimate objectives "at the levels it considers appropriate".<sup>72</sup> A technical regulation can only be found to be "more trade restrictive than necessary" under Article 2.2 where an alternative, less trade-restrictive measure that makes an equivalent contribution to the objective is reasonably available to the Member. An approach that leads to a finding of inconsistency with Article 2.2 on the basis of proposed alternative measures that provide less origin information would not be compatible with the fundamental premise that it is up to the Member adopting the technical regulation to decide the level at which it provides consumer information on origin, regardless of whether "the risks non-fulfilment would create" are high or low.

2.28. According to the United States, the Panel's interpretation of the phrase "taking account of the risks non-fulfilment would create" would appear to enable a panel to judge whether a trade-off between less origin information and wider product coverage could produce an equivalent contribution to the achievement of the objective of the amended COOL measure. In the United States' view, such an analysis would go beyond considering a challenged measure's contribution to a legitimate objective, and require an analysis of a Member's domestic interests, expectations, risks, and concerns. The value to assign to various objectives and the levels at which Members desire to fulfil particular objectives are very sensitive questions, and Members' views on these questions will vary, based on domestic conditions, societal preferences, cultural considerations, and other factors. The United States further contends that the objectives at issue include those relating to human health and safety, and that, under the Panels' approach, WTO panels would substitute their judgement for that of Members with respect to what value to assign to human health and safety and the risks created by not fulfilling the protection of human health and safety at the desired level. For the United States, any judgement based on the Panel's interpretation would ultimately be subjective, lacking any objective basis for determining whether a measure is more trade restrictive than necessary.

<sup>70</sup> United States' appellant's submission, para. 249 (referring to Panel Reports, para. 7.488).

<sup>71</sup> United States' appellant's submission, para. 260.

<sup>72</sup> United States' appellant's submission, fn 306 to para. 260 (quoting Appellate Body Reports, *US – COOL*, para. 373, in turn quoting Appellate Body Report, *US – Tuna II (Mexico)*, para. 316).

### 2.1.3 Articles III:4 and IX of the GATT 1994

2.29. The United States requests the Appellate Body to find that the Panel erred in concluding that the amended COOL measure is inconsistent with Article III:4 of the GATT 1994, in particular, by failing to take into account Article IX of the GATT 1994 as relevant context. According to the United States, the context of Article IX informs the interpretation and application of Article III:4, and the Panel erred in finding that less favourable treatment could be demonstrated based on detrimental impact without a further inquiry into the context provided by Article IX of the GATT 1994.

2.30. The United States refers to the Appellate Body's statement in *EC – Seal Products* that, "under the TBT Agreement, the balance between the desire to avoid creating unnecessary obstacles to international trade under the fifth recital, and the recognition of Members' right to regulate under the sixth recital, is not, in principle, different from the balance set out in the GATT 1994, where obligations such as national treatment in Article III are qualified by the general exceptions provision of Article XX"<sup>73</sup>, and submits that this statement is based on considerations of the context afforded to Article III:4 by Article XX. In the same vein, the United States asserts that, in the present disputes, the Panel should have considered the context provided by Article IX in interpreting Article III:4 of the GATT 1994.

2.31. In particular, the United States contends that Articles IX:2 and IX:4 of the GATT 1994 recognize that laws and regulations concerning consumer information on origin may cause difficulties and inconvenience to exporting Members, and increase the cost of imported products. Consequently, Article III:4, when read in the context of Article IX, provides regulatory space for Members to provide consumers with information as to the origin of products in the sense that "reasons for any difficulties and inconveniences caused by the measures" should be taken into account.<sup>74</sup> This requires consideration of whether difficulties and inconveniences could "be reduced, with due regard to the necessity of protecting consumers, and what the reasons would be for any increased cost for imported products caused by the measures, in particular whether the measures unreasonably increase the cost of imported products."<sup>75</sup>

2.32. The United States highlights the Panel's statement that "there may be a variety of possible reasons unrelated to risks for exempting or treating differently certain product categories under a Member's technical regulation, such as regulatory or compliance costs"<sup>76</sup>, and submits that the Panel erred in failing to consider, in its Article III:4 analysis, the role of possible reasons, such as regulatory or compliance costs, for the structure of the amended COOL measure and its impact on imported livestock.

2.33. The United States contends that the need to take into account the context provided by Article IX in interpreting Article III:4 of the GATT 1994 is particularly relevant in these disputes, in the light of the original panel's finding that it is a legitimate objective of the United States to provide consumers with information on the country of origin of meat at the level of fulfilment that the United States considers appropriate. For the United States, the compliance Panel's finding that providing such information at the chosen level of fulfilment results in detrimental impact on the conditions of competition for imported livestock creates a "paradox".<sup>77</sup> On the one hand, the United States would be entitled to adopt a measure in order to provide this information to consumers. On the other hand, that measure could never be consistent with Article III:4, since it would have a detrimental impact on imported livestock.

2.34. Finally, the United States asserts that the Panel's approach would render Article IX inutile because, if a finding of detrimental impact alone were sufficient to establish discrimination in the context of marks of origin, then the provisions of Article IX would not be relevant, since a complainant could invoke the non-discrimination provisions of the GATT 1994 and there would be no utility for a complainant to invoke Article IX.

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<sup>73</sup> United States' appellant's submission, para. 277 (quoting Appellate Body Reports, *EC – Seal Products*, para. 5.127, in turn referring to Appellate Body Report, *US – Clove Cigarettes*, para. 96).

<sup>74</sup> United States' appellant's submission, para. 284.

<sup>75</sup> United States' appellant's submission, para. 284.

<sup>76</sup> United States' appellant's submission, para. 286 (quoting Panel Reports, para. 7.380).

<sup>77</sup> United States' appellant's submission, para. 288.

#### 2.1.4 Article XX of the GATT 1994

2.35. The United States requests the Appellate Body to find that the Panel erred by not addressing, at the interim review stage, the availability of Article XX of the GATT 1994 as an exception with respect to the amended COOL measure.<sup>78</sup> In addition, the United States requests the Appellate Body to complete the legal analysis and find which of the Article XX exceptions would be available "so as to maintain the balance between a Member's right to regulate and the desire to avoid unnecessary obstacles to trade"<sup>79</sup>, and to find that the amended COOL measure qualifies as "necessary" within the meaning that has been given to that term as used in Article XX of the GATT 1994.

2.36. The United States notes that, in its analysis of Article III:4 of the GATT 1994, the Panel relied on the Appellate Body reports in *EC – Seal Products*. The United States submits that, because those reports were circulated only after the conclusion of the period in which the parties in the COOL disputes could submit evidence and arguments, the present Article 21.5 proceedings presented an extraordinary situation. In particular, the United States refers to the statement of the Appellate Body in *EC – Seal Products* that, "under the TBT Agreement, the balance between the desire to avoid creating unnecessary obstacles to international trade ... and the recognition of Members' right to regulate ... is not, in principle, different from the balance set out in the GATT 1994, where obligations such as national treatment in Article III are qualified by the general exceptions provision of Article XX."<sup>80</sup> The United States asserts that this statement came too late for the parties in the present Article 21.5 proceedings to submit evidence or argumentation with respect to Article XX of the GATT 1994.

2.37. The United States recalls that, at the interim review stage, it requested the Panel to address the relationship between Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994, and to address the availability of an Article XX exception with respect to the amended COOL measure. The United States takes issue with the Panel's response to this request that, having found the amended COOL measure to be in violation of both Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994, the Panel was not faced with the situation hypothetically suggested by the United States. For the United States, the Panel failed to appreciate the concern being expressed, which was not of a hypothetical nature, but flowing logically from the Panel's findings in the interim report. The Panel contemplated that the amended COOL measure could be brought into compliance with Article 2.1 of the TBT Agreement. The United States asserts that, if that were the case, there would presumably still be detrimental impact on imported livestock, but that detrimental impact would stem exclusively from legitimate regulatory distinctions.

2.38. The United States further contends that, under the Panels' approach, a measure consistent with Article 2.1 of the TBT Agreement would nonetheless be in breach of Article III:4 of the GATT 1994 if any detrimental impact remained, unless the measure qualified for an exception under Article XX of the GATT 1994. Therefore, the Panel was required to address the availability of Article XX as an exception with respect to the amended COOL measure in order to facilitate the resolution of the COOL disputes. If the balance under Article 2.1 of the TBT Agreement is in principle no different from the balance under Article III:4 and Article XX of the GATT 1994, then the Panel should have been able to explain how that would apply in the context of the COOL disputes. For the United States, the Panel's approach raises the question as to whether the balance is upset where the objective of the measure at issue is not one that is specified in Article XX of the GATT 1994. The United States further contends that this would undermine the ability of Members to regulate, and to pursue a wide range of objectives, including providing consumer information, preventing deceptive practices. If the amended COOL measure could be consistent with Article 2.1 of the TBT Agreement, while at the same time violating Article III:4 of the GATT 1994, the United States' right to regulate under the two agreements would be out of balance, and this would not conform to the Appellate Body's statement in *EC – Seal Products*.

<sup>78</sup> United States' appellant's submission, para. 301.

<sup>79</sup> United States' appellant's submission, para. 301.

<sup>80</sup> United States' appellant's submission, para. 277 (quoting Appellate Body Reports, *EC – Seal Products*, para. 5.127, in turn referring to Appellate Body Report, *US – Clove Cigarettes*, para. 96). See also *ibid.*, para. 291.

### 2.1.5 Article XXIII:1(b) of the GATT 1994

2.39. In the event that Canada or Mexico appeals the Panel's decision to exercise judicial economy with respect to Canada's and Mexico's non-violation claims under Article XXIII:1(b) of the GATT 1994, the United States requests the Appellate Body to find that these claims were not within the Panel's terms of reference. The United States argues that the Panel erred in concluding that "reviewing the 'consistency' of a measure taken to comply under Article 21.5 of the DSU extends to non-violation claims under Article XXIII:1(b) of the GATT 1994 and Article 26.1 of the DSU"<sup>81</sup>, and submits that the Panel's conclusion "is not based on the text of Article 21.5 of the DSU itself, but rather ... over-ride[s] that text based on 'systemic considerations' and what the Panel[] perceived to be the 'objective' of Article 21.5 of the DSU."<sup>82</sup>

2.40. The United States contends that Article 21.5 of the DSU, read in its context, demonstrates that "consistency with a covered agreement of measures taken to comply" under Article 21.5 does not encompass review of a measure taken to comply in order to determine if the measure results in non-violation nullification or impairment. According to the United States, "Article 19.1 of the DSU explicitly contrasts 'inconsistency' with 'not involving a violation'.<sup>83</sup> While the recommendation under Article 19.1 is that the Member concerned bring the measure into conformity with the infringed agreement, this recommendation is not permitted under Article 26, which provides that, when there is a finding of non-violation, there is no obligation to withdraw the measure but, rather, to make a mutually satisfactory adjustment. Footnote 10 to Article 19.1 also addresses and recognizes this difference between "consistency" and "non-violation".

2.41. Moreover, the United States submits that, given the "exceptional" status of non-violation claims, such claims cannot be raised for the first time in compliance proceedings under Article 21.5 of the DSU.<sup>84</sup> The United States also alleges that the Panel's reliance on its view of the objective of Article 21.5 appears to have resulted in the Panel finding that the perceived objective justifies ignoring the text of the provision. Further, the United States maintains that the Panel erred in invoking "efficiency" as a basis for disregarding the agreed text of the covered agreements.<sup>85</sup>

## 2.2 Arguments of Canada – Appellee

### 2.2.1 Article 2.1 of the TBT Agreement

2.42. Canada requests the Appellate Body to reject the United States' claim that the Panel erred in concluding that the detrimental impact of the amended COOL measure on imported livestock does not stem exclusively from legitimate regulatory distinctions. According to Canada, the United States' claims and arguments under Article 2.1 of the TBT Agreement suggest that the Panel should have adopted and applied a legal framework that is at odds with the framework that the Appellate Body articulated and applied in the original disputes.

#### 2.2.1.1 The increased recordkeeping burden entailed by the amended COOL measure

2.43. Canada requests the Appellate Body to reject the United States' claim that the Panel erred by considering that its finding that the amended COOL measure entails an increased recordkeeping burden on upstream producers of livestock constitutes an independent basis for concluding that the detrimental impact of that measure does not stem exclusively from legitimate regulatory distinctions. In Canada's view, the United States seeks to create the erroneous impression that the Panel found that the increased recordkeeping burden entailed by the amended COOL measure *ipso facto* demonstrates that the detrimental impact of that measure does not stem exclusively from legitimate regulatory distinctions. Canada asserts, however, that this is not borne out by the analysis that the Panel conducted.

2.44. Canada contends that, at the outset of its analysis, the Panel stated that it would address the information that must be maintained by producers and processors of livestock – i.e. the recordkeeping burden – before turning to address the information ultimately conveyed to

<sup>81</sup> United States' appellant's submission, para. 307 (quoting Panel Reports, para. 7.663).

<sup>82</sup> United States' appellant's submission, para. 308.

<sup>83</sup> United States' appellant's submission, para. 316.

<sup>84</sup> United States' appellant's submission, para. 320.

<sup>85</sup> United States' appellant's submission, para. 322.

consumers, in the light of the exemptions from the COOL requirements, as well as the accuracy of labels prescribed by the amended COOL measure. According to Canada, the Panel followed this analytical framework. First, the Panel recalled its finding that the amended COOL measure has augmented the information that producers and processors of livestock are required to transmit and maintain. The Panel then observed that the amended COOL measure retains essentially the same exemptions as under the original COOL measure, and noted features of the amended COOL measure that impact on the accuracy of the information conveyed to consumers through the labels affixed to muscle cuts of meat. These factors – the upstream recordkeeping burden, label accuracy, and the exemptions from coverage – were then collectively assessed with a view to determining whether the informational "disconnect" identified by the Appellate Body in the original disputes had been rectified by the amended COOL measure. Canada submits that the Panel's assessment of the increased recordkeeping burden entailed by the amended COOL measure was methodical, and that the Panel correctly put the issue of recordkeeping within the analytical framework articulated by the Appellate Body in the original disputes.

2.45. Canada further requests the Appellate Body to reject the United States' claim that the Panel's finding that the amended COOL measure entails an increased recordkeeping burden is in error because the Panel erred in its analysis of the impact of point-of-production labelling and the elimination of the country order flexibility on recordkeeping. For Canada, the United States' claim improperly challenges factual findings made by the Panel and should not be considered by the Appellate Body in the absence of an explicit claim under Article 11 of the DSU.

2.46. With respect to the United States' claim that the Panel erred in finding that the amended COOL measure entails an increased recordkeeping burden because its analysis of the impact of point-of-production labelling on recordkeeping was based on incorrect hypothetical transactions that do not reflect actual trade in livestock among the three parties to the disputes, Canada alleges that the United States misrepresents the Panel's analysis. Canada recalls that, in assessing whether point-of-production labelling increases the number of distinct labels in scenarios involving Category B and C muscle cuts of multiple foreign origins, the Panel expressly noted that the 2009 Final Rule (AMS), itself, addressed scenarios involving non-commingled Category B muscle cuts of multiple foreign origins. In addition, the 2013 Final Rule also provides explicit guidance as to the point-of-production labelling requirements that apply to livestock born and/or raised in multiple foreign countries. Canada, thus, submits that the United States criticizes the Panel for elaborating on the labelling rules that would apply in scenarios that the United States has, itself, articulated and codified in its domestic law.

2.47. Canada notes further that, after assessing the effect of point-of-production labelling in various scenarios, the Panel then examined the impact of the elimination of the commingling and country order flexibilities on segregation. The Panel then concluded that point-of-production labelling, together with the elimination of these flexibilities, increased the need for segregation in the US market – a point confirmed by extensive evidence that was put before the Panel.<sup>86</sup> Moreover, Canada points out that the Panel did not consider that segregation – or increased segregation for that matter – would constitute a violation of Article 2.1 of the TBT Agreement. Instead, the Panel considered that it had to assess whether segregation modifies the conditions of competition to the disadvantage of the imported product. Before doing so, the Panel examined the impact of the amended COOL measure on recordkeeping, and emphasized that the greater diversity of labels resulting from the elimination of the commingling and country order flexibilities creates a multiplicity of scenarios for which distinct and commensurate substantiating records are now required. It is thus clear that, contrary to the assertions of the United States, the Panel's conclusion that the amended COOL measure entails an increased recordkeeping burden in practice is based on much more than purely hypothetical livestock transactions. Noting that the Appellate Body was critical of the panel in *Canada – Periodicals* for basing its "like" product findings "on a single hypothetical example"<sup>87</sup>, Canada submits that the Panel in these disputes cannot be similarly faulted and, as such, the United States' reliance on the Appellate Body's reasoning in *Canada – Periodicals* is "inapt".<sup>88</sup>

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<sup>86</sup> Canada's appellee's submission, para. 53 (referring to Panel Reports, para. 7.135 and to Panel exhibits cited in fns 324 and 325 thereto).

<sup>87</sup> Canada's appellee's submission, para. 55 (quoting Appellate Body Report, *Canada – Periodicals*, p. 21, DSR 1997:1, p. 467).

<sup>88</sup> Canada's appellee's submission, para. 55.

2.48. Canada also requests the Appellate Body to reject the United States' contention that the Panel erred in finding that the removal of the country order flexibility increases the recordkeeping burden for US-slaughtered livestock, and that this supports a conclusion that the detrimental impact of the amended COOL measure does not stem exclusively from legitimate regulatory distinctions. According to Canada, uncontested facts that the Panel referred to reveal the inaccuracy of the United States' assertion that the elimination of the country order flexibility does not alter the recordkeeping burden that existed under the original COOL measure. In this regard, the Panel observed that the recordkeeping and verification requirements that apply under both the original and amended COOL measures mandate that suppliers and retailers make available to USDA representatives records that verify an origin claim and, therefore, that the "origin claim" is a key determinant of the records and information required under the amended COOL measure. In addition, the Panel observed that the USDA's commentary accompanying the 2009 Final Rule (AMS) indicates that costs would be incurred by producers "to record, maintain, and transfer country of origin ... information to substantiate required claims made at retail", and that records were required to be sufficient to substantiate country of origin claims.<sup>89</sup> For Canada, this reveals the inaccuracy of the United States' position. Canada adds that, in the original proceedings, the United States asserted that the country order flexibility had been included under the original COOL measure to reduce compliance costs. Noting that compliance costs arise from the burden of the recordkeeping and verification requirements and the consequent need for segregation, Canada submits that the United States' position in the original proceedings confirms that the elimination of the country order flexibility increases the recordkeeping burden on producers and processors of livestock.

2.49. In relation to the United States' assertion that the elimination of the county order flexibility does not alter the recordkeeping burden because different categories of muscle cuts already had different records under the original COOL measure, Canada explains that, under the original COOL measure, where non-commingled Category B muscle cuts from Canada bore Label C as a result of the country order flexibility, the origin claim was "Product of Canada and the United States". Because the livestock used to produce these muscle cuts did not satisfy the definition of Category C, audited retailers could not demonstrate that such muscle cuts derived from livestock imported from Canada for immediate slaughter. Nor could audited retailers be expected to demonstrate that such muscle cuts were in fact Category B muscle cuts – i.e. that they were derived from livestock raised in the United States. Thus, all that was required to verify a Label C origin claim was proof that the animal from which the muscle cut was derived was born outside of the United States – in the country that appeared on the label. Canada asserts that, for the Appellate Body to accept the United States' position that the elimination of the country order flexibility does not alter the recordkeeping burden entailed by the amended COOL measure, the Appellate Body would need to be persuaded that, where Category B muscle cuts bore Label C under the original COOL measure, the records regarding any raising occurring in the United States were required to be maintained notwithstanding that such records were unnecessary to verify the origin claim.

#### **2.2.1.2 The accuracy of labels prescribed by the amended COOL measure**

2.50. Canada requests the Appellate Body to reject the United States' contentions that the Panel erred in finding that Labels B and C under the amended COOL measure convey potentially inaccurate information, and that this finding does not support the Panel's ultimate conclusion that the detrimental impact of that measure does not stem exclusively from legitimate regulatory distinctions. For Canada, the Panel's finding that Labels B and C convey potentially inaccurate information is a factual finding and, to the extent that the United States argues that this finding does not have a proper basis in the evidence examined by the Panel, the United States' arguments are outside the scope of this appeal in the absence of an explicit claim under Article 11 of the DSU.

2.51. In any event, as regards the United States' argument that the Panel erred by basing its finding that Labels B and C are potentially inaccurate on incorrect hypothetical scenarios, Canada considers that the United States mischaracterizes the Panel's analysis. According to Canada, the Panel correctly found that, on average, "Canadian feeder cattle spend between 45 and 68% ... of their raising period outside the United States" and, on this basis, correctly determined that the country of raising flexibility allows labels "to designate the United States as the sole place of

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<sup>89</sup> Canada's appellee's submission, para. 41 (quoting Panel Reports, para. 7.145, in turn quoting 2009 Final Rule (AMS), p. 2698).

raising to an animal that spent as little as 15 days in the United States".<sup>90</sup> It was on this basis that the Panel found that Label B entails a potential for conveying inaccurate information in respect of its identification of where the animal was "raised". Canada submits that, accordingly, the United States' claim that the Panel based its analysis of label accuracy under the amended COOL measure on hypothetical livestock transactions has no foundation.

2.52. Canada further considers as being without merit the United States' claim that the Panel was precluded from examining hypothetical scenarios because the claim before it was one of *de facto* discrimination under Article 2.1 of the TBT Agreement. In this regard, Canada recalls that, in determining whether the detrimental impact caused by a challenged technical regulation reflects discrimination, panels are required to assess, among other things, the design, architecture, and revealing structure of the technical regulation at issue.<sup>91</sup> In short, the analysis is not strictly confined to factual matters concerning actual trade in the relevant market.

2.53. Canada also observes that the Panel found that Labels B and C represent the greatest incremental improvement in origin information achieved by the 2013 Final Rule, but rejected the contention of the United States that Label B is entirely accurate. In addition, the Panel noted that, although Label C "may allow – and possibly require – omission of actual countries of raising, resulting in label inaccuracy", that label "does not appear likely to convey misleading information about the country where animals imported for immediate slaughter are raised, given that these appear to be most commonly born and raised in the country of export".<sup>92</sup> Hence, in Canada's view, the Panel's identification of the informational shortcomings of the labels prescribed by the amended COOL measure was thus largely, but not entirely, focused on Label B.

2.54. Turning to the United States' argument that the omission of countries of raising on Label B is not inaccurate because it is understood that an animal born in another country – i.e. outside the United States – will have been raised for at least a portion of its life in that other country, Canada responds that it is doubtful that a reasonable consumer would consider that an animal can be accurately described as having been raised in the United States if it has spent considerable time, and in many cases the majority of its raising period, in a foreign country. Therefore, it was appropriate for the Panel to take account of the fact that "the amended COOL measure allows labels to read 'raised in the United States' ... on meat from Category B feeder cattle that spend a substantial portion of their lives either in Canada or Mexico."<sup>93</sup>

2.55. Canada further requests the Appellate Body to reject the United States' challenge of the Panel's finding that Labels B and C are potentially inaccurate on the ground that the Panel erred by not making a determination of whether the labels prescribed by the amended COOL measure are even handed in their design and application, including whether a disconnect exists between, on the one hand, the origin information required to be kept under the amended COOL measure and, on the other hand, the origin information that is ultimately conveyed to consumers through the labels. Canada contends that the Panel was correct in considering the upstream recordkeeping burden, label accuracy, and the exemptions from coverage in its assessment of whether the detrimental impact of the amended COOL measure stems exclusively from legitimate regulatory distinctions. For Canada, "[t]he interaction of these three factors within the 'overall architecture' of the amended COOL measure"<sup>94</sup> supports the Panel's ultimate conclusion that "the detrimental impact caused by the amended COOL measure does not stem exclusively from legitimate regulatory distinctions"<sup>95</sup>, and this was a sufficient basis for finding a violation of Article 2.1 of the TBT Agreement.

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<sup>90</sup> Canada's appellee's submission, para. 101 (quoting Panel Reports, paras. 7.242 and 7.244, respectively).

<sup>91</sup> Canada's appellee's submission, para. 106 (referring to Appellate Body Reports, *US – COOL*, para. 271, in turn referring to Appellate Body Report, *US – Clove Cigarettes*, para. 182).

<sup>92</sup> Canada's appellee's submission, para. 99 (quoting Panel Reports, para. 7.254).

<sup>93</sup> Canada's appellee's submission, para. 103 (quoting Panel Reports, para. 7.269).

<sup>94</sup> Canada's appellee's submission, para. 108.

<sup>95</sup> Canada's appellee's submission, para. 108 (quoting Panel Reports, para. 7.283).

### 2.2.1.3 The exemptions under the amended COOL measure

2.56. Canada requests the Appellate Body to reject the United States' claims concerning the Panel's assessment of the exemptions under the amended COOL measure in its analysis of whether the detrimental impact of that measure on imported livestock stems exclusively from legitimate regulatory distinctions.

2.57. Canada first requests the Appellate Body to reject the United States' argument that the Panel erred in finding that the exemptions under the amended COOL measure are relevant to the assessment of whether the detrimental impact of that measure on imported livestock stems exclusively from legitimate regulatory distinctions. Canada notes that, consistent with the approach adopted by the Appellate Body in the original disputes, the Panel identified the relevant regulatory distinctions drawn by the amended COOL measure as the distinctions between the three production steps, as well as the mandatory labels to be affixed to muscle cuts of beef and pork. Noting the United States' argument that the exemptions are irrelevant because they are not distinctions that account for the detrimental impact on imported livestock, Canada responds that the Panel's attribution of relevance to the exemptions is consistent with the Appellate Body's approach in the original disputes. Moreover, the Panel's approach is consistent with the general legal framework that the Appellate Body has prescribed for assessing whether the relevant regulatory distinctions drawn by a technical regulation are designed and applied in an even-handed manner. Canada explains that this legal framework requires panels to scrutinize carefully the particular circumstances of the case – that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue – rather than simply the relevant regulatory distinctions. In Canada's view, the United States requests the Appellate Body to ignore the exemptions and to consider the legitimacy of the regulatory distinctions drawn by the amended COOL measure in the abstract, divorced from the overall architecture of that measure.

2.58. Canada notes that, in support of its position, the United States repeatedly cites a statement made by the Appellate Body in *US – Tuna II (Mexico)* that "[it] only need[ed] to examine the distinction that account[ed] for the detrimental impact on Mexican tuna products as compared to US tuna products and tuna products originating in other countries."<sup>96</sup> In Canada's view, this statement should be read as guidance that a determination should be focused on whether the detrimental impact caused by the relevant regulatory distinctions reflects arbitrary or unjustifiable discrimination. In the light of the clear guidance that the Appellate Body has provided to panels, as well as the analysis conducted by the Appellate Body in the original disputes, the statement relied on by the United States cannot credibly be interpreted as a prohibition on the consideration of elements of a challenged technical regulation – or the particular circumstances of the case – that do not directly account for the detrimental impact on imported products but, nevertheless, demonstrate the arbitrary or unjustifiable character of such impact.

2.59. As regards the United States' argument that the Panel failed to take account of the fact that the exemptions apply equally to meat derived from imported and domestic livestock and are thus even handed, Canada responds that the United States' argument reveals a fundamental misunderstanding of the analysis under Article 2.1 of the TBT Agreement. The Panel took the exemptions into account as part of its assessment of the "overall architecture" of the amended COOL measure. In this regard, the Panel, like the Appellate Body in the original disputes, determined that the exemptions under the amended COOL measure demonstrate that the recordkeeping burden giving rise to the detrimental impact cannot be explained by the need to convey to consumers information regarding the countries where livestock were born, raised, and slaughtered. Canada highlights that this ultimately led the Panel to conclude that the detrimental impact of the amended COOL measure on imported livestock does not stem exclusively from legitimate regulatory distinctions.

2.60. Canada further contends that the United States' reliance on differences between, on the one hand, the exemptions under the measures at issue in *US – Clove Cigarettes* and *EC – Seal Products* and, on the other hand, the exemptions under the amended COOL measure should be rejected, because the Appellate Body has not indicated that exemptions must exhibit certain characteristics to be relevant to an analysis under Article 2.1. Instead, the Appellate Body has

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<sup>96</sup> Canada's appellee's submission, para. 62 (quoting Appellate Body Report, *US – Tuna II (Mexico)*, para. 286 (emphasis original)).

been clear that panels are required to base their determination of *de facto* discrimination "on the totality of facts and circumstances" before them.<sup>97</sup>

2.61. Canada also requests the Appellate Body to reject the United States' contention that the Panel erred in its assessment of the exemptions by failing to take into account the legitimate desire of Members to adjust the scope of their technical regulations in order to take account of cost considerations. Canada submits that the Panel correctly found that, while such considerations "are not *per se* prohibited", they do not constitute a "supervening justification for discriminatory measures".<sup>98</sup> In addition, Canada contends that the cost savings achieved by exempt US entities do not detract from the fact that the amended COOL measure arbitrarily and unjustifiably discriminates against Canadian livestock. Thus, for Canada, the position of the United States that the cost savings achieved by the exemptions nullify the discriminatory effects of the amended COOL measure is "untenable".<sup>99</sup>

2.62. Canada further requests the Appellate Body to reject the United States' claim that the Panel erred in its assessment of the exemptions because it failed to examine whether the nature and scope of these exemptions establish a "disconnect" between the origin information collected by producers and processors of livestock and the origin information conveyed to consumers on labels that is so disproportionate as to support the conclusion that the detrimental impact of the amended COOL measure reflects discrimination. For Canada, the Panel was thorough in its assessment of the contribution made by the exemptions to the informational "disconnect" identified by the Appellate Body in the original disputes. In this regard, the Panel determined that, because of the exemptions under the amended COOL measure, of total US beef consumption, between 16.3% and 24.5% are muscle cuts carrying Labels A-D, and between 16.6% and 17.8% are ground meat carrying Label E.<sup>100</sup> Moreover, Canada submits that the increased recordkeeping burden entailed by the amended COOL measure, and the fact that the greatest incremental improvement in origin information achieved by the 2013 Final Rule is for Labels B and C in a market dominated by Label A, reveal how marginal the contribution of the amended COOL measure is to the rectification of the informational "disconnect" identified by the Appellate Body in the original disputes. Canada, thus, submits that the United States' characterization of the Panel's treatment of the exemptions in its analysis of the legitimacy of regulatory distinctions under Article 2.1 does not withstand scrutiny.

2.63. In addition, Canada requests the Appellate Body to reject the United States' claim that the Panel's conclusions concerning the exemptions are legally erroneous because the Panel failed to undertake an evaluation of the operation of these exemptions in the US market, and pointed to no evidence in support of its findings. Canada submits that the United States' challenge to the Panel's conclusion essentially concerns the merits of the adopted findings of the original panel and the Appellate Body in the original disputes to the effect that the ultimate disposition of a meat product is often not known at any particular stage of distribution. These findings, contends Canada, are factual findings and, to the extent that the United States seeks to challenge them, this challenge is outside of the scope of this appeal in the absence of an explicit claim under Article 11 of the DSU.

2.64. In any event, Canada asserts that the United States has not questioned the continued accuracy of the findings of the original panel and the Appellate Body in the original disputes. Canada points out that it relied on those findings in making its *prima facie* case under Article 2.1 of the TBT Agreement, and the Panel correctly relied on those findings in its assessment of the exemptions.<sup>101</sup> Canada highlights that the Appellate Body has considered that "doubts could arise about the objective nature of an Article 21.5 panel's assessment if, on a specific issue, that panel were to deviate from the reasoning in the original panel report in the absence of any change in the underlying evidence in the record."<sup>102</sup> Thus, having not been presented with any evidence that would affect the findings of the original panel concerning the operation of the exemptions in the

<sup>97</sup> Canada's appellee's submission, para. 70 (quoting Appellate Body Report, *US – Clove Cigarettes*, para. 206).

<sup>98</sup> Canada's appellee's submission, para. 73 (quoting Panel Reports, para. 7.275).

<sup>99</sup> Canada's appellee's submission, para. 76.

<sup>100</sup> Canada's appellee's submission, para. 79 (referring to Panel Reports, para. 7.258).

<sup>101</sup> Canada's appellee's submission, para. 34 (referring to Canada's first written submission to the Panel, para. 71; and second written submission to the Panel, para. 33).

<sup>102</sup> Canada's appellee's submission, para. 87 (quoting Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 386, in turn quoting Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 103).

US market, the compliance Panel was correct in not deviating from the reasoning of the original panel on this issue.

2.65. Canada submits further that the United States' criticism of Canada for failing to present evidence that distinct distribution channels do not exist for the sale of meat to entities that are exempt, and not exempt, from the COOL requirements is inconsistent with basic principles concerning the allocation of the burden of proof in WTO dispute settlement proceedings. A party asserting a fact must provide proof thereof. Thus, Canada did not have a burden to discharge with respect to an adopted finding made by the original panel that the United States did not take issue with before the compliance Panel. Instead, had the United States claimed before the compliance Panel that distinct distribution channels currently exist for the sale of meat to entities that are exempt, and not exempt, from the COOL requirements, the United States would have borne the burden of proving this.

2.66. Finally, although Canada considers that the arguments brought by the United States raise factual issues that are outside the scope of appellate review, Canada contends that, in any event, evidence on the record does not support the United States' contention that distinct distribution channels exist for the sale of meat products to exempt US entities. In this regard, Canada relies on, *inter alia*, several statements of the USDA in its analyses of the impact that the original and amended COOL measures would entail in the pork, beef, hog, and cattle markets in the United States.

### **2.2.2 Article 2.2 of the TBT Agreement**

2.67. Canada requests the Appellate Body to reject the United States' conditional appeal with respect to certain aspects of the Panel's interpretation of Article 2.2 of the TBT Agreement. Canada submits that this appeal reflects a mistaken understanding of that provision. Canada argues that, contrary to the United States' understanding, the phrase "taking account of the risks non-fulfilment would create" is not merely descriptive or hortatory<sup>103</sup>; rather, it is an integral part of the obligation under Article 2.2, and means that the trade-restrictiveness of a technical regulation has to be calibrated to the gravity of the consequences that may arise if its objective is not fulfilled.

2.68. Canada contends that the GATT 1994 is directed to the substantial reduction of barriers to trade, and that the TBT Agreement contributes to the objectives of the GATT 1994 through the same means. Technical regulations are a class of measures that may be used to pursue objectives whose importance varies. Technical regulations may seriously hinder international trade and the risks at issue may not always justify such restrictions. Canada submits that the phrase "taking account of the risks non-fulfilment would create" reflects those considerations and, in that regard, it differs significantly from Article 5.6 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), since the SPS Agreement is directed at very important objectives with grave consequences.

2.69. In Canada's view, the recognition in the sixth preambular recital of the TBT Agreement that a Member may take measures necessary to fulfil certain objectives "at the levels it considers appropriate" is qualified by the clause that such measures must be "otherwise in accordance with the provisions of [the TBT] Agreement". Thus, "taking account of the risks non-fulfilment would create" under Article 2.2 requires the weighing and balancing of relevant factors in a "relational" analysis to determine whether the trade-restrictiveness of the measure is calibrated to the risks.

2.70. In Canada's view, an assessment of "the risks non-fulfilment would create" is not a political or regulatory matter for the Member concerned, but is, rather, a legal requirement under Article 2.2 of the TBT Agreement. It is thus for a panel to assess on the basis of reason, which is neither purely subjective nor purely objective, contrary to the arguments of the United States.

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<sup>103</sup> Canada's appellee's submission, para. 123.

### 2.2.3 Articles III:4 and IX of the GATT 1994

2.71. Canada requests the Appellate Body to uphold the Panel's finding in respect of Article III:4 of the GATT 1994 and to reject the approach of relying on Article IX in the interpretation of Article III:4 of the GATT 1994, as suggested by the United States.<sup>104</sup> For Canada, it was correct for the Panel not to address Article IX, because the United States had made no defensive claim under that provision, nor had it presented evidence in that regard. Canada explains that the Appellate Body in *US – Gambling* made it clear that a responding Member cannot expect a panel to formulate a defence or rebuttal argument for it and then rule on it.<sup>105</sup>

2.72. Canada disagrees with the United States' argument that the approach taken by the Panel in these disputes would render Article IX "inutile".<sup>106</sup> Canada alleges that the United States has failed to explain why that would be so, and refers to oral arguments before the panel and the Appellate Body in the original proceedings in which it had explained why, in its view, Article IX of the GATT 1994 is not relevant to the facts of this case.

2.73. Canada maintains that, even if the Appellate Body were to be of the view that reliance by the United States on Article IX does not amount to an affirmative defence, then there would still be strong reasons, based on considerations of due process, not to entertain the United States' argument based on Article IX. In this regard, Canada refers to the Appellate Body reports in *EC – Seal Products*, and submits that the Appellate Body refrained from completing the legal analysis in view of the novel character of an issue that the panel had not examined, and on which the panel made no findings.<sup>107</sup> In Canada's view, similar considerations of due process apply to the reliance by the United States on Article IX of the GATT 1994 at this stage in the present dispute, in the light of a "complete absence" of legal arguments in this regard before the compliance Panel.<sup>108</sup> In any event, Canada maintains that the legal test for Article III:4 of the GATT 1994 is well established and should not be modified as suggested by the United States.

### 2.2.4 Article XX of the GATT 1994

2.74. Canada requests the Appellate Body to uphold the Panel's finding in respect of Article III:4 of the GATT 1994 and to reject the United States' request to find that the Panel erred in not addressing the availability of Article XX of the GATT 1994 as an exception for the amended COOL measure and to complete the legal analysis and determine which of the Article XX exceptions would be available. For Canada, the United States' request resembles a request for an "advisory opinion".<sup>109</sup>

2.75. Canada highlights that, while both in the original proceedings and in the Article 21.5 proceedings it had claimed that the measures at issue were inconsistent with Article III:4, the United States chose not to raise a defence under Article XX. For Canada, the present request of the United States is an attempt to advance such a defence at the final stage of the disputes, contrary to the principles of due process and previous jurisprudence of the Appellate Body.

2.76. Canada disagrees with the United States' argument that it could not have predicted the Appellate Body's ruling in *EC – Seal Products*. First, the Appellate Body reports in *EC – Seal Products* simply upheld the finding of the panel on this point. Canada also highlights that the issue of the applicability of the legitimate regulatory distinctions criterion to the test under Article III:4 of the GATT 1994 was a key issue throughout the *EC – Seal Products* disputes, and that the United States as a third participant in those disputes was aware of this.<sup>110</sup> Moreover, Canada explains that the Appellate Body report in *US – Tuna II (Mexico)* already clarified that the scope and content of the national treatment obligations of the TBT Agreement and of the GATT 1994 are

<sup>104</sup> Canada's appellee's submission, para. 150.

<sup>105</sup> Canada's appellee's submission, para. 143 (referring to Appellate Body Report, *US – Gambling*, para. 282).

<sup>106</sup> Canada's appellee's submission, para. 142 (quoting United States' appellant's submission, para. 289).

<sup>107</sup> Canada's appellee's submission, para. 144 (referring to Appellate Body Reports, *EC – Seal Products*, para. 5.69).

<sup>108</sup> Canada's appellee's submission, para. 144.

<sup>109</sup> Canada's appellee's submission, para. 145.

<sup>110</sup> Canada's appellee's submission, para. 146 (referring to United States' third participant's submission in *EC – Seal Products*, paras. 4-26).

not the same. Therefore, the United States could well have foreseen the possibility that consideration of legitimate regulatory distinctions relevant under Article 2.1 of the TBT Agreement would not be relevant in respect of Article III:4 of the GATT 1994. Canada further argues that the United States could have structured its defence in the present disputes so as to accommodate the possibility of the panel's and Appellate Body's findings in *EC – Seal Products* by raising a defence under Article XX of the GATT 1994 in the alternative, should its "novel interpretation" of Article III:4 not be accepted.<sup>111</sup>

2.77. Finally, Canada highlights that, while under Article XX of the GATT 1994 a measure must be provisionally justified under one of the subparagraphs of that provision, the United States has not identified any subparagraph, let alone provisionally justified the amended COOL measure under a subparagraph. Furthermore, even at the interim review stage, the United States limited itself to asserting that "there must be an Article XX exception that would be available for COOL", and requesting the Panel to "address the availability of Article XX as an exception for Article III:4 with respect to COOL" in general terms.<sup>112</sup> According to Canada, the Panel was correct in denying this request because it would have required examination of an issue for which neither the United States, nor the complainants, had provided specific evidence or arguments.

### 2.2.5 Article XXIII:1(b) of the GATT 1994

2.78. Canada requests the Appellate Body to reject the United States' appeal of the Panel's interpretation of Article 21.5 of the DSU. With respect to the United States' claim that Canada's non-violation claim fell outside the Panel's terms of reference, Canada maintains that the United States portrays the Panel as "having taken liberties with the text" of Article 21.5 of the DSU.<sup>113</sup> For Canada, the Panel conducted a careful analysis of the text of Article 21.5 in its context and in the light of its object and purpose, and correctly concluded that its jurisdiction included Canada's non-violation claim. The Panel correctly considered the objective of Article 21.5 as being the promotion of prompt compliance with the recommendations and rulings of the DSB, the avoidance of requiring new proceedings, and the efficient use of the original panelists.<sup>114</sup> For Canada, these are valid considerations going to the object and purpose of Article 21.5 in the broader context of the WTO dispute settlement system, and the Panel was entitled to point out that the interpretation of Article 21.5 espoused by the United States would, as its consequence, require the complainants in the Article 21.5 proceedings to request the establishment of an entirely new panel in respect of a non-violation claim. For these reasons, Canada disagrees with the United States' contention that the Panel used institutional considerations to override the text of Article 21.5 of the DSU.

## 2.3 Arguments of Mexico – Appellee

### 2.3.1 Article 2.1 of the TBT Agreement

2.79. Mexico requests the Appellate Body to reject the United States' claim that the Panel erred in concluding that the detrimental impact of the amended COOL measure on imported livestock does not stem exclusively from legitimate regulatory distinctions. According to Mexico, the Panel correctly found that the relevant regulatory distinctions under the amended COOL measure are essentially the same as those under the original COOL measure. The Panel then correctly applied the same legal framework that the Appellate Body applied in the original disputes in determining whether these distinctions are "legitimate" for the purposes of Article 2.1 of the TBT Agreement.

#### 2.3.1.1 The increased recordkeeping burden entailed by the amended COOL measure

2.80. Mexico requests the Appellate Body to reject the United States' claim that the Panel erred in considering that its finding that the amended COOL measure entails an increased recordkeeping burden constitutes an independent basis for concluding that the detrimental impact of that measure does not stem exclusively from legitimate regulatory distinctions. According to Mexico,

<sup>111</sup> Canada's appellee's submission, para. 147.

<sup>112</sup> Canada's appellee's submission, para. 148 (referring to United States' appellant's submission, para. 292; and Panel Reports, para. 6.70).

<sup>113</sup> Canada's appellee's submission, para. 152 (referring to United States' appellant's submission, paras. 308-311).

<sup>114</sup> Canada's appellee's submission, para. 153 (referring to Panel Reports, para. 7.661).

the United States' arguments are without merit because they are based on a misunderstanding of the legal analysis that the Panel conducted under Article 2.1 of the TBT Agreement. In this regard, the Panel considered the increased recordkeeping burden entailed by the amended COOL measure as a relevant factor in the design, architecture, revealing structure, operation, and application of the technical regulation at issue, which the Panel carefully scrutinized for the purpose of determining whether the relevant regulatory distinctions under the amended COOL measure are designed and applied in an even-handed manner. The framework applied by the Panel, in this respect, is the same framework applied by the Appellate Body in the original proceedings.<sup>115</sup> Moreover, contends Mexico, the Panel's application of this framework demonstrates that the Panel carefully considered the proportionality of the burden of recordkeeping and verification requirements imposed on producers and processors of livestock, in relation to the origin information that is actually provided to consumers of meat products in the US market.

2.81. In addition, Mexico contends that, contrary to the United States' assertions, the Panel's analysis of the legitimacy of regulatory distinctions drawn by the amended COOL measure involved a comparison of the burden of recordkeeping and the provision of information through labels. In this regard, the Panel determined that the amended COOL measure is designed and applied in a manner that: (i) increases the origin information communicated to consumers through mandatory retail labels of muscle cuts of meat sold in retail establishments; (ii) necessarily increases the recordkeeping burden on upstream producers and processors of livestock in order to do so; and (iii) maintains the same proportion of information that is not communicated at all to consumers due to the exemptions from coverage. Accordingly, Mexico submits that the United States' argument that the Panel used its finding that the amended COOL measure entails an increased recordkeeping burden as an independent basis for its conclusion under Article 2.1 of the TBT Agreement is without merit.

2.82. Mexico further requests the Appellate Body to reject the United States' claim that the Panel's finding that the amended COOL measure entails an increased recordkeeping burden is in error because the Panel erred in its analysis of the impact of the point-of-production labelling requirement and the elimination of the country order flexibility on recordkeeping. For Mexico, the United States' claim improperly challenges factual findings made by the Panel and should not be considered by the Appellate Body in the absence of an explicit claim under Article 11 of the DSU.

2.83. In any event, as regards the Panel's analysis of the impact of point-of-production labelling on recordkeeping, Mexico requests the Appellate Body to reject the United States' contention that the Panel's analysis is in error because it is based on incorrect hypothetical scenarios that do not reflect actual trade in livestock among the three parties to the disputes. According to Mexico, the United States' arguments are premised on a fundamental mischaracterization of the Panel's reasoning. Mexico recalls, in this regard, that, in its analysis of the impact of point-of-production labelling on recordkeeping, the Panel recognized that point-of-production labelling does not increase the number of labels for Category A, B, and C muscle cuts of a single foreign origin. However, the Panel found that point-of-production labelling increases the number of distinct labels in respect of: Category B muscle cuts of different foreign origins; Category B muscle cuts of different, multiple foreign origins; and Category C muscle cuts of animals born in a foreign country, raised in that and another foreign country, and imported into the United States for immediate slaughter (where only the country of immediate import can be shown as the country of raising on the label). Mexico contends that, although the United States seeks to create the impression that none of these scenarios is in any way realistic, the United States overlooks that the Panel included in its discussion of Category B and C muscle cuts of "multiple foreign origins" scenarios in which muscle cuts from different animals – some born in Mexico, some born in Canada, and both slaughtered in the United States – would be packaged together. The Panel correctly concluded that, under the original COOL measure, those muscle cuts could be packaged with a single label while, under the amended COOL measure, they may not. Mexico highlights that the United States has not explained why this scenario is unrealistic. Moreover, the Panel correctly noted that the 2009 Final Rule (AMS), itself, addressed scenarios involving non-commingled Category B muscle cuts of multiple foreign origins, and that the 2013 Final Rule provides explicit guidance as to the point-of-production labelling requirements that apply to livestock born and/or raised in multiple foreign countries. Mexico submits that the fact that the USDA considered these

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<sup>115</sup> Mexico's appellee's submission, para. 26 (referring to Panel Reports, paras. 7.194-7.195).

very scenarios as warranting specific attention undermines the credibility of the United States' criticism of the Panel's analysis.<sup>116</sup>

2.84. Mexico further requests the Appellate Body to reject the United States' contention that the Panel erred in finding that the removal of the country order flexibility increases the recordkeeping burden for US-slaughtered livestock and in considering that this finding supports its ultimate conclusion under Article 2.1 of the TBT Agreement. Mexico points out that, contrary to the United States' assertion, the Panel made no finding that "the removal of the country order flexibility supported a conclusion that the detrimental impact does not stem exclusively from legitimate regulatory distinctions through increased recordkeeping."<sup>117</sup> Instead, the Panel found that the greater diversity of labels resulting from the elimination of both the commingling and country order flexibilities "creates a multiplicity of scenarios for which distinct and commensurate substantiating records are now required"<sup>118</sup>, and that the "increase in the number of distinct labels and in segregation logically entails a higher recordkeeping burden."<sup>119</sup> In addition, in the light of the nature of the "origin claims" that must be substantiated through the records that are created and maintained by meat processors, packers, and retailers, the Panel found that the amended COOL measure necessarily leads to a higher recordkeeping burden and higher costs for these industry participants. Mexico highlights, further, that the Panel took into account the USDA's own admission that greater costs would be incurred by industry participants as a result of the elimination of the flexibilities previously available under the original COOL measure.

### 2.3.1.2 The accuracy of labels prescribed by the amended COOL measure

2.85. Mexico requests the Appellate Body to reject the United States' contention that the Panel erred in finding that Labels B and C under the amended COOL measure are potentially inaccurate because the Panel based this finding on incorrect hypothetical scenarios that are not reflective of actual trade in livestock between the three parties to the disputes. Mexico submits that, contrary to the United States' assertions, the Panel's concerns regarding potential label inaccuracy under the amended COOL measure focused on Category B feeder cattle that spend a substantial portion of their lives either in Canada or Mexico, and that the United States itself admits that this scenario occurs. Moreover, the Panel's finding of a potential for label inaccuracy in relation to Label B is not based on incorrect hypothetical livestock trade scenarios, as the United States alleges but, rather, on a carefully reasoned and objective assessment of the implications of the design and application of the labelling rules prescribed by the amended COOL measure for muscle cuts of beef. In undertaking this assessment, the Panel clearly and consistently indicated where "certain so-called 'hypothetical scenarios' would be unlikely to occur with material frequency in actual practice", and discounted them accordingly.<sup>120</sup> The Panel's finding is not based on these infrequent scenarios but, rather, on specific scenarios in which the amended COOL measure, in its application, would permit labels indicating only "raised in the United States" for "livestock that commonly spend between approximately one third and one half of their lives elsewhere".<sup>121</sup> This was not an unlikely "hypothetical scenario" but, rather, a reasoned finding of a reality based on the average age at which Category B feeder cattle are imported into the United States from Mexico and Canada.

2.86. As regards Label C, Mexico observes that the Panel recognized that the potential inaccuracies that it observed with respect to the omission of countries of raising on that label were less likely to occur in practice. It is, thus, clear from the Panel's reasoning that its concerns regarding a potential for label inaccuracy under the amended COOL measure were focused on Label B, in respect of which the Panel found that, "in its *application*, the amended COOL measure permits labels indicating 'raised in the United States' alone for livestock that commonly spend between approximately one third and one half of their lives elsewhere."<sup>122</sup> By contrast, the Panel expressed very limited concerns about the potential inaccuracies arising in respect of Label C,

<sup>116</sup> Mexico's appellee's submission, para. 35.

<sup>117</sup> Mexico's appellee's submission, para. 39 (quoting United States' appellant's submission, paras. 21 and 129).

<sup>118</sup> Mexico's appellee's submission, para. 40 (quoting Panel Reports, para. 7.147).

<sup>119</sup> Mexico's appellee's submission, para. 40 (quoting Panel Reports, para. 7.149).

<sup>120</sup> Mexico's appellee's submission, para. 46 (referring to Panel Reports, para. 7.238).

<sup>121</sup> Mexico's appellee's submission, para. 46 (quoting Panel Reports, para. 7.244).

<sup>122</sup> Mexico's appellee's submission, para. 47 (quoting Panel Reports, para. 7.244 (emphasis original)).

precisely because scenarios giving rise to such inaccuracies "appear to be unlikely in the United States' actual trade of livestock."<sup>123</sup>

2.87. Mexico considers further that the United States' reliance on the Appellate Body report in *Canada – Periodicals* is also incorrect, as the Panel did not undertake an inadequate factual analysis but, rather, undertook a careful, detailed, and thorough factual analysis to arrive logically at its conclusion. Accordingly, the United States' argument that the Panel erred in basing its finding that the amended COOL measure entails a potential for label inaccuracy on incorrect hypothetical scenarios is premised on a mischaracterization of the Panel's reasoning and findings, and should, therefore, be rejected.

### 2.3.1.3 The exemptions under the amended COOL measure

2.88. Mexico requests the Appellate Body to reject the United States' claims concerning the Panel's assessment of the exemptions under the amended COOL measure in its analysis of whether the detrimental impact of that measure on imported livestock stems exclusively from legitimate regulatory distinctions.

2.89. Mexico considers as being without merit the United States' argument that the Panel erred in finding that the exemptions under the amended COOL measure are relevant to the analysis of whether the detrimental impact of that measure on imported livestock stems exclusively from legitimate regulatory distinctions. According to Mexico, the Panel correctly found that the exemptions are relevant to the analysis because they are essential elements of the design, architecture, revealing structure, operation, and application of the amended COOL measure. Mexico asserts further that, contrary to what the United States suggests, an examination of whether the detrimental impact of a technical regulation stems exclusively from legitimate regulatory distinctions should not be undertaken in a vacuum. Instead, such an examination must take into account the operation and application of the relevant regulatory distinctions within the context of the design, overall architecture, and revealing structure of the technical regulation at issue. For Mexico, the United States' approach would insulate from examination the elements of a regulatory regime that evidence a lack of even-handedness in the design, operation, and application of the elements that cause the detrimental impact.

2.90. Mexico agrees that, in assessing whether the detrimental impact of a technical regulation on imported products stems exclusively from legitimate regulatory distinctions, a panel needs to examine only the regulatory distinctions drawn by that technical regulation that account for such detrimental impact. Contrary to the interpretation proposed by the United States, however, the Appellate Body's statements in *US – Tuna II (Mexico)* and *EC – Seal Products* do not restrict or narrow the manner in which the legitimacy of the relevant regulatory distinctions should be examined for the purposes of Article 2.1 of the TBT Agreement. Such an examination must take into account the operation and application of the relevant regulatory distinction – i.e. how it functions in practice – within the context of the design, overall architecture, and revealing structure of the technical regulation as it operates and is applied in the real world. Mexico emphasizes that the Appellate Body confirmed as much in the original disputes when it explained that, "[i]n assessing even-handedness, a panel must 'carefully scrutinize ... the design, architecture, revealing structure, operation and application of the technical regulation at issue'."<sup>124</sup>

2.91. Mexico also requests the Appellate Body to reject the United States' contention that the Panel erred in its assessment of the exemptions by failing to take account of the fact that the exemptions apply equally to meat derived from imported and domestic livestock and are, thus, even handed. Mexico asserts that the Appellate Body has established that the regulatory distinctions that account for the detrimental impact on imported products must be assessed for the purpose of determining whether they are designed and applied in an even-handed manner. By contrast, it is not necessary to determine also whether other aspects of the measure – i.e. aspects that do not account for the detrimental impact on imported products – are designed or applied in an even-handed manner. Mexico contends that the even-handedness of the exemptions under the amended COOL measure was not at issue before the compliance Panel because they are not regulatory distinctions that account for the detrimental impact on imported livestock. Accordingly,

<sup>123</sup> Mexico's appellee's submission, para. 47 (quoting Panel Reports, para. 7.252 (fn omitted)).

<sup>124</sup> Mexico's appellee's submission, para. 57 (quoting Appellate Body Reports, *US – COOL*, para. 271, in turn referring to Appellate Body Report, *US – Clove Cigarettes*, para. 182).

the question of whether the exemptions under the amended COOL measure are designed or applied in an even-handed manner is entirely irrelevant to the pertinent legal issue, i.e. whether the relevant regulatory distinctions that account for the detrimental impact on imported livestock are designed or applied in an even-handed manner. In Mexico's view, the United States fails to recognize that the exemptions are relevant as part of the overall analysis of how the relevant regulatory distinctions are designed and applied within the context of the amended COOL measure.

2.92. Responding to the United States' characterization of the exemptions as "even handed", Mexico submits that the fact that certain US entities may enjoy cost savings as a result of the exemptions has no bearing on the fact that the exemptions, as a central element of the overall design and architecture of the amended COOL measure, contribute to the informational "disconnect" created by the amended COOL measure between the origin information tracked and transmitted by producers of livestock and the origin information conveyed to consumers through the mandatory labels.<sup>125</sup>

2.93. With regard to the United States' argument that the Panel failed to take into account cost considerations in its assessment of the exemptions under the amended COOL measure, Mexico responds that any cost savings achieved by these exemptions cannot excuse, justify, counterbalance, or otherwise legitimize the discriminatory effects of that measure. Thus, the cost savings entailed by the exemptions under the amended COOL measure do not alter the reality that these exemptions remove a significant proportion of beef products from the scope of the requirements of the amended COOL measure altogether, thereby preventing the origin information that is required to be collected by producers of livestock from being conveyed to consumers. Mexico highlights that it was for this reason that the Panel considered the exemptions as evidence that the recordkeeping burden giving rise to the detrimental impact on imported livestock cannot be explained by the need to convey to consumers information regarding the countries where livestock were born, raised, and slaughtered. Mexico submits that the cost savings for US entities excluded from the COOL requirements achieved by the exemptions do not affect this conclusion. Mexico highlights further that the United States' arguments ignore the Appellate Body's clear pronouncement that, although "[n]othing in Article 2.1 prevents a Member from seeking to minimize the potential costs arising from technical regulations", this is qualified by the requirement that "the technical regulation at issue does not overtly or covertly discriminate against imports."<sup>126</sup> In Mexico's view, the amended COOL measure fails to comply with this requirement.

2.94. Mexico further requests the Appellate Body to reject the United States' claim that the Panel erred in its assessment of the exemptions because the Panel failed to examine whether the nature and scope of these exemptions establish a "disconnect" between the origin information collected by producers and processors of livestock and the origin information conveyed to consumers on labels that is so disproportionate as to support the conclusion that the detrimental impact of the amended COOL measure reflects discrimination. For Mexico, the United States' arguments lack merit because, "even if" more detailed and accurate origin information is now provided to consumers of meat sold in retail establishments, there is still no origin information at all provided to consumers with respect to the majority of beef products consumed in the United States.<sup>127</sup> Thus, there continues to be a significant "disconnect" between, on the one hand, the information collected by producers and processors of livestock and, on the other hand, the information ultimately conveyed to consumers of meat products in the US market.

2.95. Mexico also addresses the United States' claim that the Panel's conclusions concerning the exemptions are legally erroneous because the Panel failed to undertake an evaluation of the operation of the exemptions in the US market, and, in particular, the United States' allegation that the Panel erred by not making a finding that the existence of the exemptions provides an incentive to establish distribution channels to avoid cost related to the COOL requirements.<sup>128</sup> Mexico alleges that the United States is attempting to shift its own burden of proof to the complainants or the Panel. Noting the United States' argument that the Panel committed legal error because it did not evaluate evidence and make sufficient findings in relation to the US market, Mexico points out that the United States did not present any arguments or evidence to the compliance Panel that called

<sup>125</sup> Mexico's appellee's submission, para. 69 (referring to Panel Reports, para. 7.272).

<sup>126</sup> Mexico's appellee's submission, para. 71 (quoting Appellate Body Report, *US – Clove Cigarettes*, fn 431 to para. 221).

<sup>127</sup> Mexico's appellee's submission, para. 76.

<sup>128</sup> Mexico's appellee's submission, para. 77 (quoting United States' appellant's submission, para. 246).

into question the findings of the panel and the Appellate Body in the original disputes concerning the effect of the exemptions from the COOL requirements. Mexico highlights that it did not bear a burden to refute an argument that the United States did not raise.

2.96. In any event, Mexico considers that the evidence on the record does not support the United States' arguments. In this regard, the Panel made findings, based on undisputed evidence, that Mexican cattle entering the United States have an average age of six to seven months, and that the "slaughter age" of cattle is approximately 22 months.<sup>129</sup> According to Mexico, the United States does not attempt to explain how the first US purchaser of Mexican cattle entering the United States could know, 15 to 16 months prior to the slaughter of the animal by unrelated companies, whether the animal's meat would be destined for sale in entities that are exempt, or not exempt, from the COOL requirements.

### 2.3.2 Article 2.2 of the TBT Agreement

2.97. Mexico requests the Appellate Body to reject the United States' appeal of the Panel's findings relating to the clause "the risks non-fulfilment would create" in Article 2.2 of the TBT Agreement. Mexico submits that the Panel's interpretation of this clause is correct. In Mexico's view, "taking account of the risks non-fulfilment would create" requires, as part of the weighing and balancing process, an assessment of whether there is proportionality between the trade-restrictiveness of technical regulations and the risks non-fulfilment would create.

2.98. Mexico contends that the Appellate Body's reference to an "equivalent contribution" in *US – Tuna II (Mexico)* is qualified by reference to the phrase "taking account of the risks non-fulfilment would create" in Article 2.2.<sup>130</sup> In this regard, Mexico draws a distinction with the unqualified use of the term "equivalent contribution" in Article XX of the GATT 1994 and Article XIV of the General Agreement on Trade in Services (GATS). On that basis, the degree of contribution exhibited by a proposed alternative measure need not be the same as the challenged measure. Instead, its degree of contribution may be lesser where this is justified in the light of the risks non-fulfilment would create.

2.99. Contrary to the interpretation advanced by the United States, Mexico presents a series of reasons suggesting that the meaning of "taking account of the risks non-fulfilment would create" should not be equated with the meaning of "at the levels it considers appropriate" in the sixth preambular recital of the TBT Agreement. First, Article 2.2 is not expressly qualified by the clause "at the levels it considers appropriate". Second, the elements listed in the final sentence of Article 2.2 are not consistent with an approach that equates "taking account of the risks non-fulfilment would create" with "at the levels it considers appropriate". Third, the phrase "taking account of the risks non-fulfilment would create" is unique to the necessity test in Article 2.2, and thus the inclusion of this clause must mean something other than the level of protection considered appropriate by a Member. Fourth, the clause "at the levels it considers appropriate" in the sixth preambular recital of the TBT Agreement is subject to the relevant measures being "otherwise in accordance with the provision of [the TBT] Agreement", which suggests that it is subject to the disciplines of Article 2.2, including the phrase "taking account of the risks non-fulfilment would create".

2.100. Mexico further contends that the Panel's interpretation does not inappropriately interfere with Members' right to regulate. Rather, Mexico considers that a Member's "policy space" is limited by its obligations under the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) and the rights of other WTO Members.<sup>131</sup>

<sup>129</sup> Mexico's appellee's submission, para. 86 (quoting Panel Reports, para. 7.242).

<sup>130</sup> Mexico's appellee's submission, para. 99 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 321, in turn referring to Appellate Body Report, *US – Gambling*, para. 307). See also *ibid.*, para. 107 (referring to Appellate Body Reports, *US – COOL*, para. 471, in turn referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 322).

<sup>131</sup> Mexico's appellee's submission, para. 112 (quoting Original Panel Reports, *US – COOL*, para. 7.549; and referring to Panel Reports, para. 7.485).

### 2.3.3 Articles III:4 and IX of the GATT 1994

2.101. Mexico requests the Appellate Body to uphold the Panel's finding in respect of Article III:4 of the GATT 1994 and to reject the United States' appeal of that finding. Mexico understands that the United States' argument relating to Article IX of the GATT 1994 is that this provision is part of the context in which Article III:4 should be interpreted, and not that compliance with Article IX is a defence to a violation of Article III:4. If, however, the United States was raising Article IX as a defence, Mexico submits that this would be precluded by Article 17.6 of the DSU, which limits appeals to issues of law covered in the panel report, because the United States did not raise a defence based on Article IX before the Panel.

2.102. Mexico disagrees with the United States that Article IX should be considered context relevant to the interpretation of Article III:4. Mexico maintains that, while Article III:4 applies to internal measures, Article IX applies to imports at the border. Because of this difference in the coverage of the two provisions, Article IX is not relevant context for the interpretation of Article III:4. In particular, with regard to the amended COOL measure, Mexico contends that Labels A, B, and C are internal measures applying to beef processed from imported cattle within the United States, and are therefore not "marks of origin" in the sense of Article IX. Label D, however, could fall within the scope of Article IX because it relates to imported meat. Mexico explains that it has not asserted that Label D aspects of the amended COOL measure are inconsistent with the covered agreements, and further explains that it is not challenging origin-marking requirements in general, but rather aspects of the amended COOL measure that discourage the use of imported Mexican cattle to produce US beef products.

2.103. Furthermore, Mexico emphasizes that Article IX is not an exception to Article III:4, but that both provisions apply cumulatively and that Members must comply with both of them simultaneously. In addition, Mexico submits that the United States suggested that, because of Article IX of the GATT 1994, the analysis of whether the amended COOL measure denies national treatment to imported livestock should be different under Article III:4 of the GATT 1994 and under Article 2.1 of the TBT Agreement, and that this implied that Article IX was not relevant context for the interpretation of Article 2.1. However, in the original proceedings, the Appellate Body found Article IX of the GATT 1994 to be relevant context for the TBT Agreement, in finding that the objective of the original COOL measure was legitimate within the meaning of Article 2.2.<sup>132</sup> Because, at the same time, the Appellate Body did not find that its interpretation of Article 2.1 should be influenced by Article IX, Mexico submits that the United States' argument relating to Article IX is inconsistent with the Appellate Body's analytical approach in the original proceedings.

### 2.3.4 Article XX of the GATT 1994

2.104. Mexico requests the Appellate Body to uphold the Panel's finding that the amended COOL measure is inconsistent with Article III:4 of the GATT 1994 and to reject the United States' request to find that the Panel erred in not addressing the availability of Article XX of the GATT 1994 as an exception with respect to the amended COOL measure. Mexico highlights that it is the Member invoking Article XX that bears the burden to demonstrate that the measure at issue is justified under that provision, and that the United States has not done so in these disputes. Mexico adds that it is inappropriate for the United States to raise a defence under Article XX of the GATT 1994 on appeal when it did not raise an Article XX defence before the Panel, nor did it invoke Article XX as a defence in its Notice of Appeal.

2.105. In response to the United States' reference to extraordinary circumstances in the present disputes, Mexico submits that there is no change in the circumstances that could support the United States' request that the Appellate Body address Article XX. Mexico disagrees with the United States that the findings of the Appellate Body in *EC – Seal Products* were unforeseeable. Mexico explains that the United States has presented Article XX defences to challenges under Article III:4 in prior disputes, and submits that it must, therefore, be assumed that the United States made a considered decision not to raise Article XX, even in the alternative, before the Panel in the present case.<sup>133</sup> Moreover, Mexico submits that the findings of the Appellate Body in *EC – Seal Products* are in line with the Appellate Body report in *US – Clove Cigarettes*, where

<sup>132</sup> Mexico's appellee's submission, para. 129 (referring to Appellate Body Reports, *US – COOL*, para. 445).

<sup>133</sup> Mexico's appellee's submission, para. 133 (referring to the *US – Shrimp* and *US – Gasoline* disputes).

the Appellate Body observed that the "balance set out in the preamble of the TBT Agreement ... is not, in principle, different from the balance set out in the GATT 1994, where obligations such as national treatment in Article III are qualified by the general exceptions provision of Article XX".<sup>134</sup>

2.106. Finally, Mexico points out that the fact that the United States has not specified which of the subparagraphs of Article XX of the GATT 1994 it would wish to rely on as a defence makes it impossible to follow the specific sequence of analysis prescribed by the Appellate Body with regard to Article XX, i.e. first assessing whether the relevant subparagraph would provide provisional justification to the measure, and then whether the same measure would meet the requirements of the chapeau of Article XX of the GATT 1994. Mexico emphasizes that this omission affects Mexico's due process right to rebut that defence.

### **2.3.5 Article XXIII:1(b) of the GATT 1994**

2.107. Mexico submits that the Panel correctly found that its non-violation claim under Article XXIII:1(b) of the GATT 1994 was within its terms of reference. In Mexico's view, a "measure taken to comply" that results in the non-violation nullification or impairment of a benefit that accrues to a party under the GATT 1994 is no less inconsistent with the GATT 1994 than a measure that results in the violation of one or more provisions. The mere existence of Article XXIII:1(b) indicates that the application of a measure does not need to result in the violation of a provision in order to be considered inconsistent with the GATT 1994, if it otherwise nullifies or impairs a benefit accruing to a Member under that agreement.

2.108. Mexico further contends that the factual findings made by the Panel provide a sufficient basis for the Appellate Body to complete the legal analysis and find that the amended COOL measure nullifies or impairs benefits accruing to Mexico within the meaning of Article XXIII:1(b) of the GATT 1994. In this respect, Mexico contends that it was uncontested that the amended COOL measure is being applied by the United States; that the United States' WTO tariff concessions for cattle are within the meaning of the term "benefit accruing" in the sense of Article XXIII:1(b) of the GATT 1994 and Article 26.1 of the DSU; and that there was no compelling evidence to confirm that the amended COOL measure could have been reasonably anticipated before its adoption.<sup>135</sup>

## **2.4 Claims of error by Canada – Other appellant**

### **2.4.1 Article 2.1 of the TBT Agreement**

2.109. Canada does not take issue with the Panel's conclusion that the amended COOL measure is inconsistent with Article 2.1 of the TBT Agreement; however, Canada requests the Appellate Body to modify certain aspects of the Panel's analysis under Article 2.1. In particular, Canada alleges that the Panel erred in its analysis by failing to assess appropriately the relevance of Labels D and E, as well as the prohibition of a trace-back system, for the determination of whether the detrimental impact of the amended COOL measure stems exclusively from legitimate regulatory distinctions.

#### **2.4.1.1 The Panel's analysis of Label D**

2.110. Canada requests the Appellate Body to reverse the Panel's finding that the COOL requirements applicable to Label D do not demonstrate that the detrimental impact of the amended COOL measure reflects discrimination prohibited by Article 2.1 of the TBT Agreement.

2.111. Canada contends that the labelling requirements for Label D, together with the informational shortcomings identified by the Panel with respect to Labels B and C, contribute to a labelling regime in which the only information that can be relied on as invariably accurate is the information conveyed on Label A – i.e. information in respect of livestock that were born, raised, and slaughtered in the United States. Thus, the purported intention of the United States "to ensure [that] label information accurately reflects the origin of muscle cut covered commodities" is belied by the fact that a perfect consumer, who is fully informed of the meaning of different categories of

<sup>134</sup> Mexico's appellee's submission, para. 134 (quoting Appellate Body Report, *US – Clove Cigarettes*, para. 96).

<sup>135</sup> Mexico's appellee's submission, para. 144 (referring to Panel Reports, paras. 7.675, 7.690, and 7.712).

labels under the amended COOL measure, can only be assured of receiving complete and accurate information when purchasing Category A muscle cuts.<sup>136</sup> This discrepancy, according to Canada, exposes the arbitrary and unjustifiable character of the discrimination against Canadian livestock. Accordingly, the Panel erred by dismissing the relevance of Label D for its analysis of whether the detrimental impact of the amended COOL measure reflects discrimination prohibited by Article 2.1 of the TBT Agreement.

2.112. Canada observes that the Panel dismissed the relevance of Label D on the following grounds: (i) that the complainants had not provided evidence of Category D animals that were not born and raised in the same foreign country in which they were slaughtered; (ii) that there existed only a small portion of Category D muscle cuts in the US market; and (iii) that there was no claim that Label D creates any detrimental impact on imported livestock.<sup>137</sup>

2.113. With respect to the Panel's dismissal of the relevance of Label D on the ground that the market share of Category D muscle cuts in the US market is small, Canada recalls that it had explained to the Panel that Canada imports tens of thousands, and sometimes hundreds of thousands, of cattle annually and that, when feed is cheaper in Canada than in the United States, economic incentives exist to import US animals that can then be used to produce muscle cuts that are then available for export to the United States. The statistics submitted to the Panel demonstrate that Canada exports between 500,000-860,000 pounds of beef, and 630,000-710,000 pounds of pork, to the United States on an annual basis. Although there is no tracing of the specific meat produced from imported animals in Canada, it is "virtually certain" that some of the meat that is exported to the United States is produced from animals that were born and/or raised in the United States.<sup>138</sup> In addition, under appropriate market conditions, "both the flow of U.S. livestock to Canada and Canadian meat to the U.S. would increase".<sup>139</sup>

2.114. Canada further contends that the Panel improperly faulted Canada for failing to provide evidence of Category D animals that were not born and raised in the country in which they were slaughtered. As the Panel observed, Canada does not track the life histories of animals. However, in the light of the export volumes of meat from Canada to the United States, and the "sometimes significant imports of livestock", it is "reasonable" to infer that at least some Category D meat from Canada is obtained from animals not born and raised in Canada.<sup>140</sup> In any event, Canada submits that, by requiring positive evidence of Category D animals that were not born and raised in the country in which they were slaughtered, the Panel placed undue importance on "actual trade effects" for the purposes of its analysis under Article 2.1, "despite having previously acknowledged that 'there is no need to verify actual trade effects to dispose of claims under [TBT] Article 2.1'".<sup>141</sup>

2.115. Canada also takes issue with the Panel's exclusion of Label D from its analysis of whether the detrimental impact of the amended COOL measure reflects discrimination prohibited by Article 2.1 of the TBT Agreement on the ground that Canada had not challenged Label D as causing a detrimental impact on Canadian livestock. According to Canada, whether an aspect of a challenged technical regulation is responsible for the detrimental impact on imported products is not determinative of its relevance to the analysis of the legitimacy of regulatory distinctions under Article 2.1. Instead, the "key determinant" is whether an element of the challenged technical regulation is probative of the existence of arbitrary or unjustifiable discrimination or an absence of even-handedness.<sup>142</sup>

#### 2.4.1.2 The Panel's analysis of Label E

2.116. Canada requests the Appellate Body to find that the Panel committed legal errors and acted inconsistently with Article 11 of the DSU in concluding that Label E does not support the conclusion that the detrimental impact of the amended COOL measure reflects discrimination prohibited by Article 2.1 of the TBT Agreement. Canada notes that, on the one hand, the amended COOL measure imposes stringent recordkeeping and verification requirements on upstream

<sup>136</sup> Canada's other appellant's submission, para. 159 (quoting 2013 Final Rule, p. 31372).

<sup>137</sup> Canada's other appellant's submission, para. 158.

<sup>138</sup> Canada's other appellant's submission, para. 160.

<sup>139</sup> Canada's other appellant's submission, para. 160.

<sup>140</sup> Canada's other appellant's submission, para. 161.

<sup>141</sup> Canada's other appellant's submission, para. 162 (quoting Panel Reports, para. 7.183).

<sup>142</sup> Canada's other appellant's submission, para. 162.

producers of livestock used to produce domestic beef trimmings, while, on the other hand, Label E conveys inaccurate origin information. Canada submits that the operation of the COOL requirements as they relate to Label E, therefore, demonstrate that the amended COOL measure is inconsistent with Article 2.1 of the TBT Agreement.

2.117. First, Canada submits that the Panel erred by relying on the different forms of processing undergone by muscle cuts and ground meat as support for the proposition that Label E should be excluded from the analysis of whether the detrimental impact of the amended COOL measure reflects discrimination. Canada explains that, although the processing of meat differs depending on whether the final product is a muscle cut or ground meat, the processing of both products involves the input of livestock and results in the production of meat products. The Panel failed to explain why the different forms of processing undergone by muscle cuts and ground meat supports its conclusion with respect to Label E. Canada adds that the Panel's approach with respect to Label E is inconsistent with the Panel's correct approach to the exemptions under the amended COOL measure. In particular, in assessing whether the detrimental impact of the amended COOL measure stems exclusively from legitimate regulatory distinctions, the Panel took into account the exemption of muscle cuts of meat that are ingredients in processed food items from the COOL requirements. For Canada, it was therefore "unreasonable" for the Panel to rely on the different forms of processing undergone by muscle cuts and ground meat as a reason to exclude Label E from its analysis under Article 2.1.<sup>143</sup>

2.118. Second, Canada contends that the Panel erred by relying on the diverse origins of "trimmings" involved in the processing of ground meat as a justification for its exclusion of Label E from its analysis under Article 2.1. Canada explains that ground beef, like muscle cuts of beef, is produced in the United States from inputs of muscle cuts of diverse origins. Canada submits that the fact that, in recent years, producers in the United States have apparently sourced trimmings from a slightly larger number of countries than is the case with respect to livestock used to produce muscle cuts is not a factor that supports the Panel's exclusion of Label E from its analysis under Article 2.1.

2.119. Third, Canada submits that the Panel's conclusion that the complainants did not submit arguments in this compliance dispute as to the upstream burdens relating to ground meat "reveals that [the Panel] disregarded evidence and arguments submitted by Canada on precisely this point."<sup>144</sup> Canada submits that the Panel, thus, acted inconsistently with its mandate under Article 11 of the DSU.

#### **2.4.1.3 The prohibition of a trace-back system**

2.120. Canada requests the Appellate Body to find that the Panel erred in its assessment of the relevance of the prohibition of a trace-back system under the amended COOL measure for the analysis of whether the detrimental impact of the amended COOL measure reflects discrimination prohibited by Article 2.1 of the TBT Agreement.

2.121. Canada recalls that it had explained to the Panel that the mandatory identification of animals is an integral component of a mandatory trace-back system, and that the amended COOL measure effectively prohibits such a system. For Canada, this element of the amended COOL measure is a component of the "design" and "architecture" of that measure, which affects its "operation". Canada submits that the trace-back prohibition should therefore have been "carefully scrutinize[d]" by the Panel in accordance with the guidance provided by the Appellate Body under Article 2.1.<sup>145</sup>

2.122. Canada submits that the Panel erred in dismissing Canada's arguments concerning the relevance of the trace-back prohibition for the analysis under Article 2.1 on the basis of an alleged failure of Canada to "provide specific arguments or evidence ... as to the nature of the prohibited

<sup>143</sup> Canada's other appellant's submission, para. 166.

<sup>144</sup> Canada's other appellant's submission, para. 168 (referring to Panel Reports, para. 7.280; and American Meat Institute (AMI) Fact Sheet, "Questions and Answers about Ground Beef, Hamburger and Patties" (June 2011) (Panel Exhibit CDA-121); Canada's first written submission to the Panel, fn 93; second written submission to the Panel, paras. 41-42; and comments on responses to Panel questions, para. 2).

<sup>145</sup> Canada's other appellant's submission, para. 175 (referring to Appellate Body Reports, *US – COOL*, para. 271, in turn referring to Appellate Body Report, *US – Clove Cigarettes*, para. 182).

trace-back measure."<sup>146</sup> In this regard, Canada asserts that it is clear from the text of the amended COOL measure that no particular trace-back measure is prohibited. Rather, "the prohibition applies to a key component – mandatory identification – of *any* trace-back measure, thereby precluding the implementation of the origin labelling requirements through such a measure."<sup>147</sup>

2.123. Canada further submits that the Panel erred in dismissing Canada's argument on the grounds that it was "limited to whether the trace-back prohibition necessitates the same (or similar) audit and verification system of the amended COOL measure" and that it "reverts focus to the claimed deficiencies of the amended COOL measure's labelling rules".<sup>148</sup> As Canada noted before the Panel, the COOL statute requires that persons subject to audits provide the Secretary of Agriculture with verification of the origin of covered commodities and that origin information be maintained by persons supplying covered commodities to retailers. A trace-back system and the amended COOL measure's system of recordkeeping and verification could both meet that origin verification requirement. However, the trace-back prohibition constitutes an explicit choice between these two systems in favour of the recordkeeping and verification system that discriminates against Canadian livestock. Canada contends that this choice between the two systems is relevant to the analysis under Article 2.1 because it strongly influences the "design" and "operation" of the amended COOL measure and reflects discrimination. Moreover, Canada asserts that the existence of an alternative measure that would not cause discrimination – i.e. a trace-back system – is evidence of arbitrary and unjustifiable discrimination, particularly where the non-discriminatory alternative measure is prohibited.

#### 2.4.2 Article 2.2 of the TBT Agreement

##### 2.4.2.1 Introduction

2.124. Canada requests the Appellate Body to reverse the Panel's conclusion that Canada failed to make a *prima facie* case that the amended COOL measure is more trade restrictive than necessary, "taking account of the risks non-fulfilment would create".<sup>149</sup> Canada alleges that the Panel made a series of errors in respect of the interpretation and application of Article 2.2 of the TBT Agreement, and in failing to make an objective assessment of the matter before it, that warrant the reversal of the Panel's conclusion in this regard. First, Canada submits that the Panel erred in its analysis of the degree of contribution made by the amended COOL measure to its objective in two ways, namely: (i) by making a legal error in excluding Labels D and E from its analysis; and (ii) by failing to make an objective assessment of the matter at issue pursuant to Article 11 of the DSU. Second, Canada argues that the Panel erred in its articulation of the legal test under Article 2.2 of the TBT Agreement, both in general terms, as well as specifically in respect of the phrase "taking account of the risks non-fulfilment would create". Third, Canada claims that the Panel erred in concluding that it could not assess the gravity of the consequences of non-fulfilment of the amended COOL measure to its objective. Fourth, Canada claims that the Panel erred by failing correctly to "tak[e] account of the risks non-fulfilment would create" in its analysis of Canada's claims, including in respect of its first and second proposed alternative measures.

2.125. With regard to the Panel's analysis of "the risks non-fulfilment would create", Canada advances two alternative positions. First, Canada considers that the Panel erred in finding that Canada failed to make a *prima facie* case that the first and second proposed alternative measures would contribute to a degree equivalent to that of the amended COOL measure. Second, in the alternative, Canada argues that the Panel failed to conclude that the significantly lower degree of trade-restrictiveness of the first and second proposed alternative measures counterbalances the difference in their degrees of contribution vis-à-vis the amended COOL measure. Canada requests the Appellate Body to complete the legal analysis of its claims under Article 2.2 of the TBT Agreement in respect of its first and second proposed alternative measures.

<sup>146</sup> Canada's other appellant's submission, para. 176 (quoting Panel Reports, para. 7.281).

<sup>147</sup> Canada's other appellant's submission, para. 176. (emphasis original)

<sup>148</sup> Canada's other appellant's submission, para. 177 (quoting Panel Reports, para. 7.281).

<sup>149</sup> Canada's other appellant's submission, para. 23.

2.126. Separately, Canada requests the Appellate Body to find that the Panel erred in the burden of proof that it applied in respect of Canada's third and fourth proposed alternative measures. Canada does not request the Appellate Body to complete the legal analysis in respect of these proposed alternative measures.

#### **2.4.2.2 The legal test under Article 2.2 of the TBT Agreement**

2.127. Canada claims that the Panel erred in articulating the legal test under Article 2.2 of the TBT Agreement, both generally as well as specifically in respect of the phrase "taking account of the risks non-fulfilment would create".

2.128. In respect of the Panel's articulation of the legal test generally, Canada claims that the Panel failed to indicate that the amended COOL measure's degree of contribution to a legitimate objective, its trade-restrictiveness, and the nature of the risks at issue and the gravity of the consequences that would arise from non-fulfilment of its objective, would be assessed in relation to each other. Consequently, the Panel failed to describe how these factors are to be weighed and balanced against each other. In addition, Canada asserts that the Panel did not clarify the relationship between the "relational" and the "comparative" analyses, in particular, it did not clarify that the latter does not necessarily prevail over the former. In this regard, Canada explains that an assessment under Article 2.2 must begin with a "relational" analysis. This includes an analysis of the trade-restrictiveness of the challenged measure, its degree of contribution to a legitimate objective, and the risks non-fulfilment of that objective would create. These factors must be assessed individually, in addition to being weighed and balanced against one another. In conducting this "relational" analysis, a panel may then engage in a "comparative" analysis, whereby a comparison is conducted with an alternative measure proposed by a complainant to see whether it is less trade restrictive, makes an equivalent contribution to the challenged measure's legitimate objective, and is reasonably available to the respondent Member. Canada contends that this kind of "comparative" analysis is a "conceptual tool" that assists in determining whether a measure is more trade restrictive than necessary.<sup>150</sup> While the Appellate Body has noted it is not always required<sup>151</sup>, it should not overtake the "relational" analysis when such an analysis is carried out. In this regard, Canada draws a distinction with footnote 3 to Article 5.6 of the SPS Agreement, which specifically provides that a violation exists if there is a valid alternative measure that is significantly less trade restrictive.

2.129. In respect of the interpretation of the phrase "taking account of the risks non-fulfilment would create", Canada advances two claims of error in arguing that the Panel adopted an "overly narrow[]" approach.<sup>152</sup> First, Canada claims that the Panel wrongly found the importance of the values or interests underlying the legitimate objective to be irrelevant in "taking account of the risks non-fulfilment would create". In Canada's view, there is a direct correlation between the relative importance of the values or interests being protected and the gravity of the consequences of not fulfilling the measure's objective. In particular, the more important the values or interests at stake, the higher the gravity of the consequences of non-fulfilment. In the present case, the fact that no harm would be caused to consumers by not receiving the origin information at issue is relevant to assessing the gravity of the consequences of the non-fulfilment of the amended COOL measure's objective.

2.130. Second, Canada contends that the Panel wrongly dismissed the design, structure, and architecture of the amended COOL measure as elements that may shed light on the gravity of the consequences of not fulfilling its objective. In Canada's view, the design, structure, and architecture of a measure may contain elements that put the risks into perspective, and may even provide an indication of how the Member taking the measure perceives those risks. In the present case, Canada contends that certain elements of the amended COOL measure, such as the exclusion of a considerable proportion of beef and pork from the coverage of the measure and allowing that less accurate information be provided on ground meat (Label E) demonstrate that the United States itself does not consider the consequences of non-fulfilment to be grave.

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<sup>150</sup> Canada's other appellant's submission, para. 37 (quoting Appellate Body Report, *US – Tuna II (Mexico)*, para. 320).

<sup>151</sup> Canada's other appellant's submission, para. 50 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, fn 647 to para. 322).

<sup>152</sup> Canada's other appellant's submission, para. 92.

2.131. In Canada's view, these legal errors of the Panel led to the Panel erroneously concluding that it could not assess the gravity of the consequences of non-fulfilment. Had the Panel applied the correct legal test, it would have found the consequences of non-fulfilment to be not particularly grave. For Canada, this is because the objective of providing origin information does not reflect a value of particularly high importance but, rather, serves no further purpose beyond satisfying parochial interests of certain consumers. Moreover, the design, structure, and architecture of the amended COOL measure shows that, for the United States itself, the fact that consumers may not receive meaningful information on origin does not constitute a grave consequence, because the covered products represent only a small fraction of all beef and pork sold in the United States, and a significant portion is inaccurately labelled (i.e. ground meat). In addition, Canada submits that the Panel failed to take into account that there was no market failure regarding the provision of country of origin information, and that thus the market would provide origin information if a sufficient number of consumers highly valued such information. The Panel's error, in that regard, was compounded by its mischaracterization of the panel's and Appellate Body's findings in respect of consumer demand in the original proceedings. Thus, Canada argues that its arguments and evidence demonstrate that the consequence arising from the non-fulfilment of the amended COOL measure's objective would not be particularly grave, which suggests that the Panel erred in concluding that it could not assess the gravity of the consequences of non-fulfilment.

#### **2.4.2.3 The degree of contribution made by the amended COOL measure to its objective**

2.132. Canada requests the Appellate Body to find that the Panel's exclusion of Labels D and E in its assessment of the amended COOL measure's degree of contribution to its objective constitutes a legal error. Canada further claims that, in spite of its statement that it would exclude Labels D and E from the assessment of the contribution of the amended COOL measure, the Panel nonetheless referred to a range of percentages of beef consumed in the United States that includes beef bearing either Label D or E. In doing so, Canada submits that the Panel acted inconsistently with Article 11 of the DSU.

2.133. Canada argues that Labels D and E are "core features" of the impugned measure.<sup>153</sup> Therefore, Labels D and E should have been taken into account in the assessment of the measure's degree of contribution and as part of the Panel's overall "relational" analysis to determine the "necessity" of the measure under Article 2.2 of the TBT Agreement.

2.134. Canada contends that the Panel's concern that including Labels D and E in its assessment of the amended COOL measure's degree of contribution to its objective "could prejudice" the "comparative" analysis under Article 2.2 is unfounded.<sup>154</sup> This is because, in Canada's view, the conclusions yielded from the "relational" analysis on the relevant aspects of the amended COOL measure are not to be individually compared to those of proposed alternatives. Rather, the subsequent "comparative" analysis involves a comparison between the amended COOL measure and proposed alternatives. Further, the inclusion of Labels D and E in the "relational" analysis would not prejudice the "comparative" analysis because they are constant under both the impugned measure and the proposed alternatives.

2.135. In respect of its claim under Article 11 of the DSU, Canada contends that the Panel included meat bearing Labels D and E in its assessment of the proportion of muscle cuts that bear labels under the amended COOL measure, despite having determined that those labels were to be excluded.<sup>155</sup> In Canada's view, in assessing the contribution of the amended COOL measure to its objective, the Panel should have had regard to the evidence before it that demonstrated that only between 16.3% and 24.5% of beef consumed in the United States are muscle cuts bearing Labels A-D, while also recognizing that Label D conveys incomplete information.<sup>156</sup> According to Canada, the Panel's failure in this respect exaggerated the extent of the amended COOL measure's degree of contribution to its objective. The Panel should have taken into account in its analysis the incomplete character of the information provided by Label D and the likely inaccurate nature of the information conveyed by Label E. Had the Panel taken these elements of the amended COOL measure into account, and properly characterized the degree of contribution of the amended COOL measure to its objective, it could not have concluded that it makes a "considerable but necessarily

<sup>153</sup> Canada's other appellant's submission, para. 82.

<sup>154</sup> Canada's other appellant's submission, para. 83 (quoting Panel Reports, para. 7.345).

<sup>155</sup> Canada's other appellant's submission, para. 86.

<sup>156</sup> Canada's other appellant's submission, para. 87 (referring to Panel Reports, para. 7.258).

partial contribution".<sup>157</sup> Rather, Canada argues that "limited" would have been a more appropriate characterization of the amended COOL measure's degree of contribution, particularly since meaningful consumer information was provided on between less than one fifth and one quarter of beef and pork consumed in the United States.<sup>158</sup>

#### 2.4.2.4 The first and second proposed alternative measures

2.136. As a result of its failure to find that not fulfilling the amended COOL measure's objective would not be grave, Canada claims that the Panel failed correctly to "tak[e] account of the risks non-fulfilment would create" in its analysis of Canada's first and second proposed alternatives.<sup>159</sup> In particular, Canada argues that the Panel should have found that, in "taking account of the risks non-fulfilment would create", the first and second proposed alternative measures would make a contribution to the amended COOL measure's objective that is at least equivalent to that made by the amended COOL measure itself. While those alternatives provide less origin information or less accurate origin information, they cover a significantly wider range of products. Canada's claim, in this regard, rests on the assertion that an alternative measure need not necessarily achieve precisely the same contribution or degree of fulfilment of the measure's objective in order to establish a violation of Article 2.2 of the TBT Agreement. In that regard, Canada argues that less grave consequences arising from non-fulfilment should make it easier to accept an alternative measure's degree of contribution as "equivalent".

2.137. In Canada's view, it is unclear what the Panel meant when it stated that it could not determine the "specific implications" of the risks of non-fulfilment for the interplay between less information and more extensive product coverage under the first proposed alternative measure, or less accurate information and more extensive coverage under the second proposed alternative measure.<sup>160</sup> However, to the extent that the reference to distinct "implications" means that the Panel considered that the risks would not be the same under the amended COOL measure and each of the proposed alternatives, Canada acknowledges that the gravity of the consequences may vary depending on the extent to which a measure fulfils its objective.<sup>161</sup> However, this would have no impact in the case at hand, because the consequences of non-fulfilment of the amended COOL measure's objective are not particularly grave regardless of the degree of contribution. Furthermore, Canada contends that the Panel erred in considering "the nature of the information being conveyed and the method of conveyance" in its assessment of gravity, since these elements relate to the degree of contribution of the measure to its objective, and not to the risks non-fulfilment would create.<sup>162</sup> In any event, the fact that the Panel found it "difficult to establish the exact implications"<sup>163</sup> for providing consumers less information or less accurate information on labels was not a justification for the Panel to "shirk its responsibility" to reach a finding.<sup>164</sup>

2.138. In the alternative, Canada argues that, even if the first and second proposed alternative measures do not contribute to the amended COOL measure's objective to an equivalent degree, the significantly lower degree of trade-restrictiveness of these alternatives should nonetheless counterbalance the difference in their respective degrees of contribution. In this regard, had the Panel conducted a proper "relational" analysis, it would have concluded that the high degree of trade-restrictiveness of the amended COOL measure is out of all proportion to its very limited contribution to its objective and the benign nature of the risks and the "non-gravity" of the consequences arising from non-fulfilment.<sup>165</sup> On this basis, Canada argues that the Panel ought to have found that the amended COOL measure is more trade restrictive than necessary under Article 2.2 of the TBT Agreement, even in the absence of a "comparative" analysis with proposed alternatives.

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<sup>157</sup> Canada's other appellant's submission, para. 88 (quoting Panel Reports, para. 7.356).

<sup>158</sup> Canada's other appellant's submission, para. 89.

<sup>159</sup> Canada's other appellant's submission, para. 116.

<sup>160</sup> Canada's other appellant's submission, paras. 119 and 123 (quoting Panel Reports, paras. 7.488 and 7.501).

<sup>161</sup> Canada's other appellant's submission, para. 119.

<sup>162</sup> Canada's other appellant's submission, para. 120 (quoting Panel Reports, paras. 7.489).

<sup>163</sup> Canada's other appellant's submission, para. 120 (quoting Panel Reports, paras. 7.489).

<sup>164</sup> Canada's other appellant's submission, para. 120.

<sup>165</sup> Canada's other appellant's submission, para. 128.

2.139. In any event, Canada argues that, even taking into account a "comparative" analysis with proposed alternatives exhibiting a degree of contribution that is less than equivalent, the Panel should have found an acceptable trade-off between the limited degree of contribution of the amended COOL measure and the significantly lower degree of trade-restrictiveness of the first and second proposed alternatives. Thus, even if the Appellate Body were to conclude that the first and second proposed alternatives do not make an equivalent degree of contribution to the amended COOL measure's objective, Canada nonetheless requests the Appellate Body to reverse the Panel's conclusion that Canada failed to make a *prima facie* case that the amended COOL measure violates Article 2.2 of the TBT Agreement, and to complete the legal analysis.

#### 2.4.2.5 The third and fourth proposed alternative measures

2.140. Canada requests the Appellate Body to find that the Panel erred in setting an overly high burden of proof in respect of the third and fourth proposed alternatives.<sup>166</sup> Canada requests the Appellate Body to reverse the Panel's finding that, for the purpose of making a *prima facie* case that an alternative measure is reasonably available, a complainant bears the burden of providing a cost estimate of the alternative measure or evidence substantiating the likely magnitude of the costs that would be associated with the alternative measure.<sup>167</sup> However, Canada does not request the Appellate Body to complete the legal analysis.<sup>168</sup>

2.141. Canada argues that the appropriate level of precision for describing alternatives can be elucidated by reference to their twofold purpose. First, the trade-restrictiveness of the proposed alternative and any "conceptual limitations" in its ability to make an equivalent contribution to the stated objective need to be identified in order to facilitate a comparison with the challenged measure under Article 2.2 of the TBT Agreement.<sup>169</sup> Second, the capacity of a Member to implement the alternative measure, in financial and technical terms, needs to be described in order to demonstrate its reasonable availability. This might include a showing that the burden of the alternative on the industry concerned does not jeopardize its economic viability, nor its ability or willingness to comply. In Canada's view, unless there are "real doubts" as to the capacity of the Member and its industry to implement the alternative, its identification does not require a detailed description.<sup>170</sup>

2.142. Canada claims that the Panel erred in imposing an unreasonably high burden by requiring a description of the third and fourth proposed alternatives with an unnecessarily high level of precision, namely, of "how" they would "be implemented in the United States", and requiring an "actual, concrete proposal".<sup>171</sup> Although the Panel appears to have set out a standard that considered whether the alternative is "merely theoretical in nature"<sup>172</sup>, a review of the Panel's approach demonstrates that it sought information and evidence disproportionate to such an inquiry, and which would involve "massive research and extensive and expensive expert reports of a sort never previously required in WTO litigation when reviewing possible alternative measures".<sup>173</sup> Canada contends that it provided sufficient descriptions of the third and fourth proposed alternatives to fulfil the dual purpose of identifying such alternatives, and thus to facilitate a comparison under Article 2.2 and to make a *prima facie* case that they are reasonably available.

2.143. Canada claims that the Panel erroneously interpreted the Appellate Body's findings in *China – Publications and Audiovisual Products* as support for its findings on the nature of the burden of proof that fell on the complainants. Whereas the Panel referred to these findings for the proposition that the magnitude of the associate costs was to be provided by the complainants, the Appellate Body in *China – Publications and Audiovisual Products* found that China, the respondent

<sup>166</sup> Canada's other appellant's submission, para. 132.

<sup>167</sup> Canada's other appellant's submission, para. 154 (referring to Panel Reports, paras. 7.556 and 7.603).

<sup>168</sup> Canada's other appellant's submission, para. 132.

<sup>169</sup> Canada's other appellant's submission, para. 134 (quoting Appellate Body Reports, *EC – Seal Products*, para. 5.267).

<sup>170</sup> Canada's other appellant's submission, para. 139.

<sup>171</sup> Canada's other appellant's submission, para. 141 (quoting Panel Reports, paras. 7.553, 7.586, and 7.602).

<sup>172</sup> Canada's other appellant's submission, para. 142 (quoting Panel Reports, para. 7.506, in turn quoting Appellate Body Reports, *Brazil – Retreaded Tyres*, para. 156; and *US – Gambling*, para. 308).

<sup>173</sup> Canada's other appellant's submission, para. 143.

in that case, bore the burden to substantiate the likely nature or magnitude of associate costs.<sup>174</sup> Although the Appellate Body's findings in that case related to Article XX(a) of the GATT 1994, Canada submits that a complainant's burden under Article 2.2 of the TBT Agreement should not be comparatively heavier. Thus, Canada submits that its description of the third and fourth proposed alternative measures was sufficient to enable the Panel to compare the amended COOL measure with these alternative measures regarding their trade-restrictiveness and degrees of contribution.

### **2.4.3 Article XXIII:1(b) of the GATT 1994**

2.144. Canada requests the Appellate Body to reverse the Panel's decision to exercise judicial economy in respect of Canada's non-violation claim under Article XXIII:1(b) of the GATT 1994, and to complete the legal analysis on the basis of the legal interpretations and facts established by the Panel, unless the Appellate Body upholds the Panel's finding of violation under either Article 2.1 of the TBT Agreement or Article III:4 of the GATT 1994. In the event that the Appellate Body reverses the Panel's decision to exercise judicial economy, Canada requests the Appellate Body to complete the legal analysis in respect of its non-violation claim by applying the legal interpretations of the Panel to the facts as found by the Panel.

## **2.5 Claims of error by Mexico – Other appellant**

### **2.5.1 Article 2.1 of the TBT Agreement**

2.145. Mexico, like Canada, does not take issue with the Panel's conclusion that the amended COOL measure is inconsistent with Article 2.1 of the TBT Agreement. However, Mexico appeals certain findings made by the Panel in its analysis of whether the detrimental impact of that measure stems exclusively from legitimate regulatory distinctions. In particular, Mexico claims that the Panel erred by failing to assess correctly the relevance of Label E for its analysis of whether the detrimental impact of the amended COOL measure stems exclusively from legitimate regulatory distinctions.

#### **2.5.1.1 The Panel's analysis of Label E**

2.146. Mexico requests the Appellate Body to find that the Panel erred in finding that the COOL requirements applicable to Label E do not support the conclusion that the amended COOL measure is inconsistent with Article 2.1 of the TBT Agreement.

2.147. Mexico notes that the Panel observed that Label E had not been shown to demonstrate that the amended COOL measure is inconsistent with Article 2.1 of the TBT Agreement, and that Label E "does not constitute a relevant regulatory distinction of the amended COOL measure for the purposes of Article 2.1."<sup>175</sup> For these reasons, the Panel refused to attribute relevance to Label E for the purposes of its analysis under Article 2.1. Mexico submits that the Panel's approach with respect to Label E is entirely inconsistent with the Panel's acknowledgement that the analysis under Article 2.1 must take into account "the 'overall architecture' of the measure, and encompass[es] aspects of the measure that [are] not themselves 'relevant regulatory distinctions' or independent sources of detrimental impact."<sup>176</sup> Indeed, it was on this basis that the Panel correctly determined that the exemptions under the amended COOL measure were relevant factors to be considered in its analysis under Article 2.1, despite the fact that they did not constitute a relevant regulatory distinction, and were not found to give rise to any detrimental impact on imported products. Mexico submits that the rationale for including the exemptions under the amended COOL measure in the analysis under Article 2.1 also applies to the COOL requirements in respect of Label E. More specifically, as a central component of the amended COOL measure that applies to a substantial proportion of covered beef products, the requirements applicable to Label E are relevant to the question of whether the detrimental impact of the amended COOL measure reflects discrimination prohibited by Article 2.1.

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<sup>174</sup> Canada's other appellant's submission, paras. 144-146 (referring to Panel Reports, para. 7.599; and Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 327-328).

<sup>175</sup> Mexico's other appellant's submission, para. 186 (quoting Panel Reports, para. 7.207).

<sup>176</sup> Mexico's other appellant's submission, para. 187 (quoting Panel Reports, para. 7.202 (fns omitted)).

2.148. Mexico asserts that the Panel attempted to validate its exclusion of Label E from its assessment of the even-handedness of the amended COOL measure on the basis that "the production of ground meat entails the processing of 'trimmings' of diverse origin that are ground into a final product, and the ground meat labelling rules were adapted to the purchasing, inventory, and production practices of US beef grinders."<sup>177</sup> According to Mexico, the Panel's reasoning is untenable, as different muscle cuts of beef themselves undergo distinct processing methods; yet, the Panel included labelling rules applicable to muscle cuts in its analysis under Article 2.1 of the TBT Agreement. Likewise, processed beef products and beef products served in food service establishments that are exempt from the COOL requirements undergo distinct processing methods; yet, the Panel included these exemptions in its analysis under Article 2.1. Mexico submits, accordingly, that the production process for ground meat does not constitute a legitimate justification for excluding Label E from the analysis under Article 2.1.

2.149. Mexico further contends that the Panel incorrectly interpreted the Appellate Body's findings in the original disputes as implying that the Appellate Body had specifically excluded Label E from its analysis under Article 2.1 of the TBT Agreement. The passage of the Appellate Body reports relied on by the Panel describes the discriminatory effect of the original COOL measure as arising "because the prescribed labels do not expressly identify specific production steps and, in particular for Labels B and C, contain confusing or inaccurate origin information, or because the meat or meat products are exempt from the labelling requirements altogether."<sup>178</sup> This finding, submits Mexico, cannot properly be interpreted as an explicit determination that requirements relating to Label E are irrelevant for the assessment of whether the amended COOL measure is designed and applied in an even-handed manner.

## 2.5.2 Article 2.2 of the TBT Agreement

### 2.5.2.1 Introduction

2.150. Mexico requests the Appellate Body to reverse Panel's findings and conclusions under Article 2.2 of the TBT Agreement, complete the legal analysis under Article 2.2 and find that the amended COOL measure is more trade restrictive than necessary and has the effect of creating unnecessary obstacles to international trade in violation of Article 2.2 of the TBT Agreement.

2.151. Mexico advances a number of claims of error in requesting the Appellate Body to reverse the Panel's conclusion that Mexico failed to make a *prima facie* case that the amended COOL measure is more trade restrictive than necessary, "taking account of the risks non-fulfilment would create". First, Mexico claims that the Panel erred by replacing the weighing and balancing of relevant factors in the "relational" analysis with an "exceptional circumstances" test.<sup>179</sup> Second, Mexico claims that the Panel erred by failing to include the design and operation of Label E when ascertaining the degree of contribution of the amended COOL measure to its objective as part of the "relational" analysis. Third, Mexico claims that the Panel erred in its assessment of "the risks non-fulfilment would create". In this regard, Mexico submits that the Panel erred in ascertaining the gravity of the consequences that would arise from non-fulfilment of the objective by strictly limiting itself to an assessment of consumer interest in country of origin information and consumer willingness to pay for such information, to the exclusion of other relevant considerations including the relative importance of the interests or values furthered by the amended COOL measure, as well as its design, structure, and architecture. Mexico also claims, in this regard, that the Panel erred under Article 11 of the DSU by failing to make an objective assessment of the evidence before it in respect of consumer demand for origin information and the design, structure, and architecture of the amended COOL measure.

2.152. In Mexico's view, these multiple errors of the Panel in respect of its "relational" analysis of the amended COOL measure led to subsequent errors in its "comparative" analysis of Mexico's first and second proposed alternative measures, namely, in failing to find that these alternatives make an equivalent degree of contribution to the amended COOL measure's objective.

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<sup>177</sup> Mexico's other appellant's submission, para. 191 (quoting Panel Reports, para. 7.280 (fns omitted)).

<sup>178</sup> Mexico's other appellant's submission, para. 193 (quoting Appellate Body Reports, *US – COOL*, para. 349).

<sup>179</sup> Mexico's other appellant's submission, para. 39 (referring to Panel Reports, para. 7.298).

2.153. Separately, Mexico requests the Appellate Body to find that the Panel erred in the burden of proof that it applied in respect of its third and fourth proposed alternative measures.

### 2.5.2.2 The legal test under Article 2.2 of the TBT Agreement

2.154. Mexico claims that the Panel made a number of errors in its legal interpretation in respect of the "relational" analysis and then took an incorrect approach to determining whether the amended COOL measure is more trade restrictive than necessary.

2.155. In particular, Mexico claims that the Panel erred in narrowing the "relational" analysis step of the necessity test under Article 2.2 of the TBT Agreement to an "exceptional circumstances" test.<sup>180</sup> Mexico points to the Appellate Body's findings in *US – Tuna II (Mexico)* and in the original proceedings in these disputes that an assessment of "necessity" under Article 2.2 must begin with a "relational" analysis, involving a weighing and balancing of the trade-restrictiveness of the challenged measure, its degree of contribution to its objective, and the risks non-fulfilment would create.<sup>181</sup> In Mexico's view, the step of reaching a conclusion under the "relational" analysis is a requisite component of the assessment under Article 2.2. This is because the subsequent "comparative" analysis is not directed at the "necessity" of the measure's trade-restrictiveness but, rather, functions to confirm the conclusion from the initial "relational" analysis that the measure is necessary by comparing it to proposed alternatives. Mexico draws on the Appellate Body's identification in *US – Tuna II (Mexico)* of certain circumstances under which a "comparative" analysis may not be required to support its understanding that it is possible to yield a conclusion on the necessity of the measure solely under the "relational" analysis.<sup>182</sup> In that regard, while it considers the examples identified by the Appellate Body to be "extreme", Mexico notes that the use of the qualifier "at least" suggests that these were not exclusive or exhaustive examples, and that there is "a range of more realistic possibilities" where a "comparative" analysis would be unnecessary on the basis of a definitive finding under the "relational" analysis.<sup>183</sup> Thus, Mexico submits that the Panel erred in finding that a "comparative" analysis would only be redundant under Article 2.2 in "exceptional" circumstances.<sup>184</sup> In response to questioning at the oral hearing, Mexico stated that it had modified its position slightly. In particular, Mexico stated that it considers in most cases that a "comparative" analysis with alternative measures would be required under Article 2.2 of the TBT Agreement, but that a provisional conclusion should be drawn first under the "relational" analysis.

2.156. Mexico also claims that the Panel erred in failing to find, based on record evidence before it, that the gravity of the consequences that would arise from non-fulfilment of the amended COOL measure's objective is very low. In particular, Mexico claims that the Panel limited its consideration to evidence on consumer interest in and willingness to pay for origin information, and excluded from its consideration the relative importance of the values or interests furthered by the measure, and its design, structure, and architecture. Mexico further claims that the Panel failed to make an objective assessment of certain evidence relating to consumer demand that it did consider, in violation of Article 11 of the DSU. Mexico requests the Appellate Body to reverse the Panel's findings, reassess the evidence on consumer demand, and find the gravity of the consequence of non-fulfilment to be very low, taking into account the very low relative importance of the objective and the very low consumer demand for origin information. Further, notwithstanding these errors of the Panel, Mexico notes that the Panel found there to be "some risk" associated with the non-fulfilment of the objective, and that the Panel ought to have taken this finding into account in the weighing and balancing process with other relevant factors in both the "relational" and "comparative" analyses.<sup>185</sup>

2.157. Mexico contends, first, that the Panel committed a legal error in limiting itself to considering the criterion of consumer demand in its consideration of "the risks non-fulfilment would create" to the exclusion of other relevant factors. While the Appellate Body considered consumer demand when assessing "the risks non-fulfilment would create" in the original

<sup>180</sup> Mexico's other appellant's submission, para. 39.

<sup>181</sup> Mexico's other appellant's submission, para. 40 (referring to Appellate Body Reports, *US – Tuna II (Mexico)*, para. 318; and *US – COOL*, para. 374).

<sup>182</sup> Mexico's other appellant's submission, paras. 41-44 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 322 and fn 647 thereto).

<sup>183</sup> Mexico's other appellant's submission, para. 43.

<sup>184</sup> Mexico's other appellant's submission, para. 45 (quoting Panel Reports, para. 7.298).

<sup>185</sup> Mexico's other appellant's submission, para. 64 (quoting Panel Reports, para. 7.417).

proceedings, the Appellate Body was constrained in its examination by the limited factual findings made by the original panel, and did not state that these findings necessarily reflected the most relevant or appropriate criteria for the purposes of the assessment.<sup>186</sup> According to Mexico, the Panel in the present proceedings failed to explain why only consumer demand ought to be determinative of "the risks non-fulfilment would create", to the exclusion of any and all other relevant criteria.

2.158. Mexico argues that the relative importance of the values furthered by the measure should have been considered because, where those values are relatively important (e.g. protection of human health), the gravity of the consequences are correspondingly significant (e.g. injury, death), whereas relatively unimportant values will have correspondingly insignificant consequences. Mexico considers it noteworthy and relevant to the "necessity" test under Article 2.2 of the TBT Agreement that the relative importance of the values furthered by the measure is considered at the beginning of a "necessity" analysis under Article XX of the GATT 1994 and under Article XIV of the GATS. Mexico contends that the relative importance of the values furthered by a measure can be ascertained under Article 2.2 of the TBT Agreement comparatively vis-à-vis other values that may be more, or less, important. Accordingly, compared to public health and the protection of the environment, and in the light of the low actual demand or general indifference towards origin information, the mere provision of such information is not important. Accordingly, the gravity of the consequences of not fulfilling the objective of providing consumer information in this case is very low.

2.159. In respect of the design, structure, and architecture of the measure, Mexico argues that, if the gravity of the consequences arising from non-fulfilment were significant, then there would not be large exemptions and less-detailed information for certain products. Thus, the very existence of these features in the measure constitutes demonstrative evidence that the gravity of the consequences of non-fulfilment is insignificant or trivial. Mexico argues that the Panel's rejection of this evidence constitutes a legal error. Mexico further alleges that the Panel's failure to consider this evidence constitutes an inconsistency with Article 11 of the DSU.

2.160. Regarding the allegation that the Panel erred by not making a finding on the gravity of the consequences of non-fulfilment, Mexico contends that an objective assessment of the evidence on the record relating to consumer demand demonstrates that the gravity of the consequences of non-fulfilment is low. In particular, Mexico alleges that the Panel failed to make an objective assessment under Article 11 of the DSU in several ways. First, Mexico claims that the Panel erroneously required evidence on consumer demand to be based on contexts exactly equivalent to, or consistent with, the specific kinds of information provided by the measure.<sup>187</sup> For example, the Panel rejected a study about food values in relation to beef, chicken, and milk because the definition of origin was different to that under the amended COOL measure, without explaining why this difference made the study conceptually incompatible. As another example, the Panel rejected the evidence adduced in the KSU Revealed Demand study<sup>188</sup> on the basis that there might be reasons other than low consumer demand for origin information to explain the steady, relative demand exhibited by the study in respect of covered and exempted products under the original COOL measure. In Mexico's view, this represented the dismissal of evidence on the basis of speculative reasons as to why it might not be relevant, which is inconsistent with Article 11 of the DSU.

2.161. Second, Mexico claims that certain evidence of the United States was treated to a different standard, and was considered probative notwithstanding that this meant the Panel needed to accept certain assumptions to be true. In particular, Mexico contends that the Panel rejected its evidence on the basis that it was not directly responsive to consumer demand, whereas the Panel accepted a telephone opinion poll adduced by the United States as relevant evidence, even though the poll in question did not test consumer demand for origin information for beef products at all.

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<sup>186</sup> Mexico's other appellant's submission, para. 69 (referring to Appellate Body Reports, *US – COOL*, para. 478).

<sup>187</sup> Mexico's other appellant's submission, para. 96 (quoting Panel Reports, para. 7.393, in turn referring to Panel Exhibit CDA-154, consisting of a Working Paper reporting on a study undertaken by associates of the Department of Agricultural Economics, Kansas State University entitled, "Food Values Applied to Livestock Products" (7 February 2014)).

<sup>188</sup> M.R. Taylor and G.T. Tonsor, "Revealed Demand for Country of Origin Labeling of Meat in the United States" (2013) 38(2) *Journal of Agricultural and Resource Economics*, pp. 235-247 (Panel Exhibits CDA-83, MEX-35, and MEX-62).

Third, Mexico claims that the Panel failed to draw the correct inferences from certain evidence. In particular, Mexico contends that the Panel inferred from evidence suggesting consumer willingness to pay approximately the same amount for "Product of North America" information that consumers are indeed willing to pay something for origin information. In Mexico's view, the Panel ought to have inferred that consumers have no greater willingness to pay for country-specific origin information than for much broader, non-country-specific origin information. Fourth, Mexico contends that the Panel erred in focusing on the conclusion in a USDA assessment that the expected benefits of providing origin information are difficult to quantify, rather than focusing on the conclusion that the economic benefits would be small. Taken together or singly, Mexico argues that these failures rise to the level of a breach of Article 11 of the DSU. Mexico submits that an objective assessment of the evidence demonstrates that consumer demand for origin information is very low.

2.162. In Mexico's view, and in the light of the foregoing, the Panel's failure to undertake a rigorous and complete "relational" analysis as a first step under Article 2.2 of the TBT Agreement and to render a conclusion as to the "necessity" of the trade-restrictiveness of the amended COOL measure amounts to a legal error. Mexico submits that, when weighed and balanced in a holistic way under the "relational" analysis, the "very considerable" trade-restrictiveness is clearly unnecessary in the light of its "profoundly disproportional relationship" to the very low gravity of the consequences that would arise from the non-fulfilment of its objective, as well as its degree of contribution to its objective.<sup>189</sup>

### **2.5.2.3 The degree of contribution made by the amended COOL measure to its objective**

2.163. Mexico claims that the Panel erred in failing to include Label E in its assessment of the amended COOL measure's degree of contribution to its objective. Although Mexico does not claim that Label E is inconsistent with any provisions of the covered agreements, it asserts that Label E is nonetheless an "integral component" of the measure because it is applied to beef products consumed in the United States for the purpose of providing consumer information on origin.<sup>190</sup> Label E should thus have been part of the assessment of the degree of fulfilment by the amended COOL measure to its objective.

2.164. More specifically, Mexico submits three grounds in contending that the Panel erred in failing to include Label E in its assessment. First, Mexico contends that the Panel's concern to ensure alignment between the aspects encompassed by the assessment of the degree of contribution of the amended COOL measure and the alternatives it proposed is unfounded. In Mexico's view, the "relational" analysis and "comparative" analysis are different types of analyses that are not compared. Further, the inclusion of Label E in the "relational" analysis would not prejudice the "comparative" analysis because it is constant under both the amended COOL measure and the proposed alternatives. Second, Mexico argues that the "relational" analysis must be conducted taking into account all relevant factors related to the challenged measure, and Label E is clearly one of these factors because the very existence of Label E suggests that the amended COOL measure includes ground beef in its objective to provide consumer information on origin. Third, Mexico submits that, after deciding that Label E should be excluded from the "relational" analysis, the Panel nonetheless referred to percentages that included Label E as part of its determination that the amended COOL measure makes a "considerable" contribution to its objective.<sup>191</sup> In Mexico's view, an assessment that actually excludes Label E from its assessment leaves a degree of contribution of less than one quarter, which is not "considerable". Further, Mexico contends that, to the extent that Label E actually is included in the contribution assessment, the Panel found that Label E rules do not provide sufficient information to fulfil the amended COOL measure's objective. Accordingly, Label E ought not to be credited as contributing to the fulfilment of the measure's objective.

### **2.5.2.4 The first and second proposed alternative measures**

2.165. Mexico claims that it was wrongly deprived of a full "comparative" analysis for its first and second proposed alternative measures under the second step of the "necessity" test under Article 2.2 of the TBT Agreement. In particular, Mexico argues that the Panel's ability to undertake

<sup>189</sup> Mexico's other appellant's submission, para. 110.

<sup>190</sup> Mexico's other appellant's submission, para. 53.

<sup>191</sup> Mexico's other appellant's submission, para. 59 (referring to Panel Reports, para. 7.356).

a "comparative" analysis was compromised by its earlier error of failing to ascertain the gravity of the consequences arising from non-fulfilment. Mexico considers that the Panel ought to have found such gravity to be very low, and should have completed the "comparative" analysis on that basis.

2.166. In Mexico's view, the determination of whether a proposed alternative makes an "equivalent" degree of contribution to the challenged measure is qualified by a consideration of "the risks non-fulfilment would create". In this regard, Mexico cites the Appellate Body's statement in the original proceedings that "it will be relevant to consider whether the proposed alternative ... would make an equivalent contribution to the relevant legitimate objective, taking account of the risks non-fulfilment would create".<sup>192</sup> Thus, to the extent its proposed alternatives make a "somewhat lesser" contribution to the measure's objective, Mexico argues that they should nonetheless be treated as making an "equivalent" contribution where the risks of non-fulfilment of the measure's objective are insignificant so as not to outweigh the alternative's lower degree of trade-restrictiveness.<sup>193</sup>

2.167. Accordingly, Mexico argues that the first proposed alternative makes at least an equivalent contribution to the measure's objective vis-à-vis the challenged measure. The first alternative preserves information on where the animal was slaughtered, and extends it to food service establishments and retailers that are otherwise exempt under the measure. The additional information on where the animal was born and raised may be provided under this alternative on a voluntary basis, such that consumers that place value on such information can seek it out and pay a premium for it. Thus, the extent to which the voluntary component of the alternative contributes to the amended COOL measure's objective is contingent on the degree of consumer demand for such information, which is in turn reflective of the risks non-fulfilment would create.<sup>194</sup> Mexico further argues that its first proposed alternative is less trade restrictive than the amended COOL measure because the use of the substantial transformation rule would eliminate the need for segregation. Mexico also argues that its first proposed alternative is reasonably available because the amended COOL measure currently employs a similar approach to origin labelling for imported muscle cuts of beef, and because the more specific location information related to production steps would be voluntary.

2.168. In respect of the second proposed alternative measure, Mexico argues that, while the use of the ground beef labelling rule (Label E) for Labels A-C might provide less accurate information, the removal of exemptions would lead to a broader scope of application. In Mexico's view, the very existence of Label E in the challenged measure for a substantial portion of beef suggests that the level of accuracy it affords is satisfactory, particularly in the absence of any legitimate justification for applying a higher standard of accuracy to muscle cuts of beef. Thus, the use of Label E for muscle cuts of beef currently covered by Labels A-C, coupled with a broader scope of application, should be treated as providing an equivalent degree of contribution as the challenged measure, particularly in the light of the very low risk of non-fulfilment manifested through a lack of consumer demand for more accurate origin information. Mexico further argues that its second proposed alternative is less trade restrictive than the challenged measure because it would include the same 60-day inventory allowance, which would reduce the degree to which processors would be required to segregate beef products. Mexico also argues that its second proposed alternative is reasonably available because the amended COOL measure currently employs a similar approach to origin labelling for ground beef, noting that there is no legitimate basis on which to distinguish ground beef and other beef products.

#### **2.5.2.5 The third and fourth proposed alternative measures**

2.169. Mexico requests the Appellate Body to reverse the Panel's finding that precise and complete cost estimates are a pre-requisite to the "adequate identification" of an alternative in order to make a *prima facie* case that it is reasonably available.<sup>195</sup>

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<sup>192</sup> Mexico's other appellant's submission, para. 119 (quoting Appellate Body Reports, *US – COOL*, para. 471).

<sup>193</sup> Mexico's other appellant's submission, para. 124.

<sup>194</sup> Mexico's other appellant's submission, paras. 134-136.

<sup>195</sup> Mexico's other appellant's submission, paras. 174 and 184.

2.170. Mexico argues that the Panel effectively imposed a new and unjustifiable requirement on the complainants to explain exactly how a proposed alternative measure would be implemented by the respondent. Further, Mexico argues that there is no authority for the Panel's determination that precise and complete cost estimates are a prerequisite to the "adequate identification" of an alternative. Rather, Mexico submits that the Appellate Body has referred to evidence and arguments on costs in respect of what a respondent might raise in rebuttal, as opposed to evidence that a complainant would need to raise in identifying the alternative in the first instance.<sup>196</sup> Thus, by requiring the complainants to provide precise explanations and complete cost estimates with respect to the implementation of the proposed alternatives, Mexico contends that the Panel applied an impossible standard of proof, which effectively relieved the United States of its burden to adduce evidence and arguments in rebuttal.

2.171. In Mexico's view, the only Member in a position to comment meaningfully on the specific issues of implementation and the associated costs, including any significant obstacles or difficulties, is the respondent Member itself. For Mexico, this should be reflected in the standard of proof for establishing a *prima facie* case. Mexico contends that, by requiring precise explanations and complete cost estimates with respect to the implementation of proposed alternative measures in the foreign jurisdiction of the responding Member for the purposes of "adequate identification", the Panel required a standard of proof that was impossible for the complainants to satisfy. As a consequence, the Panel effectively relieved the United States of its burden to adduce evidence and arguments in rebuttal. It should not be sufficient for the United States merely to argue that the complainants failed to meet their burden because they did not set out an "actual, concrete proposal" or exact explanations regarding the implementation of the alternative measures.<sup>197</sup> For Mexico, the United States was obligated to demonstrate specific obstacles, costs, or difficulties facing the implementation of each proposed alternative measure. Thus, in the absence of any real doubt regarding the capacity of the respondent Member to implement the alternatives, Mexico considers that it would not be reasonable or appropriate to require the implementation or costs associated with the alternatives to be described with the precision demanded by the Panel. Accordingly, the Panel's interpretation of the appropriate standard of proof – which called upon the complainants to adduce evidence and arguments demonstrating specific obstacles, cost issues, or other difficulties relating to the practicality of the alternatives – was an error with serious systemic implications.

### 2.5.3 Article XXIII:1(b) of the GATT 1994

2.172. Should the Appellate Body conclude that the Panel erred in finding that the amended COOL measure is inconsistent with Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994, and further determine that the amended COOL measure is not inconsistent with these provisions, Mexico appeals the Panel's decision to exercise judicial economy with respect to Mexico's non-violation claim under Article XXIII:1(b) of the GATT 1994, and requests the Appellate Body to complete the legal analysis and find that the amended COOL measure is inconsistent with Article XXIII:1(b).<sup>198</sup> Mexico submits that the Panel erred in exercising judicial economy, particularly because the Panel's findings under Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994 could be reversed by the Appellate Body on appeal.

## 2.6 Arguments of the United States – Appellee

### 2.6.1 Article 2.1 of the TBT Agreement

2.173. The United States requests the Appellate Body to reject the claims of Canada and Mexico that the Panel erred in its treatment of Labels D and E, as well as the prohibition of a trace-back system under the amended COOL measure, for the purposes of the Panel's assessment of whether the detrimental impact of the amended COOL measure reflects discrimination prohibited by Article 2.1 of the TBT Agreement. The United States submits that the Panel's conclusions under Article 2.1 with respect to these elements of the amended COOL measure are correct. According to

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<sup>196</sup> Mexico's other appellant's submission, paras. 177-178 (referring to Panel Reports, para. 7.555; Appellate Body Reports, *EC – Seal Products*, paras. 7.276-7.277; *Brazil – Retreaded Tyres*, para. 156; and *US – Gambling*, para. 308).

<sup>197</sup> Mexico's other appellant's submission, paras. 175 and 180 (quoting Panel Reports, para. 7.586, in turn quoting United States' comments on Canada's response to Panel question No. 74).

<sup>198</sup> Mexico's other appellant's submission, para. 199.

the United States, Labels D and E, the statutory prohibition of a trace-back system, and the three exemptions to the COOL requirements are irrelevant to the analysis under Article 2.1 because they are not responsible for the detrimental impact on imported livestock. As such, these "regulatory distinctions" cannot answer the question posed by the second step of the analysis under Article 2.1 of the TBT Agreement, namely, whether the detrimental impact on imported products reflects discrimination.

### 2.6.1.1 The Panel's analysis of Label D

2.174. The United States requests the Appellate Body to reject Canada's claim that the Panel erred in finding that Label D does not support a finding that the amended COOL measure is inconsistent with Article 2.1 of the TBT Agreement.

2.175. In relation to Canada's assertion that Label D exposes the "arbitrary character" of the amended COOL measure, the United States responds that Canada misunderstands the analysis to be conducted under Article 2.1 of the TBT Agreement.<sup>199</sup> The United States explains that, because the question posed in the second step of the analysis under Article 2.1 is whether the detrimental impact on like imported products reflects discrimination, only those regulatory distinctions that account for such detrimental impact can answer that question. The United States highlights that Canada has neither argued, nor proved, that there is a detrimental impact on Category D muscle cuts produced in Canada and exported to the United States.

2.176. In addition, Canada has failed to prove that Label D contributes to any "origin-based discrepancy" between the accuracy of Label A as compared to the accuracy of the other labels prescribed by the amended COOL measure.<sup>200</sup> Nor has Canada proven that Label D is otherwise "arbitrary". In this regard, the United States asserts that Canada has not provided any evidence of Category D animals that were not born and raised in the country in which they were slaughtered to substantiate its assertion that Label D is inaccurate in cases where an animal was not born and/or raised in the foreign country in which it was slaughtered. Thus, for the United States, the Panel was correct in determining that there is no reason to conclude that Category D muscle cuts, bearing the label "Product of Country X", will not be from animals "that are *entirely* a product of that country".<sup>201</sup>

2.177. With respect to Canada's challenge of the Panel's reliance on the small market share of Category D muscle cuts in the US market as a basis for concluding that Label D does not support a conclusion that the detrimental impact of the amended COOL measure reflects discrimination, the United States responds that Canada has not provided a reason as to why the Panel's reliance on this factor was "misplaced".<sup>202</sup> In the United States' view, whether, and to what extent, a label is used is a relevant factor in the inquiry under Article 2.1 in these disputes. The United States highlights, in this regard, that the original panel concluded that muscle cuts bearing Label D constitute somewhere between 0% and 0.3% of the US market.

2.178. The United States also disagrees with Canada's argument that the Panel erred by faulting Canada for failing to provide evidence of Category D animals that were not born and raised in the country in which they were slaughtered. According to the United States, while Canada apparently considers Label D to be relevant to the analysis because it allegedly "demonstrates the dissonance" between, on the one hand, the United States' objective of ensuring that label information accurately reflects the origin of muscle cuts and, on the other hand, the amended COOL measure's operation "in practice", Canada is unable to prove that Category D animals were not born and raised in the same foreign country in which they were slaughtered.<sup>203</sup>

<sup>199</sup> United States' appellee's submission, para. 252 (quoting Canada's other appellant's submission, para. 159).

<sup>200</sup> United States' appellee's submission, para. 253 (quoting Canada's other appellant's submission, para. 159).

<sup>201</sup> United States' appellee's submission, para. 253 (quoting Panel Reports, para. 7.279). (emphasis added by the United States)

<sup>202</sup> United States' appellee's submission, para. 254 (quoting Canada's other appellant's submission, para. 160).

<sup>203</sup> United States' appellee's submission, para. 256 (quoting Canada's other appellant's submission, para. 163).

2.179. Finally, with respect to Canada's contention that a "dissonance" exists between the objective of the amended COOL measure and what that measure actually achieves, the United States responds that this contention reveals a misunderstanding of the analyses under Article 2.1 and Article 2.2 of the TBT Agreement. The United States asserts that it is not the case that an importing Member must "fulfil" its objective to satisfy the requirements of Article 2.2. Nor is there any basis for the proposition that a regulatory distinction is not "even handed", for the purposes of Article 2.1, merely because it does not "fulfil" the measure's objective in "every way possible".<sup>204</sup>

#### **2.6.1.2 The Panel's analysis of Label E**

2.180. The United States requests the Appellate Body to reject the claims of Canada and Mexico that the Panel erred in finding that the labelling requirements for Category E ground meat do not support a conclusion that the detrimental impact of the amended COOL measure reflects discrimination prohibited by Article 2.1 of the TBT Agreement.

2.181. First, the United States submits that the claims of Canada and Mexico concerning Label E are premised on the proposition that a regulatory distinction that does not account for the detrimental impact on imported products is relevant to the assessment of whether such detrimental impact stems exclusively from legitimate regulatory distinctions. This premise, in the United States' view, is incorrect. The United States explains that, once it is established that a regulatory distinction does not account for the detrimental impact on imported products, the inquiry under Article 2.1 should end with respect to that particular regulatory distinction. In the light of the findings of the original panel, Label E, unquestionably, does not account for the detrimental impact on imported livestock. Noting Mexico's argument that the Panel's approach to Label E, on the one hand, and its approach to the exemptions under the amended COOL measure, on the other hand, are inconsistent because both elements do not account for the detrimental impact on imported livestock, the United States agrees with Mexico that, in this regard, the Panel's analysis is inconsistent and is, therefore, in error. The United States clarifies that this incoherence, however, proves only that the exemptions are not relevant to the analysis under Article 2.1, and that the Panel erred in relying on them as a basis for finding that the amended COOL measure is inconsistent with Article 2.1.

2.182. Second, the United States contends that Canada and Mexico incorrectly criticize the Panel for relying on the fact that ground meat is produced from different suppliers, and through different means of processing, as a basis for excluding Label E from its analysis under Article 2.1. In particular, Mexico appears to argue that the mere fact that the labelling requirements for Category E meat are different from those applicable to other categories of meat provides a basis for concluding that the amended COOL measure is inconsistent with Article 2.1. In the United States' view, Article 2.1 of the TBT Agreement does not require the United States to apply the same labelling rules to different products. As the United States explained to the Panel, the USDA created separate labelling rules for ground meat based on the unique attributes regarding the production of ground meat, which differs substantially from the production of muscle cuts.

#### **2.6.1.3 The prohibition of a trace-back system**

2.183. The United States requests the Appellate Body to reject Canada's argument that the Panel erred in its treatment of the prohibition of a trace-back system under the amended COOL measure in its assessment of whether the detrimental impact of that measure reflects discrimination prohibited by Article 2.1 of the TBT Agreement.

2.184. The United States submits that Canada's argument that the trace-back prohibition is relevant to the analysis under Article 2.1 is incorrect because the trace-back prohibition does not account for the detrimental impact on imported livestock and, therefore, it is not relevant for the determination of whether such detrimental impact stems exclusively from legitimate regulatory distinctions. Canada's argument appears to be that the trace-back prohibition supports a finding of discrimination because the prohibition represents a "choice" between a trace-back system, on the one hand, and the recordkeeping and verification requirements of the amended COOL measure, on

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<sup>204</sup> United States' appellee's submission, para. 257.

the other hand.<sup>205</sup> The United States explains, however, that the fact that the United States could have chosen an alternative that, in Canada's view, does not result in a detrimental impact on imported livestock does not mean that the amended COOL measure is discriminatory. The United States submits that, in this regard, Canada misunderstands the analysis under Article 2.1 of the TBT Agreement for determining whether the detrimental impact of a technical regulation on imported products reflects discrimination.

## 2.6.2 Article 2.2 of the TBT Agreement

### 2.6.2.1 Introduction

2.185. The United States submits that the Panel was correct in rejecting the complainants' claim that the amended COOL measure is "more trade restrictive than necessary" under Article 2.2 of the TBT Agreement because Canada and Mexico failed to make a *prima facie* case that any of their four proposed alternative measures are less trade restrictive and reasonably available alternatives that make an equivalent contribution to the amended COOL measure's objective.

2.186. In the United States' view, Canada's and Mexico's claims and arguments on appeal are based on a significant misunderstanding of the meaning of Article 2.2 of the TBT Agreement, the Panel's analysis of their claims, and their own burden of proof, in addition to other errors. In particular, the United States submits that a comparison between a challenged measure and an alternative measure is central to the analysis of whether the challenged measure is "more trade restrictive than necessary" under Article 2.2. The United States contends that complainants must make out a *prima facie* case that there exists an alternative measure that is reasonably available, less trade-restrictive, and makes an equivalent degree of contribution to the challenged measure in order to discharge their burden of proof under Article 2.2. In the United States' view, the Panel correctly found that Canada and Mexico failed to make out a *prima facie* case for any of the four alternatives that they proposed, thus warranting the finding of no inconsistency with Article 2.2.

### 2.6.2.2 The legal test under Article 2.2 of the TBT Agreement

2.187. In response to Canada's and Mexico's claims that the Panel erred in its interpretation of Article 2.2 of the TBT Agreement in relation to the role and nature of the "relational" and "comparative" analyses, the United States argues that their approach has no basis in the text of Article 2.2 and its attendant case law, and represents an attempt of the complainants to relieve themselves of their proper burden of proof. The United States considers that a comparison of the challenged measure with a proposed alternative is central to the analysis under Article 2.2. In this regard, the United States relies on the language of Article 2.2 – namely, "more ... than" – and the Appellate Body's findings in *US – COOL* and *US – Tuna II (Mexico)*.<sup>206</sup> The United States explains that circumstances may arise that negate the need for a comparison with an alternative, namely, where Article 2.2 is found not to apply because there is no trade-restrictiveness, or where the measure is found not to contribute to a legitimate objective in the first instance. However, the possibility for such circumstances does not require the bifurcation of the "necessity" analysis under Article 2.2, and, further, no such circumstances are present in the case at hand. Rather, the assessment of the measure itself provides the basis, in terms of intermediate findings, that are required in order for a panel to engage in a comparison of the challenged measure and the proposed alternative measures.

2.188. Thus, according to the United States, since the text of, and case law referring to, Article 2.2 calls for a "comparative" analysis, and since no circumstances are present to render a comparison inutile, the Appellate Body's finding in the original proceedings that an examination of proposed alternatives is a requisite part of the analysis under Article 2.2 should continue to apply.<sup>207</sup> Moreover, the United States alleges that Mexico misunderstands the key question posed by Article 2.2 as being whether a WTO panel, in weighing and balancing all of the relevant factors,

<sup>205</sup> United States' appellee's submission, para. 272 (quoting Canada's other appellant's submission, para. 177).

<sup>206</sup> United States' appellee's submission, para. 59 (quoting Appellate Body Reports, *US – COOL*, para. 376; and *US – Tuna II (Mexico)*, para. 320), and paras. 55-56 (referring to Panel Reports, paras. 7.292-7.303, in turn quoting Appellate Body Reports, *US – COOL*, para. 469).

<sup>207</sup> United States' appellee's submission, paras. 62-64 (referring to Appellate Body Reports, *US – COOL*, para. 469).

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would choose a different public policy goal and means to accomplish that goal than what the importing Member has decided.<sup>208</sup>

2.189. In respect of Canada's and Mexico's specific claims of error regarding the Panel's interpretation of the phrase "taking account of the risks non-fulfilment would create" in Article 2.2 of the TBT Agreement, the United States argues that this phrase is properly understood as a reflection that an individual Member takes into account such risks when setting its level of fulfilment.<sup>209</sup> In the United States' view, there is nothing in the text of Article 2.2 that indicates that the intent underlying this phrase is to restrict a Member's ability to regulate in the public interest. Accordingly, it would be incorrect to interpret this phrase so as to facilitate a finding of inconsistency under Article 2.2 on the basis of an alternative measure that makes a lesser contribution to the objective of a challenged measure than the challenged measure itself.

2.190. In respect of Canada's and Mexico's claims that the Panel erred in failing to assess the relative importance of the values furthered by the measure when "taking account of the risks non-fulfilment would create", the United States contends that there is no correlation between the "importance" of an objective and "the risks non-fulfilment would create".<sup>210</sup> In the United States' view, it is significant that the elements listed as relevant considerations for "taking account of the risks non-fulfilment would create" do not include the "relative importance" of the measure's objective, whereas Canada and Mexico seem to treat it as the "paramount consideration".<sup>211</sup> Furthermore, panels are not in a position to judge the relative importance of various objectives pursued by different Members. Members have not provided guidance to assist panels in any such exercise, which would rely on the subjective judgement of panels, which would in turn be detrimental to the WTO systemically, and to the WTO dispute settlement system more specifically.<sup>212</sup>

2.191. In respect of Canada's and Mexico's arguments that the Panel erred in omitting the design, structure, and architecture of the amended COOL from its assessment of "the risks non-fulfilment would create", the United States argues that this is another version of their "relative importance" argument. In the United States' view, it is wrong to suggest that the United States does not consider the amended COOL measure's objective to be important. Rather, the measure itself demonstrates that it covers an extremely large amount of food, and the consequences of not providing origin information in respect of that food are significant. The reasons for exemptions or different kinds of information on certain labels are not reflective of a lack of importance placed by a Member on a measure's objective but, rather, reflect that Members accommodate certain cost considerations in designing their measures.

2.192. The United States further argues that the additional factors advocated by Canada to be considered when "taking account of the risks non-fulfilment would create" are not relevant to the analysis. First, the Panel did not err by refraining from taking into account that the life or health of consumers would not be endangered if they did not receive origin information, since Article 2.2 does not distinguish between "important" and "unimportant" objectives, as Canada presumes. Second, the Panel did not err in not taking into account the "market failure" perspective, because there are many situations where consumer demand for a labelling regime could be conceivably low – such as health warnings on tobacco products – but that would not mean that the government mandating the requirement would consider the risks non-fulfilment would create to be low.

2.193. In respect of Canada's and Mexico's claims regarding the Panel's conclusions on the gravity of the consequences arising from non-fulfilment of the measure's objective, the United States notes first that Canada's claim relates to the factors that Canada would prefer to be taken into account when assessing "the risks non-fulfilment would create". Thus, the United States considers that Canada's claim is unfounded for the same reasons that the relative importance of the measure's objective, the design, structure, and architecture of the measure, the absence of harm to consumers, and the "market failure" perspective are not relevant in "taking account of the risks non-fulfilment would create". In respect of Mexico's claim in this regard, the United States submits that it rests on Mexico's erroneous "two-step" approach to assessing measures under Article 2.2 of

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<sup>208</sup> United States' appellee's submission, para. 66.

<sup>209</sup> United States' appellee's submission, para. 84.

<sup>210</sup> United States' appellee's submission, para. 107.

<sup>211</sup> United States' appellee's submission, para. 108.

<sup>212</sup> United States' appellee's submission, paras. 109-112.

the TBT Agreement, and is based on the misunderstanding that an alternative measure that makes a lesser contribution to the measure's objective can ground an inconsistency with Article 2.2.

2.194. In respect of Mexico's claims of error under Article 11 of the DSU regarding the Panel's treatment of evidence concerning consumer demand, the United States advances a number of arguments. First, with regard to Mexico's allegation that the Panel erred in its consideration of Exhibit CDA-154 ("Food Values Applied to Livestock Products"), the United States submits that that piece of evidence was submitted to the Panel record for the DS384 Panel hearing the dispute between the United States and Canada, and not for the DS386 Panel hearing the dispute between the United States and Mexico. Second, the United States submits that, contrary to Mexico's arguments, the Panel did indeed address the relevance and shortcomings of each of the pieces of evidence raised by Mexico, but merely disagreed with Mexico as to their relevance. For instance, in respect of Exhibit CDA-154, the Panel assessed the evidence by presenting its conclusion, noting the representativeness of the sample of the study, analysing the questions posed in the study, and pointing out aspects of the design of the study. With regard to the KSU Revealed Demand study, the Panel stated its conclusion, and examined the inference that could be drawn from it. In respect of the telephone opinion poll<sup>213</sup>, the Panel identified shortcomings in the poll, and concluded that, in view of the shortcomings, it could not be assumed that 47% of consumers would actually be interested in having a meat label with country of origin information, but, rather, drew the inference that there is some consumer interest in country of origin information in general. In respect of evidence on consumer willingness to pay for a "Product of North America" label vis-à-vis a country of origin label, the Panel was correct on drawing inferences from the evidence submitted by Mexico. Regarding the evidence on the USDA's findings of small economic benefits of receiving country of origin information, the Panel noted that the benefits accruing to consumers could be a determinant of consumer demand, while also noting that a Member's interest in pursuing a legitimate objective might also be relevant for ascertaining the gravity of the consequences of not fulfilling an objective, which in turn affected the weight it attributed to that evidence. In the United States' view, Mexico's claims under Article 11 of the DSU go to the inferences drawn and the weight accorded by the Panel, which is insufficient to ground a claim under Article 11.

### **2.6.2.3 The degree of contribution made by the amended COOL measure to its objective**

2.195. According to the United States, the claims of Canada and Mexico that the Panel erred by limiting its assessment of the degree of contribution of the amended COOL measure to Labels A-C are premised on the misunderstanding that Article 2.2 of the TBT Agreement requires two separate analyses. Rather, Article 2.2 comprises one analysis requiring the demonstration that an alternative measure exists that is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available. Thus, the Panel correctly sought to ensure that the same scopes were used for the measure and the proposed alternatives to enable a proper comparison. For the United States, the Panel could only make an appropriate comparison by either excluding Labels D and E from, or including them in, its analysis of both the measure and the alternatives. In this regard, it is immaterial whether the degree of contribution is "considerable", as found by the Panel, or "limited", as suggested by Canada.<sup>214</sup> Rather, the key question is whether a proposed alternative makes an equivalent degree of contribution, such that a Member's chosen level of contribution is fulfilled. Since Canada and Mexico did not make arguments in respect of the contribution made by Labels D and E when discussing their alternatives, it was entirely proper for the Panel to exclude those labels from its assessment of the degree of contribution.

2.196. In respect of Canada's and Mexico's arguments regarding the Panel's inconsistent reliance on figures on the quantum of coverage under the amended COOL measure, the United States argues that they misread the Panel Reports. The United States contends that the Panel explained that its use of the figures 33.3% to 42.3% coverage of beef products related to "an indicative approximation of the extent to which the exemptions prevent any contribution to the COOL objective".<sup>215</sup> For the United States, the Panel provided further context for its use of these figures by stating that it was "unable to determine the proportion of exempted products within

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<sup>213</sup> Results of a telephone survey conducted by the National Research Center, "Country of Origin Labeling Poll, Final Report" (4 October 2010) (Panel Exhibit US-48).

<sup>214</sup> United States' appellee's submission, para. 81.

<sup>215</sup> United States' appellee's submission, para. 79 (quoting Panel Reports, fn 786 to para. 7.347).

Categories A-C specifically".<sup>216</sup> The United States contends that the Panel relied on these figures at no further stage in its analysis but, rather, that its focus was on the contribution made by Labels A-C, evinced through the finding that "the amended COOL measure contributes to the objective of providing consumer information on origin to a significant degree *for products carrying Labels A-C*."<sup>217</sup> The following sentence – "At the same time, the amended COOL measure does not make any contribution for products exempted from its coverage that would otherwise carry such labels." – demonstrates that the Panel made its findings of the "considerable but ... partial contribution" to its objective based on the contribution made by Labels A-C, as qualified by the exemptions.<sup>218</sup>

#### 2.6.2.4 The first and second proposed alternative measures

2.197. The United States requests the Appellate Body to reject Canada's and Mexico's appeals of the Panel's findings that the complainants have not made a *prima facie* case that their first and second proposed alternative measures would make at least an equivalent contribution to the objective of providing origin information to consumers as the amended COOL measure. For the United States, Article 2.2 involves a straightforward analysis of whether a complainant has demonstrated the existence of an alternative measure that is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available. This analysis is reflective of the balance struck by Article 2.2 of the TBT Agreement between, on the one hand, the right of Members to pursue legitimate objectives at the levels they consider appropriate and, on the other hand, the requirement to choose less trade-restrictive alternatives when pursuing such objectives at such levels.

2.198. The United States submits that Canada's and Mexico's conception of Article 2.2 strikes an entirely different balance that distinguishes between "important" and "unimportant" objectives.<sup>219</sup> Under this conception, alternative measures that make a lesser degree of contribution than the challenged measure to its objective can ground a violation of Article 2.2 where the given objective is less important. The United States submits that this is the central weakness of Canada's and Mexico's claims in respect of the first and second proposed alternative measures, since, under this approach, the United States would be prohibited from providing point-of-production information. In the United States' view, both the first and second proposed alternative measures provide a lesser degree of consumer information on origin, or less accurate information, than the amended COOL measure. Thus, such measures cannot be considered to contribute to the amended COOL measure's objective to an "equivalent" degree. In that regard, the United States cites the Appellate Body's reversal of the panel's finding in *US – Tuna II (Mexico)* that the challenged measure in that dispute was inconsistent with Article 2.2 in the light of the fact that the proposed alternative "would contribute to both the consumer information objective and the dolphin protection objective *to a lesser degree* than the [challenged] measure".<sup>220</sup>

2.199. In the United States' view, Canada's and Mexico's claims in respect of the first and second proposed alternative measures are premised on a flawed interpretation of the phrase "taking account of the risks non-fulfilment would create". For the United States, a panel will never be in a position to undertake the complex balancing of whether adjusting one variable or another in the alternative measure would adequately "compensate" for providing a lesser contribution to the objective than the challenged measure in the context of a particular Member.<sup>221</sup> Further, no reason is provided to explain why expanding the scope of product coverage under the alternatives would "compensate" for the lesser degree of information, or less accurate information. In any case, the United States argues that there are insufficient undisputed facts on the record and factual findings of the Panel for the Appellate Body to complete the legal analysis.

<sup>216</sup> United States' appellee's submission, para. 79 (quoting Panel Reports, fn 786 to para. 7.347).

<sup>217</sup> United States' appellee's submission, para. 80 (quoting Panel Reports, para. 7.356). (emphasis added by the United States)

<sup>218</sup> United States' appellee's submission, para. 80 (quoting Panel Reports, para. 7.356).

<sup>219</sup> United States' appellee's submission, para. 151.

<sup>220</sup> United States' appellee's submission, para. 171 (quoting Appellate Body Report, *US – Tuna II (Mexico)*, para. 330). (emphasis added by the United States)

<sup>221</sup> United States' appellee's submission, para. 176.

### 2.6.2.5 The third and fourth proposed alternative measures

2.200. In response to Canada's and Mexico's claims that the Panel erred in applying an overly high burden of proof in respect of their third and fourth proposed alternative measures, the United States submits that the Panel correctly concluded that the complainants' description of the third and fourth proposed alternatives was insufficient. In the United States' view, it is well established that precisely how much and precisely what kind of evidence will be required for a complainant to satisfy its burden "will necessarily vary from measure to measure, provision to provision, and case to case".<sup>222</sup> In the present case, the complainants made "exceedingly complex" proposals requiring changes at all levels of production and retail of meat in the United States, but provided only "limited explanations" and sometimes "vague" and "incomplete" descriptions.<sup>223</sup> In the United States' view, Canada's and Mexico's argument that the evidentiary burden applied by the Panel would require substantial research and expense is simply a reflection of the complexity of their proposals. Further, while the complainants insist that they provided sufficient information to describe the proposed alternatives, they failed to provide reasons as to why the information was sufficient or how they made their *prima facie* case.

2.201. In response to the complainants' arguments regarding the allocation of the burden of proof, the United States argues that the complainants carried the burden of proving all three elements of the analysis under Article 2.2 of the TBT Agreement, namely, that the alternative is less trade restrictive, makes an equivalent contribution, and is reasonably available. While the burden might be on the respondent to provide sufficient evidence to support an assertion that a proposed alternative is not reasonably available, this does not relieve complainants of their burden of proving that the alternative is reasonably available in the first instance. Further, in respect of the complainants' reliance on jurisprudence relating to Article XX of the GATT 1994 and to Article XIV of the GATS, the United States argues that the nature of Article 2.2 of the TBT Agreement is "entirely different" and its burden of proof is accordingly "entirely different".<sup>224</sup>

2.202. The United States also notes that neither Canada nor Mexico appeals the Panel's finding that they failed to make a *prima facie* case that either the third or fourth proposed alternative measures is less trade restrictive than the amended COOL measure, makes an equivalent contribution to the objective, or is reasonably available. Similarly, neither Canada nor Mexico appeals the Panel's finding in that regard, namely, that neither the third nor fourth proposed alternative measure proves an inconsistency with Article 2.2 of the TBT Agreement. Thus, the United States argues that, even if the Appellate Body were to find in favour of Canada's and Mexico's appeals in respect of the third and fourth proposed alternative measures, the Panel's ultimate finding that they did not prove an inconsistency with Article 2.2 would stand.

### 2.6.3 Article XXIII:1(b) of the GATT 1994

2.203. The United States requests the Appellate Body to reject Canada's and Mexico's appeals of the Panel's exercise of judicial economy with respect to their non-violation claims under Article XXIII:1(b) of the GATT 1994 and to reject their requests that the Appellate Body complete the legal analysis. In this respect, the United States refers to the arguments presented in its appellant's submission that the terms of reference of proceedings under Article 21.5 of the DSU do not include non-violation claims.

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<sup>222</sup> United States' appellee's submission, para. 222 (quoting Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 134, in turn quoting Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, p. 335).

<sup>223</sup> United States' appellee's submission, para. 222 (quoting Panel Reports, paras. 7.556 and 7.602).

<sup>224</sup> United States' appellee's submission, para. 237.

## 2.7 Arguments of the third participants

### 2.7.1 Australia

2.204. Australia disagrees with Canada's argument that "the existence of an alternative measure that would not cause discrimination (i.e. trace-back) is evidence of arbitrary and unjustifiable discrimination, especially where the non-discriminatory alternative measures are prohibited."<sup>225</sup> In Australia's view, this argument is not supported by longstanding Appellate Body jurisprudence with respect to determining arbitrary and unjustifiable discrimination in the context of both the chapeau of Article XX of the GATT 1994 and the TBT Agreement. Australia notes that, in considering whether the relevant regulatory distinctions are designed and applied in an even-handed manner in the context of Article 2.1 of the TBT Agreement, the Appellate Body has "focused on the relationship between the regulatory distinction at issue and the objective of the relevant measure".<sup>226</sup> However, Australia contends that the Appellate Body has in no case undertaken an examination of alternative measures in the context of an analysis of arbitrary or unjustifiable discrimination for the purposes of Article 2.1 of the TBT Agreement, nor should it do so in this case.

2.205. With regard to Article 2.2 of the TBT Agreement, Australia highlights that the TBT Agreement seeks to maintain the balance between the objective of avoiding the creation of unnecessary obstacles to international trade and the right of a Member to regulate in order to pursue certain legitimate objectives. Furthermore, Australia refers to the statement by the panel in *EC – Sardines* that "Article 2.2 and [the preamble to the TBT Agreement] affirm that it is up to Members to decide which policy objectives they wish to pursue and the levels at which they wish to pursue them."<sup>227</sup>

2.206. With respect to the participants' arguments concerning the relationship between the "relational" analysis of various factors of the challenged measure and the "comparative" analysis focusing on proposed alternative measures, Australia submits that the legal framework for the analysis of whether a measure is "more trade restrictive than necessary" under Article 2.2 was clearly articulated by the Appellate Body in *US – Tuna II (Mexico)* and in the original proceedings in *US – COOL*. Australia considers that these reports provide instructive guidance regarding the overall framework for the necessity analysis under Article 2.2.

2.207. Finally, Australia addresses Canada's and Mexico's allegations that the Panel erred in not considering the relative importance of the values and interests being protected by the amended COOL measure as against other measures. Australia cautions against adopting an "analytical discourse around the *relative importance* of the values and interests underlying a measure"<sup>228</sup>, because this may lead to a reassessment of the objective of the measure and its legitimacy and result in the development of a "hierarchy" of legitimate objectives.<sup>229</sup> Rather, in Australia's view, "the nature of the risks and the gravity of the consequences of non-fulfilment of the legitimate objective must be determined by reference to the legitimate objective of the challenged measure itself ... and not by comparison with the values and interests underlying other legitimate objectives not at issue in that dispute."<sup>230</sup> In this vein, Australia highlights that, in assessing "the risks non-fulfilment would create" in the original proceedings, the Appellate Body considered arguments and evidence presented by the participants but did not refer to the "relative" importance of the legitimate objective of the challenged measure as compared with other legitimate objectives.

<sup>225</sup> Australia's third participant's submission, para. 7 (quoting Canada's other appellant's submission, para. 177 (fn omitted)).

<sup>226</sup> Australia's third participant's submission, para. 9 (referring to Appellate Body Reports, *US – Clove Cigarettes*, para. 236; *US – Tuna II (Mexico)*, para. 297; and *US – COOL*, para. 347).

<sup>227</sup> Australia's third participant's submission, para. 13 (quoting Panel Report, *EC – Sardines*, para. 7.120; and referring to Appellate Body Report, *EC – Sardines*, para. 276).

<sup>228</sup> Australia's third participant's submission, para. 24 (referring to United States' appellant's submission, paras. 249-271). (emphasis original)

<sup>229</sup> Australia's third participant's submission, para. 30.

<sup>230</sup> Australia's third participant's submission, para. 26. (fn omitted)

### 2.7.2 Brazil

2.208. Brazil submits that, in assessing whether a measure modifies the conditions of competition between imported and domestic like products in violation of Article 2.1 of the TBT Agreement, no single characteristic or effect of the measure can, in itself, be determinative. Rather, and especially in the case of a technical regulation that does not *de jure* discriminate against imports, the design, structure, and expected operation of a measure, as a whole, should be carefully scrutinized. Moreover, Brazil contends that the assessment of whether a challenged measure has detrimental impact on imported products "must be informed by all relevant aspects of the market, which may include the particular characteristics of the industry at issue, the relative market share in a given industry, consumer preferences and historical trade patterns".<sup>231</sup>

2.209. With regard to Article 2.2 of the TBT Agreement, Brazil contends that the legitimate objective pursued by a technical regulation is a factor that permeates the analysis and informs the obligation set out in Article 2.2. Accordingly, it is important that the legitimate objective pursued by a Member is correctly defined, and that the measure's actual contribution to the fulfilment of the stated objective, and the manner and extent of the measure's contribution to the legitimate objective, is assessed. In this assessment, no single characteristic or effect of the measure can be determinative of the measure's inconsistency with Article 2.2. Rather, this analysis involves an evaluation of a number of factors, including the degree of contribution made by the measure to the legitimate objective pursued, and the nature of the risks and the gravity of consequences that would arise from non-fulfilment of the measure. In addition, in most cases, this "relational" analysis should be followed by a "comparative" analysis between the measure at issue and possible alternative measures.<sup>232</sup>

2.210. With regard to "the risks non-fulfilment would create" in the sense of Article 2.2 of the TBT Agreement, Brazil contends that these risks inform the degree of contribution of an alternative measure and the burden of proof in relation to potential less trade-restrictive alternative measures. In particular, Brazil contends that the complainant bears the burden of identifying a possible less trade-restrictive alternative measure, and of explaining how the alternative would be implemented. In Brazil's view, the risks of non-fulfilment need to be taken into account in the allocation of the burden of proof in the sense that, when non-fulfilment of the measure's objective would entail grave consequences, the alternative measure should be described in detail. Similarly, with regard to the degree of contribution, when non-fulfilment of the measure's objective would entail grave consequences, the alternative measure would need to present an "invariably equivalent degree of contribution" to the legitimate objective being pursued.<sup>233</sup>

### 2.7.3 China

2.211. China takes issue with the United States' argument relating to the Panel's analysis under Article 2.1 of the TBT Agreement that, because the exemptions to the amended COOL measure are even handed and apply to domestic and imported livestock equally, the amended COOL measure does not disadvantage Canadian or Mexican livestock. First, China argues that the exemptions *per se* are not measures alleged to be inconsistent with Article 2.1, and, thus, even if they are even handed and apply to domestic and imported products equally, it does not mean that the amended COOL measure itself is even handed, or that its detrimental effect stems only from legitimate regulatory distinctions. Second, the exemptions *per se* are not relevant regulatory distinctions, and, therefore, even if they are even handed and apply to domestic and import livestock equally, it does not mean that all detrimental impact of the amended COOL measure stems only from legitimate regulatory distinctions. Third, China contends that the exemptions are part of the overall architecture of the amended COOL measure, and, in particular, they are part of the reason why origin information that is collected and maintained by upstream producers and processors is not conveyed to consumers for the majority of the meat products consumed in the United States. Fourth, China disagrees with the United States that there is an analogy between the exemptions at issue in *US – Clove Cigarettes* and *EC – Seal Products*, on the one hand, and the exemptions to the amended COOL measure, on the other hand. While the former "were central to

<sup>231</sup> Brazil's third participant's submission, para. 7 (referring to Appellate Body Reports, *US – COOL*, para. 269).

<sup>232</sup> Brazil's third participant's submission, para. 12 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 322).

<sup>233</sup> Brazil's third participant's submission, para. 14.

the relevant regulatory distinctions in those disputes", the latter "are not relevant regulatory distinctions".<sup>234</sup> Accordingly, the findings relating to the exemptions in *US – Clove Cigarettes* and *EC – Seal Products* have no relevance for the exemptions of the amended COOL measure in the present disputes. Fifth, China takes issue with the United States' argument that the exemptions contributed to the reduction of costs of the amended COOL measure. In China's view, the exemptions' contribution to the reduction in costs is irrelevant to the determination of whether the detrimental impact of the amended COOL measure stems only from legitimate regulatory distinctions. Otherwise, the national treatment obligation of Article 2.1 could easily be circumvented by granting some kind of exemption reducing cost.

2.212. Regarding Article 2.2 of the TBT Agreement, China disagrees with Canada's and Mexico's contention that the Panel erred in failing to consider the relative importance of the values or interests furthered by the amended COOL measure in assessing "the risks non-fulfilment would create". First, China submits that there is no "clear-cut hierarchy among the numerous values stipulated in Article 2.2 of the [TBT Agreement]".<sup>235</sup> Second, China considers that determining the "relative importance" of an objective involves subjective judgement and submits that Members are free to decide which policy objectives and at which levels they wish to pursue. Third, there is no clear correspondence between the objectives pursued and trade-restrictiveness, and, thus, a measure could be found to be inconsistent with Article 2.2 of the TBT Agreement when it exceeds the necessary level to "fulfil" the objective, even if it pursues an "important" objective.

2.213. With regard to the burden of proof for identifying alternative measures under Article 2.2 of the TBT Agreement, China disagrees with Canada and Mexico that the Panel "set[] the bar overly high" for the complainants to establish a *prima facie* case of violation under Article 2.2 with respect to the third and fourth proposed alternative measures.<sup>236</sup> In China's view, in order to establish a *prima facie* case, the complainant must provide evidence to prove that an alternative is not merely a theory but is reasonably available. China adds that "lowering the bar" of establishing a *prima facie* case would blur the difference between the "necessity" tests in Article 2.2 of the TBT Agreement and Article XX of the GATT 1994.<sup>237</sup>

2.214. With respect to the Panel's findings under Article III:4 of the GATT 1994, China disagrees with the United States' argument that the Panel erred in failing to consider Article IX of the GATT 1994 as context of Article III:4. For China, Article IX does not constitute an exemption from Article III because nothing in Article IX indicates the right of a Member to depart from the obligations set out in Article III. Rather, Article IX establishes additional obligations for Members in relation to marks of origin. In the alternative, China submits that, even if Article IX allowed derogation from the obligation under Article III:4, the United States failed to demonstrate that Article IX is applicable in this case and that the requirements set out in this provision are satisfied.

2.215. Finally, China also disagrees with the United States' contention that the Panel erred in not addressing the availability of Article XX [of the GATT 1994] as an exception for Article III:4 of the GATT 1994 with respect to the amended COOL measure. China submits that the United States failed to advance the defence under Article XX or identify any subparagraph thereof as relevant before the Panel and, thus, did not meet its burden of proof in this respect. Moreover, China states that Article XX can always be invoked by a Member if it considers that the exceptions set out therein are applicable, and, thus, it is not the case that the United States could have access to Article XX only after the publication of the Appellate Body reports in *EC – Seal Products*.

#### 2.7.4 Colombia

2.216. Colombia submits that the Panel erred in its interpretation of Article 2.2 of the TBT Agreement because it failed to establish a clear legal test, and because it erred in applying the phrase "taking account of the risks non-fulfilment would create" in that provision to the amended COOL measure. First, with regard to the legal test under Article 2.2, Colombia maintains that the Panel identified six factors as relevant to the analysis, however, the Panel failed to consider the relationships between these different factors. For Colombia, this resulted in an incorrect weighing and balancing of the risks at issue in the present case. Colombia therefore supports Canada's claim

<sup>234</sup> China's third participant's submission, para. 18 (quoting Mexico's appellee's submission, para. 67).

<sup>235</sup> China's third participant's submission, para. 23.

<sup>236</sup> China's third participant's submission, para. 27.

<sup>237</sup> China's third participant's submission, para. 32.

that the Panel should have clarified how it intended to address the relevant factors of the analysis under Article 2.2.

2.217. Second, Colombia asserts that the Panel erred in limiting its assessment of "the risks non-fulfilment would create" to only two criteria, namely, consumer interest in country of origin information, and willingness of consumers to pay for this information. For Colombia, the Panel failed to explain why only these criteria are relevant for assessing "the risks non-fulfilment would create", to the exclusion of any other criteria. In particular, Colombia argues that the Panel should have considered the design, structure, and architecture of the amended COOL measure as an element that may shed light on the gravity of the consequences of not fulfilling the measure's objective. In particular, Colombia submits that it is evident from the design of the amended COOL measure that the United States, itself, does not consider the consequences of non-fulfilment of the amended COOL measure to be grave, because the Label E requirements of the amended COOL measure, itself, allow for providing inaccurate information.

2.218. Furthermore, Colombia disagrees with the United States' argument that the Panel erred by not addressing the availability of an Article XX exception with respect to Article III:4 of the GATT 1994. Colombia notes that the United States did not invoke Article XX, and merely proposed a "hypothetical situation" for the Panel's consideration.<sup>238</sup> It was, therefore, correct of the Panel not to address the availability of an exception under Article XX, given the fact that the United States had not provided specific evidence or arguments in this regard. For Colombia, a panel should not make findings "based on hypothetical situations".<sup>239</sup>

2.219. In addition, Colombia addresses the issue of the availability of the general exceptions of Article XX of the GATT 1994 to justify violations of provisions of covered agreements other than the GATT 1994. In this regard, Colombia refers to the Appellate Body reports in *China – Rare Earths*, and emphasizes the requirement of an objective link between the provision that is alleged to be violated and the provision of the GATT 1994.<sup>240</sup>

2.220. Moreover, Colombia addresses the relationship between Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement, and notes that the national treatment obligations under Article 2.1 and Article III:4 use the same terms, namely, "like products" and "treatment no less favourable". Colombia agrees with the Appellate Body in *EC – Seal Products* that, "in interpreting Article 2.1 of the TBT Agreement, a panel should focus on the text of Article 2.1, read in the context of the TBT Agreement, including its preamble, and also consider other contextual elements, such as Article III:4 of the GATT 1994."<sup>241</sup>

2.221. Finally, with regard to Canada's and Mexico's non-violation claims under Article XXIII:1(b) of the GATT 1994, Colombia addresses the criteria for exercising judicial economy in this regard. While Colombia does not wish to comment on Canada's and Mexico's requests that the Appellate Body reverse the Panel's decision to exercise judicial economy, Colombia considers that the Appellate Body might "shed some light" on the application of Article XXIII:1(b) of the GATT 1994.<sup>242</sup>

## 2.7.5 European Union

2.222. With respect to Article 2.1 of the TBT Agreement, the European Union notes that the participants do not challenge the Panel's findings on the detrimental impact of the amended COOL measure. Rather, the United States invokes the impropriety of relying on increased recordkeeping only as an aspect of the analysis of legitimate regulatory distinctions. However, for the European Union, the question of whether or not an increase in recordkeeping is relevant to the Article 2.1 analysis is more properly an issue of detrimental impact. In this regard, the European Union maintains that the amended COOL measure's detrimental impact on imports should be assessed on its own terms, and not by comparing it to that of the original COOL measure. Thus, the key

<sup>238</sup> Colombia's third participant's submission, para. 23.

<sup>239</sup> Colombia's third participant's submission, para. 23.

<sup>240</sup> Colombia's third participant's submission, paras. 25-27 (referring to Appellate Body Reports, *China – Rare Earths*, para. 5.74).

<sup>241</sup> Colombia's third participant's submission, para. 35 (quoting Appellate Body Reports, *EC – Seal Products*, para. 5.122, in turn referring to Appellate Body Report, *US – Clove Cigarettes*, para. 100).

<sup>242</sup> Colombia's third participant's submission, para. 45.

question is not whether the recordkeeping burden or segregation under the amended COOL measure has increased as compared to the original COOL measure, but whether, as such, the amended COOL measure has a detrimental impact on imports.

2.223. The European Union further submits that compliance with the recommendations of a panel may be achieved by adopting measures that are simultaneously more trade restrictive and more even handed. However, the European Union disagrees with the United States' argument that the inquiry into whether a measure's detrimental impact stems exclusively from a legitimate regulatory distinction should be limited to those elements of a measure that, in themselves, cause detrimental impact on imports. Rather, all aspects of a measure that speak to its design and architecture are relevant. Therefore, it would have been correct for the Panel to consider arguments relating to the three exemptions from coverage, as well as arguments relating to Labels D and E and the prohibition of trace-back. For the European Union, these are all aspects of the amended COOL measure's design, architecture, revealing structure, operation and application to be taken into account in the assessment of even-handedness, even if these aspects of the measure are not relevant regulatory distinctions that impact imports detrimentally.

2.224. Furthermore, the European Union agrees with Canada that even hypothetical or rare categories of transactions could be considered as an aspect of the design and architecture of a measure that shows a lack of even-handedness. For the European Union, it would be relevant for the analysis of even-handedness if certain relevant scenarios were treated more, or less, favourably for reasons that have nothing to do with a measure's purported aim or other legitimate objective, even if those scenarios do not (or do not yet) frequently occur in practice. At the same time, the variety of features of a measure may not all be explained by one overriding objective. Thus, mitigating adverse effects on a conflicting objective, or the pursuit of another objective implicated by the measure, could legitimately explain "looser regulatory approaches in some markets or market segments".<sup>243</sup>

2.225. Turning to Article 2.2 of the TBT Agreement, the European Union first addresses the structure and sequence of the analysis under that provision. In particular, the European Union submits that the analysis of whether a measure is more trade restrictive than necessary involves a "relational" and a "comparative" analysis, which are closely interlinked. For the European Union, it makes little sense to ask how much a measure contributes to some objective without being aware of alternatives that could contribute more, or less. The European Union therefore supports the Appellate Body's finding that a "comparative" analysis is required "in most cases", and submits that quantifying the difference, if any, between "most cases" and "all but exceptional circumstances" seems to be a "fruitless task".<sup>244</sup>

2.226. With regard to the contribution of the measure at issue to the legitimate objective, the European Union agrees with Canada's and Mexico's argument that, just because Labels D and E are neither challenged *per se*, nor addressed by any of the proposed alternative measures, this does not mean that they should be *a priori* excluded from the "relational" analysis. Nonetheless, the European Union expresses doubt whether including the contribution of Labels D and E would have changed the outcome of the analysis under Article 2.2, because a Member may legitimately impose stricter regulatory requirements for some market segments, as long as doing so does not reveal incoherence or protectionism.

2.227. With respect to the phrase "taking account of the risks non-fulfilment would create", the European Union agrees with the United States that there is no "hierarchy of values" in WTO law<sup>245</sup>, and that it is for a Member to decide which regulatory objective it wishes to pursue and at which level. The European Union disagrees with Canada and Mexico that the Panel's "necessity" analysis was flawed by the Panel's failure to reach definite conclusions on the gravity of consequences of non-fulfilment. For the European Union, this reading would be merely another way of saying that the TBT Agreement is based on a hierarchy, or a "relative importance", of regulatory objectives. In addition, the European Union submits that, while the Panel was correct in considering consumer interest and willingness to pay among the issues to be taken into account, these criteria should not necessarily have been the only ones to be considered.

<sup>243</sup> European Union's third participant's submission, para. 24.

<sup>244</sup> European Union's third participant's submission, paras. 47-48.

<sup>245</sup> European Union's third participant's submission, para. 58 (referring to United States' appellant's submission, para. 260).

2.228. With respect to the proposed alternative measures, the European Union submits that they should, in principle, make a contribution that is equivalent to that of the challenged measure. The European Union agrees with the Panel that, in some circumstances, an alternative measure may be found to make an equivalent contribution "by covering a broader range of transactions in a less demanding way".<sup>246</sup> The burden to demonstrate that such a proposed alternative measure makes an equivalent contribution rests on the complainant. In this regard, the European Union submits that Canada and Mexico did not meet that burden with respect to the first and second proposed alternatives.

2.229. However, the European Union agrees with Canada's and Mexico's argument that "'identifying' a reasonably available alternative measure, which by necessity means identifying a *hypothetical* scenario, cannot require a complainant to describe in detail a fully worked out measure ready to be put in place by a regulator."<sup>247</sup> Therefore, the European Union disagrees with the Panel that the complainant should have to show "comparability between the circumstances of the respondent and a third country ... whose measures are put forward as an example", because it is for the respondent to rebut a *prima facie* case of inconsistency.<sup>248</sup> In the same vein, the European Union considers that the Panel erred in requiring Canada and Mexico to demonstrate how and at what cost the proposed alternative measures would be implemented in the United States. The European Union questions the Panel's reliance on the Appellate Body's approach in *China – Publications and Audiovisual Products*, because that case concerned not the burden of persuasion to be met by a complainant seeking to identify alternative measures as part of a *prima facie* claim, but that of a respondent demonstrating that the proposed alternative measure is not reasonably available.<sup>249</sup> While the European Union does not take a position on whether Canada and Mexico discharged their burden of proof with respect to the third and fourth proposed alternatives measures, the European Union nevertheless considers the Panel's approach to the allocation of the burden of proof under Article 2.2 of the TBT Agreement to be "excessively strict towards complainants".<sup>250</sup>

2.230. Turning to the relationship between Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement, the European Union expresses a concern about a possible "hollowing out" of the TBT Agreement.<sup>251</sup> The concern is that a measure causing detrimental impact on imports might *de facto* violate Article III:4 of the GATT 1994, while being consistent with Article 2.1 of the TBT Agreement, if it even-handedly pursues a legitimate objective. This may give complainants an incentive to pursue national treatment claims under Article III:4 alone, which would be at odds with the TBT Agreement's role as a *lex specialis*. The European Union recalls that these concerns were addressed by the Appellate Body in *EC – Seal Products*. While the European Union does not question those findings, it considers the Panel's approach to Article III:4 in the present case questionable, because it fails to take account of the need for a harmonious and contextual interpretation of national treatment obligations across the covered agreements. The European Union considers that this was a central element of the Appellate Body's findings relating to Article III:4 in *EC – Seal Products*. In particular, the Panel erred in concluding that, simply because a finding of a detrimental impact on imports has been made under Article 2.1 of the TBT Agreement, there is automatically a violation of Article III:4 of the GATT 1994. Rather, in European Union's view, the specific and more immediate context of Article III:4 should have been taken into account.

2.231. In particular, the European Union agrees with the United States that Article IX of the GATT 1994, as the most specific provision on marking imported products, and the Agreement on Rules of Origin may provide such contextual guidance. Thus, were the Appellate Body to find that the amended COOL measure follows the principles laid down by Article IX, that may put the Panel's finding of less-favourable treatment under Article III:4 into question. While the European Union does not take a position on whether the Appellate Body should complete the legal analysis in this way, it nonetheless considers that the question merits discussion. The European Union adds that another way of interpreting Article III:4 in the context of Article IX would be by focusing on

<sup>246</sup> European Union's third participant's submission, para. 64.

<sup>247</sup> European Union's third participant's submission, para. 69. (emphasis original)

<sup>248</sup> European Union's third participant's submission, para. 69 (referring to Panel Reports, para. 7.548).

<sup>249</sup> European Union's third participant's submission, para. 70 (referring to Appellate Body Report, *China – Publications and Audiovisual Products*, para. 327, as well as the preceding discussion in paras. 318-326).

<sup>250</sup> European Union's third participant's submission, para. 71.

<sup>251</sup> European Union's third participant's submission, para. 77.

whether the detrimental impact is "*attributable* to the measure at issue".<sup>252</sup> The European Union explains that, under this approach, as long as a Member has complied with Article IX of the GATT 1994, the remaining detrimental impact "should no longer be attributed to the measure" but, rather, to "subsequent market developments, such as the lack of investment by private actors in innovative processing techniques or distribution channels".<sup>253</sup>

2.232. With regard to the United States' argument regarding the availability of an Article XX of the GATT 1994 exception for the amended COOL measure, the European Union notes that the United States did not put forward a defence of Article XX, and failed to identify any specific subparagraph of Article XX that would be applicable in the present case. The European Union notes that panels are not required to apply Article XX on their own motion whenever a violation of some provision is invoked. Moreover, the European Union considers it unclear whether any subparagraph of Article XX applies in the present case. If it were to speculate, the European Union would consider that Article XX(d) "might seem to offer some support to the amended COOL measure".<sup>254</sup> However, the European Union observes that, in order to justify the amended COOL measure under Article XX(d), the United States would have had to identify another domestic measure separate to the amended COOL measure. In addition, the amended COOL measure would have to be necessary to secure compliance with that other domestic measure. In any event, to the extent that the balance between the obligations contained in the TBT Agreement and the obligations of the GATT 1994 can be preserved by interpreting the GATT 1994 in a way that respects legitimate regulatory objectives as much as the TBT Agreement does, the Appellate Body should adopt such an approach.

2.233. Finally, with respect to Canada's and Mexico's non-violation claims, the European Union submits that the proposition that "a non-violation claim can *never* be made in compliance proceedings" would be incorrect.<sup>255</sup> By way of illustration, the European Union refers to a situation where original proceedings would consist of a single non-violation claim and there would be a recommendation by the DSB that the Member concerned make a mutually satisfactory adjustment under Article 26.1(b) of the DSU. If, in such case, a Member would recast the original measure instead of offering compensation, it would be questionable whether this would be a "mutually satisfactory adjustment". Consequently, there would be a "disagreement" as to the consistency with a covered agreement (Article 26.1 of the DSU) of a measure taken to comply.<sup>256</sup> In the case of a successful non-violation complaint, the recommendation made under Article 26.1(b) of the DSU is "the necessary foundation for the subsequent 'disagreement as to ... consistency' within the meaning of Article 21.5".<sup>257</sup> The European Union notes that, to the contrary, in the absence of a successful non-violation claim in the original proceedings, a non-violation claim cannot be raised in compliance proceedings.

### 2.7.6 Japan

2.234. With respect to Article 2.1 of the TBT Agreement, Japan submits that providing general information on origin to consumers can be a legitimate objective pursued by a technical regulation. However, Japan urges that, in fulfilling this legitimate objective, a government should not demand more information than necessary to satisfy the objective. In Japan's view, the regulatory distinctions drawn by a technical regulation imposing detailed COOL requirements "may not be 'legitimate' in the first place where the government intervention does not respond to consumer demand and the more detailed information can be voluntarily provided by suppliers to consumers in the market."<sup>258</sup> In the absence of consumer demand, the detrimental impact of such regulatory distinctions would have no "'rational connection to the objective' pursued by the measure and ... would constitute arbitrary or unjustifiable discrimination contrary to Article 2.1 of the TBT Agreement."<sup>259</sup> Japan also notes that the assessment of the "legitimacy" of the regulatory distinction under Article 2.1 should be conducted together with the analysis of the "disconnect"

<sup>252</sup> European Union's third participant's submission, para. 83. (emphasis original)

<sup>253</sup> European Union's third participant's submission, para. 83.

<sup>254</sup> European Union's third participant's submission, para. 89.

<sup>255</sup> European Union's third participant's submission, para. 96. (emphasis original)

<sup>256</sup> European Union's third participant's submission, para. 96.

<sup>257</sup> European Union's third participant's submission, para. 101.

<sup>258</sup> Japan's third participant's submission, para. 9.

<sup>259</sup> Japan's third participant's submission, para. 10.

between the information required from upstream producers and the information conveyed to consumers through the labels prescribed under the amended COOL measure.<sup>260</sup>

2.235. Furthermore, Japan takes issue with the United States' argument that the Panel erred in analysing hypothetical scenarios when examining whether the detrimental impact of the amended COOL measure stems exclusively from legitimate regulatory distinctions. In Japan's view, hypothetical situations would seem relevant to the examination of the design, architecture, revealing structure, operation, or application of the measure because such situations may arise in the future, and therefore should not necessarily be excluded from the assessment of the measure's even-handedness. However, Japan cautions that potential situations or hypothetical scenarios are relevant only to the extent that they relate to how the regulatory distinctions operate and are applied in the particular market at issue.

2.236. Turning to the relationship between the relevant regulatory distinctions and the exemptions to the amended COOL measure, Japan submits that, although the exemptions are relevant to the analysis of "treatment no less favourable", they are not, on their own, dispositive as to whether the relevant regulatory distinction under the amended COOL measure lacks "even-handedness" in its design and application. Japan explains that, by excluding "a considerable portion"<sup>261</sup> of meat products from the COOL requirements, the exemptions effectively create an additional product category of "unknown" or "unidentified" origin<sup>262</sup>, which precludes products from being classified under Categories A-D. Thus, "the difference in labelling conditions under the amended COOL measure does not appear to be calibrated to the regulatory distinctions drawn by that measure."<sup>263</sup> For these reasons, Japan concludes that the exemptions are sufficiently connected to the relevant regulatory distinctions.

2.237. Japan disagrees with the Panel's conclusions regarding the source of the detrimental impact. According to the Japan, it is not the regulatory distinctions, but the recordkeeping and verification requirements imposed by the amended COOL measure that cause the detrimental impact on imports. Thus, Japan argues that the relationship between the exemptions and the scope of the recordkeeping and verifications requirements, and how the former affect the latter in the particular market, are relevant factors to be carefully scrutinized in these proceedings. In addition, with respect to the United States' argument that the exemptions are justifiable as a "legitimate policy choice to reduce regulatory costs", Japan maintains that such justification must be scrutinized in the light of, *inter alia*, the measure's objective of providing origin information to consumers.<sup>264</sup>

2.238. With respect to the relationship between Article 2.1 of the TBT Agreement and Article III:4 and XX of the GATT 1994, Japan notes that the scope of legitimate objectives under the TBT Agreement is broader than that under Article XX of the GATT 1994. First, the analysis of what can be considered as a legitimate objective may be informed by the objectives listed in Article 2.2 and the sixth and seventh recitals of the preamble of the TBT Agreement, as well as the objectives recognized in the provisions of other covered agreements. Second, Japan argues that, in analysing the relationship between Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994, each agreement needs to be considered as a whole. To the extent that there is potential for an imbalance between the obligations set out in these agreements, this should be a relevant factor to be taken into account in the analysis of the relationship between the two agreements. Third, Japan recognizes that, although arguments in favour of a more flexible interpretation of Article III:4 of the GATT 1994 exist, this approach does not appear to be in line with the case law developed by the Appellate Body.<sup>265</sup> Japan recalls that the Appellate Body has been reluctant to accept considerations based on the objectives of the measure to determine whether there is "less favourable treatment". Furthermore, Japan is of the view that such a more flexible approach to the interpretation of Article III:4 might raise the question as to whether this would render Article XX of the GATT 1994 meaningless.

<sup>260</sup> Japan's third participant's submission, para. 11.

<sup>261</sup> Japan's third participant's submission, para. 17 (quoting Appellate Body Reports, *US – COOL*, para. 344, in turn quoting Original Panel Reports, *US – COOL*, para. 7.417).

<sup>262</sup> Japan's third participant's submission, para. 17.

<sup>263</sup> Japan's third participant's submission, para. 17.

<sup>264</sup> Japan's third participant's submission, paras. 24-25 (referring to United States' appellant's submission, paras. 210-215; and Appellate Body Reports, *US – COOL*, paras. 271 and 340).

<sup>265</sup> Japan's third participant's submission, para. 32 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 137).

2.239. Turning to the relationship between Article III:4 and Article IX of the GATT 1994, Japan recognizes that Article IX may provide context for the interpretation of Article III:4 in relation to marks of origin measures. However, Japan expresses a concern that such interpretation could lead to a conclusion that Article IX "reduces the normative scope" of Article III:4 and provides "a carve-out" for violations of Article III:4.<sup>266</sup> In addition, Article III:4 and Article IX "provide different and distinct disciplines, and ... regulate Members' conduct in a cumulative manner".<sup>267</sup> Therefore, Japan does not consider that labelling requirements on the origin of products are excluded from the scope of Article III:4 of the GATT 1994.

2.240. With respect to Article 2.2 of the TBT Agreement, Japan disagrees with Canada's and Mexico's argument that the "comparative" analysis inherently assumes that the challenged measure's trade-restrictiveness is "necessary" in order to fulfil the legitimate objective. In this respect, Japan recalls that the inquiry under Article 2.2 is a holistic exercise involving both a "relational" analysis and a "comparative" analysis. Furthermore, according to the Appellate Body in the original proceedings in *US – COOL*, the "comparative" analysis is part of an overall weighing and balancing exercise and should be undertaken in most cases, unless the inconsistency of a technical regulation with Article 2.2 can be unequivocally established without such analysis.<sup>268</sup>

2.241. Japan agrees with the Panel's finding that "the relative importance of interests or values protected by a measure is not a separate factor of the Article 2.2 legal test."<sup>269</sup> It can be examined in the assessment of the nature of the risks at issue and the gravity of the consequences that would arise from non-fulfilment of the legitimate objective. With respect to the alternative measures, Japan agrees with Canada that they are hypothetical in nature and should not be required to be identified with unnecessary precision. Finally, Japan adds that, under Article 2.2, the complainant's burden to establish a *prima facie* case includes identification of a possible reasonably available alternative measure, while the respondent should rebut the complainant's *prima facie* case by presenting evidence and arguments to demonstrate that the proposed alternative is "merely theoretical in nature", impossible to undertake, or that it would impose an "undue burden" on the Member, such as prohibitive costs or substantial technical difficulties.<sup>270</sup>

### 2.7.7 Korea

2.242. At the oral hearing, Korea commented on two issues. First, Korea addressed the meaning of "compliance" under Article 21 of the DSU. Second, Korea addressed the relationship between Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994. With regard to the first issue, Korea is of the view that "compliance" encompasses more than the withdrawal or modification of the measure at issue. Thus, while addressing concerns articulated by a panel or the Appellate Body is an important element in the implementation of DSB recommendations and rulings, the genuine meaning of compliance is to bring the measure at issue into conformity in good faith with the obligations under the agreement at issue. Accordingly, in the present disputes, the issue before the Appellate Body is not only whether the United States has addressed the concerns identified by the Appellate Body in the original proceedings, but whether the amended COOL measure has removed discrimination against imported livestock, which does not stem exclusively from legitimate regulatory distinctions. Second, Korea highlighted the systemic importance of clarifying the relationship between Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994. Korea explained that a detrimental impact that stems from legitimate regulatory distinctions may be found to be consistent with Article 2.1 of the TBT Agreement, while violating Article III:4 of the GATT 1994, if Article XX of the GATT 1994 does not provide an exception. For Korea, this may lead to confusion and cause implementation problems.

<sup>266</sup> Japan's third participant's submission, para. 38.

<sup>267</sup> Japan's third participant's submission, para. 39. (fn omitted)

<sup>268</sup> Japan's third participant's submission, para. 43 (referring to Appellate Body Reports, *US – COOL*, para. 374).

<sup>269</sup> Japan's third participant's submission, para. 44 (quoting Panel Reports, para. 7.379, and referring to para. 7.311).

<sup>270</sup> Japan's third participant's submission, para. 47 (quoting Panel Reports, para. 7.555, in turn quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156, in turn quoting Appellate Body Report, *US – Gambling*, para. 308).

### 2.7.8 New Zealand

2.243. With regard to the Panel's analysis of Article 2.1 of the TBT Agreement, New Zealand submits that the Panel was correct in considering elements of the amended COOL measure that are not, themselves, relevant regulatory distinctions or independent sources of detrimental impact in its analysis of the "overall architecture" of the measure. While individual elements of the measure, when viewed in isolation, may appear to be consistent with Article 2.1, the combined effect may nevertheless be inconsistent if the nature or number of distinctions is such that the technical regulation, as a whole, accords less-favourable treatment to imported products.

2.244. With respect to Article 2.2 of the TBT Agreement, New Zealand offers comments on three issues. First, regarding the interpretation of the phrase "taking account of the risks non-fulfilment would create", New Zealand does not consider that the relative importance of the legitimate objective of the measure constitutes a separate factor in the analysis. Rather, this element is part of the analysis of the nature of the risks and gravity of the consequences of non-fulfilment. For New Zealand, consideration of the nature of the risks and of the gravity of the consequences will necessarily, although indirectly, include consideration of the "importance" of the objective.

2.245. Second, with respect to the complainant's burden of proof to present a *prima facie* case for an alternative measure, New Zealand recalls that the Appellate Body in *US – Tuna II (Mexico)* referred to at least two instances where a complainant may be absolved from this burden: (i) when the challenged measure is not trade restrictive at all; or (ii) when a challenged measure makes no contribution to the achievement of the relevant legitimate objective.<sup>271</sup> New Zealand considers that, if neither of the instances identified by the Appellate Body is applicable, then the burden rests on the complainant to establish a *prima facie* case that an alternative measure that meets the requirements of Article 2.2 exists.

2.246. Finally, with respect to the degree of contribution to the objective that an alternative measure is required to achieve, New Zealand points out that "[a]n alternative measure may make a greater contribution, or only a generally equivalent contribution to the legitimate objective".<sup>272</sup> In only "very rare cases" may a proposed alternative measure that makes a lesser contribution demonstrate that the challenged measure is more trade restrictive than necessary.<sup>273</sup> New Zealand cautions against adopting an interpretative approach "that would routinely favour alternative measures that make a lesser contribution to the achievement of the legitimate objective".<sup>274</sup>

## 3 ISSUES RAISED IN THIS APPEAL

3.1. With respect to the Panel's findings that the amended COOL measure is inconsistent with Article 2.1 of the TBT Agreement, the following issues are raised by the participants:

- a. whether the Panel erred in concluding that the detrimental impact of the amended COOL measure on imported livestock does not stem exclusively from legitimate regulatory distinctions, and, in particular:
  - i. whether the Panel erred in finding that the amended COOL measure increases the recordkeeping burden entailed by the original COOL measure, and that this supports a conclusion that the detrimental impact of that measure on imported livestock does not stem exclusively from legitimate regulatory distinctions (issue raised by the United States);
  - ii. whether the Panel erred in finding that Labels B and C, as prescribed by the amended COOL measure, are potentially inaccurate, and that this supports a conclusion that the detrimental impact of that measure on imported livestock does not stem exclusively from legitimate regulatory distinctions (issue raised by the United States); and

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<sup>271</sup> New Zealand's third participant's submission, para. 10 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 322; and United States' appellee's submission, para. 52).

<sup>272</sup> New Zealand's third participant's submission, para. 13.

<sup>273</sup> New Zealand's third participant's submission, para. 13.

<sup>274</sup> New Zealand's third participant's submission, para. 13.

- iii. whether the Panel erred in finding that the exemptions prescribed by the amended COOL measure support the conclusion that the detrimental impact of that measure on imported livestock does not stem exclusively from legitimate regulatory distinctions (issue raised by the United States);
- b. whether the Panel erred by failing to assess appropriately the relevance of Label D for the analysis of whether the detrimental impact of the amended COOL measure on imported livestock stems exclusively from legitimate regulatory distinctions (issue raised by Canada);
- c. whether the Panel erred by failing to assess appropriately the relevance of Label E for the analysis of whether the detrimental impact of the amended COOL measure on imported livestock stems exclusively from legitimate regulatory distinctions (issue raised by Canada and Mexico); and
- d. whether the Panel erred by failing to assess appropriately the relevance of the prohibition of a trace-back system under the amended COOL measure for the analysis of whether the detrimental impact of that measure on imported livestock stems exclusively from legitimate regulatory distinctions (issue raised by Canada).

3.2. With respect to the Panel's findings under Article 2.2 of the TBT Agreement, the following issues are raised by the participants:

- a. in respect of the sequence and order of the "necessity" analysis under Article 2.2:
  - i. whether the Panel erred by failing to articulate correctly the relational component of the analysis under Article 2.2 (issue raised by Canada);
  - ii. whether the Panel erred by failing to describe how different factors are to be weighed and balanced against each other under the "relational" analysis (issue raised by Canada);
  - iii. whether the Panel erred by failing to clarify that the "comparative" analysis does not necessarily prevail over the "relational" analysis (issue raised by Canada); and
  - iv. whether the Panel erred by stating that a "comparative" analysis would only be redundant in exceptional circumstances, and in concluding that such "exceptional circumstances" must be demonstrated before any "overall" conclusions with respect to Article 2.2 may be drawn from the "relational" analysis (issue raised by Mexico);
- b. whether the Panel erred by excluding Labels D and E (issue raised by Canada), or Label E only (issue raised by Mexico), in its analysis of the contribution of the amended COOL measure to its objective, and, therefore, in concluding that the amended COOL measure makes a "considerable but necessarily partial" degree of contribution to its objective;
- c. with respect to the interpretation and application of the phrase "taking account of the risks non-fulfilment would create" in Article 2.2:
  - i. whether the Panel erred in contemplating that an alternative measure providing less specific or less accurate information could qualify as making an "equivalent" degree of contribution as compared to the amended COOL measure (issue raised by the United States);
  - ii. whether the Panel erred by failing to take into account the relative importance of the values or interests furthered by the amended COOL measure (issue raised by Canada and Mexico);
  - iii. whether the Panel erred by failing to take into account the design, structure, and architecture of the amended COOL measure (raised by Canada and Mexico); and

- iv. whether the Panel erred in concluding that it was unable to ascertain the gravity of the consequences of non-fulfilment of the amended COOL measure's objective (issue raised by Canada and Mexico);
- d. whether the Panel erred in finding that Canada and Mexico did not make a *prima facie* case that the first and second proposed alternative measures would make an "equivalent" degree of contribution to the amended COOL measure's objective (issue raised by Canada and Mexico); and
- e. whether the Panel erred in finding that Canada and Mexico did not make a *prima facie* case that the third and fourth proposed alternative measures are reasonably available for purposes of their claims under Article 2.2 (issue raised by Canada and Mexico).

3.3. With respect to the Panel's finding that the amended COOL measure is inconsistent with Article III:4 of the GATT 1994, whether the Panel erred by failing to take into account Articles IX:2 and IX:4 of the GATT 1994 as relevant context in interpreting Article III:4 of the GATT 1994 (issue raised by the United States).

3.4. Whether the Panel erred in the way it addressed the United States' request at the interim review stage regarding the availability of Article XX of the GATT 1994 as an exception for Article III:4 of the GATT 1994 with respect to the amended COOL measure (issue raised by the United States).

3.5. In the event that the Appellate Body reverses the Panel's findings that the amended COOL measure is inconsistent with Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994, whether the Panel erred by exercising judicial economy with respect to Canada's and Mexico's non-violation claims under Article XXIII:1(b) of the GATT 1994 (issue raised by Canada and Mexico).

3.6. In the event that the condition of Canada's and Mexico's appeals under Article XXIII:1(b) of the GATT 1994 is fulfilled, whether the Panel erred in concluding that the complainants' claims under Article XXIII:1(b) were within the Panel's terms of reference (issue raised by the United States).

## 4 BACKGROUND AND OVERVIEW OF THE MEASURE AT ISSUE

4.1. Before turning to the analysis of the issues raised in this appeal, we provide an overview of the measure at issue in these disputes, as identified by the Panel.

### 4.1 Introduction

4.2. The measure at issue in the original disputes comprised the "COOL statute"<sup>275</sup>, adopted by the US Congress, and related implementing regulations, promulgated by the US Secretary of Agriculture through the Agricultural Marketing Service (AMS) of the US Department of Agriculture<sup>276</sup> (USDA) (2009 Final Rule (AMS)), which, in these Reports, we refer to collectively as the "original COOL measure". Other measures considered by the original panel have either expired or have been withdrawn and are not at issue in these compliance proceedings.<sup>277</sup>

<sup>275</sup> The Agricultural Marketing Act of 1946 (60 Stat. 1087, *United States Code*, Title 7, Section 1621 et seq.) (Panel Exhibit CDA-3), as amended by the Farm Security and Rural Investment Act of 2002 (116 Stat. 134, 533-535, Public Law No. 107-171, Section 10816: "Country of Origin Labeling" (Panel Exhibit CDA-4)) (2002 Farm Bill) and the Food, Conservation, and Energy Act of 2008, 122 Stat. 923, 1351-1354, Public Law No. 110-234 (22 May 2008), Section 11002: "Country of Origin Labeling" (Panel Exhibit CDA-5) (2008 Farm Bill). Through the enactment of the 2002 and 2008 Farm Bills, the COOL requirements were inserted into the Agricultural Marketing Act of 1946 as Section 1638, and in turn codified under *United States Code*, Title 7, Section 1638. (See Original Panel Reports, *US – COOL*, paras. 7.12-7.13 and 7.77)

<sup>276</sup> USDA, Final 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, *United States Federal Register*, Vol. 74, No. 10 (15 January 2009) pp. 2704-2707 (Panel Exhibits CDA-2 and MEX-12).

<sup>277</sup> Panel Reports, para. 7.7.

4.3. These compliance disputes concern measures adopted by the United States to comply with the DSB recommendations and rulings in *US – COOL*. As noted by the Panel, the AMS of the USDA issued the final rule, effective 23 May 2013<sup>278</sup> (2013 Final Rule), in order "to make changes to the labeling provisions for muscle cut covered commodities and certain other modifications".<sup>279</sup> The COOL statute, which constituted part of the original COOL measure, remains unchanged.<sup>280</sup> In these Reports, we refer to the COOL statute and the 2009 Final Rule (AMS), as amended by the 2013 Final Rule, collectively as the "amended COOL measure". The amended COOL measure maintains the key elements of the original COOL measure<sup>281</sup>, in particular: (i) the wide range of "covered commodities", including muscle cuts of beef and pork, as well as ground beef and pork<sup>282</sup>; (ii) the four different origin categories for muscle cuts of meat and one additional origin category for ground meat<sup>283</sup>; (iii) rules concerning the way in which information is provided to the consumer<sup>284</sup>; and (iv) recordkeeping and verification requirements.<sup>285</sup> The main changes introduced by the amended COOL measure concern: (i) the prescription of a point-of-production labelling requirement – i.e. a requirement that Labels A, B, and C for muscle cuts of US-slaughtered livestock indicate where each production step (birth, raising, slaughter) occurred<sup>286</sup>; (ii) the removal of the commingling and country order flexibilities<sup>287</sup>; (iii) the amendment of the multiple countries of raising flexibility<sup>288</sup>; and (iv) the amendment of the coverage of Label D.<sup>289</sup>

## 4.2 Overview of the amended COOL measure

4.4. The amended COOL measure is an internal measure of the United States, as opposed to a customs or border measure.<sup>290</sup> It requires retailers in the United States to affix labels providing country of origin information on certain products. This obligation applies irrespective of whether the products are imported or domestically produced. The measure applies to a wide range of commodities, including muscle cuts and ground meat of beef and pork. Although livestock are not formally listed as "covered commodities" under the amended COOL measure, the Panel found that, for the same reasons as set out in the original panel reports, the amended COOL measure applies also to cattle and hogs.<sup>291</sup> The products at issue in these disputes are cattle and hogs used in the production of beef and pork.<sup>292</sup> The definition of "origin" of meat under the original and amended COOL measures differs from the conception of "origin" generally employed by the United States and other Members for customs purposes. While, for customs purposes, the United States relies on the rule of substantial transformation for determining the origin of products imported into the United States<sup>293</sup>, the original and amended COOL measures define "origin" for purposes of Labels A, B, and C as a function of where the animals from which the meat is derived were born, raised, and slaughtered.<sup>294</sup> Under the COOL measures, meat carrying Labels A, B, and C may have one or more countries of origin, depending on where these production steps took place. Similarly, meat carrying Label E (ground meat) may have one or more countries of origin, as the label must list all countries of origin of the meat contained therein, or of meat that may reasonably be

<sup>278</sup> USDA, Final 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, *United States Federal Register*, Vol. 78, No. 101 (24 May 2013), pp. 31367-31385 (Panel Exhibits CDA-1 and MEX-3).

<sup>279</sup> Panel Reports, para. 7.8 (quoting 2013 Final Rule, p. 31367).

<sup>280</sup> Panel Reports, para. 7.9.

<sup>281</sup> Panel Reports, para. 7.55. For additional details with regard to the original COOL measure, see Appellate Body Reports, *US – COOL*, paras. 237-253; and Original Panel Reports, *US – COOL*, paras. 7.75-7.142.

<sup>282</sup> Panel Reports, para. 7.25.

<sup>283</sup> Panel Reports, para. 7.12.

<sup>284</sup> Panel Reports, para. 7.22.

<sup>285</sup> Panel Reports, para. 7.45.

<sup>286</sup> Panel Reports, para. 7.18.

<sup>287</sup> Panel Reports, paras. 7.34 and 7.37.

<sup>288</sup> Panel Reports, paras. 7.40-7.43.

<sup>289</sup> Panel Reports, para. 7.19.

<sup>290</sup> Panel Reports, para. 7.635 (referring to Canada's first written submission to the Panel, para. 93; and Mexico's first written submission to the Panel, para. 224).

<sup>291</sup> Panel Reports, paras. 7.25-7.26 (quoting Original Panel Reports, *US – COOL*, para. 7.246).

<sup>292</sup> Panel Reports, para. 7.26 (quoting Original Panel Reports, *US – COOL*, para. 7.246).

<sup>293</sup> The rule of substantial transformation confers origin exclusively to the country where the processing of food took place, which, in the case of meat, is the country where the animal was slaughtered. (Appellate Body Reports, *US – COOL*, para. 241)

<sup>294</sup> Panel Reports, para. 7.10 (referring to Appellate Body Reports, *US – COOL*, paras. 240-241).

contained therein.<sup>295</sup> The origin of meat carrying Label D is determined based on the criterion of substantial transformation that confers origin to the country where the animal was slaughtered.<sup>296</sup>

4.5. The amended COOL measure permits the same methods for conveying origin information as the original COOL measure. Specifically, requisite information may be conveyed to consumers "by means of a label, stamp, mark, placard, or other clear and visible sign on the covered commodity or on the package, display, holding unit, or bin containing the commodity at the final point of sale to consumers".<sup>297</sup> The amended COOL measure allows the use of country abbreviations (e.g. "U.S." and "USA" for "United States of America"), and abbreviations for the production steps (e.g. "slghtrd" as meaning "slaughtered").<sup>298</sup> In addition, the amended COOL measure maintains the permission of the use of the term "harvested" in lieu of "slaughtered".<sup>299</sup>

4.6. In addition to requiring retailers to provide information on the origin of beef and pork, the amended COOL measure maintains the requirements for upstream suppliers of meat products to provide retailers with information on the origin of the meat supplied. The recordkeeping and verification rules of the original COOL measure remain unchanged under the amended COOL measure.<sup>300</sup> The US Secretary of Agriculture "may conduct an audit of any person that prepares, stores, handles, or distributes a covered commodity for retail sale to verify compliance" with the recordkeeping requirements.<sup>301</sup>

4.7. The COOL statute limits the recordkeeping obligations for retailers and their suppliers to "[r]ecords maintained in the course of the normal conduct of the business of such person, including animal health papers, import or customs documents, or producer affidavits".<sup>302</sup> Moreover, it expressly prohibits the USDA from imposing "a mandatory identification [trace-back] system to verify the country of origin of a covered commodity".<sup>303</sup> This limitation and prohibition of the original COOL measure remain unchanged under the amended COOL measure.<sup>304</sup>

### 4.3 Coverage of the amended COOL measure

4.8. The original COOL measure applied to a wide range of "covered commodities", including muscle cuts of beef and pork, as well as to ground beef and pork.<sup>305</sup> Even though cattle and hogs were not formally listed as "covered commodities", the original panel found that the original COOL measure nevertheless applied not only to beef and pork, but also to cattle and hogs.<sup>306</sup> The 2013 Final Rule does not modify the original COOL measure in respect of its application to meat and livestock.<sup>307</sup>

<sup>295</sup> Panel Reports, para. 7.20 (quoting 2009 Final Rule (AMS), Section 65.300(h)).

<sup>296</sup> Panel Reports, para. 7.15 (referring to Original Panel Reports, *US – COOL*, para. 7.674; and Appellate Body Reports, *US – COOL*, para. 241). We note that the amended COOL measure provides a voluntary option for Label D to "include more specific location information related to production steps". Where that option is exercised, origin under Label D is also a function of where the animals from which the meat is derived were born, raised, and slaughtered. (Panel Reports, para. 7.19 (quoting 2013 Final Rule, Section 65.300(f)(2)))

<sup>297</sup> Panel Reports, para. 7.22 (quoting COOL statute, Section 1638a(c)(1)).

<sup>298</sup> Panel Reports, paras. 7.23-7.24 (quoting 2013 Final Rule, p. 31369).

<sup>299</sup> Panel Reports, fn 78 to para. 7.23 (quoting 2009 Final Rule (AMS), Section 65.250; and 2013 Final Rule, p. 31368).

<sup>300</sup> Panel Reports, para. 7.45. The 2009 Final Rule (AMS) required that "[a]ny person engaged in the business of supplying a covered commodity to a retailer, whether directly or indirectly ..., must maintain records to establish and identify the immediate previous source (if applicable) and immediate subsequent recipient of a covered commodity for a period of 1 year from the date of transaction", and must make that information available to the buyer. (2009 Final Rule (AMS), Section 65.500(b)(3)) See also Original Panel Reports, *US – COOL*, para. 7.118.

<sup>301</sup> Panel Reports, fn 134 to para. 7.45 (quoting COOL statute, Section 1638a(d)(1)).

<sup>302</sup> Panel Reports, para. 7.82 (quoting COOL statute, Section 1638a(d)(2)(A)).

<sup>303</sup> Panel Reports, para. 7.82 (quoting COOL statute, Section 1638a(f)(1)).

<sup>304</sup> Panel Reports, para. 7.45 (quoting COOL statute, Section 1638a(d)(1) and (2)(4) and Section 1638a(f)(1)).

<sup>305</sup> The "covered commodities", in addition to beef and pork, include lamb, chicken, goat meat, wild and farm-raised fish and shellfish, perishable agricultural commodities, peanuts, pecans, ginseng, and macadamia nuts. (Panel Reports, fn 82 to para. 7.25 (quoting COOL statute, Section 1638(2)(A)))

<sup>306</sup> Panel Reports, para. 7.26 (referring to Original Panel Reports, *US – COOL*, para. 7.246).

<sup>307</sup> Panel Reports, para. 7.26.

4.9. The original COOL measure contained three exemptions from coverage. They concerned: (i) ingredients in "processed food items"<sup>308</sup>; (ii) products served in "food service establishments"<sup>309</sup>; and (iii) entities not meeting the definition of "retailer".<sup>310</sup> The Panel found that the amended COOL measure retains these exemptions and "slightly adjust[s]" the definition of "retailer".<sup>311</sup>

4.10. The original COOL measure defined "retailer" as "any person licensed as a retailer under the Perishable Agricultural Commodities Act of 1930 (PACA)".<sup>312</sup> Pursuant to the terms of the PACA, this means that a "retailer" is an entity whose invoice costs of purchases of perishable agricultural commodities are in excess of US \$230,000 in any calendar year.<sup>313</sup> The 2013 Final Rule defines "retailer" as "any person *subject to be* licensed as a retailer under the ... PACA".<sup>314</sup> The Panel also noted the USDA's explanation that the change in the definition clarifies that all retailers that meet the PACA definition of "retailer", whether or not they actually have a PACA licence, are covered by the amended COOL measure.<sup>315</sup>

#### 4.4 Categories of meat

4.11. The original COOL measure established four categories of origin for muscle cuts of meat (Categories A-D) and one additional category for ground meat (Category E).<sup>316</sup> These categories remain applicable under the amended COOL measure<sup>317</sup>:

- a. **Category A** is reserved for meat derived from livestock born, raised, and slaughtered in the United States.
- b. Two categories of origin are reserved for muscle cuts derived from livestock slaughtered in the United States but that were born and/or raised in a different country. For each of these categories, at least one production step will have taken place outside the United States, and at least one production step will have taken place within the United States. These categories are distinguished based on whether the animals were born in a foreign country and then raised and slaughtered in the United States (**Category B**), or raised outside the United States and then imported into the United States for immediate slaughter, that is, to be slaughtered within two weeks of the date the animals enter the United States (**Category C**).<sup>318</sup>

<sup>308</sup> A "processed food item" is defined as "a retail item derived from a covered commodity that has undergone specific processing resulting in a change in the character of the covered commodity, or that has been combined with at least one other covered commodity or other substantive food component". (Panel Reports, para. 7.29 (quoting 2009 Final Rule (AMS), Section 65.220)) Such processing includes "cooking", "curing", "smoking", and "restructuring". (Panel Reports, fn 91 to para. 7.29 (referring to 2009 Final Rule (AMS), Section 65.220)) Any covered commodities that are "an ingredient in a processed food item" were also excluded from the scope of the original COOL measure. (Panel Reports, para. 7.29 (quoting COOL statute, Section 1638(2)(B)))

<sup>309</sup> "Food service establishments" are defined by the original COOL measure as "a restaurant, cafeteria, lunch room, food stand, saloon, tavern, bar, lounge, or other similar facility operated as an enterprise engaged in the business of selling food to the public." The 2009 Final Rule (AMS) further provided that "[s]imilar food service facilities include salad bars, delicatessens, and other food enterprises located within retail establishments that provide ready-to-eat foods that are consumed either on or outside of the retailer's premises." (Panel Reports, para. 7.30 (quoting 2009 Final Rule (AMS), Section 65.140))

<sup>310</sup> Panel Reports, para. 7.27 (referring to Original Panel Reports, *US – COOL*, paras. 7.101-7.108; and Appellate Body Reports, *US – COOL*, para. 334).

<sup>311</sup> Panel Reports, para. 7.27.

<sup>312</sup> Panel Reports, para. 7.28 (quoting 2009 Final Rule (AMS), Section 65.240, in turn referring to Perishable Agricultural Commodities Act of 1930, *United States Code of Federal Regulations*, Title 7, Section 499 (Panel Exhibits CDA-10 and MEX-7)).

<sup>313</sup> Panel Reports, para. 7.28 (referring to Original Panel Reports, *US – COOL*, para. 7.101).

<sup>314</sup> Panel Reports, para. 7.28 (quoting 2013 Final Rule, Section 65.240). (emphasis added by the Panel)

<sup>315</sup> Panel Reports, fn 89 to para. 7.28 (quoting 2013 Final Rule, p. 31368).

<sup>316</sup> Panel Reports, para. 7.11 (referring to COOL statute, Section 1638a(2)(A-E); and Original Panel Reports, *US – COOL*, para. 7.89).

<sup>317</sup> Panel Reports, para. 7.12 (referring to 2013 Final Rule, p. 31370).

<sup>318</sup> See Panel Reports, para. 7.14; Appellate Body Reports, *US – COOL*, para. 244; and Original Panel Reports, *US – COOL*, para. 7.92.

- c. Muscle cuts must be designated as having a country of origin other than the United States (**Category D**) when the livestock from which the meat is derived have been slaughtered in that country prior to export – i.e. when imported as meat.
- d. For ground meat (**Category E**), the label must list all countries of origin of the meat contained therein or that may reasonably be contained therein based on the 60-day "inventory allowance" rule.<sup>319</sup> According to this rule, when a raw material from a specific origin has not been in a processor's inventory for more than 60 days, that country shall no longer be included as a country of origin on the label.<sup>320</sup>

4.12. The Panel found that the 2013 Final Rule amends the definition of Category D muscle cuts. Under the original COOL measure, Category D extended to "[i]mported covered commodities for which origin has already been established as defined by this law (e.g., born, raised, and slaughtered or produced) and for which no production steps have occurred in the United States".<sup>321</sup> The amended COOL measure defines Category D meat as "[m]uscle cut covered commodities derived from an animal that was slaughtered in another country ... including muscle cut covered commodities derived from an animal that was born and/or raised in the United States and slaughtered in another country."<sup>322</sup>

#### 4.5 Labelling requirements

4.13. For each of the above-mentioned categories of products, the original COOL measure provided for corresponding Labels A, B, C, D, and E.

4.14. The original COOL measure provided that muscle cuts in Category A could bear a declaration that identified the United States as the sole country of origin at retail. Label A could read "Product of the United States" or any variation permitted under the original COOL measure (e.g. "Product/Produce of the USA", using acceptable country abbreviations "U.S." or "USA" for the "United States of America").<sup>323</sup> The amended COOL measure provides that "[t]he United States country of origin designation for muscle cut covered commodities shall include all of the production steps (i.e. 'Born, Raised, and Slaughtered in the United States')."<sup>324</sup> Accordingly, under the amended COOL measure, Label A may read "Born, Raised and Slaughtered in the United States", or any variation thereof permitted under the amended COOL measure.<sup>325</sup>

4.15. Under the original COOL measure, Category B meat could be labelled as a product of the United States and of the foreign country or countries in which the animal was born and raised. The countries of origin could be listed in any order. For example, a label on Category B meat could state "Product of the U.S. and Mexico" or "Product of Mexico and the U.S."<sup>326</sup> The amended COOL measure provides that, "[i]f an animal was born and/or raised in Country X and/or (as applicable) Country Y, and slaughtered in the United States, the resulting muscle cut covered commodities shall be labeled to specifically identify the production steps occurring in each country".<sup>327</sup> Accordingly, under the amended COOL measure, Label B may read "Born and Raised in Country X, Raised and Slaughtered in the United States" or "Born and Raised in Country X, Raised in Country Y, Raised and Slaughtered in the United States".

<sup>319</sup> Panel Reports, para. 7.20 (referring to 2009 Final Rule (AMS), Section 65.300(h)).

<sup>320</sup> Panel Reports, para. 7.16 (referring to 2009 Final Rule (AMS), Section 65.300(h)).

<sup>321</sup> Panel Reports, para. 7.15 (quoting 2009 Final Rule (AMS), Section 65.300(f)). (emphasis added by the Panel)

<sup>322</sup> Panel Reports, para. 7.15 (quoting 2013 Final Rule, Section 65.300(f)(2)). (emphasis added by the Panel)

<sup>323</sup> Panel Reports, para. 7.17 and fn 62 thereto (quoting 2009 Final Rule (AMS), Section 65.300(d)).

<sup>324</sup> Panel Reports, para. 7.21, Table 1 (quoting 2013 Final Rule, Section 65.300(d)). (emphasis added by the Panel)

<sup>325</sup> Panel Reports, paras. 7.23-7.24 (quoting 2013 Final Rule, p. 31369). See also *supra*, para. 4.5. Such variations are permitted for Labels A-E.

<sup>326</sup> See Panel Reports, para. 7.17.

<sup>327</sup> Panel Reports, para. 7.21, Table 1 (quoting 2013 Final Rule, Section 65.300(e)). (emphasis added by the Panel)

4.16. In the case of Label C, under the original COOL measure, when an animal was imported into the United States for immediate slaughter, the origin of the resulting meat products derived from that animal had to be designated as "Product of Country X and the United States".<sup>328</sup> Label C had to indicate all the origins of the animal, but could not list the United States first. Labels following this rule could read, e.g. "Product of Canada and the U.S." Because the countries of origin for meat of Category B could be listed in any order, the labels for Category B and C meat could look the same in practice – i.e. a label stating "Product of Canada and the United States" could be describing the origin of Category B meat from an animal born in Canada and raised and slaughtered in the United States, or it could be describing Category C meat derived from an animal imported from Canada for immediate slaughter.<sup>329</sup> Under the amended COOL measure, "[i]f an animal was born and/or raised in Country X and/or (as applicable) Country Y, and slaughtered in the United States, the resulting muscle cut covered commodities *shall* be labelled to specifically identify the production steps occurring in each country (e.g., 'Born and Raised in Country X, Slaughtered in the United States')."<sup>330</sup> Accordingly, under the amended COOL measure, Label C may read "Born and raised in Country X, Slaughtered in the United States".

4.17. Under the original COOL measure, Label D reflected the country of origin "as declared to U.S. Customs and Border Protection" based on the criterion of substantial transformation.<sup>331</sup> The amended COOL measure maintains the requirement to indicate origin of meat "as declared to U.S. Customs and Border Protection at the time the product entered the United States" based on the criterion of substantial transformation.<sup>332</sup> In addition, the amended COOL measure provides a voluntary option for Label D to "include more specific location information related to production steps (i.e., born, raised, and slaughtered) provided records to substantiate the claims are maintained".<sup>333</sup> Accordingly, under the amended COOL measure, Label D may read "Product of Country X".

4.18. Finally, under the original COOL measure, Label E for ground meat products had to list all countries of origin of the meat contained therein or that could reasonably have been contained therein based on the 60-day "inventory allowance" mentioned above.<sup>334</sup> The amended COOL measure maintains this requirement.

4.19. In paragraph 7.21 of its Reports, the Panel summarized the origin definitions and gave examples of labels for each category of meat under the original and the amended COOL measures as set out in the table below.

<sup>328</sup> Panel Reports, para. 7.17 (referring to 2009 Final Rule (AMS), Section 65.300(e)(3)). The Panel further noted that the 2009 Final Rule (AMS) also stipulated that the countries on Label B "may be listed in any order", as distinct from Label C, which did not have a similar flexibility. (Panel Reports, fn 64 to para. 7.17 (quoting 2009 Final Rule (AMS), Section 65.300(e)(4) and p. 2659))

<sup>329</sup> Panel Reports, para. 7.35 (quoting Appellate Body Reports, *US – COOL*, para. 245; and Original Panel Reports, *US – COOL*, para. 7.288).

<sup>330</sup> Panel Reports, para. 7.21, Table 1 (quoting 2013 Final Rule, Section 65.300(e)). (emphasis added by the Panel)

<sup>331</sup> Panel Reports, paras. 7.17 and 7.21, Table 1 (quoting 2009 Final Rule (AMS), Section 65.300(f)).

<sup>332</sup> Panel Reports, paras. 7.19 and 7.21, Table 1 (quoting 2013 Final Rule, Section 65.300(f)(2)).

<sup>333</sup> Panel Reports, para. 7.19 (quoting 2013 Final Rule, Section 65.300(f)(2)). The Panel noted that the provision for voluntarily providing such information applied to Labels B and C under the original COOL measure. (Panel Reports, fn 70 to para. 7.19)

<sup>334</sup> Panel Reports, para. 7.17 (referring to 2009 Final Rule (AMS), Section 65.300(h)).

**Table 1: Definitions of origin and basic labels for muscle cuts**

	2009 Final Rule (AMS)	2013 Final Rule*
<b>LABEL A</b>	<div style="border: 1px solid black; padding: 5px; text-align: center;">Product of the U.S.</div> <p>"United States country of origin means ... [f]rom animals exclusively born, raised, and slaughtered in the United States" (65.260(a)(1))</p> <p>"A covered commodity <i>may</i> bear a declaration that identifies the United States as the sole country of origin at retail only if it meets the definition of United States country of origin as defined in § 65.260." (65.300(d) (emphasis added by Panel))</p>	<div style="border: 1px solid black; padding: 5px; text-align: center;">Born, Raised, and Slaughtered in the United States</div> <p>"The United States country of origin designation for muscle cut covered commodities <i>shall</i> include all of the production steps (i.e. 'Born, Raised, and Slaughtered in the United States')." (65.300(d) (emphasis added by Panel))</p>
<b>LABEL B</b>	<div style="display: flex; justify-content: space-around;"> <div style="border: 1px solid black; padding: 5px; text-align: center;">Product of the United States, Country X</div> <div style="border: 1px solid black; padding: 5px; text-align: center;">Product of the United States, Country X, and ... Country Y</div> </div> <p>"For muscle cut covered commodities derived from animals that were born in Country X or (as applicable) Country Y, raised and slaughtered in the United States, and were not derived from animals imported for immediate slaughter as defined in § 65.180, the origin <i>may</i> be designated as Product of the United States, Country X, and (as applicable) Country Y." (65.300(e)(1) (emphasis added by Panel))</p>	<div style="display: flex; justify-content: space-around;"> <div style="border: 1px solid black; padding: 5px; text-align: center;">Born and Raised in Country X, Raised and Slaughtered in the United States</div> <div style="border: 1px solid black; padding: 5px; text-align: center;">Born and Raised in Country X, Raised in Country Y, Raised and Slaughtered in the United States</div> </div> <p>"If an animal was born and/or raised in Country X and/or (as applicable) Country Y, and slaughtered in the United States, the resulting muscle cut covered commodities <i>shall</i> be labelled to specifically identify the production steps occurring in each country... ." (65.300(e) (emphasis added by Panel))</p>
<b>LABEL C</b>	<div style="border: 1px solid black; padding: 5px; text-align: center;">Product of Country X and the United States</div> <p>"If an animal was imported into the United States for immediate slaughter as defined in § 65.180, the origin of the resulting meat products derived from that animal <i>shall</i> be designated as Product of Country X and the United States." (65.300(e)(3) (emphasis added by Panel))</p>	<div style="border: 1px solid black; padding: 5px; text-align: center;">Born and Raised in Country X, Slaughtered in the United States</div> <p>"If an animal was born and/or raised in Country X and/or (as applicable) Country Y, and slaughtered in the United States, the resulting muscle cut covered commodities <i>shall</i> be labeled to specifically identify the production steps occurring in each country (e.g., 'Born and Raised in Country X, Slaughtered in the United States')." (65.300(e) (emphasis added by Panel))</p>
<b>LABEL D</b>	<div style="border: 1px solid black; padding: 5px; text-align: center;">Product of Country X</div> <p>"Imported covered commodities for which origin has already been established as defined by this law (e.g., born, raised, and slaughtered or produced) and for which no production steps have occurred in the United States, <i>shall</i> retain their origin, as declared to U.S. Customs and Border Protection at the time the product entered the United States, through retail sale." (65.300(f) (emphasis added by Panel))</p>	<div style="border: 1px solid black; padding: 5px; text-align: center;">Product of Country X</div> <p>"Muscle cut covered commodities derived from an animal that was slaughtered in another country <i>shall</i> retain their origin, as declared to U.S. Customs and Border Protection at the time the product entered the United States, through retail sale (e.g., 'Product of Country X')." (65.300(f)(2) (emphasis added by Panel))</p>

\*The excerpts from the 2013 Final Rule in the right-hand column replace the corresponding provisions from the 2009 Final Rule (AMS) in the left-hand column, except for the excerpt in the top right-hand cell, which is additional to the excerpt in the top left-hand cell.

**Notes to Table 1:** **Label A on the left** is taken from the 2009 Final Rule (AMS), p. 2668. See also Original Panel Reports, *US – COOL*, para. 7.100. **Label A on the right** is taken from the 2013 Final Rule, § 65.300(d). **The two Labels B on the left** are taken from the 2009 Final Rule (AMS), § 65.300(e)(1) and p. 2661. **The first Label B on the right** is taken from the 2013 Final Rule, p. 31368. **The second Label B on the right** is taken from the 2013 Final Rule, § 65.300(e). **Label C on the left** is taken from the 2009 Final Rule (AMS), § 65.300(e)(3). **Label C on the right** is taken from the 2013 Final Rule, § 65.300(e) and pp. 31368-31369. **Label D on the left** is taken from Original Panel Reports, *US – COOL*, para. 7.100. **Label D on the right** is taken from the 2013 Final Rule, § 65.300(f)(2).

Source: Panel Reports, para. 7.21, Table 1.

#### 4.6 Flexibilities

4.20. The original COOL measure provided for flexibilities with respect to labelling of "commingled" meat, the order in which countries of origin were indicated on Label B, and labelling of muscle cuts from animals raised in the United States and another country. The amended COOL measure has removed the commingling and country order flexibilities, and changed the multiple countries of raising flexibility.

4.21. First, the original COOL measure included certain flexibilities with respect to origin labelling of meat "commingled" on a single production day.<sup>335</sup> More specifically, the original COOL measure allowed that commingled Category A and B meat could be labelled as Category B meat, even though a particular piece of meat could have been derived from a Category A animal.<sup>336</sup> Further, when Category B and C meat was commingled on a single production day, the original COOL measure allowed that the resulting meat was labelled as Category B meat, even though a particular piece of meat could have been derived from a Category C animal.<sup>337</sup> In both cases, the countries of origin for the commingled meat could be listed on the label in any order.<sup>338</sup> The commingling flexibility has been removed by the 2013 Final Rule.<sup>339</sup>

4.22. Second, the original COOL measure contained flexibility with respect to the order in which countries of origin were indicated on Label B, which could be listed on the label in any order.<sup>340</sup> For example, Label B for muscle cuts of mixed US and Canadian origin could read "Product of U.S., Canada" or "Product of Canada, U.S."<sup>341</sup> Furthermore, because the country order flexibility could be applied cumulatively with the commingling flexibility, commingled Label A, B, and C meat could carry the same label.<sup>342</sup> The amended COOL measure has eliminated the country order flexibility.<sup>343</sup>

4.23. Finally, under the original COOL measure, for animals raised in the United States and another country, for the purpose of indicating origin on the label, the raising in the United States "[took] precedence" over the minimal raising in the country of birth.<sup>344</sup> By contrast, under the amended COOL measure, a country of partial raising may be "omitted" from the label.<sup>345</sup> The Panel noted that the main difference between the two versions of this flexibility is that, under the original COOL measure, the US raising "[took] precedence" over the raising in the country of birth,

<sup>335</sup> "Commingled covered commodities" were defined as "covered commodities (of the same type) presented for retail sale in a consumer package that have been prepared from raw material sources having different origins." (See Panel Reports, fn 101 to para. 7.33 (quoting 2009 Final Rule (AMS), Section 65.125))

<sup>336</sup> See Panel Reports, fn 97 to para. 7.32 (referring to 2009 Final Rule (AMS), Section 65.300(e)(2); and Original Panel Reports, *US – COOL*, para. 7.96). The 2009 Final Rule (AMS), Section 65.300(e)(2), provided the following with regard to the commingling of Categories A and B meat:

For muscle cut covered commodities derived from animals born, raised, and slaughtered in the U.S. that are commingled during a production day with muscle cut covered commodities described in § 65.300(e)(1), the origin may be designated as Product of the United States, Country X, and (as applicable) Country Y.

<sup>337</sup> Panel Reports, fn 98 to para. 7.32 (referring to 2009 Final Rule (AMS), Section 65.300(e)(4); and Original Panel Reports, *US – COOL*, para. 7.96). The 2009 Final Rule (AMS), Section 65.300(e)(4), reads:

For muscle cut covered commodities derived from animals that are born in Country X or Country Y, raised and slaughtered in the United States, that are commingled during a production day with muscle cut covered commodities that are derived from animals that are imported into the United States for immediate slaughter as defined in § 65.180, the origin may be designated as Product of the United States, Country X, and (as applicable) Country Y.

<sup>338</sup> See Original Panel Reports, *US – COOL*, para. 7.97 (referring to 2009 Final Rule (AMS), Section 65.300(e)(4)).

<sup>339</sup> Panel Reports, para. 7.34 (quoting 2013 Final Rule, p. 31385).

<sup>340</sup> Panel Reports, para. 7.35 (quoting 2009 Final Rule (AMS), Section 65.300(e)(4) and pp. 2659, 2661, and 2662).

<sup>341</sup> Panel Reports, para. 7.35 (referring to 2009 Final Rule (AMS), p. 2661).

<sup>342</sup> Panel Reports, para. 7.36 (quoting Appellate Body Reports, *US – COOL*, para. 246).

<sup>343</sup> Panel Reports, para. 7.37 (referring to 2013 Final Rule, Section 65.300(e)).

<sup>344</sup> Panel Reports, para. 7.40 (quoting 2009 Final Rule (AMS), p. 2659: "[I]f animals are raised in another country and the United States, provided the animals are not imported for immediate slaughter as defined in § 65.180, the raising that occurs in the United States *takes precedence* over the minimal raising that occurred in the animal's country of birth."). (emphasis added)

<sup>345</sup> Panel Reports, para. 7.38 (quoting 2013 Final Rule, Section 65.300(e): "If an animal is raised in the United States as well as another country (or multiple countries), the raising occurring in the other country (or countries) *may be omitted* from the origin designation."). (emphasis added)

while, under the amended COOL measure, the other country or countries of raising may be "omitted" from the label.<sup>346</sup> The Panel further explained that because, under the 2009 Final Rule (AMS), Label B did not need to show point-of-production information, a muscle cut from a US-slaughtered animal that was born in Canada, and raised in Canada and the United States, could have carried a "Product of United States, Canada" label. The US raising taking precedence over the Canadian raising had no practical implication for this label, because the label had to mention Canada in any event, given the place of birth.<sup>347</sup> The Panel explained that, by contrast, under the 2013 Final Rule, for meat derived from animals raised in the country of birth and the United States, Label B may read "Born in Country X, Raised and Slaughtered in the United States" in lieu of "Born and Raised in Country X, Raised and Slaughtered in the United States".<sup>348</sup>

## 5 ANALYSIS OF THE APPELLATE BODY

### 5.1 Article 2.1 of the TBT Agreement

#### 5.1.1 Introduction

5.1. The Panel concluded that the amended COOL measure is inconsistent with Article 2.1 of the TBT Agreement because it accords less favourable treatment to imported livestock than to like products of US origin.<sup>349</sup> This conclusion was based on two central findings made by the Panel, namely, that the amended COOL measure has increased the original COOL measure's detrimental impact on competitive opportunities for imported livestock, and that such detrimental impact does not stem exclusively from legitimate regulatory distinctions.<sup>350</sup>

5.2. On appeal, each participant challenges certain elements of the Panel's analysis and findings under Article 2.1 of the TBT Agreement. The United States appeals the Panel's conclusion that the amended COOL measure is inconsistent with Article 2.1 because its detrimental impact on imported livestock does not stem exclusively from legitimate regulatory distinctions. The United States asserts that this conclusion rests on three intermediate findings made by the Panel that are in error, namely: (i) that the amended COOL measure entails an increased recordkeeping burden for producers and processors of livestock; (ii) that Labels B and C convey potentially inaccurate information; and (iii) that the amended COOL measure continues to exempt a large proportion of muscle cuts from its scope.<sup>351</sup>

5.3. Canada and Mexico do not appeal the Panel's conclusion that the amended COOL measure is inconsistent with Article 2.1. They do take issue, however, with the Panel's assessment of certain elements of the amended COOL measure in reaching its conclusion that the detrimental impact of that measure on imported livestock does not stem exclusively from legitimate regulatory distinctions. Canada claims that the Panel failed to assess appropriately the relevance of Labels D and E, as well as the amended COOL measure's prohibition of a trace-back system, for the analysis of whether the detrimental impact of that measure on imported livestock stems exclusively from legitimate regulatory distinctions.<sup>352</sup> Mexico puts forward a similar claim, but limits its appeal to the Panel's assessment of the relevance of Label E for the purposes of its analysis under Article 2.1.<sup>353</sup>

5.4. We begin our review of the participants' appeals under Article 2.1 by considering the claims of the United States. Thereafter, we address those of Canada and Mexico.

<sup>346</sup> Panel Reports, para. 7.42 (quoting 2013 Final Rule, Section 65.300(e)).

<sup>347</sup> Panel Reports, fn 127 to para. 7.42 (quoting 2013 Final Rule, p. 31368: "the country of birth is already required to be listed in the origin designation").

<sup>348</sup> Panel Reports, paras. 7.41-7.42 (referring to 2013 Final Rule, p. 31368: "if animals are born and raised in another country and subsequently further raised in the United States, only the raising that occurs in the United States needs to be declared on the label, as it is understood that an animal born in another country will have been raised at least a portion of its life in that other country. Because the country of birth is already required to be listed in the origin designation, and to reduce the number of required characters on the label, the Agency is not requiring the country of birth to be listed again as a country in which the animal was also raised.").

<sup>349</sup> Panel Reports, para. 7.284.

<sup>350</sup> Panel Reports, paras. 7.176 and 7.283.

<sup>351</sup> United States' appellant's submission, paras. 53-54.

<sup>352</sup> Canada's other appellant's submission, para. 156.

<sup>353</sup> Mexico's other appellant's submission, para. 185.

## 5.1.2 Claims of the United States under Article 2.1 of the TBT Agreement

### 5.1.2.1 Claims relating to the Panel's analysis of the recordkeeping burden entailed by the amended COOL measure

5.5. The United States claims that the Panel's finding that the amended COOL measure entails an increased recordkeeping burden does not support the Panel's conclusion that the detrimental impact of that measure on imported livestock does not stem exclusively from legitimate regulatory distinctions. This claim rests on two main grounds. First, the United States argues that the Panel erred in relying on its finding that the amended COOL measure entails an increased recordkeeping burden as an independent basis for concluding that the detrimental impact of that measure does not stem exclusively from legitimate regulatory distinctions. Second, the United States argues that the Panel's finding that the amended COOL measure entails an increased recordkeeping burden is flawed to the extent that it is based on incorrect analyses of the impact of point-of-production labelling and the elimination of the country order flexibility on the recordkeeping burden for producers along the livestock and meat production chain.<sup>354</sup>

5.6. We begin our analysis with the United States' contention that the Panel erred in its analyses of the impact of point-of-production labelling and the elimination of the country order flexibility on recordkeeping. We then address the United States' claim that the Panel erred in relying on its finding that the amended COOL measure entails an increased recordkeeping burden as an independent basis for concluding that the detrimental impact of that measure does not stem exclusively from legitimate regulatory distinctions.

#### 5.1.2.1.1 Whether the Panel erred in its analysis of the impact of point-of-production labelling on recordkeeping

5.7. The United States claims that the Panel erred by basing its analysis of the impact of point-of-production labelling on recordkeeping on incorrect hypothetical transactions, without regard for actual trade in livestock among the three parties to these disputes.<sup>355</sup> In addressing this claim, we begin by recalling salient aspects of the Panel's analysis and findings concerning the introduction of point-of-production labelling by the amended COOL measure, and the implications for recordkeeping along the livestock and meat production chain.

5.8. We recall that, in its analysis under Article 2.1 of the TBT Agreement, the Panel considered whether the amended COOL measure has increased the original COOL measure's detrimental impact on competitive opportunities for imported livestock.<sup>356</sup> In undertaking this assessment, the Panel considered, *inter alia*, whether compliance with the amended COOL measure involves segregation of livestock and meat derived therefrom and, consequently, differential costs for imported livestock.<sup>357</sup> Noting that the original panel had found that, "for all practical purposes, the [original] COOL measure necessitates segregation of meat and livestock according to origin"<sup>358</sup> in order to comply with the requirement of an unbroken chain of origin information, the compliance

<sup>354</sup> United States' appellant's submission, para. 91.

<sup>355</sup> United States' appellant's submission, para. 91.

<sup>356</sup> Before the Panel, the United States conceded that the amended COOL measure was not intended to "remove [the original COOL measure's] detrimental impact on imports". (Panel Reports, para. 7.63 (fn omitted)) As the Panel noted, the United States explained in response to a question from the Panel that, "to comply with the DSB recommendations and rulings, the United States could either remove the detrimental impact on imports *or* ensure that any detrimental impact stems exclusively from a legitimate regulatory distinction. The 2013 Final Rule implements the second option – it addresses the DSB recommendations and rulings by ensuring that any detrimental impact stems exclusively from a legitimate regulatory distinction." (Panel Reports, fn 172 to para. 7.63 (quoting United States' response to Panel question No. 18 (emphasis original)) At the same time, the United States disputed the claim of the complainants that the amended COOL measure has increased the detrimental impact on imported livestock compared with the detrimental impact entailed by the original COOL measure. (Panel Reports, para. 7.63)

<sup>357</sup> The Panel considered three issues in its analysis of whether the amended COOL measure has increased the detrimental impact of the original COOL measure on imported livestock: (i) whether the different categories of muscle cut labels under the amended COOL measure accord different treatment to imported livestock; (ii) whether the amended COOL measure involves segregation and, consequently, differential costs for imported livestock; and (iii) whether, through the compliance costs involved, the amended COOL measure creates any incentive to process domestic livestock, thus reducing the competitive opportunities for imported livestock. (Panel Reports, para. 7.66)

<sup>358</sup> Panel Reports, para. 7.83 (quoting Original Panel Reports, *US – COOL*, para. 7.327).

Panel considered that "[t]he same conclusion continues to apply to the amended COOL measure, which has the same features that led the original panel to reach its conclusion regarding segregation."<sup>359</sup> Thus, the Panel concluded that, "for all practical purposes, the amended COOL measure necessitates segregation of meat and livestock according to origin."<sup>360</sup>

5.9. Noting that the parties disputed whether the amended COOL measure involves *more* segregation than the original COOL measure, the Panel assessed, in turn, the impact of three "potentially relevant changes" introduced by the amended COOL measure: (i) the introduction of a mandatory point-of-production labelling requirement for Category A, Category B, and Category C muscle cuts; (ii) the removal of the commingling and country order flexibilities that existed under the original COOL measure; and (iii) the amended coverage of Label D.<sup>361</sup> As regards point-of-production labelling, the Panel considered whether, in practice, point-of-production labelling increases the number of distinct labels for Category A, Category B, and Category C muscle cuts, noting that the original panel had found that more origins and labels means more segregation.<sup>362</sup> The Panel concluded that point-of-production labelling, in and of itself, increases the number of labels and, accordingly, results in more segregation for: (i) Category B muscle cuts of different foreign origins<sup>363</sup>; (ii) Category B muscle cuts of different, multiple foreign origins<sup>364</sup>; and (iii) Category C muscle cuts derived from animals born in a foreign country, raised in that country and another foreign country, and imported into the United States for immediate slaughter.<sup>365</sup> By contrast, the Panel concluded that point-of-production labelling, as prescribed by the amended COOL measure, does not directly increase or decrease segregation for other Category B and C muscle cut scenarios, and for Category A muscle cuts in general.<sup>366</sup>

5.10. On appeal, the United States submits that the Panel's finding that the amended COOL measure entails an increased recordkeeping burden is in error to the extent that the Panel's analysis of the impact of point-of-production labelling was based on incorrect hypothetical scenarios that do not reflect actual trade in livestock among the three parties to these disputes.

5.11. Noting that the Panel found that point-of-production labelling for "single foreign origin" scenarios would lead to neither more labels, nor an increased record-keeping burden, the United States asserts that it is "those very scenarios" that constitute the virtual entirety of the livestock market in the United States.<sup>367</sup> In this regard, the United States asserts that the market for livestock in the United States consists of: Category A animals (i.e. animals born, raised, and slaughtered in the United States); "single foreign origin" Category B animals from either Canada or Mexico (i.e. animals born in either Canada or Mexico, and raised and slaughtered in the United States); and "single foreign origin" Category C animals from Canada (i.e. animals born and raised in Canada, and exported for immediate slaughter in the United States).<sup>368</sup> Thus, contrary to the scenarios posited by the Panel, there is no evidence of trade in live animals between Canada

<sup>359</sup> Panel Reports, para. 7.84. While the amended COOL measure does not explicitly require the segregation of livestock according to origin, it prescribes, like the original COOL measure, "an unbroken chain of reliable country of origin information with regard to every animal and muscle cut". (Panel Reports, para. 7.81 (quoting Original Panel Reports, *US – COOL*, para. 7.317))

<sup>360</sup> Panel Reports, para. 7.86.

<sup>361</sup> Panel Reports, para. 7.88.

<sup>362</sup> Panel Reports, para. 7.90 (referring to Original Panel Reports, *US – COOL*, para. 7.331).

<sup>363</sup> The Panel explained that, "[u]nder this scenario (Scenario B2), the Category B muscle cuts in question originate from both (i) livestock born in Country X, and raised and slaughtered in the United States, as well as (ii) livestock born in Country Y, and raised and slaughtered in the United States. This scenario therefore represents a combination of livestock from two different foreign countries of origin, which fall *within* Category B." (Panel Reports, para. 7.97 (referring to 2009 Final Rule (AMS), Section 65.300(e)(1)) (emphasis original))

<sup>364</sup> The Panel identified this situation as consisting of "Category B muscle cuts from livestock (i) born in *two* different foreign countries; (ii) raised in the same two foreign countries and the United States; and (iii) slaughtered in the United States." (Panel Reports, para. 7.102 (emphasis original)) The Panel explained further that the same would apply to "muscle cuts from US-born and -slaughtered animals raised in both the United States and a foreign country". (Panel Reports, fn 269 to para. 7.102)

<sup>365</sup> Panel Reports, para. 7.111. The Panel found that point-of-production labelling increases segregation in this scenario if the 2013 Final Rule is read as requiring that only the country of immediate import is shown as the country of raising on Label C. (Ibid.)

<sup>366</sup> In other words, point-of-production labelling under the amended COOL measure does not directly increase or decrease segregation for these types of muscle cuts and the originating livestock. (Panel Reports, para. 7.113)

<sup>367</sup> United States' appellant's submission, para. 118 (referring to Panel Reports, paras. 7.96-7.98).

<sup>368</sup> United States' appellant's submission, para. 118.

and Mexico that would result in the "multiple origin" Label B and Label C scenarios on which the Panel based its findings.<sup>369</sup> The lack of such evidence, contends the United States, is explained by the fact that it is highly improbable, if not inconceivable, that the prices for energy, feed, and livestock would ever align such that it would be profitable to export animals between Canada and Mexico even once, much less twice, before exporting to the United States, as the Panel's hypothetical scenarios envision.<sup>370</sup> The United States emphasizes that the scenarios that reflect actual livestock trade between the parties prove that point-of-production labels do not increase the recordkeeping burden that was entailed by the original COOL measure.<sup>371</sup> Noting that, in *Canada – Periodicals*, the Appellate Body reversed the panel's "like" product analysis in the light of the panel's reliance on an incorrect hypothetical, the United States submits that the Panel's analysis in the current disputes is similarly flawed.<sup>372</sup>

5.12. Canada responds that the United States criticizes the Panel for elaborating on the labelling rules that would apply in scenarios that the United States has itself articulated and codified in its domestic law.<sup>373</sup> In this regard, Canada points out that the Panel expressly noted that the 2009 Final Rule (AMS), itself, addressed scenarios involving non-commingled Category B muscle cuts of multiple foreign origins, and the 2013 Final Rule also provides explicit guidance as to the point-of-production labelling requirements that apply to livestock born and/or raised in multiple foreign countries. Canada further contends that, contrary to the assertions of the United States, the Panel's conclusion that the amended COOL measure entails an increased recordkeeping burden was based on much more than purely hypothetical livestock transactions. Canada highlights, in this connection, that the Panel concluded that point-of-production labelling, together with the elimination of the commingling and country order flexibilities, increased the need for segregation in the US market – a point confirmed by extensive evidence that was put before the Panel.<sup>374</sup> Moreover, the Panel examined the impact of the amended COOL measure on recordkeeping, and emphasized that the greater diversity of labels resulting from the elimination of the commingling and country order flexibilities creates a multiplicity of scenarios for which distinct and commensurate substantiating records are now required. Noting that the Appellate Body was critical of the panel in *Canada – Periodicals* for basing its "like" product analysis on a single hypothetical example, Canada submits that the Panel in the present disputes cannot be similarly faulted and, as such, the United States' reliance on *Canada – Periodicals* is inapt.<sup>375</sup>

5.13. For its part, Mexico responds that, although the United States seeks to create the impression that none of the scenarios examined by the Panel are in any way realistic, the United States overlooks that the Panel included in its discussion scenarios in which muscle cuts from different animals – some born in Mexico, some born in Canada, and both slaughtered in the United States – would be packaged together. Mexico asserts that the Panel correctly concluded that, under the original COOL measure, those muscle cuts could be packaged with a single label, while, under the amended COOL measure, they may not. Mexico highlights that the United States has not explained why this scenario is unrealistic. In addition, Mexico, like Canada, highlights that the United States faults the Panel for elaborating on the labelling rules that would apply in scenarios that the United States has itself articulated and codified in its domestic law.<sup>376</sup>

5.14. Turning to our analysis, we consider that the United States' claim raises two issues: First, whether, and to what extent, a panel may rely on hypothetical scenarios that are not reflective of actual patterns of trade for the purpose of determining whether a technical regulation accords less favourable treatment to imported products than to like domestic products in violation of Article 2.1 of the TBT Agreement. Second, we must consider whether the United States is correct in asserting that the Panel *based* its finding on the impact of point-of-production labelling on "incorrect hypothetical" scenarios involving trade in live animals between Canada and Mexico.<sup>377</sup>

<sup>369</sup> United States' appellant's submission, para. 119.

<sup>370</sup> United States' appellant's submission, para. 121.

<sup>371</sup> United States' appellant's submission, para. 122.

<sup>372</sup> United States' appellant's submission, para. 123 (referring to Appellate Body Report, *Canada – Periodicals*, pp. 20-23, DSR 1997:1, pp. 465-468).

<sup>373</sup> Canada's appellee's submission, para. 52.

<sup>374</sup> Canada's appellee's submission, para. 53 (referring to Panel Reports, para. 7.135, and to exhibits submitted by Canada and Mexico listed in fns 324 and 325 thereto).

<sup>375</sup> Canada's appellee's submission, paras. 53-55.

<sup>376</sup> Mexico's appellee's submission, para. 35.

<sup>377</sup> United States' appellant's submission, paras. 19, 117, and 119.

5.15. As regards the first issue, we recall that, in *US – Clove Cigarettes*, the Appellate Body considered that the context and object and purpose of the TBT Agreement weigh in favour of reading the "treatment no less favourable" requirement of Article 2.1 as prohibiting both *de jure* and *de facto* discrimination against imported products while, at the same time, permitting a detrimental impact on *competitive opportunities* for like imported products that stems exclusively from legitimate regulatory distinctions.<sup>378</sup> Because Article 2.1 is concerned with *competitive opportunities* for like imported products, we consider that the analysis under that provision is not limited to an examination of the operation of the technical regulation at issue within the confines of scenarios that are representative of current patterns of trade.

5.16. At the same time, we are not suggesting that a panel may ascribe undue *weight* to the effect of a technical regulation in *any* hypothetical scenario for the purposes of its analysis under Article 2.1. In this connection, we emphasize that Article 2.1 proscribes a detrimental impact on *competitive opportunities* for like imported products that does not stem exclusively from legitimate regulatory distinctions. Thus, a panel's analysis under Article 2.1 must be grounded in an assessment of the technical regulation at issue in scenarios under which competitive opportunities may arise, notwithstanding that they may not be currently reflective of actual patterns of trade.

5.17. Turning to the second issue, we do not agree with the United States that the Panel's assessment of the impact of point-of-production labelling was *based* on "incorrect hypothetical" scenarios involving the trade of live animals between Canada and Mexico.<sup>379</sup> As Mexico correctly points out, the Panel included in its analysis scenarios in which muscle cuts from different animals – some born in Mexico, some born in Canada, and both slaughtered in the United States – would be packaged together.<sup>380</sup> This scenario does not involve the trade of live animals between Canada and Mexico. The Panel found that, under the original COOL measure, such muscle cuts could be packaged with a single label, while, under the amended COOL measure, they would need to carry distinct labels to reflect their different countries of origin.<sup>381</sup> The United States has not explained why this scenario is inconceivable or constitutes an "incorrect" hypothetical scenario. Instead, the United States asserts that the extent to which processors have "actually taken advantage of this particular type of commingling *appears to be small*", as processors typically purchase livestock born in either Canada or Mexico, not both.<sup>382</sup> For the reasons stated above, however, we do not consider that the Panel erred under Article 2.1 by assessing the impact of point-of-production labelling in scenarios that are not representative of actual, or the most common, situations in which the products at issue are traded among the parties to these disputes.

5.18. In the light of the foregoing considerations, we disagree with the United States that the Panel *based* its analysis of the impact of point-of-production labelling, as prescribed by the amended COOL measure, on incorrect hypothetical scenarios. Accordingly, we find that the Panel did not err, in paragraphs 7.87-7.113 of the Panel Reports, in its analysis of the impact of point-of-production labelling on recordkeeping.

#### **5.1.2.1.2 Whether the Panel erred in its analysis of the impact of the elimination of the country order flexibility on recordkeeping**

5.19. We turn now to the United States' claim that the Panel erred in finding that the elimination of the country order flexibility increases the recordkeeping burden entailed by the original COOL measure.<sup>383</sup>

5.20. We begin by recalling that, under the original COOL measure, the country order flexibility applied to Category B muscle cuts and permitted the countries of origin to be listed in any order on Label B such that muscle cuts of, for example, "mixed US-Canadian origin" could be labelled as

<sup>378</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 175.

<sup>379</sup> United States' appellant's submission, para. 119.

<sup>380</sup> In this regard, we recall the Panel's explanation that, "[u]nder this scenario, the Category B muscle cuts in question originate from both (i) livestock born in Country X, and raised and slaughtered in the United States, as well as (ii) livestock born in Country Y, and raised and slaughtered in the United States. This scenario therefore represents a combination of livestock from two different foreign countries of origin, which fall *within* Category B." (Panel Reports, para. 7.97 (referring to 2009 Final Rule (AMS), Section 65.300(e)(1)) (emphasis original))

<sup>381</sup> Panel Reports, paras. 7.97-7.99.

<sup>382</sup> United States' appellant's submission, para. 98. (fn omitted; emphasis added)

<sup>383</sup> United States' appellant's submission, para. 91.

"Product of U.S., Canada" or "Product of Canada, U.S."<sup>384</sup> Further, the labelling requirements under the original COOL measure for Category C muscle cuts mandated that Label C had to indicate all the origins of the animal from which such muscle cuts were derived, but could not list the United States first. As the Panel acknowledged, the Appellate Body noted in the original proceedings that, "[b]ecause the countries of origin for Category B meat [c]ould be listed in any order [under the original COOL measure], the labels for Category B and C meat could look the same in practice."<sup>385</sup> The amended COOL measure has eliminated the country order flexibility that had been available under the original COOL measure.<sup>386</sup>

5.21. As part of its analysis of whether the amended COOL measure, as compared to the original COOL measure, involves *more* segregation of livestock and resulting muscle cuts of meat, the Panel assessed, in conjunction, the impact of the removal of the commingling and country order flexibilities. The Panel recalled that, in the original proceedings, the commingling flexibility was found to have only partially mitigated the segregation necessitated by the original COOL measure<sup>387</sup> and, in the Panel's view, the country order flexibility had a similar effect.<sup>388</sup> The Panel concluded that the effect of eliminating these flexibilities – that had partially mitigated the need for segregation under the original COOL measure – is increased segregation for US-slaughtered livestock and muscle cuts of meat derived therefrom.<sup>389</sup>

5.22. The United States does not dispute that the removal of the commingling flexibility increases the need for segregation in respect of those operators that had made use of this flexibility. However, the United States disputes that the removal of the country order flexibility has a similar effect. In particular, the United States submits that, although the removal of the country order flexibility increases the distinct number of labels for non-commingled muscle cuts, it does not increase the recordkeeping burden that had been entailed by the original COOL measure.

5.23. The United States explains that, under the original COOL measure, the country order flexibility allowed non-commingled Category B and Category C muscle cuts to have labels that could look the same in practice – i.e. Label B and Label C could both read "Product of Canada, U.S." By contrast, those same muscle cuts are labelled differently under the amended COOL measure – i.e. Category B muscle cuts are labelled "Born in Canada, Raised and Slaughtered in the U.S.", while Category C muscle cuts are now labelled "Born and Raised in Canada, Slaughtered in the U.S." The United States asserts, however, that the fact that there are now two labels – where before there was one – does not mean that the recordkeeping burden has increased under the amended COOL measure. According to the United States, this is because the records required for substantiating an origin claim under the original COOL measure in respect of Category B muscle cuts must have been able to demonstrate that they were produced from an animal that was born in Canada, and raised and slaughtered in the United States. Similarly, the records required for substantiating an origin claim under the original COOL measure in respect of Category C muscle cuts must have been able to demonstrate that they were produced from an animal that was born in Canada, raised in Canada, and exported to the United States for immediate slaughter. Thus, the United States asserts that, although the removal of the country order flexibility creates more distinct labels for non-commingled muscle cuts, "it does not alter the recordkeeping burden" that existed under the original COOL measure, because "different categories of muscle cuts already had different records" under that measure.<sup>390</sup>

<sup>384</sup> Panel Reports, para. 7.35 (referring to 2009 Final Rule (AMS), p. 2661).

<sup>385</sup> Panel Reports, para. 7.35 (quoting Appellate Body Reports, *US – COOL*, para. 245).

<sup>386</sup> Panel Reports, para. 7.37.

<sup>387</sup> Panel Reports, para. 7.114 (referring to Original Panel Reports, *US – COOL*, para. 7.327; and Appellate Body Reports, *US – COOL*, para. 310).

<sup>388</sup> Panel Reports, para. 7.114 and fn 284 thereto. The Panel based this view on the following statement contained in the Appellate Body reports in the original proceedings:

Meat derived from animals born outside the United States but raised and slaughtered in the United States (Category B meat) must be labelled as a product of the United States and the foreign country in which the animal was born, and the countries of origin may be listed in any order. For meat derived from animals imported into the United States for immediate slaughter (Category C meat), labels must indicate all of the countries of origin of the animal, but cannot list the United States first. Because the countries of origin for Category B meat can be listed in any order, the labels for Categories B and C meat could look the same in practice.

(Appellate Body Reports, *US – COOL*, para. 245 (fns omitted))

<sup>389</sup> Panel Reports, para. 7.127.

<sup>390</sup> United States' appellant's submission, para. 126.

5.24. Canada disagrees with the United States' assertion that the removal of the country order flexibility creates more distinct labels, but does not increase the recordkeeping burden that was entailed by the original COOL measure. Canada explains that, under the original COOL measure, where non-commingled Category B muscle cuts from Canada bore Label C as a result of the country order flexibility, the origin claim to be substantiated was "Product of Canada and the United States". Canada asserts that, because the livestock used to produce these muscle cuts did not satisfy the definition of Category C meat, audited retailers could not demonstrate that such muscle cuts derived from livestock imported from Canada for immediate slaughter. Nor could audited retailers be expected to demonstrate that such muscle cuts were, in fact, Category B muscle cuts – i.e. that they were derived from livestock raised in the United States. Thus, Canada contends that all that was required to verify the origin claim – "Product of Canada and the United States" – was proof that the animal from which the muscle cut was derived was born outside of the United States, in the country that appeared on the label.<sup>391</sup>

5.25. For its part, Mexico observes that the Panel found that the greater diversity of labels resulting from the elimination of both the commingling and country order flexibilities "creates a multiplicity of scenarios for which distinct and commensurate substantiating records are now required"<sup>392</sup>, and that "the increase in the number of distinct labels and in segregation logically entails a higher recordkeeping burden."<sup>393</sup> In Mexico's view, these findings reveal the inaccuracy of the United States' claim that the removal of the country order flexibility does not contribute to the increased recordkeeping burden entailed by the amended COOL measure.

5.26. Turning to our analysis, it seems to us that the United States' claim is premised on its assertion that, although removing the country order flexibility creates more distinct labels, "it does not alter the recordkeeping burden" that was entailed by the original COOL measure.<sup>394</sup>

5.27. We recall that, in comparing the recordkeeping burdens entailed by the original and amended COOL measures, the Panel found that, under both measures, the recordkeeping obligations of operators along the livestock and meat production chain are explicitly tied to the "information needed to correctly label the covered commodities".<sup>395</sup> The Panel further explained how the introduction of mandatory point-of-production labelling under the amended COOL measure for muscle cuts deriving from US-slaughtered livestock affects the recordkeeping burden that had been entailed by the original COOL measure. In this regard, the Panel noted that, under the original COOL measure, an "origin claim" could consist of a muscle cut being a "product of" the country(ies) of origin involved, and that the original COOL measure stipulated that "the origin declaration [for Category B, Category C, and all commingled muscles cuts] may include more specific information related to production steps *provided records to substantiate the claims are maintained*".<sup>396</sup> Noting that the amended COOL measure now *mandates* such specific production step information on Labels A, B, and C, the Panel considered that this entails a corresponding augmentation of the records kept by livestock and meat producers to substantiate the origin claims made on these labels.<sup>397</sup>

5.28. To us, this finding of the Panel on the implications of the introduction of mandatory point-of-production labelling for recordkeeping calls into question the United States' assertion that the removal of the country order flexibility creates more distinct labels, but does not increase the recordkeeping burden that was entailed by the original COOL measure. This assertion is necessarily premised on the proposition that the original COOL measure *required* that records be maintained to substantiate specific production step information concerning the livestock from which muscle cuts derived. Yet, as the Panel explained, the original COOL measure stipulated that "the origin declaration [for Category B, Category C, and all commingled muscles cuts] may include

<sup>391</sup> Canada's appellee's submission, para. 43.

<sup>392</sup> Mexico's appellee's submission, para. 40 (quoting Panel Reports, para. 7.147).

<sup>393</sup> Mexico's appellee's submission, para. 40 (quoting Panel Reports, para. 7.149).

<sup>394</sup> United States' appellant's submission, para. 126.

<sup>395</sup> Panel Reports, para. 7.144 and fn 344 thereto (referring to 2009 Final Rule (AMS), p. 2693).

<sup>396</sup> Panel Reports, para. 7.146 (quoting 2009 Final Rule (AMS), Section 65.500(e)(4) and p. 2662).

(emphasis added by the Panel)

<sup>397</sup> Panel Reports, para. 7.146.

more specific information related to production steps *provided records to substantiate the claims are maintained*."<sup>398</sup>

5.29. Thus, it seems to us that, because, under the original COOL measure, the provision of specific information on production steps could voluntarily be provided only if "records to substantiate the claims are maintained"<sup>399</sup>, origin claims for non-commingled Category B and Category C muscle cuts carrying the same label as a result of the country order flexibility – e.g. "Product of Canada, U.S." – could be substantiated by records demonstrating that the livestock from which these muscle cuts derived were born outside the United States, in the country appearing on the label.<sup>400</sup> By contrast, the provision of production step information for such muscle cuts is now mandatory under the amended COOL measure. This, in turn, entails the augmentation of the records kept by livestock and meat producers to substantiate the origin claims made on the mandatory retail labels for muscle cuts deriving from US-slaughtered livestock, including non-commingled Category B and Category C muscle cuts.<sup>401</sup>

5.30. For the reasons expressed above, we are not persuaded by the United States that removing the country order flexibility has not altered the recordkeeping burden that was entailed by the original COOL measure.<sup>402</sup> Accordingly, we find that the Panel did not err, in paragraphs 7.114-7.127 of the Panel Reports, in its analysis of the impact of the elimination of the country order flexibility on recordkeeping.

#### **5.1.2.1.3 Whether the Panel erred in relying on its finding that the amended COOL measure entails an increased recordkeeping burden as an independent basis for its conclusion under Article 2.1 of the TBT Agreement**

5.31. We turn now to the United States' claim that the Panel erred in relying on its finding that the amended COOL measure entails an increased recordkeeping burden as an independent basis for concluding that the detrimental impact of that measure on imported livestock does not stem exclusively from legitimate regulatory distinctions.<sup>403</sup>

5.32. According to the United States, the Panel "failed to put the issue of recordkeeping within the proper analysis, which involves a comparison of the burdens of recordkeeping and the provision of information through labels."<sup>404</sup> The United States submits that, to the extent that the recordkeeping burden entailed by the amended COOL measure is at all relevant for the analysis of whether the detrimental impact of that measure stems exclusively from legitimate regulatory distinctions, it is relevant only for the question of whether there is a "disconnect" between, on the one hand, the amount of origin information collected along the livestock and meat production chain and, on the other hand, the amount of origin information provided to consumers through the mandatory labels. The United States further asserts that, in order to conclude that the detrimental impact of the amended COOL measure does not stem exclusively from legitimate regulatory distinctions, the origin information collected must be so disproportionate to the information provided to consumers on labels that the collection of the information cannot be explained in the first place.<sup>405</sup> The United States submits, however, that the Panel failed to undertake this inquiry and, therefore, the Panel erred in relying on any increase in the recordkeeping burden entailed by the amended COOL measure as a basis for its ultimate conclusion under Article 2.1 of the TBT Agreement.<sup>406</sup>

5.33. Canada responds that the United States is seeking to create the erroneous impression that the Panel found that the increased recordkeeping burden entailed by the amended COOL measure, *ipso facto*, demonstrates that the detrimental impact of that measure does not stem exclusively from legitimate regulatory distinctions.<sup>407</sup> Canada observes that, at the outset of its analysis, the

<sup>398</sup> Panel Reports, para. 7.146 (quoting 2009 Final Rule (AMS), Section 65.500(e)(4) and p. 2662). (italics added by the Panel; underlining added)

<sup>399</sup> Panel Reports, para. 7.146 (quoting 2009 Final Rule (AMS), Section 65.500(e)(4) and p. 2662).

<sup>400</sup> See also Canada's appellee's submission, para. 43.

<sup>401</sup> Panel Reports, para. 7.146.

<sup>402</sup> United States' appellant's submission, para. 126.

<sup>403</sup> United States' appellant's submission, para. 91.

<sup>404</sup> United States' appellant's submission, para. 113.

<sup>405</sup> United States' appellant's submission, para. 115.

<sup>406</sup> United States' appellant's submission, para. 116.

<sup>407</sup> Canada's appellee's submission, para. 47.

Panel stated that it would address the information that must be collected by producers and processors of livestock before addressing the information ultimately conveyed to consumers.<sup>408</sup> According to Canada, the Panel followed this analytical framework. In this regard, the Panel first recalled its finding that the amended COOL measure has augmented the information that producers and processors of livestock are required to transmit and maintain. The Panel then observed that the amended COOL measure retains essentially the same exemptions as under the original COOL measure, and noted features of the amended COOL measure that impact on the accuracy of the information conveyed to consumers on the labels affixed to muscle cuts of meat. Canada asserts that these factors – the upstream recordkeeping burden, label accuracy, and the exemptions from coverage of the COOL requirements – were then collectively assessed by the Panel with a view to determining whether the informational "disconnect" identified by the Appellate Body in the original disputes had been rectified by the amended COOL measure.<sup>409</sup>

5.34. Mexico contends that, contrary to the United States' assertions, the Panel's analysis involved a comparison of the recordkeeping burden entailed by the amended COOL measure with the provision of information on the labels prescribed by that measure. In this regard, Mexico points out that the Panel determined that the amended COOL measure is designed and applied in a manner that: (i) increases the origin information communicated to consumers on the mandatory retail labels for muscle cuts of meat; (ii) necessarily increases the recordkeeping burden on upstream producers and processors of livestock in order to do so; and (iii) maintains the same proportion of information that is not communicated at all to consumers as a result of the exemptions from coverage of the COOL requirements.<sup>410</sup> Accordingly, Mexico submits that the United States' claim is without merit.

5.35. Turning to our analysis, we consider it useful first to recall the analytical framework that the Appellate Body applied in the original disputes for the purpose of assessing whether the detrimental impact of the original COOL measure on imported livestock stemmed exclusively from legitimate regulatory distinctions. In conducting that assessment, the Appellate Body recalled the original COOL measure's recordkeeping and verification requirements, and the detailed origin information required to be identified, tracked, and transmitted by upstream producers of livestock.<sup>411</sup> The Appellate Body then compared this with the information communicated to consumers on the retail labels. In undertaking this comparison, the Appellate Body observed that, under the original COOL measure, a large amount of information was tracked and transmitted by upstream producers of livestock for the purpose of providing consumer information on origin, but only a small amount of this information was communicated to consumers in an understandable manner, if it was communicated at all.<sup>412</sup> The Appellate Body explained that this was because the labels prescribed by the original COOL measure did not expressly identify specific production steps and, in particular for Label B and C, contained confusing or inaccurate origin information, or because the meat or meat products were exempt from the labelling requirements altogether.<sup>413</sup>

5.36. Accordingly, the Appellate Body considered that the recordkeeping and verification requirements under the original COOL measure imposed a disproportionate burden on upstream producers and processors because the level of information conveyed to consumers through the prescribed labels was far less detailed and accurate than the information required to be tracked and transmitted by upstream producers and processors. The Appellate Body, therefore, considered that the recordkeeping and verification requirements imposed on these producers and processors could not be explained by the need to convey to consumers information regarding the countries where livestock were born, raised, and slaughtered. Consequently, the Appellate Body considered that the detrimental impact caused by these same recordkeeping and verification requirements under the original COOL measure could also not be explained by the need to provide origin information to consumers. Based on these findings, the Appellate Body considered that the regulatory distinctions imposed by the original COOL measure amounted to arbitrary and unjustifiable discrimination against imported livestock, such that they could not be said to be applied in an even-handed manner. Accordingly, the Appellate Body concluded that the

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<sup>408</sup> Canada's appellee's submission, para. 48 (referring to Panel Reports, paras. 7.218-7.219).

<sup>409</sup> Canada's appellee's submission, para. 49.

<sup>410</sup> Mexico's appellee's submission, para. 29.

<sup>411</sup> Appellate Body Reports, *US – COOL*, para. 342.

<sup>412</sup> Appellate Body Reports, *US – COOL*, para. 347.

<sup>413</sup> Appellate Body Reports, *US – COOL*, para. 349.

detrimental impact on imported livestock did not stem exclusively from a legitimate regulatory distinction but, instead, reflected discrimination in violation of Article 2.1 of the TBT Agreement.<sup>414</sup>

5.37. In the current proceedings, the participants do not appear to dispute that a similar analysis is required for the purpose of examining the consistency of the amended COOL measure with Article 2.1. Thus, the increased recordkeeping burden entailed by the amended COOL measure – i.e. the source of the increased detrimental impact on imported livestock – is to be compared with the origin information conveyed to consumers on the revised labels prescribed by that measure, with a view to determining whether the information conveyed to consumers is far less detailed and accurate than the information required to be collected by producers and processors. The United States contends that, instead of conducting this analysis, the Panel relied on its finding that the amended COOL measure entails an increased recordkeeping burden as an independent basis for its conclusion that the detrimental impact of that measure does not stem exclusively from legitimate regulatory distinctions.

5.38. We note that, at the outset of its analysis, the Panel articulated the analytical framework that it would employ for the purpose of determining whether the detrimental impact of the amended COOL measure stems exclusively from legitimate regulatory distinctions. In this regard, the Panel explained that it would take the objective of the amended COOL measure as a point of reference and, drawing upon the Appellate Body's guidance, it would assess the amended COOL measure by reference to whether there is a "disconnect" between, on the one hand, "the detailed information required to be tracked and transmitted by [upstream] producers" and, on the other hand, the information "conveyed to consumers through the labels prescribed under the [amended] COOL measure".<sup>415</sup> In respect of the latter, the Panel explained that it would examine the exemptions from the labelling requirements of the amended COOL measure, as well as the accuracy of the labels prescribed by that measure.<sup>416</sup>

5.39. As we see it, the Panel articulated an analytical framework pursuant to which the recordkeeping burden entailed by the amended COOL measure would serve as a comparator against which to compare the origin information that is ultimately conveyed to consumers on the mandatory labels for muscle cuts of meat. This approach, as articulated by the Panel, comports with the approach of the Appellate Body in the original proceedings set out above.

5.40. Turning to the Panel's application of the analytical framework that it had articulated, we note that the Panel first considered the detailed origin information that must be collected by upstream producers and processors of livestock. In this regard, the Panel recalled its earlier findings that had led it to conclude that the amended COOL measure entails an increased recordkeeping burden on upstream producers and processors of US-slaughtered livestock.<sup>417</sup> The Panel then examined the information ultimately conveyed to consumers on the labels prescribed by the amended COOL measure. In doing so, the Panel assessed, in particular, the nature and accuracy of the information conveyed on these labels and the proportion of the collected information that is exempt from being communicated to consumers.<sup>418</sup>

5.41. As regards the nature and accuracy of the information conveyed on the revised labels, the Panel noted that the greatest incremental improvement of the amended COOL measure is for Labels B and C, which, the Panel considered, were effectively indistinguishable under the original COOL measure.<sup>419</sup> The Panel further found that, "although the amended COOL measure increases the information communicated to consumers", it "necessarily increases the associated upstream informational (recordkeeping) requirements in order to do so."<sup>420</sup> Moreover, notwithstanding the improvement in the nature and accuracy of the information conveyed on the revised labels, the Panel considered that, at the same time, these labels introduce the potential for informational inaccuracy in respect of where livestock were "raised". In particular, the Panel recalled its earlier finding that the amended COOL measure allows labels to read "raised in the United States" (without listing any other country) on meat from Category B feeder cattle that spent a substantial

<sup>414</sup> Appellate Body Reports, *US – COOL*, para. 349.

<sup>415</sup> Panel Reports, para. 7.217 (quoting Appellate Body Reports, *US – COOL*, para. 349).

<sup>416</sup> Panel Reports, para. 7.218.

<sup>417</sup> Panel Reports, paras. 7.220-7.221.

<sup>418</sup> Panel Reports, para. 7.265.

<sup>419</sup> Panel Reports, para. 7.268.

<sup>420</sup> Panel Reports, para. 7.266.

portion of their lives either in Canada or Mexico. According to the Panel, this was of primary importance to its assessment as it represents "potential inaccuracy in light of the average age of cattle traded between the complainants and the United States".<sup>421</sup>

5.42. As regards the proportion of origin information that is exempt from being communicated to consumers at all, the Panel found that the amended COOL measure maintains the same proportion of information that is not communicated to consumers as a result of the exemptions from coverage of the COOL requirements.<sup>422</sup> The Panel reasoned, therefore, that, due to the increased recordkeeping burden under the amended COOL measure, even more "information regarding the origin of *all* livestock will have to be identified, tracked, and transmitted through the chain of production by upstream producers in accordance with the recordkeeping requirements ... even though 'a considerable proportion' of the beef and pork derived from that livestock will ultimately be exempt from the COOL requirements and therefore carry no COOL label at all."<sup>423</sup>

5.43. In concluding its overall assessment of whether the detrimental impact of the amended COOL measure on imported livestock stems exclusively from legitimate regulatory distinctions, the Panel noted that, in the original disputes, the Appellate Body found "the manner in which the [original] COOL measure [sought] to provide information to consumers on origin ... to be arbitrary, and the disproportionate burden imposed on upstream producers and processors to be unjustifiable."<sup>424</sup> The Panel considered this finding of the Appellate Body to be relevant in the context of the amended COOL measure, which, the Panel explained, "entails an increased recordkeeping burden and a potential for label inaccuracy, and continues to exempt a large proportion of muscle cuts" from its scope.<sup>425</sup> Accordingly, the Panel concluded that, under the particular circumstances of this case, the detrimental impact of the amended COOL measure on imported livestock does not stem exclusively from legitimate regulatory distinctions.<sup>426</sup>

5.44. Having reviewed the Panel's analysis, it seems to us that the Panel's conclusion that the detrimental impact of the amended COOL measure does not stem exclusively from legitimate regulatory distinctions was based on a comparative analysis of three key determinants of the informational "disconnect" that the Appellate Body had identified in the original disputes in relation to the original COOL measure: (i) the informational requirements imposed on upstream producers; (ii) the nature and accuracy of the information conveyed on the labels; and (iii) the proportion of the collected information that is exempt from being communicated to consumers.<sup>427</sup> Accordingly, we do not consider that the Panel, as the United States alleges, relied on its finding that the amended COOL measure entails an increased recordkeeping burden as an *independent* basis for concluding that the detrimental impact of that measure does not stem exclusively from legitimate regulatory distinctions.

5.45. We recall that the United States further asserts that, in order to conclude that the detrimental impact of the amended COOL measure does not stem exclusively from legitimate regulatory distinctions, the origin information required to be collected under that measure must be *so* disproportionate to the information provided to consumers on labels that the collection of the information cannot be explained in the first place.<sup>428</sup> As we see it, this comports with the analysis of the Appellate Body in the original disputes. Indeed, in the original disputes, of central importance to the Appellate Body's conclusion under Article 2.1 was its finding that the level of information conveyed to consumers through the prescribed labels under the original COOL measure was far less detailed and accurate than the information required to be tracked and transmitted by upstream producers and processors.

5.46. In looking at the Panel's analysis in the current proceedings, it seems to us that several of the discrete findings made by the Panel support the conclusion that the recordkeeping burden entailed by the amended COOL measure is disproportionate to the information conveyed to consumers on the revised labels under that measure. First, the Panel acknowledged that the

<sup>421</sup> Panel Reports, para. 7.269.

<sup>422</sup> Panel Reports, para. 7.266.

<sup>423</sup> Panel Reports, para. 7.272 (quoting Appellate Body Reports, *US – COOL*, para. 344 (emphasis original; fn omitted)).

<sup>424</sup> Panel Reports, para. 7.282 (quoting Appellate Body Reports, *US – COOL*, para. 347).

<sup>425</sup> Panel Reports, para. 7.282 (referring to Appellate Body Reports, *US – COOL*, para. 347).

<sup>426</sup> Panel Reports, para. 7.283.

<sup>427</sup> Panel Reports, para. 7.265.

<sup>428</sup> United States' appellant's submission, para. 115.

amended COOL measure has increased the amount of information conveyed to consumers on the mandatory labels but, importantly, that it has increased the recordkeeping burden on upstream producers in order to do so. Second, the Panel noted that the revised labels under the amended COOL measure introduce the potential for informational inaccuracy in respect of the identification of where the animals were "raised". Third, in connection with the exemptions from the scope of the COOL requirements, the Panel reasoned that, due to the increased recordkeeping burden under the amended COOL measure, even more "information regarding the origin of *all* livestock will have to be identified, tracked, and transmitted through the chain of production by upstream producers in accordance with the recordkeeping requirements ... even though 'a considerable proportion' of the beef and pork derived from that livestock will ultimately be exempt from the COOL requirements and therefore carry no COOL label at all."<sup>429</sup>

5.47. As we see it, the discrete findings made by the Panel outlined above support the conclusion that the recordkeeping and verification requirements of the amended COOL measure impose a disproportionate burden on producers and processors of livestock that cannot be explained by the need to provide consumers with information regarding where livestock were born, raised, and slaughtered. Accordingly, the detrimental impact on imported livestock arising from these same recordkeeping and verification requirements does not stem exclusively from legitimate regulatory distinctions.

5.48. In the light of the above, we disagree with the United States that the Panel's finding that the amended COOL measure entails an increased recordkeeping burden served as an "independent basis" for the Panel's conclusion that the detrimental impact of that measure does not stem exclusively from legitimate regulatory distinctions. Moreover, we do not consider, as the United States alleges, that the Panel "failed to put the issue of recordkeeping within the proper analysis, which involves a comparison of the burdens of recordkeeping and the provision of information through labels."<sup>430</sup> Accordingly, we find that the Panel did not err, in Section 7.5.4.2.4.4 of the Panel Reports, in its consideration of the increased recordkeeping burden entailed by the amended COOL measure within its analysis of whether the detrimental impact of that measure on imported livestock stems exclusively from legitimate regulatory distinctions.

#### **5.1.2.2 Claims relating to the Panel's analysis of the accuracy of the labels prescribed by the amended COOL measure**

5.49. We turn now to assess the United States' claims concerning the Panel's findings on the accuracy of the revised labels prescribed by the amended COOL measure. The United States puts forward two claims of error in relation to these findings. First, the United States contends that the Panel erred in finding that Labels B and C are potentially inaccurate, because this finding is based on "incorrect hypotheticals" and does not account for the actual trade in livestock among the three parties to these disputes. Second, the United States claims that the Panel erred in considering that its finding that Labels B and C are potentially inaccurate supports a conclusion that the detrimental impact of the amended COOL measure does not stem exclusively from legitimate regulatory distinctions. The United States argues, in this regard, that the Panel failed to make a determination of whether the labels prescribed by the amended COOL measure are designed and applied in an even-handed manner, including of whether a "disconnect" exists between, on the one hand, the origin information required to be collected by producers and processors and, on the other hand, the origin information that is ultimately conveyed to consumers.<sup>431</sup>

##### **5.1.2.2.1 Whether the Panel's analysis of the accuracy of Labels B and C was based on incorrect hypotheticals**

5.50. The United States claims that the Panel's finding that Labels B and C are potentially inaccurate is in error because it was based on incorrect hypothetical transactions that do not reflect actual trade in livestock among the three parties to these disputes. Noting that the Panel's analysis of the accuracy of Labels B and C turns on how information relating to where an animal was "raised" is communicated on these labels in various scenarios, the United States asserts that

<sup>429</sup> Panel Reports, para. 7.272 (quoting Appellate Body Reports, *US – COOL*, para. 344 (emphasis original; fn omitted)).

<sup>430</sup> United States' appellant's submission, para. 113.

<sup>431</sup> United States' appellant's submission, para. 131.

some of these scenarios reflect actual trade in livestock among the three parties to the disputes, and others are purely hypothetical.<sup>432</sup> The United States submits that, in determining whether Labels B and C are potentially inaccurate, the Panel treated each of the scenarios it examined as being equally persuasive, without regard for their improbability. Thus, as regards Label B, the Panel treated the scenario where an animal was born in Canada and exported to the United States for further raising and slaughter – a scenario that the United States admits occurs – on equal terms with the scenario where an animal was born in Canada, exported to Mexico for raising, and then exported to the United States for further raising and slaughter – a scenario that the United States alleges does not occur.

5.51. The United States further contends that the Panel was precluded from relying on hypothetical transactions that do not reflect actual trade in livestock because the claim before it was one of alleged *de facto* discrimination under Article 2.1 of the TBT Agreement. The United States submits, in this regard, that, in a *de facto* case, a panel must base its finding of detrimental impact on the effect of the measure in the marketplace – "i.e., the 'facts'".<sup>433</sup> The United States, thus, submits that, as was the case in *Canada – Periodicals*, the Panel's reliance on such hypotheticals lacks "proper reasoning based on inadequate factual analysis" and, as such, constitutes legal error.<sup>434</sup>

5.52. Canada responds that, in arguing that the Panel based its finding that Labels B and C are potentially inaccurate on incorrect hypothetical scenarios, the United States mischaracterizes the Panel's analysis. According to Canada, the Panel correctly found that, on average, "Canadian feeder cattle spend between 45 and 68% ... of their raising period outside the United States", and, on this basis, correctly determined that the country of raising flexibility under the amended COOL measure allows Label B "to designate the United States as the sole place of raising to an animal that spent as little as 15 days in the United States".<sup>435</sup> Canada asserts that it was on this basis that the Panel found that Label B entails a potential for conveying inaccurate information. Canada submits that, accordingly, the United States' claim that the Panel based its analysis of label accuracy under the amended COOL measure on incorrect hypothetical livestock transactions has no foundation.

5.53. Canada further considers as being without merit the United States' claim that the Panel was precluded from examining hypothetical scenarios because the claim before it was one of *de facto* discrimination under Article 2.1 of the TBT Agreement. In this regard, Canada recalls that, in determining whether the detrimental impact of a technical regulation on like imported products reflects discrimination, panels are required to assess, *inter alia*, the design, architecture, and revealing structure of the technical regulation at issue.<sup>436</sup> Canada submits that, in short, the analysis under Article 2.1 is not strictly confined to factual matters concerning actual trade in the relevant market.

5.54. Canada also observes that the Panel found that, although Label C "may allow – and possibly require – omission of actual countries of raising, resulting in label inaccuracy", that label "does not appear likely to convey misleading information about the country where animals imported for immediate slaughter are raised, given that these appear to be most commonly born and raised in the country of export."<sup>437</sup> Hence, in Canada's view, the Panel's identification of the informational shortcomings of the labels prescribed by the amended COOL measure was, thus, largely, but not entirely, focused on Label B.

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<sup>432</sup> The United States explains that, as regards Label B, the Panel found that this label is potentially inaccurate in two scenarios: (i) where an animal had a "single foreign origin", i.e. born in either Canada or Mexico and then exported to the United States for further raising and slaughter; and (ii) where an animal had a "multiple foreign origin", e.g. born in Mexico, exported to Canada for further raising, then exported to the United States for further raising and slaughter. As regards Label C, the Panel found that, although this label is accurate in practice, it is potentially inaccurate when affixed to muscle cuts produced from animals that have been the subject of at least one, and maybe two, transactions between Mexico and Canada, prior to being exported to the United States for immediate slaughter. (United States' appellant's submission, para. 152)

<sup>433</sup> United States' appellant's submission, para. 158.

<sup>434</sup> United States' appellant's submission, para. 159 (quoting Appellate Body Report, *Canada – Periodicals* p. 22, DSR 1997:I, p. 467).

<sup>435</sup> Canada's appellee's submission, para. 101 (quoting Panel Reports, para. 7.244).

<sup>436</sup> Canada's appellee's submission, para. 106 (referring to Appellate Body Reports, *US – COOL*, para. 271, in turn referring to Appellate Body Report, *US – Clove Cigarettes*, para. 182).

<sup>437</sup> Canada's appellee's submission, para. 99 (quoting Panel Reports, para. 7.254).

5.55. For its part, Mexico submits that, contrary to the United States' assertions, the Panel's finding that Label B potentially conveys inaccurate information was not based on incorrect hypotheticals but, rather, on a carefully reasoned and objective assessment of the implications of the design and application of the labelling rules prescribed by the amended COOL measure. Mexico submits that, in undertaking this assessment, the Panel clearly and consistently indicated where certain so-called "hypothetical scenarios" would be unlikely to occur with material frequency in actual practice, and discounted them accordingly.<sup>438</sup> Mexico contends that the Panel's finding with respect to Label B was not based on these infrequent scenarios but, rather, on specific scenarios in which the amended COOL measure, in its application, would permit labels indicating only "raised in the United States" for "livestock that commonly spend between approximately one third and one half of their lives elsewhere".<sup>439</sup> This was not an unlikely "hypothetical scenario" but, rather, a reasoned finding based on the average age at which Category B feeder cattle are imported into the United States from Mexico and Canada.

5.56. As regards Label C, Mexico observes that the Panel recognized that the potential inaccuracies that it observed with respect to the omission of countries of raising on that label were less likely to occur in practice.<sup>440</sup> Mexico asserts that it is, thus, clear from the Panel's reasoning that its concerns regarding potential label inaccuracy under the amended COOL measure were focused on Label B, in respect of which the Panel found that, "in its *application*, the amended COOL measure permits labels indicating 'raised in the United States' alone for livestock that commonly spend between approximately one third and one half of their lives elsewhere."<sup>441</sup>

5.57. In addressing the United States' claim, we consider first the United States' argument that, because the claim before the Panel was one of *de facto* discrimination under Article 2.1, the Panel was precluded from examining the accuracy of labels under the amended COOL measure in hypothetical scenarios "that do not reflect" actual trade in livestock between Canada, Mexico, and the United States.<sup>442</sup>

5.58. We have considered above that, because Article 2.1 is concerned with *competitive opportunities* for like imported products, the analysis under that provision is not limited to an examination of the operation of the technical regulation at issue within the confines of scenarios that are representative of actual patterns of trade. We have emphasized, however, that a panel may not ascribe undue *weight* to the effect of a technical regulation in *any* hypothetical scenario for the purposes of its analysis under Article 2.1. Instead, a panel's analysis under Article 2.1 must be grounded in an assessment of the technical regulation at issue in scenarios in which competitive opportunities may arise, notwithstanding that they may not be currently reflective of actual patterns of trade.<sup>443</sup>

5.59. Accordingly, we disagree with the United States to the extent that it contends that, in considering claims of *de facto* discrimination under Article 2.1, a panel's analysis is confined to assessing the effect of a measure on actual trade.

5.60. The United States argues, in any event, that the Panel's finding that Labels B and C are potentially inaccurate was based on *incorrect* hypotheticals. We note that, in considering the accuracy of the labels prescribed by the amended COOL measure, the Panel addressed the complainants' contention that the amended COOL measure may convey potentially misleading or inaccurate information to consumers as a result of the multiple countries of raising flexibility – applicable to Label B – and the rules applicable to Label C.<sup>444</sup>

5.61. As regards the alleged inaccuracy of Label B due to the multiple countries of raising flexibility, the Panel noted that this flexibility can be applied only in respect of the labelling of Category B muscle cuts deriving from animals that were raised in at least two countries, including the United States. The Panel further explained that, pursuant to this flexibility, "if animals are born

<sup>438</sup> Mexico's appellee's submission, para. 46 (referring to Panel Reports, para. 7.238).

<sup>439</sup> Mexico's appellee's submission, para. 46 (quoting Panel Reports, para. 7.244).

<sup>440</sup> Mexico's appellee's submission, para. 47 (quoting Panel Reports, para. 7.252).

<sup>441</sup> Mexico's appellee's submission, para. 47 (quoting Panel Reports, para. 7.244 (emphasis original)).

<sup>442</sup> United States' appellant's submission, para. 158.

<sup>443</sup> See *supra*, paras. 5.14-5.16.

<sup>444</sup> Panel Reports, para. 7.232.

and raised in another country and subsequently further raised in the United States, only the raising that occurs in the United States needs to be declared on the label."<sup>445</sup>

5.62. The Panel stated that it would evaluate the accuracy of Label B by considering evidence regarding where Category B animals were actually "raised", and what must be ultimately labelled according to the terms of the amended COOL measure.<sup>446</sup> After reviewing evidence concerning the age at which feeder cattle are imported into the United States, as well as the amount of time feeder cattle typically spend in the United States prior to slaughter, the Panel considered that the slaughter age of cattle is approximately 22 months.<sup>447</sup> The Panel considered further that, relative to this slaughter age, it was clear from the evidence that feeder cattle exported to the United States typically spend a substantial part of their lifespan in their country of birth. In this regard, the Panel pointed out that the parties' evidence indicated that, on average, Canadian feeder cattle spend between 45% and 68%, while Mexican feeder cattle spend between 27% and 32%, of their raising period outside the United States. Yet, these feeder cattle, explained the Panel, will be processed into muscle cuts that are eligible to be labelled with a Category B label that reads "Born in Canada/Mexico, Raised and Slaughtered in the United States". Thus, the Panel found that feeder cattle imported into the United States may spend up to 68% of their lifespan outside the United States, yet, the resulting meat products could be labelled to indicate that the animals from which the meat products derived were raised only in the United States.<sup>448</sup>

5.63. In the light of the above, the Panel was not persuaded by the United States' contention that Label B can be regarded as "*entirely* accurate"<sup>449</sup>, particularly given the definition of "raised" under the amended COOL measure.<sup>450</sup> The Panel further observed that the rationale for permitting flexibility to designate the United States as the sole place of raising is that this would "reduce the number of required characters on the label"<sup>451</sup>, and that there is a "presumption" that the raising of an animal must naturally occur, at least in part, in an animal's country of birth. The Panel considered, however, that this takes no account of the substantial amount of time that traded livestock typically spend outside the United States.<sup>452</sup>

5.64. In the light of the Panel's analysis as set out above, we do not consider that the Panel's finding that the amended COOL measure entails a potential for label inaccuracy was *based* on hypothetical scenarios, as argued by the United States. Instead, the Panel's findings concerning the accuracy of Label B was based on unchallenged evidence concerning where feeder cattle are actually "raised", and what must be ultimately indicated on Label B according to the terms of the amended COOL measure.

5.65. As regards Label C, the Panel concluded that the *design* of the rules pertaining to this label may allow, "and possibly require", the omission of actual countries of raising, "resulting in label inaccuracy as to an animal's place of raising".<sup>453</sup> The Panel qualified this finding by acknowledging, however, that, "[i]n its actual application to traded livestock ... Label C does not appear likely to convey misleading information about the country where animals imported for immediate slaughter are raised, given that these appear to be most commonly born and raised in the country of export."<sup>454</sup> Thus, we find persuasive Mexico's contention that the Panel did not *rely* on unlikely hypothetical scenarios in determining that there is a potential for label inaccuracy under the amended COOL measure but, instead, that the Panel "considered all of the potential scenarios" and "discounted or disregarded those that were unlikely to occur in actual practice".<sup>455</sup>

<sup>445</sup> Panel Reports, para. 7.233 (quoting 2013 Final Rule, p. 31368).

<sup>446</sup> Panel Reports, para. 7.239.

<sup>447</sup> Panel Reports, para. 7.242.

<sup>448</sup> Panel Reports, para. 7.242.

<sup>449</sup> Panel Reports, para. 7.243 (quoting United States' comments on the complainants' responses to Panel question No. 9, para. 16). (emphasis added by the Panel)

<sup>450</sup> "Raised" is defined by way of exclusion from the extreme start and end points of an animal's life, that is, from birth until slaughter or, in the case of Category C, entry into the United States for immediate slaughter. Immediately after an animal is born, "the period of time" for raising commences and continues for the remaining lifespan. (Panel Reports, para. 7.234 (quoting 2009 Final Rule (AMS), Section 65.235))

<sup>451</sup> Panel Reports, para. 7.243 (quoting 2013 Final Rule, p. 31368).

<sup>452</sup> Panel Reports, para. 7.243.

<sup>453</sup> Panel Reports, para. 7.254.

<sup>454</sup> Panel Reports, para. 7.254.

<sup>455</sup> Mexico's appellee's submission, para. 49.

5.66. In the light of the foregoing considerations, we disagree with the United States that the Panel's finding that the amended COOL measure entails a potential for label inaccuracy was based on "incorrect hypotheticals." Accordingly, we find that the Panel did not err, in paragraph 7.269 of the Panel Reports, in its assessment of the accuracy of Labels B and C as prescribed by the amended COOL measure.

#### **5.1.2.2.2 Whether the Panel erred by failing to assess the potential for label inaccuracy under the amended COOL measure in relation to the recordkeeping burden entailed by that measure**

5.67. We turn now to the United States' claim that the Panel's finding that Labels B and C are potentially inaccurate does not support the Panel's conclusion that the detrimental impact of that measure on imported livestock does not stem exclusively from legitimate regulatory distinctions. For the United States, the Panel was required to assess the potential for label inaccuracy under the amended COOL measure in relation to the recordkeeping burden entailed by that measure by determining whether a "disconnect" exists between, on the one hand, the origin information required to be collected by producers and processors and, on the other hand, the origin information that is ultimately conveyed to consumers on the mandatory labels.<sup>456</sup> The United States submits that the Panel erred by failing to make this determination.

5.68. According to the United States, the "central criticism" of the Appellate Body with regard to the original COOL measure was that the origin information provided by Labels B and C was "far less detailed and accurate than the information required to be tracked and transmitted by ... producers and processors" of livestock, such that the tracking and transmission of such information "[could not] be explained by the need to convey [origin] information" on meat products to consumers.<sup>457</sup> The United States contends that the Panel adopted an analytical framework that is different from the Appellate Body's approach in the original disputes. In this regard, the United States submits that the Panel criticized Labels B and C because of their potential to omit information concerning some of the countries where an animal was raised when its raising occurred in multiple countries. However, the Panel did not make a finding that the amended COOL measure requires that producers and processors of livestock track and transmit any information that is not provided by the labels. As such, the United States contends that the Panel erred, as a matter of law, in finding that the informational "disconnect" that the Appellate Body found to exist under the original COOL measure continues to exist under the amended COOL measure.<sup>458</sup>

5.69. Canada and Mexico respond that, in its assessment of whether the detrimental impact of the amended COOL measure stems exclusively from legitimate regulatory distinctions, the Panel correctly considered the upstream recordkeeping burden entailed by the amended COOL measure, the potential for label inaccuracy entailed by that measure, and the exemptions from coverage of the COOL requirements. Canada and Mexico submit that the interaction of these three factors within the overall architecture of the amended COOL measure supports the Panel's ultimate conclusion that the detrimental impact caused by the amended COOL measure does not stem exclusively from legitimate regulatory distinctions. Canada and Mexico submit that this was a sufficient basis for the Panel's finding of a violation of Article 2.1 of the TBT Agreement.<sup>459</sup>

5.70. Turning to our assessment of the United States' present claim, we recall that, in connection with a separate claim put forward by the United States on appeal, we have considered in detail above the Panel's overall assessment of whether the detrimental impact of the amended COOL measure stems exclusively from legitimate regulatory distinctions.<sup>460</sup> After examining the Panel's analysis, we have considered that the Panel's conclusion that the detrimental impact of the amended COOL measure does not stem exclusively from legitimate regulatory distinctions was based on a comparative analysis of three key determinants of the informational "disconnect" that the Appellate Body had identified in the original disputes in relation to the original COOL measure: (i) the informational requirements imposed on upstream producers; (ii) the nature and accuracy of

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<sup>456</sup> United States' appellant's submission, para. 131.

<sup>457</sup> United States' appellant's submission, para. 172 (quoting Appellate Body Reports, *US – COOL*, para. 349).

<sup>458</sup> United States' appellant's submission, para. 179.

<sup>459</sup> Canada's appellee's submission, para. 108; Mexico's response to questioning at the oral hearing.

<sup>460</sup> See *supra*, paras. 5.38-5.44.

the information conveyed on the labels; and (iii) the proportion of the collected information that is exempt from being communicated to consumers.<sup>461</sup> In addition, we have considered that several elements of the Panel's analysis, and discrete findings made by the Panel in relation to these three determinants, support the conclusion that the recordkeeping and verification requirements of the amended COOL measure impose a disproportionate burden on producers and processors of livestock that cannot be explained by the need to provide origin information to consumers.<sup>462</sup> Accordingly, we are not persuaded by the United States' contention that the Panel failed to address the question of whether there is a "disconnect" between, on the one hand, the information required to be collected by producers and processors of livestock and, on the other hand, the information ultimately conveyed to consumers on the labels prescribed by the amended COOL measure.

5.71. For the reasons expressed above, we find that the Panel did not err, in Section 7.5.4.2.4.4 of the Panel Reports, in its consideration of the potential for label inaccuracy under the amended COOL measure within its analysis of whether the detrimental impact of that measure on imported livestock stems exclusively from legitimate regulatory distinctions.

### 5.1.2.3 Claims relating to the exemptions prescribed by the amended COOL measure

5.72. We turn now to the United States' claim that the Panel erred in finding that the scope of the exemptions prescribed by the amended COOL measure support a conclusion that the detrimental impact of that measure on imported livestock does not stem exclusively from legitimate regulatory distinctions.<sup>463</sup>

5.73. We recall that the COOL statute provides for three exemptions from the COOL requirements. In particular, it exempts: (i) entities not meeting the definition of the term "retailer"; (ii) covered commodities that are used as ingredients in "processed food items"; and (iii) products served in "food service establishments". These exemptions were provided for under the original COOL measure, and are maintained by the amended COOL measure.

5.74. In its overall assessment of whether the detrimental impact of the amended COOL measure stems exclusively from legitimate regulatory distinctions, the Panel considered the exemptions from the coverage of the COOL requirements as evidence that the recordkeeping burden giving rise to the detrimental impact on imported livestock "cannot be explained by the need to convey to consumers information regarding the countries where livestock were born, raised, and slaughtered."<sup>464</sup>

5.75. On appeal, the United States claims that the Panel erred in finding that the scope of the exemptions under the amended COOL measure supports a conclusion that the detrimental impact of that measure on imported livestock does not stem exclusively from legitimate regulatory distinctions.<sup>465</sup> This claim rests on three main grounds.

5.76. First, the United States claims that the Panel erred in finding that the exemptions are relevant for the analysis, under Article 2.1 of the TBT Agreement, of whether the detrimental impact of the amended COOL measure stems exclusively from legitimate regulatory distinctions.<sup>466</sup> The United States submits in this connection that, because the exemptions are not relevant regulatory distinctions drawn by the amended COOL measure, the Panel should not have considered them in its analysis under Article 2.1.

5.77. Second, the United States claims that, "aside from the fact that the exemptions are not relevant", the Panel erred by failing to take into account the following considerations in its assessment: (i) that the exemptions apply equally to meat derived from imported and domestic livestock and are, therefore, even handed in their design and application; (ii) the "legitimate desire of Members to adjust the scope of their technical regulations" to take account of cost considerations; and (iii) that, in the light of the "enhanced accuracy" of the labels prescribed by

<sup>461</sup> Panel Reports, para. 7.265.

<sup>462</sup> See *supra*, paras. 5.46-5.47.

<sup>463</sup> United States' appellant's submission, paras. 184-185.

<sup>464</sup> Panel Reports, para. 7.277 (quoting Appellate Body Reports, *US – COOL*, para. 349).

<sup>465</sup> United States' appellant's submission, para. 91.

<sup>466</sup> United States' appellant's submission, para. 186.

the amended COOL measure, the recordkeeping burden entailed by that measure can now "be explained by the need to provide origin information to consumers".<sup>467</sup>

5.78. Third, the United States submits that the Panel failed to evaluate the operation of the exemptions within the US market and, therefore, that the Panel erred in concluding that these exemptions support a conclusion that the detrimental impact of the amended COOL measure reflects discrimination in violation of Article 2.1 of the TBT Agreement.<sup>468</sup>

5.79. We turn now to examine these distinct claims of error advanced by the United States. Before doing so, we recall briefly the Panel's key findings concerning the exemptions under the amended COOL measure for the purpose of its assessment of whether the detrimental impact of that measure on imported livestock stems exclusively from legitimate regulatory distinctions.

5.80. We recall that, having found that the amended COOL measure increases the detrimental impact of the original COOL measure on imported livestock, the Panel turned to consider whether such detrimental impact stems exclusively from legitimate regulatory distinctions. In considering this issue, the Panel first identified the relevant regulatory distinctions drawn by the amended COOL measure as the distinctions between the three production steps, as well as the mandatory labels to be affixed to muscle cuts of beef and pork. The Panel observed that the parties had not disputed that these are relevant regulatory distinctions under the amended COOL measure.<sup>469</sup> The Panel then proceeded to consider the relevance of other elements of the amended COOL measure for the analysis of whether the detrimental impact of that measure stems exclusively from legitimate regulatory distinctions.<sup>470</sup>

5.81. As regards the relevance of the exemptions, the Panel observed that, in the original disputes, the Appellate Body had considered relevant for its analysis under Article 2.1 "the fact that the COOL measure exempts from its labelling requirements muscle cuts of beef and pork that are 'ingredient[s] in a processed food item', or are sold in a 'food service establishment' or in an establishment that is not a 'retailer'".<sup>471</sup> According to the Panel, the Appellate Body's attribution of relevance to the exemptions in the original disputes was consistent with the Appellate Body's explanation that, in assessing whether the detrimental impact of a technical regulation stems exclusively from legitimate regulatory distinctions, a panel must "carefully scrutinize the particular circumstances of the case, that is the design, architecture, revealing structure, operation, and application of the technical regulation at issue".<sup>472</sup>

5.82. The Panel, therefore, concluded that, although the exemptions from the COOL requirements are not "relevant regulatory distinctions" as such, they should, nevertheless, be taken into account as part of its examination of the "overall architecture" of the amended COOL measure, insofar as they are relevant to the issue of whether "the detrimental impact [of that measure on imported livestock] reflects discrimination in violation of Article 2.1".<sup>473</sup>

5.83. The Panel then examined the exemptions as part of its overall assessment of whether the detrimental impact of the amended COOL measure stems exclusively from legitimate regulatory distinctions. The Panel considered that the amended COOL measure failed to address, in any way, the Appellate Body's finding that "the [original] COOL measure exempts from its labelling

<sup>467</sup> United States' appellant's submission, para. 187.

<sup>468</sup> United States' appellant's submission, para. 188.

<sup>469</sup> See Canada's second written submission to the Panel, para. 47; Mexico's first written submission to the Panel, paras. 118-119; and United States' second written submission to the Panel, para. 19.

<sup>470</sup> The Panel noted that the United States contended that the complainants had inappropriately challenged "other regulatory distinctions that either have nothing to do with the detrimental impact caused by the amended COOL measure or, in fact, are not regulatory distinctions at all". (Panel Reports, para. 7.199 (quoting United States' first written submission to the Panel, para. 81)) The United States had referred in this regard to: (i) the exemptions and defined scope of the amended COOL measure; (ii) Label D for muscle cuts derived from foreign-slaughtered animals; (iii) the COOL statute's prohibition of a trace-back system; and (iv) Label E for ground meat products. We address Labels D and E and the prohibition of a trace-back system in the context of the claims raised by Canada and Mexico in their other appeals under Article 2.1 of the TBT Agreement in section 5.1.3 *infra*.

<sup>471</sup> Panel Reports, para. 7.201 (quoting Appellate Body Reports, *US – COOL*, para. 344).

<sup>472</sup> Panel Reports, para. 7.202 (quoting Appellate Body Reports, *US – COOL*, para. 271, in turn referring to Appellate Body Report, *US – Clove Cigarettes*, para. 182).

<sup>473</sup> Panel Reports, para. 7.203. (fn omitted)

requirements muscle cuts of beef and pork that are 'ingredient[s] in a processed food item', or are sold in a 'food service establishment' or in an establishment that is not a 'retailer'.<sup>474</sup> Further, the Panel stated that it had no evidence before it that called into question the finding of the original panel that "the ultimate disposition of a meat product is often not known at any particular stage of the production chain".<sup>475</sup> Thus, the Panel considered that, due to the increased recordkeeping burden under the amended COOL measure, even more "information regarding the origin of *all* livestock will have to be identified, tracked, and transmitted through the chain of production by upstream producers in accordance with the recordkeeping requirements ... even though 'a considerable proportion' of the beef and pork derived from that livestock will ultimately be exempt from the COOL requirements and therefore carry no COOL label at all."<sup>476</sup>

5.84. For these reasons, the Panel concluded that the exemptions under the amended COOL measure constitute evidence that the recordkeeping burden giving rise to the detrimental impact on imported livestock "cannot be explained by the need to convey to consumers information regarding the countries where livestock were born, raised, and slaughtered".<sup>477</sup>

5.85. We turn now to examine the distinct claims of error raised by the United States concerning the Panel's analysis of the exemptions from the COOL requirements.

#### **5.1.2.3.1 Whether the Panel erred in considering that the exemptions from the COOL requirements were relevant for its analysis under Article 2.1**

5.86. The United States claims that the Panel erred in finding that the exemptions are relevant for the analysis of whether the detrimental impact of the amended COOL measure stems exclusively from legitimate regulatory distinctions.<sup>478</sup> Relying on the Appellate Body's statement in *US – Tuna II (Mexico)* that "[it] *only* need[ed] to examine the distinction that account[ed] for the detrimental impact on Mexican tuna products", the United States argues that only regulatory distinctions that account for the detrimental impact on like imported products can answer the question of whether such detrimental impact reflects discrimination.<sup>479</sup> The United States points out that the original panel had found that the exemptions under the original COOL measure were not a source of detrimental impact on imported livestock.<sup>480</sup> The United States submits that, accordingly, the compliance Panel should not have found that the exemptions under the amended COOL measure are relevant for the analysis of whether the detrimental impact of that measure stems exclusively from legitimate regulatory distinctions.<sup>481</sup>

5.87. Canada responds that the Panel's attribution of relevance to the exemptions is consistent with the Appellate Body's approach to the exemptions under the original COOL measure and the general legal framework that the Appellate Body has prescribed for the analysis under Article 2.1 of the TBT Agreement.<sup>482</sup> According to Canada, this legal framework requires panels to scrutinize carefully the particular circumstances of the case – that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue – rather than simply the relevant regulatory distinctions.

5.88. In respect of the United States' reliance on the Appellate Body report in *US – Tuna II (Mexico)*, Canada submits that, in the light of the clear guidance that the Appellate Body has provided to panels, as well as the analysis conducted by the Appellate Body in the original disputes, the statement relied on by the United States cannot "credibly" be interpreted as a prohibition on the consideration of elements of a challenged technical regulation, or the particular circumstances of the case, that do not directly account for the detrimental impact on imported

<sup>474</sup> Panel Reports, para. 7.272 (quoting Appellate Body Reports, *US – COOL*, para. 344).

<sup>475</sup> Panel Reports, para. 7.272 (quoting Appellate Body Reports, *US – COOL*, para. 344, in turn referring to Original Panel Reports, *US – COOL*, para. 417).

<sup>476</sup> Panel Reports, para. 7.272 (quoting Appellate Body Reports, *US – COOL*, para. 344 (emphasis original; fn omitted)).

<sup>477</sup> Panel Reports, para. 7.277 (quoting Appellate Body Reports, *US – COOL*, para. 349).

<sup>478</sup> United States' appellant's submission, para. 203.

<sup>479</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 286 (emphasis original); United States' appellant's submission, para. 195.

<sup>480</sup> United States' appellant's submission, para. 196 (referring to Original Panel Reports, *US – COOL*, paras. 7.417 and 7.419).

<sup>481</sup> United States' appellant's submission, para. 201.

<sup>482</sup> Canada's appellee's submission, para. 59. (fns omitted)

products but, nevertheless, demonstrate the arbitrary or unjustifiable character of such detrimental impact.<sup>483</sup>

5.89. For Mexico, the Panel correctly found that the exemptions are relevant for the analysis under Article 2.1 because they constitute an essential element of the design, architecture, revealing structure, operation, and application of the amended COOL measure. Mexico submits that, contrary to the interpretation proposed by the United States, the Appellate Body's statement in *US – Tuna II (Mexico)* does not restrict or narrow the manner in which the legitimacy of the relevant regulatory distinctions should be examined for the purposes of Article 2.1 of the TBT Agreement. According to Mexico, such an examination must take into account the operation and application of the relevant regulatory distinction – i.e. how it functions in practice – within the context of the design, overall architecture, and revealing structure of the technical regulation. Mexico emphasizes that the Appellate Body confirmed as much in the original disputes when it explained that, "in assessing even-handedness, a panel must carefully scrutinize the design, architecture, revealing structure, operation and application of the technical regulation at issue."<sup>484</sup>

5.90. Turning to our analysis, we consider that the United States' claim raises the issue of what elements of a technical regulation are relevant for the inquiry of whether the detrimental impact of that technical regulation on like imported products stems exclusively from legitimate regulatory distinctions. In particular, we must consider whether elements of a technical regulation that have not been identified as relevant regulatory distinctions can be examined for the purpose of determining whether the detrimental impact of that measure on like imported products stems exclusively from legitimate regulatory distinctions.

5.91. We recall that, in the original disputes, the Appellate Body explained that some technical regulations that have a *de facto* detrimental impact on imported products may not be inconsistent with Article 2.1 "when such impact stems exclusively from a legitimate regulatory distinction".<sup>485</sup> The Appellate Body further explained that, by contrast, where a regulatory distinction is not designed and applied in an even-handed manner<sup>486</sup> – because, for example, it is designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination – that distinction cannot be considered "legitimate", and the detrimental impact on competitive opportunities for like imported products will reflect discrimination in violation of Article 2.1. The Appellate Body considered that, in assessing whether a regulatory distinction is designed and applied in an "even-handed" manner, a panel must "carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue".<sup>487</sup>

5.92. Thus, if a panel finds that a technical regulation has a *de facto* detrimental impact on competitive opportunities for like imported products, the focus of the inquiry shifts to whether such detrimental impact stems exclusively from legitimate regulatory distinctions. This inquiry probes the legitimacy of regulatory distinctions through careful scrutiny of whether they are designed and applied in an even-handed manner such that they may be considered "legitimate" for the purposes of Article 2.1.

5.93. We consider, therefore, that the inquiry into whether the detrimental impact of a technical regulation on like imported products stems exclusively from legitimate regulatory distinctions must focus on those regulatory distinctions that account for such detrimental impact. Further, the legitimacy of such regulatory distinctions, for the purposes of Article 2.1, is a function of whether they are designed and applied in an even-handed manner. While the assessment of even-handedness focusses on the regulatory distinction(s) causing the detrimental impact on imported products, other elements of the technical regulation are relevant for that assessment to the extent that they are probative of whether such detrimental impact stems exclusively from legitimate regulatory distinctions. Indeed, as the Appellate Body explained in the original disputes, a panel, in

<sup>483</sup> Canada's appellee's submission, para. 62.

<sup>484</sup> Mexico's appellee's submission, para. 57 (quoting Appellate Body Reports, *US – COOL*, para. 271, in turn quoting Appellate Body Report, *US – Clove Cigarettes*, para. 182).

<sup>485</sup> Appellate Body Reports, *US – COOL*, para. 271 (referring to Appellate Body Reports, *US – Clove Cigarettes*, para. 182; and *US – Tuna II (Mexico)*, para. 215).

<sup>486</sup> Appellate Body Reports, *US – COOL*, para. 271 (referring to Appellate Body Reports, *US – Clove Cigarettes*, para. 182; and *US – Tuna II (Mexico)*, para. 216).

<sup>487</sup> Appellate Body Reports, *US – COOL*, para. 271 (referring to Appellate Body Report, *US – Clove Cigarettes*, para. 182).

assessing even-handedness for the purposes of Article 2.1, must "carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue".<sup>488</sup>

5.94. Thus, the inquiry under Article 2.1 must situate the regulatory distinctions that account for the detrimental impact on imported products within the overall design and application of the technical regulation at issue. In this way, a determination can be made as to whether these distinctions are designed and applied in an even-handed manner such that they may be considered "legitimate" for the purposes of Article 2.1, or whether, instead, they lack even-handedness because, for example, they are designed and applied in a manner that constitutes arbitrary or unjustifiable discrimination in violation of Article 2.1.

5.95. We emphasize that the analysis described above is meant to assess an allegation of *de facto* discrimination under Article 2.1 of the TBT Agreement. Such *de facto* discrimination against imported products will not be immediately discernible from the text of a measure, nor may it be discernible when its operation is assessed exclusively through the lens of one of its components. Therefore, technical regulations must be assessed as composite legal instruments through careful scrutiny of their design, architecture, revealing structure, operation, and application.

5.96. In support of its argument that the Panel erred in attributing relevance to the exemptions for the purposes of its analysis under Article 2.1, the United States relies on the Appellate Body's statement in *US – Tuna II (Mexico)* that "[it] only need[ed] to examine the distinction that account[ed] for the detrimental impact on Mexican tuna products."<sup>489</sup> This statement merely confirms that the inquiry into whether the detrimental impact of a technical regulation on imported products stems exclusively from legitimate regulatory distinctions has, as its focus, those regulatory distinctions that account for such detrimental impact. Thus, those regulatory distinctions are the distinctions that must be assessed to determine whether they are designed and applied in an "even-handed" manner, such that they may be considered "legitimate" for the purposes of Article 2.1. However, the statement of the Appellate Body on which the United States relies does not exclude consideration of other relevant elements that may be probative of whether the detrimental impact on imported products stems exclusively from legitimate regulatory distinctions. Indeed, in *US – Tuna – II (Mexico)*, the Appellate Body recalled that, in making a determination of whether a measure is *de facto* inconsistent with Article 2.1, "a panel must carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue, and, in particular, whether that technical regulation is even-handed."<sup>490</sup>

5.97. To us, the analytical framework followed by the Appellate Body in examining claims under Article 2.1 does not support the United States' contention that a panel may examine only the regulatory distinctions causing the detrimental impact on imported products, for the purposes of assessing the consistency of a technical regulation with Article 2.1 of the TBT Agreement.<sup>491</sup> We, therefore, disagree with the United States' reading of the Appellate Body report in *US – Tuna II (Mexico)*.

5.98. For the reasons expressed above, we find that the Panel did not err, in paragraph 7.203 of the Panel Reports, in finding that the exemptions prescribed by the amended COOL measure are relevant for the analysis of whether the detrimental impact of that measure on imported livestock stems exclusively from legitimate regulatory distinctions.

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<sup>488</sup> Appellate Body Reports, *US – COOL*, para. 271 (quoting Appellate Body Report, *US – Clove Cigarettes*, para. 182).

<sup>489</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 286 (original emphasis); United States' appellant's submission, para. 195.

<sup>490</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 225 (quoting Appellate Body Report, *US – Clove Cigarettes*, para. 182).

<sup>491</sup> United States' appellant's submission, para. 195.

### 5.1.2.3.2 Whether the Panel erred in finding that the exemptions under the amended COOL measure support a conclusion that the detrimental impact of that measure on imported livestock reflects discrimination

5.99. We turn now to the second ground of the United States' appeal of the Panel's finding that the exemptions under the amended COOL measure support a conclusion that the detrimental impact of that measure on imported livestock does not stem exclusively from legitimate regulatory distinctions. The United States claims that, "aside from the fact that the exemptions are not relevant" to the analysis under Article 2.1, the Panel erred by failing to take into account the following considerations: (i) that the exemptions apply equally to meat derived from imported and domestic livestock and are, therefore, even handed in their design and application; (ii) the "legitimate desire of Members to adjust the scope of their technical regulations" to take account of cost considerations; and (iii) that, in the light of the "enhanced accuracy" of the labels prescribed by the amended COOL measure, the recordkeeping burden entailed by that measure can now "be explained by the need to provide origin information to consumers".<sup>492</sup>

#### 5.1.2.3.2.1 Whether the Panel erred by failing to take into account that the exemptions under the amended COOL measure apply equally to meat derived from imported and domestic livestock

5.100. The United States claims that, in concluding that the exemptions under the amended COOL measure support a conclusion that the detrimental impact of that measure on imported livestock reflects discrimination, the Panel erred by failing to take into account that these exemptions apply equally to meat derived from imported and domestic livestock and are, therefore, even handed in their design and application.

5.101. The United States asserts that it is uncontested that neither the design, nor the operation, of the exemptions disadvantage Canadian and Mexican livestock exports. In this regard, these exemptions are "wholly different" from the exemptions under the measures at issue in *US – Clove Cigarettes* and *EC – Seal Products*.<sup>493</sup> The United States explains that, in *US – Clove Cigarettes*, the Appellate Body found that the exemption of menthol cigarettes from the ban on flavoured cigarettes was not even handed because producers of menthol cigarettes – mainly US producers – could take advantage of this exemption notwithstanding the fact that menthol cigarettes presented a risk similar to that presented by the banned products.<sup>494</sup> The United States adds that, similarly, the panel in *EC – Seal Products* found that the indigenous community exemption was not even handed in the light of the fact that, while seal products from Greenland could benefit from that exemption, seal products from Canada could not, even though the hunts from which these seal products derived "greatly approximated one another".<sup>495</sup> According to the United States, the same dynamic does not arise in the case of the exemptions under the amended COOL measure. The United States submits that, by failing to take this into account, the Panel erred in finding that the exemptions under the amended COOL measure support a conclusion that the detrimental impact of that measure on imported livestock reflects discrimination in violation of Article 2.1 of the TBT Agreement.

5.102. Canada responds that the even-handedness of the exemptions, in and of themselves, was not at issue before the Panel. Instead, the exemptions constitute a component of the overall architecture of the amended COOL measure that reveals that this measure is not designed and applied in an even-handed manner, and causes arbitrary and unjustifiable discrimination against imported livestock.<sup>496</sup>

5.103. For its part, Mexico, like Canada, contends that the even-handedness of the exemptions under the amended COOL measure was not at issue before the Panel because they are not regulatory distinctions that account for the detrimental impact on imported livestock. Accordingly,

<sup>492</sup> United States' appellant's submission, para. 187 (quoting Appellate Body Reports, *US – COOL*, para. 349).

<sup>493</sup> United States' appellant's submission, para. 208.

<sup>494</sup> United States' appellant's submission, para. 208 (referring to Appellate Body Report, *US – Clove Cigarettes*, para. 225).

<sup>495</sup> United States' appellant's submission, para. 208 (referring to Panel Reports, *EC – Seal Products*, para. 7.317).

<sup>496</sup> Canada's appellee's submission, para. 68.

the question of whether the exemptions under the amended COOL measure are designed or applied in an even-handed manner is entirely irrelevant to the pertinent legal issue, i.e. whether the relevant regulatory distinctions that account for the detrimental impact on imported livestock are designed or applied in an even-handed manner. Responding further to the United States' characterization of the exemptions as "even handed", Mexico submits that the fact that certain US entities may enjoy cost savings as a result of the exemptions has no bearing on the fact that these exemptions, as a central element of the overall design and architecture of the amended COOL measure, contribute to the informational "disconnect" between, on the one hand, the origin information tracked and transmitted by producers of livestock and, on the other hand, the origin information conveyed to consumers through the mandatory labels.<sup>497</sup>

5.104. In our analysis above, we have considered that other elements of a measure, apart from the regulatory distinctions causing detrimental impact, may be relevant for assessing whether these regulatory distinctions are designed and applied in an even-handed manner and are, thus, "legitimate" for the purposes of Article 2.1 of the TBT Agreement. In particular, we have considered that such other elements are relevant for that assessment to the extent that they are probative of whether the detrimental impact on like imported products stems exclusively from legitimate regulatory distinctions.<sup>498</sup>

5.105. It follows, in our view, that the Panel was not required to assess the even-handedness of the exemptions under the amended COOL measure because these exemptions are not relevant regulatory distinctions under that measure. Instead, the exemptions form part of the overall architecture of the amended COOL measure that the Panel scrutinized in order to assess whether the relevant regulatory distinctions at issue – i.e. the distinctions between the three production steps, as well as the mandatory labels to be affixed to muscle cuts of beef and pork – are designed and applied in an even-handed manner. Thus, whether the exemptions under the amended COOL measure are, *in and of themselves*, designed and applied in an even-handed manner is not relevant for the inquiry under Article 2.1. The question is not whether the exemptions are even handed in the sense that they exclude from the scope of the COOL requirements both domestic and imported meat products. Instead, the question is whether the exemptions, as part of the overall architecture of the amended COOL measure, demonstrate that the relevant regulatory distinctions are not designed and applied in an even-handed manner.

5.106. The Panel ultimately found that the exemptions, as an integral part of "the overall architecture" of the amended COOL measure, were "of central importance" to its overall analysis under Article 2.1<sup>499</sup> because between 57.7% and 66.7% of beef consumed in the United States, and between 83.5% and 84.1% of pork muscle cuts, will convey no consumer information on origin despite imposing an upstream recordkeeping burden on producers and processors that has a detrimental impact on competitive opportunities for imported livestock.<sup>500</sup> For this reason, the exemptions prescribed by the amended COOL measure are probative of whether the detrimental impact of that measure on imported livestock stems exclusively from legitimate regulatory distinctions.

5.107. Finally, we consider that the United States' reliance on the exemptions prescribed by the measures at issue in *EC – Seal Products* and *US – Clove Cigarettes* is unavailing. By contrast with the exemptions under the amended COOL measure, the exemptions prescribed by the measures at issue in *EC – Seal Products* and *US – Clove Cigarettes* were, in fact, the regulatory distinctions causing detrimental impact on the imported products at issue. As such, it was necessary to examine, for the purposes of Article 2.1, whether these exemptions were designed and applied in an even-handed manner such that they could be considered legitimate for the purposes of that provision.

5.108. For the reasons expressed above, we find that the Panel did not err, in paragraphs 7.273-7.276 of the Panel Reports, by not attributing significance to the fact that the exemptions under the amended COOL measure apply equally to meat derived from imported and domestic livestock.

<sup>497</sup> Mexico's appellee's submission, para. 69 (referring to Panel Reports, para. 7.272).

<sup>498</sup> See *supra*, para. 5.93.

<sup>499</sup> Panel Reports, para. 7.273 (quoting Appellate Body Reports, *US – COOL*, para. 348).

<sup>500</sup> Panel Reports, para. 7.273.

### 5.1.2.3.2.2 Whether the Panel erred by failing to take into account that cost considerations provide a non-discriminatory basis for the exemptions under the amended COOL measure

5.109. The United States claims that, in concluding that the exemptions under the amended COOL measure support a conclusion that the detrimental impact of that measure on imported livestock reflects discrimination, the Panel erred by failing to take into account the "legitimate desire of Members to adjust the scope of their technical regulations" to take account of cost considerations.<sup>501</sup>

5.110. According to the United States, the exemptions under the amended COOL measure constitute "important mechanisms that policy makers use to control costs of measures in pursuit of legitimate government objectives".<sup>502</sup> The United States explains that, while its intent is to provide consumers with accurate and meaningful information on the origin of the meat that they purchase, it does not intend to do so "at any cost".<sup>503</sup> Accordingly, even if such information was, and remains, desired by consumers, the United States, ultimately, set a slightly lower level of fulfilment by including exemptions in the amended COOL measure, as is the prerogative of any regulator.<sup>504</sup> The United States further argues that the cost savings provided by the exemptions under the amended COOL measure are real and, in this regard, the United States asserts that it is uncontested that removing these exemptions would increase recordkeeping, verification, and segregation costs associated with the amended COOL measure.<sup>505</sup> The United States highlights that it is not the only Member seeking to balance, on the one hand, the provision of information to consumers with, on the other hand, the costs of providing such information. Thus, for the United States, the exemptions under the amended COOL measure reflect sound public policy, rather than arbitrary discrimination.<sup>506</sup>

5.111. Canada submits that the Panel correctly found that, while cost considerations "are not *per se* prohibited", they do not constitute a "supervening justification for discriminatory measures".<sup>507</sup> In addition, Canada contends that the cost savings achieved by exempt US entities do not detract from the fact that the amended COOL measure arbitrarily and unjustifiably discriminates against Canadian livestock. Thus, for Canada, the position of the United States that the cost savings achieved by the exemptions justify the discriminatory effects of the amended COOL measure is "untenable".<sup>508</sup>

5.112. Mexico contends that any cost savings achieved by the exemptions from the COOL requirements cannot excuse, justify, counterbalance, or otherwise legitimize the discriminatory effects of the amended COOL measure.<sup>509</sup> These cost savings enjoyed by US entities that remain exempt from the COOL requirements do not, in Mexico's view, alter the reality that the exemptions remove a significant proportion of products from the scope of the requirements of the amended COOL measure, thereby preventing the origin information that is collected by producers of livestock from being conveyed to consumers. Mexico highlights that it was for this reason that the Panel considered the exemptions as evidence that the recordkeeping burden giving rise to the detrimental impact on imported livestock cannot be explained by the need to convey to consumers information regarding the countries where livestock were born, raised, and slaughtered.<sup>510</sup> Mexico submits that the cost savings achieved by the exemptions do not affect this conclusion.

5.113. Turning to our analysis, we recall that, in *US – Clove Cigarettes*, the Appellate Body considered that "[n]othing in Article 2.1 prevents a Member from seeking to minimize the potential costs arising from technical regulations, provided that the technical regulation at issue does not

<sup>501</sup> United States' appellant's submission, para. 187 (quoting Appellate Body Reports, *US – COOL*, para. 349).

<sup>502</sup> United States' appellant's submission, para. 211. (fn omitted)

<sup>503</sup> United States' appellant's submission, para. 212. (emphasis omitted)

<sup>504</sup> United States' appellant's submission, para. 212.

<sup>505</sup> United States' appellant's submission, para. 213.

<sup>506</sup> United States' appellant's submission, paras. 214-215.

<sup>507</sup> Canada's appellee's submission, para. 73 (quoting Panel Reports, para. 7.275).

<sup>508</sup> Canada's appellee's submission, para. 76.

<sup>509</sup> Mexico's appellee's submission, para. 72.

<sup>510</sup> Mexico's appellee's submission, para. 70.

overtly or covertly discriminate against imports."<sup>511</sup> Thus, Members may seek to minimize the costs entailed by technical regulations insofar as such technical regulations do not discriminate against like imported products in violation of Article 2.1.

5.114. We note that the Panel explicitly engaged with the United States' defence of the exemptions on the basis of the cost savings that they allegedly entail. In this regard, the Panel recalled the guidance of the Appellate Body in *US – Clove Cigarettes* and considered that cost considerations do not provide "supervening justification for discriminatory measures".<sup>512</sup> On that basis, the Panel did not consider that "such practical considerations justify the discriminatory nature of the amended COOL measure or call into question the Appellate Body's concern with the exemptions in the original dispute."<sup>513</sup>

5.115. As we see it, the Panel's analysis, as set forth above, comports with the Appellate Body's guidance in *US – Clove Cigarettes*. We see no error in the Panel's finding that cost considerations do not constitute a "supervening justification for discriminatory measures".<sup>514</sup> In particular, we do not consider that the cost savings enjoyed by US entities that are exempt from the COOL requirements mitigate the Panel's finding that, as a result of the exemptions, between 57.7% and 66.7% of beef consumed in the United States, and between 83.5% and 84.1% of pork muscle cuts, will convey no consumer information on origin, despite imposing recordkeeping burdens upstream that have a detrimental impact on competitive opportunities for imported livestock.<sup>515</sup>

5.116. In the light of the above, we find that the Panel did not err, in paragraph 7.275 of the Panel Reports, in considering, with respect to the cost considerations that allegedly justify the existence of the exemptions, that cost considerations do not constitute a supervening justification for discriminatory measures.

#### **5.1.2.3.2.3 Whether the Panel erred by failing to take into account the enhanced accuracy of the revised labels under the amended COOL measure**

5.117. The United States claims that, in determining that the exemptions constitute evidence that the detrimental impact of the amended COOL measure on imported livestock reflects discrimination, the Panel erred by failing to take into account that, in the light of the "enhanced accuracy" of the labels prescribed by the amended COOL measure, the recordkeeping burden entailed by that measure can now be explained by the need to provide origin information to consumers.<sup>516</sup>

5.118. According to the United States, the scope of the exemptions under the original COOL measure further corroborated a problem with that measure, namely, that adequate information was not provided on Labels B and C to justify the recordkeeping required of producers and processors of livestock.<sup>517</sup> The United States asserts that the amended COOL measure has corrected this "underlying problem" so that more detailed and accurate information is provided to consumers on the labels.<sup>518</sup> The United States further contends that, although the exemptions have not been eliminated, this alone cannot be determinative of whether the detrimental impact of the amended COOL measure on imported livestock stems exclusively from legitimate regulatory distinctions. In this regard, the United States asserts that the scope of the exemptions "no longer exacerbate any underlying problem since the underlying problem no longer exists".<sup>519</sup> In the United States' view, the Panel erred by failing to examine whether, in the light of the more detailed and accurate information provided on labels to consumers, the recordkeeping burden imposed on producers of livestock can now be explained by the need to provide origin information to consumers, notwithstanding the continued existence of the exemptions.

<sup>511</sup> Panel Reports, para. 7.275 (quoting Appellate Body Report, *US – Clove Cigarettes*, fn 431 to para. 221).

<sup>512</sup> Panel Reports, para. 7.275.

<sup>513</sup> Panel Reports, para. 7.276.

<sup>514</sup> Panel Reports, para. 7.275.

<sup>515</sup> Panel Reports, para. 7.273.

<sup>516</sup> United States' appellant's submission, para. 187.

<sup>517</sup> United States' appellant's submission, para. 218.

<sup>518</sup> United States' appellant's submission, para. 219.

<sup>519</sup> United States' appellant's submission, para. 220.

5.119. Canada responds that the increased recordkeeping burden entailed by the amended COOL measure, and the fact that the greatest incremental improvement in origin information achieved by the 2013 Final Rule is for Labels B and C in a market dominated by Label A, reveal how marginal the contribution of the amended COOL measure is to the rectification of the informational "disconnect" identified by the Appellate Body in the original disputes. Canada, thus, submits that the United States' characterization of the Panel's assessment of the exemptions in its analysis of the legitimacy of regulatory distinctions under Article 2.1 does not withstand scrutiny.<sup>520</sup>

5.120. For its part, Mexico considers that the United States' arguments lack merit because, "even if more detailed and accurate origin information is now provided to consumers" of meat sold in retail establishments, there is still no origin information at all provided to consumers with respect to the majority of beef products consumed in the United States. Thus, in Mexico's view, there continues to be a significant "disconnect" between, on the one hand, the information collected by producers and processors of livestock and, on the other hand, the information ultimately conveyed to consumers of meat products in the US market.<sup>521</sup>

5.121. Turning to our analysis, we do not agree with the United States that the Panel failed to examine whether the nature and scope of the exemptions establish a "disconnect" between, on the one hand, the amount of information collected by upstream producers and, on the other hand, the amount of information conveyed to consumers that is so disproportionate as to support the conclusion that the detrimental impact of the amended COOL measure reflects discrimination in violation of Article 2.1.<sup>522</sup> We have found above that several discrete findings made by the Panel support the conclusion that the recordkeeping and verification requirements of the amended COOL measure impose a disproportionate burden on producers and processors of livestock that cannot be explained by the need to provide origin information to consumers.<sup>523</sup> In particular, as regards the exemptions from the scope of the COOL requirements, the Panel found that, as an integral part of the "overall architecture" of the amended COOL measure, these exemptions were "of central importance" to its overall analysis under Article 2.1<sup>524</sup> because between 57.7% and 66.7% of beef consumed in the United States, and between 83.5% and 84.1% of pork muscle cuts, will convey no consumer information on origin despite imposing recordkeeping burdens upstream that detrimentally impact competitive opportunities for foreign livestock.<sup>525</sup> We see no error in the Panel's approach.

5.122. Accordingly, we disagree with the United States that the Panel failed to take into account the "enhanced accuracy" of the labels prescribed by the amended COOL measure in determining that the exemptions support a conclusion that the detrimental impact of that measure on imported livestock does not stem exclusively from legitimate regulatory distinctions. Thus, we find that the Panel did not err, in paragraph 7.277 of the Panel Reports, in considering that the exemptions prescribed by the amended COOL measure support a conclusion that the detrimental impact of that measure on imported livestock does not stem exclusively from legitimate regulatory distinctions.

#### **5.1.2.3.3 Whether the Panel erred by failing to evaluate the operation of the exemptions under the amended COOL measure in the US market**

5.123. We turn now to the third and final ground of the United States' appeal of the Panel's findings concerning the exemptions under the amended COOL measure in its assessment of the consistency of that measure with Article 2.1 of the TBT Agreement. The United States submits that, in concluding that the exemptions under the amended COOL measure support a conclusion that the detrimental impact of that measure reflects discrimination, the Panel erred by failing to evaluate the operation of the exemptions in the US market.<sup>526</sup>

<sup>520</sup> Canada's appellee's submission, para. 79.

<sup>521</sup> Mexico's appellee's submission, para. 76.

<sup>522</sup> United States' appellant's submission, para. 216.

<sup>523</sup> See *supra*, paras. 5.46-5.47.

<sup>524</sup> Panel Reports, para. 7.273 (quoting Appellate Body Reports, *US – COOL*, para. 348).

<sup>525</sup> Panel Reports, para. 7.273.

<sup>526</sup> United States' appellant's submission, para. 188.

5.124. The United States asserts that the Panel drew a conclusion that distinct distribution channels for the sale of meat products to exempt entities do not exist simply by repeating a statement of the original panel that "the ultimate disposition of a meat product is often not known at any particular stage of the production chain"<sup>527</sup>, and a statement by the Appellate Body that "information regarding the origin of *all* livestock will have to be identified, tracked, and transmitted through the chain of production by upstream producers ... even though 'a considerable proportion' of the beef and pork derived from that livestock will ultimately be exempt from the COOL requirements and therefore carry no COOL label at all."<sup>528</sup> The United States contends that whether information regarding the origin of all livestock will have to be identified, tracked, and transmitted through the chain of production by upstream producers is critical to the weight that the Panel could have placed on the exemptions for the purpose of its analysis of whether the detrimental impact of the amended COOL measure reflects discrimination. Thus, the Panel, in the United States' view, was required to consider whether the statement that it relied on is currently supported by the operation of the US market, or whether information regarding the origin of less than all livestock is being identified, tracked, and transmitted by producers and processors of livestock. The United States asserts that the Panel failed to undertake such an analysis and, accordingly, the Panel erred because it had no basis to conclude that all US slaughterhouses, wholesalers, and exempt retailers take on recordkeeping costs that they are not obligated to assume.<sup>529</sup>

5.125. The United States notes that, although it is not aware of the extent of use of distinct distribution channels by US economic operators, neither Canada nor Mexico presented any evidence that slaughterhouses, wholesalers, and exempt establishments are not making use of the exemptions to establish lower cost channels of distribution.<sup>530</sup> In the United States' view, the limited evidence on the record relating to this issue suggests that distinct distribution channels for sales to exempt establishments do exist. Thus, submits the United States, the Panel's conclusion is unsupported.<sup>531</sup>

5.126. Canada submits that the United States' challenge to the Panel's conclusion essentially concerns the merits of the adopted findings of the original panel and the Appellate Body in the original disputes to the effect that the ultimate disposition of a meat product is often not known at any particular stage of distribution. These findings, contends Canada, are factual findings and, to the extent that the United States seeks to challenge them, this challenge is outside of the scope of this appeal in the absence of an explicit claim under Article 11 of the DSU.<sup>532</sup> Canada points out that it relied on the findings of the panel and the Appellate Body in the original disputes concerning the operation of the exemptions in the US market in making its *prima facie* case under Article 2.1 of the TBT Agreement. According to Canada, the Panel correctly relied on those findings in its assessment of the exemptions.<sup>533</sup> Canada highlights that the Appellate Body has considered that "doubts could arise about the objective nature of an Article 21.5 panel's assessment if, on a specific issue, that panel were to deviate from the reasoning in the original panel report in the absence of any change in the underlying evidence in the record."<sup>534</sup> Thus, having not been presented with evidence that would affect the findings of the original panel concerning the operation of the exemptions in the US market, the compliance Panel was correct in not deviating from the reasoning of the original panel on this issue.

5.127. Canada submits further that the United States' criticism of Canada for failing to present evidence that distinct distribution channels do not exist for the sale of meat to entities that are exempt from the COOL requirements is inconsistent with basic principles concerning the allocation

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<sup>527</sup> United States' appellant's submission, para. 233 (quoting Panel Reports, para. 7.272, in turn quoting United States' response to original panel question No. 93, para. 16).

<sup>528</sup> United States' appellant's submission, para. 233 (quoting Panel Reports, para. 7.272, in turn quoting Appellate Body Reports, *US – COOL*, para. 344 (emphasis original; fn omitted)).

<sup>529</sup> United States' appellant's submission, para. 233.

<sup>530</sup> United States' appellant's submission, para. 244.

<sup>531</sup> United States' appellant's submission, para. 246.

<sup>532</sup> Canada's appellee's submission, paras. 33 and 36.

<sup>533</sup> Canada's appellee's submission, para. 34 (referring to Canada's first written submission to the Panel, para. 71; and second written submission to the Panel, para. 33).

<sup>534</sup> Canada's appellee's submission, para. 87 (quoting Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 386, in turn quoting Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 103).

of the burden of proof in WTO dispute settlement proceedings.<sup>535</sup> A party asserting a fact must provide proof thereof. Thus, Canada did not have a burden to discharge with respect to an adopted finding made by the original panel that the United States did not take issue with before the compliance Panel. Instead, had the United States claimed before the compliance Panel that distinct distribution channels currently exist for the sale of meat to entities that are exempt from the COOL requirements, the United States would have borne the burden of proving this assertion.

5.128. For Mexico, the United States is attempting to shift its own burden of proof to the complainants or the Panel.<sup>536</sup> Noting the United States' argument that the Panel committed legal error because it did not evaluate evidence and make sufficient findings in relation to the US market, Mexico points out that the United States did not present any arguments or evidence to the compliance Panel that called into question the findings of the panel and the Appellate Body in the original disputes concerning the effect of the exemptions in the US market. Mexico highlights that it did not bear a burden to refute an argument that the United States did not raise.<sup>537</sup>

5.129. Turning to our analysis of whether the Panel erred by failing to evaluate the operation of the exemptions in the US market, we recall that the Panel, in reaching its conclusion, noted that it had "no evidence" before it that called into question the original panel's finding that "the ultimate disposition of a meat product is often not known at any particular stage of the production chain."<sup>538</sup> The United States asserts that it was for Canada and Mexico to adduce evidence sufficient to establish whether, and to what extent, the ultimate disposition of a meat product is known at any particular stage of the production chain.<sup>539</sup> In our view, having not been presented with evidence that would affect the findings of the original panel concerning the operation of the exemptions in the US market, it was appropriate for the Panel to have relied on those findings.

5.130. In the light of the foregoing considerations, we find that the Panel did not err, in paragraph 7.272 of the Panel Reports, by failing to evaluate the operation of the exemptions prescribed by the amended COOL measure in the US market.

### 5.1.3 Claims of Canada and Mexico under Article 2.1 of the TBT Agreement

5.131. We turn now to address the claims raised by Canada and Mexico in their other appeals with regard to the Panel's findings under Article 2.1 of the TBT Agreement. Canada and Mexico do not appeal the Panel's conclusion that the amended COOL measure is inconsistent with Article 2.1. However, they challenge the Panel's assessment of certain elements of the amended COOL measure in its analysis of whether the detrimental impact of that measure on imported livestock stems exclusively from legitimate regulatory distinctions.

5.132. For Canada, the Panel failed to assess appropriately the relevance of Labels D and E, as well as the prohibition of a trace-back system under the amended COOL measure, in its analysis of whether the detrimental impact of that measure on imported livestock stems exclusively from legitimate regulatory distinctions.<sup>540</sup> In Canada's view, Labels D and E, as well as the prohibition of a trace-back system, demonstrate that the detrimental impact of the amended COOL measure on imported livestock does not stem exclusively from legitimate regulatory distinctions but, instead, reflects arbitrary and unjustifiable discrimination in violation of Article 2.1.

5.133. Mexico alleges that the Panel erred in its assessment of the relevance of Label E for the analysis of whether the detrimental impact of the amended COOL measure stems exclusively from legitimate regulatory distinctions.<sup>541</sup> In Mexico's view, the labelling rules for ground beef – to which Label E must be affixed – provide further evidence that the amended COOL measure is not designed and applied in an even-handed manner, and that its detrimental impact on imported livestock reflects arbitrary discrimination.<sup>542</sup> Mexico does not allege that the Panel erred in its

<sup>535</sup> Canada's appellee's submission, para. 91.

<sup>536</sup> Mexico's appellee's submission, para. 78.

<sup>537</sup> Mexico's appellee's submission, para. 79.

<sup>538</sup> Panel Reports, para. 7.272 (quoting Appellate Body Reports, *US – COOL*, para. 344, in turn referring to Original Panel Reports, *US – COOL*, para. 7.417).

<sup>539</sup> United States' appellant's submission, fn 284 to para. 243.

<sup>540</sup> Canada's other appellant's submission, para. 156.

<sup>541</sup> Mexico's other appellant's submission, para. 186.

<sup>542</sup> Mexico's other appellant's submission, para. 197.

assessment of the relevance of Label D or of the prohibition of a trace-back system under the amended COOL measure.

5.134. We begin our analysis of the claims put forward by Canada and Mexico under Article 2.1 of the TBT Agreement with Canada's claim concerning the Panel's treatment of Label D. Next, we consider the claims of Canada and Mexico as they relate to the Panel's treatment of Label E. Finally, we consider Canada's claim concerning the Panel's treatment of the prohibition of a trace-back system under the amended COOL measure.

### 5.1.3.1 Whether the Panel erred in its assessment of Label D under Article 2.1 of the TBT Agreement

5.135. Canada submits that Label D, as a part of the amended COOL measure's design, architecture, and revealing structure, demonstrates that the detrimental impact of that measure on imported livestock reflects arbitrary and unjustifiable discrimination prohibited by Article 2.1 of the TBT Agreement. Accordingly, Canada submits that the Panel failed to assess appropriately the relevance of Label D for the analysis of whether the detrimental impact of the amended COOL measure stems exclusively from legitimate regulatory distinctions.<sup>543</sup>

5.136. At the outset, we recall that, unlike Labels A, B, and C, which apply to muscle cuts of meat derived from US-slaughtered livestock, Label D applies to muscle cuts of meat derived from foreign-slaughtered livestock. Thus, under the amended COOL measure, Label D is to be affixed to muscle cuts of meat that are imported into the United States. We further recall that the amended COOL measure introduced a change to the coverage of Label D. In this regard, under the original COOL measure, Label D applied to "[i]mported covered commodities for which origin has already been established as defined by this law (e.g., born, raised, and slaughtered or produced) and *for which no production steps have occurred in the United States*".<sup>544</sup> By contrast, the 2013 Final Rule refers to "[m]uscle cut covered commodities derived from an animal that was slaughtered in another country ... *including muscle cut covered commodities derived from an animal that was born and/or raised in the United States and slaughtered in another country*".<sup>545</sup>

5.137. Under both the original and the amended COOL measures, origin, for the purposes of Category D muscle cuts of meat, is designated according to the definition used for customs purposes<sup>546</sup> – i.e. based on the rules of substantial transformation. In practice, this means that Label D indicates "Product of Country X", with "X" representing the foreign country where the livestock from which the muscle cuts derive were slaughtered.<sup>547</sup> By contrast, Labels A, B, and C indicate production step information concerning the place(s) of birth, raising, and slaughter for US-slaughtered livestock based on the records collected in accordance with the recordkeeping and verification requirements under the amended COOL measure. While, in principle, Label D indicates only the place of slaughter on muscle cuts deriving from foreign-slaughtered livestock<sup>548</sup>, the 2013 Final Rule introduced a voluntary option to "include more specific location information related to production steps (i.e., born, raised, and slaughtered) provided records to substantiate the claims are maintained".<sup>549</sup>

5.138. In its overall assessment of whether the detrimental impact of the amended COOL measure stems exclusively from legitimate regulatory distinctions, the Panel considered the contention of the complainants that the requirements for Label D weigh against the "even-handedness" of the amended COOL measure. Noting that the Appellate Body had observed, in the original disputes, that Label D, under the original COOL measure, did not convey information on the place of an animal's birth or raising<sup>550</sup>, the Panel observed that this has not been modified

<sup>543</sup> Panel Reports, para. 7.279.

<sup>544</sup> Panel Reports, para. 7.128 (quoting 2009 Final Rule (AMS), Section 65.300(f)). (emphasis added by the Panel)

<sup>545</sup> Panel Reports, para. 7.128 (quoting 2013 Final Rule, Section 65.300(f)(2)). (emphasis added by the Panel)

<sup>546</sup> Panel Reports, para. 7.15 (referring to 2009 Final Rule (AMS), Section 65.300(f); and 2013 Final Rule, Section 65.300(f)(2)).

<sup>547</sup> Panel Reports, para. 7.15 (referring to Original Panel Reports, *US – COOL*, para. 7.674; and Appellate Body Reports, *US – COOL*, para. 241).

<sup>548</sup> See Panel Reports, para. 7.132 and fn 317 thereto.

<sup>549</sup> Panel Reports, para. 7.19 (quoting 2013 Final Rule, Section 65.300(f)(2)).

<sup>550</sup> Panel Reports, para. 7.279 (referring to Appellate Body Reports, *US – COOL*, para. 343).

under the amended COOL measure. The Panel considered, however, that the complainants had not provided evidence of Category D animals that were not born and raised in the country in which they were slaughtered, and that there was "nothing before [it] to suggest" that muscle cuts bearing Label D stating "Product of Country X" would not derive from animals that were born, raised, and slaughtered in that country. On this basis, the Panel considered that, although the omission of production step information would result in the provision of less detailed information on Label D, this was not apt to mislead consumers of Category D muscle cuts "in the same fashion" as would the omission of countries of raising on Labels B and C. The Panel further considered the relatively small portion of Category D muscle cuts in the US market, and the absence of a claim that Label D creates any detrimental impact. Ultimately, the Panel was not convinced that Label D rules of substantial transformation are compelling evidence of arbitrary or unjustifiable discrimination.<sup>551</sup>

5.139. On appeal, Canada submits that the Panel's reliance on the small market share of Category D muscle cuts in the United States was misplaced. According to Canada, statistics submitted to the Panel demonstrate that Canada exports between 500,000 and 860,000 pounds of beef and between 630,000 and 710,000 pounds of pork to the United States on an annual basis.<sup>552</sup> Moreover, when feed is cheaper in Canada than in the United States, economic incentives exist to import US animals into Canada that can then be used to produce muscle cuts that are then available for export to the United States.

5.140. Canada further contends that the Panel improperly faulted Canada for failing to provide evidence of Category D animals that were not born and raised in the country in which they were slaughtered. Canada notes that, as the Panel observed, Canada does not track the life histories of animals. However, in the light of the export volumes of meat from Canada to the United States, and the "sometimes significant imports of livestock", Canada submits that it is "reasonable" to infer that at least some Category D meat from Canada is obtained from animals not born and raised in Canada. In any event, Canada submits that, by requiring positive evidence of Category D animals that were not born and raised in the country in which they were slaughtered, the Panel placed undue importance on "actual trade effects" for the purposes of its analysis under Article 2.1, "despite having previously acknowledged that 'there is no need to verify actual trade effects to dispose of claims under Article 2.1'."<sup>553</sup>

5.141. Canada also takes issue with the Panel's dismissal of its arguments concerning Label D on the ground that Canada had not challenged Label D as causing a detrimental impact on Canadian livestock. According to Canada, whether an aspect of a challenged technical regulation is responsible for the detrimental impact on imported products is not determinative of its relevance for the analysis of the legitimacy of regulatory distinctions under Article 2.1. Instead, the "key determinant" is whether an element of the challenged technical regulation is probative of the existence of arbitrary or unjustifiable discrimination or an absence of even-handedness.<sup>554</sup>

5.142. The United States responds that, because the question posed in the second step of the analysis under Article 2.1 is whether the detrimental impact on imported products reflects discrimination, only those regulatory distinctions that account for such detrimental impact can answer that question. The United States highlights, in this regard, that Canada has neither argued, nor proved, that there is a detrimental impact on Category D muscle cuts produced in Canada and exported to the United States.<sup>555</sup> The United States further submits that Canada has failed to prove that Label D contributes to any "origin-based discrepancy" between the accuracy of Label A as compared to the accuracy of the other labels prescribed by the amended COOL measure.<sup>556</sup> Nor has Canada, in the United States' view, proven that Label D is otherwise "arbitrary".

5.143. According to the United States, while Canada apparently considers Label D to be relevant for the analysis because it allegedly "demonstrates the dissonance" between, on the one hand, the United States' objective of ensuring that label information accurately reflects the origin of muscle

<sup>551</sup> Panel Reports, para. 7.279.

<sup>552</sup> Canada's other appellant's submission, para. 160.

<sup>553</sup> Canada's other appellant's submission, para. 162 (quoting Panel Reports, para. 7.183).

<sup>554</sup> Canada's other appellant's submission, para. 162 (referring to Appellate Body Reports, *US – COOL*, para. 272).

<sup>555</sup> United States' appellee's submission, para. 252.

<sup>556</sup> United States' appellee's submission, para. 253 (quoting Canada's other appellant's submission, para. 159).

cuts and, on the other hand, the amended COOL measure's operation "in practice", Canada is unable to prove that Category D animals were not born and raised in the same foreign country in which they were slaughtered.<sup>557</sup> Thus, for the United States, the Panel was correct in determining that there is no reason to conclude that Category D muscle cuts, bearing the label "Product of Country X", will not be from animals "that are *entirely* a product of that country".<sup>558</sup> The United States further disagrees with Canada's argument that the Panel erred by faulting Canada for failing to provide evidence of Category D animals that were not born and raised in the country in which they were slaughtered.

5.144. The United States argues further that Canada's contention that a "dissonance" exists between the objective of the amended COOL measure and what that measure actually achieves reveals a misunderstanding of the analyses under Article 2.1 and Article 2.2 of the TBT Agreement. According to the United States, there is no basis for the proposition that a regulatory distinction is not "even handed", for the purposes of Article 2.1, merely because it does not "fulfil" the measure's objective in "every way possible".<sup>559</sup>

5.145. With respect to Canada's criticism of the Panel for relying on the small market share of Category D muscle cuts as a basis for concluding that Label D does not support a conclusion that the detrimental impact of the amended COOL measure reflects discrimination, the United States responds that Canada has not provided a reason as to why the Panel's reliance on this factor was "misplaced".<sup>560</sup> In the United States' view, whether, and to what extent, a label is used is a relevant factor in the inquiry under Article 2.1 in these disputes. The United States highlights, in this regard, that the original panel concluded that muscle cuts bearing Label D constitute somewhere between 0% and 0.3% of the US market.

5.146. At the outset, we note that Canada has framed its challenge to the Panel's consideration of Label D as a failure of the Panel to assess appropriately the relevance of Label D for the analysis of whether the detrimental impact of the amended COOL measure stems exclusively from legitimate regulatory distinctions or, instead, reflects arbitrary or unjustifiable discrimination in violation of Article 2.1 of the TBT Agreement.<sup>561</sup> We recall, however, that the Panel considered that, "[t]o the extent that Label D concerns the 'overall architecture' of the amended COOL measure, and hence is relevant to the analysis of legitimate regulatory distinctions", it would consider Label D as it relates to the relevant distinctions that it had identified "for other muscle cut labels".<sup>562</sup> Thus, the Panel found that the requirements for Label D were, in fact, relevant for the analysis of whether the detrimental impact of the amended COOL measure stems exclusively from legitimate regulatory distinctions to the extent that Label D forms part of the overall architecture of that measure. The Panel then considered the requirements for Label D in its overall analysis of whether the detrimental impact of the amended COOL measure on imported livestock stems exclusively from legitimate regulatory distinctions. In conducting this analysis, the Panel stated that it was not convinced that Label D rules of substantial transformation are compelling evidence of arbitrary or unjustifiable discrimination. Canada takes issue with this statement of the Panel.

5.147. According to Canada, the Panel failed to recognize that the requirements for Label D, together with the informational shortcomings identified by the Panel with respect to Labels B and C, contribute to a labelling regime in which the only information that can be relied on as invariably accurate is the information conveyed on Label A – i.e. origin information in respect of livestock that were born, raised, and slaughtered exclusively in the United States.<sup>563</sup> Thus, contends Canada, the purported intention of the United States "to ensure [that] label information accurately reflects the origin of muscle cut covered commodities" is belied by the fact that a consumer, who is fully informed of the meaning of different categories of labels under the amended COOL measure, can only be assured of receiving complete and accurate information

<sup>557</sup> United States' appellee's submission, para. 256 (quoting Canada's other appellant's submission, para. 163).

<sup>558</sup> United States' appellee's submission, para. 253 (quoting Panel Reports, para. 7.279). (emphasis added by the United States)

<sup>559</sup> United States' appellee's submission, para. 257.

<sup>560</sup> United States' appellee's submission, para. 254 (quoting Canada's other appellant's submission, para. 160).

<sup>561</sup> Canada's other appellant's submission, paras. 156 and 163.

<sup>562</sup> Panel Reports, para. 7.204.

<sup>563</sup> Canada's other appellant's submission, para. 159.

when purchasing Category A muscle cuts.<sup>564</sup> This discrepancy, according to Canada, exposes the arbitrary and unjustifiable character of the discrimination against Canadian livestock.

5.148. We recall that, in the original disputes, the Appellate Body considered as being of central importance to its overall analysis under Article 2.1 the lack of correspondence between, on the one hand, the recordkeeping and verification requirements of the original COOL measure and, on the other hand, the limited consumer information conveyed through the labelling requirements of that measure and the exemptions therefrom.<sup>565</sup> More specifically, the Appellate Body found that the level of information conveyed to consumers was far less detailed and accurate than the information required to be tracked and transmitted by upstream producers and processors of livestock.<sup>566</sup> This was central to the Appellate Body's analysis under Article 2.1 because, as the Appellate Body explained, it was those same recordkeeping and verification requirements that necessitated segregation and, thus, created an incentive for US producers to process exclusively domestic livestock, and a disincentive to process imported livestock.<sup>567</sup>

5.149. To us, the accuracy of the muscle cut labels prescribed by the amended COOL measure is a relevant factor to the extent that it demonstrates that the recordkeeping and verification requirements of that measure impose a disproportionate burden on upstream producers and processors in comparison with the level of information conveyed to consumers through the mandatory labelling requirements. This comports with the Appellate Body's analysis in the original disputes as outlined above. Thus, the focus of the inquiry under Article 2.1 for the purposes of these disputes is not, in itself, the relative accuracy of the muscle cut labels prescribed by the amended COOL measure. In particular, the relevant question is not whether Label A fulfils the objective of the amended COOL measure to a greater degree than Label D.

5.150. In examining Canada's claim as it relates to Label D, we consider it useful to juxtapose the requirements for Labels B and C and the exemptions from the coverage of the COOL requirements with the requirements for Label D. In our view, the informational shortcomings of Labels B and C, as well as the exemptions from the coverage of the COOL requirements, are closely connected to the *source* of the detrimental impact on imported livestock in these disputes, namely, the recordkeeping and verification requirements for US-slaughtered livestock that create an incentive for US producers to process exclusively domestic livestock, a disincentive to handle imported livestock, and, consequently, a detrimental impact on such imported livestock. In particular, the detailed information required to be tracked and transmitted by upstream producers may not be conveyed to consumers as a result of the informational shortcomings of Labels B and C with regard to the countries where US-slaughtered livestock were raised, and the exemptions from the coverage of the COOL requirements. For this reason, the detrimental impact of the amended COOL measure on imported livestock that is caused by the same recordkeeping and verification requirements under the amended COOL measure cannot be explained by the need to provide origin information to consumers.

5.151. By contrast, origin, for the purposes of Category D muscle cuts of meat, is based on the rules of substantial transformation and, in practice, is a function of where the livestock from which such muscle cuts derive were slaughtered. Accordingly, it seems to us that the requirements for Label D – as compared to the requirements for Labels B and C, as well as the exemptions – do not have a sufficient nexus with the source of the detrimental impact on the imported products at issue in these disputes, namely, the recordkeeping and verification requirements that apply to US-slaughtered livestock and muscle cuts of meat deriving therefrom. Thus, because the requirements for Label D do not have a sufficient nexus with the source of the detrimental impact on the imported products at issue in these disputes, we are not convinced that these requirements are

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<sup>564</sup> Canada's other appellant's submission, para. 159 (quoting 2013 Final Rule, p. 31372).

<sup>565</sup> Appellate Body Reports, *US – COOL*, para. 348.

<sup>566</sup> Appellate Body Reports, *US – COOL*, para. 349.

<sup>567</sup> Appellate Body Reports, *US – COOL*, para. 348.

probative of whether such detrimental impact stems exclusively from legitimate regulatory distinctions.<sup>568</sup>

5.152. Ultimately, the Panel determined that the requirements for Label D did not support a conclusion that the detrimental impact of the amended COOL measure stems exclusively from legitimate regulatory distinctions on the cumulative grounds that: (i) the omission of production steps on Label D does not seem apt to mislead consumers regarding the origin of Category D muscle cuts "in the same fashion" as would the omission of countries on Labels B and C; (ii) there is a relatively small proportion of Category D muscle cuts in the US market; and (iii) no claim was made that Label D creates any detrimental impact on imported livestock.<sup>569</sup>

5.153. As regards the grounds on which the Panel dismissed Canada's claim concerning Label D for the purposes of the analysis under Article 2.1, we note Canada's contention that the Panel placed too much emphasis on actual trade patterns in requiring positive evidence of Category D animals that were not born and raised in the country in which they were slaughtered, and in expressing concern about the small market share of Label D muscle cuts in the US market. As we have stated in connection with our disposition of the United States' appeal under Article 2.1, that provision is concerned with competitive *opportunities* for like imported products rather than, more narrowly, actual trade patterns or volumes. It is, therefore, unfortunate that the Panel seemed to place emphasis on the latter aspect in disposing of the complainants' claims regarding the requirements for Label D. In any event, we have found above that, because the requirements for Label D do not have a sufficient nexus with the source of the detrimental impact on the imported products at issue in these disputes, these requirements are not probative of whether such detrimental impact stems exclusively from legitimate regulatory distinctions.

5.154. Turning to Canada's criticism of the Panel's reliance on the absence of a claim that Label D creates any detrimental impact on imported livestock, we do not consider that whether an element of a challenged technical regulation is, independently, the cause of the detrimental impact on imported products is determinative of its relevance for the analysis of whether such detrimental impact stems exclusively from legitimate regulatory distinctions. Instead, the relevant question is whether that element of the challenged technical regulation is probative of whether the detrimental impact of that technical regulation on imported products stems exclusively from legitimate regulatory distinctions. As we have found above, because the requirements for Label D do not have a sufficient nexus with the source of the detrimental impact on the imported products at issue in these disputes, these requirements are not probative of whether such detrimental impact stems exclusively from legitimate regulatory distinctions. We, therefore, do not consider that the Panel erred in stating that it was not convinced that "Label D rules of substantial transformation" are compelling evidence that the detrimental impact of the amended COOL measure on imported livestock reflects arbitrary or unjustifiable discrimination in violation of Article 2.1.<sup>570</sup>

5.155. In the light of the foregoing considerations, we find that the Panel did not err, in paragraph 7.279 of the Panel Reports, in finding that the requirements for Label D are not compelling evidence of arbitrary or unjustifiable discrimination in violation of Article 2.1 of the TBT Agreement.

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<sup>568</sup> We recognize that, while, in principle, Label D indicates only the place of slaughter on muscle cuts deriving from foreign-slaughtered livestock, the 2013 Final Rule introduced a voluntary option to "include more specific location information related to production steps (i.e., born, raised, and slaughtered) provided records to substantiate the claims are maintained". (Panel Reports, para. 7.19 (quoting 2013 Final Rule, Section 65.300(f)(2))) Although the exercise of this voluntary option may, in a given case, result in a disconnect between the information collected and the information provided on Label D to the extent that a Category D animal was not born and raised in the country where it was slaughtered, we consider it important that the provision of production step information on Label D is not mandatory in character. Thus, producers and processors of foreign-slaughtered livestock are not *required* to collect information on Category D animals that may not eventually be conveyed on Label D.

<sup>569</sup> Panel Reports, para. 7.279.

<sup>570</sup> Panel Reports, para. 7.279.

### 5.1.3.2 Whether the Panel erred in its assessment of Label E under Article 2.1 of the TBT Agreement

5.156. We turn now to address the claims of Canada and Mexico that the Panel committed legal errors in its assessment of the relevance of Label E for the analysis of whether the detrimental impact of the amended COOL measure stems exclusively from legitimate regulatory distinctions<sup>571</sup>, as well as Canada's discrete claim under Article 11 of the DSU that the Panel disregarded certain evidence that Canada had placed before it, and thereby acted inconsistently with its duty as prescribed by that provision.<sup>572</sup>

5.157. We recall that, unlike Labels A, B, C, and D, which all apply to muscle cuts of meat, Label E applies to ground meat products. The requirements for Label E prescribed by the amended COOL measure are the same as those that were prescribed under the original COOL measure. Thus, under the amended COOL measure, Label E must indicate all countries of origin of the meat contained in the ground meat product, or that may reasonably be contained therein, based on the 60-day "inventory allowance".<sup>573</sup> Accordingly, when a raw material from a specific country has not been in a processor's inventory for more than 60 days, that country shall no longer be included as a possible country of origin on the label.<sup>574</sup>

5.158. In its overall analysis of whether the detrimental impact of the amended COOL measure stems exclusively from legitimate regulatory distinctions, the Panel first recalled that, in the original disputes, the complainants had not demonstrated that the labelling requirements for ground meat caused detrimental impact on imported livestock. The Panel then noted that, in their arguments in these compliance proceedings, the complainants referred to the large percentage of meat under the amended COOL measure that would carry Label E, which omits point-of-production information and contains "significant flexibility" as to which countries may be listed on the label. The Panel considered, however, that the findings of the original panel on the ground meat labelling rules had not been appealed in the original disputes, nor had they been reviewed in the Appellate Body's analysis under Article 2.1. Further, the Panel considered that it was not clear that the treatment of ground meat "is sufficiently connected to the relevant regulatory distinctions to justify incorporation into [the Panel's] broad assessment" of the design and operation of the amended COOL measure.<sup>575</sup> In this regard, the Panel noted that the USDA has explained that the production of ground meat entails the processing of trimmings of diverse origin that are ground into a final product, and that the ground meat labelling rules have been adapted to the purchasing, inventory, and production practices of US beef grinders.<sup>576</sup> The Panel stated that the complainants had not refuted the different forms of processing undergone by muscle cuts and ground meat, nor had they submitted arguments as to the upstream recordkeeping burdens for ground meat. Accordingly, in the light of the findings in the original disputes and the complainants' arguments and claims in these compliance disputes, the Panel did not consider the requirements for Label E to evidence that the detrimental impact of the amended COOL measure reflects discrimination in violation of Article 2.1.<sup>577</sup>

5.159. Canada submits that the Panel erred by relying on the different forms of processing undergone by muscle cuts and ground meat as support for the proposition that Label E should be excluded from the analysis of whether the detrimental impact of the amended COOL measure reflects discrimination. According to Canada, although the processing of meat differs depending on whether the final product is a muscle cut or ground meat, the processing of both products involves the input of livestock and results in the production of meat products. Canada submits that the Panel failed to explain why the different forms of processing undergone by muscle cuts and ground meat support its conclusion with respect to Label E. Canada adds that the Panel's approach with respect to Label E is inconsistent with the Panel's correct approach to the exemptions under the amended COOL measure. In particular, in assessing whether the detrimental impact of the amended COOL measure stems exclusively from legitimate regulatory distinctions, the Panel took into account the exemption from the COOL requirements of muscle cuts of meat that are ingredients in processed food items. For Canada, it was, therefore, "unreasonable" for the Panel to

<sup>571</sup> Canada's other appellant's submission, para. 165; Mexico's other appellant's submission, para. 196.

<sup>572</sup> Canada's other appellant's submission, para. 172.

<sup>573</sup> Panel Reports, para. 7.20.

<sup>574</sup> Panel Reports, para. 7.493 (quoting 2009 Final Rule (AMS), Section 65.300(h)).

<sup>575</sup> Panel Reports, para. 7.280. (fn omitted)

<sup>576</sup> Panel Reports, para. 7.280 and fn 635 thereto.

<sup>577</sup> Panel Reports, para. 7.280 and fn 635 thereto.

rely on the different forms of processing undergone by muscle cuts and ground meat as a basis for its conclusion concerning the requirements for Label E.<sup>578</sup>

5.160. Canada further disagrees with the Panel's statement that "[t]he complainants [... did not] submit arguments in this compliance dispute as to the upstream burdens relating to ground meat", and alleges that the Panel disregarded evidence and arguments submitted by Canada.<sup>579</sup> In this connection, Canada points out that, in its second written submission to the Panel, Canada had explained that, in practice, ground beef is produced from trimmings resulting from the cutting of beef carcasses into steaks and roasts. Canada explains that these beef carcasses are derived from cattle that are subject to the increased recordkeeping burden entailed by the amended COOL measure. Thus, livestock used, or partly used, for the production of ground meat are subject to the onerous tracking and verification requirements of the amended COOL measure, even though the information conveyed to consumers is far less detailed than that which is required to be tracked and verified. For Canada, the Panel disregarded evidence and arguments submitted by Canada and, therefore, acted inconsistently with its mandate under Article 11 of the DSU.<sup>580</sup>

5.161. For its part, Mexico takes issue with the Panel's finding that, because the requirements for Label E have not been shown to demonstrate a detrimental impact on imported livestock, Label E "does not constitute a relevant regulatory distinction of the amended COOL measure for the purposes of Article 2.1".<sup>581</sup> Mexico submits that this finding is entirely inconsistent with the Panel's acknowledgement that the analysis under Article 2.1 must take into account "the 'overall architecture' of the measure, and encompass[es] aspects of the measure that [are] not themselves 'relevant regulatory distinctions' or independent sources of detrimental impact."<sup>582</sup>

5.162. Mexico, like Canada, also contends that the Panel erred by relying on the different forms of processing undergone by muscle cuts and ground meat as support for its conclusion concerning the requirements for Label E. For Mexico, this is evident in the fact that muscle cuts of beef, processed beef products, and products served in food service establishments, were all considered by the Panel to be relevant for the purposes of the analysis under Article 2.1, despite the fact that they all involve distinct production processes. Accordingly, Mexico asserts that the production process for ground meat cannot constitute a legitimate justification for excluding Label E from the analysis under Article 2.1.<sup>583</sup> Mexico submits that, as a central component of the amended COOL measure that applies to a substantial proportion of covered beef products, the requirements for Label E are relevant to the question of whether the detrimental impact of that measure stems exclusively from legitimate regulatory distinctions.<sup>584</sup>

5.163. The United States responds that the claims of Canada and Mexico concerning the Panel's treatment of the requirements for Label E are premised on the incorrect proposition that a regulatory distinction that does not account for the detrimental impact on imported products is relevant for the assessment of whether such detrimental impact stems exclusively from legitimate regulatory distinctions. The United States emphasizes that, in the light of the findings of the original panel, Label E, unquestionably, does not account for the detrimental impact on imported livestock. Noting Mexico's argument that the Panel's approach to Label E, on the one hand, and its approach to the exemptions under the amended COOL measure, on the other hand, are inconsistent because both elements do not account for the detrimental impact on imported livestock, the United States agrees with Mexico that, in this regard, the Panel's analysis is inconsistent and is, therefore, in error. The United States clarifies that this incoherence, however, proves only that the exemptions are not relevant for the analysis under Article 2.1, and that the Panel erred in relying on them as a basis for finding that the amended COOL measure is inconsistent with Article 2.1.<sup>585</sup>

5.164. The United States further contends that Canada and Mexico incorrectly criticize the Panel for relying on the fact that ground meat is produced from meat derived from different suppliers, and through different means of processing, as a basis for concluding that the requirements for

<sup>578</sup> Canada's other appellant's submission, para. 166.

<sup>579</sup> Canada's other appellant's submission, para. 168 (quoting Panel Reports, para. 7.280).

<sup>580</sup> Canada's other appellant's submission, para. 171.

<sup>581</sup> Mexico's other appellant's submission, para. 186 (quoting Panel Reports, para. 7.207).

<sup>582</sup> Mexico's other appellant's submission, para. 187 (quoting Panel Reports, para. 7.202).

<sup>583</sup> Mexico's other appellant's submission, paras. 191-192.

<sup>584</sup> Mexico's other appellant's submission, para. 189.

<sup>585</sup> United States' appellee's submission, para. 264.

Label E do not evidence that the detrimental impact of the amended COOL measure reflects discrimination. In the United States' view, Article 2.1 does not require the United States to apply the same labelling rules to different products. As the United States explained to the Panel, the USDA created separate labelling rules for ground meat based on the unique attributes regarding the production of ground meat, which differs substantially from the production of muscle cuts.<sup>586</sup>

5.165. We note that Canada and, in particular, Mexico suggest that the Panel found that Label E is not *relevant* for the analysis of whether the detrimental impact of the amended COOL measure stems exclusively from legitimate regulatory distinctions.<sup>587</sup> We observe that the Panel found that the requirements for Label E do not constitute a relevant regulatory distinction under the amended COOL measure.<sup>588</sup> Subsequently, in its overall assessment of whether the detrimental impact of the amended COOL measure stems exclusively from legitimate regulatory distinctions, the Panel considered "other factors", including the requirements for Label E, on the basis that they "may pertain to the amended COOL measure's 'design, architecture, revealing structure, operation, and application' in the context of Article 2.1 of the TBT Agreement".<sup>589</sup> In particular, the Panel explained that it would address these other factors with a view to examining the "significance of such aspects" for the determination of whether the amended COOL measure is designed and applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination.<sup>590</sup>

5.166. Accordingly, although the Panel found that the requirements for Label E do not constitute a relevant regulatory distinction under the amended COOL measure, it did not find, as Canada and Mexico suggest, that these requirements were not relevant for the assessment of whether the detrimental impact of the amended COOL measure stems exclusively from legitimate regulatory distinctions. After considering the requirements for Label E in its overall assessment of whether the detrimental impact of the amended COOL measure stems exclusively from legitimate regulatory distinctions, the Panel stated that it "[did] not consider Label E to evidence the amended COOL measure's violation of Article 2.1".<sup>591</sup> Canada and Mexico challenge this statement of the Panel as failing to recognize that the requirements for Label E demonstrate that the detrimental impact of the amended COOL measure does not stem exclusively from legitimate regulatory distinctions but, instead, reflects arbitrary and unjustifiable discrimination in violation of Article 2.1.

5.167. The Panel's finding that Label E does not evidence the amended COOL measure's violation of Article 2.1 appears to have rested essentially on two grounds: (i) that it was not clear that the treatment of ground meat is sufficiently connected to the relevant regulatory distinctions under the amended COOL measure; and (ii) that the original panel had found that the ground meat label had not been shown to result in less favourable treatment for imported livestock.<sup>592</sup>

5.168. Turning to the first of the two grounds above, we recall that the Panel considered that it was not clear that the treatment of ground meat "is sufficiently connected to the relevant regulatory distinctions to justify incorporation into [the Panel's] broad assessment" of the design and operation of the amended COOL measure.<sup>593</sup> In this regard, the Panel noted that the USDA had explained that the production of ground meat entails the processing of trimmings of diverse origin that are ground into a final product, and that the ground meat labelling rules had been adapted to the purchasing, inventory, and production practices of US beef grinders.<sup>594</sup>

5.169. Canada and Mexico contend that the Panel's reliance on the differences in the processing of ground beef and muscle cuts was in error. In this regard, Canada and Mexico claim that the Panel's reliance on this factor is inconsistent with its correct approach to the exemptions under the amended COOL measure for the purposes of its analysis under Article 2.1. Canada and Mexico point out that the exemptions from the COOL requirements for muscle cuts of beef sold in small retail establishments, processed beef products, and products served in food service

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<sup>586</sup> United States' appellee's submission, para. 267.

<sup>587</sup> Canada's other appellant's submission, para. 172; Mexico's other appellant's submission, para. 185.

<sup>588</sup> Panel Reports, para. 7.207.

<sup>589</sup> Panel Reports, para. 7.278.

<sup>590</sup> Panel Reports, para. 7.278.

<sup>591</sup> Panel Reports, para. 7.280.

<sup>592</sup> Panel Reports, para. 7.280.

<sup>593</sup> Panel Reports, para. 7.280.

<sup>594</sup> Panel Reports, para. 7.280 and fn 635 thereto.

establishments, were all considered by the Panel to be relevant for the purposes of the analysis under Article 2.1, despite the fact that they all involve distinct production processes.<sup>595</sup>

5.170. Turning to our analysis, we recall that the Appellate Body has stated that technical regulations are measures that, by their very nature, establish distinctions between products according to their characteristics or their related processes and production methods. Thus, we do not consider that differences between products regulated by the same technical regulation are *a priori* irrelevant for the assessment of the consistency of that technical regulation with the requirements of Article 2.1. However, for the reasons stated below, we do not consider that whether the requirements for Label E support a conclusion that the detrimental impact of the amended COOL measure stems exclusively from legitimate regulatory distinctions is a function of the differences between the production processes for muscle cuts of meat, ground meat, and meat products that are exempt from the coverage of the COOL requirements.

5.171. First, we note that the Panel identified the relevant regulatory distinctions in these disputes as the distinctions between the three production steps, as well as the mandatory labels to be affixed to muscle cuts of beef and pork.<sup>596</sup> Moreover, the Panel found that, in the context of the muscle cut labels, and in comparison with the original COOL measure, the amended COOL measure entails increased detrimental impact on imported livestock.<sup>597</sup> The participants have not appealed these findings. Both Canada and Mexico rely on the exemptions from the coverage of the COOL requirements as support for their contention that the requirements for Label E demonstrate that the detrimental impact of the amended COOL measure does not stem exclusively from legitimate regulatory distinctions. As we see it, the exemptions from the coverage of the COOL requirements have a direct connection to the relevant regulatory distinctions under the amended COOL measure and the source of the detrimental impact on the imported products in these disputes – i.e. the recordkeeping and verification requirements that create an incentive for US producers to process exclusively domestic livestock, a disincentive to handle imported livestock, and, consequently, a detrimental impact on such imported livestock in the context of the muscle cut labels. This is because, due to these exemptions, the detailed information required to be tracked and transmitted by upstream producers is not necessarily conveyed to consumers on the mandatory labels to be affixed to muscle cuts of beef and pork. For this reason, the detrimental impact caused by the same recordkeeping and verification requirements under the amended COOL measure cannot be explained by the need to provide origin information to consumers.

5.172. By contrast, we are not persuaded that the requirements applicable to Category E ground meat have a sufficient connection to the recordkeeping and verification requirements that cause a detrimental impact on imported livestock "*in the context of the muscle cut labels*".<sup>598</sup> Nor do they have a sufficient connection to the relevant regulatory distinctions at issue, i.e. the distinction between the three production steps, as well as the mandatory labels to be affixed to *muscle cuts* of beef and pork. In this regard, we note that the original panel had found that the flexibility provided by the 60-day "inventory allowance" for the labelling of Category E ground meat was available not only for meat grinders "but for market participants at *every stage of [ground] meat supply and distribution*".<sup>599</sup> Thus, contrary to what Canada and Mexico suggest, we are not persuaded that Label E contributes, as the exemptions do, to the lack of correspondence between, on the one hand, the recordkeeping and verification requirements of the amended COOL measure and, on the other hand, the limited consumer information conveyed through the retail labelling requirements for muscle cuts of meat.<sup>600</sup>

5.173. Thus, we consider that the requirements for Label E are not sufficiently connected to the relevant regulatory distinctions under the amended COOL measure, or the source of the detrimental impact on imported livestock, to be probative of whether such detrimental impact stems exclusively from legitimate regulatory distinctions. Accordingly, we do not consider that the Panel erred in stating that it was not clear that the treatment of ground meat "is sufficiently

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<sup>595</sup> Canada's other appellant's submission, para. 166; Mexico's other appellant's submission, paras. 191-192.

<sup>596</sup> Panel Reports, para. 7.198.

<sup>597</sup> Panel Reports, para. 7.176.

<sup>598</sup> Panel Reports, para. 7.176. (emphasis added)

<sup>599</sup> Original Panel Reports, *US – COOL*, para. 7.434. (emphasis added)

<sup>600</sup> Canada's other appellant's submission, para. 170.

connected to the relevant regulatory distinctions to justify incorporation into [the Panel's] broad assessment" of the design and operation of the amended COOL measure.<sup>601</sup>

5.174. We note that, for Mexico, the requirements for Label E evidence that the detrimental impact of the amended COOL measure on imported livestock does not stem exclusively from legitimate regulatory distinctions because Label E provides less detailed, and less accurate, information on Category E ground meat compared with the information provided on the labels for muscle cuts of meat.<sup>602</sup> As we have stated in connection with Canada's claim concerning the Panel's consideration of Label D for the purposes of its analysis under Article 2.1, the focus of the inquiry under Article 2.1 in these disputes is not, in itself, the relative accuracy of the labels prescribed by the amended COOL measure. Instead, the accuracy of the labels prescribed by the amended COOL measure is a relevant factor to the extent that it demonstrates that the recordkeeping and verification requirements of that measure impose a disproportionate burden on upstream producers and processors compared with the level of information conveyed to consumers through the mandatory labelling requirements for muscle cuts of meat. For the reasons stated above, we do not see this to be the case with the requirements for Label E.

5.175. Turning to the second of the two grounds referred to above, we recall Mexico's contention that the Panel erred in dismissing Mexico's claim concerning the relevance of the requirements for Label E for the analysis under Article 2.1 on the basis that the original panel had found that "the complainants ha[d] not demonstrated that the ground meat label under the [original] COOL measure results in less favourable treatment for imported livestock."<sup>603</sup> We recall that, in the original disputes, the original panel had not specifically considered whether the detrimental impact of the original COOL measure stemmed exclusively from legitimate regulatory distinctions.<sup>604</sup> Instead, the original panel's finding that the original COOL measure accorded less favourable treatment to imported livestock than to domestic livestock in violation of Article 2.1 was based only on the existence of a detrimental impact on imported livestock. Thus, the finding of the original panel that the compliance Panel relied on was, essentially, a finding that Label E had not been shown to cause a detrimental impact on imported livestock.

5.176. According to Mexico, the fact that the requirements for Label E do not independently cause the detrimental impact on the imported products at issue in these disputes is not a sufficient ground for the Panel's finding that Label E does not evidence that the amended COOL measure is inconsistent with Article 2.1.<sup>605</sup> We do not consider that whether an element of a challenged technical regulation is, independently, the cause of the detrimental impact on imported products to be determinative of its relevance for the analysis of whether such detrimental impact stems exclusively from legitimate regulatory distinctions. Instead, the relevant question is whether that element of the challenged technical regulation is probative of whether the detrimental impact of that technical regulation on imported products stems exclusively from legitimate regulatory distinctions. For the reasons stated above, we do not consider that the requirements for Label E are sufficiently connected to the relevant regulatory distinctions under the amended COOL measure, or the source of the detrimental impact in the context of these disputes, to be probative of whether such detrimental impact stems exclusively from legitimate regulatory distinctions.

5.177. It remains for us to consider Canada's claim that the Panel acted inconsistently with Article 11 of the DSU by stating that "[t]he complainants [... did not] submit arguments in this compliance dispute as to the upstream burdens relating to ground meat."<sup>606</sup> Canada points out that, in its second written submission to the Panel, Canada had explained that, in practice, ground

<sup>601</sup> Panel Reports, para. 7.280.

<sup>602</sup> Mexico's other appellant's submission, para. 195.

<sup>603</sup> Original Panel Reports, *US – COOL*, para. 7.437.

<sup>604</sup> In this regard, the Appellate Body noted in the original disputes:

The Panel seems to have considered its finding that the COOL measure alters the conditions of competition to the detriment of imported livestock to be dispositive, and to lead, without more, to a finding of violation of the national treatment obligation in Article 2.1. In this sense, the Panel's legal analysis under Article 2.1 is incomplete. The Panel should have continued its examination and determined whether the circumstances of this case indicate that the detrimental impact stems exclusively from a legitimate regulatory distinction, or whether the COOL measure lacks even-handedness.

(Appellate Body Reports, *US – COOL*, para. 293)

<sup>605</sup> Mexico's other appellant's submission, paras. 186-187.

<sup>606</sup> Canada's other appellant's submission, para. 168 (quoting Panel Reports, para. 7.280).

beef is produced from trimmings resulting from the cutting of beef carcasses into steaks and roasts, and that these beef carcasses, in turn, are produced from cattle that are subject to the "increased recordkeeping burden" resulting from the implementation of the amended COOL measure. Accordingly, livestock used, or partly used, for the production of ground meat are subject to the onerous tracking and verification requirements of the amended COOL measure, even though the information conveyed to consumers is far less detailed than that which is required to be tracked and verified. Canada submits that the Panel's statement that Canada did not submit arguments as to the upstream burdens relating to ground meat, thus, "lack[ed] a basis in the evidence contained in the panel record".<sup>607</sup> Canada further contends that, "[h]ad the [c]ompliance Panel properly assessed" Canada's arguments and evidence, it "could not have dismissed" Canada's claim "in the manner that it did".<sup>608</sup>

5.178. As we see it, Canada's claim under Article 11 of the DSU implicates issues that we have already considered in examining the requirements for Label E above. In particular, we have found that the requirements for Label E are not sufficiently connected to the relevant regulatory distinctions under the amended COOL measure, or the source of the detrimental impact in the context of these disputes, to be probative of whether such detrimental impact stems exclusively from legitimate regulatory distinctions. We are not persuaded that further examination of Canada's claim under Article 11 of the DSU would affect our view of the conclusion of the Panel that the requirements for Label E do not "evidence the amended COOL measure's violation of Article 2.1".<sup>609</sup> Thus, we decline to examine further Canada's claim under Article 11 of the DSU.

5.179. For the reasons expressed above, we find that the Panel did not err, in paragraph 7.280 of the Panel Reports, in finding that the requirements for Label E do not evidence the amended COOL measure's inconsistency with Article 2.1 of the TBT Agreement.

### **5.1.3.3 Whether the Panel erred in its assessment of the amended COOL measure's prohibition of a trace-back system under Article 2.1 of the TBT Agreement**

5.180. We turn now to the final claim of Canada under Article 2.1 of the TBT Agreement. Canada submits that the Panel failed to assess the relevance of the prohibition of a trace-back system under the amended COOL measure for the analysis of whether the detrimental impact of that measure stems exclusively from legitimate regulatory distinctions.

5.181. In its overall assessment of whether the detrimental impact of the amended COOL measure stems exclusively from legitimate regulatory distinctions, the Panel noted that, although the complainants had relied on the prohibition of a trace-back system under the amended COOL measure as evidence of "arbitrariness", they had not provided specific arguments or evidence as to the nature of the prohibited trace-back measure.<sup>610</sup> Instead, the Panel considered the relevance of the complainants' argument to be limited to the question of whether the prohibition of a trace-back mechanism necessitated the same, or similar, audit and verification system as the amended COOL measure and its related detrimental impact on imported livestock. The Panel, thus, found that, inasmuch as this argument focused on the claimed deficiencies of the amended COOL measure's labelling rules, it had already considered this in its analysis under Article 2.1.<sup>611</sup>

5.182. Canada submits that the Panel erred in dismissing Canada's argument concerning the trace-back prohibition, and its relevance for the assessment of the amended COOL measure under Article 2.1, on the grounds that it was "limited to whether the trace-back prohibition necessitates the same (or similar) audit and verification system of the amended COOL measure and that it 'reverts focus to the claimed deficiencies of the amended COOL measure's labelling rules'".<sup>612</sup> Canada observes that it had noted before the Panel that the COOL statute requires that persons subject to audits provide the Secretary of Agriculture with verification of the origin of covered commodities and that origin information be maintained by persons supplying covered commodities

<sup>607</sup> Canada's other appellant's submission, para. 169. (fn omitted)

<sup>608</sup> Canada's other appellant's submission, para. 171.

<sup>609</sup> Panel Reports, para. 7.280.

<sup>610</sup> Panel Reports, para. 7.281 (referring to Canada's second written submission to the Panel, para. 45; and Mexico's second written submission to the Panel, paras. 71-72).

<sup>611</sup> Panel Reports, para. 7.281.

<sup>612</sup> Canada's other appellant's submission, para. 177 (quoting Panel Reports, para. 7.281).

to retailers. According to Canada, a trace-back system and the amended COOL measure's system of recordkeeping and verification could both meet that origin verification requirement.

5.183. For Canada, the prohibition of a trace-back system demonstrates that the detrimental impact of the amended COOL measure does not stem exclusively from legitimate regulatory distinctions but, instead, reflects arbitrary and unjustifiable discrimination in violation of Article 2.1. This is because, as Canada puts it, by prohibiting a trace-back system that, in Canada's view, would not cause a detrimental impact on imported livestock, the United States has made an explicit choice in favour of the recordkeeping requirements under the amended COOL measure – i.e. the source of the detrimental impact on imported livestock in these disputes. For Canada, this explicit choice in favour of the recordkeeping requirements under the amended COOL measure demonstrates that the detrimental impact resulting therefrom does not stem exclusively from legitimate regulatory distinctions but, instead, reflects arbitrary or unjustifiable discrimination in violation of Article 2.1.<sup>613</sup>

5.184. Canada submits further that the Panel erred in dismissing Canada's arguments concerning the relevance of the trace-back prohibition for the analysis under Article 2.1 on the basis of an alleged failure of Canada to "provide specific arguments or evidence ... as to the nature of the prohibited trace-back measure".<sup>614</sup> In this regard, Canada asserts that it is clear from the text of the amended COOL measure that no particular trace-back measure is prohibited. Rather, "the prohibition applies to a key component – mandatory identification – of *any* trace-back measure, thereby precluding the implementation of the origin labelling requirements through such a measure."<sup>615</sup>

5.185. The United States responds that Canada's argument that the trace-back prohibition is relevant for the analysis under Article 2.1 is incorrect because the trace-back prohibition does not account for the detrimental impact on imported livestock and, therefore, it is not relevant for the determination of whether such detrimental impact stems exclusively from legitimate regulatory distinctions. Noting Canada's argument that the trace-back prohibition supports a finding of violation under Article 2.1 because it represents a "choice" between a trace-back system, on the one hand, and the recordkeeping and verification requirements of the amended COOL measure, on the other hand<sup>616</sup>, the United States contends that the fact that the United States could have chosen an alternative that, in Canada's view, does not result in a detrimental impact on imported livestock does not mean that the amended COOL measure is inconsistent with Article 2.1. The United States submits that, in this regard, Canada misunderstands the analysis under Article 2.1 for determining whether the detrimental impact of a technical regulation on imported products stems exclusively from legitimate regulatory distinctions.<sup>617</sup>

5.186. In addressing this claim, we recall that Article 2.1 of the TBT Agreement does not, *per se*, prohibit technical regulations that cause a detrimental impact on like imported products. We recall that technical regulations that have a *de facto* detrimental impact on imports may not be inconsistent with Article 2.1 when such impact stems exclusively from legitimate regulatory distinctions.<sup>618</sup> Thus, if a panel finds that a technical regulation has a detrimental impact on competitive opportunities for like imported products, the focus of the inquiry under Article 2.1 shifts to whether that detrimental impact stems exclusively from legitimate regulatory distinctions. This inquiry must focus on the technical regulation at issue and its detrimental impact on like imported products with a view to ascertaining whether such detrimental impact stems exclusively from legitimate regulatory distinctions. The inquiry probes the legitimacy of the relevant regulatory distinctions drawn by the technical regulation at issue through careful scrutiny of whether they are designed and applied in an even-handed manner such that they may be considered "legitimate" for the purposes of Article 2.1.

<sup>613</sup> Canada's other appellant's submission, para. 177.

<sup>614</sup> Canada's other appellant's submission, para. 176 (quoting Panel Reports, para. 7.281).

<sup>615</sup> Canada's other appellant's submission, para. 176. (emphasis original)

<sup>616</sup> United States' appellee's submission, para. 272 (quoting Canada's other appellant's submission, para. 177).

<sup>617</sup> United States' appellee's submission, para. 272.

<sup>618</sup> Appellate Body Reports, *US – COOL*, para. 271.

5.187. As we see it, because Article 2.1 of the TBT Agreement does not, *per se*, prohibit technical regulations that cause a detrimental impact on like imported products, the inquiry into whether the detrimental impact stems exclusively from legitimate regulatory distinctions is not answered by comparing the measure at issue and its associated detrimental impact with an alternative measure that, allegedly, would not cause a detrimental impact on such imported products.

5.188. In our view, the trace-back prohibition is part of the overall architecture of the amended COOL measure and thus cannot *a priori* be excluded as a relevant factor in assessing the consistency of that measure with Article 2.1. That notwithstanding, the trace-back prohibition under the amended COOL measure is ultimately not probative of whether the detrimental impact of that measure stems exclusively from legitimate regulatory distinctions. This is because, as explained above, the relevant question posed for the purposes of Article 2.1 is whether the detrimental impact on imported products caused by the recordkeeping and verification requirements of the amended COOL measure stems exclusively from legitimate regulatory distinctions. The question is not, as Canada suggests, whether such detrimental impact can be avoided by utilizing a trace-back system that could be designed in a manner that avoids detrimental impact on imported products. We, therefore, disagree with Canada that the trace-back prohibition is relevant for the inquiry under Article 2.1 because it constitutes an explicit choice between, on the hand, a trace-back system that, allegedly, would not create a detrimental impact on imported livestock and, on the other hand, the recordkeeping and verification requirements of the amended COOL measure that create a detrimental impact on Canadian livestock. To us, this "choice", as Canada puts it, is not relevant for the purposes of determining whether the detrimental impact of the amended COOL measure stems exclusively from legitimate regulatory distinctions. In our view, Canada's arguments concerning the implications of a trace-back system as an alternative to the recordkeeping and verification requirements under the amended COOL measure would seem to be more relevant for the analysis under Article 2.2 of the TBT Agreement, that is, whether the measure is more trade restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.

5.189. Turning more specifically to the Panel's findings challenged by Canada on appeal, it seems to us that the Panel dismissed Canada's claim under Article 2.1 concerning the prohibition of a trace-back system under the amended COOL measure on two grounds. First, Canada had not provided specific arguments or evidence as to the nature of the prohibited trace-back system. Second, Canada's claim was premised on an assumption that the prohibition of a trace-back system necessitates the same (or similar) audit and verification system as the amended COOL measure and its related detrimental impact on imported livestock.<sup>619</sup> Canada faults the Panel for basing its dismissal of Canada's claim concerning the trace-back prohibition on these grounds.

5.190. We have found, for the reasons stated above, that the prohibition of a trace-back system under the amended COOL measure is not probative of whether the detrimental impact of that measure on imported livestock stems exclusively from legitimate regulatory distinctions. Thus, evidence and arguments as to the nature of the trace-back system prohibited by the amended COOL measure would not have altered the Panel's ultimate conclusion as to the relevance of the trace-back prohibition for its analysis under Article 2.1.

5.191. For the reasons expressed above, we find that the Panel did not err, in paragraph 7.281 of the Panel Reports, in its assessment of the relevance of the amended COOL measure's prohibition of a trace-back system for the analysis of whether the detrimental impact of that measure on imported livestock stems exclusively from legitimate regulatory distinctions.

## 5.2 Article 2.2 of the TBT Agreement

5.192. Canada and Mexico request us to reverse the Panel's finding that they failed to make a *prima facie* case that the amended COOL measure is inconsistent with Article 2.2 of the TBT Agreement, and to complete the legal analysis in respect of their first and second proposed alternative measures. In this regard, Canada and Mexico claim that the Panel made a series of errors of interpretation and application, and failed to make, in respect of certain factual findings, an objective assessment of the matter as required under Article 11 of the DSU. Canada and Mexico also request us to find that the Panel erred in the burden of proof it applied in respect of the

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<sup>619</sup> Panel Reports, para. 7.281.

complainants' third and fourth proposed alternative measures, but they do not request completion of the legal analysis with respect to those proposed alternative measures.

5.193. The United States also makes a claim on appeal in respect of Article 2.2 of the TBT Agreement, contingent on whether Canada or Mexico appeals the Panel's findings under that provision. Thus, in the light of Canada's and Mexico's appeals concerning Article 2.2, the United States' conditional appeal is activated. We are, therefore, called upon to review the United States' request to reverse the Panel's interpretation of the phrase "taking account of the risks non-fulfilment would create" in Article 2.2 of the TBT Agreement.

5.194. We begin by setting out our interpretation of Article 2.2 of the TBT Agreement, as relevant to the claims before us. We then address the specific claims of Canada and Mexico in respect of the legal test for "more trade-restrictive than necessary" under Article 2.2, followed by their claims of error in respect of the Panel's finding on the amended COOL measure's degree of contribution to its objective. We then turn to the series of claims made by the participants on appeal in respect of the interpretation and application of the phrase "taking account of the risks non-fulfilment would create" in Article 2.2. These include the United States' claim that the Panel erred in its interpretation of this phrase, as well as the claims of Canada and Mexico that the Panel erred in the factors it took into account in assessing "the risks non-fulfilment would create", and that the Panel erred in finding that it could not ascertain the gravity of the consequences of non-fulfilment of the amended COOL measure's objective. Finally, we consider whether the Panel erred in finding that Canada and Mexico failed to make a *prima facie* case that the first and second proposed alternative measures would make an equivalent degree of contribution to the amended COOL measure's objective, before considering the claims of Canada and Mexico in respect of their third and fourth proposed alternative measures.

### 5.2.1 Interpretation of Article 2.2 of the TBT Agreement

5.195. We begin by recalling the Appellate Body's interpretation of Article 2.2 of the TBT Agreement in previous disputes, focusing, in particular, on the sequence and order of the analysis of whether a technical regulation is "more trade-restrictive than necessary", and on the relevant considerations of how various factors are to be assessed under Article 2.2 within that analysis.

5.196. Article 2.2 of the TBT Agreement provides:

#### *Article 2*

#### *Preparation, Adoption and Application of Technical Regulations by Central Government Bodies*

With respect to their central government bodies:

...

2.2 Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products.

5.197. The Appellate Body addressed the approach to determining whether a technical regulation is more trade restrictive than necessary under Article 2.2 in *US – Tuna II (Mexico)* and in the original proceedings in these disputes.<sup>620</sup> Ultimately, the task of a panel under Article 2.2 is to determine whether the technical regulation at issue restricts international trade beyond what is

<sup>620</sup> See Appellate Body Reports, *US – Tuna II (Mexico)*, para. 322; and *US – COOL*, para. 471.

necessary for that technical regulation to achieve the degree of contribution that it makes to the achievement of a legitimate objective.<sup>621</sup> For that purpose, the Appellate Body identified a number of factors to be evaluated. These include:

... (i) the degree of contribution made by the measure to the legitimate objective at issue; (ii) the trade-restrictiveness of the measure; and (iii) the nature of the risks at issue as well as the gravity of the consequences that would arise from non-fulfilment of the objective pursued by the Member through the measure. The Appellate Body further stated that, "[i]n most cases, a comparison of the challenged measure and possible alternative measures should be undertaken."<sup>621</sup> In making this comparison, it will be relevant to consider whether the proposed alternative is less trade restrictive; whether it would make an equivalent contribution to the relevant legitimate objective, taking account of the risks non-fulfilment would create; and whether it is reasonably available. For the reasons that led us to reverse the Panel's finding under Article 2.2, we consider the present case to be one that calls for an examination of the factors identified above for both the COOL measure and the alternatives proposed by the complainants in order to determine whether the COOL measure is more trade restrictive than "necessary" to fulfil its objective.<sup>622</sup>

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[\*fn original] <sup>950</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 322. As noted above, the Appellate Body identified two instances where a comparison of the challenged measure with possible alternative measures may not be required, namely, when the measure is not trade restrictive at all, or when a trade-restrictive measure makes *no* contribution to the achievement of the relevant legitimate objective. (Appellate Body Report, *US – Tuna II (Mexico)*, footnote 647 to para. 322)

5.198. The assessment of whether a technical regulation is more trade restrictive than necessary under Article 2.2 involves the *holistic* weighing and balancing of the factors as set out above.<sup>623</sup>

5.199. A complainant may seek to identify a possible alternative measure that is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available, as part of making its *prima facie* case that a technical regulation is more trade restrictive than necessary.<sup>624</sup> As the Appellate Body has stated, the use of the comparative "more ... than" in the second sentence of Article 2.2 suggests that the existence of an "unnecessary obstacle[] to international trade" in the first sentence may be established on the basis of a comparative analysis.<sup>625</sup> This understanding of the comparative character of Article 2.2 is confirmed by the context afforded by Article 2.3 of the TBT Agreement, which provides that "[t]echnical regulations shall not be maintained ... if the changed circumstances or objectives can be addressed *in a less trade-restrictive manner*."<sup>626</sup>

5.200. The Appellate Body has held that a comparison of the technical regulation with possible alternative measures is required "[i]n most cases".<sup>627</sup> The Appellate Body has also clarified that a comparison with proposed alternative measures should be understood as a "conceptual tool" for the purpose of assessing whether a challenged technical regulation is more trade restrictive than necessary under Article 2.2.<sup>628</sup> This assessment would involve a comparison of the trade-restrictiveness and the degree of contribution to the objective achieved by the technical regulation at issue with those same elements in respect of reasonably available alternative measures, taking account of the risks non-fulfilment of the objective would create.<sup>629</sup>

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<sup>621</sup> Appellate Body Reports, *US – COOL*, para. 461. See also Appellate Body Report, *US – Tuna II (Mexico)*, para. 319.

<sup>622</sup> Appellate Body Reports, *US – COOL*, para. 471 and fn 950 thereto. (fns 949 and 951 omitted)

<sup>623</sup> See Appellate Body Reports, *US – Tuna II (Mexico)*, fn 643 to para. 318; *Brazil – Retreaded Tyres*, para. 178; and *US – Gambling*, paras. 306-308.

<sup>624</sup> Appellate Body Reports, *US – Tuna II (Mexico)*, para. 323; *US – COOL*, para. 379.

<sup>625</sup> Appellate Body Reports, *US – Tuna II (Mexico)*, para. 320; *US – COOL*, para. 376.

<sup>626</sup> Emphasis added.

<sup>627</sup> Appellate Body Reports, *US – Tuna II (Mexico)*, para. 322 and fn 641 thereto; *US – COOL*, para. 376 and fn 748 thereto.

<sup>628</sup> Appellate Body Reports, *US – Tuna II (Mexico)*, para. 320; *US – COOL*, fn 749 to para. 376.

<sup>629</sup> See Appellate Body Report, *US – Tuna II (Mexico)*, para. 320.

5.201. An assessment of whether a proposed alternative measure achieves an *equivalent* degree of contribution to the relevant legitimate objective is essential for a panel to determine whether the technical regulation at issue restricts international trade beyond what is necessary to achieve the degree of contribution that it makes to the achievement of a legitimate objective.<sup>630</sup> The need for the equivalence of the respective degrees of contribution as between the challenged technical regulation and proposed alternative measures also comports with the principle reflected in the sixth preambular recital of the TBT Agreement – that a Member shall not be prevented from pursuing a legitimate objective "at the levels it considers appropriate".<sup>631</sup> The level a Member "considers appropriate" is usually revealed by the degree of contribution that a technical regulation *actually* makes to its objective.<sup>632</sup>

5.202. As we have noted, an assessment of whether a technical regulation is more trade restrictive than necessary under Article 2.2 ultimately involves the holistic weighing and balancing of all relevant factors. Article 2.2 does not explicitly prescribe, in rigid terms, the sequence and order of analysis in assessing whether the technical regulation at issue is more trade restrictive than necessary.<sup>633</sup> As we explain below, a certain sequence and order of analysis may, nonetheless, flow logically from the nature of the examination under Article 2.2.

5.203. This sequence and order is discernible both in the Appellate Body's past analyses in respect of Article 2.2 of the TBT Agreement<sup>634</sup>, as well as in the relevant jurisprudence relating to Article XX of the GATT 1994 and Article XIV of the GATS.<sup>635</sup> For instance, in *US – Gambling*, the Appellate Body set out a sequence in respect of the "necessity" analysis under Article XIV of the GATS as follows: "The process *begins with* an assessment of ..."; "*Having ascertained ...*, a panel should *then* turn to the other factors that are to be 'weighed and balanced'"; and "A comparison between the challenged measure and possible alternatives should *then* be undertaken."<sup>636</sup> Likewise, with regard to the sequence and order of the "necessity" analysis under Article XX of the GATT 1994, the Appellate Body in *Brazil – Retreaded Tyres* mentioned, first, the relevant factors to be weighed and balanced for the measure sought to be justified, and continued as follows:

If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with its possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued.<sup>637</sup>

5.204. The Appellate Body in *China – Publications and Audiovisual Products* summarized these approaches to assessing the sequence and order of the "necessity" analysis as "recogniz[ing] that a comprehensive analysis of the 'necessity' of a measure is a sequential process" that "must logically begin with a first step, proceed through a number of additional steps, and yield a final conclusion."<sup>638</sup> We take a similar view in respect of the sequence and order of the "necessity" analysis under Article 2.2 of the TBT Agreement.

<sup>630</sup> Appellate Body Reports, *US – COOL*, para. 461.

<sup>631</sup> See Appellate Body Reports, *US – COOL*, para. 373.

<sup>632</sup> Appellate Body Reports, *US – COOL*, para. 373. The level at which a Member considers it appropriate to pursue a legitimate objective may also be discernible in other ways, such as through an express provision or statement in the instrument at issue.

<sup>633</sup> Appellate Body Report, *US – Tuna II (Mexico)*, fn 643 to para. 318 (referring to Appellate Body Reports, *Brazil – Retreaded Tyres*, para. 178; and *US – Gambling*, paras. 306-308).

<sup>634</sup> Appellate Body Reports, *US – Tuna II (Mexico)*, paras. 327-329; *US – COOL*, paras. 472-479.

<sup>635</sup> See Appellate Body Report, *US – Tuna II (Mexico)*, para. 320 and fn 645 thereto. The Appellate Body drew an analogy with the analysis of "necessity" in the context of Article XX of the GATT 1994 and Article XIV of the GATS, in which a measure found to be inconsistent with a relevant obligation is to be compared with reasonably available less trade-restrictive alternative measures. (Appellate Body Report, *US – Tuna II (Mexico)*, fn 645 to para. 320 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 166))

<sup>636</sup> Appellate Body Report, *US – Gambling*, paras. 306-307. (emphasis added)

<sup>637</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156.

<sup>638</sup> Appellate Body Report, *China – Publications and Audiovisual Products*, para. 242 (referring to Appellate Body Reports, *US – Gambling*, paras. 306-307; *Korea – Various Measures on Beef*, para. 166; and *Brazil – Retreaded Tyres*, paras. 156 and 178).

5.205. Nonetheless, the particular manner of sequencing the steps of this analysis is adaptable, and may be tailored to the specific claims, measures, facts, and arguments at issue in a given case.<sup>639</sup> For instance, the sequence and order of analysis appropriate in a given case may depend on the characteristics of the technical regulation at issue as revealed through its design and structure, as well as on the nature of the objective pursued and the quantity, quality, and availability of evidence. It may also depend on which elements are the focus of contention between the disputing parties, and which, if any, are conceded or undisputed between the parties. This adaptability of the sequence or order is indicative of the character of the assessment of "more trade-restrictive than necessary" under Article 2.2 as a *holistic* weighing and balancing of all relevant factors. We note that, in the context of Article XX of the GATT 1994, the sequence and order of analysis in the circumstances of *Brazil – Retreaded Tyres* called for a "preliminary conclusion" on the necessity of the challenged measure before proceeding to a comparison with proposed alternatives, whereas such a "preliminary conclusion" was not considered to be a requisite aspect of the sequence and order of analysis in the circumstances of *EC – Seal Products*.<sup>640</sup>

5.206. Accordingly, panels are afforded a certain degree of latitude to tailor the sequence and order of analysis in a given case when assessing the relevant factors and in conducting the overall weighing and balancing under Article 2.2. This latitude, however, is not boundless.<sup>641</sup> Rather, it is informed by the specific claims, measures, facts, and arguments at issue, as mentioned above. Therefore, an appellant challenging the sequence and order of analysis adopted by a panel in a given case must demonstrate why, by following a particular sequence, the panel committed an error in the specific circumstances of the case at hand. It is not sufficient for an appellant merely to claim that a panel erred by deviating from a certain sequence and order of analysis in the abstract.

5.207. Having set out our considerations with respect to the sequence and order of analysing relevant factors under Article 2.2 of the TBT Agreement, we turn now to certain observations in respect of how to assess these factors. While cognizant that these factors are to be assessed as part of a holistic weighing and balancing, we begin with the factors pertaining to the technical regulation itself, followed by the factors involved in the comparative analysis with proposed alternative measures, before turning to the role of "the risks non-fulfilment would create".

5.208. In assessing the relevant factors in respect of the technical regulation itself, we note that, while a complainant must be held to fulfil its burden to present a *prima facie* case that the technical regulation is more trade restrictive than necessary under Article 2.2, it will not always be possible to quantify a particular factor, or to do so with precision. This may be due to, *inter alia*, the nature of the objective pursued and the level of protection sought, as well as the nature, quantity, and quality of evidence existing at the time the analysis is made, and the characteristics of the technical regulation at issue as revealed by its design and structure.<sup>642</sup> For instance, in respect of assessing the trade-restrictiveness of a technical regulation under Article 2.2, the Appellate Body has considered that the demonstration of a limiting effect on competitive opportunities in qualitative terms might suffice in the particular circumstances of a given case.<sup>643</sup>

5.209. We also consider the jurisprudence under Article XX of the GATT 1994 to be instructive in this regard. For instance, in *Brazil – Retreaded Tyres*, the Appellate Body considered that there was no obligation to *quantify* the contribution of the challenged measure but, rather, in the specific circumstances of that case, it sufficed to demonstrate in qualitative terms that the measure was "apt to produce a material contribution" to its objective at some point in time.<sup>644</sup> In a similar vein, the Appellate Body considered in *EC – Seal Products* that there was "limited and uneven

<sup>639</sup> See e.g. Appellate Body Report, *China – Publications and Audiovisual Products*, para. 247.

<sup>640</sup> Appellate Body Reports, *Brazil – Retreaded Tyres*, para. 156; *EC – Seal Products*, fn 1299 to para. 5.215.

<sup>641</sup> Appellate Body Reports, *Brazil – Retreaded Tyres*, para. 145; *EC – Seal Products*, para. 5.211.

<sup>642</sup> See Appellate Body Report, *Brazil – Retreaded Tyres*, para. 145.

<sup>643</sup> See Appellate Body Reports, *US – COOL*, para. 477. At the same time, evidence of actual trade effects may also be probative in making this assessment. (Ibid.) For instance, a detrimental modification of competitive opportunities may be self-evident in respect of certain *de jure* discriminatory measures, whereas supporting evidence and argumentation of actual trade effects might be required to demonstrate the existence and extent of trade-restrictiveness in respect of non-discriminatory internal measures that address a legitimate objective. (See e.g. Appellate Body Report, *EC – Poultry*, paras. 126-127)

<sup>644</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

information relating to the *actual* operation of the measure on the [p]anel record".<sup>645</sup> In that context, while the panel's conclusion on contribution did not provide "much information" as to the precise degree or extent of the measure's contribution, the Appellate Body also recognized that "it [was] not clear what greater clarity or precision the [p]anel could have achieved in the circumstances of this case".<sup>646</sup> Thus, the Appellate Body did not find fault with the statement made by the panel in *EC – Seal Products* that the measure at issue was "*capable* of making and does make *some* contribution" to its objective, or that it did so "to a *certain extent*".<sup>647</sup>

5.210. While panels are afforded a certain degree of latitude in determining how to assess the relevant factors in an Article 2.2 analysis, this latitude is not boundless.<sup>648</sup> Rather, it is informed, for example, by the facts and arguments presented to the panel by the parties. Where different methodologies for the assessment of a relevant factor are available based on the facts and arguments submitted by the parties, panels must adopt or develop a methodology that is suited to yielding a correct assessment of the relevant factor in the circumstances of a given case.

5.211. Thus, in our view, the nature of the objective of the technical regulation at issue, its characteristics as revealed by its design and structure, and the nature, quantity, and quality of evidence available, may have a bearing on whether a relevant factor, such as the technical regulation's degree of contribution to its objective, can be assessed in quantitative or qualitative terms under Article 2.2, as well as on the degree of precision with which such an analysis can be undertaken. The corollary is that, when a factor such as the contribution of a technical regulation to its objective can be assessed only with a lesser degree of precision, a panel should not end its analysis and conclude that the complainant failed to make its *prima facie* case in this regard. We note that, in *EC – Seal Products*, the Appellate Body considered in respect of Article XX of the GATT 1994 that "a measure's contribution is ... only one component of the necessity calculus under Article XX", and that "whether a measure is 'necessary' cannot be determined by the level of contribution alone, but will depend on the manner in which the other factors of the necessity analysis, including a consideration of potential alternative measures, inform the analysis."<sup>649</sup> The Appellate Body continued that "the very utility of examining the interaction between the various factors of the necessity analysis, and conducting a comparison with potential alternative measures, is that it provides a means of testing these factors as part of a holistic weighing and balancing exercise, whether quantitative or qualitative in nature."<sup>650</sup> We consider this relevant for the analysis called for under Article 2.2 of the TBT Agreement. The weighing and balancing of the relevant factors both in respect of the challenged technical regulation and in the comparison with proposed alternative measures involves a holistic analysis in order to reach an overall conclusion on claims under Article 2.2. A panel should proceed with this weighing and balancing even if a particular factor under Article 2.2, such as the challenged technical regulation's degree of contribution to its objective, cannot be quantified with precision or can only be assessed in qualitative terms.

5.212. Having addressed the relevant factors pertaining to the technical regulation itself, we now make some observations on the factors pertaining to the comparison with alternative measures contemplated under Article 2.2, as relevant to the case before us. As we have already noted, the comparative character of Article 2.2 is grounded in its text, namely, the use of the term "*more ... than necessary*", in addition to the context afforded by Article 2.3 of the TBT Agreement. Accordingly, the Appellate Body has clarified that Article 2.2 does not prohibit any or all trade-restrictiveness, but is, instead, intended to impugn "unnecessary obstacles" to trade and restrictions on international trade that "exceed what is necessary" to achieve the degree of contribution that a technical regulation makes to the achievement of a legitimate objective.<sup>651</sup> Thus, the Appellate Body has stated that "the existence of an 'unnecessary obstacle[] to international trade' in the first sentence [of Article 2.2] may be established on the basis of a *comparative analysis*".<sup>652</sup>

<sup>645</sup> Appellate Body Reports, *EC – Seal Products*, para. 5.228. (emphasis original)

<sup>646</sup> Appellate Body Reports, *EC – Seal Products*, para. 5.228.

<sup>647</sup> Appellate Body Reports, *EC – Seal Products*, para. 5.228 (quoting Panel Reports, *EC – Seal Products*, paras. 7.460 and 7.638, respectively). (emphasis added)

<sup>648</sup> Appellate Body Reports, *Brazil – Retreaded Tyres*, para. 145; *EC – Seal Products*, para. 5.211.

<sup>649</sup> Appellate Body Reports, *EC – Seal Products*, para. 5.215.

<sup>650</sup> Appellate Body Reports, *EC – Seal Products*, para. 5.215. (fn omitted)

<sup>651</sup> Appellate Body Reports, *US – Tuna II (Mexico)*, para. 319; *US – COOL*, para. 375.

<sup>652</sup> Appellate Body Reports, *US – Tuna II (Mexico)*, para. 320; *US – COOL*, para. 376. (emphasis added)

5.213. For these reasons, a complainant may seek to identify a possible alternative measure that is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available, as part of making its *prima facie* case that a technical regulation is more trade restrictive than necessary.<sup>653</sup> As we have mentioned above, there may be circumstances where a comparative analysis of this nature may be unnecessary under Article 2.2.<sup>654</sup> In our view, however, given that an alternative measure proposed by a complainant functions as a "conceptual tool" to illustrate that a technical regulation is more trade restrictive than necessary, once an alternative measure has been proposed by the complainant, it should be considered by a panel in the overall weighing and balancing under Article 2.2.<sup>655</sup>

5.214. We recall that, where a comparison is undertaken under Article 2.2, relevant factors to consider include whether the proposed alternative is less trade restrictive, whether it would make an equivalent contribution to the legitimate objective at issue, "taking account of the risks non-fulfilment would create", and whether it is reasonably available.<sup>656</sup> As we have noted above, an assessment of whether a proposed alternative measure achieves an *equivalent* degree of contribution to the relevant legitimate objective is essential for a panel to determine whether the technical regulation at issue restricts international trade beyond what is necessary for that technical regulation to achieve the degree of contribution that it makes to a legitimate objective.<sup>657</sup> The need for the equivalence of the respective degrees of contribution as between the challenged technical regulation and proposed alternative measures also comports with the principle reflected in the sixth preambular recital of the TBT Agreement – that a Member shall not be prevented from pursuing a legitimate objective "at the levels it considers appropriate".<sup>658</sup>

5.215. We do not consider that a complainant must demonstrate that its proposed alternative measure achieves a degree of contribution *identical* to that achieved by the challenged technical regulation in order for it to be found to achieve an *equivalent* degree. Rather, in our view, there is a margin of appreciation in the assessment of whether a proposed alternative measure achieves an equivalent degree of contribution, the contours of which may vary from case to case. For instance, in assessing the equivalence of the respective degrees of contribution, such a margin of appreciation can be informed by the risks that non-fulfilment of the technical regulation's objective would create, in particular, it may be affected by the nature of the risks and the gravity of the consequences arising from the non-fulfilment of the technical regulation's objective. This stems from the requirement in Article 2.2 that account is to be taken of "the risks non-fulfilment would create" in assessing whether a technical regulation is "more trade-restrictive than necessary to fulfil a legitimate objective". The assessment of whether a proposed alternative measure achieves an equivalent degree of contribution should also be made in the light of the characteristics of the technical regulation at issue as revealed through its design and structure, as well as the nature of the objective pursued and the nature, quantity, and quality of the evidence available. We emphasize, in this respect, that a proposed alternative measure may achieve an equivalent degree of contribution in ways different from the technical regulation at issue.

5.216. We note that there may be instances where it is difficult to assess with precision whether there is equivalence between the technical regulation's degree of contribution and that of a proposed alternative measure. For instance, as in the present case, a technical regulation and the proposed alternative measures may deploy various methods or techniques that jointly or separately contribute to achieving the objective pursued, which may not each be quantifiable in an isolated manner.<sup>659</sup> For the purpose of assessing the equivalence between the respective degrees of contribution of the challenged technical regulation and the proposed alternative measures, it is the *overall* degree of contribution that the technical regulation makes to the objective pursued that

<sup>653</sup> Appellate Body Reports, *US – Tuna II (Mexico)*, para. 323; *US – COOL*, para. 379.

<sup>654</sup> Appellate Body Reports, *US – Tuna II (Mexico)*, fn 647 to para. 322; *US – COOL*, fn 748 to para. 376.

<sup>655</sup> Appellate Body Reports, *US – COOL*, para. 469 and fn 749 to para. 376.

<sup>656</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 322.

<sup>657</sup> Appellate Body Reports, *US – COOL*, para. 461.

<sup>658</sup> See Appellate Body Reports, *US – COOL*, para. 373. As we have noted above, the level a Member "considers appropriate", as referred to in the sixth preambular recital of the TBT Agreement, is usually revealed in the degree of contribution that a technical regulation *actually* makes to its objective under Article 2.2.

<sup>659</sup> See e.g. Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

is relevant, rather than any individual isolated aspect or component of contribution.<sup>660</sup> We recognize that a panel may encounter practical difficulties in assessing the overall degree of contribution made by a technical regulation, and in comparing whether a proposed alternative measure makes an equivalent degree of contribution. Some imprecision in assessing the equivalence of the respective degrees of contribution of a technical regulation and a proposed alternative may be inevitable in certain circumstances. However, such imprecision should not, in and of itself, relieve a panel from its duty to assess the equivalence of the respective degrees of contribution. In spite of such imprecision, a panel should proceed with the overall weighing and balancing under Article 2.2.<sup>661</sup>

5.217. Article 2.2 of the TBT Agreement further stipulates that the risks non-fulfilment of the objective would create shall be taken into account. In *US – Tuna II (Mexico)*, the Appellate Body found that the obligation to "tak[e] account of the risks non-fulfilment would create" suggests that the comparison of the challenged measure with a possible alternative measure should be made in the light of the nature of the risks at issue and the gravity of the consequences that would arise from non-fulfilment of the legitimate objective.<sup>662</sup> In our view, in order to engage in this assessment and ensure that this factor is "tak[en] account of", the nature of the risks and the gravity of the consequences that would arise from non-fulfilment would themselves, in the first place, need to be identified.

5.218. We note that Article 2.2 does not prescribe further a particular methodology for assessing "the risks non-fulfilment would create" or define how they should be "tak[en] account of". However, in the context of Article XX of the GATT 1994, the Appellate Body has recognized that risks may be assessed in either qualitative or quantitative terms.<sup>663</sup> Some kinds of risks might not be susceptible to quantification<sup>664</sup>, and some types of risk assessment methods might not be of assistance in respect of particular kinds of objectives listed in Article XX of the GATT 1994.<sup>665</sup> In order to take account of "the risks non-fulfilment would create" under Article 2.2 of the TBT Agreement, in some contexts, it might be possible and appropriate to seek to determine separately the nature of the risks, on the one hand, and to quantify the gravity of the consequences that would arise from non-fulfilment, on the other hand. In other contexts, however, it might be difficult, in practice, to determine or quantify those elements separately with precision. In such contexts, it may be more appropriate to conduct a conjunctive analysis of both the nature of the risks and the gravity of the consequences of non-fulfilment, in which "the risks non-fulfilment would create" are assessed in qualitative terms. In any case, difficulties or imprecision that arise in assessing "the risks non-fulfilment would create" – due to the nature of the relevant risks or the gravity of the consequences of non-fulfilment at issue – should not, in and of themselves, relieve a panel from its duty to assess this factor. A panel should proceed further with a holistic weighing and balancing of all relevant factors, and reach an overall conclusion under Article 2.2. We recall, in this respect, that the text of Article 2.2 requires "taking account of" such risks. In our view, the term "taking account of" calls for the active and meaningful consideration of "the risks non-fulfilment would create", even where there is imprecision as to the nature and magnitude of such risks, in the weighing and balancing under Article 2.2 of the TBT Agreement. At the same time, the manner of such consideration is adaptable to the particularities of a given case.<sup>666</sup>

<sup>660</sup> In stating this, we do not exclude that there may be aspects of a technical regulation that may be manifestly immaterial in a given case in the light of the specific products, processes, or labels at issue, or that a technical regulation may operate as part of a more complex suite of measures directed at the same objective. (See Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151)

<sup>661</sup> See Appellate Body Reports, *EC – Seal Products*, para. 5.215.

<sup>662</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 321.

<sup>663</sup> See e.g. Appellate Body Report, *EC – Asbestos*, para. 167.

<sup>664</sup> Appellate Body Report, *EC – Asbestos*, para. 167.

<sup>665</sup> See e.g. Appellate Body Reports, *EC – Seal Products*, para. 5.198.

<sup>666</sup> See e.g. Panel Reports, *EC – Approval and Marketing of Biotech Products*, para. 7.1620; *US – Continued Suspension*, para. 7.480; *US – Clove Cigarettes*, paras. 7.632-7.633; and *Japan – Apples*, para. 8.241.

### 5.2.2 Claims of error with respect to the legal test for "more trade-restrictive than necessary" under Article 2.2 of the TBT Agreement

5.219. We now turn to the requests of Canada and Mexico that we find that the Panel erred in the legal test it applied in assessing whether the amended COOL measure is "more trade-restrictive than necessary" under Article 2.2 of the TBT Agreement.

5.220. Mexico claims that the Panel erred in stating that a "comparative analysis" would be redundant "only in exceptional circumstances", and in concluding that such "exceptional circumstances" must be demonstrated before any "overall" conclusions with respect to Article 2.2 may be drawn from the "relational" analysis.<sup>667</sup> Canada claims that the Panel erred by failing to articulate correctly the "relational" component of the analysis under Article 2.2, namely, by failing to indicate that it would assess the three relevant factors pertaining to the amended COOL measure separately, and then "*in relation to each other*", and, consequently, by failing to describe how these factors are to be weighed and balanced against each other under the "relational" analysis.<sup>668</sup> Further, and relatedly, Canada claims that the Panel erred by not clarifying that the "comparative" analysis does not necessarily prevail over the "relational" analysis.

5.221. The United States argues that, contrary to the claims of Canada and Mexico, the amended COOL measure is not more trade restrictive than necessary under Article 2.2. In the United States' view, since it is uncontested that the amended COOL measure is trade restrictive and that it makes some contribution to its objective, demonstrating the existence of a less trade-restrictive alternative that is reasonably available and makes an equivalent degree of contribution is a necessary part of the complainants' burden of proof under Article 2.2.<sup>669</sup>

5.222. We begin our assessment by analysing these claims on appeal and, in particular, by analysing the understanding of the legal test under Article 2.2 of the TBT Agreement on which Canada's and Mexico's claims are predicated.

5.223. As we understand it, Canada and Mexico consider the legal test under Article 2.2 to be separated into two components. The first component is a "relational" analysis of three factors in respect of the technical regulation at issue itself, namely, its degree of contribution to its objective, its trade-restrictiveness, and the risks non-fulfilment would create.<sup>670</sup> We note that the participants clarified at the oral hearing that they have differing understandings of the term "'relational' analysis". Canada and Mexico consider it to refer to an assessment of the technical regulation at issue itself, before proceeding to a comparison with an alternative. By contrast, the United States considers it to refer to the holistic weighing and balancing under Article 2.2, which includes a comparison with an alternative.

5.224. Based on Canada's and Mexico's understanding of Article 2.2, the "relational" analysis constitutes the first component of the legal test, under which the factors pertaining to the technical regulation at issue should first be ascertained, and then weighed and balanced in relation to one another.<sup>671</sup> In Mexico's view, a "provisional" conclusion should be drawn from the "relational" analysis on the "necessity" of the challenged technical regulation, while a comparison with an alternative would also normally need to be undertaken to confirm this conclusion and reach an overall finding.<sup>672</sup> In Canada's view, a panel could, in principle, conclude at the end of the "relational" analysis that a technical regulation is more trade restrictive than necessary, but it should normally also consider any alternative measure identified by the complainant before reaching a conclusion on its "necessity".<sup>673</sup>

<sup>667</sup> Mexico's other appellant's submission, para. 45 (quoting Panel Reports, para. 7.298). See also Panel Reports, paras. 7.301-7.303.

<sup>668</sup> Canada's other appellant's submission, paras. 92-93. (emphasis original)

<sup>669</sup> United States' appellee's submission, paras. 54-67.

<sup>670</sup> Canada's other appellant's submission, para. 25; Mexico's other appellant's submission, para. 40.

<sup>671</sup> Canada's other appellant's submission, para. 26; Mexico's other appellant's submission, para. 46.

<sup>672</sup> Mexico's response to questioning at the oral hearing. We note that, in this regard, Mexico argued initially in its written submission on appeal that, following the weighing and balancing under the "relational" analysis, a conclusion must also be drawn as to the necessity of the technical regulation before proceeding, if still necessary, to a comparison with proposed alternative measures. (See Mexico's other appellant's submission, paras. 46-47)

<sup>673</sup> Canada's other appellant's submission, para. 24.

5.225. The second component of the legal test in assessing whether a technical regulation is more trade restrictive than necessary is, for Canada and Mexico, a "comparative" analysis. This involves a comparison of the trade-restrictiveness of the technical regulation at issue, and the degree of achievement of its objective, with that of reasonably available alternative measures that are less trade restrictive than the challenged technical regulation, taking account of "the risks non-fulfilment would create".<sup>674</sup> For Mexico, the function of such a "comparative" analysis is to confirm the preliminary conclusion under the "relational" analysis that the technical regulation at issue is necessary. For Canada, the function of such a "comparative" analysis is to serve as a "conceptual tool" to assist in determining whether the measure is more trade restrictive than necessary.<sup>675</sup> It does not, however, supplant the "relational" analysis, and a failure to identify an alternative measure that achieves an equivalent degree of contribution to the technical regulation's objective should not be dispositive in the overall weighing and balancing under Article 2.2.<sup>676</sup>

5.226. It is on the basis of this understanding of the legal test under Article 2.2, namely, that it engages two separate components, each requiring the drawing of certain conclusions or the weighing and balancing of certain factors at particular stages, that Canada and Mexico make their respective claims.

5.227. We recall our interpretation above of Article 2.2 of the TBT Agreement. In our view, an assessment of whether a technical regulation is more trade restrictive than necessary under Article 2.2 ultimately involves the *holistic* weighing and balancing of all relevant factors. Article 2.2 does not explicitly prescribe, in rigid terms, the sequence and order of analysis in assessing whether the technical regulation at issue is "more trade-restrictive than necessary".<sup>677</sup> That notwithstanding, a certain sequence and order of analysis may logically flow from the nature of the examination under Article 2.2.

5.228. This sequence and order is discernible both in the Appellate Body's past analyses in respect of Article 2.2 of the TBT Agreement<sup>678</sup> and in the relevant jurisprudence relating to Article XX of the GATT 1994 and Article XIV of the GATS.<sup>679</sup> In particular, the Appellate Body in *China – Publications and Audiovisual Products*, having reviewed the approaches to the "necessity" analysis in *US – Gambling*, *Brazil – Retreaded Tyres*, and *Korea – Various Measures on Beef*, considered that those approaches "recognize[d] that a comprehensive analysis of the 'necessity' of a measure is a sequential process" that "must logically begin with a first step, proceed through a number of additional steps, and yield a final conclusion."<sup>680</sup> We take a similar view in respect of the sequence and order of analysis under Article 2.2 of the TBT Agreement.

5.229. Nonetheless, as we have elaborated above, the particular manner of sequencing the steps of this analysis is adaptable, and may be tailored to the specific claims, measures, facts, and arguments at issue in a given case. Accordingly, panels are afforded a certain degree of latitude to tailor the sequence and order of analysis in a given case when assessing the relevant factors and conducting the overall weighing and balancing under Article 2.2. This latitude, however, is not boundless.<sup>681</sup> Rather, it is informed by the specific claims, measures, facts, and arguments at issue, as mentioned above. For instance, while the particular circumstances of a given case may call for "preliminary conclusions" on the necessity of the trade-restrictiveness of the challenged measure before proceeding to a comparison with an alternative<sup>682</sup>, such preliminary

<sup>674</sup> Canada's other appellant's submission, para. 37; Mexico's other appellant's submission, para. 112.

<sup>675</sup> Canada's other appellant's submission, para. 37 (quoting Appellate Body Report, *US – Tuna II (Mexico)*, paras. 320 and 322).

<sup>676</sup> Canada's other appellant's submission, para. 53; Mexico's other appellant's submission, para. 49.

<sup>677</sup> Appellate Body Report, *US – Tuna II (Mexico)*, fn 643 to para. 318 (referring to Appellate Body Reports, *Brazil – Retreaded Tyres*, para. 178; and *US – Gambling*, paras. 306-308).

<sup>678</sup> Appellate Body Reports, *US – Tuna II (Mexico)*, paras. 327-329; *US – COOL*, paras. 472-479.

<sup>679</sup> See Appellate Body Reports, *US – Tuna II (Mexico)*, para. 320. The Appellate Body drew an analogy with the analysis of "necessity" in the context of Article XX of the GATT 1994 and Article XIV of the GATS, in which a measure found to be inconsistent with a relevant obligation is to be compared with reasonably available less trade-restrictive alternative measures. (Appellate Body Report, *US – Tuna II (Mexico)*, fn 645 to para. 320 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 166))

<sup>680</sup> Appellate Body Report, *China – Publications and Audiovisual Products*, para. 242 (referring to Appellate Body Reports, *US – Gambling*, paras. 306-307; *Korea – Various Measures on Beef*, para. 166; and *Brazil – Retreaded Tyres*, paras. 156 and 178).

<sup>681</sup> Appellate Body Reports, *Brazil – Retreaded Tyres*, para. 145; *EC – Seal Products*, para. 5.211.

<sup>682</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 156. See also Appellate Body Report, *China – Publications and Audiovisual Products*, para. 248.

determinations are not mandatory, and may not be appropriate in the circumstances of other cases.<sup>683</sup> Therefore, an appellant challenging the sequence and order of analysis adopted by a panel in a given case must demonstrate why, by following a particular sequence, the panel committed an error in the specific circumstances of the case at hand. It is not sufficient for an appellant merely to claim that a panel erred by deviating from a certain sequence and order of analysis in the abstract.

5.230. With these considerations in mind, we assess the relevant findings and conclusions of the Panel in this case that are relevant to the specific claims of error by Canada and Mexico with respect to the sequence and order of the Panel's analysis under Article 2.2 of the TBT Agreement. In respect of whether it should take into consideration the possible alternative measures proposed by Canada and Mexico in the weighing and balancing under Article 2.2, the Panel stated:

Our reading of the relevant Appellate Body statements suggests that a "comparative analysis" would be redundant only in exceptional circumstances where consistency or inconsistency with Article 2.2 may be deduced by looking solely at certain aspects of the challenged measure. Mexico has not explained why the Panel is faced with such exceptional circumstances in this case. In particular, Mexico does not argue that the amended COOL measure falls into either of the two exceptional scenarios identified by the Appellate Body; rather, Mexico contends that amended COOL measure represents a third scenario under which it should be found inconsistent without looking at alternatives. However, Mexico fails to identify what this third exceptional scenario entails in the context of the amended COOL measure.<sup>684</sup>

5.231. As we have mentioned above, given that an alternative measure proposed by a complainant functions as a "conceptual tool" to illustrate that a technical regulation is more trade restrictive than necessary, once an alternative measure has been proposed by the complainant, it should be considered by a panel in the overall weighing and balancing under Article 2.2.<sup>685</sup> However, we note that, in certain cases, a comparison with proposed alternatives may be of limited value.<sup>686</sup> In this regard, Mexico argues that, under the Panel's interpretation, the "relational" analysis component of the necessity test under Article 2.2 was "erroneously narrow[ed] ... to a determination of whether 'exceptional circumstances' exist".<sup>687</sup> The Appellate Body has stated that the weighing and balancing under Article 2.2 will involve a comparison with proposed alternatives "[i]n most cases".<sup>688</sup> The Panel did not exclude the possibility that a conclusion could be reached under Article 2.2 in the absence of a comparison with proposed alternatives. Nor did the Panel state that the circumstances identified by the Appellate Body in past cases in which a comparison with alternatives is not required are exhaustive.<sup>689</sup> Rather, the Panel considered that Mexico "fail[ed] to identify" why, in the particular circumstances of this case, the necessity of the amended COOL measure could be established in the absence of a comparison with the proposed alternatives.<sup>690</sup> In our view, as both Canada and Mexico proposed alternative measures in order to make their *prima facie* case under Article 2.2, and in the light of the holistic nature of the weighing and balancing under that provision, the Panel was correct in conducting a "comparative" analysis of the proposed alternative measures.

<sup>683</sup> Appellate Body Reports, *EC – Seal Products*, fn 1299 to para. 5.215.

<sup>684</sup> Panel Reports, para. 7.298.

<sup>685</sup> Appellate Body Reports, *US – Tuna II (Mexico)*, para. 323; *US – COOL*, fn 749 to para. 376. We note that, in the original proceedings, the Appellate Body found that, by not undertaking a comparison with the alternative measures proposed by Mexico and Canada, the original panel erroneously relieved Mexico and Canada of the burden to prove, on the basis of the comparison with the proposed alternative measures, that the original COOL measure was more trade restrictive than necessary. (Appellate Body Reports, *US – COOL*, para. 469)

<sup>686</sup> Appellate Body Reports, *US – Tuna II (Mexico)*, fn 647 to para. 322; *US – COOL*, fn 748 to para. 376.

<sup>687</sup> Mexico's other appellant's submission, para. 39.

<sup>688</sup> Appellate Body Reports, *US – Tuna II (Mexico)*, para. 322; *US – COOL*, para. 376. (emphasis added)

<sup>689</sup> Panel Reports, para. 7.298.

<sup>690</sup> Panel Reports, para. 7.298.

5.232. In respect of the points or stages at which to draw conclusions or engage in the weighing and balancing of different factors, the Panel considered in relation to the original proceedings that:

[t]he Appellate Body did not draw any conclusions on Article 2.2 consistency at the end of its "relational analysis". The Appellate Body called this a "preliminary assessment" of the original COOL measure, and "proceed[ed] to examine the alternative measures proposed by [the complainants] ... to *complete* [its] assessment of whether the COOL measure was 'more trade-restrictive than necessary to fulfil a legitimate objective'."<sup>691</sup>

5.233. Thus, in the Panel's view, the Appellate Body in the original proceedings "undertook the 'comparative analysis' before trying to draw 'overall' conclusions with regard to Article 2.2".<sup>692</sup> In the light of that understanding, the Panel determined to:

... do the same, and draw conclusions as to the consistency of the amended COOL measure with Article 2.2 of the TBT Agreement only after having considered all relevant factors. Like the Appellate Body in both *US – Tuna II (Mexico)* and the original *US – COOL* dispute, we address the following six factors before reaching an overall conclusion on the complainants' Article 2.2 claims:

- a. the amended COOL measure's degree of contribution to a legitimate objective;
- b. the trade-restrictiveness of the amended COOL measure;
- c. the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective pursued by the United States through the amended COOL measure;
- d. whether the alternatives proposed by the complainants are less trade restrictive than the amended COOL measure;
- e. whether the proposed alternatives would make an equivalent contribution to the relevant legitimate objective, taking account of the risks non-fulfilment would create; and
- f. whether the proposed alternatives are reasonably available.<sup>693</sup>

5.234. In addressing the first three factors, the Panel conducted what it termed a "'relational' analysis" that led it to conclude that: (i) the amended COOL measure pursues a legitimate objective and contributes to the fulfilment of this objective to a considerable but necessarily partial degree; (ii) the amended COOL measure has increased the "considerable degree of trade-restrictiveness" found by the Appellate Body in the original disputes; and (iii) the nature of the risks and consequences of not fulfilling the amended COOL measure's objective are that consumers would not receive meaningful information on the origin of the covered products and would, therefore, be misinformed, confused, or not informed at all.<sup>694</sup> However, the Panel was unable to ascertain the gravity of these consequences of non-fulfilment of the amended COOL measure's objective.<sup>695</sup> Having arrived at these conclusions in respect of the relevant factors pertaining to the amended COOL measure itself, the Panel proceeded to conduct a "comparative" analysis of the amended COOL measure with the complainants' four proposed alternative measures. The Panel found that the complainants had not made a *prima facie* case that any of these alternatives demonstrate that the amended COOL measure is more trade restrictive than necessary within the meaning of Article 2.2 of the TBT Agreement.<sup>696</sup>

<sup>691</sup> Panel Reports, para. 7.301 (quoting Appellate Body Reports, *US – COOL*, para. 479). (emphasis added by the Panel)

<sup>692</sup> Panel Reports, para. 7.302 (quoting Appellate Body Reports, *US – COOL*, para. 491).

<sup>693</sup> Panel Reports, para. 7.303 (referring to Appellate Body Reports, *US – Tuna II (Mexico)*, para. 322; and *US – COOL*, paras. 471-491).

<sup>694</sup> Panel Reports, paras. 7.417, 7.611, and 7.612.

<sup>695</sup> Panel Reports, paras. 7.418 and 7.424.

<sup>696</sup> Panel Reports, para. 7.612.

5.235. As we have stated above, a certain sequence and order of analysis may logically flow from the nature of the examination under Article 2.2. This sequence and order is discernible both in the Appellate Body's past analyses in respect of Article 2.2 of the TBT Agreement<sup>697</sup> and in the relevant jurisprudence relating to Article XX of the GATT 1994 and Article XIV of the GATS.<sup>698</sup> That notwithstanding, the particular manner for conducting this analysis is adaptable, and may be tailored to the specific claims, measures, facts, and arguments at issue in a given case.<sup>699</sup> With these considerations in mind, and without prejudice to our findings below on specific aspects of the Panel's analysis that are the subject of separate and more specific claims on appeal, we do not consider that Canada and Mexico have demonstrated that, in the particular circumstances of the present case, the sequence and order of analysis chosen by the Panel was outside the bounds of its latitude to tailor, to the case before it, its approach to the overall weighing and balancing required under Article 2.2. As the Appellate Body has found in respect of Article XX of the GATT 1994, it is likewise not mandatory in respect of Article 2.2 of the TBT Agreement for a panel to draw a preliminary conclusion on "necessity" based on the factors with respect to the technical regulation itself before engaging further in a comparison with proposed alternative measures.<sup>700</sup>

5.236. In the light of both the degree of latitude afforded to panels to tailor the sequence and order of analysis for assessing "necessity" to the specific claims, measures, arguments, and facts at issue in a given case, as well as the concomitant requirement on an appellant to demonstrate why, by following that particular sequence and order of analysis, a panel committed an error in the context of the case at hand, we find, in respect of Canada's claims, that the Panel did not err: (i) by failing to articulate correctly, in paragraphs 7.301-7.303 of the Panel Reports, the relational component of the analysis under Article 2.2 of the TBT Agreement; (ii) by failing to describe, in paragraphs 7.301-7.303 of the Panel Reports, how the relevant factors are to be weighed and balanced against each other under the "relational" analysis; and (iii) by failing to clarify, in paragraphs 7.297-7.299 of the Panel Reports, that the "comparative" analysis does not necessarily prevail over the "relational" analysis. For the same reasons, we find, in respect of Mexico's claims, that the Panel did not err, in paragraph 7.298 of the Panel Reports, in stating that "a 'comparative analysis' would be redundant only in exceptional circumstances", and in concluding, in paragraphs 7.301-7.303 and 7.424 of the Panel Reports, that such "exceptional circumstances" must be demonstrated before any "overall" conclusions with respect to Article 2.2 may be drawn from the "relational" analysis. These findings are without prejudice to the separate and more specific claims of error in respect of particular aspects of the Panel's analysis under Article 2.2 of the TBT Agreement, to which we now turn.

### **5.2.3 Claims of error with respect to the Panel's finding on the amended COOL measure's degree of contribution to its objective**

5.237. Canada and Mexico request that we reverse the Panel's finding that the amended COOL measure makes a "considerable but necessarily partial" contribution to its objective.<sup>701</sup> Their claims and arguments differ in relation to their respective requests. Canada claims that the Panel erred by omitting to take into account Label D (including the incomplete character of the information conveyed by that label) and Label E (including the propensity of that label to convey inaccurate origin information) in ascertaining the amended COOL measure's degree of contribution to its objective.<sup>702</sup> Canada further claims that, by failing to characterize properly the degree of the amended COOL measure's coverage for the purposes of determining its degree of contribution, the Panel acted inconsistently with its duty under Article 11 of the DSU.<sup>703</sup> Mexico claims that the Panel erred by failing to include Label E in ascertaining the amended COOL measure's degree of contribution to its objective on the basis that Label E is an "integral component" of the amended COOL measure.<sup>704</sup>

<sup>697</sup> Appellate Body Reports, *US – Tuna II (Mexico)*, paras. 327-329; *US – COOL*, paras. 472-479.

<sup>698</sup> See Appellate Body Report, *US – Tuna II (Mexico)*, para. 320 and fn 645 thereto.

<sup>699</sup> See e.g. Appellate Body Report, *China – Publications and Audiovisual Products*, para. 247.

<sup>700</sup> Appellate Body Reports, *EC – Seal Products*, fn 1299 to para. 5.215.

<sup>701</sup> Canada's other appellant's submission, paras. 81-90; Mexico's other appellant's submission, paras. 52-61 (both referring to Panel Reports, para. 7.356).

<sup>702</sup> Canada's other appellant's submission, paras. 82 and 88.

<sup>703</sup> Canada's other appellant's submission, paras. 88-89.

<sup>704</sup> Mexico's other appellant's submission, para. 53.

5.238. For its part, the United States argues that the claims of Canada and Mexico are premised on the misunderstanding that Article 2.2 of the TBT Agreement requires two separate analyses, namely, a "relational" analysis and a "comparative" analysis.<sup>705</sup> Instead, the United States contends that Article 2.2 comprises one analysis requiring the demonstration that an alternative measure exists that is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available. Thus, the Panel correctly sought to ensure that the same scope was used for the measure and the proposed alternatives to enable a proper comparison.<sup>706</sup> For the United States, the Panel could only make an appropriate comparison by either including Labels D and E in both sides of the comparison or excluding them from both sides of the comparison.<sup>707</sup>

5.239. We begin by addressing the correct scope for the assessment of the degree of contribution of a measure to its objective. In our view, a technical regulation should, in principle, be reviewed in its entirety in order to assess its degree of contribution to its objective. We note that paragraph 1 of Annex 1 to the TBT Agreement defines a "technical regulation", in relevant part, as a "[d]ocument which lays down product characteristics or their related processes and production methods".<sup>708</sup> It is, thus, the "document" constituting the technical regulation that should be assessed under Article 2.2, rather than isolated or disconnected portions of that document. We note, in this regard, the statement of the Appellate Body in *US – Tuna II (Mexico)* that a "panel adjudicating a claim under Article 2.2 of the TBT Agreement must seek to ascertain to what degree, or if at all, *the challenged technical regulation*, as written and applied, actually contributes to the legitimate objective pursued by the Member."<sup>709</sup> In assessing the relevant document constituting the technical regulation at issue under Article 2.2, the elements contained within it that contribute to the objective of the technical regulation should first be identified, with all of those elements then being taken into account when assessing the degree of contribution of the technical regulation to its objective.<sup>710</sup> Otherwise, to exclude certain elements from that assessment could yield an incorrect finding as to the technical regulation's degree of contribution to its objective, and could lead to an imbalance or asymmetry in a comparison with proposed alternatives.<sup>711</sup>

5.240. With those considerations in mind, we turn to the relevant findings of the Panel relating to the assessment of the degree of contribution of the amended COOL measure to its objective and, in particular, to the Panel's statements concerning the relevance of Label D and Label E for the assessment of the degree of contribution. The Panel considered that, "[i]n principle, Label D (muscle cuts from foreign-slaughtered animals) and Label E (ground meat) could potentially be relevant for [its] assessment of Article 2.2 – including for the amended COOL measure's degree of contribution".<sup>712</sup> However, the Panel considered that "the complainants have unequivocally stated that in this compliance dispute they are not bringing claims with respect to Labels D and E" and, further, that "the alternative measures they have proposed under Article 2.2 specifically apply only to US-slaughtered muscle cuts that would be eligible for Labels A-C."<sup>713</sup> Since the complainants provided "no indication of how the conclusions from a relational analysis based on all distinctions of the amended COOL measure could be meaningfully compared to alternative measures pertaining only to Labels A-C"<sup>714</sup>, the Panel expressed a concern that including Labels D and E in its assessment of the contribution of the amended COOL measure to its objective might result in "an improper comparison" with the proposed alternatives.<sup>715</sup> Accordingly, the Panel declined to examine in its contribution assessment those aspects of the amended COOL measure, including Labels D and E, that the complainants did not challenge in the Panel proceedings, and that the complainants excluded from their arguments under the comparative analysis.<sup>716</sup> Ultimately, the

<sup>705</sup> United States' appellee's submission, para. 76.

<sup>706</sup> United States' appellee's submission, para. 76.

<sup>707</sup> United States' appellee's submission, para. 77.

<sup>708</sup> Emphasis added. We note that a "document" may comprise multiple legal instruments in a given circumstance.

<sup>709</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 317. (fn omitted; emphasis added)

<sup>710</sup> See *supra*, fn 660 to para. 5.216.

<sup>711</sup> See e.g. Appellate Body Report, *US – Tuna II (Mexico)*, paras. 328-331.

<sup>712</sup> Panel Reports, para. 7.344.

<sup>713</sup> Panel Reports, para. 7.344. (fns omitted)

<sup>714</sup> Panel Reports, para. 7.344. (fns omitted)

<sup>715</sup> Panel Reports, para. 7.345 (quoting Appellate Body Report, *US – Tuna II (Mexico)*, para. 328).

<sup>716</sup> Panel Reports, para. 7.345.

Panel concluded that the amended COOL measure makes a considerable but necessarily partial contribution to its objective of providing consumer information on origin.<sup>717</sup>

5.241. We agree with the Panel that it is important to ensure a conceptual alignment between a challenged technical regulation and proposed alternatives in assessing their respective degrees of contribution in order to preserve the integrity of the subsequent comparison. However, we also emphasize the importance of assessing the relevant factors in respect of a challenged technical regulation and proposed alternatives in their entirety. In our view, a challenged technical regulation should be considered in its entirety even when particular elements of the technical regulation are common to both the technical regulation and the proposed alternative measures. This is because the manner in which such common elements interact with other elements of a challenged technical regulation or other elements of the proposed alternatives, respectively, may differ. Hence, even if such common elements are excluded from the assessment of the contribution of *both* the technical regulation and the proposed alternatives, this may distort the result of that assessment. In that context, we note that Labels D and E are common elements of the amended COOL measure and the proposed alternative measures.<sup>718</sup> We note that Labels D and E should have been taken into account in the assessment of both the amended COOL measure's degree of contribution and the degrees of contribution achieved by the proposed alternatives. Such an approach would have ensured conceptual alignment in the assessment of the respective degrees of contribution for the purposes of a comparison. It would also have ensured that all relevant elements of the measure at issue and the proposed alternative measures were properly taken into account in assessing the respective overall degrees of contribution.

5.242. Canada and Mexico further argue that, notwithstanding its statement that it would not take Labels D and E into account, the Panel nonetheless inadvertently took those elements into account in reaching its ultimate conclusion on the amended COOL measure's degree of contribution to its objective.<sup>719</sup> Thus, before reaching a finding on whether the Panel erred in its conclusion on the degree of contribution that the amended COOL measure made to its objective, we first evaluate whether the Panel, in fact, took Labels D and E into account.

5.243. We note that the Panel began its assessment by seeking to ascertain the proportion of muscle cuts that are actually labelled, as opposed to those that are exempt from the labelling requirements. The Panel considered this to be the "initial determinant" of the degree to which the amended COOL measure is capable of fulfilling its objective, since no origin information is conveyed on a mandatory basis for muscle cuts falling within the amended COOL measure's three exemptions.<sup>720</sup>

5.244. It was in this context that the Panel noted that the amended COOL measure covers only between 33.3% and 42.3% of beef consumed in the United States.<sup>721</sup> Conversely, between 57.7% and 66.7% of beef consumed in the United States is exempt from carrying a mandatory label because it is either sold in a food service establishment, as an ingredient in a processed food item, or by an entity not subject to be licensed as a "retailer".<sup>722</sup> The Panel considered between 57.7% and 66.7% to be a "substantial portion".<sup>723</sup>

5.245. However, the Panel also noted that these figures "correspond to all beef consumed in the United States, including Categories A-C, imported muscle cuts (Category D), and ground meat (Category E)", and are therefore only "an indicative approximation of the extent to which the exemptions prevent any contribution to the COOL objective".<sup>724</sup> The Panel expressly acknowledged

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<sup>717</sup> Panel Reports, para. 7.356.

<sup>718</sup> In this respect, we note the Panel's finding that the complainants' proposed alternative measures would not cover ground meat or muscle cuts from foreign-slaughtered animals, and would not change the amended COOL measure's Labels D and E. (Panel Reports, fn 1247 to para. 7.565 (referring to Canada's and Mexico's responses to Panel question Nos. 44 and 47))

<sup>719</sup> Canada's other appellant's submission, paras. 86-88; Mexico's other appellant's submission, paras. 58-60.

<sup>720</sup> Panel Reports, para. 7.347.

<sup>721</sup> Panel Reports, para. 7.347.

<sup>722</sup> Panel Reports, para. 7.347.

<sup>723</sup> Panel Reports, para. 7.347.

<sup>724</sup> Panel Reports, fn 786 to para. 7.347.

that it was "unable to determine the proportion of exempted products within Categories A-C specifically".<sup>725</sup>

5.246. Thus, although the Panel cited percentages that included Labels D and E, it expressly stated that such percentages could only function as an "indicative approximation", rather than provide determinative proof, for the very reason that those figures were affected by the inclusion of Labels D and E.<sup>726</sup> We note that, in its concluding paragraph, the Panel stated: "[W]e find that the amended COOL measure contributes to the objective of providing consumer information on origin to a significant degree *for products carrying Labels A-C*."<sup>727</sup> We consider this to demonstrate that the Panel's analysis was limited to Labels A-C, despite some of the data analysed by the Panel incidentally covering Labels D and E. The Panel then stated that, "[a]t the same time, the amended COOL measure does not make any contribution for products exempted from its coverage that would otherwise carry *such labels*."<sup>728</sup> In our view, the reference to "such labels" suggests that the Panel was referring to Labels A-C in this consideration. In view of the foregoing, we do not consider that the Panel did, in fact, include Labels D and E in reaching its conclusion that the amended COOL measure makes a "considerable but necessarily partial" contribution to its objective.

5.247. We recall that, in our view, Labels D and E should have been taken into account in the assessment of both the amended COOL measure's degree of contribution and the degrees of contribution that would be achieved by the proposed alternatives. In the light of our conclusion that the Panel did not take those labels into account in that assessment, we find that the Panel erred, in paragraph 7.356 of the Panel Reports, by excluding Labels D and E in reaching its conclusion that the amended COOL measure makes a "considerable but necessarily partial" contribution to its objective.

#### **5.2.4 Claims of error with respect to the Panel's interpretation and application of the phrase "taking account of the risks non-fulfilment would create" in Article 2.2 of the TBT Agreement**

5.248. Canada, Mexico, and the United States all request us to find that the Panel erred in various aspects of its interpretation and application of the phrase "taking account of the risks non-fulfilment would create" in Article 2.2 of the TBT Agreement. In this section, we begin with the United States' claim on appeal that the Panel erred by interpreting this phrase to mean that either the first or second proposed alternative measure put forward by Canada and Mexico could be found to make an equivalent contribution to the amended COOL measure's objective, notwithstanding that these alternatives provide less information on origin than the amended measure.<sup>729</sup> We then evaluate the claims of Canada and Mexico that the Panel erred in the factors it took into account in assessing "the risks non-fulfilment would create", before turning to their claims that the Panel erred in finding that it could not ascertain the gravity of the consequences of non-fulfilment of the amended COOL measure's objective. Finally, we address the request of Canada and Mexico that we find that the Panel erred in concluding that they failed to make a *prima facie* case that the first and second proposed alternative measures would be able to make an equivalent degree of contribution to the amended COOL measure's objective, and assess their request that we complete the legal analysis in that regard.

##### **5.2.4.1 The United States' claim that the Panel erred in its interpretation of the phrase "taking account of the risks non-fulfilment would create"**

5.249. The United States requests us to find that the Panel erred in its interpretation of the phrase "taking account of the risks non-fulfilment would create" in Article 2.2 of the TBT Agreement. In particular, the United States claims that the Panel erred in contemplating, on the basis of this phrase, that the first or second proposed alternative measure put forward by Canada and Mexico could be found to make a contribution to the amended COOL measure's

<sup>725</sup> Panel Reports, fn 786 to para. 7.347.

<sup>726</sup> Panel Reports, fn 786 to para. 7.347.

<sup>727</sup> Panel Reports, para. 7.356. (emphasis added)

<sup>728</sup> Panel Reports, para. 7.356. (emphasis added)

<sup>729</sup> United States' appellant's submission, para. 259.

objective that is equivalent to that of the amended COOL measure, notwithstanding that these alternatives provide less information, or less accurate information, on origin to consumers.<sup>730</sup>

5.250. In the United States' view, the phrase "taking account of the risks non-fulfilment would create" should be understood as a reflection that a WTO Member takes such risks into account when setting its chosen level of fulfilment of the objective pursued, thus, engaging an assessment of the degree of contribution.<sup>731</sup> The United States emphasizes that the TBT Agreement makes clear that it is within a Member's discretion to determine what legitimate objectives it seeks to pursue, and to what degree it wishes to pursue those objectives.<sup>732</sup> To permit "the risks non-fulfilment would create" to lessen the degree of contribution that a proposed alternative would need to achieve in order to find a violation would mean to ignore these aspects of the TBT Agreement. Thus, it is for the United States to decide the level at which it provides consumer information on origin, regardless of whether "the risks non-fulfilment would create" are high or low.<sup>733</sup> The United States argues that the Panel erred in suggesting that proposed alternatives that make a lesser degree of contribution might be satisfactory comparators on the basis of "the risks non-fulfilment would create".<sup>734</sup> In the United States' view, for a panel to be able to determine whether adjusting one variable or another would adequately "compensate" for making a lower degree of contribution than the Member intends to provide, it would have to analyse the Member's domestic interests, expectations, risks, and concerns, thus encroaching in a Member's policy space.<sup>735</sup>

5.251. In response, Canada and Mexico argue that, for the purposes of Article 2.2, a Member's right to set its own level of fulfilment, as evidenced through the degree of contribution a measure makes to its objective, may be qualified by "taking account of the risks non-fulfilment would create".<sup>736</sup> They justify this assertion on a number of grounds. In their view, the reference to "the levels it considers appropriate" in the preamble of the TBT Agreement is qualified by "otherwise in accordance with the provisions of this Agreement", thus subordinating that principle to the terms of Article 2.2.<sup>737</sup> Further, if "the risks non-fulfilment would create" were already embodied in the degree of contribution that a measure achieves in fulfilling its objective, as argued by the United States, the express inclusion of that expression would be inutile.<sup>738</sup>

5.252. Before proceeding to assess the Panel's interpretation under appeal and the United States' claim of error, we consider it useful to recall briefly pertinent aspects of our interpretation of Article 2.2 set out above.

5.253. In particular, we recall that an assessment of whether a proposed alternative measure achieves an *equivalent* degree of contribution to the relevant legitimate objective is essential for a panel to determine whether the technical regulation at issue restricts international trade beyond what is necessary to achieve the degree of contribution that it makes to the achievement of a legitimate objective.<sup>739</sup> The need for the equivalence of the respective degrees of contribution of the challenged technical regulation and proposed alternative measures also comports with the principle reflected in the sixth preambular recital of the TBT Agreement that a Member shall not be prevented from pursuing a legitimate objective "at the levels it considers appropriate".<sup>740</sup>

5.254. However, as we have elaborated above, we do not consider that a complainant must demonstrate that its proposed alternative measure achieves a degree of contribution *identical* to that achieved by the challenged technical regulation in order for it to be found to achieve an *equivalent* degree. Rather, in our view, there is a margin of appreciation in the assessment of whether a proposed alternative measure achieves an equivalent degree of contribution, whose

<sup>730</sup> United States' appellant's submission, para. 259.

<sup>731</sup> United States' appellant's submission, paras. 250 and 262; appellee's submission, para. 84.

<sup>732</sup> United States' appellant's submission, paras. 250 and 260.

<sup>733</sup> United States' appellant's submission, para. 262.

<sup>734</sup> United States' appellant's submission, paras. 259-263.

<sup>735</sup> United States' appellant's submission, para. 264.

<sup>736</sup> Mexico's appellee's submission, paras. 102-108; Canada's appellee's submission, paras. 126-129.

<sup>737</sup> Mexico's appellee's submission, para. 106; Canada's appellee's submission, paras. 126-127.

<sup>738</sup> Mexico's appellee's submission, paras. 103-104; Canada's appellee's submission, paras. 122-123.

<sup>739</sup> Appellate Body Reports, *US – COOL*, para. 461.

<sup>740</sup> Appellate Body Reports, *US – COOL*, para. 373. As we have noted above, the level a Member "considers appropriate" is usually revealed by the degree of contribution that a technical regulation *actually* makes to its objective under Article 2.2.

contours may vary from case to case. In particular, a margin of appreciation in assessing the equivalence of the respective degrees of contribution may be affected by the nature of the risks and the gravity of the consequences arising from the non-fulfilment of the technical regulation's objective. We further recall that the assessment of whether a proposed alternative measure achieves an equivalent degree of contribution should also be made in the light of the characteristics of the technical regulation at issue as revealed through its design and structure, as well as the nature of the objective pursued, and the nature, quantity, and quality of the evidence available. In our view, a proposed alternative measure may achieve an equivalent degree of contribution in ways different from the technical regulation at issue.

5.255. For the purpose of assessing the equivalence of the respective degrees of contribution of the challenged technical regulation and proposed alternative measures, it is the *overall* degree of contribution that a technical regulation makes to its objective that is relevant, rather than any individual isolated aspect or component of contribution.<sup>741</sup> This remains the case even where a technical regulation and proposed alternative measures may deploy various methods or techniques that jointly or separately contribute to achieving the objective, which may not each be quantifiable in an isolated manner.<sup>742</sup>

5.256. In the light of these considerations, we now assess the statements of the Panel pertinent to the United States' claim of error under appeal. The United States takes issue, in particular, with the Panel's statement:

Ultimately, the complainants have not persuasively demonstrated how the increased coverage of their first alternative measure would compensate for less origin information provided on Labels A-C under the first alternative measure. Accordingly, we find that the complainants have not made a *prima facie* case that their first alternative measure would make an at least equivalent degree of contribution to the objective of providing origin information to consumers as does the amended COOL measure.<sup>743</sup>

5.257. Although this statement was made in respect of the first proposed alternative measure in particular, we note that the Panel applied the same reasoning *mutatis mutandis* in respect of the second proposed alternative measure.<sup>744</sup> The United States understands from this reasoning that the Panel contemplated that alternatives providing less specific origin information in the case of the first proposed alternative measure, or less accurate origin information in the case of the second proposed alternative measure, could be considered to make an equivalent contribution to the objective of the amended COOL measure.<sup>745</sup> However, the United States considers neither alternatives providing less specific origin information nor alternatives providing less accurate origin information to be "compatible with the fundamental premise that it is up to the United States to decide at what level it wants to provide consumer information on origin, regardless of whether the 'risks non-fulfilment would create' are high or low, great or small."<sup>746</sup>

5.258. We note that the above statement of the Panel was, in respect of the first proposed alternative measure, premised, in part, on the Panel's preceding consideration:

Given the potential relevance of risks of non-fulfilment in comparing degrees of contribution, we consider that providing less origin information to consumers for a significantly wider range of products through a measure like the complainants' first alternative measure might achieve an equivalent degree of contribution as the amended COOL measure.<sup>747</sup>

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<sup>741</sup> See *supra*, fn 660 to para. 5.216.

<sup>742</sup> See *supra*, para. 5.216. See also Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

<sup>743</sup> See also Panel Reports, para. 7.490; and United States' appellant's submission, para. 263.

<sup>744</sup> Panel Reports, para. 7.503

<sup>745</sup> United States' appellant's submission, para. 261.

<sup>746</sup> United States' appellant's submission, para. 262.

<sup>747</sup> Panel Reports, para. 7.488.

5.259. We further note that the Panel likewise considered in respect of the second alternative measure:

We have explained that in light of the risks, we considered that the first alternative measure might achieve an equivalent degree of contribution as the amended COOL measure, by providing *less* origin information to consumers for a significantly wider range of products. In a similar vein, we consider that by providing *less accurate* origin information to consumers for a significantly wider range of products, the second alternative measure might achieve an equivalent degree of contribution as the amended COOL measure.<sup>748</sup>

5.260. In addition, the Panel stated that "an alternative measure making a less than *equivalent contribution* to the legitimate objective in question cannot prove a violation of Article 2.2 of the TBT Agreement."<sup>749</sup> To us, this suggests that the Panel understood that both the first and second proposed alternative measures needed to achieve an "equivalent" degree of contribution to the amended COOL measure's objective.

5.261. The Panel then turned to assess whether these alternative measures proposed by Canada and Mexico would make an equivalent degree of contribution to the amended COOL measure's objective. The Panel noted that, under the first alternative measure proposed by Canada and Mexico, which essentially provides information on where the animal was slaughtered and extends its coverage to food service establishments and retailers that are otherwise exempt<sup>750</sup>, less specific information would be provided to consumers than under the amended COOL measure and stated that the proposed alternative, therefore, "does not seem capable of making an actual contribution to the objective of providing consumer information on origin *at least equivalent* to the actual contribution of the amended COOL measure."<sup>751</sup>

5.262. In respect of the second proposed alternative measure, which essentially uses of the ground beef labelling rule (Label E) for Labels A-C and extends the coverage of those labels to the products exempt under the amended COOL measure<sup>752</sup>, the Panel similarly considered that this proposed alternative "does not seem capable of making an actual contribution to the objective of providing consumer information on origin *at least equivalent* to the actual contribution of the amended COOL measure" because it "would potentially provide less accurate origin information than the amended COOL measure for covered muscle cuts of US-slaughtered animals".<sup>753</sup>

5.263. For both the first and second proposed alternative measures, the Panel then noted the complainants' argument that removing the three exemptions of the amended COOL measure should offset the loss of accuracy or specificity in the origin information provided.<sup>754</sup> Citing jurisprudence of the Appellate Body, the Panel stated that "'the risks non-fulfilment would create' may be a relevant factor in assessing whether an alternative measure fulfils the legitimate objective to an equivalent degree as the challenged measure."<sup>755</sup> As we see it, these considerations informed the Panel's subsequent consideration that, "[g]iven the potential relevance of risks of non-fulfilment in comparing degrees of contribution", the provision of "less origin information" or "less accurate origin information" to consumers "for a significantly wider range of products" could, in principle, "achieve an equivalent degree of contribution as the amended COOL measure".<sup>756</sup>

<sup>748</sup> Panel Reports, para. 7.501. (emphasis original; fn omitted)

<sup>749</sup> Panel Reports, para. 7.482. (emphasis added)

<sup>750</sup> See Panel Reports, paras. 7.468-7.471. The additional information on where the animal was born and raised may be provided under this alternative on a voluntary basis, such that consumers that place value on such information can seek it out and pay a premium for it.

<sup>751</sup> Panel Reports, para. 7.483. (emphasis added)

<sup>752</sup> Panel Reports, para. 7.492.

<sup>753</sup> Panel Reports, para. 7.500. (emphasis added)

<sup>754</sup> Panel Reports, paras. 7.484 and 7.501.

<sup>755</sup> Panel Reports, para. 7.487 (referring to Appellate Body Reports, *US – Tuna II (Mexico)*, para. 321; and *US – COOL*, paras. 377 and 471).

<sup>756</sup> Panel Reports, paras. 7.488 and 7.501.

5.264. The United States deduced from these statements of the Panel that the Panel considered the phrase "taking account of the risks non-fulfilment would create" to be capable of potentially lessening the degree of contribution achieved by an alternative in order to be considered "equivalent".<sup>757</sup> However, it is evident to us that this was not what the Panel meant when it stated that "'the risks non-fulfilment would create' may be a relevant factor in assessing whether an alternative measure fulfils the legitimate objective *to an equivalent degree* as the challenged measure."<sup>758</sup> The Panel did not state that "taking account of the risks non-fulfilment would create" may lessen the degree of contribution achieved by a proposed alternative measure in order to be considered "equivalent"; nor, in our view, is this borne out in its reasoning in applying this phrase to the alternatives before it. Rather, the Panel stated expressly that "an alternative measure making a less than equivalent contribution to the legitimate objective in question cannot prove a violation of Article 2.2 of the TBT Agreement."<sup>759</sup>

5.265. Instead of using the phrase "taking account of the risks non-fulfilment would create" to potentially lessen the degree of contribution needed to be made by an alternative measure, we consider the Panel to have sought to use "the risks non-fulfilment would create" to assist in shedding light on whether the respective degrees of contribution of the amended COOL measure and the proposed alternatives are "equivalent".<sup>760</sup>

5.266. An interpretation that would potentially lessen the degree of contribution needed to be made by an alternative measure in order to be considered "equivalent" would not be compatible with the legal standard for Article 2.2 and could potentially erode the principle that a Member shall not be prevented from pursuing a legitimate objective "at the levels it considers appropriate" pursuant to the sixth preambular recital of the TBT Agreement.<sup>761</sup> In this regard, we do not agree with the arguments of Canada and Mexico that the qualification "subject to the requirement that they ... are otherwise in accordance with the provisions of this Agreement" in the sixth preambular recital of the TBT Agreement subordinates the principle expressed in that recital – that a Member shall not be prevented from pursuing a legitimate objective "at the levels it considers appropriate" – to the provisions of the TBT Agreement.<sup>762</sup> Rather, this principle functions as interpretive context to the provisions of the TBT Agreement, including Article 2.2.<sup>763</sup> In the context of Article 2.2, we understand the qualification "subject to the requirement that they ... are otherwise in accordance with the provisions of this Agreement" to mean that, while a Member may pursue a legitimate objective "at the levels it considers appropriate", it may not do so in a manner that is "more trade-restrictive than necessary". In our view, the obligation to ensure that technical regulations are not more trade restrictive than necessary under Article 2.2 can be interpreted and applied in a manner that does not conflict with the principle enunciated in the sixth preambular recital of the TBT Agreement.

5.267. The United States further argues that no proposed alternative measure that provides less origin information could ever prove the amended COOL measure to be more trade restrictive than necessary because this would be incompatible with the "fundamental premise" that it is up to the United States to decide the level at which it provides consumer information on origin.<sup>764</sup> In our view, this argument is premised on the understanding that only the amount, type, and accuracy of origin information to be specifically affixed to a product count towards the contribution of the

<sup>757</sup> United States' appellant's submission, para. 261; response to questioning at the oral hearing. We note that Canada and Mexico share this understanding of the Panel's findings. (Canada's and Mexico's responses to questioning at the oral hearing)

<sup>758</sup> Panel Reports, para. 7.487. (emphasis added)

<sup>759</sup> Panel Reports, para. 7.482. See also para. 7.490.

<sup>760</sup> See Panel Reports, paras. 7.488, 7.490, and 7.491.

<sup>761</sup> We note that this principle has found expression in other areas of the covered agreements. (See e.g. Appellate Body Reports, *China – Publications and Audiovisual Products*, para. 318; *Brazil – Retreated Tyres*, para. 156; *US – Gambling*, paras. 307-308; and *Australia – Salmon*, para. 199)

<sup>762</sup> Canada's appellee's submission, paras. 126-127; Mexico's appellee's submission, para. 106.

<sup>763</sup> Appellate Body Report, *US – Tuna II (Mexico)*, paras. 212-213.

<sup>764</sup> United States' appellant's submission, para. 262.

amended COOL measure to its objective.<sup>765</sup> However, we note that the amended COOL measure's objective is framed more broadly than "providing consumers point of production information". In particular, the Panel rejected the United States' argument that the objective ought to be framed more specifically as the provision to consumers of information on where livestock were born, raised, and slaughtered.<sup>766</sup> Rather, the Panel identified the objective of the amended COOL measure more broadly as "to provide consumer information on origin".<sup>767</sup>

5.268. We note that the United States has not appealed this finding.<sup>768</sup> We further note that the Panel considered there to be "two main criteria" in assessing the amended COOL measure's degree of contribution to its objective: "the proportion of muscle cuts in the United States that actually carry labels as well as the degree of clarity and accuracy of such labels."<sup>769</sup> The United States has similarly not appealed this aspect of the Panel's finding in respect of the amended COOL measure's degree of contribution. In this regard, we observe that there are at least two variables that may affect the amended COOL measure's degree of contribution. The first variable encompasses the specificity and accuracy of "information". The second variable encompasses the range of "consumers" that are able to receive the information provided under the amended COOL measure, which is a function of the scope of that measure and its exemptions from coverage. In this regard, it follows that a significant expansion in the number of consumers receiving origin information would increase the degree of contribution to the amended COOL measure's objective, which could thus potentially offset a reduction in the degree of contribution effected through the provision of less specific or less accurate information. In assessing the equivalence of the respective degrees of contribution made by the technical regulation at issue and the proposed alternative measures, it is the duty of a panel to consider the implications of the interplay between these variables, on the basis of the evidence presented, in either quantitative or qualitative terms, as appropriate.

5.269. Where two or more distinct variables in a technical regulation collectively produce an overall degree of contribution to its objective, as with the amended COOL measure, we see no reason why, in principle, adjustments that were made with respect to one of those variables could not compensate for adjustments made with respect to another such variable, so that the overall degrees of contribution of a measure and a proposed alternative measure would be equivalent. This would, of course, need to be established by a complainant with sufficient argumentation and evidence. Relatedly, as we have discussed above, we do not consider that a complainant must demonstrate that its proposed alternative measure achieves a degree of contribution *identical* to that achieved by the challenged technical regulation in order for it to be found to achieve an *equivalent* degree. Nor do we consider that a proposed alternative measure cannot achieve an equivalent degree of contribution in ways different from the technical regulation at issue. In this regard, we recall that there can be a margin of appreciation in the assessment of whether a proposed alternative measure achieves an equivalent degree of contribution, whose contours may vary from case to case. In particular, a margin of appreciation in assessing the equivalence of the respective degrees of contribution may be affected by the nature of the risks and the gravity of the consequences arising from non-fulfilment of the technical regulation's objective. Thus, we do not consider that the Panel erred in contemplating that adjustments made in the proposed alternative measures with respect to one variable of the amended COOL measure's contribution to its objective, namely, the range of "consumers" informed, could compensate for adjustments made with respect to another such element, namely, the specificity and accuracy of the "information" provided, and that such interplay might have an impact on the assessment of the equivalence of the respective degrees of contribution.

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<sup>765</sup> As the Appellate Body has noted, a Member's level of protection need not be determined in the abstract, but may instead be articulated, implicitly or explicitly, through the degree of contribution that the measure makes to the legitimate objective. In that sense, and without excluding the possibility that the level a Member considers appropriate to pursue a legitimate objective may be articulated in other ways, it is the extent of contribution to achieving the legitimate objective that provides the reference point for ascertaining a Member's chosen level of fulfilment. (See Appellate Body Reports, *US – COOL*, para. 373; and *US – Tuna II (Mexico)*, para. 316)

<sup>766</sup> Panel Reports, para. 7.314 (referring to United States' first written submission to the Panel, paras. 160-166).

<sup>767</sup> Panel Reports, para. 7.331 (referring to Appellate Body Reports, *US – COOL*, paras. 433 and 496(b)(ii)).

<sup>768</sup> United States' response to questioning at the oral hearing.

<sup>769</sup> Panel Reports, para. 7.346. (fn omitted)

5.270. In the light of the above considerations, we find that the Panel did not err, in paragraphs 7.488 and 7.501 of the Panel Reports, in contemplating that an alternative measure providing less, or less accurate, origin information to consumers for a significantly wider range of products might achieve an "equivalent" degree of contribution as the amended COOL measure.

#### **5.2.4.2 Canada's and Mexico's claims that the Panel erred in the factors it took into account in assessing "the risks non-fulfilment would create"**

5.271. Canada and Mexico request us to find that the Panel erred in respect of the factors it took into account in assessing "the risks non-fulfilment would create" under Article 2.2 of the TBT Agreement. In particular, Canada and Mexico claim that the Panel erred by failing to take into account the relative importance of the values or interests pursued by the amended COOL measure, as well as by failing to take into account its design, structure, and architecture as part of "taking account of the risks non-fulfilment would create". We provide an overview of the Panel's approach and conclusions in this regard, before addressing each of these factors in turn.

5.272. The Panel noted that the Appellate Body in the original proceedings addressed the risks non-fulfilment of the original COOL measure's objective would create by taking into account consumer interest in, and willingness to pay for, country of origin information.<sup>770</sup> The Panel stated that, "[l]ike the Appellate Body, we address these factors for the risks non-fulfilment of the amended COOL measure's objective would create."<sup>771</sup> In respect of the argument that the relative importance of the values or interests pursued by the amended COOL measure must also be taken into account, the Panel began by recalling its finding in a previous section of its Reports addressing the legal test under Article 2.2 that the "relative importance of interests or values protected by a measure is not a separate factor of the Article 2.2 legal test."<sup>772</sup> There the Panel also stated:

As Mexico points out, "the risks non-fulfilment would create" is unique to the text of Article 2.2 of the TBT Agreement, does not appear in Article XX of the GATT 1994 and Article XIV of the GATS. We agree that meaning must be given to this difference. In our view, the most appropriate way to give meaning to this difference is to address the risk non-fulfilment of the objective would create in the context of Article 2.2, which has been specifically identified by the Appellate Body as a factor of the Article 2.2 legal test. We shall do this, rather than assess as a separate factor "relative importance of the objective", which does not appear in the text of Article 2.2, and was developed only in the context of Article XX of the GATT 1994 and Article XIV of the GATS.<sup>773</sup>

5.273. Proceeding with its assessment of the risks of non-fulfilment of the amended COOL measure's objective, the Panel stated that it did not "exclude the possibility for overlap between analytical components of the legal obligations of the TBT Agreement and the GATT 1994" in addressing the argument that the relative importance of interests or values protected by a measure should be taken into account in assessing "the risks non-fulfilment would create".<sup>774</sup> However, the Panel did not consider it necessary to define "the precise relationship between the nature of risks and gravity of the consequences of the non-fulfilment of a legitimate objective under the TBT Agreement, on the one hand, and the relative importance of the interests or values protected under Article XX of the GATT 1994, on the other".<sup>775</sup> Rather, the Panel determined to confine its analysis to "the express terms of the TBT Agreement", namely, by "taking account of the risks non-fulfilment would create", which, it recalled, requires an examination of the nature of the risks and the gravity of the consequences according to the jurisprudence of the Appellate Body.<sup>776</sup>

<sup>770</sup> Panel Reports, para. 7.375 (referring to Appellate Body Reports, *US – COOL*, para. 478).

<sup>771</sup> Panel Reports, para. 7.375.

<sup>772</sup> Panel Reports, para. 7.379. (fn omitted)

<sup>773</sup> Panel Reports, para. 7.310. (fn omitted)

<sup>774</sup> Panel Reports, para. 7.379.

<sup>775</sup> Panel Reports, para. 7.379.

<sup>776</sup> Panel Reports, para. 7.379. See also Panel Reports, para. 7.311 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 322).

5.274. In respect of the argument that the design and architecture of the amended COOL measure should be taken into account in assessing "the risks non-fulfilment would create", such as the exemptions from product coverage and the provision of potentially less accurate information for ground beef, the Panel noted that "there may be a variety of possible reasons unrelated to risks for exempting or treating differently certain product categories under a Member's technical regulation, such as regulatory or compliance costs."<sup>777</sup> Further, the Panel considered that "the amended COOL measure's treatment of different categories of meat products is more directly connected to the degree of contribution under Article 2.2 and the legitimacy of regulatory distinctions under Article 2.1."<sup>778</sup>

5.275. Thus, the Panel confined its analysis of "the risks non-fulfilment would create" to assessing consumer interest in, and willingness to pay for, country of origin information.<sup>779</sup> We now turn to the specific claims of Canada and Mexico that the Panel erred in this regard. We begin by assessing whether the Panel erred by failing to take into account the relative importance of the values or interests pursued by the amended COOL measure, followed by whether the Panel erred by failing to take into account the design, structure, and architecture of that measure.

#### **5.2.4.2.1 Whether the Panel erred by failing to take into account the relative importance of the values or interests pursued by the amended COOL measure in "taking account of the risks non-fulfilment would create"**

5.276. Canada and Mexico claim that the Panel erred by failing to consider in its assessment of "the risks non-fulfilment would create" that, compared to other objectives such as public health and the protection of the environment, the mere provision of origin information is not important.<sup>780</sup> For Canada and Mexico, the relatively low importance of providing origin information suggests that the gravity of the consequences of not providing such information is concomitantly low.<sup>781</sup>

5.277. In addressing the question at hand, we turn first to the text of Article 2.2 of the TBT Agreement, namely, the phrase "taking account of the risks non-fulfilment would create". In our interpretation of Article 2.2 above, we have noted that, textually, the "risks" to be "tak[en] account of" under Article 2.2 are those that would be created by the "non-fulfilment" of the "legitimate objective" of the technical regulation at issue. In this regard, the risks that would be created by the non-fulfilment of legitimate objectives *other than* the particular legitimate objective at issue are not referred to in the text of Article 2.2. In other words, because the objective of the amended COOL measure is the "provision of consumer information on origin", the risks referred to in Article 2.2 are those that would be created by the non-fulfilment of the "provision of consumer information on origin", rather than the risks related to other potential legitimate objectives, such as the protection of public health or the environment. In that regard, we do not view the phrase "taking account of the risks non-fulfilment would create" as providing a direct textual basis for taking into account the relative importance of the objective pursued, i.e. the importance of the objective pursued as compared to the importance of other objectives.

5.278. We consider this understanding to be confirmed by the final sentence of Article 2.2, which provides that, "[i]n assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products." While we agree that this is a non-exhaustive list<sup>782</sup>, the terms listed in this sentence, namely, "scientific and technical information", "related processing technology", and "intended end-uses of products", provide an indication of the relevant elements of consideration when "taking account of the risks non-fulfilment would create".<sup>783</sup> In our view, these terms relate to neutral and observable considerations in respect of fulfilling the objective of the technical regulation at issue. By contrast, an evaluation of the relative importance of an objective vis-à-vis other objectives involves particular opinions or points of view on differing objectives that might be pursued by a Member. In our view, the terms "scientific and technical information", "related

<sup>777</sup> Panel Reports, para. 7.380.

<sup>778</sup> Panel Reports, para. 7.380. (fn omitted)

<sup>779</sup> Panel Reports, para. 7.381.

<sup>780</sup> Canada's other appellant's submission, paras. 98 and 100; Mexico's other appellant's submission, paras. 77, 78, and 81.

<sup>781</sup> Canada's other appellant's submission, paras. 98-100; Mexico's other appellant's submission, para. 73.

<sup>782</sup> Canada's other appellant's submission, para. 32.

<sup>783</sup> See e.g. Appellate Body Reports, *US – COOL*, para. 370.

processing technology", and "intended end-uses of products", do not connote the kinds of judgements that would be necessary to determine whether one objective is, in comparative terms, more or less important than other objectives.

5.279. However, we consider it useful to distinguish between the *relative* importance of an objective, on the one hand, and the importance of the objective *to the Member implementing the technical regulation at issue*, on the other hand. As we see it, the importance of the objective to the Member implementing the technical regulation at issue could inform the analysis under Article 2.2 in some capacity, to the extent it is reflected in the level considered appropriate by the Member to pursue the relevant objective, or the actual degree of contribution made by the technical regulation to its objective. For instance, where a Member chooses a high level of fulfilment for a technical regulation to contribute to its objective, this may be indicative of the importance this Member places on the fulfilment of that objective, and evidence pertaining to the importance a Member places on an objective might inform an assessment of the degree of contribution made by the technical regulation to its objective.<sup>784</sup> Thus, we would ordinarily expect the gravity of the consequences arising from the non-fulfilment of the technical regulation's legitimate objective to correlate, at least to some extent, to the importance of the objective to the Member concerned. However, this does not mean that the *relative* importance of an objective, as determined against other potential objectives that a Member might pursue, is a factor directly pertinent to "taking account of the risks non-fulfilment would create" under Article 2.2.<sup>785</sup>

5.280. We further recall that a panel is not bound by a Member's characterization of the objective of a measure and should conduct its own assessment of the objective pursued. The Appellate Body has noted, in this regard, that a panel is called upon to make a determination of "legitimacy" of a measure's objective under Article 2.2. It appears to us that the importance of an objective to the Member concerned may be relevant for assessing the "legitimacy" of an objective. Moreover, as we have explained above, while there is no requirement under Article 2.2 to assess the *relative* importance of the objective as a separate factor, we do not mean to suggest that the importance of an objective is irrelevant for the assessment of the other relevant factors under Article 2.2.

5.281. For these reasons, we find that the Panel did not err, in paragraph 7.379 of the Panel Reports, by failing to take into account the relative importance of the values or interests pursued by the amended COOL measure in assessing "the risks non-fulfilment would create" under Article 2.2 of the TBT Agreement.

#### **5.2.4.2.2 Whether the Panel erred by failing to take into account the design, structure, and architecture of the amended COOL measure in assessing "the risks non-fulfilment would create"**

5.282. Canada and Mexico request us to find that the Panel erred by failing to consider the design, structure, and architecture of the amended COOL measure, such as the exemptions from coverage and the potentially less accurate or less specific information for certain products, as part of "taking account of the risks non-fulfilment would create" under Article 2.2 of the TBT Agreement.<sup>786</sup> For Canada and Mexico, the existence of these aspects of the amended COOL measure demonstrates that the gravity of the consequences arising from the non-fulfilment of its objective is insignificant<sup>787</sup> or not grave.<sup>788</sup> This is because, if the gravity of the consequences arising from non-fulfilment were significant, then there would not be large exemptions and less-detailed information for certain products.<sup>789</sup>

5.283. We begin by noting that both Canada and Mexico clarified in response to questioning at the oral hearing that their claims relate to an error of law by the Panel. Thus, they claim that the Panel rejected the design, structure, and architecture of the amended COOL measure as relevant for

<sup>784</sup> See e.g. Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 144 and 151-155.

<sup>785</sup> In our view, is not required that the relative importance of the objective concerned be ascertained as a separate factor in a manner similar to the "necessity" analysis under Article XX of the GATT 1994 or Article XIV of the GATS.

<sup>786</sup> Canada's other appellant's submission, paras. 96, 101-102, and 111; Mexico's other appellant's submission, paras. 84-89.

<sup>787</sup> Mexico's other appellant's submission, para. 86.

<sup>788</sup> Canada's other appellant's submission, paras. 101-102.

<sup>789</sup> Mexico's other appellant's submission, paras. 85-86. See also Canada's other appellant's submission, para. 101.

assessing "the risks non-fulfilment would create" generally as a matter of legal interpretation. For Mexico, this error also manifests itself as an inconsistency with Article 11 of the DSU.<sup>790</sup>

5.284. In this regard, we recall the interpretation of the phrase "taking account of the risks non-fulfilment would create" set out above, namely, that "taking account" calls for an active and meaningful consideration of "the risks non-fulfilment would create" in the weighing and balancing under Article 2.2. At the same time, this requirement is also sufficiently flexible so as to be adaptable to the particularities of a given case. Thus, certain aspects of a technical regulation may be salient to "taking account of the risks non-fulfilment would create" in a given case. A technical regulation itself, or its related instruments, might contain elements pertaining to the nature of the risks it seeks to address and the gravity of the consequences arising from the non-fulfilment of its objective.

5.285. We now turn to the relevant findings of the Panel. In rejecting the relevance of the design, structure, and architecture of the amended COOL measure for assessing "the risks non-fulfilment would create", we recall that the Panel stated that "there may be a variety of possible reasons unrelated to risks for exempting or treating differently certain product categories under a Member's technical regulation, such as regulatory or compliance costs."<sup>791</sup> The implication is that the Panel left open the possibility that there might be reasons for exempting or treating differently certain categories of meat products under the amended COOL measure that are indeed related to the risks non-fulfilment would create. As we see it, rather than rejecting the relevance of the design, structure, and architecture generally as a matter of legal interpretation, the Panel did not consider that sufficient reasons had been advanced connecting those features to "the risks non-fulfilment would create" in the particular case at hand. This is supported by the fact that, in its subsequent analysis, the Panel considered, specifically with respect to the amended COOL measure, that the "treatment of different categories of meat products is more directly connected to the degree of contribution under Article 2.2 and the legitimacy of regulatory distinctions under Article 2.1".<sup>792</sup> In our view, this suggests that the Panel considered that, in respect of the features of the *particular technical regulation at issue* in this case – namely, its exemptions from coverage and the potentially less accurate or less specific information for certain products – such features were more suited to consideration as part of other aspects of the analysis. We, thus, do not read the Panel's findings as interpreting the phrase "taking account of the risks non-fulfilment would create" to exclude, in all instances, the design, structure, and architecture of the technical regulation at issue.

5.286. We note that, in their arguments on appeal, Canada and Mexico simply assert, without more, that the very existence of these features demonstrates their connection to "the risks non-fulfilment would create".<sup>793</sup> In our view, this assertion does not, in and of itself, suffice to make out a *prima facie* case that the specific features of the amended COOL measure are pertinent considerations in "taking account of the risks non-fulfilment would create". As we have stated above, a technical regulation itself, or its associated instruments, may reveal elements relevant to the nature and gravity of the risks addressed. However, the Panel did not consider the evidence and argumentation presented by Canada and Mexico to substantiate the connection between specific aspects of the design, architecture, and structure of the amended COOL measure, on the one hand, and the nature of the risks of the non-fulfilment of its objective or the gravity of the consequences arising from its non-fulfilment, on the other hand.<sup>794</sup>

5.287. For these reasons, we find that the Panel did not err, in paragraph 7.380 of the Panel Reports, by failing to take into account the design, structure, and architecture of the amended COOL measure in assessing "the risks non-fulfilment would create" under Article 2.2 of the TBT Agreement. In the light of our finding that the Panel did not err under Article 2.2 by failing to take the design, structure, and architecture of the amended COOL measure into account in this regard, we further find that the Panel did not fail to make an objective assessment of the matter

<sup>790</sup> Mexico's other appellant's submission, para. 89; response to questioning at the oral hearing.

<sup>791</sup> Panel Reports, para. 7.380.

<sup>792</sup> Panel Reports, para. 7.380. (fn omitted)

<sup>793</sup> See e.g. Canada's other appellant's submission, para. 101; and Mexico's other appellant's submission, para. 86.

<sup>794</sup> Panel Reports, para. 7.380.

before it under Article 11 of the DSU by omitting these factors from its assessment of "the risks non-fulfilment would create".<sup>795</sup>

#### 5.2.4.2.3 Whether the Panel erred in finding that it could not ascertain the gravity of the consequences of non-fulfilment of the amended COOL measure's objective

5.288. Canada and Mexico request us to find that the Panel erred in concluding that it could not ascertain the gravity of the consequences of non-fulfilment of the amended COOL measure's objective.<sup>796</sup> Canada's request is grounded in the argument that, had the Panel not erred in considering that certain factors were irrelevant or unnecessary for its assessment of "the risks non-fulfilment would create", then it would have been able to reach a conclusion on the gravity of the consequences of non-fulfilment, namely, that such consequences "would not be particularly grave".<sup>797</sup> Mexico's request engages both a claim that the Panel erred as a matter of law in finding that it was unable to ascertain the gravity of the consequences that would arise from the non-fulfilment of the amended COOL measure, as well as a claim that the Panel acted inconsistently with Article 11 of the DSU in its approach to the assessment of evidence in relation to consumer demand for origin information.<sup>798</sup> The United States argues that the Panel did not err in determining that it was unable to reach a conclusion on the gravity of the consequences of non-fulfilment in the light of the conflicting evidence, or a lack of evidence, regarding consumer demand, consumer benefits, and the interest of the Member concerned in pursuing the legitimate objective at issue.<sup>799</sup>

5.289. We begin by setting out the approach of the Panel that led it to find that it could not ascertain the gravity of the consequences of not fulfilling the amended COOL measure's objective. The Panel stated that it would "review the risks non-fulfilment of the amended COOL measure's objective would create by assessing the nature of the risks and the gravity of the consequences."<sup>800</sup> As part of this assessment, the Panel undertook "a critical assessment of the evidence submitted by the parties on consumers' interest in, and willingness to pay for, country of origin information."<sup>801</sup> From this assessment, the Panel yielded a number of findings. In particular, the Panel found that consumers are interested in both country of origin information in general and country of origin information according to point of production.<sup>802</sup> The Panel also found that consumers show some willingness to pay for general country of origin information.<sup>803</sup> However, the Panel did not consider that it had been given probative evidence showing consumer willingness to pay for country of origin information according to point of production.<sup>804</sup> On the basis of these findings, the Panel concluded there to be "some risk" associated with the non-fulfilment of the amended COOL measure's legitimate objective, whose nature took the form of consumers being "misinformed, confused, or not informed at all".<sup>805</sup>

5.290. However, for the Panel, the inability to determine the extent of consumer interest, in either general country of origin information or country of origin information according to point of production, based on the evidence on the record meant that it could not ascertain the gravity of not fulfilling the amended COOL measure's objective. The Panel appears to have treated its assessment of such gravity as essentially a *quantitative* exercise. For instance, the Panel stated in respect of one study that, while it "*quantifies* the premium consumers would be willing to pay for labels showing general information on country of origin, neither the study nor the complainants have translated the implications of *this figure* for the specific degree of gravity of the consequences of not fulfilling the objective to provide consumer information."<sup>806</sup>

<sup>795</sup> See Mexico's other appellant's submission, para. 89.

<sup>796</sup> Canada's other appellant's submission, para. 115; Mexico's other appellant's submission, para. 90.

<sup>797</sup> Canada's other appellant's submission, paras. 96, 108, and 115.

<sup>798</sup> Mexico's other appellant's submission, paras. 90 and 93-94; response to questioning at the oral hearing.

<sup>799</sup> United States' appellant's submission, paras. 124-125.

<sup>800</sup> Panel Reports, para. 7.381.

<sup>801</sup> Panel Reports, para. 7.383.

<sup>802</sup> Panel Reports, para. 7.416.

<sup>803</sup> Panel Reports, para. 7.416.

<sup>804</sup> Panel Reports, para. 7.416.

<sup>805</sup> Panel Reports, para. 7.417.

<sup>806</sup> Panel Reports, para. 7.418. (emphasis added)

5.291. The Panel then considered that the benefits accruing to consumers from receiving origin information may also be a determinant of consumer demand for such information.<sup>807</sup> However, the Panel rejected certain evidence of the USDA submitted in respect of the economic benefits of the amended COOL measure because of the USDA's consideration that "the expected benefits from implementing mandatory COOL requirements remain *difficult to quantify*".<sup>808</sup> Thus, despite considering that the benefits that would be foregone by consumers in the absence of meaningful origin information are relevant for assessing the gravity of the consequences of such an eventuality, the Panel concluded that even the USDA was unable to ascertain the benefits to consumers of the amended COOL measure.<sup>809</sup>

5.292. The Panel further considered that a Member's interest in pursuing a legitimate objective might be additionally relevant for ascertaining the gravity of the consequences of not fulfilling the amended COOL measure's objective.<sup>810</sup> However, with respect to the measure at issue, the Panel appeared to consider the USDA's aforementioned difficulties in quantifying consumer benefits under both the original and amended COOL measures as a reason for not being able to quantify the United States' interest in pursuing the legitimate objective at hand.<sup>811</sup>

5.293. For the foregoing reasons, the Panel considered that, although it established the *nature* of the risks and the *consequences* of not fulfilling the amended COOL measure's objective, it could not ascertain the *gravity* of the *consequences* of not fulfilling that measure's objective based on the evidence before it.<sup>812</sup>

5.294. The Panel cited its inability to ascertain the gravity of the consequences of not fulfilling the amended COOL measure's objective as the reason for which it could not "tak[e] account of the risks non-fulfilment would create" in assessing whether the first and second proposed alternative measures demonstrate that the amended COOL measure is "more trade-restrictive than necessary".<sup>813</sup> Thus, in practical terms, we understand the Panel to have considered that its inability to quantify the gravity of the consequences of not fulfilling the amended COOL measure's objective meant that it could not make an assessment of "the risks non-fulfilment would create", and that, consequently, it could not take such risks into account in the overall weighing and balancing under Article 2.2. In our view, the Panel, upon concluding in effect that it could not *quantify* the gravity of the consequences of non-fulfilment, effectively ceased to take into account "the risks non-fulfilment would create" in the overall weighing and balancing, as demonstrated in its further analysis of the first and second proposed alternative measures.

5.295. We recall that the nature of the risks and the gravity of the consequences of non-fulfilment are merely components of the overall analysis of "the risks non-fulfilment would create". In the light of our understanding that panels must adopt or develop a methodology that is suited to yielding a correct assessment of the relevant factors under Article 2.2 in the circumstances of a given case, we consider that the Panel was correct to seek to assess as precisely as it could the gravity of the consequences of non-fulfilment of the amended COOL measure's objective in the circumstances of this case. However, as we have stated above, and as is apparent from the circumstances of the case before us, it might be difficult, in some contexts, to determine separately the nature of the risks, on the one hand, and to quantify the gravity of the consequences that would arise from non-fulfilment, on the other hand. In such contexts, it may be more appropriate to conduct a conjunctive analysis of both the nature of the risks and the gravity of the consequences of non-fulfilment, in which "the risks non-fulfilment would create" can be assessed in qualitative terms.

5.296. In any case, as we have explained above, difficulties or imprecision that arise in assessing "the risks non-fulfilment would create", due to the nature of the relevant risks or the gravity of the consequences of non-fulfilment of the objective of the measure at issue, should not, in and of themselves, relieve a panel from its duty to assess this factor. A panel should proceed further with a holistic weighing and balancing of all relevant factors, and reach an overall conclusion under

<sup>807</sup> Panel Reports, para. 7.419.

<sup>808</sup> Panel Reports, para. 7.420 (quoting 2013 Final Rule, p. 31376). (emphasis added)

<sup>809</sup> Panel Reports, para. 7.420.

<sup>810</sup> Panel Reports, para. 7.422.

<sup>811</sup> Panel Reports, para. 7.422.

<sup>812</sup> Panel Reports, paras. 7.423-7.424.

<sup>813</sup> Panel Reports, paras. 7.488 and 7.501.

Article 2.2. In our view, the term "taking account of" calls for the active and meaningful consideration of "the risks non-fulfilment would create", even where there is imprecision in their nature or magnitude, in the weighing and balancing under Article 2.2 of the TBT Agreement.

5.297. In the light of these considerations, we find that the Panel erred, in paragraph 7.423 of the Panel Reports, in concluding that it was unable to ascertain the gravity of the consequences of non-fulfilment of the amended COOL measure's objective.<sup>814</sup>

#### **5.2.4.3 Claims of error with respect to the Panel's finding that Canada and Mexico failed to make a *prima facie* case that the first and second proposed alternative measures would make an equivalent degree of contribution to the amended COOL measure's objective**

5.298. We turn now to the requests of Canada and Mexico that we find that the Panel erred in finding that Canada and Mexico failed to make a *prima facie* case that the first and second proposed alternative measures would make an equivalent degree of contribution to the amended COOL measure's objective. Canada and Mexico also request us to complete the legal analysis in respect of these proposed alternative measures and find that they make an equivalent degree of contribution to that of the challenged measure. In the alternative, Canada and Mexico request us to find that, even if these proposed alternative measures achieve a lesser degree of contribution than the amended COOL measure, this is offset by their lower level of trade-restrictiveness and by the low gravity of "the risks non-fulfilment would create", such that the amended COOL measure is "more trade-restrictive than necessary" under Article 2.2 of the TBT Agreement.

5.299. Canada and Mexico consider that the Panel's error in relation to assessing the equivalence between the respective degrees of contribution stems from the Panel's earlier error in failing to ascertain the gravity of the risks of non-fulfilment.<sup>815</sup> In particular, Canada argues that the Panel did not take account of "the risks non-fulfilment would create" because of its erroneous finding that it was unable to assess the gravity of the consequences of non-fulfilment of the amended COOL measure's objective, and that this led the Panel to find that Canada failed to make a *prima facie* case in respect of the equivalence of the degrees of contribution of the first and second proposed alternative measures with that of the amended COOL measure.<sup>816</sup> Mexico argues that the Panel's error in respect of "the risks non-fulfilment would create" had "the effect of compromising its ability to engage in a fulsome comparative analysis of the amended COOL measure and Mexico's first and second alternative measures", particularly in assessing whether their respective degrees of contribution were equivalent to that of the amended COOL measure.<sup>817</sup>

5.300. Canada and Mexico argue, in the first instance, that the first and second proposed alternative measures can be considered to achieve an equivalent degree of contribution to the amended COOL measure's objective because their respectively lower degrees of origin information and accuracy are applied to a significantly wider range of products.<sup>818</sup>

5.301. The United States responds that the proposed alternative measures cannot be found to make an "equivalent" degree of contribution because they provide a lesser degree of information or accuracy. Otherwise, this would effectively prohibit the United States from providing point-of-production origin information, which is the level of origin information that it considers appropriate to provide to its consumers.<sup>819</sup> Further, the United States argues that Canada and Mexico have not explained why or how expanding the scope of products subject to labelling could compensate for the failure to provide the same degree of point-of-production origin information.<sup>820</sup>

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<sup>814</sup> We note that Canada's claim under Article 2.2 of the TBT Agreement, and Mexico's claim under Article 11 of the DSU, in respect of the Panel's assessment of certain evidence relating to consumer demand, are addressed in section 5.2.4.4 *infra*.

<sup>815</sup> Canada's other appellant's submission, paras. 119 and 122; Mexico's other appellant's submission, paras. 113, 114, 132, and 150.

<sup>816</sup> Canada's other appellant's submission, paras. 118 and 122;

<sup>817</sup> Mexico's other appellant's submission, paras. 113-115.

<sup>818</sup> Canada's other appellant's submission, para. 117; Mexico's other appellant's submission, paras. 133 and 152.

<sup>819</sup> United States' appellee's submission, para. 154.

<sup>820</sup> United States' appellee's submission, paras. 179 and 194.

5.302. We begin our analysis by recalling the Panel's findings in respect of the first and second proposed alternative measures. The Panel considered in respect of the first proposed alternative measure that, "given the potential relevance of risks of non-fulfilment in comparing degrees of contribution", the provision of "less origin information to consumers for a significantly wider range of products through a measure like the complainants' first alternative measure might achieve an equivalent degree of contribution as the amended COOL measure".<sup>821</sup> The Panel made a substantially similar observation in respect of the second proposed alternative measure.<sup>822</sup> As we have noted above, our understanding of the Panel's statements in this regard is that the Panel considered that taking account of "the risks non-fulfilment would create" might shed light on the assessment of whether the first and second proposed alternative measures, in fact, would make an equivalent degree of contribution as the amended COOL measure does to the objective pursued. However, the Panel considered that, since it was unable to ascertain the gravity of the consequences of non-fulfilment of the amended COOL measure's objective, it could not determine "the specific implications of risks of non-fulfilment for the interplay between less accurate information and more extensive coverage".<sup>823</sup> Thus, the Panel considered that, in the particular circumstances of this case, taking account of "the risks non-fulfilment would create" could not shed light on whether the respective degrees of contribution of the amended COOL measure and the first and second proposed alternative measures are equivalent, because it had not been able to ascertain the gravity of the consequences of not fulfilling the amended COOL measure's objective.<sup>824</sup>

5.303. The Panel proceeded to conclude, in respect of the first proposed alternative measure, that, "[u]ltimately, the complainants have not persuasively demonstrated how the increased coverage of their first alternative measure would compensate for less origin information provided on Labels A-C under the first alternative measure".<sup>825</sup> In the context of the considerations and analysis of the Panel preceding this conclusion, we take this statement to mean that, although the Panel did not in principle exclude the possibility that less specific origin information coupled with increased product coverage could produce an "equivalent" degree of contribution, this had not been *proven* by the complainants. For the Panel, an assessment of "taking account of the risks non-fulfilment would create" could have shed light on whether the increased coverage of the first proposed alternative measure might compensate for less origin information provided on Labels A-C to produce an equivalent degree of contribution, but the complainants did not make a *prima facie* case in this regard.<sup>826</sup> This was because, in the Panel's view, the complainants had not submitted probative evidence on the gravity of the consequences of non-fulfilment of the amended COOL measure's objective.<sup>827</sup> Thus, the Panel concluded that "the complainants have not made a *prima facie* case that their first alternative measure would make an at least equivalent degree of contribution to the objective of providing origin information to consumers as does the amended COOL measure."<sup>828</sup>

5.304. The Panel employed substantially the same reasoning and reached substantially the same conclusions in respect of the second proposed alternative measure, which, the complainants argued, achieved an equivalent degree of contribution to the amended COOL measure's objective by offsetting less accurate information with increased product coverage.<sup>829</sup>

5.305. Thus, in summary, we understand that the Panel's ultimate findings that the complainants did not make a *prima facie* case that their first and second proposed alternative measures would make an equivalent degree of contribution to the amended COOL measure's objective was based on its conclusion that the complainants had not proved how or why less origin information, or less accurate origin information, could be offset by increased product coverage to produce an equivalent degree of contribution.<sup>830</sup> This conclusion of the Panel, was, in turn, based on its consideration that, on the evidence before it, the Panel was unable to take account of "the risks non-fulfilment would create" and, consequently, could not assess whether the respective degrees

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<sup>821</sup> Panel Reports, para. 7.488.

<sup>822</sup> Panel Reports, para. 7.501.

<sup>823</sup> Panel Reports, para. 7.501. See also para. 7.488.

<sup>824</sup> Panel Reports, paras. 7.488 and 7.501.

<sup>825</sup> Panel Reports, para. 7.490.

<sup>826</sup> Panel Reports, paras. 7.488-7.490.

<sup>827</sup> Panel Reports, para. 7.423.

<sup>828</sup> Panel Reports, para. 7.490.

<sup>829</sup> Panel Reports, paras. 7.501-7.503.

<sup>830</sup> Panel Reports, paras. 7.490 and 7.502.

of contribution of the amended COOL measure and the first and second proposed alternative measures were equivalent.

5.306. In this regard, we recall our finding above that the Panel erred by ceasing its analysis when it concluded that it was unable to ascertain the gravity of the consequences that would arise from the non-fulfilment of the amended COOL measure's objective in quantitative terms. As we have explained above, it might be difficult, in some contexts, to determine separately the nature of the risks, on the one hand, and to quantify the gravity of the consequences that would arise from non-fulfilment, on the other hand. In such contexts, it may be more appropriate to conduct a conjunctive analysis of both the nature of the risks and the gravity of the consequences of non-fulfilment, in which "the risks non-fulfilment would create" are assessed in qualitative terms. In any case, difficulties or imprecision that arise in assessing "the risks non-fulfilment would create", due to the nature of the relevant risks or the gravity of the consequences of non-fulfilment at issue, should not, in and of themselves, relieve a panel from its duty to assess this factor and proceed further with a holistic weighing and balancing of all relevant factors, and reach an overall conclusion under Article 2.2.

5.307. In our view, this error of the Panel effectively meant that the Panel did not fulfil its duty to take account of "the risks non-fulfilment would create" in its overall assessment under Article 2.2 and, more particularly, in assessing whether the first and second proposed alternative measures make a contribution to the amended COOL measure's objective that is equivalent in degree to that made by the amended COOL measure itself.

5.308. We have found the Panel's finding that it was unable to ascertain the gravity of the consequences of non-fulfilment of the amended COOL measure's objective to be in error. The Panel cited this inability as its reason for concluding that it could not determine whether the first and second proposed alternative measures make a degree of contribution equivalent to that of the amended COOL measure.<sup>831</sup> Thus, we consider that this error also compromised the Panel's finding, in paragraphs 7.490 and 7.503 of the Panel Reports, that the complainants failed to make a *prima facie* case that the first and second proposed alternative measures would make an equivalent degree of contribution to the amended COOL measure's objective and, subsequently, its decision to end its analysis as to whether the amended COOL measure is "more trade-restrictive than necessary" under Article 2.2 of the TBT Agreement on the basis of those proposed alternative measures.<sup>832</sup> This, in turn, led to the Panel's overall conclusion that the complainants did not make a *prima facie* case that the amended COOL measure violates Article 2.2 of the TBT Agreement.<sup>833</sup> Because the Panel's overall conclusion was based on these erroneous intermediate findings, we reverse the Panel's overall conclusion, in paragraph 7.613 of the Panel Reports, that Canada and Mexico did not make a *prima facie* case that the amended COOL measure violates Article 2.2 of the TBT Agreement. We reach this finding without prejudice to how, in the circumstances of this case, "the risks non-fulfilment would create" actually shed any light on whether the first and second proposed alternative measures make a contribution to the amended COOL measure's objective that is equivalent in degree to that of the amended COOL measure itself.

5.309. We also express reservations in respect of the Panel's decision to cease its analysis of the first and second proposed alternative measures due to the difficulties it encountered in assessing, in precise terms, whether they achieve a degree of contribution equivalent to that of the amended COOL measure.<sup>834</sup> In particular, we understand the Panel to have decided to "end [its] analysis" and not proceed to assess the other relevant factors in the analysis because it could not, *inter alia*, "determine the specific implications of [the] risks of non-fulfilment for the interplay between less information coupled with more extensive coverage", or determine how less specific or less accurate information might be compensated by significantly wider product coverage.<sup>835</sup>

5.310. As we have recognized above, there may be instances where it is difficult to assess with precision whether there is equivalence between the technical regulation's degree of contribution and that of a proposed alternative measure. For instance, as demonstrated by the case before us, a technical regulation and proposed alternative measures may deploy various methods or

<sup>831</sup> Panel Reports, paras. 7.488 and 7.501.

<sup>832</sup> Panel Reports, paras. 7.491 and 7.503.

<sup>833</sup> Panel Reports, paras. 7.611-7.613.

<sup>834</sup> See Panel Reports, para. 7.491 and 7.503.

<sup>835</sup> Panel Reports, para. 7.488 and 7.491.

techniques that jointly or separately contribute to achieving the objective, which may not each be quantifiable in an isolated manner.<sup>836</sup> We recognize that, in such instances, a panel may encounter practical difficulties in assessing the overall degree of contribution made by a technical regulation and in comparing whether a proposed alternative measure makes an equivalent degree of contribution. Some imprecision in assessing the respective degrees of contribution of a technical regulation and proposed alternatives may be inevitable in certain circumstances. However, such imprecision should not, in and of itself, relieve a panel from its duty to assess the equivalence of the respective degrees of contribution. In spite of such imprecision, a panel should proceed with the overall weighing and balancing process under Article 2.2.<sup>837</sup> In this regard, as we have elaborated above, there is a margin of appreciation in the assessment of whether a proposed alternative measure achieves an equivalent degree of contribution, whose contours may vary from case to case. Having said that, however, we have already reversed the Panel's overall conclusion that Canada and Mexico failed to make a *prima facie* case that the amended COOL measure is "more trade-restrictive than necessary" on the basis of the first and second proposed alternatives. We, therefore, do not consider it necessary to evaluate further the Panel's decision to cease its analysis due to the difficulties it encountered in determining the equivalence of the degree of contribution made by the first and second proposed alternatives with that of the amended COOL measure.

5.311. Finally, we recall that, in the alternative, Canada and Mexico request us to find that, even if these proposed alternative measures are found to achieve a lesser degree of contribution than the amended COOL measure, this is offset by their lower level of trade-restrictiveness and by the low gravity of "the risks non-fulfilment would create", such that the amended COOL measure is "more trade-restrictive than necessary". We note that the requests of Canada and Mexico are slightly different from each other.

5.312. Canada's request in the alternative is premised on us finding that the first and second alternative measures do not make a degree of contribution to the amended COOL measure's objective that is at least equivalent to that achieved by the measure itself.<sup>838</sup> In that circumstance, Canada requests us to complete the legal analysis in respect of the first and second proposed alternative measures and, after considering the relevant findings under both the "relational" and "comparative" analyses together, to reverse the Panel's finding that Canada failed to make a *prima facie* case that the amended COOL measure violates Article 2.2 of the TBT Agreement.<sup>839</sup> In this regard, we recall that we have already found that the Panel erred in its overall conclusion that the complainants failed to make a *prima facie* case that the amended COOL measure violates Article 2.2 of the TBT Agreement. Canada's request in respect of how we complete the legal analysis is predicated on the outcome of our assessment of whether the respective degrees of contribution of the first and second proposed alternative measures, and the amended COOL measure, are equivalent. We will therefore address Canada's request in the context of assessing whether we can complete the legal analysis.

5.313. Mexico's request in the alternative is predicated on "any of [its] proposed alternative measures mak[ing] a somewhat lesser contribution to the consumer information objective".<sup>840</sup> If Mexico's proposed alternative measures are found to make a "somewhat lesser" contribution, Mexico argues that they should nonetheless be found to fulfil the amended COOL measure's objective to an equivalent degree due to "the risks non-fulfilment would create" being insignificant, and due to their less trade-restrictive nature.<sup>841</sup> Thus, whereas Canada's request presumes that the first and second proposed alternative measures are not found to be "equivalent" due to us concluding that they make a lesser degree of contribution, Mexico's request calls for us to find that they make an "equivalent" degree of contribution *notwithstanding* us concluding that they make a lesser degree of contribution. Since Mexico's request is predicated on how we complete the legal analysis, and is predicated on the outcome of our assessment of whether the first and second proposed alternative measures make a lesser degree of contribution, we will address its request in the context of assessing whether we can complete the legal analysis.

<sup>836</sup> See e.g. Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

<sup>837</sup> See Appellate Body Reports, *EC – Seal Products*, para. 5.215.

<sup>838</sup> Canada's other appellant's submission, para. 131.

<sup>839</sup> Canada's other appellant's submission, para. 131.

<sup>840</sup> Mexico's other appellant's submission, para. 124.

<sup>841</sup> Mexico's other appellant's submission, para. 124.

#### 5.2.4.4 Claims of error with respect to the Panel's assessment of certain evidence and arguments in respect of consumer demand for origin information

5.314. As part of their requests that we find that the Panel erred in concluding that it could not ascertain the gravity of the consequences of non-fulfilment of the amended COOL measure's objective, Canada and Mexico claim that the Panel erred in its assessment of evidence and arguments relating to consumer demand for origin information.

5.315. In particular, Canada claims that, although the Panel identified "consumer demand for origin information" as a "relevant indicator" for assessing the gravity of the consequences of not fulfilling the amended COOL measure's objective, the Panel erred by excluding evidence relating to the "market failure perspective" in its assessment of consumer demand.<sup>842</sup> In Canada's view, this was the "single most relevant element" for assessing consumer demand for the purpose of ascertaining the gravity of the consequences of not fulfilling the amended COOL measure's objective.<sup>843</sup> For Canada, the appropriate inference to draw from this evidence is that consumers have no interest in this information, or that this interest is weak<sup>844</sup>, which demonstrates in turn that the consequences of non-fulfilment are not particularly grave.<sup>845</sup> Canada submits that, in the light of this error, the Panel erred in concluding that it could not assess the gravity of the consequences of non-fulfilment.<sup>846</sup>

5.316. Mexico requests us to find that the Panel failed to make an objective assessment of the matter before it, pursuant to Article 11 of the DSU, in respect of a number of pieces of evidence relating to consumer demand for origin information.<sup>847</sup> In Mexico's view, an objective assessment of this evidence would have established a *prima facie* case that consumer demand for origin information on the covered products is very low. This, in turn, would have supported a conclusion that the gravity of the consequences arising from non-fulfilment of the amended COOL measure's objective is very low, rather than a conclusion that such gravity cannot be ascertained on the basis of the evidence submitted in this case.<sup>848</sup>

5.317. We recall our finding above that the Panel erred in concluding that it was unable to ascertain the gravity of the consequences of non-fulfilment of the amended COOL measure's objective. We have also found that the Panel erred in its overall conclusion with respect to Article 2.2 of the TBT Agreement.<sup>849</sup> Accordingly, we do not consider it necessary, for the purposes of resolving these disputes, to rule on whether, in the assessment of the evidence and arguments on consumer demand for origin information, the Panel erred under Article 2.2 of the TBT Agreement or acted inconsistently with Article 11 of the DSU.

#### 5.2.4.5 Completion of the legal analysis with respect to the first and second proposed alternative measures

5.318. We have reversed the Panel's overall conclusion that Canada and Mexico failed to make a *prima facie* case that the amended COOL measure is "more trade-restrictive than necessary" on the basis of the first and second proposed alternative measures. We, thus, turn to the request of Canada and Mexico that we complete the legal analysis and find, based on their first and second proposed alternative measures, that the amended COOL measure is more trade restrictive than necessary, in violation of Article 2.2 of the TBT Agreement.

5.319. At the outset, we note that, on a number of occasions, the Appellate Body has completed the legal analysis with a view to facilitating the prompt settlement and effective resolution of the dispute.<sup>850</sup> The Appellate Body has completed the legal analysis when sufficient factual findings by

<sup>842</sup> Canada's other appellant's submission, para. 112 (quoting Panel Reports, para. 6.59).

<sup>843</sup> Canada's other appellant's submission, para. 112.

<sup>844</sup> Canada's other appellant's submission, para. 112.

<sup>845</sup> Canada's other appellant's submission, para. 104.

<sup>846</sup> Canada's other appellant's submission, para. 115.

<sup>847</sup> Mexico's other appellant's submission, para. 93.

<sup>848</sup> Mexico's other appellant's submission, para. 93.

<sup>849</sup> Panel Reports, para. 7.613.

<sup>850</sup> See e.g. Appellate Body Reports, *Australia – Salmon*, paras. 117-136; *US – Wheat Gluten*, paras. 80-92; and *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 43-52.

the panel or undisputed facts on the panel record allowed it to do so.<sup>851</sup> The Appellate Body has declined to complete the legal analysis where doing so would involve addressing claims that the panel had not examined at all<sup>852</sup>, particularly where, at the appellate review stage, the participants did not sufficiently address the issues the Appellate Body needed to resolve in order to complete the legal analysis, including the probative value of the evidence not considered by the panel.<sup>853</sup>

5.320. With these considerations in mind, we recall that the Panel did not make factual findings in respect of the reasonable availability or trade-restrictiveness of the first and second proposed alternative measures.<sup>854</sup> Thus, we may only complete the legal analysis if there are sufficient undisputed facts on the Panel record that allow us to do so. In this case, there would need to be sufficient undisputed facts to enable us to make an assessment of whether the first and second proposed alternative measures are less trade restrictive than the amended COOL measure, reasonably available to the United States, and make an equivalent degree of contribution to the amended COOL measure's objective. We assess below whether there are undisputed facts on the Panel record in respect of the first and second proposed alternative measures.

5.321. Turning to the first proposed alternative measure, we note that it would involve the removal of the three exemptions maintained under the amended COOL measure for (i) entities not meeting the definition of the term "retailer"; (ii) ingredients in "processed food items"; and (iii) products served in "food service establishments".<sup>855</sup> The United States asserted before the Panel that these exemptions stemmed from "U.S. policymakers ultimately ma[king] the determination that the provision of such information in restaurants, by small retailers, and in all processed foods would cross the threshold for the overall level of cost that consumers and industry were willing to bear".<sup>856</sup> Canada and Mexico asserted before the Panel that origin information could be conveyed on products currently exempt from the scope of the COOL requirements by indicating origin information on menus, signs, placards, blackboards where daily specials are posted, and on websites.<sup>857</sup> Canada and Mexico acknowledged that this would involve the introduction of compliance costs for those entities that are currently exempt.<sup>858</sup> Thus, on the one hand, the United States asserted that the exemptions were designed to contain costs at an overall level that consumers and industry could bear, whereas, on the other hand, Canada and Mexico suggested some means by which previously exempt entities could implement the first proposed alternative measure, while acknowledging that this would involve costs. In that context, it is not apparent to us that there are sufficient *undisputed* facts on the Panel record on the basis of which we could assess the reasonable availability to the United States of the first proposed alternative measure. Further, Canada and Mexico have not drawn our attention to undisputed facts on the Panel record on the basis of which we could assess the reasonable availability of the first proposed alternative measure, especially in respect of the removal of the exemptions.<sup>859</sup>

5.322. Turning to the second proposed alternative measure, we note that its degree of trade-restrictiveness was a contested element on which the Panel made no factual findings. In particular, the United States asserted before the Panel that Canada and Mexico had not demonstrated that the second proposed alternative measure would be less trade restrictive than the amended COOL measure. In this regard, the United States noted that increased costs on previously exempt entities, including approximately 600,000 restaurants in the United States, could be conceived as worsening the trade-restrictiveness of the amended COOL measure.<sup>860</sup> Canada and Mexico argued

<sup>851</sup> See e.g. Appellate Body Reports, *US – Gasoline*, p. 19, DSR 1996:1, p. 18; *Canada – Periodicals*, p. 24, DSR 1997:1, p. 469; *EC – Poultry*, para. 156; *EC – Hormones*, para. 222; *US – Shrimp*, paras. 123-124; *Japan – Agricultural Products II*, para. 112; *US – FSC*, para. 133; *Australia – Salmon*, paras. 117-118; *US – Lamb*, paras. 150 and 172; *US – Section 211 Appropriations Act*, para. 352; *EC and certain member States – Large Civil Aircraft*, paras. 1174-1178; and *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, paras. 1272-1274.

<sup>852</sup> Appellate Body Reports, *EC – Asbestos*, paras. 79 and 82; *US – Section 211 Appropriations Act*, para. 343; *EC – Poultry*, para. 107; *EC – Export Subsidies on Sugar*, para. 337.

<sup>853</sup> Appellate Body Report, *Japan – DRAMs (Korea)*, para. 142.

<sup>854</sup> Panel Reports, paras. 7.491 and 7.503.

<sup>855</sup> Panel Reports, para. 7.471.

<sup>856</sup> United States' response to Panel question No. 13, para. 27.

<sup>857</sup> Mexico's response to Panel question No. 46, para. 93; Canada's response to Panel question No. 46, para. 102.

<sup>858</sup> Mexico's response to Panel question No. 47, para. 96; Canada's response to Panel question No. 47, para. 103.

<sup>859</sup> Mexico's other appellant's submission, paras. 142-146; Canada's other appellant's submission, paras. 116-126; Canada's and Mexico's responses to questioning at the oral hearing.

<sup>860</sup> United States' first written submission to the Panel, paras. 176-177.

that the second proposed alternative measure would be less trade restrictive because it included the flexibility of the 60-day inventory allowance, which the panel in the original proceedings found to have reduced the magnitude of the cost entailed by segregation.<sup>861</sup> In that context, it is not apparent to us that there are sufficient *undisputed* facts on the Panel record on the basis of which we could assess the respective degrees of trade-restrictiveness of the second proposed alternative measure vis-à-vis the amended COOL measure. Further, Canada and Mexico have not drawn our attention to undisputed facts on the Panel record on the basis of which we could assess the respective degrees of trade-restrictiveness of the second proposed alternative measure vis-à-vis the amended COOL measure.<sup>862</sup>

5.323. In view of the foregoing considerations, we find that there are not sufficient undisputed facts on the record to complete the legal analysis of Canada's and Mexico's claims under Article 2.2 of the TBT Agreement in respect of the first and second proposed alternative measures. Consequently, we are also not in a position to complete the legal analysis with respect to the alternative claims raised by Canada and Mexico on appeal.<sup>863</sup>

### 5.2.5 Claims of error with respect to the third and fourth proposed alternative measures

5.324. Canada and Mexico request us to reverse the Panel's finding that they did not adequately identify the third and fourth proposed alternative measures for the purpose of making a *prima facie* case that an alternative measure is reasonably available.<sup>864</sup> Canada and Mexico allege, in particular, that the Panel erred in finding that it is the complainant that bears the burden of providing precise explanations with respect to the implementation of the proposed alternative and of providing evidence substantiating the likely magnitude of the costs that would be associated with the alternative measure.<sup>865</sup> For Canada and Mexico, the Panel, thus, applied an incorrect standard of proof, which effectively relieved the United States of its burden to adduce evidence and arguments in rebuttal. Canada and Mexico do not request the completion of the legal analysis under Article 2.2 of the TBT Agreement in respect of the third and fourth proposed alternative measures.

5.325. We recall that the third proposed alternative measure would apply to muscle cuts from US-slaughtered animals and would entail a mandatory trace-back system to provide specific information on the precise location where the animal was born, raised, and slaughtered.<sup>866</sup> The fourth proposed alternative measure would prescribe that muscle cuts from US-slaughtered animals carry labels indicating the place of birth, raising, and slaughter according to "states and/or province(s)", in addition to the country designations required by the amended COOL measure.<sup>867</sup>

5.326. We begin our analysis with an overview of the Appellate Body's jurisprudence on what needs to be established to demonstrate the "reasonable availability" of a proposed alternative measure, and how the burden of proof is allocated in that regard under Article 2.2. We then assess the burden of proof applied by the Panel in respect of the "reasonable availability" of the third and fourth proposed alternative measures, and how the Panel allocated that burden among the parties. Finally, we evaluate whether the Panel erred in respect of the burden of proof it required of the complainants in respect of the "reasonable availability" of the third and fourth proposed alternative measures.

<sup>861</sup> Mexico's response to Panel question No. 47, para. 98 (referring to Original Panel Reports, *US – COOL*, para. 7.435); Canada's response to Panel question No. 47, para. 104 (referring to Original Panel Reports, *US – COOL*, para. 7.435).

<sup>862</sup> Mexico's other appellant's submission, paras. 157-160; Canada's other appellant's submission, paras. 116-126; Canada's and Mexico's responses to questioning at the oral hearing.

<sup>863</sup> See *supra*, paras. 5.311-5.313.

<sup>864</sup> Mexico further requests us to reverse the Panel's finding that it did not make a *prima facie* case that its proposed third alternative measure would be less trade restrictive than the amended COOL measure. (Mexico's other appellant's submission, para. 184) We address this request in fn 906 *infra*.

<sup>865</sup> Canada's other appellant's submission, para. 154; Mexico's other appellant's submission, para. 184.

<sup>866</sup> Panel Reports, para. 7.504.

<sup>867</sup> Panel Reports, para. 7.565.

5.327. The Appellate Body stated in *US – Tuna II (Mexico)* that, "[i]n making its *prima facie* case, a complainant may ... seek to identify a possible alternative measure that is less trade restrictive, makes an equivalent contribution to the relevant objective, and is *reasonably available*."<sup>868</sup> It is then for the respondent to rebut this case by presenting evidence and arguments showing that the challenged measure is not more trade restrictive than necessary to achieve the contribution it makes toward the objective pursued, and by demonstrating, for example, that the alternative measure identified by the complainant is not, in fact, "reasonably available".<sup>869</sup> The nature and degree of evidence required for a complainant to establish the "reasonable availability" of a proposed alternative measure as part of a claim under Article 2.2 of the TBT Agreement will necessarily vary from measure to measure and from case to case.<sup>870</sup>

5.328. That notwithstanding, we consider certain elements of Article 2.2 to be generally relevant to the question of what nature and degree of evidence is required to establish the "reasonable availability" of a proposed alternative measure. In particular, it is important to keep in mind that such "reasonable availability" pertains to proposed alternative measures that function as "conceptual tool[s]" to assist in assessing whether a technical regulation is more trade restrictive than necessary.<sup>871</sup> Such alternative measures are of a hypothetical nature in the context of the analysis under Article 2.2 because they do not yet exist in the Member in question, or at least not in the particular form proposed by the complainant. These considerations should, in our view, inform the nature and degree of evidence required to establish the "reasonable availability" of proposed alternative measures in making a *prima facie* case under Article 2.2 of the TBT Agreement.

5.329. We also consider relevant jurisprudence relating to Article XX of the GATT 1994 and Article XIV of the GATS in assessing the appropriate burden of proof concerning the "reasonable availability" under Article 2.2 of the TBT Agreement. In this regard, we note that the Appellate Body has considered Article XX of the GATT 1994 as relevant context for the interpretation of Article 2.2 of the TBT Agreement.<sup>872</sup> At the same time, we are cognizant of the fact that Article XX of the GATT 1994 and Article XIV of the GATS are exceptions, while Article 2.2 of the TBT Agreement sets out positive obligations. This may have implications for the allocation of the burden of proof. In this respect, we recall that the Appellate Body held in *US – Clove Cigarettes* that:

... the burden of proof in respect of a particular provision of the covered agreements *cannot* be understood in isolation from the overarching logic of that provision, and the function which it is designed to serve. On the contrary, it is by having regard for the function and rationale of a particular provision that an adjudicator can, adequately, assess the manner in which the burden of proof should be allocated under that provision.<sup>873</sup>

5.330. In *US – Gambling*, the Appellate Body considered in respect of Article XIV(a) of the GATS that an alternative measure may be found not to be "reasonably available" where it is "merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties".<sup>874</sup> In a similar vein, in *China – Publications and Audiovisual Products*, the Appellate Body stated in respect of Article XX(a) of the GATT 1994 that, "in order to establish that an alternative measure is not 'reasonably available', the respondent must establish that the alternative measure would impose an *undue* burden on it, and it must support such an

<sup>868</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 323. (emphasis added) See also Appellate Body Reports, *US – COOL*, para. 379.

<sup>869</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 323. See also Appellate Body Reports, *US – COOL*, para. 379.

<sup>870</sup> See Appellate Body Report, *Chile – Price Band System (Article 21.5 – Argentina)*, para. 134 (referring to Appellate Body Reports, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:1, p. 335; and *US – Carbon Steel*, para. 157).

<sup>871</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 320.

<sup>872</sup> See Appellate Body Reports, *US – COOL*, fn 745 to para. 374 and fn 750 to para. 376; and *US – Tuna II (Mexico)*, fn 643 to para. 318 and fn 645 to para. 320.

<sup>873</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 286.

<sup>874</sup> Appellate Body Report, *US – Gambling*, para. 308. (fn omitted)

assertion with sufficient evidence."<sup>875</sup> In that regard, the Appellate Body faulted the respondent for failing to provide "evidence to the [p]anel substantiating the likely nature or magnitude of the costs that would be associated with the proposed alternative, as compared to the current system".<sup>876</sup> The Appellate Body considered "some change or administrative cost" would not suffice to meet the threshold of an "undue" burden on the respondent that would render it merely theoretical in nature.<sup>877</sup> In the same vein, the Appellate Body held in *Korea – Various Measures on Beef* that the relevant proposed alternative in that case "could well entail higher enforcement costs for the national budget".<sup>878</sup> Additionally, the Appellate Body in *EC – Seal Products* considered in respect of Article XX(a) of the GATT 1994 that the impact on the relevant industry might be pertinent, stating that "an alternative measure may be deemed not reasonably available due to significant costs or difficulties faced by the affected industry, in particular where such costs or difficulties could affect the ability or willingness of the industry to comply with the requirements of that measure."<sup>879</sup> With these considerations in mind, we now assess the burden of proof applied by the Panel on the complainants in respect of the third and fourth proposed alternative measures.

5.331. We note that, at the outset of its assessment of the third proposed alternative measure, the Panel stated that the complainants' identification of an alternative measure should, at a minimum, enable a comparison with the challenged measure in terms of the relevant legal elements, and that an alternative measure may be found not to be reasonably available where, for example, it is merely theoretical in nature.<sup>880</sup> With respect to the cost of an alternative measure, the Panel stated that it was guided by the Appellate Body's clarification that a party bearing the burden of proof in the context of an alternative measure's reasonable availability must provide evidence "substantiating the likely nature or magnitude of the costs that would be associated with the proposed alternative, as compared to the current system".<sup>881</sup> The Panel noted that, in this statement, the Appellate Body was referring to the respondent's burden under Article XX of the GATT 1994 to show that an alternative measure would impose an *undue* burden. The Panel also noted that, under Article 2.2 of the TBT Agreement, the burden is on the complainant to make a *prima facie* case that the proposed alternative measure is less trade restrictive, reasonably available, and that it makes an "equivalent" contribution to the objective of the measure at issue. While the Panel did "not wish to imply that complainants are required in all cases to describe each and every specific aspect of an alternative measure and provide quantified cost estimates for each", it nonetheless considered that "adequate identification of alternative measures requires more precision than the sometimes vague and in some respects incomplete description of the implementation and ultimate magnitude of the associate[d] costs provided by the complainants in this case".<sup>882</sup> Ultimately, the Panel faulted the complainants for having "not sufficiently explained"<sup>883</sup> how their third proposed alternative measure would be implemented in the United States, and for having "put forward cost estimates that would only partially cover the [third] alternative".<sup>884</sup>

5.332. Regarding the burden of proof to be applied with respect to the fourth proposed alternative measure, the Panel referred back to its statements regarding the burden of proof with respect to the third proposed alternative measure.<sup>885</sup> The Panel then found with regard to the fourth alternative measure that the complainants had not provided a sufficient description of how their fourth alternative measure would be implemented in the United States<sup>886</sup>, and that they had not advanced sufficient arguments on the cost of the fourth alternative.<sup>887</sup>

<sup>875</sup> Appellate Body Report, *China – Publications and Audiovisual Products*, para. 327. (emphasis original; fn omitted)

<sup>876</sup> Appellate Body Report, *China – Publications and Audiovisual Products*, para. 328.

<sup>877</sup> Appellate Body Report, *China – Publications and Audiovisual Products*, para. 327. (emphasis original)

<sup>878</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 181.

<sup>879</sup> Appellate Body Reports, *EC – Seal Products*, para. 5.277.

<sup>880</sup> Panel Reports, para. 7.506 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 156).

<sup>881</sup> Panel Reports, para. 7.510 (quoting Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 327-328). (fn omitted) See also Panel Reports, para. 7.603.

<sup>882</sup> Panel Reports, para. 7.556.

<sup>883</sup> Panel Reports, para. 7.553.

<sup>884</sup> Panel Reports, para. 7.556. (fn omitted)

<sup>885</sup> Panel Reports, para. 7.586 and fn 1286 thereto, and para. 7.603 and fn 1316 thereto.

<sup>886</sup> Panel Reports, para. 7.602.

<sup>887</sup> Panel Reports, para. 7.609.

5.333. We recall that, with regard to the burden of proof for establishing whether the third and fourth proposed alternative measures were "reasonably available", the Panel noted that, in *China – Publications and Audiovisual Products*, the Appellate Body faulted the respondent for failing to provide evidence to that panel substantiating the likely nature or magnitude of the costs that would be associated with the proposed alternative, as compared to the measure at issue in that case.<sup>888</sup> The Panel in this case acknowledged the fact that this statement was made in the context of an analysis under Article XX of the GATT 1994 relating to the question of whether an alternative measure identified by a complainant would impose an *undue* burden on the respondent<sup>889</sup>; however, we do not see that the Panel placed this consideration within the particular context of Article 2.2 of the TBT Agreement in order to assess the manner in which the burden of proof should be allocated under that provision. As we have noted above, while Article XX provides for exceptions, Article 2.2 contains positive obligations, and this difference must be taken into account in the allocation of the burden of proof imposed on respondents and complainants under the respective provisions.

5.334. In this regard, we have noted above the Appellate Body's observation in *US – Clove Cigarettes* that the burden of proof in respect of a particular WTO provision "cannot be understood in isolation from the overarching logic of that provision, and the function which it is designed to serve".<sup>890</sup> We have considered above several elements that inform the nature and degree of evidence required to establish the "reasonable availability", or lack thereof, of a proposed alternative measure for purposes of Article 2.2. In particular, the function of alternative measures as "conceptual tool[s]" informs the nature and degree of evidence required. As noted, such alternative measures are of a hypothetical nature for purposes of an analysis under Article 2.2 because they do not yet exist in the Member in question, or at least not in the particular form proposed by the complainants. Thus, we do not consider that complainants can be expected to provide complete and exhaustive descriptions of the alternative measures they propose.

5.335. In the case at hand, we note that Canada and Mexico asserted before the Panel that their third and fourth proposed alternative measures were based on, *inter alia*, analogous measures that had been implemented in the United States and in other Members.<sup>891</sup> With regard to the complainants' reliance on examples of trace-back systems in other countries, the Panel held that these provided "little if any clarity about the proposed trace-back system to be implemented in the United States".<sup>892</sup> The Panel also stated that "the complainants' references to other traceability and foreign trace-back systems do not cohesively span the necessary stages between animal, carcass, and retail muscle cut", and that the complainants failed to elaborate on the "manner or cost implications of spanning these stages in the United States under the third alternative measure".<sup>893</sup> Ultimately, the Panel found, with respect to the third alternative measure, that the complainants had not addressed the stages of a trace-back system with sufficient clarity. On the basis that the complainants' explanations on the implementation and cost of the third alternative measure provide for "extensive flexibility both overall and for specific stages", the Panel faulted the complainants for not providing a "cohesive depiction of the complainants' third alternative measure".<sup>894</sup> With regard to cost, the Panel faulted the complainants for providing "cost estimates that would only partially cover the suggested alternative".<sup>895</sup>

5.336. Similarly, at the outset of its analysis of the fourth proposed alternative measure, the Panel stated that "adequately explaining how an alternative measure would be implemented is an essential part of the complainants' burden to identify an alternative measure that is not limited to a 'concept'".<sup>896</sup> In this regard, the Panel referred back to its statements regarding the allocation of the burden of proof in the context of the third alternative measure.<sup>897</sup> Ultimately, the Panel found,

<sup>888</sup> Panel Reports, para. 7.510 (quoting Appellate Body Report, *China – Publications and Audiovisual Products*, para. 328).

<sup>889</sup> Panel Reports, fn 1130 to para. 7.510.

<sup>890</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 286. (emphasis omitted)

<sup>891</sup> See e.g. Panel Reports, paras. 7.507, 7.513-7.523, 7.531-7.532, 7.535, 7.540-7.541, 7.547-7.549, 7.569, 7.589-7.590, and 7.594.

<sup>892</sup> Panel Reports, para. 7.549.

<sup>893</sup> Panel Reports, para. 7.551.

<sup>894</sup> Panel Reports, para. 7.552.

<sup>895</sup> Panel Reports, para. 7.556. (fn omitted)

<sup>896</sup> Panel Reports, para. 7.586 (quoting United States' comments on Canada's response to Panel question No. 74).

<sup>897</sup> Panel Reports, fn 1286 to para. 7.586.

with regard to the fourth alternative measure, that "the complainants' limited explanations did not provide a sufficient description of how their fourth alternative measure would be implemented in the United States."<sup>898</sup> With respect to the cost of the fourth alternative measure, the Panel, at the beginning of its analysis, referred back to the burden of proof articulated in its assessment of the third alternative measure.<sup>899</sup> Ultimately, the Panel concluded that the complainants had "not advanced sufficient arguments on the costs of the fourth alternative measure".<sup>900</sup> In this respect, we note that the Appellate Body has held that a proposed alternative measure may be "reasonably available" even if it involves "some change or administrative cost".<sup>901</sup> In other words, not any change or any increase in cost by virtue of the implementation of an alternative measure would render a proposed alternative not "reasonably available". In our view, this has implications on the allocation of the burden of proof.

5.337. In this respect, we see differences between, on the one hand, the burden on the respondent under Article XX of the GATT 1994 to prove that an alternative measure proposed by the complainant would impose an undue burden – e.g. due to prohibitively high cost or substantial technical difficulties – and that this alternative is therefore *not* reasonably available and, on the other hand, the burden on the complainant under Article 2.2 of the TBT Agreement to make a *prima facie* case that the alternative measure it proposes would be reasonably available. Under Article XX of the GATT 1994, a respondent must establish that the alternative measure identified by the complainant is ultimately *not* reasonably available to the respondent because it is merely theoretical in nature – e.g. where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties.<sup>902</sup> The particular circumstances of the responding Member – e.g. the capacity of the respondent to implement a proposed alternative measure that would be costly or would require advanced technologies – may be relevant for the assessment of whether or not a proposed alternative would impose an undue burden.<sup>903</sup> The question of whether or to what extent a respondent would be capable of implementing a proposed alternative measure, and the cost involved in that implementation, depend on the specifics of implementation. While, under Article XX, the complainant has to identify alternatives, it is the respondent that has to adduce evidence substantiating why costs are prohibitive or technical difficulties are substantial.

5.338. To the contrary, under Article 2.2 of the TBT Agreement, a complainant must make a *prima facie* case that its proposed alternative measure is indeed reasonably available. As under Article XX of the GATT 1994, we consider that a proposed alternative may be reasonably available even if it involves "some change or administrative cost".<sup>904</sup> Thus, in the first instance, cost estimates may be relevant for the assessment of whether a proposed alternative measure is reasonably available. However, considering that proposed alternative measures serve as "conceptual tool[s]", and taking into account that the specific details of implementation may depend on the capacity and particular circumstances of the implementing Member in question, it would appear incongruous to expect a complainant, under Article 2.2 of the TBT Agreement, to provide detailed information on how a proposed alternative would be implemented by the respondent in practice, and precise and comprehensive estimates of the cost that such implementation would entail. Rather, once a complainant has established *prima facie* that the proposed alternative is reasonably available to the respondent, it would be for the respondent to adduce specific evidence showing that associated costs would be prohibitive, or that technical difficulties would be so substantial that implementation of such an alternative would entail an undue burden for the Member in question.

5.339. Accordingly, in the circumstances of the present case, the Panel should have considered whether the evidence provided by the complainants, and, in particular, the examples of implemented trace-back systems in the United States and elsewhere, could have provided a sufficient indication that the costs of the proposed alternatives would not be *a priori* prohibitive, and that potential technical difficulties associated with their implementation would not be of such a

<sup>898</sup> Panel Reports, para. 7.602.

<sup>899</sup> Panel Reports, fn 1317 to para. 7.603.

<sup>900</sup> Panel Reports, para. 7.608.

<sup>901</sup> See Appellate Body Report, *China – Publications and Audiovisual Products*, para. 327. (emphasis original; fn omitted)

<sup>902</sup> Appellate Body Report, *US – Gambling*, para. 308.

<sup>903</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 171.

<sup>904</sup> See Appellate Body Report, *China – Publications and Audiovisual Products*, para. 327. (emphasis original)

substantial nature that they would render the proposed alternatives merely theoretical in nature. The Panel should have then considered to what extent the United States had submitted evidence substantiating that the proposed alternative measures were indeed merely theoretical in nature, or entailed an undue burden, for instance, because they involved prohibitively high costs or would entail substantial technical difficulties.

5.340. Thus, having failed to engage in the inquiries outlined above, we consider that the Panel did not properly allocate the burden of proof under Article 2.2 of the TBT Agreement in finding that Canada and Mexico had not provided sufficient explanation of how their third and fourth proposed alternative measures would be implemented in the United States, and of the costs associated with those alternative measures.<sup>905</sup> Accordingly, we reverse the Panel's findings, in paragraphs 7.564 and 7.610 of the Panel Reports, that Canada and Mexico did not make a *prima facie* case that their third and fourth proposed alternative measures are reasonably available for purposes of their claims under Article 2.2 of the TBT Agreement.<sup>906</sup>

### 5.3 Article III:4 and Article IX of the GATT 1994

5.341. We now turn to consider the United States' appeal of the Panel's findings under Article III:4 and Article IX of the GATT 1994. The United States requests us to find that the Panel erred by failing to take into account Article IX as relevant context in interpreting Article III:4.<sup>907</sup> For the United States, the context of Article IX informs the interpretation and application of Article III:4. The United States alleges that the Panel erred in finding that less favourable treatment under Article III:4 could be demonstrated based on a finding of detrimental impact without a further inquiry into the context provided by Article IX.

5.342. Canada and Mexico request us to uphold the Panel's finding in respect of Article III:4 of the GATT 1994 and to reject the United States' allegation that the Panel erred by failing to take into account Article IX of the GATT 1994 as relevant context in its interpretation of Article III:4.<sup>908</sup> Canada also contends that there are strong reasons, based on considerations of due process, not to entertain the United States' claim based on Article IX because it was not raised before the Panel, but only on appeal.<sup>909</sup> Mexico maintains that Article IX is not an exception to Article III:4. For Mexico, both provisions apply cumulatively and Members must comply with both of them simultaneously.<sup>910</sup>

#### 5.3.1 The Panel's findings

5.343. Before the Panel, Canada and Mexico argued that the amended COOL measure is inconsistent with Article III:4 of the GATT 1994 because it modifies the conditions of competition in the US market to the detriment of Canadian and Mexican livestock. Canada and Mexico requested the Panel to address their claims under Article III:4 irrespective of the Panel's findings under Article 2.1 of the TBT Agreement.<sup>911</sup> In response, the United States contended that the existence of a detrimental impact alone does not imply that the measure accords less favourable treatment within the meaning of Article III:4 of the GATT 1994.<sup>912</sup> Rather, a panel must examine whether the detrimental impact can be explained by other circumstances or factors that do not reflect discrimination.<sup>913</sup> In this regard, the United States explained that any detrimental impact of the amended COOL measure can be explained by the information to be conveyed to the consumer

<sup>905</sup> Panel Reports, paras. 7.553, 7.556, 7.557, 7.602, and 7.608.

<sup>906</sup> We see no need, in the light of the present finding to also address Mexico's request for the reversal of the Panel's intermediate finding that the complainants did not make a *prima facie* case that the third alternative measure would be less trade restrictive than the amended COOL measure, in paragraph 7.560 of the Panel Reports. (Mexico's other appellant's submission, para. 184) Furthermore, we recall that Canada and Mexico do not request completion of the legal analysis under Article 2.2 of the TBT Agreement in respect of the third and fourth proposed alternative measures.

<sup>907</sup> United States' appellant's submission, para. 290.

<sup>908</sup> Canada's appellee's submission, para. 150; Mexico's appellee's submission, para. 138.

<sup>909</sup> Canada's appellee's submission, para. 144.

<sup>910</sup> Mexico's appellee's submission, para. 128.

<sup>911</sup> Panel Reports, para. 7.618 (referring to Canada's first written submission to the Panel, para. 90; and Mexico's first written submission to the Panel, para. 213).

<sup>912</sup> United States' first written submission to the Panel, para. 122 (referring to Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 96), and para. 123.

<sup>913</sup> Panel Reports, para. 7.621 (quoting United States' first written submission to the Panel, para. 123).

in the sense that the recordkeeping and verification requirements are the same for companies processing imported and domestic livestock, and the information conveyed on the labels is also the same.<sup>914</sup> However, the United States made no claim before the Panel and presented no argument with respect to Article IX of the GATT 1994.

5.344. The Panel rejected the United States' request that it assess whether any detrimental impact of the amended COOL measure could be explained by other factors that do not reflect discrimination in the context of the analysis of less favourable treatment under Article III:4.<sup>915</sup> The Panel recalled that, in *EC – Seal Products*, the Appellate Body stated that Article III:4 is "concerned with ensuring effective equality of competitive opportunities for imported products"<sup>916</sup>, and permits regulatory distinctions to be drawn between products "provided that such distinctions do not modify the conditions of competition between imported and like domestic products".<sup>917</sup> Furthermore, the Panel cited the Appellate Body's statements that, if a measure has a detrimental impact on the conditions of competition for like imported products, then such detrimental impact will amount to treatment that is "less favourable" within the meaning of Article III:4, and that, "for the purposes of an analysis under Article III:4, a panel is [not] required to examine whether the detrimental impact of a measure on competitive opportunities for like imported products stems exclusively from a legitimate regulatory distinction."<sup>918</sup> The Panel considered that this "directly dispose[d] of similar arguments" in the present disputes, and rejected, on that basis, the United States' suggestion to address legitimate regulatory distinctions in the context of less favourable treatment under Article III:4.<sup>919</sup> Accordingly, the Panel found that the amended COOL measure is inconsistent with Article III:4 of the GATT 1994.<sup>920</sup> The Panel did not refer to Article IX of the GATT 1994 in its analysis of Canada's and Mexico's claims under Article III:4.

### 5.3.2 Article IX of the GATT 1994 as relevant context for the interpretation of Article III:4 of the GATT 1994

5.345. We now turn to examine the United States' claim that Article IX of the GATT 1994 constitutes relevant context for the interpretation of Article III:4 of the GATT 1994, and that the Panel erred by failing to consider this in its analysis under Article III:4. For the United States, Articles IX:2 and IX:4 are relevant context informing the interpretation and application of Article III:4 in the sense that these provisions recognize that laws and regulations aimed at providing consumer information on origin may cause "difficulties and inconveniences" to exporting Members and increase the cost of imported products.<sup>921</sup> On this basis, the United States asserts that the Panel erred in finding that less favourable treatment could be demonstrated based on the existence of detrimental impact without further inquiry into the context provided by Article IX.

5.346. For the United States, Article III:4, when read in the context of Article IX, provides regulatory space for Members to provide consumers with information on the origin of products in the sense that "reasons for any difficulties and inconveniences caused by the measures" should be taken into account.<sup>922</sup> This requires consideration of whether difficulties and inconveniences could "be reduced, with due regard to the necessity of protecting consumers, and what the reasons would be for any increased cost for imported products caused by the measures, in particular whether the measures unreasonably increase the cost of imported products."<sup>923</sup>

5.347. In response, Canada contends that the legal test under Article III:4 is well established and should not be modified as suggested by the United States. Moreover, Canada argues that we should not entertain the United States' argument on appeal based on Article IX because the "complete absence" of legal arguments in this regard before the compliance Panel raises due process concerns.<sup>924</sup> Mexico contends that Article IX is not an exception to Article III:4, but that

<sup>914</sup> United States' first written submission to the Panel, para. 124.

<sup>915</sup> Panel Reports, para. 7.625.

<sup>916</sup> Panel Reports, para. 7.623 (quoting Appellate Body Reports, *EC – Seal Products*, para. 5.101).

<sup>917</sup> Panel Reports, para. 7.623 (quoting Appellate Body Reports, *EC – Seal Products*, para. 5.116).

<sup>918</sup> Panel Reports, para. 7.624 (quoting Appellate Body Reports, *EC – Seal Products*, paras. 5.116-5.117).

<sup>919</sup> Panel Reports, para. 7.625.

<sup>920</sup> Panel Reports, para. 7.643.

<sup>921</sup> United States' appellant's submission, para. 284.

<sup>922</sup> United States' appellant's submission, para. 284.

<sup>923</sup> United States' appellant's submission, para. 284.

<sup>924</sup> Canada's appellee's submission, para. 144.

both provisions apply cumulatively and that Members must comply with both provisions simultaneously.<sup>925</sup>

5.348. We begin by addressing the due process concerns raised by Canada. Canada contends that the United States did not raise an argument based on Article IX before the Panel, and that entertaining this argument on appeal, therefore, raises due process concerns.<sup>926</sup> We note that, indeed, the United States did not present arguments with regard to Article IX to the Panel. Only on appeal does the United States argue that Article IX constitutes relevant context for the interpretation of Article III:4 of the GATT 1994, and alleges that the Panel erred by not taking this into account in its interpretation of Article III:4.

5.349. In this respect, we note that the Appellate Body held in *Canada – Aircraft* that "new arguments are not *per se* excluded from the scope of appellate review, simply because they are new."<sup>927</sup> At the same time, the Appellate Body recognized that Article 17.6 of the DSU precludes engaging with new arguments where doing so would require the Appellate Body to review new facts that were not before the panel. Moreover, if complaining parties were allowed to raise on appeal new arguments that would require the Appellate Body to solicit, receive, and review new facts, this could also undermine the due process rights of responding parties, which would not have had the opportunity to rebut such allegations by submitting evidence in response.<sup>928</sup> We further note that, in *US – FSC*, the Appellate Body declined to consider a new argument on appeal that would have required it "to address legal issues quite different from those which confronted the [p]anel and which may well [have] require[d] proof of new facts".<sup>929</sup>

5.350. In the present case, the United States argues that Article IX constitutes relevant context for the interpretation of Article III:4 of the GATT 1994. We consider that this is a legal argument relating to the proper interpretation of the term "treatment no less favourable" in Article III:4. This issue was before the Panel and was addressed in the Panel Reports. As such, it does not require us to solicit or review new facts or address issues with which the Panel was not confronted. Accordingly, we do not consider that addressing the United States' argument based on Article IX of the GATT 1994 would raise concerns of due process, and we, therefore, proceed with our analysis.

5.351. We note that Article III:4 of the GATT 1994 provides, in relevant part:

*National Treatment on Internal Taxation and Regulation*

...

4. The products of the territory of any Member imported into the territory of any other Member shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. ...

5.352. Article IX of the GATT 1994 provides:

*Marks of Origin*

1. Each Member shall accord to the products of the territories of other Members treatment with regard to marking requirements no less favourable than the treatment accorded to like products of any third country.

2. The Members recognize that, in adopting and enforcing laws and regulations relating to marks of origin, the difficulties and inconveniences which such measures may cause to the commerce and industry of exporting countries should be reduced to

<sup>925</sup> Mexico's appellee's submission, para. 128.

<sup>926</sup> Canada's appellee's submission, para. 144 (referring to Appellate Body Reports, *EC – Seal Products*, para. 5.69).

<sup>927</sup> Appellate Body Report, *Canada – Aircraft*, para. 211.

<sup>928</sup> Appellate Body Report, *Canada – Aircraft*, para. 211.

<sup>929</sup> Appellate Body Report, *US – FSC*, para. 103.

a minimum, due regard being had to the necessity of protecting consumers against fraudulent or misleading indications.

3. Whenever it is administratively practicable to do so, Members should permit required marks of origin to be affixed at the time of importation.

4. The laws and regulations of Members relating to the marking of imported products shall be such as to permit compliance without seriously damaging the products, or materially reducing their value, or unreasonably increasing their cost.

5. As a general rule, no special duty or penalty should be imposed by any Member for failure to comply with marking requirements prior to importation unless corrective marking is unreasonably delayed or deceptive marks have been affixed or the required marking has been intentionally omitted.

6. The Members shall co-operate with each other with a view to preventing the use of trade names in such manner as to misrepresent the true origin of a product, to the detriment of such distinctive regional or geographical names of products of the territory of a Member as are protected by its legislation. Each Member shall accord full and sympathetic consideration to such requests or representations as may be made by any other Member regarding the application of the undertaking set forth in the preceding sentence to names of products which have been communicated to it by the other Member.

5.353. We recall that three elements must be demonstrated to establish that a measure is inconsistent with Article III:4 of the GATT 1994: (i) that the imported and domestic products are "like products"; (ii) that the measure at issue is a "law, regulation, or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution, or use" of the products at issue; and (iii) that the treatment accorded to imported products is "less favourable" than that accorded to like domestic products.<sup>930</sup> The United States' claim on appeal relates to the third element, namely, whether the measure at issue accords less favourable treatment to imported products than to like domestic products.

5.354. The United States' appeal raises the question of whether Articles IX:2 and IX:4 may be of contextual relevance for the interpretation of "treatment no less favourable" in Article III:4.<sup>931</sup> In this regard, we recall the Appellate Body's statement in *China – Auto Parts* that "context is relevant for a treaty interpreter to the extent that it may shed light on the interpretative issue to be resolved, such as the meaning of the term or phrase at issue".<sup>932</sup> Therefore, for a particular provision to serve as relevant context in any given situation, "it must not only fall within the scope of the formal boundaries identified in Article 31(2) [of the Vienna Convention<sup>933</sup>], it must also have some pertinence to the language being interpreted that renders it capable of helping the interpreter to determine the meaning of such language."<sup>934</sup>

5.355. The "language being interpreted" here is "treatment no less favourable" in Article III:4 of the GATT 1994. The United States submits that Articles IX:2 and IX:4 of the GATT 1994 recognize that laws and regulations informing consumers about the origin of products may cause difficulties and inconveniences to exporting Members and may increase the cost of imported products. For the United States, Articles IX:2 and IX:4 suggest a particular interpretation of "treatment no less favourable" in Article III:4, where origin marks are at issue. In particular, the United States asserts that "treatment no less favourable" in Article III:4 should be interpreted as providing regulatory space for Members to provide consumers with information as to the origin of products in

<sup>930</sup> Appellate Body Reports, *EC – Seal Products*, para. 5.99 (referring to Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 127, in turn referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 133).

<sup>931</sup> In response to questioning at the oral hearing, the United States clarified that it did not seek to raise Article IX as a defence. Rather, the United States contends that Article IX of the GATT 1994 is context relevant for the interpretation of Article III:4 of the GATT 1994.

<sup>932</sup> Appellate Body Reports, *China – Auto Parts*, para. 151. (emphasis original)

<sup>933</sup> Vienna Convention on the Law of Treaties, done at Vienna, 23 May 1969, UN Treaty Series, Vol. 1155, p. 331.

<sup>934</sup> Appellate Body Reports, *China – Auto Parts*, para. 151.

the sense that "reasons for any difficulties and inconveniences caused by the measures" should be taken into account.<sup>935</sup>

5.356. We note that Article IX:2 calls for a *reduction* of difficulties and inconveniences that laws and regulations relating to marks of origin may cause to exporters. Furthermore, Article IX:4 requires that compliance with such laws and regulations should be possible without materially reducing the value of the products, or unnecessarily increasing the cost of the products. Hence, these provisions call for a limitation of the impact of the use of marks of origin.

5.357. We are not persuaded that the objective of reducing the difficulties and inconveniences caused by instruments relating to marks of origin set out in Article IX:2, and the objective of avoiding an unreasonable increase in the cost of the products at issue under Article IX:4, suggest a more flexible interpretation of "treatment no less favourable" in Article III:4 of the GATT 1994, where marking requirements are concerned. In particular, we do not consider that the reference to "difficulties and inconveniences" in Article IX:2 affects the interpretation of "treatment no less favourable" under Article III:4. Nor do we consider that the obligation in Article IX:4 that regulations relating to the marking of products shall be such as to permit compliance without seriously damaging the products, or materially reducing their value, or unreasonably increasing their cost, affects the interpretation of "treatment no less favourable" under Article III:4. Rather, we see Articles IX:2 and IX:4 as setting out obligations with regard to "marking requirements" that are separate from, and additional to, the national treatment obligation in Article III:4 of the GATT 1994.

5.358. Finally, we note that the United States' argument is based on the proposition that the analysis of less favourable treatment under Article III:4 should include an inquiry into whether the detrimental impact of a measure on imports is unrelated to foreign origin, and can be explained by other factors that do not reflect discrimination, in this case, the fact that the amended COOL measure pursues consumer information objectives. However, we note that this argument is based upon a proposition that was expressly rejected by the Appellate Body in *US – Clove Cigarettes*. In that dispute, the Appellate Body rejected the proposition that Article III:4 of the GATT 1994 includes consideration of whether the detrimental impact on imports is unrelated to the foreign origin of the product.<sup>936</sup> Moreover, in *EC – Seal Products*, the Appellate Body clarified that the analysis of whether a measure causes detrimental impact on competitive opportunities for like imported products under Article III:4 "does not involve an assessment of whether such detrimental impact stems exclusively from a legitimate regulatory distinction".<sup>937</sup>

5.359. For the reasons set out above, we find that the Panel did not err by not attributing contextual relevance to Article IX of the GATT 1994 in its interpretation of Article III:4 of the GATT 1994.

#### 5.4 Article III:4 and Article XX of the GATT 1994

5.360. We now turn to consider the United States' claim that the Panel erred in the way it addressed the United States' request, at the interim review stage, regarding the availability of Article XX of the GATT 1994 as an exception for Article III:4 of the GATT 1994 with respect to the amended COOL measure.<sup>938</sup> The United States requests us to complete the legal analysis under Article XX, and to find that an exception under Article XX would be available with respect to the amended COOL measure.<sup>939</sup> In particular, the United States submits that the amended COOL measure should be considered to qualify as "necessary" within the meaning of Article XX, and that it satisfies the requirements of the chapeau of Article XX of the GATT 1994.<sup>940</sup>

5.361. Canada and Mexico request us to uphold the Panel's finding in respect of Article III:4 of the GATT 1994, and to reject the United States' request to find that the Panel erred by not addressing the availability of Article XX of the GATT 1994 as an exception for the amended COOL

<sup>935</sup> United States' appellant's submission, para. 284.

<sup>936</sup> Appellate Body Report, *US – Clove Cigarettes*, fn 372 to para. 179.

<sup>937</sup> Appellate Body Reports, *EC – Seal Products*, para. 5.105.

<sup>938</sup> United States' appellant's submission, para. 292.

<sup>939</sup> United States' appellant's submission, para. 301.

<sup>940</sup> United States' appellant's submission, paras. 303-304.

measure, as well as the United States' request to complete the legal analysis and determine which of the Article XX exceptions would be available.<sup>941</sup>

#### 5.4.1 Interim review section of the Panel Reports

5.362. The United States did not invoke a defence under Article XX of the GATT 1994 either in its written submissions to the Panel or in its oral statements at the Panel meetings.

5.363. At the interim review stage, the United States requested the Panel to review its analysis under Article III:4 of the GATT 1994 and "address the availability of Article XX as an exception for Article III:4 with respect to COOL".<sup>942</sup> The United States noted the Panel's reliance on the Appellate Body reports in *EC – Seal Products*, and observed that the circulation of those reports occurred after the period for the parties to make their arguments and submit evidence to the Panel had ended.

5.364. In particular, the United States referred to the statement by the Appellate Body in *EC – Seal Products* that "a Member's right to regulate under the sixth recital [of the preamble of the TBT Agreement], is not, in principle, different from the balance set out in the GATT 1994, where obligations such as national treatment in Article III are qualified by the general exceptions provision of Article XX."<sup>943</sup> The United States contended that the Panel did not find the amended COOL measure to be inherently inconsistent with Article 2.1 of the TBT Agreement. Rather, the Panel's analysis suggested that "one would expect there to be a COOL measure that causes a detrimental impact on imports yet is consistent with Article 2.1 of the TBT Agreement."<sup>944</sup> Accordingly, for the United States, the Appellate Body's approach in *EC – Seal Products* suggests that there must be an Article XX exception that would be available for the amended COOL measure. The United States argued that, because the Appellate Body reports in *EC – Seal Products* were circulated only after the period for the parties to make their submissions to the Panel had ended, it had not been able to shape its submissions according to the Appellate Body's finding in *EC – Seal Products* regarding a respondent's reliance on an Article XX exception "with respect to a claim under Article III:4 of the GATT 1994 even where the measure could be consistent with Article 2.1 of the TBT Agreement."<sup>945</sup>

5.365. In response to these comments of the United States at the interim review stage, the Panel first noted that the United States had not raised a defence under Article XX and had not identified any paragraph of that provision as relevant to the present disputes.<sup>946</sup> Rather, the United States' request that the Panel "address the availability of Article XX as an exception with respect to COOL" was "quite general".<sup>947</sup> Furthermore, the Panel stated that the United States' position "appear[ed] to be predicated" on a perceived conflict between, on the one hand, the Appellate Body's clarification of the relationship of the national treatment obligation under the GATT 1994 and the TBT Agreement and, on the other hand, the implications for a hypothetical measure found to be consistent with Article 2.1 of the TBT Agreement but in violation of Article III:4 of the GATT 1994.<sup>948</sup> The Panel explained that it had found the amended COOL measure to be in violation of both Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994, and that it was, therefore, not faced with the hypothetical situation suggested by the United States. Finally, the Panel observed that accepting the United States' request at the interim review stage would require examination of an issue for which neither the United States, nor the complainants, had provided specific evidence or arguments.<sup>949</sup>

<sup>941</sup> Canada's appellee's submission, para. 150; Mexico's appellee's submission, para. 137.

<sup>942</sup> Panel Reports, para. 6.70.

<sup>943</sup> Panel Reports, para. 6.70 (quoting Appellate Body Reports, *EC – Seal Products*, para. 5.122, in turn referring to Appellate Body Report, *US – Clove Cigarettes*, paras. 93-96).

<sup>944</sup> Panel Reports, para. 6.70.

<sup>945</sup> Panel Reports, para. 6.70.

<sup>946</sup> Panel Reports, para. 6.73.

<sup>947</sup> Panel Reports, para. 6.73.

<sup>948</sup> Panel Reports, para. 6.74.

<sup>949</sup> Panel Reports, para. 6.75.

#### 5.4.2 The availability of an Article XX exception with respect to the amended COOL measure

5.366. We turn now to examine the United States' claim that the Panel erred in the way it addressed the United States' request, at the interim review stage, regarding the availability of Article XX of the GATT 1994 as an exception to Article III:4 of the GATT 1994 with respect to the amended COOL measure. The United States requests us to complete the legal analysis under Article XX, and to find that an exception under Article XX would be available with respect to the amended COOL measure.<sup>950</sup> In particular, the United States submits that the amended COOL measure should be considered to qualify as "necessary" within the meaning of Article XX, and that the amended COOL measure satisfies the requirements of the chapeau of Article XX of the GATT 1994.<sup>951</sup>

5.367. On appeal, the United States presents arguments similar to those it presented at the interim review stage of the Panel proceedings. First, the United States argues that, because the Appellate Body reports in *EC – Seal Products* were circulated only after the conclusion of the period for the parties in the present disputes to submit evidence and arguments to the Panel, the current Panel proceedings present an extraordinary situation. The United States highlights the statement of the Appellate Body in *EC – Seal Products* that the balance between the desire to avoid creating unnecessary obstacles to international trade and the recognition of Members' right to regulate under the TBT Agreement is not, in principle, different from the balance set out in the GATT 1994, where obligations such as national treatment in Article III are qualified by the general exceptions of Article XX.<sup>952</sup> The United States further argues that, while the Panel found the amended COOL measure to be inconsistent with Article 2.1 of the TBT Agreement, it nevertheless "contemplate[d] that the amended COOL measure could be brought into compliance with the Panel's findings on Article 2.1 of the TBT Agreement".<sup>953</sup> If the amended COOL measure were to be brought into compliance with Article 2.1 of the TBT Agreement, it would nonetheless be in breach of Article III:4 of the GATT 1994 because there would remain a detrimental impact, unless the measure qualified under an exception under Article XX. The United States considers that, if no exception under Article XX was available for the amended COOL measure, its right to regulate under the GATT 1994 and under the TBT Agreement would be out of balance. The United States alleges that the Panel, therefore, erred by not addressing the availability of Article XX as an exception to Article III:4 with respect to the amended COOL measure.

5.368. Canada submits that the United States' request is an attempt to advance a defence under Article XX of the GATT 1994 at the final stage of these disputes, and that this is incompatible with the principles of due process. Moreover, in Canada's view, the Panel was correct in denying the United States' request because the United States had failed to provide specific evidence or arguments to make a *prima facie* case that the amended COOL measure is justified under Article XX. In addition, Canada disagrees with the United States' argument that it could not have foreseen the outcome of the *EC – Seal Products* disputes. For Canada, the Appellate Body had already clarified, in *US – Tuna II (Mexico)*, that the scope and content of the national treatment obligations of the TBT Agreement and the GATT 1994 are not the same<sup>954</sup>, and the findings in *EC – Seal Products* are in keeping with that.

5.369. Mexico submits that the United States failed to indicate before the Panel a specific paragraph of Article XX that it considers relevant in the present disputes. For Mexico, this made it impossible to follow the legal test under Article XX, as prescribed by the Appellate Body, and affected Mexico's due process right to rebut an Article XX defence. Furthermore, Mexico disagrees with the United States that the findings of the Appellate Body in *EC – Seal Products* were unforeseeable, and notes that these findings are in line with the Appellate Body report in *US – Clove Cigarettes*.<sup>955</sup>

<sup>950</sup> United States' appellant's submission, para. 301.

<sup>951</sup> United States' appellant's submission, para. 304.

<sup>952</sup> United States' appellant's submission, para. 291.

<sup>953</sup> United States' appellant's submission, para. 295.

<sup>954</sup> Canada's appellee's submission, para. 146 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 405).

<sup>955</sup> Mexico's appellee's submission, para. 134 (referring to Appellate Body Report, *US – Clove Cigarettes*, para. 96).

5.370. At the outset of our analysis, we note that Article XX sets out the general exceptions to substantive obligations of the GATT 1994.<sup>956</sup> It is well established that the analysis under Article XX is two-tiered: in order to be justified under Article XX, a measure must not only fall under one of its paragraphs, it must also satisfy the requirements contained in its chapeau.<sup>957</sup> Moreover, the burden of establishing a defence under Article XX rests on the party asserting it.<sup>958</sup> Specifically, it is for the respondent to establish *a prima facie* case that a measure is justified under Article XX. It is then for the complainant to rebut such *prima facie* case.<sup>959</sup>

5.371. As we have noted above, the United States did not invoke Article XX either in its written submissions to the Panel or in its oral statements at the Panel meetings. It was not until the interim review stage of these compliance proceedings before the Panel that the United States referred for the first time to Article XX of the GATT 1994. Even then, however, the United States did not identify a specific paragraph of Article XX or provide arguments and evidence to demonstrate that the amended COOL measure meets the requirements of one of the paragraphs of Article XX and of the chapeau. Rather, the United States requested the Panel to "address the availability of Article XX as an exception for Article III:4 with respect to COOL".<sup>960</sup> On appeal, the United States alleges that the Panel erred in the way it addressed the United States' request regarding the availability of Article XX at the interim review stage.

5.372. With regard to the Panel's obligations at the interim review stage, we note that Article 15.3 of the DSU stipulates that "the final panel report shall include a discussion of the arguments made at the interim review stage." In the present case, the Panel responded to the United States' request to address the availability of Article XX of the GATT 1994 as an exception for Article III:4 of the GATT 1994 with respect to the amended COOL measure by discussing three different considerations.

5.373. First, the Panel noted that the United States' request was "quite general".<sup>961</sup> The Panel observed that the United States had not advanced or argued a defence under Article XX of the GATT 1994, that it had not identified any paragraph of that Article as relevant to the present disputes, and that the United States "merely request[ed]" that the Panel "address the availability of Article XX as an exception with respect to COOL".<sup>962</sup>

5.374. Second, the Panel observed that the hypothetical situation suggested by the United States of a measure found to be consistent with Article 2.1 of the TBT Agreement and, at the same time, inconsistent with Article III:4 of the GATT 1994 did not arise in these disputes because the Panel had found the amended COOL measure to be inconsistent with both Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994.<sup>963</sup>

5.375. Third, the Panel noted that addressing the availability of Article XX of the GATT 1994 as an exception for Article III:4 of the GATT 1994 with respect to the amended COOL measure, at the interim review stage, would require examination of an issue for which neither the United States, nor the complainants, had presented specific evidence or arguments. The Panel also noted that the United States had not invoked Article XX of the GATT 1994 or any relevant paragraph(s) thereof, or adduced arguments under Article XX at an appropriate stage of the proceedings.<sup>964</sup>

5.376. These three considerations show that the Panel Reports include a discussion of the arguments raised by the United States at the interim review stage, as required by Article 15.3 of the DSU.

5.377. We see no reason to disagree with the first consideration set out by the Panel in this regard. The Panel correctly noted that the United States, as the responding Member, had not

<sup>956</sup> Appellate Body Report, *US – Shrimp*, para. 121.

<sup>957</sup> Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996:I, p. 20.

<sup>958</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16, DSR 1997:I, p. 337.

<sup>959</sup> Appellate Body Report, *US – Gambling*, para. 282.

<sup>960</sup> Panel Reports, para. 6.70.

<sup>961</sup> Panel Reports, para. 6.73.

<sup>962</sup> Panel Reports, para. 6.73.

<sup>963</sup> Panel Reports, para. 6.74.

<sup>964</sup> Panel Reports, para. 6.75.

invoked a defence under Article XX before the Panel, and that it had not identified a specific paragraph of Article XX that would apply to the amended COOL measure.

5.378. We also agree with the second consideration of the Panel. The hypothetical situation suggested by the United States, of a measure found to be consistent with Article 2.1 of the TBT Agreement and, at the same time, found to be inconsistent with Article III:4 of the GATT 1994, does not arise in these disputes. Rather, the Panel found the amended COOL measure to be inconsistent with both Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994.

5.379. Finally, we see no error in the Panel's consideration that addressing, at the interim review stage, the availability of Article XX as an exception for Article III:4 of the GATT 1994 with respect to the amended COOL measure would have required examination of an issue for which neither the United States, nor the complainants, had provided specific evidence or arguments. We note that the responding party should invoke a defence in the early stages of panel proceedings because, once it has received the first written submission of a complaining party, it is likely to be aware of the defences it might invoke and the evidence needed to support them.<sup>965</sup> Consideration of a defence raised for the first time at interim review would give rise to due process concerns.

5.380. In the light of the above considerations, we find that the Panel did not err, in paragraphs 6.73 to 6.75 of the Panel Reports, in the way it addressed the United States' request, at the interim review stage, relating to the availability of Article XX of the GATT 1994 as an exception to Article III:4 of the GATT 1994 with respect to the amended COOL measure. Consequently, the premise of the United States' request on appeal that we complete the legal analysis and find that the amended COOL measure would be justified under one of the exceptions set out in Article XX of the GATT 1994 is not fulfilled and we, therefore, do not address it.

## 5.5 Article XXIII:1(b) of the GATT 1994

5.381. Canada, Mexico, and the United States each conditionally raises an appeal under Article XXIII:1(b) of the GATT 1994. Specifically, if we were to reverse the Panel's finding of violation under Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994, Canada and Mexico request us to reverse the Panel's decision to exercise judicial economy, and to complete the legal analysis in respect of Canada's and Mexico's non-violation claims under Article XXIII:1(b) of the GATT 1994.<sup>966</sup>

5.382. For its part, in the event that the conditions of Canada's and Mexico's appeals are fulfilled, the United States appeals the Panel's conclusion that the complainants' claims were within the Panel's terms of reference.<sup>967</sup> Specifically, the United States argues that the mandate of a panel under Article 21.5 of the DSU to review the consistency of a measure taken to comply does not extend to non-violation claims under Article XXIII:1(b) of the GATT 1994 and Article 26.1 of the DSU.<sup>968</sup>

5.383. We have upheld the Panel's findings that the amended COOL measure is inconsistent with Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994. Accordingly, we find that the condition upon which Canada's and Mexico's appeals under Article XXIII:1(b) of the GATT 1994 are premised is not satisfied and, consequently, we make no finding with respect to whether the Panel erred by exercising judicial economy with respect to Canada's and Mexico's claims under Article XXIII:1(b).

5.384. The United States' appeal is premised on the condition of Canada's and Mexico's appeals being satisfied. We have found that the condition of Canada's and Mexico's appeals is not satisfied. Consequently, we find that the condition upon which the United States' appeal under Article XXIII:1(b) of the GATT 1994 is premised is not satisfied either. Accordingly, we make no finding with respect to whether the Panel erred in finding, in paragraph 7.663 of the Panel Reports, that Canada's and Mexico's claims under Article XXIII:1(b) were within the Panel's terms of reference.

<sup>965</sup> Appellate Body Report, *US – Gambling*, para. 271.

<sup>966</sup> Canada's other appellant's submission, para. 182; Mexico's other appellant's submission, para. 199.

<sup>967</sup> United States' appellant's submission, para. 324.

<sup>968</sup> United States' appellant's submission, para. 307.

## 6 FINDINGS AND CONCLUSIONS IN THE APPELLATE BODY REPORT WT/DS384/AB/RW

6.1. In the appeal of the Panel Report, *United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Canada*, WT/DS384/RW (Canada Panel Report), the Appellate Body makes the findings below.

6.2. For the reasons set out in section 5.1 of this Report, regarding the Panel's findings under Article 2.1 of the TBT Agreement, the Appellate Body:

- a. with respect to the Panel's finding that the amended COOL measure increases the recordkeeping burden entailed by the original COOL measure:
  - i. finds that the Panel did not err, in paragraphs 7.87-7.113 of the Canada Panel Report, in its analysis of the impact of point-of-production labelling;
  - ii. finds that the Panel did not err, in paragraphs 7.114-7.127 of the Canada Panel Report, in its analysis of the impact of the elimination of the country order flexibility; and
  - iii. finds that the Panel did not err, in Section 7.5.4.2.4.4 of the Canada Panel Report, in its consideration of the increased recordkeeping burden entailed by the amended COOL measure within its analysis of whether the detrimental impact of that measure on imported livestock stems exclusively from legitimate regulatory distinctions;
- b. with respect to the Panel's findings regarding the potential for label inaccuracy under the amended COOL measure:
  - i. finds that the Panel did not err, in paragraph 7.269 of the Canada Panel Report, in its consideration of the potential for label inaccuracy with respect to Labels B and C as prescribed by the amended COOL measure; and
  - ii. finds that the Panel did not err, in Section 7.5.4.2.4.4 of the Canada Panel Report, in its consideration of the potential for label inaccuracy under the amended COOL measure within its analysis of whether the detrimental impact of that measure on imported livestock stems exclusively from legitimate regulatory distinctions;
- c. with respect to the Panel's findings regarding the exemptions prescribed by the amended COOL measure:
  - i. finds that the Panel did not err, in paragraph 7.203 of the Canada Panel Report, in finding that the exemptions prescribed by the amended COOL measure are relevant for the analysis of whether the detrimental impact of that measure on imported livestock stems exclusively from legitimate regulatory distinctions;
  - ii. finds that the Panel did not err, in paragraphs 7.273-7.276 of the Canada Panel Report, by not attributing significance to the fact that the exemptions under the amended COOL measure apply equally to meat derived from imported and domestic livestock;
  - iii. finds that the Panel did not err, in paragraph 7.275 of the Canada Panel Report, in considering, with respect to the cost considerations that allegedly justify the existence of the exemptions, that cost considerations do not constitute a supervening justification for discriminatory measures;
  - iv. finds that the Panel did not err, in paragraph 7.277 of the Canada Panel Report, in considering that the exemptions prescribed by the amended COOL measure support a conclusion that the detrimental impact of that measure on imported livestock does not stem exclusively from legitimate regulatory distinctions; and

- v. finds that the Panel did not err, in paragraph 7.272 of the Canada Panel Report, by failing to evaluate the operation of the exemptions prescribed by the amended COOL measure in the US market;
- d. with respect to the Panel's assessment of the relevance of Label D for the analysis of whether the detrimental impact of the amended COOL measure on imported livestock stems exclusively from legitimate regulatory distinctions:
  - i. finds that the Panel did not err, in paragraph 7.279 of the Canada Panel Report, in finding that the requirements for Label D are not compelling evidence of arbitrary or unjustifiable discrimination in violation of Article 2.1 of the TBT Agreement;
- e. with respect to the Panel's assessment of the relevance of Label E for the analysis of whether the detrimental impact of the amended COOL measure on imported livestock stems exclusively from legitimate regulatory distinctions:
  - i. finds that the Panel did not err, in paragraph 7.280 of the Canada Panel Report, in finding that the requirements for Label E do not evidence the amended COOL measure's violation of Article 2.1 of the TBT Agreement; and
- f. with respect to the Panel's assessment of the relevance of the amended COOL measure's prohibition of a trace-back system for the analysis of whether the detrimental impact of that measure on imported livestock stems exclusively from legitimate regulatory distinctions:
  - i. finds that the Panel did not err, in paragraph 7.281 of the Canada Panel Report, in its assessment of the relevance of the amended COOL measure's prohibition of a trace-back system for the analysis of whether the detrimental impact of that measure on imported livestock stems exclusively from legitimate regulatory distinctions.

6.3. For the reasons set out in section 5.2 of this Report, regarding the Panel's findings under Article 2.2 of the TBT Agreement, the Appellate Body:

- a. with respect to the sequence and order of the Panel's "necessity" analysis:
  - i. finds that the Panel did not err, in paragraphs 7.301-7.303 of the Canada Panel Report, by failing to articulate correctly the relational component of the analysis under Article 2.2;
  - ii. finds that the Panel did not err, in paragraphs 7.301-7.303 of the Canada Panel Report, by failing to describe how the relevant factors are to be weighed and balanced against each other under the "relational" analysis; and
  - iii. finds that the Panel did not err, in paragraphs 7.297-7.299 of the Canada Panel Report, by failing to clarify that the "comparative" analysis does not necessarily prevail over the "relational" analysis;
- b. with respect to the Panel's analysis of the contribution of the amended COOL measure to its objective:
  - i. finds that the Panel erred, in paragraph 7.356 of the Canada Panel Report, by excluding Labels D and E in reaching its conclusion that the amended COOL measure makes a "considerable but necessarily partial" contribution to its objective;

- c. with respect to the interpretation and application of the phrase "taking account of the risks non-fulfilment would create" in Article 2.2 of the TBT Agreement:
- i. finds that the Panel did not err, in paragraphs 7.488 and 7.501 of the Canada Panel Report, in contemplating that an alternative measure providing less, or less accurate, origin information to consumers for a significantly wider range of products might achieve an "equivalent" degree of contribution as the amended COOL measure;
  - ii. finds that the Panel did not err, in paragraph 7.379 of the Canada Panel Report, by failing to take into account the relative importance of the values or interests pursued by the amended COOL measure in assessing "the risks non-fulfilment would create";
  - iii. finds that the Panel did not err, in paragraph 7.380 of the Canada Panel Report, by failing to take into account the design, structure, and architecture of the amended COOL measure in assessing "the risks non-fulfilment would create";
  - iv. finds that the Panel erred, in paragraph 7.423 of the Canada Panel Report, in concluding that it was unable to ascertain the gravity of the consequences of non-fulfilment of the amended COOL measure's objective, and finds that the Panel subsequently erred, in paragraphs 7.490 and 7.503 of the Canada Panel Report, in finding that Canada failed to make a *prima facie* case that the first and second proposed alternative measures would make an "equivalent" degree of contribution to the measure's objective;
  - v. consequently, reverses the Panel's overall conclusion, in paragraph 7.613 of the Canada Panel Report, that Canada did not make a *prima facie* case that the amended COOL measure violates Article 2.2 of the TBT Agreement; and
  - vi. finds that there are not sufficient undisputed facts on the record to complete the legal analysis of Canada's claims under Article 2.2 of the TBT Agreement in respect of the first and second proposed alternative measures; and
- d. with respect to the third and fourth proposed alternative measures:
- i. reverses the Panel's findings, in paragraphs 7.564 and 7.610 of the Canada Panel Report, that Canada did not make a *prima facie* case that its third and fourth proposed alternative measures are reasonably available for purposes of its claims under Article 2.2 of the TBT Agreement.

6.4. For the reasons set out in section 5.3 of this Report, regarding the Panel's analysis under Article III:4 of the GATT 1994, the Appellate Body:

- a. finds that the Panel did not err by not attributing contextual relevance to Article IX of the GATT 1994 in its interpretation of Article III:4 of the GATT 1994; and

6.5. For the reasons set out in section 5.4 of this Report, the Appellate Body:

- a. finds that the Panel did not err, in paragraphs 6.73 to 6.75 of the Canada Panel Report, in the way it addressed the United States' request, at the interim review stage, relating to the availability of Article XX of the GATT 1994 as an exception to Article III:4 of the GATT 1994 with respect to the amended COOL measure.

6.6. For the reasons set out in section 5.5 of this Report, the Appellate Body:

- a. finds that the condition upon which Canada's appeal under Article XXIII:1(b) of the GATT 1994 is premised is not satisfied and, consequently, makes no finding with respect to whether the Panel erred by exercising judicial economy with respect to Canada's claim under Article XXIII:1(b); and

- b. finds that the condition upon which the United States' appeal under Article XXIII:1(b) of the GATT 1994 is premised is not satisfied and, consequently, makes no finding with respect to whether the Panel erred, in paragraph 7.663 of the Canada Panel Report, in finding that Canada's claim under Article XXIII:1(b) was within the Panel's terms of reference.

6.7. The Appellate Body recommends that the DSB request the United States to bring its measures found in this Report, and in the Canada Panel Report as modified by this Report, to be inconsistent with the GATT 1994 and the TBT Agreement into conformity with its obligations under those Agreements.

Signed in the original in Geneva this 24th day of April 2015 by:

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Ricardo Ramírez-Hernández  
Presiding Member

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Seung Wha Chang  
Member

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Peter Van den Bossche  
Member

**6 FINDINGS AND CONCLUSIONS IN THE APPELLATE BODY REPORT WT/DS386/AB/RW**

6.1. In the appeal of the Panel Report, *United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Mexico*, WT/DS386/RW (Mexico Panel Report), the Appellate Body makes the findings below.

6.2. For the reasons set out in section 5.1 of this Report, regarding the Panel's findings under Article 2.1 of the TBT Agreement, the Appellate Body:

- a. with respect to the Panel's finding that the amended COOL measure increases the recordkeeping burden entailed by the original COOL measure:
  - i. finds that the Panel did not err, in paragraphs 7.87-7.113 of the Mexico Panel Report, in its analysis of the impact of point-of-production labelling;
  - ii. finds that the Panel did not err, in paragraphs 7.114-7.127 of the Mexico Panel Report, in its analysis of the impact of the elimination of the country order flexibility; and
  - iii. finds that the Panel did not err, in Section 7.5.4.2.4.4 of the Mexico Panel Report, in its consideration of the increased recordkeeping burden entailed by the amended COOL measure within its analysis of whether the detrimental impact of that measure on imported livestock stems exclusively from legitimate regulatory distinctions;
- b. with respect to the Panel's findings regarding the potential for label inaccuracy under the amended COOL measure:
  - i. finds that the Panel did not err, in paragraph 7.269 of the Mexico Panel Report, in its consideration of the potential for label inaccuracy with respect to Labels B and C as prescribed by the amended COOL measure; and
  - ii. finds that the Panel did not err, in Section 7.5.4.2.4.4 of the Mexico Panel Report, in its consideration of the potential for label inaccuracy under the amended COOL measure within its analysis of whether the detrimental impact of that measure on imported livestock stems exclusively from legitimate regulatory distinctions;
- c. with respect to the Panel's findings regarding the exemptions prescribed by the amended COOL measure:
  - i. finds that the Panel did not err, in paragraph 7.203 of the Mexico Panel Report, in finding that the exemptions prescribed by the amended COOL measure are relevant for the analysis of whether the detrimental impact of that measure on imported livestock stems exclusively from legitimate regulatory distinctions;
  - ii. finds that the Panel did not err, in paragraphs 7.273-7.276 of the Mexico Panel Report, by not attributing significance to the fact that the exemptions under the amended COOL measure apply equally to meat derived from imported and domestic livestock;
  - iii. finds that the Panel did not err, in paragraph 7.275 of the Mexico Panel Report, in considering, with respect to the cost considerations that allegedly justify the existence of the exemptions, that cost considerations do not constitute a supervening justification for discriminatory measures;
  - iv. finds that the Panel did not err, in paragraph 7.277 of the Mexico Panel Report, in considering that the exemptions prescribed by the amended COOL measure support a conclusion that the detrimental impact of that measure on imported livestock does not stem exclusively from legitimate regulatory distinctions; and

- v. finds that the Panel did not err, in paragraph 7.272 of the Mexico Panel Report, by failing to evaluate the operation of the exemptions prescribed by the amended COOL measure in the US market; and
- d. with respect to the Panel's assessment of the relevance of Label E for the analysis of whether the detrimental impact of the amended COOL measure on imported livestock stems exclusively from legitimate regulatory distinctions:
  - i. finds that the Panel did not err, in paragraph 7.280 of the Mexico Panel Report, in finding that the requirements for Label E do not evidence the amended COOL measure's violation of Article 2.1 of the TBT Agreement.

6.3. For the reasons set out in section 5.2 of this Report, regarding the Panel's findings under Article 2.2 of the TBT Agreement, the Appellate Body:

- a. with respect to the sequence and order of the Panel's "necessity" analysis:
  - i. finds that the Panel did not err, in paragraph 7.298 of the Mexico Panel Report, in stating that "a 'comparative analysis' would be redundant only in exceptional circumstances", and in concluding, in paragraphs 7.301-7.303 and 7.424 of the Mexico Panel Report, that such "exceptional circumstances" must be demonstrated before any "overall" conclusions with respect to Article 2.2 may be drawn from the "relational" analysis;
- b. with respect to the Panel's analysis of the contribution of the amended COOL measure to its objective:
  - i. finds that the Panel erred, in paragraph 7.356 of the Mexico Panel Report, by excluding Labels D and E in reaching its conclusion that the amended COOL measure makes a "considerable but necessarily partial" contribution to its objective;
- c. with respect to the interpretation and application of the phrase "taking account of the risks non-fulfilment would create" in Article 2.2 of the TBT Agreement:
  - i. finds that the Panel did not err, in paragraphs 7.488 and 7.501 of the Mexico Panel Report, in contemplating that an alternative measure providing less, or less accurate, origin information to consumers for a significantly wider range of products might achieve an "equivalent" degree of contribution as the amended COOL measure;
  - ii. finds that the Panel did not err, in paragraph 7.379 of the Mexico Panel Report, by failing to take into account the relative importance of the values or interests pursued by the amended COOL measure in assessing "the risks non-fulfilment would create";
  - iii. finds that the Panel did not err, in paragraph 7.380 of the Mexico Panel Report, by failing to take into account the design, structure, and architecture of the amended COOL measure in assessing "the risks non-fulfilment would create";
  - iv. finds that the Panel erred, in paragraph 7.423 of the Mexico Panel Report, in concluding that it was unable to ascertain the gravity of the consequences of non-fulfilment of the amended COOL measure's objective, and finds that the Panel subsequently erred, in paragraphs 7.490 and 7.503 of the Mexico Panel Report, in finding that Mexico failed to make a *prima facie* case that the first and second proposed alternative measures would make an "equivalent" degree of contribution to the measure's objective;
- v. consequently, reverses the Panel's overall conclusion, in paragraph 7.613 of the Mexico Panel Report, that Mexico did not make a *prima facie* case that the amended COOL measure violates Article 2.2 of the TBT Agreement; and

vi. finds that there are not sufficient undisputed facts on the record to complete the legal analysis of Mexico's claims under Article 2.2 of the TBT Agreement in respect of the first and second proposed alternative measures; and

d. with respect to the third and fourth proposed alternative measures:

i. reverses the Panel's findings, in paragraphs 7.564 and 7.610 of the Mexico Panel Report, that Mexico did not make a *prima facie* case that its third and fourth proposed alternative measures are reasonably available for purposes of its claims under Article 2.2 of the TBT Agreement.

6.4. For the reasons set out in section 5.3 of this Report, regarding the Panel's analysis under Article III:4 of the GATT 1994, the Appellate Body:

a. finds that the Panel did not err by not attributing contextual relevance to Article IX of the GATT 1994 in its interpretation of Article III:4 of the GATT 1994; and

6.5. For the reasons set out in section 5.4 of this Report, the Appellate Body:

a. finds that the Panel did not err, in paragraphs 6.73 to 6.75 of the Mexico Panel Report, in the way it addressed the United States' request, at the interim review stage, relating to the availability of Article XX of the GATT 1994 as an exception to Article III:4 of the GATT 1994 with respect to the amended COOL measure.

6.6. For the reasons set out in section 5.5 of this Report, the Appellate Body:

a. finds that the condition upon which Mexico's appeal under Article XXIII:1(b) of the GATT 1994 is premised is not satisfied and, consequently, makes no finding with respect to whether the Panel erred by exercising judicial economy with respect to Mexico's claim under Article XXIII:1(b); and

b. finds that the condition upon which the United States' appeal under Article XXIII:1(b) of the GATT 1994 is premised is not satisfied and, consequently, makes no finding with respect to whether the Panel erred, in paragraph 7.663 of the Mexico Panel Report, in finding that Mexico's claim under Article XXIII:1(b) was within the Panel's terms of reference.

6.7. The Appellate Body recommends that the DSB request the United States to bring its measures found in this Report, and in the Mexico Panel Report as modified by this Report, to be inconsistent with the GATT 1994 and the TBT Agreement into conformity with its obligations under those Agreements.

Signed in the original in Geneva this 24th day of April 2015 by:

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Ricardo Ramírez-Hernández  
Presiding Member

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Seung Wha Chang  
Member

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Peter Van den Bossche  
Member

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## ANNEX 1

WORLD TRADE  
ORGANIZATIONWT/DS384/29  
WT/DS386/28

2 December 2014

(14-6999)

Page: 1/2

Original: English

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

## RECOURSE TO ARTICLE 21.5 OF THE DSU BY CANADA AND MEXICO

NOTIFICATION OF AN APPEAL BY THE UNITED STATES  
UNDER ARTICLE 16.4 AND ARTICLE 17 OF THE UNDERSTANDING ON RULES  
AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU),  
AND UNDER RULE 20(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW

The following notification, dated 28 November 2014, from the Delegation of the United States, is being circulated to Members.

1. Further to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and pursuant to Rule 20 of the *Working Procedures for Appellate Review*, the United States hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Reports of the Panels in *United States – Certain Country of Origin Labelling (COOL) Requirements: Recourse to Article 21.5 of the DSU by Canada / Recourse to Article 21.5 of the DSU by Mexico* (WT/DS384/RW and WT/DS386/RW) ("Panel Reports") and certain legal interpretations developed by the Panels.

2. The United States seeks review by the Appellate Body of the Panels' findings and conclusion that amended U.S. COOL measure is inconsistent with Article 2.1 of the *Agreement on Technical Barriers to Trade* (the "TBT Agreement") because the amended COOL measure accords less favorable treatment to complainants' livestock exports.<sup>1</sup> This conclusion is in error and is based on erroneous findings on issues of law and legal interpretations, including:

- (a) the Panels' finding that the detrimental impact does not stem exclusively from legitimate regulatory distinctions because the amended COOL measure entails an increased recordkeeping burden and increased segregation.<sup>2</sup>
- (b) the Panels' finding that the detrimental impact does not stem exclusively from legitimate regulatory distinctions because the current labels provided by the amended COOL measure have a potential for label inaccuracy.<sup>3</sup>

<sup>1</sup> See, e.g., Panel Reports, paras. 7.284-7.285, 8.3(b) (DS384), 8.3(b) (DS386).

<sup>2</sup> See, e.g., Panel Reports, paras. 7.134, 7.149-7.150, 7.220-7.221, 7.271-7.272, 7.282.

<sup>3</sup> See, e.g., Panel Reports, paras. 7.243-7.244, 7.252-7.254, 7.269-7.270, 7.282.

- (c) the Panels' finding that the detrimental impact does not stem exclusively from legitimate regulatory distinctions because the amended COOL measure continues to exempt a large proportion of muscle cuts.<sup>4</sup>

3. In the event that Canada or Mexico appeals the ultimate findings of either Panel that the amended U.S. COOL measure is not inconsistent with Article 2.2 of the TBT Agreement<sup>5</sup>, the United States seeks conditional review of the Panels' legal interpretation of the phrase "the risks non-fulfilment would create."<sup>6</sup> This analysis is based on erroneous findings on issues of law and legal interpretations, including: the Panels' interpretation of what effect a finding with regard to "the risks non-fulfilment would create" can have as to whether any particular alternative measure makes a contribution to the objective equivalent to the contribution made by the challenged measure.<sup>7</sup>

4. The United States seeks review by the Appellate Body of the Panels' findings and conclusion that the amended U.S. COOL measure is inconsistent with Article III:4 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994").<sup>8</sup> This conclusion is in error and is based on erroneous findings on issues of law and legal interpretations, including that "the amended COOL measure accords less favourable treatment within the meaning of Article III:4 of the GATT 1994"<sup>9</sup> and that the amended COOL measure would not be examined under Article XX of the GATT 1994.<sup>10</sup>

5. The United States seeks review by the Appellate Body of the Panels' failure to address the aspect of the relationship between Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994 related to the availability of an exception under Article XX of the GATT 1994 and the Panels' failure to address the availability of Article XX as an exception for Article III:4 of the GATT 1994 with respect to the amended U.S. COOL measure.<sup>11</sup>

6. Finally, in the event that Canada or Mexico appeals the determination by either Panel not to make findings or legal conclusions in relation to the non-violation claim by that complainant under Article XXIII:1(b) of the GATT 1994, the United States seeks conditional review by the Appellate Body of the Panels' findings and conclusion that the non-violation claims under Article XXIII:1(b) of the GATT 1994 were within the Panels' terms of reference.<sup>12</sup> This conclusion is in error and is based on erroneous findings on issues of law and legal interpretations, including that "reviewing the 'consistency' of a measure taken to comply under Article 21.5 of the DSU extends to non-violation claims under Article XXIII:1(b) of the GATT 1994 and Article 26.1 of the DSU."

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<sup>4</sup> See, e.g., Panel Reports, paras. 7.216-7.219, 7.201-7.203, 7.272-7.277, 7.282.

<sup>5</sup> See, e.g., Panel Reports, paras. 8.3(c) (DS384), 8.3(c) (DS386).

<sup>6</sup> See, e.g., Panel Reports, paras. 7.374-7.383.

<sup>7</sup> See, e.g., Panel Reports, paras. 7.481-7.488, 7.501-7.502.

<sup>8</sup> See, e.g., Panel Reports, paras. 7.625, 7.642, 7.643, 8.4 (DS384), 8.4 (DS386).

<sup>9</sup> See, e.g., Panel Reports, paras. 7.642-7.643.

<sup>10</sup> See, e.g., Panel Reports, paras. 6.70, 6.75.

<sup>11</sup> See, e.g., Panel Reports, paras. 6.70-6.75.

<sup>12</sup> See, e.g., Panel Reports, paras. 7.647-7.663.

## ANNEX 2

WORLD TRADE  
ORGANIZATION

WT/DS384/30

16 December 2014

(14-7279)

Page: 1/2

Original: English

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

## RECOURSE TO ARTICLE 21.5 OF THE DSU BY CANADA

NOTIFICATION OF AN OTHER APPEAL BY CANADA  
UNDER ARTICLE 16.4 AND ARTICLE 17 OF THE UNDERSTANDING ON RULES  
AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU),  
AND UNDER RULE 23(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW

The following notification, dated 12 December 2014, from the Delegation of Canada, is being circulated to Members.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) and Rule 23 of the *Working Procedures for Appellate Review*, Canada hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Report of the Panel in *United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Canada* (WT/DS384/RW) (Panel Report) and certain legal interpretations developed by the Panel.

Canada seeks review by the Appellate Body of the Panel's legal conclusion that Canada has not made a *prima facie* case that the amended COOL measure is more trade-restrictive than necessary within the meaning of Article 2.2 of the TBT Agreement.<sup>1</sup> This conclusion is incorrect as a matter of law, and is based on erroneous intermediate findings on issues of law and legal interpretation, including:

- a. the Panel's exclusions of Labels D and E from the scope of its analysis of the degree of contribution to the legitimate objective achieved by the amended COOL measure<sup>2</sup> and its subsequent erroneous finding that the amended COOL measure makes a "considerable but necessarily partial contribution to its objective"<sup>3</sup>;
- b. the Panel's articulation and application of an incorrect legal test under Article 2.2<sup>4</sup> in that it failed to articulate and apply a proper relational analysis of the relevant factors and to consider its findings under the relational and comparative analyses together before reaching a conclusion on the claim of violation;

<sup>1</sup> See e.g. Panel Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 7.613.

<sup>2</sup> See e.g. *ibid.* para. 7.345.

<sup>3</sup> See e.g. *ibid.* para. 7.356.

<sup>4</sup> See e.g. *ibid.* paras. 7.303 and 7.424.

- c. the Panel's exclusion of certain relevant factors from the assessment of the "risks non-fulfilment would create"<sup>5</sup> and its resulting incorrect finding that it was unable to ascertain the gravity of the consequences of not fulfilling the amended COOL measure's objective<sup>6</sup>; and
- d. the Panel's findings that Canada failed to make a *prima facie* case that the first and second alternative measures would make a contribution to the legitimate objective that is at least equivalent to the contribution made by the amended COOL measure<sup>7</sup>, which resulted from the Panel's failure to correctly assess the "risks non-fulfilment would create".

In addition, Canada seeks review by the Appellate Body of the Panel's finding under TBT Article 2.2 that Canada has not sufficiently and adequately identified the third and fourth alternative measures for assessing their reasonable availability and for comparing their respective trade-restrictiveness and degrees of contribution with the amended COOL measure.<sup>8</sup> In reaching this finding, the Panel erred by imposing on Canada an obligation to describe the alternative measures with an excessively high level of precision. In particular, Canada seeks review by the Appellate Body of the Panel's finding that, for the purpose of making a *prima facie* case that an alternative measure is reasonably available, a complainant bears the burden of providing a cost estimate of the alternative measure or evidence substantiating the likely magnitude of the costs that would be associated with the alternative measure.<sup>9</sup>

Canada also requests the Appellate Body to find that the Panel failed to make an objective assessment of the matter at issue, including an objective assessment of the facts, as required by Article 11 of the DSU, with respect to the above-referenced intermediate finding that the amended COOL measure makes a "considerable but necessarily partial contribution to its objective".<sup>10</sup>

While Canada does not take issue with the Panel's overall conclusion and most of its analysis under Article 2.1 of the TBT Agreement, Canada seeks review by the Appellate Body of:

- a. the Panel's legal reasoning in respect of its legitimate regulatory distinction (LRD) analysis under Article 2.1 of the TBT Agreement that caused it to exclude Labels D and E as well as the amended COOL measure's prohibition of trace-back from the LRD analysis<sup>11</sup>; and
- b. the Panel's failure to make an objective assessment of the facts, as required by Article 11 of the DSU, because its exclusion of Label E from its LRD analysis also lacked a basis in the evidence contained in the Panel record.<sup>12</sup>

In the event that the Appellate Body finds that there is no violation of either Article 2.1 of the TBT Agreement or Article III:4 of the GATT 1994, Canada also seeks review by the Appellate Body of the exercise of judicial economy by the Panel with regard to Canada's non-violation claim under Article XXIII:1(b) of the GATT 1994.<sup>13</sup>

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<sup>5</sup> See e.g. *ibid.* paras. 7.374-7.383.

<sup>6</sup> See e.g. *ibid.* paras. 7.423-7.424.

<sup>7</sup> See e.g. *ibid.* paras. 7.490 and 7.503.

<sup>8</sup> See e.g. *ibid.* paras. 7.553 and 7.602.

<sup>9</sup> See e.g. *ibid.* paras. 7.556 and 7.603.

<sup>10</sup> See e.g. *ibid.* para. 7.356.

<sup>11</sup> See e.g. *ibid.* paras. 7.279, 7.280, and 7.281.

<sup>12</sup> See e.g. *ibid.* para. 7.280.

<sup>13</sup> See e.g. Panel Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 7.716.

## ANNEX 3

WORLD TRADE  
ORGANIZATION

WT/DS386/29

16 December 2014

(14-7280)

Page: 1/3

Original: English

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

## RECOURSE TO ARTICLE 21.5 OF THE DSU BY MEXICO

NOTIFICATION OF AN OTHER APPEAL BY MEXICO  
UNDER ARTICLE 16.4 AND ARTICLE 17 OF THE UNDERSTANDING ON RULES  
AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU),  
AND UNDER RULE 23(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW

The following notification, dated 12 December 2014, from the Delegation of Mexico, is being circulated to Members.

1. Pursuant to Articles 16.4 and 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) and Rule 23(1) of the *Working Procedures for Appellate Review*, the United Mexican States (Mexico) hereby notifies its decision to appeal to the Appellate Body certain issues of law and certain legal interpretations developed by the Panel in *United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Mexico* (WT/DS386/RW) (Panel Report), and the Panel's failure to make an objective assessment of the matter as required by Article 11 of the DSU.

2. Pursuant to Rule 23(2)(c)(ii) of the *Working Procedures for Appellate Review*, this Notice of Other Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to Mexico's ability to refer to other paragraphs of the Panel Report in the context of this appeal.

**I. Appeal of the Panel's conclusion that Mexico did not make a *prima facie* case that the amended COOL measure is more trade restrictive than necessary within the meaning of Article 2.2 of the TBT Agreement and the Panel's failure to make an objective assessment of the matter before it as required under Article 11 of the DSU**

3. Mexico seeks review by the Appellate Body of the Panel's findings that Mexico did not make a *prima facie* case that the amended COOL measure is more trade restrictive than necessary within the meaning of Article 2.2 of the Agreement on Technical Barriers to Trade (TBT Agreement).<sup>1</sup> The Panel's conclusion is in error and is based on erroneous findings on issues of law, related interpretations, and the Panel's failure to make an objective assessment of the matter before it as required by Article 11 of the DSU. The Panel erred:

<sup>1</sup> Panel Reports, *US – COOL (Article 21.5)*, paras. 7.612-7.613; Panel Report, *US – COOL (Article 21.5 – Mexico)*, para. 8.3(c).

- a. by finding that overall conclusions under Article 2.2 may not be drawn from the "relational analysis" in the first step of the "necessity test"<sup>2</sup>, by improperly applying an "exceptional circumstances" requirement<sup>3</sup>, by failing to complete the "relational analysis", and by failing to make a finding as to whether the amended COOL measure is more trade-restrictive than necessary at the conclusion of the "relational analysis".<sup>4</sup>
- b. by failing to properly consider and take into account the design and operation of Label E (the ground beef label) in its assessment of the amended COOL measure's degree of contribution to the fulfilment of the legitimate objective.<sup>5</sup>
- c. by limiting its assessment of the risks that non-fulfilment of the amended COOL measure's objective would create to consumer interest in country of origin information, and the willingness of consumers to pay the costs of obtaining country of origin information on product labels.<sup>6</sup>
- d. by failing to consider and take into account the relative importance of the interests or values furthered by the amended COOL measure and the design, architecture, revealing structure, operation and application of the measure in its assessment of the risks that non-fulfilment of the measure's objective would create.<sup>7</sup>
- e. by applying an erroneous approach to its assessment of the gravity of the consequences that would arise from non-fulfilment of the amended COOL measure's objective<sup>8</sup>, by failing to make an objective assessment of the matter before it as required by Article 11 of the DSU with respect to the arguments and evidence put forward by the parties for the purpose of assessing the gravity<sup>9</sup>, and by failing to make a finding on the gravity of the consequences that would arise from non-fulfilment of the amended COOL measure's objective.<sup>10</sup>
- f. by not completing the "comparative analysis" of the amended COOL measure with the first and second alternative measures because it was unable to determine the specific implications of risks of non-fulfilment of the amended COOL measure's objective<sup>11</sup> for the purposes of evaluating whether the first and second alternative measures make an equivalent degree of contribution, taking into account the risks non-fulfilment would create.<sup>12</sup>
- g. by failing to undertake an assessment of whether the first and second alternative measures are reasonably available, less trade-restrictive and provide an equivalent contribution to the fulfilment of the amended COOL measure's objective.<sup>13</sup>

<sup>2</sup> Panel Reports, *US – COOL (Article 21.5)*, para. 7.298.

<sup>3</sup> Panel Reports, *US – COOL (Article 21.5)*, para. 7.298.

<sup>4</sup> Panel Reports, *US – COOL (Article 21.5)*, paras. 7.424-7.425.

<sup>5</sup> Panel Reports, *US – COOL (Article 21.5)*, paras. 7.343-7.345, 7.346-7.356 and footnote 785 to para. 7.347, citing data in paragraphs 7.258 and 7.262.

<sup>6</sup> Panel Reports, *US – COOL (Article 21.5)*, paras. 7.375, 7.381, 7.383, and 7.418. In this respect, the Panel erred in its interpretation of the Appellate Body's reasons respecting the assessment of the risks that non-fulfilment would create under Article 2.2 in the original proceedings. See Panel Reports, *US – COOL (Article 21.5)*, para. 7.375, citing Appellate Body Report, *US – COOL*, para. 478.

<sup>7</sup> Panel Reports, *US – COOL (Article 21.5)*, para. 7.379-7.380.

<sup>8</sup> Panel Reports, *US – COOL (Article 21.5)*, paras. 7.383, 7.418-7.420, 7.422-7.424.

<sup>9</sup> Panel Reports, *US – COOL (Article 21.5)*, 7.384-7.414, 7.416, 7.418-7.422.

<sup>10</sup> Panel Reports, *US – COOL (Article 21.5)*, paras. 7.423-7.424, 7.488, 7.501, and 7.611.

<sup>11</sup> Panel Reports, *US – COOL (Article 21.5)*, paras. 7.488 and 7.501.

<sup>12</sup> Panel Reports, *US – COOL (Article 21.5)*, paras. 7.488-7.491 and 7.501-7.503.

<sup>13</sup> Panel Reports, *US – COOL (Article 21.5)*, paras. 7.488, 7.491, 7.500, and 7.503. This includes the Panel's error in interpreting and applying Article 2.2 of the TBT Agreement by failing to make a finding that Mexico's second alternative measure would provide a contribution to the fulfilment of the amended COOL measure's objective that would be at least equivalent to that of the amended COOL measure, because it would provide exactly the same origin information as that required under Label E (the ground beef label) of the amended COOL measure.

- h. by requiring Mexico to adduce unnecessarily precise explanations as to how the third and fourth alternative measures proposed by Mexico would be implemented in the United States<sup>14</sup> and by failing to make an objective assessment of the matter before it as required by Article 11 of the DSU.

**II. Appeal of the Panel's finding that Label E (the ground meat label) is not relevant to the legal analysis under Article 2.1 of the TBT Agreement**

4. Mexico seeks review by the Appellate Body of the Panel's erroneous finding that Label E (the ground meat label) is not relevant to the legal analysis under Article 2.1 of the TBT Agreement.<sup>15</sup>

**III. Conditional appeal of the Panel's decision to exercise judicial economy with respect to Mexico's claim of non-violation nullification or impairment under Article XXIII:1(b) of the GATT 1994**

5. In the event that the Appellate Body overturns the Panel's findings that the COOL measure is inconsistent with Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994, Mexico appeals the Panel's decision to exercise judicial economy with respect to Mexico's claim of non-violation nullification or impairment under Article XXIII:1(b) of the GATT 1994 and asks the Appellate Body to complete the analysis.<sup>16</sup>
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<sup>14</sup> Panel Reports, *US – COOL (Article 21.5)*, paras. 7.564, 7.601-7.602, and 7.608-7.610. See also Panel Reports, *US – COOL (Article 21.5)*, paras. 7.522, 7.525, 7.526, 7.538, 7.542, 7.551-7.553, 7.556-7.557, 7.559-7.560, 7.562-7.563, 7.599, 7.601, 7.602 and 7.609-7.610.

<sup>15</sup> Panel Reports, *US – COOL (Article 21.5)*, paras. 7.206-7.207 and 7.280.

<sup>16</sup> Panel Reports, *US – COOL (Article 21.5)*, paras. 7.716 and 8.4.

**ANNEX 4****ORGANISATION MONDIALE  
DU COMMERCE****ORGANIZACIÓN MUNDIAL  
DEL COMERCIO****WORLD TRADE ORGANIZATION****APPELLATE BODY***United States – Certain Country of Origin Labelling (COOL) Requirements*Recourse to Article 21.5 of the DSU by Canada and Mexico

AB-2014-10

**Procedural Ruling****1 BACKGROUND**

1.1. On Friday, 28 November 2014, the United States notified the Dispute Settlement Body (DSB) of its intention to appeal certain issues of law covered in the Panel Reports in *United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Canada and Mexico* (WT/DS384/RW, WT/DS386/RW) and filed a Notice of Appeal with the Appellate Body Secretariat. The notification was circulated and the Notice of Appeal filed in advance of a special meeting of the DSB scheduled for the same day to consider these Panel Reports. In its Notice of Appeal, the United States challenges the Panel's findings regarding Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994. The United States also alleges that the Panel failed to examine the measure at issue under Article XX of the GATT 1994 and raises conditional challenges in respect of Article 2.2 of the TBT Agreement and the Panel's terms of reference.

1.2. At the request of Canada and Mexico, the special meeting of the DSB proceeded as scheduled to consider these Panel Reports, notwithstanding the filing of a Notice of Appeal by the United States earlier in the day. This meeting was subsequently suspended in order to facilitate informal consultations about a joint request to the Appellate Body by Canada, Mexico, and the United States (the "participants") to modify the time-periods for filing written submissions in this appeal.

1.3. At 3:58 p.m. on the same day, the participants filed a joint request with the Division hearing this appeal to modify certain time-periods for filing written submissions pursuant to Rule 16(2) of the Working Procedures for Appellate Review (Working Procedures). More specifically, the participants requested the Division to fix the deadlines for filing the United States' appellant's submission to 8 December 2014; the other appellants' submissions to 15 December 2014; and the appellees' submissions to 12 January 2015. The participants jointly submitted that "exceptional circumstances" present in this dispute mean that strict adherence to the regular deadlines would result in a "manifest unfairness" within the meaning of Rule 16(2) of the Working Procedures. In particular, the participants submitted that the time-period set out in Rule 21 would not afford the United States as appellant sufficient time to present its arguments. This would impede the development of arguments in subsequent submissions, thereby impeding the orderly conduct of the appeal. In support of their request, the participants pointed to serious resource constraints due to concurrent work on other pending proceedings, as well as the constraints imposed by the contemporaneous holiday period, the multiple complex issues at stake in this dispute, and the present workload of the Appellate Body.

1.4. By letter sent at 4:51 p.m. on the same day, the Presiding Member of the Division invited the third participants to provide their comments on the joint request of the participants by 3 p.m. on 1 December 2014. In order to offer the third participants an opportunity to comment on the joint request of the participants, and to ensure orderly procedure in the conduct of this appeal in accordance with Rule 16(1) of the Working Procedures, the Division suspended the deadlines for the filing of any Notice of Other Appeal, and of the written submissions in this appeal, until the issuance of this Ruling. Brazil, the European Union, India, and Japan submitted comments. All of them considered that it is within the discretion of the Appellate Body to modify deadlines for filing written submissions, and no third participant expressed any objections to the extension of deadlines in the present case. Brazil expressed no view as to whether the request meets the conditions set out in Rule 16(2) of the Working Procedure, whereas the European Union and Japan submitted that the factors in this case may give rise to exceptional circumstances, without such factors necessarily setting a precedent for Rule 16(2) or being categorically accepted as constituting "exceptional circumstances" in future cases. India submitted that resource constraints, especially when experienced by developing countries, could constitute "exceptional circumstances" for modifying time-periods, and that what is considered to constitute "exceptional circumstances" in this case could be relevant factors in future appeals. Japan expects that, if the request of the participants is granted, the time-period for the filing of third participants' submissions would be extended to 15 January 2015.

## **2 THE JOINT REQUEST FROM CANADA, MEXICO, AND THE UNITED STATES TO EXTEND TIME-PERIODS FOR FILING SUBMISSIONS**

2.1. Pursuant to Article 17.9 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), the Appellate Body has the authority to draw up working procedures for appellate proceedings in consultation with the Chair of the DSB and the Director-General. The Working Procedures, adopted pursuant to this mandate, contain Rule 26(1), which provides that, "after the commencement of an appeal, the division shall draw up an appropriate working schedule for that appeal in accordance with the time-periods stipulated in these Rules". In drawing up an appropriate working schedule, Rule 16(2) permits us to consider requests to derogate from the time-periods stipulated in the Working Procedures.

2.2. The request before us would require derogation from: Rule 21(1), which requires an appellant's submission to be filed on the same day as the date of the filing of the Notice of Appeal; Rule 22(1), which requires the appellees' submissions to be filed within 18 days after the date of the filing of the Notice of Appeal; and Rule 23(3), which requires the other appellants' submissions to be filed within 5 days after the filing of the Notice of Appeal. We also note that, in practical terms, the request implicates a derogation from Rule 18 of the Working Procedures, which provides that "[n]o document is considered filed with the Appellate Body unless the document is received by the Secretariat within the time-period set out for filing in accordance with these Rules." Under the terms of Rule 16(2), we may consider requests to derogate from these provisions "[i]n exceptional circumstances, where strict adherence to a time-period set out in these Rules would result in a manifest unfairness". Rule 16(2) of the Working Procedures provides:

In exceptional circumstances, where strict adherence to a time-period set out in these Rules would result in a manifest unfairness, a party to the dispute, a participant, a third party or a third participant may request that a division modify a time-period set out in these Rules for the filing of documents or the date set out in the working schedule for the oral hearing. Where such a request is granted by a division, any modification of time shall be notified to the parties to the dispute, participants, third parties and third participants in a revised working schedule.

2.3. In assessing the joint request of the participants, we are cognisant that the procedural rules of WTO dispute settlement, including the Working Procedures, are designed to promote the fair, prompt, and effective resolution of trade disputes.<sup>1</sup> As the Appellate Body has stated, the Working Procedures "have been drawn up pursuant to the DSU and as a means of ensuring that the dispute settlement mechanism achieves the aim of securing a positive solution to a dispute".<sup>2</sup>

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<sup>1</sup> Appellate Body Report, *US – FSC*, para. 166.

<sup>2</sup> Appellate Body Report, *EC – Sardines*, para. 139.

2.4. We note, in general terms, that compliance with time-periods in WTO dispute settlement is an obligation for participants and of systemic interest to all WTO Members. This is reflected clearly in the DSU, which provides that "[t]he *prompt* settlement of situations in which a Member considers that any benefits accruing to it ... are being impaired ... is essential to the effective functioning of the WTO".<sup>3</sup> The concern to ensure the prompt settlement of disputes through the fixing of time-periods is evident throughout the DSU, from provisions on the broader timeframes for the settlement of disputes<sup>4</sup> to specific time-periods set out for particular stages of proceedings.<sup>5</sup> The time-periods set out in Rules 21(1), 22(1), and 23(3), from which the participants' request would require derogation, are provisions aimed at facilitating the prompt settlement of disputes. Rule 16(2) of the Working Procedures subsists within this broader framework. In particular, we view the use of terms such as "exceptional circumstances", "strict adherence", and "manifest unfairness" in Rule 16(2) as indicative of the systemic interest of all Members in maintaining the integrity of the time-periods set out in WTO dispute settlement. In our view, any derogation from those time-periods pursuant to Rule 16(2) must be clearly justified in the specific circumstances of a given case.

2.5. We observe that the WTO dispute settlement system is currently experiencing a high level of activity. We recognise that this high level of dispute settlement activity is onerous on those WTO Members actively engaged in multiple, parallel proceedings. We note further that the capacity for Members involved in multiple, parallel proceedings to manage resource constraints could at times be limited by the fact that dispute settlement proceedings are initiated, and timeframes in one proceeding are set, independently from other proceedings. As a result, Members engaged in multiple, parallel proceedings can experience peak demands on their capacity to resource their dispute settlement activities, especially where filing dates or hearing dates in multiple proceedings occur contemporaneously or in close sequence. In such situations, a Member's ability to engage effectively in disputes may be burdened to such a point where its ability to properly exercise its rights under the DSU may be impaired. We would expect, however, that Members engaged in multiple, parallel proceedings make adequate resources available to engage in their dispute settlement activities. In this regard, we also recognize that the ability of a Member to make available such resources may depend on its capacities and the frequency with which it participates in WTO dispute settlement.

2.6. In addition, we consider that other extraneous factors, such as the year-end closure of government offices, may be relevant to an assessment under Rule 16(2) in a given case. For instance, the year-end closure of government offices could restrict the ability of personnel to make sufficient preparations for a submission or hearing.

2.7. At the same time, we are cognisant that modifications to the time-periods in one proceeding could have broader implications, especially in the current context of increased dispute settlement activity. First, modifications could present organizational implications for the Appellate Body. This may especially be the case where several appellate proceedings are conducted in parallel, with Appellate Body Members serving concurrently on multiple Divisions. Second, and relatedly, modifications of the time-periods in one appellate proceeding may require consequential changes to the time-periods and conduct of other parallel or subsequent proceedings, and thus may affect the rights and legitimate expectations of other WTO Members to have their cases heard and completed within the time-periods set out in the DSU. With the foregoing considerations in mind, we turn to the particular circumstances of the participants in the present dispute.

2.8. We note that the United States is currently a participant in three parallel appeals, as well as in a number of panel proceedings, some of which could be appealed shortly. We also take note of the participation of Canada and Mexico in other concurrent proceedings. As we have considered, such a degree of involvement in multiple, parallel proceedings can lead to acute resource constraints at particular junctures. Additionally, any changes to the time-periods for one participant's filing of submissions would likely require modifications to those of other participants. We also take note of the participants' concerns regarding the concurrence of certain time-periods for filing written submissions in this dispute with the year-end closure of government offices.

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<sup>3</sup> Article 3.3 of the DSU. (emphasis added)

<sup>4</sup> See e.g. Article 20 of the DSU.

<sup>5</sup> See e.g. Articles 4.7, 16.4, and 17.5 of the DSU.

2.9. Another element to be considered is that the request before us is made jointly by the participants. It stands in contrast to other instances where requests to modify time-periods have been unilateral<sup>6</sup> or were contested.<sup>7</sup> While the agreement of all participants is neither necessary nor sufficient to the grant of a request under Rule 16(2), it does suggest that the grant of such a request would be unlikely to prejudice the due process rights of any of the participants.

2.10. A further relevant consideration is that the third participants have not raised any objection to the participants' request. We thus do not consider that the grant of an extension to the filing dates would prejudice the due process rights of third participants.

2.11. We are, however, cognisant that the United States' initiation of its appeal has implications for the participation of third participants in this dispute. In particular, pursuant to the time-period specified in Rule 24(1) of the Working Procedures, third participants must file written submissions within 21 days of the United States' filing of its Notice of Appeal. Within that period, third participants must review the appellant's, other appellants', and appellees' submissions and prepare their own submissions in response to the Panel Reports and these submissions. We therefore consider, in the circumstances of this case, and taking account of the impact of the extensions for the participants, that this 21-day period may be insufficient to allow the third participants a meaningful opportunity to review the appellees' submissions and to finalize their own submissions.

2.12. Having considered all of the particular circumstances of the present case and in the light of the above considerations as a whole, we consider that in the exceptional circumstances of this case, "strict adherence" to the regular time-periods for filing submissions set out in Rules 21, 22, 23, and 24 would result in "manifest unfairness". At the same time, we are guided by the Working Procedures to limit modifications to the time-periods set out in these Rules to the minimum extent necessary in this case. Accordingly, we have decided to modify, to the extent appropriate, in the particular circumstances of this case, the time-periods for filing written submissions by the participants and third participants as follows:

Modified Dates for the Submission of Documents

<u>Process</u>	<u>Rule</u>	<u>Date</u>
Appellant's submission	Rules 16 and 21(1)	5 December 2014
Notice(s) of Other Appeal	Rules 16 and 23(1)	12 December 2014
Other appellants' submissions	Rules 16 and 23(3)	12 December 2014
Appellees' submissions	Rules 16, 22, and 23(4)	9 January 2015
Third participants' submissions	Rules 16 and 24(1)	12 January 2015
Third participants' notifications	Rules 16 and 24(2)	12 January 2015

Signed in Geneva this 2nd day of December 2014 by:

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Ricardo Ramírez-Hernández  
Presiding Member

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Seung Wha Chang  
Member

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Peter Van den Bossche  
Member

<sup>6</sup> See e.g. Appellate Body Report, *US – Shrimp (Thailand) / US – Customs Bond Directive*, paras. 17-18.

<sup>7</sup> See e.g. Appellate Body Reports, *China – Rare Earths*, para. 1.31.

**ANNEX 5****ORGANISATION MONDIALE  
DU COMMERCE****ORGANIZACIÓN MUNDIAL  
DEL COMERCIO****WORLD TRADE ORGANIZATION****APPELLATE BODY***United States – Certain Country of Origin Labelling (COOL) Requirements*Recourse to Article 21.5 of the DSU by Canada and Mexico

AB-2014-10

**Procedural Ruling**

1.1. On 11 December 2014, the Appellate Body Division hearing the above appeal received a letter from Australia requesting that the deadline for the filing of the third participants' submissions be extended from 12 January to 15 January 2015. We understand that Australia's letter was copied to the participants and third participants in this appeal.

1.2. Australia notes that, in its Procedural Ruling of 2 December 2014, the Division set the deadline for the filing of the appellees' submissions to Friday, 9 January, and the deadline for the filing of the third participants' submissions to Monday, 12 January 2015. Australia acknowledges that a time-period of three days between the filing of the appellees' submissions and the filing of the third participants' submissions is in line with the standard time-periods set out in the Working Procedures for Appellate Review (Working Procedures); however, Australia notes that, in the particular circumstances of this case, this time-period runs over a weekend, providing third participants with only one working day to incorporate reactions to the appellees' submissions into their third participants' submissions. Australia further explains that the challenges it faces in preparing its submission are exacerbated by the decreased staffing capacity during the peak summer holiday period in Australia.

1.3. By letter dated 12 December 2014, the Division invited the participants and the other third participants to comment on Australia's request. Brazil, Colombia and New Zealand supported Australia's request that the deadline for the filing of the third participants' submissions be extended from 12 January to 15 January 2015. Canada and the United States expressed no objections to an extension of the deadline. Mexico submitted that it had no objection if the timetable for the subsequent stages of the appellate proceeding is not affected and if the extension is granted to all third participants. Japan stated that it had no specific comments on Australia's request.

1.4. We recall that, pursuant to a joint request by the participants to modify the time-periods for filing written submissions, we issued a Procedural Ruling on 2 December 2014, extending the time-periods for the filing of the United States' appellant's submission to 5 December, the Notices of Other Appeal and the other appellants' submissions to 12 December, and the appellees' submissions to 9 January. In its comments on the joint request of the participants' request, Japan had stated that it expected that the filing dates for third participants' submissions would be adapted to correspond to standard time-periods, if the joint request of the participants was granted. However, no request for an extension of the time-period for the filing of third participants' submission had been made. Accordingly, the deadline was set for 12 January 2014, that is, three days after the modified date for filing appellees' submissions, in keeping with standard time-periods set out in the Working Procedures.

1.5. Australia's present request would require a modification of the time-periods set out in our Procedural Ruling of 2 December 2014, which provided derogation from, *inter alia*, Rule 24 of the Working Procedures. This rule stipulates that any third participant's submission shall be filed within 21 days after the date of the filing of the Notice of Appeal. Pursuant to Rule 16(2), we may consider requests to derogate from this provision "[i]n exceptional circumstances, where strict adherence to a time-period set out in these Rules would result in a manifest unfairness".

1.6. In our Procedural Ruling of 2 December 2014, we noted that the procedural rules of WTO dispute settlement, including the Working Procedures, are designed to promote the fair, prompt, and effective resolution of trade disputes<sup>1</sup>, and that the Working Procedures "have been drawn up pursuant to the DSU and as a means of ensuring that the dispute settlement mechanism achieves the aim of securing a positive solution to a dispute".<sup>2</sup> We also recall our observation that compliance with time-periods in WTO dispute settlement is an obligation for participants and of systemic interest to all WTO Members, and that any derogation from those time-periods pursuant to Rule 16(2) must be clearly justified in the specific circumstances of a given case.

1.7. We note that Australia's request is based partly on similar reasons as the participants' earlier joint request for extending the time-periods for the filing of written submissions in this appeal, which we considered to be relevant factors in our assessment of exceptional circumstances pursuant to Rule 16(2). We note in this regard Australia's reference to decreased staffing capacity during the peak summer holiday period in Australia and other Southern hemisphere countries.

1.8. Australia also submits that the time-period for the filing of third participants' submissions ends on a Monday, and that this provides third participants with only one working day to incorporate reactions to the appellees' submissions filed on a Friday into their third participants' submissions. We do not consider this in itself to be an exceptional situation. On the contrary, this situation arises under the time-periods set out in the Working Procedures whenever the time-period for the filing of third participants' submissions ends on a Monday. At the same time, because this coincides with decreased staffing capacity during the year-end closure and peak summer holiday period in Southern hemisphere countries, we consider it relevant to the assessment under Rule 16(2) in the specific circumstances of the present case.

1.9. As a further relevant consideration, we note that the participants and other third participants have not raised any objection to this request. Accordingly, we consider that granting an extension to the deadline for the filing of the third participants' submissions would not prejudice the due process rights of the participants. However, in order to ensure due process also with regard to the other third participants, we must extend any extension granted to Australia also to the other third participants.

1.10. In the light of all of the above elements, we consider that, in the exceptional circumstances of this case, "strict adherence" to the regular time-periods for the filing of the third participants' submissions pursuant to Rule 24 of the Working Procedures would result in "manifest unfairness". Accordingly, we have decided to extend the deadline for the filing of the third participants' notifications and third participants' submissions to 15 January 2015.

Signed in Geneva this 17th day of December 2014 by:

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Ricardo Ramírez-Hernández  
Presiding Member

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Seung Wha Chang  
Member

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Peter Van den Bossche  
Member

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<sup>1</sup> Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, para. 166.

<sup>2</sup> Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, para. 139.

**ANNEX 6****ORGANISATION MONDIALE  
DU COMMERCE****ORGANIZACIÓN MUNDIAL  
DEL COMERCIO****WORLD TRADE ORGANIZATION****APPELLATE BODY***United States – Certain Country of Origin Labelling (COOL) Requirements*Recourse to Article 21.5 of the DSU by Canada and Mexico

AB-2014-10

**Procedural Ruling**

1. On 18 December 2014, we received a joint letter from Canada, Mexico, and the United States in the above proceedings. In that letter, Canada and the United States request that the oral hearing in this appeal be opened to public observation. Specifically, Canada and the United States request that we authorize public observation of the statements and answers to questions of the participants, as well as those of third participants who agree to make their statements and responses to questions public. Canada and the United States make this request on the understanding that any information that had been designated as confidential in the documents filed by any participant in the panel proceedings would be adequately protected in the course of the oral hearing. They propose that public observation be permitted via simultaneous closed-circuit television broadcasting with the option for the transmission to be turned off when issues involving confidential information are discussed, or if a third participant indicates that it wishes to keep its oral presentation confidential.

2. For its part, Mexico does not object to allowing observation by the public of the oral hearing. Mexico requests that the Division reflect in its report that Mexico's position is specific to these proceedings, without prejudice to its systemic views on the matter.

3. On 19 December 2014, we invited any third participant that wished to comment on this request to do so by 12 noon on 6 January 2015. By that deadline, only Japan had responded, indicating that it has no objection to this request.<sup>1</sup>

4. We recall that requests to allow public observation of the oral hearing have been made, and have been authorized, in 11 previous appeals.<sup>2</sup> In its rulings, the Appellate Body has held that it has the power to authorize such requests by the participants, provided that this does not affect the confidentiality in the relationship between the third participants and the Appellate Body, or impair the integrity of the appellate process. We concur with the reasons previously expressed by the Appellate Body, and its interpretation of Article 17.10 of the DSU, in this regard, and consider that it applies equally in circumstances such as those prevailing in these appellate proceedings.

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<sup>1</sup> In addition, Brazil and Australia responded in the afternoon of 6 January that they had no objection to this request.

<sup>2</sup> The first time the Appellate Body authorized, at the request of the participants, public observation of the oral hearing was in 2008 in *United States / Canada – Continued Suspension of Obligations in the EC – Hormones Dispute* (WT/DS320/AB/R / WT/DS321/AB/R); most recently the Appellate Body authorized public observation of the oral hearing in *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* (WT/DS400/AB/R / WT/DS401/AB/R).

5. In this appeal, the participants request that the Appellate Body allow observation by the public of the oral hearing by means of simultaneous closed-circuit television broadcasting, with the option for the transmission to be turned off when issues involving confidential information are discussed, or if a third participant indicates that it wishes to keep its oral presentation confidential. In our view, these modalities would operate to protect confidential information in the context of a hearing that is open to public observation, and would not have an adverse impact on the integrity of the adjudicative function performed by the Appellate Body. We also consider that, during public observation by means of simultaneous closed-circuit television broadcasting in previous appeals, the confidentiality of information designated as such and the rights of those third participants that did not wish to have their oral statements made subject to public observation have been fully protected.

6. We therefore authorize public observation of the oral hearing in this appeal on the terms set out below. Accordingly, pursuant to Rule 16(1) of the Working Procedures for Appellate Review, we adopt the following additional procedures for the purpose of these appellate proceedings:

- a. The oral hearing will be open to public observation by means of simultaneous closed-circuit television broadcasting, shown in a separate room to which duly registered delegates of WTO Members and members of the general public will have access.
- b. Oral statements and responses to questions by the third participants that have indicated their wish to maintain the confidentiality of their submissions, as well as – at the request of any participant – any discussion of information that the participants designated as confidential in documents submitted to the Panel, will not be subject to public observation.
- c. Any request by a third participant wishing to maintain the confidentiality of its oral statements and responses to questions should be received by the Appellate Body Secretariat no later than 5 p.m. Geneva time on Monday, 9 February 2015.
- d. An appropriate number of seats will be reserved in the separate room where the closed-circuit television broadcast will be shown for delegates of WTO Members that are not participants or third participants in these proceedings. WTO delegates wishing to observe the oral hearing are requested to register in advance with the Appellate Body Secretariat.
- e. Notice of the oral hearing will be provided to the general public on the WTO website. Members of the general public wishing to observe the oral hearing will be required to register in advance with the Appellate Body Secretariat, in accordance with the instructions set out in the WTO website notice.

Signed in Geneva this 7th day of January 2015 by:

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Ricardo Ramírez-Hernández  
Presiding Member

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Seung Wha Chang  
Member

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Peter Van den Bossche  
Member

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