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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY CANADA AND MEXICO

AB-2014-10

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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-Rai sed Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pe cans, Ginseng, and Macadamia Nuts, United States Federal Register , 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-Rai sed Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pe cans, 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)
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, United States Code , 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 Go verning 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 US – COOL
original panel reports	Panel Reports, United States – Certain Country of Origin Labelling (COOL) Requirements , WT/DS384/R / WT/DS386/R
PACA	Perishable Agricultural Commodities Act of 1930, United States Code of Federal Regulations , Title 7, Section 499 (Panel Exhibits CDA-10 and MEX-7)
Panel Reports	Panel Reports, United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Canada and Mexico , 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 Depart ment 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 an

Short Title	Full Case Title and Citation
Canada – Aircraft (Article 21.5 – Brazil)	Appellate Body Report, Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU

Short Title	Full Case Title and Citation
EC – Seal Products	Appellate Body Reports, European Communities – Measures Prohibiting the Importation and Marketing of Seal Products , WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014
EC – Seal Products	Panel Reports, European Communities – Measures Prohibiting the Importation and Marketing of Seal Products , 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
EC – Selected Customs Matters	Appellate Body Report, European Communities – Selected Customs Matters , WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, p. 3791
EC – Tube or Pipe Fittings	Appellate Body Report, European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil , WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, p. 2613
EC and certain member States – Large Civil Aircraft	Appellate Body Report, European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft , WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
Japan – Agricultural Products II	Appellate Body Report,

WORLD TRADE ORGANIZATION
APPELLATE BODY

United States – Certai n 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 [1]
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 [2]
New Zealand,

treatment to imported livestock than to like domestic livestock. [7] 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". [8] 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 properly". [9]

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 live stock, within the meaning of Article III:4 of the GATT 1994. [27]

1.12. Finally, in the light of these findings of vi olation, 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. [28]

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 [29] pursuant to Rule 20 of the Working Procedures for Appellate Review [30] (Working Procedures). The notification was

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. [31] In accordance with these time-periods, the United States filed an appellant's submission on 5 December 2014. [32]

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 [33] and an other 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

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.[35] 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.[36] Guatemala[37] and Korea[38] 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[39], 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

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 meas ure, 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

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')".[46] 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.[47]

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

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".[51] 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.[52]

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".[53] 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*.[54] 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.[55] 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".[56] 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.[57] 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

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[51] United States' appellant's submission, para. 184 (referring to Panel Reports, paras. 7.28-7.30).
[52] United States' appellant's submission, para. 201.
[53] United States' appellant's submission, para. 207.
[54] United States' appellant's submission, para. 208.
[55] United States' appellant's submission, para. 208 (referring to Appellate Body Report, *US – Clove Cigarettes*, para. 225).
[56] United States' appellant's submission, para. 208 (referring to Panel Reports, *EC – Seal Products*, para. 7.317).
[57] United States' appellant's submission, para. 187.

the implementation of the measure at issue without necessarily involving protectionist intent." [58]

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"[81], 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."[82]

2.40. The United States contends that Article 21.5 of the DSU, read in its context, demonstrates

consumers, in the light of the exemptions from th e 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 amen ded COOL measure retains essentially the same exemptions as under the original COOL measur e, and noted features of the amended COOL measure that impact on the accuracy of the info rmation 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 burd en 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

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 th is 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

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.

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

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

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 [103]; 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

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.[104] 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.[105]

2.72. Canada disagrees with the United States' argument that the approach taken by the Panel in these disputes would render Article IX "inutile".

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. [111]

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. [112] 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. [113]

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

very scenarios as warranting specific attention undermines the credibility of the United States' criticism of the Panel's analysis. [116]

2.84. Mexico further requests the Appellate Body

precisely because scenarios giving rise to such inaccuracies "appear to be unlikely in the United States' actual trade of livestock."[123]

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

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 or

the Appellate Body observed that the "balance se t 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

labels under the amended COOL measure, can only be assured of receiving complete and accurate information when purchasing Category A muscle cuts. [136] 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 re

producers of livestock used to produce domestic be ef trimmings, while, on the other hand, Label E

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. [150] While the Appellate Body has noted it is not always required [151], 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.

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 conseq uences 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, rath er, 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,

partial contribution". [157] 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. [158]

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. [159] 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 al ternative measure need not necessarily achieve precisely the same contribution or degree of fulfilment of the measure's objective in order to

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.[166] Canada requests the

in that case, bore the burden to substantiate the likely nature or magnitude of associate costs.[174] 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."[175] 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."[176] Indeed, it was on this basis that the Panel

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."[177] According to Mexico, the Panel's

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. [189]

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. [190] 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

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 prer equisite 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. [196] 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 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. [199] 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 exportedesto07voqad4(la)50(t)6Sd1ertie0ment.

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". [204]

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

[204] United States' appellee's submission, para. 257.

would choose a different public policy goal and means to accomplish that goal than what the importing Member has decided. [208]

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. [209] 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". [210] 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". [211] 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. [212]

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

[208] United States' appellee's submission, para. 66.
[209] United States' appellee's submission, para. 84.
[210] United States' appellee's submission, para. 107.
[211] United States' appellee's submission, para. 108.
[212] 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

2.7 Arguments of the third participants

2.7.1 Australia

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".[231]

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

the relevant regulatory distinctions in those disputes", the latter "are not relevant regulatory distinctions". [234] Accordingly, the findings relating to the exemptions in US – Clove Cigarettes and EC – Seal Products

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.[238] 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".[239]

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.[240]

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". [243]

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

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". [246] 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." [247] 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. [248] 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. [249] 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". [250]

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. [251] 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

whether the detrimental impact is " attributable to the measure at issue".[252] 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".[253]

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".[254] However, the European Union observes that, in order to justify the amended COOL measure under Article XX(d), the United States would had 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.[255] 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

between the information required from upstream producers and the information conveyed to consumers through the labels prescribed under the amended COOL measure.[260]

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, Japa

2.239. Turning to the relationship between Article III:4 and Article IX of the GATT 1994, Japan

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

iii. whether the Panel erred in finding that th e exemptions prescribed by the amended

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"[275], 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[276] (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.[277]

[275] 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)

[276] 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).

[277] 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 [278] (2013 Final Rule), in order "to make changes to the labeling provisions for muscle cut covered commodities and certain other modifications". [279] The COOL statute, which constituted part of the original COOL measure, remains unchanged. [280] In these Reports, we refer to the COOL statute an d 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 [281], in particular: (i) the wide range of "covered commodities", including muscle cuts of beef and pork, as well as ground beef and pork [282]; (ii) the four different origin categories for muscle cuts of meat and one additional origin category for ground meat [283]; (iii) rules concerning the way in which information is provided to the consumer [284]; and (iv) recordkeeping and verification requirements. [285] The main changes introduced by the amended COOL measure concern: (i) D,013 oOOL meD,01.7(")-2(.)6.9()]TJ a por m t-of-p7(y)-tns for r

contained therein. [295] 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. [296]

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". [297] 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"). [298] In addition, the amended COOL measure maintains the permission of the use of the term "harvested" in lieu of "slaughtered". [299]

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. [300] 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. [301]

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". [302]

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

4.10. The original COOL measure defined "retailer" as "any person licensed as a retailer under the Perishable Agricultural Commodities Act of 1930 (PACA)". [312] 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. [313] The 2013 Final Rule defines "retailer" as "any person subject to be licensed as a retailer under the … PACA". [314] 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. [315]

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). [316] These categories remain applicable under the amended COOL measure [317]:

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

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

	2009 Final Rule (AMS)	2013 Final Rule*
LABEL A		
	"United States country of origin means … [f]rom animals exclusively born, raised, and slaughtered in the United States" (65.260(a)(1)) "A covered commodity may 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))	"The 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')." (65.300(d) (emphasis added by Panel))
LABEL B		
	"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 may be designated as Product of the United States, Country X, and (as applicable) Country Y." (65.300(e)(1) (emphasis added by Panel))	"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 shall be labelled to specifically identify the production steps occurring in each country… . " (65.300(e) (emphasis added by Panel))
LABEL C		
	"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 shall be designated as Product of Country X and the United States." (65.300(e)(3) (emphasis added by Panel))	"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 shall 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))
LABEL D		
	"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, shall 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))	"Muscle cut covered commodities derived from an animal that was slaughtered in another country shall 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))

*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 m Do Q 308.2 SeTw 528.4o L theo p2.8(.)-5

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

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

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. [361] 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.

and Mexico that would result in the "multiple origin" Label B and Label C scenarios on which the Panel based its findings. [369] The lack of such evidence, contends the United States, is explained by

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.[378] 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

"Product of U.S., Canada" or "Product of Canada, U.S." [384] 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." [385] The amended COOL measure has eliminated the country order flexibility that had been available under the original COOL measure. [386]

5.21. As part of its analysis of whether the amended COOL measure, as compared to the original COOL measure, involves more

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. [391]

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" [392], and that "the increase in the number of distinct labels and in segregation logically entails a higher recordkeeping burden." [393]

more specific information related to production steps

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. [414]

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". [415] 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. [416]

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. [417] 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. [418]

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. [419] The Panel further found that, "although the amended COOL measure increases the information co 234er ther ct 6 1,inh "neessoaigty-2.2(c)6.7(in)reasesgtherepstream-6.8(m)-18()]TJ T* -.0011 Tc .1145 Tw [(e

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."[429]

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."[430] Accordingly, we find that the Panel did not err, in

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."[445]

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.[446] 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.[447] 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'

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 accu racy 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

the information conveyed on the labels; and (iii) the proportion of the collected information that is exempt from being communicated to consumers.[461] 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.[462] 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.[463]

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."[464]

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.[465] 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

the amended COOL measure, the recordkeeping burden entailed by that measure can now "be explained by the need to provide origin information to consumers".[467]

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.[468]

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.[469] 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 dient ilts op of0.0043 Tc 0 Tw (469)Tj 700 0 9 503.282354.32504w [.0018 Tc ( )Tj -36.8131 of.2133 TD -.0012
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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'."[474] 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".[475] Thus, the Panel considered that, due to the increased recordkeeping burden under the amended COOL measure, even

products but, nevertheless, demonstrate the ar bitrary or unjustifiable character of such detrimental impact. [483]

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".[488]

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

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

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. [501]

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". [502] 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". [503] 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. [504] 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. [505] 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. [506]

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". [507] 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". [508]

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. [509] 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. [510] 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

[501] United States' appellant'dngg72(' appe)4.7(ll)6.7(anm(e)7.2(i)-1.5(a-5.4(n)-5 Tw [7e need)-6.7(to6.1(vestock fromi)-6.2(2s 0

overtly or covertly discriminate against imports."[511] 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".[512] 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."[513]

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".[514] 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.[515]

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.[516]

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.[517] 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.[518] 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".[519] In the United States' view, the Panel erred by failing to examine whether, in the light of the more

5.119. Canada responds that the increased reco rdkeeping burden entailed by the amended COOL measure, and the fact that the greatest incremen tal improvement in origin information achieved

assessment of the relevance of Label D or of th e prohibition of a trace-back system under the amended COOL measure.

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

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. [557] Thus, for the United States, the Panel was correct in determining

when purchasing Category A muscle cuts. [564] This discrepancy, according to Canada, exposes the

5.1.3.2 Whether the Panel e rred 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 Labe l E for the analysis of whether the detrimental impact of the amended COOL measure stems exclus ively from legitimate regulatory distinctions [571], 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. [572]

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 in dicate 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". [573] 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. [574]

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 on5.5(n (a)5.8(.2(t)5.9(ioTw (57(p)8.2(r)5.3(o)5.u o)4.7(n)4.7

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. [578]

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. [586]

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 distinctio

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.[595]

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.[596] Moreover, the Panel found that, in the context of the muscle cut labels, and in comparison with th e original COOL measure, the amended COOL measure entails increased detrimental impact on imported livestock.[597] The participants have not

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

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

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

information relating to the actual operation of the measure on the [p]anel record".[645] 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".[646] 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".[647]

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.[648] 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."[649] 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,

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

is relevant, rather than any individual isolated aspect or component of contribution.[660] 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 contribu tion 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.[661]

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.[662] In our view, in order to engage in this assessment and ensure that this factor is "tak[e n] 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 GA TT 1994, the Appellate Body has recognized that risks may be assessed in either qualitative or quantitative terms.[663] Some kinds of risks might not be susceptible to quantification[664], 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.[665] 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 te xt of Article 2.2 requires "taking account of" such risks. In our view, the term "taking account of" ca lls 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 bala ncing 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.[666]

[660] 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, proc esses, 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 Appe

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. [667] 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. [668]

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 te chnical regulation at issue, and the degree of achievement of its objective, with that of reason ably available alternative measures that are less trade restrictive than the challenged technical regulation, taking account of "the risks non-fulfilment would create". [674] 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. [675] It does not, however, supplant the "relatio nal" 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. [676]

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 Arti cle 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". [677] 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 bo th in the Appellate Body's past analyses in respect of Article 2.2 of the TBT Agreement [678] and in the relevant jurisprudence relating to Article XX of the GATT 1994 and Article XIV of the GATS. [679] 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." [680] 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 an(measures, fa)-6.4(cts, and)]ving re11 Tc .28a4(ys)6.93(al)-5.7(ys)7.6ethel82.5467 TD -.00e-26.6133 -1.2133 TD -.0006en case 5(p5 t9e379l)4rriouc51w [(consi)-D28s part simil9 fu701 TTD -701 T1090(, 2c .356 Tw [ary i)-50f 6.08 0 A7.5llte .06t

determinations are not mandatory, and may not be appropriate in the circumstances of other cases.[683] 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

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 trad e-restrictive than necessary to fulfil a legitimate objective'."[691]

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 [697] and in the relevant jurisprudence relating to Article XX of the GATT 1994 and Article XIV of the GATS. [698] 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. [699] 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. [700]

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

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.[705] 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.[706] 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.[707]

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".[708] 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."[709] In assessing the relevant document constituting the technical regulation at issue under Article 2.2, the elements contained within it

Panel concluded that the amended COOL measure makes a considerable but necessarily partial contribution to its objective of providing consumer information on origin. [717]

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

that it was "unable to determine the proportion of exempted products within Categories A-C specifically". [725]

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. [726] 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." [727] We consider this to demonstrate that the Panel.22 TD .0052 Tc .0166 Tw 9 dndiatat

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. [730]

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 th e objective pursued, thus, engaging an assessment of the degree of contribution. [731] 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. [732] 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 violatio n 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. [733] 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". [734] 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. [735]

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". [736] 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. [733]

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". [757] 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." [758] 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." [759]

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

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amended COOL measure to its objective. [765] However, we note that the amended COOL measure's objective is frd C

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 risk s 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

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."[777] 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."[778]

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.[779] 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.[780] 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.[781]

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[782], the terms listed in this sentence, namely, "scientific and technical information", "related processing technology", and

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,

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. [790]

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." [791] 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". [792] 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". [793] 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. [794]

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

[790] Mexico's other appellant's submission, para. 89; response to questionhn.0004 Tc .2(e0 TD .006e-7(. 89;)4.4h 4.98 100.38 12e72 c

before it under Article 11 of the DSU by omitting these factors from its assessment of "the risks non-fulfilment would create".[795]

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

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.[807] 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".[808] 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.[809]

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.[810] 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.[811]

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.[812]

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".[813] 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

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

techniques that jointly or separately contribute to achieving the objective, which may not each be quantifiable in an isolated manner.[836] 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.[837] 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.[838] 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.[839] 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".[840] 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.[841] 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.

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[836] See e.g. Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.
[837] See Appellate Body Reports, *EC – Seal Products*, para. 5.215.
[838] Canada's other appellant's submission, para. 131.
[839] Canada's other appellant's submission, para. 131.
[840] Mexico's other appellant's submission, para. 124.
[841] 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.[842] 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.[843] 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[844], which demonstrates in turn that the consequences of non-fulfilment are not particularly grave.[845] 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.[846]

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.[847] 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.[848]

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.[849] 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.[850] The Appellate Body has completed the legal analysis when sufficient factual findings by

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[842] Canada's other appellant's submission, para. 112 (quoting Panel Reports, para. 6.59).
[843] Canada's other appellant's submission, para. 112.
[844] Canada's other appellant's submission, para. 112.
[845] Canada's other appellant's submission, para. 104.
[846] Canada's other appellant's submission, para. 115.
[847] Mexico's other appellant's submission, para. 93.
[848] Mexico's other appellant's submission, para. 93.
[849] Panel Reports, para. 7.613.
[850] See e.g. Appellate Body Reports, *Australia – Salmon*

the panel or undisputed facts on the panel record allowed it to do so. [851] 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 [852], 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. [853]

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. [854] 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". [855] 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". [856] 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. [857] Canada and Mexico acknowledged that this would involve the introduction of compliance costs for those entities that are currently exempt. [858] 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. [859]

5.322. Turning to the second proposed alternative measure, we note that its deg4(that ig125 Tw [(a)-7.2(d)1.9(e r5.4(t-v3n)

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.[861] 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.[862]

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

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 ."[868] It is then for the respondent to rebut this case by pr esenting 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 demo nstrating, for example, that the alternative measure identified by the complainant is not, in fact, "reasonably available".[869] 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.[870]

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 ev idence 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.[871] 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. Theympon, or at l6.1(r)6.(i)7 a1.4(o)7(T)7-1(a)5..8(t).2(l6.1(r)6. 1(r)6.9(

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 subst4im5.2171 Tw [(8133 TD -.0008 Tc .2492 Tw [(3.9933 TD -g4im5.(at p)7.7(a)5(o)5(tlit p

substantial nature that they would render the proposed alternatives merely theoretical in nature.

both provisions apply cumulatively and that Members must comply with both provisions simultaneously. [925]

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. [926] 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." [927] 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. [928] 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". [929]

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

[925] Mexico's appellee's submission, para. 128.
[926] Canada's appellee's submission, para. 144 (referring to Appellate Body Reports, *EC – Seal Products*, para. 5.69).
[927] Appellate Body Report, *Canada – Aircraft*, para. 211.
[928] Appellate Body Report, *Canada – Aircraft*, para. 211.
[929] 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 prac ticable to do so, Members should permit required marks of origin to be a ffixed 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 decept, or m7 4(s).29 Twsxv6.7(e)8.2( )]0 T1D .0034 23 -.0016 4.6(M5(u

the sense that "reasons for any difficulties and inconveniences caused by the measures" should be taken into account. [935]

5.356. We note that Article IX:2 calls for a

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

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.[956] 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.[957] Moreover, the burden of establishing a defence under Article XX rests on the party asserting it.[958] 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.[959]

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".[960] 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".[961] 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".[962]

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.[963]

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.[964]

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

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[956] Appellate Body Report, US – Shrimp, para. 121.
[957] Appellate Body Report, US – Gasoline, p. 22, DSR 1996:I, p. 20.
[958] Appellate Body Report, US – Wool Shirts and Blouses, p. 16, DSR 1997:I, p. 337.
[959] Appellate Body Report, US – Gambling, para. 282.
[960] Panel Reports, para. 6.70.
[961] Panel Reports, para. 6.73.
[962] Panel Reports, para. 6.73.
[963] Panel Reports, para. 6.74.
[964] 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.[965] 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.[966]

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.[967] 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.[968]

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.

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[965] Appellate Body Report, US – Gambling, para. 271.
[966] Canada's other appellant's submission, para. 182; Mexico's other appellant's submission, para. 199.
[967] United States' appellant's submission, para. 324.
[968] 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.

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 regula

6 FINDINGS AND CONCLUSIONS IN THE APPELLATE BODY REPORT WT/DS386/AB/RW

finds that the Panel did not err, in paragraph 7.275 7f the Mexico Panel Report, in

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 record keeping 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 regardin g 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 justificati.1(ic)5.2(a(h)3vestoc7l)-6.7(y)$4t.persp,y

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 "exception al 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 applic ation of the phrase "taking account of the risks non-fulfilment would create" in Article 2.2 of the TBT Agreement:

i.

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:

Ricardo Ramírez-Hernández
Presiding Member

Seung Wha Chang
Member

Peter Van den Bossche
Member

ANNEX 1

WORLD TRADE ORGANIZATION

WT/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.

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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

(c) the Panels' finding that the detrimental impact does not stem exclusively from legitimate regulatory distinctions because the amended COOL measure continues

c. the Panel's exclusion of certain relevant factors from the assessment of the "risks non-fulfilment would create" [5] and its resulting incorrect finding that it was unable to ascertain the gravity of the consequences of not fulfilling the amended COOL measure's

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.

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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). [1] 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:

[1] Panel Reports, US – COOL (Article 21.5), paras. 7.612-7.613; Panel Report, US – COOL (Article 21.5 – Mexico), para. 8.3(c).

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 [14] 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.

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 th e 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 Proc edures, 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 Un ion, 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 countri es, 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 consultati on 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-perio d 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 reques t 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. [1] 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". [2]

2.4. We note, in general terms, that compliance with time-periods in WTO dispute settlement is

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 [6]

ANNEX 5

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 observ ation be permitted via simultaneous closed-circuit

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 prot ect 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 perf ormed by the Appellate Body. We al so 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/TT0