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

Recourse to Article 21.5 of the DSU by Canada **(DS384)**

Recourse to Article 21.5 of the DSU by Mexico **(DS386)**

(AB-2014-10)

Appellee Submission
of the United States of America

January 9, 2015

SERVICE LIST

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I. INTRODUCTION AND EXECUTIVE SUMMARY

A. Introduction

1. The Panels appropriately determined that complainants failed to prove the COOL measure, as amended by the 2013 Final Rule (hereinafter "amended COOL measure" or "amended measure"), is "more trade restrictive than necessary," and thus inconsistent with Article 2.2 of the *Agreement on Technical Barriers to Trade* ("TBT Agreement"). As discussed in this submission, this was the correct decision in light of the text of Article 2.2, the guidance provided by the Appellate Body in the original proceeding, and the evidence submitted by the parties in these compliance proceedings. In particular, the Panels found that complainants had failed to prove their claims because complainants had not established a *prima facie* case that an alternative exists "that is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available."[1]

2. Complainants now criticize the Panels' analysis and findings on a number of different grounds. At the root of complainants' Article 2.2 appeals, however, is the belief that the Panels erred by requiring complainants to put forward an alternative that meets each of these three elements of the *prima facie* case. Thus, complainants argue that the Panels erred by requiring them to put forward any alternative at all. In complainants' view, such a showing is entirely unnecessary in light of how "unimportant" the objective of providing origin information to consumers is (at least in complainants' view).[2] Complainants further argue that even if they are required to put forward an alternative, they should not have to prove that it makes an equivalent contribution to the objective, again, because complainants consider the objective "unimportant," or "trivial" even.[3] Likewise, complainants contend that they should not have to prove that an alternative is "reasonably available." They apparently believe that the burden to prove this element of the test falls more appropriately on the United States, not themselves.[4]

3. As discussed in section II, complainants' appeals are wholly in error. The Appellate Body was clear in its analysis of the original panel's reports that that panel erred in its Article 2.2 analysis by not requiring complainants to put forward a less trade restrictive, reasonably available alternative that makes an equivalent contribution to the objective.[5] The fact that complainants do not value providing information on origin to consumers to the same degree that the United States does is immaterial – the text of Article 2.2 does not distinguish between "important" and "unimportant" objectives, and WTO adjudicative bodies have no basis in the text to rank such objectives, as complainants wrongly suggest. Moreover, it is absolutely true that for a proposed alternative to prove a challenged measure "more trade restrictive than necessary" such an alternative must make an equivalent contribution to the objective. To find otherwise, would mean that the TBT Agreement does not permit Members to fulfill their

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[1] *US – COOL (AB)*, para. 379.

[2] *See* Mexico's Other Appellant Submission, paras. 107-111; Canada's Other Appellant Submission, para. 128.

[3] *See, e.g.*, Mexico's Other Appellant Submission, paras. 44, 86, 110.

[4] *See, e.g.*, Canada's Other Appellant Submission, para. 147 ("[T]he burden is on the *respondent* to provide sufficient evidence to support an assertion that a measure is *not* reasonably available.") (emphasis in original).

[5] *US – COOL (AB)*, para. 469.

objectives at the level they consider appropriate, an assertion clearly at odds with the text. Finally, the fact that complainants cannot prove their respective cases is no reason to reverse long established principles regarding a complainant's burden of proof. For these reasons, complainants' Article 2.2 appeals should fail.

4. Similarly, complainants' Article 2.1 appeals should also fail. As discussed in section III, neither the rules governing imported muscle cuts (Label D), nor the rules governing ground meat (Label E), provide a basis for a finding that the amended measure is inconsistent with Article 2.1. The same holds true for the statutory prohibition of trace-back.

5. Finally, in section IV, the United States again explains why the Panels were in error with regard to their analysis under Article XXIII:(1)(b) of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994").

6. Accordingly, and for all the reasons discussed below, the United States respectfully requests the Appellate Body to reject complainants' appeals in their entirety.

B. Executive Summary

1. The Legal Test for Article 2.2 is Clear and Well-Established

7. In the original proceeding, the Appellate Body explained that an Article 2.2 analysis involves a "relational analysis" of three factors: "the trade-restrictiveness of the technical regulation; the degree of contribution that it makes to the achievement of a legitimate objective; and the risks non-fulfilment would create."[6] The Appellate Body has further determined that in order for a complaining party to prove an Article 2.2 claim:

> The complainant must make a *prima facie* case by presenting evidence and arguments sufficient to establish that the challenged measure is more trade restrictive than necessary to achieve the contribution it makes to the legitimate objective, taking account of the risks non-fulfilment would create. A complainant may, and in most cases will, also seek to identify a possible alternative measure that is *less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available*.[7]

8. In limited circumstances, the Appellate Body has also observed "such a comparison might not be required," citing to "when the measure is not trade restrictive at all, or when a trade-restrictive measure makes *no* contribution to the achievement of the relevant legitimate objective." Because it was *uncontested* in this proceeding that neither instance is applicable here, the burden was on complainants to put forward sufficient evidence to establish a *prima facie* case that an alternative measure exists "that is less trade restrictive, makes an equivalent

[6] *US – COOL (AB)*, para. 374.

[7] *US – COOL (AB)*, para. 379 (emphasis added).

contribution to the relevant objective, and is reasonably available."[8] The Panels were entirely correct in finding that the complainants had failed to establish such a *prima facie* case for any of the four alternatives that complainants proposed.

2. Complainants' Characterization of the Legal Test Attempts to Relieve Themselves of Their Own Burden of Proof and Should Be Rejected

9. Mexico and Canada argue that the Panels' analysis was in error when they indicated that they would only draw conclusions as to the consistency of the amended measure with Article 2.2 after analyzing whether complainants proposed an alternative that is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available.[9] Complainants' arguments, which advocate for a two-step inquiry that avoids comparison of the challenged measure to proposed alternatives, are in error.

10. First, complainants' proposed approach ignores the text of the TBT Agreement, including "the use of the comparative 'more … than' in the second sentence of Article 2.2 [which] suggests that the existence of an 'unnecessary obstacle[] to international trade' in the first sentence may be established on the basis of a comparative analysis of [these] factors."[10] That is, in evaluating whether a proposed alternative is less trade restrictive or makes an equivalent contribution to the objective, a panel needs to determine the trade-restrictiveness of the technical regulation and the degree of contribution that it makes to the achievement of a legitimate objective, as these provide the basis (in terms of intermediate findings) that the panel needs *in order to compare* the challenged measure and the proposed alternative(s).

11. Second, complainants' approach ignores the Appellate Body's findings in this very dispute. Specifically, complainants ignore that the Appellate Body reversed the original panel's finding, concluding that "by finding the COOL measure to be inconsistent with Article 2.2 of the TBT Agreement without examining the proposed alternative measures, the Panel erred by relieving Mexico and Canada of this part of their burden of proof."[11]

12. Third, there is no "substantial gap" in the Article 2.2 analysis, as Mexico alleges.[12] That is, the relevant inquiry is not – as Mexico presumes – whether a WTO panel, weighing and balancing all the relevant factors, would choose a different public policy goal (and means to accomplish that goal) than what the importing Member has identified. Rather, the central question posed by Article 2.2 is whether the Member could have pursued its legitimate objective

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[8] *US – COOL (AB)*, para. 379; *see also id.*, para. 469 ("The Appellate Body has found, and the participants do not contest, that the burden of proof with respect to such alternative measures is on the complainants.") (emphasis added).

[9] *US – COOL (Article 21.5) (Panel)*, para. 7.303.

[10] *US – COOL (AB)*, para. 376; *US – Tuna II (Mexico) (AB)*, para. 320.

[11] *US – COOL (AB)*, para. 469.

[12] Mexico's Other Appellant Submission, para. 46.

at the level it considers appropriate by means of a less trade restrictive measure than the challenged measure.

13. Complainants' multiple suggested analytic approaches are thus not consistent with the text of the agreement or with the Appellate Body's interpretation of that text, nor do they have any logical basis. Rather, these approaches appear to be (yet another) attempt by complainants to relieve themselves of their own burden of proving their *prima facie* cases that an alternative measure exists "that is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available."[13]

3. Complainants' Appeal of the Panels' Finding as to the Amended Measure's Level of Contribution to the Objective Should Be Rejected

14. Complainants challenge the Panels' analysis regarding the degree of contribution that the amended measure makes to its objective. Specifically, Canada argues that the Panels erred by not taking account of the additional origin information provided by Labels D and E for beef and pork,[14] while Mexico claims that the Panels erred by not taking account of the additional origin information provided by Label E for beef.[15] Additionally, Canada alleges that the analysis was inconsistent with Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").[16] All three of these appeals should be rejected.

15. As a preliminary matter, as discussed above, complainants are wrong to argue that Article 2.2 requires two, wholly separate analyses – there is one analysis, and that is whether the complainant has proved an alternative measure exists "that is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available."[17]

16. Considering the inclusion of D and E Labels, complainants are entirely inconsistent in their approach. When discussing their alternatives, complainants put forward no evidence or argument with regard to the contribution that Labels D and E make to the objective and instead focus on the contribution that the alternatives would make under Labels A-C if the exemptions were eliminated.[18] Further, as the Panels correctly recognized, it is not possible to determine whether an alternative measure makes an equivalent contribution to a particular objective without comparing the same thing, and in this case, the Panels could only make an appropriate "apples-to-apples" comparison by either *including* labels D and E in *both* sides of the comparison or *excluding* these labels from *both* sides of the comparison. As the Panels

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[13] *US – COOL (AB)*, para. 379; *see also id.*, para. 469.

[14] *See* Canada's Other Appellant Submission, paras. 82-86.

[15] *See* Mexico's Other Appellant Submission, paras. 52-61.

[16] *See* Canada's Other Appellant Submission, paras. 86-90.

[17] *US – COOL (AB)*, para. 379.

[18] *See, e.g., US – COOL (Article 21.5) (Panel)*, paras. 7.469-7.473 (summarizing complainants' arguments as to why the first alternative makes an equivalent contribution to the objective that the amended measure does).

recognized, proceeding otherwise and conducting an "improper" (or "apples to oranges") comparison such as the one complainants propose, would constitute reversible error.[19]

17. Ultimately, analyzing the degree to which the amended measure contributes to its objective is not precisely how the Panels describe this finding; instead, the Panels indicate that they must determine whether any alternative proposed by complainants makes an equivalent contribution to the objective. In that regard, whether the level of fulfillment is characterized as "considerable," as the Panels do, or "limited," as Canada suggests, is immaterial. What is material is whether the alternatives make an equivalent contribution to what the amended measure does because it is for the Member to determine for itself at what levels it considers appropriate to contribute to its objective.[20] And the inescapable fact is that the amended measure contributes to its objective by providing consumer information on where the animal was born, raised, and slaughtered, which complainants' first two alternatives, unquestionably, fail to do. As such, Canada fails explain why its Article 11 appeal of the analysis and finding of a "considerable" contribution amounts to an error – if, indeed one has occurred – that is so "material" as to "undermine the objectivity of the panel's assessment of the matter before it."[21] Mexico's legal claim similarly fails.

4. Complainants' Characterization of the "Risks Non-Fulfilment Would Create" Is Unsupported, and Complainants Multiple Appeals Should Be Rejected

18. In this proceeding, both the Panels' analysis as to the "risks non-fulfilment would create," and complainants' appeals of that analysis, are fundamentally misplaced.

a. The Panels Did Not Err by Failing to Consider the "Importance" of the Legitimate Measure, or the Exemptions When Considering the "Risks Non-Fulfilment Would Create"

19. Complainants make two appeals related to the legal test that was utilized in relation to the "risks non-fulfilment would create." First, complainants argue the Panels should have taken the "importance" of the legitimate governmental objective into account, and second, complainants contend that the Panels should have considered Label E and the exemptions when considering the "risks non-fulfilment would create."

20. First, complainants are wrong to argue that the phrase "taking account of the risks non-fulfilment would create" requires a WTO panel to rank the "importance" of legitimate government objectives. There is no correlation between the "importance" of an objective and the phrase "risks non-fulfilment would create," and the United States disagrees that the "importance"

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[19] *US – COOL (Article 21.5) (Panel)*, para. 7.345 (citing to *US – Tuna II (Mexico) (AB)*, paras. 328-331); *see also US – Tuna II (Mexico) (AB)*, para. 328.

[20] *US – COOL (AB)*, para. 373; *see also US – Tuna II (AB)*, paras. 315-316.

[21] *US – Carbon Steel (India) (AB)*, paras. 4.78-4.79.

of the measure is at all relevant to the Article 2.2 analysis. The text of Article 2.2 does not distinguish objectives on the basis of "importance," but "legitimacy." That is to say, Article 2.2 does not require Members to only apply technical regulations that pursue "important" policy goals – however that would be judged – but "legitimate" ones.

21. Not surprisingly, the Appellate Body has not identified "relative importance" of the objective as a key factor in its Article 2.2 analyses of *US – COOL* and *US – Tuna II (Mexico).* While Mexico attributes this fact to the limits of the record in *US – COOL* and that the measure was "different" in *US – Tuna II (Mexico),*[22] neither explains why the "relative importance" of the objective is relevant in this proceeding and not others. The fact is the text simply does not support such an analysis, nor would a panel ever be in a position to conduct such an analysis.

22. Second, complainants also argue that the Panels erred by not taking into account that the amended measure provides for different rules for ground meat (Category E) and that the amended measure provides three exemptions in its analysis of the "risks non-fulfilment would create." As the Panels indicated this argument appears to be another version of the "relative importance" argument discussed above,[23] and, as such, has been fully addressed above.

23. Complainants argue that the limited exemptions demonstrate the low risk of failing to provide consumers with origin information, but fail to consider that the amended COOL measure covers an extremely large amount of food – $38.5 billion worth of beef and $8.0 billion worth of pork sold annually at over 30,000 retail establishments spread throughout the United States.[24] The United States considers that the consequences of not providing such origin information to the covered products are significant. That said, U.S. policymakers have made 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 it was appropriate for consumers and industry to bear. Accordingly, U.S. regulators have consider the various factors present in the United States and set the level of contribution accordingly.

24. For these reasons, complainants' appeals with respect to the legal test associated with "risks non-fulfilment would create" should fail.

b. Complainants Appeal of the Panels' "Risks Non-Fulfilment Would Create" Analysis Should Also Fail, as Should Mexico's DSU Article 11 Challenge

25. Complainants also appeal the finding that followed from the Panels' analysis of the "risks non-fulfilment would create." In particular, complainants argue that the Panels erred by failing to ascertain the gravity of not fulfilling the amended measure's objective. Mexico makes a series

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[22] Mexico's Other Appellant Submission, para. 75.

[23] *US – COOL (Article 21.5) (Panel)*, para. 7.380 ("To the extent that Canada's suggestion concerns the relative importance of the amended COOL measure's objective, we have explained the legal test that it is our task to apply to the complainants' Article 2.2 claims, including as regards the risks nonfulfillment would create.").

[24] *See* U.S. Appellant Submission, para. 88 (citing U.S. First Written 21.5 Submission, para. 92).

of DSU Article 11 appeals, which object to the Panels' assessment of the evidence that they reviewed in analyzing the gravity of the consequences of non-fulfillment. Complainants' appeals are in error, and should be rejected.

26. First, Canada argues that the Panels' "inability to assess the gravity of the consequence of non-fulfilment is the direct consequence of the incorrect legal test it applied to assess the 'risks non-fulfilment would create.'"[25] In Canada's view, the Panels' failure to address the relative importance of the objective, harm to consumers, Label E and the exemptions, and market failure[26] have resulted in a failure to reach a finding with respect to the gravity of the consequences.[27] As discussed above, Canada's arguments are in error.

27. Second, the bulk of Mexico's objections are characterized as a series of DSU Article 11 appeals, the point of which appears to be that the Panels did not objectively assess the evidence that it reviewed in analyzing the gravity of the consequences of non-fulfillment. In reality, Mexico appears to complain that the DS386 Panel did not accord "the same meaning and weight" to the factual evidence that Mexico does.[28]

28. Mexico's DSU Article 11 appeals are flawed. First, there were separate Panels for these Article 21.5 proceedings and each Panel could only consider the evidence submitted in the proceeding for that Panel. Second, the Panel in DS386 did not review the evidence submitted in those proceedings in order to "accept" or "reject" evidence, but rather to assess the "credibility" and "weight" of each piece of evidence to ensure that the Panel's factual findings have a "proper basis."[29] Third, and most importantly, an Article 11 claim is a "very serious allegation,"[30] and requires an appellant making an Article 11 claim to "clearly articulate and substantiate [the claim] with specific arguments"[31] and "*must explain why*… [the] evidence is so material to its case that the panel's failure to explicitly address and rely upon the evidence has a bearing on the objectivity of the panel's factual assessment."[32] For each of the evidentiary challenges raised by Mexico, it has failed to satisfy the requirements of an Article 11 claim.[33]

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[25] Canada's Other Appellant Submission, para. 108.

[26] *See* Canada's Other Appellant Submission, para. 96.

[27] Canada's Other Appellant Submission, para. 108.

[28] *US – COOL (Article 21.5) (Panel)*, para. 7.382 ("We are also mindful that we 'are not required to accord to factual evidence of the parties the same meaning and weight as do the parties.'") (quoting *Australia – Salmon (AB)*, para. 267).

[29] *US – COOL (Article 21.5) (Panel)*, para. 7.382 (citing *US – Tuna II (Mexico) (AB)*, para. 254; *Philippines – Distilled Spirits (AB)*, para. 135; *Brazil – Retreaded Tyres (AB)*, para. 185; and *EC – Hormones (AB)*, paras. 132-133).

[30] *EC – Poultry (AB)*, para. 133.

[31] *China – Rare Earths (AB)*, para. 5.227.

[32] *China – Rare Earths (AB)*, para. 5.178 (emphasis added).

[33] Such a claim is insufficient to meet the requirements of an Article 11 claim. *See, e.g.*, *China – Rare Earths (AB)*, para. 5.203; *US – Tuna II (Mexico) (AB)*, para. 272; *EC – Seal Products (AB)*, para. 5.254.

5. Complainants' Appeals of the Panels' Findings Regarding the First and Second Alternative Measures Should Fail

29. As described above, a panel's analysis of whether a challenged measure is inconsistent with Article 2.2 of the TBT Agreement is straight forward. The complainant must prove that an alternative measure exists "that is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available."[34] Where this is the case, the challenged measure should be found to be inconsistent with Article 2.2; where it is not, the measure should be found to be consistent with Article 2.2.

30. In this dispute, both complainants' first alternative measure (substantial transformation based labeling) and second alternative measure (application of the ground meat rules) would provide labels with less detailed origin information on a wider range of products. While complainants indicate that these alternatives could provide an "*equivalent* contribution" to the objective of providing consumer information on origin,[35] the Panels declined to reach this conclusion. As such, the Panels should have concluded their analysis once they determined that the first (and second) alternative measure did "not seem capable of making an actual contribution to the objective of providing consumer information on origin at least equivalent to the actual contribution of the amended COOL measure."[36]

31. Complainants' nonetheless argue that the phrase "taking account of the risks non-fulfillment would create" means that a WTO panel could find that either the first or second proposed alternative, both of which provide less information on origin than the amended measure, could still be found to make a contribution to the objective equivalent to the amended measure. That interpretation is incorrect; the phrase "taking account of the risks non-fulfillment would create" is properly understood as a reflection that an individual Member takes into account such risks when setting its level of fulfillment (*i.e.*, required degree of contribution), and not a measure of complainant's burden of proof.

32. What this means for purposes of this dispute is plain – a measure that provides less origin information does not prove the amended measure "more trade restrictive than necessary" as such an alternative will not make an equivalent contribution to the objective even if it is less trade restrictive than the amended measure, and even if it is reasonably available to the United States. Even aside from this, neither complainant provides any reason as to why expanding the scope of COOL under the first (or second) alternative would "compensate" for failure to provide the same degree of point of production origin information provided by the amended measure.[37]

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[34] *US – COOL (AB)*, para. 379.

[35] *US – COOL (Article 21.5) (Panel)*, para. 7.478 (noting that "the evidence does not suggest that the voluntary option would be exercised on a wide scale").

[36] *US – COOL (Article 21.5) (Panel)*, para. 7.483.

[37] *US – COOL (Article 21.5) (Panel)*, para. 7.490.

33. Complainants' appeals with respect to their first and second alternatives should therefore fail. Moreover, there are neither sufficient factual findings, nor sufficient undisputed facts on the record that would allow the Appellate Body to conclude this analysis. For these reasons, neither the first , nor second alternative provide a basis for finding the amended COOL measure inconsistent with Article 2.2 of the TBT Agreement.

6. Complainants' Appeals of the Panels' Findings Regarding the Third and Fourth Alternative Measures Should Fail

34. With respect to the third alternative measure (mandatory trace-back) and the fourth alternative measure (state/province labelling), the Panels found that complainants had failed to make a *prima facie* case that either alternative measure was less trade restrictive than the amended COOL measure, makes an equivalent contribution to the relevant objective, and is reasonably available to the United States.[38] Accordingly, the Panels found that neither the third nor fourth alternative proved the amended measure inconsistent with Article 2.2.[39]

35. Complainants limit their appeals. Canada appears to make only two appeals: first, Canada appeals the DS384 Panel's findings as to whether Canada has sufficiently "identified" the third and fourth alternatives for purposes of making the comparison,[40] and second, Canada appeals the finding that "complainant bears the burden of providing a cost estimate of the alternative measure or evidence substantiating the likely magnitude of the costs that would be associated with the alternative measure."[41] Mexico makes similar appeals regarding the identification of the alternative and the Panels' finding as to reasonable availability.[42] Neither complainant challenges the Panels' ultimate conclusion or asks the Appellate Body to complete the analysis.

36. Complainants' appeals should be rejected. The Panels correctly concluded that complainants' description of the third and fourth alternative measures is insufficient, and subsequently complainants failed to establish a *prima facie* case as to any of the three elements for either of the two alternatives (these Panel findings are ones that complainants have not appealed). Complainants however claim that the level of detail required by the Panels "set[] the

[38] *US – COOL (Article 21.5) (Panel)*, paras. 7.564, 7.609-7.610.

[39] *US – COOL (Article 21.5) (Panel)*, paras. 7.564, 7.610.

[40] Canada's Other Appellant Submission, para. 154.

[41] Canada's Other Appellant Submission, para. 154 (citing *US – COOL (Article 21.5) (Panel)*, paras. 7.556 and 7.603).

[42] *See* Mexico's Other Appellant Submission, para. 184.

bar overly high,"[43] was "disproportionate,"[44] was "unnecessarily precise,"[45] etc., and challenge the Panels' findings on this basis.

37. It is well established that "precisely how much and precisely what kind of evidence will be required [for a complainant to satisfy its burden] will necessarily vary from measure to measure, provision to provision, and case to case."[46] What a complainant must put forward in way of argument and evidence is, therefore, not fixed in place, but will necessarily vary based on the complexity of the claims that the complainant chooses to make. But here complainants have only provided "limited explanations,"[47] and "sometimes vague and in some respects incomplete description[s]"[48] of exceedingly complex proposals that require changes at all levels of production and retail of meat in the United States.[49] And while both complainants insist that they have put forward sufficient information, neither provides a reason why this is so or detailed the ways in which they have made their *prima facie* case. Complainants' appeals should therefore be rejected.

38. In this context, Canada and Mexico object to the Panels' reference to the lack of cost information, but Canada and Mexico's criticism appears to be focused on the burden of proof more generally. Complainants' central argument in this regard is that the Panels' have misread the Appellate Body's previous analyses under Article XX of the GATT 1994 to suggest that complainants have the burden of proof for this element.[50] In addition, Mexico appears to argue that the burden of proof for this element should fall on the respondent as it is difficult for Mexico to produce the relevant cost estimates.[51]

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[43] Canada's Other Appellant Submission, para. 132.

[44] Canada's Other Appellant Submission, para. 142.

[45] Mexico's Other Appellant Submission, para. 173.

[46] *Chile – Price Band System (Article 21.5 – Argentina) (AB)*, para. 134 ("The nature and scope of arguments and evidence required 'will necessarily vary from measure to measure, provision to provision, and case to case.' When a claim is brought against a WTO Member's legislation or regulation, a panel may, in some circumstances, consider that the text of the relevant legal instrument is sufficiently clear to establish the scope and meaning of the law. However, in other cases, a panel may consider that additional evidence is necessary to do so. Once the complaining party has established a *prima facie* case, it is then for the responding party to rebut it.") (quoting *US – Wool Shirts and Blouses (AB)*, p. 14); *see also Japan – Apples (AB)*, para. 159.

[47] *US – COOL (Article 21.5) (Panel)*, para. 7.602 (fourth alternative).

[48] *US – COOL (Article 21.5) (Panel)*, para. 7.556 (third alternatives).

[49] *See, e.g., US – COOL (Article 21.5) (Panel)*, paras. 7.538, and 7.540-7.543.

[50] *See* Canada's Other Appellant Submission, paras. 144-184 (quoting *China Publications and Audiovisual Products (AB)*, paras. 327-328); Mexico's Other Appellant Submission, paras. 177-182 (quoting *EC – Seal Products (AB)*, paras. 7.276-77).

[51] *See* Mexico's Other Appellant Submission, paras. 181-182 ("The only Member who is in a position to comment meaningfully on the specific issues of implementation and the associated costs – including any significant obstacles or difficulties – is the responding Member itself. . . . The standard of proof in establishing a *prima facie* case should be attuned accordingly.").

39. Complainants' appeals are clearly in error because complainants carry the burden of proving all three elements of the Article 2.2 analysis.[52] Indeed, in the original proceeding, it was *uncontested* by complainants that that they have "the burden of proof with respect to such alternative measures."[53] Finally, Mexico is wrong to argue that the complainant's burden of proof should be "attuned" to the fact that Mexico considers it difficult to prove its own case.[54] As the Appellate Body has correctly stated, a complainant's burden of proof is not allocated based on difficulty.[55] For these reasons, complainants' appeals should be rejected.

40. Finally, neither complainant appeals the Panels' finding that complainants have failed to make a *prima facie* case that either the third or fourth alternative is less trade restrictive than the amended measure,[56] makes an equivalent contribution to the objective,[57] or is reasonably available to the United States.[58] Similarly, neither complainant appeals the Panels' ultimate findings that neither the third nor fourth alternative proves the amended measure inconsistent with Article 2.2.[59] As such, even if the Appellate Body were to accept complainants' appeals with regard to the third and fourth alternatives, the Panels' findings that neither the third nor fourth alternative proves the amended measure inconsistent with Article 2.2 would stand.

7. Complainants' Appeals of Article 2.1 of the TBT Agreement Should Be Rejected

41. Canada argues that the Panels erred in determining that the statutory prohibition of trace-back and the D Label do not support a finding that the amended measure is inconsistent with Article 2.1. Both Canada and Mexico consider that the Panels erred in determining that the E Label does not support a finding that the amended measure is inconsistent with Article 2.1.

42. As the Appellate Body has noted, because "technical regulations are measures that, by their very nature, establish distinctions between products according to their characteristics, or related processes and production methods,"[60] not every distinction a measure makes is relevant to the Article 2.1 inquiry. Only the distinctions that account for the detrimental impact could possibly answer the question of whether the detrimental impact reflects discrimination.[61] Therefore, once the Panels concluded that the regulatory distinction at issue did not account for

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[52] *US – COOL (AB)*, para. 379.

[53] *US – COOL (AB)*, para. 469 ("The Appellate Body has found, *and the participants do not contest*, that the burden of proof with respect to such alternative measures *is on the complainants*.") (emphasis added).

[54] *See* Mexico's Other Appellant Submission, paras. 181-182.

[55] *See EC – Sardines (AB)*, para. 281.

[56] *US – COOL (Article 21.5) (Panel)*, para. 7.560 (third alternative), para. 7.609 (fourth alternative).

[57] *US – COOL (Article 21.5) (Panel)*, para. 7.563 (third alternative), para. 7.610 (fourth alternative).

[58] *US – COOL (Article 21.5) (Panel)*, para. 7.557 (third alternative), para. 7.610 (fourth alternative).

[59] *US – COOL (Article 21.5) (Panel)*, para. 7.564 (third alternative), para. 7.610 (fourth alternative).

[60] *US – COOL (AB)*, para. 268.

[61] *See US – Tune II (Mexico) (AB)*, para. 286.

the detrimental impact, the Panels should have ended their analysis at that point for purposes of that regulatory distinction.

43. For both Label D (muscle cuts from animals slaughtered outside of the United States) and Label E (ground meat), the Panels concluded that the category does not result in a detrimental impact on imported livestock and is therefore not a relevant regulatory distinction. [62] Nonetheless, the Panels erroneously continued their analysis to determine whether the Labels provide evidence of discrimination.[63] Complainants raise a number of baseless objections to the Panels' analysis. For instance, complainants argue that the labels exposes the "arbitrary character" of the amended measure. This misunderstands that the question posed in the second step of the Article 2.1 analysis is whether the detrimental impact reflects discrimination. Ultimately, complainants' appeals with regard to the D and E Labels should be rejected.

44. Similarly, Canada also contends that the Panels erred in rejecting Canada's argument that the statutory prohibition for a trace-back regime (7 U.S.C. § 1638A(f)(1)) supported a finding that the detrimental impact reflects discrimination.[64] As with the other regulatory distinctions, the Panels conducted a two part review concluding that "the complainants do not provide specific arguments or evidence" as to the "arbitrariness" of this particular statutory provision.[65]

45. Canada now argues that the trace-back prohibition should have been "carefully scrutinized" by the DS384 Panel because (in Canada's view) the prohibition is a component of the amended COOL measure's "design" and "architecture" that affects its "operation."[66] Contrary to Canada's assertion, the Panels did make such an analysis (wrongly in the U.S. view), and found that complainants had failed to provide specific arguments and evidence to support their position. Additionally, and as discussed above, the fact that this statutory provision does not account for the detrimental impact means that the provision is not relevant to determining whether the detrimental impact, in fact, reflects discrimination. For these reasons, Canada's appeal with regard to the statutory prohibition for trace-back should be rejected.

8. Complainants' Appeals of Article XXIII:(1)(B) of GATT 1994 Should Be Rejected

46. In this compliance dispute, complainants presented a claim of non-violation nullification or impairment ("NVNI") under Article XXIII:(1)(b) of the GATT 1994. The complainants'

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[62] *US – COOL (Article 21.5) (Panel)*, para. 7.204 ("Given the complainants' explicit delimitation of their claims and the lack of demonstrated detrimental impact, however, the relevance of Label D for legitimate regulatory distinctions must accordingly be adjusted in this compliance dispute.").

[63] *US – COOL (Article 21.5) (Panel)*, para. 7.279. *US – COOL (Article 21.5) (Panel)*, paras. 7.206-07 (emphasis added).

[64] Canada's Other Appellant Submission, paras. 173-178. As noted in Canada's submission, 7 U.S.C. § 1638A(f)(1) states: "The Secretary [of Agriculture] shall not use a mandatory identification system to verify the country of origin of a covered commodity."

[65] *US – COOL (Article 21.5) (Panel)*, para. 7.281.

[66] Canada's Other Appellant Submission, para. 175.

request should be rejected. As described in detail in the U.S. Appellant Submission, such a claim is not within the terms of reference of these Article 21.5 proceedings.

9. Conclusion

47. For the foregoing reasons, the United States respectfully requests the Appellate Body to reject in their entirety complainants' appeals of the Panels' reports.

II. COMPLAINANTS' APPEALS REGARDING ARTICLE 2.2 OF THE TBT AGREEMENT SHOULD BE REJECTED

48. The Panels appropriately determined that complainants failed to prove that any of the four proposed alternatives is a less trade restrictive, reasonably available alternative to the amended COOL measure that makes an equivalent contribution to the amended measure's objective. As such, the Panels properly rejected complainants' claims that the amended measure is "more trade restrictive than necessary," and thus inconsistent with Article 2.2 of the TBT Agreement.

49. Complainants now challenge various aspects of the Panels' Article 2.2 analysis. As discussed below, such appeals are based on a significant misunderstanding of the meaning of the obligation, the Panels' analysis of complainants' claims, and complainants' own burden of proof, among other errors.

50. After summarizing the correct legal test for Article 2.2 in section II.A, the United States addresses: complainants' incorrect legal tests for Article 2.2 (*e.g.*, Mexico's "two step" approach to Article 2.2) in section II.B; complainants' appeal of the Panels' finding as to the amended measure's level of contribution in section II.C; complainants' appeals of the Panels' analysis and findings as to the "risks non-fulfilment would create" in section II.D; complainants' appeals of the Panels' findings regarding the first and second alternatives in section II.E; and complainants' appeals of the Panels' findings regarding the third and fourth alternative in section II.F.

A. The Legal Test for "More Trade Restrictive Than Necessary to Fulfil a Legitimate Objective, Taking Account of the Risks Non-Fulfilment Would Create"

51. In the original proceeding, the Appellate Body explained that an Article 2.2 analysis involves a "relational analysis" of three factors: "the trade-restrictiveness of the technical regulation; the degree of contribution that it makes to the achievement of a legitimate objective; and the risks non-fulfilment would create."[67] Importantly, the Appellate Body considered that "the use of the comparative 'more … than' in the second sentence of Article 2.2 suggests that the existence of an 'unnecessary obstacle[] to international trade' in the first sentence may be

[67] *US – COOL (AB)*, para. 374.

established on the basis of a comparative analysis of [these] factors."[68] The Appellate Body has thus determined that in order for a complaining party to prove an Article 2.2 claim:

> The complainant must make a *prima facie* case by presenting evidence and arguments sufficient to establish that the challenged measure is more trade restrictive than necessary to achieve the contribution it makes to the legitimate objective, taking account of the risks non-fulfilment would create. A complainant may, and in most cases will, also seek to identify a possible alternative measure that is *less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available*.[69]

52. The Appellate Body has also observed "that there are 'at least two instances' when such a comparison might not be required, namely, when the measure is not trade restrictive at all, or when a trade-restrictive measure makes *no* contribution to the achievement of the relevant legitimate objective."[70] The comparison between the challenged measure and an alternative measure is thus central to the analysis. The only times where a panel would not need to conduct such a comparison would be where the discipline of Article 2.2 would not apply because there is no trade restrictiveness, or where it would be self-evident that the measure is more trade restrictive than necessary because the measure is not contributing to the fulfillment of a legitimate objective.

53. In light of the fact that it was *uncontested* in this proceeding that neither instance is applicable here, the burden was on complainants to put forward sufficient evidence to establish a *prima facie* case that an alternative measure exists "that is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available."[71] As discussed below, the Panels were entirely correct in finding that the complainants had failed to establish such a *prima facie* case for any of the four alternatives that complainants proposed.

B. Complainants' Attempts to Relieve Themselves of Their Own Burden of Proof Should Be Rejected

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[68] *US – COOL (AB)*, para. 376; *US – Tuna II (Mexico) (AB)*, para. 320.

[69] *US – COOL (AB)*, para. 379 (emphasis added). If the complaining party does establish a *prima facie* case:

> It is then for the respondent to rebut the complainant's *prima facie* case by presenting evidence and arguments showing that the challenged measure is not more trade restrictive than necessary to achieve the contribution it makes toward the objective pursued, for example, by demonstrating that the alternative measure identified by the complainant is not, in fact, 'reasonably available,' is not less trade restrictive, or does not make an equivalent contribution to the achievement of the relevant legitimate objective. *Id.*

[70] *US – Tuna II (Mexico) (AB)*, para. 322; *US – COOL (AB)*, n. 929.

[71] *US – COOL (AB)*, para. 379; *see also id.*, para. 469 ("The Appellate Body has found, and the participants do not contest, that the burden of proof with respect to such alternative measures is on the complainants.") (emphasis added).

54. In this proceeding Mexico, as it did in the original proceeding, argues that the Article 2.2 analysis entails a two-step approach.[72] Under Mexico's proposed approach, the Panels would first need to engage in a "relational analysis." Where the Panels consider the challenged measure inconsistent in the first step, they would not need to engage in the separate "comparative analysis."

55. Relying heavily on the Appellate Body's analysis in the original proceeding, the Panels rejected Mexico's unsupportable argument.[73] In particular, the Panels noted that "the relevant Appellate Body statements suggest[] that a 'comparative analysis' would be redundant only in exceptional circumstances where consistency or inconsistency with Article 2.2 may be deduced by looking solely at certain aspects of the challenged measure."[74] The Panels further noted that "Mexico has not explained why the Panel is faced with such exceptional circumstances in this case."[75]

56. The Panels next noted that the Appellate Body had reversed the original panel's Article 2.2 findings on this very point, pointing out that "[t]he Appellate Body 'agree[d] with the United States that' 'the Panel erred' 'by finding the COOL measure to be inconsistent with Article 2.2 of the TBT Agreement *without examining the proposed alternative measures*.'"[76] The Panels finally recalled that the Appellate Body did not "complete [its] assessment" until examining whether an alternative measure proposed by complainants would prove the original COOL measure more trade restrictive than necessary.[77]

57. The Panels concluded that they will "do the same," and only draw conclusions as to the consistency of the amended measure with Article 2.2 after analyzing whether complainants have proposed an alternative that is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available.[78]

58. Mexico claims that the Panels' analysis was in error. Mexico argues, on the one hand, that "[t]he Panel erred by replacing the weighing and balancing of relevant factors in the relational analysis with an 'exceptional circumstances' test,"[79] and erred by not determining the measure inconsistent with Article 2.2 on the basis of the "relational analysis" alone,[80] on the other hand. Similarly, Canada also now appears to argue that the Panels erred by considering

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[72] *See US – COOL (Article 21.5) (Panel)*, paras. 7.288, 7.293-7.294.

[73] *US – COOL (Article 21.5) (Panel)*, paras. 7.292-7.303.

[74] *US – COOL (Article 21.5) (Panel)*, para. 7.298

[75] *US – COOL (Article 21.5) (Panel)*, para. 7.298.

[76] *US – COOL (Article 21.5) (Panel)*, para. 7.299 (emphasis in Panels Report) (quoting *US – COOL (AB)*, para. 469).

[77] *US – COOL (Article 21.5) (Panel)*, paras. 7.301-7.302.

[78] *US – COOL (Article 21.5) (Panel)*, para. 7.303.

[79] *See* Mexico's Other Appellant Submission, paras. 39-51.

[80] *See* Mexico's Other Appellant Submission, paras. 107-111.

that a comparison with the proposed alternatives was necessary,[81] or, at the very least, by treating complainants' failure to establish a *prima facie* case for any one of the four alternatives as determinative as to complainants' Article 2.2 claims.[82] These arguments are in error.

59. First, complainants' proposed approach ignores the text of the TBT Agreement. As the Appellate Body has correctly noted, "the use of the comparative 'more … than' in the second sentence of Article 2.2 suggests that the existence of an 'unnecessary obstacle[] to international trade' in the first sentence may be established on the basis of a comparative analysis of [these] factors."[83] In other words, the challenged measure is "more trade restrictive than necessary" if an alternative measure exists "that is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available."[84] In this regard, Canada's insistence that the text of Article 2.2 does not generally require a panel to conduct a comparison between the challenged measure and an alternative measure is surely wrong.[85]

60. Of course, in order to engage in that comparison consistent with the text of the Agreement, a panel needs to determine the trade-restrictiveness of the technical regulation and the degree of contribution that it makes to the achievement of a legitimate objective. As such, the "relational analysis" under the correct legal analysis is not "pointless" as Canada suggests,[86] but rather provides the basis (in terms of intermediate findings) that a panel would need *in order to compare* the challenged measure and the proposed alternative(s).

61. The fact that there may be situations that arise that negate the need for a comparison (*i.e.*, the two instances identified by the Appellate Body and discussed above) does not change one

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[81] *See* Canada's Other Appellant Submission, para. 128 ("Had [the Panel] conducted a proper relational analysis, it would have concluded that the high degree of trade-restrictiveness of the amended COOL measure is out of all proportion to its very limited contribution to the fulfilment of the objective and the benign nature of the risks and the non-gravity of the consequences that would arise if the objective were not fulfilled. . . . Such an analysis would have led the Compliance Panel to the conclusion, *even in the absence of a comparative analysis*, that the amended COOL measure is more trade-restrictive than necessary.") (emphasis added).

[82] *See* Canada's Other Appellant Submission, para. 47 ("While a comparison may not always be required, when one is carried out, it *should not overtake* the relational analysis of the relevant factors under Article 2.2. In other words, the outcome under Article 2.2 *should not be dictated* by a mechanistic comparative analysis.") (emphasis added); *see also id.*, para. 56 ("The comparative analysis – and, *a fortiori*, a single factor of that analysis – does not prevail over the relational analysis."); *id.*, para. 94 (arguing that the Panels erred by "not clarify[ing] that the comparative analysis does not necessarily prevail over the relational analysis").

[83] *US – COOL (AB)*, para. 376; *US – Tuna II (Mexico) (AB)*, para. 320.

[84] *US – COOL (AB)*, para. 379; *see also id.*, para. 469 ("The Appellate Body has found, and the participants do not contest, that the burden of proof with respect to such alternative measures *is on the complainants*.") (emphasis added).

[85] *See* Canada's Other Appellant Submission, para. 49 ("The text of Article 2.2 does not give the comparison with possible alternative measures any special status."); *see also id.*, para. 48 ("However, no matter how attractive a comparison with possible alternative measures might be, there is no textual basis to support the proposition that a comparative analysis is, in fact, the only operative analysis.").

[86] Canada's Other Appellant Submission, para. 53 ("A relational analysis *would be pointless* under Article 2.2 because, if there is a valid alternative measure, then there is a violation.") (emphasis added)

analysis into two. It only means that the rare occasion may exist where it would not be necessary to undertake the analysis at all. But, as the Panels correctly found, neither Mexico nor Canada even argue that either scenario is true here.[87] It is *uncontested* that the challenged measure is trade restrictive and it is uncontested that it makes some contribution to its objective.

62. Second, complainants' approach ignores the Appellate Body's findings in this very dispute. As recounted above, the Appellate Body reversed the original panel's finding with regard to Article 2.2 on this point, concluding that:

> [W]e agree with the United States that, by finding the COOL measure to be inconsistent with Article 2.2 of the TBT Agreement without examining the proposed alternative measures, the Panel erred by relieving Mexico and Canada of this part of their burden of proof.[88]

63. There would simply be no basis for the Panels to refuse to base their findings regarding the consistency of the amended COOL measure on a comparison with an alternative – and, indeed, complainants provide none. The fact that Mexico claims that the Appellate Body did not "find or rule" that a comparison must be conducted in this case is simply wrong, and ignores the findings of the Appellate Body in this very dispute.[89]

64. Moreover, Mexico is surely wrong to make the related argument that the Panel should not have taken into account the fact that the Appellate Body found the original panel's finding that the original COOL measure was inconsistent with Article 2.2 without making a comparison was in error.[90] A compliance panel's analysis must be "done in the light of the evaluation of the consistency of the original measure with a covered agreement undertaken by the original panel and subsequently by the Appellate Body."[91] In other words, a compliance panel may not simply

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[87] *US – COOL (Article 21.5) (Panel)*, para. 7.298 ("Mexico does not argue that the amended COOL measure falls into either of the two exceptional scenarios identified by the Appellate Body…").

[88] *US – COOL (AB)*, para. 469.

[89] Mexico's Other Appellant Submission, para. 107 ("At no point in either *US – Tuna II (Mexico)* or the original *US – COOL* dispute did the Appellate Body find or rule that conclusions regarding Article 2.2 should not be drawn until after both steps of the "necessity" test have been undertaken, including the "comparative analysis" of the challenged measure with possible alternative measures. Such an interpretation would be contrary to the reasons provided by the Appellate Body in *US – Tuna II (Mexico)* and followed by the Appellate Body in *US – COOL*, as outlined above."); *but see US – Tuna II (Mexico) (AB)*, paras. 330-331 (reversing the panel's Article 2.2 finding in light of the Appellate Body's determination that Mexico's alternative made a lesser contribution to the objective than the challenged measure did).

[90] Mexico's Other Appellant Submission, para. 107 ("Regardless, a panel's analysis of a challenged measure under Article 2.2 at first instance is entirely different from the Appellate Body's analysis of such a decision in the context of an appeal. *The latter simply cannot be applied as a model for the purposes of undertaking the former*.") (emphasis added).

[91] *US – Shrimp (Article 21.5 – Malaysia) (Panel)*, para. 5.5 ("In other words, although we are entitled to analyse fully the consistency with a covered agreement of measures taken to comply, our examination is not done from a completely fresh start. Rather, it has to be done in the light of the evaluation of the consistency of the original measure with a covered agreement undertaken by the Original Panel and subsequently by the Appellate Body.") (internal quotes omitted).

ignore the previous analyses done in this dispute, as Mexico urged the Panel to do in this proceeding. As the Appellate Body noted in reviewing an Article 21.5 panel report:

> The reasoning in our Report in *United States – Shrimp* on which the Panel relied was not *dicta*; it was essential to our ruling. The Panel was right to use it, and right to rely on it. … The Panel had, *necessarily*, to consider our views on this subject…[92]

65. Third, there is no "substantial gap" in the Article 2.2 analysis, as Mexico so alleges.[93] Mexico appears to argue that allowing the Panel to find a measure inconsistent with Article 2.2 without resort to a comparison is "crucial" because, in Mexico's view, only in the first step of Mexico's approach is the trade restrictiveness of the challenged measure determined to be "necessary,"[94] a point which is assumed to be true in the second step of Mexico's approach.[95]

66. But Mexico badly misunderstands the key question posed by the obligation. The question is not – as Mexico presumes – whether a WTO panel, weighing and balancing all the relevant factors, would choose a different public policy goal (and means to accomplish that goal) than what the importing Member has already decided. Rather, the central question posed by Article 2.2 is whether the Member could have pursued its legitimate objective at the level it considers appropriate by means of a less trade restrictive measure than the challenged measure. As the text of the TBT Agreement itself makes clear, the analysis accepts that it is up to the Member itself to decide what public policy objectives to pursue and at what levels it is appropriate to pursue those objectives.[96] In this regard, the question of how to answer the question of whether a challenged measure is actually "more trade restrictive than necessary" is clear – is there a less trade restrictive (and reasonably available) alternative available to the Member that makes an equivalent contribution to the objective. If, in fact, there was no such less trade restrictive alternative for the Member to choose from, it simply cannot be said that the approach the Member did choose – the challenged measure – is "more trade restrictive than necessary."

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[92] *US – Shrimp (Article 21.5 – Malaysia) (AB)*, para. 107 (emphasis added).

[93] Mexico's Other Appellant Submission, para. 46.

[94] Canada persists in its confusion as to whether Article 2.2 concerns the necessity of the "measure" or the necessity of the "trade restrictiveness." Canada's Other Appellant Submission, para. 53 ("[T]his would mean that all challenged technical regulations are presumed to be *equally necessary*.") (emphasis in original).

[95] Mexico's Other Appellant Submission, para. 46 ("The weighing and balancing process in the "relational analysis" is crucial because it determines whether the trade-restrictiveness of the measure, in itself and on its own merits, is "necessary" in the first place to fulfil the legitimate objective. . . . Critically, the "comparative analysis" does not question the underlying "necessity" of the challenged measure's trade-restrictiveness; rather, it inherently assumes that the challenged measure's trade-restrictiveness is "necessary" in order to fulfil the legitimate objective, and seeks to determine whether or not there are less trade restrictive alternatives that are reasonably available.").

[96] *See* Article 2.2 of, and the sixth recital of the preamble to, the TBT Agreement. *See also EC – Sardines (Panel)*, para. 7.120 ("[I]t is up to the Members to decide which policy objectives they wish to pursue and the levels at which they wish to pursue them.").

67. Complainants' suggested approaches are thus not consistent with the text of the agreement or with the Appellate Body's interpretation of that text, nor do they have any logical basis. Rather, these approaches appear to be (yet another) attempt by complainants to relieve themselves of their own burden of proving their *prima facie* cases that an alternative measure exists "that is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available."[97] The Panels certainly did not err by requiring complainants to satisfy this basic obligation. Indeed, as is clear from the Appellate Body's report in the original proceeding, it would have been legal error to do anything but what the Panels did in this compliance proceeding. The fact that complainants could not ultimately satisfy their burdens of proof does not mean that the burden is too high. Rather, it simply means that the amended measure is not, in fact, "more trade restrictive than necessary."

C. Complainants' Appeal of the Panels' Finding as to the Amended Measure's Level of Contribution to the Objective Should Be Rejected

68. Complainants appeal aspects of the Panels' analysis and findings regarding the amended COOL measure's contribution to its objective. Canada argues that the Panels made a legal error by excluding foreign slaughtered muscle cuts (Label D) and domestically produced ground meat (Label E) from the analysis,[98] while Mexico argues that the legal error is limited to excluding ground meat from the analysis.[99] In addition, Canada asserts that the Panels acted inconsistently with Article 11 of the DSU in conducting this analysis.[100] For the reasons discussed below, these appeals should be rejected.

1. The Panels' Analysis

69. The Panels begin their analysis by noting the Appellate Body's guidance that the panel "must seek to ascertain – from the design, structure, and operation of the technical regulation, as well as from evidence relating to its application – to what degree, if at all, the challenged technical regulation, as written and applied, actually contributes to the achievement of the legitimate objective pursued by the Member."[101]

70. The Panels then reviewed certain findings made during the original proceeding relating to the contribution of the original COOL measure to its objective. In particular, the Panels recalled the Appellate Body's statement that "information on the origin of products must be clear and accurate for it to be able to convey *meaningful information* to consumers."[102] In this regard, the

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[97] *US – COOL (AB)*, para. 379; *see also id.*, para. 469 ("The Appellate Body has found, and the participants do not contest, that the burden of proof with respect to such alternative measures is on the complainants.") (emphasis added).

[98] *See* Canada's Other Appellant Submission, paras. 82-85.

[99] *See* Mexico's Other Appellant Submission, paras. 52-61.

[100] *See* Canada's Other Appellant Submission, paras. 86-90.

[101] *US – COOL (Article 21.5) (Panel)*, para. 7.334 (quoting *US – COOL (AB)*, para. 373).

[102] *US – COOL (Article 21.5) (Panel)*, n.784 (quoting *US – COOL (AB)*, para. 463) (emphasis in original).

Appellate Body concluded that while the original COOL measure makes "some" contribution to the objective, it did not have sufficient information to "ascertain the *degree* of contribution" to the objective.[103]

71. The Panels then addressed complainants' inclusion of Category D muscle cuts and Category E ground meat in their respective Article 2.2 analyses. The Panels noted that while, "[i]n principle," these categories of meat "could potentially be relevant" to the Article 2.2 analysis, neither complainant had provided a basis as to why this would be.[104] Specifically, the Panels noted that complainants had not made any claims with respect to either category, the alternative measures leave these two categories unaffected, and complainants did not explain how inclusion of these categories in this analysis could lead to a "meaningful[]" comparison with "alternative measures pertaining only to Labels A-C," particularly in light of the errors that the panel in *US – Tuna II (Mexico)* had made in conducting the comparison.[105]

72. Next, the Panels addressed the amended measure's degree of contribution by first recalling its earlier findings as to what percentages of beef and pork are covered by COOL and what percentages are exempt.[106] In doing so, the Panels acknowledged that the percentages covered by all of COOL (*i.e.*, Categories A-E) are "an indicative approximation of the extent to which the exemptions prevent any contribution to the COOL objective," noting that the Panels "are unable to determine the proportion of exempted products within Categories A-C specifically."[107]

73. Then, the Panels turned to the contribution to the objective of providing consumers information on origin by categories of muscle cuts actually at issue in this dispute – *i.e.*, Categories A, B, and C. The Panels noted that "[t]he introduction of point-of-production information on Labels A-C represents a *clear improvement* of the information formerly provided under the original COOL measure,"[108] and that the clarity and accuracy of the information is improved for each one of the A, B, and C labels.[109] In particular, the A, B, and C labels provide "consumer information that now largely corresponds to the measure's definition of origin by requiring labels that specify the country(ies) of birth, raising, and slaughter."[110]

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[103] *US – COOL (Article 21.5) (Panel)*, para. 7.339 (quoting *US – COOL (AB)*, para. 476) (emphasis in original).

[104] *US – COOL (Article 21.5) (Panel)*, para. 7.344.

[105] *US – COOL (Article 21.5) (Panel)*, paras. 7.344-7.345.

[106] *US – COOL (Article 21.5) (Panel)*, para. 7.347.

[107] *US – COOL (Article 21.5) (Panel)*, n.786.

[108] *US – COOL (Article 21.5) (Panel)*, para. 7.348 (emphasis added).

[109] *US – COOL (Article 21.5) (Panel)*, paras. 7.349-51.

[110] *US – COOL (Article 21.5) (Panel)*, paras. 7.348.

74. As such, the Panels found that the amended measure makes "'some contribution' to the objective of providing consumer information on origin."[111] As to the precise degree of contribution made by Labels A-C, the Panels found that:

> [T]he amended COOL measure contributes to the objective of providing consumer information on origin to a *significant degree* for products *carrying Labels A-C*. At the same time, the amended COOL measure does not make any contribution for products exempted from its coverage that would otherwise carry such labels. Overall, the amended COOL measure thus makes a *considerable but necessarily partial contribution* to its objective of providing consumer information on origin.[112]

2. Complainants' Appeals of the Panels' Analysis and Findings Are Faulty

75. Complainants now challenge the Panels' analysis regarding the degree of contribution that the amended measure makes to its objective. Specifically, Canada argues that the Panels erred by only looking to the contribution made by Labels A-C in making its determination and not taking account of the additional origin information provided by Labels D and E for beef and pork,[113] while Mexico makes the more limited claim that the Panels erred by not taking account of the additional origin information provided by Label E for beef.[114] Additionally, Canada alleges that the analysis was inconsistent with Article 11 of the DSU.[115] All three of these appeals should be rejected.

76. First, complainants' appeals are premised on a significant misunderstanding of the obligation under Article 2.2. As recounted above in section II.C, complainants are wrong to argue that Article 2.2 requires two, wholly separate analyses – there is one analysis, and that is whether the complainant has proved an alternative measure exists "that is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available."[116] Of course, to conduct that analysis one of the critical findings a panel must first make is the degree to which the challenged measure contributes to its objective. Here, the Panels did this and correctly based their decision not only on the scope of contribution that the Appellate Body had analyzed before, but, critically, used the same scope that would allow a proper comparison with complainants' alternatives (which also do not include Labels D and E).

77. Second, complainants fail to explain why it would be proper to compare the degree of contribution the amended measure makes with regard to Labels A-E to alternatives that only

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[111] *US – COOL (Article 21.5) (Panel)*, para. 7.352.

[112] *US – COOL (Article 21.5) (Panel)*, para. 7.356 (emphasis added).

[113] *See* Canada's Other Appellant Submission, paras. 82-86.

[114] *See* Mexico's Other Appellant Submission, paras. 52-61.

[115] *See* Canada's Other Appellant Submission, paras. 86-90.

[116] *US – COOL (AB)*, para. 379.

make changes to labels A-C. Canada merely states that including categories D and E would not "prejudice" the comparison "because these labels apply under the amended COOL measure and all of the alternative measures."[117] But the Panels could only make an appropriate "apples-to-apples" comparison by either *including* labels D and E in *both* sides of the comparison or *excluding* them from *both* sides of the comparison.

78. Yet complainants put forward no evidence or argument with regard to the contribution that Labels D and E make to the objective when discussing their alternatives, and instead focused on the contribution that the alternatives would make to the objective in lieu of Labels A-C if the exemptions were eliminated.[118] As such, it was entirely proper for the Panels not to include any contribution that Labels D and E make to the objective and focus in on what contribution the revised A-C labels make to the objective, consistent with the Appellate Body's previous analysis of the issue.[119] Indeed, as the Panels correctly recognized, determining whether an alternative measure makes an equivalent contribution based on an "improper" comparison such as the one proposed by complainants here, constitutes reversible error.[120] As such, Mexico is entirely incorrect when it argues that the omission of Label E from the contribution analysis of the amended measure "create[s] the exact misalignment that the Panel is seeking to avoid."[121]

79. Finally, complainants seize upon the fact that in paragraph 7.347 of their report, the Panels repeat their findings with regard to the extent of the exemptions, discussing the percentage of beef and pork covered by the amended measure (*i.e.*, sold under Labels A-E) and those beef and pork products not covered. Complainants contend, in essence, that the Panels relied on those beef and pork products sold under the D and E labels in making its finding as to the degree of contribution. Complainants misread the Panels' report. As to paragraph 7.347, the Panels are clear as to the probity of the percentages it lists. Namely, for beef, "these figures are thus an indicative approximation of the extent to which the exemptions prevent any contribution to the COOL objective" in light of the fact that the Panels "are unable to determine the proportion of exempted products within Categories A-C specifically."[122] For pork, the figures

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[117] Canada's Other Appellant Submission, para. 83.

[118] *See, e.g., US – COOL (Article 21.5) (Panel)*, paras. 7.469-7.473 (summarizing complainants' arguments as to why the first alternative makes an equivalent contribution to the objective that the amended measure does).

[119] *US – COOL (Article 21.5) (Panel)*, para. 7.344 ("[T]he alternative measures they have proposed under Article 2.2 specifically apply only to US-slaughtered muscle cuts that would be eligible for Labels A-C. The complainants provide no indication of how the conclusions from a relational analysis based on all distinctions of the amended COOL measure could be meaningfully compared to alternative measures pertaining only to Labels A-C.").

[120] *US – COOL (Article 21.5) (Panel)*, para. 7.345 (citing to *US – Tuna II (Mexico) (AB)*, paras. 328-331); *see also US – Tuna II (Mexico) (AB)*, para. 328 ("It appears to us, however, that the Panel's analysis of whether Mexico had demonstrated that the US 'dolphin-safe' labelling provisions are 'more trade-restrictive than necessary' within the meaning of Article 2.2 was based, at least in part, on an improper comparison.").

[121] Mexico's Other Appellant Submission, para. 56.

[122] *US – COOL (Article 21.5) (Panel)*, n.786.

are more probative in that only a "negligible" amount of ground pork is sold in the United States.[123]

80. This paragraph thus serves as background for the Panels' analysis, and at no time in their remaining analysis do the Panels rely on these particular percentages.[124] Rather, the focus of the Panels' analysis is (as it should be) on the contribution made by the revised A-C labels. And, indeed, that is the focus of the Panels' finding – "we 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*."[125] The Panels go on to find that "the amended COOL measure does not make any contribution for products exempted from its coverage that would otherwise carry such labels."[126] Looking at these two sentences together, it is clear that the Panels are making their findings based on the contribution made by the A-C labels qualified by the exemptions. As such, the Panels' ultimate finding – that "the amended COOL measure thus makes a considerable but necessarily partial contribution to its objective of providing consumer information on origin" does not rely on beef and pork sold under the D and E labels.[127]

81. Ultimately, of course, the importance of analyzing the degree the amended measure contributes to its objective is not precisely how the Panels describe this finding; instead, the Panels indicate that they must determine whether any alternative proposed by complainants makes an equivalent contribution to the objective. In that regard, whether the level of fulfillment is characterized as "considerable" as the Panels characterize it, or "limited," as Canada suggests, is immaterial. What is material is whether the alternatives make an equivalent contribution to what the amended measure does because it is for the Member to determine for itself at what levels it considers appropriate to contribute to its objective.[128] And the inescapable fact is that the amended measure contributes to its objective by providing consumer information on where the animal was born, raised, and slaughtered, which complainants' first two alternatives, unquestionably, fail to do. As such, Canada fails explain why its Article 11 appeal of the analysis and finding of a "considerable" contribution amounts to an error – if, indeed one has occurred – that is so "material" as to "undermine the objectivity of the panel's assessment of the matter before it."[129] Mexico's legal claim similarly fails.

D. Complainants' Appeals of the Panels' Analysis and Findings as to the "Risks Non-Fulfilment Would Create" Should Be Rejected

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[123] *US – COOL (Article 21.5) (Panel)*, n.786.

[124] In this regard, Mexico further errs in considering that the percentage of products that are subject to the amended measure equates to the level of contribution to the objective. The Panels never expressed it in this way, so the complainants' argument is simply contrary to the findings of the Panels. *See, e.g.*, Mexico's Other Appellant Submission, para. 59.

[125] *US – COOL (Article 21.5) (Panel)*, para. 7.356 (emphasis added).

[126] *US – COOL (Article 21.5) (Panel)*, para. 7.356.

[127] *US – COOL (Article 21.5) (Panel)*, para. 7.356.

[128] *US – COOL (AB)*, para. 373; *see also US – Tuna II (AB)*, paras. 315-316.

[129] *US – Carbon Steel (India) (AB)*, paras. 4.78-4.79.

1. Both the Panels' Analysis, and Complainants' Appeals of that Analysis, Are Fundamentally Misplaced

82. As discussed below, both the Panels' analysis as to the "risks non-fulfilment would create," and complainants' appeals of that analysis, are fundamentally misplaced.

83. Among other errors, complainants are wrong to argue that the phrase "taking account of the risks non-fulfilment would create" requires a WTO panel to rank the "importance" of legitimate government objectives under the premise that measures that pursue "unimportant" objectives are more likely to be considered inconsistent with Article 2.2 than measures that pursue "important" objectives.

84. Rather, the phrase "taking account of the risks non-fulfillment would create" is properly understood as a reflection that an individual Member takes into account such risks when setting its level of fulfillment (*i.e.*, required degree of contribution). Nothing in the text indicates that the intent underlying the phrase is to restrict a Member's ability to regulate in the public interest, as both the Panels' analysis, and complainants' appeals of that analysis, appear to presume. Accordingly, under no circumstances does the phrase provide a window through which WTO panels are to rank the "importance" of a Member's objective and use that ranking to judge a measure's consistency with Article 2.2. The "importance" of the objective of the measure is not what is at issue in Article 2.2; rather what is at issue is whether the Member could have chosen a less trade restrictive measure than the one it did choose that is reasonably available and makes an equivalent contribution to the objective.

85. In addition, the Panels erred in determining that the phrase "taking account of the risks non-fulfilment would create" allows a WTO panel to find a challenged measure inconsistent with Article 2.2 because the Member could have chosen to apply a measure that provides a lesser contribution to the objective than the challenged measure does. As discussed in the U.S. Appellant Submission, that is certainly not correct.[130] Rather, an alternative measure can only prove the challenged measure "more trade restrictive than necessary" if it makes a contribution to the objective that is equivalent to that of the challenged measure. If this were not the case, Members could not pursue objectives at the levels they wish to pursue them, a fundamental point that the TBT Agreement explicitly recognizes.[131] For purposes of these disputes, what this means is that a measure that does not provide the same detailed consumer information on origin regarding where the animal was born, raised, and slaughtered cannot prove the amended COOL measure inconsistent with Article 2.2, and the Panels erred by suggesting that such a finding is even possible,[132] and complainants err by criticizing the Panels for not making such a finding in these disputes.

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[130] *See* U.S. Appellant Submission, paras. 259-271.

[131] *See* TBT Agreement, sixth recital; *see also EC – Sardines (Panel)*, para. 7.120 ("[I]t is up to the Members to decide which policy objectives they wish to pursue and the levels at which they wish to pursue them.").

[132] *See* U.S. Appellant Submission, paras. 261-262.

86. In this section, the United States summarizes the Panels' analysis of the "risks non-fulfilment would create" and complainants' appeals of that analysis before addressing the specific points of complainants' appeals of the Panels' analysis regarding the alleged legal test for this phrase and the Panels' findings that flowed from the Panels' application of this legal test. Following that discussion, the United States addresses complainants' appeals of the Panels' findings as to the first and second alternatives in section II.E and to the third and fourth alternatives in section II.F.

87. As explained below, complainants have failed to prove that a reasonably available, less trade restrictive alternative exists that provides an equivalent contribution to the objective – that is to say, an alternative that provides the same origin information as to where the animal was born, raised, and slaughtered. And it is for this reason that complainants' appeals with regard to the Panels' Article 2.2 claims should be rejected.

2. The Panels' Analysis

88. In section 7.6.1.3 of their reports, the Panels addressed Mexico's argument as to whether that the "'relative importance' of the interests or values furthered by the challenged measure" is a separate factor of the Article 2.2 test.[133] The Panels declined to accept this argument. Among other points, the Panels noted that the Appellate Body did not identify the "relative importance" as a separate factor in the analysis in either *US – Tuna II (Mexico)* or *US – COOL* even though, in the latter dispute, Canada explicitly took the position that under Article 2.2, "a measure will be easier to justify if it pursues an objective that is 'vital' or 'important.'"[134] Instead, the Panels noted that the Appellate Body did reference "the risks non-fulfilment would create" as a "further" factor.[135]

89. As to the legal test for "the risks non-fulfilment would create," the Panels noted that the Appellate Body addressed the risks non-fulfilment would create "by taking into account consumer interest in, and willingness to pay for, country of origin information."[136] The Panels then addressed a variety of complainants' arguments regarding this assessment.

90. First, the Panels rejected Mexico's argument that the Panels "should examine whether actual risks exist," noting that Mexico provides no explanation of how such an analysis should be carried out nor how Mexico's preferred analysis would differ from the one conducted by the Appellate Body in the original proceeding.[137]

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[133] *US – COOL (Article 21.5) (Panel)*, paras. 7.304-7.311.

[134] *US – COOL (Article 21.5) (Panel)*, para. 7.308 (citing *US – COOL (AB)*, para. 79).

[135] *US – COOL (Article 21.5) (Panel)*, para. 7.310.

[136] *US – COOL (Article 21.5) (Panel)*, para. 7.375; *see also id.*, para. 7.381 ("[W]e review the risks non-fulfilment of the amended COOL measure's objective would create by assessing the nature of the risks and the gravity of the consequences. We do this by assessing consumer interest in, and willingness to pay for, country of origin information, in accordance with the Appellate Body's approach in the original dispute.").

[137] *US – COOL (Article 21.5) (Panel)*, para. 7.376.

91. Second, the Panels declined to take into account Canada's argument that the three exemptions as well as the fact that there were different rules for Labels D and E was relevant to this analysis, noting that this was an issue that the Panels "have addressed in the context of legitimate regulatory distinctions under Article 2.1 and also in our Article 2.2 analysis of the amended COOL measure's degree of contribution to its objective."[138]

92. Third, the Panels declined to accept Canada's argument that the "relative importance of values or interests" of the measure "is directly linked to the risks non-fulfilment would create," such that "the more important the values or interests underlying the objective . . . the more likely it is that a restrictive measure will be found to be 'necessary.'"[139] The Panels noted that while they "do not exclude the possibility for overlap between analytical components of the legal obligations of the TBT Agreement and the GATT 1994," "the text of the TBT Agreement requires us to assess the necessity of a technical regulation's trade-restrictiveness by 'taking account of the risks nonfulfillment would create,'" which is examined according to two criteria: the nature of the risks and the gravity of the consequences."[140]

93. Finally, the Panels declined to make this assessment according to "[w]hether the design and architecture of the measure consistently reflect the importance of the objective," as argued by Canada.[141] The Panels correctly 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."[142] Further, the Panels noted 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."[143]

94. The Panels thus addressed the conflicting evidence the parties submitted as to consumer interest in country of origin information and consumer willingness to pay for such information.[144] With regard to consumer interest in country of origin information, the evidence submitted by the parties included the previously submitted Kansas State University (KSU) produced documents, certain studies on food values submitted by Canada (but not Mexico), various letters and opinion polls submitted by the United States, and various pieces of evidence the United States submitted that are probative to consumer interest in point of production origin

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[138] *US – COOL (Article 21.5) (Panel)*, para. 7.377.

[139] *US – COOL (Article 21.5) (Panel)*, para. 7.378.

[140] *US – COOL (Article 21.5) (Panel)*, para. 7.379; *see also id.* (In this regard, the Panels noted that that they "need not define the precise relationship between the nature of risks and gravity of the consequences of the non-fulfilment of a legitimate objective under the TBT Agreement, on the one hand, and the relative importance of the interests or values protected under Article XX of the GATT 1994, on the other.").

[141] *US – COOL (Article 21.5) (Panel)*, para. 7.380.

[142] *US – COOL (Article 21.5) (Panel)*, para. 7.380.

[143] *US – COOL (Article 21.5) (Panel)*, para. 7.380.

[144] As to consumer interest in, and willingness to pay for, country of origin information the Panels noted that parties had strongly divergent opinions and evidence. *See US – COOL (Article 21.5) (Panel)*, para. 7.382.

information, all of which the Panels analyzed individually. As to the final group of evidence, the Panels concluded that "there is some consumer interest in country of origin information according to point-of-production."[145]

95. With regard to consumer willingness to pay, the evidence submitted by the parties included at KSU Consumer Valuation study submitted by complainants and an Australian-produced report submitted by the United States.

96. The Panels found, as the original panel did, "that consumers are not ready to bear all the costs of the amended COOL measure."[146] However, the Panels also found that the evidence in this proceeding established that "consumers are interested both in country of origin information in general and in country of origin information according to point-of-production," and that "consumers show some willingness to pay for general country of origin information" (although the Panels make no conclusion as to "consumer willingness to pay for country of origin information according to point-of-production").[147]

97. Accordingly, the Panels found that:

> [T]here is *some risk* associated with the non-fulfilment of the amended COOL measure's legitimate objective. In terms of the nature of this risk, we observe that the risk is related to the objective of the amended COOL measure, which is to provide consumer information on origin. The consequence that would arise from non-fulfilment of the amended COOL measure's objective is that consumers would not receive meaningful information on the origin of the covered products. In other words, consumers would be misinformed, confused, or not informed at all.[148]

98. However, based on the record evidence the Panels found that they could not make a finding as to the "gravity" of the consequence of non-fulfilment. Specifically, the Panels, which analyzed consumer demand as a "relevant indicator" of "gravity" found that "the evidence on the record does not allow us to determine the strength of consumer interest in either general country of origin information or country of origin information according to point-of-production," and that complainants' evidence regarding willingness to pay has numerous shortcomings.[149]

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[145] *US – COOL (Article 21.5) (Panel)*, para. 7.407.

[146] *US – COOL (Article 21.5) (Panel)*, para. 7.416.

[147] *US – COOL (Article 21.5) (Panel)*, para. 7.416.

[148] *US – COOL (Article 21.5) (Panel)*, para. 7.417 (emphasis added)

[149] *US – COOL (Article 21.5) (Panel)*, para. 7.418; *see also id.* ("As for willingness to pay, the KSU Consumer Valuation study addresses the premium consumers would be ready to pay for labels showing general information on country of origin. However, as noted, this study does not show any increase in consumer willingness to pay for country of origin information from previous studies pre-dating the original COOL measure. Further, while the study quantifies the premium consumers would be willing to pay for labels showing general information

99. Moreover, the Panels found that the evidence on the record as to the benefits to consumers to be wanting.[150] Finally, the Panels recalled the original panel's acknowledgement that "Members have certain policy space in determining their objectives," whereby "Members may decide to adopt particular regulations even in the absence of a specific demand from their citizens, and may do so without in fact shaping consumer expectations through regulatory intervention."[151] However, the Panels found that despite the fact that a Member's interest in pursuing an objective "might also be relevant for ascertaining the gravity of the consequences of not fulfilling such objective, the Panels could not make any determination of this interest in light of the limited information on the record as to the benefits to consumers of receiving this same information.[152] Accordingly, the Panels concluded that although the Panels "found that the amended COOL measure pursues the same legitimate objective as the original COOL measure, based on the evidence before us in this compliance dispute we cannot ascertain the gravity of not fulfilling the amended COOL measure's objective."[153]

3. Complainants' Appeals

100. Complainants criticize the Panels' analysis of the legal test for determining what the "risks non-fulfilment would create," the Panels' actual findings regarding the "risks non-fulfilment would create" based on the record evidence, and, ultimately, how those findings (or lack thereof) impacted the comparison between the amended measure and complainants' first two alternatives. In light of complainants' complicated, repetitive, and somewhat contradictory arguments on this issue, the United States summarizes complainants' arguments in this regard before responding to the individual arguments below in section II.D.4 (legal test) and section II.D.5 (findings).

101. As to the legal test, the main thrust of complainants' arguments is that the Panels erred by not analyzing the "relative importance" of the objective. Complainants make this argument

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on country of origin, neither the study nor the complainants have translated the implications of this figure for the specific degree of gravity of the consequences of not fulfilling the objective to provide consumer information.").

[150] *US – COOL (Article 21.5) (Panel)*, paras. 7.419-7.420; *see also id.* ("The benefits accruing to consumers from receiving origin information may also be determinant of consumer demand for such information. By the same logic, the benefits that consumers would forego in the absence of meaningful origin information are relevant for the gravity of the consequences of such an eventuality.").

[151] *US – COOL (Article 21.5) (Panel)*, para. 7.421 ("There are … circumstances in which Members may decide to adopt particular regulations even in the absence of a specific demand from their citizens, and may do so without in fact shaping consumer expectations through regulatory intervention. We also note the panel's statement in *Korea – Various Measures on Beef* that 'there can be good reasons – apart from any protectionist motives – why a WTO Member might want information to be provided as to the origin of products, and particularly meat products, at the retail level.'").

[152] *US – COOL (Article 21.5) (Panel)*, para. 7.422.

[153] *US – COOL (Article 21.5) (Panel)*, para. 7.423.

directly, arguing that the Panels legally erred in declining to consider the "relative importance" of the objective of the amended measure in assessing the risks non-fulfilment would create.[154]

102. Complainants also make the same point indirectly, arguing that the Panels erred by not analyzing the design and architecture of the amended measure in this context. Although complainants style this argument as separate from their argument regarding the relative importance, it appears to argue a similar point – complainants argue that the fact that the United States has designed the measure to provide different rules for ground meat and exempt certain products (*i.e.*, processed products) and retailers (*e.g.*, restaurants) indicates that the objective of providing consumer information on origin is not "important."[155] Canada's other arguments – that the Panels' test should have included an analysis of whether consumers would be "harmed" if not provided such origin information or whether a "market failure" would result from the failure to provide such origin information – also makes a very similar point.[156]

103. In this regard, complainants' arguments do not appear to differ materially from what complainants argued on appeal in the original proceeding, such as where Canada argued before the Appellate Body that "a measure will be easier to justify [under Article 2.2] if it pursues an objective that is 'vital' or 'important.'"[157] The Appellate Body resisted such an argument the first time around, and the argument should be resisted here again.

104. As to the Panels' actual findings, Mexico appears to challenge both the Panels finding that there is "some risk" of non-fulfilment as well as the Panels' determination that it could not ascertain the gravity of these consequences on the basis of a series of Article 11 challenges. Canada does not appear to challenge the former but does challenge the latter based on the same arguments it made with regard to the Panels' legal test.

105. The United States will address complainants' arguments as to the legal test and the Panels' determination that it could not ascertain the gravity of these consequences in turn.

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[154] *See* Canada's Other Appellant Submission, para. 97; Mexico's Other Appellant Submission, para. 72.

[155] *See* Canada's Other Appellant Submission, paras. 96, 101; Mexico's Other Appellant Submission, paras. 84-86.

[156] *See* Canada's Other Appellant Submission, para. 96. Canada also appears to make an implicit appeal of the Panels' finding that the objective pursued by the amended measure is a legitimate objective. *See US – COOL (Article 21.5) (Panel)*, para. 7.333. Canada states that the information provided to consumers "plays no obvious role other than to enable those consumers that are interested in the information to make purchasing decisions motivated by nationalistic preferences or specious health beliefs." Canada's Other Appellant Submission, para. 98. Not only is this characterization wrong as a matter of fact, it also has no foundation in the findings of the Panels nor in the DSB recommendations and rulings. The DSB recommendations and rulings in these disputes found that the objective pursued by COOL is legitimate. Canada cannot in this proceeding now seek contrary findings, and certainly not by simple assertion and innuendo.

[157] *See US – COOL (Article 21.5) (Panel)*, para. 7.308 (citing *US – COOL (AB)*, para. 79 (quoting Canada's Original Appellee Submission, para. 103)). Mexico had argued something very similar. *See US – COOL (AB)*, para. 107 ("Mexico agrees that, consistent with the Appellate Body's Article XX 'necessity' case law, '[t]he more vital or important those common interests or values are, the easier it would be to accept' a measure as 'necessary' for purposes of Article 2.2.") (quoting Mexico's Original Appellee Submission, para. 179).

4. Complainants' Appeals of the Panels' Legal Test Should Fail

a. Relative Importance Is Not Part of the Analysis

106. As they argued on appeal in the original proceeding,[158] complainants contend here that the Panels erred by not considering the "relative importance" in analyzing the "risks non-fulfilment would create." In particular, complainants argue that there is a direct correlation between the relative importance of the objective and the gravity of consequences of non-fulfilment.[159] Relying in particular on the fact that the objective of the amended measure – the provision of consumer information on origin – is not a listed objective in the general exceptions articles of either the GATT or GATS, complainants argue that this objective is relatively unimportant, and, as such, the gravity of the consequences of non-fulfilment is low.[160] Accordingly, complainants conclude where a comparison with an alternative is done (which complainants dispute is required at all),[161] the Panels should have found that both the first and second alternative measures provide an equivalent contribution to the objective where the alternatives do not make the same contribution in light of the fact that gravity/objective is low/unimportant.[162] Complainants' argument is in error.

107. There is simply no correlation between the "importance" of an objective and the phrase "risks non-fulfilment would create," and the United States disagrees that the "importance" of the measure is at all relevant to the Article 2.2 analysis. As should be clear, the text of Article 2.2 does not distinguish objectives on the basis of "importance," but "legitimacy." That is to say, Article 2.2 does not require Members to only apply technical regulations that pursue "important" policy goals – however that would be judged – but "legitimate" ones.

108. Complainants argue that the "importance" of the objective is relevant in "taking account of the risks non-fulfilment would create." However, Article 2.2 provides specific examples of what the "relevant elements of consideration" are when assessing the risks non-fulfillment would create. Article 2.2 states: "In assessing such risks, relevant elements of consideration are, *inter alia:* available scientific and technical information, related processing technology or intended end-uses of products." It is significant that the listed relevant elements do not include the "importance" of the objective. Indeed, for complainants, the "importance" of the objective appears to be the paramount consideration. Yet complainants can offer no explanation for why this is not included in the agreed list of relevant considerations, or why Members would have

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[158] *See US – COOL (AB)*, paras. 133, 154.

[159] *See* Canada's Other Appellant Submission, para. 98; Mexico's Other Appellant Submission, para. 73.

[160] *See, e.g.*, Canada's Other Appellant Submission, para. 98 ("That value is objectively not highly important in and of itself and in comparison with other values, such as protecting human life or the environment."); Mexico's Other Appellant Submission, para. 81 ("These consequences would not endanger human or animal life or health, or the protection of the environment, or the integrity of public morals. Therefore, it must be found that the consequences of non-fulfilment would not be particularly significant.").

[161] *See supra*, sec. II.B.

[162] *See* Canada's Other Appellant Submission, paras. 121, 124; Mexico's Other Appellant Submission, paras. 136, 156.

been silent not only on this being a relevant consideration, but how to rank objectives according their "importance."

109. Furthermore, panels are simply not in a position to rank and judge the importance of various objectives pursued by different Members. Such a role is not part of the TBT Agreement and would "add to or diminish the rights and obligations provided in the covered agreements," contrary to Article 3.2 of the DSU. Moreover, Members have provided no guidance to assist panels in any such exercise. Such an evaluation is inherently subjective, and there is no basis for assuming (as complainants appear to do) that Members have reached agreement on the relative importance of various legitimate objectives. For any number of reasons, one Member's important objective may well be another Member's unimportant objective.

110. Indeed, complainants have provided no basis for their assertion that the objective pursued by the amended measure is not important (even "trivial"), other than complainants' own subjective (and self-serving) assertions. Complainants simply compare the objective of the amended measure to that of protecting human life and health, the environment, or public morals, and assert that since consumer information is not as important as these, it is unimportant. This is not a logical result. Nothing says that the objectives cited by the complainants exhaust the category of "important" objectives, or that all objectives are in one of two categories: "important" and "not important."

111. The type of subjective judgment calls that the complainants' approach would entail[163] should raise concerns with all Members, as imposing on dispute settlement panels the responsibility to make such calls with no guidance, and the consequences that would flow from such judgment calls, would indeed be detrimental to the WTO systemically, and to the WTO dispute settlement system in particular.

112. As such, it remains absolutely true, as it always has been, that "it is up to the Members to decide which policy objectives they wish to pursue and the levels at which they wish to pursue them."[164] A measure that pursues a particularly "important" legitimate objective is no more or less vulnerable to an Article 2.2 challenge than a measure that pursues an "unimportant" legitimate objective. In both cases the inquiry is the same – does an alternative measure exist "that is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available."[165]

113. Not surprisingly, the Appellate Body did not identify the "relative importance" of the objective as a key factor in its Article 2.2 analyses of *US – COOL* and *US – Tuna II (Mexico)*. While Mexico attributes this fact to the limits of the record in *US – COOL* and that the measure was "different" in *US – Tuna II (Mexico)*,[166] neither explains why the "relative importance" of

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[163] Canada concedes that such judgment calls would be involved in its approach. Canada's Other Appellant Submission, para. 46.

[164] *EC – Sardines (Panel)*, para. 7 .120; *see also* TBT Agreement, sixth preambular recital.

[165] *US – COOL (AB)*, para. 379.

[166] Mexico's Other Appellant Submission, para. 75.

the objective is relevant in this proceeding and not others. The fact is the text simply does not support such an analysis, nor would a panel ever be in a position to conduct such an analysis.

114. In fact, complainants are essentially arguing that the Panels (and now the Appellate Body) should have applied a test different from that agreed in Article 2.2. The complainants' "relational analysis" approach would convert the obligation in Article 2.2 from a "no more trade restrictive than necessary" obligation, which focuses on whether there is a less trade restrictive way to accomplish a Member's legitimate objective, into an obligation where a panel would judge whether a Member should be permitted to pursue a legitimate objective at all, if any trade restrictive effect of a measure surpassed some unspecified level for an objective of some undefined level of importance.[167] One can understand why Members were willing to agree to the "no more trade restrictive than necessary" obligation that is actually provided under the text of Article 2.2. One can also understand why Members were not comfortable with the complainants' approach and thus why that approach is *not* found in the agreed text of Article 2.2.

b. Label E and the Exemptions Are Not Relevant to the Analysis

115. Complainants also argue that the Panels erred by not taking into account that the amended measure provides for different rules for ground meat (Category E) and that the amended measure provides three exemptions in its analysis of the "risks non-fulfilment would create." In not taking into account of these two points, Mexico claims that the Panels erred legally as well as acted inconsistently Article 11 of the DSU, while Canada claims that the Panels erred legally.[168]

116. As the Panels indicate, this argument, which the Panels considered that only Canada had made, appears to be another version of the "relative importance" argument discussed above,[169]

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[167] Complainants' argument for some sort of proportional importance test is specifically undermined by the history of the TBT Agreement. Specifically during the Uruguay Round, the United States proposed adding the following footnote to the second sentence of Article 2.2: "This provision is intended to ensure proportionality between regulations and the risks non-fulfillment of legitimate objectives would create." Dunkel Draft TBT Agreement, n. 1. The footnote was, however, eliminated in the final text of the TBT Agreement because:

> This footnote … was misconstrued by some as requiring a "proportionality" test under the TBT Agreement in which a measure would be required to be "proportionate" to the risk it was designed to protect against. The U.S.-proposed footnote was not intended to suggest a proportionality requirement. "Proportionality" is not a concept used anywhere in the GATT or agreements negotiated under its auspices. It is ill-defined and would be inappropriate under the TBT Agreement. Accordingly, the United States withdrew its proposal and the footnote was deleted from the final text.

Statement of Administrative Action at 1218, n.9. Thus, Members considered, and rejected, proposed language that would have explained that the risks of non-fulfilment language introduces a proportionality requirement into Article 2.2.

[168] Mexico's Other Appellant Submission, para. 89; Canada's Other Appellant Submission, paras. 101-102.

[169] *US – COOL (Article 21.5) (Panel)*, para. 7.380 ("To the extent that Canada's suggestion concerns the relative importance of the amended COOL measure's objective, we have explained the legal test that it is our task to apply to the complainants' Article 2.2 claims, including as regards the risks nonfulfillment would create.").

and, as such, has been fully addressed above. Indeed, Canada appears to make this precise point, arguing that the Category E rules and the exemptions indicate that the United States itself does not consider that the objective of the amended measure to be important,[170] although Canada also makes the contrary argument that a "Member's interest in pursuing a legitimate objective" is not a "relevant factor" in this very same analysis.[171]

117. In any event, Canada is clearly wrong to suggest that the United States does not consider this to be an important objective. The evidence regarding the U.S. Government interest in providing such information is clear – the U.S. Congress passed legislation to implement a COOL regime in 2002 and 2008, and the U.S. Department of Agriculture ("USDA") ensured it is implemented appropriately. In this regard, the United States notes that the U.S. Government interest in providing such information is not at all unusual as numerous Members maintain measures to provide their consumers with information on origin (including complainants),[172] an interest reflected in Article IX of the GATT 1994. And while Mexico insists that the exemptions and ground meat rules demonstrates that "the gravity of the consequences of providing little or no information on the origin of beef products to consumers is very low to the point of being insignificant or trivial,"[173] it is anything but. Indeed, as discussed in the U.S. Appellant Submission, the COOL measure covers an extremely large amount of food – $38.5 billion worth of beef and $8.0 billion worth of pork sold annually at over 30,000 retail establishments spread throughout the United States[174] – and the United States considers that the consequences of not providing such origin information are significant.

118. That said, the United States has never taken the position that it is willing to provide consumers such information on origin *regardless of the cost of doing so*. And as explained in the U.S. Appellant Submission,[175] with regard to the exemptions, U.S. policymakers have made 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 it was appropriate for consumers and industry to bear. Accordingly, even if this information was and remains desired by consumers, the United States ultimately set the level at which it set out to fulfill its objective at a slightly lesser level, the prerogative of any regulator.

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[170] *See* Canada's Other Appellant Submission, para. 101 ("The amended COOL measure shows that the United States itself does not consider that the consequences of non-fulfilment would be grave."); *see also id.*, para. 98-100 (arguing that there is a direct correlation between gravity and importance).

[171] Canada's Other Appellant Submission, para. 106.

[172] U.S. First Written 21.5 Submission, para. 40; WTO Members with Country of Origin Regimes (Exh. US-5) (listing Australia, Barbados, Canada, Chile, Chinese Taipei, Colombia, the EU, Korea, Japan, and Mexico); TBT Notifications of Country of Origin Measures (Exh. US-6).

[173] Mexico's Other Appellant Submission, para. 86.

[174] *See* U.S. Appellant Submission, para. 88 (citing U.S. First Written 21.5 Submission, para. 92).

[175] *See* U.S. Appellant Submission, paras. 210-215.

119. Similarly, and as explained below,[176] the United States created different rules for ground meat in recognition that the production of ground meat differs from the production of muscle cuts in such a manner that providing detailed origin information would constitute a higher burden on the production of ground meat products than muscle cuts. And, indeed, the Panels appear to correctly recognize that simply because Members design their measures to accommodate certain cost considerations does not mean that the Member considers the "risks non-fulfilment would create" are necessarily low[177] – only that the Member has designed its measure to accommodate several different goals. Indeed, as noted previously, the United States is not aware of *any* COOL measure applied by *any* Member (including the complainants) that applies to all sales of all products.[178]

c. Canada's Additional Factors Are Not Relevant to the Analysis

120. For much of the same reasons as explained above, complainants' additional arguments all fail.

121. First, Canada argues that the Panels erred by not taking into account that the life or health of U.S. consumers would not be endangered if they did not receive origin information in making this analysis.[179] Leaving aside Canada's obvious confusion between the SPS Agreement and the TBT Agreement, this argument appears to be nothing more than another version of Canada's "relative importance" argument. As such, this argument fails for the same reason that its broader "relative importance" argument did – the text of Article 2.2 simply does not distinguish between "important" and "unimportant" objectives as Canada wrongly presumes. Indeed, "it is up to the Members to decide which policy objectives they wish to pursue and the levels at which they wish to pursue them."[180]

122. Second, the Panels were entirely correct to reject the relevance of Canada's "market failure" argument, which appears to posit that a measure is more vulnerable to an Article 2.2

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[176] *See infra*, sec. III.C.

[177] *US – COOL (Article 21.5) (Panel)*, para. 7.380 ("We note 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.").

[178] *See* U.S. Appellant Submission, para. 214; *see also US – COOL (Article 21.5) (Panel)*, para. 7.275 ("it is not atypical for any kind of regulation to have exceptions in terms of the products and entities that are subject to it. Some of such exceptions might be justifiable for practical reasons and simply facilitate the implementation of the measure at issue without necessarily involving protectionist intent.") (quoting *US – COOL (Panel)*, para. 7.684); U.S. First Written 21.5 Submission, paras. 41-44 (citing Scope of Third Party COOL Regulations (Exh. US-10); WTO Members with Country of Origin Regimes (Exh. US-5); TBT Notifications of Country of Origin Measures (Exh. US-6)).

[179] Canada's Other Appellant Submission, para. 100 ("Therefore, the fact that no harm would be caused to consumers – even to those who make purchasing decision based on false food safety assumptions – from not receiving origin information is a relevant element to consider in assessing the gravity of the consequences of not fulfilling the amended COOL measure's objective.").

[180] *EC – Sardines (Panel)*, para. 7 .120; *see also* TBT Agreement, sixth preambular recital.

challenge based simply on a lack of consumer demand for the labeling regime.[181] As the Panel correctly noted, "[t]here are … circumstances in which Members may decide to adopt particular regulations even in the absence of a specific demand from their citizens, and may do so without in fact shaping consumer expectations through regulatory intervention."[182] And, indeed, there are many situations where consumer demand for a labeling regime could conceivably be low – health warnings on tobacco products, nutrition labeling on food products – but that would not mean that the government mandating the requirement would consider the risks non-fulfilment would create to be low. In other words, the fact that the consumers of particular products – cigarettes or high fat foods, for example – are not demanding the information being provided to them does not make a challenged measure more vulnerable to being inconsistent with Article 2.2 than it otherwise would be if those consumers were demanding the information.[183] The same holds true for the amended COOL measure.

123. Finally, Mexico's position that the "relative importance" of a measure can be measured solely on the basis for consumer demand for the regulatory requirements is doubly faulty, for the reasons explained in the above two paragraphs.[184]

5. Complainants' Appeals of the Panels' Findings Should Fail

124. In addition to appealing the legal test the Panels applied to determining what "risks non-fulfilment would create," complainants also appeal the Panels' finding that followed from the Panels' analysis. In particular, complainants argue that the Panels erred by failing to ascertain the gravity of not fulfilling the amended measure's objective. Complainants' appeals are in error, and should be rejected.

125. As discussed above, the Panels analyzed "the risks non-fulfilment would create" by assessing the nature of the risks and the gravity of the consequences.[185] The Panels did this by assessing the evidence submitted by the parties pertaining to consumer interest in, and willingness to pay for, country of origin information.[186] Based on the Panels' review of all the relevant evidence, the Panels found that there is "some risk" arising from the non-fulfillment of

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[181] Canada's Other Appellant Submission, para. 112.

[182] *US – COOL (Article 21.5) (Panel)*, para. 6.59 (responding to Canada's "market failure" argument and quoting *id.*, para. 7.421).

[183] In fact there are a broad range of reasons that a Member may seek to provide information that is not specifically demanded by a majority of their citizens. For instances, countries with multiple national languages such as Canada may require packaging to convey information in multiple languages, even though a majority of consumers only seek information in one language.

[184] *See* Mexico's Other Appellant Submission, para. 79 ("Further, in the context of consumer information, one way to assess the "relative importance" of the interests or values furthered by the amended COOL measure is to consider the actual demand by U.S. consumers for the origin information in question. Low demand or general indifference among the public regarding consumer information is an indication of lower relative importance.").

[185] *US – COOL (Article 21.5) (Panel)*, para. 7.381.

[186] *US – COOL (Article 21.5) (Panel)*, paras. 7.381-7.383.

the objective of providing consumer information on origin.[187] The Panels considered the nature of this risk to be that "consumers would be misinformed, confused, or not informed at all."[188] However, the Panels determined that they were not able to make similar findings as to the gravity of this consequence in light of the conflicting evidence (or lack of evidence) regarding consumer demand, consumer benefits, and interest of the government.[189]

126. While complainants agree that the Panels' findings are in error, they differ substantially as to why this is the case.

127. Canada argues that the Panels' "inability to assess the gravity of the consequence of non-fulfilment is the direct consequence of the incorrect legal test it applied to assess the 'risks non-fulfilment would create.'"[190] In Canada's view, had the Panels addressed the factors that Canada prefers (the relative importance of the objective, harm to consumers, Label E and the exemptions, and market failure),[191] instead of the factors the Panels actually addressed (consumer demand, consumer benefits, and interest of the government),[192] the Panels would have made a finding as to the gravity of the consequences.[193] As such, the United States has fully addressed why Canada's arguments are in error in the preceding section.

128. Mexico, for its part, begins this part of its appeal by making a characterization (rather than a legal challenge) that the Panels' failure to make a finding as to the gravity prong rendered "both steps" of the analysis "unworkable."[194] Mexico's characterization is in error for any number of reasons. As discussed above, Mexico is wrong to urge the Appellate Body to adopt Mexico's "two-step" approach.[195] As such, Mexico's fear that the Panels' lack of findings has made the first step of Mexico's necessity test "unworkable" is unfounded. Mexico's concern regarding the Panels' lack of findings as to the "gravity" of the consequences, which is based on the misunderstanding that an alternative that makes a lesser contribution to the objective can prove a challenged measure inconsistent with Article 2.2, is likewise unfounded, as discussed below in section II.E.

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[187] *US – COOL (Article 21.5) (Panel)*, paras. 7.417.

[188] *US – COOL (Article 21.5) (Panel)*, para. 7.417.

[189] *US – COOL (Article 21.5) (Panel)*, paras. 7.418-7.424.

[190] Canada's Other Appellant Submission, para. 108 ("The Compliance Panel's inability to assess the gravity of the consequence of non-fulfilment is the direct consequence of the incorrect legal test it applied to assess the 'risks non-fulfilment would create.' Had the Compliance Panel applied the correct legal test and, as a result, considered all of the evidence and arguments, it would have concluded that the consequence it had identified would not be particularly grave.").

[191] *See* Canada's Other Appellant Submission, para. 96.

[192] *See US – COOL (Article 21.5) (Panel)*, paras. 7.384-7.422.

[193] Canada's Other Appellant Submission, para. 108.

[194] *See* Mexico's Other Appellant Submission, paras. 90-92.

[195] *See supra*, sec. II.B.

129. Aside from this incorrect characterization, Mexico makes a series of DSU Article 11 appeals, claiming that the Panels did not objectively assess the evidence that it reviewed in analyzing the gravity of the consequences of non-fulfillment. However, Mexico's true complaint appears to be that the DS386 Panel did not accord "the same meaning and weight" to the factual evidence that Mexico does.[196] As such, Mexico's DSU Article 11 appeals fail, as discussed below in this section.

a. Mexico's Appeal with Regard to the Panels' Assessment of the Evidence Regarding Consumer Demand Fails

130. Mexico alleges that the DS386 Panel erred by requiring evidence that "directly and narrowly address[es]" "the specific kinds" of origin information provided by the COOL measure and "reject[ing]" all other evidence that was "not exactly equivalent to, or consistent with, the specific kinds of information provided under the COOL measures or because it would not be relevant under certain hypothetical scenarios."[197] In particular, Mexico complains that the DS386 Panel wrongly "rejected" an exhibit submitted by Canada regarding food values (Exh. CDA-154),[198] and the KSU Revealed Demand Study.[199] Mexico claims that both pieces of evidence were "material to the assessment of the risks that non-fulfilment of the legitimate objective would create, specifically with respect to measuring the gravity of the consequences that would arise from non-fulfilment," and that, "[t]aken singly or together with the other evidentiary errors of the Panel discussed above and below, [these] error[s] undermine[] the objectivity of the Panel's assessment of the matter before it."[200] Mexico misunderstands both the DS386 Panel's analysis, as well as the requirements of making a claim under DSU Article 11.

131. First, Mexico's DSU Article 11 appeal regarding Exhibit CDA-154 is in error. For purposes of these Article 21.5 proceedings, there were separate Panels. Each Panel could only consider the evidence submitted in the proceeding for that Panel. It is therefore impossible for the DS386 Panel to act inconsistently with DSU Article 11 with regard to a piece of evidence that is not even on the record of that proceeding. Indeed, the Appellate Body has stated that "[p]anels may not 'make affirmative findings that lack a basis in the evidence contained in the panel record.'"[201]

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[196] *US – COOL (Article 21.5) (Panel)*, para. 7.382 ("We are also mindful that we 'are not required to accord to factual evidence of the parties the same meaning and weight as do the parties.'") (quoting *Australia – Salmon (AB)*, para. 267).

[197] Mexico's Other Appellant Submission, para. 96.

[198] Mexico's Other Appellant Submission, para. 97; *US – COOL (Article 21.5) (Panel)*, paras. 7.392-7.393.

[199] Mexico's Other Appellant Submission, para. 98; *US – COOL (Article 21.5) (Panel)*, para. 7.387 (discussing Exh. MEX-35).

[200] Mexico's Other Appellant Submission, paras. 97, 98.

[201] *China – Rare Earths (AB)* para. 5.178 (quoting *US – Carbon Steel (AB)*, para. 142 (referring to *US – Wheat Gluten (AB)*, paras. 161 and 162)).

132. Second, Mexico misunderstands the Panel's analysis of the evidence. The Panel did not analyze the various pieces of evidence submitted in DS386 in order to "accept" or "reject" particular pieces of evidence. Rather, the Panel reviewed all the evidence, including the two exhibits that Mexico specifically raises, to assess the "credibility" and "weight" of each piece of evidence to ensure that Panel's factual findings have a "proper basis."[202] And, as discussed below, the Panel did address the relevance (and shortcomings thereof) of each of the pieces of evidence, including the two that Mexico raises in this appeal. The mere fact that the Panel considered Exhibit CDA-154 to not be relevant in light of the questions posed in that study does not mean that the Panel acted inconsistently with DSU Article 11. Rather, it indicates that the Panel disagreed with Canada (and, belatedly, Mexico) as to the relevance of this particular evidence. As the Panel correctly pointed out, DSU Article 11 does not mandate a panel "to accord to factual evidence of the parties the same meaning and weight as do the parties."[203]

133. Third, Mexico misunderstands DSU Article 11, which calls on a panel to "consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence."[204] "Within these parameters, 'it is generally within the discretion of the [p]anel to decide which evidence it chooses to utilize in making findings.'"[205] An Article 11 claim is a "very serious allegation,"[206] "[o]nly egregious errors" constitute a failure to satisfy Article 11.[207] To that end, "[t]he Appellate Body has held that it will not 'interfere lightly' with a panel's fact-finding authority."[208] As such, an appellant making an Article 11 claim "must…clearly articulate[] and substantiate[] [the claim] with specific arguments"[209] and "*must explain why*… [the] evidence is so material to its case that the panel's failure to explicitly address and rely upon the evidence has a bearing on the objectivity of the panel's factual assessment."[210] As discussed below, the Panel's analysis is consistent with Article 11 and Mexico's allegations fail to demonstrate otherwise.

134. With regard to Exhibit CDA-154, the Panel assessed the evidence by presenting the conclusion, noting the representativeness of the sample of the study, analyzing the questions posed in the study, and pointing out aspects of the design of the study, which speak to the

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[202] *US – COOL (Article 21.5) (Panel)*, para. 7.382 (citing *US – Tuna II (Mexico) (AB)*, para. 254; *Philippines – Distilled Spirits (AB)*, para. 135; *Brazil – Retreaded Tyres (AB)*, para. 185; and *EC – Hormones (AB)*, paras. 132-133)).

[203] *US – COOL (Article 21.5) (Panel)*, para. 7.382 (quoting *Australia – Salmon (AB)*, para. 267).

[204] *Brazil – Retreaded Tyres (AB)*, para. 185.

[205] *China – Rare Earths (AB)*, para. 5.178 (quoting *EC – Hormones (AB)*, para. 135).

[206] *EC – Poultry (AB)*, para. 133.

[207] *Japan – Agricultural Products II (AB)*, para. 141.

[208] *China – Rare Earths (AB)*, para. 5.179 (quoting *EC – Sardines (AB)*, para. 299; *US – Carbon Steel (AB)*, para. 142; *US – Wheat Gluten (AB)*, para. 151).

[209] *China – Rare Earths (AB)*, para. 5.227.

[210] *China – Rare Earths (AB)*, para. 5.178 (emphasis added).

relevance of the study.[211] Based on the fact that the questions referenced a definition of origin different from its definition in the COOL measure, and that the study does not speak to "the absolute value consumers attach to origin" – a point that might shed light on the gravity of the consequences of non-fulfilment – the Panel discounted the relevance of the study.[212] As such, the Panel acted within its discretion as the trier of fact, and Mexico errs by alleging that the Panel did not so act.

135. In its Article 11 claim, Mexico does not even attempt to explain *why or how* a very different definition of origin, the very purpose of the measure, is (in its view) conceptually compatible with the COOL measure's definition[213] or *why*, in its view, the Panel's relevant concern is speculative.[214] It appears that Mexico's claims are "premised on [its] disagreement with the Panel's reasoning and weighing of the evidence,"[215] and therefore, do not establish an inconsistency with Article 11.[216]

136. With regard to the KSU Revealed Demand Study, the Panel assessed the evidence by stating the conclusion of the study, which does not directly speak to consumer interest, and by examining the inferences that (in the Panels view) can be drawn from the study.[217] The Panel noted that the unchanged demand for the products covered by the COOL measure does not necessarily support an inference that there is a lack of consumer interest in the information mandated by the measure because other reasons can explain the result of the study.[218] The Panel also noted that the due to the methodology of the study, its conclusion has "no direct bearing" on *consumer* welfare, a point that might illuminate the gravity of the consequences of non-fulfilment.[219]

137. In its Article 11 claim, Mexico does not explain *why* (in its view) the Panel's concerns were speculative or *why* the circumstances were hypothetical.[220] It appears that Mexico's claims

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[211] *US – COOL (Article 21.5) (Panel)*, paras. 7.392-7.394.

[212] *US – COOL (Article 21.5) (Panel)*, paras. 7.392-7.394.

[213] Mexico's Other Appellant Submission, para. 97.

[214] Mexico's Other Appellant Submission, para. 98.

[215] *China – Rare Earths (AB)*, para. 5.203.

[216] *China – Rare Earths (AB)*, para. 5.203; *US – Tuna II (Mexico)*, para. 272; *EC – Seal Products (AB)*, para. 5.254 ("The fact that the complainants may not agree with a conclusion the Panel reached, or considered itself unable to reach, does not mean that the Panel committed an error amounting to a violation of Article 11."); *id*, para. 5.150 ("it is insufficient for an appellant simply to disagree with a statement or to assert that it is not supported by evidence."); *Dominican Republic – Import and Sale of Cigarettes (AB)*, para. 82.

[217] *US – COOL (Article 21.5) (Panel)*, paras. 7.387-7.388.

[218] *US – COOL (Article 21.5) (Panel)*, paras. 7.387.

[219] *US – COOL (Article 21.5) (Panel)*, paras. 7.388.

[220] Mexico's Other Appellant Submission, para. 98; U.S. Comments on Complainants' Responses to Panels' Question 15, para. 27. In its responses to the Panels' questions, the United States noted that Mexico "fail[s] to explain how a change in a consumer's purchasing patterns is probative of consumer demand for the provision of

stem from the fact that the Panel did not draw the inferences that Mexico drew from the evidence. The Appellate Body has stated that such a claim does not meet the requirements of Article 11.[221]

138. As explained below, Mexico repeats many of these same errors in its other DSU Article 11 appeals.

b. Mexico's Appeal Fails with Regard to the Telephone Poll Question as Evidence of "Some Consumer Interest" in COOL Information

139. Mexico alleges that the Panel acted inconsistently with DSU Article 11 when the Panel "rejected" the evidence it offered regarding consumer demand for origin information, "holding the evidence to a very precise standard of relevance and probity," yet the Panel "accepted telephone opinion poll results as 'relevant'… even though the poll in no way tested for the level of consumer interest, demand, or willingness to pay for origin information."[222] Mexico's appeal should be rejected.

140. First, Mexico misunderstands the Panel's analysis. In its assessment of the evidence, the Panel first identified the poll question and conclusion that 47 percent of "consumers said they prefer comprehensive labeling."[223] The Panel proceeded to identify shortcomings in the poll, and concluded that, in view of the shortcomings, they cannot assume that "47% of the consumers consulted, let alone 47% of all US consumers, would actually be interested in having a meat label with country of origin information;" rather, the poll – *together with the other letters* and poll submitted by the United States – only suggests that there is some consumer interest in country of origin information in general."[224] The Panels *simply did not* find that there is some consumer interest on the basis that the poll "assumed 'some' level of demand," as Mexico alleges.[225]

141. Second, Mexico's claims do not meet the requirements of Article 11. As discussed above, the Panel examined the question posed in the poll and identified shortcomings in order to base its conclusion regarding the relevance of the evidence in question, taking into account other similar evidence submitted by the United States. The fact that the Panel judged the evidence to be more probative than Mexico would have liked does not constitute error.[226] Indeed, the

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certain information, which only constitutes one element of decision making." Mexico still fails to address the point made in the U.S. query; instead Mexico merely repeats its point or characterizes the concern as speculation.

[221] *Australia – Salmon (AB)*, para. 267.

[222] Mexico's Other Appellant Submission, para. 99.

[223] *US – COOL (Article 21.5) (Panel)*, para. 7.397-7.398.

[224] *US – COOL (Article 21.5) (Panel)*, para. 7.399 (emphasis added).

[225] Mexico's Other Appellant Submission, para. 100.

[226] *China – Rare Earths (AB)*, para. 5.203; *US – Tuna II (Mexico) (AB)*, para. 272; *EC – Seal Products (AB)*, para. 5.254; *id.*, para. 5.150 ("it is insufficient for an appellant simply to disagree with a statement or to assert that it is not supported by evidence."); *Dominican Republic – Import and Sale of Cigarettes (AB)*, paras. 82, 84

Appellate Body has long stated that panels have the discretion to "determine how much weight to attach to the various items of evidence."[227]

142. Third, Mexico's unsupported claim that the evidence was "material"[228] is in error for the reasons explained in the preceding subsection.

c. Mexico's Appeal Fails with Regard to the Finding that Willingness to Pay for a "Product of North America Label" Is Evidence of Willingness to Pay for Country of Origin Information

143. Mexico alleges that the Panel's finding that "consumers show some willingness to pay for general country of origin information" is in error.[229] Specifically Mexico argues that "[t]he Panel erred by conflating 'product of North America' origin information with 'country of origin' information.[230] Mexico's appeal is in error and should be rejected.

144. First, Mexico again misunderstands the Panel's analysis. The Panel stated the conclusion of the study,[231] and then opined that "despite the higher premium for the North America label, *we read this as showing* that consumers are indeed willing to pay *something* for origin information – whether country specific or not."[232] Contrary to Mexico's assertion, the Panel did not "conflate" the "Product of North America" origin information with "country of origin" information. The label "Product of the United States" provides specific country of origin information, and a willingness on the part of consumers to pay a premium in absolute value terms (USD 1.77 per 12 ounces of meat products) for such a label evinces that consumers are indeed willing to pay for general country of origin information.[233] The Panel presented the conclusion of the evidence submitted by Mexico and then proceeded to *draw its own* inferences, and as such the Panel acted within its discretion as the trier of fact.[234]

(stating "a mere divergence of views between a party and a panel on the inferences to be drawn from pieces of evidence is not a sufficient ground to conclude that the Panel failed to 'make…an objective assessment of the facts of the case.'").

[227] *See, e.g., US – Tuna II (Mexico) (AB)*, para. 272.

[228] Mexico's Other Appellant Submission, para. 100.

[229] Mexico's Other Appellant Submission, para. 101 (quoting *US – COOL (Article 21.5) (Panel)*, para. 7.416).

[230] Mexico's Other Appellant Submission, para. 101.

[231] *US – COOL (Article 21.5) (Panel)*, para. 7.410 ("The KSU Consumer Valuation study concludes that consumers would be willing to pay on average a premium of USD 1.77 per 12 ounces of meat products for the label 'Product of United States,' and USD 1.88 per 12 ounces of meat products for the label 'Product of North America.'").

[232] *US – COOL (Article 21.5) (Panel)*, para. 7.410 (emphasis added).

[233] *US – COOL (Article 21.5) (Panel)*, para. 7.410.

[234] *See Dominican Republic – Import and Sale of Cigarettes (AB)*, para. 82 (rejecting the Dominican Republic's claim that the Panel "'misunderstood the proposition for which [the evidence] was offered' because 'the

145. Second, Mexico's unsupported claim that the evidence was "material"[235] is in error for the reasons explained above.

d. Mexico's Appeal Fails with Regard to the Alleged Failure to Find that the "Small" Economic Benefits of Receiving the COOL Information Indicates that the Demand for COOL Information Is "Small"

146. Mexico alleges that the Panel did not conduct an objective assessment of the matter by failing to find that "because the economic benefits of the amended COOL measure for U.S. consumers are 'small,' consumer demand for such information is 'small,'"[236] and, in turn, the gravity of the consequences of non-fulfilment is low.[237]

147. First, Mexico yet again misunderstands the Panel's analysis. The Panel did not focus "on the isolated statement that the 'expected benefits…are difficult to quantify.'"[238] While the Panel did note that "the benefits accruing to consumers from receiving origin information may also be a determinant of consumer demand for such information," the Panel *also noted* that a "Member's interest in pursuing a legitimate objective might also be relevant for ascertaining the gravity of the consequences of not fulfilling such objective."[239] This balancing process exemplifies the very role of a fact-finding body. Contrary to Mexico's claim, the Panel did not err in its assessment of the evidence, as the Panel simply acted within its discretion by assessing the evidence with respect to USDA's findings of "economic benefits" and by attaching weight to the findings, taking into account other relevant factors.

148. Second, Mexico's claims again do not meet the requirements of Article 11. Mexico does not make any attempt to "substantiate" its curious argument that the degree of economic benefits accrued to consumers by the information provided by the amended COOL measure translates to the degree of consumer demand for such information.[240] Similarly, Mexico does not "substantiate" its claim that because consumer demand is low, the gravity of the consequences of non-fulfilment is necessarily low. On the contrary, the Panel has acknowledged that a Member's interest in pursuing a legitimate objective is a determinant of the gravity of the consequences of

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Panel incorrectly focused on the relationship between smuggling and forgery,' whereas '[the evidence] was offered'" for another purpose).

[235] Mexico's Other Appellant Submission, para. 101.

[236] Mexico's Other Appellant Submission, para. 103.

[237] Mexico's Other Appellant Submission, paras. 105-106.

[238] Mexico's Other Appellant Submission, para. 103 (quoting *US – COOL (Article 21.5) (Panel)*, para. 7.420).

[239] *US – COOL (Article 21.5) (Panel)*, paras. 7.419, 7.422.

[240] Mexico Other Appellant Submission, para. 103. In fact, Mexico's argument appears to relate to the legal characterization of the facts as opposed to an issue relating to the Panels' appreciation of the evidence. *See, e.g., Brazil – Retreaded Tyres (AB)*, para. 207 (stating that the European Communities argument that the Panel erroneously equated high costs with prohibitive costs "is not an issue relating to the Panel's appreciation of the evidence, but rather to its legal characterization of the facts.").

non-fulfilment.[241] The core of Mexico's claim is that the Panel did not accord the same weight to the evidence that Mexico would have or interpret the evidence in a manner that is consistent with Mexico's interpretation. As discussed above, such a claim is insufficient to meet the requirements of an Article 11 claim.[242]

149. Third, Mexico's unsupported claim that the evidence was "material"[243] is in error for the reasons explained above.

E. Complainants' Appeals of the Panels' Findings Regarding the First and Second Alternative Measures Should Fail

150. As discussed above, a panel's analysis of whether a challenged measure is inconsistent with Article 2.2 of the TBT Agreement is straight forward – has the complainant proven that an alternative measure exists "that is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available."[244] Where this is the case, the challenged measure should be found to be inconsistent with Article 2.2; where it is not, the measure should be found to be consistent with Article 2.2. This legal test thus implements the balance struck in the TBT Agreement, which recognizes that Members may pursue legitimate governmental objectives "at the levels it considers appropriate,"[245] while requiring Members to choose a less trade restrictive alternative when pursuing such objectives at the levels the Member considers appropriate.

151. Complainants, however, consider that the TBT Agreement strikes an entirely different balance, one that distinguishes between "important" and "unimportant" objectives. Under complainants' theory, where a Member pursues an "important" objective, such as the protection of human life or the environment,[246] the "risks non-fulfilment would create" are accordingly high (there being a direct correlation between importance and such risks[247]), and the complainant must, indeed, prove that a less trade restrictive, reasonably available alternative measure exists that makes an equivalent contribution to that "important" objective (assuming the challenged measure makes at least some contribution to that objective).

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[241] Providing information to consumers about the products they purchase is a key objective of the U.S. Government. And the evidence on the U.S. Government interest in providing such information is clear – Congress has passed legislation to implement a COOL regime in 2002 and 2008, and the current Administration has ensured it is implemented appropriately. U.S. Response to the Panels' Question 15, paras. 36-37.

[242] Such a claim is insufficient to meet the requirements of an Article 11 claim. *See, e.g.*, *China – Rare Earths (AB)*, para. 5.203; *US – Tuna II (Mexico) (AB)*, para. 272; *EC – Seal Products (AB)*, para. 5.254.

[243] *US – COOL (Article 21.5) (Panel)*, paras. 7.421-7.422.

[244] *US – COOL (AB)*, para. 379.

[245] TBT Agreement, sixth preambular recital.

[246] *See, e.g.*, Mexico's Other Appellant Submission, paras. 73, 78.

[247] Canada's Other Appellant Submission, para. 98; Mexico's Other Appellant Submission, para. 73.

152. But where the objective is "unimportant," under the complainants' approach the analysis is very different. In that case, a complainant need not even identify a comparison to prove their case,[248] and even if it does, that comparison need not be determinative of the result.[249] As to the comparison itself, an alternative need not contribute to the objective in the same manner that the challenged measure does. Alternatives that make much less contribution to the objective can still prove a challenged measure more trade restrictive than necessary as long as the "risks non-fulfilment would create" are "low" (or some equivalent phrase), as long as the alternative is "comparable" to the challenged measure, or as long as the alternative has some other features that can "compensate" for its lesser contribution. The text of Article 2.2 provides no guidance as to how one alternative's lesser contribution to the objective could be "compensated" by other features, nor did the Panels consider that complainants put forward any evidence on this point (even though the Panels appear to agree with complainants that such an analysis is theoretically possible to conduct).[250]

153. The bottom line for complainants is, of course, their insistence that Article 2.2 prohibits the United States from requiring the provision of information on origin that distinguishes between beef and pork products based on where the animal was born, raised, and slaughtered. And complainants insist that this is the case because: 1) the provision of consumer information on origin is allegedly "unimportant"; and 2) the United States could have chosen an alternative that provides much less (or no) information as to these three production steps, but on a greater range of products (*e.g.*, processed beef and pork products and those beef and pork products sold in restaurants).

154. But complainants' arguments are in error. Article 2.2 does not prevent Members from pursuing "unimportant" legitimate objectives (indeed, we do not know how a WTO panel could ever be in a position to make such a judgment on "importance" in the first place). Moreover, the requirement that a complainant prove that an alternative measure makes an equivalent contribution to the objective means just that. For purposes of these disputes what that means is that the less trade restrictive alternative must provide origin information as to where the animal was born, raised, and slaughtered for Labels A-C muscle cuts. To require otherwise would mean that, in fact, Article 2.2 prohibits the United States from providing point of production origin information, which is the level of origin information that the United States considers appropriate to provide to its consumers and is one of the levels of origin information suggested by the DSB recommendations and rulings.

155. This is the central weakness of complainants' claims. Simply put, complainants have not proposed that the United States could have adopted a reasonably available, less trade restrictive alternative that provides point of production information for beef and pork sold in the United States in lieu of the amended measure. Rather, complainants have proposed two alternatives that provide little (to no) point of production information (the first and second alternatives) and two

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[248] Mexico's Other Appellant Submission, para. 46; Canada's Other Appellant Submission, paras. 35-36.

[249] Canada's Other Appellant Submission, paras. 51, 60-61.

[250] *US – COOL (Article 21.5) (Panel)*, para. 7.490.

alternatives that provide point of production information but that do so in such a costly and disruptive way that neither alternative could not possibly be considered less trade restrictive or reasonably available (third and fourth alternatives).

156. The United States addresses complainants' appeals for the first two alternatives in turn.

1. Complainants' First Alternative Does Not Prove the Amended Measure Inconsistent with Article 2.2

a. The Panels' Analysis

157. Complainants' first alternative is the "mandatory labelling of muscle cuts based on the country of substantial transformation (i.e. slaughter), combined with voluntary labelling based on the country of birth and raising, and the elimination of the amended COOL measure's three main exemptions."[251]

158. In light of the fact that "substantial transformation" refers to the slaughter of the animal,[252] under the mandatory labeling scheme, the three distinct labels covering categories A-C would be collapsed into one label, which would state that the meat was the "Product of the U.S." or "Slaughtered (or harvested) in the U.S."[253] As to the voluntary point of production labeling part of the alternative, the Panels found that "the evidence does not suggest that the voluntary option would be exercised on a wide scale."[254] The Panels noted that, on the whole, that while the alternative "would cover a significantly wider range of muscle cuts from US-slaughtered livestock than the amended COOL measure," the alternative "would provide less origin information for this extended coverage than the amended COOL measure."[255]

159. In a preceding section, the Panels had already found given that the amended measure provided point of production origin information for categories A-C,[256] the amended measure "contributes to the objective of providing consumer information on origin to a significant degree for products carrying Labels A-C," and that "[o]verall, the amended COOL measure thus makes

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[251] *US – COOL (Article 21.5) (Panel)*, para. 7.426.

[252] *US – COOL (Article 21.5) (Panel)*, para. 7.474.

[253] *US – COOL (Article 21.5) (Panel)*, para. 7.483 ("The complainants have confirmed that all Labels A-C could read 'Product of the U.S.' or 'Slaughtered (or harvested) in the US' under their first alternative measure.").

[254] *US – COOL (Article 21.5) (Panel)*, para. 7.478.

[255] *US – COOL (Article 21.5) (Panel)*, para. 7.481. In this regard, the Panels also recalled the original panel's finding in the Article 2.4 claim that "CODEX STAN 1-1985, which is based on the principle of substantial transformation, 'does not have the function or capacity of accomplishing the objective of providing information to consumers about the countries in which an animal was born, raised and slaughtered' and hence is 'ineffective and inappropriate for the fulfilment of the specific objective as defined by the United States.'" *Id.*, para. 7.475.

[256] *US – COOL (Article 21.5) (Panel)*, para. 7.353.

a considerable but necessarily partial contribution to its objective of providing consumer information on origin."[257]

160. The question for the Panels was "whether a suggested alternative that would provide less origin information on a wider range of products would make at least 'an equivalent contribution to the relevant legitimate objective' as the amended COOL measure."[258] The Panels found that this was not the case. In particular, the Panels found that "not only would the first alternative measure provide less origin information (although for a significantly wider range of products), it would result in all muscle cuts from US slaughtered animals carrying the same label, irrespective of where the animals were born and raised … in sharp contrast with the amended COOL measure."[259] As such, the Panels found that "the first alternative measure as described by the complainants does not seem capable of making an actual contribution to the objective of providing consumer information on origin at least equivalent to the actual contribution of the amended COOL measure."[260]

161. The Panels' then continued (improperly in the U.S. view) to examine whether the proposed alternative still could be considered to make an equivalent contribution to the objective in light of the "nature of the risks and the gravity of the consequences of non-fulfillment."[261] However, in light of the Panels' inability to "ascertain the gravity of these consequences," the Panels made an initial finding that they "cannot determine the specific implications of risks of nonfulfillment for the interplay between less information coupled with more extensive coverage under the first alternative measure, or for the first alternative's degree of contribution."[262]

162. Notwithstanding this initial finding, the Panels then continued, stating that based on the evidence on the record, "it is difficult to establish the exact implications for consumer information of having less information on the labels – even for a wider coverage of products."[263] From this, the Panels made a second finding that the complainants had "not persuasively demonstrated how the increased coverage of their first alternative measure would compensate for less origin information provided on Labels A-C under the first alternative measure."[264]

b. The U.S. Appeal of the Panels' Analysis

163. As noted in the U.S. Appellant Submission, the United States considers that the Panels erred in the above analysis (although the United States considers that the Panels correctly found

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[257] *US – COOL (Article 21.5) (Panel)*, para. 7.356.

[258] *US – COOL (Article 21.5) (Panel)*, para. 7.481.

[259] *US – COOL (Article 21.5) (Panel)*, para. 7.483.

[260] *US – COOL (Article 21.5) (Panel)*, para. 7.483.

[261] *US – COOL (Article 21.5) (Panel)*, paras. 7.486-7.491.

[262] *US – COOL (Article 21.5) (Panel)*, para. 7.488.

[263] *US – COOL (Article 21.5) (Panel)*, para. 7.489.

[264] *US – COOL (Article 21.5) (Panel)*, para. 7.490.

that the amended measure is not inconsistent with Article 2.2). The United States considers that the Panels should have concluded their analysis and found the amended measure consistent with Article 2.2 once the Panels found that the first alternative measure did "not seem capable of making an actual contribution to the objective of providing consumer information on origin at least equivalent to the actual contribution of the amended COOL measure."[265] At that point, the Panels had made a sufficient finding that complainants had not satisfied their burden of proof that the first alternative measure is one "that is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available,"[266] and, as such, cannot possibly prove the amended measure "more trade restrictive than necessary,"[267] consistent with the Appellate Body's reasoning in *US – Tuna II (Mexico)*.[268]

164. In this regard, the Panels erred by interpreting the phrase "taking account of the risks non-fulfillment would create" to potentially allow the Panels to find an alternative measure that the Panels have already found to a make a lesser contribution to the objective than the amended measure does, could, nonetheless, still be deemed to make an "equivalent" contribution if the Panels had, in fact, made certain findings.

165. In contrast, complainants' appeals are premised on the assumption that the Panels' interpretation of the phrase "taking account of the risks non-fulfillment would create" is correct, but that the Panels erred by not ultimately finding that the first alternative did, in fact, make an "equivalent contribution" and that, as a consequence, the first alternative measure proves the amended measure "more trade restrictive than necessary." Complainants' appeals are in error and should be rejected. The Panels' ultimate finding that complainants have failed to make a *prima facie* case that the first alternative proves the amended COOL measure is "more trade restrictive than necessary" within the meaning of Article 2.2 should be upheld.

c. Complainants' Appeals

166. Although complainants do not say so directly, it is clear that neither complainant appeals the Panels' finding that, based on the information that would actually be provided by the first alternative, the proposed measure did "not seem capable of making an actual contribution to the objective of providing consumer information on origin at least equivalent to the actual contribution of the amended COOL measure."[269] As such, complainants' appeals must be understood as accepting that the first alternative provides a lesser degree of consumer information on origin than the amended measure. Nonetheless, complainants appear to believe that the first alternative nevertheless should be deemed to make an "equivalent contribution" to

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[265] *US – COOL (Article 21.5) (Panel)*, para. 7.483.

[266] *US – COOL (AB)*, para. 379.

[267] U.S. Appellant Submission, para. 249.

[268] *See US – Tuna II (Mexico) (AB)*, para. 330 (reversing the panel's finding that the challenged measure was inconsistent with Article 2.2 because Mexico's proposed alternative "would contribute to both the consumer information objective and the dolphin protection objective *to a lesser degree* than the measure at issue …") (emphasis added).

[269] *US – COOL (Article 21.5) (Panel)*, para. 7.483.

consumer information on origin based on factors exogenous to the origin information actually provided by either the first alternative or the amended measure in light of their view as to the "risks non-fulfilment would create."[270]

167. In this regard, complainants' appeal assumes the correctness of the Panels' theory that the first alternative "might achieve an equivalent degree of contribution as the amended COOL measure" in light of "the potential relevance of risks of non-fulfilment [would create],"[271] but criticizes the Panels for not making a finding as to the gravity prong. In complainants' view, this alleged failure on the part of the Panels made it "virtually impossible to establish a violation"[272] and "effectively ended" the comparative analysis with complainants' first alternative.[273]

168. Had the Panels made the findings as to the "risks non-fulfilment would create" that complainants urge the Appellate Body to adopt, complainants consider that the first alternative makes at least an "equivalent contribution" to the objective. Mexico, for its part, appears to never explain why, simply making conclusory remarks that the first alternative provides a "greater contribution" or "at least equivalent" contribution.[274] Canada, for its part, argues that the first alternative should be deemed to make an "equivalent contribution" because under a "correct" assessment of the "risks non-fulfilment would create" it is sufficient that an alternative contributes to the objective "in a different, yet comparable, manner."[275] In Canada's view, therefore, the first alternative makes an "equivalent," or, in Canada's words, a "generally equivalent" contribution to the objective because "(i) no grave consequence would arise from not fulfilling of the objective; (ii) the alternative measure would provide the same kind of origin information that is presented on Label D (i.e. imported meat); and (iii) the information would be provided for *all* muscle cuts."[276]

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[270] Indeed, one of Canada's criticisms of the Panels' analysis is that the Panels focused on the degree of contribution the first alternative would make to the objective rather than the "risk non-fulfilment would create." *See* Canada's Other Appellant Submission, para. 120 ("Furthermore, the Compliance Panel's error is compounded by its additional comments on these imprecise 'specific implications.' With respect to the implications 'for the first alternative's degree of fulfilment,' the Compliance Panel indicated that they would 'depend on the nature of the information being conveyed and the method of conveyance.' However, these elements relate to the degree of contribution of the measure, not to the risks non-fulfilment would create.").

[271] *See, e.g.*, Mexico's Other Appellant Submission, para. 129 (quoting *US – COOL (Article 21.5) (Panel)*, para. 7.488).

[272] Canada's Other Appellant Submission, para. 116.

[273] Mexico's Other Appellant Submission, paras. 92, 115.

[274] *See* Mexico's Other Appellant Submission, paras. 128, 133.

[275] Canada's Other Appellant Submission, para. 121.

[276] Canada's Other Appellant Submission, para. 121 (emphasis in original).

d. Complainants' Appeals Should Be Rejected

i. The First Alternative Does Not Make an Equivalent Contribution to the Objective

169. Complainants' first alternative would require virtually all muscle cuts sold in the United States to carry a label (or equivalent) that states that it is a "Product of the U.S." or has been "Slaughtered (or harvested) in the U.S.," coupled with the allowance that such muscle cuts be voluntarily labeled to provide the location of where the animal was born, raised, and slaughtered.[277] Complainants urge the Appellate Body to find that such a regime makes an "equivalent contribution" to the objective that the amended measure does, which requires the provision of the location of where the animal was born, raised, and slaughtered on all muscle cuts sold at retail that were produced from animals slaughtered in the United States. Complainants' appeals fail as a factual matter and as a matter of law.

170. As to the facts, it is simply not true that an alternative that provides very little origin information as to where the animal was born, raised, and slaughtered could provide an "*equivalent* contribution" to the objective of providing consumer information on origin that the amended measure does by providing exactly that same origin information (but for a smaller group of products).[278] Indeed, the first alternative would not even satisfy the presumably lower standards of "generally equivalent" or "comparable" that Canada (wrongly) considers part of the Article 2.2 analysis.[279]

171. As such, as discussed above, the United States considers that the Panels should have concluded their analysis once they determined that the first alternative measure did "not seem capable of making an actual contribution to the objective of providing consumer information on origin at least equivalent to the actual contribution of the amended COOL measure."[280] Such an analysis would have been entirely consistent with the Appellate Body's reversal of the *U.S. – Tuna II (Mexico)* panel's finding that the challenged measure in that dispute was inconsistent with Article 2.2 in light of the fact that Mexico's proposed alternative "would contribute to both the consumer information objective and the dolphin protection objective *to a lesser degree* than the [challenged] measure"[281] – a point that both complainants studiously ignore in their submissions.

172. Moreover, complainants' appeals fail because they are both premised upon a faulty understanding of the law. Complainants (and the Panels) interpret the phrase "taking account of

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[277] *US – COOL (Article 21.5) (Panel)*, para. 7.483. The only muscle cuts that would not carry such a label would be muscle cuts that were produced from animals slaughtered outside the United States, which accounts for a very small percentage of muscle cuts sold in the United States. *See id.*, para. 7.700.

[278] *US – COOL (Article 21.5) (Panel)*, para. 7.478 (noting that "the evidence does not suggest that the voluntary option would be exercised on a wide scale").

[279] Canada's Other Appellant Submission, para. 121.

[280] *US – COOL (Article 21.5) (Panel)*, para. 7.483.

[281] *US – Tuna II (Mexico) (AB)*, para. 330 (emphasis added).

the risks non-fulfillment would create" to mean that a WTO panel could find that either the first or second proposed alternative, both of which provide less information on origin than the amended measure, could, nevertheless, still be found to make a contribution to the objective equivalent to the amended measure.

173. As discussed in the U.S. Appellant Submission,[282] that interpretation is incorrect. Rather, the phrase "taking account of the risks non-fulfillment would create" is properly understood as a reflection that an individual Member takes into account such risks when setting its level of fulfillment (*i.e.*, required degree of contribution). For purposes of dispute settlement what this means is that this phrase does not affect a complainant's burden of proof. That is to say, notwithstanding what the "risks non-fulfillment would create" are or are not in any particular dispute, a complainant will always have to prove that an alternative measure exists "that is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available."[283]

174. What this means for purposes of this dispute is plain – a measure that provides less origin information does not prove the amended measure "more trade restrictive than necessary" as such an alternative will not make an equivalent contribution to the objective even if it is less trade restrictive than the amended measure and even if it is reasonably available to the United States.[284]

175. In this regard, complainants are wrong to argue that in not making a finding as to the gravity of the consequences the Panels made it "virtually impossible to establish a violation"[285] or that the Panels' action "effectively ended" the comparative analysis with complainants' first alternative.[286] The reason that complainants' first alternative fails is not because of something the Panels did or did not do, but rather because the first alternative would drastically reduce the origin information regarding where the animal was born, raised, and slaughtered from what is required by the amended measure.

176. Further, and as discussed in the U.S. Appellant Submission,[287] complainants' legal interpretation is entirely unworkable as it suggests that a WTO panel will ever be in a position to undertake the complex balancing of whether adjusting one variable or another in the alternative measure would adequately "compensate" for providing a lesser contribution to the objective than the challenged measure in the context of a particular Member state. For purposes here, such an interpretation requires the Panels to decide whether increasing the scope of the measure would

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[282] *See* U.S. Appellant Submission, paras. 250, 259-271.

[283] *US – COOL (AB)*, para. 379.

[284] *See also US – Tuna II (Mexico) (AB)*, para. 330.

[285] Canada's Other Appellant Submission, para. 116.

[286] Mexico's Other Appellant Submission, paras. 92, 115.

[287] U.S. Appellant Submission, paras. 259-271.

"compensate" for providing much less origin information in the first place such that the alternative could be deemed to make an "equivalent contribution."

177. As discussed, there is no reason to believe that WTO Members intended for panels to encroach into a particular Member's policy space to make such a decision, and, indeed, Members have not provided panels with any guidance in the text of Article 2.2 on how to make such a decision. It is thus not surprising at all to the United States that the Panels considered that it is "difficult" to conduct such an analysis.[288] Indeed, the United States considers that it is impossible to do so given the text of Article 2.2, and the Panels erred in suggesting that any such an analysis is proper.[289]

178. Complainants' own arguments confirm that such an approach is in error.

179. As noted above, Mexico provides no reason why expanding the scope of COOL under the first alternative would "compensate" for failure to provide the same degree of point of production origin information provided by the amended measure.[290] Instead, Mexico relies solely on conclusory remarks.[291] Mexico simply provides no reason why one alternative would satisfy the test Mexico proposes the Appellate Body adopt and another alternative would not. Taking Mexico's argument as a whole, it appears what Mexico is actually arguing for is that where a measure pursues an "unimportant" objective, any less trade restrictive alternative that contributes to that objective to *any* degree would prove the challenged measure "more trade restrictive than necessary." In other words, where the objective is "unimportant," Article 2.2 prohibits the Member from pursuing such an objective at the level it wishes to pursue them.

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[288] *US – COOL (Article 21.5) (Panel)*, para. 7.489 ("In the context of the first alternative measure, it is difficult to establish the exact implications for consumer information of having less information on the labels – even for a wider coverage of products."). In this regard, Canada's view reference that disputes "will always involve an unavoidable element of individual, discretionary judgement" is besides the point. Canada's Other Appellant Submission, para. 46 (quoting *Japan – Alcoholic Beverages II (AB)*, pp. 20-21). What complainants are proposing is an analysis with no guidelines whatsoever whereby the WTO panel should have unlimited discretionary judgment to decide what the best public policy for the importing Member should be.

[289] U.S. Appellant Submission, para. 264. The approach urged by complainants, and apparently contemplated by the Panels, is one of making a "trade off" between a lower level of contribution toward a legitimate objective in certain instances with some level of contribution in other instances, and somehow assigning a weight to each instance in order to arrive at the conclusion that "on average" the level of contribution is equivalent. *See, e.g.*, Canada's Other Appellant Submission, para. 130, urging a finding that there is "an acceptable trade-off between the limited degree of contribution of the amended COOL measure and the significantly lower degree of trade-restrictiveness.") This concept of a "trading off" or "averaging" is analogous to the concept that has been rejected in the past. *See U.S. – Gasoline (Panel)*, para. 6.14 (finding that "under Article III:4 less favourable treatment of particular imported products in some instances could not be balanced by more favourable treatment of other imported products in other instances.").

[290] *US – COOL (Article 21.5) (Panel)*, para. 7.490 ("Ultimately, the complainants have not persuasively demonstrated how the increased coverage of their first alternative measure would *compensate* for less origin information provided on Labels A-C under the first alternative measure.") (emphasis added).

[291] *See* Mexico's Other Appellant Submission, paras. 128, 133.

180. Canada's argument does not appear to amount to anything different. Canada argues that the first alternative is "equivalent" (or "generally equivalent") because the consequences of non-fulfilment are not "grave" (*i.e.*, the objective is "unimportant"), the first alternative adopts the same rule applied to Category D muscle cuts, and the three exemptions would no longer apply.[292] And while Canada criticizes the Panels for finding this analysis "difficult,"[293] Canada provides no reason why the fact that substantial transformation rule is employed for imported muscle cuts or that the "Product of U.S." label would be affixed to more beef and pork sold in the United States could possibly means that the first alternative "compensates" for its shortcomings such that it should be deemed to make an "equivalent contribution" to the objective as the amended measure. Canada's inability to proffer any reasons appears an acknowledgment of the difficulty of this task.

181. Finally, Canada urges the importance of adopting a "flexible" approach, rather than a "mechanistic" one, whereby "the more benign those consequences of non-fulfilment, the easier it should be to accept as 'equivalent' the contribution to the achievement of the objective by the alternative measure."[294] Indeed, Canada goes as far as to warn the Appellate Body that adopting such a "mechanistic" approach would mean that it would be "impossible" to successfully challenge an import ban "because no alternative measure could make the same contribution to the objective as a ban or could contribute to the objective to the same degree."[295] But that is surely false. Indeed, the United States was successful in challenging Japan's import ban on U.S. apples based on a fear of the fire blight disease under the parallel provision to Article 2.2 in the SPS Agreement, Article 5.6, by providing an alternative that was not an import ban that also met Japan's appropriate level of protection.[296]

182. As such, complainants' appeals should fail.

ii. In any Event, It Is Not Possible for the Appellate Body to Complete the Analysis

183. After failing to address why its first alternative somehow meets the necessary threshold for contribution to the U.S. objective, Mexico then goes on to explain why this alternative is less trade restrictive and reasonably available.[297] However, there are not sufficient undisputed factual findings on the record to complete such an analysis, and Mexico points to none.

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[292] Canada's Other Appellant Submission, para. 121.

[293] Canada's Other Appellant Submission, para. 120 ("While Canada appreciates the difficulty of the task the Compliance Panel was faced with, the Compliance Panel could not simply shirk its responsibility.").

[294] Canada's Other Appellant Submission, paras. 44-46, 121.

[295] Canada's Other Appellant Submission, para. 44.

[296] *Japan – Apples (Article 21.5 – US) (Panel)*, paras. 8.196-8.199 (finding Japan's import ban inconsistent with SPS Article 5.6 as the United States demonstrated that restricting imports to Japan to mature and symptomless apples "is an alternative measure that could meet Japan's [appropriate level of protection]").

[297] *See* Mexico's Other Appellant Submission, paras. 137-146.

184. The Appellate Body will only complete the analysis if a panel has made sufficient factual findings or there is sufficient undisputed facts on the record that would allow the Appellate Body to conduct such an analysis.[298] Here, there are no relevant factual findings by the Panels because they concluded their evaluation following their finding that the first alternative did not make an equivalent contribution to the objective.[299]

185. Indeed, Mexico appears to present these arguments as if the Appellate Body was reviewing this proceeding on a *de novo* basis, without any regard to the Panels' analysis or Mexico's arguments before the Panels. For example, Mexico now makes the argument that the voluntary element of the first alternative is not trade restrictive *simply because it is voluntary*.[300] At no time does Mexico explain how such a position is consistent with the Appellate Body report in *US – Tuna II (Mexico)* (or Mexico's own approach with regard to that issue in that continuing dispute), nor does Mexico cite to any undisputed facts or panel findings in this regard.

186. For these reasons, the Appellate Body does not have a basis to complete the analysis with regard to the first alternative.

2. Complainants' Second Alternative Does Not Prove the Amended Measure Inconsistent with Article 2.2

187. Complainants' second alternative is the extension of "the mandatory 60-day inventory rule applicable to ground meat also to muscle cuts [*i.e.*, Categories A-C], combined with the elimination of the three main exemptions" from the mandatory labelling of muscle cuts.[301]

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[298] *US – COOL (AB)*, para. 481 ("We note that the Panel made no factual findings with regard to these four proposed labelling schemes because, having found that the COOL measure does not fulfil its objective, it did 'not consider it necessary to proceed with the next step of the analysis, namely whether the COOL measure is 'more trade-restrictive than necessary' based on the availability of less trade-restrictive alternative measures.' Therefore, to the extent that our analysis of the proposed alternative measures entails consideration of factual elements, we will be able to complete the analysis only if there are sufficient undisputed facts on the record, or factual findings made by the Panel elsewhere in its analysis . . .").

[299] *US – COOL (Article 21.5) (Panel)*, para. 7.491 ("The United States argues that this should be the end of our analysis of the first alternative measure. We agree. According to the Appellate Body, the three factors of the comparative analysis are conjunctive. An alternative measure that has not been proven to make at least an equivalent degree of contribution cannot serve as a basis for finding a violation of Article 2.2 of the TBT Agreement – irrespective of whether the alternative measure is reasonably available or how its eventual trade-restrictiveness compares with the challenged measure. As the United States points out, at the outset of its Article 2.2 assessment in *US – Tuna II (Mexico)*, the Appellate Body noted all three factors of the comparative analysis under that Article, but ended its Article 2.2 review after having overturned the panel's finding that the alternative measure would make a contribution equivalent to that made by the challenged measure.").

[300] *See* Mexico's Other Appellant Submission, para. 138 ("With regard to the voluntary labelling of beef products with more specific information pertaining to where an animal was born, raised and slaughtered, it is clear that no trade restrictive effect is entailed. The provision of this additional information to consumers would be carried out on an entirely voluntary basis, permitting market forces to recognize and cater to consumer demand for such information. In short, there is no governmental measure that would have the effect of restricting trade.").

[301] *US – COOL (Article 21.5) (Panel)*, para. 7.426.

a. The Panels' Analysis

188. The Panels began their analysis by describing the alternative, noting that under this alternative, "Labels A-C would not provide information on where the originating animal was born, raised, and slaughtered."[302] Thus, Category A muscle cuts could now carry a label that states "Product of the U.S."[303] However, these same cuts could also read "Product of U.S., Canada" or "Product of U.S., Mexico" if the producer had processed either B or C category animals at any time within the last 60 days.[304]

189. Upon examination, the Panels found that not only would the second alternative "involve less detailed origin information" than the amended COOL measure,[305] it would be less accurate as the label could list "a country name of meat that the processor might not even have used to produce the specific ground meat in that package."[306] As a result, the Panels found that the second alternative "does not seem capable of making an actual contribution to the objective of providing consumer information on origin at least equivalent to the actual contribution of the amended COOL measure."[307]

190. Then, as they had done in analyzing the first alternative, the Panels went further and speculated that, "in light of the risks," "by providing less accurate origin information to consumers for a significantly wider range of products, the second alternative measure might achieve an equivalent degree of contribution as the amended COOL measure."[308] However, in light of insufficient arguments and evidence from complainants, the Panels determined that they "cannot determine the specific implications of risks of non-fulfilment for the interplay between less accurate information and more extensive coverage under the second alternative measure, or for the second alternative's degree of contribution."[309] In addition, the Panels also found that the complainants had failed to make sufficient "arguments and explanations" to "determine how and to what degree extended coverage could actually compensate for the less accurate origin information provided to consumers under the second alternative measure."[310] Accordingly, the

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[302] *US – COOL (Article 21.5) (Panel)*, para. 7.493.

[303] *US – COOL (Article 21.5) (Panel)*, para. 7.493.

[304] *US – COOL (Article 21.5) (Panel)*, n.1098 ("As the original panel held, 'a processor may use the same label for all of its ground meat, provided that the label lists all countries of origin of the meat ground by the processor, and that the processor has had in its inventory meat for grinding of each origin at least every 60 days.'").

[305] *US – COOL (Article 21.5) (Panel)*, para. 7.496 ("As a consequence, the complainants' second alternative measure would involve less detailed origin information for muscle cuts from US slaughtered animals than the amended COOL measure.") (quoting *US – COOL (Panel)*, para. 7.427).

[306] *US – COOL (Article 21.5) (Panel)*, para. 7.497 (quoting *US – COOL (Panel)*, para. 7.706).

[307] *US – COOL (Article 21.5) (Panel)*, para. 7.500.

[308] *US – COOL (Article 21.5) (Panel)*, para. 7.501 (emphasis added).

[309] *US – COOL (Article 21.5) (Panel)*, para. 7.501.

[310] *US – COOL (Article 21.5) (Panel)*, para. 7.502 ("Like for the first alternative measure, we lack relevant arguments and explanations from the complainants in this regard. Consequently, we cannot determine how and to

Panels found that "the complainants have not made a *prima facie* case that their second alternative measure would make an equivalent degree of contribution to the objective of providing origin information to consumers as the amended COOL measure," and ended their analysis of the second alternative at that point.[311]

b. Complainants' Appeals Should Be Rejected

191. Complainants' appeals, which closely track their appeals of the Panels' analysis and findings of the first alternative, fail for the same reasons the United States discussed above.

192. As was the case in their appeals of the first alternative, neither complainant challenges the factual findings of the Panels as to what level of information the second alternative actually provides. That is to say, neither complainant appeals the finding that the second alternative "does not seem capable of making an actual contribution to the objective of providing consumer information on origin at least equivalent to the actual contribution of the amended COOL measure."[312] Indeed, Canada appears to affirmatively agree with the Panels' assessment, indicating in a previous section of its brief that the second alternative, which adopts the Category E label rules, would "likely" provide "inaccurate information to consumers."[313]

193. Rather, both complainants premise their appeals on the incorrect interpretation of Article 2.2 that where the governmental objective is "unimportant," such as the complainants allege is the case here, then alternative measures that provide less consumer information on origin than the amended measure (but on a greater scope of products) can still be deemed to make an "equivalent contribution" to the objective and thus prove the amended measure "more trade restrictive than necessary." As the United States has explained, such an interpretation is inconsistent with the text of Article 2.2, places the Article 2.2 analysis in direct conflict with the principle that "it is up to the Members to decide which policy objectives they wish to pursue and the levels at which they wish to pursue them,"[314] and forces WTO panels to make decisions that are squarely in the political, not legal, regime without any guidance to do so.[315] And for these reasons, complainants' appeals fails. The finding that the second alternative "does not seem capable of making an actual contribution to the objective of providing consumer information on origin at least equivalent to the actual contribution of the amended COOL measure" should have

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what degree extended coverage could actually compensate for the less accurate origin information provided to consumers under the second alternative measure.").

[311] *US – COOL (Article 21.5) (Panel)*, para. 7.503.

[312] *US – COOL (Article 21.5) (Panel)*, para. 7.500.

[313] Canada's Other Appellant Submission, para. 101 ("For instance, the United States chose to adopt labeling requirements for ground meat (Label E) that lead to the provision of likely inaccurate information to consumers.").

[314] *EC – Sardines (Panel)*, para. 7 .120; *see also* TBT Agreement, sixth preambular recital.

[315] *See* U.S. Appellant Submission, paras. 264-265.

concluded the Panels' analysis, and the complainants (and Panels) are wrong to suggest otherwise.

194. And, again, complainants' own arguments confirm the correctness of approach taken by the Appellate Body in earlier reports that under Article 2.2 a proposed alternative measure must make an equivalent contribution to the legitimate objective, and not that a failure to fulfill a legitimate objective at the level considered appropriate by the Member could somehow be offset by some contribution to that objective elsewhere. In particular, neither complainant has provided – either to the Panels or the Appellate Body – any evidence or arguments to establish "how and to what degree extended coverage could actually compensate for the less accurate origin information provided to consumers under the second alternative measure."[316] Complainants simply conclude that such extended coverage means that the second alternative measure makes an "equivalent contribution" without ever saying why.[317]

195. Moreover, while complainants both appear to consider that the fact that the second alternative uses the same rules that the measure does for ground meat supports a finding that the second alternative makes an "equivalent contribution," neither complainant explains why. Again, as was the case with regard to the appeal of the first alternative, Canada simply asserts that this is so.[318] Mexico, for its part, appears to claim that it is somehow that relevant that its proposed alternative applies the same 60 day rule as ground meat, but only in the context of an entirely different legal test than the Appellate Body has ever employed before. In Mexico's view, because Category E has the same labelling requirements as what is proposed in the second alternative, such requirements "should be considered to fulfil the U.S. objective of providing consumer information on origin,"[319] and that Article 2.2, in Mexico's view, prevents the United States from applying different rules for different categories of meats.[320] But Mexico's argument misses the point– the question is not whether the proposed alternative measure would fulfill the legitimate objective at the level for just one subset of meat products, but whether the proposed alternative measure would make an equivalent contribution to the amended measure with respect to all the products to which it applies. With respect to this question, the answer is clearly "no", and Mexico does not dispute this.

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[316] *US – COOL (Article 21.5) (Panel)*, para. 7.500; *see also id.*, para. 7.501 ("Like for the first alternative measure, we lack relevant arguments and explanations from the complainants in this regard. Consequently, we cannot determine how and to what degree extended coverage could actually compensate for the less accurate origin information provided to consumers under the second alternative measure.").

[317] *See* Canada's Other Appellant Submission, para. 124; Mexico's Other Appellant Submission, para. 156.

[318] *See* Canada's Other Appellant Submission, para. 124.

[319] Mexico's Other Appellant Submission, para. 154 ("In reaching this conclusion, the Panel failed to address Mexico's point that the Label E rules are actually already part of the amended COOL measure, and therefore should be considered to fulfil the U.S. objective of providing consumer information on origin.").

[320] *See* Mexico's Other Appellant Submission, para. 153 ("There is no legitimate justification for applying a higher standard of accuracy to muscle cuts of beef.").

196. Finally, Mexico's effort to have the Appellate Body complete the analysis must fail as well. At no time does Mexico point to findings of fact of the Panels and uncontested facts on the record sufficient for the Appellate Body to complete the analysis.

197. For these reasons, complainants' appeals with regard to the second alternative fail.

F. Complainants' Appeals of the Panels' Findings Regarding the Third and Fourth Alternative Measures Should Fail

198. With respect to the third alternative measure (mandatory trace-back) and the fourth alternative measure (state/province labelling), the Panels found that complainants had failed to make a *prima facie* case that either alternative measure was less trade restrictive than the amended COOL measure, makes an equivalent contribution to the relevant objective, and is reasonably available to the United States.[321] Accordingly, the Panels found that neither the third nor fourth alternative proved the amended measure inconsistent with Article 2.2.[322]

199. In response to these findings, Canada appears to make two related appeals. First, Canada appeals the DS384 Panel's findings as to whether Canada has sufficiently "identified" the third and fourth alternatives for purposes of making the comparison in the first place.[323] Second, Canada appeals the DS384 Panel's finding that, "for the purpose of making a *prima facie* case that an alternative measure is reasonably available, a complainant bears the burden of providing a cost estimate of the alternative measure or evidence substantiating the likely magnitude of the costs that would be associated with the alternative measure."[324] Importantly, Canada does not appeal the DS384 Panel's findings that Canada has failed to make a *prima facie* case that either the third or fourth alternatives are less trade restrictive,[325] make an equivalent contribution,[326] or are reasonably available,[327] nor does Canada appeal the DS384 Panel's ultimate findings that neither the third nor fourth alternatives proves the amended measure inconsistent with Article

[321] *US – COOL (Article 21.5) (Panel)*, paras. 7.564, 7.609-7.610.

[322] *US – COOL (Article 21.5) (Panel)*, paras. 7.564, 7.610.

[323] Canada's Other Appellant Submission, para. 154 ("Therefore, Canada requests the Appellate Body to reverse the Compliance Panel's finding that Canada has not sufficiently and adequately *identified* the third and fourth alternative measures for assessing their reasonable availability and for comparing their respective trade-restrictiveness and degrees of contribution with the amended COOL measure.") (emphasis added) (citing *US – COOL (Article 21.5) (Panel)*, paras. 7.553 and 7.602).

[324] Canada's Other Appellant Submission, para. 154 (citing *US – COOL (Article 21.5) (Panel)*, paras. 7.556 and 7.603).

[325] *US – COOL (Article 21.5) (Panel)*, para. 7.560 (third alternative), para. 7.609 (fourth alternative).

[326] *US – COOL (Article 21.5) (Panel)*, para. 7.563 (third alternative), para. 7.610 (fourth alternative).

[327] *US – COOL (Article 21.5) (Panel)*, para. 7.557 (third alternative), para. 7.610 (fourth alternative).

2.2.[328] Canada notes explicitly that, even if the Appellate Body were to agree with Canada in these two appeals, "Canada does not request the Appellate Body to complete the analysis."[329]

200. Mexico also appears to make the same two appeals that Canada makes regarding the identification of the alternative and the Panels' finding as to reasonable availability.[330] Mexico likewise appears to have declined to challenge the DS386 Panel's findings that Mexico has failed to make a *prima facie* case that either the third or fourth alternatives is less trade restrictive,[331] makes an equivalent contribution,[332] or is reasonably available,[333] nor the ultimate findings that neither the third nor fourth alternatives proves the amended measure inconsistent with Article 2.2.[334]

201. As discussed below, complainants' error-filled appeals should be rejected. It is well established that the complainant bears the burden of proof with respect to affirmative claims of WTO-inconsistency. The difficulty of this burden or relative availability of information to another party does not serve to alleviate this obligation.[335] Moreover, the level of detail and precision required to meet this burden is not static, it may vary based on the information demanded by the panel, as well as the complexity of the proposition or facts asserted by the complainant.[336] It is thus the complainants' obligation to identify and describe their proposed

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[328] *US – COOL (Article 21.5) (Panel)*, para. 7.564 (third alternative), para. 7.610 (fourth alternative).

[329] Canada's Other Appellant Submission, para. 154 ("However, in the event the Appellate Body were to reverse these findings, Canada does not request the Appellate Body to complete the analysis."); *see also id.*, para. 132 ("Thus, Canada appeals certain intermediary findings made by the Compliance Panel but does not request the Appellate Body to complete the analysis.").

[330] *See* Mexico's Other Appellant Submission, para. 184 ("For these reasons, Mexico requests that the Appellate Body reverse the Panel's finding that Mexico has not sufficiently and adequately *identified* the third and fourth alternative measures to enable it to complete the analysis of the measures' respective reasonable availability, trade-restrictiveness and degree of contribution, as compared against the amended COOL measure. Specifically, Mexico requests that the Appellate Body reverse the Panel's finding that precise and complete cost estimates are a prerequisite to the 'adequate identification' of an alternative measure for the purposes of establishing *prima facie* that an alternative measure is *reasonably available*.") (emphasis added).

[331] *US – COOL (Article 21.5) (Panel)*, para. 7.560 (third alternative), para. 7.609 (fourth alternative).

[332] *US – COOL (Article 21.5) (Panel)*, para. 7.563 (third alternative), para. 7.610 (fourth alternative) (in light of the insufficiency of evidence, the Panels did not assess whether the fourth alternative makes an equivalent contribution).

[333] *US – COOL (Article 21.5) (Panel)*, para. 7.557 (third alternative), para. 7.610 (fourth alternative).

[334] *US – COOL (Article 21.5) (Panel)*, para. 7.564 (third alternative), para. 7.610 (fourth alternative).

[335] *See EC – Sardines (AB)*, para. 281 ("There is nothing in the WTO dispute settlement system to support the notion that the allocation of the burden of proof should be decided on the basis of a comparison between the respective difficulties that may possibly be encountered by the complainant and the respondent in collecting information to prove a case.").

[336] *Chile – Price Band System (Article 21.5 – Argentina) (AB)*, para. 134 ("The nature and scope of arguments and evidence required 'will necessarily vary from measure to measure, provision to provision, and case to case.' When a claim is brought against a WTO Member's legislation or regulation, a panel may, in some circumstances, consider that the text of the relevant legal instrument is sufficiently clear to establish the scope and meaning of the law. However, in other cases, a panel may consider that additional evidence is necessary to do so.

alternative measures in such a manner as to enable the Panels to make a determination as to each element of Article 2.2, including whether the proposed alternatives are less trade-restrictive, reasonably available, or make an equivalent contribution. Complainants' failure to do so in this case means that they ultimately failed to establish a *prima facie* case for either the third and fourth alternative measures that they have proposed (a point that complainants do not appeal).

202. In light of the fact that the Panels' findings as to the third and fourth alternatives are similar, and complainants' appeals of those findings are likewise similar, the United States will address the two alternatives together, first summarizing the Panels' findings as to each alternative, then addressing complainants' two specific appeals.

1. The Panels' Analysis

a. Burden of Proof

203. Prior to addressing any of complainants' arguments regarding any particular alternative, the Panels conducted a number of threshold analyses, including one regarding the proper allocation of the burden of proof to address certain arguments of complainants. Specifically, Mexico, relying on previous analyses under Article XX of the GATT 1994, argued before the DS386 Panel that Mexico, as the complainant, need only "identify possible alternatives," and that "[t]he burden is on the United States to present sufficient evidence and arguments showing that these alternative measures are not less trade restrictive, do not make an equivalent contribution to the objective pursued, taking account of the risks non-fulfilment would create and are not reasonably available."[337] Canada, for its part, had made the more narrow argument that when proving the trade restrictiveness of a technical regulation, the complainant need not do so with "the same precision" where the technical regulation has not been in force for a lengthy period of time.[338]

204. The Panels correctly rejected these arguments. In particular, the Panels noted that Mexico's approach, which "would run counter" to the Appellate Body's long standing guidance in *US – Wool Shirts and Blouses*, is based on a misreading of the Appellate Body's statements in *US – COOL*, in particular paragraph 379.[339] The Panels correctly found that complainants must "both identify at least one specific alternative measure, and that they make a *prima facie* case that such alternative is less trade restrictive, makes an equivalent contribution to the relevant

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Once the complaining party has established a *prima facie* case, it is then for the responding party to rebut it.") (quoting *US – Wool Shirts and Blouses (AB)*, p. 14); *Japan – Apples (AB)*, para. 157.

[337] *US – COOL (Article 21.5) (Panel)*, para. 7.430 (citing Mexico's Second Written 21.5 Submission, para. 118 (relying on *US – Gambling (AB)*, paras. 308 and 311; *China – Publications and Audiovisual Products (AB)*, para. 327; and *Brazil – Retreaded Tyres (AB)*, para. 156).

[338] *US – COOL (Article 21.5) (Panel)*, para. 7.430.

[339] *US – COOL (Article 21.5) (Panel)*, para. 7.433-7.434.

objective, and is reasonably available."[340] The Panels further found these conclusions to be relevant to Canada's argument, noting that:

> [T]he complainants must address the trade-restrictiveness of both the amended COOL measure and the alternative measures with a sufficient level of precision that allows us to conduct a meaningful comparison with alternative measures under Article 2.2 of the TBT Agreement. The complainants cannot be relieved of their burden to prove that at least one specific, reasonably available, and less trade restrictive alternative exists that would fulfil the US objective at least to a degree equivalent to the amended COOL measure.[341]

205. Neither complainant appeals any finding made by the Panels in this section of the Panels' reports (sec. 7.6.5.1.1 "Burden of Proof").

b. The Third Alternative Measure: Mandatory Trace-back

206. Complainants' third alternative measure would require a "mandatory trace-back" or "traceability" system for all muscle cuts from U.S.-slaughtered animals.[342] This system would require information be maintained regarding where individual animals were born, raised, and slaughtered, allowing a consumer to trace a muscle cut piece of meat back to the original animal.[343] Under such a system, all individual animals would need to be segregated so that they could be individually tracked and groups of animals would no longer be segregated on the basis of the country or countries where the animal was born and raised.[344]

207. Noting that "adequate identification of an alternative measure by the complainants is a prerequisite of meeting their burden to make a *prima facie* case,"[345] the Panels discussed at length feasibility and costs of the "trace-back" system(s) suggested by complainants. In particular, the Panels engaged in an extensive review of complainants' statements regarding potential trace-back system in the context of existing U.S. programs (such as the National Animal Identification System ("NAIS") and USDA's Interstate Livestock Traceability Rule) and trace-back regimes implemented in other countries.[346] The Panels appeared to accept Canada's proposition that any trace-back system would involve three stages "(i) from the birth of the animal to the slaughterhouse; (ii) the killing of the animal and the division of the carcass into

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[340] *US – COOL (Article 21.5) (Panel)*, para. 7.437.

[341] *US – COOL (Article 21.5) (Panel)*, para. 7.438.

[342] *See US – COOL (Article 21.5) (Panel)*, paras. 7.504-7.505.

[343] *See US – COOL (Article 21.5) (Panel)*, para. 7.505.

[344] *See US – COOL (Article 21.5) (Panel)*, para. 7.505.

[345] *See US – COOL (Article 21.5) (Panel)*, para. 7.506 (noting that according to the Appellate Body identification of an alternative measure, "at a minimum, [should] enable comparison with the challenged measure in terms of the relevant legal elements." To that end, a measure cannot be found to be reasonably available if it is "merely theoretical," nor can the level of trade restrictiveness or degree of contribution be assessed.).

[346] *See US – COOL (Article 21.5) (Panel)*, paras. 7.513-7.525.

cuts at the slaughterhouse; and (iii) the delivery of cuts from the slaughterhouse to the consumer through the distribution chain."[347] However, the Panels concluded that complainants' description of these stages lacks "clarity"[348] or a "cohesive depiction,"[349] and "leave significant gaps"[350] in the Panels' understanding of the third proposed alternative measure.

208. For example, the Panels identified uncertainty related to:

- The use of existing trace-back systems to track animals during the first stage (birth to the slaughterhouse), noting that the existing systems only provide a "fragment of the first stage of trace-back" and "would be insufficient;"[351]
- The need to evaluate the proposal over the entire course of an animals' life, noting that the Panels did not have sufficient information to conduct a review based on "the complainants' descriptions of trace-back following the animals' entry in the United States;"[352]
- The "variety of different tracking technologies and informational systems" that could be used to implement the third alternative;[353]
- The "methods of animal identification . . . with potentially varying costs;"[354]
- "The manner of data storage, management, and retrieval – as well as related costs – that would form part of the third alternative;"[355]
- "The existence, amount, manner and resulting costs of recordkeeping and audit under the third alternative;"[356] and
- A system which would "entail tracking more detailed information than under the amended COOL measure, irrespective of the information actually labelled."[357]

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[347] *See US – COOL (Article 21.5) (Panel)*, para. 7.511.

[348] *See US – COOL (Article 21.5) (Panel)*, para. 7.544.

[349] *See US – COOL (Article 21.5) (Panel)*, para. 7.552.

[350] *See US – COOL (Article 21.5) (Panel)*, para. 7.538.

[351] *See US – COOL (Article 21.5) (Panel)*, para. 7.522 (describing findings related to the existing Interstate Livestock Traceability Rule).

[352] *See US – COOL (Article 21.5) (Panel)*, para. 7.539.

[353] *See US – COOL (Article 21.5) (Panel)*, para. 7.540.

[354] *See US – COOL (Article 21.5) (Panel)*, para. 7.541.

[355] *See US – COOL (Article 21.5) (Panel)*, para. 7.542.

[356] *See US – COOL (Article 21.5) (Panel)*, para. 7.543.

[357] *See US – COOL (Article 21.5) (Panel)*, para. 7.546.

209. In sum, the Panels found that complainants had "not sufficiently explained how their third alternative measure would be implemented in the United States."[358] The Panels, therefore, concluded that they lacked sufficient information to undertake an assessment of the third alternative or meaningfully compare it to the amended COOL measure as required by Article 2.2.[359]

210. Despite complainants' deficient description of the proposed third alternative measure, the Panels did proceed with the three-pronged comparative analysis of the proposed third alternative measure.

211. First, the Panels considered whether the alternative was reasonably available, noting that a measure may not be "reasonably available" where it is "merely theoretical in nature, for instance where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties."[360] The Panels noted that it is the burden of the party proposing the alternative measure to demonstrate that it is reasonably available by supporting "with sufficient evidence" its assertion that the proposed alternative measure is reasonably available and "substantiating the likely nature or magnitude of the costs that would be associated with the proposed alternative."[361] In this instance, the Panels found that complainants failed to demonstrate that the trace-back system was reasonably available for purposes of their claims under Article 2.2 of the TBT Agreement because the Panels lacked significant information regarding the alternative's costs and practical implementation.[362]

212. Second, the Panels briefly reviewed whether the third alternative measure is less trade-restrictive than the amended COOL measure, noting that the complainants' arguments focus primarily on the distribution of costs. However, the Panels ultimately found that "the complainants have not demonstrated that trace-back – including the various possible costs of animal identification, meat traceability and eventual recordkeeping and verifications aspects – would be less trade restrictive based purely on the alleged even distribution of costs."[363]

213. Finally, the Panels reviewed whether the third alternative measure would provide an equivalent contribution to the relevant legitimate objective. Noting that the "capability of the proposed trace-back system to fulfil the relevant objective would largely depend on the system adopted," and that "the actual contribution . . . would be 'merely theoretical' until the alternative

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[358] *See US – COOL (Article 21.5) (Panel)*, para. 7.553.

[359] *See US – COOL (Article 21.5) (Panel)*, para. 7.553.

[360] *See US – COOL (Article 21.5) (Panel)*, para. 7.555 (quoting *Brazil – Retreaded Tyres (AB)*, para.156; *see also US – Gambling (AB)*, para. 308).

[361] *See US – COOL (Article 21.5) (Panel)*, para. 7.556 (quoting *China – Publications and Audiovisual Products (AB)*, paras. 327-328).

[362] *See US – COOL (Article 21.5) (Panel)*, para. 7.556-7.557.

[363] *See US – COOL (Article 21.5) (Panel)*, paras. 7.558-7.559.

measure is adequately identified and the complainants demonstrate its reasonable availability."[364] The Panels declined to determine whether there would be an equivalent contribution.

214. Reviewing the evidence put forward by complainants in total, the Panels correctly found that the complainants did not "provide a sufficient explanation of how their third alternative measure would be implemented."[365] This failure prevented an adequate analysis of the third alternative measure under Article 2.2 of the TBT Agreement and resulted in a finding that complainants failed to make a *prima facie* case that their third alternative measure is reasonably available and less trade restrictive than the amended COOL measure.[366]

c. The Fourth Alternative Measure: State/Province Labeling

215. The fourth alternative measure proposed by complainants is a labeling regime whereby the label would inform consumers as to the state or province where the animal was born, raised, and slaughtered.[367] As noted by the Panels, this method would require segregation on a "more detailed state/province level."[368] Complainants suggest that this information may be obtained and transmitted on the basis of (i) trace-back, or (ii) segregation and recordkeeping.[369]

216. With respect to the trace-back method of tracking livestock and resulting muscle cuts on a state or province level, the Panels noted that they had "already addressed the shortcomings of the complainants' references to the NAIS."[370] The Panels indicated that Canada subsequently recognized that the NAIS could serve as a model for only the first stage of review, and so the second stage would require U.S. slaughterhouses to assemble groups of animals based on state or province of origin.[371] The Panels found that it lacked sufficient information regarding the second and third stage of the trace-back process.[372] Mexico, which only endorsed the fourth alternative

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[364] *See US – COOL (Article 21.5) (Panel)*, para. 7.562.

[365] *See US – COOL (Article 21.5) (Panel)*, para. 7.564.

[366] *See US – COOL (Article 21.5) (Panel)*, para. 7.564.

[367] *See US – COOL (Article 21.5) (Panel)*, para. 7.565; *see also* Canada's Second Written 21.5 Submission, para. 138 (stating that these requirements would be in "addition to the existing requirements of the amended COOL measure").

Canada first proposed this alternative measure in its second written submission; Mexico subsequently endorsed this alternative in its oral statement and responses to the Panels' questions. *See US – COOL (Article 21.5) (Panel)*, para 7.570 (*see also* Canada's Second Written Submission, paras. 90-91 and 138-152; Mexico's Opening Statement at Meeting with Panel, para. 54; Mexico's Response to Panel Questions, Nos. 71-72). The United States challenged Mexico's "endorsement" as failing to meet its burden of proof, and failing to provide adequate time for response. Nonetheless, the Panel found that Mexico's endorsement of Canada's fourth alternative had not come too late. *See US – COOL (Article 21.5) (Panel)*, para 7.584.

[368] *See US – COOL (Article 21.5) (Panel)*, para. 7.568.

[369] *See US – COOL (Article 21.5) (Panel)*, para 7.587.

[370] *See US – COOL (Article 21.5) (Panel)*, para. 7.589.

[371] *See US – COOL (Article 21.5) (Panel)*, para. 7.590.

[372] *See US – COOL (Article 21.5) (Panel)*, para. 7.591.

at the end of the panel proceedings, provided little to no detail regarding the operation of such a trace-back system.[373] For these reasons, the Panels found the complainants had "not provided a sufficient explanation of how their fourth alternative measure would be implemented using a trace-back system."[374]

217. With respect to segregation and recordkeeping, Canada pointed to USDA's "Interstate Livestock Traceability Rule." The Panels, however, found that complainants failed to clarify this rule's "requirements or relevance to an alternative providing state/province designations on retail muscle cuts."[375] In particular, complainants provided limited explanation of how the rule applies to livestock currently, as well as how it may be extended to muscle cuts and other exempt products.[376] Additionally, complainants failed to adequately describe how recordkeeping would be implemented or required information transmitted.[377] For these reasons, the Panel determined that the complainants had failed to explain how the fourth alternative measure could be implemented through segregation and recordkeeping.

218. Noting that an adequate identification of an alternative measure is a pre-requisite for assessing its reasonable availability, trade restrictiveness and contribution to a legitimate objective, the Panels found that they had insufficient information to carry out a comparative analysis with respect to the fourth alternative.[378] The Panels indicated that information regarding costs are important for evaluating the availability of a measure, as well as its trade restrictiveness. With respect to the fourth alternative measure, the complainants have provided very little meaningful information regarding relative costs.[379] For the reasons noted above, the Panels correctly found that complainants had not made a *prima face* case that the fourth alternative measure is reasonably available, or less trade restrictive. The Panel therefore declined to evaluate whether the measure was capable of making an equivalent contribution.

2. The Panels Did Not Err in Finding that Complainants Had Not Sufficiently Identified the Third and Fourth Alternatives

219. As discussed above, the Panels considered that complainants must identify the alternative sufficiently to "undertak[e] an assessment of this alternative and meaningfully compar[e] it with the amended COOL measure as required under Article 2.2 of the TBT Agreement."[380] The

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[373] *See US – COOL (Article 21.5) (Panel)*, paras. 7.590-7.591.

[374] *See US – COOL (Article 21.5) (Panel)*, para. 7.592.

[375] *See US – COOL (Article 21.5) (Panel)*, para. 7.596.

[376] *See US – COOL (Article 21.5) (Panel)*, para. 7.597.

[377] *See US – COOL (Article 21.5) (Panel)*, paras. 7.599-7.560.

[378] *See US – COOL (Article 21.5) (Panel)*, para. 7.602.

[379] *See US – COOL (Article 21.5) (Panel)*, paras. 7.603-7.608.

[380] *US – COOL (Article 21.5) (Panel)*, para. 7.553; *see also id.*, para. 7.438 ("[T]he complainants must address the trade-restrictiveness of both the amended COOL measure and the alternative measures with a sufficient level of precision that allows us to conduct a meaningful comparison with alternative measures under Article 2.2 of the TBT Agreement. The complainants cannot be relieved of their burden to prove that at least one specific,

Panels correctly concluded that complainants' description of the third and fourth alternative measures was insufficient, and subsequently complainants failed to establish a *prima facie* case as to any of the three elements for either of the two alternatives (these are Panel findings that complainants have not appealed).[381]

220. As the Panels extensively discussed, the third and fourth alternatives constitute exceedingly complex proposals, requiring substantial changes to three stages of meat processing: "(i) from the birth of the animal to the slaughterhouse; (ii) the killing of the animal and the division of the carcass into cuts at the slaughterhouse; and (iii) the delivery of cuts from the slaughterhouse to the consumer through the distribution chain," with significant cost consequences for each stage of production.[382] However, complainants fail to adequately "address each of these stages with sufficient clarity," including providing sufficient explanation "on the manner or cost implications of spanning these stages in the United States."[383]

221. Both Canada and Mexico appear to accept the proposition that it is their burden, as complainants, to identify the proposed alternatives sufficient for the Panels to make a "meaningful" comparison,[384] but disagree with the Panels that they had not done so here. Complainants claim that the level of detail required by the Panels "set[] the bar overly high,"[385] was "disproportionate,"[386] was "unnecessarily precise,"[387] etc., and challenge the Panels' findings on this basis. Complainants' assessment of the Panels' analysis is incorrect and their appeals should be rejected.

222. First, it is clear that "precisely how much and precisely what kind of evidence will be required [for a complainant to satisfy its burden] will necessarily vary from measure to measure, provision to provision, and case to case."[388] What a complainant must put forward in way of

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reasonably available, and less trade restrictive alternative exists that would fulfil the US objective at least to a degree equivalent to the amended COOL measure.").

[381] *See supra*, sec. II.F.1.

[382] *US – COOL (Article 21.5) (Panel)*, paras. 7.511; *see also id.*, paras. 7.525, 7.531, 7.536, 7.539, and 7.550.

[383] *US – COOL (Article 21.5) (Panel)*, para. 7.551-7.552 (discussing third alternative); *see also id.*, paras. 7.593-7.608 (discussing fourth alternative).

[384] *See* Mexico's Other Appellant Submission, para. 173 ("Although the "adequate identification" of a proposed alternative measure is a precondition to *the meaningful assessment* of its degree of contribution to the relevant objective, reasonable availability and trade-restrictiveness …") (emphasis added); Canada's Other Appellant Submission, para. 133 ("An alternative measure has to be sufficiently identified for two purposes in the context of the comparative analysis: (i) *to make the comparison with the alternative measure possible*; and (ii) to determine whether the alternative measure is reasonably available.") (emphasis added).

[385] Canada's Other Appellant Submission, para. 132.

[386] Canada's Other Appellant Submission, para. 142.

[387] Mexico's Other Appellant Submission, para. 173.

[388] *Chile – Price Band System (Article 21.5 – Argentina) (AB)*, para. 134 ("The nature and scope of arguments and evidence required 'will necessarily vary from measure to measure, provision to provision, and case to case.' When a claim is brought against a WTO Member's legislation or regulation, a panel may, in some

argument and evidence is, therefore, not fixed in place, but will necessarily vary based on the complexity of the claims that the complainant chooses to make. But here complainants have only provided "limited explanations,"[389] and "sometimes vague and in some respects incomplete description[s]"[390] of exceedingly complex proposals that require changes at all levels of production and retail of meat in the United States.[391] And while both complainants insist that they have put forward sufficient information to make a *prima facie* case, neither provides a reason why this is so.

223. Mexico, for its part, simply makes conclusory statements,[392] and provides no substantive reason why the Panels could have made a meaningful assessment as to whether either third or fourth alternative is, in fact, a less trade restrictive, reasonably available alternative that makes an equivalent contribution to the objective.[393]

224. Canada, for its part, does attempt to establish that the DS384 Panel could have made a meaningful comparison as to the three elements of the test, but does so merely by referring to the argument and evidence that the Panels have already rejected in findings that Canada has not appealed.

225. First, considering trade restrictiveness, Canada claims that its two previous arguments that neither alternative would have "a limiting effect on the competitive opportunities of imported livestock," and that Dr. Sumner's economic analysis that purportedly demonstrates "none of the alternative measures Canada proposed could plausibly entail costs that would generate a greater impact on trade than the impact of the amended COOL measure,"[394] was sufficient to make a meaningful assessment as to whether the third and fourth alternatives are less trade restrictive than the amended measure. But the Panels clearly thought otherwise, finding that complainants could not establish a *prima facie* case that the third alternative, for example, is less trade restrictive simply based on an allegation of an "even distribution of

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circumstances, consider that the text of the relevant legal instrument is sufficiently clear to establish the scope and meaning of the law. However, in other cases, a panel may consider that additional evidence is necessary to do so. Once the complaining party has established a *prima facie* case, it is then for the responding party to rebut it.") (quoting *US – Wool Shirts and Blouses (AB)*, p. 14); *see also Japan – Apples (AB)*, para. 157.

[389] *US – COOL (Article 21.5) (Panel)*, para. 7.602 (fourth alternative).

[390] *US – COOL (Article 21.5) (Panel)*, para. 7.556 (third alternatives).

[391] *See, e.g., US – COOL (Article 21.5) (Panel)*, paras. 7.538, and 7.540-43. Indeed the suggested alternatives may result in significant (and detrimental) structural shifts within the U.S. livestock and meat industry. Canada's Second Written Submission, para. 136; see also U.S. Second Written 21.5 Submission, para. 150; *see also* U.S. First Written 21.5 Submission, para. 191 (*quoting* Congressional Research Service, "Animal Identification and Traceability: Overview and Issues," p. 10 (Nov. 29, 2010) ("2010 CRS Report") (Exh. CDA-92)).

[392] *See* Mexico's Other Appellant Submission, para. 183 ("Given Mexico's adequate identification of its third and fourth alternative measures and the establishment of a *prima facie* case . . .").

[393] *See US – COOL (AB)*, para. 379.

[394] Canada's Other Appellant Submission, para. 150 (citing Canada's Second Written 21.5 Submission, at paras. 92-95). *See also* Canada's Second Written 21.5 Submission, para. 122.

costs."[395] Indeed, even Canada had conceded that the third alternative would be so costly that it may drive down consumer demand for meat in the United States, leading to a possible "contraction in the U.S. industry."[396] Such a "contraction," could, among other things, reduce market access of complainants' livestock in the United States. Canada has not appealed the Panels' findings in this regard,[397] and indeed now appears to contradict its position on trade restrictiveness. In its Other Appellant Submission, Canada now states that, "it is Canada's view that a measure that increases compliance costs in a non-discriminatory manner, but does not otherwise modify the conditions of competition to the detriment of imported products, would be 'trade-restrictive' if the cost increase has the effect of reducing trade flows or reducing the price of both imported and domestic products."[398]

226. Second, while Canada considers that it clear that Canada's description was sufficient for purposes of evaluating whether the alternatives make an equivalent contribution,[399] the Panels' unappealed findings stand in stark contrast to such a conclusion.[400] For example, while "the complainants seem to presuppose that the trace-back system would entail tracking more detailed information than under the amended COOL measure, irrespective of the information actually labelled," the Panels correctly determined that complainants do not explain what information would be on the label versus what would be tracked, nor do complainants ever "clarify the implications of any differences between the information kept in the supply chain and eventually conveyed to consumers under their third alternative."[401] Among other points, such "insufficiency" on the part of complainants' own arguments and evidence undermined the Panels' ability to make this assessment.[402]

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[395] *US – COOL (Article 21.5) (Panel)*, para. 7.559 ("In this case, the complainants have not demonstrated that trace-back – including the various possible costs of animal identification, meat traceability, and eventual recordkeeping and verification aspects – would be less trade restrictive based purely on the alleged even distribution of costs.").

[396] *US – COOL (Article 21.5) (Panel)*, n.1240 ("We note that Canada expressly recognizes that 'there might be some contraction in the U.S. industry under a trace-back system as a result of a possible reduction in consumer demand.' Canada's second written submission, para. 136. *See also* Hayes and Meyer paper, p. 12 [(Exh. CDA-89/Exh. MEX-37)] (explaining the reduction of consumer purchases of pork in response to increased production costs and prices)").

[397] *See also US – COOL (Article 21.5) (Panel)*, para. 7.466 ("As a result, neither of the [Dr. Sumner] studies assesses the actual magnitude of the cost of a specific trace-back system or any of the other three alternatives put forward by the complainants."). Complainants did not appeal this finding.

[398] Canada's Other Appellant Submission, n.63.

[399] *See* Canada's Other Appellant Submission, para. 151.

[400] *US – COOL (Article 21.5) (Panel)*, paras. 7.563; 7.610.

[401] *US – COOL (Article 21.5) (Panel)*, para. 7.546.

[402] *US – COOL (Article 21.5) (Panel)*, para. 7.563 ("The insufficiency of the complainants' evidence and arguments as to the implementation of the third alternative impedes our assessment of its provision of consumer information."); *see also id.*, para. 7.538 ("The complainants' evidence and arguments leave significant gaps as to the three separate stages that would need to be linked under the third alternative measure.").

227. Third, Canada's claims that its descriptions of the third and fourth alternatives were sufficient for the Panels to make a meaningful assessment of whether either alternative is "reasonably available" is again directly contradicted by the Panels who determined, in unappealed findings, that this was not the case.[403] In particular, with regard to the third alternative, the Panels correctly found that complainants' "sometimes vague and in some respect incomplete description of the implementation and ultimate magnitude of the associate costs provided by the complainants" was not sufficient to make the appropriate assessment suggested by the Appellate Body.[404] The fact that complainants consider that "[t]here are no real doubts" that their alternatives are "reasonably available"[405] is undermined not only by the Panels conclusions[406] and the significant argument and evidence put forward by the United States that this was not the case,[407] but by the fact that complainants have chosen *not to appeal* the Panels' findings in this regard.[408]

228. Rather than demonstrate that the evidence provided to the Panels in this proceeding meet the *prima facie* threshold, complainants attempt to minimize the scope of the Panels' inquiry under Article 2.2. Canada in particular, claims the "[t]he key consideration" is whether the description of the measure or evidence provided "enables a panel to determine whether the responding Member, and potentially its industry, is capable of implementing the alternative

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[403] *US – COOL (Article 21.5) (Panel)*, paras. 7.557; 7.609.

[404] *US – COOL (Article 21.5) (Panel)*, para. 7.555-56 (citing *Brazil – Retreaded Tyres (AB)*, para. 156; *EC – Seal Products (AB)*, para. 5.277, among other cases); *see also id.*, para. 7.609 (The complainants failed to provide an adequate explanation of how their fourth alternative measure would be implemented. In addition, the complainants have not advanced sufficient arguments on the costs of the fourth alternative measure to enable us to review the fourth alternative measure's reasonable availability and trade-restrictiveness."). In addition, the Panels correctly noted that neither the Sumner Economic Analysis or its Mexican variant "assess[] the actual magnitude of the cost of a specific trace-back system or any of the other three alternatives put forward by the complainants. Hence, we cannot draw any inferences from these studies as to whether the implied additional costs of an alternative, such as a trace-back system, implemented in the United States would be effectively lower than the hypothetical and simulated figures." *Id.*, para. 7.466.

[405] Canada's Other Appellant Submission, para. 152 ("There are no real doubts that the United States and its industry are capable of implementing either the third or fourth alternative measures, especially given that Uruguay has implemented a trace-back system for meat"); Mexico's Other Appellant Submission, para. 182 ("In the absence of any real and objective doubt as to the capacity of the responding member to implement the alternative measure . . .").

[406] *See, e.g., US – COOL (Article 21.5) (Panel)*, para. 7.556 (concluding that complainants' references to the "trace-back systems of other WTO Members [are] of limited evidentiary value in terms of the implementation and costs of the complainants' third alternative measure in the United States"); *see also id*. at paras. 7.547-48 (noting that "the various foreign trace-back systems referred to by complainants do not explain how these are meant to elucidate the implementation of trace-back in the context of the US livestock and meat market" and noting significant "key advantages" of other markets).

[407] *See* U.S. First Written 21.5 Submission, paras. 190-193 (discussing feasibility of trace-back); U.S. Second Written 21.5 Submission, paras. 150-158, and 160-161; U.S. Response to Panels' Questions Nos. 62, 63, 65, and 70 paras. 134-144, 145-150, 151-156, and 157-162; and U.S. Comments to Responses to Panels' Questions Nos. 56, 57, 58, 59, 65, 66, and 68, paras. 167-170, 171-174, 175-176, 177-179, 185-188, 198-190, and 191-192.

[408] *See supra*, sec. II.F (introduction).

measure."[409] Canada concludes that unless there are "real doubts" as to a Member's capacity to apply the measure, "identifying the measure does not require providing a detailed description as to how it would be implemented."[410] However, the Panels have rejected complainants' assertion that the use of trace-back by other Members is evidence that the United States is capable of taking this measure, a finding that complainants do not appeal.[411]

229. While Canada claims that producing sufficient argument and evidence, including adequate cost estimates, would "involve massive research and extensive and expensive expert reports,"[412] this evidentiary burden is simply a function of the complexity of complainants' proposals and the *prima facie* case required under Article 2.2 of the TBT Agreement.[413] And to the extent that this evidentiary burden is "impossible" to satisfy, as Mexico so claims,[414] that is only because the third and fourth alternatives are not, in fact, less trade restrictive, reasonably available alternatives that make an equivalent contribution to the objective, rather than some inherent inability of complainants to hire consultants, such as the already retained Dr. Sumner,[415] to produce cost estimates and other expert reports.

230. For these reasons, complainants' appeals should be rejected.

3. Complainants' Appeals Should Be Rejected as to Whether, in this Dispute, It Was Incumbent Upon Complainants to Provide Cost Estimates to Establish a *Prima Facie* Case that the Third and Fourth Alternatives Are "Reasonably Available"

231. In light of the fact that the third and fourth alternatives represent very costly options for the United States,[416] requiring changes to each stage of production, it was of no surprise that all

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[409] Canada's Other Appellant Submission, para. 139 (emphasis added).

[410] Canada's Other Appellant Submission, para. 139. To support this position, Canada remarks that "there are no real doubts that the United States and its industry are capable of implementing [the trace-back measure], especially given that Uruguay has implemented a trace-back system for meat." *Id.*, para. 139. Mexico similarly references the alleged "real and objective doubt as to the capacity" of the United States to adopt either the third or fourth alternative. Mexico's Other Appellant Submission, para. 182.

[411] *US – COOL 21.*5, paras. 7.548, 7.551.

[412] Canada's Other Appellant Submission, para. 143.

[413] *See, e.g., US – Wool Shirts and Blouses (AB)*, p. 14; *Chile – Price Band System (Article 21.5 – Argentina) (AB)*, para. 134; *Japan – Apples (AB)*, para. 157. *See also Australia-Apples (AB)*, para. 364 (noting that complainant is not required to produce a particular piece of evidence (such as a risk assessment) to demonstrate a *prima facie* case with respect to an alternative measure, but given the nature of the claim it will be difficult to meet the burden without relying on similar evidence (*i.e.*, "evidence that is scientific in nature")).

[414] Mexico's Other Appellant Submission, para. 180.

[415] *See US – COOL (Article 21.5) (Panel)*, para. 7.452 ("Canada submitted an economic study by Professor Sumner to support its estimate of the magnitude of added compliance costs required for any non-discriminatory alternative measure to cause export revenue losses equivalent to those caused by the original COOL measure.").

[416] *See, e.g., US – COOL (Article 21.5) (Panel)*, para. 7.550 ("As regards costs in general, it is clear that the complainants' third alternative would impose costs on the affected industries and regulatory authorities involved in any trace-back system."); *see also id.*, para. 7.607 (indicating that the fourth alternative measure "could entail higher

three parties made "extensive reference to the costs entailed by the third alternative,"[417] and, by extension, the fourth alternative as well. Indeed, the Panels considered that "the costs imposed by an alternative measure may be directly relevant to whether such a measure can be considered reasonably available to a responding Member."[418]

232. The Panels then made a thorough examination of this evidence,[419] ultimately concluding that "the complainants put forward cost estimates that would only partially cover the suggested alternative."[420] While the Panels agree that not all complainants in all cases need to provide such information,[421] in light of the complexity of the third and fourth alternatives, the Panels concluded that complainants' "sometimes vague and in some respects incomplete description of the implementation and ultimate magnitude of the associate costs" to be insufficient to establish a *prima facie* case that either the third or fourth alternative is "reasonably available" for purposes of Article 2.2.[422]

233. Complainants now appeal this finding, arguing that the Panels erred by determining that, "for the purpose of making a *prima facie* case that an alternative measure is reasonably available, a complainant bears the burden of providing a cost estimate of the alternative measure or evidence substantiating the likely magnitude of the costs that would be associated with the alternative measure."[423] Complainants are incorrect.

234. Of course, and as discussed above, it is well established that a complainant's burden is not fixed but will necessarily vary based on the complexity of the claims that the complainant

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overall segregation and recordkeeping costs than the amended COOL measure," which "Canada recognizes . . . would create a 'further . . . burden' for Canada").

[417] *See US – COOL (Article 21.5) (Panel)*, para. 7.509 (citing, among other sources, parties' responses to Panels' Questions Nos. 39-41).

[418] *US – COOL (Article 21.5) (Panel)*, para. 7.509.

[419] *See, e.g., US – COOL (Article 21.5) (Panel)*, paras. 7.513-7.528.

[420] *US – COOL (Article 21.5) (Panel)*, para. 7.556; *see also id*., n.1128 (reflecting Canada's cost estimates and rejecting certain evidence as to the magnitude of potential costs). Similarly, the Panels note that Canada provided little (and Mexico provided no) information regarding the costs associated with the fourth alternative measure. *See id.*, para. 7.604 (citing Canada's submission of partial cost information), para. 7.607, and n.1324 (stating that the Panel cannot draw any inferences from the Sumner Reports advanced by complainants).

[421] For instance, the Panels did not seek additional costs estimates with regard to the first and second alternative measures proposed by complainants.

[422] *US – COOL (Article 21.5) (Panel)*, paras. 7.556-7.557 (third alternative); *id.*, paras. 7.607-7.608 (regarding the fourth alternative the Panels indicated that the complainants' limited arguments on cost "reinforce our conclusion that the complainants have not adequately explained how the fourth alternative measure would be implemented so as to enable a meaningful comparison with the amended COOL measure").

[423] Canada's Other Appellant Submission, para. 154; Mexico's Other Appellant Submission, para. 184 ("Mexico requests that the Appellate Body reverse the Panel's finding that precise and complete cost estimates are a prerequisite to the 'adequate identification' of an alternative measure for the purposes of establishing *prima facie* that an alternative measure is reasonably available.").

chooses to make.[424] Here, the question is whether either of two complex alterations to the way the United States produces meat could be considered "reasonably available" to the United States in the sense that the Member is "capable of taking" the alternative or whether the "alternative would "impose[] an undue burden on that Member, such as prohibitive costs or substantial technical difficulties."[425]

235. The Panels are, thus, clearly correct that "the costs imposed by an alternative measure may be *directly relevant* to whether such a measure can be considered reasonably available to a responding Member."[426] And, indeed, complainants do not appear to dispute this point. Rather, Canada and Mexico's entire criticism appears to be that it should not be them, as complainants, that should have been required to present this analysis, but the United States, as respondent. Complainants' central argument in this regard is that the Panels have misread the Appellate Body's previous analyses under Article XX of the GATT 1994 when concluding that complainants have the burden of proof for this element.[427] In addition, Mexico appears to argue that the burden of proof for this element should fall on the respondent as it is difficult for Mexico to produce the relevant cost estimates.[428] Complainants' appeals are in error.

236. Complainants carry the burden of proving all three elements of the Article 2.2 analysis – that is, that an alternative measure exists "that is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available."[429] Indeed, in the original

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[424] *Chile – Price Band System (Article 21.5 – Argentina) (AB)*, para. 134 ("The nature and scope of arguments and evidence required 'will necessarily vary from measure to measure, provision to provision, and case to case.' When a claim is brought against a WTO Member's legislation or regulation, a panel may, in some circumstances, consider that the text of the relevant legal instrument is sufficiently clear to establish the scope and meaning of the law. However, in other cases, a panel may consider that additional evidence is necessary to do so. Once the complaining party has established a *prima facie* case, it is then for the responding party to rebut it.") (quoting *US – Wool Shirts and Blouses (AB)*, p. 14); *see also Japan – Apples (AB)*, para. 157.

[425] *US – Gambling (AB)*, para. 308; *see also EC – Seal Products (AB)*, para. 5.277 ("We would not exclude *a priori* the possibility that an alternative measure may be deemed not reasonably available due to significant costs or difficulties faced by the affected industry, in particular where such costs or difficulties could affect the ability or willingness of the industry to comply with the requirements of that measure. We therefore consider that an assessment of the reasonable availability of an alternative measure could potentially include the burden on the industries concerned.").

[426] *US – COOL (Article 21.5) (Panel)*, para. 7.509 (emphasis added).

[427] *See* Canada's Other Appellant Submission, paras. 144-154 (quoting *China Publications and Audiovisual Products (AB)*, paras. 327-328); Mexico's Other Appellant Submission, paras. 177-183 (quoting *EC – Seal Products (AB)*, paras. 7.276-7.277).

[428] *See* Mexico's Other Appellant Submission, paras. 181-182 ("The only Member who is in a position to comment meaningfully on the specific issues of implementation and the associated costs – including any significant obstacles or difficulties – is the responding Member itself. . . . The standard of proof in establishing a *prima facie* case should be attuned accordingly.").

[429] *US – COOL (AB)*, para. 379.

proceeding, it was *uncontested* by complainants that that they have "the burden of proof with respect to such alternative measures."[430]

237. Moreover, it is simply impossible to read the Appellate Body's explanation of the analysis under Article XX of the GATT 1994 as undermining this clear guidance. As has been long understood, complainants carry the burden of proof for their claims that a Member has breached a positive obligation (such as Article 2.2 of the TBT Agreement), while respondents carry the burden of proof for their affirmative defenses (such as Article XX of the GATT 1994).[431] So while Canada is correct that the "the burden is on the *respondent* to provide sufficient evidence to support an assertion that a measure is *not* reasonably available" for purposes of a respondent's affirmative defense under Article XX,[432] complainants are entirely wrong to suggest that this means the complainants do not have the burden of proof for Article 2.2. As such, the Panels were correct not to relieve complainants of their own burden of proof, either for the reasonable available element of the test,[433] or for Article 2.2 more generally.[434] And complainants are wrong to urge the Appellate Body to adopt a rule whereby "[a] complainant's burden with respect to possible alternative measures should not be heavier under Article 2.2 of the TBT Agreement than under GATT Article XX or GATS Article XIV."[435] Indeed, the two burdens are entirely different, since the nature of these provisions are entirely different.

238. Finally, Mexico is wrong to argue that the complainant's burden of proof should be "attuned" to the fact that Mexico considers it difficult to prove its own case.[436] As the Appellate Body has correctly stated previously, a complainant's burden of proof is not allocated based on difficulty.[437] In any event, Mexico has ready access to both economists (such as Dr. Summer) and elements of the industry (who would bear substantial costs under either the third or fourth alternatives).

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[430] *US – COOL (AB)*, para. 469 ("The Appellate Body has found, *and the participants do not contest*, that the burden of proof with respect to such alternative measures *is on the complainants*.") (emphasis added).

[431] *US – Wool Shirts and Blouses (AB)*, pp. 15-16.

[432] Canada's Other Appellant Submission, para. 147 (emphasis in original).

[433] *US – COOL (Article 21.5) (Panel)*, paras. 7.556-7.557 (third alternative); *id.*, paras. 7.609 (fourth alternative).

[434] *US – COOL (Article 21.5) (Panel)*, para. 7.437.

[435] Canada's Other Appellant Submission, para. 148.

[436] *See* Mexico's Other Appellant Submission, paras. 181-182 ("The only Member who is in a position to comment meaningfully on the specific issues of implementation and the associated costs – including any significant obstacles or difficulties – is the responding Member itself. . . . The standard of proof in establishing a *prima facie* case should be attuned accordingly.").

[437] *See EC – Sardines (AB)*, para. 281 ("There is nothing in the WTO dispute settlement system to support the notion that the allocation of the burden of proof should be decided on the basis of a comparison between the respective difficulties that may possibly be encountered by the complainant and the respondent in collecting information to prove a case.").

239. For these reasons, complainants' appeals should be rejected.

4. Complainants Do Not Appeal the Panels' Findings that Neither the Third nor Fourth Alternative Proves the Amended COOL Measure Inconsistent with Article 2.2, and, as such, These Findings Stand

240. As noted above, neither complainant appeals the Panels finding that complainants have failed to make a *prima facie* case that either the third or fourth alternatives is less trade restrictive than the amended measure,[438] makes an equivalent contribution to the objective,[439] or is reasonably available to the United States.[440] Similarly, neither complainant appeals the Panels' ultimate findings that neither the third nor fourth alternatives proves the amended measure inconsistent with Article 2.2.[441] Indeed, Canada notes explicitly that it "does not request the Appellate Body to complete the analysis" with regard to either the third or fourth alternatives.[442]

241. As such, even if the Appellate Body were to accept complainants' appeals with regard to the third and fourth alternatives, the Panels' findings that neither the third nor fourth alternatives proves the amended measure inconsistent with Article 2.2 would stand.

III. COMPLAINANTS' APPEALS OF ARTICLE 2.1 OF THE TBT AGREEMENT SHOULD BE REJECTED

242. Canada argues that the Panels erred in determining that the statutory prohibition of trace-back and the D Label do not support a finding that the amended measure is inconsistent with Article 2.1.[443] Both Canada and Mexico consider that the Panels erred in determining that the E Label does not support a finding that the amended measure is inconsistent with Article 2.1.[444]

243. As discussed below, the United States considers the ultimate conclusions of the Panels as to these three regulatory distinctions to be correct, and consider that complainants' appeals with regard to their Article 2.1 claims should fail.

244. However, as discussed in the U.S. Appellant Submission with regard to the Panels' Article 2.1 analysis of the three exemptions to the COOL measure, the United States considers the Panels' overall framework of whether a regulatory distinction is relevant or not to the Article

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[438] *US – COOL (Article 21.5) (Panel)*, para. 7.560 (third alternative), para. 7.609 (fourth alternative).

[439] *US – COOL (Article 21.5) (Panel)*, para. 7.563 (third alternative), para. 7.610 (fourth alternative).

[440] *US – COOL (Article 21.5) (Panel)*, para. 7.557 (third alternative), para. 7.610 (fourth alternative).

[441] *US – COOL (Article 21.5) (Panel)*, para. 7.564 (third alternative), para. 7.610 (fourth alternative).

[442] Canada's Other Appellant Submission, para. 154 ("However, in the event the Appellate Body were to reverse these findings, Canada does not request the Appellate Body to complete the analysis."); *see also id.*, para. 132 ("Thus, Canada appeals certain intermediary findings made by the Compliance Panel but does not request the Appellate Body to complete the analysis.").

[443] *See* Canada's Other Appellant Submission, paras. 157-163, 173-178.

[444] *See* Canada's Other Appellant Submission, paras. 164-172; Mexico's Other Appellant Submission, paras. 185-197.

2.1 analysis to be in error.[445] Indeed, under the appropriate approach, the D Label, the E Label, the statutory prohibition of trace-back, *and the three exemptions* are irrelevant to the second step of the Article 2.1 analysis as none of them account for the detrimental impact.[446] As such, none of these regulatory distinctions can answer the question posed by the second step of the Article 2.1 analysis – whether "the detrimental impact reflects discrimination"[447] – and, none of these regulatory distinctions can constitute a basis for a finding that the detrimental impact does not stem exclusively from legitimate regulatory distinctions.

245. The United States addresses the proper approach to this issue first, and then responds directly to complainants' appeals regarding Labels D and E, and the statutory prohibition of trace-back.

A. The Panels' Overall Framework Is in Error

246. As the Appellate Body has noted, because "technical regulations are measures that, by their very nature, establish distinctions between products according to their characteristics, or related processes and production methods,"[448] not every distinction a measure makes is relevant to the Article 2.1 inquiry. Only the distinctions that account for the detrimental impact could possibly answer the question of whether the detrimental impact reflects discrimination.[449] As such, only the three production steps and the A-C categories of muscle cuts (and those labels affixed to those muscle cuts) are relevant to this analysis as it those regulatory distinctions that account for the detrimental impact on imported livestock cited by Mexico and Canada.[450] In other words, none of the other regulatory distinctions made by the amended measure, including those distinctions raised by complainants in their Other Appellant Submissions (*i.e.*, the statutory prohibition on trace-back, the D Label, and the E Label), account for the detrimental impact, and, as such, are not relevant to the Article 2.1 analysis at all.

247. While the Panels appear to acknowledge the Appellate Body's guidance in this regard,[451] ultimately the Panels appeared to consider this guidance a mere formality as the Panels considered whether the regulatory distinctions provide "compelling evidence of arbitrary or

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[445] *See* U.S. Appellant Submission, paras. 195-203.

[446] *See US – Tuna II (Mexico) (AB)*, para. 286.

[447] *US – COOL (AB)*, para. 327.

[448] *US – COOL (AB)*, para. 268.

[449] *See US – Tuna II (Mexico) (AB)*, para. 286.

[450] *US – COOL (AB)*, para. 341.

[451] *See US – COOL (Article 21.5) (Panel)*, para. 7.216 (quoting *US – Tuna II (Mexico) (AB)*, para. 286).

unjustifiable discrimination"[452] even where these regulatory distinctions did not account for the detrimental impact.[453]

248. As discussed in the U.S. Appellant Submission and below, this analysis is in error. Once the Panels concluded that the regulatory distinction at issue did not account for the detrimental impact, the Panels should have ended their analysis at that point for purposes of that regulatory distinction. While the Panels' error ultimately did not matter for purposes of the D Label, the E Label, and the statutory prohibition on trace-back in light of the Panels' ultimate findings as to each of those three distinctions, the error did indeed matter for purposes of the exemptions, as the Panels wrongly concluded that the exemptions provided a basis for finding that the detrimental impact caused by the amended measure reflects discrimination.[454]

B. Canada's Claim that the D Label Supports a Finding that the Detrimental Impact Reflects Discrimination Should Be Rejected

249. Under the amended COOL measure, Label D covers muscle cuts produced from animals slaughtered outside the United States.[455] The D Label reads "Product of Country X."[456] Canada appeals the Panels' finding that Label D is not a basis for finding that the amended measure is inconsistent with Article 2.1.[457]

250. As the Panels did with regard to the three exemptions, Label E, and the statutory prohibition of trace-back, the Panels appeared to analyze the issue of whether Label D constitutes a basis for a finding that the amended measure is inconsistent with Article 2.1 in two parts. First, the Panels reviewed the "relevance" of the regulatory distinction. In light of the fact that complainants do not directly challenge this aspect of the amended measure and the label (which applies to imported *muscle cuts*) does not account for the detrimental impact on imported *livestock*, the Panels appear to find that the Label D is an irrelevant regulatory distinction.[458] Nevertheless, the Panels continued their analysis,[459] subsequently concluding that that the Label D statement of "Product of Country X" "does not seem apt to mislead consumers" in light of the fact that the evidence indicated that imported muscle cuts are produced from animals born and

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[452] *See, e.g., US – COOL (Article 21.5) (Panel)*, para. 7.279 (analyzing the D Label in the context of Article 2.1).

[453] *See, e.g., US – COOL (Article 21.5) (Panel)*, para. 7.204 (finding that there is a "lack of demonstrated detrimental impact" with regard to the D Label); *id.*, para. 7.207 ("[W]e find that the ground meat label does not constitute a relevant regulatory distinction of the amended COOL measure for the purposes of Article 2.1.").

[454] *See* U.S. Appellant Submission, paras. 195-203.

[455] 2013 Final Rule, § 65.300(f)(2) (Exh. CDA-1).

[456] *US – COOL (Article 21.5) (Panel)*, para. 7.279.

[457] Canada's Other Appellant Submission, paras. 157-163.

[458] *US – COOL (Article 21.5) (Panel)*, para. 7.204 ("Given the complainants' explicit delimitation of their claims and the lack of demonstrated detrimental impact, however, the relevance of Label D for legitimate regulatory distinctions must accordingly be adjusted in this compliance dispute.").

[459] *US – COOL (Article 21.5) (Panel)*, para. 7.279.

raised in the country of slaughter.[460] This finding, coupled with the fact that Category D muscle cuts represent a very small portion of the U.S. market and that Label D does not create any detrimental impact, led the Panels to conclude that they "are not convinced that Label D rules of substantial transformation are compelling evidence of arbitrary or unjustifiable discrimination."[461]

251. Canada raises a number of baseless objections.

252. First, Canada argues that the D Label exposes the "arbitrary character" of the amended measure because it contributes to the alleged "origin-based discrepancy" that the 2013 Final Rule did not correct.[462] Canada misunderstands the analysis. The question posed in the second step of the Article 2.1 analysis is whether the detrimental impact reflects discrimination.[463] As such, only those regulatory distinctions that account for the detrimental impact can answer that question.[464] And it is unquestioned that the labeling rules that apply to imported *muscle cuts* do not cause, or affect in any way, the detrimental impact on imported *livestock* found to exist in this dispute.[465] Indeed, Canada did not even argue (much less prove) that there is a detrimental impact on its domestically produced muscle cuts before the Panels, and ignores the point entirely in its appeal.[466] This should have been the end of the Panels' inquiry, and Canada errs by arguing the contrary.

253. Moreover, Canada fails to prove that the D Label contributes to any "origin-based discrepancy" or is otherwise "arbitrary."[467] Indeed, Canada has not provided any evidence of Category D animals that were not born and raised in the country in which they were slaughtered.[468] As such, the Panels were correct to determine that there is no reason to conclude that Category D muscle cuts, bearing the label, "Product of Country X," will not be from animals

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[460] *US – COOL (Article 21.5) (Panel)*, para. 7.279 ("The complainants claim there is potential to mislead consumers given that birth or raising in other countries may be omitted from the label. As the United States points out, however, the complainants have not provided evidence of Category D animals that were not born and raised in the country in which they were slaughtered. In other words, there is nothing before us to suggest that muscle cuts with Label D stating 'Product of Country X' will not be from animals that are entirely a product of that country.").

[461] *US – COOL (Article 21.5) (Panel)*, para. 7.279 ("Thus, although the omission of production steps would result in provision of less detailed information, this does not seem apt to mislead consumers of Category D muscle cuts in the same fashion as would omission of countries on Labels B and C. Combined with the relatively small portion of Category D muscle cuts in the US market, and the absence of a claim that Label D creates any detrimental impact, we are not convinced that Label D rules of substantial transformation are compelling evidence of arbitrary or unjustifiable discrimination.").

[462] Canada's Other Appellant Submission, para. 159.

[463] *See, e.g., US – COOL (AB)*, para. 273.

[464] *US – Tuna II (Mexico) (AB)*, para. 286.

[465] *US – COOL (Article 21.5) (Panel)*, para. 7.204.

[466] *See* Canada's Other Appellant Submission, paras. 157-163.

[467] Canada's Other Appellant Submission, para. 159.

[468] Canada's Other Appellant Submission, paras. 160, 161; *US – COOL (Article 21.5) (Panel)*, para. 7.279; U.S. First Written 21.5 Submission, para. 86; U.S. Second Written 21.5 Submission, para. 59.

"that are *entirely* a product of that country."[469] It follows that, for all practical purposes, a Category D label, stating "Product of Country X" will be placed on muscle cuts of animals born, raised, and slaughtered in that particular country and are actually *products* of that country. Further, there are good reasons why the United States chose not to mandate adding the born, raised, and slaughtered origin labels for meat derived from foreign slaughtered animals. As the United States explained to the Panels, these reasons include a basis to avoid confusion among consumers due to long-standing customs rules regarding labels, confusion among retailers as to recordkeeping requirements, and imposition of recordkeeping requirements on foreign processors and their foreign upstream producers.[470]

254. Second, Canada argues that the Panels' "emphasis on the small market share of Category D muscle cuts in the United States was misplaced,"[471] but provides no reason why. As noted in the U.S. Appellant Submission, the question of whether a label is used – and to the extent it is used – is a relevant factor in the inquiry, and the Panels erred by basing its Article 2.1 finding on hypothetical or isolated instances of trade.[472] For purposes of the D Label, the original panel had already concluded that the evidence indicated that the D Label constitutes somewhere between 0 and 0.3 percent of the market.[473] As such, the amount of muscle cuts sold at retail that bear a "Product of Canada" D Label would be truly miniscule indeed (a point that Canada does not contest).[474]

255. In this regard, Canada appears to argue that the fact that Canada imports livestock from the United States, and that some of the *muscle cuts* produced from such livestock may be sold at retail in the United States as Category D meat (a point that Canada is unable to prove), is somehow relevant to whether its own *livestock* exports are being discriminated against by amended measure's A-C categories/labels.[475] It is not – there is simply no nexus between the

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[469] *US – COOL (Article 21.5) (Panel)*, para. 7.279 (emphasis added); *see also* U.S. Responses to the Panels' Questions No. 5, para. 11. Canada appears to concede that there is no likelihood that pork sold under a "Product of Canada" label at retail would be produced from animal that was not born or raised in Canada. *See* Canada's Responses to the Panels' Questions, No. 5, para. 7.

[470] U.S. First Written 21.5 Submission, paras. 84-85.

[471] Canada's Other Appellant Submission, para. 160.

[472] *See* U.S. Appellant Submission, para. 117-134.

[473] See *US – COOL (Panel)*, n.941 (noting that both Canada and the United States had submitted evidence on the record that muscle cuts sold with the D Label constituted somewhere between 0 and 0.3 percent of the market).

[474] *See* U.S. Second Written 21.5 Submission, para. 58 (noting that Canada's Category D beef muscle cuts would constitute, at most, 0.1 percent of COOL-labeled muscle cuts sold at retail); *see also* U.S. Responses to the Panels' Questions No. 5, para. 11. Moreover, Canada appears to concede that there is no likelihood that pork sold under a "Product of Canada" label at retail would be produced from animal born or raised in the United States. *See* Canada's Responses to the Panels' Questions, No. 5, para. 7.

[475] Canada's Other Appellant Submission, para. 160. With regard to the trade in cattle, Canada imported on average 48,000 head of cattle between 2003 and 2012 (apparently all from the United States and in none of those years, has Canadian imports amounted to more than 2 percent of its slaughter volume). U.S. Second 21.5 Written Submission, para. 56. Canada is unable to say whether any meat derived from those imported cattle is actually exported back into the United States or sold as D labeled-meat by a retailer. Similarly, with regard to beef and pork,

two points at all. Moreover, even if the point was relevant, Canada fails to explain why a label that states "Product of Canada" in lieu of "Born in the U.S., Raised and Slaughtered in Canada" is not "even-handed" in its treatment of Canadian livestock, Canadian muscle cuts, or any other Canadian product.

256. Third, Canada argues that the Panels should not have faulted Canada for "failing to provide evidence of Category D animals that were not born and raised in the country in which they were slaughtered."[476] But Canada must prove its own case. And Canada apparently considers the D Label to be relevant to the analysis because it "demonstrates the dissonance between the United States' objective of ensuring that 'label information accurately reflects the origin of muscle cut covered commodities' and the amended COOL measure's operation in practice."[477] Yet Canada cannot even prove that such a "dissonance" – as Canada puts it – exists for muscle cuts labeled "Product of Canada," much less Category D exported by any other country. In other words, Canada is unable to prove that any Category D muscle cuts were not produced from animals born, raised, and slaughtered in that country. While Canada notes that it "does not track the life histories of animals,"[478] that does not excuse its own burden of proof. As the Appellate Body has correctly stated previously, complainant's burden of proof is not allocated based on difficulty.[479]

257. Canada's reliance on the contention that a "dissonance" exists between the amended measure's objective and what it actually achieves reveals a misunderstanding regarding both the Article 2.1 and 2.2 analyses, and thus fails for a much more fundamental point than Canada's failure to prove what it asserts. It is certainly not the case that an importing Member must "fulfil" its objective to satisfy the requirements of Article 2.2,[480] and there is no basis to believe that a regulatory distinction is not "even-handed" for purposes of the Article 2.1 analysis merely because it does not "fulfill" the measure's objective in every way possible, and Canada errs by suggesting that this is so.

258. For these reasons, Canada's appeal with regard to the D Label should be rejected.

C. Complainants' Appeals that the E Label Supports a Finding that the Detrimental Impact Reflects Discrimination Should Be Rejected

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Canada has proffered *no* evidence that the beef or pork derived from animals imported into Canada is *actually* exported to the United States. Canada has simply stated that such muscle cuts are "available for export." Canada's assertions about its import and export market as it relates to Category D meat lack basis in evidence, and the Panels were correct to disregard Canada's arguments in this regard.

[476] Canada's Other Appellant Submission, para. 161.

[477] Canada's Other Appellant Submission, para. 163.

[478] Canada's Other Appellant Submission, para. 161.

[479] *See EC – Sardines (AB)*, para. 281 ("There is nothing in the WTO dispute settlement system to support the notion that the allocation of the burden of proof should be decided on the basis of a comparison between the respective difficulties that may possibly be encountered by the complainant and the respondent in collecting information to prove a case.").

[480] *US – COOL (AB)*, para. 461.

259. Label E is affixed on ground meat products. Under the amended measure, the E Label can list all countries of origin that have been in the processor's inventory for the last 60 days.[481]

260. As the Panels did with regard to each of the regulatory distinctions whose relevancy was in dispute, the Panels engaged in a two-step analysis. Thus, the Panels initially found that "the ground meat label *does not constitute a relevant regulatory distinction* of the amended COOL measure for the purposes of Article 2.1"[482] in light of fact that the original panel had already found that this category did not account for a detrimental impact, complainants did not challenge Category E directly (indeed, neither complainant appealed the original panel's findings in the original proceeding[483]), and that the Appellate Body did not list Category E as a relevant regulatory distinction in the original proceeding.[484]

261. However, notwithstanding this finding, the Panels then (again, unnecessarily) further examined whether the E Label provides evidence that the detrimental impact reflects discrimination. In this second step of the analysis, the Panels again repeat the fact that "complainants had not demonstrated detrimental impact caused by the ground meat rules in the original dispute" (nor appealed the original panel's findings).[485] The Panels then further concluded that in light of the different production methods for ground meat, "it is not clear that the treatment of ground meat is sufficiently connected to the relevant regulatory distinctions to justify incorporation into our broad assessment of the amended COOL measure's design and

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[481] *US – COOL (Article 21.5) (Panel)*, para. 7.20.

[482] *US – COOL (Article 21.5) (Panel)*, paras. 7.206-7.207 (emphasis added).

[483] *US – COOL (AB)*, n.388 (stating that the Appellate Body did "not address the additional category for ground meat (Category E) and the associated labelling rules since the Panel concluded that the complainants had not established that these result in less favourable treatment for imported livestock, and no participant appeals this finding").

[484] *US – COOL (Article 21.5) (Panel)*, paras. 7.206-7.207; *see also id.*, n.491 ("Canada and Mexico's arguments focus on the flexibilities for ground meat and the accuracy of resulting labels, but they do not address whether and how the ground meat labelling rules account for any alleged detrimental impact on imported livestock. Indeed, the original panel reviewed in detail the features of the ground meat labelling rules and their flexibility, before noting that Canada and Mexico 'ha[d] not made specific arguments in response to the United States' contentions regarding this flexibility, nor as to how any remaining costs would affect imported livestock less favourably in the context of ground meat.'") (citing *US – COOL (Panel)*, paras. 7.421-36).

[485] *US – COOL (Article 21.5) (Panel)*, para. 7.280 ("With respect to Label E for ground meat products, we recall that the complainants had not demonstrated detrimental impact caused by the ground meat rules in the original dispute. The complainants refer to the large percentage of meat under the amended COOL measure that would carry Label E, which omits point-of-production labelling and contains 'significant flexibility' as to which countries may be listed. However, the original panel's findings on the ground meat labelling rules were not appealed, nor reviewed in the Appellate Body's Article 2.1 analysis in the original dispute.").

operation."[486] Accordingly, the Panels found that they "do not consider Label E to evidence the amended COOL measure's violation of Article 2.1."[487]

262. Both Canada and Mexico appeal the Panels' finding. Each of their appeals should be rejected.

263. First, complainants' appeals are again premised on the understanding that a regulatory distinction that does not account for the detrimental impact may be relevant to the second step of the Article 2.1 analysis. As explained above, this is incorrect. Once it has been determined that the regulatory distinction does not account for the detrimental impact, the inquiry should end as to that particular regulatory distinction. And, it should be without question that the E Label does not account for the detrimental impact in light of the original's panel's previous findings.[488] While for purposes of this appeal, Canada appears to argue that it took the position before the Panels that the ground meat rules do in fact cause a detrimental impact, it appears that what Canada was, in fact, complaining about was the application of the rules for the A-C Categories applying to animals that eventually produce ground meat, *not* the application of the Category E rules to those same animals.[489] In any event, it is improper for Canada to use this compliance proceeding to argue that the DSB recommendations and rulings are incorrect.

264. Moreover, Mexico objects to the Panels' refusal to consider Mexico's argument regarding Label E because the distinction does not account for the detrimental impact while accepting Mexico's argument regarding the three exemptions even though the exemptions also do not account for the detrimental impact.[490] As noted in the U.S. Appellant Submission, the United States agrees with Mexico that the Panels' analysis is inconsistent in this regard and is therefore in error.[491] However, this incoherence proves that the exemptions, in fact, are not relevant to the analysis and the Panels erred in relying on them as a basis for finding that the amended measure is inconsistent with Article 2.1.[492] In this regard, complainants are wrong to argue that the simple fact that a particular regulatory distinction is part of the challenged measure

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[486] *US – COOL (Article 21.5) (Panel)*, para. 7.280 ("As explained by the USDA, 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. The complainants do not refute the different forms of processing undergone by muscle cuts and ground meat, nor do they submit arguments in this compliance dispute as to the upstream burdens relating to ground meat.").

[487] *US – COOL (Article 21.5) (Panel)*, para. 7.280.

[488] *US – COOL (Panel)*, para. 7.437 (finding that the ground meat rules do not constitute less favorable treatment to complainants' livestock imports). This finding was not appealed.

[489] *See* Canada's Other Appellant Submission, para. 168.

[490] Mexico's Other Appellant Submission, para. 189 ("[T]he Panel on the one hand recognized that aspects of the measure that neither constitute a relevant regulatory distinction nor give rise to the detrimental impact are relevant to the Article 2.1 analysis (i.e. the amended COOL measure's exemptions), and on the other hand refused to consider Label E in its Article 2.1 analysis because it neither constituted a relevant regulatory distinction, nor was it found to give rise to any detrimental impact.").

[491] *See* U.S. Appellant Submission, paras. 195-203.

[492] *See* U.S. Appellant Submission, para. 192.

means that such distinction must be relevant to the question of whether the detrimental impact reflects discrimination.[493]

265. Second, complainants do not even appear to argue that the ground meat rules are not "even-handed." The rule operates exactly the same – not only between the products of Canada, Mexico and the United States, but between the products of all countries that are used by U.S. ground meat producers.[494] Notably, neither complainant appears to argue that its products are disadvantaged in any way through the operation of the ground meat rule.

266. Rather, complainants make a series of arguments that are not only irrelevant to the Article 2.1 analysis, but are factually incorrect.

267. In particular, Mexico argues that the mere fact that the Category E sets forth a different set of rules than is applicable to other categories of meat is somehow suspect and reason to find the amended measure inconsistent with Article 2.1, implying that the burden is on the United States to prove that this particular regulatory distinction is legitimate.[495] Of course, nothing requires the United States to apply the same labeling rule to different products and, regardless, the burden is on Mexico, as a complainant, to prove its case, not on the United States to disprove Mexico's unsupportable allegations. In any event, as the United States explained to the Panels, USDA created separate labeling rules for ground meat based on the unique attributes regarding the production of ground meat, which differs substantially from the production of muscle cuts.[496] USDA arrived at the 60-day inventory allowance to accommodate the distinct practices of the

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[493] *See, e.g.*, Mexico's Other Appellant Submission, para. 189 (alleging that Label E is "a central component of the measure").

[494] Ground meat sold in the United States is produced by the United States and four other countries: Australia, Canada, New Zealand, and Uruguay.

[495] Mexico's Other Appellant Submission, para. 195 ("[T]he United States has provided no explanation that could serve to legitimize the amended COOL measure's arbitrarily imbalanced standards of accuracy.").

[496] *See* U.S. First Written Submission, para. 96 (quoting 2009 Final Rule, 74 Fed. Reg. at 2671 (Exh. CDA-2) ("The Agency arrived at the 60-day allowance during its analysis of the ground meat industry. In this analysis, the Agency determined that in the ground beef industry a common practice is to purchase lean beef trimmings from foreign countries and mix those with domestic beef trimmings before grinding into a final product. Often those imported beef trimmings are not purchased with any particular regard to the foreign country, but the cost of the trimmings due to currency exchange rates or availability due to production output capacity of that foreign market at any particular time. Because of that, over a period of time, the imported beef trimmings being utilized in the manufacture of ground beef can and does change between various foreign countries. As large scale beef grinders can have in inventory at any one time, several days worth of beef trimmings (materials to be processed into ground beef) from several different countries and have orders from yet other foreign markets, or from domestic importers, trimmings from several foreign countries that will fulfill several weeks worth of ground beef production, the Agency determined that it was reasonable to allow the industry to utilize labels representing that mix of countries that were commonly coming through their inventory during what was determined to be a 60-day product inventory and on order supply. To require beef grinders to completely change their production system into grinding beef based on specific batches was determined to be overly burdensome and not conducive to normal business practices, which the Agency believes was not the intent of the statute. Further, because beef grinders often purchase their labeling material in bulk, if a given foreign market that a beef grinder is sourcing from is no longer capable of supplying product, the interim final rule allowed that grinder a period of time to obtain new labels with that given country of origin removed from the label.")).

ground meat industry, and the agency had good reasons to include this allowance.[497] In this regard, complainants err in criticizing the Panels for relying on the fact that the ground meat is produced from different suppliers and through different processing means and that these differences make a difference in the Article 2.1 analysis.[498] As explained in the 2009 Final Rule, such conclusions have a strong basis in the record evidence.[499]

268. Complainants' appeals with regard to the E Label should be rejected.

D. Canada's Claim that Statutory Prohibition for Trace-back Supports a Finding that the Detrimental Impact Reflects Discrimination Should Be Rejected

269. Canada argues that the Panel erred in rejecting Canada's argument that the statutory prohibition for a trace-back regime (7 U.S.C. § 1638A(f)(1)) supported a finding that the detrimental impact reflects discrimination.[500]

270. As it did with regard to the other regulatory distinctions, the Panels analyzed whether this particular statutory provision should constitute a basis for a finding that the amended measure is inconsistent with Article 2.1 in two parts. First, the Panels initially imply (without making a definitive finding) that this particular provision (7 U.S.C. § 1638A(f)(1)) is not a "relevant"

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[497] *See* 2009 Final Rule, 74 Fed. Reg. at 2671 (Exh. CDA-2) ("[T]he Agency spent considerable time analyzing the current production systems of the ground meat supply chain and retail industry so that this program could be implemented in a manner that was least burdensome as possible while still providing consumers with accurate information to base their purchasing decisions on. It must also be stressed that if a country of origin is utilized as a raw material source in the production of ground beef, it must be listed on the label. The 60-day in inventory allowance speaks only to when countries may no longer be listed. The 60-day inventory allowance is an allowance for the Agency' enforcement purposes for when the Agency would deem ground meat products as no longer accurately labeled.").

[498] *See, e.g.*, Canada's Other Appellant Submission, paras. 166-167, 170; Mexico's Other Appellant Submission, paras. 191-192.

[499] The United States would further note that Canada's reliance on the language in *China – Rare Earths* in the context of its Article 11 appeal is improper. In that dispute, the Appellate Body stated that an appellant must explain why the evidence the panel did not consider "is so material to its case that the panel's failure to explicitly address and rely upon the evidence has a bearing on the objectivity of the panel's factual assessment." *China – Rare Earths (AB)*, para. 5.178 (referring to *EC – Fasteners (China) (AB)*, para. 442). The Appellate Body also stated that "an appellant must identify specific errors regarding the objectivity of the panel's assessment, and 'it is incumbent on a participant raising a claim under Article 11 on appeal to explain *why* the alleged error meets the standard of review under that provision.'" *China – Rare Earths (AB)*, para. 5.178 (referring to *EC – Fasteners (China) (AB)*, para. 442 (emphasis in original)). Yet here, Canada argues that had the Panels assessed Canada's evidence in the manner Canada's views to be "proper," the Panels "could not have" reached a different conclusion. Canada's argument assumes that the Panels would assess the evidence in the manner in which Canada views to be proper. Canada also fails to explain *why* the Panels "could not have dismissed" the relevance of Label E as a distinction in the COOL measure. In view of these shortcomings, Canada has not satisfied the requirements of an Article 11 claim.

[500] Canada's Other Appellant Submission, paras. 173-178. As noted in Canada's submission, 7 U.S.C. § 1638A(f)(1) states: "The Secretary [of Agriculture] shall not use a mandatory identification system to verify the country of origin of a covered commodity."

regulatory distinction in light of the fact that complainants did not directly challenge this statutory provision, nor could the statutory provision be said to account for the detrimental impact.[501] In the second part of the analysis, the Panels noted that "the complainants do not provide specific arguments or evidence" as to the "arbitrariness" of this particular statutory provision.[502] The Panels then explained that the relevance of complainants' arguments in this regard "appears to be limited to whether the trace-back prohibition necessitates the same (or similar) audit and verification system of the amended COOL measure and its related detrimental impacts," and, as such, complainants' arguments merely "revert[] focus to the claimed deficiencies of the amended COOL measure's labelling rules," which the Panels consider to have been addressed elsewhere.[503]

271. Canada now argues that in light of the guidance provided by the Appellate Body, the trace-back prohibition should have been "carefully scrutinized" by the Panel because (in Canada's view) the prohibition is a component of the amended COOL measure's "design" and "architecture" that affects its "operation."[504] Canada's argument is incorrect for any number of reasons. First, and as discussed above, the fact that this statutory provision (which is unchanged from the original measure and is not part of the measure taken to comply) does not account for the detrimental impact means that the provision is not relevant to determining whether the detrimental impact, in fact, reflects discrimination. Second, Canada is wrong to assert that its argument was not "carefully scrutinized." As noted above, the Panels did make such an analysis (wrongly in the U.S. view), and found that complainants had failed to provide specific arguments and evidence to support their position. In response, Canada merely asserts that the Panels "erred" in making such a conclusion without referencing such arguments and evidence that Canada did make, but that were overlooked by the Panels.[505]

272. In fact, Canada puts forward no reason to conclude that a particular provision of U.S. law, which does not account for the detrimental impact, is relevant to determining *whether* the amended measure is discriminatory at all. Indeed, Canada's sole (and highly circular) argument appears to be that the statutory provision supports a finding of discrimination because (in Canada's view) the provision represents a "choice" between a trace-back regime and the what is in Canada's view *discriminatory* provisions of the amended measure.[506] But the fact that the United States could have chosen an alternative that (in Canada's view) does not result in a

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[501] *See US – COOL (Article 21.5) (Panel)*, para. 7.205 ("It is in a similar light [to the Panels' examination of the D Label] that the COOL statute's prohibition of trace-back *could* be considered under Article 2.1.") (emphasis added); *see also id.* (noting that "the Appellate Body made no reference to the trace-back prohibition in its assessment of regulatory distinctions under the original COOL measure").

[502] *US – COOL (Article 21.5) (Panel)*, para. 7.281.

[503] *US – COOL (Article 21.5) (Panel)*, para. 7.281.

[504] Canada's Other Appellant Submission, para. 175.

[505] Canada's Other Appellant Submission, para. 176.

[506] Canada's Other Appellant Submission, para. 177 ("However, the trace-back prohibition constitutes an explicit choice between these two systems in favour of the recordkeeping and verification system that *discriminates* against Canadian livestock.") (emphasis added).

detrimental impact, does not mean the COOL measure must itself be discriminatory. In this regard, Canada misunderstands the second step of the Article 2.1 analysis which is to determine *whether* the detrimental impact reflects discrimination in the first place.[507]

273. Canada's appeal with regard to the statutory prohibition for trace-back should be rejected.

IV. COMPLAINANTS' APPEALS OF ARTICLE XXIII:(1)(B) OF THE GATT 1994 SHOULD BE REJECTED

274. In this compliance dispute, complainants presented a claim of non-violation nullification or impairment ("NVNI") under Article XXIII:(1)(b) of the GATT 1994. Determining that its terms of reference under DSU Article 21.5 include NVNI claims, [508] the Panels then found that it was warranted in this case to exercise judicial economy.[509] Nonetheless, the Panels proceeded with their analysis in case their other findings were overturned by the Appellate Body, thus necessitating the completion of the NVNI analysis.[510]

275. Mexico claims the Panels erred when exercising judicial economy and the Appellate Body should complete the underlying analysis.[511] Canada indicates that this analysis should only be completed if the Appellate Body overturns the Panels finding with respect to TBT Article 2.1 or GATT Article III:4.[512]

276. The complainants' request should be rejected –as described in detail in the U.S. Appellant Submission, the terms of reference for these Article 21.5 proceedings do not include NVNI claims. For these reasons, complainants' appeals with respect to their NVNI claims should be rejected.

V. CONCLUSION

277. For the foregoing reasons, the United States respectfully requests the Appellate Body to reject in their entirety complainants' appeals of the Panels' reports.

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[507] *US – COOL (AB)*, para. 273.

[508] As described in detail in the United States' Appellant Submission, the Panels erred when they determined that the terms of reference found in Article 21.5 of the DSU extends to NVNI claims. *See* U.S. Appellant Submission, paras. 305-324.

[509] *See US – COOL (Article 21.5) (Panel)*, paras. 7.664-7.672.

[510] *See US – COOL (Article 21.5) (Panel)*, para. 7.672.

[511] Mexico's Other Appellant Submission, para. 205.

[512] Canada's Other Appellant Submission, para. 181.