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)

Opening Statement
of the United States of America
at the Oral Hearing

February 16, 2015

I. INTRODUCTION

1. The United States imports significant quantities of foreign-produced live animals for domestic slaughter. While the structure of the U.S. market provides many advantages to the Canadian, Mexican, and U.S. economies, it presents challenges as well. One such challenge is how to adequately inform U.S. consumers where their beef and pork comes from when the source animal may have spent its entire life, half of its life, or just a single day in the United States prior to slaughter.

2. To address this challenge, the measure at issue divides muscle cuts produced in the United States into three categories – A, B, and C – and requires each category to carry a label clearly identifying where the source animal was born, raised, and slaughtered. It is the recordkeeping and verification steps needed for the labeling of such muscle cuts that the Appellate Body found to result in a detrimental impact on the conditions of competition for the complainants' livestock in light of certain market realities.[1] The Appellate Body went on to find that the origin information actually provided to consumers did not sufficiently explain this detrimental impact.[2]

3. The United States addressed this concern directly, making significant amendments to the COOL regulations to ensure that the labels did convey accurate and meaningful information to consumers.

4. Complainants (and the Compliance Panels) would have the Appellate Body believe that the amended measure is inconsistent with the *General Agreement on Tariffs and Trade 1994* (GATT 1994) and the *Agreement on Technical Barriers to Trade* (TBT Agreement) because it, like any regulation, is structured for real world conditions rather than seeking to address some other situation that does not in fact exist in the U.S. market. The Panels' approach is erroneous

---

[1] *See, e.g., US – COOL (AB)*, para. 348.

[2] *US – COOL (AB)*, para. 349.

and particularly so in the context of alleged *de facto* discrimination. Given the accuracy of the revised labels actually used in the U.S. market, the Panels' findings are tantamount to saying that the United States cannot provide this type of legitimate consumer information *at all*.

II. THE PANELS ERRED IN FINDING THAT THE AMENDED COOL MEASURE IS INCONSISTENT WITH ARTICLE 2.1 OF THE TBT AGREEMENT

5. In the original proceeding, the Appellate Body determined that the origin information provided by the B and C labels in particular was "significantly" less detailed and accurate than the information required to be collected so that the burden of collecting such information could not "be explained by the need to provide origin information to consumers."[3] As such, "the regulatory distinctions imposed by the COOL measure amount[ed] to arbitrary and unjustifiable discrimination" and could not "be said to be applied in an even-handed manner."[4]

6. Those deficiencies have been corrected. In light of the quality of origin information provided by the labels actually used in the marketplace, the amended measure does, in fact, provide a legitimate, non-discriminatory basis to explain why upstream producers and processors are required to keep the records in the first place (and thus for the existence of the detrimental impact). In other words, the detrimental impact can no longer be found to "reflect discrimination."

7. And the Panels erred in finding otherwise. In particular, the Panels erred in finding that the detrimental impact does not stem exclusively from legitimate regulatory distinctions based on three findings: (1) the amended measure "entails an increased recordkeeping burden;" (2) the B and C labels have "a potential for label inaccuracy;" and (3) the amended measure "continues to

[3] *US – COOL (AB)*, paras. 346, 349.

[4] *US – COOL (AB)*, para. 349.

exempt a large proportion of muscle cuts."[5] The United States respectfully requests that the Appellate Body reverse the Panels' findings that the amended COOL measure is inconsistent with Article 2.1.

A. The Panels Erred in Relying on Their Finding as to the "Increased Recordkeeping Burden" in Concluding that the Detrimental Impact Reflects Discrimination

8. The Panels' analysis of the recordkeeping burden constitutes legal error.

9. First, the Panels erred in reasoning that an increase in the recordkeeping burden supports a finding that the amended measure is inconsistent with Article 2.1.[6] Nothing in the Appellate Body report would suggest such a conclusion. Rather, the recordkeeping burden was relevant, if at all, to the question of whether a "disconnect" exists between information collected and provided that was so disproportionate that the collection of the information cannot be explained by the need to convey consumer information on origin.[7] But the Panels erred in failing to conduct such an analysis, instead reviewing the records required to be kept, and the information provided by the labels, as two entirely independent strands of analysis.

10. In response, Canada (but not Mexico) objects to the U.S. appeal on the grounds that it is factual in nature.[8] Notably, Canada does not describe which "facts and evidence" the United States is allegedly disputing, and indeed, there are none. Rather, the U.S. appeal concerns the manner in which the Panels applied the legal framework under Article 2.1, a question falling

---

[5] *US – COOL (Article 21.5) (Panel)*, para. 7.282.

[6] *See* U.S. Appellant Submission, paras. 113-116.

[7] *See US – COOL (AB)*, para. 349.

[8] *See* Canada's Appellee Submission, para. 25; Mexico's Appellee Submission, paras. 20-21.

within Article 17.6 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), not Article 11, as has been explained in numerous previous reports.[9]

11. Second, the Panels erred in reaching their conclusions as to whether the recordkeeping burden supported a finding of *de facto* discrimination based on a variety of scenarios without assessing whether those scenarios reflected actual trade or not.[10] Again, such an appeal is legal in nature – the question concerns the Panels' *legal reasoning* underlying their *de facto* discrimination findings.[11]

12. As to the merits of the appeal, once one recognizes that a finding of *de facto* discrimination must be based on the facts and not scenarios that are entirely fictional or, represent, at best, rare, isolated transactions, the Panels' findings indicate that the labels *actually* used in the marketplace – the A Label and the "single foreign origin" B and C labels – do not increase the recordkeeping burden.[12] In fact, the only modification that increased recordkeeping was the elimination of the commingling flexibility. But since the *existence* of the commingling flexibility supported a finding of inconsistency in the original proceeding, the Panels leave unexplained how any increase in recordkeeping resulting from the *elimination* of that flexibility could also, similarly, support a finding of inconsistency.

13. And it is notable that neither complainant directly defends the Panels' reliance on fictional hypotheticals as part of this *de facto* discrimination analysis, or provides any reason why such reliance would be legally proper. The closest the complainants come is to point out

---

[9] *See, e.g., US – Upland Cotton (AB)*, para. 399; *China – GOES (AB)*, para. 184; *Chile – Price Band (AB)*, para. 226; *China – Rare Earths (AB)*, paras 5.163-5.169.

[10] *See* U.S. Appellant Submission, paras. 117-124; *US – COOL (Article 21.5) (Panel)*, n. 280.

[11] *See Canada – Periodicals (AB)*, pp. 19-20; *see also US – Upland Cotton (AB)*, para. 399; *China – GOES (AB)*, para. 184; *Chile – Price Band (AB)*, para. 226.

[12] *See US – COOL (Article 21.5) (Panel)*, paras. 7.134, 7.238, 7.253.

that the 2013 Final Rule provides guidance as to what the labeling would be where the meat was produced from an animal of "multiple foreign origin."[13] But it was entirely reasonable for the U.S. Department of Agriculture (USDA) to craft a rule that provides guidance on a whole range of scenarios, regardless of whether they actually occur or are unlikely to ever occur, in order to provide fulsome guidance to the regulated industry. The fact that the amended measure provides guidance as to a particular scenario does not prove that the scenario *actually* occurs. Proof of that is the responsibility of the complainants in proving their *de facto* discrimination claims.

B. The Panels Erred in Relying on Their Finding as to the "Potential" Inaccuracy of the Labels in Concluding that the Detrimental Impact Reflects Discrimination

14. The Panels erred in at least two respects in their analysis regarding the accuracy of the labels.

15. First, the Panels erred in relying on fictional hypotheticals in evaluating the accuracy of the labels as part of a *de facto* discrimination claim.[14]

16. Canada – but not Mexico – again incorrectly asserts that the U.S. appeal relates to facts.[15] But the U.S. appeal is not premised on a disagreement with the factual findings of the Panels as to what the B or C labels would be required (at a minimum) to state under "single foreign origin"[16] or "multiple foreign origin" scenarios.[17] Nor is the U.S. appeal premised on a factual disagreement as to whether Canada and Mexico trade livestock that are eventually shipped to the United States for ultimate (or immediate) slaughter – it is *uncontested* that they do not. Rather,

---

[13] *See* Canada's Appellee Submission, para. 52; Mexico's Appellee Submission, para. 35.

[14] *See* U.S. Appellant Submission, paras. 151-159.

[15] *See* Canada's Appellee Submission, para. 28; Mexico's Appellee Submission, paras. 44-49.

[16] *See US – COOL (Article 21.5) (Panel)*, para. 7.236 (Table 13 – scenarios B1/B2); para. 7.250 (Table 14 – scenarios C1/C2).

[17] *US – COOL (Article 21.5) (Panel)*, para. 7.236 (Table 13 – scenario B3), para. 7.250 (Table 14 – scenarios C3 through C6).

again, the U.S. appeal addresses the Panels' legal reasoning underlying their *de facto* discrimination findings. And in that regard, the facts do matter in a *de facto* discrimination case, and the Panels erred legally in relying on fictional hypotheticals.[18]

17. Complainants also try to re-interpret the Panels' conclusion as being based exclusively on the inaccuracy of the "single foreign origin" B Label, and not on "unlikely hypothetical scenarios."[19] Of course, that interpretation not only ignores that the Panels' analysis included such fictional hypotheticals,[20] but ignores the Panels' specific conclusions as well. In particular, in paragraph 7.269, the Panels conclude that the B Label is potentially inaccurate without regard to whether the label was affixed to a single or multiple foreign origin muscle cut. And the Panels are even more explicit later in that same paragraph, finding that the C Label "creates the potential for inaccuracy" in scenarios *other* than ones that take place "in practice" (*i.e.*, "single foreign origin" imports from Canada).

18. Second, the Panels erred in failing to conduct the proper legal analysis with regard to the accuracy of the labels, having never analyzed whether these "potential[ly]" inaccurate labels are designed and applied in an "even-handed" manner or not, including whether a "disconnect" exists between the information required to be collected and the information provided on the A, B, and C labels such that the provision of consumer information cannot explain the recordkeeping and verification burdens.[21]

---

[18] *See Canada – Periodicals (AB)*, pp. 19-20; *see also US – Upland Cotton (AB)*, para. 399; *China – GOES (AB)*, para. 184; *Chile – Price Band System (AB)*, para. 226.

[19] *See* Mexico's Appellee Submission, paras. 44-49; Canada's Appellee Submission, para. 101.

[20] *See US – COOL (Article 21.5) (Panel)*, Tables 13, 14.

[21] *See* U.S. Appellant Submission, paras. 160-183.

19. In response, Canada appears to argue that no such further legal analysis is needed – a "potential[ly]" inaccurate label is *per se* an illegitimate regulatory distinction.[22] But Canada is surely incorrect to consider that the standard for "legitimacy" is "perfection." Every labelling regime will provide certain information, and not provide other information, and the measure cannot be judged discriminatory simply because it does not provide (what complainants view) as a "perfect" amount of information.

20. And certainly that is not the standard by which the Appellate Body judged the original measure. In the original proceeding, the Appellate Body found that the original labels were "significantly" less detailed and less accurate than what was required to be collected by upstream suppliers such that the burden of such recordkeeping could not "be explained by the need to provide origin information to consumers."[23]

21. Moreover, Canada is wrong to argue that the labels are not, in fact, "even-handed" because the B Label provides an alleged "double standard in which *U.S.*-origin information is prioritized."[24] Notably, Canada simultaneously criticizes the C Label for prioritizing *Canada*-origin information over U.S.-origin information in the rare circumstance that a C animal exported from Canada was born in the United States.[25] Canada misunderstands the measure. In short, the amended measure allows additional countries of raising to be omitted where this would not result in an inaccurate label.

22. Thus, allowing the omission of the foreign country of birth as a country of raising on a "single foreign origin" B label still accurately notifies the consumer that the meat was produced

---

[22] *See* Canada's Appellee Submission, paras. 108-109.

[23] *US – COOL (AB)*, paras. 346, 349.

[24] Canada's Appellee Submission, para. 110 (second bullet).

[25] Canada's Appellee Submission, para. 110 (third bullet); *see also id.*, para. 105.

from a B animal and provides information on all of the countries in which a production step occurred. Likewise, allowing the omission of the United States as a country of raising in the rare circumstance where an animal was born in the United States, exported to Canada, and re-exported to the United States for immediate slaughter, still accurately notifies the consumer that meat was produced from a C animal and still identifies all relevant countries where a production step occurred.

23. But that point *does not* hold true in the rare circumstance where the B animal was born in the United States. In that case, if the foreign country of raising is omitted, an A Label – "Born, Raised, and Slaughtered in the U.S." – would inaccurately be affixed to B meat. Indeed, it was the mirror image of this problem (affixing a B label to A meat as a result of commingling) that the Appellate Body considered to be so concerning in the original proceeding.[26] In other words, the revised labeling rules prevent inaccurate labels from being affixed to A, B, and C muscle cuts. And the fact that the labels could provide more information than they do does not render the labels illegitimate, such that they prove that the detrimental impact reflects discrimination.

C. No Other Regulatory Distinction Supports a Finding that the Detrimental Impact Reflects Discrimination

24. Of course, these are not the only regulatory distinctions that the amended measure makes. The amended measure makes a whole host of distinctions, including between meat produced in the United States and elsewhere, between muscle cuts and ground beef, between raw and processed products, between big businesses and small ones, and between supermarkets and restaurants.

25. However, none of these distinctions causes a detrimental impact on imported livestock, and thus cannot answer the central question of the second step of the Article 2.1 analysis –

[26] *See US – COOL (AB)*, paras. 337-338, 343.

whether the detrimental impact "reflects discrimination."[27] Yet the Panels' analysis is contradictory on this point. On the one hand, the Panels consider that the fact that the D and E labels do not cause a detrimental impact to be supportive of the conclusion that neither label proves that the detrimental impact reflects discrimination. Yet, the Panels take the opposite approach concerning the three exemptions.[28]

26. Complainants criticize the U.S. approach as an attempt to artificially "insulate" the measure from any examination, rendering the Article 2.1 analysis "meaningless."[29] But this is not the case. Rather, the Panels erred in deviating from the Appellate Body approach whereby the Panels' analysis should be focused on whether the measure actually provides less favorable treatment to imported livestock or not. In contrast, complainants argue for an approach that any requirement contained in the measure, no matter how disconnected from the detrimental impact, proves that detrimental impact discriminatory simply because that particular requirement is "imperfect" in some way. Complainants inappropriately seek to convert this analysis from one of whether less favorable treatment exists to one whether the respondent – in the eyes of the WTO panel – could have designed a "better" measure.

27. Indeed, complainants appear to go even further when they argue that the reason for the different requirements or exemptions is simply irrelevant to the analysis.[30] In other words, it makes no difference whether the requirement is arbitrary or not, the mere fact that the regulatory distinction imposes a different rule for a particular category of products or provides that no requirement exists for a particular category of retailer, is enough to find an inconsistency.

---

[27] *US – COOL (AB)*, para. 327.

[28] *See US – COOL (Article 21.5) (Panel)*, paras. 7.279, 7.280, 7.277; Mexico's Other Appellant Submission, para. 189.

[29] Canada's Appellee Submission, paras. 58-62; *see also* Mexico's Appellee Submission, para. 58.

[30] *See, e.g.*, Canada's Appellee Submission, paras. 68-69; Mexico's Appellee Submission, para. 65.

Complainants' theory seems to be that if the Member decides to pursue a legitimate objective in a manner that causes a detrimental impact, the Member must pursue that objective – such as, consumer information on country of origin – at 100 percent. In this regard, complainants' approach to Article 2.1 is strikingly similar to their theory of Article 2.2 in the original appeal – that the measure is inconsistent with the obligation unless the measure "fulfils" the objective.[31]

28. Adopting complainants' approach would severely limit a Member's ability to tailor its measure in light of different costs or other relevant considerations. And while complainants are insistent that cost considerations, for example, "do not constitute a 'supervening justification for discriminatory measures,'"[32] what complainants are really saying is that cost considerations cannot be considered in the evaluation of *whether* the measure is discriminatory in the first place. Once the respondent decides to pursue a particular objective, in a particular manner, it must do so for all products and all sellers. But, of course, this is surely the wrong approach – "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."[33]

29. As to the exemptions themselves, the United States would make two brief points.

30. First, the Panels erred by simply assuming that the exemptions are illegitimate distinctions on their face, without conducting the legal analysis of whether the nature and scope of the exemptions establish a "disconnect" so disproportionate between what is collected and what is provided that they prove the detrimental impact reflects discrimination.[34] Again, the question for the Appellate Body in the original proceeding did not appear to be whether there is

---

[31] *See US – COOL (AB)*, para. 458.

[32] Mexico's Appellee Submission, para. 72 (quoting *US – COOL (Article 21.5) (Panel)*, para. 7.275); Canada's Appellee Submission, para. 73 (quoting same).

[33] *EC – Sardines (Panel)*, para. 7.120; *see also* TBT Agreement, sixth preambular recital.

[34] *See* U.S. Appellant Submission, paras. 216-225.

any disconnect, but rather whether "the need to provide origin information to consumers" explains the recordkeeping burden.[35] In this regard, referring to the value or amount of beef and pork actually labeled is the more useful framework than the Panels' framework of only looking to the percentage of beef and pork not labeled.[36]

31. Second, the Panels made no determination as to the degree that the exemptions cause any such disconnect between what is provided and what is conveyed, appearing to simply assume that the information is collected and conveyed throughout the different distribution chains for *all* livestock, beef and pork,[37] regardless of whether it was known that the beef or pork were destined for an exempt seller, or whether the beef or pork were destined to be further processed and become exempt products. The underlying assumption appears to be that the exemptions indicate a "one for one" disconnect – whereby all products sold without a COOL label have had that information collected and conveyed throughout the entire supply chain.

32. In light of that assumption, Canada argues, for example, that the percentages of beef and pork not covered by COOL "provide a clearer picture of the extent to which the exemptions contribute to the disconnect . . ."[38] But, of course, that is not at all clear. The Panels' finding in this regard is based on a simple assumption derived from a U.S. answer to a single question (on a different topic) in the original proceeding relating to a different measure. The Panels conducted no actual analysis of whether that assumption was correct based on the revised measure in light of the revised economic impact of the measure found by the Panels, and in that regard, the Panels erred in drawing any legal conclusions based on the exemptions.

---

[35] *US – COOL (AB)*, paras. 346, 349.

[36] *Compare* U.S. Appellant Submission, para. 221, *with US – COOL (Article 21.5) (Panel)*, para. 7.273.

[37] *See US – COOL (Article 21.5) (Panel)*, para. 7.272 (emphasis in original).

[38] Canada's Appellee Submission, para. 79.

33. Complainants' objections to the U.S. appeal fall flat. For example, Canada is wrong to try to shield the Panels' error on the basis that the U.S. appeal is improper as it would require the Appellate Body "to solicit, receive, and review new facts."[39] The U.S. appeal is that the Panels erred by not conducting the proper legal analysis and relieving the complainants' of their burden of proof.

34. Canada is also wrong to argue that the United States previously "adopted the position that the exemptions would not have a material impact on the upstream recordkeeping burden."[40] The quotes from the 2009 Final Rule that Canada cites relate to a different measure and are from the cost benefit analysis, in which the USDA adopted a conservative approach and "overstat[ed] the number of affected firms and establishments" to ensure that all costs were captured even though the rule recognized that "some [firms and establishments] may not produce or sell products ultimately within the scope of the rule."[41] Indeed, Canada's understanding runs directly contrary to how USDA's verification plan works, which is only to verify the accuracy of labels actually used in the marketplace. USDA does not track and verify all entities in the supply chain as to whether the particular entity is generally collecting and conveying origin information, regardless of where the product is sold and in what form.

35. Finally, Canada's further reliance on admittedly speculative statements on the effects of the amended rule by certain industry opponents of COOL do not appear to be evidence of anything – the 2013 Final Rule has not caused "a *de facto* closing of the border to foreign origin livestock" as speculated, for example.[42] If anything, a statement from a smaller stakeholder

---

[39] Canada's Appellee Submission, para. 9.

[40] Canada's Appellee Submission, paras. 83-85.

[41] 2009 Final Rule, 74 Fed. Reg. 2658, 2684 (Exh. CDA-2).

[42] Canada's Appellee Submission, para. 89 (third bullet).

indicates that the larger, vertically integrated U.S. companies do understand where their product is being delivered and can seek to lower costs based on that information.[43]

36. Ultimately, this is a question of degree. The Appellate Body's approach does not mean that *any* "disconnect" whatsoever would render the amended measure inconsistent with Article 2.1. Rather, even aside from the fact that the exemptions were not regulatory distinctions that cause the detrimental impact, the Panels would have needed to analyze, in determining whether the need to provide consumers the information explained the recordkeeping and verification requirements, to what degree the exemptions contributed to any "disconnect." It was incorrect for the Panels to simply assume, without any analysis at all, that the exemptions led to a situation where "the recordkeeping burden giving rise to the detrimental impact 'cannot be explained by the need to convey to consumers information regarding the countries where livestock were born, raised, and slaughtered.'"[44] Given the lack of any showing by complainants or findings by the Panels on the contribution of exemptions under the revised COOL measure in the current U.S. market to a disconnect between the information collected and provided, we respectfully request the Appellate Body to reverse the Panels' finding that the amended measure is inconsistent with Article 2.1.

III. COMPLAINANTS' APPEALS REGARDING THE PANELS' FINDINGS REGARDING ARTICLE 2.2 OF THE TBT AGREEMENT SHOULD BE REJECTED

37. Turning to Article 2.2, it is clear that complainants have failed to establish a *prima facie* case that the amended measure is "more trade-restrictive than necessary." Simply put, complainants have not proven that an alternative exists that is "less trade restrictive, makes an

[43] Canada's Appellee Submission, para. 89 (fifth bullet).

[44] *US – COOL (Art. 21.5) (Panel)*, para. 7.277 (quoting *US – COOL (AB)*, para. 349).

equivalent contribution to the relevant objective, and is reasonably available."[45] As such, the Panels were correct to reject complainants' first two alternatives for not making an equivalent contribution to the objective, and the second two alternatives for not being less trade restrictive than the amended measure or reasonably available to the United States. As complainants have not appealed the Panels' ultimate findings as to the latter two alternatives, the United States will focus today on the appeals related to the first two alternatives.

38. Complainants and the United States differ substantially in what Article 2.2 requires of the importing Member. In effect, complainants read Article 2.2 as containing two, parallel obligations. Where the Member regulates to pursue an "important" legitimate objective in a trade restrictive manner, it may do so unless a less trade restrictive, reasonably available alternative exists that makes an equivalent contribution to the objective.[46] However, where the Member regulates to pursue an "unimportant" legitimate objective, the obligation is much different, and complainants set out two alternative theories on how this should work.

39. First, complainants argue that Article 2.2 requires the Member, before applying the technical regulation, to assess whether the trade restrictiveness of the measure will be "disproportionate" to the "unimportant" objective.[47] If so, the Member cannot apply that measure. Complainants provide no suggestion how a Member would make such an open ended judgment prospectively, nor how a WTO panel would do so in hindsight.

40. Alternatively, complainants argue that a Member could apply this technical regulation as long as a less trade restrictive alternative does not exist that provides a lower level of fulfilment,

---

[45] *US – COOL (AB)*, para. 379.

[46] *See* Canada's Other Appellant Submission, para. 98; Mexico's Other Appellant Submission, paras. 73, 78.

[47] *See* Mexico's Other Appellant Submission, paras. 107-111; *see also* Canada's Other Appellant Submission, paras. 47, 56, 94, 128.

but does so in a manner that "compensates" for this shortcoming. For the purposes of this dispute, what this apparently means is that a measure that provides less detailed and accurate origin information, but has a broader scope, proves the amended measure "more trade restrictive than necessary."[48] Again, complainants provide no suggestion how either a Member or a panel would judge whether an alternative sufficiently "compensates" for not meeting the Member's chosen level of fulfilment.[49]

41. Not surprisingly, the United States disagrees with the complainants. Instead of seeing multiple obligations, we see but one. Instead of seeing open-ended balancing tests whose results will always be in the eye of the beholder, we see an orderly, predictable comparison that Members can do prospectively, and a WTO panel can do in hindsight, with the same results. This is the approach we understand that the Appellate Body has taken in *US – COOL* and in *US – Tuna II (Mexico)*, and is the correct approach for this proceeding.

42. Of course, much of the disagreement centers on the proper meaning of the phrase "risks non-fulfilment would create."

43. First, Canada is wrong to state that the overall approach suggested by the United States would result in unchecked trade restrictions.[50] Rather, Article 2.2 provides a real obligation on Members to seek less trade-restrictive, reasonably available alternatives that make an equivalent contribution to the objective.

---

[48] *See* Canada's Other Appellant Submission, paras. 127-131; Mexico's Other Appellant Submission, paras. 124, 133, 136, 152, 155.

[49] *See* U.S. Appellee Submission, paras. 176-180.

[50] Canada's Appellee Submission, para. 129.

44. Second, the United States does not "read out," or "narrow" this part of Article 2.2, nor "equate" Article 2.2 with the sixth recital of the preamble to the TBT Agreement.[51] To the contrary, the United States seeks to interpret the phrase "risks non-fulfilment would create" in the context of Article 2.2, and in harmony with the preamble and the Appellate Body's prior interpretation of this provision. To that end, the United States seeks to avoid reading into the TBT Agreement requirements of "importance," and other tests which were not agreed to by the drafters.

45. Indeed, there is no correlation, textual or otherwise, between the "importance" of an objective, and the phrase "risks non-fulfilment would create." Rather, Article 2.2 distinguishes objectives on the basis of "legitimacy," not "importance." That is, panels are instructed to make a binary determination as to legitimate or illegitimate, not rank the importance of various objectives based on some secret, universal scale. The third participant submissions echo this understanding.[52]

46. Moreover, Canada's reliance on the last sentence of Article 2.2 is misplaced.[53] The factors listed there do not stress the relative importance of the objective. Rather they guide the Member in considering what are the risks that non-fulfillment would create.

47. We respectfully request that the Appellate Body reverse the Panels' interpretation of the phrase "taking account of the risks non-fulfilment would create," but uphold the Panels' finding that complainants have failed to demonstrate a *prima facie* case for any of the four proposed alternatives – and have therefore, failed to demonstrate inconsistency with Article 2.2.

---

[51] Mexico's Appellee Submission, para. 102.

[52] *See, e.g.*, Australia's Third Participant Submission, para. 30; China's Third Participant Submission, paras. 22-26; EU's Third Participant Submission, paras. 58-60.

[53] Canada's Appellee Submission, para. 123.

IV. THE PANELS ERRED IN FINDING THAT THE AMENDED COOL MEASURE IS INCONSISTENT WITH ARTICLE III:4 OF THE GATT 1994

48. Turning now to Article III:4 of the GATT 1994, the Panels' analysis was contrary to customary rules of interpretation of public international law. In particular, the Panels failed to interpret Article III:4 in context, including Article IX.

49. Article IX expresses Members' understanding that there will be costs ("difficulties and inconveniences") for the commerce and industry of exporting countries associated with providing information on the origin of products. Yet the Panels disregarded this context in their analysis and instead appeared to consider that any costs on imported products greater than for domestic products would result in a breach of Article III:4.

50. The Appellate Body has recently recognized that provisions of the GATT 1994 can be relevant to the interpretation of other provisions,[54] and nothing in prior Appellate Body findings limits the context of Article III:4 to Article XX of the GATT 1994.

51. The Panels' findings of a breach are based solely on the relative shares of imported vs. domestic livestock used for meat in the United States because these shares could lead to certain cost reduction choices by slaughterhouses. At the same time, the Panels reaffirmed that providing consumers with information as to where an animal was born, raised, and slaughtered is a legitimate objective under the covered agreements. Yet under the Panels' analysis, whether a Member may maintain a COOL measure to provide consumers that information would depend on whether the Member imported more animals than it slaughtered domestically. But that approach means that whether a Member may pursue a legitimate objective is related not to the measure, but rather is based solely on market shares unrelated to the measure at issue and outside the control of the Member.

[54] *Argentina – Import Measures (AB)*, para. 5.220.

52. Had the Panels interpreted Article III:4 in the context of Article IX, the Panels would have included in their examination elements about the amount of any detrimental impact, such as whether it had been reduced to a minimum, or whether the measure resulted in seriously damaging the products, materially reducing their value, or unreasonably increasing their cost. The Panels failed to do so.

53. The complainants' response is to mischaracterize the U.S. appeal and rely on an incorrect interpretation of Article IX. For instance, Canada asserts that Article IX of the GATT 1994 would have to be invoked as a defense to Article III:4 of the GATT 1994. Of course, Article IX is not an affirmative defense to Article III:4 and the U.S. appeal does not describe it as such.

54. Mexico argues that Article IX is limited to border measures and thus cannot provide relevant context to Article III:4. Of course, nothing in Article IX states that it is limited to border measures. It calls for *permitting* marks of origin to be affixed at the time of importation, but that clearly means they could be affixed at another point. Furthermore, the Appellate Body has indicated that the analysis under Article I:1 and Article III:4 is the same, and even under Mexico's approach, Article IX and Article I:1 would apply to the same measures. Consequently, Article IX is relevant context for Article I:1 and by extension for Article III:4.

V. IN THE CIRCUMSTANCES OF THIS DISPUTE, THE PANELS ERRED IN NOT ADDRESSING THE AVAILABILITY OF ARTICLE XX AS AN EXCEPTION FOR ARTICLE III:4 OF THE GATT 1994 WITH RESPECT TO COOL

55. The Panels failed to explain how their findings comported with the Appellate Body's statement that in principle the balance under Article 2.1 of the TBT Agreement is the same as for Article III:4 of the GATT 1994, in light of the availability of Article XX. Complainants respond simply by sidestepping the issue and urging the Appellate Body to disregard the logical consequences of the Panels' approach. The United States has already explained why the Panels'

approach was in error and has real consequences for Members and in seeking a resolution of this dispute.

VI. THE PANELS ERRED IN FINDING THE NON-VIOLATION CLAIM TO BE WITHIN THEIR TERMS OF REFERENCE

56. With respect to non-violation nullification or impairment, the Panels failed to respect their terms of reference under Article 21.5 of the DSU. Complainants' response, surprisingly, is to argue that the "object and purpose" of "Article 21.5" should override the actual agreed text of Article 21.5. In so arguing, complainants disregard customary rules of interpretation which call for an interpreter to rely on the object and purpose of the *agreement* at issue, and do not condone relying instead on the purported object and purpose of an individual provision of an agreement. Complainants invite re-writing provisions in the guise of paraphrasing them in terms of their "object and purpose." Mexico also argues that a measure "taken to comply" that results in NVNI is no less inconsistent with the GATT 1994 than a measure which results in a violation of one or more provisions. Mexico's argument is incoherent. It does not explain how a non-violation finding equates to a *violation* finding. Furthermore, Mexico's approach cannot be reconciled with the plain text of the DSU, including Article 3.7 and footnote 10.

VII. CONCLUSION

57. This concludes our statement. We look forward to responding to the Appellate Body's questions.