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

(AB-2012-3 / DS384/386)

OPENING STATEMENT OF THE
UNITED STATES OF AMERICA
AT THE ORAL HEARING

May 2, 2012

1. Good morning Mr. Chairman and members of the Division. On behalf of the United States, thank you for your ongoing work in this appeal.

2. The United States adopted the country of origin labeling ("COOL") requirements at issue in this dispute to inform consumers of the origin of the meat, fruits, vegetables, and other food they buy at the retail level. In particular, the United States responded to the requests of U.S. consumers to identify where the livestock from which meat is derived was born, raised, and slaughtered. Unlike fruits and vegetables, which are grown in one location, animals are mobile and may spend time in more than one country.

3. The United States only adopted the COOL measure after a long and considered process that spanned nearly a decade. Ultimately, the measure adopted was carefully structured to balance the concerns of those who wanted to maximize the information provided to consumers with those who wanted to minimize compliance costs. Unsatisfied with the steps taken to minimize costs, including the adoption of unique commingling provisions specifically intended to benefit them, the complainants now challenge the regulatory balance struck by the United States.

4. The Panel acknowledged that nearly 70 WTO Members maintain mandatory country of origin labeling requirements and found that providing consumers information on origin is a legitimate objective under the TBT Agreement. The Panel, however, inappropriately assumed the role of the regulator and faulted the precise manner in which the United States designed its requirements, at times for contradictory reasons. For example, the Panel found that the COOL measure breaches Article 2.1 because the resulting compliance costs are too high for certain market actors, but that the measure breaches Article 2.2 because it does not require these same market actors to provide more precise, and thus more costly, information to consumers.

5. These and other flawed findings of the Panel are difficult to reconcile, and if upheld by the Appellate Body, would make it extremely challenging for any Member to defend its country of origin labeling requirements, or indeed numerous other regulations. For these reasons, and others that the United States will describe today, the Panel's findings under Article 2.1 and 2.2 should be reversed.

I. The Panel Erred in Finding that the COOL Measure Breaches Article 2.1 of the TBT Agreement

A. The Panel's Less Favorable Treatment Analysis Failed to Recognize that the COOL Measure Does Not Treat Imported Livestock Differently or Less Favorably than Domestic Livestock

6. The Panel erred in finding that the COOL measure accords imported livestock less favorable treatment than domestic livestock under Article 2.1 of the TBT Agreement.[1] The Panel's analysis did not focus on the measure and whether it treats imports differently and less favorably by modifying the conditions of competition to their detriment. Rather, the Panel based its finding on a faulty and unprecedented cost comparison analysis, which theorized that private market actors would disproportionately pass compliance costs on to imports because of their smaller market share, despite the fact that the measure even-handedly applies the same labeling and record-keeping requirements to all products regardless of origin.

7. The Panel's analysis also failed to recognize inherent features of technical regulations in general and country of origin labeling requirements in particular. The adoption of any technical regulation imposes compliance costs, and these costs are very likely to impact different actors in different ways. In addition, <u>any</u> country of origin labeling requirement involves applying

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[1] Panel Report, paras. 7.420, 8.3(b).

different labels to products of different origins. Ensuring the accuracy of these labels always requires record-keeping and compliance costs are always higher for market actors who process products of more than one origin than those who process a single origin as a result of the need to keep track of multiple origins at the same time.

8. An appropriate inquiry must account for these inherent aspects of regulating and examine: (1) whether the measure treats imports differently from domestic like products – on its face for a *de jure* claim or through certain aspects of the measure, such as its design and application, for a *de facto* claim; and (2) if there is different treatment, whether this different treatment is less favorable.[2]

9. In *US – Clove Cigarettes*, the Appellate Body stated that, "where a technical regulation ... does not *de jure* discriminate against imports, the existence of a detrimental impact on competitive opportunities for the group of imported ... products is not dispositive of less favourable treatment under Article 2.1."[3] Instead of basing its conclusion solely on the fact that there was a detrimental impact in the market, the Appellate Body closely examined the measure and considered whether it actually treated imports differently than like domestic products so as to produce the detrimental impact on them. In particular, the Appellate Body examined whether the detrimental impact stemmed exclusively from a legitimate regulatory distinction or reflected discrimination in the measure's design, architecture, structure, operation, and application to

[2] U.S. Appellant Submission, para. 68; *Korea – Beef (AB)*; *Thailand – Cigarettes (AB)*; *Dominican Republic – Cigarettes (AB)*; *US – Clove Cigarettes (AB)*; *Mexico – Soft Drinks (Panel).*

[3] *US – Clove Cigarettes (AB)*, para. 182 (emphasis original).

determine whether the measure in fact treated imports differently than the like domestic product within the meaning of Article 2.1.

10. The Appellate Body's analysis properly recognizes that a Member should not be held accountable for factors outside its control that may ultimately lead to a detrimental impact if it has adopted an even-handed measure. In other words, a Member should not be barred from taking an otherwise permissible action (that another Member under different circumstances could take) when there is no evidence of discrimination. This is consistent with the Appellate Body's longstanding view that the broad purpose of the national treatment provisions is to avoid measures that serve as a form of protectionism.[4]

11. The Panel in this dispute did not follow these principles and found a breach of Article 2.1 without ever finding that the COOL measure was responsible for a detrimental impact on imports by treating them differently. The Panel also failed to consider whether the detrimental impact that it did find might merely be incidental to the measure's efforts to provide information on origin or whether it actually stemmed from a discriminatory aspect of the measure.

12. While the Panel purported to examine the measure, its conclusion did not hinge on any of the measure's provisions, but entirely on the theoretical response of private market actors to the measure's even-handed record-keeping requirements due to the small market share of imports. The Panel's conclusion with regard to the exact same measure would have been the exact opposite if imports had a higher market share than domestic products.

B. The Panel's Analysis Is Not Supported By Past Appellate Body and Panel Reports

[4] *Japan – Alcohol (AB)*, p. 16; *EC – Asbestos (AB)*, para. 97; *US – Clove Cigarettes (AB)*, para. 178.

13. The complainants defend the Panel's flawed *de facto* analysis by comparing it with past *de jure* disputes, failing to recognize key distinctions between these claims, and failing to recognize that in all past disputes – *de jure* and *de facto* – the Appellate Body and panels have only found a breach when it is the measure that treats imported products both differently and less favorably.

14. For example, in *Korea – Beef*, one of the primary *de jure* disputes cited by the complainants, the Appellate Body first found that the measure "formally separat[ed] the selling of imported and domestic beef," and thus, treated these products differently.[5] The Appellate Body then concluded that this formally different treatment was less favorable because it modified the conditions of competition to the detriment of imported beef.[6] The Appellate Body in *Thailand – Cigarettes* and *US – FSC* also first found that the measure treated imports differently before finding that the different treatment was less favorable.

15. The Appellate Body and previous panels have also found that both different and less favorable treatment are necessary to establish a *de facto* breach. For example, in *Mexico – Soft Drinks*, the panel found that the measure treated imports differently from domestic soft drinks because it imposed a different tax rate on soft drinks produced with high fructose corn syrup (a product characteristic associated with imports) than soft drinks produced with sugar (a product characteristic associated with domestic products).[7] The panel also found that this different

[5] *Korea – Beef (AB)*, para. 144.

[6] *Korea – Beef (AB)*, paras. 145-149.

[7] *Mexico – Soft Drinks* (Panel), para. 8.119.

treatment was less favorable because the tax rate on high fructose corn syrup was higher than on sugar.[8] The Appellate Body in *US – Clove Cigarettes* made a similar finding.

16. By contrast, the *COOL* Panel never found any different treatment that was also less favorable arising from the measure itself. While the Panel found *de jure* different treatment (even though neither complaining party argued this), it did not examine whether this purported different treatment is responsible for any detrimental impact. Likewise, while the Panel found a detrimental impact, it never explained how the impact derived from any aspect of the measure that treats imports differently. Rather, the Panel merely (and erroneously) found *de jure* different treatment, then blamed the purported less favorable treatment on something else entirely – the smaller market share of imports.

17. Canada supports the Panel's reliance on market share by comparing it with other reports that merely reference the term or use it in an entirely different way.[9] The Appellate Body in *Korea – Beef* referenced "market share" while summarizing the panel report, but did not consider it relevant, clarifying that "the reduction of competitive opportunity through the restriction of access to consumers results from the imposition of the dual retail system for beef...<u>and is not a function of the limited volume of foreign beef actually imported into Korea.</u>"[10]

18. Likewise, *Mexico – Soft Drinks* and *US – Clove Cigarettes* considered the market share of domestic and imported products with a certain product characteristics being regulated in different fashions to determine whether these product characteristics served as a "proxy" for domestic

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[8] *Mexico – Soft Drinks (Panel)*, para. 8.118.

[9] Canada's Appellee Submission, para. 43.

[10] *Korea – Beef (AB)*, para. 147 (emphasis added).

products and imports, respectively. In other words, the reports used market share to support the conclusion that the measure at issue treated imports differently. The *COOL* Panel, on the other hand, used market share to justify the conclusion that the measure treated imports less favorably by theorizing how it might influence the response of private market actors to an even-handed measure.

C. The Appropriate Legal Test Demonstrates that the COOL Measure Does Not Accord Less Favorable Treatment to Imported Livestock

19. If the Panel had applied a legal test focusing on the COOL measure, it would not have found an Article 2.1 breach. The COOL measure is even-handed. It requires meat to be labeled with information about origin regardless of what that origin may be, and it applies the same record-keeping requirements to all market actors regardless of the type of livestock – imported or domestic – in their feedlots and slaughterhouses.[11] The COOL measure also does not require segregation, but to the extent that some market actors may choose to segregate instead of commingle, they are equally segregating imported and domestic livestock from one another.[12]

20. The fact that the labels applied to different meat products under the COOL measures may say different things based on their underlying origin does not mean there is different treatment, or a lack of even-handedness. Different treatment under Article 2.1 refers to a situation where a measure actually imposes different requirements on an imported product than a like domestic product, such as when a measure imposes a ban, a tax, or another condition on an imported

[11] Panel Report, paras. 7.88, 7.116-7.120; *Contra* Canada's Appellee Submission, n.13.

[12] Panel Report, para. 7.330.

product but not a like domestic product, or where a measure only avails a benefit to a domestic product, but not a like imported product.[13]

21. Despite this, and despite the fact that neither complainant made a *de jure* claim, the Panel erroneously concluded that the COOL measure treats imported and domestic products differently on its face because of the commingling provisions.[14] The Panel's finding overlooks that both imported and domestic livestock are eligible for the benefit of commingling (lower compliance costs) when they are processed together on the same production day. How the commingled label identifies the resulting product is irrelevant. There is not different treatment because the measure provides the same benefit to both imported and like domestic products under the same conditions.

22. Canada and Mexico also argue that the COOL measure is not even-handed because the compliance costs, including the costs of segregation, are allegedly imposed disproportionately on imported livestock.[15] However, they fail to recognize that any unequal costs are not imposed by the measure. The measure simply does not address this issue. In fact, at no point in this dispute has the Panel or either complainant identified a provision of the COOL measure that, independent of market share, requires costs to be imposed solely or even disproportionately on imported products. The Panel was forced to attribute this alleged disproportionate distribution of

[13] *See US – FSC (Article 21.5 – EC) (AB)*; *Thailand – Cigarettes (AB)*; *Mexico – Soft Drinks (Panel)*.

[14] Panel Report, paras. 7.294-7.297.

[15] Canada's Appellee Submission, para. 58; Mexico's Appellee Submission, para. 59.

costs on the smaller market share of imports because there is nothing in the measure itself to support this conclusion.[16]

23. It is also worth noting that there is no evidence to suggest that the United States anticipated that costs would be disproportionately imposed on imported livestock as a result of segregation, pre-existing market conditions, or any other reason. While the United States expected that some market participants might segregate instead of commingle, it did not assume that this would disproportionately impact imports. Rather, the 2009 Final Rule estimated that imports of cattle and hogs would *increase* because "U.S. domestic suppliers of these products respond more to changes in their operating costs than do foreign suppliers," and "[t]he resulting gap between the supply response of United States and foreign producers provides foreign suppliers with a cost advantage in United States markets that enables them to increase their exports to the United States even though they face similar increases in operating costs."[17]

24. Finally, when considering the COOL measure's even-handedness, it is important to note that the COOL measure treats meat derived from livestock born, raised, and slaughtered entirely in Canada or Mexico, and the livestock itself, exactly like U.S. origin meat and livestock. The meat derived from both types of livestock must be labeled, and records on origin must be maintained for both types of livestock as well. To the extent that the label's content is relevant, animals born, raised, and slaughtered in the United States receive a Category A "Product of the U.S." label and animals born, raised, and slaughtered in Canada or Mexico receive a Category D

[16] Panel Report, paras. 7.349-7.350.

[17] 2009 Final Rule, p. 2691.

"Product of Canada" or "Product of Mexico" label. The complainants ignore this and instead focus on mixed-origin livestock, a mere subset of the Canadian and Mexican animals affected by the measure.

25. For these reasons, and others described in the U.S. Appellant Submission, including the Panel's failure to conduct an objective assessment of the facts related to commingling, segregation, and the livestock price differential, the Panel's findings under Article 2.1 should be reversed.

II. The COOL Measure Is Consistent with Article 2.2 of the TBT Agreement

26. Turning now to Article 2.2, the complaining parties suggest an approach to Article 2.2 that is unprecedented and nowhere based on the text of that article. Yet the appropriate interpretation of Article 2.2 flows from the text. The second sentence, which makes operational the first, asks two questions: 1) whether the objective of the measure is legitimate; and, if so, 2) whether the measure is "more trade-restrictive than necessary to fulfil a legitimate objective." The Panel correctly decided that the COOL measure pursues the legitimate objective of "provid[ing] consumer information on origin."[18] The Panel erred, however, by not proceeding to determine whether there was a less trade-restrictive alternative that achieves the same end as the COOL measure. Instead, the Panel looked to see if the COOL measure sufficiently fulfilled the objective, and in so doing, the Panel was taking the role of the regulator. The Panel's failure to examine the complaining parties' alternative measures was grounded in its misunderstanding that Article 2.2 requires a separate inquiry into whether a measure sufficiently "fulfills" its objective.

[18] Panel Report, paras. 7.617, 7.685.

27. The complaining parties now expand upon the Panel's error and contend that the level of fulfillment that the Member considers appropriate to be essentially an irrelevant inquiry – the measure must fulfill its objective at the level somehow required by Article 2.2.[19] We disagree. Members apply technical regulations that fulfill objectives at the levels of their own choosing, and there is nothing in Article 2.2, or the TBT Agreement as a whole, that would indicate otherwise.

A. The Objective of the United States and the Extent to Which the United States Aims to Fulfill That Objective

28. As the complaining parties appear to misunderstand the two U.S. appeals of the Panel's finding regarding the U.S. level of fulfillment, we think it is useful to again start with the Panel's analysis.

29. In paragraph 7.617, the Panel identifies the objective pursued by the United States through the COOL measure as "to provide consumer information on origin." While the Panel identifies this objective based solely on the statements to the Panel by the United States, the Panel verifies this declared objective in an analysis of the measure's text, design, and structure in paragraphs 7.678-7.691.

30. Following this finding as to the objective, the Panel, in paragraph 7.619, purports to review the U.S. "descriptions [that] indicate the level at which [the United States] aims to achieve the identified objective." Based on its selective quotation of these statements, the Panel finds in paragraph 7.620 that the extent to which the United States aims to fulfill the objective of providing "consumer information on origin" is "to provide as much clear and accurate origin

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[19] Canada's Appellee Submission, para. 107; Mexico's Appellee Submission, para. 177.

information as possible to consumers." Then, in paragraphs 7.692-7.719, the Panel examines the text, design, and structure of the measure and finds that the COOL measure does not meet this threshold, and, as such, does not "fulfill" its objective. That is to say, while the Panel finds that the COOL measure provides a certain amount of consumer information on origin, the measure does not provide clear and accurate information "as much . . . as possible," given both the design of the B and C labels and the impact of the commingling allowance.[20]

31. The United States appeals the Panel's findings in paragraphs 7.619-7.620 regarding the U.S. level of fulfillment. This finding is in error both because it is based on a distortion of the U.S. argument contrary to the Panel's responsibilities under Article 11 of the DSU, and because the Panel did not take into account the balance the COOL measure strikes between the provision of information and the costs to market participants of providing such information, as confirmed by the text, structure, and design of the measure itself.[21]

32. As the United States discussed many times with the Panel, the United States, through the COOL measure, aims to provide as much consumer information on origin as possible without imposing unduly burdensome compliance costs on market participants.[22] This level is confirmed in an analysis of the text, structure, and design of the measure. Using the proposed alternatives as guideposts, the COOL measure provides more information on origin than a substantial transformation regime, which provides only information about where cattle is slaughtered, and not where it was born and raised, but provides less information than the more costly trace-back

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[20] *See* Panel Report, paras. 7.713, 7.715, and 7.718.

[21] U.S. Appellant Submission, paras. 137-144.

[22] *See* U.S. Appellant Submission, paras. 139-140, n.210.

system. Notably, nothing in the text, structure, and design of the measure indicates that the United States, through the COOL measure, aims to provide as much information as possible regardless of cost, and neither Canada nor Mexico argue to the contrary.

B. The COOL Measure Is Not "More Trade-Restrictive Than Necessary to Fulfill a Legitimate Objective"

33. The complaining parties assert that Article 2.2 requires all technical regulations to be "necessary." In essence, they re-write Article 2.2 so that "necessary" modifies "measure" rather than "trade restrictive." They then contend that Article 2.2 charges panels with taking on the role of the regulator to decide whether the measure contributes to its policy goal at a sufficient level. For purposes of evaluating a measure such as this one, the complaining parties assert that this level is very high. Material contributions are not sufficient – the measure must make a "very material" or "very significant" achievement to its objective (as Canada contends), or must fulfill at the 100% level (or close to it) (as Mexico contends).[23] In other words, Canada and Mexico argue that the *Sardines* and *Tuna* panels were wrong to conclude that "it is up to the Members to decide" at what levels they may pursue policy objectives.[24] Instead, Article 2.2 requires Members to apply technical regulations that achieve a certain level. A measure that does not satisfy Article 2.2's "strict standard" is inconsistent with Article 2.2, even if the challenged measure is the least trade-restrictive alternative to achieving the level the Member considers appropriate.[25]

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[23] Canada's Appellee Submission, para. 107; Mexico's Appellee Submission, para. 177.

[24] *EC – Sardines (Panel)*, para.7.120; *US – Tuna (Panel)*, para 7.460.

[25] Mexico's Appellee Submission, para. 177; Canada's Appellee Submission, para. 107.

34. For the reasons discussed in the U.S. Appellant Submission, this analysis is in error. The preamble of the TBT Agreement recognizes that Members are allowed to apply technical regulations to achieve legitimate objectives at the levels they choose, not that are chosen for them. Article 2.2 thus asks two questions: 1) whether the objective is legitimate; and 2) whether the Member has taken a more trade-restrictive approach than necessary in pursuit of that objective at the particular level the Member seeks to achieve.

35. Article 2.2 does not ask whether the measure itself is "necessary" to fulfill a policy goal. Both Canada and Mexico rely heavily on Article XX jurisprudence in claiming that measures must achieve these goals at certain levels, and in providing the analytical framework for determining such levels. As to that framework, both complainants claim that the Panel erred in its analysis and should have engaged in a balancing test weighing the importance of the objective against various other factors, including the trade-restrictiveness of the measure. The complaining parties leave it unclear whether they are abandoning their respective arguments that a measure should be determined "more trade-restrictive than necessary" through differing balancing tests, or that they are proposing that panels perform separate balancing tests – with very similar elements – in each step of their analyses.[26] In this regard, while both complaining parties insist that "omissions must be given meaning,"[27] neither explains how its respective approach gives effect to the significant differences between Article XX of the GATT 1994 and Article 2.2 of the TBT Agreement.

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[26] *Compare* Mexico's Other Appellant Submission, para. 51, *with* Mexico's Appellee Submission, para. 164; *compare also* Canada's Other Appellant Submission, para. 157, *with* Canada's Appellee Submission, para. 107.

[27] Canada's Appellee Submission, para. 89; Mexico's Appellee Submission, para. 189 ("The absence of a similar footnote in Article 2.2 of the *TBT Agreement* must have meaning.").

36. Nothing in the text of Article 2.2 indicates that measures should be judged in an elaborate and subjective balancing test. In particular, Article 2.2 does not indicate that panels are charged with prioritizing objectives based on their "importance" and then balancing that importance with the measure's trade-restrictiveness. The phrase "taking account of risks non-fulfillment would create" does not provide a basis for engaging in such balancing. Rather, it is an element that Members take into account in determining what level is appropriate for the particular legitimate objective at issue, and a panel could verify that a Member has taken these risks into account as one of a number of elements that Member considers in determining the level that it considers appropriate.[28]

C. The COOL Measure Fulfills Its Objective at the Level the United States Considers Appropriate

37. As to the level at which the COOL measure actually achieves its objective of providing consumer information on origin, the complaining parties expend a significant amount of energy trying to re-interpret the Panel Report as concluding that the COOL measure does not provide any information on origin.[29] Such a suggestion is clearly false. As the Panel found in paragraph 7.713, the A label "appears to fulfil the objective" in its provision of information. And while the Panel Report finds that the B and C labels do not provide as much information "as possible," the Panel Report clearly finds that the labels do provide more origin information than was previously

[28] *See also* U.S. Appellant Submission, n.177 (quoting *US – Clove Cigarettes (Panel)*, para. 7.424, *US – Tuna (Panel)*, para. 7.467).

[29] *See* Mexico's Appellee Submission, paras. 170-172; Canada's Appellee Submission, para. 120.

available on where livestock was born, raised, and slaughtered.[30] Again, using the proposed alternatives as guideposts, the COOL measure provides more information than a substantial transformation regime, which was previously applied in the United States, and less than the much more costly trace-back regime, which has never been applied in the United States.

D. The Complaining Parties Misunderstand the "More Trade-Restrictive Than Necessary" Test

38. Finally, with regard to the "more trade-restrictive than necessary" test, both complaining parties make the spurious argument that the United States contends that a measure is only proven inconsistent with Article 2.2 when a less trade-restrictive alternative measure exists that meets some "theoretical" level of fulfillment, which may be substantially higher than the level at which the measure actually fulfills its objective.[31] That is incorrect, as is clear from the U.S. submissions in this dispute. Rather, as we have explained, Article 2.2 requires the panel to assess what is the Member's objective, and at what level the Member pursues that objective, in order to evaluate whether the complaining party is correct that there is a significantly less trade-restrictive alternative measure available to achieve that objective at the chosen level.[32] What Mexico and Canada's approaches would both miss is the situation in which the measure at issue overshoots the mark and fulfills the objective at a higher level than that sought by the Member.

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[30] *See* Panel Report, para. 7.717; *see also id.* paras. 7.734-7.735 (finding, for purposes of Mexico's Article 2.4 claim, that a Codex standard reflecting a substantial transformation scheme is an ineffective and inappropriate means for the fulfilment of the legitimate objectives of the United States).

[31] *See, e.g.*, Mexico's Appellee Submission, para. 144; Canada's Appellee Submission, para. 112.

[32] *See, e.g.*, U.S. Appellant Submission, para. 126.

In that situation, any alternative measure should need only fulfill the objective at the level sought, not at the level achieved by the measure at issue.

39. For purposes of this dispute, the COOL measure is consistent with Article 2.2 because the complaining parties never established that there is a reasonably available, significantly less trade-restrictive alternative that fulfills the U.S. objective at the level chosen by the United States, contrary to what Canada argues.[33]

40. In the end, the one fact that all three parties can agree on is that the United States could have designed the COOL measure to provide more origin information than it actually does, but chose not to. And the central question posed by the U.S. appeal is what legal consequence, if any, flows from this uncontested fact. The essence of the Panel's finding is that the COOL measure is inconsistent with Article 2.2 because it was "possible" for the United States to design the COOL measure to provide more information than it actually does (notwithstanding the costs imposed on market participants as a result),[34] even if it is the least trade-restrictive way of providing the level of information it does provide.

41. The United States requests the Appellate Body to overturn this fundamentally misconceived approach and to reverse the finding that the COOL measure is inconsistent with Article 2.2 of the TBT Agreement.

III. Conclusion

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[33] *See* Canada's Other Appellant Submission, para. 91 (contending that alternative measures need not contribute to the objective at the same level the COOL measure does).

[34] *See* Panel Report, paras. 7.711, 7.715.

42. This concludes our statement today. We thank you for your attention and look forward to your questions.