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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY CANADA AND MEXICO

REPORTS OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Reports of the Panel to be found in documents WT/DS384/RW and WT/DS386/RW.

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ANNEX A-1**WORKING PROCEDURES OF THE PANEL (DS384)****Adopted on 25 October 2013 and revised on 21 January 2014**

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the Panel which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public. The Panel may adopt special procedures concerning Business Confidential Information after consulting the parties.

3. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it. The Panel may open its meetings with the parties to the public, subject to appropriate procedures to be adopted by the Panel after consulting the parties.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

5. Before the substantive meeting of the Panel with the parties, each party shall transmit to the Panel a first written submission, and subsequently a written rebuttal, in which it presents the facts of the case and its arguments, and counter-arguments, respectively, in accordance with the timetable adopted by the Panel.

6. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If Canada requests such a ruling, the United States shall submit its response to the request in its first written submission. If the United States requests such a ruling, Canada shall submit its response to the request prior to the substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

7. Each party shall submit all factual evidence to the Panel no later than during the substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the substantive meeting.

8. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the

same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

9. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions attached as Annex 1.

10. To facilitate the maintenance of the record, and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the compliance proceedings. For example, exhibits submitted by Canada could be numbered CDA-1, CDA-2, etc. If the last exhibit in connection with the first submission was numbered CDA-5, the first exhibit of the next submission thus would be numbered CDA-6. The first time a party or third party submits to the Panel an exhibit that corresponds to an exhibit submitted in the original panel proceedings, the party or third party submitting such exhibit shall also identify the number of the original exhibit in the original panel proceedings.

Questions

11. The Panel may at any time pose questions to the parties and third parties, orally in the course of the substantive meeting or in writing.

Substantive meeting

12. Each party shall provide to the Panel the list of members of its delegation in advance of the meeting with the Panel and no later than 5.00 p.m. (Geneva time) on the previous working day.

13. The substantive meeting of the Panel shall be conducted as follows:

- a. The Panel shall invite Canada to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view. Before taking the floor, each party shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies to the interpreters. Each party shall make available to the Panel and the other party the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.00 p.m. (Geneva time) on the first working day following the meeting.
- b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask questions or make comments, through the Panel. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's questions within a deadline to be determined by the Panel.
- c. The Panel may subsequently pose questions to the parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel. The Panel's written questions to the parties and each party's written answers to questions after the substantive meeting with the Panel shall be made available to all third parties.
- d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Canada presenting its statement first, followed by the United States.

Third parties

14. The Panel shall invite each third party to transmit to the Panel a written submission prior to the substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

15. All third parties may be present during the entirety of the substantive meeting with the parties. During this meeting, third parties may, at the invitation of the Panel, ask questions to the parties or the other third parties. The parties and the other third parties, however, have no obligation to respond to these questions.

16. Each third party shall also be invited to present its views orally during a session of the substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. (Geneva time) on the previous working day.

17. The third party session shall be conducted as follows:

- a. All third parties may be present during the entirety of this session.
- b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third parties with provisional written versions of their statements before they take the floor. In the event that interpretation is needed, each third party shall provide additional copies to the interpreters. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. (Geneva time) on the first working day following the session.
- c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.
- d. The Panel may subsequently pose questions to the third parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

18. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

19. Each party shall submit an executive summary of the facts and arguments as presented to the Panel in its written submissions and oral statements, in accordance with the timetable adopted by the Panel. This executive summary may also include a summary of responses to questions. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions. The executive summary provided by each party shall not exceed 15 pages.

20. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

Interim review

21. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

22. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

23. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

24. The following procedures regarding service of documents shall apply:

- a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).
- b. Each party and third party shall file three paper copies of all documents it submits to the Panel. When exhibits are provided on CD-ROMs/DVDs, three CD-ROMs/DVDs and three paper copies of those exhibits shall be filed. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.
- c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to *****@wto.org, and cc'd to *****@wto.org, to *****@wto.org, to *****@wto.org, and to *****@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.
- d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.
- e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel.
- f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

25. The Panel reserves the right to modify these procedures at any time following consultations with the parties.

ANNEX A-2**WORKING PROCEDURES OF THE PANEL (DS386)****Adopted on 25 October 2013 and revised on 21 January 2014**

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the Panel which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public. The Panel may adopt special procedures concerning Business Confidential Information after consulting the parties.

3. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it. The Panel may open its meetings with the parties to the public, subject to appropriate procedures to be adopted by the Panel after consulting the parties.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

5. Before the substantive meeting of the Panel with the parties, each party shall transmit to the Panel a first written submission, and subsequently a written rebuttal, in which it presents the facts of the case and its arguments, and counter-arguments, respectively, in accordance with the timetable adopted by the Panel.

6. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If Mexico requests such a ruling, the United States shall submit its response to the request in its first written submission. If the United States requests such a ruling, Mexico shall submit its response to the request prior to the substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

7. Each party shall submit all factual evidence to the Panel no later than during the substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the substantive meeting.

8. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the

same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

9. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions attached as Annex 1.

10. To facilitate the maintenance of the record, and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the compliance proceedings. For example, exhibits submitted by Mexico could be numbered MEX-1, MEX-2, etc. If the last exhibit in connection with the first submission was numbered MEX-5, the first exhibit of the next submission thus would be numbered MEX-6. The first time a party or third party submits to the Panel an exhibit that corresponds to an exhibit submitted in the original panel proceedings, the party or third party submitting such exhibit shall also identify the number of the original exhibit in the original panel proceedings.

Questions

11. The Panel may at any time pose questions to the parties and third parties, orally in the course of the substantive meeting or in writing.

Substantive meeting

12. Each party shall provide to the Panel the list of members of its delegation in advance of the meeting with the Panel and no later than 5.00 p.m. (Geneva time) on the previous working day.

13. The substantive meeting of the Panel shall be conducted as follows:

- a. The Panel shall invite Mexico to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view. Before taking the floor, each party shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies to the interpreters. Each party shall make available to the Panel and the other party the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.00 p.m. (Geneva time) on the first working day following the meeting.
- b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask questions or make comments, through the Panel. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's questions within a deadline to be determined by the Panel.
- c. The Panel may subsequently pose questions to the parties. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel. The Panel's written questions to the parties and each party's written answers to questions after the substantive meeting with the Panel shall be made available to all third parties.
- d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Mexico presenting its statement first, followed by the United States.

Third parties

14. The Panel shall invite each third party to transmit to the Panel a written submission prior to the substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

15. All third parties may be present during the entirety of the substantive meeting with the parties. During this meeting, third parties may, at the invitation of the Panel, ask questions to the parties or the other third parties. The parties and the other third parties, however, have no obligation to respond to these questions.

16. Each third party shall also be invited to present its views orally during a session of the substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. (Geneva time) on the previous working day.

17. The third party session shall be conducted as follows:

- a. All third parties may be present during the entirety of this session.
- b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third parties with provisional written versions of their statements before they take the floor. In the event that interpretation is needed, each third party shall provide additional copies to the interpreters. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. (Geneva time) on the first working day following the session.
- c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.
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Descriptive part

18. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

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Interim review

21. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

22. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

23. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

24. The following procedures regarding service of documents shall apply:

- a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).
- b. Each party and third party shall file three paper copies of all documents it submits to the Panel. When exhibits are provided on CD-ROMS/DVDs, three CD-ROMS/DVDs and three paper copies of those exhibits shall be filed. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.
- c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to *****@wto.org, and cc'd to *****@wto.org, *****@wto.org, *****@wto.org, and *****@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.
- d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.
- e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel.
- f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

25. The Panel reserves the right to modify these procedures at any time following consultations with the parties.

ANNEX A-3**PROCEDURES FOR AN OPEN SUBSTANTIVE MEETING OF THE PANEL¹ (DS384)****Adopted on 28 October 2013 and revised on 21 January 2014**

1. The Panel shall hold a joint substantive meeting in DS384 and DS386.
2. Subject to the availability of suitable WTO meeting rooms, the Panel will start its substantive meeting, on 18-19 February 2014, with a session with the parties open to the public. At that session, each party will be asked to make an opening statement. After the parties have made their statements, they will be given the opportunity to pose questions to the other party or make comments on the other party's statement. The Panel may pose any questions or make any comments during such session. The parties will also have an opportunity to make their closing statement during the session open to the public.
3. To the extent that the Panel or any party considers it necessary, the Panel will also hold a session with the parties not open to public observation during which the parties will be allowed to make additional statements or comments, and pose questions, that involve business confidential information. The Panel may also pose questions during such a session.
4. In addition to its sessions with the parties, at the substantive meeting the Panel will also hold a separate session with the third parties. The Panel will start the third party session by opening a portion of this session to the public. At this portion of the third party session, any third party wishing to make its oral statement in a public session shall do so. Following the third party open session, the Panel will proceed to a third party closed session during which any other third party shall make its oral statement. At each of these third party open or closed sessions, after the third parties' statements, the Panel or any party may pose questions to any third party or make comments concerning these statements. Third parties may also ask questions to the parties or other third parties at the invitation of the Panel; however, the parties and the other third parties have no obligation to respond to these questions by third parties.
5. The following persons will be admitted into the meeting room during all sessions of the Panel's substantive meeting, whether open or closed to the public:
 - the members of the Panel;
 - all members of the delegations of the parties to DS384 and DS386;
 - all members of the delegations of the third parties to DS384 and DS386; and
 - WTO Secretariat staff assisting the Panel.
6. No person shall disclose any business confidential information at any session open to the public.
7. WTO Members and Observers and the public may observe the Panel's sessions that are open to the public by means of a real time closed-circuit television broadcast to a separate viewing room. The broadcasts will be open to officials of WTO Members and Observers upon presentation of their official badges. Accredited journalists and representatives of relevant non-governmental organizations may indicate to the Secretariat their interest in attending the broadcasts (Information and External Relations Division). Members of the general public will be invited to register their interest in attending each broadcast via the WTO website, by close of business on 7 February 2014.

¹ These procedures are adopted according to, and are an integral part of, the Panel's Working Procedures of 25 October 2013.

ANNEX A-4**PROCEDURES FOR AN OPEN SUBSTANTIVE MEETING OF THE PANEL¹ (DS386)****Adopted on 28 October 2013 and revised on 21 January 2014**

1. The Panel shall hold a joint substantive meeting in DS386 and DS384.
2. Subject to the availability of suitable WTO meeting rooms, the Panel will start its substantive meeting, on 18-19 February 2014, with a session with the parties open to the public. At that session, each party will be asked to make an opening statement. After the parties have made their statements, they will be given the opportunity to pose questions to the other party or make comments on the other party's statement. The Panel may pose any questions or make any comments during such session. The parties will also have an opportunity to make their closing statement during the session open to the public.
3. To the extent that the Panel or any party considers it necessary, the Panel will also hold a session with the parties not open to public observation during which the parties will be allowed to make additional statements or comments, and pose questions, that involve business confidential information. The Panel may also pose questions during such a session.
4. In addition to its sessions with the parties, at the substantive meeting the Panel will also hold a separate session with the third parties. The Panel will start the third party session by opening a portion of this session to the public. At this portion of the third party session, any third party wishing to make its oral statement in a public session shall do so. Following the third party open session, the Panel will proceed to a third party closed session during which any other third party shall make its oral statement. At each of these third party open or closed sessions, after the third parties' statements, the Panel or any party may pose questions to any third party or make comments concerning these statements. Third parties may also ask questions to the parties or other third parties at the invitation of the Panel; however, the parties and the other third parties have no obligation to respond to these questions by third parties.
5. The following persons will be admitted into the meeting room during all sessions of the Panel's substantive meeting, whether open or closed to the public:
 - the members of the Panel;
 - all members of the delegations of the parties to DS386 and DS384;
 - all members of the delegations of the third parties to DS384 and DS386; and
 - WTO Secretariat staff assisting the Panel.
6. No person shall disclose any business confidential information at any session open to the public.
7. WTO Members and Observers and the public may observe the Panel's sessions that are open to the public by means of a real time closed-circuit television broadcast to a separate viewing room. The broadcasts will be open to officials of WTO Members and Observers upon presentation of their official badges. Accredited journalists and representatives of relevant non-governmental organizations may indicate to the Secretariat their interest in attending the broadcasts (Information and External Relations Division). Members of the general public will be invited to register their interest in attending each broadcast via the WTO website, by close of business on 7 February 2014.

¹ These procedures are adopted according to, and are an integral part of, the Panel's Working Procedures of 25 October 2013.

ANNEX A-5**PROCEDURES OF THE PANEL CONCERNING BUSINESS CONFIDENTIAL INFORMATION¹ (DS384)****Adopted on 28 October 2013**

1. These procedures apply to any business confidential information (BCI) that a party submits to the Panel.
2. For the purposes of these procedures, BCI is defined as any information that has been designated as such by the Party submitting the information, that is not available in the public domain and the release of which could reasonably be considered to cause or threaten to cause harm to an interest of the person or entity that supplied the business information to the Party.
3. No person may have access to BCI except a member of the Secretariat or the Panel, a party's or third party's employee participating in the dispute, and a party's or third party's outside advisor for purposes of this dispute. However, an outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, export, or import of cattle, swine, beef, or pork. When a party or third party provides BCI to an outside advisor who is an employee or officer of an industry association of such enterprises, that party or third party shall obtain written assurances from such advisor that he or she has read and understands these Working Procedures and will not disclose any BCI in contravention of the Working Procedures.
4. A party or third party obtaining access to BCI as a result of the BCI being submitted in this dispute shall treat it as confidential, i.e. shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Each party and third party shall have responsibility in this regard for its employees as well as any outside advisors for the purposes of this dispute. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute.
5. A party or third party submitting or referring to BCI in a document shall mark the cover and each page of the document to indicate the presence of BCI in the document as follows: BCI shall be placed between double brackets (for example, [[xx,xxx.xx]]). The cover and the top of each page of the document shall contain the notice "Contains Business Confidential Information". Any BCI that is submitted in electronic form shall be clearly marked with the phrase "Contains BCI" on a label on the storage medium, and clearly marked with the phrase "Contains BCI" in the electronic file name.
6. In the case of an oral statement containing BCI to be delivered in the session not open to public observation as foreseen in paragraph 2 of the "Procedures for an open substantive meeting of the Panel," the Panel should ensure that only persons authorized to have access to BCI pursuant to these procedures are permitted to hear the statement.
7. The parties, third parties, and the Panel shall store all documents containing BCI so as to prevent unauthorized access to such information.
8. The Panel shall not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel makes its final report publicly available, the Panel shall give each party an opportunity to ensure that the report does not contain any information that it has designated as BCI.
9. Submissions containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Panel's Report.

¹ These procedures are adopted according to, and are an integral part of, the Panel's Working Procedures of 25 October 2013.

ANNEX A-6**PROCEDURES OF THE PANEL CONCERNING BUSINESS CONFIDENTIAL INFORMATION¹ (DS386)****Adopted on 28 October 2013**

1. These procedures apply to any business confidential information (BCI) that a party submits to the Panel.
2. For the purposes of these procedures, BCI is defined as any information that has been designated as such by the Party submitting the information, that is not available in the public domain and the release of which could reasonably be considered to cause or threaten to cause harm to an interest of the person or entity that supplied the business information to the Party.
3. No person may have access to BCI except a member of the Secretariat or the Panel, a party's or third party's employee participating in the dispute, and a party's or third party's outside advisor for purposes of this dispute. However, an outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, export, or import of cattle, swine, beef, or pork. When a party or third party provides BCI to an outside advisor who is an employee or officer of an industry association of such enterprises, that party or third party shall obtain written assurances from such advisor that he or she has read and understands these Working Procedures and will not disclose any BCI in contravention of the Working Procedures.
4. A party or third party obtaining access to BCI as a result of the BCI being submitted in this dispute shall treat it as confidential, i.e. shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Each party and third party shall have responsibility in this regard for its employees as well as any outside advisors for the purposes of this dispute. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute.
5. A party or third party submitting or referring to BCI in a document shall mark the cover and each page of the document to indicate the presence of BCI in the document as follows: BCI shall be placed between double brackets (for example, [[xx,xxx.xx]]). The cover and the top of each page of the document shall contain the notice "Contains Business Confidential Information". Any BCI that is submitted in electronic form shall be clearly marked with the phrase "Contains BCI" on a label on the storage medium, and clearly marked with the phrase "Contains BCI" in the electronic file name.
6. In the case of an oral statement containing BCI to be delivered in the session not open to public observation as foreseen in paragraph 2 of the "Procedures for an open substantive meeting of the Panel," the Panel should ensure that only persons authorized to have access to BCI pursuant to these procedures are permitted to hear the statement.
7. The parties, third parties, and the Panel shall store all documents containing BCI so as to prevent unauthorized access to such information.
8. The Panel shall not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel makes its final report publicly available, the Panel shall give each party an opportunity to ensure that the report does not contain any information that it has designated as BCI.
9. Submissions containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Panel's Report.

¹ These procedures are adopted according to, and are an integral part of, the Panel's Working Procedures of 25 October 2013.

ANNEX B

ARGUMENTS OF THE PARTIES

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ANNEX B-1**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENT OF CANADA****I. INTRODUCTION**

1. In a report issued on 29 June 2012, the Appellate Body confirmed that the COOL measure of the United States accorded less favourable treatment to imported livestock as compared to domestic livestock, in violation of the United States' obligations under TBT Article 2.1. In response to this ruling, instead of eliminating the incentive created by the COOL measure for U.S. market actors to handle exclusively domestic livestock, the United States amended the labelling requirements in a manner that further undermined the competitive position of Canadian cattle and hogs in the U.S. market.

II. FACTUAL BACKGROUND**A. The original COOL measure**

2. The original COOL measure provided that retailers licensed under the *Perishable Agricultural Commodities Act, 1930* were required to provide consumers with origin information on pork and beef muscle cuts that was loosely based on the location of three production steps undergone by livestock: birth, raising, and slaughter. Muscle cuts of pork and beef were divided into the following four categories:

Category A	Meat from animals born, raised, and slaughtered in the United States, or from animals present in the United States on or prior to 15 July 2008	<i>Product of the U.S.</i>
Category B	Meat from animals born in Country X and raised and slaughtered in the United States. (These animals were not exclusively born, raised and slaughtered in the United States or imported for immediate slaughter.)	<i>Product of the U.S., Country X, Country Y (if applicable; can appear in any order)</i>
Category C	Meat from animals imported into the United States for immediate slaughter	<i>Product of Country X, U.S.</i>
Category D	Foreign meat imported into the United States	<i>Product of Country X</i>

3. The original COOL measure permitted the commingling of muscle cuts derived from categories A, B, and C on a single production day. Where commingling occurred, the muscle cuts could be labelled under a common, mixed-origin label (e.g. "Product of Canada, United States"). Imported muscle cuts were labeled so as to indicate that they were a product of the country in which the animal from which they were produced was slaughtered (e.g. "Product of Canada"), regardless of where the birth and raising steps occurred.

4. In addition, the original COOL measure permitted labels that applied to ground beef and pork to list countries if "raw material" from those countries was in a processor's inventory less than 60 days prior to the ground meat's production. This "60-day inventory allowance" flexibility was available for market participants at every stage of meat supply and distribution.

5. Large amounts of pork and beef consumed in the United States were exempted from the scope of the original COOL measure's application. Specifically, food service establishments, all processed pork and beef, and retailers that either purchased less than \$230,000 worth of fresh fruits and vegetables annually or that did not ship, receive, or contract to be shipped or received fresh fruits and vegetables in quantities exceeding 2,000 pounds (one ton) in a single day were exempt from the original COOL measure's labelling requirements.

B. The amended COOL measure

6. The amendments to the original COOL measure introduced two major changes: (1) the commingling flexibility, which had somewhat mitigated the original COOL measure's segregation requirements, was eliminated; and (2) subject to certain exceptions, labels applying to muscle cuts of beef and pork were required to name the country (countries) in which the animal from which the muscle cut was derived was born, was raised, and was slaughtered.

7. The amended COOL measure provides that if an animal was raised in part in the United States and in part outside the United States, the label may treat the animal as if it was raised entirely in the United States, unless the animal was imported for immediate slaughter (when it is consigned directly from a port of entry to a recognized slaughtering establishment and slaughtered within two weeks from its date of entry) or where by doing so the muscle cut covered commodity would be designated as having a United States country of origin.

8. The amended COOL measure did not modify the original COOL measure's extensive exclusions and exemptions, the labelling of imported muscle cuts, or the 60-day inventory allowance that applies to ground beef and pork.

III. THE SCOPE OF CANADA'S CHALLENGE

9. Canada's challenge of the amended COOL measure concerns the labelling of muscle cuts of beef and pork derived from livestock slaughtered in the United States. Canada does not make claims of inconsistency of the provisions of the amended COOL measure pertaining to the labelling of muscle cuts of foreign origin imported into the United States or the labelling of ground meat with the WTO obligations of the United States. However, Canada refers to these provisions of the amended COOL measure to demonstrate the WTO-inconsistency of the labelling requirements in respect of muscle cuts of beef and pork derived from livestock slaughtered in the United States.

IV. LEGAL CLAIMS

A. The amended COOL measure is a technical regulation and Canadian cattle and hogs are "like" U.S. Cattle and hogs

10. The Panel concluded that the original COOL measure was a technical regulation. The United States did not appeal this finding and this aspect did not become an issue in the current compliance proceedings. The amended COOL measure equally qualifies as a technical regulation. In the original proceedings, the Panel concluded that Canadian cattle and hogs are "like" U.S. cattle and hogs. This was not appealed in the previous proceedings and this aspect did not become an issue in the current compliance proceedings either.

B. The amended COOL measure violates TBT Article 2.1

1. The amended COOL measure accords less favourable treatment to Canadian cattle and hogs, in violation of TBT Article 2.1

11. TBT Article 2.1 imposes a national treatment obligation on WTO Members with respect to technical regulations. The analysis of whether a technical regulation is *de facto* inconsistent with TBT Article 2.1 consists of the following two inquiries: (i) whether the technical regulation at issue modifies the conditions of competition in the relevant market to the detriment of imported products compared to like domestic products; and, if so, (ii) whether the detrimental impact on imported products stems exclusively from a legitimate regulatory distinction (LRD).

12. The assessment under element (i) is the same test as that which applies under GATT Article III:4 for determining whether a measure accords less favourable treatment to imported products. The legal test under element (ii) assesses both whether the regulatory distinction and technical regulation in issue are designed and applied in an even-handed manner. In assessing even-handedness, a panel must carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation and application of the technical regulation at issue.

13. As a result of the removal of the commingling flexibility and the introduction of point-of-production labelling through the 2013 Final Rule, the amended COOL measure's labelling, recordkeeping, and segregation requirements are more onerous than those that prevailed under the original COOL measure.

14. Throughout the original proceedings, the United States argued that the original COOL measure did not require the segregation of animals on the basis of their origin because of the availability of commingling, which was alleged by the United States to be widely used by producers. The elimination of the commingling flexibility removes any pretence that segregation is not necessary under the COOL regime. This view is confirmed by comments on the amended COOL measure that were submitted by industry actors to the U.S. Department of Agriculture (USDA) and referred to by Canada in these proceedings.

15. Basic economic logic suggests that the elimination of commingling and the resulting additional recordkeeping and segregation requirements will further deter market actors from handling Canadian livestock and the muscle cuts derived therefrom. The United States resorts to both bald assertions regarding what it now considers to have been the limited extent to which commingling occurred and criticism directed at industry actors for failing to provide evidence regarding the extent of commingling in practice.

16. The United States further contends that Canada's claim regarding the amended COOL measure's detrimental impact is based on the elimination of commingling. This contention is without merit. While the prohibition of commingling has exacerbated the original COOL measure's significant and negative impact, this is by no means the sole basis for Canada's argument regarding the amended COOL measure's detrimental impact. The amended COOL measure does nothing to alter the elements of the original COOL measure that were responsible for undermining the competitive position of Canadian cattle and hogs in the U.S. market.

17. The amended COOL measure has increased the recordkeeping and verification requirements that cause the segregation that is the source of the detrimental impact on Canadian cattle and hogs.

18. As a result of the commingling flexibility that applied under the original COOL measure, producers could affix a common label to muscle cuts derived from combinations of commingled Category A, B, and C animals. Both the provisions on commingling that were set out in the 2009 Final Rule and the USDA's commentary on that Rule reveal that the original COOL measure provided flexibility for upstream producers that reduced the records that had to be kept in the case of commingled muscle cuts. This flexibility has been eliminated by the amended COOL measure.

19. Furthermore, the original COOL measure permitted Category B muscle cuts to bear Label C, even where no commingling occurred. In practical terms, only one set of records was necessary to track Category B and C animals and the muscle cuts derived therefrom. The elimination of this flexibility means that two sets of records will now be required.

20. Canada has submitted evidence that demonstrates the widespread expectation among a wide range of industry actors, that recordkeeping will increase under the amended COOL measure, and has provided practical examples that demonstrate the reasons for this expectation.

21. The United States acknowledges that compliance costs will rise as a result of the changes introduced through the amended COOL measure but fails to recognize that it is the structure of the North American markets for beef and pork muscle cuts that ensures that Canadian cattle and hogs will bear a disproportionate burden of those compliance costs.

22. The U.S. market for cattle and hogs is dominated by U.S. animals. As a result, U.S. market actors can usually avoid the segregation requirements of the amended COOL measure by handling exclusively U.S. animals and muscle cuts derived therefrom. In order to compete with these entities, market actors selling muscle cuts or animals that have undergone a production step in Canada must pass the higher costs of segregating and tracking Canadian cattle and hogs and the muscle cuts derived therefrom up the supply chain to Canadian cattle and hog producers. The amended COOL measure not only perpetuates this situation but adds to the higher costs arising

from the use of imported livestock, thereby strengthening the incentive for U.S. producers to handle exclusively domestic livestock.

23. Canada has submitted extensive evidence demonstrating the detrimental impact that the amended COOL measure has had on Canadian cattle and hogs, even with the six-month delay in the amended COOL measure's enforcement. This evidence is consistent both with basic economic logic, which is elaborated upon by Dr. Sumner in his report on the amended COOL measure's economic impact on Canadian livestock, and the expectations of industry actors that are documented by Canada.

24. Canada has shown that the amended COOL measure does not stem exclusively from a LRD, in that the measure is arbitrary, lacks even-handedness, and results in unjustifiable discrimination against Canadian livestock.

25. The United States attempts to limit the scope of the Panel's analysis under TBT Article 2.1, adopting the position that the distinctions between the categories of meat and the different labels should be considered in the abstract, divorced from the amended COOL measure's overall architecture and application. In so doing, the United States advocates an approach that runs directly counter to both the analytical framework that the Appellate Body has developed and applied under the LRD component of the TBT Article 2.1 test and to the analysis conducted by the Appellate Body in this case.

26. At the core of the Appellate Body's approach are assessments of the even-handedness of both the challenged technical regulation and the relevant regulatory distinction(s). These assessments require close scrutiny of the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue.

27. An important panel finding supporting the Appellate Body's conclusion that the detrimental impact on Canadian cattle and hogs caused by the COOL measure did not stem from a LRD was the "considerable proportion" of beef and pork that is exempt from labelling requirements. The amended COOL measure does not address the scope of the extensive exemptions to the original COOL measure in any way.

28. Canada has demonstrated that approximately 33% of beef and 9% of pork that is consumed in the United States is subject to the amended COOL measure's labelling requirements. These figures are broadly consistent with the findings of the U.S. Congressional Research Service in its report on COOL and this WTO dispute. Furthermore, factoring ground beef into this consideration shows that approximately only 16% of all beef that is consumed in the U.S. bears labels that provide origin information regarding the place of birth, raising, and slaughter.

29. Thus, despite the fact that information regarding the origin of all livestock must be identified, tracked, and transmitted throughout the chain of production by producers, processors, and retailers, the amended COOL measure conveys information regarding the location of the three production steps on only a fraction of the meat that is derived from this livestock. This reveals that a lack of correspondence between the recordkeeping and verification requirements, on the one hand, and the limited information provided to consumers, on the other hand, persists under the amended COOL measure. Consequently, the detrimental impact on Canadian cattle and hogs cannot be explained by the need to provide origin information to consumers and, therefore, reflects arbitrary and unjustifiable discrimination.

30. The amended COOL measure purports to address the lack of correspondence between the recordkeeping and verification requirements and the limited information conveyed to consumers. However, the requirements of the latter half of this ratio have been expanded by the amended COOL measure. Moreover, the increased recordkeeping and verification requirements apply throughout the entire beef and pork muscle cut supply chains, while the information conveyed through the new labels is limited to the much smaller segment of beef and pork that is subject to point-of-production labelling. This more than offsets the contribution that any additional information provided to consumers under the amended COOL measure makes to the rectification of the imbalance described above.

31. The Appellate Body considered that Label A was capable of conveying to consumers that the livestock used to produce muscle cuts were born, raised, and slaughtered in the United States. Label D remains unchanged under the amended COOL measure. Therefore, any additional meaningful information provided to consumers by the amended COOL measure is limited to those muscle cuts to which Labels B and C were previously applied.

32. Even if the United States' assertion that roughly 27 to 28% of pork and beef muscle cuts that were subject to the original COOL measure bore Label B or C is accepted, this means that the additional information provided to U.S. consumers by the amended COOL measure applies to less than a third of all muscle cuts that are subject to the amended COOL measure's labelling requirements.

33. The information conveyed to consumers by the amended COOL measure may be incomplete or misleading, particularly with respect to the labels that apply to muscle cuts that are derived from animals that do not satisfy the definition of U.S. origin. For example: (1) Imported muscle cuts may be labeled as "Product of Canada" even if the animal used to produce the muscle cut was born and raised in the United States; (2) Muscle cuts may be labelled as "Born in Canada, Raised and Slaughtered in the United States" even if the animal from which the muscle cut is derived spends as little as 15 days in the United States prior to slaughter; (3) Labels affixed to an animal that spends a short time in Canada prior to being exported to the United States for immediate slaughter must be labelled as "Born and Raised in Canada, Slaughtered in the United States".

34. The United States describes the objective of the amended COOL measure as the provision of accurate origin information to consumers. Yet, consideration of the amended COOL measure's design, architecture, and revealing structure demonstrates that significant dissonance exists between this objective and the measure's operation and application. The following aspects of the amended COOL measure's treatment of meat consumed in the United States illustrate this point: (1) The only information on the location of the production steps that can be relied on by U.S. consumers as accurate is that which is conveyed in respect of muscle cuts that are derived from animals that satisfy the measure's definition of U.S. origin; (2) As a result of the 60-day inventory allowance that applies to ground beef and pork, consumers are only informed of the countries of origin "that may be reasonably contained therein". The USDA simply asserts that this is reasonable because precise labelling for ground meat would be burdensome for industry, ignoring the contradiction with its approach to muscle cut labels, which is also burdensome for industry; (3) The amended COOL measure permits the omission of information on the raising production step occurring in a foreign country if an animal is raised in both the United States and a foreign country. However, this flexibility is unavailable if an animal is born and raised in the United States, raised in another country, and then raised and slaughtered in the United States. The United States offers no explanation that accounts for this clear contradiction that prioritizes U.S. origin information; (4) The amended COOL measure continues to exempt food service establishments, processed foods, and retailers that either do not purchase \$230,000 worth of fresh fruit and vegetables annually or do not ship, receive, or contract to be shipped or received quantities of fresh fruit and vegetables in quantities exceeding 2,000 pounds (one ton) in a single day. This means that butcher shops, i.e. *shops that specialize in selling meat products* do not provide consumers with origin information.

35. These elements of the amended COOL measure reveal the uneven manner of its operation and application to meat products and the animals from which they are produced. This uneven application in turn demonstrates that the amended COOL measure and its regulatory distinctions are arbitrary, and that the discrimination against Canadian cattle is unjustifiable.

36. The Panel's findings in respect of Label D were a factor in the Appellate Body's analysis of the legitimacy of the original COOL measure's regulatory distinctions. Furthermore, Label D is part of the amended COOL measure's design, architecture, and revealing structure that affects its operation and application. Therefore, Label D must factor into the Panel's LRD analysis.

37. Canada is not challenging the consistency of the ground meat label with the WTO obligations of the United States. However, the logic that underpinned the Appellate Body's analysis weighs in favour of the amended COOL measure's treatment of ground meat being regarded as a relevant factor in assessing the measure's consistency with TBT Article 2.1.

38. Cattle and hogs, which are used to produce both muscle cuts and ground meat, are subject to the amended COOL measure's onerous tracking and verification requirements, despite the fact that a large portion of the meat derived from these animals (i.e. ground meat) does not convey the information that must be tracked and transmitted upstream. This element of the amended COOL measure supports the following conclusions: (i) the detrimental impact on Canadian cattle and hogs that results from the recordkeeping and verification requirements cannot be explained by the need to provide origin information on the location of the three production steps; and (ii) the amended COOL measure, therefore, reflects discrimination.

39. The prohibition of trace-back is a relevant consideration in assessing whether the amended COOL measure's detrimental impact on Canadian livestock reflects discrimination. This prohibition, coupled with a mandate for the Secretary of Agriculture to audit retailers to verify compliance, necessitates the implementation of the amended COOL measure's labelling requirements through the system of recordkeeping and verification that is the cause of the detrimental impact on Canadian livestock. Therefore, the prohibition on trace-back is a critical element in demonstrating that the detrimental impact on Canadian livestock does not stem exclusively from a LRD.

C. The amended COOL measure violates GATT Article III:4

40. The Appellate body has clarified that the national treatment obligations in TBT Article 2.1 and GATT Article III:4 differ in scope and content. As a result, Canada requests that, regardless of the Panel's findings under TBT Article 2.1, the Panel address Canada's claim under GATT III:4.

41. According "treatment no less favourable" in the context of a *de facto* violation of GATT Article III:4 means according conditions of competition no less favourable to the imported product than to the like domestic product. The analysis of a measure's effect on the conditions of competition in the context of TBT Article 2.1 applies equally to GATT Article III:4.

42. Notwithstanding the long line of jurisprudence that has applied the GATT Article III:4 analysis, the United States seeks to import the LRD component of the TBT Article 2.1 test into this analysis. There is no textual basis for the position of the United States, which disregards the specific context in which the LRD analysis was developed and the context provided for in the GATT 1994 itself.

43. The genesis of the LRD analysis is the balance between the right to regulate and the commitment to liberalize trade that is provided for in the context of the TBT Agreement and also reflected in GATT Articles III and XX. That balance is reflected in both GATT Articles III *and* XX (as well as in the two-step TBT Article 2.1 test) accounts for the Appellate Body's clarification that the scope and context of TBT Article 2.1 and GATT Article III:4 are not the same.

44. The United States fails to explain how an assessment of whether a challenged technical regulation is applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination, as is required in the LRD analysis under the TBT Agreement would somehow apply under GATT 1994. In particular, the United States does not explain how the assessment of arbitrary or unjustifiable discrimination that it proposes to read into GATT Article III:4 would interact with the assessment under the chapeau of GATT Article XX of whether the challenged measure is "applied in a manner that would constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail".

45. The extensive jurisprudence interpreting the relationship between GATT Article III and XX should not be jettisoned through the importation of the interpretation of TBT Article 2.1 into the GATT. Accepting the United States' position on this point would defy basic principles of treaty interpretation and create uncertainty among Members about the scope of both the WTO commitments that they have agreed to and that are under negotiation.

46. If the United States had legitimate regulatory purposes relevant for an analysis under the GATT 1994, it should have put forward a GATT Article XX defence. Having failed to do so, it cannot now seek to twist the GATT Article III:4 test to pretend that it does not need Article XX of GATT 1994.

D. The amended COOL measure violates TBT Article 2.2

47. Two issues are in dispute: (i) the identification of the objective, and; (ii) the necessity of the trade-restrictiveness of the amended COOL measure.

48. The objective of a measure is the benchmark on a scale against which to assess the actual contribution of the measure to the fulfilment of the objective. If defined too narrowly, an objective may more easily correlate with the measure that is being challenged and, as a result, affect the comparison with alternative measures by reducing the possibility of formulating measures that achieve a level of fulfilment of the objective that is equivalent to that achieved by the challenged measure.

49. In the original proceedings, the Appellate Body confirmed the Panel's finding that the United States' objective was "the provision of consumer information on origin". The United States nevertheless contends that its objective may be stated in a number of ways, including more narrowly as "to provide consumers with information on the countries in which the livestock from which the meat they purchase is produced were born, raised and slaughtered". The Panel should reject the United States' attempt to reformulate its objective in an artificially narrow and self-serving manner, all the more because the United States has conceded that its objective remains the provision of consumer information on origin.

50. Assessing the necessity of the trade-restrictiveness of a measure involves the consideration of the following factors: (i) the trade-restrictiveness of the regulation; (ii) the degree of contribution the regulation makes to the achievement of the objective, and (iii) the nature of the risks at issue and the gravity of the consequences that would arise from non-fulfilment of the objective pursued through the measure. In most cases, the analysis involves a comparison with alternative measures.

51. A measure is trade-restrictive if it has a limiting effect on trade. A measure that affects the conditions of competition to the detriment of imported products is trade-restrictive. An actual reduction in trade flows is not a *conditio sine qua non* for a measure to be considered trade-restrictive. A technical regulation that increases compliance costs in a non-discriminatory manner, but does not otherwise modify the conditions of competition to the detriment of imported products, may nevertheless be trade-restrictive if the cost increase has the effect of reducing trade flows or reducing prices of both imported and domestic products. The amended COOL measure is highly trade-restrictive.

52. WTO jurisprudence recognizes that panels enjoy a certain latitude in choosing and designing the methodology to assess the contribution of a measure to the fulfilment of the measure's objective. There is no reason why panels should not enjoy the same latitude in choosing the methodology to assess the trade-restrictiveness of a measure. Contrary to the position expressed by the United States, trade-restrictiveness is not exclusively concerned with trade volumes. The assessment of trade-restrictiveness is concerned with the *impact* of a measure on imports. Such an impact may be, *inter alia*, a reduction in prices or quantities or both, as in this case.

53. The assessment of the contribution is concerned with the degree of contribution that the technical regulation *actually* makes towards the achievement of the objective. There is no requirement for a panel to identify, in the abstract, the level at which a responding Member aims to achieve that objective. The Appellate Body has explained that a Member, "by preparing, adopting, and applying a measure in order to pursue a legitimate objective, articulates either implicitly or explicitly the level at which it seeks to pursue that particular legitimate objective".

54. Contrary to the contention of the United States, whether an alternative measure provides an equivalent "amount" of information on the countries where the animal was born, raised and slaughtered is not the "only question". Further, determining the actual degree of contribution of a measure does not preclude characterizing that degree as, for instance, "low" or "limited". Such characterization allows comparing the degree of contribution of the challenged measure with alternative measures that contribute to the objective in a different way.

55. The amended COOL measure is capable of contributing towards its objective to a very limited degree. A considerable proportion of beef and pork sold in the United States continues to be exempted from the labelling requirements.

56. The obligation to consider the "risks non-fulfilment would create" means that the comparison of the challenged measure with a possible alternative measure should be made in the light of the nature of the risks at issue and the gravity of the consequences that would arise from non-fulfilment of the legitimate objective. In this case, the consequence that would arise from non-fulfilment would be that those consumers who want information on the origin of source livestock might not be able to get it. The Appellate Body has already found that the consequences that may arise from non-fulfilment of the objective would not be particularly grave.

57. The comparison with possible alternative measures is a *conceptual tool* for ascertaining whether the challenged measure is more trade-restrictive than necessary. As with any analytical tool, it must not be applied in a mechanistic fashion. It is relevant to determine whether the alternative is less trade-restrictive, whether it would make an equivalent contribution to the relevant objective, taking into account the risks non-fulfilment would create, and whether it is reasonably available. An alternative measure is not reasonably available if it imposes an undue burden on the responding Member, such as prohibitive costs or substantial technical difficulties. The reasonable availability of an alternative measure must be assessed in relation to the *capacity* of the responding Member to implement it.

58. A comparison with an alternative measure that is less trade-restrictive than the challenged measure but fulfils the responding Party's objective to a lesser extent does not preclude a finding that the challenged measure is more trade-restrictive than necessary. Such a finding would require that the consequences that would arise from non-fulfilment of the objective would not be grave.

59. Turning to the comparative analysis, Canada submitted a detailed analysis prepared by Dr. Sumner to assist the Panel in making a determination on the trade-restrictiveness element (Exhibit CDA-126). That analysis calculates the magnitude of compliance costs required for a non-discriminatory alternative measure to cause an impact on trade equal to the impact of the original COOL measure. The impact is calculated in terms of export revenue losses in dollar amounts. The concept of export revenue losses captures the meaning of trade restrictiveness because it is a measurement of the magnitude of the impact of a measure on imports. Dr. Sumner used the costs of the original COOL measure to Canadian producers – in the sense of the losses that the measure has caused them, both in terms of reduced prices and quantities – to calculate how much tracing livestock and meat, labelling meat and keeping records would need to cost to market participants under a non-discriminatory measure to cause Canadian producers the same export losses as under the original COOL measure. In Exhibit CDA-126, Dr. Sumner has demonstrated that a non-discriminatory alternative measure would have to entail implausibly high compliance costs to cause such losses. These already implausibly high minimum amounts of compliance costs are even much higher when calculated based on the export revenue losses caused by the amended COOL measure or on quantities alone, further to the United States' conception of trade-restrictiveness. None of the alternative measures could possibly entail compliance costs of the magnitude calculated.

60. The United States has not rebutted Canada's *prima facie* case that any one of the proposed alternative measures would be less trade-restrictive than the amended COOL measure.

61. First alternative measure – Mandatory labelling of muscle cuts of beef and pork based on substantial transformation could be implemented, combined with voluntary labelling for the production steps of birth and raising. This measure would be significantly less trade-restrictive than the amended COOL measure because it would not require segregation of livestock and muscle cuts for that segment of the market that does not voluntarily provide consumer information on where livestock were born and raised. The United States has not contested that this alternative measure is reasonably available.

62. While this alternative measure might not contribute to the fulfilment of the objective to the exact same degree as the amended COOL measure, that consideration does not preclude the Panel from finding that the amended COOL measure is more trade-restrictive than necessary. This is so because the consequences that may arise from non-fulfilment of the objective of the amended

COOL measure are not particularly grave. Based on the following factors, considered in conjunction, the Panel should find that the amended COOL measure is more trade-restrictive than necessary: the amended COOL measure is capable of contributing towards its objective to a very limited degree; the amended COOL measure is highly trade-restrictive; any difference in the degrees of fulfilment of the objective between the two measures is not considerable, given that the alternative measure would have a broader scope of application than the amended COOL measure, and; the alternative measure would be significantly less trade restrictive than the amended COOL measure.

63. Second alternative measure – The 60-day inventory allowance flexibility applicable to ground meat could be extended to muscle cuts of beef and pork. This alternative measure would be significantly less trade-restrictive than the amended COOL measure, because market participants throughout the meat supply chain would have sufficient flexibility as a result of less intense segregation requirements. Also, the alternative measure could not possibly entail costs of the magnitude calculated by Dr. Sumner to track livestock and meat, label meat and keep records. This alternative measure is reasonably available. While this alternative measure, like the first alternative measure, might not contribute to the fulfilment of the objective to the exact same degree as the amended COOL measure, that consideration does not preclude the Panel from finding that the amended COOL measure is more trade-restrictive than necessary for the same reasons Canada provided with respect to the first alternative measure.

64. Third alternative measure – A mandatory trace-back system could be implemented to provide information, with respect to covered muscle cuts derived from livestock slaughtered in the United States, on where the production steps took place for the relevant source animal or group of animals. Tellingly, the amended COOL measure *prohibits* the USDA from using a trace-back system.

65. The first stage of a trace-back system involves the establishment of an animal identification and traceability system. Several WTO Members have established such a system. The United States once had a comprehensive voluntary system – the National Animal Identification System (NAIS) – that could have been maintained and made mandatory to provide information to consumers. The second stage of a trace-back system occurs at the slaughterhouse, where processors have to preserve the link between the animal, or group of animals, and the muscle cuts. Preserving the link between the animal, or groups of animals, and the muscle cuts is done on a country-wide and commercial basis in at least two WTO Members, namely Japan and Uruguay; various supply chains elsewhere on the globe also preserve that link. Most of the compliance costs under a trace-back system would be incurred at that stage. The third stage of a trace-back system involves the distributors and the retailers, who have to preserve the information about the muscle cut.

66. A trace-back system would achieve a contribution to the fulfilment of the objective that is equal to or greater than the contribution achieved by the amended COOL measure. The label on a muscle cut could indicate the precise name and address of the facility where each of the production steps took place. However, as an alternative, the labelling requirements under a trace-back system could be the same as those under the amended COOL measure, provided that market participants be able to demonstrate, if audited, that a muscle cut has been derived from an animal, or group of animals, that was born, raised and slaughtered *at a specific location*.

67. Also, a trace-back system would be less trade-restrictive than the amended COOL measure. This is so because it could be implemented in such a way as to avoid modifying the conditions of competition to the detriment of imported livestock and it could not possibly entail the minimum amounts of compliance costs calculated by Dr. Sumner.

68. Further, a trace-back system is a reasonably available alternative measure. It would be unreasonable for the United States to expect Canadian producers to continue shouldering the burden of a measure that affects the competitive conditions of imported livestock when all market participants could share equally the burden of providing consumer information on origin. Further, there is no evidence that the first stage of a trace-back system would reward vertical integration at the expense of family farms in the United States. While a trace-back system would likely increase compliance costs for U.S. producers (and would lower the overall enormous costs borne by Canadian producers), these costs would not be prohibitive; the U.S. industry would remain profitable. The experience of other countries' industries demonstrates that changes in production practices are well within the capacity of the U.S. industry. Finally, given that the United States has

asserted that providing consumer information on origin is very important, the United States should be expected to use its capabilities to implement its objective consistently with its WTO obligations.

69. Fourth alternative measure – In addition to the existing requirements of the amended COOL measure to designate the country or countries where production steps occurred on labels of muscle cuts of beef and pork derived from livestock slaughtered in the United States, the designation of the state(s) and/or province(s) where each of those steps occurred could also be required on those labels.

70. The proposed alternative measure would achieve a greater degree of fulfilment than that achieved by the amended COOL measure, because it would provide the same consumer information as that provided under the amended COOL measure, with the addition of other information.

71. The proposed alternative would also be less trade-restrictive than the amended COOL measure. This is so because it could be implemented in such a way as to avoid modifying the conditions of competition to the detriment of imported livestock and it could not possibly entail the minimum amounts of compliance costs calculated by Dr. Sumner.

72. The proposed alternative measure is reasonably available. State/province designations may already be used in lieu of country of origin labeling for, *inter alia*, perishable agricultural commodities. Also, the alternative measure is based on the principle that animals should be traceable when in interstate commerce in the United States, which is operationalized in the Final Rule on Traceability for Livestock Moving Interstate (Final Rule on Traceability). The fourth alternative measure would entail lower compliance costs than a trace-back system. Further, animals would not need to have been raised in all the same states or provinces; it would be sufficient that they have the last state/province in common. The United States could rely on the segregation of animals on a state/province basis and on documents generated pursuant to, or required under, the Final Rule on Traceability, combined with requirements for producer's affidavits for elements that are not currently fully covered under that Rule, to implement the fourth alternative measure. Alternatively, the United States could implement a national animal identification and traceability system, as many other WTO Members have done. The United States once had such a system – i.e. the NAIS – but decided not to make it mandatory. Neither solution proposed by Canada to implement the fourth alternative measure would represent an undue burden for the United States.

E. The COOL measure nullifies or impairs benefits that have accrued to Canada within the meaning of GATT Article XXIII:1(b)

73. The amended COOL measure also nullifies or impairs benefits that have accrued to Canada on the basis of tariff concessions made by the United States in respect of live cattle and hogs as part of the Uruguay Round. These tariff concessions apply on a most-favoured-nation (MFN) basis.

74. The three elements that, according to the WTO jurisprudence, must exist for a finding of non-violation nullification or impairment in the sense of GATT Article XXIII:1(b), are all present in this case: (1) The application of the amended COOL measure by the United States has deprived Canada of benefits; (2) The benefits that have accrued to Canada from which Canada has been deprived are tariff concessions made by the United States in the Uruguay Round, on the basis of which Canada is entitled to rely for its expectation that its live cattle and hogs will have unimpeded access to the U.S. market; and (3) By applying the requirements of the amended COOL measure, the United States has upset the competitive relationship between U.S. and Canadian livestock, and has nullified or impaired the benefits accruing to Canada under the GATT 1994.

75. The benefits concerned accrued to Canada under the WTO Agreement, regardless of the operation of the *Canada-United States Free Trade Agreement* (Canada-United States FTA) and of the *North American Free Trade Agreement* (NAFTA), by virtue of which Canadian live cattle and hogs are entitled to duty-free entry into the United States.

76. The current MFN rate of the United States under the WTO Agreement for cattle other than for dairy or breeding is US \$ 0.01 per kilogram. The duty-free import of hogs into the United States pre-dates the WTO Agreement (as well as the Canada-United States FTA and the

NAFTA). These tariff concessions would apply if in the future Canada or the United States were to withdraw from the NAFTA or if the NAFTA were to be suspended by agreement between Canada and the United States.

77. Canada provided detailed justification for its claim under GATT Article XXIII:1(b), in paras. 182-190 of its first written submission and in paras. 154-157 of its second written submission. In addition, Canada has placed on the record extensive evidence on the upset by the COOL measure, both in its original and amended form, of the conditions of competition between Canadian and US cattle and hogs. Canada has established a *prima facie* case, which the United States has failed to rebut.

78. Meat from Canadian cattle and hogs imported into the United States and subsequently slaughtered there was considered, until the adoption of the COOL measure, to be a U.S. product and was allowed to be marketed as such in the United States. The upset of the competitive relationship between Canadian livestock and U.S. livestock caused by the original COOL measure and continued and aggravated by the amended COOL measure could not reasonably have been anticipated by Canada.

79. The United States tries to confuse the issue by referring to its meat labelling legislation of the U.S. *Tariff Act of 1930*, which concerns only the labelling of imported muscle cuts. Therefore, this Act is irrelevant in terms of Canada's reasonable expectations as to the importation of Canadian cattle and hogs into the United States and their competitive position in the U.S. market.

80. The issue of the origin labelling of muscle cuts derived from imported animals that were subsequently slaughtered in the United States did not arise before 2003, when a Proposed Rule was published under the 2002 Farm Bill, well after the conclusion of the Uruguay Round and the entry into force of the WTO Agreement. It is the rejection of the long-standing principle of substantial transformation in the COOL measure that has upset the competitive position of Canadian cattle and hogs in the U.S. market. There is no merit in the suggestion of the United States that because of the U.S. *Tariff Act of 1930* Canada could have foreseen the COOL measure and its effects on muscle cuts derived from Canadian cattle and hogs slaughtered in the United States. Even under the original and amended COOL measure the United States has continued to apply substantial transformation in respect of imported muscle cuts (Label D) and muscle cuts from animals slaughtered in the United States destined for export from the United States.

81. As to the assertion of the United States that the Panel lacks jurisdiction to deal with the claim of non-violation under GATT Article XXIII:1(b), Canada refers to the words "consistency with a covered agreement" in Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The terms "consistency with a covered agreement" are broad enough to cover a non-violation case because "consistency" can have a meaning that is broader than a violation or infringement of a covered agreement.

82. Article 26.1 of the DSU sets out a series of special rules that apply to non-violation claims under GATT Article XXIII:1(b). The jurisdiction of a compliance panel to make findings of non-violations was not ousted by DSU Article 26.1. To the contrary, the first sentence of DSU Article 26.1 confirms the jurisdiction of "a panel" in general to make such a finding. This applies equally to a panel acting under DSU Article 21.5. Furthermore, from a systemic perspective, there is no good reason why a non-violation claim could not be heard by the Panel, particularly in a case like this, in which a similar claim was made in respect of the original COOL measure in the previous phase of the litigation but no finding was made in respect of that claim.

83. Because the COOL measure was adopted well after the conclusion of the Uruguay Round and the entry into force of the WTO Agreement, Canada is entitled to benefit from the presumption articulated by the panel in *Japan-Film*, at para. 10.79 of its Report, i.e. that a measure that was adopted following the conclusion of tariff negotiations could not have been foreseen by the complaining Member and that it is up to the defending Member to rebut that presumption. Canada has established a *prima facie* case of non-violation, which has not been rebutted by the United States.

V. REQUEST FOR RELIEF

84. Canada requests the Panel to find that the amended COOL measure: (i) continues the violation of Article 2.1 of the TBT Agreement previously found in respect of the original COOL measure; (ii) violates Article III:4 of the GATT 1994; and (iii) violates Article 2.2 of the TBT Agreement. Canada also request the Panel to find that the amended COOL measure nullifies or impairs benefits accruing to Canada under the GATT 1994, within the meaning of Article XXIII:1(b) of that Agreement.

ANNEX B-2**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF MEXICO****I. INTRODUCTION AND BACKGROUND INFORMATION**

1. This proceeding, under Article 21.5 of the DSU, concerns a disagreement as to the consistency with the covered agreements of measures taken to comply with the recommendations and rulings of the DSB in the dispute *United States – Certain Country of Origin Labelling (COOL) Requirements*.

2. Mexico has initiated this proceeding to address the failure of the United States to comply with its WTO obligations in relation to its mandatory "country of origin" labeling system ("COOL") for muscle cuts of beef. A measure that is found to be inconsistent with a core non-discrimination provision cannot later be found by a compliance Panel to be consistent with that obligation if the arbitrary and unjustifiable discriminatory effects of the measure have not been removed, or, as in the present case, have been increased.

3. This dispute was initiated by Mexico in December 2008 and it has been ongoing for more than five years without a positive resolution. It is now 2014, and Mexico's cattle producers face even worse discrimination and trade restrictions than they did in 2010. The Amended COOL Measure still has the effect of requiring all imported cattle to be segregated. The measure continues to discourage the use of imported cattle in meat production and there is still a "COOL discount" imposed on Mexican cattle. There are still restrictions on the number of U.S. processing plants that will accept Mexican cattle and on the days at which Mexican cattle can be delivered.

4. The Panel and Appellate Body ("AB") Reports found that the "COOL Measure", particularly in regard to the muscle cut meat labels, is inconsistent with Article 2.1 of the TBT Agreement because it accords less favourable treatment to imported livestock than to like domestic livestock. The DSB recommended that the United States bring the COOL Measure into conformity with the United States' obligations under the covered agreements.

5. The reasonable period of time was determined through binding arbitration under Article 21.3(c) of the DSU, to be the 23 May 2013. On 12 March 2013, the United States published in the Federal Register a proposed rule to amend the COOL regulations. On 23 May 2013 USDA published the "Final Rule on Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts" (the "2013 Final Rule"), which made only minor changes to the proposed rule. The Final Rule purportedly entered into force on that same date, although the notice published with the rule indicates that the new regulation would not actually be enforced for an additional six months. Although the COOL Statute was part of the measure found by the Panel and the AB to be inconsistent with Article 2.1 of the TBT Agreement, the United States did not modify the Statute. In this sense, the United States has failed to bring the COOL Measure – as a whole – into compliance.

6. The Amended COOL Measure has in fact strengthened the incentive to favour domestic livestock in meat production by imposing higher segregation costs and further adversely affecting competitive conditions in the U.S. market to the detriment of imported livestock. The measure continues to discourage the use of imported cattle in meat production and there is still a "COOL discount" imposed on Mexican cattle.

II. THE AMENDED COOL MEASURE

7. The Amended COOL Measure includes the COOL Statute and the 2009 Final Rule, as amended by the 2013 Final Rule. As stated by the Panel and confirmed by the AB the statutory and regulatory provisions were an integral part of one single COOL measure. The COOL Statute maintains a close legal and substantive link with the 2013 Final Rule and remains an integral part of the Amended COOL Measure.

8. The Amended COOL Measure entailed changes only in the implementing regulations, and not in the COOL Statute. The COOL Statute is contained in the Agricultural Marketing Act of 1946, as amended by the Farm Bill 2002 and the Farm Bill 2008. These provisions were codified in the United States Code ("U.S.C."), in Title 7 (Agriculture), Chapter 38 (Distribution and Marketing of Agricultural Products), Subchapter IV (Country of Origin Labeling) (hereinafter the "COOL Statute").

9. The COOL Statute excludes from the scope of the COOL requirements covered commodities that are used as an ingredient in a processed food item, those that are served or sold in "food service establishments" (e.g., restaurants, cafeterias, etc.). The law also does not apply to retailers who do not sell fruits and/or vegetables (e.g., butcher shops) or to products destined for export.

10. The 2009 Final Rule repeated the requirements from the statute for origin labeling for covered beef products. As described by the Panel, the options were as follows. For a product to be eligible to be labelled as U.S. origin – the animals from which the meat was derived must have been born, raised and slaughtered in the United States (known as "Label A"). For products made from animals born in another country/ies, and raised and slaughtered in the United States, the regulations authorized the use of a label that would say "Product of the United States, Country X and (as applicable) Country Y" (known as "Label B"). For products made from animals born and raised in another country and imported for immediately slaughter, the regulations required that the name of the foreign country be listed first: "Product of Country X and the United States" (known as "Label C").

11. The 2009 Final Rule added a feature to the rules that was not addressed by the statute. Specifically, the commingling provisions allows that muscle cuts processed on the same production day contained meat from animals born in another country and animals born in the United States could be labelled "Product of the United States, Country X, and (as applicable) Country Y." The 2013 Final Rule eliminated these flexibilities.

12. For ground beef, the label must list all countries of origin contained therein or that may be reasonably contained therein. In determining what is considered reasonable, when a raw material from a specific origin is not in a processor's inventory for more than 60 days, that country may no longer be included as a possible country of origin. Mexico is not challenging the application of the Amended COOL Measure to ground beef.

13. The Amended COOL Measure has not changed in relation to the scope of coverage, the definitions of "origin," the labeling requirements for imported meat products, the recordkeeping, verification and enforcement provisions, or the labelling rules for ground meat. As with the original COOL Measure, the Amended COOL Measure applies only to: (i) meat in the form of muscle cuts and ground beef, and not to other edible portions of the animal such as the liver, tongue and head; (ii) only to covered products sold in major grocery stores, and not to such items sold in food service establishments (e.g., restaurants and cafeterias) and smaller retailers, including butcher shops; and does not apply to: (i) covered products that are an ingredient in a processed food item; and (ii) to exported products, which in the case of beef constitutes about 10 percent of total U.S. production.

III. LEGAL ARGUMENT

14. The Amended COOL Measure is inconsistent with the obligations of the United States under Articles 2.1 and 2.2 of the TBT Agreement, and Article III:4 of the GATT 1994. It also nullifies or impairs benefits that accrue to Mexico under the GATT 1994 within the meaning of Article XXIII:1(b). Mexico requests that the Panel rule on each of Mexico's claims and avoid exercising judicial economy. This is necessary to achieve a satisfactory resolution of this dispute.

A. TERMS OF REFERENCE OF THE PANEL

15. It is necessary for the Panel to rule on all of Mexico's claims under Articles 2.1 and 2.2 of the TBT Agreement and Article III:4 of the GATT 1994, its obligations scope and content are not the same.

16. In *US – Tuna II (Mexico)*, the AB clarified the boundaries of judicial economy. It criticized the panel for exercising false judicial economy by not ruling on Mexico's claims under Articles I and III:4 of the GATT 1994 ("panels may refrain from ruling on every claim as long as it does not lead to a "partial resolution of the matter"). This finding is particularly relevant given the differences of Articles 2.1 and 2.2 of the TBT Agreement and Article III:4 of the GATT 1994.

17. If the Panel does not make all findings under Mexico's other claims and there is an appeal, the AB would be unable to complete the analysis of those claims, and there would only be a partial resolution. Taking into account that in the original proceedings the AB was unable to complete the legal analysis under Article 2.2 of the TBT Agreement due to the absence of relevant factual findings by the Panel and of sufficient undisputed facts on the record, the Panel should make clear findings regarding all factors of the Amended COOL Measure and proposed less trade-restrictive alternative measure.

18. The claims advanced by Mexico are raised exclusively in respect of the measure "taken to comply" –"that is, in principle, a new and different measure" –and do not, as the United States alleges, constitute attempts to re-open the adopted findings of the DSB. Further to the original proceedings, the DSB adopted the finding that the original COOL Measure was inconsistent with Article 2.1 of the TBT Agreement, but as for Article 2.2 there were insufficient factual findings and undisputed evidence on the record for the AB to complete the analysis.

19. Similarly, no findings were made in respect of Mexico's claims under Articles III:4 and XXIII:1(b) of the GATT 1994 due to the exercise of judicial economy. None of the claims raised by Mexico against the Amended COOL Measure under Articles 2.1 and 2.2 of the TBT Agreement and Articles III:4 and XXIII:1(b) of the GATT 1994 impinge on the finality of any findings, recommendations, or rulings adopted by the DSB in relation to the original proceedings. Hence, nothing precludes the Panel from considering these claims in respect of the Amended COOL Measure in the present proceedings.

B. THE AMENDED COOL MEASURE IS INCONSISTENT WITH ARTICLE 2.1 OF THE TBT AGREEMENT

20. For a violation of the national treatment obligation in Article 2.1 to be established, three elements must be satisfied: (i) the measure at issue must be a "technical regulation"; (ii) the imported and domestic products at issue must be like products; and (iii) the treatment accorded to imported products must be less favourable than that accorded to like domestic products.

1. Technical Regulation

21. In order to qualify as a "technical regulation" within the meaning of the definition in Annex 1.1, a document must: (i) apply to an identifiable product or group of products; (ii) lay down one or more characteristics of the product; and (iii) require mandatory compliance with the product characteristics.

22. The Amended COOL Measure is a "technical regulation". The AB acknowledged the Panel's finding that the original COOL Measure is a "technical regulation" which is subject to the requirements of Article 2 of the TBT Agreement, and observed that this finding was not challenged in the appeal. For the same reasons as those on which the Panel's finding was based in respect of the COOL Measure, the Amended COOL Measure continues to be a "technical regulation" for the purposes of the TBT Agreement.

2. Like Products

23. The relevant imported and domestic products – in the case of Mexico's cattle, in particular feeder cattle – also continue to be "like". Although the labeling requirements at issue apply to muscle cuts of beef, by its structure and design, the Amended COOL Measure applies indirectly to cattle. The effect of that measure –indeed its core purpose– is to regulate the inputs to muscle cuts –namely, cattle.

24. Before the Panel, the United States did not contest the arguments presented by the complainants that the products at issue are "like" and did not dispute the proposition that the only basis of distinction between the products at issue is that of origin. The factual circumstances of the

relevant imported and domestic products have neither changed nor been affected in any way by the adoption of the Amended COOL Measure. The same kinds of Mexican cattle and the same kinds of U.S. cattle remain the products at issue. Hence, the relevant imported and domestic products continue to be "like".

3. Treatment no Less Favourable

25. The AB has established a two-step approach for assessing whether a technical regulation accords less favourable treatment under Article 2.1: (i) whether the measure at issue modifies the conditions of competition in the relevant market to the detriment of imported products as compared to like domestic products or products originating in any other Member; and (ii) whether any detrimental impact reflects discrimination against the imported products.

a. The Amended COOL Measure Modifies Competitive Opportunities to the Detriment of Imports

26. As explained by the AB in *US – COOL*, when a panel determines whether the operation of a measure, in the relevant market, has a *de facto* detrimental impact on the group of like imported products, its analysis must take into consideration the totality of the facts and circumstances before it, including any implications for competitive conditions discernible from the design and structure of the measure itself, as well as all features of the market at issue that are relevant to the measure's operation within that market.

27. There have been no material changes made in the Amended COOL Measure to the design and structure of the COOL Measure that were found by the Panel and the AB to modify the competitive opportunities in the U.S. market to the detriment of the imported products at issue. The key elements of the design and structure of the measure that operated together to deny competitive opportunities were: (i) the mandatory labelling requirement, (ii) the "born, raised and slaughtered" requirement to determine origin, (iii) the recordkeeping requirement and verification requirement, and (iv) the enforcement requirement. These elements remain integral components of the Amended COOL Measure.

28. Although the Panel and the AB highlighted the recordkeeping and verification requirements of the COOL Measure, it was not these requirements, in isolation, that modified the competitive opportunities. These requirements operate in conjunction with other important elements of the measure explained below, that collectively deny competitive opportunities. Accordingly, as was the case with the original COOL Measure, it is the collective effect of the foregoing four elements of the Amended COOL Measure that continues to deny competitive opportunities.

29. Because the features of the relevant market also remain unchanged, the denial of competitive opportunities for Mexican cattle that the Panel and the AB found to be caused by the COOL Measure has continued unabated under the Amended COOL Measure. Moreover, the available evidence indicates that the Amended COOL Measure is exacerbating the discriminatory impact of the original COOL Measure. The impact of the Amended COOL Measure can be separated into two categories of analysis: (i) the failure to eliminate the discriminatory impact of the original measure and (ii) the increase in discriminatory effects caused by the new regulations.

30. The Panel in the original proceedings undertook a detailed examination of the impact of the COOL Measure on imported livestock. The Panel found that competitive opportunities were reduced in significant ways. No aspect of the new regulations is aimed at eliminating or reducing the burdens and discriminatory impact of the COOL Measure. Thus, it is reasonable to assume that all of these instances of the denial of competitive opportunities continue under the Amended COOL Measure.

31. For the second category of the impact analysis, the three major areas in which increased effects are expected are (i) increased requirements to segregate cattle of different nationalities; (ii) greater reductions in the value of Mexican cattle resulting directly from the Amended COOL Measure; and (iii) heightened disincentives to purchase Mexican cattle.

b. The Detrimental Impact Reflects Discrimination against Imports

32. Based on the two-step approach of the AB in *US-COOL*, the Panel must analyze whether the above-noted detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products. In making this determination, the Panel must carefully scrutinize the particular circumstances of this dispute - the design, architecture, revealing structure, operation, and application of the Amended COOL Measure- and, in particular, whether it is even-handed, in order to determine whether it discriminates against the group of imported products.

c. Relevant Regulatory Distinctions

33. In conducting its assessment of the COOL Measure, the AB first identified the relevant regulatory distinctions made by the COOL Measure, namely the distinctions between the three production steps, as well as between the types of country of origin labels that must be affixed to muscle cuts of beef and pork. The Amended COOL Measure makes the same distinctions among the three production steps.

34. The Panel must examine, based on the particular circumstances of this dispute, whether the distinctions (i.e., born, raised and slaughtered) are designed and applied in an even-handed manner, or whether they lack even-handedness because, for example, they are designed or applied in a manner that constitutes arbitrary or unjustifiable discrimination.

35. The AB found that the COOL Measure is inconsistent with Article 2.1 on the basis that the regulatory distinctions imposed by the COOL Measure amount to arbitrary and unjustifiable discrimination against imported livestock, such that the distinctions could not be said to be applied in an even-handed manner. On this basis, it found that the detrimental impact on imported livestock did not stem exclusively from a legitimate regulatory distinction but, instead, reflected discrimination in violation of Article 2.1. In particular, the AB considered that the manner in which the COOL measure seeks to provide information to consumers on origin, through the regulatory distinctions described above, to be arbitrary, and the disproportionate burden imposed on upstream producers and processors to be unjustifiable.

36. This finding was anchored in the AB's finding that the detrimental impact caused by the COOL Measure could not be explained by the need to provide origin information to consumers. This finding, in turn, was based on the existence of two major information asymmetries between the origin information collected and the origin information communicated to the consumer. First, the COOL Measure did not impose labelling requirements for meat products that provide consumers with origin information commensurate with the type of origin information that upstream livestock producers and processors were required to maintain and transmit. Second, information regarding the origin of all livestock had to be identified, tracked, and transmitted along the chain of production by upstream producers in accordance with the recordkeeping and verification requirements of the COOL Measure, even though a considerable proportion of the beef derived from this livestock was ultimately exempted from the COOL requirements under the exclusions for processed food items, food service establishments, and other establishments that are not a "retailer" within the meaning of the COOL Measure.

d. The Distinctions are not applied in an Even-Handed Manner

37. The factors raised by Mexico that demonstrate a lack of even-handedness relate to the "facts and circumstances related to the design and application of the relevant regulatory distinctions of the COOL Measure" found by the AB.

38. In *US -COOL*, the AB applied its reasoning from *US – Tuna II (Mexico)* when it found that the COOL measure modifies the conditions of competition in the U.S. market to the detriment of imported livestock by creating an incentive in favour of processing exclusively domestic livestock and a disincentive against handling imported livestock (para. 292). The AB concluded that the original COOL Measure was not even-handed because of the two information asymmetries. These information asymmetries are "facts and circumstances" related to the design and application of the "relevant regulatory distinctions". They are not, in themselves, relevant regulatory distinctions.

39. The two information asymmetries identified by the AB demonstrate the expansive nature of the inquiry into the "facts and circumstances" related to the design and application of the relevant regulatory distinctions. In principle, every fact or circumstance that can demonstrate that the relevant regulatory distinctions are not even-handed should be covered by this expansive inquiry. The four additional factors raised by Mexico to demonstrate that the measure is not even handed clearly fall within this scope.

e. Additional factors that demonstrate that the Amended COOL Measure is not Even-Handed

40. In addition to the two information asymmetries, Mexico identified four additional factors to demonstrate that the discrimination is against imported products.

41. First, according to the United States, a key justification for the COOL label is to avoid "consumer confusion" it claims is caused by the USDA's own grade labelling system. To the extent that the Amended COOL Measure is designed to override the positive impression for beef products with a USDA Prime, Choice or Select label when the product is made from imported cattle, the Amended COOL Measure is intentionally discriminatory and not even-handed. Second, the Amended COOL Measure maintains different labelling rules for different forms of beef, namely muscle cuts of beef and ground beef. Specifically, it allows a processor to reference a country of origin on its ground meat label even if the processor has not had ground meat from that particular country in its inventory for the last 60 days or less. Thus, the allegedly needed consumer information is provided with the flexibility of a 60-day inventory allowance for ground beef but with no inventory allowance for muscle cuts of beef. Third, "Trace-back", a less trade restrictive alternative measure is prohibited under the Amended COOL Measure. Such a system would accurately track information on where the livestock contained in beef were born, raised and slaughtered, and it would do so in a less trade restrictive manner. The Amended COOL Measure, like the COOL Measure, employs a certification and audit compliance mechanism that inherently shifts the costs of complying with the COOL Measure to imported cattle. The fact that a trace-back alternative is expressly prohibited demonstrates that the detrimental impact on imported livestock does not stem exclusively from a legitimate regulatory distinction. The exclusion is arbitrary and, because it prohibits the substitution of the certification and audit compliance mechanism with a less trade restrictive mechanism and even the simple consideration of such an alternative, is evidence that the Amended COOL Measure is a disguised restriction on international trade. It is therefore not even-handed.

42. Finally, only a very small sub-set of U.S. consumers is interested in information on the origin of beef. To the extent that the Amended COOL Measure mandates the communication of origin information to a broader group of U.S. consumers, those additional consumers will not pay any attention to the information and will not benefit from it. The only beneficiary of this unnecessary additional coverage is the U.S. cattle industry, which directly benefits from the discriminatory effects of the measure. In this sense, this unnecessary additional coverage is further evidence that the Amended COOL Measure is a disguised restriction on international trade. It is therefore not even-handed.

43. For the above reasons, the detrimental impact that continues to be caused by the Amended COOL Measure cannot be explained or justified by the need to provide origin information to consumers.

C. ARTICLE III:4 OF THE GATT 1994

44. The Amended COOL Measure accords Mexican cattle treatment less favourable than that accorded to U.S. feeder cattle in a manner that is inconsistent with Article III:4. The AB has made clear that the scope and content of the provisions of Article III:4 and Article 2.1 of the TBT Agreement are different. Accordingly, the Panel's decision on Mexico's claim under Article 2.1 will not necessarily resolve Mexico's Article III:4 claim, and it is therefore crucial the Panel's findings on the Article III:4 claim.

45. In *Korea – Various Measures on Beef*, the AB explained that a Member's measure is inconsistent with Article III:4 if three elements are met: (i) the imported and domestic products at issue are "like products"; (ii) the measure at issue is a law, regulation or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use; and (iii) the

imported products are accorded "less favourable" treatment than that accorded to like domestic products.

1. Like Products

46. The imported and domestic products at issue (i.e., Mexican and U.S. cattle) are like products.

2. Laws, Regulations and Requirements Affecting Their Internal Sale, Offering for Sale, Purchase, Transportation, Distribution or Use

47. Article III:4 applies to those "laws, regulations and requirements" that affect "the internal sale, offering for sale, purchase, transportation, distribution or use" of the products at issue. The Amended COOL Measure, which comprises a group of laws and regulations that set out the country of origin labeling requirement, pertains to the category of "laws, regulations and requirements". These instruments include the COOL Statute the 2009 Final Rule (AMS); and the 2013 Final Rule, which "affect the internal sale, offering for sale, purchase, transportation, distribution or use" of feeder cattle.

3. Less Favourable Treatment

48. The collective effect of the four elements of the Amended COOL Measure identified above (i.e., the mandatory requirement, the born/raised/slaughtered requirement, the recordkeeping and verification requirement, and the enforcement requirement) continue to deny competitive opportunities to imported cattle. In particular, the failure of the Amended COOL Measure to eliminate the various discriminatory effects of the original measure and the increase in discriminatory effects caused by the new regulations.

49. In the original proceedings, the Panel observed that in the absence of a large share of US consumers willing to pay a price premium for country of origin labelling, the cheapest way to comply with the COOL Measure is to process only US-origin livestock, all other things being equal, that the other possibility is to continue processing imported livestock through segregation, which entails additional costs in virtually all cases and that either process configuration is likely to cause a decrease in the volume and price of imported livestock. Those effects continue under the Amended COOL Measure, and indeed are becoming worse.

50. The Amended COOL Measure accords less favourable treatment to Mexican cattle compared to U.S. cattle, providing U.S. cattle with a competitive advantage in the U.S. market.

4. Article 2.1 of the TBT Agreement and Article III:4 of the GATT

51. The United States and the European Union argue that the meaning of "treatment no less favourable" should be the same in Article 2.1 and Article III:4. In their view, the two-step approach to determining treatment no less favourable under Article 2.1 should be applied when interpreting "treatment no less favourable" under Article III:4. This interpretation is incorrect.

52. In the recent disputes *US – Clove Cigarettes*, *US – Tuna II* and *US – COOL*, the AB provided useful guidance on the relationship between the non-discrimination provisions – Article 2.1 and Article III.4 –. The AB noted that both provisions maintain some close similarities in terms of their language, but at the same time recognized that "the scope and the content" of both provisions are not the same.

53. Mexico's interpretation of Article III:4 follows the interpretation developed in a long series of WTO and GATT 1947 reports i.e., a measure confers less favourable treatment under Article III:4 where it modifies conditions of competition in the relevant market to the detriment of imported products compared to like domestic products. Therefore, in order to analyze whether the amended COOL measure accords "less favorable treatment" to imported livestock under GATT Article III:4, the only relevant inquiry is whether the measure modifies the conditions of competition in the relevant market to the detriment of the group of imported products vis-à-vis the group of domestic like products.

D. THE AMENDED COOL MEASURE IS INCONSISTENT WITH ARTICLE 2.2 OF THE TBT AGREEMENT

54. In ruling on the claims raised by Canada and Mexico under Article 2.2 in the original proceedings, the Panel found that the COOL measure is "trade-restrictive"; that the objective pursued by the United States through the COOL measure is "to provide consumer information on origin" and that this objective is "legitimate" within the meaning of Article 2.2. The AB confirmed these findings.

55. Ultimately, the Panel found that the COOL measure does not fulfil the identified objective within the meaning of Article 2.2 and therefore violated Article 2.2. The AB reversed the ultimate finding and attempted to complete the legal analysis under Article 2.2, but found it could not do so because the Panel had not made relevant factual findings and there were not sufficient uncontested facts.

56. In this proceeding, therefore, it is crucial that the Panel make "clear and precise" findings, in particular, with respect to: (i) the Amended COOL Measure: the degree of its contribution to the objective of providing consumers with information on origin, the degree of its trade-restrictiveness, the relative importance of the common interests or values furthered by the challenged measure, the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the legitimate objective; and (ii) each proposed alternative measure: the degree of its contribution to the objective of providing consumers with information on origin, taking account of the risks non-fulfilment would create, the degree of its trade-restrictiveness and whether it is reasonably available.

57. The United States misinterprets the Panel's and the AB's findings when it states that the objective pursued through the original COOL Measure was to provide consumers with information on origin, namely, with respect to meat, where the animal was born, raised and slaughtered. This misinterpretation should be rejected. The original Panel and the AB found that the objective pursued by the United States through the COOL Measure was "to provide consumer information on origin".

58. The new United States' argument that the objective of the Amended COOL Measure is specifically to provide information on where the livestock from which muscle cuts are produced were born, raised and slaughtered is contradicted by the facts, including the Amended COOL Measure itself. The United States attempts to redefine the objective to an artificially narrow and self-serving one.

1. The Two-Step Necessity Test under Article 2.2 of the TBT Agreement

59. Article 2.2 requires a two-step analysis: first, examination of the measure at issue and second, comparison of this measure with the identified alternative measures. The Panel should objectively examine the trade-restrictiveness of the Amended COOL Measure to determine whether it is "necessary", in itself and independently of less trade restrictive alternative measures. Before moving to the second step of the legal analysis and conducting an assessment of each proposed alternative measure, the Panel should assess the Amended COOL Measure.

a. Application of the First Step of the Necessity Test to the Amended COOL Measure

60. Under the first step of the necessity test, the following factors are relevant to the weighing and balancing analysis in respect of the Amended COOL Measure: (i) the "relative importance" of the interests or values furthered by the Amended COOL Measure; (ii) the degree of contribution made by the Amended COOL Measure to the legitimate objective at issue; (iii) the trade-restrictiveness of the Amended COOL Measure; and (iv) the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the United States through the Amended COOL Measure. In conducting this holistic analysis, the Panel should find that the trade restrictiveness of the Amended COOL Measure is not necessary because it is disproportionate to the risk non-fulfilment would create.

61. The interests and values furthered by the Amended COOL Measure fall on the low end of the spectrum of importance. The relative importance of the provision of consumer information is

substantially lower than protecting the environment or protecting human beings from health risks, both of which are vital and important in the highest degree; and protecting public morals, which a panel observed ranks among the most important values or interests pursued by Members as a matter of public policy. Importantly, the interests or values furthered by the Amended COOL Measure are not *common*. The USDA has acknowledged that there is "interest by *certain* U.S. consumers in information disclosing the countries of birth, raising and slaughter on muscle cut product labels".

62. The following facts demonstrate that the Amended COOL Measure has a very low degree of contribution to the objective of providing consumer information on origin: (i) the Panel and AB already determined that the labelling scheme for muscle cuts under the COOL Measure did not provide clear and accurate information, (ii) the Amended COOL Measure does not apply to all beef sold within the United States because the measure's labelling requirements do not apply to all entities that sell beef or to all beef products, the labeling requirements apply only to a very limited portion of the meat products produced in the United States – about 18 to 21 percent, (iii) like the COOL Measure, the Amended COOL Measure continues to provide unclear, imperfect, or inaccurate information to consumers, the information conveyed by the point of production information will not in all cases be accurate. It is questionable whether consumers will understand the meaning of a label that says "brn in Mexico, rsd and slghtrd in US". The COOL information is normally printed in very small typeface on labels, and often is on the bottom (rear) of the packaging; (iv) Mexico is not aware of any information published by USDA to educate consumers on what the COOL labelling information means.

63. The Amended COOL Measure does nothing to eliminate these negative effects on competitive opportunities of imported livestock. The U.S. meat processing industry has stated that the Amended COOL Measure, through its prohibition of commingling, will increase the burdens of using imported cattle even more. There will be increased burdens and effects relating to the need to segregate, the application of the "COOL discount" to Mexican cattle, and the disincentive to purchase Mexican cattle.

64. The risks at issue and the consequences that may arise from non-fulfilment of the objective are certainly very minor, in light of the following facts: (i) the COOL Measure is not a food safety measure, only a small percentage of U.S. consumers are even aware of the measure, (ii) the meaning of the labels is unclear, (iii) consumers value a label that says "Product of North America" at least as much as a label that says "Product of United States, (iv) the COOL Measure has not affected sales of meat products, (v) USDA itself sees little economic value in the COOL Measure and the Amended COOL Measure, (vi) USDA has reported that a comprehensive analysis of consumer reaction to COOL requirements for shrimp – implemented in 2005 – shows that COOL had no effect on consumer behavior.

65. In conducting the first step of the necessity test, it is clear from these factors that the trade-restrictiveness of the Amended COOL Measure is disproportionate to the risks that non-fulfilment would create. The fact that the Amended COOL Measure might make some contribution to the objective does not outweigh the other relevant factors. Accordingly, the trade-restrictiveness of the Amended COOL Measure is unnecessary and it is inconsistent with Article 2.2 of the TBT Agreement.

b. Application of the Second Step of the Necessity Test to the Amended COOL Measure: Evaluation of the Alternative measures proposed by Mexico

66. If the Panel finds that the trade-restrictiveness of the Amended COOL Measure is necessary, under the second step, all relevant factors of each alternative measure are considered and a comparison is undertaken between the challenged measure and each possible alternative measure. The Panel must consider whether the proposed alternative is less trade restrictive, whether it would make an equivalent contribution to the relevant legitimate objective, taking account of the risks non-fulfilment would create, and whether it is reasonably available.

67. As in the case of the COOL Measure, alternative measures exist that are less trade-restrictive than the Amended COOL measure, make an equivalent contribution to the legitimate objective of providing consumer information on origin taking account of the risks non-fulfilment would create, and are reasonably available to the United States. The alternatives are: (i)

mandatory labeling based on a substantial transformation rule of origin combined with voluntary labelling of specific information (i.e., born, raised and slaughtered); (ii) mandatory labeling based on the 60-day inventory allowance rule currently used for ground beef; (iii) mandatory labelling of more specific information (i.e., born, raised and slaughtered) using a "trace-back" system under which the precise source of each animal and muscle cut must be traceable through the production process, and (iv) a state/province labeling presented by Canada and adopted by Mexico.

68. The first proposed alternative will provide all consumers with mandatory required information on the origin of beef products based on the substantive transformation rule and those consumers, who are interested in further details, with voluntary information on where livestock were born, raised and slaughtered. Under this alternative, the exemptions of products (i.e., processed food items) and market segments (i.e., beef sold in food service establishments and retailers) are eliminated, giving the mandatory labelling element of this alternative labelling a broader scope of application than the Amended COOL Measure. This alternative measure is not trade restrictive.

69. It would have a greater contribution to the provision of origin information to consumers than the Amended COOL Measure. At the very least, through the combination of mandatory and voluntary labelling requirements, this alternative measure would make an equivalent contribution to the objective of providing consumers with information on origin, taking account of the risks non-fulfilment would create. A weighing and balancing of the relevant factors of both the Amended COOL Measure and the alternative measure demonstrates that compared to the challenged measure, this alternative is less-trade restrictive and more proportionate to the risks non-fulfilment would create. The voluntary labelling element of this alternative is reasonably available and is used in the United States in many other contexts.

70. The second proposed alternative is to extend the mandatory country of origin labelling rule that is currently applied to ground beef to apply to muscle cuts of beef and to processed food items made of beef. Under this alternative, the exemptions of products (i.e., processed food items) and market segments (i.e., beef sold in food service establishments and small retailers) are eliminated, giving the mandatory labelling a broader scope of application. For ground beef, the label must list all countries of origin contained therein or that may be reasonably contained therein. In determining what is considered reasonable, when a raw material from a specific origin is not in a processor's inventory for more than 60 days, that country may no longer be included as a possible country of origin. By extending this rule to muscle cuts of beef and processed food items, such products must be labeled in a manner that lists all countries of origin contained therein or that may be reasonably contained therein in accordance with the 60-day inventory allowance. The COOL rules for ground beef are less trade restrictive than the Amended COOL Measure for muscle cuts, because they provide more flexibility to cattle producers and meat processors. Since the flexibility relates to the inputs in meat processing, the same beneficial effects will occur if the ground beef rules are applied to muscle cuts and processed food items. This alternative is reasonably available. The ground beef requirement fulfils this objective for 40 percent of the beef products consumed in the United States, and there is no objective basis for distinguishing between ground beef and muscle cuts and processed food items in this context.

71. The third proposed alternative measure is a trace-back system. During the original proceedings, Mexico and Canada proposed a trace-back system as a reasonably available less trade-restrictive alternative. This alternative would accurately and comprehensively fulfil the objective of the COOL Measure and yet not discriminate against imports in the sense that it would eliminate the option of restricting trade in imports and as well as the option of discounting the price of imports as the most commercially viable option to comply with the Amended COOL Measure. Thus, costs of the mandatory labelling would be spread evenly throughout the market. The employment of a trace-back system to meet the objectives of the COOL measure is discussed in a paper written by Dermot J. Hayes and Steve R. Meyer entitled *Impact of Mandatory Country of Origin Labeling on U.S. Pork Exports* ("Hayes and Meyer Paper"). Although it focuses on pork, its analysis and conclusions apply equally to beef. The authors discuss this system as a potential method to implement COOL.

72. In Mexico's view, if there were trace-back system in place, there would be no incentive to exclude imported Mexican cattle or shift the cost of compliance solely to Mexican animals. A mandatory trace-back alternative will provide detailed information on where the animals were born, raised and slaughtered on all beef covered commodities. The Hayes and Meyer Paper

suggests that trace-back is technically and economically feasible in the United States and, therefore, is a reasonably available alternative. Trace-back systems are used in the EU, Korea, Japan and other countries. For example, Uruguay has implemented a comprehensive trace back system which allows tracking livestock and the meat derived from those animals. The Mexican system provides all the information needed for a trace-back system for Mexican cattle. The applicable rules require that cattle exported to the United States bear an ear-tag that can be used to trace the animal, including the State of origin, the ranch which the cattle belongs to, and complete information about its producer.

73. Finally, Canada presented a fourth alternative measure which involves state/province labelling. Mexico acknowledged to the Panel that Canada presented this fourth alternative measure and Mexico endorsed and adopted this alternative by agreeing with Canada's submissions on this alternative and the fact it (i) would provide a greater contribution to the objective than the Amended COOL Measure, (ii) would be less trade restrictive and (iii) is reasonably available. The arguments and evidence that were endorsed and adopted by Mexico were presented by Canada in its Second Written Submission. Given that Mexico and Canada have separately filed submissions rather than a single joint submission, Mexico endorsed and adopted the arguments and evidence at the first available opportunity in its Opening Statement to the Panel. Thus, Mexico is clearly entitled to endorse and incorporate the arguments and evidence of Canada pertaining to the third and fourth alternative measures.

74. A weighing and balancing the relevant factors of both the Amended COOL Measure and the alternative measure demonstrates that the Amended COOL Measure is more trade-restrictive than necessary within the meaning of Article 2.2 and is, therefore, inconsistent with that provision.

2. Allocation of the Burden of Proof under Article 2.2

75. It is clear that, in addition to making a prima facie case that the challenged measure is more trade restrictive than necessary to achieve the contribution it make to the legitimate objective, taking account of the risks non-fulfilment would create, a complainant may seek "to identify" a possible alternative measure. Mexico's burden is simply to "identify possible alternatives", which it has done so. In this dispute, Mexico has identified three possible alternative measures that are less trade restrictive, make an equivalent contribution to the relevant objective, taking account of the risks non-fulfilment would create, and are reasonably available. The 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. The United States failed to do so.

3. The Test of Article 5.6 of the SPS Agreement is Not Applicable to Article 2.2 of the TBT Agreement

76. As in the original proceedings, the United States attempts to incorporate Article 5.6 of the SPS Agreement into Article 2.2 of the TBT Agreement, by arguing that the test of Article 2.2 was equivalent to Article 5.6 and that an alternative measure should be *significantly* less trade restrictive as required by footnote 3 of Article 5.6. These arguments failed in the original proceedings. The test described in paragraph 378 of the AB Report clearly indicates that: (i) Article 2.2 requires evaluation of the challenged measure, and in some cases a comparative analysis with a proposed alternative; and (ii) when comparing with an alternative measure, it may be relevant to consider "whether the proposed alternative is less trade restrictive".

77. Second, Article 2.2 neither contains the word "significant" nor a footnote similar to footnote 3 to Article 5.6 of the SPS Agreement. Third, Article 1.4 of the SPS Agreement provides that the different regimes, rules and the scope of application of it and that of the TBT Agreement are mutually exclusive, and therefore provisions of the SPS Agreement cannot be incorporated into the provisions of the TBT Agreement. Fourth, with regard to the letter from Peter D. Sutherland to John Schmidt on December 15, 1993, offered by the United States, Mexico considers that it is not relevant because there is no footnote in Article 2.2 that clarifies the meaning of the phrase "more trade-restrictive than necessary". Such letter cannot be considered as a supplementary means of interpretation within the meaning of Article 32 of the *Vienna Convention on the Law of Treaties*.

E. ARTICLE XXIII:1(B) (NON-VIOLATION NULLIFICATION OR IMPAIRMENT) OF THE GATT 1994

78. The Amended COOL Measure nullifies or impairs benefits accruing to Mexico based on tariff concessions made by the United States in respect of live cattle at the end of successive multilateral rounds of trade negotiations, in a manner that is inconsistent with Article XXIII:1(b).

79. The Panel in *Japan – Film* dispute summarized the elements of a non-violation nullification and impairment claim, and stated that in order to make out a cognizable claim under Article XXIII:1(b) the complaining party must demonstrate the following three elements: (i) an application of any measure by a WTO Member; (ii) a benefit accruing under the relevant agreement; and (iii) nullification or impairment of the benefit as a result of the application of the measure.

80. The first element relates to the phrase "the application by another Member of any measure", the word "any" indicates that Article XXIII:1(b) does not distinguish between, or exclude, certain types of measures. The United States enacted and implemented the COOL Measure and the Amended COOL Measure through a series of measures including statutory provision, regulations and other implementing guidance, directives of policy announcements issued in relation to those measures. The application of such measures by the United States meets this element of Mexico's claim under Article XXIII:1(b).

81. The second element requires demonstrating the existence of a "benefit accruing" to the complaining Member. This benefit can be measured in terms of "legitimate expectations" of improved market-access opportunities. An expectation is considered to be legitimate if the challenged measure could not have been "reasonably anticipated" at the time the tariff concession was negotiated.

82. Although the tariff concessions between Mexico and the United States are currently based on the NAFTA, Mexico is entitled under Article XXIII:1(b) to expect market access to the United States for its feeder cattle that is related to the tariff concessions that would apply, on a Most-Favoured-Nation (MFN) basis, between Mexico and the United States under the WTO Agreement. The extent of the restrictions on market access resulting from the Amended COOL Measure clearly could not have been expected. Mexico was entitled to expect for exports of its feeder cattle.

83. The third required element is that the benefit accruing to the WTO Member (e.g., improved market access from tariff concessions) is nullified or impaired as the result of the application of a measure by another WTO Member. In this sense, the Panel affirmed that it must be demonstrated that the competitive position of the imported products subject to and benefitting from a relevant market access (tariff) concession is being upset by ("nullified or impaired ... as the result of") the application of a measure not reasonably anticipated. Given the low U.S. MFN rates in respect of feeder cattle, Mexico reasonably expected that its access to the U.S. market for feeder cattle would be unrestricted. The Amended COOL measure drastically restricts this access in a manner that could not have been anticipated at the time of the conclusion of the Uruguay Round.

F. MEXICO'S CLAIM UNDER ARTICLE XXIII:1(B) OF THE GATT 1994 IS WITHIN THE SCOPE OF THE PANEL'S TERMS OF REFERENCE

84. Mexico's non-violation nullification or impairment ("NVNI") claim raised under Article XXIII:1(b) is within this Panel's terms of reference in these Article 21.5 proceedings. The purpose of Article 21.5 proceedings is to resolve, on an expedited basis, "disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" adopted by the DSB. This mandate encompasses claims by the complaining party that a measure "taken to comply" is inconsistent with a covered agreement. A measure "taken to comply" that results in the non-violation nullification or impairment of any benefit which accrues to a party under the GATT 1994 is no less inconsistent with the GATT 1994 than a measure which results in a violation of one or more provisions. The mere existence and operation of Article XXIII:1(b) indicates that the application of a measure does not need to result in a violation of a provision of the GATT 1994 to be considered inconsistent with the GATT 1994 if it nullifies or impairs a benefit accruing under the GATT 1994. Hence, a claim to this effect under Article XXIII:1(b) is entirely within the scope of Article 21.5 proceedings.

85. Article 26.1 of the DSU clearly establishes that a panel or the AB has jurisdiction to consider and resolve claims under Article XXIII:1(b), "whether or not" the measure at issue conflicts with the provisions of the relevant covered agreement, and provides additional guidance for circumstances in which the measure at issue does not conflict with the provisions of the relevant covered agreement.

IV. CONCLUSION

86. As Mexico has shown, the Amended COOL Measure is inconsistent with the national treatment obligation under 2.1 of the TBT Agreement and Article III:4 of the GATT, also constitutes an unnecessary obstacle to trade in violation of Article 2.2. of the TBT Agreement, and nullifies and impairs benefits accruing to Mexico under the GATT 1994, within the meaning of Article XXIII:1(b). United States has not brought itself into compliance with its obligations through the adoption of the Amended COOL Measure.

ANNEX B-3**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES****A. Complainants Have Failed to Establish That the Amended COOL Measure Is Inconsistent with Article 2.1 of the TBT Agreement**

1. The United States has taken a measure to comply that directly addresses the concerns in the Appellate Body reports. The amended COOL measure increases the information provided and sets out what is in effect a single label – disclosing the country of birth, raising, and slaughter – for the three categories of meat that impact complainants' livestock imports (*i.e.*, categories A, B, and C). The single label affixed to those categories of meat is even-handed. As such, any detrimental impact resulting from the amended COOL measure now stems exclusively from legitimate regulatory distinctions.

2. What complainants primarily contest, however, is a series of regulatory distinctions that has nothing to do with the detrimental impact at all. The sum result of complainants' arguments appears to be an attempt to convince the Panels that proof of a detrimental impact alone proves a technical regulation to be discriminatory, despite the Appellate Body's statements to the contrary. And, of course, this insistence that a detrimental impact is enough to prove a technical regulation discriminatory is the foundation of complainants' claim under GATT Article III:4.

3. Complainants' approach, if successful, would render a great many regulatory measures vulnerable to WTO challenge for the first time. All a complainant would need to prove to successfully make a national treatment claim would be that a majority of the domestic producers satisfy a particular standard, while a majority of the complainants' producers do not, a fact pattern that surely repeats itself many times over throughout the WTO membership.

4. However, the Appellate Body has confirmed that technical regulations are not discriminatory where they draw legitimate, even-handed regulatory distinctions, even where they disproportionately impact the complaining party's producers. And complainants' arguments fail on this very point. The regulatory distinctions made in the amended COOL measure are, in fact, legitimate distinctions. In particular, the label that is now affixed to A, B, and C meat explicitly references the location where each of the three production steps took place, and provides equally meaningful and accurate origin information for all three categories of meat. Moreover, because the 2013 Final Rule eliminates the allowance for commingling, the information provided for each of the three categories of meat is equally accurate.

5. Complainants thus fail to prove their case that any detrimental impact "reflect[s] discrimination." Accordingly, the amended COOL measure does not accord less favorable treatment to imported livestock within the meaning of Article 2.1 of the TBT Agreement.

1. The Complaining Parties Have Failed to Show That Any Detrimental Impact Caused by the Amended COOL Measure Does Not Stem Exclusively From Legitimate Regulatory Distinctions**a. DSB Recommendations and Rulings Regarding Legitimate Regulatory Distinctions**

6. To prove that the measure accords less favorable treatment, and therefore discriminates *de facto* against imports from the complaining parties, complainants must prove that it "modifies the conditions of competition in the relevant market to the detriment of the group of imported products *vis-à-vis* the group of like domestic products." The Appellate Body has further clarified that a party must demonstrate (1) that the measure has a "detrimental impact on imported livestock;" and, if so, (2) that this detrimental impact does not stem exclusively from a legitimate regulatory distinction, but rather reflects discrimination or a lack of even-handedness. While the parties agree on that general framework, they appear to agree on little else. In particular, the parties disagree as to (1) which regulatory distinctions are relevant to the Article 2.1 analysis, and (2) what analysis should be performed with regard to the relevant regulatory distinctions.

7. As to the first point, the Appellate Body has stated that because "technical regulations are measures that, by their very nature, establish distinctions between products according to their characteristics, or related processes and production methods," not every distinction a measure makes is relevant to the inquiry. Rather, "in an analysis under Article 2.1, we *only* need to examine the distinction that accounts for the detrimental impact on [imported] products as compared to [domestic] products." As to the second point, the Appellate Body has also been clear that a panel should examine whether the regulatory distinction is "even-handed" or not.

8. Neither complainant incorporates this analytical framework into their arguments. While Canada "agrees that the regulatory distinction that must be examined to determine *the consistency* with TBT Article 2.1 is the distinction that *causes* the detrimental impact on imported products," Canada argues that that is not the entirety of the analysis. Rather, Canada contends that "panels are not precluded from considering elements of the challenged technical regulation that do not specifically cause the detrimental impact but nevertheless demonstrate *that the relevant regulatory distinction(s)* reflect discrimination." But the test is not whether the relevant regulatory distinctions reflect discrimination, but whether *the detrimental impact* reflects discrimination – a point that the Appellate Body has made repeatedly. Canada provides no support for its preferred analytic framework. Mexico ignores this part of the analysis entirely.

9. Moreover, complainants largely ignore whether the regulatory distinctions they focus on are even-handed or not, preferring to criticize the distinctions as not constituting "significant" enough change, or being "arbitrary," or that the information is not "intelligible." In so arguing, they appear to apply the wrong test. The test under Article 2.1 is *not* whether another Member thinks that the measure could be designed better, or more clearly, or otherwise improved upon. The test is whether the measure treats imported products less favorably than like products of another origin. And as the Appellate Body has explained, this means whether any detrimental impact on imported products stems exclusively from legitimate regulatory distinctions.

10. The question then is whether the regulatory distinctions being made are legitimate, not whether the technical regulation could, in the opinion of another Member, be better designed.

b. The Complainant Parties Fail to Establish a *Prima Facie* Case That Any Detrimental Impact Caused by the Amended COOL Measure Does Not Stem Exclusively From Legitimate Regulatory Distinctions

11. First, Canada wrongly argues that the B and C labels have the "potential [for] inaccuracy" where the animal "spends as little as 15 days in the United States" and where animals "spend a short time in Canada prior to export for slaughter in the United States."

12. Distinguishing between the three stages of production necessarily entails defining when each stage ends. And any definition will always be open to criticism that it could be done differently or better, or that product on one side of the defined line between stages is not sufficiently distinct from product on the other. Complainants must rely on exotic hypotheticals because the new labeling requirements do, in fact, provide the same accurate and meaningful origin information on A, B, and C categories of meat resulting from animals actually being produced in the three countries. But as to animals *actually traded*, neither complainant disputes that the origin information provided regarding the meat produced from feeder cattle actually traded is inaccurate (*e.g.*, "Born in Mexico, Raised and Slaughtered in the U.S."), and certainly not less accurate than the information provided for A category meat. Similarly, Canada makes no claim that the origin information provided for fed cattle actually traded (*i.e.*, "Born and Raised in Canada, Slaughtered in the United States") is inaccurate, and certainly not less accurate than the information provided for A category meat. The analysis should end there. The fact that complainants are forced to rely on hypothetical scenarios not related to actual products being traded and sold reveals that there is no basis for the complainants' *de facto* claims.

13. Of course, no actual labeling situation will be able to address every hypothetical a clever lawyer can invent, or every unusual circumstance that may occur. Rather, the labelling system should address what is happening in the real world. And the amended COOL measure does just that. The origin information regarding meat produced from all (or virtually all) animals *actually traded* by Canada and Mexico is *as meaningful* and *as accurate* as the origin information regarding A meat, and neither Canada nor Mexico dispute that fact.

14. Second, Canada (but not Mexico) contends that because B and C meat only constitute approximately a third of the COOL labeled meat, any "new accurate information conveyed by the amended COOL measure cannot be regarded as significant." By adding the production steps to the label and eliminating the allowance for commingling, the amended COOL measure provides a single label that provides for the same level of origin information for A, B, and C category meat, which constitutes approximately 99.7 percent of COOL labeled muscle cuts sold in the United States. The United States has thus directly responded to the concerns in the Appellate Body reports regarding the original COOL measure, which was not just limited to the B and C labels, but included a concern that the previous A label did not explicitly list the three production steps either.

15. Third, Mexico (but not Canada) again argues that the labels being used by retailers to provide origin information (both in terms of the size of the font and the abbreviations allowed) does not provide "information that is accessible by or intelligible to consumers." Mexico makes no claim that the label affixed to the B or C meat is less intelligible than the label affixed to A meat. Indeed, Mexico and the United States agree that a "single label" is now used to provide origin information regarding A, B, and C category COOL-labelled meat. Accordingly, we understand Mexico to concede that the design and application of the label itself is even-handed. Further, Mexico does not establish a *prima facie* case by merely making bare allegations that it "submits" are true.

16. Fourth, Mexico criticizes the six month period of education and outreach that USDA provided for in the 2013 Final Rule, although it remains unclear what legal significance Mexico attributes to its argument. However, Mexico does not appear to contest that the six month period of education and outreach is even-handed (if, it could even be considered a regulatory distinction at all). Mexico further concedes that retailers are complying with the new rule and provides photographs from retailers to prove this point.

17. Fifth, Canada argues, incorrectly, that the elimination of the commingling will dramatically increase the record keeping requirements and the overall detrimental impact on Canadian livestock imports. To be clear, the United States has always taken the position that the allowance of commingling reduced costs for those producers that handle both U.S. origin and mixed origin animals or meat. However, as discussed in the U.S. First Written 21.5 Submission, only *three* beef processors, and *zero* pork processors, stated for the record that they commingle different origin animals. Accordingly, the administrative record of the 2013 Final Rule suggests that a limited number of processors have been actually making use of this flexibility, and that the adjustment costs due to the elimination of commingling are low. Notably, Canada puts forward no evidence that any additional beef processors (other than three already on the record) or any pork processors at all have been commingling.

c. None of the Complaining Parties' Other Criticisms Undermines the Conclusion That Any Detrimental Impact Caused by the Amended COOL Measure Stems Exclusively From Legitimate Regulatory Distinctions

18. First, it is clear that the D Label is affixed to imported *meat*, and therefore does not cause any detrimental impact on imported *livestock*. Neither complaining party contests this fact. It should be quite clear, therefore, that any examination of the D Label will simply not explain whether the detrimental impact on imported livestock reflects discrimination. Moreover, Canada does not even allege – much less prove – that the content of the D Label disadvantages Canadian producers while benefiting U.S. producers. Indeed, Canada (and Mexico) believe the opposite – that it is categories A, B, and C that disadvantage their producers, not Category D.

19. Canada also argues that Label D has the "potential to mislead consumers" where the meat was produced from animals that were born and raised in a different country than the exporting one. Yet imported meat is typically – if not always – produced entirely within the exporting country as few countries around the world import significant quantities of live cattle and hogs, and even fewer represent major beef or pork suppliers to the United States. Canada is further unable to say whether any meat derived from those imported cattle is actually exported back into the United States (much less sold as D labeled-meat by a retailer). Accordingly, Canada is forced to argue that the D Label merely has the "potential to mislead consumers" because Canada has *no* evidence that the Canadian D labeled meat (*i.e.*, "Product of Canada") is *actually* misleading. It is clear that requiring the additional production step information to be provided would not provide the consumer much, if any, additional origin information as all (or virtually all) imported meat sold

by U.S. retailers will be derived from animals born, raised, and slaughtered in the country denoted on the label (e.g., "Product of Canada"). In other words, "Product of Canada" means, for all practical purposes, "born, raised, and slaughtered in Canada."

20. Second, complainants argue that the three exemptions from the COOL measure prove that the amended COOL measure is discriminatory in that the detrimental impact does not stem exclusively from legitimate regulatory distinctions. Neither party asserts that the design and operation of the three exemptions has any nexus to any detrimental impact. In fact, Canada affirmatively argues that such exemptions do not cause the detrimental impact at all. As such, it would appear that all parties agree with the original panel's finding that the "exact proportion or magnitude of the exceptions and exclusions is irrelevant" for purposes of the detrimental impact analysis. It is also clear that the exemptions themselves are perfectly even-handed. That is to say, nothing in the design or operation of the exemptions that define the scope of the amended COOL measure disadvantage Canadian and Mexican livestock exports. Mexico also argues that the exemptions prove that the amended COOL measure itself is not even-handed. But, Mexico, like Canada, fails to explain why a measure that required small businesses and restaurants to label their muscle cuts would make the measure, as a whole, more even-handed in the measure's treatment of imported livestock on the one hand and U.S. livestock on the other. The fact of the matter is that it would not. Complainants also argue that the "disconnect" between the amended COOL measure's "very limited coverage" and the upstream costs of the amended COOL measure proves that the detrimental impact reflects discrimination. Of course, neither Canada nor Mexico can explain why exemptions that do not cause the detrimental impact, and are, themselves, entirely even-handed, mean that the measure is discriminatory. The United States, of course, disagrees with this approach – complainants must prove that the detrimental impact reflects discrimination because it does not stem exclusively from legitimate regulatory distinctions. Moreover, the coverage of COOL is hardly limited. The measure constitutes a major policy decision to require over 30,000 grocery stores and other retailers throughout the United States to provide country of origin information to their customers on the \$38.5 billion worth of beef and \$8.0 billion worth of pork they sell annually.

21. Third, complainants argue that the rules regarding ground meat (Category E) prove that rules for muscle cuts are discriminatory without providing any basis for that argument. In fact, the original panel has already found that the ground meat labeling rule does not have a detrimental impact on imported livestock. As such, it simply cannot be that any detrimental impact from the COOL measure stems from the ground meat labeling rules. Further, USDA created the 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. Canada also contends that while it "is not challenging the consistency of the ground meat label," it also claims that the ground meat label provides origin information that "is far less detailed than that which is required to be tracked and verified," and, therefore, not legitimate. The ground meat rule does not cause a detrimental impact and therefore it is impossible to say that the detrimental impact does not stem from a legitimate regulatory distinction because the ground meat rule provides a different level of information. Moreover, nothing about the ground meat rule could be said not to be "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.

22. Mexico appears to argue that the ground meat rule does not provide consumer information on origin. Mexico is wrong, of course. The ground meat rule does provide consumer information on origin, but does so differently than the rules governing muscle cuts, a point that Mexico itself concedes in the final sentence of its argument. Mexico also argues that it is "arbitrary" for the United States to set forth different origin labeling rules for ground meat than for muscle cuts. But Article 2.1 disciplines discriminatory measures, not arbitrary measures, and as discussed above, the analysis of whether a measure provides less favorable treatment to imported products does not call for an analysis of arbitrariness – standing alone – as Mexico appears to contend.

23. Fourth, complainants argue that the statutory prohibition of USDA implementing a "farm to fork" traceability regime proves that the amended COOL measure is discriminatory. This statutory provision (7 U.S.C. § 1638A(f)(1)) is an unchanged part of the amended COOL measure, which does not cause any detrimental impact, and, as such, is not relevant for purposes of this analysis.

24. Canada now argues that "the prohibition [of a "farm to fork" traceability system], coupled with a mandate for the Secretary of Agriculture to audit retailers to verify compliance, necessitates the implementation of the amended COOL measure's labelling requirements through the system of recordkeeping and verification that is the cause of the detrimental impact on Canadian livestock." Mexico appears to take a similar position, contending that "the prohibition is a disguised restriction on international trade," and establishes that the entire measure "is not even-handed." Again, the prohibition contained in 7 U.S.C. § 1638A(f)(1) is not the cause of the detrimental impact. The original panel made no such finding, and neither did the Appellate Body. Rather, the Appellate Body determined that the detrimental impact stemmed from the distinctions between the production steps and the distinctions between the different types of labels. Those distinctions are set out in other parts of the statute and the 2009 Final Rule, and it is those parts – not 7 U.S.C. § 1638A(f)(1) – that are relevant to this inquiry.

B. Complainants Have Failed To Establish That the Amended COOL Measure is Inconsistent with Article III:4 of the GATT 1994

25. Despite arguing repeatedly in the original proceeding that the national treatment provisions contained in the TBT Agreement and the GATT 1994 should be given the same interpretation, complainants now encourage these Panels to judge as to whether the amended COOL measure is discriminatory under two entirely different legal standards. For purposes of Article III:4, complainants contend that "treatment no less favourable" is established solely based on proof that the technical regulation results in a detrimental impact on imported products. This analysis is incorrect.

26. The phrase "treatment less favourable" as used in Article III:4 has always provided regulatory space for the Member to take otherwise legitimate measures that may restrict trade unevenly across the membership. Complainants disagree, arguing that once a detrimental impact is established, the reasons underlying the requirements of the technical regulation are irrelevant to the analysis. The WTO has never adopted as narrow of an interpretation as complainants assert here. It has long been understood that, consistent with Article III:4, "a Member *may draw distinctions* between products which have been found to be 'like,' without, *for this reason alone*, according to the group of 'like' imported products 'less favourable treatment' than that accorded to the group of 'like' domestic products." Thus, the existence of distinctions between imported and domestic products is not enough. Any Article III:4 analysis must include an examination of whether such distinctions are evidence that the measure is discriminatory or not. Given this, the Appellate Body's approach to Article 2.1 is not surprising. The Appellate Body has noted: "the two Agreements should be interpreted in a coherent and consistent manner" in light of the fact that the Members intended the TBT Agreement "to further the objectives of the GATT 1994."

27. Complainants argue that the *sole* relevant consideration is the effect of the measure. Any examination of whether the technical regulation draws legitimate, even-handed distinctions is deferred to the analysis of whether the "discrimination" is "arbitrary or unjustified" under Article XX. Of course, for technical regulations that pursue legitimate objectives not listed in Article XX, the matter would end there. As to these measures, the question of whether a measure is discriminatory turns only on whether a majority of the domestic products satisfy a particular technical regulation, while a majority of the like foreign products do not. A responding Member is simply not afforded the opportunity to explain, nor would a panel have the ability to examine, the underlying rationale and operation of the standard. The legitimacy – *even the correctness* – of the requirements is wholly immaterial to the national treatment analysis.

28. Complainants' overly narrow interpretation of Article III:4 greatly undermines a Member's ability to regulate in the public interest, particularly where the Member pursues legitimate governmental objectives not listed in Article XX. What complainants' approach suggests is that a Member must, prior to applying a technical regulation, survey all current and potential trading partners of products affected by the measure to determine whether the affected products of those countries either meet that standard (or whether its producers are willing to adapt to the new standard). Where a particular country's products do not meet that standard (and that country's producers are not willing to adapt), the Member must *lower* its standards to avoid creating an obstacle to trade. This "least common denominator" analysis approach would undermine entirely the fact that the Member may take technical regulations "necessary to achieve its legitimate objectives 'at the levels it considers appropriate.'"

29. Each criticism of the U.S. approach fails. First, Canada challenges that the United States has "no textual basis" for claiming that the Article III:4 analysis "necessarily entails an examination of whether the regulation makes distinctions that could not be considered even-handed as to the group of 'like' imported products versus the group of 'like' domestic products . . ." But what Canada ignores is that this conclusion is built upon the Appellate Body's interpretation of the text of Article III. Moreover, Canada is simply wrong to argue that the United States ignores the context of the TBT Agreement and the GATT 1994. The context supports the U.S. interpretation. While it is unquestioned that Article III:4 provides relevant context for the interpretation of Article 2.1, Article 2.1, in fact, provides relevant context for the interpretation of Article III:4, especially *where the measure at issue is a technical regulation*.

30. Second, complainants criticize the U.S. interpretation as trying to alter the "balance" set out between Article III:4 and Article XX. The United States is not contending that the Panel must "read into" Article III:4 an assessment of whether the discrimination is "arbitrary or unjustifiable," as Canada alleges. Rather, what the United States is saying is that the appropriate interpretation of *whether* a technical regulation *is discriminatory* must necessarily include an examination of the basis for the regulatory distinctions that cause the detrimental impact. Furthermore, in light of their view that Article 2.1 sets a much higher bar for a discrimination claim, complainants fail to explain how their approach interprets the two agreements "in a coherent and consistent manner." Just the opposite would appear to be the case. Complainants' artificially narrow interpretation of Article III:4 renders Article 2.1 a nullity.

31. The ultimate goal of complainants is clear. While they no longer directly challenge the proposition that providing consumer information on origin as to where the animal is born, raised, and slaughtered is a legitimate governmental objective, complainants' overly narrow construction of Article III:4 would prevent the United States from doing just that, short of fundamentally altering how the entire U.S. meat industry operates. To accept complainants' approach would be to accept that there is no practical and reasonable way for the United States to provide accurate origin information to its consumers, even where the meat was derived from an animal that spent less than a day in the United States before being slaughtered.

C. Complainants Have Failed to Establish That the Amended COOL Measure is Inconsistent with Article 2.2 of the TBT Agreement

1. The DS386 Panel Should Reject Mexico's "Two Step Necessity" Test

32. Mexico argues that the DS386 Panel should adopt a "two step necessity" test, comprising what Mexico calls a "relational analysis" and a "comparative analysis." Mexico fails to explain why the Appellate Body did not engage in this "two step necessity" test in the one dispute where it examined the merits of the claim, *US – Tuna II (Mexico)*. Indeed, in *US – Tuna II (Mexico)*, the Appellate Body *does not even acknowledge* the possibility of such an approach.

33. Mexico tries to ground its approach in the fact that the Appellate Body acknowledges that there may be instances where a comparison between the challenged measure and an alternative measure would not be needed. But what Mexico cannot explain – and, in fact, studiously ignores – is *why* the Appellate Body determined in the original *US – COOL* proceeding that, in fact, the original panel should have made this comparison. Indeed, the Appellate Body reversed the original panel's Article 2.2 finding on this very point. It is clear that Mexico's "two step" invention is designed to lessen its own burden of proof. Mexico was quite explicit in this regard in its first submission, arguing that the DS386 Panel could find the amended COOL measure inconsistent with Article 2.2 without making a comparison to an alternative measure. Under Article 2.2 the complaining party must establish that an alternative measure exists that "is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available." The arguments by either complaining party that seek to relieve themselves of any part of this burden should be rejected.

2. Factors to Consider in Comparison Between the Amended COOL Measure and an Alternative Measure

34. First, the objective of the amended COOL measure was "to provide consumers with information on the countries in which the livestock from which the meat they purchase is produced were born, raised, and slaughtered," quoting the Appellate Body. Complainants disagree,

contending that the United States has taken the quote out of context and that the Appellate Body made that statement in the context of whether the objective was legitimate, and not in its identification. As such, complainants appear to argue that the Appellate Body, in evaluating whether the COOL measure's objective was legitimate, analyzed the *wrong* objective. That is clearly incorrect. As the Panels are well aware, the relevant objective can be stated in a number of ways. Certainly, it could be stated as "to provide consumer information on origin," which is how both the Appellate Body and the Panel has characterized it. Of course, that same objective can be stated in more specific terms, such as how the Appellate Body has also stated it. They are simply two formulations of the same objective. Complainants disagree with the Appellate Body's formulation because that formulation mentions the three production steps. Although they do not say so directly, it would appear that complainants view such a formulation as undermining their first two alternatives, neither of which provide much, if any, origin information on the three production steps. Complainants would simply prefer that providing consumers with information about the production steps not factor into the analysis.

35. But this is where the flaw of complainants' approach is truly exposed. For the real issue is not what the objective is – that has been decided – but, as the Appellate Body explains, what "is the degree of contribution to the objective that a measure *actually* achieves." And what the amended COOL measure *actually* achieves is that it provides meaningful and accurate information on origin for muscle cuts sold at retail as to where the animal was born, raised, and slaughtered. It is thus immaterial whether the objective is characterized as "to provide consumer information on origin," on the one hand, or it is "to provide consumers with information on the countries in which the livestock from which the meat they purchase is produced were born, raised, and slaughtered," on the other. The degree of contribution to the objective that the measure actually achieves is *the same* under either formulation.

36. Second, Canada and (sometimes) Mexico continue to equate the phrase "less trade restrictive" with the phrase "less discriminatory." The term "trade restrictive" "means something having a limiting effect on trade." Accordingly, the Appellate Body in *US – Tuna II (Mexico)* concluded that "Article 2.2 does not prohibit measures that have any trade-restrictive effect. It refers to 'unnecessary obstacles' to trade and thus allows for *some* trade-restrictiveness ..." In light of that guidance, it simply cannot be that Article 2.2 allows for *some* discrimination. Indeed, the Appellate Body's statement that what Article 2.2 disciplines is "trade-restrictive effect" only makes sense when "trade restrictive" is understood to refer to limiting trade effects, *i.e.*, limiting market access.

37. Canada requests that the DS384 Panel "be sufficiently flexible" in its interpretation of the agreement "to account for elements that are difficult to quantify, such as practical difficulties in selling or handling imported products" under the amended COOL measure. Yet the difficult question here is not what the trade effects of the amended COOL measure are. The question is what will be the trade effects of the "farm to fork" traceability regime, and it is that burden that complainants fail to meet.

38. Mexico attempts to lessen its burden by contending that it does not have the burden of proof with regard to any alternative measures it proposes. Canada appears to take a similar, albeit more limited approach, contending that it should not have to carry this burden where it is difficult to do so. Yet the Appellate Body has been clear on this point – the allocation of the burden of proof does not depend on how difficult it is for the complainant to prove its case.

39. The United States agrees with Canada that it may very well be difficult to establish that a "farm to fork" traceability regime (or the state/province alternative) is actually less trade restrictive than the amended COOL measure. The reason for this is fairly obvious – determining how a complicated regulatory mechanism would affect the complex U.S. livestock and meat industries is not easily done. Indeed, Canada may understand this problem better than most, given that it has failed to completely implement its own "farm to fork" traceability regime in Canada despite examining the issue for over a decade. But this is the complainants' burden.

40. Third, complainants appear to accept the framework for evaluating whether a measure could be considered to be "reasonably available." However, neither party satisfies its burden in this regard, particularly with regard to the "farm to fork" traceability alternative and state/province designation alternative.

3. The Complaining Parties Have Failed to Establish a *Prima Facie* Case That an Alternative Measure Exists That Proves the Amended COOL Measure Is Inconsistent With Article 2.2

a. The Burden of Proof

41. Mexico contends that it does not have the burden of proving that an alternative measure exists that establishes that the amended COOL measure is inconsistent with Article 2.2. Mexico's position directly contradicts *its own position* before the Appellate Body in this very dispute where it accepted that, as a complainant, *it is Mexico* that carries "the burden of proof with respect to such alternative measures." It has been long understood that complainants carry the burden of proof for their claims under those rules, and respondents carry the burden of proof for their affirmative defenses. Mexico's argument is just the latest attempt by the complainants to relieve themselves of their own burden of proof. The United States requests both Panels to reject arguments of the complaining parties that seek to relieve themselves of their own burden.

b. First Alternative Measure

42. The design, structure, and operation of the amended COOL measure indicates that the degree to which it *actually* contributes to its objective of providing consumer information on origin: it provides meaningful and accurate information on origin for muscle cuts sold at retail as to where the animal was born, raised, and slaughtered. Alternative measures that contribute to the objective at a lesser degree do not prove a challenged measure inconsistent with Article 2.2. This is the only logical interpretation of the TBT Agreement whose 6th preambular recital acknowledges that the Member "shall not be prevented from taking measures necessary to achieve its legitimate objectives '*at the levels it considers appropriate*,'" a point that the Appellate Body has repeatedly emphasized. Complainants' analyses are directly contradictory to both the applicable agreement and the Appellate Body's interpretation of that agreement. Complainants' proposed first alternative unquestionably fails the legal test of Article 2.2.

43. Rather than acknowledging these problems directly, complainants discuss the labeling differences between Categories A, B, and C, on the one hand, and Categories D and E, on the other. First, Canada appears to argue that they have satisfied their own burden of proof because *the United States* "has not explained why it considers that Label D and Label E fulfil its objective." Notwithstanding the obvious burden of proof problem, what should be obvious to all participants in this dispute is that this is not the test for Article 2.2 – *none* of the parties need to prove that a label does or does not "fulfill" the U.S. objective in the abstract. The question is rather, whether complainants have established 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." Second, Mexico argues that "[t]he United States has not provided a basis for distinguishing consumers' desires for origin information as between muscle cuts, ground beef and imported meat products." But again Mexico, like Canada, fails to explain how the existence or non-existence of such a basis is relevant to the required *prima facie* case for this claim. Third, the phrase "risks non-fulfilment would create" does not provide a different conclusion. What complainants are essentially arguing here is that the objective of consumer information is simply not "legitimate" or "important" enough to rebut an Article 2.2 challenge. As should be clear, the United States considers that providing consumers with this information is very important. And nothing in the TBT Agreement generally, or Article 2.2, requires the United States to re-order its objectives to conform to the policy priorities of its trading partners.

c. Second Alternative Measure

44. Complainants continue to maintain that applying the ground meat rules to all muscle cuts without exemptions proves the amended COOL measure inconsistent with Article 2.2. This argument is in error. The ground meat rules provide limited origin information as to where the animal was born, raised, and slaughtered, and, therefore, cannot be considered to make an equivalent contribution to the objective that the amended COOL measure does – namely, to provide meaningful and accurate information on origin for muscle cuts sold at retail as to where the animal was born, raised, and slaughtered.

d. Third Alternative Measure

45. Third, complainants maintain that the alternative of a "farm to fork" traceability regime proves the amended COOL measure inconsistent with Article 2.2. This argument is in error. A complaining party does not discharge its burden of proof by putting forward an alternative that is "merely theoretical in nature." The party must base its alternative on "sufficient evidence," which "substantiat[es] the likely nature or magnitude of the costs that would be associated with the proposed alternative, as compared to the current system." Bare allegations that the Member could adopt the alternative are simply not enough to establish a *prima facie* case.

46. Canada now argues that "farm to fork" traceability is less trade restrictive for two reasons: 1) the alternative is non-discriminatory; and 2) the alternative "could not possibly entail" the same costs that the amended COOL measure does with respect to Canadian producers. Canada continues to decline to examine what effects a "farm to fork" traceability system would actually have on trade. Mexico provides no additional timely evidence, simply alleging that such a system "would not impose material new costs on Mexican producers."

47. As to Canada's first argument, the TBT Agreement cannot be read to mean that a "less trade restrictive" measure is one that is simply "less discriminatory." Rather, a "less trade restrictive" measure is one that will permit greater market access for goods than the challenged measure. Moreover, in *EC – Seals*, Canada appears to agree with the United States that trade flows, not discrimination, is the touchstone of trade restrictiveness.

48. As explained previously, the central question here is what effect the adoption of this alternative will have on trade. And as to this central question, neither complainant *even alleges* that trade would increase under a trace-back regime.

49. As to Canada's second argument, Canada relies on Dr. Sumner's analyses of the original COOL regime, which Canada claims to prove a "farm to fork" traceability regime to be less trade restrictive because it "could not possibly entail" the same amount of costs to Canadian industry as the original COOL measure has allegedly imposed, an impact which Dr. Sumner estimates to be the equivalent of increasing processing and marketing costs by \$608 per head of cattle and \$116 per hog on all livestock processed in the United States. However, the conclusions drawn from the previous econometric models are not credible, highly inflated (to say the least), and suffer from numerous data and methodological shortcomings.

50. However, even setting aside the inaccuracies and discrepancies, then Dr. Sumner's conclusions should be readily observable in today's market for Canadian cattle in the United States, given that the original COOL measure is imposing costs of approximately \$600 per head, in the form of increased processing and marketing costs, on Canadian exported cattle. Under these circumstances, one would expect to see drastic differences between Canadian and U.S. steer prices to account for such an effect. To the contrary, there has been minimal change between the prices and the difference between them has actually narrowed.

51. Given these minimal changes in Canadian steer prices in respect of U.S. steer prices, Dr. Sumner's model, if appropriate, implies that Canadian cattle producers and U.S. packers and feedlots purchasing Canadian livestock are internalizing the majority of the estimated equivalent costs (which, according to Dr. Sumner, at a minimum, are equivalent to 39 percent of the average wholesale steer price). But to do so would be prohibitively expensive and should cause the Canadian live cattle export market to the United States to disappear entirely. But this is not occurring. In fact, the quantity and price of cattle exported from Canada into the United States has remained relatively consistent, accounting for normal fluctuations since the implementation of the 2009 Final Rule. In short, Dr. Sumner's analysis is simply not credible and is not borne out by the facts and data in the market.

52. Mexico's "adoption" of Dr. Sumner's calculations contained in CDA-126 were untimely, and inconsistent with paragraph 7 of the Working Procedures of the Panel and DSU Article 12.4.

53. While complainants appear to accept the Appellate Body's view in *US – Gambling* that an alternative measure is not "reasonably available" where it "imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties," neither complainant

provides any evidence to establish a *prima facie* case that the measure is, in fact, reasonably available.

54. First, Mexico contends that it does not shoulder the burden in this regard, and (presumably) in light of that position, provides no additional cost analysis, nor responds to any of the U.S. criticisms of the sole piece of evidence that Mexico relies on, the ten year old Hayes & Meyer article. As discussed above, it is clear that Mexico, as the complaining party, has the burden of proof with regard to the alternatives it proposes. It is equally clear that Mexico has failed to satisfy that burden of proof.

55. Second, while Canada appears to accept that it has the burden of proof to prove that a "farm to fork" traceability regime is "reasonably available," Canada does not put forward sufficient evidence to establish a *prima facie* case in this regard, relying solely on a cost estimate done in relation to the NAIS.

56. As to the costs of the alternative itself, as noted above, Canada misleadingly relies on a cost analysis commissioned by APHIS and performed by a consortium of non-government researchers in connection with the NAIS. The NAIS Study did not evaluate a trace-back system from farm to retail. Rather, it only evaluated traceability up to the point of *slaughter*, since it was focused on animal disease status, not consumer information. Yet the implementation of animal traceability would create heavy costs after the animal has been slaughtered at the processing and retail levels where workers are forced to keep meat from each animal segregated and attached to data generated at the farm and intermediary production steps. As such, it is clear that Canada has not put forward a complete cost analysis.

57. USDA has never produced an analysis of the costs of implementing a farm to retail trace-back regime for beef and pork, and, as discussed above, it is not the U.S. burden to do so for purposes of this proceeding. As is clear, however, the costs of implementing such a regime would be high indeed, and would likely have dramatic effects on the industry. By moving from a COOL regime to a traceability regime that is concerned with the life history of each animal, animals are forced to move in batches of one animal (*i.e.*, animal by animal) through the slaughter facility, in the packaging process, and at the retail level, as meat cutters are forced to segregate each animal and the meat for each animal from other animals to ensure the label finally placed at retail has accurate detailed information about place of birth, development, and slaughter. Those procedures would require dramatic slowdowns in the meat cutting process, and would add substantial burdens to retailers and other vendors who must associate particular cuts of meat with labels that correspond to the individual animal. In this regard, the U.S. industry differs greatly from the two examples Canada cites to, Japan and Uruguay, both of which have much smaller industries than the United States does.

58. It is, of course, telling that Canada cannot cite *itself* as an example of a country that has implemented a "farm to fork" traceability regime, despite studying the issue since 2003. All Canada can say is that it and its stakeholders "are working towards a practical phased-in strategy for tracking animal movements." The fact that Canada has been "working towards" full national traceability for over a decade now, without being able to implement (or even being able to state *when* it will implement), underscores just how difficult it is for a country to implement this extremely expensive system. And if that is true for Canada then it means it will be even more true for the United States, which has much larger herds than does Canada, and whose individual animals appear to move much more frequently domestically than do Canadian animals.

e. Fourth Alternative Measure

59. Canada puts forward a fourth alternative measure: a labeling regime whereby the label would inform consumers as to the state or province from which an animal was born, raised, and slaughtered. Canada puts forward no (or virtually no) evidence to support this alternative, and it is abundantly clear that Canada has not established a *prima facie* case that that this alternative proves that the amended COOL measure is inconsistent with Article 2.2. Canada merely alleges, without support, that the alternative would provide a "greater degree of fulfillment" than the amended COOL measure and would be less trade-restrictive. Importantly, however, it does not appear to the United States that this alternative is any more reasonably available or any less trade-restrictive than the "farm to fork" traceability regime. As such, the United States considers that this alternative does not present an entirely new alternative at all.

60. Cattle production in the United States is widely dispersed throughout the entire country. However, because it is often less expensive to move animals than feed, the U.S. industry is characterized by a large amount of interstate movement of animals. This is particularly true for cattle, 57 percent of which move interstate, but it is true for hogs as well. As such, the U.S. industry has evolved such that different regions of the country have specialized in certain aspects of livestock production system. As an individual cow moves through its lifecycle it would not be unusual for it to move through multiple states as it goes to different specialized feed lots, etc. Moreover, the overwhelming majority of cattle (85 percent) are sold and resold in local auctions, often several times, where they are "sorted and mixed with calves from other areas before ultimately arriving at pastures or feedlots." This repeated intermingling of cattle from different states between multiple auction houses commonplace within the cattle industry would necessitate that each individual head of cattle be tracked as it goes through the livestock production process. As such, it would appear to the United States that the recordkeeping that would need to be required in any such system would need to track the individual animal, no different from the "farm to fork" traceability system.

61. We do note, however, that U.S. cattle production is in stark contrast to Canadian cattle production, which is highly concentrated in Western Canada, with nearly 86.6 percent of all beef cows within this region. Additionally, the remaining cattle not produced in Western Canada are exceptionally concentrated, with 91 percent of all beef cattle raised in Eastern Canada occurring in the provinces Ontario and Quebec. It does not appear to the United States that there is the same amount of inter-province movement of cattle (or hogs) as there is in the United States.

62. Mexico's "adoption" of this argument was untimely, and inconsistent with paragraph 7 of the Working Procedures of the Panel and Article 12.4 of the DSU.

D. Complainant's Claims Under Article XXIII:(1)(b) of the GATT 1994 Are Outside the Terms of Reference of these Panels and Otherwise Fail

1. NVNI Claims Are Outside the Terms of Reference of These Proceedings

63. Under the plain text of DSU Article 21.5, the terms of reference of a compliance panel do not include a claim that a measure taken to comply causes NVNI. This is because the questions presented are either: (1) whether a measure taken to comply exists (an issue not presented in the current proceeding); or (2) whether a measure taken to comply is inconsistent with a covered agreement. The first question is inapplicable in this case since the United States has taken a measure to comply. The second question by definition concerns the inconsistency of a measure, and therefore excludes a claim of NVNI.

64. Complainants respond that "'consistency' can have a meaning that is broader than a violation or infringement of a covered agreement" or, perhaps even more surprisingly, that a "measure 'taken to comply' that results in the non-violation nullification or impairment of any benefit which accrues to a party under the GATT 1994 is no less *inconsistent* with the GATT 1994 than a measure which results in a violation of one or more provisions." Neither approach can be reconciled with the text of the DSU or with the complainants' own claims.

65. DSU Articles 19.1 and 26.1(b) make clear that if a measure is inconsistent with the covered agreements, then Article 19.1 applies and Article 26.1(b) does not, and the converse is also true. Contrary to what the complainants assert, the term "inconsistent" does not encompass measures that are both consistent and inconsistent with the covered agreements.

66. The NVNI claims of the complainants appear to be claims in the alternative. Essentially, the complainants are claiming that, if the Panels find that the amended COOL measure is not inconsistent with one of the provisions of a covered agreement cited by a complainant in its panel request, then the amended COOL measure nonetheless nullifies or impairs the benefits of Canada or Mexico. However, complainants' own claims demonstrate that their NVNI claims do not involve a "disagreement as to the ... consistency with a covered agreement of measures taken to comply." Rather, at the point their NVNI claims would become relevant, there is no longer a disagreement as to consistency, and the issue involves instead the issue of whether, despite the lack of any inconsistency, the amended COOL measure nullifies or impairs benefits. This latter question is not within the terms of reference of Article 21.5 of the DSU.

2. Complainants' NVNI Claims Otherwise Fail

67. Complainants appear to agree that they need to demonstrate that the amended COOL measure nullifies or impairs benefits accruing to them under the WTO Agreement. However, they fundamentally misunderstand what this demonstration entails. First, they have only generally referred to "tariff concessions" under the GATT 1994 without ever specifying what they are in detail. This general reference is not sufficient to meet the requirement in Article 26.1(a) that "the complaining party shall present a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement."

68. But even more importantly, the complainants do not explain how the amended COOL measure can nullify or impair any benefits under these unspecified tariff concessions when they concede that currently their trade is governed by, and benefitting from, tariff concessions under the NAFTA. If their trade is not benefitting from WTO tariff concessions, then the benefits under those tariff concessions are being neither nullified nor impaired.

69. Complainants also appear to misunderstand the aspect of an NVNI claim relating to reasonable expectations. Complainants state that they could not have anticipated the "upset of the competitive relationship" or "a change to the labelling regime that is designed and implemented in a manner which results in severe discriminatory treatment and the modification of competitive opportunities in the U.S. market to the detriment of Mexican cattle." In both cases, however, complainants appear to be arguing that they did not anticipate a measure in breach of the covered agreements. This argument does not, however, address *NVNI* claims.

70. Furthermore, the complainants do not address the evidence put forward by the United States that the complainants had a reasonable expectation that the United States could require more information be provided to consumers as to the origin of the meat they purchased.

ANNEX C**ARGUMENTS OF THIRD PARTIES**

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ANNEX C-1**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL**

1. Brazil hereby presents its integrated executive summary, where it provides a brief description of the main points it submitted to the Panel in its Third Party Submission and Oral Statement.

(a) The legitimacy of the objective of a technical regulation does not constitute a waiver to illegitimate regulatory discrimination that is detrimental to the conditions of competition of imported products

2. Brazil agrees that in the pursuit of a legitimate objective, adopted technical regulations may have an adverse impact on imports inasmuch as compliance with such regulations is mandatory. Accordingly, it has been clarified that Article 2.1 of the *TBT Agreement* does not prohibit measures that result in a detrimental impact on imports, provided that such impact stems exclusively from a legitimate regulatory distinction.¹ However, in Brazil's understanding, the fact that the objective of the measure is legitimate has no bearing on the determination of the legitimacy of the regulatory distinction under Article 2.1 of the TBT.² Rather, the legitimacy and the legality of the distinction itself must be assessed separately.

3. In addition, for the assessment of the consistency of the measure taken to comply with Article 2.1 of the *TBT Agreement*, Brazil recalls the approach taken by the Appellate Body in the original proceeding. While verifying whether a treatment no less favorable is accorded to like imported products, it is relevant to consider the effect of the measure on the competitive opportunities in the market.³ As Brazil stated in its Third Party Submission, the market conditions prevailing before and after the measure taken to comply can be informative to such assessment.

(b) The assessment on whether a technical regulation is no more trade restrictive than necessary must encompass not only the analysis of the intrinsic features of the measure, but also a comparative analysis of other available substitutable measures.

4. While assessing whether the changes in the COOL measure contributed to restore the aforementioned conditions of competition, the Panel may also look into its effects on international trade, in light of Article 2.2 of the TBT Agreement.

5. As the Appellate Body has already stated, the determination of whether a measure is more restrictive to trade than necessary involves a process of weighting and balancing a series of factors, including the impact of the regulation on imports or exports.⁴ In addition, a comparison with reasonably available alternative measures is a conceptual tool for the purpose of ascertaining whether a challenged measure is more trade restrictive than necessary in the light of the nature of the risks at issue and the gravity of the consequences that would arise from non-fulfilment of the legitimate objective.⁵

6. Once a measure is found to genuinely contribute to the fulfilment of its legitimate policy objectives, the analysis should turn to the effects of the measure itself, taking into account the contribution it makes to the objective and the risks that the non-fulfilment of the objective would create. Brazil agrees with the Parties that this assessment cannot be done in abstract; rather, it has to be discerned from the design and operation of the measure itself. This involves necessarily an analysis of ends and means and, from the comparison between ends and means and less trade-restrictive alternatives, what could be considered technically and economically feasible.

¹ US – Clove Cigarettes (Appellate Body Report, para. 174)

² EC – Seal Products (Panel Report, para. 7.278-7.278)

³ US – COOL (AB Reports, paragraph 270). Emphasis added.

⁴ Korea – Various Measures on Beef (AB Report, paragraph 164)

⁵ US-Tuna II (Appellate Body Report paragraph 321)

7. Assuming that the COOL measure, if properly applied, could contribute to the legitimate objective of providing meaningful information to consumers, the focus of the inquiry, in the context of an Article 21.5 panel procedure, should be on whether the changes introduced in the measure by the United States can achieve this very objective in a manner consistent with the DSB recommendations and rulings. The changes must ensure that the same conditions of competition prevail between imported and national products. The degree of trade-restrictiveness of the amended COOL measure may serve as useful guidance to the panel's assessment.

(c) The scope of compliance proceedings includes not only newly adopted measures, but also any unmodified part of the original challenged measure

8. Brazil understands that compliance with DSB's recommendations and rulings must be assessed through the examination of the measures taken to comply broadly understood, i.e. including not only new administrative and legal measures but also omissions and relevant measures in force before the adoption of the report(s) by the DSB. This means that such assessment must encompass the effects of both the amendments and the unaltered parts of the original challenged measure as they operate jointly.

9. Were unaltered parts of the original challenged measure outside the jurisdiction of the compliance panel, this would mean that the responding party would be able to circumvent the DSB's recommendations and rulings by complying with only selected parts of challenged measures, while evading compliance with all the rest, as these would be immune to further challenge.⁶

⁶ Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 71.

ANNEX C-2**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA****1. Whether the Amended COOL measure is consistent with Article 2.1 of the TBT Agreement****- Exemptions Granted by the Amended COOL Measure**

1. In the original proceeding, the Appellate Body found "the Panel's legal approach to assessing detrimental impact was correct",¹ but the Panel shall not end its analysis under Article 2.1 of the TBT Agreement there, and leave its legal analysis under Article 2.1 incomplete. Instead, "the Panel should have continued its examination and determined whether the circumstances of this case indicate that the detrimental impact stems exclusively from a legitimate regulatory distinction, or whether the COOL measure lacks even-handedness".²

2. The Appellate Body further stated that "A regulatory distinction is not designed and applied in an even-handed manner—for example, because it is designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination—that distinction cannot be considered legitimate and, thus, the detrimental impact will reflect discrimination prohibited under Article 2.1."³

3. China understands there are two respects of fact leading to the conclusion of the Appellate Body that regulatory distinctions imposed by the COOL measure are arbitrary and unjustifiable: (1) prescribed labels do not expressly identify specific production steps, in particular for Labels B and C; (2) considerable proportion of beef and pork is exempted from the COOL requirements.

4. As demonstrated by the complaining parties, it seems that the Amended COOL Measure does not address the scope of the extensive exemptions to the COOL measure in any way, the only modification is a slight change to the definition of "retailer" to include any person subject to be licensed as a retailer under the PACA.⁴ The US itself does not contend this argument, and the US admits that the Amended COOL measure "makes no change to the scope of the COOL measure".⁵

5. In its first written submission, the US provided three arguments to prove that revising the scope of the COOL measure is not necessary, which China does not agree.

6. Firstly, the US relies on the finding of the Panel that the exemptions that define the scope of the Amended COOL measure were simply "irrelevant" to the detrimental impact analysis.⁶ However, the US seems to ignore the fact that the Appellate Body has revised the reasoning of the Panel as to Article 2.1 of the TBT Agreement, and it made extensive findings in terms of the scope of the COOL measure. Contrary to the US's argument, the Appellate Body emphasizes that "this lack of correspondence between the recordkeeping and verification requirements, on the one hand, and the limited consumer information conveyed through the retail labelling requirements and exemptions therefrom, on the other hand, is of central importance to our overall analysis under Article 2.1 of the TBT Agreement".⁷

7. Secondly, the US argues that the challenged measure is not unusual at all – in fact it is firmly in the majority, since even the complaining parties' own COOL measures do have limitations.⁸ This logic is problematic. If the US believes that measures of other complaining parties also accorded less favorable treatments to the imported product from the US than those

¹ Appellate Body Report, *US – COOL*, para. 293.

² *Ibid.*

³ *Ibid.*

⁴ Canada's First Written Submission, *US – COOL (21.5)*, para. 69.

⁵ US's First Written Submission, *US – COOL (21.5)*, para. 87.

⁶ US's First Written Submission, *US – COOL (21.5)*, para. 88.

⁷ Appellate Body Report, *US – COOL*, para. 348.

⁸ US's First Written Submission, *US – COOL (21.5)*, para. 90.

domestic products, it is entitled to challenge, as it often did in the past, in the dispute settlement procedure. Nevertheless, the fact that other WTO Members keep similar measures can not be an excuse for the US to adopt measures violating its WTO obligations, no matter to what extent those measures are "similar".

8. Thirdly, the US argues that the statistics provided by the complainants are not correct. As demonstrated by the complaining parties, the Amended COOL Measure provides information to consumers on only 30% of the U.S. beef supply and on 11% of this pork supply – figures that include ground beef and pork.⁹ According to the US, the statistics are not very accurate and miss some amounts which have been included in the 2013 Final Rule. However, even using the figures provided by the US, there are still over 50% percent of the beef supply that are not covered by the COOL measure. China is of the view that, although necessary exemption could be allowed in order to reflect the complexity of economy, significant percentage of exemption would likely show that the objective of a technical regulation is arbitrary and not even-handed. And what is important is that the exemption has been found by the Appellate Body to constitute a very important element demonstrating that the legal distinction is arbitrary and not even-handed, but it remains in the place.

9. China notes the US repeatedly argued in the second submission that the design and operation of the three exemptions does not have any nexus to any detrimental impact and the exemptions themselves are perfectly even-handed.

10. However, China is not persuaded by the US's argument. The asymmetry between the coverage of the Amended COOL Measure and the burdens it imposes on all imports was an important evidence for the Appellate Body to conclude that the COOL Measure is not even-handed. The US tends to argue that only those exemptions that directly discriminate the imported products need to be revised in the implementation stage. But the Appellate Body has made it clear: "In assessing even-handedness, a panel must 'carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue'." In this regard, we agree with Canada that those exemptions are elements of the original COOL measure, and form part of the measure's "overall architecture" that the Appellate Body considered in its analysis. Therefore, China is of the view that, without taking any measure to change the scope and remove or minimize the exemptions of the COOL measure, it will be very difficult to imagine how the Amended COOL Measure may cure the inconsistency found by the Panel and Appellate Body in particular.

2. Whether the Amended COOL measure is consistent with Article 2.2 of the TBT Agreement

- Whether the "two-step necessity" test under Article 2.2 of the TBT Agreement alleged by Mexico is correct

11. In its first written submission, Mexico submits in its explanation of Article 2.2 that the Appellate Body effectively established a two-step test to determine whether a measure is more trade-restrictive than necessary. According to Mexico, "The first step starts with the statement '[a] panel should begin by considering factors that include'" ¹⁰: "(i) the degree of contribution made by the measure to the legitimate objective at issue; (ii) the trade-restrictiveness of the measure; and (iii) the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the measure".¹¹ According to Mexico, the first step "requires a weighing and balancing of relevant factors in respect of the challenged measure itself"¹². And according to Mexico, there is also a second step, which "starts with the statement '[i]n most cases, a comparison of the challenged measure and possible alternative measures should be undertaken'".¹³ According to Mexico, this step "involves a weighing and balancing analysis similar to that under the first step, except that it is undertaken in respect of a

⁹ US's First Written Submission, *US – COOL (21.5)*, para. 92.

¹⁰ Mexico's First Written Submission, *US – COOL (21.5)*, para. 153,

¹¹ Appellate Body Reports, *US – COOL*, para. 378 (quoting Appellate Body Report, *US – Tuna (II)* Mexico, para. 322)

¹² Mexico's First Written Submission, *US – COOL (21.5)*, para. 153,

¹³ *Ibid.*

comparison between the challenged measure and each reasonably available less trade-restrictive alternative measure."¹⁴

12. Mexico also submits that "when weighed and balanced in a holistic manner, it is clear from these factors that the trade-restrictiveness of the Amended COOL Measure is disproportionate to the risks that non-fulfilment would create."¹⁵ Mexico believes "the fact that the Amended COOL Measure might make some contribution to the objective does not outweigh the other relevant factors."¹⁶ Accordingly, Mexico thinks "the trade-restrictiveness of the Amended COOL Measure is unnecessary and it is inconsistent with Article 2.2 of the TBT Agreement."¹⁷

13. China is of the view that the comparison of the challenged measure and possible alternative measures is an integrated part of analysis of whether the technical regulation is more trade restrictive than necessary to fulfill its legitimate objective instead of a standalone analysis due to the following reasons.

14. Firstly, the phrase "comparison of the challenged measure and possible alternative measures" is not the language appearing in the text of Article 2.2 of the TBT Agreement, instead, it is developed by the Panel and Appellate Body in the interpretation of the second sentence of Article 2.2. Therefore, it can only be part of the test instead of an addition to the interpretation of the second sentence.

15. Secondly, the language of Article 2.2 of the TBT Agreement suggests that the technical regulations have inherent characteristics of trade restrictiveness. Therefore, what is important is not whether the trade restrictiveness of a measure is necessary, but whether it exceeds the extent to fulfill a legitimate objective. Without weighting the factors contributing to the legitimate objective and trade-restrictiveness, it will be hard to come to the conclusion. In most cases, it could be very difficult to quantify the extent of contribution to the legitimate objective and trade-restrictiveness, and therefore, it is useful to examine the availability of alternative measures.

16. Thirdly, the Panel report on *EC-Seal Products* also confirms that the Mexico' interpretation is not appropriate. The Panel states "an examination of the obligations under Article 2.2 requires a relational analysis of all of the following elements: (a) trade-restrictiveness of the EU Seal Regime; (b) degree of the measure's contribution to the identified objective; and (c) availability of alternative measures."¹⁸ Therefore, the discussion on alternative measure should be part of analysis if a measure is more trade restrictive than necessary to fulfill a legitimate objective.

17. China notes that Mexico has retreated from its previous position in its second written submission, and Mexico stated "even if the Panel decides that the Amended COOL Measure is inconsistent with Article 2.2 on the basis of the relational weighing and balancing test discussed above, it should make a comparative analysis of challenged measure and each alternative measure to ensure that the record is complete in the event of a review by the Appellate Body". Therefore, China is of the view that the discussion on alternative measure should be part of analysis if a measure is more trade restrictive than necessary to fulfill a legitimate objective and that "there are not two steps, but one." And the "two-step" approach indeed has risk of lessening the burden of proof and loosening the conditions under Article 2.2.

18. To sum up, China believes that the unchanged significant exemptions under the Amended COOL Measure sheds lights on the analysis of consistency of the measure with Article 2.1 of the TBT Agreement, and that the "two-step necessity" test is not a correct approach for Article 2.2 test.

¹⁴ Ibid.

¹⁵ Mexico's First Written Submission, *US – COOL (21.5)*, para. 178,

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Panel report, *EC-Seal Products*, para 7.467.

ANNEX C-3**INTEGRATED EXECUTIVE SUMMARY OF COLOMBIA****I. INTRODUCTION**

1. Colombia, as a Member of the WTO, had a systemic interest in the application of Article 2.2 of the TBT Agreement. In its intervention Colombia wanted to reiterate what was expressed in previous opportunities during the present dispute, in the sense that an appropriate interpretation of this provision is essential to avoid unnecessary barriers to trade.

II. INTERPRETATION OF ARTICLE 2.2 OF THE TBT

2. First, Colombia considered important to highlight that the debate in the present issue was not whether the objective pursued by the amended COOL measure was legitimate or not. In fact, previous Panels and the Appellate Body have found that consumer's information is a legitimate objective under Article 2 of the TBT Agreement¹. Colombia's submission related to the standard that the Panel must apply in order to determine if the adopted measure is in accordance with Article 2.2 of the TBT. As Colombia stated in its submission, Article 2.2 "more restrictive than necessary" standard might imply either a complex or a simple approach to the standard on necessity.

3. Colombia considered that the construction of a proper standard for assessing whether a technical regulation "is more trade-restrictive than necessary to achieve the contribution it makes to the legitimate objective", seems extremely relevant in the process of designing, adopting and assessing a TBT measure. Therefore, Colombia respectfully suggested the Panel in this case to take into account the fold arguments in order to clarify the "more trade-restrictive than necessary" standard of article 2.2 of the TBT.

4. However, in Colombia's opinion a Member could also proceed in a simpler way, proving necessity by showing that a trade restrictive measure, as such, was either a proportional or a proper response to achieve a legitimate policy objective. Thus, in this vein, the definition of proportional also means that a measure corresponds, matches or is equivalent in size or amount to something else; in this case, to achieve a legitimate objective.² According to Colombia, it is a matter of reasonability used by several courts around the World, and by the WTO legal texts.³ In the end, the fact that a measure is proportional to achieve a legitimate objective means that such a measure is reasonable, and not more trade restrictive than necessary to achieve such a legitimate objective.

5. In other words, rather than demanding a unique assessment involving, among other elements, the pondering of a measure's "degree of contribution of the TBT to the legitimate objective", article 2.2 allows Members to construe the "more trade restrictive than necessary" standard under two scopes: a complex approach or a more simple one, that allow to analyze whether the measure was, at the moment of its adoption, either an appropriate, a proportional or a reasonable policy response to achieve a legitimate objective.

6. As it has been pointed out by some authors, "proportionality is a trade-off-device which helps resolve conflicts between different norms, principles, and values. It is also a determining factor for the role of courts in reviewing administrative or legislative measures. Proportionality thus provides a legal standard against which individual or state measures can be reviewed. From a more procedural perspective, proportionality is closely related to the issues of intensity of review-

¹ AB Report, United States – certain country of origin labelling (cool) requirements. WT/DS384/AB/R WT/DS386/AB/R, adopted 29 June 2012.

² According to the Oxford Dictionary definition.

³ To elaborate on this concept's application, Colombia suggests to consult Max Andenas and Stefan Zleptnig, Proportionality: Wto Law: In Comparative Perspective Texas International Law Journal - Vol. 42 Num. 3, July 2007

the level of scrutiny exercised by judges-and whether there should be a full review on the merits or a more deferential standard of judicial review."⁴

III. THE PANEL'S OBJECTIVE ASSESSMENT PURSUANT TO ARTICLE 21.5

7. Colombia recalled the Appellate Body's previous statements when it acknowledged, "that Members enjoy the right to determine the legitimate policies they want to pursue".⁵ Therefore "WTO Members have a large measure of autonomy to determine their own policies (...). Colombia highlighted that so far as it concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the General Agreement and the other covered agreements."⁶

8. It was Colombia's position, that the Panel and the Appellate Body should show some kind of comity when assessing a Member's public policy, and its trade restrictiveness. This applies for a technical regulation, and the "more trade-restrictive than necessary" standard "to achieve the contribution it makes to the legitimate objective". Additionally, this "degree of contribution" standard seems to be more like an ex-post review based not in the data or information available at the moment that the measure was issued, but with the information available at the date of its review. Hence, in Colombia's opinion that is not the appropriate comity that both, Panels and the Appellate Body, should show to a Member's policy under the DSU.

9. According to the Black's Law Dictionary, comity stands for "courtesy; complaisance; respect; a willingness to grant a privilege, not as a matter of right, but out of deference and good will". It was Colombia's opinion that the WTO provides Members with leeway to adopt technical measures in order to achieve an objective. Colombia was referring to this meaning of comity. There must be a balance in the Panel's analysis between the regulatory objective of a measure and the conformity of such measure to WTO provisions. The purpose of Article 2.2 of the TBT is to allow a Member certain discretion with regard to its regulatory powers, always bearing in mind that these regulatory powers cannot amount to be unnecessary barriers to trade.

10. Pursuant to Article 11 of the DSU the Panel has to conduct an objective assessment of the facts of the case, of the adopted measure, and of the relevant provisions under the Covered Agreements. When considering the facts of the case the Panel does not have to do a de novo examination, a complete repetition of the Member's fact finding, nor it has to have total deference towards the Member's fact submission. The Panel, complying with the mandate of standard review encompassed in Article 11 has to analyse all the relevant facts in order to determine if the adopted measure is in compliance with the obligations under the WTO.

11. Bearing this in mind, Colombia considered that a Panel is not allowed to conduct an ex-post review of the adopted measure in every case. This would be contrary, not only to the comity that the Panel should show to the Member's regulatory powers, but also to Article 3.2 of the DSU in as much as it would not provide the system with security and predictability. If the Panel were to conduct its review of the facts with an ex-post perspective, depending on the factual context at the time of the decision, then every measure adopted by a Member would be subject to a continuous scrutiny by the DSB, depriving the system of security and predictability.

12. Therefore, in Colombia's opinion a Panel should keep a delicate balance when assessing a measure. In principle and based in articles 11 and 3.2 of the DSU, a Panel should start considering the factual elements that an authority of a Member had available when it was assessing the chance of imposing a particular measure. Then, according to Colombia, a Panel should assess the effects of a measure as such; and just in case this information is not enough in order to conduct an objective assessment, a Panel may start examining criteria or factual findings that came after the measure was discussed at the DSB on an ex post basis.

⁴ Supra Max Adenas and Stefan Zleptnig, p. 4

⁵ Report of the Panel. United States – Measures Concerning the Importation, Marketing and Sale of Tuna And Tuna Product. WT/DS381/R adopted 15 September 2011. Para. 7.441

⁶ AB. US – Gasoline, p. 28; Panel Report, US – Shrimp, para. 7.26, Fn 629; GATT Panel Report, Japan – Alcoholic Beverages I, para. 5.13

13. Colombia considered that this case rose important questions on the interpretation and application of Article 2.2 of the TBT. While not taking a final position on the merits of the case, Colombia requested the Panel to carefully review the scope of the claims in light of the observations made throughout this submission.

ANNEX C-4**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION**

1. **Third party rights.** Since the Panel modified the standard working procedures in Appendix 3 DSU to permit the shifting of fact, evidence and argument to the second phase, it must adopt re-balancing measures preserving (not enhancing) third party rights, as mandated in Article 10 DSU, which the Panel must not diminish. The Panel does not require the parties' agreement. This is required by the multilateral nature of dispute settlement and the principles of due process and consent. It is particularly important in balancing cases, such as the present one; and where a defence has a significant role to play. It is particularly appropriate in the case of a public hearing. Thus, third parties must have the right to: be present throughout the hearing; comment at the invitation of the Panel; receive the questions and responses thereto; and respond to written questions.
2. **Relationship between original and compliance proceedings.** There is no formal rule of precedent in WTO law, although original proceedings and compliance proceedings are part of a continuous process, and compliance panels are expected to be guided by their prior findings. There is also no rule of *res judicata*, although compliance panels may refer to prior findings as *part* of their objective assessment.
3. **Scope of these compliance proceedings.** The amended COOL measure is a declared measure taken to comply within the scope of these compliance proceedings. It can only meaningfully and reasonably be considered as a whole. The facts of *EC – Bed Linen (Article 21.5 – India)* were different and the reasoning in that case does not apply.
4. **Order of analysis.** The Panel should begin with the more specific agreement: the TBT Agreement. It should follow the order of analysis in the original proceedings: Article 2.1 then Article 2.2.
5. **Article IX GATT and Agreement on Rules of Origin.** The Panel should not make any findings regarding Article IX GATT or the Agreement on Rules of Origin, which are not before it, and should ensure that nothing in its report prejudices the interpretation or application of those provisions in another case.
6. **Article 2.1 TBT.** Several provisions of the covered agreements seek a balance between a desire to avoid unnecessary obstacles to international trade and a recognition of a Member's right to regulate in an *even-handed* manner in pursuit of a legitimate objective. The second TBT recital confirms that the GATT and TBT overlap in scope and have similar objectives; that the TBT expands on pre-existing GATT disciplines; and that the two should be interpreted in a coherent and consistent manner. The national treatment obligations of Articles III:4 and 2.1 are built around the same core terms. The balance set out in the TBT preamble, and in particular in the fifth and sixth recitals, is not in principle different from the balance set out in the GATT, where the national treatment obligation in Article III:4 is qualified by the general exceptions provision of Article XX. The fifth and sixth recitals are reflected, *inter alia*, in Article 2.1 TBT. Article 2.2 also informs contextually Article 2.1. Thus, in cases involving an alleged *de facto* breach, that same balance is to be found in Article 2.1 TBT itself.
7. Determining the scope of the imported *product* and the scope of the domestic *product* to be compared is about the nature and extent of any *competitive relationship* between the two things being considered as potentially part of the *product*. Any distortive effects that the measure itself might have are to be discounted. Regulatory distinctions are only relevant to the extent that they find expression in the relevant competitive relationship, such as through consumer preferences. Once the imported and domestic products have been properly identified, Article 2.1 TBT requires a panel to compare the treatment accorded under the technical regulation to *all like products imported* from the complaining Member (that is, the "group" or "universe" of imported products) with that accorded to *all like domestic products* (that is, the "group" or "universe" of domestic like products). There must be a *genuine* relationship between the measure and an adverse impact on competitive opportunities for imported products – conditions resulting *solely* from private actions

cannot ground a breach. Measures that create incentives may breach. Asymmetrical impact resulting from the lower market share of imports is an exacerbating element, but is not sufficient. However, the national treatment obligation of Article 2.1 does not require Members to accord no less favourable treatment to each and every imported product as compared to each and every domestic like product. Regulatory distinctions that stem *exclusively* from the pursuit of legitimate objectives are permissible.

8. In assessing whether or not there is less favourable treatment the existence of a detrimental impact on competitive opportunities for the group of imported vis-à-vis the group of domestic like products is relevant but *not dispositive*. A panel must further analyze whether the detrimental impact on imports stems *exclusively* from a *legitimate* regulatory distinction rather than reflecting discrimination. In making this determination, a panel must carefully scrutinize the *particular circumstances* of the case, that is, the design, architecture, revealing structure, operation and application of the measure, and in particular whether that measure is *even-handed*. There are no facts that are *per se* excluded, it being for the litigant asserting such facts to persuade the adjudicator of their relevance. The burden of proof rests in principle with the party asserting the affirmative.

9. In this case, in assessing whether or not there is a detrimental impact, the relevant comparison is between the situation before adoption of the original COOL measure and the present situation. All regulatory change may involve costs that, in the short term, will inevitably be unequally distributed amongst existing firms and Members as a function of their past investment decisions. This does not mean the measure breaches. What is important is that, in the long term, all firms and Members can adjust to the new regulatory regime and enjoy equal competitive opportunities. The mere fact that unit regulatory compliance costs may be higher for firms or Members with lower production volumes or market share does not establish breach. Firms and Members make their own choices about economies of scale. Propensity to breach WTO law is not a function of the relative size of Members or their firms or their production volumes or market shares. A measure that regulates a downstream product that has effects on upstream products, or *vice versa*, justifies an assessment that encompasses all such aspects.

10. The root of the problem in this case is that the production chain currently employed by Canadian and Mexican firms is partly *transnational*, which, as a matter of fact, necessitates more specific record keeping, segregation, and therefore higher costs. In this respect, it is helpful to consider the situation in which birth, raising and slaughter occur only in one Member. Does this scenario, which does not involve any transnational element in the production or processing chain, reveal *de facto* discrimination? It is very difficult to see any. Furthermore, it is very difficult to see that, in this scenario, the exemptions for restaurants, small retailers and ground meat would alter that conclusion. It is also helpful to think about the case from the perspective of the MFN principle. If the transnational element is determinative in concluding that there is a *de facto* breach of the national treatment obligation, what would this imply with respect to possible *de facto* breaches of the MFN rule? Would it not mean that, if there are two third countries, one of which maintains the chain of production or processing entirely within its own territory, and the second of which does not – but rather carries out some part of it in a further third country – there would also be a breach of the MFN rule? This seems to imply that a regulating Member might find it *impossible* to regulate because, whatever origin neutral rule is put in place, there would be *de facto* discrimination.

11. **Article 2.2 TBT Agreement.** The *legitimate objective* of the measure is to provide consumers with information about origin and points-of-production. There may be many reasons why consumers might want such information. Some consumers might want to boost trade or development. Some might have their own opinions about issues they perceive to be associated with a particular product or production process and wish to express them when making choices about what they consume. There is always a concern that such labels may facilitate irrational origin-based discrimination. In an increasingly integrated global economy it may become increasingly difficult to discern a rational link between origin described in terms of a particular WTO Member and a particular issue. Nevertheless, the objective is legitimate. Once origin labelling is accepted as a legitimate objective, that same approach has to be adopted for all WTO Members, and it is problematic to go on to question the motives of particular consumers. In a very real sense they *are* the market. Even if some irrational origin-based discrimination persists or re-emerges, it is simply part of the task of firms to overcome it through information and marketing. The same reasoning generally applies, by extension, to other types of labels. Food labelling is a particular

issue. We are speaking of what people choose to eat, for themselves and their children. Information and evidence about what labels consumers want may be relevant to an assessment under Article 2.2 TBT, but not determinative. WTO Member governments also have the right to determine what their legitimate regulatory objectives are.

12. The measure is *significantly trade-restrictive*, such that a consideration of the other elements of Article 2.2 TBT is necessary. The trade-restriction must be *significant*. It is not possible nor permissible to put a precise number on what this means: it is something that can only be considered on a case-by-case basis. This is but one part of a more complex mechanism, so precise quantification may be unnecessary. But this requirement of significance implies there is a category of regulations that do not significantly restrict trade and do not therefore breach Article 2.2 TBT. To be meaningful, this category must be reasonably populated. Furthermore, this significance requirement, as well the requirement to compare the trade-restrictiveness of alternative measures, implies some degree of precision about what the concept of trade-restriction means, and how it is to be generally calibrated, if not precisely measured.

13. The concept of trade-restrictiveness encompasses what effects a measure has had, and may have in the *future*. However, it may be difficult to appreciate the degree of trade-restrictiveness on a hypothetical basis. Modelling may be used, but may be expensive, data may be difficult to obtain, and the conclusion may be excessively dependent on the assumptions. In a hypothetical, attempts at precise measurement may be misplaced. At some point mooted trade-restrictiveness may be too remote to establish breach. Under the TBT Agreement, regulations may be consistent when adopted but become inconsistent later (and *vice versa*). Excessively speculative cases can be deferred. In the short term, all regulatory change can impose one-off costs and so appear to restrict trade. However, in the long term, once firms adapt, some regulatory change may increase trade, or at least be fully absorbed by traders. Thus, one should not be too quick to jump to the conclusion that a new regulation restricts trade just because there is an initial shock. A good place to look for guidance about the meaning of trade-restrictiveness could be arbitration panel reports. However, one should be cautious about transposing excessively. Article 3.8 of the DSU presumes nullification or impairment; and no special interest is required to bring a case. In short, assessing trade-restrictiveness should be grounded in reasonable, balanced and qualitative considerations of good sense, accessible to all Members.

14. The concept of trade-restrictiveness involves focussing on the impact of a particular measure on imports. If a measure has no impact on imports, it cannot be said to be trade-restrictive. An asymmetrical distribution of costs may be significant, but rather something to analyse under the heading of whether or not there is a *de facto* breach of the national treatment obligation in Article 2.1. Regulation is rarely an easy task, especially in a complex and more integrated global economy, and often necessitates the striking of reasonable compromises. Pointing to specific inconsistencies at the margins may not always reveal much about the overall balance of a particular regulation. It is legitimate to regulate for some of the people. A US consumer concerned about such issues can choose. They can go to a large supermarket and read the labels; and at the same time choose to avoid restaurants, processed foods and small retailers. This does not make the measure WTO inconsistent. The same is true with respect to ground meat: the measure simply allows concerned US consumers to avoid it.

15. With respect to Canada and Mexico's argument that the measure causes a reduction in the price of their imported products, they appear to be treating the concepts of trade restriction and nullification or impairment as being the same thing. We do not think that this is correct. However, what they appear to be arguing is that if they do raise their prices (in order to account for their increased costs) then, all other things being equal, they will lose volume, and that is the required restriction of trade, albeit an anticipated one rather than an actual one. Perhaps they are reticent about making this clear because they are concerned about a counter-argument from the US to the effect that what they would experience would be caused by their own actions and not by the measure at issue. They should have no concern. If the measure is a genuine and substantial cause of the trade restriction, that will be sufficient. There can be more than one genuine and substantial cause. Thus, a hypothetical price rise would not break the causal link for the purposes of their claims under Articles 2.1 and 2.2. In effect, Canada and Mexico appear to be mitigating the trade loss (in terms of volume) that would otherwise accrue to them by reducing their prices and thus absorbing the additional costs, at least temporarily. Mitigation of loss is foreseen in Article 39 of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts, which provides that account shall be taken of the contribution to the injury by wilful or negligent action or

omission of the injured States. WTO Members mitigating trade loss should not, for that reason, be precluded from pursuing a claim pursuant to Articles 2.1 or 2.2 TBT.

16. It is not for WTO adjudicators to rank in general and abstract terms the importance of legitimate regulatory objectives, which may overlap and which are rarely comparable. In WTO law, the fixing of the ALOP is strictly reserved to the regulating Member. It is not for WTO adjudicators to weigh the relative values of different WTO Members. Different WTO Members have different values, sometimes in counterpoint to each other. Attempting to harmonise or rank them is no task for a judge; and it is not a task that has been conferred on WTO adjudicators. Regulatory competition promotes efficiency and makes a positive contribution to the objectives of the WTO. Regulatory autonomy is as much a pillar of the WTO as MFN and national treatment. The WTO has no mandate to apply a pure proportionality test. If a particular measure is put through the disciplines of the TBT Agreement, and no breach is found, but a WTO judge simply comes to a point at which what appears to that judge to be a very large trade restriction is being justified by what seems to that judge to be a matter of very small concern, the WTO judge must defer to the national measure. It is not for WTO judges to value legitimate objectives: that is reserved to WTO Members.

17. Canada and Mexico read Article 2.2 as if it refers to the *consequences* that non-fulfilment would create. They have in mind the proposition that the *consequence* of someone being killed, for example, is graver than the *consequence* of someone eating a steak without having accurate information about the place of birth, raising and slaughter of the animal from which the steak is derived. On this basis, they imagine that the alternative measure could make a lesser contribution to the legitimate objective, because the consequence of non-fulfilment is, in relative terms, not so serious. However, Article 2.2 does not refer to the consequences of non-fulfilment. It refers to the *risks* non-fulfilment would create. This does not imply any diminishing of the ALOP. It merely directs the enquiry towards the question of whether or not there is a rational relationship between the various parts of the measure or alternative measure.

18. Although the list in the final sentence of Article 2.2 is open, the three listed items are all *technical* in nature: none of them empower a panel to *question the ALOP*. If this provision would be calling upon panels to provide a general ranking of the relative *political values* of WTO Members, then one would expect *other kinds* of references, such as, for example, to the UN Charter or other international agreements. These are referenced in many other provisions, but not here. In short, a panel has full authority to consider whether or not the relationships between the various moving parts of the measure or alternative measure are rational, and this is the additional element of weighing and balancing – not a re-setting of the ALOP.

19. In the context of Article 2.2 TBT, there is no direct relationship between the degree of asymmetry in the distribution of regulatory costs between domestic and foreign firms and the legitimacy of a particular regulatory distinction or objective. That is because (1) Article 2.2 is about necessity (not discrimination) and (2) as a matter of logic, there is no necessary connection between the two concepts. Thus, regulatory costs could be distributed in a perfectly equal way both in the short and long term; but the regulatory distinction or objective might nevertheless not be legitimate. If the measure significantly restricts trade (constituting an unnecessary obstacle to international trade) and the regulatory distinction or objective is not legitimate, Article 2.2 will be breached. Conversely, regulatory costs could be distributed in a perfectly unequal way both in the short term and in the long term; but the regulatory distinction or objective might nevertheless be legitimate. Although the TBT Agreement classically applies to regulations of general application to all WTO Members, its application is not precluded in the case of measures relating to goods originating from a particular WTO Member. Just as under the SPS Agreement, in some instances this might be justified or even necessary. The unequal distribution is something that may be taken into account in the overall assessment, but it does not necessarily result in a re-opening of the question of whether or not the objective is legitimate.

20. Similarly, in the context of Article 2.1 TBT, there is no direct relationship between the degree of asymmetry in the distribution of regulatory costs between domestic and foreign firms and the legitimacy of a particular regulatory distinction or objective, because, as a matter of logic, there is no necessary connection between the two concepts. In the context of a *de facto* breach of the national treatment obligation there must be a negative impact on competitive conditions or opportunities for foreign products, at least in the short term. What constitutes the short term is something to be considered on a case-by-case basis. In this particular case, to the extent that the

alternatives (the importing Members conduct all operations on their own territories or establish their own slaughterhouses in the US) may not be reasonably available, there would appear to be a long term impact on market structures that constitutes a disincentive to the market integration pursued by the WTO Agreement.

21. The mechanism by which the volume of imports are reduced or suppressed compared to domestic sales volume, on an actual or anticipated basis, classically involves an asymmetrical incidence of costs. That is because, as their costs increase, and importing firms raise prices relative to domestic producers, in order to remain profitable, all other things being equal, they will lose volume. Nevertheless, as in the case of Article 2.2, this does not necessarily mean that the regulatory distinction or objective is not legitimate. Conversely, if there is no asymmetry in the distribution of regulatory costs in the short or long term then it is difficult to see in what sense there may be a negative impact on competitive conditions or opportunities for foreign products. In such a case, there is no breach of Article 2.1, irrespective of the regulatory distinction or objective being pursued.

22. The differences between claims of *de facto* breach of Article 2.1 and breach of Article 2.2 are that (1) Article 2.1 focusses on discrimination whilst Article 2.2 focusses on necessity (2) Article 2.1 requires a particular impact on the competitive conditions or opportunities for imports whilst Article 2.2 requires only a significant restriction of trade and (3) a particular issue may appear as a fact in the Article 2.1 analysis (thus just one fact to be taken into account with all the other facts) but as part of the operation of a particular legal rule in the Article 2.2 analysis (for example, if a measure that significantly restricts trade makes no contribution to its objective then Article 2.2 is breached – but this would be only one fact to consider with other facts in the context of Article 2.1).

23. The *first alternative* would involve a particular origin rule: substantial transformation. This is problematic. As the EU has explained above, the Agreement on Rules of Origin leaves this matter open and to the discretion of WTO Members. If this would be the only alternative, then, by a process of elimination, the US would eventually be compelled to adopt it in order to comply. The EU considers that the TBT Agreement, which does not even refer expressly to origin, was not adopted in order to effectively compel WTO Members to do something that is expressly reserved as a matter for their discretion, pursuant to the terms of the Agreement on Rules of Origin.

24. The *second alternative* would certainly be less restrictive of trade. Slaughterhouses could, in effect, label all meat as originating in Canada and the US, as long as they had both types of animal within their inventory in the last 60 days. However, it seems equally clear that this measure would make a lesser contribution to the objective. For this reason, the EU considers that the second alternative measure is insufficient for the purposes of establishing a breach of Article 2.2 TBT.

25. The *third alternative* would remove the asymmetry complained of by Canada and Mexico, would be more trade-restrictive in the sense that it would increase costs for imports. If it would be the only viable alternative, that would seem to imply that the only way that the US could comply would be by adopting a heavier regulatory burden. The EU considers that it is not the task of the WTO to impose such regulatory decisions on WTO Members. In our view, by definition, the alternative measure should be one that imposes equivalent or fewer costs. In so far as Canada and Mexico are concerned about asymmetry, that matter can be addressed under Article 2.1. Thus, the third alternative measure is insufficient for the purposes of establishing a breach of Article 2.2 TBT.

26. **Article III:4 GATT.** The *scope* and *content* of Article III:4 of the GATT and the scope of Article 2.1 TBT differ. However, the basic concept of a *de facto* breach of a national treatment obligation is the same whether one is in Article III:4 of the GATT or Article 2.1 TBT. It includes a consideration of not only the impact of the measure on competitive opportunities for imports, but also a consideration of whether the origin neutral objective or regulatory distinction is legitimate and even-handed, rather than *de facto* discriminatory. If one is going to accept the concept of a *de facto* breach, then the necessary *quid pro quo* is that one at least considers the reasons for the origin neutral regulatory distinction.

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDIA*

1. India thanks the Panel for this opportunity to present its views in the present proceedings. India has systemic interest with respect to certain issues raised in this Article 21.5 proceeding. India does not take any position on the factual aspects of this dispute but limits its statement only on the issue of the scope of Article 21.5 proceedings.
2. In the present proceeding, the United States has argued that the scope of a Panel request in an Article 21.5 proceeding is only limited to the measures which has been taken to comply with the ruling and recommendations of the DSB and has contended that:
 - a. GATT Article XXIII: 1(b) claim is outside the Panel's terms of reference as Article 21.5 proceeding is limited to the issue of determining the existence of a measure taken to comply or the consistency with a covered agreement of a measure taken to comply whereas the claim under GATT Article XXIII:1(b) involves a situation other than the question of consistency of a measure with a covered agreement.
 - b. The claim with respect to trace back and labeling rule for ground beef is outside the terms of reference as these two measures were not found to be inconsistent. Thus Article 21.5 proceeding cannot be used to raise claims related to an unchanged aspect of the original measure.
 - c. Lastly the United States has also argued that the complainants in the 21.5 proceedings are asserting claims with respect to issues already considered in the original proceedings. This as per the United States is contrary to DSU which does not allow the complaining parties to use compliance proceedings to re raise claims and arguments which were rejected during the original proceedings.
3. Mr. Chairman, Article 21.5 proceedings are initiated for the purpose of assessing whether the respondent country has complied with the ruling and recommendation of the DSB. However while making this assessment, India believes that Article 21.5 proceedings should not be limited to evaluating the implementing measure only but instead should be extended to a full consideration of the factual and legal background against which the implementing measure is taken.¹ This broad approach would ensure that a respondent country would not be able to circumvent the ruling and recommendation of the DSB by complying with the same through one measure, while, at the same time, negating compliance through another.²
4. This position of India is consistent with the Appellate Body report in *Canada — Aircraft (Article 21.5 — Brazil)*³ wherein it concluded that a review by the Panel pursuant to Article 21.5 of the DSU would not be limited to examining the measures 'taken to comply'. Further the Appellate Body in *US Shrimp (21.5)* observed that "*when the issue concerns the consistency of a new measure "taken to comply", the task of a panel in a matter referred to it by the DSB for an Article 21.5 proceeding is to consider that new measure in its totality. The fulfilment of this task requires that a panel consider both the measure itself and the measure's application*"⁴. Therefore India believes that the scope of a Panel request in an Article 21.5 proceeding includes not only the measure which has been taken to comply with the ruling and recommendation of the DSB but also its application.

* India's oral statement serves as the integrated executive summary.

¹ WT/DS257/AB/RW, paragraph 67-69. Also see Appellate Body report in *US OCTG SSR (21.5)*, WT/DS268/AB/RW, paragraph 147

² WT/DS257/AB/RW, paragraph 71

³ WT/DS70/AB/RW, paragraph 40-42

⁴ *US Shrimp (21.5)*, WT/DS58/AB/RW, paragraph 87

5. India therefore submits that pursuant to Article 11 of the DSU, the Panel in an Article 21.5 proceeding is obligated to objectively assess not only whether the respondent party has complied with the recommendation of the DSB but also evaluate the new measure⁵, if any, taken by the respondent in its entirety. This position of India is consistent with the objective behind Article 21.5 proceeding as highlighted by the Appellate Body in *US — Softwood Lumber IV (Article 21.5)*.⁶
6. India would now address the issue of Article XXIII:1(b) of GATT and its inclusion in an Article 21.5 proceedings. The Appellate Body observed in *US-Shrimp* that a Panel in an Article 21.5 proceeding is required to consider both the measure itself and measure's application.⁷ Therefore if the application of the new measure implemented pursuant to the ruling and recommendation of the DSB leads to nullification or impairment as provided under Article XXIII:1(b) of GATT, India believes that the same can be pursued by the Panel in this Article 21.5 proceeding. This position of India is also supported by the Appellate Body report in *EC- Asbestos*⁸ where it observed that *Article XXIII:1(b) of GATT sets forth a separate cause of action for a claim that through the application of a measure, a member has nullified or impaired benefits accruing to another member, whether or not that measure conflicts with the provision of GATT 1994*. However whether the application of the new implemented measure leads to nullification or impairment is a factual exercise which has to be undertaken by the Panel.
7. With respect to the issue concerning inclusion of trace back and labeling rule for ground beef within the Panel's terms of reference, Mexico has responded and argued that the complainant is not challenging the rule with respect to ground beef and the rule with respect to trace back but are using the same as an argument to compare with the amended rule for muscle cut of beef and to establish that the amended COOL measure is a disguised restriction on the international trade respectively.
8. In this respect, India believes that as long as the complainants in the present proceeding are not challenging the aspect of the original measure which was not found to be inconsistent but are simply using the same as an argument to establish their claim, the same should be within the Panel's terms of reference.
9. With respect to the issue of re raising claims in 21.5 proceedings which were rejected in the original proceedings, India would draw the attention of the Panel that the United States is ambiguous in its argument as it has not explicitly identified all such claims.
10. India would therefore respectfully request the Panel to identify the claims which has been re raised by the complainants in the present proceedings but which were rejected by the Panel in the original proceedings. If the same relates to the claims of the complainants under Articles III:4 and XXIII:1(b) of the GATT 1994 which the original Panel did not address on account of judicial economy, India believes that the same can be addressed in a Article 21.5 proceeding.
11. This position of India is supported by the Appellate Body ruling in *EC-Bed Linen (21.5)*⁹ wherein it was observed that in a situation where a panel, in declining to rule on a certain claim, has provided only a partial resolution of the matter at issue, a complainant should not be held responsible for the panel's false exercise of judicial economy, such that a complainant would not be prevented from raising the claim in a subsequent proceeding.

Therefore India respectfully requests the Panel to take into consideration the above jurisprudence as outlined above while assessing the issue of judicial economy, assuming that this was the issue the United States was referring to with respect to the issue of re raising claims in Article 21.5 proceedings which were rejected in the original proceedings.

⁵ *US Shrimp* (21.5), WT/DS58/AB/RW, paragraph 86-87

⁶ WT/DS257/AB/RW, paragraph 71

⁷ *US Shrimp* (21.5), WT/DS58/AB/RW, paragraph 87

⁸ WT/DS135/AB/R, paragraph 185

⁹ WT/DS141/AB/RW, footnote 115 to para 96. Also see paragraph 14 of the second written submission by Mexico.

India thanks the Panel for the opportunity to present its views and to participate in these proceedings.

ANNEX C-6**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN****Third Party Submission****I. Article 2.1 of the TBT Agreement**

1. Japan wishes to address one issue relating to Article 2.1, namely, the relevance of the exemptions under the Amended COOL measure for purposes of assessing whether there is "treatment no less favourable."

2. Canada and Mexico explain that the Amended COOL measure made two key changes to the original measure: (i) the Amended COOL measure requires that retail labels for muscle cut covered commodities list the country or countries in which the animal from which the muscle cut was derived was born, raised, and slaughtered; and, (ii) it eliminated the commingling flexibility, *i.e.*, the allowance to use the mixed origin label on muscle cuts produced the same production day.¹

3. It would appear that the first change is intended to address part of the disconnect that the Appellate Body found between the "large amount of information ... tracked and transmitted by upstream producers for purposes of providing consumers with information on origin" and the "small amount of this information ... actually communicated to consumers in an understandable manner, if it is communicated at all."² However, Japan notes that the Appellate Body also found it difficult to reconcile that – on the one hand – information regarding the origin of all livestock had to be identified, tracked, and transmitted through the chain of production by upstream producers, while – on the other hand – a considerable proportion of the beef and pork derived from that livestock would ultimately be exempt from the COOL requirements, and therefore carry no COOL label at all.³ Canada and Mexico underscore the fact that these exemptions remain unchanged.⁴

4. Japan submits that the Amended COOL measure's exemptions are relevant to the analysis of "treatment no less favourable" under Article 2.1, even though they are not, on their own, dispositive of the question of whether the Amended COOL measure is "even-handed". The exemptions may undermine the proposition that the detrimental impact caused by the recordkeeping and verification requirements of the Amended COOL measure stems exclusively from a legitimate regulatory distinction because the exemptions exclude "a considerable portion"⁵ of meat products from the need to provide origin information to consumers. Japan encourages the Panel to carefully scrutinize the rationale of the exemptions provided under the Amended COOL measure in light of, among others, the measure's objective of providing origin information to consumers, and to determine whether the exemptions are consistent with the requirement that any detrimental impact stem exclusively from a legitimate regulatory distinction.

5. In the original proceedings, the United States maintained that WTO Members should be allowed to weigh costs and benefits in the design of their technical regulations, and explained that the United States had decided to adopt certain exemptions and flexibilities to reduce the costs of compliance for industry, taking into account the views of interested parties.⁶ Japan accepts that when a government designs a technical regulation, it is reasonable for that government to try to reduce the compliance costs for market participants by allowing for reasonable exemptions and flexibilities. This is a consideration that a government can take into account, along with other relevant factors such as the diminished level of fulfillment of the objective pursued as a result of the exemptions and flexibilities, as well as consumer preferences. However, in Japan's view, if a technical regulation modifies the conditions of competition in the market to the detriment of

¹ Canada's first written submission, para. 15; Mexico's first written submission, para. 44.

² Appellate Body Report, *US – COOL*, para. 347.

³ Appellate Body Report, *US – COOL*, para. 344.

⁴ Canada's first written submission, para.18; Mexico's first written submission, para.46.

⁵ Appellate Body Report, *US – COOL*, para. 344, quoting Panel Report, *US – COOL*, para. 7.417.

⁶ United States' second written submission to the original Panel, paras. 149, 153-154; see also Panel Report, *US – COOL*, para. 7.711.

imported livestock, the government adopting it would be required to take into account the burdens of compliance to be borne by imported products as well as those by domestic products in adopting the technical regulation, including exemptions of the kind maintained in the Amended COOL measure.

6. Japan observes that the Amended COOL measure does not seem to address the disproportionate burdens of compliance that fall on the imported products. Moreover, although the United States indicated in the original proceedings that the flexibility regarding the use of labels B and C had been added in response to requests from Canada and its producer groups,⁷ this flexibility has been abolished in the Amended COOL measure. This Panel appears to be confronted with a technical regulation that further increases the costs of compliance, thus exacerbating a situation in which compliance costs were already borne disproportionately by the imported product. The Panel must "carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue."⁸

II. Article 2.2 of the TBT Agreement

7. In its Article 2.2 arguments, Mexico argues that, in these compliance proceedings, a comparison with reasonably available alternative measures is not required given the circumstances of the Amended COOL measure.⁹ Mexico finds support for its view in the Appellate Body Report in *US – Tuna II (Mexico)*.¹⁰

8. Japan notes that the two instances mentioned by the Appellate Body in *US – Tuna II (Mexico)* are extreme scenarios where the challenged measure is either not trade restrictive or makes no contribution at all to achieving the relevant legitimate objective. Japan further observes that, in the original proceedings, the Appellate Body recognized that the Panel's findings, and undisputed facts on the record, indicated that the labeling requirements under the COOL measure did make some contribution to the objective of providing consumer information on origin.¹¹ In the absence of evidence demonstrating that such contribution has been eliminated completely under the Amended COOL measure, an assessment of Article 2.2 should include a comparison of the Amended COOL measure and possible alternative measures.

9. Canada argues that a reasonably available alternative measure need not achieve "precisely the same degree of contribution to the achievement of the objective as that of the challenged measure in all cases."¹² Mexico makes a similar point.¹³

10. Japan recalls the Appellate Body's statement that "the importance of a panel identifying with sufficient clarity and consistency the objective or objectives pursued by a Member through a technical regulation cannot be overemphasized."¹⁴ Japan agrees with this statement, and further observes that the greater the precision with which a panel identifies the objective pursued by a government, the more accurately the panel can identify what would constitute an equivalent contribution by a reasonably available alternative measure. If the objective is not defined with sufficient precision, the panel may have difficulties deciding whether an alternative measure can fulfill the objective at a level that is acceptable to the government adopting the technical regulation.

11. In addition, Japan notes that the Appellate Body has said, in the context of evaluating "necessity" under Article XX of the GATT 1994 and Article XIV of the GATS, that a measure qualifies as an alternative measure if it preserves for the responding Member the right to achieve its desired level of protection with respect to objective pursued.¹⁵ The Appellate Body's

⁷ United States' second written submission to the original Panel, para.137.

⁸ Appellate Body Report, *US – COOL*, para. 271, quoting Appellate Body Report, *US – Clove Cigarettes*, para. 182.

⁹ Mexico's first written submission, para. 155.

¹⁰ Appellate Body Report, *US – Tuna II (Mexico)*, footnote 647 to para. 322 (emphasis omitted).

¹¹ Appellate Body Report, *US – COOL*, para. 476.

¹² Canada's first written submission, para. 118 (emphasis omitted).

¹³ Mexico's first written submission, para. 162.

¹⁴ Appellate Body Report, *US – COOL*, para. 387.

¹⁵ See Appellate Body Report, *US – Brazil Retreated Tyres*, para. 156 and Appellate Body Report, *US – Gambling*, para. 308.

interpretation of the necessity test in these similar contexts would seem to require a stricter comparison than is suggested by Canada and Mexico, between the degree of contribution achieved by the challenged measure and the degree achieved by any alternatives raised by a complaining party.

12. Mexico finds support for the more flexible comparison that it advocates in the language in Article 2.2, calling for consideration of "the risks non-fulfilment would create." The Appellate Body, however, has explained that "the risks non-fulfilment would create" is a "further element of weighing and balancing" in the analysis under Article 2.2.¹⁶ In other words, "the risks non-fulfilment would create" is a factor, among others, to be considered in weighing and balancing under Article 2.2 and does not provide a basis for a more flexible comparison between the challenged measure and any reasonably available alternatives. Therefore, a lesser degree of contribution by the alternative measure cannot be justified in the light of the risks non-fulfilment would create, as Mexico contends.

Third Party Oral Statement

I. "Legitimate Regulatory Distinction" Test under Article 2.1 of the TBT Agreement

1. With respect to Article 2.1 of the TBT Agreement, the United States does not appear to contest that the Amended COOL measure has a detrimental impact on the imported products. Instead, the contestation centers on the second prong of the test articulated by the Appellate Body previously,¹⁷ that is, whether the detrimental impact stems from a legitimate regulatory distinction. In the earlier TBT disputes, the Appellate Body initially referred to this test as involving an inquiry about even-handedness. In a subsequent case, the Appellate Body referred to the measure being "designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination" as an example of a situation that would not be considered to be even-handed.¹⁸ Japan further notes that, in applying the even-handedness test, the Appellate Body has also focused on the "calibration" of a measure as well as the proportionality of certain requirements. Japan recalls that "even-handedness" is not treaty text and is, in fact, twice removed from it. The concept is an elaboration or clarification of the second prong of the test articulated by the Appellate Body. It is a useful concept and a good illustration of the type of discrimination that is prohibited by Article 2.1 of the TBT Agreement. However, Japan would caution against relying too rigidly on this term.

2. In Japan's view, the assessment of whether the detrimental impact stems exclusively from a legitimate regulatory distinction broadly encompasses consideration of two elements. The first element relates to the legitimacy of the rationale or objective that the regulatory distinction pursues. The second element looks more broadly at the design or manner in which the measure is applied in the light of the rationale or objective claimed to be pursued. Whether the examination of these two elements is part of a single, holistic assessment of "even-handedness" (or legitimacy) or separate inquiries, in our view, both elements must be properly considered.

3. As regards the first element, Japan does not understand the Appellate Body to have suggested that Article 2.1 allows all possible regulatory distinctions. Rather, the regulatory distinctions must further one of the policy objectives recognized in the TBT Agreement. This should not be a superficial inquiry that is satisfied merely because the measure has some connection to the objective pursued. A panel must confirm that the regulatory distinction drawn by the regulation in question can indeed further the objectives allegedly pursued by it.

4. In this case, the Panel must scrutinize what information, which is not already provided voluntarily, the United States considers that consumers need in order to avoid confusion or deception when shopping. Where certain information would be unnecessary from a consumer point of view, the disclosure requirement merely imposes additional costs on the covered products without providing any value or utility. In addition, the Panel must scrutinize the relationship between the measure and the objective it pursues. Under the particular facts of this case, this

¹⁶ Appellate Body Report, *US – Tuna (Mexico)*, para. 321; see also Appellate Body Report, *US – COOL*, para. 377.

¹⁷ Appellate Body Report, *US – Tuna II (Mexico)*, para. 215 (referring to Appellate Body Report, *US – Clove Cigarettes*, paras. 180 and 215).

¹⁸ Appellate Body Report, *US – COOL*, para. 271.

inquiry must examine the manner in which the information is provided to consumers and whether the measure in fact provides consumers with the information that they purportedly require.

5. With respect to the second element, the Appellate Body has stated that, in assessing even-handedness, a panel must "carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue".¹⁹ We recall that, in this case, the United States has questioned whether the exemptions are relevant for the assessment of less favourable treatment. Japan does not see any reason to exclude *ex ante* any exemptions from the assessment of less favourable treatment. To fully understand the scope of a measure and how it operates, it is often necessary to consider any and all exemptions.

6. Japan understands that the particular exemptions at issue exclude certain meat products from the scope of the Amended COOL measure. In so doing, the exemptions appear to effectively create an additional product category of origin "unknown" or "unidentified" under the Amended COOL measure. The existence of this category covering a large proportion of meat products may cast doubt on the need for the information required under the four types of labels of the Amended COOL measure because meat products falling under that additional category do not provide origin information to consumers. Also, by allowing certain meat products to be put in the additional category, the exemptions appear to preclude them from being classified in any of the four categories on the basis of the relevant regulatory distinction, i.e. the three production steps and the countries in which such steps take place. Under these circumstances, Japan wonders whether the regulatory distinction can be said to be calibrated or tailored to the basis or rationale of the distinction.

7. Therefore, Japan respectfully requests the Panel to take into account the above considerations to examine whether the relevant regulatory distinction under the Amended COOL measure is legitimate or designed or applied in an even-handed manner, so as to determine whether the detrimental impact on imported livestock stems exclusively from a legitimate regulatory distinction.

II. The Relationship Between Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994

8. The parties would appear to hold different views as to whether the phrase "treatment no less favourable" should be interpreted in the same manner under Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994. Another question raised in these proceedings is whether the second prong of the *de facto* discrimination test that the Appellate Body developed in the context of Article 2.1 of the TBT Agreement²⁰ applies to the assessment of *de facto* discrimination claims under Article III:4 of the GATT 1994.

9. At the outset, Japan recalls that the non-discrimination rule under Article 2.1 of the TBT Agreement applies specifically "in respect of technical regulations". Thus the application of the second prong of the test developed by the Appellate Body is unique to technical regulations. In contrast, Article III:4 of the GATT 1994 addresses a broad and diverse range of measures, including technical regulations. Thus, it would arguably be prudent to exercise a degree of caution when drawing guidance from the interpretation developed in the context of Article 2.1, even though we also recognize that Article 2.1 provides context to the interpretation of Article III:4 "in respect of technical regulations".

10. Japan also notes that the Appellate Body developed the second prong of the test at least partly based on the "absence among the provisions of the TBT Agreement of a general exception provision similar to Article XX of the GATT 1994"²¹ and the structural parallel between the balance set out in the TBT Agreement, on the one hand, and "the balance set out in the GATT 1994, where obligations such as national treatment in Article III are qualified by the general exceptions provision of Article XX."²² Japan further notes that Article 2.2 also contains certain elements set

¹⁹ Appellate Body Report, *US – Clove Cigarettes*, para. 182.

²⁰ Appellate Body Report, *US – Tuna II (Mexico)*, para. 215 (referring to Appellate Body Report, *US – Clove Cigarettes*, paras. 180 and 215).

²¹ Appellate Body Report, *US – Clove Cigarettes*, para.88.

²² Appellate Body Report, *US – Clove Cigarettes*, para.96. See also Appellate Body Report, *US – Clove Cigarettes*, para.101.

out in Article XX of the GATT 1994. Therefore, although a technical regulation could be found to be consistent with Article 2.1 of the TBT Agreement and yet inconsistent with Article III:4 of the GATT 1994, under the Appellate Body's theory, this "inconsistency" could be resolved by the application of Article XX of the GATT 1994.

11. That being said, it is theoretically possible that some technical regulations may not find protection under Article XX. In such a situation, Japan notes that the TBT Agreement does not contain the same helpful guidance found in Article 2.4 of the SPS Agreement.

12. To address such interpretive discrepancies, some Members suggest to import the interpretation of Article 2.1 of the TBT Agreement directly to Article III:4 of the GATT 1994, thus requiring the assessment of a *de facto* claim of less favourable treatment under Article III:4 to follow a two-step analysis similar to the one developed under Article 2.1 of the TBT Agreement. This approach has its attraction. After all, both Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement address "treatment no less favourable". Moreover, technical regulations in principle are not only regulated under Article 2.1 of the TBT Agreement, but also fall among the types of measures regulated by Article III:4 of the GATT 1994.

13. The approach that Japan has described, however, is not without difficulties. For one thing, there would appear to be some tension between this approach and the approach followed by the Appellate Body in earlier cases. Indeed, this would not be the first time that consideration of the objectives pursued by the challenged measure is sought to be introduced into Article III:4, but to date the Appellate Body apparently has been reluctant to accept such considerations, even though the Appellate Body has taken such considerations into account when the objectives have a bearing under one of the criteria of the "like products" analysis, as was the case in *EC – Asbestos*.²³ Japan also recalls the Appellate Body's statement that, with respect to regulatory distinctions based on a regulatory objective, such "distinctions among products that have been found to be like are better drawn when considering subsequently, whether less favourable treatment has been accorded".²⁴ The other difficulty stems from Article XX itself. If some flexibility were introduced into Article III:4, questions arise as to whether this would make Article XX meaningless. These questions should be answered taking into consideration the fact that certain restrictions on exports or imports of, for example, exhaustible natural resources or non-automatic import licensing requirements, which are found to be inconsistent with GATT Article XI:1 can be justified only under Article XX. Japan also notes that under the chapeau of Article XX, the issue is whether "the reasons given for this discrimination bear [] rational connection to the objective falling within the purview of a paragraph of Article XX, or would go against that objective", as found by the Appellate Body in *Brazil – Retreaded Tyres*.²⁵

14. The Panel must carefully address these interpretive difficulties in resolving the issue of the consistent interpretation of TBT Article 2.1 and GATT Article III:4 (in light of GATT Article XX(b)) for technical regulations raised by the parties.

III. Article 2.2 of the TBT Agreement

15. Finally, Japan wishes to address the following two points regarding the analysis under Article 2.2: (i) the scope of the concept of "trade restrictiveness", and (ii) the role of "reasonably available alternative measures" in the Article 2.2 analysis.

16. Japan notes that despite the apparent differences in the way in which the parties define "trade-restrictiveness", they do not essentially disagree on the factors to examine in the "trade-restrictiveness" analysis. Canada recalls that WTO jurisprudence interpreted the term "trade-restrictive" to mean "having a limiting effect on trade" and argues that a measure that affects the conditions of competition to the detriment of imported livestock is trade-restrictive.²⁶ Mexico takes a similar position. The United States interprets the term "trade restrictive" as referring to something that has a limiting effect on trade, that is, limits market access.²⁷ Although the United States argues that the term "trade restrictiveness" refers to the restricting of trade flows,

²³ Appellate Body Report, *EC – Asbestos*, paras. 113-116. See also Appellate Body Report, *US – Clove Cigarettes*, paras. 117-119.

²⁴ Appellate Body Report, *US – Clove Cigarettes*, paras. 116.

²⁵ Appellate Body Report, *Brazil – Tyres*, para. 227.

²⁶ Second Written Submission of Canada, para. 71.

²⁷ Second Written Submission of the United States of America, para. 107.

and not to the concept of discrimination,²⁸ it does not explicitly exclude qualitative impacts on trade from being taken into account, along with quantitative ones, in the analysis of "trade restrictiveness."²⁹

17. Japan does not see a basis for excluding discrimination from the scope of the analysis of trade restrictiveness under Article 2.2 of the TBT Agreement. The text of Article 2.2 prohibits WTO Members from creating "unnecessary obstacles to international trade". In Japan's view, this language suggests a broad scope of application and it supports the conclusion that Article 2.2 imposes a prohibition on a range of activities that are broader than the direct denial of market access.

18. The United States highlights the separate obligations set out by Articles 2.1 and 2.2 and on this basis argues that the term "trade restrictiveness" does not refer to the concept of discrimination. Japan notes, in this regard, that Article 2.1 addresses whether a technical regulation has a detrimental impact on imported products, whereas Article 2.2 examines the degree of impact that it has on trade.

19. In its third party submission, the European Union raises the question of whether the concept of trade-restrictiveness is merely concerned with the *absolute* impact of a regulation on imports, or also with its *relative* impact on imported and domestic products.³⁰ Japan observes that none of the parties, not even the United States as the respondent, seems to confine "a limiting effect on trade" to the absolute impact of a regulation on imports.

20. Japan turns now to the role of "reasonably available alternative measures" in the Article 2.2. Japan recalls that except for the two extreme instances mentioned by the Appellate Body in *US—Tuna II (Mexico)* where the challenged measure is either not trade restrictive or makes no contribution at all to achieving the relevant legitimate objective, a comparison between the trade-restrictiveness of the technical regulation at issue and that of an alternative measures is required under Article 2.2.

21. The comparison with alternative measures is a fundamental element of the analysis of trade-restrictiveness under Article 2.2. The objective of this comparison is to determine whether there is an alternative measure that has a lower impact on trade, or is more neutral as regards the competitive opportunities of the imported products in the relevant market, than the challenged measure. In this assessment, the removal of disproportionate compliance costs on imported products would certainly have the effect of facilitating trade. In other circumstances, depending on the absolute and relative costs that it imposes on imported products, a non-discriminatory measure can have a more limiting effect on trade than a discriminatory measure. Japan considers that this lends further support to the conclusion that the term "trade restrictive" addresses a broad range of impacts on trade including, but not limited to, the modification in the competitive conditions of imported products.

22. With regard to the allocation of the burden of proof under Article 2.2, Mexico contends that a complaining party's burden is to simply "identify possible alternatives", and that the complaining party does not have the burden of presenting evidence and arguments sufficient to demonstrate that the alternative measure is less trade restrictive, makes an equivalent contribution to the relevant objective pursued and is reasonably available.³¹ As explained by the Appellate Body, and as argued in this case by the United States in detail,³² Japan believes that a complaining party bears the burden of presenting a *prima facie* case that the challenged measure is inconsistent with Article 2.2 by establishing that there is an alternative measure reasonably available and that this alternative measure is less trade restrictive and makes an equivalent contribution to the relevant objective pursued.

²⁸ First Written Submission of United States of America, para. 153.

²⁹ See e.g., Second Written Submission of Canada, para. 71.

³⁰ European Union Third-Party Written Submission, para. 110.

³¹ Second Written Submission of the United Mexican States, paras. 114-119.

³² Second Written Submission of the United States of America, paras. 114-119.

ANNEX C-7**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS
OF THE REPUBLIC OF KOREA***

1. The Republic of Korea ("Korea") appreciates this opportunity to present its views to the Panel as a third party. The decision of this Panel will provide important guidelines to the WTO Members in making their policy decisions and formulating their respective government programs in a manner consistent with the relevant rules of the WTO.

2. While the parties to the dispute and third parties raise several important issues, Korea would like to briefly focus on certain systemic issues. First, Korea would like to share its views about what kind of legal standard must be established with respect to the Article 21.5 panel's terms of reference. Second, Korea would like to comment on whether the trace-back system suggested by the complaints can be a reasonably available alternative measure consistent with Article 2.2 of the TBT Agreement.

COMPLIANCE PANEL SHOULD BEAR IN MIND 'TRUE FINALITY' OF A DISPUTE IN DETERMINING ITS TERMS OF REFERENCE

3. To begin with, Korea observes that compliance panel's jurisdiction has become an important systemic issue in the recent Article 21.5 proceedings. As the number of compliance disputes increases,¹ the scope of compliance panel's terms of reference has also been in dispute as a major systemic issue.

4. Korea has maintained that a compliance panel must possess a relatively broad authority to identify measures taken to comply. The Appellate Body in several Article 21.5 disputes has ruled that measures taken to comply are not confined to the declared measures by the implementing Member.² The Appellate Body in *Mexico – Corn Syrup (Article 21.5)* has particularly ruled that panels have a duty to examine issues of a "fundamental nature," issues that go to the root of their jurisdiction on their own motion even if the parties to the dispute remain silent on those issues.³

5. Because the WTO jurisprudence recognizes a compliance panel's broad authority to identify measures to comply, Korea believes that certain guiding principle to determine whether a measure is within a compliance panel's jurisdiction would be necessary. As a guiding principle to determine compliance panel's jurisdiction, Korea submits that the concept of 'true finality' may assist a compliance panel in delineating its jurisdiction. As we understand, 'true finality' of a dispute could be achieved when a compliance panel resolves all the disagreements between the parties to the dispute with respect to measures taken to comply. As a practical matter, true finality of a dispute should envisage a situation where the exporters of the aggrieved party restore their competitiveness which they had enjoyed before the WTO inconsistent measures imposed by the Member concerned.

6. It should be noted, however, that the concept of 'true finality' should not be interpreted to include all the claims raised by the complaining party. As Korea has pointed out, if a compliance panel's terms of reference are overly broad, it may open a possibility for the parties to the dispute to re-litigate the issues already lost in the prior proceedings. Therefore, compliance panel must strike a balance between the broad authority and the concerns on re-litigation.

* The Republic of Korea requested that its oral statement serve as the integrated executive summary.

¹ As of 16 February 2014, 48 complaints requesting Article 21.5 panel have been filed in the DSB since 1995. In the same period, 110 disputes have been appealed. About half of the DSB decisions have not been effectively resolved, resulting in compliance disputes. See the statistics in www.worldtradelaw.net. (last visited on 16 February 2014).

² E.g., Appellate Body Reports, *US-Softwood Lumber IV (Article 21.5 – Canada)*; *US-Zeroing (Article 21.5 – EC)*.

³ Appellate Body Report, *Mexico-Corn Syrup (Article 21.5)*, para. 36, quoted in *US-Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, para. 7.35.

7. In this respect, Korea would like to briefly comment on certain aspects of the principle of *res judicata*, although the principle is known to be inapplicable to international law. The principle of *res judicata* precludes parties from re-litigating claims that have already been finally resolved in a prior proceeding before a competent tribunal. Of course, the narrow scope of the WTO panel's terms of reference must be distinguished from the more flexible municipal court proceedings where the principle of *res judicata* applies. Ordinarily, in the municipal court proceedings, each party can amend its complaint as necessary with permission by the court. As we know, this kind of flexibility is not allowed in the WTO dispute settlement procedures. Nonetheless, systemic interest in achieving finality of disputes still exists in the WTO dispute settlement procedures.

8. For example, the Panel in *India-Autos* examined certain aspect of *res judicata*. In that dispute, India argued that certain import licensing requirements that were the subject of the dispute had already been addressed by a prior WTO proceeding, and therefore should not be considered by the panel in the subsequent proceeding. Although the Panel did not directly touched upon the issue of *res judicata*, it appeared to take the position that *res judicata* would apply to the issues that were actually litigated and decided in the prior WTO dispute.⁴

PANEL SHOULD EXAMINE WHETHER THE POLICY OBJECTIVE OF THE TRACE-BACK SYSTEM WOULD BE DIFFERENT FROM THE POLICY OBJECTIVE THAT THE COOL REQUIREMENTS PURSUE

9. One of the issues in this compliance proceeding is whether trace-back system suggested by the complaints as a reasonably available alternative measure is congruent with the object and purpose under Article 2.2 of the TBT Agreement. It seems to be agreed among the parties to this dispute that the trace-back system will apply to both domestic and imported product in a non-discriminatory manner. However, the parties disagree on the question of whether the trace-back system requiring more burden on the farms and meat producers is permissible as a reasonably available alternative measure under Article 2.2 of the TBT Agreement.

10. To Korea's understanding, the ordinary meaning of trade-restrictiveness would be that the flow of goods and services between national borders is constrained. Considering the additional costs and administrative burden incurred by the trace-back system, one would tend to conclude that the alternative measure would constrain the flow of the goods in dispute. Therefore, without legitimate policy objective justifying the additional burden, the trace-back system would not seem to be a reasonably available alternative measure.

11. In this dispute, the objective of the COOL requirements is clear: that is, to provide consumers of certain designated products with information about country of origin in order to enhance the consumers' right to know. Clearly, the trace-back system seems to meet this policy objective. However, a question arises as to reasonableness of the measure. In other words, is the trace-back system reasonably available alternative measure to substitute for the current COOL requirement?

12. To Korea's understanding, there exist somewhat different policy objectives between the COOL requirements and the trace-back system. Normally, a trace-back system is known to be adopted to ensure animal health and food safety. That being said, the policy objective of the trace-back system would be surveillance rather than consumers' right to know. Therefore, this Panel should examine whether the degree of information required in the trace-back system is appropriate and necessary to fulfill the policy objective, contemplated in the COOL requirements. If the trace-back system incurring additional costs and administrative burden unnecessarily requires more information than the policy objective of the COOL requirements pursues, Korea considers that the trace-back system should not be regarded as a *reasonably* available alternative measure.

13. This concludes Korea's oral statement. Again, Korea appreciates this opportunity to present its view and would be happy to take questions you might have.

⁴ Panel Report, *India-Measures Affecting the Automotive Sector*, paras. 7.62-66.

ANNEX C-8**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF NEW ZEALAND****I. INTRODUCTION**

1. New Zealand's participation as a Third Party in this dispute reflects both its systemic legal issues arising from the amended country of origin labelling measure and its trade interest in the United States beef market.

II. THE DISPUTE SETTLEMENT UNDERSTANDING

2. New Zealand notes that the United States' amended Country of Origin Labeling Measure¹ (amended COOL measure) was subject to a six month "education and outreach" grace period in which it was legally in force, but was not fully enforced to allow retailers and suppliers transition to the new rule.² Article 21.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) provides that prompt compliance with the recommendations and rulings of the Dispute Settlement Body is essential in the effective resolution of disputes. If compliance were achieved once a Member formally changed the law on its books, even where the Member has stated its intention not to fully implement it until a later date, relief for Members suffering adverse effects from a non-compliant measure would be deferred until this later date. This would have systemic implications for the dispute settlement process. New Zealand approves of the approach taken in previous disputes where the appropriateness and length of a grace period was considered in a determination as to the "reasonable period of time" for compliance under Article 21.3(c) of the DSU.³

III. THE AGREEMENT ON TECHNICAL BARRIERS TO TRADE**A. ARTICLE 2.1: THE FRAMEWORK TO ASSESS LEGITIMATE REGULATORY DISTINCTIONS**

3. The Appellate Body has stated that a technical regulation that detrimentally impacts on imported products compared to like domestic products will nevertheless be consistent with Article 2.1 of the Agreement on Technical Barriers to Trade (TBT Agreement) if this impact stems from a legitimate regulatory distinction.⁴ Jurisprudence further clarifies that a regulatory distinction that is not designed in an even-handed manner will not be legitimate.⁵ A regulatory distinction will not be even-handed if it is designed or applied in a manner that "constitutes a means of arbitrary or unjustifiable discrimination".⁶

¹ As set out in §1638 of the *Agricultural Marketing Act of 1946* (7 U.S.C. § 1638 (2012)) and the COOL regulations (i.e. *the Final Rule on Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng and Macadamia Nuts*, 74 Fed. Reg. 2658 (15 January 2009) as modified by *the Final Rule on Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng and Macadamia Nuts*, 78 Fed. Reg. 31,367 (24 May 2013)).

² Mexico First Written Submission, 31 October 2013 (Mexico FWS), para. 51.

³ See Award of the Arbitrator, *Korea – Taxes on Alcoholic Beverages* (Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes), WT/DS75/16 and WT/DS84/14, 4 June 1999, para. 47 where the arbitrator noted that a thirty day grace period was required for the enforcement of certain measures under Korean law and included this additional period after the promulgation of the amendments to the legislation as part of the reasonable period of time.

⁴ Appellate Body Reports, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012, para. 181 (*US – Clove Cigarettes*); *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012, para 215 (*US – Tuna II (Mexico)*); *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R /WT/DS386/AB/R, adopted 23 July 2012 (*US – COOL*), para. 271.

⁵ Appellate Body Reports, *US – Clove Cigarettes*, para. 182 and *US – COOL*, para. 271.

⁶ Appellate Body Report, *US – COOL*, para. 271.

4. The recently published panel report in *EC – Seal Products* may provide a useful framework for the Panel to consider in assessing the exceptions and flexibilities in the amended COOL measure.⁷ The Panel's approach in *EC – Seal Products* involves consideration of three questions: First, is the regulatory distinction rationally connected to the objective of the overarching measure? Second, if not, is there any cause or rationale that can justify the distinction (i.e., "explain the existence of the distinction") despite the absence of the connection to the objective of the overarching measure, taking into account the particular circumstances of the instant dispute? Third, is the distinction "designed or applied in a manner that constitutes arbitrary or unjustifiable discrimination" such that it lacks "even-handedness"?⁸

5. If this analysis concludes that individual regulatory distinctions are even-handed, New Zealand submits that a Panel should also step back to consider the measure as a whole in determining whether there is less favourable treatment. This additional step would prevent Members from expressly designing measures with even-handed regulatory distinctions that, when combined, nevertheless have an overall protectionist effect. While individual distinctions may be even-handed, the number and/or nature of the distinctions may still accord less favourable treatment to like imported products.

B. ARTICLE 2.2: DETERMINING WHETHER A MEASURE IS MORE TRADE-RESTRICTIVE THAN NECESSARY

(i) *It is not necessary to add the relative importance of the common interests or values as a separate factor to the Appellate Body's test*

6. The Appellate Body has set out a test for assessing whether a technical regulation is "more trade-restrictive than necessary" under Article 2.2 of the TBT Agreement, which involves consideration of three matters: (i) the degree of contribution made by the measure to the legitimate objective at issue; (ii) the trade-restrictiveness of the measure; and (iii) the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the measure.⁹

7. Mexico has suggested that "the relative importance of the common interests or values furthered by the challenged measure" should be added as an additional factor in the Article 2.2 necessity test.¹⁰ While the importance of the common interests or values at stake is an important element under Article 2.2, this is already considered (albeit indirectly) in the assessment of the "nature of the risks at issue and the gravity of the consequences that would arise from non-fulfilment of the objective". To include the importance of the objective as a separate factor could cause confusion, and may give the importance of the objective (or the lack of importance) undue emphasis in the overall weighing and balancing process.

8. New Zealand would be concerned if this increased emphasis undermined the rights of WTO Members to decide which legitimate policy objectives they wish to pursue, and the levels at which they wish to pursue them.¹¹ Establishing the *relative* importance of the objective as a factor in its own right would lead panels to difficult assessments of the hierarchy of legitimate objectives. New Zealand considers that, beyond objectives such as the protection of human health that are universally recognised as being of utmost importance, different Members will place importance on different objectives based on current circumstances and their own subjective values and priorities, all of which may change over time. New Zealand is therefore wary of any attempts to categorise or rank the importance of legitimate objectives in advance, and in isolation from the measure and the Member under consideration.

⁷ Panel Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/R WT/DS401/R and Add. 1, circulated to WTO Members 25 November 2013 (appeal in progress), para. 7.259.

⁸ Panel Report, *EC – Seal Products*, para. 7.259.

⁹ Appellate Body Report, *US – Tuna II (Mexico)*, para. 322.

¹⁰ Mexico FWS, paras. 156 - 157.

¹¹ As recognised in Article 2.2 and the sixth recital to the preamble of the TBT Agreement.

(ii) *There must be a balancing and weighing in the consideration of alternative measures*

9. The Appellate Body in *US – Tuna II (Mexico)* found that the text of Article 2.2 imports an element of "weighing and balancing" into the analysis of whether a technical regulation is more trade restrictive than necessary by requiring the risks non-fulfilment of the objective would create to be taken into account.¹² This process will generally involve a comparative analysis of the challenged measure against reasonably available alternatives.

10. This analysis requires the Panel to identify the legitimate objective of the challenged measure in order to assess the contribution it makes to that objective and to assess the risks that non-fulfilment of that objective would create. The proper identification of the legitimate objective is therefore fundamentally important to identify these comparison points to evaluate against proposed alternatives. A legitimate objective described in an artificially narrow manner may prevent the formulation of reasonably available alternatives.

11. The parties differ as to the comparative contribution that an alternative measure is required to make to the achievement of the legitimate objective. New Zealand's view is that the fact that an alternative measure makes a lesser contribution to the legitimate objective is a highly relevant, but not determinative, factor in this weighing and balancing process. The extent of this lesser contribution should be balanced against the risks that non-fulfilment of the objective would create and the trade-restrictiveness of the measure. For instance, an alternative measure that makes only a slightly lesser contribution to the legitimate objective, but is considerably less trade restrictive, *may* demonstrate that a challenged measure is more trade restrictive than necessary if the risks that non-fulfilment of the objective would create are not particularly grave. However, New Zealand expects that an alternative measure that makes a lesser contribution to the legitimate objective will only very rarely demonstrate an inconsistency with Article 2.2.

12. In regard to possible alternatives, New Zealand notes Mexico's and Canada's proposed first alternative measure that includes a mandatory COOL requirement based on substantial transformation, complemented by a voluntary COOL scheme that provides information on where the animal was born, raised and slaughtered.¹³ New Zealand considers that voluntary COOL may be an alternative measure where there is no health or safety objective behind the regulation. As noted by Mexico¹⁴ and Canada,¹⁵ voluntary COOL can provide the same information to the consumer if there is consumer demand for such information. Voluntary COOL allows the design and operation of a labelling system to be developed in response to supply and demand needs. Well-designed voluntary COOL can make an equivalent (or even better) contribution to the objective of providing consumers with information as to origin than a mandatory COOL regime that is peppered with exceptions.

IV. THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

13. The complainants and respondent differ as to the correct interpretation of the term "treatment no less favourable" in Article III:4 of the General Agreement on Tariffs and Trade 1994 (GATT 1994) as compared to the interpretation of the same term in Article 2.1 of the TBT Agreement. The Appellate Body has found that Article III:4 of the GATT 1994 provides relevant context for interpreting the term "treatment no less favourable in Article 2.1 of the TBT Agreement,"¹⁶ given the provisions are "built around the same core terms, namely 'like products' and 'treatment no less favourable'".¹⁷

14. However, the legal standards for the national treatment obligations are not identical. Article III:4 of the GATT 1994 prohibits Members from modifying the conditions of competition in the marketplace to the detriment of the group of imported products vis-à-vis the group of

¹² Appellate Body Report, *US – Tuna II (Mexico)*, para. 321.

¹³ Mexico FWS, paras. 182 – 191; Canada First Written Submission, 31 October 2013 (Canada FWS), paras. 156 – 163.

¹⁴ Mexico FWS, para. 185.

¹⁵ Canada FWS, para. 158.

¹⁶ Appellate Body Reports, *US – Clove Cigarettes*, paras. 100 and 180; *US – Tuna II (Mexico)*, para. 214; *US – COOL*, para. 269.

¹⁷ Appellate Body Report, *US – Clove Cigarettes*, para. 100.

domestic products.¹⁸ In contrast, as noted above at paragraph 3, the Appellate Body has consistently maintained that the "treatment no less favourable" requirement in Article 2.1 of the TBT Agreement does not prohibit "detrimental impact on imports that stems exclusively from a legitimate regulatory distinction".¹⁹ This additional element in Article 2.1 reflects the context in which the term "treatment no less favourable" is used, particularly the second, fifth and sixth recitals of the preamble, the text of Article 2.2, the definition of "technical regulation",²⁰ and the lack of a general exceptions clause in the TBT Agreement.²¹ The United States submits²² that analysis under Article III:4 requires an assessment of whether distinctions can be explained by factors or circumstances unrelated to the origin of the imported product on the basis of the Appellate Body reports in *Dominican Republic – Import and Sale of Cigarettes*²³ and *EC – Asbestos*.²⁴ New Zealand notes that the Appellate Body in *US – Clove Cigarettes* specifically found that *Dominican Republic – Import and Sale of Cigarettes* is not authority for the proposition that panels should inquire further into whether the detrimental effect is unrelated to the foreign origin of the product in an Article III:4 analysis.²⁵

15. The jurisprudence therefore provides that the analysis under Article III:4 of the GATT 1994 focuses on the modification of the conditions of competition in the marketplace.²⁶ However, New Zealand acknowledges the concern that this legal analysis could result in a technical regulation being found consistent with the national treatment obligation in Article 2.1 of the TBT Agreement (because the detrimental impact stems exclusively from a legitimate regulatory distinction) but nevertheless inconsistent with Article III:4 of the GATT 1994 because the reason for the distinction does not fall within the general exceptions in Article XX of the GATT 1994. New Zealand expresses some unease about this potential outcome, particularly as the TBT Agreement is the more specialised agreement dealing with technical regulations. That being the case, the WTO-consistency or otherwise of a technical regulation should primarily be determined by the Agreement negotiated specifically to discipline such measures. This issue is unlikely to be resolved as a matter of strict legal interpretation, and New Zealand supports the complainants' view that the scope and content of the obligations in Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement are distinct and that "treatment no less favourable" under Article III:4 focuses on the modification of the conditions of competition in the marketplace.²⁷

¹⁸ Appellate Body Reports, *US – Clove Cigarettes*, para. 179; *US – Tuna II (Mexico)*, para. 214 (citing Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001 (*Korea – Various Measures on Beef*), para. 137); *US – COOL*, para. 270.

¹⁹ Appellate Body Reports, *US – Clove Cigarettes*, paras. 174 and 181; *US – COOL*, para. 271; *US – Tuna II (Mexico)*, para. 215.

²⁰ Appellate Body Reports, *US – Clove Cigarettes*, paras. 88-102 and 181-182; *US – Tuna II (Mexico)*, paras. 211-213; *US – COOL*, para. 268.

²¹ Appellate Body Report, *US – Clove Cigarettes*, para. 101.

²² United States First Written Submission, 26 November 2013, paras. 131 – 134.

²³ Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005.

²⁴ Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001.

²⁵ Appellate Body Report, *US – Clove Cigarettes*, footnote 372 at para. 180.

²⁶ Appellate Body Reports, *US – Clove Cigarettes*, para. 179; *US – Tuna II (Mexico)*, para. 214 (citing Appellate Body Reports, *Korea – Various Measures on Beef*, para. 137); *US – COOL*, para. 270.

²⁷ Appellate Body Reports, *US – Clove Cigarettes*, para. 179; *US – Tuna II (Mexico)*, para. 214 (citing Appellate Body Reports, *Korea – Various Measures on Beef*, para. 137); *US – COOL*, para. 270.