

**UNITED STATES – CERTAIN COUNTRY OF ORIGIN
LABELLING REQUIREMENTS**

(AB-2012-3/DS386)



Appellee Submission of Mexico

10 April 2012

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CASES CITED IN THIS SUBMISSION

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<i>Australia – Salmon</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327
<i>Brazil – Retreaded Tyres</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, 1527
<i>Canada – Periodicals</i>	Appellate Body Report, <i>Canada – Certain Measures Concerning Periodicals</i> , WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, 449
<i>China – Raw Materials</i>	Appellate Body Report, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R, adopted 24 February 2012
<i>Dominican Republic – Import and Sale of Cigarettes</i>	Appellate Body Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV, 7367
<i>EC – Asbestos</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243
<i>EC – Fasteners (China)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/AB/R, adopted 28 July 2011
<i>EC – Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
<i>EC – Poultry</i>	Appellate Body Report, <i>European Communities – Measures Affecting the Importation of Certain Poultry Products</i> , WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, 2031
<i>EC – Sardines</i>	Panel Report, <i>European Communities – Trade Description of Sardines</i> , WT/DS231/R and Corr.1, adopted 23 October 2002, as modified by Appellate Body Report WT/DS231/AB/R, DSR 2002:VIII, 3451
<i>EC – Trademarks and Geographical Indications (US)</i>	Panel Report, <i>European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, Complaint by the United States</i> , WT/DS174/R, adopted 20 April 2005, DSR 2005:VIII, 3499
<i>Japan – Agricultural Products II</i>	Panel Report, <i>Japan – Measures Affecting Agricultural Products</i> , WT/DS76/R, adopted 19 March 1999, as modified by Appellate Body Report WT/DS76/AB/R, DSR 1999:I, 315
<i>Korea – Beef</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, 5
<i>Thailand – Cigarettes from the</i>	Appellate Body Report, <i>Thailand – Customs and Fiscal Measures on</i>

<i>Philippines</i>	<i>Cigarettes from the Philippines</i> , WT/DS371/AB/R, adopted 15 July 2011
<i>US – Clove Cigarettes</i>	Appellate Body Report, <i>United States – Measures Affecting the Production and Sale of Clove Cigarettes</i> , WT/DS406/AB/R, 4 April 2012 [adoption pending]
<i>US – COOL</i>	Panel Report, <i>United States – Certain Country of Origin Labelling (COOL) Requirements</i> , WT/DS384/R (Canada) and WT/DS386/R (Mexico), 18 November 2011
<i>US – FSC (Article 21.5 – EC)</i>	Appellate Body Report, <i>United States – Tax Treatment for “Foreign Sales Corporations” – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, 55
<i>US – Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, 5663 (Corr.1, DSR 2006:XII, 5475)
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755
<i>US – Tyres (China)</i>	Appellate Body Report, <i>United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China</i> , WT/DS399/AB/R, adopted 5 October 2011

TABLE OF GATT DISPUTES CITED IN THIS SUBMISSION

Short Title	Full Case Title and Citation
<i>US – Section 337 Tariff Act</i>	Panel Report, <i>United States – Section 337 of the Tariff Act of 1930</i> , adopted 7 November 1989, BISD 36S/345

TABLE OF ACRONYMS USED IN THIS SUBMISSION

Acronym	Full Name
2002 Farm Bill	The Farm Security and Rural Investment Act of 2002
2008 Farm Bill	Food, Conservation, and Energy Act of 2008
2009 Final Rule (AMS)	Final Rule on Mandatory Country of Origin Labelling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, published on 15 January 2009 as 7 CFR Part 65
BCI	Additional procedures for the protection of business confidential information
AMS	Agriculture Marketing Service (of the United States Department of Agriculture)
C.F.R.	Code of Federal Regulations
COOL	Country of Origin Labelling
DSB	Dispute Settlement Body

DSU	Dispute Settlement Understanding
FSIS	Food Safety and Inspection Service (of the United States Department of Agriculture)
GATT 1994	General Agreement on Tariffs and Trade 1994
Interim Final Rule (AMS)	Interim Final Rule on Mandatory Country of Origin Labelling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, published on 1 August 2008 as 7 CFR Part 65
Interim Final Rule (FSIS)	Interim Final Rule on Mandatory Country of Origin Labelling of Muscle Cuts of Beef (including Veal), Lamb, Chicken, Goat, and Pork, Ground Beef, Ground Lamb, Ground Chicken, Ground Goat, and Ground Pork, published on 28 August 2008 as 9 CFR Parts 317 and 381
NAFTA	North American Free Trade Agreement
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT Agreement	Agreement on Technical Barriers to Trade
U.S.C.	United States Code
USDA	United States Department of Agriculture
Vilsack letter	Letter to “Industry Representative” from the United States Secretary of Agriculture, Thomas J. Vilsack, of 20 February 2009
WTO	World Trade Organization

I. INTRODUCTION

1. This dispute concerns a particularly egregious type of country of origin labeling measure as it applies to specific facts and circumstances. It does not concern country of origin labeling in general, nor does it concern all aspects and applications of the challenged COOL measure. It involves a U.S. labelling measure (the “COOL measure”), which by intent and design imposes special costs on the use of non-U.S.-born cattle to produce muscle cuts of beef within the United States, thereby denying equal competitive opportunities to Mexican cattle and imposing an unnecessary obstacle to trade. In short, this dispute concerns an internal measure that discourages the use of imported inputs, specifically Mexican feeder cattle, to produce domestic U.S. beef products.

2. As Mexico highlighted during the panel proceedings, this dispute is important for the preservation of Mexico's competitive advantage in the production of feeder cattle. An efficient and competitive industry has developed in this sector. For decades, Mexican cattle exports were fully integrated into the U.S. market and were commingled with U.S. cattle during all of the production stages. The COOL measure changed this. It has broken the former economic integration in this sector.

3. The design, structure and application of the COOL measure, in respect of muscle cuts of beef, unjustifiably discriminates against and restricts imports of Mexican cattle into the United States. Prior to the COOL measure, Mexican cattle were processed throughout the United States at various packing plants without the need for segregation by origin. As a result of the COOL measure, Mexican cattle are now segregated from U.S. cattle and processed at a limited number of packing plants, during a limited number of days and subject to additional conditions such as advance notification. Not only has this reduced the packing plants and processing opportunities available to Mexican cattle, it has reduced the number of feedlots and backgrounders that are willing to take Mexican cattle. This adverse change in the conditions of competition is a direct result of the COOL measure. It is clear from the case presented by Mexico that the COOL measure protects the U.S. cattle industry against competition with Mexican like products – live cattle. The resulting denial of competitive opportunities for Mexican live cattle is contrary to Article 2.1 of the *TBT Agreement* and Article III:4 of the *GATT 1994*.

4. The COOL measure not only discriminates against Mexican cattle, it creates a restriction on imports of such cattle. This restriction is in the form of an unnecessary obstacle to trade, which violates Article 2.2 of the *TBT Agreement*. The Panel found that the mandatory labelling scheme under the COOL measure falls short of providing consumers with information on the country of origin of meat products in an accurate and clear manner.¹ Therefore, the panel correctly concluded that the COOL measure does not fulfil its legitimate objective within the meaning of Article 2.2.²

¹ Panel Report, para. 7.716.

² Panel Report, para. 7.720.

5. This dispute is of great importance to Mexico from an economic point of view, particularly given its status as a developing country Member. It is also important from a systemic point of view. The confirmation by the Appellate Body of the panel findings and legal conclusions will assist Mexico in rebalancing the conditions of competition for its exports of Mexican-born cattle into the United States. It will also prevent these kinds of protectionist, discriminatory and restrictive measures from circumventing the WTO rules. Developing country Members are at the highest risk of being adversely affected by non-tariff measures such as the mandatory labeling measure at issue in this dispute. It is therefore essential for Mexico that the Appellate Body carefully review the measure at issue and correctly and cumulatively apply, in a strict manner, the WTO provisions raised by Mexico, in favour of the multilateral trading system.

II. FACTUAL BACKGROUND

6. In describing the factual background, the United States omits certain key facts.

A. Legislative And Regulatory History

7. The United States cites to evidence that it claims shows that the COOL measure reflects demands by U.S. consumers.³ However, most of the U.S. comments refer to evidence of interest in *general* origin labelling, which is not at issue in this dispute. Moreover, the Panel noted that “[t]his evidence generally refers to comments made during the legislative process, hence it may not necessarily prove the existence of public policies or consumer demand calling for the pursuit of the stated objective that led to the introduction of the COOL measure.”⁴

8. During the Panel proceedings, Mexico and Canada explained that the legislative process relating to the COOL measure started in the late 1990s, with legislation proposed by advocates for the U.S. cattle industry that would require identification of the country of birth of cattle from which beef was produced. The legislators who supported that legislation were frank in stating that their intent was to favour the U.S. domestic industry. The substance of those proposals, with minor modifications, was later incorporated into the 2002 Farm Bill.⁵ Mexico provided examples of the pertinent statements of legislators in support of the 2002 Farm Bill, including the following:

- Mr. Lucas of Oklahoma (Congressional Record – House May 2, 2002): “Producers pushed Congress to include a country-of-origin labeling and their work paid off. When given this option, I believe consumers will pick American produce over our foreign competitors. I strongly support this farm bill. I urge my

³ U.S. Appellant Submission, paras. 19-22.

⁴ Panel Report, para. 7.647.

⁵ Mexico’s First Written Submission, paras. 177 and 186; Canada’s First Written Submission, para. 14.

colleagues to vote for final passage and show their support for America's farmers."⁶

- Mr. Kolbe: (Congressional Record – House May 2, 2002): "We should not be undermining our negotiating efforts at the WTO, and this conference report will unfortunately do just that. Further, I am extremely disappointed that this final agreement requires mandatory country of origin labeling for meat, fruits, vegetables, fish, and peanuts. In order to meet the threshold of being labeled a "USA product," it must be born, raised and processed in the United States. This is ridiculous. I grew up on a ranch in southern Arizona, and my family bought calves in Mexico to be raised and sold on our ranch. So I guess if I bought a small calf in Mexico and raised him for 5 years on my ranch in the United States, he would still never be a "U.S. calf." Is this what our national policy should be? I find this outrageous and am surprised that something like this is on the road to becoming law. It was my hope that we would be able to fashion a new farm policy that helps the farmers, increases conservation efforts, reduces the price of food for the American people, and fulfills our obligations to our trading partners around the world. Unfortunately, the conference report before us today does not accomplish these goals."⁷
 - Mr. INOUE: (Congressional Record – Senate May 8, 2002): "Mr. President, title X of the farm bill contains provisions that would provide country of origin labeling for certain covered products. This program will specifically inform consumers right at their local markets whether they are eating U.S. products, or products produced under the laws of another nation. In a time of uncertainty about our economic, environmental, and personal security, we want to provide this level of assurance to our citizens and to our producers. U.S. origin labeling is important because it will allow consumers to vote with their wallets to support U.S. farmers, ranchers, and fishermen. I ask the distinguished Senator from Iowa, one of the managers of the bill, if this is not the purpose of the country of origin provision?"
- Mr. HARKIN. Indeed, the distinguished Senator from Hawaii is correct about the intent of the provision."⁸
- Mr. Wyden: (Congressional Record – Senate May 8, 2002): "Country of origin labeling for fresh meats, fruits, vegetables and fish will help Oregon's producers."⁹

⁶ Exhibit MEX-89, p. H2043.

⁷ Exhibit MEX-90, p. H2056.

⁸ Exhibit MEX-92, p. S4022-23.

9. During the Panel proceedings, at the request of the Panel, the United States committed to search for more complete evidence of the public comments on a proposed 2001 regulation of the Food Safety and Inspection Service (“FSIS”) on food origin labelling, but stated that the records were not available in electronic form and therefore were difficult to research.¹⁰ Ultimately, in its response to the Panel’s question the United States did not provide any new evidence, but rather simply cited to several public comments it previously submitted.¹¹ Mexico noted that without access to the complete record of public comments, it is not possible to judge whether the comments selected by the United States are representative of “public opinion” on the subject. Moreover, because the FSIS procedure post-dated the legislative proposals – which were still pending at that time – there is an implication that not all the comments cited by the United States may have represented independent ideas.

10. Thus, the U.S. evidence of consumer interests – even if legally relevant – is not probative of the legislative and regulatory intent, and is outweighed by the evidence of protectionist intent.

Footnote continued from previous page

⁹ Exhibit MEX-93. In 2001, A letter from 27 U.S. cattle growing associations was sent to members of the U.S. Congress demanding the adoption of country of origin label system that currently is the COOL measure. The letter stated in part as follows:

The U.S. cattle industry invested considerable time, effort, and money to improve, promote, and advertise its finished product – U.S. beef. The U.S. cattle industry now needs the ability to identify its beef from among the growing volume of beef supplied by its foreign competitors. The ability to differentiate domestic beef from foreign beef is necessary to ensure that U.S. cattle producers have a competitive, open market that allows consumer demand signals to reach domestic cattle producers.

....

Several importing and processing industry groups are aggressively working to weaken the Senate Farm Bill’s mandatory country-of-origin labeling language. They want to eliminate the exclusively born, raised, and slaughtered definition of origin. They also want to exempt ground beef from among the meat covered by the legislation. We strongly oppose any such changes as they would severely impair the competitiveness of U.S. cattle producers.

Letter from R-CALF USA and 27 Cattle Associations to members of the U.S. Congress dated December 2, 2001, Exhibit MEX-95, available online: http://www.r-calfusa.com/COOL/country_of_origin_labeling.htm.

¹⁰ See Mexico’s Comments On The Responses To The Panel’s Questions From The Second Substantive Hearing, para. 44.

¹¹ Answers of the United States to the Second Set of Questions from the Panel to the Parties, para. 80.

B. Development Of The Implementing Regulations

11. The United States claims that, as part of its rulemaking process, it took into account the concerns of numerous interested parties, including those of the complaining parties in this dispute.¹²

12. Although the United States gave some opportunity to Mexico to comment on the development of the 2009 Final Rule, it is undisputed the United States did not give Mexico the opportunity to participate in the development of the 2002 Farm Bill.¹³ The only opportunity that Mexico had to provide comments was when the COOL provisions were already established and only needed to be implemented. At that point, there was little flexibility in the measure.

C. The Measure At Issue

13. The United States seeks to differentiate the requirements set out in the COOL statute from the 2009 Final Rule (AMS).¹⁴ However, as Mexico explained throughout the Panel proceedings, the WTO inconsistencies of the COOL measure started with the COOL statute and were implemented through the 2009 Final Rule.¹⁵ In the Panel proceedings, the parties disputed whether the statute and rule should be evaluated as a single measure or distinct measures, and the Panel evaluated this issue in depth.¹⁶ The Panel ultimately made a finding that the statute and rule should be analyzed as an integrated, single measure, stating as follows:

Given the above considerations, in particular the close legal and substantive link between the COOL statute and the 2009 Final Rule (AMS), we consider it appropriate to examine the relevant elements of both the COOL statute and the 2009 Final Rule (AMS) pertaining to the COOL requirements for meat products “as an integral part” of one single COOL measure. In reaching this conclusion, we find sufficient “legal, logical and factual” bases to treat the COOL statute and 2009 Final Rule (AMS) as the COOL measure. In this connection, we observe the Appellate Body's statement in *US – Gambling* that “the ‘total prohibition’ described by Antigua does not, in itself, constitute a ‘measure’. ... the ‘total prohibition’ is the collective effect of the operation of several state and federal laws of the United States. And it is the ‘total prohibition’ itself – as the effect of the underlying laws – that constitutes the alleged impairment of Antigua's benefits

¹² U.S. First Written Submission, para. 131. The United States overstates that the 2009 Final Rule reflects a balance of the views of all interested parties, including consumer groups, market participants, and U.S. trading partners like Canada and Mexico. See also U.S. Appellant Submission, paras. 17 and 27.

¹³ Panel Report, para. 7.84 and Opening Statement of Mexico at the Second Meeting with the Panel, para. 61.

¹⁴ U.S. Appellant Submission, para. 28.

¹⁵ Mexico's Second Written Submission, paras. 23-29.

¹⁶ Panel Report, paras. 7.35-7.61.

under the GATS”. Similarly, we consider that the so-called “COOL measure”, although used as the term for referring to the COOL statute and 2009 Final Rule (AMS) in these reports, does not constitute a measure in itself, but reflects the collective effect of the operation of the COOL statute and the 2009 Final Rule (AMS) in respect of the country of origin labelling requirements contained in those instruments.¹⁷ (footnotes omitted).

The United States did not appeal this finding.

D. Country Of Origin Labelling Requirements Of Other WTO Members

14. The United States repeats the argument it made to the Panel that many other WTO members maintain country of origin labelling requirements.¹⁸ This point is irrelevant, because Mexico has not challenged the validity of general country of origin labelling requirements; rather, it has challenged certain aspects of the COOL measure with respect to the labelling of muscle cuts.

15. The United States went on to highlight four Members that do not define origin exclusively based on substantial transformation: Australia, Japan, Korea and the E.U. In this regard, it was uncontested that Mexican cattle are imported into the United States at a young age and spend the great majority of their lives in the United States before they are slaughtered and processed into beef products.¹⁹ Accordingly, if the United States were to apply the rules used by Australia, Japan and Korea, beef products produced from Mexican cattle could be labelled as “made in United States.” Specifically:

- Australia requires substantial transformation with 50% value added.²⁰ If this rule were applied by the United States, meat produced from Mexican cattle would easily qualify.
- Under Korea’s system, if cattle spends six months in the country before slaughter the beef product is considered domestic.²¹ Under the COOL measure, no amount of time spent in the United States can confer origin; the U.S. system is designed to block any possibility that products derived from a foreign born cattle, even if it arrived at the United States the day after birth, may qualify for Label A.

¹⁷ Panel Report, para. 7.61.

¹⁸ U.S. Appellant Submission, paras. 44-45.

¹⁹ Panel Report, para. 7.66 (citing Mexico’s First Written Submission, paras. 193, 199, 261 and 273).

²⁰ Australia’s Responses to Questions of the Panel Following the First Substantive Meeting with the Panel, Question 1.

²¹ Exhibit US-139, p. 7.

- Japan's system provides that, where meat was produced from livestock raised in two counties, "the country of origin is the country with a longer raising period"²²; if this rule were applied in the United States, meat produced from Mexican cattle also would qualify to be labelled as domestic.
- Trace back systems such as that of the European Union impose equal burdens on all products, regardless of the origin of their inputs, because every cattle has to be traceable in the same manner.²³ Because it does not discriminate, that type of system does not change the conditions of competition, and Mexico has already proposed that type of system as a less trade restrictive alternative to the COOL measure.

16. Accordingly, the examples of labelling measures of other Members are not "similar" to the U.S. COOL measure as the United States suggests.

E. The North American Livestock Market

17. The United States claims that the North America livestock market is "highly complex," and argues that factors other than the COOL measure have been responsible for the price differentiation between U.S. domestic and foreign cattle²⁴. In fact, the North American livestock market is highly integrated.²⁵ Mexico produces and exports feeder cattle to the United States where it is raised in grasslands and feedlots and subsequently slaughtered.²⁶ The muscle cuts derived from this process are sold as a final product in the United States or exported to Mexico and other countries for final consumption.²⁷ The COOL measure has adversely affected the entire production process of beef derived from cattle that was born in Mexico.

18. The Panel recognized the integrated nature of the market:

The market for livestock and meat of Canada, Mexico and the United States is highly integrated. Different stages of the North American livestock and meat production are often performed in more than one country. Trade in livestock

²² Japan's Replies to Questions from the Panel Following the First Substantive Meeting, para. 5.

²³ Mexico's Responses To The Panel's Questions from The Second Substantive Meeting, paras. 100-101.

²⁴ U.S. Appellant Submission, para. 46.

²⁵ Mexico's First Written Submission, paras. 2-3 and 109.

²⁶ Panel Report, para. 7.141 and Mexico's First Written Submission, para. 109.

²⁷ Mexico's First Written Submission, para. 109. See also Exhibit MEX-34, p. 25. In fact, a muscle cut derived from such an animal when exported to Mexico would be labeled as "product of the U.S.", but if it remained in the United States would be labeled as "product of the U.S. & Mexico". The offal of that animal when sold in the United States would be labeled as "product of the U.S." See Exhibit MEX-98, p. 3.

takes place between, on the one hand, the United States and Canada and, on the other hand, the United States and Mexico. Both Canada and Mexico export cattle to the United States to be processed into meat. Canada additionally exports hogs to the United States. The United States also exports a very limited amount of livestock to Mexico and Canada, but this is not at issue in the current dispute.²⁸ (footnotes omitted).

19. The United States argues that exports of Mexico “are doing well” and have been “largely normalized.”²⁹ As Mexico explained during the panel proceedings, the increase of exports is legally irrelevant to Mexico’s claims under both Articles 2.1 and 2.2 of the *TBT Agreement*. Exports of cattle to the United States may rise and fall due to factors such as general supply and demand conditions in the U.S. market, but the modification of conditions of competition arising from the COOL measure continue. But for the COOL measure, the volume and selling prices of Mexican cattle to the United State would be even higher.³⁰

20. The United States also argues that there are other factors that affects trade, and claims that there is a “longstanding practice of the U.S. feedlots and slaughterhouses to discount Canadian and Mexican livestock *vis-à-vis* U.S. livestock.”³¹

21. Prices for Mexican cattle exports vary depending on supply and demand in the United States. However, Mexico demonstrated that the U.S. processors are imposing COOL-based downward adjustments to the prices they pay for Mexican-born cattle, and that the Mexican industry has bore the burden of that differential during times of both rising and declining prices.³²

22. Regardless of the importance of factors other than the COOL measure affecting the North American livestock market, their effects translate into changed prices for livestock, unrelated to the birthplace of the animals. It was the COOL measure that triggered the requirement for U.S. purchasers to treat Mexican-born cattle differently, thereby affecting the conditions of competition for Mexican cattle.

23. The Panel agreed that the U.S. claims in this regard were never established. During the interim review, the United States attempted to convince the Panel to add a statement about prices being affected by non-COOL factors as a finding, and the Panel rejected the request:

²⁸ Panel Report, para. 7.140.

²⁹ U.S. Appellant Submission, para. 49.

³⁰ Opening Statement of Mexico at the Second Hearing with the Panel, para. 28.

³¹ U.S. Appellant Submission, para. 47.

³² Mexico’s Response to the Panel’s Questions from the First Substantive Meeting, paras. 120, 125 and 126; Mexico’s Second Written Submission, paras. 102-106.

The **United States** suggests adding a sentence to the end of paragraph 7.392 to reflect that Canadian and Mexican livestock were discounted *vis-à-vis* US livestock even before the COOL measure. **Canada** and **Mexico** disagree with the suggested new sentence. Canada argues that neither of the paragraphs that would be referenced in the new footnote supports the statement in the new sentence that there were consistent discounts for Canadian livestock “as a result of comparatively higher transport costs and currency fluctuations”. The “basis” or “spread” referenced in Canada's first written submission applies to both Canadian and US cattle. The relevant chart in Exhibit US-30, cited to support the United States' position that “prices are generally lower” for Canadian cattle, is a bare chart with no indication of who prepared it or what data were used. Canada adds that both first written submissions refer, in relevant part, to Canadian cattle and not to hogs or to Mexican cattle. Mexico argues that this is the first time that the United States has argued that Mexican cattle received lower prices than US cattle. The relevant portions of the US and Canadian written submissions do not address Mexican cattle. Mexico refers to its submissions arguing that the price of Mexican cattle was freely determined before the COOL measure. Mexico also notes that the United States has not contested this argument. Further, Mexico argues that currency fluctuation is irrelevant as the price of Mexican livestock for export is negotiated in US dollars. In fact, as Exhibit MEX-48 demonstrates, at times before the COOL measure Mexican cattle received higher prices than US cattle. There is also no reason to consider that transportation costs are any different for Mexican cattle than for US-born cattle located near the US-Mexican border.

In light of the complainants' comments, the **Panel** has decided to keep paragraph 7.392 unchanged.³³

Accordingly, there is no evidentiary basis for the U.S. argument.

24. On the other hand, Mexico submitted direct evidence that U.S. processors are applying discounts to Mexican cattle specifically because of the COOL measure, and the Panel made the following factual findings in this regard:

- “In fact, there is direct evidence of major slaughterhouses applying a considerable COOL discount of USD 40-60 per head for imported livestock. This proves that major processors are passing on at least some of the additional costs of the COOL measure upstream to suppliers of imported livestock. We have no evidence of a similar discount being applied to suppliers of domestic livestock, nor has the United States responded to the evidence submitted by Canada and Mexico in this respect.”³⁴ (footnotes omitted).

³³ Panel Report, paras. 6.76-6.77.

³⁴ Panel Report, para. 7.356.

- “The competitive opportunities of imported livestock are reduced as the additional costs of compliance with the COOL measure incurred when handling imported livestock are, at least in part, passed on to suppliers of imported livestock. We referenced in this regard direct evidence of a considerable COOL discount being applied by several major processors to imported livestock and the absence of evidence of a similar discount being applied to domestic livestock.”³⁵ (footnotes omitted).
- “Certain suppliers of imported livestock have also suffered significant financial disadvantages resulting from the COOL measure. Several suppliers reported that the price difference between imported and domestic livestock has become larger to the detriment of domestic livestock, and that discounts for imported livestock appeared or existing ones increased as a result of the COOL measure. Further, in several cases, financial institutions are reported to have refused to provide credits and loans to Canadian livestock producers due to the risks resulting from the COOL measure.”³⁶ (footnotes omitted).

III. THE PANEL CORRECTLY FOUND THAT THE COOL MEASURE IS INCONSISTENT WITH ARTICLE 2.1 OF THE *TBT AGREEMENT* IN THE CONTEXT OF MUSCLE CUT LABELS

25. The United States challenges the Panel’s reasoning and conclusions in respect of the third element of the legal test under Article 2.1, whether there is “treatment no less favourable”, or less favourable treatment in the context of muscle cut labels under the COOL measure.³⁷ It argues that the Panel made both legal and factual errors in respect of this element of the test.³⁸ It requests that the Appellate Body reverse the Panel’s findings with respect to Mexico’s claim under Article 2.1.³⁹

26. Mexico first addresses the alleged legal errors followed by the alleged factual errors.

³⁵ Panel Report, para. 7.374.

³⁶ Panel Report, para. 7.379.

³⁷ The United States does not challenge the Panel’s finding that the COOL measure is a “technical regulation” and that Canadian, Mexican and U.S. livestock are like products. It restricts its appeal to the third element of the Article 2.1 analysis. U.S. Appellant Submission, paras. 54-55. For the Panel’s analysis of the third element in the context of muscle cut labels, see Panel Report, paras. 7.257-7.420 and 7.438-7.548.

³⁸ U.S. Appellant Submission, para. 52.

³⁹ U.S. Appellant Submission, para. 183.

**A. The Panel Correctly Found That The COOL Measure Violates
Article 2.1**

1. Introduction

27. In the context of muscle cut labels, the Panel found that the COOL measure creates an incentive in favour of processing exclusively domestic livestock and a disincentive against handling imported livestock.⁴⁰ It also found that the COOL measure *de facto* discriminates against imported livestock by according less favourable treatment to Mexican cattle, especially Mexican feeder cattle, than to like domestic livestock.⁴¹

28. The United States argues that the Panel's findings are based on "a faulty and unprecedented legal test for the assessment of less favourable treatment".⁴² In the view of the United States, "[f]rom a legal standpoint, the Panel adopts a radical and unprecedented test for less favourable treatment that does not focus on whether the measure *itself* modifies the *conditions* of competition to the detriment of imported livestock (i.e. whether the measure affects the terms under which products compete in the market), but instead examines whether imported livestock are equally competitive with domestic livestock, a very different question".⁴³ It argues that "[n]othing in the *TBT Agreement* or the WTO agreements requires Members to ensure that imported products are placed on an equal footing in terms of their ability to compete."⁴⁴

29. Mexico first addresses the legal approach of the Panel and explains why it is the correct approach. Contrary to the arguments of the United States, the Panel's finding is not based on a faulty, radical and unprecedented test. Rather, it is consistent with the well-established body of WTO and GATT 1947 jurisprudence on the meaning of "treatment no less favourable". It is also consistent with the Appellate Body's interpretation and application of Article 2.1 of the *TBT Agreement* in *US – Clove Cigarettes*. Mexico then addresses the United States' specific criticisms of the Panel's legal reasoning and conclusions. As explained, these criticisms are without merit.

2. The Approach Of The Panel

30. The Panel found that Article III:4 of the GATT 1994 provides relevant context for interpreting Article 2.1 of the *TBT Agreement*, in particular for interpreting the term "no less

⁴⁰ Panel Report, para. 7.420.

⁴¹ Panel Report, para. 7.420.

⁴² U.S. Appellant Submission, para. 52.

⁴³ U.S. Appellant Submission, para. 62. (emphasis original)

⁴⁴ U.S. Appellant Submission, para. 62. (emphasis original)

favourable treatment than that accorded to like products of national origin”.⁴⁵ The Panel observed that Article III:4 ultimately serves to further the “equality of competitive conditions for imported products in relation to domestic products” or “the equal competitive relationship between imported and domestic products”, rather than “expectations ... of any particular trade volume”.⁴⁶ It further observed that according “treatment no less favourable” means according *conditions of competition* no less favourable to the imported product than to the like domestic product.⁴⁷ The Panel found that Article 2.1 covers both *de jure* and *de facto* discrimination and went on to assess whether the muscle cut labels under the COOL measure accord *de facto* less favourable treatment to imported than to domestic livestock and *de facto* modify the conditions of competition in the U.S. market to the detriment of imported livestock.⁴⁸

31. The Panel explained that Article 2.1 is concerned with the equality of competitive conditions between domestic and imported products which has been interpreted as meaning that a measure accords less favourable treatment to imported products if it gives domestic like products a competitive advantage in the market over imported like products.⁴⁹ In the Panel’s view, this means that no competitive disadvantage shall be accorded to imported products as compared to like domestic products.⁵⁰ A cost resulting from a (technical) regulation may qualify as a competitive disadvantage if it is incurred only by imported and not like domestic products.⁵¹ The question was whether the measure modifies the conditions of competition to the disadvantage of the imported product by imposing higher costs on imported than on domestic livestock.⁵² The Panel cited previous disputes where government measures that create an incentive to use domestic over imported input products were found to be inconsistent with Article III:4 and observed that a similar incentive to use domestic input exists under the COOL measure.⁵³

⁴⁵ Panel Report, paras. 7.234 and 7.275.

⁴⁶ Panel Report, para. 7.276.

⁴⁷ Panel Report, para. 7.276. (emphasis original)

⁴⁸ Panel Report, paras. 7.298-7.302.

⁴⁹ Panel Report, para. 7.313.

⁵⁰ Panel Report, para. 7.313.

⁵¹ Panel Report, para. 7.313.

⁵² Panel Report, para. 7.328.

⁵³ Panel Report, paras. 7.358-7.359.

32. The Panel applied this legal interpretation of Article 2.1 to the facts before it in a methodical manner that reflected, in part, the structure of the arguments presented by the complainants.⁵⁴

33. As a “starting point”, the Panel found that the COOL measure *de jure* treated imported and domestic livestock differently.⁵⁵ However, it recognized that different treatment does not necessarily create “treatment no less favourable”.⁵⁶ It acknowledged that the complainants were not challenging *de jure* discrimination but, rather, *de facto* discrimination.⁵⁷ The Panel did not rely upon its initial finding of *de jure* different treatment in coming to its conclusion that the COOL measure violated Article 2.1.

34. To determine whether the COOL measure *de facto* modified the conditions of competition in the U.S. market to the detriment of imported livestock and thereby violated Article 2.1, the Panel undertook a detailed examination of the costs of compliance of the COOL measure. This assessment comprised several steps: (i) assessing whether the COOL measure resulted in compliance costs at the various livestock and meat processing stages and concluding that it did;⁵⁸ (ii) assessing whether the COOL measure required segregation according to origin and concluding that, for all practical purposes, it did;⁵⁹ (iii) assessing five possible business scenarios to determine whether segregation entailed higher costs for imported livestock and concluding that it created an incentive to use domestic livestock—and a disincentive to handle imported livestock—by imposing higher segregation costs on imported livestock than on domestic livestock;⁶⁰ and (iv) assessing whether the COOL measure reduced the competitive opportunities for imported livestock compared to domestic livestock and finding that, on the facts before it, competitive opportunities were reduced in at least sixteen significant ways, namely:

- a considerable COOL discount being applied by several major processors to imported livestock and the absence of a similar discount being applied to domestic livestock,
- plants and companies simply refusing to process any imported livestock,

⁵⁴ For example, the Panel first assessed whether the COOL measure involves segregation in response to the complainants’ arguments. See Panel Report, para. 7.314

⁵⁵ Panel Report, para. 7.296.

⁵⁶ Panel Report, para. 7.296.

⁵⁷ Panel Report, para. 7.297.

⁵⁸ Panel Report, paras. 7.303-7.314.

⁵⁹ Panel Report, paras. 7.315-7.329.

⁶⁰ Panel Report, paras. 7.330-7.372.

- fewer processing plants accepting imported livestock,
- certain suppliers having to transport imported livestock longer distances,
- plants processing imported livestock at specific limited times, namely on specific days of the week or only after specific hours of the day,
- additional logistical problems and additional costs for certain imported livestock suppliers,
- due to congestion resulting from limited specific-time deliveries, certain imported livestock suppliers faced increased difficulty in obtaining delivery trucks or using trucks in the most efficient way,
- transportation delays for certain suppliers of imported livestock,
- increased transportation costs for certain suppliers of imported livestock,
- less efficient transportation for certain suppliers of imported livestock because of fewer deliveries due to the longer distance and less turn-around time,
- changes to contractual terms for suppliers of imported livestock to incorporate a COOL opt-out clause to allow processors to unilaterally terminate or amend their contracts with suppliers of imported livestock,
- cancellation, termination or non-renewal of supply contracts for imported livestock,
- replacement of long-term contracts with spot contracts at lower purchase prices,
- 14 days advance notice being required for suppliers of Mexican cattle at various U.S. processing facilities,
- certain suppliers of domestic livestock suffered significant financial disadvantages due to price discounts for imported livestock as a result of the COOL measure, and also due to the refusal of financial institutions to provide credits and loans to Canadian livestock producers because of the risks resulting from the COOL measure, and
- exclusion of imported cattle from premium beef programmes which are particularly profitable for livestock suppliers.⁶¹

⁶¹ Panel Report, paras. 7.373-7.381.

35. The reduction in competitive opportunities for imported livestock, as represented by these factors individually and cumulatively, is glaring when compared to the situation preceding the COOL measure. Prior to the measure there was an integrated NAFTA livestock and meat market in which livestock and meat products were processed together without any major segregation due to origin but purely on the basis of competitive considerations of price and quality.⁶² The foregoing factors clearly establish that the COOL measure has denied competitive opportunities to imports and thereby substantially disrupted this integrated market.

36. The Panel also observed that “[i]n 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 “[e]ither process configuration is likely to cause a decrease in the volume and price of imported livestock”.⁶³

37. The Panel responded in detail to arguments raised by the United States and found that, “in the context of muscle cut labels, the COOL measure creates an incentive in favour of processing exclusively domestic livestock and a disincentive against handling imported livestock” and that “the COOL measure *de facto* discriminates against imported livestock by according less favourable treatment to ... Mexican cattle, especially Mexican feeder cattle, than to like domestic livestock”.⁶⁴ Recognizing that it was not necessary for the complainants to demonstrate the reduction in competitive opportunities through actual economic and trade effects, the Panel assessed the actual trade effects of the COOL measure and found that the “significant and negative impact of the COOL measure ... concurs with our finding that the COOL measure, in particular in regard to muscle cuts, accords less favourable treatment within the meaning of Article 2.1”.⁶⁵

38. On the basis of the foregoing, the Panel concluded that the COOL measure, in particular in regard to muscle cuts, violates Article 2.1 of the *TBT Agreement*.⁶⁶

3. The Legal Correctness Of The Panel’s Finding

39. The Panel’s finding that the COOL measure violates Article 2.1 of the *TBT Agreement* is legally correct. Article 2.1 reads as follows:

⁶² Panel Report, paras. 7.387 and 7.399.

⁶³ Panel Report, para. 7.506.

⁶⁴ Panel Report, paras. 7.382-7.420.

⁶⁵ Panel Report, paras. 7.438-7.546.

⁶⁶ Panel Report, paras. 7.547-7.548.

Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.

40. This provision contains two non-discrimination obligations, national treatment and most-favoured-nation treatment. This appeal concerns the national treatment obligation.

a. The Test For “Treatment No Less Favourable” In The Appellate Body Report *US – Clove Cigarettes*

41. The Appellate Body recently interpreted and applied the national treatment obligation in Article 2.1. With respect to the meaning of “treatment no less favourable” the Appellate Body stated:

- “[F]or the purposes of the less favourable treatment analysis, treatment accorded to products imported from the complaining Member is to be compared with that accorded to like domestic products and like products of any other origin.”⁶⁷
- “[A] panel examining a claim of violation under Article 2.1 should seek to ascertain whether the technical regulation at issue modifies the conditions of competition in the market of the regulating Member to the detriment of the group of imported products *vis-à-vis* the group of like domestic products.”⁶⁸
- “[W]here the technical regulation at issue does not *de jure* discriminate against imports, the existence of a detrimental impact on competitive opportunities for the group of imported *vis-à-vis* the group of domestic like products is not dispositive of less favourable treatment under Article 2.1. Instead, a panel must further analyze whether the 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, 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, and, in particular, whether that technical regulation is even-handed, in order to determine whether it discriminates against the group of imported products.”⁶⁹
- “Where the technical regulation at issue does not *de jure* discriminate against imports, 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, and, in particular, whether that technical

⁶⁷ Appellate Body Report, *US – Clove Cigarettes*, para. 190.

⁶⁸ Appellate Body Report, *US – Clove Cigarettes*, para. 180.

⁶⁹ Appellate Body Report, *US – Clove Cigarettes*, para. 182.

regulation is even-handed, in order to determine whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflects discrimination against the group of imported products.”⁷⁰

42. The Panel did not have the benefit of this Appellate Body report to guide it when interpreting and applying Article 2.1. Nevertheless, the Panel’s finding of inconsistency with Article 2.1 is consistent with the Appellate Body’s test and is legally correct.

b. Relevant Imports For Comparison

43. The Panel correctly examined the treatment accorded to products imported from the complaining Members (Mexico and Canada) and compared it with that accorded to like domestic products.

c. Modification of Conditions Of Competition To The Detriment Of The Group Of Imported Products

44. The Panel also correctly examined whether the technical regulation at issue – the COOL measure – modifies the conditions of competition in the market of the regulating Member to the detriment of the group of imported products *vis-à-vis* the group of like domestic products.

45. Consistent with the Appellate Body’s test, the Panel interpreted Article 2.1 as being concerned with the equality of competitive conditions between like domestic and imported products. In the Panel’s view, a measure accords less favourable treatment to imported products if it gives domestic like products a competitive advantage in the market over imported like products,⁷¹ and that according “treatment no less favourable” means according conditions of competition no less favourable to the imported product than to the like domestic product.⁷²

46. In elaborating upon the meaning of according conditions of competition no less favourable, the Panel found that a cost resulting from a (technical) regulation may qualify as a competitive disadvantage if it is incurred only by imported and not like domestic products.⁷³

47. The Panel’s analysis is legally sound. While the Panel presented its analysis from the perspective of the imposition of costs on imported products, it took a very broad view of what such “costs” entailed. Among other things, the Panel made factual findings that such “costs” included discriminatory price discounts, loss of processing opportunities, increased logistical

⁷⁰ Appellate Body Report, *US – Clove Cigarettes*, para. 215.

⁷¹ Panel Report, para. 7.313.

⁷² Panel Report, paras. 7.276 and 7.313.

⁷³ Panel Report, para. 7.313. See paragraph 31, above.

costs, prejudicial contractual treatment and notice requirements, increased financing costs and hurdles, and loss of premium market opportunities.⁷⁴

48. Individually and cumulatively, the sixteen examples of lost competitive opportunities found by the Panel and summarized above clearly demonstrate a modification of the conditions of competition in the relevant market to the detriment of imported products. As noted above, the modification of conditions of competition is even more evident when the situation under the COOL measure is compared to the situation prior to the measure. At that time there was an integrated NAFTA livestock and meat market in which livestock and meat products were processed together without any major segregation due to origin but purely on the basis of competitive considerations of price and quality.⁷⁵ As a direct consequence of the COOL measure, imported Mexican cattle are no longer integrated into that market.

49. Although the Panel did not explicitly address the question of whether the modification of conditions of competition was to the detriment of the “group of” imported products *vis-à-vis* the “group of” like domestic products, this element of the Appellate Body’s test is clearly evident in the Panel’s findings. The sixteen examples of reduced competitive opportunities summarized above relate solely to *imported* cattle. None relate to like domestic cattle. Thus, the modification of conditions of competition was to the detriment of the *entire* group of imported products. *None* of the like domestic products were similarly affected.

50. Accordingly, consistent with the test enunciated by the Appellate Body in *US – Clove Cigarettes*, the technical regulation at issue modifies the conditions of competition in the market of the regulating Member to the detriment of the group of imported products *vis-à-vis* the group of like domestic products. The discrimination found by the Panel is on imports as a whole and solely on imports.

d. Whether The Technical Regulation Is Even-Handed

51. The last step of the recent Appellate Body’s test in *US – Clove Cigarettes* applies to situations involving *de facto* discrimination, as is the case in this dispute. Where the technical regulation at issue does not *de jure* discriminate against imports, 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, and, in particular, whether that technical regulation is even-handed, in order to determine whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products.⁷⁶

52. The Panel did not undertake this step of the test. However, it is clearly evident from the Panel’s findings that the technical regulation is *not* even-handed and that the detrimental impact

⁷⁴ Panel Report, paras. 7.373-7.381.

⁷⁵ Panel Report, paras. 7.387 and 7.399.

⁷⁶ Appellate Body Report, *US – Clove Cigarettes*, para. 215.

on imports does *not* stem “exclusively from a legitimate regulatory distinction”; rather, it clearly reflects discrimination against the group of imported products.

53. The Appellate Body did not elaborate upon the meaning of this step of its test. It did, however, make findings that provide some guidance.⁷⁷ In order to determine whether the technical regulation in question was even-handed in its treatment of imported and like domestic products, the Appellate Body first looked at the proportion of imported and like domestic products adversely affected by the measure. As in *US – Clove Cigarettes*, the COOL measure adversely affects all or almost all imported products and does *not* adversely affect all or almost all like domestic products. As found by the Panel, there is an incentive under the COOL measure to use domestic cattle inputs.⁷⁸

54. There is no similar incentive under the measure to use imported cattle inputs, rather, there is a disincentive to use those inputs.

55. The conclusion that all imported products are adversely affected while none of the like domestic products are adversely affected is consistent with the design, architecture, revealing structure, operation, and application of the COOL measure. As the Panel found, “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 “[e]ither process configuration is likely to cause a decrease in the volume and price of imported livestock”.⁷⁹ Thus, by design, the adverse effects of the measure that were found by the Panel are on imports as a whole and solely on imports.⁸⁰

56. In this way the COOL measure is not even-handed. It was designed and structured in such a way that it impacts only those processors using foreign born and raised cattle and does not have any impact on those processors using domestic born and raised cattle. In fact, because the compliance costs are balanced in favour of the domestic products, the processors have a strong commercial incentive to use only U.S. born cattle in order to comply with the COOL measure. Those producers that still use foreign born cattle address the costs of compliance with the COOL

⁷⁷ See Appellate Body Report, *US – Clove Cigarettes*, paras. 222-225.

⁷⁸ Panel Report, paras. 7.359-7.363.

⁷⁹ Panel Report, para. 7.506.

⁸⁰ The fact that this adverse effect on imported livestock vis-à-vis like domestic livestock is inherent in the design of the COOL measure is evidenced by the prediction made in a paper by Dermot J. Hayes and Steve R. Meyer. The compliance mechanism implemented in the COOL measure—i.e. certification and audit—is designed so that the lowest cost alternative for compliance is to exclude all non-U.S. animals from the processing stream or, alternatively, segregate those animals in the processing stream. Either option was correctly predicted to cause the foreign animals to be heavily discounted due to increased costs and would impose enormous economic strain on foreign producers. See Mexico’s Second Written Submission, paras. 76-78 (citing Dermot J. Hayes & Steve R. Meyer, “Impact of Mandatory Country of Origin Labeling on U.S. Pork Exports”, Exhibit MEX-88, p. 7).

measure by transferring those costs to the foreign cattle producers. A measure designed in such a way that imposes costs only on foreign products and not on like domestic products is not even-handed.

57. After examining the disproportionate impact of the technical regulation on imported and like domestic products, the Appellate Body in *US – Clove Cigarettes* then examined other factors that indicated whether the detrimental impact of the technical regulation on competitive opportunities for imported clove cigarettes stemmed from a legitimate regulatory distinction. In Mexico's view, considerable care must be taken when examining other factors in relation to a "legitimate regulatory distinction" in this dispute because of the specific design, architecture, revealing structure, operation, and application of the technical regulation at issue. The COOL measure is a mandatory country of origin labeling measure. Under such a measure, distinctions are inherently linked to origin. It would open Article 2.1 to substantial circumvention if, with respect to such measures, adverse modifications of conditions of competition could be justified solely because they were linked to the identification of the origin of a product.

58. There are several factors that establish that the detrimental impact of the technical regulation on competitive opportunities for imported clove cigarettes does *not* stem from a legitimate regulatory distinction but, rather, reflects discrimination against the group of imported products:

- The country of origin labelling regime in the COOL measure is *mandatory* even though the evidence demonstrates that there was not significant consumer demand for such information to justify country of origin information being provided on a voluntary basis.⁸¹ In this light, the substantial adverse impact on imports is manifestly disproportionate to the apparent need for the information in the market.
- The COOL measure is designed so that the lowest cost and most commercially desirable method of implementation is to exclude imported livestock.⁸² This is "not even-handed" under any definition.
- The COOL measure provides information to distinguish between beef made from U.S.-born cattle and beef made from foreign cattle. It does not provide information to distinguish between beef made from cattle born in different countries. In other words, it is designed to distinguish between beef produced from *domestic* and *foreign* cattle rather than to give information on origin. This is because the only label that may have meaningful information is Label A, which applies to beef made from cattle born, raised and slaughtered in the United States.
- The COOL measure only allows Label B to be used for Label A beef when the meat is processed on the same production day. This is completely arbitrary.⁸³

⁸¹ Panel Report, paras. 7.353-7.355.

⁸² Panel Report, para. 7.506.

- While the COOL measure is effective at discriminating against imported livestock, it is not effective at achieving its objective. As discussed below regarding Article 2.2, very little meat in the U.S. market is accurately labelled for origin by the COOL measure. According to uncontested facts, meat products carrying Label A constitute less than 39% (71% of 55%) of the meat products sold in the United States. In this regard, it is uncontested that: (i) the COOL measure applies only to 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;⁸⁴ (ii) the COOL measure applies only to covered products sold in major supermarkets, and not to such items sold in restaurants and smaller retailers, including butcher shops.⁸⁵; and (iii) that the COOL measure does not apply to meat contained as an ingredient in “processed” food products.⁸⁶

59. In Mexico’s view, the foregoing points clearly establish that the COOL measure is inconsistent with Article 2.1 under the test developed by the Appellate Body in *US – Clove Cigarettes*. However, if necessary, there is an additional legal attribute of the COOL measure that demonstrates that the discrimination it creates does *not* stem from a legitimate regulatory distinction. Particularly in a situation such as here where the challenged technical regulation directly relates to identifying products from different origins, it is necessary to ascertain what type of origin identification that plainly denies competitive opportunities to imports is permissible under Article 2.1. The answer can be found in the context of that provision, namely the sixth recital to the Preamble to the *TBT Agreement*. The sixth recital provides an exhaustive list of the justifications that are available for measures that otherwise would violate Article 2.1 because they are a legitimate regulatory distinction. None of those exceptions are applicable to the COOL measure..

60. Accordingly, the COOL measure is inconsistent with Article 2.1 of the *TBT Agreement*.

4. The United States’ Specific Criticisms Of The Panel’s Legal Reasoning And Conclusions Are Without Merit

61. As discussed in the previous section, the Panel’s interpretation and application of Article 2.1 is legally sound. This section responds to specific arguments raised by the United States that criticize the Panel’s reasoning and findings.

Footnote continued from previous page

⁸³ Panel Report, para. 7.425.

⁸⁴ Mexico’s Second Written Submission, para. 44 and Exhibit MEX-98, p. 3.

⁸⁵ Panel Report, paras. 7.106-7.108.

⁸⁶ Panel Report, para. 7.104.

62. The U.S. arguments reflect a mischaracterization of the substance of the Panel’s reasoning and findings. It argues that the Panel did not assess whether the COOL measure modifies the conditions of competition in the relevant market to the detriment of imported products. As discussed above, the Panel explicitly addressed the modification of conditions of competition in great detail. The United States proposes a new test for “treatment no less favourable” which has no basis in law and which fails to distinguish between *de jure* and *de facto* discrimination. Many of the points raised in arguments by the United States regarding different treatment and origin-neutral treatment are indicative of whether there is *de jure* discrimination. They are not pertinent to the determination of whether there is *de facto* discrimination which was the subject of the Panel’s finding under Article 2.1 that is under appeal.

63. The United States’ arguments appear to be anchored in the test that it proposes for determining whether there is “treatment no less favourable” under Article 2.1:

- “[A] measure [accords] less favourable treatment by adversely modifying the conditions of competition to the detriment of imports when [...] the measure *itself* treats imports differently and less favorably based on origin, and that any adverse effects are directly attributable to the measure’s different treatment of these products, not based on external factors unrelated to origin or to the measure *itself*.”⁸⁷
- “[T]his test will focus on whether the Member’s enactment of the measure (and the different treatment of imports on the basis of origin) is the reason for any adverse effects as opposed to the possibility that these effects may result from factors not under the Member’s control, such as the market share of imports or the independent actions of private market actors.”⁸⁸
- “The Panel [...] should have examined whether the measure *itself* modifies the conditions of competition to the detriment of imported livestock because it treats imports differently based on origin. Further, to the extent that there are any adverse effects on imported livestock, the Panel should have assessed whether these effects are due to the measure *itself* or whether they result from external factors.”⁸⁹

64. The United States cites three Appellant Body reports as authorities for this test: *Thailand – Cigarettes from the Philippines*, *Korea – Beef* and *Dominican Republic – Import and Sale of Cigarettes*. It argues that, unlike the measure at issue in *Korea – Beef*, *Thailand – Cigarettes from the Philippines*, and other similar disputes, the COOL measure itself does not treat imports

⁸⁷ U.S. Appellant Submission, para. 71. (emphasis original)

⁸⁸ U.S. Appellant Submission, para. 71.

⁸⁹ U.S. Appellant Submission, para. 75. (emphasis original)

differently than domestic products.⁹⁰ Further, to the extent that there are any adverse effects on Canadian and Mexican livestock imports and prices (a point that the United States disputes), this results from external factors not related to the measure and not controlled by the United States, such as the smaller market share of imported livestock in the United States and the independent actions of private market actors.⁹¹ It argues that these are similar to the factors that the Appellate Body held did not constitute less favourable treatment in *Dominican Republic – Import and Sale of Cigarettes*.⁹²

65. The United States misinterprets and misapplies the findings in these Appellate Body reports. It introduces several legal elements in its proposed test.

a. The Measure *Itself*

66. Under its proposed test, the United States emphasizes that the measure “itself” must modify the conditions of competition. Through the use of the word “itself”, the United States seeks to restrict the scope of the legal analysis under Article 2.1 so that the effects of the measure on market forces and market participants which indirectly modify the conditions of competition are not encompassed or included.

67. Mexico agrees that it is the government measure that must give rise to the WTO inconsistency. However, it can give rise to an inconsistency in a direct or indirect manner. In this case, it is clearly the COOL measure that is giving rise to the discrimination under Article 2.1, not other factors. The Panel made a specific finding on this point. It stated:

It is the result of the COOL measure, in particular the 2009 Final Rule (AMS), that in the circumstances of the US market, market participants, when faced with the choice between a scenario involving exclusively domestic livestock and a scenario involving both domestic and imported livestock, opted predominantly for the former. While the small market share of imported livestock influenced this choice, that very choice was made necessary by the COOL measure. Indeed, as the history of the COOL measure shows, market participants would not have opted this way, and the small market share of imported livestock per se did not dictate such an option either.

Thus, in the circumstances of the US market, the COOL measure, in particular the 2009 Final Rule (AMS), creates an incentive in favour of domestic livestock and negatively affects the competitive conditions of imported livestock. Hence, we

⁹⁰ U.S. Appellant Submission, para. 76.

⁹¹ U.S. Appellant Submission, para. 76.

⁹² U.S. Appellant Submission, para. 76.

disagree with the United States that this effect is attributable exclusively to factors distinct from the COOL measure.⁹³

68. The narrow test proposed by the United States is not consistent with the well-developed approach to *de facto* discrimination applied by the Appellate Body and WTO panels to resolve claims under Article III:4 of the *GATT 1994*, or with the approach applied by the Appellate Body in *US – Clove Cigarettes* to resolve a claim under Article 2.1 of the *TBT Agreement*. The United States misinterprets the authorities that it cites for this element of its test. Specifically, the United States has inserted (with emphasis) the reflexive word “itself” into the approach described by the Appellate Body in *Korea – Beef* (between the words “measure” and “modifies”), thereby re-interpreting the legal analysis to mean something which the Appellate Body did not articulate nor intend. Compare the allegation of the United States in its Appellant Submission, that “the Panel should have followed past Appellate Body and WTO panel reports that have focused on **whether the measure itself “modifies the conditions of competition...**”⁹⁴ with the original text of paragraph 137 in *Korea – Beef* which provides that:

A formal difference in treatment between imported and like domestic products is thus neither necessary, nor sufficient, to show a violation of Article III:4. Whether or not imported products are treated “less favourably” than like domestic products should be assessed instead **by examining whether a measure modifies the conditions of competition in the relevant market to the detriment of imported products.**⁹⁵

69. The United States’ introduction of the word “*itself*” into the description of the examination developed by the Appellate Body has the effect of significantly altering the meaning of the description and, hence, the analysis articulated by the Appellate Body, i.e. in *Korea – Beef*. The United States’ use of the word “*itself*” has the effect of shifting the focus of the examination to “the measure,” while the Appellate Body in *Korea – Beef* originally used emphasis to indicate that the focus of the examination is the “*conditions of competition* in the relevant market”. For these reasons, the examination proposed by the United States, despite its apparent reference to the Appellate Body’s approach in *Korea – Beef* as an authority, is not consistent with the Appellate Body’s approach as it is properly articulated and applied in the jurisprudence.

70. To support its proposition that a “less favourable treatment assessment must focus on the measure *itself*”, the United States also cites the Appellate Body report in *Thailand – Cigarettes from the Philippines* for the proposition that a “less favourable treatment assessment must focus on the measure *itself*”.⁹⁶ The key passage in *Thailand – Cigarettes from the Philippines* upon which the United States relies is “there must be in every case a genuine relationship between the

⁹³ Panel Report, paras. 7.403-7.404.

⁹⁴ U.S. Appellant Submission, para. 68. (italics in original; bold emphasis added).

⁹⁵ Appellate Body Report, *Korea – Beef*, para. 137. (italics in original; bold emphasis added).

⁹⁶ U.S. Appellant Submission, para. 72. (emphasis original)

measure at issue and its adverse impact on competitive opportunities for imported versus like domestic products to support a finding that imported products are treated less favourably”.⁹⁷ This passage relates to a discussion of the degree of likelihood that an adverse impact on competitive opportunities would materialize (e.g., “may potentially modify”, “may reasonably be expected to modify”, “is more than likely to modify”).⁹⁸ In the present dispute, it is not a question of the likelihood that the adverse impact on competitive opportunities will materialize. Rather, the modification of competitive opportunities has already occurred as evidenced in the above-noted sixteen findings of the Panel.⁹⁹ Thus, the cited paragraph from *Thailand – Cigarettes from the Philippines* does not support the United States’ proposition. Even if it did support the proposition, there is clearly a genuine relationship between the COOL measure and many reduced competitive opportunities for imported products. But for the COOL measure the NAFTA market would be a fully integrated market in which livestock and meat products are processed together without any major segregation due to origin but purely on the basis of competitive considerations of price and quality.

b. Different Treatment

71. Under the U.S. test, (i) it is the measure itself that must treat “imports differently and less favourably”, (ii) the test focuses on whether the Member’s enactment of the measure and the “different treatment of imports” is the reason for any adverse effects, and (iii) what should be examined under the test is whether the measure “treats imports differently”.¹⁰⁰

72. The United States argues that the “requirement that the treatment of the products must be different to be less favourable springs from the fact that, as a matter of logic, treatment that is identical cannot be less favourable”.¹⁰¹ It then argues that the COOL measure does not treat imported livestock differently from domestic livestock.¹⁰² Among other things, the United States observes that the “concept of different treatment may at first be confusing in the context of country of origin labelling; one may mistakenly assume that there is always different treatment based on origin in a country of origin labelling regime due to the different content of the labels”.¹⁰³ It argues that “under the COOL measure, U.S., Canadian, and Mexican livestock are not treated differently because the labels for meat derived from them say different things” and

⁹⁷ Appellate Body Report, *Thailand – Cigarettes from the Philippines*, para. 134. See U.S. Appellant Submission, paras. 72 and 89.

⁹⁸ Appellate Body Report, *Thailand – Cigarettes from the Philippines*, para. 134.

⁹⁹ See para. 34, above.

¹⁰⁰ U.S. Appellant Submission, paras. 71 and 75.

¹⁰¹ U.S. Appellant Submission, para. 69.

¹⁰² U.S. Appellant Submission, paras. 77-85.

¹⁰³ U.S. Appellant Submission, para. 80.

that the “meat derived from domestic and imported livestock must be labelled under the exact same conditions, and the livestock are not treated differently because the label ultimately placed on the meat derived from them sometimes says different things”.¹⁰⁴

73. As discussed above, the Panel did not rely upon its initial finding of *de jure* different treatment in coming to its conclusion that the COOL measure violated Article 2.1. Similar to the finding of the Panel concerning different treatment, the United States’ argument that the COOL measure does not treat imported livestock “differently” from domestic livestock focuses on *de jure* discrimination. This is confirmed by the United States’ argument that “as a matter of logic, treatment that is identical cannot be less favourable”.¹⁰⁵ Contrary to the United States’ argument, formally identical or same treatment could give rise to *de facto* less favourable treatment.¹⁰⁶ Mexico acknowledges that the COOL measure does not *de jure* discriminate against Mexican cattle within the meaning of Article 2.1. However, the discrimination complained about is *de facto* in nature and is evidenced in the sixteen examples of lost competitive opportunities found by the Panel and summarized above.

c. Based On Origin

74. Under the U.S. test, the measure must treat imports differently and less favourably “based on origin”.¹⁰⁷

75. The United States argues that “different treatment must be based on origin (as opposed to origin-neutral criteria) is evident from Article 2.1 of the *TBT Agreement* itself, as well as the relevant context provided by the *TBT Agreement* and *GATT* Article III”.¹⁰⁸ It argues “the broad and fundamental purpose of Article 2.1 should also be understood to be to avoid protectionism in the application of technical regulations by imposing different treatment on the basis of origin”.¹⁰⁹

¹⁰⁴ U.S. Appellant Submission, paras. 80-81. See also U.S. Appellant Submission, para. 90.

¹⁰⁵ U.S. Appellant Submission, para. 69.

¹⁰⁶ A formal difference in treatment between imported and like domestic products is neither necessary nor sufficient to show a violation of Article III:4 (Appellate Body Reports, *Thailand – Cigarettes from the Philippines*, para. 128 and *Korea – Beef*, para. 137). A measure that applies equally to importers and domestic producers might, in some circumstances, nevertheless be inconsistent with Article III:4 (Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 94). The concept of “no less favourable” treatment under Article III:4 is sufficiently broad to include situations where the application of formally identical legal provisions would in practice accord less favourable treatment: (Panel Report, *EC – Trademarks and Geographical Indications (US)*, paras. 7.172-7.174). The relevant test for whether a measure is consistent with Article III:4 is not whether the measure accords a treatment which is formally the same for both imported and like domestic products, but rather whether it accords a treatment for imported products which is not less favourable than the one granted to like domestic products (Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.182-7.183).

¹⁰⁷ U.S. Appellant Submission, paras. 71 and 75.

¹⁰⁸ U.S. Appellant Submission, para. 69.

¹⁰⁹ U.S. Appellant Submission, para. 69.

Finally, the United States argues that past panel and Appellate Body reports have not made *de facto* discrimination findings lightly, and they have only found national treatment breaches on these grounds when there was evidence that the measure at issue used a “proxy” to single out imported products and target them for discrimination, a factual situation not presented in this dispute.

76. In *US – Clove Cigarettes* the Appellate Body rejected the United States argument that “panels should inquire further whether ‘the detrimental effect is unrelated to the foreign origin of the product’”.¹¹⁰ The Appellate Body eschewed an additional inquiry as to whether the adverse impact on competitive opportunities was related to the foreign origin of the products or explained by other factors or circumstances.¹¹¹

d. External Factors, Factors Not under a Member’s Control and Pre-Existing Market Conditions

77. As part of its argument that the measure “itself” must modify the conditions of competition, the United States argues that any adverse effects must not be “based on external factors unrelated to origin”, must not result from “factors not under the Member’s control, such as the market share of imports or the independent actions of private market actors”, and must not result from “external factors”.¹¹²

78. On this basis the United States argues that to the extent that there are any adverse effects on Canadian and Mexican livestock imports and prices, this results from external factors not related to the measure and not controlled by the United States, such as the smaller market share of imported livestock in the United States and the independent actions of private market actors.¹¹³ In the view of the United States, the incentive upon which the Panel bases its less favourable treatment finding is not related to the measure itself but to the conditions that existed before the COOL measure was adopted; namely, the smaller market share of the imports and their longer distance from the market.¹¹⁴ It argues that the Panel’s conclusion is entirely based on pre-existing market conditions and would have been entirely different if these conditions had been different (e.g., if Canadian and Mexican livestock had a larger market share and were closer to U.S. slaughterhouses).¹¹⁵

79. These arguments raise two issues.

¹¹⁰ Appellate Body Report, *US – Clove Cigarettes*, fn 372.

¹¹¹ Appellate Body Report, *US – Clove Cigarettes*, fn 372.

¹¹² U.S. Appellant Submission, paras. 68, 71 and 75.

¹¹³ U.S. Appellant Submission, para. 76.

¹¹⁴ U.S. Appellant Submission, para. 92.

¹¹⁵ U.S. Appellant Submission, para. 92.

80. First, effects that are solely the result of private decisions of market participants cannot give rise to a *de facto* violation of a national treatment obligation. Mexico agrees. However, this is not the situation in this dispute. The Panel properly addressed the argument of the United States in this regard, when it found that:

It is the COOL measure, and not solely the private decisions of market participants, that has had a decisive impact on changing this pattern [i.e. the pre-existing conditions of competition in the domestic market], by creating an economic incentive to process exclusively domestic livestock.

...

Further, in the dispute before us, like in *Korea – Various Measures on Beef*, any decisions by private market participants are not “solely” the result of their independent business calculations, but are attributable in large part to the economic incentive and disincentive created by the provisions of the COOL measure.

...

In particular, we disagree with the United States that the distinction under *Korea – Various Measures on Beef* is between legal and economic aspects of a measure. We have already noted that the complainants argue *de facto* discrimination in this dispute. In the context of such a claim of *de facto* discrimination, contrary to what the United States suggests, the distinction should be made between (i) **a measure of a WTO Member creating a sufficiently strong incentive, including possibly an economic incentive, for private market participants to act in a particular way**; and (ii) business decisions of private market participants based “solely” on private economic considerations.¹¹⁶ (*italics in original; bold emphasis added*)

81. In this dispute, it is the COOL measure that is modifying the conditions of competition, not solely the private decisions of market participants. But for the COOL measure the North American market would be fully integrated.

82. Second, the arguments highlight the fundamental character of a *de facto* discrimination analysis. When assessing whether a measure *de facto* discriminates against imports in favour of like domestic products, a Panel must assess all relevant facts and circumstances in the market and determine how the imposition of the challenged measure affects the equality of competitive conditions in light of those facts and circumstances.¹¹⁷ In other words, the measure is the “variable” (i.e., what happens with and without the measure) and the facts and circumstances are a “given” or a “constant”. They are “pre-existing” in the sense that they are the facts and circumstances that would exist in a free market without the interference or effects of the challenged measure. The fact they are pre-existing and play a role in the modification of the

¹¹⁶ Panel Report, paras. 7.390-7.392.

¹¹⁷ See *e.g.* Appellate Body Report, *US – Clove Cigarettes*, paras. 206, 215 and 226.

conditions of competition is part of the character of *de facto* discrimination. The challenged measure is disrupting the normally occurring facts and circumstances.

83. The Panel specifically addressed this issue when it observed that the “dictionary defines “*de facto*” by creating a link to factual circumstances” and found that:

The very essence of the *de jure* / *de facto* dichotomy is that the first involves an analysis focusing on the language of the measure at issue, whereas the second entails assessing how a measure with language that is not discriminatory on its face plays out in actual circumstances. In the context of Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement, assessing whether a measure has actual discriminatory effects **cannot be dissociated from the circumstances prevailing in the market at issue**. Indeed, **taking into account the circumstances in which the measure in question is applied is essential for an objective assessment** of a claim of *de facto* discrimination.¹¹⁸ (italics in original; bold emphasis added).

84. Factors such as the smaller market share of the imports and their longer distance from the market are part of the circumstances which must be taken into account in assessing whether the measure denies competitive opportunities to imported livestock.

e. Equality Of Competitive Conditions

85. The United States argues that the Panel erred by examining “whether imported livestock are equally competitive with domestic livestock,” stating that “[n]othing in the TBT Agreement or the WTO agreements requires members to ensure that imported products are placed on an equal footing in terms of their ability to compete.”¹¹⁹ The implication of this statement is that the Panel required the COOL measure to *ensure* equality of competitive conditions between imported and domestic cattle. The United States repeats and reinforces this misinterpretation of the Panel’s application of Article 2.1 to the COOL measure when it alleges that “the question is not, as the Panel appears to assume, whether a technical regulation *ensures* that imported products and like domestic products *are equally competitive*.”¹²⁰

86. The Panel did not require the COOL measure to *ensure* equality of competitive conditions in the positive manner suggested by the United States. At no time did the Panel characterize the legal issue with the wording or with the reasoning that has been alleged by the United States. Rather, the Panel—consistent with the *TBT Agreement* and the GATT 1994—

¹¹⁸ Panel Report, paras. 7.396-7.397.

¹¹⁹ U.S. Appellant Submission, para. 62. (underline emphasis in original; italics emphasis added)

¹²⁰ U.S. Appellate Submission, para. 64. (emphasis added) See also U.S. Appellate Submission, para. 62 (“There is a vast difference between ensuring that a measure does not adversely affect the *conditions* of competition, for example by imposing more onerous requirements on imported products, and **ensuring that imported products are competitive with domestic products**”; italics in original; bold emphasis added).

determined whether the COOL measure affected (or modified) the conditions of competition within the U.S. beef market to the detriment of imported cattle (i.e. from Mexico).¹²¹ In this way, the alleged legal errors identified by the United States are based not on the Panel's reasoning but on its own misinterpretations of the Panel's legal approach under Article 2.1.

87. In characterizing what it alleges to be the appropriate legal test under Article 2.1, the United States asserts that: "The question for the purposes of Article 2.1 of the *TBT Agreement* is whether the technical regulation alters the *conditions* of competition so as to deny imported products the ability to compete under the same conditions as like domestic products."¹²² The United States provides no authority to support this interpretation, which substitutes "to *deny* imported products the *ability* to compete under the *same* conditions as like domestic products" for the interpretation provided in the Appellate Body jurisprudence, which is "to *modify* the *conditions* of competition in the relevant market to the *detriment* (or *disadvantage*) of imported products."¹²³

88. The wording of the U.S. re-interpretation suggests not only a different analysis, departing from the principle of equality of competitive conditions, but also a narrower scope of application at a higher threshold than that contemplated by the Appellate Body. According to the United States, the challenged measure must effectively deny the ability of imported products to compete under the same conditions as like domestic products. A measure which denies imported products the ability to compete is not necessarily equivalent to a measure which merely modifies the conditions of competition to the detriment of the imported products. Further, the phrase "same conditions" is not equivalent in meaning to the phrase "equality of competitive conditions." Imported and like domestic products may be subject to different regulatory or other conditions while enjoying relative equality within the domestic market's conditions of competition. Alternatively, imported and like domestic products may be subject to identical regulatory conditions, but nonetheless suffer from unequal conditions of competition within the domestic market.¹²⁴ The latter scenario, according to the United States, should fall outside the jurisdiction

¹²¹ See e.g. Panel Report, para. 7.302 ("we continue our analysis by addressing whether the muscle cut labels under the COOL measure accord *de facto* less favourable treatment to imported than to domestic livestock and *de facto* **modify the conditions of competition in the US market to the detriment of imported livestock**"); Panel Report, para. 7.328 ("the question is whether such separation [i.e. the COOL measure necessitates segregation of meat and livestock according to origin (para. 3.327)] '**modifies the conditions of competition ... to the detriment of the imported product**' [citing Appellate Body Report, *Korea – Beef*, para. 144 (italics in original; bold emphasis added)] by imposing higher costs on imported than on like domestic livestock"). See also Panel Report, paras. 7.372 ("we preliminarily conclude that the COOL measure creates an incentive to use domestic livestock—and a disincentive to handle imported livestock—by imposing higher segregation costs on imported livestock than on domestic livestock") and 7.381 ("we preliminarily conclude that the COOL measure reduces competitive opportunities of imported livestock relative to domestic livestock").

¹²² U.S. Appellant Submission, para. 63. (emphasis original)

¹²³ See e.g. Appellate Body Report, *Korea – Beef*, para. 137. See also Panel Report, para. 7.302.

¹²⁴ See e.g. GATT Panel Report, *US – Section 337 Tariff Act*, para. 5.11.

of Article 2.1 of the *TBT Agreement* whenever the cause of the unequal conditions of competition is not directly or *de jure* attributable to the challenged measure itself.¹²⁵

89. For these reasons, the United States' proposed approach has no basis in law and is without merit. Further, it is inconsistent with the principle of equality of competitive conditions and the corresponding analysis which are well-established in the body of WTO and GATT 1947 jurisprudence.

f. Implications For Other Country Of Origin Regulation

90. As previously noted, the Panel's findings and conclusions are specific to the facts and circumstances in this dispute. As observed by the Panel, "we do not consider it necessary to address the country of origin labelling measures of other WTO Members... . Our findings under Article 2.1 of the TBT Agreement address only the COOL measure of the United States as challenged by the complainants in the current proceeding".¹²⁶

B. The Panel Made An Objective Assessment Of The Facts

91. In addition to its allegations of legal error, the United States argues that the Panel's finding is based on "a failure to make an objective assessment of the facts related to segregation, commingling and the price differential in the U.S. livestock market as required by Article 11 of the DSU".¹²⁷

1. Legal Test

92. The United States claims that the Panel failed to make an objective assessment as required by Article 11 of the *DSU* in relation to (i) its assessment of the facts related to segregation and commingling of cattle and (ii) the price differentials for U.S. and foreign cattle.

Footnote continued from previous page

On the one hand, contracting parties may apply to imported products different formal legal requirements if doing so would accord imported products more favourable treatment. On the other hand, **it also has to be recognised that there may be cases where application of formally identical legal provisions would in practice accord less favourable treatment to imported products** and a contracting party might thus have to apply different legal provisions to imported products to ensure that the treatment accorded them is in fact no less favourable. ... Given that the underlying objective is to guarantee equality of treatment, it is incumbent on the contracting party applying differential treatment to show that, in spite of such differences, the no less favourable treatment standard of Article III is met. (emphasis added)

¹²⁵ See e.g. U.S. Appellant Submission, paras. 68 and 71.

¹²⁶ Panel Report, para. 7.281.

¹²⁷ U.S. Appellant Submission, para. 52.

Contrary to the U.S. claim, however, the Panel carefully reviewed the relevant evidence and made an objective assessment consistent with Article 11.

93. *DSU* Article 11 states:

The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.

94. The Appellate Body has established a high legal threshold in order to successfully demonstrate a panel's breach of its duty under *DSU* Article 11. In *EC – Hormones*, the Appellate Body stated:

The deliberate disregard of, or refusal to consider, the evidence submitted to a panel is incompatible with a panel's duty to make an objective assessment of the facts. The wilful distortion or misrepresentation of the evidence put before a panel is similarly inconsistent with an objective assessment of the facts. "Disregard" and "distortion" and "misrepresentation" of the evidence, in their ordinary signification in judicial and quasi-judicial processes, imply not simply an error of judgment in the appreciation of evidence but rather *an egregious error* that calls into question the good faith of a panel. A claim that a panel disregarded or distorted the evidence submitted to it is, in effect, a claim that the panel, to a greater or lesser degree, denied the party submitting the evidence fundamental fairness, or what in many jurisdictions is known as due process of law or natural justice.¹²⁸ (emphasis added; footnote omitted).

95. More recently, in *US – Tyres (China)*, the Appellate Body confirmed the applicable criteria in relation with claims based on Article 11, stating:

[P]anels enjoy a margin of discretion in their assessment of the facts. This margin includes the discretion of a panel to decide which evidence it chooses to utilize in making its findings, and to determine how much weight to attach to the various items of evidence placed before it by the parties to the case. A panel does not commit a reversible error simply because it declines to accord to the evidence the weight that one of the parties believes should be accorded to it.¹²⁹ (footnotes omitted).

¹²⁸ Appellate Body Report, *EC – Hormones*, para. 133.

¹²⁹ Appellate Body Report, *US – Tyres (China)*, para. 321.

96. In summary, an Article 11 claim is limited by the following criteria:

- “[N]ot every error allegedly committed by a panel amounts to a violation of Article 11 of the DSU. ... An attempt to make every error of a panel a violation of Article 11 of the DSU is an approach that is inconsistent with the scope of this provision.”¹³⁰
- A claim under Article 11 of the *DSU* must “stand by itself” and be substantiated with specific arguments, rather than merely being put forth as a subsidiary argument or claim in support of a claim.¹³¹
- An Article 11 claim implies an “egregious error” involving “willful distortion or misrepresentation of the evidence” that “calls into question the good faith of a panel”.¹³²
- “A panel does not err simply because it declines to accord to the evidence the weight that one of the parties believes should be accorded to it.”¹³³
- A panel is “entitled, in the exercise of its discretion, to determine that certain elements of evidence should be accorded more weight than other elements”.¹³⁴ In doing so, a panel “is not required to discuss, in its report, each and every piece of evidence.”¹³⁵
- “[W]hen alleging that a panel ignored a piece of evidence, the mere fact that a panel did not explicitly refer to that evidence in its reasoning is insufficient to support a claim of violation under Article 11.”¹³⁶

97. As explained below, the claims of error by the United States are incorrect and do not meet the standard established by the Appellate Body for establishing that a Panel failed to make an objective assessment.

¹³⁰ Appellate Body Report, *EC – Fasteners (China)*, para. 442.

¹³¹ Appellate Body Report, *EC – Fasteners (China)*, para. 442.

¹³² Appellate Body Report, *EC – Hormones*, para. 133.

¹³³ Appellate Body Report, *China – Raw Materials*, para. 107.

¹³⁴ Appellate Body Report, *EC – Asbestos*, para. 161.

¹³⁵ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 202.

¹³⁶ Appellate Body Report, *EC – Fasteners (China)*, para. 442.

2. The Panel's Findings On Segregation Are Based On An Objective Review Of The Evidence

98. The same U.S. arguments regarding the facts relating to segregation of cattle were made during the Panel proceedings and considered by the Panel. The United States essentially requests the Appellate Body to make a *de novo* review of the facts.

99. As an initial matter, it is important to note that the U.S. argument is premised on an assumption that the COOL measure must be evaluated based on its actual trade effects. For that reason, the United States focuses on purported evidence that foreign cattle is being commingled with U.S. domestic cattle, and from that assertion leaps to the conclusion that there cannot be less favourable treatment. In making its arguments, the United States disregards the finding of the Panel, based on decisions of the Appellate Body, that conclusions about less favourable treatment need not be based on trade effects. The Panel stated:

We have reached our conclusions on less favourable treatment under Article 2.1 of the TBT Agreement without examining in detail the actual trade effects of the muscle cuts and ground meat labels under the COOL measure. Instead, by assessing segregation and the resulting cost implications of the COOL measure, we have followed the Appellate Body's approach in *Korea – Various Measures on Beef*. As suggested by the Appellate Body in that dispute, there is a “more direct, and perhaps simpler approach” to assessing a national treatment claim by “focus[sing] on what appears ... to be the fundamental thrust and effect of the measure itself.”

As the Appellate Body explained in *US – FSC (Article 21.5 – EC)* this examination does not involve the actual effects of the measure in the marketplace: “This examination cannot rest on simple assertion, but must be founded on a careful analysis of the contested measure and of its implications in the marketplace. At the same time, however, the examination need not be based on the actual effects of the contested measure in the marketplace.”¹³⁷ (footnotes omitted).

100. As discussed above, the Panel's finding on less favourable treatment was based on a number of factors that collectively establish that the COOL measure affects the conditions of competition for cattle – not on a finding that all imported cattle are being segregated from all domestic cattle. Furthermore, the United States attempts to rely on purported evidence of commingling in order to demonstrate that there is no segregation. However, as Mexico demonstrated during the Panel proceedings, even in instances where commingling could be present, segregation is still necessary in order to comply with the COOL measure.¹³⁸ The Panel

¹³⁷ Panel Report, paras. 7.438-7.439.

¹³⁸ Opening Statement of Mexico at the Second Meeting with the Panel, para. 25 and Mexico's Responses to the Panel's Questions from the First Substantive Meeting, para. 98.

correctly noted this fact, concluding that “for all practical purposes, the COOL measure necessitates segregation of meat and livestock according to origin, even though this segregation is subject to certain flexibilities...”¹³⁹

101. Notwithstanding this defect in the underlying premise of the U.S. claim, Mexico responds below to the U.S. arguments. As discussed herein, the evidence cited by the United States does not support its claim.

102. The United States relies on four items of evidence, arguing that the Panel disregarded them.

a. Survey Of Grocery Stores

103. In its Appellant Submission, the United States cites to a “USDA survey” in Exhibit US-145 that it states shows that that “22 percent of beef muscle cuts and 4 percent of pork muscle cuts were labeled as a ‘Product of the United States, Canada, and Mexico.’”¹⁴⁰ But when the United States submitted that exhibit, it explained as follows:

USDA has not conducted a representative nationwide study of the different labels being used on beef or pork muscle cuts and is *unable to provide any statistically reliable information of this type to the Panel*. However, in July 2009, USDA conducted a *limited survey* of the labels being placed on covered commodities at 152 retail stores.¹⁴¹ (Emphasis added).

104. In its response to the U.S. evidence, Mexico noted that, besides the fact that the survey was limited and not “statistically reliable,” it was not possible to tell from the single page summary comprising the U.S. exhibit what methodology was used to gather the information, and the there was no explanation of such issues as:

- whether the surveyors looked at all of the beef in the freezers at the stores, or only evaluated the packages that were apparently available to shoppers at any given moment;
- whether the counting was done on the basis of weight or number of packages;
- whether carcasses (or quarters) of unpackaged beef were counted;
- whether the packages were filled by the stores themselves or by unrelated packers; and

¹³⁹ Panel Report, para. 7.327.

¹⁴⁰ U.S. Appellant Submission, para. 106.

¹⁴¹ Answers of the United States of America to the Second Set of Questions from the Panel to the Parties, para. 7.

- how many different grocery chains were visited, noting for example that if all 19 “warehouse club” stores included in the survey were from the same corporate chain, that would significantly skew the results.¹⁴²

105. Accordingly, Exhibit US-145 cannot be viewed as even remotely reliable evidence, and as explained above, the Panel is not required to discuss individually every piece of evidence that is submitted.

b. Photographs Of Labels

106. The United States also cites four photographs showing the use of Label B, and states that each of them show labels for meat stating “U.S., Canadian, Mexican origin.” There is one such label included in Exhibit US-67, but the United States provided no information on when that photograph was taken. Exhibit US-95, also cited by the United States, shows a photograph of a specialty product – bacon-wrapped tenderloin filet “cured with a plastic skewer” – leaving open the question whether the labelling was referring to the origins of the bacon and filet, rather than just one or the other. Exhibit US-96 cited by the United States shows a label that says “Product of USA/Canada,” and therefore apparently was cited in error. Exhibit US-97 shows a label photographed in 2010 stating “product of USA, Canada, Mexico”, but in light of the varying definitions of that label under the COOL regulation, it could simply mean that meat was made from commingled Mexican and Canadian born cattle that was slaughtered in the United States. It does not demonstrate that cattle eligible for Label A was commingled with cattle eligible for only Labels B or C.

107. The Panel examined these photographs and stated as follows:

The United States submitted photographs of Label B suggesting that these labels had been affixed on commingled meat. However, photographs of Label B merely demonstrate that there are muscle cuts carrying Label B. Label B, and in particular the photos of such labels submitted by the United States, provide no information on whether the muscle cuts in question result from commingling Label A and B meat on a single production day.¹⁴³ (footnote omitted).

108. The Panel’s finding on the evidentiary value of the photographs is well-justified.

c. “Affidavit” Of Origin

109. The United States also complains that the Panel did not interpret an “affidavit” it submitted as meaning that cattle of U.S. and foreign origin had been commingled.¹⁴⁴ That

¹⁴² Mexico’s Comments on the Responses to the Panel’s Questions From the Second Substantive Meeting, para. 7.

¹⁴³ Panel Report, para. 7.366.

¹⁴⁴ U.S. Appellant Submission, para. 106.

affidavit is one of several documents contained in BCI Exhibit 101. The document in question is actually a form letter that a food processor distributed to its cattle suppliers. The form leaves a space for the supplier to enter its name, and then gives the supplier two choices in identifying the origin of its cattle.¹⁴⁵

110. The form requires the supplier to indicate whether all the cattle being supplied are (i) exclusively born and raised in the United States or (ii) not. Thus, a supplier whose cattle was born in Mexico and raised in the United States would check off Box B. This document does not provide any information about whether Label A and Label B cattle were commingled. The Panel considered the U.S. argument and Exhibit 101 and made the following finding:

Finally, the United States submitted a producer affidavit declaring that livestock supplied to a major US meat processor is eligible for Label B. This affidavit, however, is silent on whether such Label B livestock ends up being commingled, or whether livestock eligible for Labels A and B are being processed on separate production days.¹⁴⁶ (footnote omitted)

The Panel's conclusion was based on an objective analysis and is entirely reasonable.

111. In fact, the document cited by the United States, as well as the other similar forms from other processors included in Exhibit US-101, support the view that processors require suppliers to keep Label A-eligible cattle segregated from other cattle.

d. Canadian Exhibit

112. The United States also cites to an exhibit submitted by Canada, taking one sentence out of context and then arguing that it says something it does not. The document at issue states as follows:

In general, we are seeing segregation of plants and shifts with U.S. packing plants:

- 1) Not slaughtering Canadian cattle, taking only A cattle for ease of reporting;
- 2) Slaughtering B or C cattle on certain days in order to separate labels; or
- 3) Purchasing Canadian cattle, mostly cows, for grinding or foodservice where the country of origin label is not required.

The flexibility in the Final Rule has encouraged plants that were intending to accept only B or C cattle to accept both with processing on the same production

¹⁴⁵ See, BCI Exhibit 101

¹⁴⁶ Panel Report, para. 7.368.

day. We anticipate that as the enforcement period approaches in April, that U.S. packers will become increasingly stricter about their segregation practices.¹⁴⁷

Accordingly, the document supports the view that there is extensive segregation of foreign cattle from U.S. domestic cattle. The United States nonetheless cites the penultimate sentence as providing conclusive evidence that processors are commingling U.S.-born cattle and foreign-born cattle, but the sentence plainly does not say that.

113. The Panel evaluated the document based on what it actually says, finding as follows:

Further, the United States references an exhibit submitted by Canada to demonstrate that one of the complainants even recognizes that commingling is actually taking place. However, the Canadian exhibit in question only indicates that some US processing plants are accepting Label B meat, but not that these plants are necessarily commingling it with Label A meat. As regards commingling proper, this Canadian exhibit refers only to the commingling “flexibility” between meat eligible for Labels B and C, but not for Label A meat.¹⁴⁸ (footnote omitted).

114. The Panel’s conclusions regarding this document plainly were based on an objective review and are entirely reasonable.

115. In paragraphs 108-109 of the Appellant Submission, the United States attempts to obfuscate the effects of the COOL measure on the market for cattle by claiming that the Panel found that the COOL measure was similar to a trace back regime, in which every muscle cut of meat had to be traceable to a specific origin. In fact, the Panel stated as follows:

To accurately label muscle cuts under the COOL measure, a covered retailer needs to possess information on where livestock processing steps determining origin under the COOL measure have taken place with regard to each muscle cut. This information can be obtained only from the upstream livestock and meat supply chain. This is why, as explained above, the COOL measure establishes recordkeeping requirements – as well as sanctions for violating these – for both retailers and any “person engaged in the business of supplying a covered commodity to a retailer”. In fact, the 2009 Final Rule (AMS) elaborates on the “Responsibilities of Retailers *and Suppliers*” and references a “recordkeeping provision concerning *livestock*”. In addition, the COOL measure requires “[a]ny person engaged in the business of supplying a covered commodity to a retailer [to] provide information to the retailer indicating the country of origin of the covered commodity”.

¹⁴⁷ Exhibit CDA-41, p. 2.

¹⁴⁸ Panel Report, para. 7.367.

Hence, as a matter of principle, the COOL measure prescribes an unbroken chain of reliable country of origin information with regard to every animal and muscle cut. In other words, to comply with the COOL measure, livestock and meat processors need to possess, at each and every stage of the supply and distribution chain, the kind of origin information required by the various COOL labels for which each animal or portion of meat is eligible, and they need to transmit such information to the next processing stage. The 2009 Final Rule (AMS) stresses that “it is necessary to ensure information accurately reflects the origin of any group, lot, box, or package in accordance with the intent of the statute ...”. Further, under the 2009 Final Rule (AMS), as a general rule, “[l]abeling of covered commodities offered for sale whether individually, in a bulk bin, carton, crate, barrel, cluster, or consumer package must contain country of origin as set forth in this regulation”.¹⁴⁹ (emphasis original; footnotes omitted).

The Panel correctly found that compliance with the COOL measure requires that suppliers and processors have information on the country of birth of each cattle, and that this information must be passed forward to the retailers. This requirement is reflected in Exhibit US-101, which contains examples of the requirements imposed by processors on feedlot suppliers of cattle to provide information on whether meat from the cattle is eligible for Label A (born and raised in the United States), and in most cases even for non-U.S. born cattle to identify the countries of birth and raising. If origin information were to be missing for a single cattle, a processor may not be able to accurately determine which label is applicable to all the cattle processed on that same day.

116. In summary, the United States has not established that the Panel failed to make an objective analysis in relation to its findings regarding segregation of cattle.

3. The Panel’s Findings On Price Discrimination Are Based On An Objective Review Of The Evidence

117. The United States also claims that the Panel failed to make an objective analysis of evidence relating to the discounting of Mexican and Canadian cattle caused by the COOL measure.¹⁵⁰ The basis of the U.S. criticism is that the Panel should have preferred the evidence of the United States over that of Mexico and Canada. That of course is insufficient to establish that the Panel failed to make an objective analysis within the meaning of Article 11 of the *DSU*.

118. More specifically, the United States complains about the Panel’s finding in paragraph 7.356, where the Panel stated:

In fact, there is direct evidence of major slaughterhouses applying a considerable COOL discount of USD 40-60 per head for imported livestock. This proves that

¹⁴⁹ Panel Report, paras. 7.316-7.317.

¹⁵⁰ U.S. Appellant Submission, paras. 112-116.

major processors are passing on at least some of the additional costs of the COOL measure upstream to suppliers of imported livestock. We have no evidence of a similar discount being applied to suppliers of domestic livestock, nor has the United States responded to the evidence submitted by Canada and Mexico in this respect.¹⁵¹

119. The United States argues that the Panel erred in not giving preferential weight to monthly data on prices for the period January through September 2010 submitted by the United States, which it claims shows that the price differential between Mexican and U.S. feeder cattle had narrowed during 2010.¹⁵² According to the United States, this means that the COOL measure has not resulted in discounting of Mexican cattle.

120. For its part, Mexico presented direct evidence on the discounting caused by the COOL measure. For example, MEX-97, containing BCI, included invoices from July and August 2010 from two of the major U.S. processors, in which the price of Mexican cattle was subject to reductions in price on the basis of COOL. Mexico also submitted a letter issued by one of the largest U.S. processors stating that initially the price discount it imposed on Mexican cattle because of COOL was \$60, and that the discount had been reduced to \$40 in early 2009.¹⁵³ The United States did not contest the authenticity of any of this evidence. Mexico also submitted charts showing the price differential between Mexican and U.S. feeder cattle, which demonstrated that the price discrimination has been market-wide.¹⁵⁴

121. In light of the above, the Panel's finding was well supported by the evidence and reflected an objective analysis.

C. Conclusion

122. For the foregoing reasons, the Appellate Body should dismiss the United States' appeal of the Panel's reasoning, findings and conclusions under Article 2.1 of the *TBT Agreement*.

¹⁵¹ Panel Report, para. 7.356.

¹⁵² Exhibit U.S.-108.

¹⁵³ Exhibit MEX-64 (BCI).

¹⁵⁴ See e.g. Mexico's First Written Submission, para. 164 (citing, *inter alia*, Exhibits MEX-37, MEX-47 and MEX-48) and Mexico's Second Written Submission, para. 103 (citing Exhibit MEX-97 (BCI)).

IV. THE PANEL CORRECTLY FOUND THAT THE COOL MEASURE IS INCONSISTENT WITH ARTICLE 2.2 OF THE *TBT AGREEMENT*

1. Introduction

123. The United States appeals the Panel’s reasoning and findings under Article 2.2 of the *TBT Agreement* on several grounds:

- a) The Panel’s finding that the COOL measure is “trade restrictive” for purposes of Article 2.2;¹⁵⁵
- b) Whether the Panel made an “objective assessment of the matter before it,” consistent with Article 11 of the *DSU*, in characterizing what level the United States considers appropriate to fulfil its objective; and that the Panel errs in failing to consider all relevant information regarding the U.S. level of fulfilment in making its determination;¹⁵⁶ and
- c) The analysis and ultimate finding of the Panel regarding whether the COOL measure is “more trade-restrictive than necessary to fulfil a legitimate objective.”¹⁵⁷ In particular, the United States appeals: “the Panel’s legal framework for determining whether a measure is “more trade-restrictive than necessary to fulfil a legitimate objective”¹⁵⁸; “the Panel’s determination that the COOL measure does not fulfil its legitimate objective at the level the United States considers appropriate”¹⁵⁹; and the “Panel’s failure to require the complaining parties to meet their burden to prove that the measure is “more trade-restrictive than necessary” based on the availability of a significantly less trade-restrictive alternative measure that also fulfills the objective at the level the United States considers appropriate”.¹⁶⁰

124. The appeal of the United States is without merit and should be rejected.

¹⁵⁵ U.S. Appellant Submission, para. 120.

¹⁵⁶ U.S. Appellant Submission, para. 120.

¹⁵⁷ U.S. Appellant Submission, para. 120.

¹⁵⁸ U.S. Appellant Submission, para. 120.

¹⁵⁹ U.S. Appellant Submission, para. 120.

¹⁶⁰ U.S. Appellant Submission, para. 120 and fn 183 (citing Panel Report, para. 7.719). The United States misquotes the Panel’s Report by including the words “significantly” and “at the level the United States considers appropriate”, which are *not* used in either the Panel Report or Article 2.2 of the *TBT Agreement*.

2. The Approach Of The Panel

125. The Panel started its analysis of the meaning of Article 2.2 by examining the relationship between the first and second sentences of Article 2.2. The Panel stated that “the conformity of a measure with the general principle reflected in the first sentence of Article 2.2 must be established based on the elements of the second sentence. In other words, the second sentence explains what the first sentence means.”¹⁶¹ The Panel stated that this understanding was agreed by Mexico and the other parties.¹⁶² As noted in Mexico’s Other Appeal, Mexico did not agree that a violation of the first sentence can be established solely on the basis of the second sentence.¹⁶³ Rather, the second sentence elaborates upon the meaning of the first sentence but does not define it exhaustively.

126. The Panel then described the elements that comprise the legal test under Article 2.2¹⁶⁴:

- Whether the technical regulation is “trade restrictive”,¹⁶⁵
- If the technical regulation is “trade restrictive”, the next step is to identify the objective pursued by the technical regulation and examine its legitimacy within the meaning of Article 2.2;¹⁶⁶
- If the objective is legitimate, the next step is to determine whether the technical regulation fulfils the legitimate objective¹⁶⁷; and

¹⁶¹ Panel Report, para. 7.552. (footnote omitted)

¹⁶² Panel Report, para. 7.551–7.552.

¹⁶³ Mexico’s Other Appeal Submission, para. 38. Mexico’s position was that “the second sentence elaborates upon the meaning of the general obligation in the first sentence and establishes elements upon which a violation of that obligation can be established”. See Mexico’s Responses To The Panel’s Questions From The First Substantive Meeting, para. 129 and Mexico’s Responses To The Panel’s Questions From The Second Substantive Meeting, para. 83. Mexico did not agree that a violation of the first sentence can be established solely on the basis of the second sentence. Rather, Mexico clarified that “[i]t is not necessary for the purpose of this dispute for the Panel to assess whether a violation of the general rule in the first sentence can be found in circumstances other than those elaborated upon in the second sentence”. See Mexico’s Responses To The Panel’s Questions From The Second Substantive Meeting, fn 25. With respect to the latter, the first sentence of Article 2.2 is a general obligation that informs the remainder of the provision. The fact that the first sentence of Article 2.2 includes the verbs “prepare, adopt and apply” has to be given some meaning. To fail to give them meaning, as the Panel has done, renders this language a nullity and is a legal error.

¹⁶⁴ Panel Report, paras. 7.554-7.557.

¹⁶⁵ Panel Report, para. 7.554.

¹⁶⁶ Panel Report, para. 7.555.

¹⁶⁷ Panel Report, para. 7.556.

- Only if the technical regulation fulfils the legitimate objective, the next step will be to examine whether the technical regulation is not more trade restrictive than necessary to fulfil the objective. This will entail an analysis of the availability of less-trade restrictive alternative measures that can equally fulfil the objective, taking into account the risks of non-fulfilment would create.¹⁶⁸

127. Mexico considers that, on the facts of this dispute, this legal test is appropriate.¹⁶⁹ Mexico addresses issues related to the Panel's interpretation and application of Article 2.2 in its responses to each of the United States' grounds of appeal.

3. The U.S. Interpretation Of Article 2.2 Of The *TBT Agreement* Is Erroneous And Should Be Rejected

128. In the view of the United States, conformity of a measure with the general principle reflected in the first sentence of Article 2.2 must be established based on the elements of the second sentence; in other words, the second sentence explains what the first sentence means.¹⁷⁰ As discussed above, Mexico disagrees with this interpretation. The second sentence elaborates upon the meaning of the first sentence but does not define it exhaustively.

129. The U.S. interpretation of the test under Article 2.2 of the *TBT Agreement* appears to be an attempt to unilaterally modify the language of the multilateral agreement. The United States argues:

“If the measure **pursues** an objective considered “legitimate” for purposes of Article 2.2, then a measure is inconsistent with Article 2.2 only if the measure is “more trade-restrictive than necessary to fulfil” that legitimate objective. To establish that this is the case, a complaining Member must prove that: (1) there is a reasonably available alternative measure; (2) that fulfils the Member's **legitimate objective at the level that the Member considers appropriate**; and (3) is **significantly** less trade restrictive. As is the case for the parallel provision in the SPS Agreement, the *key* legal question for Article 2.2 is whether the importing Member could have adopted a less trade-restrictive measure yet still achieve its objective at the chosen level.”¹⁷¹ (footnotes omitted; italics in original; bold emphasis added)

¹⁶⁸ Panel Report, para. 7.557.

¹⁶⁹ It is unclear to Mexico whether, in all cases, it is necessary to first examine under Article 2.2 whether a technical regulation is “trade restrictive”. Although it is not necessary to answer this question in this appeal, the first sentence of Article 2.2 refers to ensuring that technical regulations are not “prepared, adopted or applied with a view to” creating unnecessary obstacles to international trade. It is therefore possible that the *preparation* of a technical regulation could be subject to scrutiny under this sentence of Article 2.2 before the technical regulation had any trade restrictive effect.

¹⁷⁰ U.S. Appellant Submission, para. 122.

¹⁷¹ U.S. Appellant Submission, para. 123.

130. The U.S. interpretation is incorrect for several reasons, including:

- It is not based on the text of Article 2.2 of the *TBT Agreement*.
- It is not enough simply “to pursue” a legitimate objective because Article 2.2 of the *TBT Agreement* requires the measure “to fulfil a legitimate objective”;
- Article 2.2 contains a two-step analysis: first step is focused on the technical regulation at issue, including the legitimacy of the objective pursued by a Member, currently existing risks that a measure is supposed to address, and a measure’s fulfilment of the legitimate objective, and the second step is focused on an alternative measure.
- Only if a Panel determines that the measure at issue fulfils the legitimate objective, should it examine an alternative measure. Otherwise, the legal test under Article 2.2 would mean “do as I say, not as I do”.
- Article 2.2 does not contain the wording “at the level that the Member considers appropriate” that clarifies the phrase “a legitimate objective”. Therefore, Article 2.2 does not require a Member to make a special determination of its desired theoretical level of fulfilment for its legitimate policy objective and, importantly, it does not require an alternative measure to fulfil the legitimate objective at this desired level.
- The wording “at the levels it [a country] considers appropriate”, used in the sixth recital of the preamble of the *TBT Agreement*, refers to the word “measures”, so the appropriate level of protection is reflected in the technical regulation actually applied.
- Finally, the word “significantly” is not used in Article 2.2 of the *TBT Agreement* and should not be incorporated there because it was not the Members’ intention.

Thus, if the technical regulation at issue does not fulfil the legitimate objective, the technical regulation is inconsistent with Article 2.2 of the *TBT Agreement*.

131. The United States argues that the legal analysis under Article 2.2 should be focused on an alternative measure. But at the first stage of the analysis, the focus should be on the technical regulation at issue. The relevant questions for consideration are: what are the risks, what are the interests at stake, what is the Member’s policy objective, and whether the government’s interference in the market is unavoidable? Once the technical regulation at issue is fully assessed, and only if the technical regulation fulfils the legitimate objective, should the focus of the analysis shift to potential alternative measures.

132. Regarding whether the measure fulfils the objective, before assessing whether less trade restrictive alternatives exist, it is necessary to assess first whether the measure in fact fulfils the legitimate objective. This step is essential because it is impossible to assess whether there is a less trade restrictive alternative if the measure does not fulfil the objective. In other words, it is

not possible to find a less trade restrictive alternative that fulfils the objective when the measure itself does not fulfil it. Moreover, it would be impossible to take “account of the risks non-fulfilment would create” if, in fact, non-fulfilment already exists with the U.S. measures. It follows that a measure that does not fulfil the legitimate objectives is an “unnecessary obstacle to trade” that is inconsistent with Article 2.2.

133. This interpretation is confirmed by the Panel. The panel acknowledged that the parties agreed that assessing whether the technical regulation fulfilled the legitimate objective was an analytical step required to examine whether that technical regulation was more trade restrictive than necessary to fulfil the stated objective.¹⁷² Particularly, the panel acknowledged that the United States accepted that step, when it indicated that “it is appropriate to analyse whether the measure in question fulfils a legitimate objective first because an analysis of ‘more trade restrictive than necessary’, which often includes a consideration of the existence of alternative measures, would not be possible without first establishing the responding party’s objective.”¹⁷³

134. For the foregoing reasons, the test suggested by the United States is not based on the text of Article 2.2 of the *TBT Agreement* and should be rejected.

4. The Panel Correctly Found That The COOL Measure Is “Trade-Restrictive” Within the Meaning Of Article 2.2

135. The Panel examined the ordinary meaning of the term “restrictive” and how the term has been understood in previous disputes,¹⁷⁴ and it concluded that the scope of the term “trade-restrictive” is broad and that the concept of “trade-restrictiveness” does not require the demonstration of any actual trade effects, as the focus is on the competitive opportunities available to imported products.¹⁷⁵ The Panel viewed that it was not necessary to define the exact scope of the considered term, in particular any relationship with a technical regulation’s non-conformity with Article 2.1 of the *TBT Agreement*.¹⁷⁶ The Panel found that the evidence demonstrating that the COOL measure negatively affects imported livestock’s conditions of competition in the US market under Article 2.1 is relevant for the analysis of the COOL measure under Article 2.2 of the *TBT Agreement*. Accordingly, it found that “the COOL measure negatively affects imported livestock’s conditions of competition in the U.S. market in relation to like domestic livestock by imposing higher segregation costs on imported livestock” and

¹⁷² Panel Report, para. 7.719.

¹⁷³ Panel Report, fn. 744.

¹⁷⁴ Panel Report, paras. 7.565-7.573.

¹⁷⁵ Panel Report, para. 7.572.

¹⁷⁶ Panel Report, para. 7.573.

concluded that “the complainants have demonstrated that the COOL measure is ‘trade restrictive’”.¹⁷⁷

136. The United States appeals the Panel’s finding that the COOL measure is “trade restrictive” for purposes of Article 2.2.¹⁷⁸ The United States argues that, for the same reasons it argues that the COOL measure does not violate Article 2.1, the Panel erred when it found that COOL measure negatively affects conditions of competition and therefore was trade restrictive for purposes of Article 2.2.¹⁷⁹

137. Mexico submits that Articles 2.1 and 2.2 of the *TBT Agreement* are two separate obligations that contain different legal tests. At the same time, the evidence that shows inconsistency of the technical regulation at issue with one obligation may be relevant to and can be used for the analysis of the same measure under the other obligation. In this case, the evidence on the record shows that the COOL measure negatively affects conditions of competition of imported products and restricts international trade.¹⁸⁰

138. As discussed above, in response to the U.S. appeal of the Panel’s finding under Article 2.1, the Panel’s finding that the COOL measure negatively affects the conditions of competition of imported livestock is legally and factually sound. Accordingly, the Panel’s finding that the COOL measure is trade restrictive is legally and factually sound.

5. The Panel Made An Objective Assessment Of The Matter Before It In Finding Inconsistency Of The COOL Measure With Article 2.2 Of The *TBT Agreement*

139. The United States appeals the Panel’s finding regarding the level the United States considers appropriate to fulfil its objective.¹⁸¹ The United States alleges that the Panel committed two errors in this regard. First, it argues that “the Panel acted inconsistently with Article 11 of the *DSU* by mischaracterizing the U.S. position regarding its level of fulfillment”.¹⁸² Second, it argues that the Panel erred in failing to consider all relevant information regarding the

¹⁷⁷ Panel Report, paras. 7.574-7.575.

¹⁷⁸ U.S. Appellant Submission, para. 120.

¹⁷⁹ U.S. Appellant Submission, fn 187.

¹⁸⁰ For the discussion under Article 2.1 summarizing Panel’s findings on the sixteen examples of reduced competitive opportunities for imported livestock, see para. 34, above.

¹⁸¹ U.S. Appellant Submission, para. 120.

¹⁸² U.S. Appellant Submission, para. 136.

level of fulfilment in its determination of that chosen level of fulfilment.¹⁸³ The appeal of the United States is without merit and should be rejected.

a. Article 2.2 Does Not Require Determination Of A Desired Theoretical “Level Of Fulfilment” For The Legitimate Objective

140. The United States argues that the analysis of the objective of the United States under Article 2.2 should include, in particular, a determination of “the level at which the United States considers it appropriate to fulfil the objective”.¹⁸⁴ It appears that the United States confuses two concepts: the level of its objective and the level of its measure.¹⁸⁵ In addition, the United States notes that, “[w]hile this ‘level’ is sometimes loosely referred to as the ‘levels of protection,’ it is more accurate to think of this concept as the ‘level of fulfilment’ (of the objective)”¹⁸⁶ and that “[t]he level of fulfilment is not the objective itself but is the level at which the Member seeks to achieve the objective”¹⁸⁷. The United States argues that the Panel “offers virtually no analysis of the level of fulfilment sought by the United States, confining its analysis to a single paragraph purporting to rely on three quotations from U.S. submissions that blatantly distorts the U.S. description of the level of fulfillment it sought”.¹⁸⁸ The U.S. arguments are without merit.

141. As discussed above, the second sentence of Article 2.2 of the *TBT Agreement* states that “technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create”. This provision does not use the wording “at the level a Member considers appropriate” that clarifies the phrase “a legitimate objective”, and, therefore, there is no need to determine a desired theoretical “level of fulfilment” for the legitimate objective.

142. To support its argument, the United States notes a “selective” quotation from paragraph 7.120 of the Panel Report in *EC – Sardines*.¹⁸⁹ The Panel stated in the relevant part:

“Article 2.2 and its preambular text affirm that it is up to the Members to decide which policy objectives they wish to pursue and *the levels at which they want to pursue them*. At the same time, these provisions impose some limits on the regulatory autonomy of Members that decide to adopt *technical regulations*: Members cannot create obstacles to

¹⁸³ U.S. Appellant Submission, para. 136.

¹⁸⁴ U.S. Appellant Submission, para. 124.

¹⁸⁵ See U.S. Appellant Submission, paras. 124-126.

¹⁸⁶ U.S. Appellant Submission, para. 124.

¹⁸⁷ U.S. Appellant Submission, para. 134.

¹⁸⁸ U.S. Appellant Submission, para. 135.

¹⁸⁹ U.S. Appellant Submission, paras. 124 and 130.

trade which are unnecessary or which, in their application amount to arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Thus, the TBT Agreement, like GATT 1994, whose objective it is to further, accords a degree of deference with respect to the domestic policy objectives which Members wish to pursue.”¹⁹⁰ (emphasis added)

The second sentence in this paragraph shows that, contrary to the U.S. argument, the phrase “the levels at which they want to pursue them” is connected with the phrase “technical regulations”, i.e. measures.

143. The sixth recital of the preamble of the *TBT Agreement* contains the phrase “at the levels it [a country] considers appropriate” that refers to the word “measures”. Thus, the levels it considers appropriate¹⁹¹ is reflected in the technical regulation actually applied. The level of fulfilment of the measure is to be objectively determined by a Panel based on the comparison of the technical regulation at issue against the legitimate objective.

144. If the measure at issue does not fulfil the legitimate objective, as in this case, it is not necessary to continue analysis and examine an alternative measure. However, if the measure at issue does fulfil the legitimate objective, an alternative measure should equally fulfil the legitimate objective. It appears that, if the U.S. interpretation is accepted, the legal test under Article 2.2 would mean that, while the COOL measure fails to achieve the desired theoretical level of fulfilment of the legitimate objective, an alternative measure must reach that theoretical level.¹⁹² Moreover, if determination of “the level of fulfilment” is based on the statements of the defending Member, then it would give a Member every incentive to inflate the desired theoretical “level of fulfilment” so a proposed alternative measure will never achieve it. Such an interpretation could not possibly be an intention of Members and reasonable interpretation.

145. The United States argues that “the objective may not be ‘protection’ but some other legitimate objective” and suggests using the term “‘level of fulfilment’ (of the objective)” instead of the concept “level of protection”.¹⁹³ Mexico notes that Article 2.2 contains the phrase “taking account of the risks non-fulfilment would create” and Article 2.3 requires, in particular, that

¹⁹⁰ Panel Report, *EC – Sardines*, para. 7.120.

¹⁹¹ Not to be confused with the “appropriate level of protection” in the context the *SPS Agreement*. Paragraph 5 of Annex A of the *SPS Agreement* defines the term “appropriate level of sanitary or phytosanitary protection”. In *Australia – Salmon*, the Appellate Body asserted that “[t]he ‘appropriate level of protection’ established by a Member and the ‘SPS measure’ have to be clearly distinguished. They are not one and the same thing. The first is an *objective*, the second is an *instrument* chosen to attain or implement that objective”. (footnote omitted; emphasis original) Appellate Body Report, *Australia – Salmon*, para. 200.

¹⁹² In particular, the United States argues that “a panel first needs to ascertain what objective the measure pursues, as well as the chosen level of protection, *in order* to consider whether the complaining party has met its burden of showing that the same level of fulfilment could be achieved by a significantly less trade-restrictive measure”. See U.S. Appellant Submission, para. 168. (emphasis original)

¹⁹³ U.S. Appellant Submission, para. 124.

technical regulations shall not be maintained if the circumstances giving rise to their adoption no longer exist. These provisions indicate that technical regulations should address risks, i.e. be of a protective nature. Indeed, Article 2.2 provides an illustrative list of the legitimate objectives that includes protection of national security, protection against deceptive practices, protection of human health or safety, animal or plant life or health, or protection of the environment. While the phrase “level of protection” may be used to describe technical regulations, this term in the context of the *TBT Agreement* should not be confused with the definition “appropriate level of sanitary or phytosanitary protection” used in the *SPS Agreement*.

146. After carefully considering the U.S. arguments and evidence, the Panel found that the objective pursued by the United States through the COOL measure was “to provide as much clear and accurate origin information as possible to consumers”.¹⁹⁴ The Panel arrived at this conclusion based on the arguments and evidence presented by the United States, for example stating as follows:

The United States submits that the text, design, architecture, and structure of the statute, along with the 2009 Final Rule (AMS), all clearly indicate that the objective is to provide consumer information about the country of origin of the covered commodities at the retail level and to prevent consumer confusion regarding the origin of meat.⁷⁷¹

Specifically, **the objective of the measure is to provide consumers with as much clear and accurate information as possible about the country or countries of origin of the meat products that they buy at the retail level.**⁷⁷² This includes information on the countries where the animal from which the meat was derived was born, raised, and slaughtered.

⁷⁷¹ United States’ response to the Panel question No. 3.

⁷⁷² United States’ responses to the Panel questions Nos. 24, 58.¹⁹⁵

147. The Panel carefully referenced the several ways in which the United States identified its objective:

In the course of this proceeding, the United States has variously identified its objective as follows: “to provide consumer information [on origin]”; “to achieve the legitimate objective of providing consumer information, information that, among other things, helps prevent consumer confusion related to the use of USDA grade labels”; “providing consumer information and preventing consumer confusion”; “to provide information to consumers about the origin of the covered commodities they buy at the retail level, which for meat products includes listing

¹⁹⁴ Panel Report, para. 7.620.

¹⁹⁵ Panel Report, paras. 7.587-7.588. (emphasis added)

the names of the countries in which the animal was born, raised, and slaughtered. In doing so, the COOL measures also help prevent consumer confusion.

As shown in the references above, the United States' formulation of its objective has varied somewhat throughout its written submissions. We observe, however, that the main element that the United States has consistently highlighted is “to provide consumer information on origin”. Accordingly, we will proceed on the understanding that this is the objective pursued by the United States through the COOL measure.¹⁹⁶ (footnotes omitted).

148. The United States further elaborated on the identified objective with respect to meat products. The Panel’s record indicates that “[r]egarding the exact information on origin that it wants to provide to consumers, the United States points to ‘information on the countries, where the animal from which the meat was derived was born, raised, and slaughtered’”.¹⁹⁷

149. Finally the Panel considered arguments put forward by the United States regarding the level of its objective. The Panel stated:

The United States used the following descriptions to indicate the level at which it aims to achieve the identified objective: “providing as much consumer information as possible”; “to provide consumers with as much clear and accurate information as possible about the origin of the meat products”; “to provide as much information as possible to consumers about the country of origin of the food products that they buy at the retail level and to minimize confusion about the origin of meat products to the maximum extent possible”.¹⁹⁸ (footnotes omitted).

150. Based on the foregoing, the Panel concluded that “the objective pursued by the United States through the COOL measure is to provide as much clear and accurate information as possible to consumers”.¹⁹⁹

151. Thus, the Panel’s finding regarding the objective is based on a complete and coherent assessment of the relevant facts and arguments, including the U.S. indication of the level at which it aims to achieve the identified objective.

152. The U.S. criticisms that the Panel omitted relevant text from certain specific paragraphs of the Report are without merit. The text underlined in the quotations in paragraph 139 of the U.S. Appellant Submission refers to explanations of *why* and *how* it sets its objectives and

¹⁹⁶ Panel Report, paras. 7.616-7.617.

¹⁹⁷ Panel Report, para. 7.618. See also Answers of the United States of America to the First Set of Questions from the Panel to the Parties, paras. 107-108.

¹⁹⁸ Panel Report, para. 7.619.

¹⁹⁹ Panel Report, para. 7.620.

appropriate level but not the objectives and appropriate level themselves, which are shown in the text that is not underlined. The text that is not underlined is the text which the Panel correctly relied upon. If the U.S. characterization of its objectives and appropriate level are accepted, it would render meaningless the discipline in Article 2.2 of the *TBT Agreement*. Members could define a benchmark that no measure other than the one implemented by the Member could ever meet.

153. The United States also argues that the Panel “willfully distorts and misrepresents the U.S. position as to what the U.S. level of fulfilment, contrary to Article 11 of the *DSU*”.²⁰⁰ As discussed above, an Article 11 claim implies an “egregious error” involving “willful distortion or misrepresentation of the evidence” that “calls into question the good faith of a panel”.²⁰¹

154. In *Dominican Republic – Import and Sale of Cigarettes*, the Appellate Body stated that “there is no obligation upon a panel to consider each and every argument put forward by the parties in support of their respective cases, so long as it completes an objective assessment of the matter before it, in accordance with Article 11 of the *DSU*”.²⁰² The Appellate Body has found that “[a] panel does not err simply because it declines to accord to the evidence the weight that one of the parties believes should be accorded to it.”²⁰³

155. In previous cases, the Appellate Body also stated that “panels enjoy a margin of discretion in their assessment of the facts. This margin includes the discretion of a panel to decide which evidence it chooses to utilize in making its findings, and to determine how much weight to attach to the various items of evidence placed before it by the parties to the case.”²⁰⁴ Clearly, the Panel has not acted inconsistently with Article 11 of the *DSU* with respect to its finding regarding the objective determination that is required by Article 2.2 of the *TBT Agreement*.

b. The Panel Did Not Fail To Consider All Relevant Information

156. The United States argues that the Panel failed to take into account evidence regarding the “true balance between costs and consumer information”.²⁰⁵ It claims that the Panel acted inconsistently with Article 11 of the *DSU* because it failed to make an objective assessment of the matter by not considering the U.S. argument relating to the balancing of costs and consumer

²⁰⁰ U.S. Appellant Submission, para. 142.

²⁰¹ Appellate Body Report, *EC – Hormones*, para. 133.

²⁰² Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 125.

²⁰³ Appellate Body Report, *China – Raw Materials*, para. 341.

²⁰⁴ Appellate Body Report, *US – Tyres (China)*, para. 321.

²⁰⁵ US Appellant Submission, paras. 143-144.

information when determining the so-called “level of fulfillment”. In fact, the Panel analyzed the U.S. argument and correctly concluded as follows:

Further, the United States created exceptions and added flexibility into the regulations because the United States strived to reduce the costs of compliance, and it wanted to provide as much consumer information as possible. The United States argues that it had to strike a balance between providing consumer information and reducing the compliance costs for industry. Of course, it is often necessary and important for governments to take conflicting interests into account in implementing laws and regulations to fulfil policy objectives. The act of balancing conflicting interests cannot, however, justify any inconsistency found in the impugned measure with the obligations of the respondent under the covered agreements. In the factual circumstances of the present dispute, the pertinent question for us is whether the COOL measure is fulfilling the identified objective in accordance with the obligations under Article 2.2 of the TBT Agreement.²⁰⁶ (footnotes omitted).

157. As the Appellate Body explained, “panels enjoy a margin of discretion in their assessment of the facts.”²⁰⁷ and “[j]ust as a panel has the discretion to address only those *claims* which must be addressed in order to dispose of the matter at issue in a dispute, so too does a panel have the discretion to address only those *arguments* it deems necessary to resolve a particular claim.”²⁰⁸ The Panel considered the U.S. arguments and explained why it cannot accept them.²⁰⁹ Clearly, the Panel acted within its obligations under Article 11 of the *DSU*.

6. The Panel Correctly Found That The COOL Measure Does Not Fulfil The Objective Of Providing As Much Clear and Accurate Information as Possible to Consumers

158. The United States appeals the Panel’s findings and conclusion that the COOL measure does not fulfil the objective of providing consumer information on origin with respect to meat products and thereby violates Article 2.2.²¹⁰ However, the United States uses different terminology to describe the Panel’s ultimate finding under Article 2.2, stating that it “appeals the analysis and ultimate finding of the Panel regarding whether the COOL measure is ‘more trade-

²⁰⁶ Panel Report, para. 7.711. For the Panel’s evaluation of the costs associated with the comingling provisions, see also Panel Report, 7.704-7.405.

²⁰⁷ Appellate Body Report, *US – Tyres (China)*, para. 321.

²⁰⁸ Appellate Body Report, *EC – Poultry*, para 135. (emphasis original)

²⁰⁹ Panel Report, para. 7.711. For the Panel’s evaluation of the costs associated with the comingling provisions, see also Panel Report, 7.704-7.405.

²¹⁰ U.S. Appellant Submission, para. 120.

restrictive than necessary to fulfil a legitimate objective”.”²¹¹ Specifically, the United States appeals:

- a) “the Panel’s legal framework for determining whether a measure is ‘more trade-restrictive than necessary to fulfil a legitimate objective’”;
- b) “the Panel’s determination that the COOL measure does not fulfill its legitimate objective at the level the United States considers appropriate”; and
- c) “the Panel’s failure to require the complaining parties to meet their burden to prove that the measure is ‘more trade-restrictive than necessary’ based on the availability of a significantly less trade-restrictive alternative measure that also fulfills the objective at the level the United States considers appropriate”.”²¹²

a. The United States’ Specific Criticisms Of The Panel’s Legal Reasoning and Conclusions Are Without Merit

159. The United States argues that the Panel erred when it found that it was sufficient to find a violation of Article 2.2 based on the fact that the COOL measure does not fulfil the objective of providing as much consumer information as possible on origin with respect to meat products.²¹³ The United States criticizes the Panel’s two-step analysis: (1) whether the COOL measure fulfils the objective; and, if so, (2) whether the COOL measure is more trade restrictive than necessary.²¹⁴ It argues that Article 2.2 does not set out a two-step analysis as defined by the Panel but a single analysis containing the above-noted three elements that are to be judged cumulatively as set out by the Appellate Body in *Australia – Salmon* in respect of Article 5.6 of the *SPS Agreement*.²¹⁵

160. The United States argues that “a panel first needs to ascertain what objective the measure pursues, as well as the chosen level of fulfilment, *in order* to consider whether the complaining party has met its burden of showing that the same level of fulfilment could be achieved by a significantly less trade-restrictive alternative measure.”²¹⁶ The United States recognizes that the Panel’s interpretation is based on jurisprudence developed under Article XX(b) of the GATT 1994, but argues that this jurisprudence is inapplicable to Article 2.2.²¹⁷

²¹¹ U.S. Appellant Submission, para. 120.

²¹² U.S. Appellant Submission, para. 120.

²¹³ U.S. Appellant Submission, paras. 145-146.

²¹⁴ U.S. Appellant Submission, para. 148.

²¹⁵ U.S. Appellant Submission, para. 156.

²¹⁶ U.S. Appellant Submission, para. 168. (emphasis original)

²¹⁷ U.S. Appellant Submission, paras. 157-167.

161. The Panel’s two-step analysis is correct. Article 2.2 reads as follows:

Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.

162. Irrespective of whether the second sentence defines the first sentence (the interpretation of the Panel and the United States) or whether the first sentence could have meaning that is independent of the second sentence (a possibility foreseen by Mexico), what is clear from the context provided by the first sentence is that under Article 2.2, a technical regulation must not “create” an unnecessary obstacle to trade. Thus, the U.S. argument that Article 2.2 does not ask the question “whether the measure *itself* is ‘necessary’”²¹⁸ is incorrect. Under Article 2.2 there is an obligation that the technical regulation itself be necessary that is independent of the obligation that the technical regulation be not more trade restrictive than necessary. Whether technical regulations are at the stage of drafting, adoption or implementation, a Member must ensure that they are not prepared, adopted or applied with *a view* to creating *unnecessary* obstacles to international trade.

163. The term “unnecessary” is used in both the first and second sentences and must be given meaning in both sentences, i.e., in the context of the creation of an obstacle to trade and in the context of a less trade restrictive alternative.

164. Thus, whether the technical regulation at issue is more trade-restrictive than necessary is a “two-step” analysis. This is in line with the Appellate Body clarification in *US – Gambling* and in *Brazil – Retreaded Tyres* that weighing and balancing involves *two steps*: *first*, a preliminary analysis of the necessity of the *original measure* on the basis of all relevant factors, and *second*, the conclusion of the preliminary analysis must be confirmed by comparing the measure with its possible *alternatives*.

165. The one-step approach developed for claims under Article 5.6 of the *SPS Agreement* is *not* appropriate for the purposes of Article 2.2 of the *TBT Agreement*. Mexico notes that in *Australia – Apples* the Appellate Body rejected the “two-step” approach the Panel had developed in dealing with Article 5.6 of the *SPS Agreement*.²¹⁹

166. However, the approach accepted for Article 5.6 of the *SPS Agreement* should not be automatically applied to Article 2.2 of the *TBT Agreement* for a number of reasons, including:

²¹⁸ U.S. Appellant Submission, para. 161. (emphasis original)

²¹⁹ Appellate Body Report, *Australia – Apples*, paras. 358–359.

- “Nothing in this [SPS] Agreement shall affect the rights of Members under the Agreement on Technical Barriers to Trade with respect to measures not within the scope of this Agreement”.²²⁰
- A necessity test is contained in Article 2.2 of the *SPS Agreement*²²¹ i.e. separately from Article 5.6 that focuses on requirements for alternative measures. In contrast, Article 2.2 of the *TBT Agreement* contains a necessity test (the first and second sentences) and the requirement that the “technical regulation shall not be more trade-restrictive than necessary to fulfil a legitimate objective”.
- While Article 5.6 of the *SPS Agreement* contains footnote 3 that was specifically designed for this provision,²²² Article 2.2 of the *TBT Agreement* does not have a similar footnote with clarification regarding the requirements for alternative measures. Importantly, there is no requirement in the *TBT Agreement* for an alternative measure to be “significantly” less trade restrictive to trade.
- Article 5 of the *SPS Agreement* contains “the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health” and specific requirements that Members shall or should take into account in determining the appropriate level of sanitary or phytosanitary protection. In fact, Annex A 5 defines the term “appropriate level of sanitary or phytosanitary protection”, and the whole Article 5 of the *SPS Agreement* is about assessment of risks and determination of the appropriate level of sanitary or phytosanitary protection. In contrast, Article 2.2 of the *TBT Agreement* does not contain similar provisions but provides an illustrative list of legitimate objectives. Explicit reference to the appropriate level of measures is found only in the sixth recital of the preamble to the *TBT Agreement*.
- According to Annex A.1 of the *SPS Agreement*, sanitary or phytosanitary measures applied to protect animal or plant life or health within the territory of the Member and measures that are aimed at the extra-territorial application of domestic health standards are excluded from the application of the *SPS Agreement*. In contrast, the *TBT Agreement* does not have similar limitation in its application.

²²⁰ Article 1.4 of the *SPS Agreement*.

²²¹ Article 2.2 of the *SPS Agreement* provides that: “Members shall ensure that any sanitary or phytosanitary measure is applied only to the extent **necessary** to protect human, animal or plant life or health, is based on scientific principles and is not maintained without sufficient scientific evidence, except as provided for in paragraph 7 of Article 5.” (emphasis added)

²²² Footnote 3 to Article 5.6 of the *SPS Agreement* provides that: “**For purposes of paragraph 6 of Article 5**, a measure is more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade.” (emphasis added)

- According to Article 3.3 of the *SPS Agreement*, Members may use sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards.²²³ In contrast, Article 2.4 of the *TBT Agreement* states the general rule that Members shall use relevant international standards or the relevant parts of them as a basis for their technical regulations.

This comparative analysis highlights that the *SPS Agreement* and *TBT Agreement* provide different regimes and rules, their application is mutually exclusive, and provisions of one Agreement should not be automatically incorporated in the provisions of the other because that was not intended by the Members.²²⁴

167. Accordingly, the Panel was legally correct when it interpreted Article 2.2 to incorporate a two-step approach.

b. The Panel Correctly Determined That The COOL Measure Does Not Fulfil Its Legitimate Objective

168. The United States argues that the Panel erred in finding that the COOL measure does not fulfil its objective. According to the United States, the Panel agreed that the COOL measure “provides ‘clear and accurate’ consumer information for at least 71% of the meat sold in the United States; and while not providing the same level of information for the remaining meat sold, the COOL measure provides more information on origin for this meat than the previous scheme provided.”²²⁵

169. In making this argument, the United States exaggerates or otherwise takes liberties with the Panel’s findings and the evidence. For example, the United States asserts that “it is an uncontested fact that meat carrying the A label constitutes at least 71% of the meat sold in the United States.”²²⁶ In actuality, it is uncontested that the COOL measure:

²²³ Article 3.3 of the *SPS Agreement* provides that:

“Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraph 1 through 8 of Article 5. (emphasis added)

²²⁴ Mexico further elaborates on why Article 5.6 of the *SPS Agreement* should not applied to Article 2.2 of the *TBT Agreement* in Section 6.c, below.

²²⁵ U.S. Appellant Submission, para. 173.

²²⁶ U.S. Appellant Submission, para. 172.

- applies only to 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;²²⁷
- applies only to covered products sold in major supermarkets, and not to such items sold in restaurants and smaller retailers, including butcher shops;²²⁸
- does not apply to covered commodities that are an ingredient in a processed food item; and²²⁹
- according to the United States itself, covers only about 55% of the covered products consumed in the United States.²³⁰

Accordingly, meat carrying Label A constitutes less than 39% (71% of 55%) of the “meat sold in the United States.”

170. Further, the Panel did not make a clear finding endorsing the effectiveness even of Label A. The United States quotes paragraph 7.713, but in that paragraph the Panel was summarizing the U.S. position. The Panel went on to conclude as follows:

However, as clarified in paragraph 7.620 above, the United States aims to achieve its stated objective by providing as much *clear* and *accurate* origin information as possible. Considered against this level of fulfilment of its objective and in light of the nature of the objective (i.e. to provide accurate origin information), merely providing *more* information than under the previous labelling regime or fulfilling only a limited aspect of the identified objective does not contribute in a meaningful way to fulfilling the objective. As discussed above, the different and complex categories of labels under the COOL measure and the operation of the COOL regime based on the commingling provisions render origin information contained in labels inaccurate and confusing.²³¹ (footnote omitted; emphasis original)

171. Mexico understands the Panel’s finding to be stating that, in light of the fact that Labels A, B, C and D all define origin differently, and that Labels B and C themselves can have varying

²²⁷ Mexico’s Second Written Submission, para. 44 and Exhibit MEX-98, p. 3.

²²⁸ Panel Report, paras. 7.106-7.108.

²²⁹ Panel Report, para. 7.104.

²³⁰ Answers of the United States of America to the Second Set of Questions from the Panel to the Parties, para. 15 and fn 22.

²³¹ Panel Report, para. 7.715.

meanings, the origin information conveyed by all the labels collectively is confusing to consumers. This view is supported by the Panel's finding that:

Even if we were to conceive of a perfect consumer who is fully informed of the meaning of different categories of labels under the COOL measures, she may never be assured that the label precisely reflects the origin of meat as defined under the COOL measure. This is because of the manner in which the labeling requirements under the measure operate, *inter alia*, in connection with the interchangeable use of Label B and Label C allowed for commingled meat.²³² (footnote omitted; emphasis original)

172. Mexico further understands the Panel's comment in paragraph 7.718 that origin information conveyed by Label A may be meaningful to refer to the fact that the definition of Label A, unlike Labels B and C, is defined in an unambiguous manner, but not to mean that when Label A is used that the COOL measure overall is effective by any particular degree in fulfilling the U.S. objective.

173. The United States now concedes that the COOL measure is unreliable even for the products to which it applies. The United States agrees that:

[T]he COOL measure does not provide perfect information to consumers on origin in every conceivable scenario, and the United States has never maintained that the measure does so, or that it intended to do so. The extent of information provided depends upon which label is used (whether A, B, C, or D) and, for categories A, B, or C, whether commingling has occurred.²³³ (footnotes omitted).

174. The United States argues that the ineffectiveness of the COOL measure can be justified as based on an effort to avoid imposing excessive costs on industry participants.²³⁴ But the Panel specifically found that the "balance" that the United States says is reflected in the COOL measure resulted in imposition of discriminatory higher costs on the use of imported livestock and adverse effects on competitive conditions in the U.S. market to the detriment of imported livestock.²³⁵ In other words, the United States designed and implemented the COOL measure in a manner that placed burdens disproportionately on imported livestock.

175. The Panel was not convinced by the arguments presented by the United States. In fact, nothing in Article 2.2 suggests that cost should be a factor in assessing whether a challenged

²³² Panel Report, para. 7.702. The use of the term "*inter alia*" indicates that the Panel was not just referring to the B and C labels.

²³³ U.S. Appellant Submission, para. 144.

²³⁴ U.S. Appellant Submission, paras. 139-140 and 142-144.

²³⁵ Panel Report, paras. 7.347, 7.351 and 7.372.

measure fulfils its objective. The Panel correctly concluded that the pertinent question for its analysis is whether the COOL measure is fulfilling the identified objective in accordance with Article 2.2 of the *TBT Agreement*.²³⁶

176. Mexico further observes that if the U.S. argument were accepted, that would imply that the U.S. objective would have been re-defined to be to provide accurate information regarding whether meat was produced from U.S.-born cattle only, and not to provide accurate information regarding meat from cattle of non-U.S. origin. Such an objective would be inherently arbitrary and not even-handed.

177. As the Panel noted, the dictionary meaning of the term “fulfil” is “2. Provide fully with what is wished for; satisfy the appetite or desire of; 3. Make complete, supply with what is lacking; replace (something); ... 6. Carry out, perform, do (something prescribed).”²³⁷ Mexico notes that Article 2.2 of the *TBT Agreement* has a strict standard that requires fulfilment of the legitimate objective. The standard “to fulfil” is close in its degree to the standard “necessary”, so the term “to fulfil” in the context of Article 2.2 of the *TBT Agreement* requires that a technical regulation be located significantly closer to the pole of 100% fulfilment of the legitimate objective. For a measure simply to make a material contribution to fulfilling the legitimate objective is not enough to satisfy the strict test of Article 2.2 of the *TBT Agreement*.

178. It is important to take into account the difference between standards that was stressed by the Appellate Body in *Korea – Beef*. The Appellate Body explained:

161. We believe that, as used in the context of Article XX(d), the reach of the word “necessary” is not limited to that which is “indispensable” or “of absolute necessity” or “inevitable”. Measures which are indispensable or of absolute necessity or inevitable to secure compliance certainly fulfil the requirements of Article XX(d). But other measures, too, may fall within the ambit of this exception. As used in Article XX(d), the term “necessary” refers, in our view, to a range of degrees of necessity. At one end of this continuum lies “necessary” understood as “indispensable”; at the other end, is “necessary” taken to mean as “making a contribution to.” **We consider that a “necessary” measure is, in this continuum, located significantly closer to the pole of “indispensable” than to the opposite pole of simply “making a contribution to”.**¹⁰⁴ (emphasis added).

104 We recall that we have twice interpreted Article XX(g), which requires a measure “relating to the conservation of exhaustible natural resources”. (emphasis added). This requirement is more flexible textually than the “necessity” requirement found in Article XX(d). We note that, **under the more flexible “relating to” standard of Article XX(g)**, we accepted in *United States – Gasoline* a measure because it presented a “substantial relationship”, (emphasis added) i.e., **a close and genuine relationship of ends**

²³⁶ Panel Report, para. 7.711.

²³⁷ Panel Report, para. 7.692.

and means, with the conservation of clean air. *Supra*, footnote 98, p.19. In *United States – Shrimp* we accepted a measure because it was "*reasonably related*" to the protection and conservation of sea turtles. *Supra*, footnote 98, at para. 141. (italics in original; bold emphasis added).²³⁸

179. In *Korea – Beef*, the Appellate Body stressed that "[t]he more vital or important those common interests or values are, the easier it would be to accept as 'necessary' a measure designed as an enforcement instrument".²³⁹ This is equally relevant for the interpretation of Article 2.2 of the *TBT Agreement*.

180. In any event, contrary to the U.S. argument, the COOL measure does *not* make a material contribution. A genuine relationship of ends and means between the objective pursued and the measure at issue does *not* exist. The Panel made an objective assessment of facts, arguments and evidence and correctly found that the COOL measure does not fulfil the legitimate objective.

181. The Panel accepted the United States' characterization of its objective, namely "to provide as much clear and accurate origin information as possible to consumers."²⁴⁰ Therefore, the Panel correctly considered the COOL measure against the objective of providing *clear* and *accurate* information on the places where animals were born, raised, and slaughtered.

182. Thus, the Panel was correct in finding that the COOL measure does not fulfil the objective to provide accurate and clear information about meat products sold on the United States market.

**c. The Panel Followed the Legal Test for Article 2.2 and
Correctly Stopped Its Analysis After Finding That The COOL
Measure Does Not Fulfil the Legitimate Objective**

183. In the United States' opinion, the Panel errs in making a finding of inconsistency under Article 2.2 without requiring that the complaining parties meet their burden of establishing that the measure is "more trade restrictive than necessary" based on the existence of a less trade restrictive alternative measure.²⁴¹ The United States proposed its own analysis for the phrase "more trade restrictive than necessary" in the context of Article 2.2 of the *TBT Agreement*. It argues that the test of Article 5.6 of the *SPS Agreement* should be used for the interpretation of Article 2.2 of the *TBT Agreement*.

184. To support its attempt to incorporate footnote 3 to Article 5.6 of the *SPS Agreement* into Article 2.2 of the *TBT Agreement*, the United States refers to a December 15, 1993 letter from

²³⁸ Appellate Body Report, *Korea – Beef*, para. 161 and fn 104.

²³⁹ Appellate Body Report, *Korea – Beef*, para. 162.

²⁴⁰ Panel Report, para. 7.620.

²⁴¹ U.S. Appellant Submission, para. 178.

Peter D. Sutherland, Director-General of the GATT, to Ambassador John Schmidt, Chief U.S. Negotiator. The United States argues:

That letter explains that while “**it was not possible to achieve the necessary level of support for a U.S. proposal [concerning a clarifying footnote to Article 2.2 and 2.3 of the TBT Agreement]** ... it was clear from our consultations at expert level **that participants** felt it was obvious from other provisions of the [TBT] Agreement that the Agreement does not concern itself with insignificant trade effects nor could a measure be considered more trade restrictive than necessary in the absence of a reasonably available alternative”.²⁴² (emphasis added)

185. In the United States’ opinion, this letter confirms that footnote 3 to Article 5.6 of the *SPS Agreement* should be applied for the analysis of Article 2.2 of the *TBT Agreement* because “it provides supplementary means of interpretation within the meaning of Article 32 of the *Vienna Convention on the Law of Treaties*, in particular as circumstances of the *TBT Agreement’s* conclusion”.²⁴³ The United States’ argument should not be accepted for the following reasons.

186. According to Article 32 of the *Vienna Convention on the Law of Treaties*:

recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, *in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:*

a) leaves the meaning ambiguous or obscure; or

b) leads to a result which is manifestly absurd or unreasonable.²⁴⁴ (emphasis added)

187. Contrary to the U.S. argument, there is no need to employ supplementary means of interpretation because it is clear from the text of Article 2.2 of the *TBT Agreement* and the application of article 31 of the *Vienna Convention* that there is no footnote that clarifies the meaning of the phrase “more trade-restrictive than necessary”. Thus, the December 15, 1993 letter does not assist in the interpretation of Article 2.2 of the *TBT Agreement* and should not be recognized as a supplementary means of interpretation within the meaning of Article 32 of the *Vienna Convention*.

188. Moreover, the common intention of Members cannot be ascertained on the basis of the “feelings” of some participants. As the United States described, the letter states, in particular,

²⁴² U.S. Appellant Submission, fn 269.

²⁴³ U.S. Appellant Submission, fn 269.

²⁴⁴ *Vienna Convention on the Law of Treaties*, Article 32.

that “it was not possible to achieve the necessary level of support for a U.S. proposal [concerning a clarifying footnote to Article 2.2 and 2.3 of the *TBT Agreement*]”. Thus, this letter indicates it was not the common intention of the parties to incorporate a clarifying footnote to Article 2.2 and 2.3 of the *TBT Agreement*.

189. The United States also argues that its analysis of Article 2.2 of the *TBT Agreement* “is consistent with the Appellate Body’s analysis of the parallel provision in Article 5.6 of the SPS Agreement in *Australia – Salmon*, which the Appellate Body has confirmed in other cases”.²⁴⁵ The cases cited by the United States, namely *Australia – Salmon*²⁴⁶, *Australia – Apples*²⁴⁷ and *Japan – Agricultural Products II*,²⁴⁸ did not involve any claims under the *TBT Agreement*. In *Australia – Salmon*, the Appellate Body stressed that the footnote is the most important reason for establishing the three-part test used in Article 5.6 of the SPS Agreement: “... Article 5.6 and, in particular, the footnote to this provision, clearly provides a three-pronged test to establish a violation of Article 5.6”.²⁴⁹ The absence of a similar footnote in Article 2.2 of the *TBT Agreement* must have meaning. Therefore, there is no legal basis for incorporating into Article 2.2 of the *TBT Agreement* the test of footnote 3 to Article 5.6 of the SPS Agreement.

190. The United States asserts that the Panel does not provide enough explanation for why it is not necessary after finding that the COOL measure does not fulfil the legitimate objective to continue the analysis. At the same time, the United States recognizes that the Panel refers to the analysis of Article XX(a) and (b) of the *GATT 1994* provided by the Appellate Body in earlier cases. Its position is inconsistent.

191. Contrary to the U.S. argument, the Panel presented the legal test under Article 2.2,²⁵⁰ and considered and objectively assessed arguments, facts and evidence presented by all parties.²⁵¹ In particular, the Panel stated: “If the answer [to the question whether the technical regulation fulfils the legitimate objective] is in the affirmative, we would then proceed with an examination of whether the technical regulation in question is more trade-restrictive than necessary to fulfil the objective concerned.” The United States did not appeal the legal test presented in paragraphs

²⁴⁵ U.S. Appellate Submission, para. 179 (footnotes omitted).

²⁴⁶ In *Australia – Salmon*, Canada alleged that the prohibition is inconsistent with Articles XI and XIII of the *GATT 1994*, and also inconsistent with the *SPS Agreement*.

²⁴⁷ In *Australia – Apples*, New Zealand considered that Australia’s measures were inconsistent with Australia’s obligations under the *SPS Agreement*, in particular, Articles 2.1, 2.2, 2.3, 5.1, 5.2, 5.3, 5.5, 5.6, 8 and Annex C.

²⁴⁸ In *Japan – Agricultural Products II*, the US alleged violations of Articles 2, 5 and 8 of the *SPS Agreement*, Article XI of *GATT 1994*, and Article 4 of the *Agreement on Agriculture*.

²⁴⁹ Appellate Body Report, *Australia – Salmon*, para. 194. (emphasis original)

²⁵⁰ See Panel Report, paras. 7.554-7.557.

²⁵¹ For the Panel’s assessment of whether the COOL measure fulfils the objective “to provide as much clear and accurate origin information as possible to consumers”, see Panel Report, paras. 7.692-7.720.

7.554-7.557. Because the Panel correctly found that the COOL measure does not fulfil the legitimate objective, it was unnecessary to continue the analysis.

192. The United States rejects the relevance of Article XX of the GATT 1994, claiming that it is a “*particularly* inappropriate basis” for the interpretation of Article 2.2 of the *TBT Agreement*.²⁵² The United States considers that “the *key* legal question for Article 2.2 is whether the importing Member could have adopted a less trade-restrictive measure”.²⁵³ The U.S. interpretation is in error and should be rejected.

193. Article XX of the GATT 1994 is relevant for the interpretation of Article 2.2 of the *TBT Agreement*. The relationship between the *GATT* and the *TBT Agreement* is reflected, in particular, in the preamble to the *TBT Agreement*. In *US – Clove Cigarettes*, the Appellate Body considered the second, fifth and sixth recitals and concluded, in particular, that “the second recital links the *TBT Agreement* to the *GATT 1994*”²⁵⁴ and that “the two Agreements should be interpreted in a coherent and consistent manner.”²⁵⁵ The Appellate Body stated:

While this recital may be read as suggesting that the *TBT Agreement* is a “development” or a “step forward” from the disciplines of the GATT 1994²⁵⁶, in our view, it also suggests that the two agreements overlap in scope and have similar objectives. If this were not true, the *TBT Agreement* could not serve to “further the objectives” of the GATT 1994. *The second recital indicates that the TBT Agreement expands on pre-existing GATT disciplines and emphasizes that the two Agreements should be interpreted in a coherent and consistent manner.*²⁵⁷

The language of the sixth recital of the preamble to the *TBT Agreement* is very similar to the language of the chapeau of Article XX of the GATT 1994. The Panel noted also that “examples of legitimate objectives explicitly listed in Article 2.2 resemble the types of policy objectives prescribed under Article XX of the GATT 1994”.²⁵⁸

194. Contrary to the United States’ interpretation of the legal test under Article 2.2 of the *TBT Agreement*, there are several key legal questions related to this Article. One of them is whether the technical regulation at issue fulfils the legitimate objective. It appears that the United States attempts to shift the focus of the Appellate Body from the enquiry as to whether the COOL

²⁵² U.S. Appellate Submission, paras. 180-181. (emphasis original)

²⁵³ U.S. Appellee Submission, paras. 123 and 181. (emphasis original)

²⁵⁴ Appellate Body Report, *US – Clove Cigarettes*, para. 90.

²⁵⁵ Appellate Body Report, *US – Clove Cigarettes*, para. 91.

²⁵⁶ Panel Report, para. 7.112.

²⁵⁷ Appellate Body Report, *US – Clove Cigarettes*, para. 91. (emphasis added)

²⁵⁸ Panel Report, para. 7.670. (footnote omitted)

measure is consistent with Article 2.2 to the enquiry as to whether the alternative measures will be consistent with Article 2.2. In other words, the United States considers that Article 2.2 requires scrutiny of alternative measures and full acceptance of the COOL measure without any enquiry as to the technical regulation at issue, including whether or not it fulfils the legitimate objective. The United States' interpretation has no legal basis in Article 2.2 of the *TBT Agreement*, it was not accepted during the Uruguay Round and it should not be accepted now in the course of dispute settlement proceedings.

V. CONCLUSION

195. For the foregoing reasons, the Appellate Body should reject in its entirety the United States' appeal, and confirm the Panel's reasoning, findings and conclusions.