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

(AB-2012-3 / DS384/386)

Appellee Submission
of the United States of America

April 10, 2012

SERVICE LIST

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Australia – Apples (AB)	Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/AB/R, adopted 17 December 2010
Australia – Salmon (AB)	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998
Canada – Autos (AB)	Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry,* WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000
Chile – Alcohol (AB)	Appellate Body Report, *Chile – Taxes on Alcoholic Beverages,* WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000
EC – Asbestos (AB)	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/AB/R, adopted 5 April 2001
EC – Fasteners (AB)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011
EC – Hormones (AB)	Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998
EC – Large Civil Aircraft (AB)	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011
EC – Poultry (AB)	Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998
EC – Sardines (Panel)	Panel Report, *European Communities – Trade Description of Sardines,* WT/DS231/R, adopted 23 October 2002, as modified by the Appellate Body Report, WT/DS231/AB/R

India – Quantitative Restrictions (AB)	Appellate Body Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/AB/R, adopted 22 September 1999
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US – Clove Cigarettes (Panel)	Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R, circulated 2 September 2011
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US – Hot Rolled Steel (AB)	Appellate Body Report, *United States – Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001
US – Large Civil Aircraft (AB)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012
US – Textiles Rules of Origin	Panel Report, *United States – Rules of Origin for Textiles and Apparel Products*, WT/DS243/R, adopted 21 July 2003
US – Tuna (Panel)	Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, circulated 15 September 2011
US – Wheat Gluten (AB)	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001
US – Wool Shirts and Blouses (AB)	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. The United States has maintained country of origin labeling requirements for various food products since 1930 and has sought to improve the information provided on origin over time. One of the areas that had been subject to ongoing debate was country of origin labeling for meat. This particular product poses additional levels of complexity because meat is derived from animals, and animals are mobile. Any individual cow or pig, for example, can be born, raised, or slaughtered in different countries, so assigning an origin to the meat from the animal can pose issues not present for other products. The debate over the desired means of conveying to consumers through labeling the country of origin of meat spanned nearly a decade. In an attempt to balance the precision of the information provided to consumers with efforts to minimize compliance costs, the United States modified earlier proposals for and versions of the COOL measure on numerous occasions before settling on a design that fulfills the measure's objective at the level the United States considers appropriate.

2. The United States adopted the country of origin labeling ("COOL") requirements at issue in this dispute to provide consumers with information about the origin of muscle cuts of meat and ground meat. As a result of these requirements, millions of consumers in the United States are now able to make more informed purchasing decisions about the food products that they buy at the retail level.

3. Yet, in this dispute, Canada and Mexico would disregard the extensive U.S. efforts to strike a careful balance between the level of information provided and compliance costs, and would instead require the United States to adopt measures that either fail to provide the information sought by U.S. consumers or impose unacceptable compliance costs on interested stakeholders. At the same time, Canada and Mexico advance arguments that, if adopted, would make it difficult for any of the nearly 70 Members who currently maintain country of origin labeling requirements to maintain their existing country of origin labeling regimes. Accordingly, the Appellate Body should reject Canada and Mexico's arguments under the *Agreement on Technical Barriers to Trade* ("TBT Agreement"), the *General Agreement on Tariffs and Trade of 1994* ("GATT 1994"), and the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

A. The Appellate Body Should Reject the Complaining Parties' Conditional Appeals of the Panel's Findings and Analysis under Article 2.2 of the TBT Agreement

4. As to the complaining parties' legal claims regarding the identification of the U.S. objective, Mexico's argument must fail as its entire legal appeal rests on the erroneous factual premise that the Panel did not analyze the text, design, architecture, and structure of the measure in order to identify the objective. The Panel did in fact conduct this analysis; Mexico's theory that the Panel Report is flawed in this respect is therefore fundamentally in error. Canada's argument must similarly fail in that it rests on the contention that the Panel did not conduct its analysis in the "correct" order. Moreover, insofar as Canada considers that it was inappropriate

for the Panel even to consider the objective of the measure as expressed by the United States, Canada is incorrect.

5. The complaining parties' claims under Article 11 of the DSU must also fail. The Panel properly evaluated the evidence on the record with regard to the objective of the COOL measure. The Panel carefully assessed and considered the text, design, architecture, and structure of the measure as well as its legislative history. On this basis, it appropriately found that the COOL measure's objective is the provision of consumer information on origin, not protectionism as the complainants erroneously assert. Canada and Mexico's claims that the Panel failed to conduct an objective assessment of the facts reflect their disappointment that the Panel did not to accord the same weight to their evidence as they do, which is not a violation of Article 11 of the DSU. Neither complainant has shown that the Panel deliberately disregarded or distorted its evidence or that the Panel failed to rely upon or address any evidence that is so material to the Panel's legal conclusion that it would have a bearing on the objectivity of the factual assessment.

6. Canada's claim that the Panel erred in its examination of whether an objective is legitimate must also fail. First, Canada's "test" is flawed in that it is inconsistent with the text of Article 2.2 of the TBT Agreement, which contains a non-exhaustive list of legitimate objectives. Second, Canada errs in relying on the principle of *ejusdem generis* in creating its test to interpret Article 2.2. Third, Canada's two-part "test" is based on the false assumption that Article 2.2 "prioritizes" the listed objectives over the unlisted ones, asserting that the explicitly listed objectives are more "important" than the unlisted ones. In asserting such a proposition Canada seeks to rewrite Article 2.2, which does not distinguish objectives on the basis of "importance," as Canada suggests, but rather "legitimacy," as the text actually reads. Fourth, even under Canada's approach, the legitimacy of consumer information as an objective finds support even in the enumerated objectives themselves.

7. The complaining parties' request that the Appellate Body complete the Panel's analysis as to whether the COOL measure is "more trade-restrictive than necessary" must also fail because there is no basis in the record for the Appellate Body to do so. But even if the Appellate Body were to complete the analysis, the Appellate Body should reject the complaining parties' differing proffered tests for at least four reasons. First, both Canada and Mexico seek to define a "trade-restrictive" measure in a manner that has no basis in the text. Second, the text of Article 2.2 does not create a balancing test. In particular, there is no textual support for a panel to "balance" the "importance" of the legitimate objective against the proposed alternative, and no basis for a panel to impose its own subjective values on Members' judgement to rank or prioritize legitimate objectives. Third, Canada misreads the clause "taking account of the risks that non-fulfillment would create." This clause does not mean that a complaining party can prove that the challenged measure is "more trade restrictive than necessary" by proposing an alternative measure that does not contribute to the fulfillment of the objective at the same level that the actual measure does in some circumstances (*i.e.*, where the "values are not vital"). Fourth, neither party appears to employ their respective tests to analyze their own proposed alternatives. Canada, in particular, contends that Article 2.2 simply requires a panel to step into

the shoes of the Member and decide whether there is a better means to achieve the Member's objective than the one the Member has chosen.

B. The Panel Acted Within its Discretion in its Exercise of Judicial Economy with Respect to Canada and Mexico's Claims under Article III:4 of the GATT 1994

8. The Panel acted within its discretion in its exercise of judicial economy under Article III:4 of the GATT 1994 with respect to Canada and Mexico's claims related to the COOL measure and the Vilsack Letter. Regardless of the Appellate Body's ultimate findings with respect to the COOL measure under Article 2.1 of the TBT Agreement, it is unnecessary for the Appellate Body to complete the analysis on this measure under GATT Article III:4. Neither Canada nor Mexico have explained why the Panel's exercise of judicial economy was in error or explained how an assessment of the COOL measure under GATT Article III:4 would differ from an assessment under Article 2.1. With respect to the Vilsack Letter, the United States has not appealed the Panel's finding under Article X:3(b) of the GATT 1994, rendering it unnecessary to make additional findings on the Vilsack Letter to secure a positive resolution to this dispute. Further, there are not sufficient factual findings or undisputed facts on the record related to Canada and Mexico's claim that GATT Article III:4 applies to the Vilsack Letter in the first place.

C. Canada and Mexico's Conditional Appeals Under Article XXIII:1(b) of the GATT 1994 Should Be Rejected

9. Canada and Mexico's conditional appeals under Article XXIII:1(b) of the GATT 1994 should be rejected. The complaining parties have failed to explain why it is necessary for the Appellate Body to make a non-violation finding on the COOL measure if it does not find a breach of Article 2.1 of the TBT Agreement. In addition, the complaining parties have failed to make a *prima facie* case by making a detailed justification of their non-violation claims. They have failed to identify a relevant benefit accruing under the GATT 1994, failed to demonstrate that they could not have reasonably anticipated the COOL measure at the time that the WTO tariff concessions were negotiated, and failed to show a "clear correlation" between the harm that they allege and the COOL measure. Finally, the Appellate Body cannot complete the analysis on this issue because there are not sufficient factual findings by the Panel or undisputed facts on the record to provide the basis for such an analysis.

II. THE APPELLATE BODY SHOULD REJECT THE COMPLAINING PARTIES' CONDITIONAL APPEALS OF THE PANEL'S FINDINGS AND ANALYSIS UNDER ARTICLE 2.2 OF THE TBT AGREEMENT

10. Prior to delving into the specifics of the complaining parties' various conditional appeals, it is useful to review the overall construct of the Panel's analysis under Article 2.2 of the TBT Agreement, which has triggered so many different appeals from each of the parties.

11. As discussed in the U.S. Appellant Submission, the Panel ultimately, and in the U.S. view, improperly, determined that the COOL measure is inconsistent with Article 2.2 because it does not fulfil its objective.[1] The Panel arrives at this conclusion after comparing the identified objective with what the measure, in the Panel's view, actually achieves.[2] To complete this comparison, the Panel makes a number of different findings.

- First, the Panel finds that the COOL measure is "trade-restrictive."[3]
- Second, the Panel finds that the identified objective is to provide "consumer information on origin."[4]
- Third, the Panel concludes that the identified objective the United States pursues at the level it considers appropriate can be characterized as: "to provide as much clear and accurate origin information as possible to consumers."[5]
- Fourth, the Panel finds that "providing consumer information on origin is a legitimate objective within the meaning of Article 2.2."[6]
- Fifth, the Panel analyzes "whether the identified objective is indeed the objective of the COOL measure,"[7] finding that "[o]ur assessment of the COOL measure, based on its text, and design and structure, is that its objective is consumer information on origin as declared by the United States."[8]

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[1] Panel Report, paras. 7.719-7.720.

[2] *See* Panel Report, para. 7.719 ("We therefore conclude that the COOL measure does not fulfil the identified objective within the meaning of Article 2.2 because it fails to convey meaningful origin information to consumers.").

[3] Panel Report, para. 7.575.

[4] Panel Report, paras. 7.616-7.617. The Panel further recognizes that the United States had elaborated that the information provided to consumers constituted: "information on the countries, where the animal from which the meat was derived was born, raised, and slaughtered." *Id.* para. 7.618; *see also id.* para. 7.673.

[5] Panel Report, paras. 7.619-7.620; *see also* U.S. Appellant Submission, para. 124 (discussing the concept of level of fulfillment).

[6] Panel Report, para. 7.651.

[7] Panel Report, paras. 7.677, 7.678-7.685.

[8] Panel Report, para. 7.685. Subsequently, the Panel concludes that the statements of individual U.S. legislators "do not affect our conclusion that the objective of the COOL measure is to provide consumer information on origin." *Id.* para. 7.691.

- Sixth, the Panel inquires whether the measure fulfills the identified objective at the U.S. level of fulfillment.[9] The Panel finds that the measure does not achieve this end, and is, therefore, inconsistent with Article 2.2.[10]

- Seventh, the Panel finds that it is not "necessary to proceed with the next step of the analysis, namely whether the COOL measure is 'more trade-restrictive than necessary' based on the availability of less trade-restrictive alternative measures that can equally fulfil the identified objective."[11]

12. The complaining parties' conditional appeals of the individual findings of the Panel can be broadly grouped into four categories of appeals. First, the complaining parties initially contend that the Panel's third finding was in error because it took an objective identified by the Member as the "starting point" for its analysis.[12] Second, they contend that the Panel acts inconsistently with Article 11 of the DSU in making its fifth finding.[13] Third, Canada – but not Mexico – contends that the Panel errs in its analysis that led to its fourth finding.[14] Fourth, the complaining parties request the Appellate Body to, if necessary, reverse the Panel's seventh finding and complete the Panel's analysis as to whether the COOL measure is "more trade-restrictive than necessary."[15]

13. In the following sections, the United States addresses each ground of appeal.

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[9] *See, e.g.*, Panel Report, para. 7.715 ("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.").

[10] Panel Report, paras. 7.719-7.720.

[11] Panel Report, para. 7.719.

[12] Canada's Other Appellant Submission, para. 30 (citing Panel Report, para. 7.620); *id.* para. 40 (citing same); Mexico's Other Appellant Submission, para. 28 (citing same).

[13] Canada's Other Appellant Submission, paras. 32-43; Mexico's Other Appellant Submission, paras. 40 - 44.

[14] Canada's Other Appellant Submission, paras. 47-67.

[15] Canada's Other Appellant Submission, paras. 68-92; Mexico's Other Appellant Submission, paras. 46-68. For purposes of comparison, and following this same framework, the United States contends that the Panel's first finding is in error. *See* U.S. Appellant Submission, n.187. Next, the United States contends that the Panel's third finding is in error both as a legal matter and because it is inconsistent with Article 11 of the DSU. *See* U.S. Appellant Submission, section IV.C.2. The United States also contends that the Panel errs in its analysis that support its sixth and seventh findings. *See* U.S. Appellant Submission, section IV.D.2.

A. The Appellate Body Should Reject the Complaining Parties' Conditional Appeal of the Identification of the Objective

14. Both complaining parties consider that the Panel erred when it began its analysis by "identifying" the objective based on the Panel's characterizations of statements made by the United States in the panel proceedings, though they advance two different theories for why the analysis was erroneous.[16]

15. In Mexico's view, "the Panel should have verified [the] objective [stated by the United States] and ensured that it was congruent with the design, structure, and architecture of the COOL measure as well as its legislative history and surrounding circumstances. Its failure to do this was a legal error and was inconsistent with its obligations under Article 11 of the *DSU*."[17]

16. Canada, by contrast, concedes that the Panel conducted an analysis of the design, structure, and architecture of the COOL measure in order to verify the stated objective,[18] but contends that: (1) the Panel's consideration of the stated objective is "an unnecessary and unhelpful addition to the analysis";[19] and (2) that the Panel erred in analyzing the design, structure and architecture of the measure "only as a secondary matter as an alternative to the 'identified objective.'"[20] Furthermore, as an alternative to its Article 11 claim, Canada claims that "the Panel erred in failing to define the objective at a sufficiently detailed level."[21]

17. As noted above, and as Canada repeatedly concedes, the Panel did, in fact, verify the "identified" objective of consumer information on origin based on an analysis of the text, design, architecture, and structure of the COOL measure in paragraphs 7.678-7.691 of the Panel Report.[22] Accordingly, the *entirety* of Mexico's legal appeal rests on an erroneous factual premise – that is, that the Panel did not analyze the text, design, architecture, and structure of the measure in order to identify the objective. The Panel did in fact conduct this analysis; Mexico's

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[16] Canada's Other Appellant Submission, para. 30 (citing Panel Report, paras. 7.615-7.620); Mexico's Other Appellant Submission, para. 28 (citing Panel Report, para. 7.620).

[17] Mexico's Other Appellant Submission, para. 41.

[18] Canada's Other Appellant Submission, para. 29 (citing Panel Report, paras. 7.608, 7.678-7.691).

[19] Canada's Other Appellant Submission, para. 21.

[20] Canada's Other Appellant Submission, para. 29 (citing Panel Report, para. 7.677).

[21] Canada's Other Appellant Submission, heading above para. 44. Given Canada's own characterization of its argument, the United States responds to this argument in section II.B.4 after responding to Canada's Article 11 argument.

[22] *See* Canada's Other Appellant Submission, para. 19(2), n.43, heading above para. 29, and para. 29.

theory that the Panel Report is flawed in this respect is therefore fundamentally in error.

18. Canada's legal appeal appears to rest not on the notion that the Panel failed to analyze relevant information, but simply that the Panel did not conduct its analysis of that information in what Canada considers to be the "correct" order, or that by additionally considering the stated objective of the United States, the Panel erred.[23]

19. Canada's appeal is surprising in light of the fact that Canada itself quotes *Australia – Apples* with approval where the Appellate Body states:

> Whether a measure is 'applied ... to protect' in the sense of Annex A(1)(a) must be ascertained not only from the objectives of the measure as expressed by the responding party, but also from the text and structure of the relevant measure, its surrounding regulatory context, and the way in which it is designed and applied.[24]

Thus, Canada agrees with the Appellate Body that it is appropriate to take into account *both* the objective of a measure "as expressed by the responding party" *and* the text and structure of the measure. Consequently, it is not clear why in this dispute Canada argues the contrary – *i.e.*, that a panel should ignore the objective as expressed by the responding party.[25]

20. Insofar as Canada considers that it was inappropriate for the Panel even to consider the objective of the measure as expressed by the United States, it is incorrect. The United States explained the COOL measure's objective in response to Canada and Mexico's erroneous assertions that the objective of the measure was protectionism. The Member maintaining a measure is well-situated to express the objective of that measure. Canada fails to explain why a panel should disregard – indeed have no interest at all in – the responding party's expression of the objective of the measure at issue. It is entirely reasonable for a panel to consider the responding party's explanation of its objective as a starting point for assessing whether a measure has a legitimate objective, and Canada points to nothing in the text of the provision at issue or elsewhere that suggests otherwise. The Panel correctly considers each party's claims regarding the objective of the measure, and assessed the merits of those competing assertions against the

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[23] *See, e.g.*, Canada's Other Appellant Submission, para. 23 ("If the 'objective' to be assessed is not the objective of the technical regulation itself, then a technical regulation that does not seek to pursue that objective could be justified *at this stage*. For example, a measure whose design, architecture and structure reveal the objective of protecting domestic industry could be insulated from examination *at this stage* if its stated objective is the protection of human health and safety.") (emphasis added); *see also id.* para. 24 ("Under [the Panel's] approach, it is still necessary to determine the objective of a particular technical regulation under *the fourth stage* (whether the measure fulfils a legitimate objective).") (emphasis added).

[24] Canada's Other Appellant Submission, para. 27 (quoting *Australia – Apples (AB)*, para. 172).

[25] *See, e.g.*, Canada's Other Appellant Submission, para. 22.

evidence before it regarding the design, structure, and architecture of the measure.[26]

21. Moreover, insofar as Canada suggests that the Panel commits a legal error by undertaking this analysis "only as a secondary matter as an alternative to the 'identified objective,'" Canada misunderstands the Panel's analysis.[27] As discussed above, the Panel's finding that the text, design, architecture, and structure of the COOL measure proves that its objective is consumer information on origin is a significant element to its overall analysis as to whether the measure fulfills its objective – *i.e.*, whether the measure actually achieves its "identified" objective at its "identified" level of fulfillment. The analysis contained in paragraphs 7.678-7.691 is neither a "secondary" analysis, nor an "alternative" analysis to the "main" one, as Canada suggests.[28]

22. For the above reasons, the Appellate Body should reject the complaining parties' conditional legal appeals regarding the Panel's identification of the objective of the COOL measure.

B. The Panel Properly Evaluated the Evidence Related to the Objective of the COOL Measure

23. Article 11 of the DSU instructs each panel to "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." In examining a panel's obligation to make an "objective assessment of the matter before it," the Appellate Body has explained that a panel must "consider all the evidence presented to it, assess its credibility, determine its weight, and ensure that its factual findings have a proper basis in that evidence."[29] A panel must not deliberately disregard or willfully distort such evidence, and must not make affirmative findings that lack a basis in the evidence presented.[30]

24. The Appellate Body has stated that it "will not interfere lightly" with a Panel's weighing of the facts and that it will not "base a finding of inconsistency under Article 11 simply on the conclusion that [it] might have reached a different factual finding" than the panel.[31] In other

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[26] *See* Panel Report, paras. 7.678-7.691; *see also id.* paras 7.628-7.651.

[27] Canada's Other Appellant Submission, para. 29 (citing Panel Report, para. 7.677).

[28] The same is true for the Panel's analysis contained in paragraphs 7.692-7.719.

[29] *US – Clove Cigarettes (AB),* para. 210 (quoting *Philippines – Distilled Spirits (AB)*, para. 135).

[30] *EC – Hormones (AB)*, para. 133.

[31] *US – Large Civil Aircraft (AB)*, para. 713 (quoting *US – Wheat Gluten (AB)*, para. 151).

words, panels "are not required to accord to factual evidence of the parties the same meaning or weight as do the parties."[32] The Appellate Body has also clarified that Article 11 does not require a panel to refer to every piece of evidence or argumentation advanced during the course of a dispute,[33] and that "it is generally within the discretion of the [p]anel to decide which evidence it chooses to utilize in making findings."[34] Rather, to demonstrate that a panel failed to act consistently with Article 11, the complainant must show that a specific piece of evidence is so material to the panel's legal conclusion that the panel's failure explicitly to rely upon and address it has a bearing on the objectivity of the panel's factual assessment.[35]

25. Canada and Mexico both argue that the Panel erred under Article 11 by failing to make an objective assessment of the facts related to the objective of the COOL measure, though the complainants take contradictory approaches in characterizing the alleged failures of the Panel.[36] Mexico claims that the Panel "deliberately disregarded and excluded" evidence regarding the "protectionist character of the COOL measure" (ignoring extensive discussion by the Panel of the very exhibits Mexico references in its appeal).[37] Canada concedes that the Panel addressed the evidence it proffered, but considers that it did not adequately consider it in its analysis.[38] Canada claims that the Panel did not adequately consider evidence it submitted related to: (1) the scope of the commodities covered by the measure;[39] (2) the measure's exceptions, such as the exception for certain processed products;[40] (3) the alleged confusing nature of the information provided by the measure, especially with regard to the Category B and C labels;[41] and (4) evidence related to

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[32] *US – Clove Cigarettes (AB)*, para. 210 (quoting *Australia – Salmon (AB)*, para. 267).

[33] *US – Large Civil Aircraft (AB)*, para. 722 (quoting *EC – Fasteners (AB)*, para. 442, as stating that "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"); *see also Australia – Apples (AB)*, paras. 270-271 (finding that a panel, as the trier of fact, has the discretion to choose which evidence it relied upon to make a finding, and cannot realistically be expected to refer to all statements by experts, and should have the discretion to determine which statements are useful and should be referred to explicitly); *EC – Large Civil Aircraft (AB)*, para. 1225 (quoting *EC - Hormones (AB)*, para. 135, and noting that it is generally "within the discretion of the Panel to decide which evidence it chooses to utilize in making findings").

[34] *US – Clove Cigarettes (AB)*, para. 210 (quoting *EC – Hormones (AB)*, para. 135).

[35] *US – Large Civil Aircraft (AB)*, para. 722; *EC – Fasteners (AB)*, para. 442.

[36] Canada's Other Appellant Submission, para. 32; Mexico's Other Appellant Submission, para. 40.

[37] Mexico's Other Appellant Submission, para. 40.

[38] Canada's Other Appellant Submission, paras. 32-43.

[39] Canada's Other Appellant Submission, paras. 34-36.

[40] Canada's Other Appellant Submission, para. 35.

[41] Canada's Other Appellant Submission, para. 38.

the COOL measure's legislative history.[42]

26. Contrary to Canada and Mexico's claims, the Panel objectively assessed the relevant evidence related to the objective of the COOL measure, consistent with Article 11. The Panel carefully considered, assessed, and weighed the evidence presented by all of the parties related to the COOL measure's text, its design, architecture, and structure, and its legislative history.[43] On the basis of this evidence, the Panel correctly determined that the objective of the COOL measure is to provide consumers with information on the origin of certain food products and appropriately rejected Canada and Mexico's claim that the objective is actually protectionism.[44] Canada and Mexico fail to show that the Panel deliberately disregarded or willfully distorted the evidence they presented, or that, insofar as the Panel did not explicitly cite to certain evidence, the evidence was so material to the Panel's legal conclusion that it has a bearing on the objectivity of the Panel's factual assessment.

1. The Panel Considered, Assessed, and Weighed the Evidence Presented Before Concluding That the Objective of the COOL Measure Is to Provide Consumer Information on Origin

27. As the United States explained in detail during the panel proceeding,[45] and as the Panel agreed,[46] the objective of the COOL measure is to provide consumers with information on the origin of certain food products. The Panel's consideration of whether this is the measure's objective began with a careful examination of the text of the measure itself – a step that all three parties agree should form the basis of the inquiry.[47] The Panel's conclusion was also based on a careful consideration of the measure's design, architecture, and structure as well as a thorough assessment of the evidence submitted by the parties related to the measure's legislative history.

28. In examining the text of the COOL statute and 2009 Final Rule, the Panel concluded that it "confirms that the objective of the COOL measure is to provide consumer information on origin."[48] The Panel explained that the text of the COOL statute and 2009 Final Rule are

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[42] Canada's Other Appellant Submission, paras. 39-43.

[43] Panel Report, paras. 7.679-7.684.

[44] Panel Report, para. 7.685.

[45] *See, e.g.*, U.S. Second Written Submission ("SWS"), paras. 118-146 (explaining that the objective of the COOL statute and 2009 Final Rule is consumer information about origin on the basis of the text, design, architecture, and structure of these instruments, and rejecting contrary arguments made by Canada and Mexico).

[46] Panel Report, para. 7.685.

[47] Panel Report, paras. 7.678-7.679.

[48] Panel Report, para. 7.680.

"devoted exclusively to the labelling requirements on origin."[49] In addition, the Panel noted that the 2009 Final Rule explicitly states that "the purpose of the COOL program is to provide consumers with origin information,"[50] a point echoed in other places in the 2009 Final Rule.[51]

29. Next, the Panel examined the COOL measure's design, architecture, and structure, and concluded that these aspects of the COOL measure confirm further that the objective of the COOL measure is "consumer information on origin as declared by the United States."[52] Before reaching this conclusion, however, the Panel considered, assessed, and weighed Canada and Mexico's evidence and arguments on this issue, including evidence and arguments regarding the measure's scope and its exceptions, concluding that:

> We are not persuaded by the complainants' arguments. We consider that merely because the COOL measure does not apply to all food products and all relevant entities does not necessarily mean that the measure is designed for a protectionist purpose. In fact, it is not atypical for any kind of regulation to have exceptions in terms of the products and entities that are subject to it. Some of such exceptions might be justifiable for practical reasons and simply facilitate the implementation of the measure at issue without necessarily involving a protectionist intent. We also consider that the scope of the COOL measure is broad enough to cover a significant range of food products and entities handling these products.[53]

30. Finally, the Panel examined the evidence submitted by the parties related to the COOL measure's legislative history, finding that, to the extent this evidence is relevant, it is not conclusive.[54] In reaching this conclusion, the Panel considered, assessed, and weighed evidence from all three parties related to the measure's objective, including various statements by U.S. legislators that were submitted by Canada, Mexico, and the United States.[55] In the Panel's words:

> We have examined <u>all</u> of the statements by individual legislators submitted by the parties in this respect and conclude that, while the sentiment in some of them

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[49] Panel Report, para. 7.680.

[50] Panel Report, para. 7.680.

[51] The 2009 Final Rule (Exhibit CDA-5), p. 2677 (stating that "the intent of the law and this rule is to provide consumers with additional information on which to base their purchasing decisions").

[52] Panel Report, para. 7.685.

[53] Panel Report, para. 7.684.

[54] Panel Report, para. 7.691.

[55] Panel Report, paras. 7.687-7.691.

> finds expression in the COOL measure, the sentiment in others does not. On balance, we do not find this evidence of assistance in our inquiry into the objective of the COOL measure . . . The above statements therefore do not affect our conclusion that the objective of the COOL measure is to provide consumer information on origin.[56]

31. Thus, in reaching its conclusion about the objective of the COOL measure, the Panel considered and explained its assessment of the evidence that Mexico and Canada refer to in their Other Appellant Submissions, including the scope of the measure, its exceptions, and its legislative history. The Panel also considered the alleged confusing nature of the information provided by the measure in its Article 2.2 analysis.[57] After carefully weighing and assessing the complaining parties' arguments and evidence, the Panel correctly rejected the complaining parties' position.

2. Mexico's Claim that the Panel "Disregarded" Its Evidence Is Incorrect

32. Mexico erroneously claims that "the Panel did not take into account the facts presented by Mexico" related to the objective of the COOL measure and that the Panel "deliberately disregarded and excluded Mexico's arguments and evidence based on the design, architecture and structure of the COOL measure as well as its legislative history."[58] Mexico's assertion is entirely without merit. It is contradicted by the Panel Report and even by Canada's Other Appellant Submission.

33. The Panel cited numerous arguments made by Mexico and exhibits submitted by Mexico in its consideration of the design, architecture, structure, and legislative history of the COOL measure, clearly demonstrating that it took Mexico's arguments and evidence into account. In fact, many of the arguments and evidence that Mexico claims the Panel ignored is explicitly cited in the Report. For example:

- In paragraph 7.683 of its Report, the Panel cites Mexico's arguments with regard to the scope of the COOL measure in paragraphs 10 and 173-174 of Mexico's First Written Submission – paragraphs that Mexico claims the Panel ignored.[59]

- In paragraph 7.687 of its Report, the Panel cites Mexico's arguments and evidence

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[56] Panel Report, para. 7.691 (emphasis added).

[57] Panel Report, paras. 7.698-7.719.

[58] Mexico's Other Appellant Submission, para. 40.

[59] *See* Mexico's Other Appellant Submission, n.47, 50, and 51 (citing to paras. 168-191 of Mexico's First Written Submission, claiming that they were ignored).

related to the legislative history of the COOL measure in paragraph 182 of Mexico's First Written Submission, paragraphs 79-80 of Mexico's Second Written Submission, and Exhibit MEX-50, paragraphs and an exhibit that Mexico claims the Panel ignored.[60]

- In paragraph 7.689 of its Report, the Panel cites Mexico's arguments and evidence related to the legislative history of the COOL measure in paragraph 80 of Mexico's Second Written Submission and in Exhibits MEX-89, MEX-91, MEX-92, and MEX-93, arguments and four more exhibits that Mexico claims the Panel ignored.[61]

34. After citing these specific arguments and pieces of evidence presented by Mexico, the Panel ultimately rejected Mexico's claim that they demonstrate that the objective of the COOL measure is protectionism.[62] Thus, Mexico's claim that the Panel did not take into account the facts it presented or deliberately disregarded and excluded its evidence is entirely without merit. Indeed, it is telling that even Canada acknowledges that the Panel did in fact examine evidence related to the measure's design, architecture, structure, and legislative history.[63]

3. Canada's Article 11 Claims Are Without Merit

35. Canada's Article 11 claims are also without merit, and largely reflect dissatisfaction with the weight the Panel accorded to particular arguments and evidence offered by Canada, rather than a failure to conduct an objective assessment of these arguments and evidence. In its Other Appellant Submission, Canada claims that the Panel breached Article 11 because: (1) in its assessment of the product scope of the COOL measure, the Panel "set out some, but not all, of the evidence" presented by Canada regarding the allegedly protectionist scope, and offered a "cursory treatment" of Canada's argument;[64] (2) the Panel "adverts to" but did not "clearly"

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[60] *See* Mexico's Other Appellant Submission, n.47, 50, and 51 (citing to paras.168-191 of Mexico's First Written Submission and Exhibit MEX-50, claiming that they were ignored).

[61] *See* Mexico's Other Appellant Submission, n.47, 50, 51, and 52 (citing to paras. 79-83 of Mexico's Second Written Submission and Exhibits MEX-89, 91, 92, and 93, claiming that they were ignored).

[62] Panel Report, paras. 7.684, 7.691.

[63] *See* Canada's Other Appellant Submission, para. 36 (stating that the "Panel set out some, but not all, of the evidence [related to the scope of the COOL measure] ... in a cursory manner."); *id.* n.74 (admitting that para. 7.683 of the Panel report "adverts to" its argument related to the exceptions included in the COOL measure); *id.*. para. 38 (stating that the Panel addressed its argument related to the alleged confusing nature of the COOL measure "in the context of finding that the measure does not fulfill its objective"); *id.* para. 42 (stating that "the Panel correctly found that it was appropriate to consider evidence of legislators, and summarized the evidence put forward by Canada (and Mexico) on that point, including some quotations.").

[64] Canada's Other Appellant Submission, para. 36.

mention Canada's assertions regarding certain exclusions from the measure;[65] (3) the Panel addressed Canada's argument regarding the information provided by the measure later in the report but "did not appear to" consider the argument as part of its assessment of the objective of the measure;[66] and (4) the Panel "summarized the evidence" put forward by the parties regarding the intent of legislators but did not "evaluate it" in the manner preferred by Canada.[67] None of these claims rise to a breach of Article 11.

36. *First*, regarding the allegedly protectionist scope of the measure, the Panel directly addressed the arguments made by Canada (and Mexico) in paragraphs 7.682-7.683, and rejected them in paragraph 7.684.[68] As the Panel correctly concluded, it is not atypical for regulations to include exceptions and gaps in product coverage for many different reasons; thus, the fact that the COOL measure does not cover every possible product and point of sale is not necessarily evidence of protectionism.[69]

37. The fact that the Panel may not have set out all of the evidence proffered by Canada in reaching this conclusion, as Canada alleges, would not constitute a breach of Article 11. As the Appellate Body has previously stated, Article 11 does not require a Panel to refer to every piece of evidence or argumentation advanced by the parties.[70] Rather, as explained above, Article 11's primary function is to guard against the deliberate disregard or willful distortion of evidence or the making of affirmative findings that lack a basis in the evidence before it.[71] The Panel took into account Canada's evidence, as well as contrary evidence, but was simply not persuaded that Canada's position was correct. Thus, there is no support for the conclusion that the Panel failed to make an objective assessment of the facts related to the scope of the COOL measure.

38. Because the Panel objectively considered the evidence related to the scope of the COOL measure, there is no reason to revisit this issue in this appeal. However, it is worth noting that Canada's arguments do not survive scrutiny from a substantive standpoint either. As the United States described in its First Written Submission, Canada's claim that the COOL measure includes commodities with import competition and excludes those without such competition is

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[65] Canada's Other Appellant Submission, para. 37 and n.74.

[66] Canada's Other Appellant Submission, para. 38.

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

[68] Panel Report, para. 7.684.

[69] Panel Report, para. 7.684.

[70] *US – Large Civil Aircraft (AB)*, para. 722; *EC – Fasteners (AB)*, para. 442.

[71] EC – Hormones (AB), para. 133.

simply incorrect.[72] Additionally, the mandatory country of origin labeling requirements adopted by other WTO Members, including Canada, have various exceptions and gaps in product coverage.[73] Accordingly, if Canada's argument on this point were accepted, it could be used to assert that the objective of many other WTO Members' country of origin labeling requirements, including its own, is protectionism.

39. *Second*, Canada's assertion that the Panel erred in its assessment of the 2009 Final Rule's exception for processed foods, among other exceptions, does not withstand scrutiny.[74] After considering this argument in paragraph 7.683, the Panel appropriately rejected it, stating that "merely because the COOL measure does not apply to all food products ... does not necessarily mean that the measure is designed for a protectionist purpose."[75] Canada's concern with the Panel's treatment of this issue appears mainly to be that the Panel "merges it with the point ... that many points of sale are excluded from the COOL measure,"[76] and therefore does not "clearly mention the argument in its analysis."[77] To the extent that the Panel may not have considered Canada's arguments in Canada's desired order and instead considered two arguments together, it did not breach Article 11. To the extent that the Panel's decision to take up the two issues together may have resulted in the Panel not clearly mentioning a specific argument, it likewise did not breach Article 11 either.[78] As the Appellate Body has found, a panel has the discretion "to address only those arguments it deems necessary to resolve a particular claim" and "the fact that a particular argument relating to that claim is not specifically addressed in the 'Findings' section of a panel report will not, in and of itself, lead to the conclusion that that panel has failed to make the 'objective assessment of the matter before it' required by Article 11 of the DSU."[79]

40. From a substantive standpoint, it is also inaccurate to assert that the COOL measure's exceptions demonstrate a protectionist objective. In addition to being common to country of origin labeling regimes around the world, exceptions like the processed foods exception were

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[72] *See, e.g.*, U.S. First Written Submission ("FWS"), paras. 217-218 (listing numerous products covered by the COOL measure that do not face import competition and products excluded from the COOL measure that do).

[73] *See* U.S. SWS, para. 156 (describing the differing product coverage of many WTO Members' labeling requirements and their differing application to certain points of sale).

[74] Canada's Other Appellant Submission, para. 37.

[75] Panel Report, para. 7.684.

[76] Canada's Other Appellant Submission, note 74.

[77] Canada's Other Appellant Submission, para. 37.

[78] *E.g., US – Large Civil Aircraft (AB)*, para. 722; *EC – Fasteners (AB)*, para. 442; *Australia – Apples (AB)*, paras. 270-271; *EC – Large Civil Aircraft (AB)*, para. 1225; *EC - Hormones (AB)*, para. 135.

[79] *EC – Poultry (AB)*, para. 135.

included in the U.S. measure in an effort to reduce compliance costs.[80] Canada also appears to overlook the fact that the processed foods exception applies to meat products, including meat products derived from Canadian livestock.[81] Thus, to claim that this aspect of the measure somehow "singles out" livestock reflects a fundamental misunderstanding of the measure itself.

41. *Third*, regarding the information provided by the measure, the Panel's decision to not specifically mention Canada's argument that the COOL labels are confusing during its discussion of the measure's objective in paragraphs 7.678-7.691 is not a breach of Article 11 for many of the same reasons just described. Additionally, as Canada concedes, the Panel addresses this argument in other sections of its report.[82]

42. Putting this aside, Canada's arguments on this issue are simply not persuasive. Canada claims that "if the objective had been truly to provide information, the measure would have been designed to do just that."[83] Not only is this argument undermined by the Panel's assessment of the design, architecture, and structure of the measure,[84] but it overlooks undisputed facts on the record that at least 71 percent of U.S.-origin meat products are receiving an A label.[85] The United States also finds it ironic that Canada is now asserting that the addition of the commingling provisions – provisions that Canada specifically requested – are evidence of a purported protectionist intent of the measure.[86] Canada appears to claim that the COOL measure would actually be *less* protectionist if the United States had ignored Canada's requests during the regulatory process for additional labeling flexibility.

43. *Fourth*, regarding the evidence from the legislative process, Canada (and Mexico) unpersuasively claim that the Panel failed to conduct an objective examination of this evidence, and that if it had, the Panel would have found that the objective of the COOL measure is

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[80] U.S. FWS, para. 79.

[81] *See, e.g.*, Exhibit CDA-5, p. 2660 (explaining the processed foods exemption as it applies to meat products).

[82] *See* Panel Report, paras. 7.695-7.719 (discussing the flexibilities included in the COOL measure and the arguments made by the complainants that the information provided is, in some cases, confusing).

[83] Canada's Other Appellant Submission, para. 38.

[84] Panel Report, paras. 7.681-7.685.

[85] U.S. Appellant Submission, para. 153.

[86] *See* U.S. Appellant Submission, para. 40 (describing Canada's request to add the commingling provisions to the 2009 Final Rule).

protectionism.[87] This argument does not survive scrutiny. The Panel cited to a number of statements offered by Canada and Mexico (as well as the United States).[88] After examining *all* of the statements by individual legislators, the Panel found that they did not affect its conclusion that the objective of the COOL measure is consumer information on origin.[89] Merely because the Panel did not attribute the same weight to these various statements as do the complainants and did not reach the conclusion that they would like does not rise to a breach of Article 11.[90]

44. Other evidence on the record related to the legislative and regulatory history of the measure, much of which was cited by the Panel, further demonstrates that the objective of the measure is consumer information on origin, and not protectionism. For example, the statements of legislators involved with the measure,[91] comments submitted by individuals during the regulatory process,[92] comments of support from leading consumer advocacy organizations,[93] the evolution of the measure itself,[94] and conference and committee reports accompanying the COOL statute,[95] all clearly support this conclusion. Thus, contrary to the arguments advanced by Canada and Mexico on this point in their Other Appellant Submissions, the Panel's findings were supported by the evidence before it.[96]

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[87] Canada's Other Appellant Submission, paras. 39-43; Mexico's Other Appellant Submission, paras. 40-44.

[88] Panel Report, paras. 7.687-7.690.

[89] Panel Report, para. 7.684. In this context, it is worth noting that Canada's claim in paragraph 41 of its Other Appellant Submission, that "[o]nly one letter submitted during the legislative process came from consumer groups" is patently false. Paragraph 7.645 of the Panel Report cites to three different letters submitted by consumer groups during the COOL legislative process – one from the consideration of the 2002 Farm Bill (Exhibit US-61) and two from the consideration of the 2008 Farm Bill (Exhibits US-4 and 5). The United States submitted additional evidence related to the support of consumer groups for COOL. *E.g.,* Exhibits US-84, US-89, US-90, US-100, US-111, and US-116.

[90] *Australia – Salmon (AB)*, para. 267; *US – Clove Cigarettes (AB)*, para. 210.

[91] *E.g.*, Panel Report, para. 7.690; U.S. SWS, para. 129; Exhibits US-13, US-14, US-48, and US-61.

[92] *E.g.*, Panel Report, para. 7.646; U.S. SWS, paras. 133-136; Exhibits US-113, US-119, US-120, US-121, US-122, US-123, US-124, US-125, and US-126.

[93] *E.g.,* Panel Report, para. 7.645; U.S. SWS, paras. 131-132; Exhibits US-4, US-5, US-61, US-84, US-89, US-90, US-100, US-111, US-113, US-116, US-119, US-120, US-121, US-122, US-123, US-124, and US-125.

[94] U.S. SWS, para. 137.

[95] U.S. SWS, para. 128; Exhibit US-11, p. 93-94; Exhibit US-12, p. 198.

[96] For example, the fact that the COOL measure was originally included in the 2002 Farm Bill does not support the conclusion that the measure's objective is protectionism. Canada's Other Appellant Submission, para. 139. U.S. farm bills are omnibus measures that include many items related to the production of and sale of food

45. For the foregoing reasons, Canada and Mexico's claims that the Panel acted inconsistently with Article 11 in concluding that the objective of the COOL measure is to provide consumer information on origin should be rejected.

4. The Appellate Body Should Similarly Reject Canada's "Alternative" Legal Claim to its Article 11 Claim

46. Finally, as an "alternative" to its Article 11 claim, Canada contends that the Panel committed a legal error in identifying the objective as providing "as much clear and accurate origin information as possible to consumers" without also "defin[ing] the purpose for which this information is provided."[97] According to Canada such "precision" is "necessary because information can be required to support a wide range of objectives," including such illegitimate objectives as racial discrimination and protectionism.[98]

47. The United States fails to see how this "alternative" appeal differs substantively from its Article 11 claim that the Panel did not make an "objective assessment" of the record in rejecting Canada's argument that the objective of the COOL measure is protectionism.[99] As such, the United States considers that this argument fails for the same reasons that Canada's Article 11 appeal fails, as discussed above. In any event, nothing in the TBT Agreement requires the importing Member to define its objective in either a narrow or broad fashion. If anything, the particular characterization of the legitimate objectives listed in Article 2.2, all of which are "expressed at a high level of generality," supports the Member defining its objective in general terms, a point the Panel recognizes.[100]

48. Finally, Canada appears to be requiring that a Panel examine the subjective intent of a government, the "intent" behind its objective. Canada argues that it is not sufficient to determine

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products. By Canada's logic, the objective behind U.S. efforts to provide food assistance to its poorest citizens or to promote farming policies that conserve U.S. wetlands must also have a protectionist objective since these items are also included in the 2002 Farm Bill. Exhibit MEX-2. In addition, both Canada and Mexico mistake the fact that some U.S. livestock producers may support COOL with protectionism. Canada's Other Appellant Submission, para. 41; Mexico's Other Appellant Submission, para. 43. Producers of products with a reputation for high quality may well believe that country of origin labeling would benefit them. That is not equivalent to "protectionism." U.S. SWS, paras. 138-139.

[97] Canada's Other Appellant Submission, para. 44 (quoting Panel Report, para. 7.620).

[98] Canada's Other Appellant Submission, paras. 45-46.

[99] Canada's Other Appellant Submission, paras. 32-43.

[100] Panel Report, para. 7.636 ("While the term 'legitimate objectives' might be regarded as a genus (or superordinate) and the list of objectives specifically mentioned in the provision as examples (or hyponyms), all of the listed examples are expressed at a high level of generality.").

the specific objective of the measure, *i.e.*, the provision of information to consumers regarding the origin of the food they consume, rather the panel should examine why the government is requiring the provision of this information. As the Appellate Body has previously indicated,[101] speculation on the subjective intent of a Member is not an appropriate form of analysis, and it should not be introduced here.

C. The Appellate Body Should Reject Canada's Conditional Appeal of the Panel's "Test" for Legitimacy

49. Next, Canada – but not Mexico – contends that the Panel errs in not applying the correct "test" for determining whether the objective of consumer information on origin is "legitimate" for purposes of Article 2.2.[102] Canada considers that the Panel should have followed a "two step" analysis whereby the Panel first "determine[s] whether an objective is directly related to one of the explicitly listed objectives listed in TBT Article 2.2."[103] If not, the Panel should "determine if the measure is of the same type as the listed objectives."[104] Canada argues that objectives explicitly listed in exception provisions in the covered agreements, such as the GATT 1994 and GATS, are the same "type" as those listed in Article 2.2 and therefore legitimate. Canada then asserts that objectives not explicitly referred to in the covered agreements may still be found to be "legitimate," if proved with "'clear and compelling evidence' of legitimacy."[105] Applying this "test," Canada argues that the COOL measure is inconsistent with Article 2.2 because its objective, providing consumers information on origin, "is not an objective privileged in any of the covered agreements, nor has the United States provided clear and convincing evidence that indicates why that objective is legitimate in this case."[106]

50. Canada's "test" for whether an objective is legitimate lacks any basis in the text of Article 2.2, suffers from a number of logical flaws, and should be rejected. The Appellate Body should uphold the Panel's well-reasoned and supported finding that providing consumer information on origin is a legitimate objective for governments to pursue.

51. *First*, Canada's test is flawed in that it is inconsistent with the text of Article 2.2, which contains a non-exhaustive list of legitimate objectives, as confirmed by the use of the term "*inter*

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[101] *See Japan – Alcohol (AB)*, p. 29.

[102] Canada's Other Appellant Submission, para. 47.

[103] Canada's Other Appellant Submission, para. 53, n.100.

[104] Canada's Other Appellant Submission, para. 53.

[105] Canada's Other Appellant Submission, para. 59 (citing only the New Zealand Third Party Statement to the Panel as support).

[106] Canada's Other Appellant Submission, para. 62.

alia." Thus, objectives not explicitly included in the list may also be legitimate. For example, the *EC – Sardines* panel found two objectives not listed in TBT Article 2.2 to be legitimate – market transparency and consumer protection, a point that Canada does not address.[107] Indeed, Members pursue many different objectives through technical regulations, the majority of which are not explicitly enumerated in Article 2.2.[108]

52. Nothing in Article 2.2 "ranks" or "prioritizes" various objectives or provides for an ever-escalating presumption against the legitimacy of an objective depending on how closely related it is to the list in Article 2.2. Nor does Article 2.2 reference Articles XX and XXI of the GATT 1994. Thus, there is no basis in the text of Article 2.2 to infer that other objectives, not listed in Article 2.2, enjoy a higher presumption of "legitimacy" simply because they derive from the provisions of Articles XX and XXI.

53. And Canada's argument fails even on its own (flawed) terms because Canada has failed to recognize that the objective at issue here has been recognized from the beginning of the GATT 1947 as legitimate. It is clear from Article IX of the GATT 1994 that providing information about the country of origin of a product is a legitimate objective. In fact, providing consumers information about the goods and services they use or consume is an objective many Members pursue through many different types of measures. Nearly 70 Members have country of origin labeling requirements, and many of these Members listed "consumer information" as the objective in the notification of these measures to the TBT Committee.[109]

54. *Second*, Canada mistakenly purports to rely on the principle of *ejusdem generis* in creating its "test" to interpret Article 2.2.[110] The principle is not one of the customary rules of interpretation of public international law, which are reflected in the *Vienna Convention on the Law of Treaties*. Further, as the Panel correctly finds, the principle is not "helpful for determining whether the objective pursued by the United States is legitimate," given that "all of the listed examples are expressed at a high level of generality."[111] Nor does Canada explain how the enumerated objectives admit of a particular classification by "type" – it simply observes that these are objectives frequently referenced in the covered agreements, and then asserts that an

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[107] *EC – Sardines (Panel)*, para. 7.123.

[108] For example, for just electronic goods, Members often pursue such objectives as: encouraging sufficient use of radio spectrum; protecting electrical networks; and allowing telephones to be used by hearing-impaired people.

[109] *See* Panel Report, para. 7.637 (citing Exhibit US-69, which lists the Members applying mandatory labeling systems for provide consumer information as well as to prevent deceptive practices or prevent consumers from being misled or confused); *see also* U.S. SWS, para. 116.

[110] *See, e.g.*, Canada's Other Appellant Submission, para. 52.

[111] Panel Report, para. 7.636.

objective referenced elsewhere in the covered agreements is automatically of the same "type" (and an objective not referenced is automatically not of the same "type"). There is no support for this position in the text of Article 2.2 or elsewhere in the covered agreements. Fundamentally, as the Panel found, the principle of *ejusdem generis* is not helpful in conducting such an inquiry.[112]

55. Moreover, regarding the legal standard Canada alleges is applicable where an objective is not explicitly referenced somewhere in the covered agreements,[113] Canada's position is at odds with the applicable rules of burden of proof,[114] which require Canada, as the complaining party, to prove that "consumer information on origin" is not a legitimate objective. Under Canada's view the burden would rest on the responding party to demonstrate with "clear and compelling evidence" that the objective is legitimate.[115] Canada, again, provides no legal support for this view. Article 2.2 says nothing about burden of proof, nor does it refer to any "clear and compelling" test. These are all manufactured by Canada in this dispute.

56. *Third*, Canada's two-part test is based on the false assumption that Article 2.2 "prioritizes" the listed objectives over the unlisted ones, as the explicitly listed objectives are more "important" than the unlisted ones.[116] In asserting such a proposition Canada seeks to rewrite Article 2.2, which does not distinguish objectives on the basis of "importance," as Canada suggests, but "legitimacy," as the text actually reads. That is to say, Article 2.2 does not require Members to only apply technical regulations that pursue "important" policy goals – however that would be judged – but "legitimate" ones. Among other things, panels are simply not in a position to rank and judge the importance of various objectives.[117] As stated by the panel in *EC – Sardines*, "it is up to the Members to decide which policy objectives they wish to pursue and the levels at which they wish to pursue them."[118] Article 2.2 confirms this truism by providing an open list of "legitimate" objectives. As Canada's argument runs directly contrary to this conclusion, it should be rejected.

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[112] Panel Report, para. 7.637; *see also id.* para. 7.636 (stating that it is "difficult to see how the application of this principle advances Canada's argument," even if the principle is applicable to interpreting Article 2.2 (which the Panel doubts)).

[113] Canada's Other Appellant Submission, para. 59.

[114] *See, e.g.*, *US – Wool Shirts and Blouses (AB)*, p. 14.

[115] *See* Canada's Other Appellant Submission, para. 62 (contending that the Appellate Body should find the objective of providing consumer information on origin to illegitimate because *the United States* has not "provided clear and convincing evidence that indicates why that objective is legitimate in this case").

[116] *See* Canada's Other Appellant Submission, paras. 51, 54, and 56.

[117] *See infra* section II.D.

[118] *EC – Sardines (Panel)*, para. 7.120.

57. *Fourth*, even under Canada's (flawed) approach, the legitimacy of providing consumer information as an objective finds support even in the enumerated objectives themselves. In particular, the objective of the measure at issue in this case is closely connected to the prevention of deceptive practices, which is explicitly listed in TBT Article 2.2. While the United States does not assert that providing consumer information about origin and preventing deceptive practices are the same objective, these objectives relate to the same end – namely, ensuring that consumers have correct information about the products they buy. The *EC – Sardines* panel recognized the link between this explicitly enumerated legitimate objective and other objectives related to the provision of consumer information.[119]

58. Regardless of whether the objective that the responding Member asserts is one of the enumerated objectives or not, the relevant inquiry is the same. In both instances, an Article 2.2 analysis involves confirming that the measure's objective is what the responding Member asserts it is, including that the objective is not protectionism, and determining whether the Member's measure is "more trade-restrictive than necessary" to fulfill the objective. A panel's analysis may differ slightly depending on how the responding Member decides to define its objective, but nothing in the TBT Agreement requires the Member to define its objective in either a narrow or broad fashion.[120]

59. In the end, the Panel is correct that providing consumers information on origin is a legitimate goal for Members to pursue, and one which the TBT Agreement does not prohibit. As the Panel recounts, the record in this case firmly establishes the strong desire on the part of consumers to receive such origin information and the strong trend of Members requiring producers to provide such information.[121] The Panel is further correct that the Panel cannot determine whether an objective is legitimate "in a vacuum, but [that this] must be assessed in the context of the world in which we live."[122] In that regard, the Panel was correct to look at all types

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[119] *EC – Sardines (Panel)*, para. 7.123.

[120] The United States also fails to understand Canada's efforts to distinguish the U.S. COOL measure from other Member's COOL measures (including Canada's own COOL measure) as to the legitimacy of providing consumer information on origin based on the fact that different COOL measures have different designs and structures. *See* Canada's Other Appellant Submission, para. 64 ("None of [the non-U.S. COOL measures] explicitly deals with meat obtained from livestock slaughtered within the territory of the WTO Member. Many of the measures recognize substantial transformation as conferring origin, including Canada's."). Canada never explains *why* the objective at issue here is legitimate or not depends on the structure and design of the measure. The objective of providing consumer information on origin is either legitimate or illegitimate. *How* the measure pursues that objective does not alter that conclusion.

[121] Panel Report, para. 7.650 ("We are persuaded, based on the evidence before us regarding US consumer preferences as well as the practice in a considerable proportion of WTO Members, that consumers generally are interested in having information on the origin of the products they purchase. We also observe that many WTO Members have responded to that interest by putting measures in place to require the provision of such information, albeit with different definitions of 'origin.'").

[122] Panel Report, para. 7.650.

of evidence on the record, including whether the objective is shared by the importing Member's populace and other Member governments and people. While Canada contends that the Panel's approach would allow Members to turn illegitimate goals into legitimate ones,[123] it provides no reason why this would be, and nothing in the Panel's analysis indicates that this is so.[124] In fact, the Panel's entire analysis in paragraphs 7.628-7.651 and 7.678-7.691 is dedicated to determining whether the complaining parties were correct that the COOL measure pursues the illegitimate objective of protectionism. The Panel correctly finds against the complaining parties in this regard.

D. There Is No Basis for the Appellate Body to Complete the Panel's Analysis as to Whether the COOL Measure is "More Trade-Restrictive Than Necessary"

60. In the event that the Appellate Body finds that the Panel erred in finding that the COOL measure is inconsistent with Article 2.2 because it does not fulfill its objective, both Canada and Mexico request the Appellate Body to complete the analysis as to whether the COOL measure is "more trade-restrictive than necessary" based on a comparison with an alternative measure.[125]

61. As discussed in the U.S. Appellant Submission, 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.[126] Specifically, a complaining party must prove that a measure is "more trade-restrictive than necessary" to fulfill a legitimate objective by establishing that: (1) there is a reasonably available alternative measure; (2) that fulfills the

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[123] *See* Canada Other Appellant Submission, para. 50. Further, Canada's references to racial discrimination are quite puzzling. *See* Canada's Other Appellant Submission, paras. 46, 50. First, it is not clear what relevance racial discrimination has to a dispute involving country of origin labeling on meat. Second, if Canada is implying that a WTO dispute settlement panel should inject itself into issues of social policy, there is no basis for this in Article 2.2. The "legitimacy" referred to in Article 2.2 is related to the legitimacy of the objective of the measure from a *trade* perspective, as is made clear from the context of Article 2.2, both within the TBT Agreement as well as within a multilateral *trade* agreement. Under Canada's theory, panels are charged with second guessing a whole range of governmental objectives, including, for example, objectives related to the treatment of indigenous peoples, the relationship between central and regional governments, the treatment of languages, and religion.

[124] Panel Report, para. 7.650. Indeed, the Panel specifically states that it took into consideration Canada's argument that the United States was merely trying "to justify the legitimacy of its intervention on the basis of a governmentally created consumer perception." *Id.* para. 7.644. The Panel finds that there is significant consumer interest in having this information. As the Panel correctly concludes: "[c]learly, if consumers know the country of origin, they will be able to make informed choices with respect to origin of products, including meat. Some consumers may indeed have preferences for products produced by or originating in particular countries for a variety of reasons." *Id.* para. 7.648.

[125] *See* Canada's Other Appellant Submission, paras. 68-69 (citing Panel Report, para. 7.719); Mexico's Other Appellant Submission, paras. 46-47 (citing same).

[126] *See* U.S. Appellant Submission, section IV.D.

objective of the measure at the level that the importing Member considers appropriate; and (3) is significantly less trade restrictive.[127]

62. As part of their appeals, the complaining parties put forward somewhat differing legal frameworks to determine whether a measure is "more trade-restrictive than necessary" that significantly diverge from the one indicated by the text of Article 2.2 itself. Rather, Canada and Mexico propose legal frameworks that require a panel to make wide-ranging public policy judgments of the measure, instead of focusing on whether the importing Member could have adopted a less trade-restrictive measure, as the text of Article 2.2 requires.[128]

63. Nevertheless, the legal frameworks proposed by all three parties share one important similarity – namely, that a panel must evaluate at least one alternative measure in determining whether the challenged measure is inconsistent with Article 2.2 because it is "more trade-restrictive than necessary."[129] Accordingly, if the Appellate Body is unable to evaluate at least one of the four proposed alternative measures, and reach the conclusion based on uncontested facts and Panel findings regarding that one alternative measure, the Appellate Body will be unable to complete the Panel's analysis as to whether the challenged measure is inconsistent with Article 2.2 because it is "more trade-restrictive than necessary," and reach the conclusion sought by Canada and Mexico.

64. As discussed below, the United States considers this to be the case here – no basis in the record exists for the Appellate Body to consider any of the four alternative measures proposed by Canada and Mexico, and therefore the Appellate Body cannot complete the Panel's analysis to find that any of the alternatives fulfills the U.S. objective at the level the United States considers appropriate, and is less trade-restrictive than the COOL measure. As such, it is unnecessary for the Appellate Body to address the myriad issues of interpretation raised in the Other Appellant

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[127] *See, e.g.*, U.S. Appellant Submission, paras. 178-179.

[128] U.S. Appellant Submission, para. 181; *see also Australia – Apples (AB)*, para. 356 (noting that for purposes of the parallel provision in the SPS Agreement to Article 2.2 of the TBT Agreement, "the legal question is whether the importing Member could have adopted a less trade-restrictive measure").

[129] *See, e.g.*, Canada's Other Appellant Submission, para. 71(1) ("The challenging party must propose one or more alternative measures."); Canada's Other Appellant Submission, para. 60 ("... the Appellate Body should complete the analysis and find that the COOL measure still cannot comply with TBT Article 2.2, *as there are less trade-restrictive alternative measures available*.") (emphasis added); Canada's Other Appellant Submission, paras. 77-90 (discussing four proposed alternative measures); Mexico's Other Appellant Submission, para. 59 ("... in light of the objective ... and the contribution of the COOL measure to the achievement of that objective, *there are no reasonably available less trade-restrictive measures* that provide an equivalent contribution to the achievement of the objective") (emphasis added); Mexico's Other Appellant Submission, paras. 62-68 (discussing four proposed alternative measures); U.S. Appellant Submission, paras. 178-179 (contending that a challenged measure can only be determined to be "more trade-restrictive than necessary" if: (1) there is a reasonably available alternative measure; (2) that fulfills the objective of the measure at the level that the Member imposing the measure considers appropriate; and (3) is significantly less trade restrictive).

Submissions of Canada and Mexico.

65. The United States will first address why, regardless of the legal standard to be employed, there is no foundation upon which the Appellate Body could complete the analysis and determine that any one of the four proposed alternative measures establishes that the COOL measure is "more trade-restrictive than necessary." The United States will then respond to certain issues of interpretation of Article 2.2 raised by Canada and Mexico.

1. No Basis in the Record Exists for the Appellate Body to Complete the Analysis as to Whether the COOL Measure Is "More Trade-Restrictive Than Necessary"

66. As acknowledged by Mexico,[130] the Appellate Body may complete the Panel's analysis "only if the factual findings of the panel and the undisputed facts in the panel record provide [the Appellate Body] with a sufficient basis for [its] analysis."[131] While Mexico claims that this is in fact the case here,[132] Mexico points to *no* factual findings by the Panel or undisputed facts regarding the four proposed alternative measures.[133] Canada *ignores* the legal standard, and its application to the basis of its own appeal, altogether.[134]

67. Nevertheless, both Canada and Mexico allege that if the Appellate Body completed the Panel's analysis, any one of their four proposed alternative measures would establish that the COOL measure is "more trade-restrictive than necessary."[135] However, the Panel made no factual findings, nor do any undisputed facts exist, with regard to any of the four proposed alternative measures, that would allow the Appellate Body to complete the Panel's analysis. In essence, what the complaining parties ask of the Appellate Body is that it weigh and assess the evidence on a *de novo* basis, contrary to Articles 17.6 and 17.13 of the DSU.[136] As such, both

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[130] *See* Mexico's Other Appellant Submission, para. 47.

[131] *EC – Asbestos (AB)*, para. 78; *see also US – Hot-Rolled Steel (AB)*, para. 235 ("In previous Reports, we have emphasized that, after reversing a finding of the panel, we can complete the analysis only if the factual findings of the panel, or the undisputed facts in the panel record, provide us with a sufficient basis to do so."); Mexico's Other Appellant Submission, n.56 (citing 13 Appellate Body reports).

[132] Mexico's Other Appellant Submission, para. 47.

[133] Mexico's Other Appellant Submission, paras. 62-68 (discussing the four proposed alternative measures).

[134] Canada's Other Appellant Submission, paras. 77-90 (discussing the four proposed alternative measures).

[135] Canada's Other Appellant Submission, heading above para. 77; Mexico's Other Appellant Submission, para. 61.

[136] *See, e.g.*, *EC – Poultry (AB)*, para. 107 (referring to Articles 17.6 and 17.13 of the DSU and concluding that there is "no finding nor any 'legal interpretation developed by the panel' that may be the subject of an appeal of which the Appellate Body may take cognizance"); *India – Quantitative Restrictions (AB)*, paras. 143-144 (stating

Canada and Mexico's conditional appeals must fail.

68. The four alternative measures that Canada and Mexico propose are:

- Alternative Measure No. 1 – Voluntary Country of Origin Labeling:[137] Both Canada and Mexico argued for the Panel to accept this alternative.[138] The United States responded in full with arguments demonstrating that this is not an acceptable alternative, and there are no undisputed facts as to this proposed alternative.[139] The Panel made no findings of fact with regard to this proposed alternative measure, and neither complaining party asserts otherwise.

- Alternative Measure No. 2 – Substantial Transformation:[140] Both Canada and Mexico argued for the Panel to accept this alternative.[141] The United States responded in full with arguments demonstrating that this is not an acceptable alternative, and there are no undisputed facts as to this proposed alternative.[142]

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that India's allegation "relates to the weighing and assessing of the evidence adduced by the United States, and is, therefore, outside the scope of appellate review"); *Australia – Salmon (AB)*, paras. 257-261 (finding that because Australia's claim relates to the "consideration and weighing of the evidence," it is outside the scope of appellate review).

[137] Canada's Other Appellant Submission, paras. 77-80; Mexico's Other Appellant Submission, para. 62.

[138] *See e.g.*, Canada's FWS, paras. 191-200; Mexico's FWS, para. 316.

[139] *See e.g.*, U.S. SWS, paras. 161-163; U.S. Comments on Canada and Mexico's Answers to the Panel's Second Set of Questions, Question 105, para. 24. As the United States explained, a system based on voluntary labeling would not fulfill the U.S. objective at the level the United States considers appropriate. In fact, the United States tried a voluntary labeling system before adopting the COOL measure, but this system did not result in country of origin information routinely being provided to consumers. U.S. SWS, para. 161. This directly contradicts Canada's claim that "voluntary labeling can provide a far more effective means to inform consumers of the origin of their meat than the COOL measure." Canada's Other Appellant Submission, para. 79. Canada has also failed to explain how "voluntary labelling would not have the effect of imposing differential burdens on the use of Canadian livestock." Canada's Other Appellant Submission, para. 78. To the extent that labeling imposes differential costs on livestock, a point with which the United States disagrees, it is unclear how the situation would be any different for those producers who need to keep track of origin in order to label under a voluntary system than a mandatory one – they would still need to track origin to ensure that products are accurately labeled at retail – and Canada has offered no explanation of why this would be the case. Finally, to the extent that voluntary labeling is a reasonably available alternative to mandatory labeling, this would call into question the WTO consistency of the nearly 70 other WTO Members with mandatory country of origin labeling requirements. Panel Report, para. 7.637, n.834.

[140] Canada's Other Appellant Submission, paras. 81-84; Mexico's Other Appellant Submission, para. 63.

[141] *See e.g.*, Canada's FWS, paras. 201-207; Mexico's FWS, para. 317.

[142] *See e.g.*, U.S. SWS, paras. 164-171; U.S. Comments on Canada and Mexico's Answers to the Panel's Second Set of Questions, Question 105, para. 24. As the United States explained, a system that defines origin on the basis of substantial transformation would not fulfill the U.S. objective at the level the United States considers

The Panel made no findings of fact with regard to this proposed alternative measure as part of its Article 2.2 analysis, and neither complaining party asserts otherwise. The Panel did, however, as part of its analysis of Mexico's Article 2.4 claim, find that a Codex standard incorporating substantial transformation is an ineffective and inappropriate means for the fulfilment of the legitimate objectives of the United States.[143] This finding has not been appealed. As such, the Panel's one legal finding regarding an alternative measure demonstrates that substantial transformation is not an alternative measure that would fulfill the U.S. legitimate objective at the level the United States considers appropriate. Canada is incorrect when it contends that "substantial transformation has the capacity to better fulfil the COOL measure's objective."[144]

- Alternative Measure No. 3 – A Combination of the First and Second Alternatives:[145] Canada (but not Mexico) argued for the Panel to accept this alternative.[146] The United States responded in full with arguments demonstrating that this is not an acceptable alternative, and there are no undisputed facts as to

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appropriate because it would not provide information about where animals that had production steps take place in more than one country were born and raised. It is also worth noting, that accepting labeling based on substantial transformation as a reasonably available alternative would call into question the WTO consistency of many other WTO Member's labeling requirements that are not based on substantial transformation, such as those of Australia, Canada, Colombia, the European Union, Japan, and Korea, among others. U.S. SWS, para. 171.

[143] Panel Report, paras. 7.734-7.735. There, the Panel states:

> In our view CODEX-STAN 1-1985 does not have the function or capacity of accomplishing the objective of providing information to consumers about the countries in which an animal was born, raised and slaughtered. The reason is that the standard confers origin *exclusively* to the country where the processing of food took place. In other words, it is based on the principle of substantial transformation. This means that no more than one country can claim origin under CODEX-STAN 1-1985; even when an animal is born and raised in a third country and then slaughtered in the United States, the origin would *exclusively* be the United States. Thus, the exact information that the United States wants to provide to consumers cannot be conveyed through CODEX-STAN 1-1985. For the same reasons, we find that CODEX-STAN 1-1985 is an inappropriate means for the fulfilment of this objective, as it is not specially suitable for providing this type of information to the consumer. . . .Based on the above, we find that CODEX-STAN 1-1985 is *ineffective* and *inappropriate* for the fulfilment of the specific objective as defined by the United States.

[144] Canada's Other Appellant Submission, para. 84. Mexico did not appeal this adverse finding to its Article 2.4 claim.

[145] Canada's Other Appellant Submission, paras. 85-87; Mexico's Other Appellant Submission, para. 64.

[146] *See, e.g.*, Canada's Opening Statement at the Second Meeting of the Panel, para. 71. Notwithstanding that Mexico did not propose this alternative measure to the Panel, it now, for the first time, proposes it here. *See* Mexico's Other Appellant Submission, para. 64.

this proposed alternative.[147] The Panel made no findings of fact with regard to this proposed alternative measure, and neither complaining party asserts otherwise.

- Alternative Measure No. 4 – Trace Back Regime:[148] Both Canada and Mexico argued for the Panel to accept this alternative.[149] The United States responded in full with arguments demonstrating that this is not an acceptable alternative, and there are no undisputed facts as to this proposed alternative.[150] The Panel made no findings of fact with regard to this proposed alternative measure, and neither complaining party asserts otherwise.

69. As established above, and consistent with the findings of numerous previous Appellate

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[147] *See, e.g.*, U.S. Answers to the Second Set of Questions from the Panel, Question 147(b), para. 104. As the United States explained, this suggestion is not substantively different from either of the two already discussed reasonably available alternatives – voluntary labeling or substantial transformation. Thus, it would not "permit additional information for those that are interested." Canada's Other Appellant Submission, para. 87. It would ultimately be the choice of the retailer, not the consumer, as to whether meat will be labeled with additional information about where it was born and raised, and without a record keeping infrastructure similar to that under the COOL measure in place, many retailers would not have the ability to provide this information even if they desired to do so. U.S. Answers to the First Set of Questions from the Panel, Question 37, para. 69-70; U.S. SWS, para. 144. Canada's argument that "the greater flexibility of voluntary labelling could also encourage participation at points of sale (such as restaurants or specialty stores) currently not covered by the COOL measure" is not persuasive. Canada's Other Appellant Submission, para. 87. Restaurants and speciality stores are free to voluntarily provide information under the current U.S. system as created by the COOL measure, and the situation would be no different under this proposed alternative.

[148] Canada's Other Appellant Submission, paras. 88-90; Mexico's Other Appellant Submission, para. 65.

[149] *See, e.g.*, Mexico's SWS, para. 169; Mexico's Opening Statement at the Second Meeting of the Panel, para. 57; Canada's Opening Statement at the Second Meeting of the Panel, para. 70.

[150] *See, e.g.*, U.S. Comments on Canada and Mexico's Answers to the Panel's Second Set of Questions, Question 105, para. 24. As the United States explained, a trace-back system is not a reasonably available alternative because it is more trade-restrictive than the COOL measure. This type of system would increase the costs on entities throughout the supply chain as compared with the COOL measure, including Canadian and Mexican livestock producers. Tellingly, even Canada admits that "this approach could also increase costs," and does not argue that this is a less trade-restrictive approach, but instead argues that the additional information provided by this system would outweigh its additional trade-restrictiveness. Canada's Other Appellant Submission, para. 90. In suggesting that the United States adopt a trace-back system to fulfill its consumer information objective, Canada and Mexico overlook the fact that the EU, the only WTO Member with a full trace-back mechanism in place, adopted this system for an entirely different objective, health and safety, and did not adopt this mechanism in order to facilitate country of origin labeling to provide consumer information. Finally, Mexico's argument that the Hayes & Meyer article provided in Exhibit MEX-88 and referenced in paragraphs 65-67 of Mexico's Other Appellant Submission somehow provides evidence that this option is less trade restrictive is not persuasive. The Hayes & Meyer article dates to 2003, and its analysis of the COOL measure was based on the 2002 COOL statute and the 2003 Proposed Rule, not the 2008 COOL statute and 2009 Final Rule. *See* U.S. Opening Statement at the Second Meeting of the Panel, para. 34.

Body reports, there is not an adequate basis in this record for the Appellate Body to complete the analysis as the complaining parties have requested.[151] In fact, the single relevant (and un-appealed) legal finding that the Panel did make with regard to one of the alternative measures demonstrates this proposed alternative measure would not fulfill the legitimate objective at the chosen level and so does not meet the complaining parties' burden concerning Article 2.2 of the TBT Agreement.

70. As in the case of *Australia – Salmon* and *Australia – Apples*, where the Appellate Body ended its Article 5.6 inquiries after finding no adequate basis to evaluate the alternative measures,[152] the Appellate Body should reject these two conditional appeals, which, in essence, request the Appellate Body to do an improper *de novo* "weighing and assessing" of the evidence.[153]

2. The Appellate Body Should Reject the Flawed Legal Frameworks Proposed by Canada and Mexico

71. As just discussed, it should not be necessary for the Appellate Body to address the complaining parties elaborate legal frameworks which purport to apply this element of Article 2.2. Nevertheless, in this section, the United States will address the main points of the legal frameworks proposed by Canada and Mexico. These differing frameworks appear to derive largely from the jurisprudence developed to interpret Article XX of the GATT 1994, rather than the text of Article 2.2 of the TBT Agreement. The United States has already explained why Article XX is not an appropriate guidepost for interpreting the meaning of Article 2.2, and that the proper legal framework for interpreting Article 2.2 should be grounded in the text of that

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[151] *See, e.g.*, *EC – Asbestos (AB)*, para. 81-82 (declining to complete the analysis where the panel "made no findings, at all, regarding" Canada's TBT claims); *Canada – Autos (AB)*, para. 145 (declining to complete the analysis where the panel made no factual findings nor were there sufficient undisputed facts on the record that would enable the Appellate Body to examine the issue itself); *US – Hot-Rolled Steel (AB)*, para. 236 (finding that, "in the absence of an adequate factual record, there is no basis for us to complete the analysis"); *Australia – Salmon (AB)*, para. 212 (similar); *Australia – Apples (AB)*, paras. 385, 402 (similar).

[152] *See Australia – Salmon (AB)*, para. 212 ("We, therefore, are not in a position to complete the examination of the second element of the test under Article 5.6, i.e., whether there is another measure that achieves the appropriate level of sanitary protection."); *Australia – Apples (AB)*, para. 385 ("We are, therefore, unable to identify sufficient uncontested facts or factual findings by the Panel to enable us to make a finding on the level of risk associated with New Zealand's alternative measure for fire blight. It follows that we cannot make the necessary comparison between the level of protection offered by New Zealand's alternative measure and Australia's appropriate level of protection, and thus cannot complete the legal analysis with respect to the second condition of Article 5.6 of the *SPS Agreement*.").

[153] *India – Quantitative Restrictions (AB)*, paras. 143-144 (stating that India's allegation "relates to the weighing and assessing of the evidence adduced by the United States, and is, therefore, outside the scope of appellate review"); *see also Australia – Salmon (AB)*, paras. 257-261 (finding that because Australia's claim relates to the "consideration and weighing of the evidence," it is outside the scope of appellate review).

provision, and we will not repeat these arguments here.[154]

a. The Two Legal Frameworks Proposed by Canada and Mexico

72. Both complaining parties contend that Article 2.2 calls for panels to conduct a wide-ranging, intrusive test to "balance" different elements, including the "importance" of the legitimate objective, the trade-restrictiveness of the challenged measure, and various aspects of the alternative measures.

73. Mexico styles its version of the balancing test as a "necessity test," whereby a panel must balance:

> the importance of the interests or values at stake; the extent of the contribution of the measure to the achievement of the measure's objective; the trade restrictiveness of the measure; and whether there are reasonably available alternative measures which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective.[155]

74. Canada also argues that the panel must engage in a balancing test, yet readily concedes that "the text of TBT Article 2.2 does not explicitly envisage" such "balancing."[156] Leaning heavily on the phrase "taking account of the risks non-fulfilment would create," Canada considers that a panel must balance the importance of the objective at stake, the respective trade restrictiveness of the challenged measure and proposed alternatives, and how much the alternative measures contribute to the legitimate objective.[157] According to Canada, where the "value" at issue is "'vital and important in the highest degree,' then the alternative measure must achieve the same end" as the challenged measure.[158] But where the "value" is "not vital and important in the highest degree, an alternative measure need not achieve precisely the same end."[159] That is to say, Canada contends that where the panel considers that the Member pursues a less important or low priority legitimate objective, the challenged measure can be proved to be "more trade-restrictive than necessary" where there exists a less trade restrictive alternative that

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[154] *See* U.S. Appellant Submission, paras. 157-170.

[155] Mexico's Other Appellant Submission, para. 51. Mexico would further add to this balancing test the element of "whether the circumstances giving rise to the adoption of the [] measure exist or changed and can be addressed in a less trade-restrictive manner." *Id.* para. 58.

[156] Canada's Other Appellant Submission, para. 71(4) ("As noted above, the text of TBT Article 2.2 does not explicitly envisage considering the extent of fulfilment in balancing less trade-restrictive options.").

[157] *See* Canada's Other Appellant Submission, paras. 71-74.

[158] Canada's Other Appellant Submission, para. 74.

[159] Canada's Other Appellant Submission, para. 74.

does not achieve the legitimate objective at the level the challenged measure does.[160] In Canada's view, this is so as the "failure to fulfil an objective is less significant" where the "value" at stake is "not vital."[161] In other words, Canada is saying that even though the objective pursued by the measure at issue is legitimate, a Member must sacrifice fulfilling at least some of that legitimate objective in order to advance another Member's trade interests. Nothing in Article 2.2 provides a basis for this approach, and Canada does not point to anything indicating that Members (including Canada) agreed to any such trade-off or sacrifice of other perfectly legitimate objectives as part of Article 2.2.

b. The Two Legal Frameworks Proposed by Canada and Mexico Are Flawed

75. There are at least four reasons why the complaining parties' two differing analyses are each deeply flawed and should not be adopted.

76. *First*, both Canada and Mexico seek to define a "trade-restrictive" measure as one that denies competitive opportunities to imports.[162] Such an interpretation has no basis in the text. Indeed, Canada and Mexico appear to be attempting to import into Article 2.2 the analytical approach developed for purposes of Article 2.1 and issues of "less favorable treatment" or discrimination. The complaining parties' efforts to rewrite the text of Article 2.2 is improper. Rather, and as discussed with the Panel, since there is no definition of "trade restrictive" in the TBT Agreement, and no indication of how to measure it, the interpretation of the phrase should be grounded in its ordinary meaning, consistent with the customary rules of treaty interpretation.[163] Specifically, the ordinary meaning of the word "restrictive" is "having the nature or effect of a restriction; imposing a restriction."[164] "Restriction" is defined as "a thing that restricts someone or something . . . the act of restricting someone or something."[165]

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[160] Canada's Other Appellant Submission, para. 74; *see also id.* para. 91 ("In addition, even if it is found that an alternative measure proposed by Canada does not contribute to the objective pursued to the same degree as the COOL measure, Canada submits that in these circumstances those alternative measures would still meet the test for a less trade-restrictive alternative under TBT Article 2.2.").

[161] Canada's Other Appellant Submission, para. 74.

[162] *See* Canada's Other Appellant Submission, para. 71(2) ("[E]ach proposed alternative measure must be assessed against the challenged measure to determine the extent of trade-restrictiveness – the extent to which a measure discriminates against or denies any competitive opportunities to imported products."); Mexico's Other Appellant Submission, para. 54 ("[M]easures that are 'trade restrictive' are those that deny competitive opportunities to imports.").

[163] *See* U.S. FWS, para. 244.

[164] *The New Shorter Oxford English Dictionary* (4th ed. 1993), p. 2569 (Exhibit US-51).

[165] Exhibit US-51, p. 2569.

"Restrict" is defined as "to limit, bound, confine . . . restrain by prohibition, prevent."[166] A measure that is trade-restrictive, therefore, could include one that restricts trade, *i.e.*, that limits, prevents or confines trade, or restrains it by prohibition.

77. *Second*, the text of Article 2.2 does not create a balancing test – a point that Canada concedes[167] – and Canada and Mexico err in arguing that the Appellate Body should adopt such a framework. In particular, there is no textual support for a panel to "balance" the "importance" of the legitimate objective (as both complaining parties propose doing[168]) against the proposed alternative, and no basis for a panel to impose its own subjective values on the judgments of Members to rank or prioritize legitimate objectives.[169] As discussed above, Members apply technical regulations to pursue a wide range of legitimate objectives, and panels are not in a position – nor *should* they be in a position – to make subjective determinations that some legitimate objective are "more important" than other legitimate objectives. Among other things, there is nothing in the agreed text of the TBT Agreement to indicate there is intended to be a comparison between objectives, nor did Members agree on anything on which to base any such decision.[170] As discussed in the U.S. Appellant Submission,[171] the question for Article 2.2 is quite different – whether the degree of trade-restrictiveness is necessary – and this an inquiry that does not call for "balancing" at all, but rather a determination of whether a less trade-restrictive alternative measure is available that fulfills the objective of the challenged measure at the level that the importing Member considers appropriate.

78. *Third*, Canada misreads the clause "taking account of the risks that non-fulfillment would create."[172] It is simply not true that this clause means that a complaining party can prove that the challenged measure is "more trade-restrictive than necessary" by proposing an alternative measure that does not contribute to the fulfillment of the objective at the same level the measure

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[166] Exhibit US-51, p. 2569.

[167] Canada's Other Appellant Submission, para. 71(4) ("[T]he text of TBT Article 2.2 does not explicitly envisage considering the extent of fulfilment in balancing less trade-restrictive options.").

[168] *See* Canada's Other Appellant Submission, para. 74; Mexico's Other Appellant Submission, para. 51.

[169] *See also supra*, section II.C (discussing Canada's flawed "test" to determine whether an objective is legitimate or not).

[170] In particular, the fact that Article 2.2 provides an illustrative list of legitimate objectives does not mean that it is proper to "prioritize" those listed legitimate objectives over those not listed and provide a higher level of scrutiny to the trade-restrictiveness of measures that pursue unlisted legitimate objectives and provide a more lax analysis of those measure that pursue listed legitimate objectives.

[171] *See, e.g.*, U.S. Appellant Submission, para. 161.

[172] *See* Canada's Other Appellant Submission, paras. 71(3)-(4), 91; *see also* Mexico's Other Appellant Submission, paras. 55-58.

does in some circumstances (*i.e.*, where the "values are not vital").[173] Rather, only those measures that fulfill the objective at the level sought by the United States through the COOL measure could be an alternative measure to consider for purposes of whether the COOL measure is "more trade-restrictive than necessary."[174]

79. Although Canada claims support for its position in the jurisprudence of both Article XX of the GATT 1994 and Article 5.6 of the SPS Agreement, nothing could be farther from the truth. With regard to Article XX, the Appellate Body has never held what Canada claims is "implicit" in its jurisprudence – namely, that panels are to apply a higher level of scrutiny to measures when they pursue objectives that are less important, in the eyes of the panel.[175] Canada is also mistaken when it states that the Article 5.6 analysis involves a "balancing test."[176] Canada cites no support for such a statement and the United States is not aware such support exists. Rather, for an alternative measure to establish that the challenged SPS measure is "more trade-restrictive than required to achieve" the Member's appropriate level of protection, the alternative measure must, in fact, *achieve* the Member's appropriate level of protection. That is, in an Article 5.6 analysis, the panel does not "balance" the challenged measure with an alternative measure, but, rather, "determines" whether an alternative measure: "(1) is reasonably available taking into account technical and economic feasibility; (2) *achieves* the Member's appropriate level of sanitary or phytosanitary protection; and (3) is significantly less restrictive to trade than the SPS measure contested."[177]

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[173] *See* Canada's Other Appellant Submission, para. 74; *id.* para. 91 ("[E]ven if it is found that an alternative measure proposed by Canada does not contribute to the objective pursued to the same degree as the COOL measure, Canada submits that in these circumstances those alternative measures would still meet the test for a less trade-restrictive alternative under TBT Article 2.2.").

[174] Notably, Mexico does not appear to support Canada's position, contending that the panel must determine "whether there are reasonably available alternative measures which may be less trade restrictive while providing *an equivalent* contribution to the achievement of the objective." Mexico's Other Appellant Submission, para. 51 (emphasis added).

[175] *See* Canada's Other Appellant Submission, para. 71(4).

[176] Canada's Other Appellant Submission, para. 71(4).

[177] *Australia – Salmon (AB)*, para. 194 (emphasis added). Notably, neither the *Clove Cigarettes* panel, nor the *Tuna* panel, interprets this particular clause in a manner that anywhere closely resembles the interpretation that Canada puts forth. Rather, both panels interpret the clause as meaning that when the risks of non-fulfilment *of the alternative measure* is greater than the challenged measure, then alternative measure does not prove the challenged measure is "more trade-restrictive than necessary." *See US – Clove Cigarettes (Panel)*, para. 7.424 ("In our view, where an alternative measure would entail a greater risk of non-fulfilment of the objective, it would be difficult to find that it would make an 'equivalent' contribution to the achievement of the objective, at the level of protection sought."); *US – Tuna (Panel)*, para. 7.467 ("We further understand this to imply that an alternative means of achieving the objective that would entail greater 'risks of non-fulfilment' would not be a valid alternative, even if it were less trade-restrictive. This is consistent, in our view, with the fact that each Member is entitled, as expressed in the preamble of the TBT Agreement and as discussed above, to define its own level of protection.").

80. The clause "taking into account the risks that non fulfillment would create" is better understood as an element that Members take into account in determining what level is appropriate for the particular legitimate objective at issue. As previously noted, the sixth preambular recital confirms that Members are free to determine the level that is appropriate for a particular legitimate objective. Panels could verify that a Member has taken these risks into account as one of a number of elements that Member considers in determining the level that is appropriate.[178]

81. *Finally*, despite the elaborate balancing tests put forward by both Canada and Mexico, neither party appears to employ their respective tests to analyze their own proposed alternatives. In fact, Mexico is able to address the first three alternative measures in a paragraph each, and only addresses the fourth alternative measure in three paragraphs in order to explain a particular exhibit that Mexico submitted to the Panel, on which the Panel made no findings. Canada is even more direct in dispensing with its own test, arguing – with surprising candor – that Article 2.2 simply requires a panel to step into the shoes of the Member and decide whether there is a *better* means to achieve the Member's objective than the one the Member has chosen.[179] As discussed in the U.S. Appellant Submission, such a position is utterly unsupported by the text and relevant context, including the preamble.[180]

82. In sum, there is no factual basis upon which the Appellate Body could complete the Panel's analysis as to whether the COOL measure is "more trade-restrictive than necessary." As a result, it should not be necessary for the Appellate Body to address the legal frameworks proffered by the complaining parties which purport to apply that element of Article 2.2. Should the Appellate Body address that issue, however, neither Canada nor Mexico's proffered legal frameworks are grounded in the text of Article 2.2, and they should be rejected.

III. THE PANEL ACTED WITHIN ITS DISCRETION IN ITS EXERCISE OF JUDICIAL ECONOMY WITH RESPECT TO CANADA AND MEXICO'S CLAIMS UNDER ARTICLE III:4 OF THE GATT 1994

83. The Panel acted within its discretion in its exercise of judicial economy with respect to

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[178] As such, Mexico's interpretation of this clause is also flawed. This clause does not require "consideration of whether the circumstances giving rise to the adoption of the challenged measure [still] exist or [have] changed," as posited, and such an analysis certainly should not be part of any balancing test, as discussed above. Mexico's Other Appellant Submission, para. 58.

[179] *See* Canada's Other Appellant Submission, para. 79 (arguing that the first alternative measure proves that COOL is inconsistent with Article 2.2 as "voluntary labelling can provide *a far more effective means* to inform interested consumers of the origin of their meat than the COOL measure") (emphasis added).

[180] *See, e.g.*, U.S. Appellant Submission, paras. 117-119, 126, 146.

Canada and Mexico's claims under Article III:4 of the GATT 1994.[181] It is unnecessary for the Appellate Body to make findings on the COOL measure or the Vilsack Letter under this provision, regardless of how the Appellate Body addresses the U.S. appeal under TBT Article 2.1. Findings on the COOL measure or Vilsack Letter under GATT Article III:4 will not help secure a positive resolution to this dispute.

84. Article 3.7 of the DSU states that the aim of WTO dispute settlement "is to secure a positive resolution to a dispute."[182] The Appellate Body has stated that panels are not required to examine all legal claims made by a complaining party to achieve this goal, but rather, "need only address those claims which must be addressed in order to resolve the matter in issue...."[183] Accordingly, WTO panels have the discretion to determine which claims to address in a particular dispute in order to resolve it.

85. Both complainants raise issues with regard to the Panel's exercise of judicial economy on their GATT Article III:4 claims. Canada argues that the Panel erred in failing to make a finding with respect to the COOL measure or Vilsack Letter under this provision, based on its view that the relationship between TBT Article 2.1 and GATT Article III:4 "is not settled."[184] Mexico, for its part, conditionally appeals the Panel's exercise of judicial economy, arguing that if the Appellate Body reverses the Panel's finding that the COOL measure breaches TBT Article 2.1, it should complete the analysis under GATT Article III:4.[185] Mexico, however, fails to explain how the Appellate Body could find a breach of GATT Article III:4 if it finds in favor of the United States with respect to its TBT Article 2.1 claim.

A. The Appellate Body Need Not Complete the Analysis on the COOL Measure Under Article III:4 of the GATT 1994

86. The Panel acted within the appropriate bounds of its discretion in deciding not to make findings on the COOL measure under Article III:4 of the GATT 1994. In explaining its decision to exercise judicial economy with respect to the COOL measure, the Panel stated that "[g]iven the close connection between Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994 with respect to the nature of the obligations and in light of our finding under Article 2.1 of the TBT Agreement, we consider it unnecessary to examine the complainants' claims in respect

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[181] Panel Report, paras. 7.807-7.808, 8.4(a), 8.4(c).

[182] DSU Article 3.7. *See also* DSU Article 3.4 ("Recommendations and rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under covered agreements.").

[183] *US – Wool Shirts and Blouses (AB)*, p. 19.

[184] Canada's Other Appellant Submission, paras. 93-96.

[185] Mexico's Other Appellant Submission, paras. 69-94.

of the COOL measure under Article III:4 of the GATT 1994."[186]

87. The Panel's finding in this regard was appropriate, and there is no reason to revisit GATT Article III:4 regardless of the Appellate Body's determination on the U.S. appeal under TBT Article 2.1. Canada provides no explanation for why the Panel's exercise of judicial economy was in error, beyond an assertion that "the relationship between TBT Article 2.1 and Article III:4 of the GATT is not settled."[187] It is unclear what Canada means by this statement, but in any event, Canada points to no reason why the Panel's exercise of judicial economy in this instance led to a result that did not resolve the matter before it.

88. Regarding Mexico's conditional appeal, if the Appellate Body appropriately finds that the COOL measure does not breach TBT Article 2.1 because it does not accord less favorable treatment to imported livestock, there would be no basis for it to conclude that it breaches GATT Article III:4 for the same reasons. Indeed, while Mexico asserts that uncontested facts exist to complete the analysis in this regard, the facts cited by Mexico, in particular with respect to less favorable treatment, are some of the very facts that the United States has explained are insufficient to support a finding of a breach of TBT Article 2.1.[188] As the parties have all recognized, the less favorable treatment analysis under GATT Article III:4 and TBT 2.1 is similar.[189] Thus, there would similarly be no basis for the finding that Mexico seeks.

B. The Appellate Body Need Not Complete the Analysis on the Vilsack Letter Under Article III:4 of the GATT 1994

89. The Panel also acted within the appropriate bounds of its discretion in deciding not to make findings with respect to the Vilsack Letter under Article III:4 of the GATT 1994. As the Panel explains, "if the Vilsack Letter is found not to fall within the scope of Article X:3(a), we will proceed to examine whether it falls within the scope of Article III:4."[190] Because the Panel found the Vilsack Letter within the scope of Article X:3(a) and ultimately in breach of this provision,[191] the Panel appropriately determined that it is unnecessary to examine the Vilsack Letter under Article III:4 to secure a positive resolution to this dispute.[192] The Panel's decision in

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[186] Panel Report, para. 7.807.

[187] Canada's Other Appellant Submission, para. 96.

[188] U.S. Appellant Submission, paras. 52-116.

[189] Panel Report, para. 7.259.

[190] Panel Report, para. 7.808.

[191] Panel Report, paras. 7.821-7.830.

[192] Panel Report, para. 8.4(c).

this regard is correct, and there is no reason to revisit the Vilsack Letter under Article III:4 in the context of this appeal.

90. Making findings on the Vilsack Letter under Article III:4 will not help secure a positive resolution to this dispute and Canada has pointed to nothing to suggest otherwise. *First*, the United States has not appealed the Panel's findings against the Vilsack Letter under Article X:3(a). Making an additional finding against the measure contributes nothing to resolving the dispute between the parties. *Second*, the United States has already withdrawn the Vilsack Letter. On April 5, 2012, USDA sent a letter to industry representatives stating that "the Department withdraws the letter to industry representatives pertaining to COOL dated February 20, 2009."[193] There is no reason to make an additional finding against a measure that has already been withdrawn.

91. Even aside from the fact that it is not necessary to examine the Vilsack Letter under Article III:4 to secure a positive resolution to this dispute, the complaining parties have failed to establish that Article III:4 applies to the Vilsack Letter, and there are not sufficient factual findings by the Panel and undisputed facts to provide a basis for finding otherwise. As the United States explained in its First Written Submission, the Vilsack Letter was not a "law, regulation, or requirement" affecting the internal sale, offering for sale, purchase, distribution and use of imported livestock, beef, or pork within the meaning of Article III:4 because (1) the U.S. industry was not legally bound to follow the letter and (2) the industry did not voluntarily follow the letter.[194] The Panel made no findings on the facts related to this issue in the context of Article III:4, and there is no basis for the Appellate Body to do so here.

C. Conclusion

92. Accordingly, as the United States has explained, it was appropriate for the Panel to exercise judicial economy with regard to Canada and Mexico's claims under Article III:4 of the GATT 1994, and there is neither a reason for the Appellate Body to disturb the Panel's findings in this regard nor a sufficient factual basis for it to complete the analysis in order to do so.

IV. CANADA AND MEXICO'S CONDITIONAL APPEALS UNDER ARTICLE XXIII:1(B) OF THE GATT 1994 SHOULD BE REJECTED

93. Canada and Mexico's conditional claim that the COOL measure nullifies or impairs their benefits under Article XXIII:1(b) of the GATT 1994 should be rejected. In their Other Appellant Submissions, Canada and Mexico offer only a cursory explanation of how the measure at issue results in non-violation nullification or impairment within the meaning of Article XXIII:1(b) (much as they did before the Panel), and they have failed to identify sufficient factual findings by

[193] Letter to Industry (April 5, 2012). Available at: http://www.ams.usda.gov/AMSv1.0/cool.

[194] U.S. FWS, paras. 283-285.

the Panel or undisputed facts to allow the Appellate Body to complete the analysis with respect to this claim.

94. Canada and Mexico both conditionally appeal the Panel's finding with regard to non-violation nullification and impairment.[195] In particular, both complainants ask the Appellate Body to make a finding that the COOL measure nullifies or impairs their benefits within the meaning of Article XXIII:1(b) of the GATT 1994 if the Appellate Body does not find a breach of either TBT Article 2.1 or GATT Article III:4.[196] According to both complainants, this is necessary because compliance with the TBT Article 2.2 finding or removal of the Vilsack Letter will not necessarily remove the non-violation nullification or impairment, contrary to the Panel's findings.[197] Neither complainant, however, explains why this is so.

95. Even if the complainants could somehow explain why it was necessary for the Panel to make a non-violation finding under these circumstances, or the basis on which the Appellate Body could complete the analysis in the absence of such a finding, they have failed to make a *prima facie* case with regard to their claims. To make out a cognizable claim under Article XXIII:1(b), the complaining parties must establish: (1) the application of a measure by a WTO Member; (2) a benefit accruing under the GATT 1994; (3) nullification or impairment of the benefit as a result of the application of the measure; and (4) the measures at issue could not have been reasonably anticipated at the time the relevant tariff concessions were negotiated.[198] The complainants must "provid[e] a detailed justification" for these claims.[199] As they did during the proceedings before the Panel, Canada and Mexico have failed to meet their burden.

96. Significantly, Canada and Mexico have failed to identify a relevant benefit accruing under the GATT 1994. Article XXIII:1(b) applies to benefits accruing "directly or indirectly under this Agreement." While Canada and Mexico identify the U.S. WTO bound tariff rate for livestock as the benefit to which they are referring in the context of their claims, both parties have admitted

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[195] Canada's Other Appellant Submission, paras. 97-99; Mexico's Other Appellant Submission, paras. 95-100.

[196] Because Mexico has decided to define the COOL measure in a manner inconsistent with the Panel report (Mexico's Other Appellant Submission, para. 9), it is unclear whether Mexico is actually asking the Panel to make a non-violation nullification or impairment finding with regard to the COOL measure alone, or the COOL measure and the Vilsack Letter. With regard to the Vilsack Letter, the United States would note that because the United States has not challenged the Panel's findings under GATT Article X:3(a), it does not make sense to analyze whether this measure is responsible for non-violation nullification or impairment.

[197] Canada's Other Appellant Submission, para. 99; Mexico's Other Appellant Submission, para. 100.

[198] *Japan – Film*, paras. 10.41, 10.76.

[199] DSU Article 26.1(a). *See also Japan – Film*, para. 10.32 (stating that in the context of a claim of non-violation nullification or impairment, the complainant "bears the burden of providing a detailed justification for its claim in order to establish a presumption that what is claimed is true").

that they are not currently benefitting from this rate, but instead are benefitting from the duty-free U.S. tariff rate negotiated in conjunction with the North American Free Trade Agreement (NAFTA).[200] Thus, because the parties have failed to identify a relevant benefit under the GATT 1994, their claims must fail.[201]

97. Canada and Mexico have also failed to demonstrate that they could not have reasonably anticipated the COOL measure at the time that the WTO tariff concessions were negotiated.[202] The United States has long had some form of country of origin labeling requirements in place and has long been considering enhanced requirements like those included in the COOL measure.[203]

98. Additionally, Canada and Mexico have not shown how the COOL requirements have nullified or impaired their tariff concessions because they have not shown a "clear correlation" between the harm that they allege and the COOL measure.[204] As the United States pointed out during the panel proceedings and in its Appellant Submission, any alleged deterioration in the health of the Canadian and Mexican livestock industries was not due to the COOL measure.[205]

99. Finally, the Appellate Body cannot complete the analysis on this issue because there are not sufficient factual findings by the Panel or undisputed facts on the Panel record to provide the basis for such an analysis. In fact, the Panel never directly assessed Canada and Mexico's underdeveloped arguments as to why the COOL measure nullified or impaired their benefits under the WTO Agreements or the facts related to these arguments. Thus, it would not be appropriate for the Appellate Body to complete the analysis on this issue, even if it overturns the Panel's findings under TBT Articles 2.1 and 2.2 and decides that the Panel erred in exercising judicial economy with respect to Article XXIII:1(b).

V. CONCLUSION

100. For the foregoing reasons, all of the appeals and conditional appeals contained in Canada

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[200] *See* Panel Report, para. 7.896 (stating that the complainants acknowledge that the current tariff concessions for livestock are based on NAFTA).

[201] *See also* DSU Article 1.1 (making clear that the NAFTA is not a "covered agreement" because it is not listed in Appendix 1 of the DSU); DSU Article 26.1 (providing that "a panel or Appellate Body may only make rulings and recommendations where a party to the dispute considers that any benefit accruing to it directly or indirectly under the relevant covered agreement is being nullified or impaired").

[202] U.S. FWS, paras. 307-312.

[203] *E.g.*, U.S. Appellant Submission, para. 19.

[204] *Japan – Film*, para. 10.82.

[205] *E.g.*, U.S. Appellant Submission, paras. 88-92.

and Mexico's Other Appellant Submissions should be rejected.