AB-2014-10
United States – Certain Country of Origin Labelling (COOL) Requirements
Recourse to Article 21.5 of the DSU by Canada and Mexico
(DS384, DS386)

Third Participant Written Submission
by the European Union

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<td>amended COOL measure</td>
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I. INTRODUCTION

1. The European Union intervenes in this case because of its systemic interest in the correct and consistent interpretation and application of the covered agreements and other relevant documents and the multilateral nature of the rights and obligations contained therein, notably the General Agreement on Tariffs and Trade 1994 ("the GATT 1994"), the Agreement on Technical Barriers to Trade ("the TBT Agreement") and the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). In making this submission, the European Union refers to its submission made to the Panels, as well as those made to the Panels and the Appellate Body in the original proceedings.

2. In this submission, the European Union will address the issues raised by the Parties following the same order of analysis as the Panels: Article 2.1 of the TBT Agreement; Article 2.2 of the TBT Agreement; Articles III:4 and XX of the GATT 1994; and Article XXIII:1(b) of the GATT 1994 in connection with Article 21.5 of the DSU.

II. ARTICLE 2.1 OF THE TBT AGREEMENT

3. The United States appeals the finding of a violation of Article 2.1 of the TBT Agreement, while Canada's and Mexico's Other Appeals take issue with certain aspects of the analysis under that provision.

A. Claims and arguments of the United States

4. The United States appeals the Panels' finding that the amended COOL measure is inconsistent with Article 2.1 of the TBT Agreement. The United States argues that that measure addresses the shortcomings of the original COOL measure identified by the Appellate Body's analysis under Article 2.1 in the original dispute. Any remaining detrimental impact of the amended COOL measure on imports now stems exclusively from legitimate regulatory distinctions.¹

¹ Appellant Submission of the United States, para. 50.
5. The United States takes issue with a number of the Panels' specific findings. Firstly, the Panels are claimed to have erred by taking an increased recordkeeping burden as a basis for finding that the amended measure's detrimental impact does not stem exclusively from legitimate regulatory distinctions. The United States also finds a number of flaws in the way in which an increased recordkeeping burden was found to exist, notably, in the Panels' reliance on "purely hypothetical" livestock transactions and on the removal of the country order flexibility.

6. Secondly, the United States argues that the Panels erred in basing their findings that the detrimental impact does not stem exclusively from legitimate regulatory distinctions on potential label inaccuracies. Specifically, according to the United States, the Panels found inaccuracies by identifying hypothetical transactions that do not reflect actual trade in livestock. Moreover, the Panels failed to determine whether a "disconnect" exists between the amount of origin information required to be collected and the information provided on the A, B and C labels. The latter, according to the United States, is the central issue of the analysis of even-handedness under Article 2.1 of the TBT Agreement.

7. Thirdly, the United States considers that the Panels erred by relying on the exemption of processed food items, restaurants and certain small businesses from coverage that continue to exist in the amended COOL measure in order to find that the measure's detrimental impact "reflects discrimination". According to the United States, the Panels erred by taking the exemptions into account in the first place, as well as by considering arguments related to Labels D and E and to the prohibition of trace-back, because only those distinctions that account for the detrimental impact are relevant to the question of whether the measure reflects discrimination. Even if the exemptions from coverage were relevant to the Article 2.1 analysis, the United States argues that they are in themselves even-handed.

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2 Ibid. section II.1.
3 Ibid. paras. 102-108.
4 Ibid. section II.2., in particular paras. 151-159. In its Appellee Submission, the United States adds that the Panels erred in basing their findings under Article 2.1 of the TBT Agreement on hypothetical or isolated instances of trade, noting specifically that the small market shares of Category D muscle cuts are a relevant factor in the enquiry. Appellee Submission of the United States, paras. 254–256.
5 Ibid. paras. 175-183.
6 Ibid. paras. 184-189. See also the Appellee Submission of the United States, paras. 246, 252, 263 and 271.
because they also apply to meat derived from imported livestock. Moreover, the United States considers that the Panels erred by failing to evaluate the actual operation of the exemptions in the US market in order to disprove the existence of an economic incentive to establish direct distribution channels for meat of imported origin within the scope of the exemptions.

B. Claims and arguments of Canada and Mexico

8. In their other appeals, both Canada and Mexico challenge certain aspects of the Panels' analysis under Article 2.1 of the TBT Agreement.

9. According to both Canada and Mexico, the Panels failed to recognize the relevance of Label E in the analysis of even-handedness. Specifically, Mexico considers that the existence of a 60-day inventory allowance for Label E ground beef products, and its absence from the rules on muscle cuts, shows that the amended COOL measure is not even-handed. Canada adds that the Panels' justifications for excluding Label E constituted a legal error, and that the Panels violated Article 11 of the DSU by disregarding evidence and arguments on the upstream recordkeeping burdens relating to ground beef.

10. In addition, Canada claims that the Panels erred by failing to assess Label D and the prohibition of trace-back as factors in the analysis of even-handedness. According to Canada, the Panels' reliance on the small market share of Label D muscle cuts improperly imported actual trade effects into the analysis of legitimate regulatory distinctions. Canada also points out that the prohibition of trace-back should have been taken into account as an aspect of the design and architecture of the amended COOL measure, and that the choice between a system of recordkeeping and verification and a system of trace-back reflects discrimination.

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7 Appellant Submission of the United States, section II.3 (b) i. (A).
8 Ibid. section II.3 (b) iii.
9 Other Appellant Submission of Mexico, section IV.A.
10 Other Appellant Submission of Canada, section IV.B.
11 Ibid. section IV.A.
12 Ibid. section IV.C.
11. In their Appellee Submissions, Canada and Mexico argue that a number of the United States' claims under Article 2.1 of the TBT Agreement are essentially claims of factual error. Having not been argued explicitly on the basis of Article 11 of the DSU, they are outside the scope of appellate review.13

12. Canada and Mexico disagree with the United States' argument that only those regulatory distinctions that create detrimental impact are relevant in the analysis of legitimate regulatory distinctions.14 They further argue that the United States' appeal mischaracterizes the role of increased recordkeeping in the Panels' analysis.15 Similarly, Canada and Mexico disagree with the United States' argument that the Panels' findings on legitimate regulatory distinctions were based on purely hypothetical transactions, and support the Panels' analysis of potential label inaccuracies.16 Unlike the United States, Canada considers that the Panels did not fail to determine whether the legitimate regulatory distinctions are even-handed, adding however that neither the exemptions from coverage nor the relevant regulatory distinctions are in fact even-handed.17 Mexico is of the view that the Panels were not required to assess the even-handedness of the three exemptions.18

13. Finally, the Appellee Submissions of Canada and Mexico, taken together, claim that the United States' argument on distinct distribution channels is beyond the scope of appellate review, factually incorrect, contrary to certain US submissions and, even if correct, could be indicative of discrimination.19

C. Observations of the European Union

1. Detrimental impact

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13 Appellee Submission of Canada, section II.C; Appellee Submission of Mexico, paras. 11, 21 and 22.
14 Appellee Submission of Canada, paras. 58-64; Appellee Submission of Mexico, paras. 57-66.
15 Appellee Submission of Canada, paras. 47-50; Appellee Submission of Mexico, paras. 26-32.
16 Appellee Submission of Canada, paras. 51-55, 96 et seq.; Appellee Submission of Mexico, paras. 33-35, 44 et seq. See also Canada's reference to the relevance of possible future transactions on para. 105.
17 Appellee Submission of Canada, paras. 69, 107 et seq.; Appellee Submission of Mexico, paras. 26-32.
18 Appellee Submission of Canada, paras. 47-50; Appellee Submission of Mexico, paras. 60 et seq.
19 Appellee Submission of Canada, paras. 82-95; Appellee Submission of Mexico, paras. 77-87.
14. The European Union notes that none of the appeals in this dispute specifically challenge the Panels' findings on the detrimental impact of the amended COOL measure. The United States invokes the impropriety of relying on increased record-keeping, but only as an aspect of the analysis of legitimate regulatory distinctions.\textsuperscript{20} It seems to the European Union that whether or not an increase in record-keeping is relevant to the Article 2.1 analysis is more properly an issue of detrimental impact.

15. In that sense, the European Union maintains its submission to the Panels: it is reasonably clear that the amended COOL measure imposes higher compliance costs on transnationally produced muscle cuts.\textsuperscript{21} In the context of measures taken to comply in the meaning of Article 21.5 of the DSU, however, detrimental impact must be assessed by comparing the situation before the adoption of the original measure and the situation after the adoption of the measure taken to comply.\textsuperscript{22} The amended COOL measure's detrimental impact on imports should be assessed on its own terms, and not just by comparing it to the original COOL measure. The key question is not, therefore, whether the recordkeeping burden or segregation have \emph{increased} in comparison with the original COOL measure, but whether, as such, they have a detrimental impact on imports.

2. \textbf{Legitimate regulatory distinctions}

16. Building on the previous point, the European Union considers that a Member may seek to comply with the recommendations of a panel by adopting measures that are \emph{more} trade-restrictive, but also more even-handed. Whether a measure's detrimental impact "stems exclusively from a legitimate regulatory distinction" depends on the coherence (or, as the United States phrase it, absence of "disconnect") between its detrimental impact on imports and its contribution to a legitimate objective. As the United States suggests, the purpose of this analysis is to ascertain whether a trade-restrictive measure reflects discrimination or not.\textsuperscript{23}

\textsuperscript{20} Appellant Submission of the United States, paras. 113-116.
\textsuperscript{21} Third Party Submission of the European Union in the Panel proceedings, para. 4.
\textsuperscript{22} Ibid. para. 81.
In order to address that question, all aspects of a measure that speak to its "design and architecture" are relevant, and not only - as the United States would have it24 – those that in themselves cause a detrimental impact on imports. In that sense, the Panels would have been correct in considering arguments related to the three exemptions from coverage, as well as to Labels D and E and the prohibition of trace-back. These are all aspects of the amended COOL measure's "design, architecture, revealing structure, operation, and application" that can be taken into account in the assessment of its even-handedness (which is to say, in deciding whether the measure reflects arbitrary or unjustified discrimination), even if they are not "relevant regulatory distinctions" that impact imports detrimentally.25

The European Union sees this analysis as follows. First, it is established whether or not a measure has a detrimental impact on imports. Second, we ask whether that impact stems exclusively from legitimate regulatory distinctions. In answering the second question, the "relevant" regulatory distinctions should first be identified. In this case, these are the distinctions between the three production steps and the four labels (A, B, C and D). It has been established that these distinctions account for the detrimental impact on imports. Therefore, we must ask whether they are legitimate26 and, if so, whether the detrimental impact stems exclusively from them. This must involve an analysis of the legitimacy of the regulatory objectives that underlie the relevant distinctions, but also of whether the detrimental impact is calibrated or coherent with the pursuit of those objectives.

Whether such coherence exists, in the view of the European Union, requires an assessment that looks beyond the relevant distinctions (the three production steps and the four labels) and into other connected aspects of a measure. Otherwise, the analysis would essentially stop at the abstract issue of the legitimacy of the objectives sought by the distinctions themselves.

A hypothetical example may help explain why that would be the case. A measure prohibits the use of chemical A in pesticides because it harms the environment. At

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24 Appellant Submission of the United States, para. 195.
25 Panel Reports, paras. 7.201-7.203 and 7.273-7.278. See also the jurisprudence cited in fn 23, as well as the Appellate Body Report, US - Tuna II (Mexico), para. 225.
the same time, it does not regulate the use of chemicals B and C which are proven to be even more harmful. Because there is detrimental impact on the imports of either chemical A or pesticides containing chemical A, the relevant regulatory distinction here is between pesticides that do and those that do not contain chemical A. Insofar as chemical A is harmful, that distinction clearly helps to protect the environment and is thus connected with a legitimate objective. But does the detrimental impact stem exclusively from that objective? Arguably, the fact that chemicals B and C are left unregulated might suggest that it does not, for example because it is partly explained by protectionist reasons. The lack of coherence across comparable regulatory targets clearly weakens the connection between the legitimate regulatory distinction and the detrimental impact. It would, however, be impossible to reach such a conclusion if the assessment was limited only to the relevant regulatory distinctions taken in isolation, because chemicals B and C would not figure in the analysis.

21. Moreover, the European Union agrees with Canada\(^27\) that even hypothetical or rare categories of transactions could be seen as an aspect of the design and architecture of a measure that shows a lack of even-handedness. It would certainly be relevant for the analysis of even-handedness if certain relevant scenarios were treated more or less favourably for reasons that have nothing to do with a measure's purported aim or other legitimate objectives, even if those scenarios do not (or do not yet) frequently occur in practice.

22. At the same time, this broad assessment of even-handedness cannot require regulatory measures to be as pure as the driven snow. In reality, every measure will have a variety of features that cannot be explained by a single overriding objective. A measure might have to mitigate adverse effects on a conflicting objective, or simply on a different objective implicated by the measure. Exempting certain products or certain retail outlets from labelling obligations could be legitimately explained, for example, by different consumer expectations, or different compliance or enforcement costs in those markets.\(^28\) For instance, while

\(^{27}\) Other Appellant Submission of Canada, para. 162.

\(^{28}\) The Panels recognize that costs may in some cases justify exceptions from regulation, but they roundly dismiss those arguments in the dispute at hand because "such practical considerations” do not "justify the discriminatory nature of the amended COOL measure” (para. 7.276). In the European
the fact that the United States does not require point-of-production labelling for muscle cuts derived from animals born, raised and slaughtered abroad (Label D) could be taken into account in the Article 2.1 analysis, the United States could have reasonably concluded that such a requirement would be too burdensome for exporters to comply with and for authorities to monitor and enforce (not to mention trade-restrictive).29 Would this mean that the overall measure is not even-handed, or that it reflects discrimination? In the view of the European Union, such a reading would set the bar prohibitively high for any regulating Member.

23. The analysis of even-handedness is thus relatively broad, but should not be construed as a roving inquiry into every detail of a particular measure and its coherence with a single objective. In order to comply with the second element of the Article 2.1 analysis, a measure \textit{inter alia} needs to be even-handed across directly comparable transactions. The original COOL measure failed this test partly because Labels B and C were less informative than Label A\textsuperscript{30}, even though the covered products were subject to equally stringent recordkeeping obligations. As the United States argues, this particular drawback seems to have been addressed by the amended COOL measure.

24. This leaves the question of whether the United States' decision to maintain the three exemptions from coverage, the prohibition of trace-back and the different treatment of Labels D and E can be explained by arbitrary discrimination, i.e. by a lack of even-handedness, or by other legitimate regulatory objectives. As the European Union has argued, it is not only the general objective of the amended COOL measure (provision of consumer information of origin) but other, secondary objectives (pertaining, for example, to compliance of monitoring costs) that could be considered to explain, for the purposes of the analysis of legitimate regulatory distinctions, looser regulatory approaches in some markets or market segments. Overall, the question that this analysis must answer is not whether the

\textsuperscript{29} See, in this respect, the Appellee Submission of the United States, para. 253.

measure does everything possible to achieve a certain objective to the highest degree, but whether its design and architecture show evidence of arbitrary or unjustifiable discrimination.31

III. ARTICLE 2.2 OF THE TBT AGREEMENT

25. In their Other Appeals, Canada and Mexico challenge the Panels' relational and comparative analysis under Article 2.2 of the TBT Agreement, while the United States argues against an aspect of the Panels' analysis of the risks of non-fulfilment within the relational analysis.

A. Claims and arguments of Canada and Mexico

26. Canada and Mexico appeal the Panels' findings under Article 2.2 of the TBT Agreement.

27. Mexico claims, firstly, that the Panels erred by finding that, in order to show inconsistency with Article 2.2, a comparative analysis can be dispensed with only in exceptional circumstances.32 Canada seems to support this position by claiming that a comparative analysis is required only if the measure at issue appears to be not just necessary, but indispensable.33

28. Both Canada and Mexico find numerous flaws in the way in which the Panels conducted the relational analysis under Article 2.2.

29. Canada argues that the Panels failed to correctly articulate the legal test under Article 2.2.34 In Mexico's view, the relational analysis under Article 2.2 can be described as a "holistic weighing and balancing process" that requires a panel to

31 Ibid. para. 341. In that sense, the present dispute can be distinguished from US-Clove Cigarettes and US-Tuna II (Mexico). Treating the risks of menthol cigarettes differently from those of clove cigarettes, or treating the risks arising from catching tuna outside the eastern tropical Pacific differently from those arising from catching tuna inside it, demonstrated a lack of even-handedness because those measures arbitrarily distinguished between directly comparable risks. Appellate Body report, US-Clove Cigarettes, para. 225; Appellate Body report, US-Tuna II (Mexico), para. 297.
32 Other Appellant Submission of Mexico, section III.A.1.
33 Other Appellant Submission of Mexico, paras. 52-53.
34 Ibid. section III.E.1.
draw conclusions as to whether a particular restriction of trade is necessary. By failing to draw such conclusions at the end of its analysis, the Panels erred.35

30. Regarding the degree of contribution of the amended COOL measure to its objective, Canada argues that the Panels made a legal error by excluding Labels D and E from its relational analysis. Mexico raises that claim in relation to Label E alone.36

31. Both Canada and Mexico claim that the Panels erred in their analysis of the risks of non-fulfilment, notably by failing to ascertain the gravity of the consequences that would arise from non-fulfilment of the objectives of the amended COOL measure.37 Mexico argues that the Panels improperly limited the assessment of the risks of non-fulfilment to consumer interest and willingness to pay and erred by disregarding the relative importance of the interests or values furthered by the amended COOL measure.38 In addition, Mexico claims that the exemptions from coverage and the more flexible rules on Label E also show that the gravity of consequences of non-fulfilment is very low. Canada adds that the Panels failed to consider evidence and arguments regarding consumer demand and willingness to pay or to consider the risks of non-fulfilment from a market failure perspective.39

32. Canada and Mexico also appeal the Panels' findings under the Article 2.2 comparative analysis.

33. Firstly, Canada and Mexico argue that the analysis of alternative measures is distorted and incomplete because of the Panels' previous failure to reach conclusions on the gravity of consequences of non-fulfilment under the "relational analysis". Notably, according to Canada and Mexico, had the Panels correctly concluded that the risks of non-fulfilment were low, they would also have found

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35 Other Appellant Submission of Mexico, section III.A.1., in particular para. 40.
36 Other Appellant Submission of Canada, section III.D.1; Other Appellant Submission of Mexico, section III.B.2. In addition, Canada and Mexico argue that the Panels failed to conduct an objective assessment of the matter at issue by nevertheless taking beef sold under those labels into account when referring to the extent of the amended COOL measure's coverage in the United States market. Other Appellant Submission of Canada, section III.D.2; Other Appellant Submission of Mexico, paras. 58-59.
37 Other Appellant Submission of Canada, section III.E.2; Other Appellant Submission of Mexico, section III.B.3.d.(i).
38 Other Appellant Submission of Mexico, section III.B.3.a.-III.B.3.c.
39 Other Appellant Submission of Canada, paras. 112-115.
the degree of contribution of the proposed alternative measures to be equivalent to that achieved by the amended COOL measure.\textsuperscript{40} The European Union understands the arguments of Canada and Mexico to imply that, if the risks of non-fulfilment are relatively low, there should be more leeway on what an "equivalent" contribution is.\textsuperscript{41}

34. Regarding the first (mandatory labelling of the country of last substantial transformation and voluntary labelling of other production steps, along with a removal of the three exemptions from coverage) and second proposed alternative (extending the ground beef labelling rules to muscle cuts, along with a removal of the three exemptions from coverage), the Panels are claimed to have erred by finding that Canada and Mexico failed to make a \textit{prima facie} case that the contribution of those alternatives is equivalent.\textsuperscript{42}

35. As for the third (mandatory labelling using a trace-back system) and fourth proposed alternative (mandatory state or province designations of origin), Canada and Mexico argue that the Panels imposed an excessive standard of proof on complainants seeking to "adequately identify" alternative measures.\textsuperscript{43} The Panels erred by requiring an overly detailed description that is, in Canada's terms, "akin to a comprehensive regulatory impact assessment".\textsuperscript{44}

36. In their Appellee's Submissions, Canada and Mexico disagree with the reading of the phrase "risks of non-fulfilment" that is advanced by the United States' appeal. They point out that Members are only free to choose their level of protection of regulatory objectives if their rules are otherwise in accordance with the provisions of the TBT Agreement. The risks of non-fulfilment are an integral part of the obligation imposed on Members by Article 2.2 that must be given meaning that is

\textsuperscript{40} Other Appellant Submission of Canada, para. 116; Other Appellant Submission of Mexico, section III.C.1.
\textsuperscript{41} See, for a clear statement of this reasoning, Other Appellant Submission of Mexico, para. 124.
\textsuperscript{42} Other Appellant Submission of Canada, section III.E.3.(a); Other Appellant Submission of Mexico, para. 125.
\textsuperscript{43} Other Appellant Submission of Canada, section III.F; Other Appellant Submission of Mexico, section III.C.3.(c).
\textsuperscript{44} Other Appellant Submission of Canada, para. 153.
different from a search for the least restrictive means of pursuing a given regulatory objective at the desired level.45

B. Claims and arguments of the United States

37. The United States conditionally appeals the Panel's findings on the risks of non-fulfilment. According to the United States, the Panels erred by stating that, in principle, providing less origin information for a wider range of products might achieve an equivalent degree of contribution. This weighing and balancing test would imply, in the United States' view, that panels could second-guess a Member's desired level of fulfilment of a legitimate objective.46

38. In its Appellee Submission, the United States argues that the relational and comparative analyses under Article 2.2 of the TBT Agreement are not separate tests, and that the Panels were not required to make separate findings on the outcome of the relational analysis.47 The United States considers that Labels D and E were properly excluded from the Panels' relational analysis.48

39. The United States considers that the risks of non-fulfilment under Article 2.2 of the TBT Agreement do not involve any assessment of the relative importance of regulatory aims.49 Neither were the exemptions from coverage, or the rules on Label E relevant to the analysis.50 The United States rejects Canada's arguments on the need for a market failure analysis51, as well as Mexico's claims under Article 11 of the DSU regarding the risks of non-fulfilment, noting in particular that Mexico fails to demonstrate an egregious error on the part of the Panels.52

40. In response to Canada's and Mexico's claims on the first and second proposed alternatives, the United States' Appellee Submission argues that the definition of an equivalent contribution cannot vary according to the importance of the

45 Appellee Submission of Canada, section IV; Appellee Submission of Mexico, section V.
46 Appellant Submission of the United States, section III.
47 Appellee Submission of the United States, paras. 57 – 62.
48 Ibid. paras. 76-77.
49 Ibid. paras. 83-84, section II.D.4.a. The United States adds that Article 2.2 lists several relevant elements of consideration in assessing risks, none of which involves the relative importance of aims (para. 108).
50 Ibid. para. 102, section II.D.4.b.
51 Ibid. para. 122.
52 Ibid. paras. 133, 141 and 148.
41. As for the third and fourth proposed alternatives, the United States argues that the level of detail to be provided by the complainants in meeting their burden of proof varies on a case by case basis. Mere identification of an alternative is insufficient, and the seemingly high burden of persuasion is a consequence of the complexity of the alternatives proposed by the complainants in the case at hand. Canada and Mexico do not explain why they consider to have given sufficient information, and in any event do not appeal the ultimate findings of the Panels in that respect. More generally, in the view of the United States, unlike Article XX of the GATT 1994 which is an affirmative defence, the burden of persuasion under Article 2.2 of the TBT Agreement, a positive obligation, rests on the complainant.

C. Observations of the European Union

42. The European Union's observations will roughly follow the issues identified by the Parties in their appeal and other appeals. First, the European Union will address the structure of Article 2.2 of the TBT Agreement, and in particular the relationship between the so-called relational and comparative analyses. The observations regarding the relational analysis will be limited, in turn, to the issues of the degree of contribution to the objective and the risks of non-fulfilment. The observations of the European Union on the comparative analysis will address the two aspects identified by Canada and Mexico: when an alternative measure should be considered to provide an "equivalent" contribution, and what the burden of persuasion is for making a prima facie case in favour of a proposed alternative measure.

1. The structure of Article 2.2

53 Ibid. section II.E.
54 Ibid. paras. 183-186, 196.
55 Ibid. section II.F.
56 Ibid. para. 237.
43. As the Appellate Body clarified in *US-Tuna II*, "Article 2.2 stipulates that technical regulations shall not be 'more trade-restrictive than necessary to fulfil a legitimate objective.' Article 2.2 is thus concerned with restrictions on international trade that exceed what is necessary to achieve the degree of contribution that a technical regulation makes to the achievement of a legitimate objective."\(^57\)

44. In deciding whether a measure is in this sense necessary, the first step is to look at the measure itself, specifically into the legitimacy of its objective, the degree of its contribution to that objective and its trade-restrictiveness, all in light of the risks that the non-fulfilment of the objective would create. This is the so-called relational analysis.\(^58\)

45. The second, closely related step is to compare the measure with reasonably available alternatives which would restrict trade less while making an equivalent contribution to the objective. The Appellate Body has stated that this "comparative analysis", as a "conceptual tool" in the assessment of necessity, should be followed in most cases.\(^59\)

46. In the view of the European Union, these two sets of issues are deeply interlinked. It makes little sense to ask how much a measure contributes to some objective without being aware of alternatives that contribute more or less. The horse carriage was once a highly effective means of transport, but its contribution to the objective of quickly reaching one's destination might seem rather limited when one considers cars and airplanes. Similarly, it is hard to say whether the contribution of the alternative measure is "equivalent" or not without having a clear idea of what the measure at issue actually contributes.

47. In that sense, the European Union fully supports the finding of the Appellate Body that a comparative analysis is required "in most cases". The issue contested by Mexico and, to some extent, Canada is whether this means that a comparative analysis is required in all cases except where there are "exceptional circumstances", and whether those exceptional circumstances must be separately

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\(^{57}\) Appellate Body Report, *US-Tuna II (Mexico)*, para. 319.

shown to exist, as the Panels suggest.\textsuperscript{60} In practical terms, the issue is whether a violation of Article 2.2 should have been found merely on the basis of a relational analysis of the amended COOL measure.

48. Quantifying the difference, if any, between "most cases" and "all but exceptional circumstances" seems to the European Union to be a fruitless task. The important question is what a complainant needs to show in order to make a \textit{prima facie} case of inconsistency with Article 2.2 of the TBT Agreement. In the view of the European Union, such a \textit{prima facie} case could in some circumstances be made without conducting a comparative analysis. For example, a measure might simply lack a legitimate aim, or it might completely fail to contribute to such an aim.\textsuperscript{61} The measure might be redundant and therefore no risks would arise from its non-fulfilment. Regulating the durability of rotary telephone dials in 2015 might in some sense contribute to a legitimate objective, but could be considered unnecessary because non-fulfilment would create no risks whatsoever.

49. Those kinds of circumstances, however, are likely to be rare and highly case-specific. In a typical WTO dispute dealing with Article 2.2, the measure is sufficiently complex to warrant both a relational and a comparative analysis. It seems safe to say that the present dispute falls into that category.\textsuperscript{62}

50. None of this means, however, that the relational and comparative analysis should necessarily be mirror images of each other in terms of the factual and legal issues examined under each. For example, a factor could conceivably show that a measure fails the relational analysis while not being particularly relevant in the comparative analysis, and vice-versa. This point will be taken up in the European Union's observations regarding the degree of contribution to the objective, and arguments related to the Panels' omission of Labels D and E from the analysis.

2. Contribution to objective

\textsuperscript{59} Ibid. para. 376; Appellate Body Report, \textit{US - Tuna II (Mexico)}, para. 320.
\textsuperscript{60} Panel Reports, para. 7.298.
\textsuperscript{61} See, in that sense, Appellate Body Report, \textit{US - Tuna II (Mexico)}, fn. 647. to para. 322.
\textsuperscript{62} In that light, it should be noted that the Appellate Body found the original panel to have erred by finding the original COOL measure inconsistent with Article 2.2 without examining the proposed alternative measures. Appellate Body Report, \textit{US – COOL}, para. 469.
51. The Panels found that the amended COOL measure makes a "considerable, but necessarily partial" contribution to the objective of providing consumer information on origin.63 While its contribution in relation to products to which point of production labelling applies (Labels A, B and C) was held to be significant, it was partly offset by the considerable proportion of total US beef and pork consumption that is occupied by the three exemptions from coverage.

52. The two Other Appeals, taken together, aim to add the market shares of Labels D and E (to which point-of-production labelling also does not apply) to that assessment, thus further diminishing the contribution to the objective.

53. In principle, the European Union agrees with Canada and Mexico that, just because Labels D and E are neither challenged as such for WTO-inconsistency, nor addressed by any of the proposed alternative measures, does not mean that they should be *a priori* excluded from the relational analysis.64 There is no strict parallelism between the issues that are discussed within the relational and comparative analysis.

54. On the other hand, even if Labels D and E should be taken into account, it is questionable whether that would change the outcome of the assessment under Article 2.2. As the European Union has argued in its submission to the Panels65, and as we have also pointed out in our observations on Article 2.1 of the TBT Agreement above, a Member may legitimately impose stricter regulatory requirements for some people or for some market segments, as long as that does not reveal incoherence or protectionism. Of course, if a measure is selective in an arbitrary way, for example by only regulating a small number of randomly chosen transactions, the degree of its contribution to the desired objective would be low. But the position should be different if a measure regulates only certain categories of transactions that can be legitimately distinguished from others (e.g. muscle cuts versus ground meat, supermarket meat versus butchers' meat).

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63 Panel Reports, para. 7.356.
64 Other Appellant Submission of Canada, paras. 82-85; Other Appellant Submission of Mexico, paras. 52-57.
65 Third Party Submission of the European Union in the Panel proceedings, paras. 117-118.
55. In any event, the amended COOL measure is only claimed to be trade-restrictive in relation to products covered by labels B and C. Even when its overall contribution to consumer information is reduced by taking Labels D and E into account, not much is lost, because it leaves intact the question of whether the measure's trade-restrictiveness in relation to products covered by point-of-production labelling is justified by its contribution to informing consumers in relation to those very same products.

3. **The risks non-fulfilment would create**

56. The Panel Reports and the Parties' arguments on appeal raise several important issues regarding the role of the "risks of non-fulfilment" in Article 2.2 of the TBT Agreement.

57. First among them is the relative importance of regulatory objectives. Mexico argues, in particular, that the "relative importance of the values or interests furthered by the amended COOL measure" is a factor to be considered in the analysis of the risks of non-fulfilment. Presumably, the lower a regulatory objective is placed along some predetermined hierarchy of values, the more difficult it should be to show that a measure is necessary in order to achieve it.

58. In this respect, the European Union refers to its detailed submission to the Panel. A hierarchy of values does not exist in WTO law, would be practically impossible to create, and the WTO – much less a particular panel or even the Appellate Body – has no mandate to create one. While it may seem attractive to say that certain objectives are more important than others, the WTO dispute settlement system is not the proper venue for that debate. As the United States points out, it is for the Members to decide which regulatory objectives they will protect and at what level. The WTO disciplines, including Article 2.2 of the TBT Agreement, control those choices, but do not replace a regulating Member's judgment on the relative importance of various objectives.

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66 Other Appellant Submission of Mexico, paras. 78-83.
68 Appellant Submission of the United States, para. 260.
59. Therefore, while the risks of non-fulfilment are, as pointed out by the Appellate Body, a "further element of weighing and balancing"\textsuperscript{69} in the necessity analysis, they are not a separate metric on which the relevance of all other findings hinges. They are merely one of several factors to be taken into account in the necessity analysis.

60. In that light, unlike Canada and Mexico, the European Union does not consider the Panels' necessity analysis to be fatally flawed by its failure to reach definite conclusions on the gravity of consequences of non-fulfilment. The practical importance of Canada's and Mexico's argument is that it might bolster the attempt to show that the proposed alternative measures make an equivalent contribution: a low risk of non-fulfilment would presumably mean that almost any alternative is good enough. The European Union does not share this view. Such a reading would be merely another way of saying that the TBT Agreement is based on a hierarchy, or a "relative importance", of regulatory objectives, and the European Union takes issue with it for the same reasons as above.

61. Regarding the way in which the Panels conducted the analysis of the gravity of the consequences of non-fulfilment, the European Union agrees that consumer interest and willingness to pay are among the issues to be taken into account when debating a measure aimed at providing consumers with information. They should not necessarily be the only ones, however. Indeed, there is something circular in analysing to what degree consumers are interested in consumer protection measures. The amended COOL measure is said to contribute X to informing consumers. We then ask what would be the risks of non-fulfilment, i.e. how grave it would be if X ceased to exist. If our metric for that is simply what information those very same consumers would lose, then the answer is again simply X. The risk of not providing X is that X will not be provided. That is clearly not a particularly informative finding.

62. The metric assessed by the Panels must have therefore been not how much information consumers lose, but how important that information is to consumers. That, however, would lead Article 2.2 into dangerous territory, because the

\textsuperscript{69} Appellate Body Report, \textit{US - Tuna II (Mexico)}, para. 321.
assumption behind it is that Members cannot adopt consumer protection measures, or indeed any other "paternalistic" measures, unless a majority of consumers wants them and is willing to pay for them. This goes beyond any existing WTO disciplines. In fact, standard economic theory suggests that the only regulations that would survive such a reading of WTO law would actually be unnecessary: in the absence of market failures, interested consumers would simply pay for whatever information they want. This would mean that a Member would, as a matter of WTO law, have to demonstrate the existence of a market failure before regulating any market. While some might support such a view, there is nothing in the covered agreements that would require it.

4. Proposed alternative measures

63. In the original dispute, the Appellate Body found that, in order to make a prima facie case of inconsistency, a complainant "may, and in most cases will, also seek to identify a possible alternative measure that is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available." The respondent may then seek to rebut the complainant by showing that the proposed measure, for example, is not reasonably available, is not less trade restrictive, or does not make an equivalent contribution.

64. In principle, the European Union agrees with the United States that a Member's choice of the level of protection of the legitimate objective should not be questioned. Therefore, alternative measures should in principle make a contribution that is equivalent (meaning "equal in value, power, efficacy, or import") to that of the challenged measure. Contrary to the United States, the European Union agrees with the Panel that there might be some circumstances in which an alternative measure could be held to make an equivalent contribution by covering a broader range of transactions in a less demanding way. It should be

70 As the Appellate Body has stated: "In order to demonstrate that a technical regulation is inconsistent with Article 2.2, the complainant must make a prima facie case by presenting evidence and arguments sufficient to establish that the challenged measure is more trade restrictive than necessary to achieve the contribution it makes to the legitimate objective, taking account of the risks non-fulfilment would create. A complainant may, and in most cases will, also seek to identify a possible alternative measure that is less trade restrictive, makes an equivalent contribution to the relevant objective, and is reasonably available." Appellate Body Report, US – COOL, para. 379.
noted, however, that the burden is on the complainant to show why such an alternative makes an equivalent contribution, and this will not be an easy task, especially if the level of fulfilment of a particular aim is complex or hard to quantify.\(^{72}\)

65. As already stated in its submission before the Panels\(^{73}\), the European Union does not consider that Canada and Mexico have fulfilled that burden in outlining their first and second alternative measures. Mandatory labelling of the country of last substantial transformation along with voluntary labelling of production steps, as well as the extension of the 60-day flexibility rule, would not provide meaningful information anywhere close to the level achieved by the amended COOL measure.

66. The objections related to the third and fourth alternative measures, on the other hand, relate essentially to the issue of burden of persuasion.

67. It is well established that the burden of making a *prima facie* case is on the party who asserts the affirmative of a claim or defence, after which the other party may seek to rebut the resulting presumption.\(^{74}\)

68. It is therefore for the complainant, as the party making an affirmative claim, to make a *prima facie* case of inconsistency with Article 2.2. The question in dispute, however, is how much detail the complainant must supply, specifically when "identifying" alternative measures. The European Union notes the Appellate Body's finding that "precisely how much and precisely what kind of evidence will be required to establish such a presumption will necessarily vary from measure to measure, provision to provision, and case to case."\(^{75}\) This expresses, in the view of the European Union, the notion that the burden of persuasion is not to be understood in a mechanistic way. This flexibility may take into account, for

\(^{71}\) Oxford English Dictionary Online.

\(^{72}\) For example, if my aim is to buy something worth 100 euros, I might do so either by working harder or by saving money. Those alternatives can be judged off one another because they are anchored in the same quantifiable objective. In reality, however, most measures aim at much more complex objectives, meaning that it would be harder to show how reducing their discipline while broadening their scope would lead to an equivalent outcome.

\(^{73}\) Third Party Submission of the European Union in the Panel proceedings, paras. 126-129.

\(^{74}\) Appellate Body Report, *US – Wool Shirts and Blouses*, para. 41.

\(^{75}\) Ibid. para. 42.
example, which of the parties has access to particular facts and evidence that form
the basis of a claim or a defence.

69. The European Union agrees with Canada and Mexico that "identifying" a
reasonably available alternative measure, which by necessity means identifying a
hypothetical scenario, cannot require a complainant to describe in detail a fully
worked out measure ready to be put in place by a regulator. For example, contrary
to what the Panels suggest\(^76\), the European Union is not convinced that the
complainant should have to show comparability between the circumstances of the
respondent and a third country (or, as in this case, the European Union) whose
measures are put forward as an example, even when making a prima facie case of
reasonable availability. If anything\(^77\), that is an issue for the respondent to raise in
rebutting the prima facie case of inconsistency.

70. Similarly, the Panels seem to require Canada and Mexico to show how their
alternative measures "would be implemented in the United States" – an obstacle
very difficult to surmount for complainants that are not privy to the details of other
Members' legal systems and social and economic circumstances. The Panels'
requirement that complainants substantiate "the likely nature or magnitude of the
costs that would be associated with the proposed alternative, as compared to the
current system", even with the caveat that they should not have to "provide
quantified cost estimates" for "each and every specific aspect" of that alternative
measure\(^78\), also seems to be excessively burdensome. The European Union notes
that the Panels find support for this statement in the Appellate Body Report in
China – Publications and Audiovisual Products, which describes not the burden of
persuasion of a complainant seeking to identify alternative measures as a part of a
prima facie claim, but that of a respondent attempting to show that the proposed
alternative measure is not reasonably available\(^79\). The fact that China –

\(^{76}\) Panel Reports, para. 7.548.

\(^{77}\) This comparability requirement, while not necessarily irrelevant, should not be seen as an essential
part of the analysis. Indeed, it seems to the European Union that it might create difficulties in many
scenarios. For example, the European Union is said not to be comparable because of differences in
plant sizes and plant speeds, but those differences could in fact, at least partly, be a consequence and
not a cause of the EU's measure.

\(^{78}\) Panel Reports, para. 7.556.

\(^{79}\) Appellate Body Report, China – Publications and Audiovisual Products, para. 327, as well as the
preceding discussion in paras. 318-326.
Publications and Audiovisual Products concerned a defence, rather than an affirmative claim, may have had an impact on the Appellate Body's reasoning, but it should be noted that the United States as the complainant in that case had already "identified" the alternative measure in question.

71. The European Union does not take a definitive position on whether or not Canada and Mexico have discharged their burden of persuasion as regards the third and fourth alternative measures, nor on whether those alternative measures in fact make an equivalent contribution, whether they are less trade restrictive and reasonably available. The Panels' general approach to the allocation of the burden of persuasion seems, however, to be excessively strict towards complainants under Article 2.2 of the TBT Agreement. A prima facie case, in the European Union's view, requires a genuine and coherent explanation of a proposed alternative measure. While that may require a reasonable level of specificity on how that alternative is to be put in place, as well as a discussion of costs, some difference must exist in the level of specificity required in order to raise a presumption of inconsistency and that required from the respondent in rebutting that presumption.

IV. ARTICLES III:4 AND XX OF THE GATT 1994

A. Claims and arguments of the United States

72. The United States appeals the Panels' finding that the amended COOL measure is inconsistent with Article III:4 of the GATT 1994. Specifically, the Panels erred by basing their assessment under that provision solely on a previous finding of detrimental impact under Article 2.1 of the TBT Agreement and by failing to take into account Article IX of the GATT 1994 as context for the interpretation of Article III:4. 80

73. Secondly, the United States argues that the Panels should have addressed the possible availability of an exception under Article XX of the GATT 1994. According to the United States, such an exception must exist if the balance between the elimination of trade restrictions and the right to regulate is to remain the same under Article 2.1 of the TBT Agreement and under Article III:4 of the
GATT 1994. Without some possibility of justification, the latter provision would be more intrusive than the former because it would, under the test outlined by the Panels, prohibit even measures whose detrimental impact stems exclusively from a legitimate regulatory distinction.81

B. Arguments of Canada and Mexico

74. In their Appellee Submissions, Canada and Mexico both argue that the United States' claims related to Article XX of the GATT 1994 are outside the scope of appellate review.82

75. Mexico argues that a finding of detrimental impact suffices to show less favourable treatment under Article III:4 of the GATT 1994.83 In the view of Canada and Mexico, the United States has failed to clarify in what way Article IX of the GATT 1994 should be used in the analysis of Article III:4. Canada argues that claims related to Article IX should be dismissed on procedural grounds84, while Mexico points out that that provision is not a defence, and that it covers border measures different from those in the present proceedings.85

C. Observations of the European Union

1. Article III:4 of the GATT 1994

76. In its submissions to the Panels, predating the Appellate Body's report in EC – Seal Products, the European Union supported the view that, in cases of de facto discrimination under either Article 2.1 of the TBT Agreement or Article III:4 of the GATT, whether or not the detrimental impact of a measure is caused by the even-handed pursuit of a legitimate regulatory distinction is a relevant issue that could in some cases speak against a finding of less favourable treatment.86
77. Underlying that argument was the idea that the provisions of the TBT Agreement and the GATT 1994 should broadly reflect the same balance between the liberalization of trade and regulatory autonomy. Specifically, the European Union was (and still is) concerned about a possible "hallowing out" of the TBT Agreement. The concern is that a detrimental impact on imports might suffice for finding de facto less favourable treatment under Article III:4 of the GATT 1994, while under Article 2.1 of the TBT Agreement such measures can survive scrutiny if they even-handedly pursue a legitimate objective. Violations of Article III:4, however, can only be justified by one of the exhaustively listed grounds of Article XX of the GATT 1994, or some other applicable exception (which may or may not cover consumer information), whereas the list of "legitimate regulatory distinctions" is open (covering, without a doubt, consumer information). Such a reading would give complainants an incentive to ignore the TBT Agreement and pursue national treatment claims on the basis of the GATT 1994 alone, which would be at odds with the TBT Agreement's role as lex specialis.

78. In response to those concerns, the Appellate Body in EC-Seal Products made two main findings. First, Articles 2.1 of the TBT Agreement and III:4 of the GATT 1994 are similar but need not be interpreted identically, meaning that a violation of III:4 of the GATT 1994 can be found without considering whether the measure's detrimental impact stems exclusively from a legitimate regulatory distinction. Second, "under the TBT Agreement, the balance between the desire to avoid creating unnecessary obstacles to international trade under the fifth recital, and the recognition of Members' right to regulate under the sixth recital, is not, in principle, different from the balance set out in the GATT 1994, where obligations such as national treatment in Article III are qualified by the general exceptions provision of Article XX."
79. The European Union does not put those findings into question. The Panels' approach to Article III:4 of the GATT in this particular case, however, is questionable because it fails to take into account the need for a harmonious and contextual interpretation of national treatment obligations across the covered agreements, which was a central element of the Appellate Body's findings on Article III:4 in *EC-Seal Products*.

80. In essence, the Panels have made a summary judgment that, simply because a finding of a detrimental impact on imports has been made under Article 2.1 of the TBT Agreement, there is automatically a violation of Article III:4 of the GATT 1994. In the view of the European Union, such an approach is mistaken. At a minimum, the specific and more immediate context of Article III:4, as applied to the measure at issue, should have been taken into account.

81. The United States' appeal raises, for the first time in these compliance proceedings, the point that Article IX of the GATT 1994 could be seen as a part of that context. The European Union refers here to its detailed submissions to the Panels in that respect. As those submissions argued, and as the United States now suggests, the provisions of Article IX (and eventually the Agreement on Rules of Origin) best reveal how the Contracting Parties of the GATT 1994 view the balance between trade liberalisation and regulatory autonomy in the context of rules on origin, a matter that is adjacent to, and even risks to overlap with, the origin labelling rules in the amended COOL measure. They point out, for example, that laws on marks of origin should seek to minimize inconveniences to commerce while protecting consumers against fraudulent or misleading indications (Article IX.2), and that laws on marking imported products shall be such as to permit compliance without, *inter alia*, unreasonably increasing their cost (Article IX.4). As the most specific provision of the GATT 1994 on these issues, Article IX should surely be taken into account when deciding what constitutes *de facto* less favourable treatment under Article III:4. To read the concept of *de facto* breach into Article III:4 (which is not expressly provided for in that provision), thus accepting the possibility, even absent any *de jure* breach, of looking at all the facts in order to nevertheless construe a *de facto* breach, but not take into account the
legal facts of the immediately relevant context, including Article IX and the Agreement on Rules of Origin, seems to lack balance.

82. Therefore, when deciding whether a facially neutral law on origin labels creates de facto discrimination, the European Union does not consider it unreasonable to look at Article IX of the GATT 1994 and the Agreement on Rules of Origin for contextual guidance. Were the Appellate Body to find that the amended COOL measure follows the principles laid down by Article IX, and eventually the Agreement on Rules of Origin, such a finding may put the Panel's summary finding of less favourable treatment under Article III:4 of the GATT 1994 into question. The European Union does not take a position on whether the Appellate Body should complete the analysis in this way, given the late stage in which the argument was raised by the United States. But the issue certainly merits discussion.

83. Another way of reading Article III:4 in the context of Article IX of the GATT 1994 would be by focusing on whether the detrimental impact is attributable to the measure at issue. The European Union notes the Appellate Body's clear finding in EC – Seal Products that attribution "does not involve an assessment of whether such detrimental impact stems exclusively from a legitimate regulatory distinction." In the context of rules on origin marking or labelling, however, it might be reasonable to conclude that, as long as a Member has complied with the principles of Article IX of the GATT 1994 – the most pertinent provision on the issue – any remaining de facto detrimental impact of its measure on imports should no longer be attributed to the measure. Rather, it could be subsequent market developments, such as the lack of investment by private actors in innovative processing techniques or distribution channels, that best account for the detrimental impact.

84. Again, the European Union does not assert that this is necessarily true of the amended COOL measure. It suffices to point out that, if the GATT 1994 is to be read in a contextual and holistic way that would compensate for the mismatch between the Appellate Body's approaches to national treatment under Article 2.1

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92 Third Party Submission of the European Union in the Panel proceedings, section VI.
of the TBT Agreement and Article III:4 of the GATT 1994, these are clearly among the relevant issues that should have been considered. The Panels failed to do so.

85. In addition, the European Union notes that the present dispute seems to be the first occasion on which the Appellate Body genuinely faces the risk of a measure surviving scrutiny under Article 2.1 of the TBT Agreement (assuming that the United States' appeal on legitimate regulatory distinctions succeeds) while at the same time being inconsistent with the GATT 1994 (given that there is no obviously applicable exception under Article XX, or at least not one that has been developed in detail by the defendant during the course of the panel proceedings). The European Union notes that this was not the case before the Appellate Body in EC – Seal Products, where, firstly, the measure was held not to fall within the scope of the TBT Agreement at all and, secondly, Article XX exceptions were in fact available. Neither was it the case before the Panels in this dispute, whose finding of a violation under Article 2.1 of the TBT Agreement made further findings under the GATT 1994 somewhat academic. If the Appellate Body wishes to develop the notion of a balance between the national treatment obligations and the applicable justifications across the two agreements, this may be the dispute in which to do so.

2. Article XX of the GATT 1994

86. The United States further argues that the Panels' analysis under Article III of the GATT was in error because it failed to address the availability of an Article XX exception that would fit the amended COOL measure.

87. The European Union notes that, in a GATT 1994 dispute, it is normally for the respondent to raise and defend a claim under Article XX. As Canada and Mexico point out, panels are not required to apply Article XX of the GATT 1994 of their

93 Appellate Body Report, EC-Seal Products, para. 5.105.
own motion whenever a violation of some provision of that agreement is invoked. It is not apparent why the United States could not have attempted an Article XX defence in this dispute, at least conditionally, regardless of the fact that the Appellate Body report in EC – Seal Products was still pending at the time and the ensuing uncertainties of legal interpretation. The European Union also notes that, even in its appeal, the United States does not attempt to identify a specific paragraph of Article XX that could be applied in this dispute.

88. This vagueness of the United States' submission is, however, indicative of the deeper problem that the European Union has touched upon above: it is unclear whether any paragraph of Article XX applies in this case.

89. If the European Union were to speculate along those lines, one part of Article XX of the GATT 1994 that might seem to offer some support to the amended COOL measure would be paragraph (d), dealing with measures "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement". In principle, it seems clear that consumer protection is an objective that could legitimately be pursued by laws not otherwise inconsistent with the GATT 1994. On the other hand, this paragraph seems to require invoking Members to identify a measure that is separate from the one that prima facie breaches another provision of the GATT 1994. Otherwise, the words "not inconsistent with" would be purely circular: a law is justifiable under Article XX(d), therefore it is not inconsistent with the GATT 1994, therefore it can be justified by Article XX(d). Since the amended COOL measure has not been claimed to be necessary for compliance with any other measure, however, such a justification may be problematic.

90. In the absence of specific arguments by the United States, the European Union will not further comment on Article XX of the GATT 1994. It should be reiterated, however, that the breadth and flexibility of Article XX is one of the issues pertinent to the balance between the TBT Agreement and the GATT 1994 that the

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Appellate Body has highlighted in *EC-Seal Products*. To the extent that such a balance can be preserved by interpreting the GATT 1994 in a way that respects legitimate regulatory objectives as much as the TBT Agreement does, the Appellate Body should strive to do so. In this respect, an appropriate interpretation of Article XX may be of considerable assistance to Members.

V. NON-VIOLATION CLAIMS UNDER ARTICLE XXIII:1(B) OF THE GATT 1994 IN PROCEEDINGS UNDER ARTICLE 21.5 DSU

A. Claims and arguments of the United States

91. The United States conditionally appeals the finding that Canada's and Mexico's non-violation claim fall within the Panels' terms of reference. Specifically, the Panels erred by disregarding the wording of Article 21.5 of the DSU, which refers to the "consistency" of measure taken to comply with the covered agreements. For the same reason, the United States considers that the complainants' appeals on non-violation claims should be rejected.

B. Claims and arguments of Canada and Mexico

92. Should the Appellate Body reverse the Panels' findings of a violation under Article 2.1 of the TBT Agreement and/or under Article III:4 of the GATT 1994, Canada and Mexico both conditionally appeal the Panels' exercise of judicial economy in respect of their claim under Article XXIII:1(b) of the GATT 1994, and ask the Appellate Body to complete the analysis.

93. In their Appellee Submissions, Canada and Mexico argue that Panels correctly included non-violation claims in their terms of reference. According to Mexico, the existence of Article XXIII:1(b) indicates that the application of a measure does not need to result in a violation to be considered inconsistent with the GATT 1994 if it nullifies or impairs a benefit. Canada argues that the Panels correctly...

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95 See fn. 91 above.
96 Appellant Submission of the United States, section VI.
97 Appellee Submission of the United States, section IV.
98 Other Appellant Submission of Canada, section V; Other Appellant Submission of Mexico, section V.
considered the objectives of prompt compliance and efficient proceedings in their interpretation of Article 21.5 of the DSU.\(^\text{99}\)

**C. Observations of the European Union**

94. Article XXIII:1(b) of the GATT 1994 provides for a so-called non-violation complaint, that is, a claim that a benefit accruing directly or indirectly under the GATT 1994 is being nullified or impaired by the application of a measure, whether or not it conflicts with the GATT 1994. Article 26 of the DSU addresses this type of complaint. It provides for a panel or the Appellate Body to make "rulings and recommendations". It also provides that the procedures in the DSU (thus, including Article 21.5 of the DSU) apply, subject only to four qualifications.

95. First, the complaining party must present a detailed justification. Second, in case of a successful claim, there is no obligation to withdraw the measure, but the panel or Appellate Body shall recommend that the Member concerned make a "mutually satisfactory adjustment". A mutually satisfactory adjustment could be either an adjustment to the original measure at issue, or an adjustment to some other measure, including compensation. Third, arbitration on a reasonable period of time pursuant to Article 21.3 of the DSU may include a determination of the level of benefits which have been nullified or impaired, as well as non-binding suggestions as to the ways and means of reaching a mutually satisfactory adjustment. It should be noted the words "notwithstanding the provisions of Article 21" in Article 26.1(c) of the DSU logically include a reference to Article 21.5, thus implying that Article 21.5 is in principle applicable to non-violation complaints. Fourth, compensation may be part of a mutually satisfactory adjustment as final settlement of the dispute.

96. It seems clear to the European Union that the proposition that a non-violation claim can never be made in compliance proceedings would be incorrect. In the event of an original proceeding consisting of only one successful non-violation claim there would be rulings (relating to the constituent elements of the non-violation claim) and a recommendation that the Member concerned make a

\(^{99}\) Appellee Submission of Mexico, section VII; Appellee Submission of Canada, section VI.
mutually satisfactory adjustment, pursuant to Article 26.1(b) of the DSU. If, in order to comply with those rulings and that recommendation, the defending Member would neither offer nor agree compensation, but rather recast the original measure at issue, the question would be whether or not this would be a "mutually satisfactory adjustment" within the meaning of Article 26.1(b) of the DSU. Consequently, if there would be a disagreement on that point between the complaining Member and the defending Member, then there would be a "disagreement" as to the consistency with a covered agreement (specifically, at least Article 26.1(b) of the DSU, the DSU being a covered agreement) of a measure taken to comply with the recommendations and rulings, within the meaning of Article 21.5 of the DSU.

97. Article 19.1 of the DSU (which refers to a recommendation that the Member concerned bring the inconsistent measure into conformity) and footnote 10 (which cross-refers to Article 26 with respect to recommendations in the case of non-violation complaints) do not support a different conclusion.

98. It is correct that, in original proceedings, and with respect to non-violation complaints, footnote 10 directs the reader to Article 26.1(b). However, as indicated above, the concept of a "mutually satisfactory adjustment" within the meaning of Article 26.1(b) of the DSU could include an adjustment to the original measure at issue, including by means of a declared measure taken to comply. In such circumstances, as indicated above, the issue would be a disagreement about consistency with, at least, Article 26.1(b) of the DSU. This is caught by the "consistency" language of Article 21.5 of the DSU, even if the original recommendation would have fallen into footnote 10 and Article 26.1(b), as opposed to the "inconsistent" language of the first sentence of Article 19.1.

99. However, it also seems reasonably clear to the European Union that a non-violation claim cannot be raised for the first time in compliance proceedings, or in other cases where no recommendation has been made under Article 26.1(b) in the original proceedings.

100. According to the well-established case law of the Appellate Body, the general rule is that once a declared measure taken to comply is within the scope of compliance
proceedings, as in this case, any violation claim may be made against it, including with respect to any new violation.\textsuperscript{100} There is no close nexus requirement as regards claims. Thus, for example, an original measure at issue may be found inconsistent with an MFN obligation. The defending Member may adopt a declared measure taken to comply. The complaining Member may bring compliance proceedings alleging breach of any other obligation, including, for example, a national treatment obligation. The fact that no such claim may have been made in the original proceedings and that there are no rulings or recommendations with respect to such claim is irrelevant. However, the claims made in the compliance proceedings will still be claims as to "consistency", within the meaning of Article 21.5.

101. The difficulty with raising a non-violation complaint for the first time in compliance proceedings flows from the fact that, as explained above, in the case of a successful non-violation claim in original proceedings, the recommendation made pursuant to Article 26.1(b) is the necessary foundation for the subsequent "disagreement as to … consistency" within the meaning of Article 21.5. If there is no successful non-violation claim in the original proceedings, there is no recommendation pursuant to Article 26.1(b) of the DSU, hence nothing to ground a subsequent claim of inconsistency within the meaning of Article 21.5. This is also reflected in the fact that neither of the compliance panel requests in these proceedings includes a claim of inconsistency with Article 26.1(b). As a matter of logic, they could not do so, because there was no recommendation pursuant to Article 26.1(b) made in the original proceedings. This simply confirms the fact that, by way of exception from the general rule, non-violation complaints can only be raised in compliance proceedings insofar as they relate to a recommendation pursuant to Article 26.1(b), that is, a successful non-violation complaint made in the original proceedings.

\textsuperscript{100} Appellate Body Report, \textit{Canada – Aircraft (Article 21.5 – Brazil)}, para. 41 ("… in carrying out its review under Article 21.5 of the DSU, a panel is not confined to examining the “measures taken to comply” from the perspective of the claims, arguments and factual circumstances that related to the measure that was the subject of the original proceedings."); Appellate Body Report, \textit{US – Zeroing (EC) (Article 21.5 – EC)}, para. 206 ("Article 21.5 also requires the compliance panel to examine, in light of the claims raised, whether the measures taken to comply are consistent with the relevant covered agreement … ").
VI. CONCLUSIONS

102. The European Union considers that this case raises important questions on the interpretation of Articles 2.1 and 2.2 of the TBT Agreement, of Articles III and XX of the GATT 1994 as well as of Article 21.5 of the DSU. The European Union requests the Appellate Body to carefully review the scope of the claims in light of the observations made in this submission. The European Union reserves its right to make further comments at the oral hearing.