WTO DISPUTE ANALYSIS*

Centre for WTO Studies
Indian Institute of Foreign Trade
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Reports of the Appellate Body

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

(WT/DS384/AB/R; WT/DS386/AB/R)
(Circulated on 29 June 2012)

**Parties:**

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| *Appellant / Appellee*: | United States (US) |
| *Other Appellant / Appellee*: | Canada, Mexico |
| *Third Participants*: | Argentina, Australia, Brazil, China, Colombia, European Union, Guatemala, India, Japan, Korea, New Zealand, Peru and Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu |

**Appellate Body Division:**

Bhatia (Presiding Member), Ramirez-Hernandez (Member), Van den Bossche (Member),

## I. BACKGROUND

This appeal concerns issues of law and legal interpretations developed in the Panel Reports *United States – Certain Country of Origin Labelling (COOL) Requirements*[1] ("Panel Reports"), and challenged by Canada, Mexico and the United States. The Panel was established to consider complaints by Canada and Mexico regarding certain US country of origin labelling ("COOL") requirements for beef and pork. In particular, both Canada and Mexico challenged the:

(a) Agricultural Marketing Act of 1946 , as amended by the "2002 Farm Bill" and the "2008 Farm Bill" (the "COOL statute");
(b) Final Rule on Mandatory Country of Origin Labelling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts (the "2009 Final Rule (AMS)");

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**This issue can also be accessed online at http://wtocentre.iift.ac.in/DisputeAnalysis.asp . Queries and comments are most welcome and may be directed to disputes_cws@iift.ac.in.

[1] WT/DS384/R; WT/DS386/R, 18 November 2011

(c) letter dated 20 February 2009 from the US Secretary of Agriculture, Thomas J. Vilsack, to "Industry Representative[s]" (the "Vilsack letter"); and
(d) Interim Final Rule on Mandatory Country of Origin Labelling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts (the "Interim Final Rule (AMS)").

In addition to the above, Mexico also challenged the Interim Final Rule on Mandatory Country of Origin Labelling of Muscle Cuts of Beef (Including Veal), Lamb, Chicken, Goat, and Pork; Ground Beef, Ground Lamb, Ground Chicken, Ground Goat, and Ground Pork (the "Interim Final Rule (FSIS)"). The measures challenged imposed on retailers an obligation to provide origin information on the covered commodities that they sold, including a range of meat products, as well as other agricultural products. The measures also set out the criteria that needed to be met for the covered commodities to be labelled as US origin. Canada and Mexico challenged the measures insofar as they regulated the labelling of beef and pork. For these meat products, origin was defined according to the country or countries in which certain steps in the production of the meat occurred. For instance, US origin could only be granted to meat derived from an animal that was exclusively born, raised, and slaughtered in the United States. The measures further set out the rules for determining the country or countries of origin of meat when some or all of the relevant production steps (birth, raising, and slaughter) involved in the meat production process had taken outside the US, and created four different labelling categories for muscle cut meat and one for ground meat. (Para 3)

Both complainants claimed that the challenged measures were inconsistent with Articles 2.1 and 2.2 of the *Agreement on Technical Barriers to Trade* (the "*TBT Agreement*"), and with Articles III:4 and X:3(a) of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"). Mexico additionally claimed that the COOL requirements were inconsistent with Articles 2.4, 12.1, and 12.3 of the *TBT Agreement*. The Panel Reports were circulated on 18 November 2011 and the Panel *inter alia* concluded that while the COOL measure was a 'technical regulation' within the meaning of Article 1.1 to the *TBT Agreement*, the Vilsack letter was not. Moreover, the Panel found the COOL measure to be in violation of Articles 2.1 and 2.2 of the *TBT Agreement*. The Panel however, did not make a finding on the COOL measure under Article III:4 of GATT 1994, and refrained from examining the non-violation claim under Article XXIII:1(b) of the GATT 1994. The Panel also rejected Mexico's claims under Articles 2.4, 12.1, and 12.3 of the *TBT Agreement* and Article X:3(a) of the GATT 1994. The US on 23 March 2012, and Canada and Mexico on 28 March 2012, notified their intention to appeal certain issues of law and legal interpretation covered in the Panel Reports. (Paras 4 -11)

## II. KEY ISSUES AND APPELLATE BODY FINDINGS

### A. Background and Overview of the Measure at Issue

Canada and Mexico challenged the following five measures before the Panel: (i) the COOL statute; (ii) the 2009 Final Rule (AMS); (iii) the Vilsack letter; (iv) the Interim Final Rule (AMS), and (v) the Interim Final Rule (FSIS). The COOL measure comprised the COOL statute, passed by the US Congress and its implementing regulations, promulgated by the Secretary of Agriculture through the US Department of Agriculture's (the "USDA") Agricultural Marketing Service ("AMS") (2009 Final Rule (AMS)).

The COOL measure was a US internal measure, and provided that a retailer of a covered commodity shall inform consumers, at the final point of sale of the covered commodity to consumers, of the country of origin of the commodity. Both beef and pork were covered by the COOL measure. The products at issue in these disputes were livestock, i.e., cattle and hogs. The COOL statute established the following four categories of origin for the muscle cuts of meat:

1. **Category A – United States country of origin**: meat derived from animals that are "exclusively born, raised, and slaughtered in the United States";
2. **Category B – Multiple countries of origin**: meat derived from animals:
   (1) "not exclusively born, raised, and slaughtered in the United States"; or
   (2) "born, raised, or slaughtered in the United States"; and
   (3) "not imported into the United States for immediate slaughter".
3. **Category C – Imported for immediate slaughter**: meat derived from animals "imported into the United States for immediate slaughter"; and
4. **Category D – Foreign country of origin**: meat derived from animals "not born, raised, or slaughtered in the United States". (Paras 239-243)

The COOL statute required the US retailers to provide consumers with country or countries of origin information for the meat they sold within the US market. The details as to how retailers were to comply with this obligation were elaborated in the 2009 Final Rule (AMS), which also included certain flexibilities regarding the permitted origin labelling of "commingled" meat. In order to comply with the COOL requirements, livestock and meat producers needed to possess, at each and every stage of the supply and distribution chain, information on origin, as defined by the COOL measure, and they needed to transmit such information to the next processing stage. To verify compliance, the COOL measure imposes certain recordkeeping requirements as part of its "audit verification system". (Paras 244-249)

The Vilsack letter was distributed to the industry representatives on 20 February 2009 by the newly appointed US Secretary of Agriculture, Thomas J. Vilsack, expressing concerns about certain aspects of 2009 Final Rule, which had at that point of time issued but not yet entered into force. Vilsack suggested that the industry voluntarily adopt certain practices in their implementation of the COOL requirements. According to the US, this letter was withdrawn on 5 April 2012. This measure was implicated only in Canada's appeal regarding Articles III:4 and XXIII:1(b) of the GATT 1994. (Paras 250-251)

## B. Article 2.1 of the *TBT Agreement*

*Introduction*

Canada and Mexico claimed before the Panel that the COOL measure was inconsistent with the US's national treatment obligation under Article 2.1 of the *TBT Agreement*. The Panel had found that the COOL measure, particularly in regard to the muscle cut meat labels, violated Article 2.1 because it afforded imported livestock treatment less favourable than that accorded to like domestic livestock. The US appealed this finding, as well as the Panel's intermediate conclusion that "the COOL measure on its face accords different treatment to imported livestock". The US also asserted that the Panel acted inconsistently with its duties under Article 11 of the *Understanding on Rules and Procedures governing the Settlement of Disputes* ("DSU") in reaching certain factual findings on which, according to the US, the Panel's legal conclusions under Article 2.1 were based. (Para 254)

*Interpretation of Article 2.1 of the TBT Agreement*

The Appellate Body observed that Article 2.1 contains both a national treatment obligation and a most-favoured nation ("MFN") treatment obligation. In order to establish a violation of the national treatment obligation in Article 2.1, a complainant must demonstrate three elements: (i) that the measure at issue was a "technical regulation" as under Annex 1.1 to the *TBT Agreement*; (ii) that the imported and domestic products at issue were "like products"; and (iii) that the measure at issue accorded less favourable treatment to imported products than to like domestic products. The first two of these elements were not at issue in this appeal. With regard to the third element, the Appellate Body noted that a reading of Article 2.1 of the *TBT Agreement* and its context supported a view that Article 2.1 did not operate to

prohibit *a priori* any restriction on international trade. Thus, it should not be read to mean that any distinctions, in particular, ones that are based *exclusively* on such particular product characteristics or on particular processes and production methods, would *per se* constitute less favourable treatment within the meaning of Article 2.1. (Paras 266-268)

(***Key Question***: *How relevant is the effect of a measure on the competitive opportunities in the market in assessment of detrimental impact on imported products under Article 2.1 of the TBT Agreement?)*

The Appellate Body also observed that in every case, it was *the effect of the measure on the competitive opportunities in the market* that was relevant to an assessment of whether a challenged measure has a detrimental impact of on imported products. However, even if such an impact on imported products was seen, this would not in itself be dispositive of a violation of Article 2.1 because not every instance of detrimental impact would amount to the less favourable treatment of imports that was prohibited under the provision. Rather, some technical regulations that have a *de facto* detrimental impact on imports may not be inconsistent with Article 2.1 when such impact stems exclusively from a legitimate regulatory distinction. (Para 271)

*Application of Article 2.1 of the TBT Agreement: "Treatment No Less Favourable"*

In analyzing the Panel's findings under Article 2.1 of the *TBT Agreement* with respect to "treatment no less favourable", the Appellate Body addressed the two claims of the US relating to the detrimental impact that the Panel had found was caused by COOL measure; the claim of the US under Article 11 of the DSU and it reviewed the Panel's factual findings as they related to an assessment of whether any detrimental impact was caused by the COOL measure.

1. Detrimental Impact

   a. "Different Treatment"

The Panel had, before assessing Canada and Mexico's claims that the COOL measure accorded *de facto* less favourable treatment to imported livestock, observed that under the COOL measure, imported livestock was ineligible for the label reserved for meat from exclusively US-origin livestock. However, in certain circumstances meat from domestic livestock was eligible for a label that involved imported livestock. The US argued on appeal that the Panel was wrong to conclude that "the COOL measure on its face accords different treatment to imported livestock". The US also added that the COOL measure did not treat muscle cuts of meat differently based on whether they were derived from imported or from domestic livestock. Canada and Mexico argued that the Panel did not rely upon its "initial finding of *de jure* different treatment" in coming to its conclusion that the COOL measure was inconsistent with Article 2.1. Rather, the Panel recognized that different treatment on the face of a measure did not necessarily constitute less favourable treatment, as indicated by the Appellate Body's findings in *Korea – Various Measures on Beef*.[2] According to Canada and Mexico, the Panel was correct, therefore, in analyzing whether, on the specific facts of this case, the COOL measure created an incentive in favour of processing exclusively domestic livestock and a disincentive against handling imported livestock. (Paras 274 - 276)

The statement challenged by the US thus formed part of an introductory section setting out the Panel's understanding of the measure's *de jure* structure and operation, and preceded its indepth analysis of *de facto* discrimination. The Appellate Body viewed the statement, made at this initial stage of the Panel's

[2] Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001,

reasoning, merely as a passing observation regarding the extent to which the COOL measure *de jure* treated imported livestock differently than domestic livestock. Furthermore, the Panel's later conclusions with regard to the COOL measure's *de facto* inconsistency with Article 2.1 were not based on this statement, or even directly connected to it. Thus, the Appellate Body found that the Panel did not err, in paragraph 7.295 of the Panel Reports, in stating that the COOL measure treated imported livestock differently than domestic livestock. (Para 279)

b. Did the Panel err in finding that the COOL Measure has a detrimental impact on imported livestock?

In appealing the Panel's ultimate finding of inconsistency under Article 2.1 of the *TBT Agreement*, the US submitted that, in order to determine whether the COOL measure accorded less favourable treatment to imported products than to like domestic products, the Panel should have followed past Appellate Body reports in *Thailand – Cigarettes (Philippines)*[3], *Korea – Various Measures on Beef*[4], and *Dominican Republic – Import and Sale of Cigarettes*[5]. According to the US, these reports generally focused on: (i) whether the measure *itself* treats imported products differently and less favourably than like domestic products *on the basis of their origin*; and (ii) to the extent that there are adverse effects on imported products, whether these effects are attributable to the measure *itself* or are based on external non-origin-related factors, such as pre-existing market conditions and the independent actions of private market actors. The US argued that the Panel, however, wrongfully assessed whether imported livestock were equally competitive with domestic livestock. (Para 280)

Canada and Mexico asserted that the Panel's legal approach to interpreting and applying Article 2.1 was correct, and that the Panel rightly found that the COOL measure itself treated imported livestock less favourably than domestic livestock. (Para 283)

The Appellate Body noted that where a technical regulation did not discriminate *de jure*, a panel must determine whether the evidence and arguments adduced by the complainant in a specific case nevertheless demonstrated that the operation of the measure, in the relevant market, had a *de facto* detrimental impact on the group of like imported products. The Appellate Body further noted that:

(i) The US was correct to point out that, as the Panel found, the COOL measure did not legally compel market participants to choose between processing either exclusively domestic or exclusively imported livestock. However, the Panel also found that the design of the COOL measure and its operation within the US market meant that segregation of livestock was "a practical way to ensure [compliance]". (Para 287)
(ii) The circumstances of these disputes were similar to those in *Korea – Various Measures on Beef*. In that case, Korea had established a "dual retail system" that required small retailers to sell either exclusively domestic beef or exclusively imported beef. The Appellate Body had held that it did not find a detrimental impact on imported beef due only to "[t]he legal necessity of making a choice" that the measure itself imposed.[6] Rather, it held that the adoption of a measure requiring such a choice to be made had the "direct practical effect", in that market, of denying competitive

[3] Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R, adopted 15 July 2011
[4] Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001
[5] Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005
[6] Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 200, Para. 146.

opportunities to imports. Thus, contrary to the US's arguments in this respect, the findings in *Korea – Various Measures on Beef* did not stand for the proposition that private market participants must be legally required to make a choice in order for the incentives that determine how such choice will be exercised to be attributed to a governmental measure (Para 288)

(iii) The Appellate Body agreed with Canada and Mexico that the Panel's findings indicated that the COOL measure itself, as applied in the US livestock and meat market, created an incentive for US producers to segregate livestock according to origin, in particular by processing exclusively US-origin livestock. A market's response to the application of a governmental measure is always relevant to an assessment of whether the operation of that measure accords *de facto* less favourable treatment to imported products. (Para 289)

(iv) While detrimental effects caused *solely* by the decisions of private actors could not support a finding of inconsistency with Article 2.1, where private actors were induced or encouraged to take certain decisions *because of the incentives created by a measure*, those decisions were not "independent" of that measure. (Para 291)

(***Key Question***: *What are the key steps involved in conducting a detrimental impact analysis under Article 2.1 of the TBT Agreement?)*

Based on the foregoing, the Appellate Body found that the Panel did not err, in finding that the COOL measure modified the conditions of competition in the US market to the detriment of imported livestock by creating an incentive in favour of processing exclusively domestic livestock and a disincentive against handling imported livestock. However, according to the Appellate Body while the Panel's legal approach to assessing detrimental impact was correct, the Panel ended its analysis under Article 2.1 of the *TBT Agreement* there, which was an incomplete analysis. The Panel should have continued its examination and determined whether the circumstances of this case indicated that the detrimental impact stemmed exclusively from a legitimate regulatory distinction, or whether the COOL measure lacked even-handedness. Therefore, the Appellate Body considered it appropriate to review the Panel's findings as they related to the design, architecture, revealing structure, operation, and application of the COOL measure in order to determine whether it could reach a conclusion in this respect. (Paras 292-293)

2. Did the Panel err under Article 11 of the DSU in making certain factual findings in the course of its analysis under Article 2.1 of the *TBT Agreement*?

(i) Segregation and Commingling

The US argued that the Panel acted inconsistently with its obligations under Article 11 of the DSU in finding that the COOL measure "necessitates" segregation, and in ignoring evidence showing that producers were taking advantage of the commingling flexibilities contained in the measure in order to avoid segregation "on a widespread basis". Both Canada and Mexico submitted that the US had not substantiated its claims under Article 11 of the DSU as the threshold for establishing an Article 11 violation was very high. (Paras 295-298)

The Appellate Body recalled that, in accordance with Article 11 of the DSU, while a panel was required to 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, it was generally within the discretion of the panel to decide which evidence it chose to utilize in making findings. The US challenged the Panel's finding that the COOL measure "necessitates" segregation. The Panel stated that, "for all practical purposes, the COOL measure necessitates segregation of meat and livestock according to origin, *even though this segregation is subject to certain flexibilities*". Thus, while the Panel found that the operation and application of the COOL measure "necessitates" segregation, it did not suggest that segregation was legally required, or was always required to the same extent. (Para 299)

In finding that the COOL measure "necessitates segregation", the Panel had relied on several pieces of evidence, like the USDA's Country of Origin Labelling Compliance Guide ("Compliance guide"). The Appellate Body noted that the US did not directly dispute the Panel's interpretation of the various pieces of evidence, but argued that, if they had been assessed properly, this would inevitably have led the Panel to the conclusion that widespread commingling was occurring in the US market. Moreover, the US itself seemed to acknowledge that it was possible that a piece of meat could have three countries of origin under the COOL measure. For these reasons, the Panel's conclusion—namely, that a Category B label displaying three countries of origin did not necessarily indicate that the package contained commingled meat—did not seem to be incompatible with an objective assessment of the evidence. However, the Panel did not find that the specific evidence relied upon by the US demonstrated that commingling was taking place in the US market "on a widespread basis". The fact that the Panel found this evidence not to be probative as to the *extent* of commingling occurring in the market as a whole, simply indicated that the Panel declined to attribute to the evidence the weight and significance that the US considered it should have. (Paras 308-309)

Based on the Article 11 standard articulated above, the Appellate Body did not believe that the Panel's determinations regarding segregation and commingling evinced a failure to assess the facts objectively, and hence the Panel did not act inconsistently with its duties under Article 11 of the DSU. (Para 310)

(ii) The existence of a price differential

The US also alleged that the Panel failed to make an objective assessment of the facts relating to the price differential between domestic and imported livestock in the US market, as it failed to consider all the evidence before it and only considered evidence submitted by the complainants. The Panel had discussed the differences in the prices of imported Canadian and Mexican livestock in two distinct parts of its reasoning. First, in its analysis of consistency of the COOL measure with Article 2.1 of the *TBT Agreement*, where the Panel had found that the least costly way of complying with the COOL measure was to rely on exclusively domestic livestock. Later, the Panel had observed that the COOL measure created an incentive to use domestic livestock – by imposing higher segregation costs on imported livestock than on domestic livestock. (Paras 314-316)

In finding that US producers were applying a COOL discount for imported livestock, the Panel relied on numerous exhibits submitted by Canada and by Mexico. The US's arguments relied to a large extent on Panel Exhibit US-108. This exhibit contained data comparing the prices of US and Canadian feeder and slaughter cattle, of US and Mexican feeder cattle, and of US and Canadian hogs, during the first nine months of 2010. For each category, the data showed a decrease in the price differential between imported and domestic livestock between January and September 2010. The Appellate Body observed that the fact that the Panel did not refer to or discuss the evidence put forward by the US in Panel Exhibit US-108 could suggest that the Panel did not take account of this evidence. However, it recalled that the Appellate Body had found that a panel need not refer to or discuss each and every piece of evidence put before it in order to comply with its obligations under Article 11 of the DSU. (Paras 317-321)

Based on its submissions before the Panel, the Appellate Body agreed with the US that the Panel had incorrectly stated that the US had not responded to the evidence put forward by Canada and by Mexico. Even if this was so, according to the Appellate Body, the US had not demonstrated that the Panel had acted inconsistently with Article 11 of the DSU in its assessment of the evidence relating to the price differential between domestic and imported livestock. (Paras 322-326)

3. <u>Does the Detrimental Impact on imported livestock violate Article 2.1?</u>

Having evaluated and rejected the US challenge to the Panel's assessment of the facts with respect to segregation, commingling, and the price differential between domestic and imported livestock, the Appellate Body continued its analysis under Article 2.1 of the *TBT Agreement*. According to the Appellate Body, only if it found that the detrimental impact reflected discrimination in violation of Article 2.1, could it uphold the Panel's finding that the COOL measure accorded less favourable treatment to imported livestock than to like domestic livestock. (Para 327)

The US relied on the Appellate Body finding in *US – Cloves Cigarettes* to argue that under Article 2.1, a panel should analyze whether a measure is even-handed to determine whether the measure has a detrimental impact, as well as to determine whether that impact stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination. Thus if the measure was even-handed, because it did not provide different treatment *in fact*, then it would not breach Article 2.1. The US further argued its measure did not contain a regulatory distinction, because there were no differential requirements imposed on products, or requirements that some products must be labelled and others not. Canada contended that the design, architecture, revealing structure, operation, and application of the COOL measure showed that its objective was protectionism, and argued that a regulatory distinction based on such an objective was not legitimate. In Mexico's view, although the Panel did not have the benefit of the Appellate Body report in *US – Clove Cigarettes*, the Panel's finding of inconsistency under Article 2.1 of the *TBT Agreement* was consistent with the Appellate Body's test and was legally correct. (Paras 328-331)

According to the Appellate Body, COOL measure defined the origin of beef and pork as a function of the countries in which certain steps of the production process (birth, raising, and slaughter) take place. The COOL measure also required retailers of muscle cuts of beef and pork to label that meat with one of four mandatory labels. The Appellate Body considered that it was the distinctions between the three production steps, as well as between the four types of labels that must be affixed to muscle cuts of beef and pork, that constituted the relevant regulatory distinctions under the COOL measure. Accordingly, it examined whether these distinctions were designed and applied in an even-handed manner, or whether they lacked even-handedness, for example, because they were designed or applied in a manner that constituted arbitrary or unjustifiable discrimination. (Para 341)

(***Key Question***: *What is the relevance of informational requirements in a detrimental impact analysis?)*

According to the Appellate Body, taking account of the overall architecture of the COOL measure and the way in which it operated and was applied, the detail and accuracy of the origin information that upstream producers were required to track and transmit to be significantly greater than the origin information that retailers of muscle cuts of beef and pork were required to convey to their customers. Furthermore, upstream producers would be subject to the COOL measure's recordkeeping and verification requirements even when the meat derived from their animals was ultimately exempt from the labelling requirements of the COOL measure, for example, due to the type of establishment in which the meat was sold. Lastly, the Appellate Body noted that processor's decision to use livestock of different origins rather than exclusively US origin livestock would not only be more costly, it would also lead to confusing information being conveyed to consumers. (Paras 346-347)

For all of these reasons, the Appellate Body concluded that the informational requirements imposed on upstream producers under the COOL measure were disproportionate as compared to the level of information communicated to consumers through the mandatory retail labels. According to the Appellate Body nothing in the Panel's findings or on the Panel record explained or supplied a rational basis for this disconnect. Therefore, the Appellate Body considered the manner in which the COOL measure sought to provide information to consumers on origin, through the regulatory distinctions described above, to be arbitrary, and the disproportionate burden imposed on upstream producers and processors to be unjustifiable. (Para 347)

Thus in sum, according to the Appellate Body:

i. An examination of the COOL measure under Article 2.1 revealed that its recordkeeping and verification requirements imposed a disproportionate burden on upstream producers and processors, and "necessitate(d)" segregation, meaning that their associated compliance costs were higher for entities that processed livestock of different origins. Given that the least costly way of complying with these requirements was to rely exclusively on domestic livestock, the COOL measure created an incentive for US producers to use exclusively domestic livestock and thus had a detrimental impact on the competitive opportunities of imported livestock. (Para 349)
ii. Furthermore, the recordkeeping and verification requirements imposed on upstream producers and processors could not be explained by the need to convey to consumers information regarding the countries where livestock were born, raised, and slaughtered, because the detailed information required to be tracked and transmitted by those producers was not necessarily conveyed to consumers through the labels prescribed under the COOL measure. This was either because the prescribed labels did not expressly identify specific production steps and, in particular for Labels B and C, contained confusing or inaccurate origin information, or because the meat or meat products were exempted from the labelling requirements altogether. (Para 349)

Accordingly, the Appellate Body found that the detrimental impact on imported livestock did not stem exclusively from a legitimate regulatory distinction but, instead, reflected discrimination in violation of Article 2.1 of the *TBT Agreement*. It therefore upheld, albeit for different reasons, the Panel's ultimate finding, in paragraph 7.548 of the Panel Reports, that the COOL measure, particularly in regard to the muscle cut meat labels, was inconsistent with Article 2.1 of the *TBT Agreement* because it accorded less favourable treatment to imported livestock than to like domestic livestock. (Paras 349-350)

## C. Article 2.2 of the *TBT Agreement*

*Introduction*

In ruling on the claims raised by Canada and by Mexico under Article 2.2 of the *TBT Agreement*, the Panel had found that the COOL measure was "trade restrictive"; that the objective pursued by the US through the COOL measure was "to provide consumer information on origin"; and that this objective was "legitimate" within the meaning of Article 2.2. Ultimately, the Panel sustained the claims of the complainants and found that "the COOL measure violated Article 2.2 because it did not fulfil the objective of providing consumer information on origin with respect to meat products". (Para 351)

Each of the participants challenged aspects of the Panel's interpretation of Article 2.2 of the *TBT Agreement* and the application of its chosen legal framework to the COOL measure. The US requested the Appellate Body to reverse the Panel's ultimate conclusion that the COOL measure was inconsistent with Article 2.2, whereas both Canada and Mexico requested the Appellate Body to uphold this finding. While supporting the Panel's overall conclusion that the COOL measure was inconsistent with Article 2.2 of the *TBT Agreement*, Canada sought modification of certain elements of the Panel's analysis. Specifically, Canada challenged the Panel's approach to identifying the objective of the COOL measure. Each of the grounds raised by Mexico in its other appeal was conditional upon the Appellate Body's reversal of the Panel's finding that the COOL measure was inconsistent with Article 2.2. (Paras 352-355)

*Interpretation of Article 2.2 of the TBT Agreement*

The Appellate Body noted that the participants' appeals related to discrete aspects of the framework adopted by the Panel in its analysis of Article 2.2 of the *TBT Agreement* and required it to consider a

number of issues relating to the interpretation of that provision. Accordingly, the Appellate Body began its analysis with an overview of the elements involved in an Article 2.2 analysis, drawing in particular on the guidance provided in the recent report of the Appellate Body in *US – Tuna II (Mexico)*[7]. Thereafter, the Appellate Body addressed the following specific arguments raised by the participants in their appeals.

1. Did the Panel err in finding that the COOL Measure was trade restrictive?

The US appealed the Panel's finding that the COOL measure was "trade-restrictive" within the meaning of Article 2.2. The US submitted that, "[f]or the reasons" provided in its appeal of the Panel's analysis under Article 2.1 of the *TBT Agreement*, the Panel had also erred in finding that the COOL measure was trade restrictive for purposes of its Article 2.2 analysis. The US's appeal was therefore dependent on the success of its appeal under Article 2.1. As the Appellate Body had, however, upheld the Panel's finding that the COOL measure was inconsistent with Article 2.1, it did not further consider this ground of the US's appeal. (Para 381)

2. Did the Panel err in its identification of the objectives pursued?

Before the Panel, both Canada and Mexico had asserted that, based on "the text as well as the design, architecture, and structure of the COOL measure", the objective of the COOL measure was trade protectionism. The US maintained that the objective of the COOL measure was to "provide consumer information about origin". The Panel addressed the question of "what is the objective" in two separate places in its Reports. It did so, first, under the second step of its analysis of the claims (when it considered whether the objective pursued by the United States was legitimate), and again under the third step of its analysis (whether the COOL measure was more trade restrictive than necessary to fulfil its objective). (Paras 382-383)

When it addressed the issue of the objective pursued by the COOL measure for the first time, the Panel observed that the US's formulation of the objective had "varied somewhat" throughout its written submissions, but that "the main element" consistently highlighted by the United States had been "to provide consumer information on origin"; and hence it proceeded on the understanding that the same was the objective being pursued. The second time the Panel considered the COOL measure's objective, the Panel specifically addressed the complainants' argument that the text, design, architecture, and structure of the COOL measure, as well as statements made during the legislative process for the COOL statute, demonstrated that the COOL measure was designed to protect the United States' domestic industry and found that it did "not affect" its prior finding that the objective of the COOL measure was to provide consumer information on origin. (Paras 384-385)

Before addressing the arguments of the Parties, the Appellate Body expressed its own concerns with the manner in which the Panel referred to the objective of the COOL measure throughout the course of its analysis, and observed that the Panel's formulation of the objective pursued by the United States varied over the course of its analysis. According to the Appellate Body, through the differing formulations of the objective, the Panel introduced a level of uncertainty in its reasoning. It also noted that neither Article 2.2 in particular, nor the *TBT Agreement* in general, required that, in its examination of the objective pursued, a panel must discern or identify, in the abstract, the level at which a responding Member wishes or aims to achieve that objective. Rather, what a panel was required to do, under Article 2.2, was to assess the degree to which a Member's technical regulation, as adopted, written, and applied, contributed to the legitimate objective pursued by that Member. Having identified what the Appellate Body considered the Panel's understanding of the objective pursued through the COOL measure to be—that was, the provision

[7] Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012

of consumer information on origin—it proceeded to discuss the participants' arguments on appeal. (Paras 387-391)

(i) Canada's and Mexico's Other Appeals of the Panel's approach to identifying the Objective pursued

Canada and Mexico both considered the Panel's reliance on the US's articulation of the objective alone to be an erroneous basis on which to identify the objective pursued through the COOL measure for the purposes of an Article 2.2 analysis. Both submitted that the Panel should have verified the objective identified by the US to ensure that it was congruent with the design, structure, and architecture of the COOL measure, as well as its legislative history and surrounding circumstances. US considered that the Panel took the US's declared objective only as "a starting point" for its analysis and did in fact verify the identified objective on the basis of an analysis of the text, design, architecture, and structure of the COOL measure. (Paras 392-393)

The Appellate Body noted that while the Panel, when it considered the objective for the first time, stopped once it had determined the declared objective of the US, it did consider the evidence relating to the COOL measure's text, design, architecture, structure, operation, and legislative history, when it considered the objective for the second time. Because the Panel ultimately evaluated all relevant features relating to the COOL measure's objective, including evidence and arguments presented by the parties relating to the measure's text, design, architecture, structure, and legislative history, as well as its operation, the Appellate Body did not agree with Canada and Mexico that the Panel erred in its application of Article 2.2 of the *TBT Agreement* by determining the objective of the COOL measure in the "abstract", and solely on the basis of the US's declared objective. (Paras 394-396)

(ii) Canada's and Mexico's claims under Article 11 of the DSU with respect to the Panel's identification of the objective pursued

Canada and Mexico each submitted that the Panel failed to comply with its duties under Article 11 of the DSU when it assessed the evidence relating to the design, structure, architecture, and legislative history of the COOL measure. In their view, a proper assessment of that evidence would have yielded a conclusion that the true objective of the COOL measure was trade protectionism, i.e. the protection of the US's domestic producers of cattle and hogs. The Appellate Body however noted that as discussed above, the Panel did not identify the objective based solely on the submissions of the US. Rather, the Panel undertook a bifurcated analysis of the objective of the COOL measure. For this reason, it found above that the Panel did not commit legal error in applying Article 2.2 of the *TBT Agreement*. The Appellate Body noted that it also follows that the merits of the claims raised under Article 11 of the DSU must be evaluated through an examination of *both* of the Panel's analyses of the objective pursued by the US through the COOL measure. With these considerations in mind, the Appellate Body turned to the relevant claims of error raised by each other appellant under Article 11 of the DSU, beginning with Mexico. (Paras 397-399)

a. Mexico's other appeal under Article 11 of the DSU

In addition to the Mexico's argument discussed above, Mexico also contended that the Panel had failed to take into account the relevant evidence that would have helped in identifying the genuine objective of the COOL measure, that was, trade protectionism. Since Mexico did not identify any specific error in the Panel approach or finding, nor explained why the Panel's findings with respect to the objective lacked a factual basis in the record, the Appellate Body concluded that Mexico had failed to demonstrate that the Panel failed to comply with its duties under Article 11 of the DSU in its assessment of the evidence relating to the design, structure, architecture and legislative history of the COOL measure. (Paras 400-

402)

b. Canada's other appeal under Article 11 of the DSU

On appeal, Canada referred *first* to the evidence that it presented to the Panel to demonstrate that the COOL measure "includes and excludes products in a way that makes no sense" from the perspective of providing information on origin but does make sense from the perspective of protecting the domestic industry. The Appellate Body observed that while it may not have done so in as detailed a manner as Canada might have liked, the Panel did grapple with, and reject, most of Canada's arguments regarding the scope of coverage of the COOL measure and its relevance to the identification of its objective. In addition, the Panel did acknowledge limitations on the scope of coverage of the COOL measure and provided reasoning as to why it was not persuaded that the exclusion of certain products from the COOL measure necessarily meant that the COOL measure was intended to protect domestic industry, including that such exclusions may reflect practical reasons and simply facilitate implementation of the COOL measure. (Paras 403-411)

A *second* argument raised by Canada related to the Panel's treatment of an argument by Canada that the COOL measure applied "special rules" to imported livestock that it did not apply to other products. However, according to the Appellate Body, the Panel's statement that "[t]he complainants further submit that the true objective of the COOL measure is trade protectionism as demonstrated by the fact that the COOL measure excludes from its scope covered commodities that are an ingredient in a processed food item or that undergo processing" may be understood as referring to, *inter alia*, this argument by Canada. To the extent that the Panel's decision to deal with several arguments together may have resulted in the Panel not clearly mentioning each one separately, this alone did not establish that the Panel had breached Article 11 of the DSU. (Paras 412-414)

*Third*, Canada contended that the Panel failed to consider Canada's arguments and evidence demonstrating the COOL measure's inability to provide useful information. While acknowledging that the Panel considered this evidence elsewhere in its analysis, Canada considered that it was also relevant for determining the objective of the COOL measure. However, according to the Appellate Body, a panel has a degree of discretion to assess and employ the evidence before it in the context in which the panel finds it most probative and useful. The Appellate Body noted that the Panel had taken account of evidence relating to the ability of the different COOL labels to convey meaningful information and it saw no reason why the Panel was bound to treat the evidence not just relevant but as highly probative of the objective of that measure as well. (Paras 415-416)

*Finally*, Canada referred to the Panel's treatment of evidence regarding the legislative process leading to the adoption of the COOL measure and faulted the Panel for failing to review *all* of the evidence on this point, and for failing to evaluate it. The Appellate Body noted that the Panel had referred to evidence from a wide range of sources, including some of those specifically referred to by Canada on appeal, and adduced by Mexico and the US. According to the Appellate Body, the mere fact that the Panel did not refer explicitly to each and every statement or piece of evidence submitted by Canada (or accord to them the weight that Canada considers they deserve) did not mean that it erred or failed to comply with its duties under Article 11 of the DSU. (Paras 417-419)

c. Overall Disposition of Canada's and Mexico's Claims under Article 11 of the DSU with respect to the Panel's Identification of the Objective Pursued

The Appellate Body rejected these grounds of appeal and find that Canada and Mexico had not established that the Panel acted inconsistently with its obligations under Article 11 of the DSU in assessing the evidence regarding the design, architecture, structure, and legislative history of the COOL

measure in its analysis of the objective pursued by the US through that measure. (Para 424)

(iii) US's appeal of the Panel's finding concerning the COOL measure's 'level of fulfilment' of its objective

The US alleged that the Panel committed two errors in its analysis of the level at which the US considered it appropriate to fulfil its objective. Specifically, in concluding that the US "aimed to provide '*as much clear and accurate* origin information *as possible*'", the Panel: (i) acted inconsistently with Article 11 of the DSU because it wilfully distorted and misrepresented the United States' position as to the level at which the United States considers it appropriate to fulfil that objective; and (ii) failed to consider all relevant information regarding the level at which the United States sought to achieve its objective.

The Appellate Body reiterated that it was not necessary or appropriate for the Panel, in identifying the objective (that is, to provide consumer information on origin), to further identify the level at which the US desired to fulfil its objective of providing consumer information on origin (that is, to provide *as much clear and accurate* origin information *as possible* to consumers). It noted, the fulfilment of an objective was a matter of degree, and what was relevant for the inquiry under Article 2.2 was the degree of contribution to the objective that a measure *actually* achieved. The US further argued that the Panel erred and acted inconsistently with Article 11 of the DSU andcontended that, by "selectively editing" its statements, the Panel misrepresented the US's objective as being "to provide 'as much clear and accurate origin information as possible' *without regard to ... cost*". Thus, the Panel disregarded evidence that the COOL measure reflected a balance between the provision of information and the costs incurred, and willfully distorted the United States' position. In this regard, the Appellate Body found:

> "We disagree that the Panel erred in its identification of the objective pursued in this case because it failed to take into account the fact that the COOL measure was implemented with a view to minimizing the costs to market participants…. Indeed, the Panel itself considered the issue of costs only when it came to assess whether the COOL measure fulfilled its objective.
>
> For all of these reasons, we reject the United States' claims that the Panel erred in its determination of the United States' "level of fulfilment" of its objective." (Paras 428 - 429)

d. Canada's Claim that the Panel Failed to Define the Objective of the COOL Measure at a "Sufficiently Detailed Level"

Finally, Canada argued that, should the Appellate Body disagree with its arguments under Article 11 of the DSU with respect to the Panel's identification of the objective pursued through the COOL measure, then it should find that the Panel erred in failing to define that objective at a "sufficiently detailed level". Canada asserted that the Panel erred in not identifying the purpose for which origin information was provided to consumers. The Appellate Body disagreed with Canada that the Panel failed to identify the purpose for which the COOL measure sought to provide information. According to the Appellate Body:

> "The Panel did so, at least in part, by specifying the type of information to be provided (on "origin" as defined under the COOL measure), and the persons to whom that information is to be provided (consumers). In any event, we are not persuaded by Canada's argument that, because a variety of purposes, both legitimate and illegitimate, could in theory be served by a measure with the objective of providing consumer information on origin, this is not an objective that is defined at a "sufficiently detailed level". In our view, while framed as a matter relating to the precision with which the Panel identified the objective, Canada's arguments relate more to the Panel's analysis of the legitimacy of the objective, an issue we turn to in the next section. We therefore reject this ground of appeal."(Para 431)

e. Conclusion

The Appellate Body found that, although the Panel unnecessarily conducted two analyses of the objectives pursued by the United States through the COOL measure, it did not err under Article 2.2 of the *TBT Agreement* in identifying the objective pursued by the United States through the COOL measure as being to provide consumer information on origin.

3. Did the Panel err in finding that the objective of the COOL measure was "legitimate"?

Canada also challenged the Panel's finding that "providing consumer information on origin is a legitimate objective within the meaning of Article 2.2" of the *TBT Agreement*, in the event that the Appellate Body rejected its claim that the objective pursued by the US through the COOL measure was trade protectionism and that the Panel had erred in finding otherwise.

Canada asserted that the Panel: (i) failed to articulate a test for determining what constituted a legitimate objective; (ii) wrongly concluded that any objective that had a "genuine link" to a "public policy" or "social norm" was legitimate; and (iii) erred in the two reasons that it gave for finding the objective of the COOL measure to be legitimate. According to Canada, the correct "test" for determining whether an objective not explicitly listed in Article 2.2 was "legitimate" entailed three elements. First, a panel should determine whether an objective was "directly related" to one of the objectives explicitly listed in Article 2.2. Second, if it was not, then the panel should determine, in accordance with the principle of *ejusdem generis*, if the measure was of the same type as the listed objectives. Third, Canada submitted that other unlisted objectives may also be shown to be "legitimate" with "clear and compelling evidence", and provided that they were identified with an appropriately high level of specificity. (Paras 434-437)

(***Key Question***: *What are factors taken into consideration when determining whether an unlisted objective qualified as legitimate under Article 2.2 of the TBT Agreement?)*

The Appellate Body noted that the thrust of Canada's appeal was directed at the Panel's alleged failure to articulate a proper test for determining whether an objective that was not explicitly listed in Article 2.2 was "legitimate" within the meaning of that provision. Drawing upon the Appellate Body report in *US – Tuna II (Mexico)*, it further observed that in determining whether an unlisted objective qualified as legitimate, a panel may usefully have regard to those objectives that were expressly listed in Article 2.2, because these may provide an illustration and reference point for other objectives that may be considered "legitimate". Yet, like the Panel, the Appellate Body did not see, and Canada did not elaborate, the alleged "significant elements of commonality of the explicitly listed objectives" that would illuminate the relevant type of objective and thus serve to delineate the class of legitimate objectives that fall within Article 2.2. For these reasons, it did not consider the Panel to have erred in failing to rely upon the *ejusdem generis* principle to identify the class of "legitimate objectives" under Article 2.2 of the *TBT Agreement*. (Paras 443-444)

The Appellate Body also noted that in *US – Tuna II (Mexico)* it was found, that objectives listed in the recitals of the preamble of the *TBT Agreement* and provisions of other covered agreements may guide or usefully inform a panel's determination of which other objectives can be considered "legitimate" for purposes of Article 2.2. It observed, in this regard, that the provision of information to consumers on origin bore some relation to the objective of prevention of deceptive practices reflected in both Article 2.2 itself and Article XX(d) of the GATT 1994, insofar as consumers could be deceived as to the origin of products if labelling was inaccurate or misleading. In the Appellate Body's view, support for the legitimate nature of the objective of providing information to consumers on origin was also found elsewhere in the covered agreements, in particular in Article IX of the GATT 1994. This provision,

entitled "Marks of Origin", expressly recognized the right of WTO Members to require that imported products carry a mark of origin. (Para 445)

While Canada had accepted, at a general level, that the provision of consumer information on origin could constitute a legitimate objective, it appeared to consider that the Panel erred in finding the objective of providing consumers with information on origin *as defined under the COOL measure* (that is, based on where the livestock from which meat is derived were born, raised, and slaughtered) to be legitimate. Yet, Canada did not explain why it was *not* legitimate to define the origin of meat according to the countries in which the livestock from which it was derived were born, raised, and slaughtered. It was therefore unclear on what basis or to what extent, in the context of its arguments relating to legitimacy, Canada challenged the precise way in which the COOL measure defines "origin". Furthermore, although Canada appeared to consider that the Panel wrongly assumed that a widely held social norm was always legitimate, the Appellate Body did not see that the Panel made any such assumption and found the Panel's statements regarding "social norms" to be somewhat opaque and, ultimately, of no consequence for its conclusion on legitimacy. (Paras 446-448)

The Appellate Body was nevertheless troubled by certain aspects of the Panel's analysis of the legitimacy of the United States' objective. For instance, although the Panel recognized at the outset of its analysis, that the burden of proving that an objective was *not* legitimate lay with the complainants, its reasoning at times suggested that it, instead, placed on US the burden of proving that its objective was legitimate. Ultimately, however, the Appellate Body noted that while these ambiguities may have detracted from the overall clarity of the Panel's analysis, they did not taint its conclusion. Thus, the Appellate Body rejected Canada's arguments and found that the Panel did not err in finding the provision of consumer information on origin is a legitimate objective within the meaning of Article 2.2 of the *TBT Agreement*. (Paras 449-453)

4. Did the Panel err in its analysis of whether the COOL measure was more trade restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create?

The US appealed the legal framework adopted by the Panel and submitted that the Panel erroneously employed a two-stage test that involved an initial inquiry into whether the measure fulfilled the objective, and only if so, a separate and subsequent examination of whether the measure was more trade restrictive than necessary based on the existence of a reasonably available less trade-restrictive alternative measure. According to the US, such a two-stage analysis was not required under Article 2.2. Rather, as with the "parallel provision" in Article 5.6 of the *SPS Agreement*, Article 2.2 of the *TBT Agreement* called for a "single analysis, containing three elements that were to be judged cumulatively". The three elements included an assessment of whether (i) there was a reasonably available alternative measure (ii) that fulfilled the Member's legitimate objective at the level that the Member considered appropriate and (iii) was significantly less trade restrictive. In addition to the allegedly erroneous legal framework adopted by the Panel, the US appealed what it characterized as a finding by the Panel that the COOL measure did not fulfil its objective at the level the US considered appropriate. (Paras 454-457)

The Appellate Body noted that this part of the US's appeal comprised both a challenge to the Panel's interpretation of Article 2.2 and a challenge to the Panel's application of that interpretation to the COOL measure. The Panel had noted that despite the overall finding the COOL measure "does not fulfil the identified objective within the meaning of Article 2.2 because it failed to convey meaningful origin information to consumers", a number of findings and observations made by the Panel in the course of its analysis belied this conclusion and suggested that the COOL measure did *contribute* to the objective of providing information to consumers on the countries in which the livestock from which meat was derived were born, raised, and slaughtered. The Appellate Body further observed that:

> "With respect to Label A, the Panel found that the COOL measure "appears to fulfil the objective because the measure prohibits [meat derived from animals of non-US origin] from carrying a Label A". Even with respect to Labels B and C, the Panel found that these labels provide at least some origin information, namely, "information on meat with regard to the *possible* … origin as defined by the measure". Moreover, the Panel found that, on the whole, the COOL measure provides more information to consumers than was available to them prior to its enactment. The Panel also noted that the "labels required to be affixed to meat products … provide additional country of origin information that was not available prior to the COOL measure" and that this "may have reduced consumer confusion that existed under the pre-COOL measure and USDA grade labelling system". (Para 466)

While recognizing these contributions, the Panel's concluding statements and ultimate finding suggested that the Panel considered that, in order for the COOL measure to fulfil its objective, either all of the labels had to provide 100% accurate and clear information, or that the COOL measure had to meet or surpass some minimum threshold. Whichever test it employed, the Panel was clearly of the view that the COOL measure did not meet that standard. According to the Appellate Body:

> " … a panel's assessment should focus on ascertaining the degree of contribution achieved by the measure, rather than on answering the questions of whether the measure fulfils the objective completely or satisfies some minimum level of fulfilment of that objective. Because the Panel seems to have considered it necessary for the COOL measure to have fulfilled the objective completely, or satisfied some minimum level of fulfilment to be consistent with Article 2.2, it erred in its interpretation of Article 2.2. Moreover, because the Panel ignored its own findings, which demonstrate that the labels under the COOL measure did contribute towards the objective of providing consumer information on origin, it also erred in its analysis under Article 2.2. For these reasons …we *reverse* the Panel's ultimate finding, in paragraph 7.720 of the Panel Reports, that, for this reason, the COOL measure is inconsistent with Article 2.2 of the *TBT Agreement*." (Para 468)

(***Key Question***: *Can a panel relieve the complainants of their burden to prove that the measure was "more trade-restrictive than necessary" based on the availability of less trade-restrictive alternative measures?)*

The US further argued that the Panel erred by relieving the complaining parties of their burden to prove that the measure was "more trade-restrictive than necessary" based on the availability of less trade-restrictive alternative measures. The Appellate Body noted that as explained in *US – Tuna II (Mexico)* by the Appellate Body, the Panel in this case was required also to evaluate the other factors referred to in Article 2.2, and to undertake a comparison with the alternative measures proposed by Mexico and by Canada. Accordingly, the Appellate Body agreed with the US that, by finding the COOL measure to be inconsistent with Article 2.2 of the *TBT Agreement* without examining the proposed alternative measures, the Panel erred by relieving Mexico and Canada of this part of their burden of proof. (Para 469)

5. Completion of the Legal Analysis – Is the COOL Measure more trade restrictive than necessary to fulfil the legitimate objectives, bearing in mind the risks that non-fulfilment would create?

The Appellate Body proceeded to consider whether it could rule on the complainants' claims that the COOL measure was inconsistent with Article 2.2 because it was more trade restrictive than necessary to fulfil a legitimate objective. It reiterated the finding in *US – Tuna II (Mexico)*, where the Appellate Body explained that an assessment of whether a technical regulation was "more trade-restrictive than necessary" within the meaning of Article 2.2 involved an evaluation of a number of factors, including: (i) the degree of contribution made by the measure to the legitimate objective at issue; (ii) the trade-

restrictiveness of the measure; and (iii) the nature of the risks at issue as well as the gravity of the consequences that would arise from non-fulfilment of the objective pursued by the Member through the measure. (Paras 470-471)

The Appellate Body started by examining the COOL measure. It recalled that it had affirmed the Panel's findings on the objective pursued by the US through the COOL measure and its legitimacy. With respect to the degree of contribution made by the COOL measure to its objective, it had referred to a number of Panel findings suggesting that the COOL measure did contribute, at least to some degree, to providing consumers with information on origin. Overall, the findings of the Panel and undisputed facts on the record indicated that the labelling requirements under the COOL measure made some contribution to the objective of that measure. It also noted that under the COOL measure, more meat would bear labels indicating some form of origin than was previously the case, despite the fact that not all beef and pork sold within the United States is required to carry a country of origin label. (Paras 472-476)

As for the trade-restrictiveness of the COOL measure, the Appellate Body recalled the Panel's finding that the COOL measure was "'trade-restrictive' within the meaning of Article 2.2 by affecting the competitive conditions of imported livestock". Overall, in the Appellate Body's view, the Panel's factual findings suggested that the COOL measure made some contribution to the objective of providing consumers with information on origin; that it had a considerable degree of trade-restrictiveness; and that the consequences that may arise from non-fulfilment of the objective would not be particularly grave. The Appellate Body stressed, however, that it lacked the clear and precise Panel findings with regard to these factors, and, in particular, findings that would enable it to identify the *degree* of contribution made by the COOL measure to the US's' objective. Against this preliminary assessment of the COOL measure, it proceeded to examine the alternative measures proposed by Canada and by Mexico in order to see whether it was able to complete its assessment of whether the COOL measure was "more trade-restrictive than necessary to fulfil a legitimate objective". (Paras 477-479)

As they did in their submissions to the Panel, Canada and Mexico pointed to four alternative measures, which, in their view, were reasonably available to the US, were less trade restrictive, and fulfilled the objective of providing consumers with information on origin at an equal or greater level than the COOL measure. These alternatives were: (i) a voluntary country of origin labelling requirement; (ii) a mandatory country of origin labelling requirement based on the criterion of substantial transformation; (iii) a voluntary country of origin labelling regime combined with a mandatory country of origin labelling requirement based on substantial transformation; and (iv) a trace-back regime. (Para 480)

After examining each of the four alternatives, the Appellate Body concluded that due to the absence of relevant factual findings by the Panel, and of sufficient undisputed facts on the record, it was unable to complete the legal analysis under Article 2.2 of the *TBT Agreement* and determine whether the COOL measure was more trade restrictive than necessary to fulfill its legitimate objective.

**D. Article III:4 of the GATT 1994**

Canada and Mexico each raised a conditional appeal with respect to Article III:4 of the GATT 1994. Both appeals were conditional upon the Appellate Body's reversal of the Panel's finding of inconsistency under Article 2.1 of the *TBT Agreement*. Having upheld the Panel's finding that the COOL measure was inconsistent with Article 2.1 of the *TBT Agreement*, the condition upon which Canada's and Mexico's appeals under Article III:4 were made was not satisfied, and the Appellate Body therefore did not make any findings in respect of Article III:4 with regard to the COOL measure. It also considered it unnecessary to make any finding with regard to the Vilsack letter. (Paras 492-493)

## E. Article XXIII:1(b) of the GATT 1994

Canada and Mexico also each conditionally appealed the Panel's exercise of judicial economy with respect to whether the COOL measure nullified and impaired benefits within the meaning of Article XXIII:1(b) of the GATT 1994. Having upheld the Panel's finding that the COOL measure was inconsistent with Article 2.1 of the *TBT Agreement*, the first condition upon which Canada's and Mexico's appeals under Article XXIII:1(b) of the GATT 1994 were made was not met, the Appellate Body therefore did not make any findings in respect of Article XXIII:1(b) with regard to the COOL measure. It also considered it unnecessary to make any finding with regard to the Vilsack letter. (Paras 494-495)

## III. DISPUTE NOTES ON SELECT ISSUES

- Sources of International Law:
  The Appellate Body in its analyses has mainly relied on treaty text (viz. *TBT Agreement* and GATT 1994) and the previous relevant Panel / Appellate Body Reports.

- Article 2.1 of the *TBT Agreement*:
  The Appellate Body reiterated that in order to establish a national treatment violation under Article 2.1, a complainant must demonstrate three elements: (i) that the measure at issue was a technical regulation as defined in Annex 1.1 to the *TBT Agreement*; (ii) that the imported and domestic products at issue were "like products"; and (iii) that the measure at issue accorded less favourable treatment to imported products than to like domestic products. With respect to the third element that was in issue in this dispute, the Appellate Body noted that an analysis of less favourable treatment involved an assessment of whether the technical regulation at issue modified the conditions of competition in the relevant market to the *detriment* of the group of imported products vis-à-vis the group of like products.

  However, following the previous Appellate Body ruling in *US-Clove Cigarettes*, the Appellate Body found that the Panel was wrong in considering its finding that the COOL measure altering the conditions of competition to the detriment of imported livestock to be dispositive, and to lead, without more, to a finding of violation of the national treatment obligation in Article 2.1. According to the Appellate Body, the Panel should have continued its examination and determined whether the circumstances of this case indicated that the *detrimental impact stemmed exclusively from a legitimate regulatory distinction, or whether the COOL measure lacked even-handedness*.

  On its examination of the COOL measure under Article 2.1, the Appellate Body found that the recordkeeping and verification requirements imposed a disproportionate burden on upstream producers and processors, because the level of information conveyed to consumers through the mandatory labelling requirements is far less detailed and accurate than the information required to be tracked and transmitted by these producers and processors. Thus, according to the Appellate Body:

  > ".. the regulatory distinctions imposed by the COOL measure amount to arbitrary and unjustifiable discrimination against imported livestock, such that they cannot be said to be applied in an even-handed manner. Accordingly, we find that the detrimental impact on imported livestock does not stem exclusively from a legitimate regulatory distinction but, instead, reflects discrimination in violation of Article 2.1 of the *TBT Agreement*." (Para 349)

  This element of proportionality appears to be a new check introduced by the Appellate Body, since in its two previous findings in *US- Clove Cigarettes* and *US- Tuna (II)*, emphasis was placed on the structure of the measure while examining discrimination. Thus, it follows that disproportionate

informational requirements are also relevant in evaluating discrimination in the context of Article 2.1 of the *TBT Agreement*.

- Article 2.2 of the *TBT Agreement* and 'level of fulfilment' of objective:
  The Appellate Body has reiterated that the fulfilment of an objective was a matter of degree, and what was relevant for the inquiry under Article 2.2 was the degree of contribution to the objective that a measure *actually* achieved. Thus, according to the Appellate Body it was not necessary or appropriate for the Panel, in identifying the objective (that is, to provide consumer information on origin), to further identify the level at which the US desired to fulfil its objective of providing consumer information on origin (that is, to provide *as much clear and accurate* origin information *as possible* to consumers).