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**Dispute Settlement Body**
**29 May 2015**

# MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 29 MAY 2015

*Acting Chairman: Mr. Atanas Atanassov Paparizov (the EU)*

Prior to the adoption of the Agenda, Ambassador Atanas Atanassov Paparizov (the EU), the Chairman of the Trade Policy Review Body, welcomed delegations and said that he had the pleasure of chairing the present meeting at the request of the Chairman of the DSB, Ambassador Harald Neple, who had asked him to preside on his behalf due to his absence from Geneva. He noted that this was in accordance with the Rules of Procedure for meetings of the DSB which provided that if the DSB Chairperson was absent from any meeting or part thereof, the Chairman of the General Council or the Chairman of the Trade Policy Review Body shall perform the functions of the DSB Chairman.

## 1 UNITED STATES – CERTAIN COUNTRY OF ORIGIN LABELLING (COOL) REQUIREMENTS: RECOURSE TO ARTICLE 21.5 OF THE DSU BY CANADA AND MEXICO

### A. Report of the Appellate Body (WT/DS384/AB/RW) and Report of the Panel (WT/DS384/RW and WT/DS384/RW/Add.1)

### B. Reports of the Appellate Body (WT/DS386/AB/RW) and Report of the Panel (WT/DS386/RW and WT/DS386/RW/Add.1)

1.1. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS384/33 – WT/DS386/32 transmitting the Appellate Body Reports in the disputes: "United States – Certain Country of Origin Labelling (COOL) Requirements: Recourse to Article 21.5 of the DSU by Canada and Mexico", which had been circulated on 18 May 2015 in document WT/DS384/AB/RW – WT/DS386/AB/RW. He recalled that the Appellate Body Reports and the Panel Reports pertaining to these disputes had been circulated as unrestricted documents. As Members were aware, Article 17.14 of the DSU required that: "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report".

1.2. The representative of Canada said that his country thanked the Appellate Body, the members of the compliance Panel and the various Secretariats for their work on the compliance proceedings in this dispute. Canada appreciated the efforts made by all of them in assisting Canada and the United States to resolve the dispute. Canada acknowledged and appreciated the valuable cooperation of Mexico as a co-complainant, as well as the active support of several other Members as third parties. At the outset, Canada wished to note that, counting from the date of the establishment of the original panel in November 2009, these proceedings had taken approximately five and a half years. If it had not been clear before, the outcome of the original proceedings and these compliance proceedings had confirmed the serious adverse impact of first the COOL measure, and later the amended COOL measure, on the competitive position of Canadian livestock in the United States market. Throughout this period of five and a half years, Canadian livestock producers had continued to suffer the costs of the COOL measure. Canada was, therefore, pleased with the Panel and Appellate Body findings and conclusions in this review of compliance. This was

the second time that a panel had found, and the Appellate Body had confirmed, violations by the United States of its national treatment obligation. Since the establishment of the original Panel, Canada had now successfully demonstrated, on four different occasions, that the COOL measure and its amendments violated the WTO obligations of the United States. The findings and conclusions of the Panel and Appellate Body in the compliance phase were also important systemically in several respects. In this phase, the compliance Panel had found, and the Appellate Body had confirmed, violations of the national treatment obligations of the United States under both the TBT Agreement and the GATT 1994. This clarity would serve to preserve the systemic integrity between related but different obligations under the WTO Agreement. Second, while Canada regretted that there was not a final finding of inconsistency with Article 2.2 of the TBT Agreement, the Appellate Body had provided useful and important clarifications to the interpretation of that provision. All legal avenues to examine the compatibility of the amended COOL measure with the WTO obligations of the United States had now been exhausted. Canada, therefore, renewed the call on the United States to repeal the provisions of the amended COOL measure in respect of beef and pork, thereby rectifying its WTO violations and removing this unnecessary barrier to trade. Should the United States fail to bring itself into compliance with the DSB's recommendations and rulings that would be adopted at the present meeting, Canada would seek authorization from the DSB to suspend concessions to the United States, as was its right under Article 22 of the DSU. In fact, already in June 2013, a proposed list of products from the United States to which surcharges may be applied was published in the Canada Gazette. This list included agricultural products, such as cattle, pork, apples, rice, corn, maple syrup, pasta and wine; as well as non-agricultural products such as jewellery, office chairs, wooden furniture and mattresses. Canada was interested in resolving this dispute as soon as possible and in a manner that promoted trade between the parties to this dispute. While suspension of concessions was not Canada's preferred route to resolve this dispute, Canada was prepared to exercise the right to retaliate, if necessary.

1.3. Finally, Canada wished to comment briefly on some of the institutional implications of the progression of this dispute through the system. As had already been indicated, it had taken five and a half years to get to this point. Canada had faced delays at almost every stage. For example, the compliance review alone had taken 13 months, instead of the 90 days provided for in the DSU, and the appeal of the compliance report took 172 days, instead of the 90 days provided for in the DSU. Along the way, several important opportunities were missed, including during the final appeal, to establish a pattern of cooperation between the Appellate Body and the parties that would mitigate the implications of departures from binding DSU provisions on deadlines. This was regrettable. While there were a variety of reasons for the various delays, many were the result of the workload challenges facing the WTO dispute settlement system that Members had been trying to address over the last few years. These delays had resulted in a significant burden on the Canadian economy, and in particular on the Canadian stakeholders affected by the measure at issue, as they had allowed the United States to maintain its WTO-inconsistent measure for far longer than originally foreseen in the DSU. The outcome of this dispute, therefore, served as a reminder of the importance of Members ongoing efforts, formally in the DSB and in the Budget Committee, and informally among Members, to address the workload challenges. The continued credibility and legitimacy of the system depended on its capacity to live up to the original promise of prompt settlement of disputes. As it had already indicated, Canada was pleased with the outcome that would be adopted at the present meeting, but this outcome should have been obtained much earlier. Canada therefore looked forward to continuing, and even accelerating, its efforts to find sustainable solutions to these underlying systemic issues so that future disputes need not take as long as the "US-COOL" dispute to receive a final ruling on WTO consistency.

1.4. The representative of Mexico said that his country thanked the members of the Appellate Body involved in these proceedings, the Panel and the respective Secretariats for their assistance. Mexico also thanked third parties for their views and contribution to a broader discussion on the scope of the key obligations of the TBT Agreement and the GATT 1994. He recalled that Mexico had initiated the original proceedings by submitting a request for consultations in December 2008, more than seven years ago. At the present meeting, Mexico welcomed the adoption of the Panel and Appellate Body Reports under Article 21.5 proceedings in the "US – COOL" dispute. The Appellate Body Report upheld what Mexico had argued throughout these proceedings, namely that the COOL labelling was discriminatory in that it accorded less-favourable treatment to exports of Mexican livestock. The Appellate Body had confirmed that the discrimination caused by the administrative amendments to the COOL measure was unjustified since it did not stem from a

legitimate regulatory distinction. Consequently, the amended COOL measure did not comply with the US obligations under the WTO.

1.5. With respect to Article 2.1 of the TBT Agreement, Mexico said that the Appellate Body had upheld the findings of the Panel, and in its reasoning, it had clarified the interpretation and application of that Article. Regarding the determination of less-favourable treatment and the detrimental impact on imports, the Appellate Body had stressed that Article 2.1 should be approached with a view to determining whether there was any modification in the conditions of competition for like imported products, and had explained that this analysis should not be limited to an examination of the operation of a technical regulation in relation to current patterns of trade. The analysis must be grounded in an assessment of the technical regulation at issue in scenarios under which competitive opportunities may arise. With regard to the finding that the detrimental impact of the modified COOL measure had not stemmed exclusively from a legitimate regulatory distinction, the Appellate Body had upheld the Panel's conclusion that there was a "disconnect" between the information required of livestock producers and processors on one hand, and the information conveyed to consumers on the labels prescribed by the amended COOL measure on the other hand. In particular, the Appellate Body had confirmed that the amended COOL measure: (i) entailed an increased recordkeeping burden for producers and processors of livestock; (ii) conveyed inaccurate information; and (iii) continued to exempt a large proportion of muscle cuts from its scope.

1.6. The Appellate Body had recalled that "technical regulations must be assessed as composite legal instruments through careful scrutiny of their design, architecture, revealing structure, operation and application". Accordingly, the exemptions from the COOL measure had been examined and the Appellate Body had stated that "the exemptions prescribed by the amended COOL measure are probative of whether the detrimental impact of that measure on imported livestock stems exclusively from legitimate regulatory distinctions". It was of central importance to the Appellate Body that between 57.7% and 66.7% of beef consumed in the United States, and between 83.5% and 84.1% of pork muscle cuts would convey no consumer information on origin despite imposing an upstream recordkeeping burden on producers and processors that had a detrimental impact on competitive opportunities for imported livestock. In that connection, the Appellate Body had stated that it did not consider that the cost savings enjoyed by US entities that remained exempt from the COOL requirements altered the Panel's finding with respect to the above percentages. The United States had argued that the analysis of a technical regulation under Article 2.1 of the TBT Agreement must be confined only to the regulatory distinctions causing the detrimental impact on imported products. The Appellate Body had rejected this position, and had rightly confirmed that "other elements are relevant for that assessment to the extent that they are probative of whether the detrimental impact on like imported products stems exclusively from 'legitimate' regulatory distinctions for the purposes of Article 2.1". These elements must have a "direct connection" and must form part of the design, architecture, and revealing structure of the technical regulation at issue. Mexico appreciated the Appellate Body's conclusion that the exemptions under the amended COOL measure as part of the overall architecture of the measure, demonstrated that the relevant regulatory distinctions were not designed and applied in an even-handed manner.

1.7. With regard to Article 2.2 of the TBT Agreement, in Mexico's view the Appellate Body's interpretation of Article 2.2 was highly relevant. Mexico appreciated the clarifications provided in the Appellate Body's Report on the scope of that Article. In Mexico's view, these clarifications helped to impart a meaning to Article 2.2 of the TBT Agreement and to make the obligation workable: i.e., to produce the effect for which it was intended, which was to ensure that a technical regulation did not have the purpose or effect of creating unnecessary obstacles to international trade.

1.8. Mexico also wished to highlight several different aspects of the Appellate Body's interpretation of Article 2.2 of the TBT Agreement. First, with regard to contribution to the objective, Mexico said that the Appellate Body had reversed the Panel's general conclusions to the effect that Mexico had not made a *prima facie* case under Article 2.2 of the TBT Agreement. The Panel had erroneously concluded that the amended COOL measure made a "considerable but necessarily partial contribution" to its objective. The Panel's error lied in the fact that it did not consider that some of the meat products consumed in the United States included ground meat (Label E) and imported muscle cuts (Label D), and on these labels, the US consumer was not

given information on the place of birth, raising and slaughter of the livestock from which the products were derived.

1.9. Second, with regard to holistic relational analysis and comparative analysis, Mexico said that, according to the Appellate Body, an assessment of whether a technical regulation "is more trade-restrictive than necessary" under Article 2.2 of the TBT Agreement involved the holistic weighing and balancing of all relevant factors. Concerning the "relational" and "comparative" analysis under that provision, the Appellate Body had explained that Article 2.2 did not explicitly establish a sequence and order, so that the particular manner of sequencing the steps of this analysis was adaptable, and may be tailored to the specific claims, measures, facts and arguments at issue in a given case. A possible sequence would be to begin the process with the evaluation of relevant factors to be weighed and balanced to determine the necessity of the measure. If that analysis led to the preliminary conclusion that the measure was necessary, that result must be confirmed by comparing the measure with possible alternatives, which may be less trade-restrictive while providing an equivalent contribution to the achievement of the objective pursued. Panels had a certain degree of flexibility to adapt the sequence and order of analysis in a given case in assessing the relevant factors and in the manner of weighing and balancing under Article 2.2. It had also been explained that this latitude was not unlimited and was confined to the specific claims, measures, facts, and arguments at issue. Regarding the "comparative analysis", the Appellate Body had argued that given that an alternative measure proposed by a complainant functioned as a "conceptual tool" to illustrate that a technical regulation was more trade-restrictive than necessary, once an alternative measure had been proposed by the complainant, it should be considered by a panel in the overall weighing and balancing under Article 2.2.

1.10. Third, with regard to equivalent degree of contribution of the less restrictive alternatives, he said that in Mexico's view, one highly important point in this examination was that a complainant was not deemed to have to demonstrate that its proposed alternative measure achieved a degree of contribution identical to that achieved by the challenged technical regulation in order for it to be found to achieve an equivalent degree. Rather, the Appellate Body had considered that there should be a margin of appreciation in the assessment of whether a proposed alternative measure achieved an equivalent degree of contribution, the contours of which may vary from case to case. This finding was important since it explained that the burden of proof for the complainant did not consist of identifying alternative measures that fulfilled in an "identical" manner or to the same degree the objective of the challenged measure, above all considering that those objectives could often be so specific that it was complicated for the complainant to identify and propose less restrictive alternative measures. Mexico agreed with the Appellate Body that "[f]or the purpose of assessing the equivalence between the respective degrees of contribution of the challenged technical regulation and the proposed alternative measures, it is the overall degree of contribution that the technical regulation makes to the objective pursued that is relevant, rather than any individual isolated aspect or component of that contribution".

1.11. Fourth, with regard to the failure to ascertain the gravity of the consequences of not fulfilling the objective, Mexico said that the Appellate Body had found that in applying Article 2.2 of the TBT Agreement to the facts of this case, the Panel had erred in determining that it was unable to ascertain the gravity of the consequences of non-fulfilment of the amended COOL measure's objectives. The Appellate Body had explained that it might be difficult, in some contexts, to determine separately the nature of the risks, on the one hand, and to quantify the gravity of the consequences that would arise from non-fulfilment, on the other hand. In such contexts, it may be more appropriate to conduct a conjunctive analysis of both the nature of the risks and the gravity of the consequences of non-fulfilment, in which the risks non-fulfilment would create, could be assessed in qualitative terms. The Panel should not have failed in its obligation to assess such an important factor because of difficulties or imprecision that arose in assessing "the risks nonfulfillment [of the objective of the measure at issue] would create". A panel should proceed further with a holistic weighing and balancing of all relevant factors and reach an overall conclusion.

1.12. Fifth, with regard to the error in determining that Mexico did not make a *prima facie* case on less restrictive alternatives, Mexico said that the Appellate Body had found that the Panel could not "determine whether the first and second proposed alternative measures make a degree of contribution equivalent to that of the amended COOL measure" and thus decided "to end its analysis as to whether the amended COOL measure is 'more trade-restrictive than necessary' under Article 2.2 ... on the basis of those proposed alternative measures". In view of these errors,

the Appellate Body had reversed the Panel's finding that "Mexico failed to make a *prima facie* case that the amended COOL measure violates Article 2.2". The Appellate Body was unable to complete the legal analysis of certain allegations for lack of sufficient undisputed facts on the Panel record with respect to the first and second proposed alternative measures.

1.13. Sixth, with regard to the issue of burden of proof with respect to the alternative measures, Mexico said that Appellate Body's explanation concerning the burden of proof in relation to the alternative measure was important: "Considering that proposed alternative measures serve as 'conceptual tool[s]', and taking into account that the specific details of implementation may depend on the capacity and particular circumstances of the implementing Member in question, it would appear incongruous to expect a complainant, under Article 2.2 […,] to provide detailed information on how a proposed alternative would be implemented by the respondent in practice, and precise and complete estimates of the cost that such implantation would entail." The Appellate Body had, therefore, concluded that "the Panel should have considered whether the evidence provided by the complainants, and in particular, the examples of implemented trace-back systems in the United States and elsewhere, could have provided a sufficient indication that the cost of the proposed alternative would not be a priori prohibitive, and that potential technical difficulties associated with their implementation would not be of such a substantial nature that they would render the proposed alternatives merely theoretical in nature". Against this background, the Appellate Body had concluded that "the Panel did not properly allocate the burden of the proof under Article 2.2 … in finding that … Mexico had not provided sufficient explanation of how [its] third and fourth proposed alternative measures would be implemented in the United States, and the costs associated with those alternative measures". Although the Appellate Body could not complete the analysis of Mexico's arguments under Article 2.2 of the TBT Agreement, Mexico believed that the clarifications provided by the Appellate Body would be of great help in considering the assessment of future measures in relation to the Article 2.2 analysis.

1.14. With regard to the GATT 1994, Mexico said that the Appellate Body had confirmed that the amended COOL measure was contrary to Article III:4 of the GATT 1994 and had clarified the relationship between Article III:4 and Article IX of the GATT 1994 in the following terms: "[W]e see Articles IX:2 and IX:4 as setting out obligations with regard to 'marking requirements' that are separate from, and additional to, the national treatment obligation in Article III:4 of the GATT 1994." At the same time, the Panel's and Appellate Body's conclusion concerning the attempt by the United States to depart, as an exception, from the well-established jurisprudence in respect of Article XX of the GATT 1994, was of vital importance. The Appellate Body had explained that the responding party should invoke a defence in the early stages of the panel proceedings, because otherwise the due process would be undermined.

1.15. Finally, in light of the Panel and Appellate Body Reports in the compliance proceedings, Mexico hoped that the United States would immediately comply with the DSB's rulings and recommendations. If not, Mexico would reserve its right to continue the proceedings under the DSU, including its right to suspend concessions or other obligations.

1.16. The representative of the United States said that his country would like to thank the members of the compliance Panels, the Appellate Body, and the Secretariat assisting them for their work on these proceedings. These proceedings involved US country of origin labelling (COOL) requirements for beef and pork products sold at the retail level, which had been amended in direct response to the original findings of the Panel and Appellate Body. In particular, the original Panel and Appellate Body had found that the 2009 Final Rule breached Article 2.1 of the Agreement on Technical Barriers to Trade ("TBT Agreement") because it required producers throughout the supply chain to collect information on where animals were born, raised, and slaughtered, while not requiring retailers to provide the same level of detail on the labels placed on meat products sold at retail outlets. The United States had changed its labels in the 2013 Final Rule to be directly responsive to this finding, and retailers were now required to inform consumers of the place of birth, raising, and slaughtering for every piece of labeled meat that they bought. As such, the findings of the compliance Panels and Appellate Body were particularly disappointing. Instead of recognizing that the United States had modified its measure in the manner suggested by the Appellate Body such that it would come into compliance with Article 2.1, the Panels had continued to find the US measure to be in breach of this provision based primarily on two factors: (i) the fact that some meat was not required to be labelled, which was similar to the exceptions other Members had for their country of origin measures; and (ii) because in theory there could be some slightly more detailed information provided on the label in a few cases. Unfortunately, the

Appellate Body's somewhat cursory analysis had not reversed these findings. On the other hand, the Panels and the Appellate Body had left undisturbed the finding in the original proceeding that the provision of origin information to consumers was a legitimate objective under the covered agreements. Paradoxically, however, it would appear from those findings that there was no clear way under the covered agreements for a Member to achieve that legitimate objective. When examined as a whole, the Panel and Appellate Body findings appeared to mean that the United States could not require US retailers to inform consumers of beef and pork about where the animals were born, raised, and slaughtered. This was a conclusion with which the United States strongly disagreed.

1.17. More specifically, with respect to whether the amended measure treated imports less favorably than domestic products under Article 2.1 of the TBT Agreement, neither of the issues on which the findings were based went to the question presented, at least as the Appellate Body had explained it in the original proceedings. There the Appellate Body had explained that the question was whether the detrimental impact stemmed exclusively from legitimate regulatory distinctions or reflected discrimination. But here, there had been no explanation as to why either the fact that there could be some slightly more detailed information provided in a few cases or that not all beef and pork sold was required to be labelled would "reflect discrimination". After all, Article 2.1 of the TBT Agreement addressed discrimination. It was not concerned with whether a technical regulation was "perfect" or "could be better or even more accurate" or "could apply to even more products". The findings regarding the 2013 Final Rule's recordkeeping burden further illustrated the concern. For those findings, the Panels had relied on hypothetical scenarios that did not actually occur and would not be expected to ever occur. However, the Appellate Body appeared to avoid engaging with the US argument by noting that one of the scenarios the Panels had relied on was not a pure hypothetical. But even that hypothetical scenario failed to show that the amended COOL measure reflected discrimination. The scenario relied on by the Appellate Body involved the change in labeling for meat that represented an exceedingly small percentage of the market. And by affirming the Panels' finding that recordkeeping increased through the change to this one very minor label, the Appellate Body made no real evaluation of whether the recordkeeping had increased under the amended measure. Accordingly, the Appellate Body made no real evaluation of why the amended measure impacted the competitive opportunities for Mexico and Canada in the US livestock market at all[1], which indeed was what the Panel ultimately should have been examining when answering the question of whether the detrimental impact reflected discrimination.

1.18. Regarding the accuracy of the 2013 Final Rule's labeling requirements, the Appellate Body had never engaged with the fundamental issue. That was, whether the fact that the United States could have required the B Label to contain even more detailed information by listing all countries where the animal had resided as a country of "raising" meant, in fact, that such "inaccuracy" supported a finding that the detrimental impact did not stem exclusively from a legitimate regulatory distinction.[2] Regarding the exemptions to the amended measure, the United States was very concerned by the Appellate Body's affirmation of the Panels' finding that regulatory distinctions that had no impact whatsoever on the detrimental impact were nonetheless somehow relevant in assessing whether the detrimental impact stemmed exclusively from a legitimate regulatory distinction. Exemptions, such as the ones that were part of the amended measure, were a normal public policy tool used by Members to balance benefits and costs. In this case, the exemptions did not contribute to any detrimental impact on foreign livestock exports to the United States. Moreover, even taking into account the exemptions, the amended measure required over 30,000 grocery stores and other retailers throughout the United States to provide country of origin information to their customers on the US$38.5 billion worth of beef and US$8.0 billion worth of pork they sold annually. As such, it could hardly be said that the costs of the amended measure were so disproportionate to the information actually provided to consumers that the detrimental impact reflected arbitrary discrimination against Canadian and Mexican livestock. The findings with respect to Articles III:4 and XX of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), and their connection to Article 2.1 of the TBT Agreement, were also troubling. Indeed, the Panels and Appellate Body continued to fail to adequately address the fact that there may be measures whose objective was legitimate under the TBT Agreement, and whose detrimental impact flowed exclusively from legitimate regulatory distinctions, such that these measures were consistent with Article 2.1, but at the same time would be inconsistent with

[1] "US – COOL" (Article 21.5 – Canada/Mexico) (AB), paragraphs 5.17-18.
[2] "US – COOL" (Article 21.5 – Canada/Mexico) (AB), paragraphs 5.64-66.

Article III:4 of the GATT 1994 because the legitimate objective did not directly correspond to an exception available under Article XX of the GATT 1994. This was clearly not a sustainable reading of the two agreements. Despite the United States directly raising these serious and systemic concerns, the Appellate Body Reports did nothing to address the "balance" between Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994, nor did they facilitate an understanding of the scope of Article XX of the GATT 1994. With respect to Article 2.2 of the TBT Agreement, the United States was pleased that the Panels and the Appellate Body had all agreed that the amended COOL measure was not more trade restrictive than necessary. In so doing, the Panels and the Appellate Body had both appropriately concluded that demonstrating that a measure was more trade restrictive than necessary would in most cases require a comparison of the measure at issue with another measure that a complaining party asserted would fulfil the Member's objective at a level equivalent to the challenged measure, but in a less trade restrictive manner. Nonetheless, the Panels' and Appellate Body's reasoning and apparent modification of the burden of proof requirements raised serious concerns. For instance, the Appellate Body had found that in principle it would be possible for a proposed alternative measure to fail to achieve a Member's legitimate objective at the Member's chosen level if the alternative could somehow be perceived to compensate for that failure in some other area such that the overall degree of contribution of the alternative would be equivalent to the measure at issue.[3] The United States was concerned that this approach undermined a Member's ability to address legitimate objectives at the level the Member considered appropriate. Furthermore, it called on panels and the Appellate Body to make judgments as to how to value contributions to an objective in one way in an area compared to a different way in another area. This was a task for which panels and the Appellate Body had no guidance in the covered agreements and would appear to be a task unsuited to them, yet the consequences for Members could be quite significant. The United States was also concerned about the Appellate Body's finding that the Panels had not properly allocated the burden of proof under Article 2.2 of the TBT Agreement. Specifically, when bringing a claim under Article 2.2, and as approached under past analyses, it should be for the complainant to provide sufficient evidence to demonstrate that a proposed alternative measure was reasonably available, made an equivalent contribution to the legitimate objective, and was less trade-restrictive. The Appellate Body now suggested that a panel should consider examples of the proposed alternative elsewhere in the world as potential evidence that the costs of a proposed measure were not *a priori* prohibitive.[4] The Appellate Body further suggested that the responding party was in a better position to provide evidence on this point. The United States was concerned that this relieved the complainants of the burden of demonstrating that a particular measure was available to the Member in question by eliminating the need for specific information on availability of the proposed alternative in the context of that Member's market and regulatory regime.

1.19. The United States said that it would like to conclude its statement by touching on a familiar systemic issue that had been raised by the Panel and Appellate Body Reports, the length of the proceedings. Article 21.5 of the DSU stated that a "panel shall circulate its report within 90 days after the date of referral of the matter to it". However, this provision also provided a panel with the flexibility to go beyond 90 days "when the panel considers that it cannot provide its report within this time-frame", although the United States could appreciate Mexico and Canada's frustration that the Panel proceedings had taken 13 months in light of the specific circumstances of this proceeding. As Members were aware, Article 17.5 of the DSU also included a deadline, and this provision explicitly stated that "in no case shall [Appellate Body] proceedings exceed 90 days". However, this provision had no clause equivalent to that in Article 21.5 of the DSU permitting the report to be circulated beyond the mandatory time frame "when the [Division] considers that it cannot provide its report within this time-frame". As a result, the fact that the Appellate Body had not circulated its Report for 172 days was not consistent with the text of this provision. The United States fully understood the difficulty that the Appellate Body had in meeting this 90-day deadline in this dispute, which was in part due to the fact that the disputing parties had requested a modified timeline for their submissions, among other legitimate reasons. As a result, when the Appellate Body had sent a notice to all three parties indicating that it would not be able to circulate its report within 90 days, the three parties had written to the Appellate Body to express their understanding of this situation, to provide their consent to the need for more time, and to request a meeting so that the Appellate Body could provide more information as to the date when the report would be circulated. For reasons that had still not been explained, the Appellate Body had rejected this joint request to meet with the parties to the dispute, contrary to its past practice.

[3] "US – COOL" (Article 21.5 – Canada/Mexico) (AB), paragraph 5.269.
[4] "US – COOL" (Article 21.5 – Canada/Mexico) (AB), paragraph 5.339.

Despite this, the United States continued to offer its willingness to meet with the Appellate Body when this issue comes up in other disputes as well as to try to find a solution to both this ongoing problem of failing to adhere to the text of Article 17.5 of the DSU and the equally significant problem of Appellate Body workload. In fact, it was hard to conceive of a way that Members and the Appellate Body would be able to resolve these problems without engaging with each other directly. The United States stood by fully ready to engage constructively in such a dialogue.

1.20. The DSB took note of the statements.

1.21. The DSB adopted the Appellate Body Report contained in WT/DS384/AB/RW and the Panel Report contained in WT/DS384/RW and WT/DS384/RW/Add.1, as modified by the Appellate Body Report.

1.22. The DSB adopted the Appellate Body Report contained in WT/DS386/AB/RW and the Panel Report contained in WT/DS386/RW and WT/DS386/RW/Add.1, as modified by the Appellate Body Report.

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