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

(DS384/386)

EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF THE UNITED STATES OF AMERICA AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

October 4, 2010

1. Countries around the world have recognized that consumers desire — and have the right to know — the origin of the products they buy at the retail level. In fact, at least 40 WTO Members have enacted COOL requirements in recent years. These requirements apply to a broad range of products including consumer goods, apparel, and food, among others.

2. In this dispute, Canada and Mexico challenge U.S. COOL requirements as they apply to beef and pork. These measures are the result of a longstanding effort by the U.S. Congress and USDA to update and improve upon COOL requirements first adopted in the United States in 1930. The objective of these updated requirements is to ensure that consumers are provided information about the meat and other food products they buy at the retail level and to prevent consumer confusion regarding the origin of muscle cuts of meat.

3. The updated U.S. COOL system is the product of deliberative legislative and regulatory processes. The United States made substantial efforts to ensure its measures provide consumers with as much information as possible without imposing unduly burdensome compliance costs on market participants. The United States formally solicited input on its regulations and received thousands of comments. Many commenters strongly supported enhanced COOL requirements for meat, including consumer groups and individual consumers. The United States received comments from others, including industry and trading partners such as Canada and Mexico, opposing new labeling requirements as overly burdensome. In response, the United States modified its proposed measures to make them less burdensome and to reduce compliance costs.

4. While Canada and Mexico have brought claims under numerous WTO provisions, their arguments focus on two issues. First, they challenge the specific manner in which the United States designed its COOL measures. They focus on the 2009 Final Rule's requirement that retailers list more than one country of origin for meat derived from animals who were born and/or raised in another country before being slaughtered in the United States. They argue that this requirement renders the measures more trade restrictive than necessary. Accordingly, they suggest that the United States abandon its carefully crafted system in favor of a voluntary labeling system or one based on substantial transformation.

5. These alternatives were proposed by the complaining parties during the regulatory process; they were not accepted then because, quite simply, they do not work: they do not ensure that consumers get meaningful information about the origin of meat at the retail level. These suggestions also do nothing to provide clarity in the one area where meat labels have the greatest potential to be confusing — where the meat is derived from an animal that crossed the U.S. border before being slaughtered. Thus, these suggestions should not be accepted now.

6. The United States went to great lengths to accommodate the cost-related concerns of Canada, Mexico, and others while ensuring that its measures provide consumers with meaningful information. Canada and Mexico's arguments on this point overlook these efforts and ignore the TBT Agreement's recognition that any WTO Member may take measures necessary to achieve legitimate regulatory objectives "at the levels it considers appropriate." The United States decided that consumers should be provided with origin information about the food products they buy at the retail level, including where the source animal for meat products was born, raised, and slaughtered to prevent consumer confusion. None of the alternatives that Canada and Mexico propose would fulfill the U.S. objective at the level the United States determined is appropriate.

7. Second, Canada and Mexico argue that the COOL regulations accord less favorable treatment to their livestock because they force U.S. slaughterhouses to stop purchasing their animals to avoid allegedly high costs associated with processing both foreign and domestic livestock. A major problem with these arguments is that they misrepresent the details of the COOL measures, inaccurately asserting that they require segregation. To the contrary, the regulations were designed so that segregation would not be necessary. Canada and Mexico also overstate the costs associated with segregation for those firms who may choose to do so and they ignore market conditions unrelated to COOL that explain the recent experience of their livestock producers. Finally, Canada and Mexico's claims regarding the impact of the measures cannot be reconciled

with recent trade data. U.S. processors continue to buy livestock from Canada and Mexico with strong increases in U.S. livestock imports in 2010.

8. Canada and Mexico's less favorable treatment arguments are also flawed because they presuppose that market participants will all choose to comply, and in fact, are *forced* to comply with the regulations by discontinuing the purchase of Canadian and Mexican livestock. This is simply not the case. Rather, the COOL measures establish origin neutral labeling requirements for retailers of meat. Nothing in the measures prescribes how market participants in the upstream supply chain must respond. These market participants are allowed to, and in fact they have been, complying with the regulations in many different ways, including in ways that allow them to continue to purchase significant amounts of Canadian and Mexican livestock. Even Canada and Mexico's own evidence indicates that some market participants have not altered their purchasing behavior in response to the regulations. And even if the complaining parties could prove that some market participants decided to buy less foreign livestock, this reflects independent decisions of private market actors and cannot be attributed to the measures.

9. Canada and Mexico argue that various instruments (the COOL statute; the 2008 Interim Rule; the 2009 Final Rule; the Vilsack Letter; and for Mexico, the FSIS Interim Rule and FSIS Final Rule) constitute one "COOL measure." By defining the various U.S. instruments this way, Canada and Mexico attempt to sweep into the analysis measures that no longer exist and, with regard to others, to avoid proving their case. For example, the Vilsack Letter does not include mandatory labeling requirements and is not a technical regulation under the TBT Agreement. Similarly, neither party has explained how the COOL statute and FSIS Final Rule, when examined separately from the 2009 Final Rule, are inconsistent with U.S. WTO obligations. The Panel should reject Canada and Mexico's characterization of a single measure and instead analyze each of these measures and documents on its own, consistent with the approach taken in past disputes.

10. Turning to their substantive claims, neither Canada nor Mexico prove that the COOL measures are inconsistent with TBT Article 2.1 or GATT Article III:4 because all of the measures at issue in this dispute treat beef, pork, and livestock identically regardless of origin. Despite this, Canada and Mexico argue that the COOL measures are *de facto* inconsistent with U.S. national treatment obligations because they modify the conditions of competition to the detriment of their livestock.

11. These arguments are flawed for multiple reasons. First, they are founded on the erroneous assertion that a U.S. slaughterhouse can only process both foreign and domestic livestock by segregating its production lines. To the contrary, the regulations do not require segregation. Rather, they permit U.S. slaughterhouses to commingle U.S. and foreign origin cattle within a single production day and affix the resulting muscle cuts of meat with a mixed origin label.

12. Second, to the extent that U.S. processors might choose to comply with COOL by segregating instead of commingling, the cost of doing so is not as high as Canada and Mexico assert, and it is not prohibitive. The complaining parties overstate the costs, in part, because they overlook the fact that many U.S. processors have long segregated their production lines to meet grade labeling requirements, for other marketing programs, and to meet export requirements. Insofar as these processors may segregate to meet the COOL requirements, they are unlikely to incur significant new costs since they would not be deviating much from prior practice.

13. Third, these arguments presuppose that U.S. slaughterhouses who choose to segregate cannot pass on any compliance costs to consumers and do not account for the possibility that some slaughterhouses will continue to source both foreign and domestic livestock even if there is an added expense. The reason for this is that their business models are based on a supply of mixed origin animals to ensure that the plant runs at full capacity and at maximum efficiency.

14. Beyond segregation, Canada and Mexico's view of what is happening in the market is inaccurate. According to the evidence presented by Canada and Mexico, at least 12 of the 15 U.S. slaughterhouses that were accepting foreign and domestic livestock in 2008 are continuing to do so. This indicates that these slaughterhouses do not consider the cost of processing foreign livestock under the regulations to be prohibitive. These slaughterhouses have more than enough capacity to process all Canadian and Mexican livestock sent to the United States.

15. To the extent that any U.S. slaughterhouse may decide to stop processing foreign livestock to comply with COOL, this would be the decision of that private market actor alone. The COOL measures permit processors to comply with the labeling requirements in any way they see fit as long as they provide accurate information to retailers. Nothing in the regulations compels them to stop accepting foreign livestock or to segregate.

16. Canada and Mexico's discussion of trade data ignores external factors that explain any reduction in their livestock exports. In fact, while the COOL measures were being implemented, the world was in the throes of a global economic recession. In 2009, trade in agricultural products was down 12 percent around the world and down 11 percent in the United States. Given the recession, it would have been a major surprise if Canadian and Mexican livestock exports did not decline as well. Yet both Canada and Mexico's submissions and the economic studies they commissioned fail to take notice of this major economic shock, much less to account for it in their analysis. Canada and Mexico would have the Panel believe that had the United States not enacted the COOL measures, their livestock would have entered the United States at levels and prices unaffected by the recession. This position does not withstand scrutiny.

17. Third, Canada and Mexico overstate the severity of the decline in their exports and they ignore recent market trends. Even during the recession, Canadian and Mexican cattle exports remained above their historical averages and exports of both of these products are increasing significantly in 2010. U.S. imports of Canadian cattle are up 6 percent while imports of Mexican cattle are up 31 percent. These trends are expected to continue.

18. Canada and Mexico's arguments regarding less favorable treatment are premised on an incorrect understanding of the meaning of less favorable treatment under the national treatment provisions. The TBT Agreement preamble affirms the right of Members to regulate. Any time a Member enacts a technical regulation, it likely imposes some costs on market participants. Further, depending on their situation, some market actors will face higher costs than others, and they will respond to these costs in different, and often unpredictable, ways. The fact that some market actors may decide to change their behavior in a manner that disfavors products from some Members does not establish that the measures accord those products less favorable treatment.

19. Here, the measures themselves are neutral on their face. The changes in the market that Canada and Mexico identify are not mandated by the measures themselves, but at most reflect how some private entities have decided to structure their business based on their assessment of costs and other commercial considerations. As such, the measures do not accord "less favorable treatment" to Canadian and Mexican livestock.

20. This conclusion is consistent with the Appellate Body's reasoning in *DR – Cigarettes* where the Appellate Body noted that "the existence of a detrimental effect on a given imported product resulting from a measure does not necessarily imply that this measure accords less favorable treatment to imports if the detrimental effect is explained by factors and circumstances unrelated to the origin of the product, such as the market share of the importer in this case."

21. Canada and Mexico have failed to prove that any of the measures breach TBT Article 2.2. Under Article 2.2, read in conjunction with the TBT Agreement preamble, each Member has the right to decide for itself which legitimate objectives to pursue and to take measures to meet those

objectives "at the levels it considers appropriate." The *EC – Sardines* panel agreed with this interpretation.

22. The COOL measures were enacted with the legitimate objective of providing consumers with information about the covered commodities they buy at the retail level. For muscle cuts of meat, the United States decided that retailers should provide information about all the countries where the source animal was born, raised, and slaughtered. If the measures only required retailers to list where the animal was slaughtered, meat derived from livestock that spent its entire life outside of the United States and was only present in the country for a short time period (perhaps less than 24 hours) would be designated U.S. origin. Reading the label, a consumer would assume that the source animal had been born and raised in the United States. The fact that this product might also carry a USDA grade label would only exacerbate this confusion.

23. To verify the objective, the Panel should begin with their text and may consider their design, architecture, and revealing structure. As the Appellate Body noted, "it is not necessary for a panel to sort through the many reasons legislators and regulators often have for what they do and weigh the relative significance of those reasons to establish legislative or regulatory intent."

24. The text of the COOL measures clearly indicate that their objective is consumer information. The 2009 Final Rule states that "the intent of the law and this rule is to provide consumers with additional information on which to base their purchasing decisions." The COOL measures are also designed to ensure that consumers receive information about the covered commodities and are structured to prevent consumer confusion.

25. As a number of third parties have noted, the objectives of the U.S. measures are legitimate. TBT Article 2.2 contains a non-exhaustive list of legitimate objectives, as confirmed by the use of the term "*inter alia*." Thus, objectives not included in the list may also be legitimate. The legitimacy of the U.S. objectives are validated by the widespread consumer support for this information and the fact that over 40 WTO Members have country of origin labeling systems. Additionally, one of the objectives listed in Article 2.2 (the prevention of deceptive practices) is closely related to consumer information and the prevention of consumer confusion.

26. The COOL measures fulfill their objectives at the level that the United States has deemed appropriate. They provide U.S. consumers with information previously unavailable to them and have helped prevent confusion. While they do not require retailers to convey every detail regarding the product's origin or cover every instance in which a consumer purchases food, this does not support the conclusion that the measures' objective is something other than consumer information or demonstrate that the measures do not fulfill their objectives. It is true that if exceptions and flexibilities were not included and certain modifications were not made, the 2009 Final Rule would require retailers to provide more information to consumers than it does. However, the rule would also have imposed higher costs on industry. Given that USDA made a number of changes in response to concerns expressed by Canada and Mexico, the United States finds it somewhat ironic that the complaining parties now attempt to use these changes against the United States.

27. Taking into account the U.S. objectives, and given the flexibilities the United States built into its measures, they are not "more trade restrictive than necessary." The TBT Agreement does not define the phrase "more trade restrictive than necessary" and it has not been interpreted by any WTO adjudicative body. Based on the text, a complaining party must demonstrate (1) that a particular measure is trade restrictive and (2) that the measure restricts trade more than is necessary to fulfill the measure's legitimate objective. The United States agrees with Canada that SPS Article 5.6 provides useful context for the interpretation of the phrase "more trade restrictive than necessary." SPS Article 5.6 includes similar language to TBT Article 2.2 and the Appellate Body has noted the "strong conceptual similarities" between the two agreements. Therefore, a Member asserting a breach of this provision must demonstrate that there is another measure that (1) is

reasonably available to the government, taking into account technical and economic feasibility; (2) fulfills the government's legitimate objectives at the level the government has determined is appropriate; and (3) is significantly less trade restrictive.

28. Canada and Mexico have failed to prove that any of the COOL measures adopted by the United States are more trade restrictive than necessary. Canada and Mexico's arguments in this regard rest on their erroneous assertions that the U.S. measures require segregation and that there are high costs associated with that practice that have forced U.S. processors to completely reject foreign livestock. Additionally, the complaining parties ignore recent trade data that illustrate a significant increase in Canadian and Mexican livestock exports in 2010.

29. Canada and Mexico have failed to demonstrate there is another measure that would meet the U.S. objectives of providing consumer information and preventing consumer confusion at the level the United States deems appropriate while being significantly less restrictive to trade. Both of the measures that Canada and Mexico suggest — a voluntary labeling system and a mandatory system based on substantial transformation — fall short. A voluntary system would clearly not meet the U.S. objective. Indeed, the United States at one time attempted to implement a voluntary system, but U.S. retailers simply opted not to label their products.

30. A system based on substantial transformation would fail to meet the U.S. legitimate objectives. This system would not provide any information about the different countries in which an animal was born and raised when the animal was born and/or raised in a foreign country and then slaughtered in the United States. Further, it would not prevent consumer confusion. Under this system, meat derived from an animal that spent its entire life in another country before being slaughtered in the United States would be characterized as U.S. origin. This would defy consumer perception and could perpetuate confusion. Finally, Canada and Mexico have not shown that a substantial transformation system is significantly less trade restrictive.

31. Mexico has also failed to establish the COOL measures breach TBT Article 2.4. In particular, Mexico has not demonstrated that the CODEX standard it advances is an effective or appropriate means of fulfilling the legitimate objectives pursued by the United States. CODEX-STAN 1-1985 appears to be based on substantial transformation. Thus, this standard suffers from the same deficiencies as the alternative just discussed.

32. Mexico's arguments under TBT Article 12.3 fail to establish that any of the COOL measures breach this provision. Mexico has not demonstrated that the United States did not take its needs into account during the preparation and application of the 2009 Final Rule. Rather, the United States gave Mexico the opportunity to participate in the U.S. rule making process and to share its concerns with the United States in other fora. The United States considered Mexico's contributions and even modified its regulations in response to concerns raised by Mexico.

33. Canada and Mexico have failed to demonstrate that any of the COOL measures are inconsistent with U.S. obligations under GATT Article X:3. Neither party offers evidence to show that the administration of these measures has been unreasonable or non-uniform. Indeed, their arguments do not even relate to the administration of the COOL measures. Rather, Canada and Mexico focus on the issuance of the Vilsack Letter, an action that did not in any way "put into practical effect" or "apply" the COOL statute or regulations. Further, changes the United States made to the regulations were not non-uniform or unreasonable. In fact, many changes were made at the request of interested parties, including Canada and Mexico.

34. Finally, Canada and Mexico have not demonstrated that any of the COOL measures nullify or impair their benefits under the WTO Agreements. In fact, neither party is able even to identify the relevant benefits under the covered agreements that have been affected, let alone establish that they could not have reasonably anticipated the enactment of the COOL measures.