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

(DS384/DS386)

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

December 21, 2010

1. Canada and Mexico have asserted that they are not challenging country of origin labeling requirements in general. They acknowledge that many WTO Members maintain country of origin labeling requirements for food and that this practice is not necessarily WTO-inconsistent. They both maintain country of origin labeling requirements as do many third parties.

2. Canada and Mexico necessarily claim then, that their concern is not with country of origin labeling *in general*, but only with the particular measures that the United States adopted with respect to beef and pork. However, Canada and Mexico's arguments regarding the WTO obligations at issue cannot be reconciled with this position: were their arguments accepted, it is difficult to conceive of any country of origin labeling system that would survive WTO scrutiny.

3. The complaining parties assert the U.S. measures do not fulfill their legitimate objectives and are protectionist because they apply only to some food products; yet even a cursory review of the labeling systems of the third parties shows they do not apply to all products either. Canada and Mexico find fault with the fact that the U.S. measures are mandatory and apply at retail; yet again, the United States has identified nearly 70 Members with mandatory requirements, many of which apply at retail. Canada and Mexico criticize the U.S. measures because they are not based on the concept of substantial transformation; but the United States is hardly the only WTO Member not to base its labeling requirements on this concept. Thus, if the U.S. measures are WTO-inconsistent due to their scope, their mandatory nature, the fact that they apply at the retail level, or the fact that they rely on criteria other than substantial transformation, this would raise questions about many other labeling requirements maintained by WTO Members.

4. Canada and Mexico criticize the U.S. measures as not providing complete information to consumers, in particular because the United States strived to reduce compliance costs by adding, at Canada's request, commingling provisions. When coupled with their argument that compliance costs are too high, Canada and Mexico's complaint regarding commingling puts the United States and other WTO Members with labeling requirements in an impossible position. Canada and Mexico condemn the U.S. measures as "more trade restrictive than necessary" because of their compliance costs, yet at the same time claim that they fail to fulfill their legitimate objectives because of efforts made by the United States to reduce these costs. In effect, Canada and Mexico's theory presupposes that WTO panels should stand in the shoes of the regulator, re-calibrate the costs and benefits of a given measure, and in the process undermine the right of WTO Members to adopt measures to provide origin information to their consumers at the level they consider appropriate.

5. In addition to making overly-broad arguments that would jeopardize the ability of WTO Members to adopt origin labeling requirements, Canada and Mexico argue that the U.S. measures are WTO-inconsistent because of their alleged effects in the market. However, Canada and Mexico have not identified any aspects of the COOL measures *themselves* that accord less favorable treatment to their livestock exports. While the complaining parties have provided limited evidence suggesting some private market actors changed their policies in response to the measures, much of this information is inaccurate and any such actions are not required by the measures. The measures only require retailers to label their products with origin information, regardless of what that origin may be, and they require suppliers to provide accurate information to those retailers. They do not require feed lots or slaughter houses to segregate and do not prevent them from accepting foreign livestock. Further, Canada and Mexico's assertions regarding the impact of the measures cannot be reconciled with recent data showing Canadian and Mexican livestock exports and prices are up.

6. Canada and Mexico's theory that the COOL measures were adopted for protectionist reasons is contradicted by the text of the measures, their design, and extensive evidence demonstrating that U.S. consumers and consumer organizations actively supported and sought the enactment of the

U.S. measures. The United States provided substantial evidence regarding the role played by the consumer, including letters of support from individual consumers, extensive lobbying efforts by the leading consumer organizations in the United States, and even a recommendation adopted by the Trans-Atlantic Consumer Dialogue (TACD), a coalition of 27 U.S. and 49 EU consumer organizations, explicitly endorsing the COOL statute.

7. Instead of making their case with regard to all of the instruments, Canada and Mexico urge the Panel to make findings with regard to a single "COOL measure." This characterization overlooks substantive differences between the instruments that have implications for how the various WTO obligations apply. In addition, many of the instruments Canada and Mexico characterize as part of the single "COOL measure" have expired or are not within the Panel's terms of reference. Further, the WTO reports that Canada and Mexico cite to support their "single measure" theory are not applicable to the instant dispute. Thus, the Panel should examine each instrument separately as was done in *Japan – Film* and *Turkey – Rice Licensing*.

8. By advancing the "single measure" theory, Canada and Mexico attempt to hide deficiencies in their case, such as the fact that the Vilsack Letter is not a technical regulation under the TBT Agreement or a "requirement" under GATT Article III:4. The Vilsack Letter does not meet these definitions because it is not mandatory. This is obvious from the letter's text, its lack of an enforcement mechanism, and the fact that it has no legal status. Tellingly, the evidence before the Panel also indicates that industry is not following the letter's suggestions.

9. Canada and Mexico have failed to demonstrate that the COOL measures breach TBT Article 2.1 or GATT Article III:4. The COOL measures treat covered commodities of all origins identically, requiring products to be labeled with origin regardless of what their origin may be. To the extent that these measures apply to livestock, they apply to them identically – requiring that meat derived from these livestock be labeled at the retail level, regardless of where the source animal was born, raised, and slaughtered.

10. Canada and Mexico's arguments to the contrary are premised on a misunderstanding of the legal obligations at issue and a misapplication of past reports examining the meaning of "less favorable treatment." A Member does not act inconsistently with these provisions unless its measure treats domestic products one way and provides different, less favorable treatment to imported products based on origin. A Member will not breach these provisions as a result of the behavior of private market actors not required by the measure itself. Neither the GATT 1994 nor the TBT Agreement guarantees a Member a particular outcome in the hands of an individual market actor or a particular level of sales for their product. The question is whether any of the COOL measures provides for different treatment based on origin, and if so, whether that different treatment is less favorable for imported products. Not only do the COOL measures not provide for different treatment based on origin, but the detrimental effects complained about are based on the actions of private market actors or due to external market factors.

11. Canada and Mexico's attempts to analogize the instant situation to *Korea – Beef* by asserting that the COOL measures impose a choice on market actors that requires them to accord less favorable treatment to imports are not persuasive. The *Korea – Beef* measure on its face accorded different treatment to imported and domestic products and required small retailers to choose between selling only domestic or only imported products; they could not sell both. The COOL measures are origin neutral and do not require retailers or any other private market actors to make a

choice between domestic and imported products or to take any particular action at all that would harm imports. In fact, the COOL measures allow market actors to comply in any fashion they choose as long as the end product bears an accurate label. Feed lots and slaughter houses may respond in many different ways, including by accepting all domestic livestock, accepting all foreign livestock, commingling different origin livestock on the same production day, accepting different origin livestock on different days, or by segregating if they so choose.

12. In addition to misapplying the legal standard, Canada and Mexico ignore the commingling provisions, which obviate the need to segregate. Using these provisions, feed lots can feed different types of livestock together and send these animals to be slaughtered on the same production day without segregation. The slaughter house can process these animals together or commingle them further and characterize the resulting meat as mixed origin. Finally, after the meat derived from this livestock leaves the slaughter house, it does not need to be segregated because it can all be affixed with the same label at the retail level. Evidence before the Panel demonstrates that U.S. processors are taking advantage of the commingling flexibility, directly contradicting Mexico's vague assertion that USDA is somehow adopting a strict interpretation of the 2009 Final Rule that has discouraged the use of these provisions.

13. Even if some feed lots and slaughter houses choose to respond to the COOL measures by segregating, this does not establish that the *measures* accord different treatment based on origin, let alone less favorable treatment. Segregation is but one among many options that these entities have to respond to the measures, and the feed lots and slaughter houses who choose to respond to the COOL measures by segregating are not required to reduce the price they pay for livestock (imported or domestic) in order to offset any costs they choose to bear as a result. Rather, these entities can absorb any associated costs, pass these costs on to consumers, or distribute these costs throughout the supply chain. Nothing in these measures requires them to impose these costs solely or disproportionately on imported livestock through price discounting.

14. In addition to ignoring the commingling provisions and pre-supposing that any segregation costs will be imposed only on their products, Canada and Mexico downplay the significance of the segregation that has long been occurring in the market independent of the COOL measures. The significance of this pre-existing segregation is not merely that slaughter houses who choose to respond to the COOL measures by segregating can use existing segregation mechanisms at limited additional cost, but that segregation is extremely common and U.S. processors can use their experience and existing synergies to establish new segregation practices at a lower cost than if they had not previously segregated for other purposes.

15. The evidence and economic studies that Canada and Mexico submit do not demonstrate that the COOL measures accord less favorable treatment to their livestock. First, the evidence is of questionable accuracy, and to the extent that it is accurate, it does not represent less favorable treatment accorded by the measures. Second, Canada and Mexico's argument that the COOL measures have forced U.S. feed lots and slaughter houses to reject their livestock and discount the price paid for these animals is contradicted by recent economic data. Third, the economic models and reports the complaining parties have submitted are highly flawed.

16. Canada and Mexico have failed to demonstrate the COOL measures breach TBT Article 2.2. If their arguments were accepted, it is unclear whether a Member could ever adopt country of origin labeling requirements without breaching its WTO obligations. Canada and Mexico's arguments that

the COOL measures are "more trade restrictive than necessary" because they require too much information and fail to fulfill their objectives because they do not provide enough put the United States in an impossible position. The Panel should reject Canada and Mexico's attempts to turn the TBT Article 2.2 analysis into a wholesale re-evaluation of every choice the United States made in the process of developing a complex regime. Designing a technical regulation necessitates difficult choices, especially when balancing the interests of U.S. consumers and trading partners like Canada and Mexico. Some interested parties advocated for a labeling system that provided more information, while others advocated for a less costly system. The Panel need not – and should not – stand in the shoes of the regulator and attempt to re-calibrate the balance that was struck. Rather, all the Panel need determine is whether the measures fulfill their legitimate objectives at the level the United States considers appropriate without restricting trade more than necessary.

17. The objectives of the COOL measures – providing consumer information about origin and preventing consumer confusion regarding origin – are legitimate. Many third parties agree and neither Canada nor Mexico dispute this fact. The legitimacy of these objectives is also confirmed by the strong consumer support for country of origin labeling as well as the fact that many WTO Members have adopted country of origin labeling requirements and explicitly identified "consumer information" as their objective in their TBT notifications.

18. Providing consumer information about origin and preventing consumer confusion are the objectives of the COOL measures. To determine the objectives, the Panel should focus on the measures' text and may also consider their design, architecture, and revealing structure. The text and design of the COOL measures clearly indicate that their objectives are consumer information about origin and the prevention of consumer confusion. For example, 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."

19. Canada and Mexico's arguments that the COOL measures are protectionist because of their product coverage or origin definition would imply that most, if not all, of the labeling systems maintained by WTO Members are also protectionist. Similarly, the fact that the 2009 Final Rule does not provide the most detailed information possible in all circumstances does not imply that its objective is protectionism. The commingling provisions were specifically included at Canada's request and they have reduced implementation costs. The fact that the COOL measures do not require retailers to list more than one country on a Category D label when processing steps occur in more than one country does not illustrate a protectionist objective either. The amount of meat to which this applies is trivial and requiring multiple countries to be listed on a Category D label would increase compliance costs for foreign producers.

20. To the extent that the legislative and regulatory history of the COOL measures are relevant, it confirms the objectives as providing consumer information about origin and preventing consumer confusion. This is obvious from the Committee Reports, statements of legislators, statements of interest groups, and statements of U.S. consumers on the record.

21. The COOL measures fulfill their objectives at the levels the United States considers appropriate. As a result of the measures, millions of consumers have information not previously available to them. With regard to meat, consumers have information on all the countries in which processing steps took place when the meat is slaughtered in the United States and will not be misled

into believing that meat labeled as U.S. origin was derived from an animal born, raised, and slaughtered in the United States when this is not the case.

22. While many consumers are pleased with the COOL measures and the information they provide, the United States could have designed these measures to provide even more information by omitting the commingling flexibility or requiring point-of-production labeling. However, the TBT Agreement does not require Members to take every step possible to fulfill its legitimate objectives without regard to cost, and for this reason, Canada and Mexico's arguments regarding product coverage and imperfect information must fail.

23. Canada and Mexico have not identified a reasonably available alternative. The suggestion of a voluntary labeling system is not a reasonably available alternative because the United States attempted this option without success; therefore, it failed to fulfill the U.S. objectives in a very fundamental way. The suggestion that the United States adopt a system based on substantial transformation fails to fulfill the U.S. objectives because it does not provide any information about the multiple countries in which an animal spent its life when it was not born, raised, and slaughtered in a single country; thus, it does not provide as much information as the U.S. system and does nothing to reduce consumer confusion regarding meat products from animals born and/or raised in another country and slaughtered in the United States. Many U.S. consumers and consumer organizations indicated that this level of information is important, and they rejected a definition based on substantial transformation. Accompanying the 2009 Final Rule with a trace back system is not a reasonably available alternative either. It is unclear how this alternative could possibly be less trade restrictive.

24. Mexico has failed to demonstrate that the COOL measures breach TBT Article 2.4. Mexico asserts that the United States has conceded that the CODEX standard is relevant, but this mis-characterizes the U.S. position and fails to address the fact that the CODEX cannot be a relevant standard for a large portion of the meat at issue (meat not pre-packaged) since it does not apply to these products. Mexico has also failed to explain how substantial transformation would be an "effective" or "appropriate" means of achieving the U.S. legitimate objectives.

25. Mexico has also failed to demonstrate that the COOL measures breach TBT Article 12.3 and has failed to identify what "special needs" it had. Mexico's arguments are based on a flawed legal interpretation that ignores the text of Article 12.3, the context provided by other TBT provisions, and the context provided by the special and differential treatment provisions of the SPS Agreement in addition to past reports that have interpreted the SPS provision. Based on this, it is clear that Mexico bears the burden of proof under this provision and that the United States was not required to take any particular actions in response to comments it received from Mexico. In addition, the United States has provided evidence on how it has taken Mexico's concerns into consideration *with a view* to avoiding unnecessary obstacles to Mexico's exports.

26. Canada and Mexico have failed to demonstrate that any of the COOL measures breach GATT Article X:3(a). Their arguments focus on actions that do not represent the "administration" of the COOL measures and neither party has put forward any evidence to suggest that the U.S. administration of the measures was unreasonable or non-uniform.

27. Finally, Canada and Mexico have continued to treat their nullification and impairment claims in a cursory fashion. They have failed to present "a detailed justification in support" of their claim that the COOL measures violate GATT Article XXIII(b) as required by DSU Article 26.1(a).