

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

(DS384/386)

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

September 14, 2010

1. Mr. Chairman, members of the Panel, and staff of the Secretariat: on behalf of the United States, we would like to thank you for your ongoing work in this panel proceeding.

2. The United States has explained our positions in full in our first written submission. We will not repeat all of these arguments again today. Rather, our oral statement will summarize and highlight our views on major issues in this dispute.

I. Introduction

3. 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 country of origin labeling (COOL) requirements in recent years, many of which were notified to the TBT Committee.¹ These requirements apply to a broad range of products including consumer goods, apparel, and food, among others.

4. 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 U.S. Department of Agriculture (USDA) to update and improve upon COOL requirements first adopted in the United States in 1930. The objective of these updated labeling 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.

5. The updated U.S. COOL requirements were the product of a long and thoughtful legislative process followed by an equally deliberative regulatory process. In crafting these measures, the United States made substantial efforts to ensure that they would provide consumers with as much information as possible without imposing unduly burdensome compliance costs on market participants. In an attempt to strike the right balance, the United States formally solicited input on the COOL regulations on at least four occasions and received thousands of comments in response. Many of the commenters strongly supported enhanced country of origin labeling requirements for meat, including major consumer groups and individual consumers. At the same time, the United States received comments from other groups, including both foreign and domestic industry groups and trading partners such as Canada and Mexico, opposing new labeling requirements as overly burdensome. In response to the comments, the United States modified its proposed measures in numerous respects. Nearly all of these modifications made the measures less burdensome and reduced compliance costs for foreign and domestic industry participants.

6. Three measures at issue in this dispute contribute to the COOL requirements for meat products: the 2002 COOL statute, as amended in 2008, which provides the broad framework for these requirements; the 2009 Final Rule, which was developed by USDA's Agricultural Marketing Service (AMS) and sets forth the necessary details on how the statutory framework is

¹ U.S. First Written Submission, para. 16.

to be implemented; and the Food Safety and Inspection Service (FSIS) Final Rule, which conforms FSIS policy with AMS's 2009 Final Rule.

7. While the complaining parties have brought claims under numerous WTO provisions, their primary arguments focus on two issues. I will first address these overarching issues before turning to other aspects of Canada and Mexico's arguments.

8. First, Canada and Mexico challenge the specific manner in which the United States designed its COOL measures. In particular, the complaining parties 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 (Category B and C labels). They argue that this requirement, among other features, renders the measures more trade restrictive than necessary. Accordingly, they suggest that the United States abandon its carefully crafted system for one of two alternatives: a voluntary labeling system or one based on substantial transformation.

9. These alternatives were previously 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. At the same time, these suggestions 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. For similar reasons, these suggestions should not be accepted now.

10. As the statutory and regulatory history demonstrates, the United States went to great lengths to accommodate the cost-related concerns of Canada, Mexico, and other market participants while at the same time ensuring that the measures provided consumers with meaningful information. Not only do Canada and Mexico's arguments on this point overlook U.S. efforts to reduce compliance costs, but they 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."² In this instance, the United States decided that consumers should be provided with country of origin information about the covered commodities they buy at the retail level, including information about where the source animal for meat products was born, raised, and slaughtered, in order 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.

11. 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

² Preamble to the TBT Agreement.

livestock under the COOL requirements. Canada and Mexico's arguments regarding less favorable treatment are also highly flawed.

12. One major problem with these arguments is that they misrepresent the details of the COOL statute and regulations, inaccurately asserting that these measures require segregation. To the contrary, the regulations were specifically designed so that segregation would not be necessary. Canada and Mexico also dramatically overstate the costs associated with segregation for those firms who may choose to do so in order to comply with the law. Additionally, the complaining parties ignore market conditions unrelated to the COOL measures that explain the changes in price and the level of exports of Canadian and Mexican livestock to the United States in recent years. And finally, Canada and Mexico's claims regarding the significant impact of the measures cannot be reconciled with recent trade data. U.S. processors continue to buy livestock from Canada and Mexico, and indeed there have been strong increases in U.S. livestock imports in 2010.

13. Perhaps most importantly, Canada and Mexico's less favorable treatment arguments are 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.

14. 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 at all in response to the regulations.³ Further, even if the complaining parties could prove that some market participants decided to buy less Canadian and Mexican livestock following implementation, this reflects independent decisions of private market actors. It cannot be attributed to the measures.

15. I will now proceed to address specific aspects of Canada and Mexico's arguments under the WTO provisions at issue in this dispute. Before turning to their specific claims, however, I would like briefly to discuss Canada and Mexico's attempt to characterize multiple different measures and documents as one "COOL measure" and the effect this has on the Panel's analysis.

II. Canada and Mexico Erroneously Argue that the COOL Statute, the 2008 Interim Rule, the 2009 Final Rule, the FSIS Final Rule, and the Vilsack Letter Are All One "COOL Measure"

³ Exhibit CDA-41.

16. In their first written submissions, Canada and Mexico both argue that various measures and documents (the 2002 COOL statute, as amended in 2008; the 2008 Interim Rule; the 2009 Final Rule; a letter from the U.S. Secretary of Agriculture, Thomas J. Vilsack; and for Mexico, the FSIS Interim Rule and FSIS Final Rule) constitute one “COOL measure.” By defining the various U.S. instruments in this manner, Canada and Mexico attempt to sweep into the Panel’s analysis measures that no longer exist and, with regard to others, to avoid proving their case.

17. Analyzing all of the instruments cited by Canada and Mexico in this manner is problematic for several reasons. First, Canada and Mexico both characterize the 2008 Interim Rule as part of the “COOL measure” despite the fact that it was superceded by the 2009 Final Rule in March 2009. Similarly, Mexico attempts to sweep into the Panel’s analysis the FSIS Interim Rule, another measure that has been superceded and does not have legal effect.

18. Second, Canada and Mexico’s characterization of these various instruments as a single “COOL measure” obscures substantive differences between the documents that have implications for the legal claims in this dispute. For example, the Vilsack Letter does not include mandatory labeling requirements, and therefore is not a technical regulation governed by the TBT Agreement disciplines cited by Canada and Mexico. Similarly, neither party has explained how the COOL statute and FSIS Final Rule, when examined separately from the 2009 Final Rule, are inconsistent with the obligations at issue. Canada and Mexico cannot avoid making a prima facie case by ignoring basic differences between these instruments. The United States urges the Panel to reject Canada and Mexico’s characterization of a single “COOL measure” and instead analyze each of these measures and documents on its own merits, consistent with the approach taken in past disputes.⁴

III. The Vilsack Letter is Not A Technical Regulation

19. One of the more significant implications of Canada and Mexico’s attempts to characterize the various U.S. measures and documents as one “COOL measure” is that it leads them to avoid demonstrating that the Vilsack Letter meets the definition of a technical regulation under the TBT Agreement. In fact, it is clear that the Vilsack Letter is not a “technical regulation” because, among other things, compliance with this document is not mandatory. The letter indicates in four separate places that it is making “voluntary” suggestions. It contains no enforcement mechanism to “bind” or “compel” the industry to follow these suggestions.⁵ And neither complaining party has provided any evidence to suggest that the industry is actually following the suggestions contained in the letter. Accordingly, the Vilsack Letter is not a technical regulation and is not subject to any of the TBT provisions at issue in this dispute.

⁴ *Japan – Film*, paras. 10.88-10.89; *Turkey – Rice Licensing*, paras. 7.279-7.281.

⁵ *EC – Asbestos (AB)*, para. 68.

IV. The COOL Measures Are Not Inconsistent with TBT Article 2.1 or GATT Article III:4

20. 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. Canada and Mexico are unable to make this showing because all of the measures at issue in this dispute treat beef, pork, and livestock identically regardless of origin. These measures simply require that retailers label covered food products with country of origin no matter what that country of origin may be.

21. 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. In particular, the complaining parties argue that the COOL regulations impose higher costs on slaughterhouses that process foreign and domestic livestock than those who process only domestic livestock because processing livestock of more than one origin requires segregation. According to Canada and Mexico, some U.S. slaughterhouses have stopped purchasing foreign livestock altogether to avoid the allegedly prohibitive segregation costs. To support their argument, Canada and Mexico cite a reduction in their livestock exports to the United States in 2008 and 2009.

22. Canada and Mexico's arguments regarding less favorable treatment are flawed for multiple reasons. Above all, they rest on a number of inaccurate assumptions regarding the role of segregation in the market and in the measures at issue. On this matter, I would like to note three points. One, their arguments are founded on the erroneous assertion that the only way a U.S. slaughterhouse may continue to process both foreign and domestic livestock is by segregating its production lines. To the contrary, nothing in the regulations requires segregation. Rather, they explicitly 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 either a Category B or C label. With this flexibility, slaughterhouses simply do not need to segregate.

23. Second, to the extent that U.S. processors might choose to comply with the law by segregating instead of commingling, the cost of doing so is not nearly as high as Canada and Mexico assert, and it certainly 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 and for other marketing programs, as well as to meet the demands of various U.S. export markets.⁶ Insofar as these processors may segregate to meet the statutory and regulatory COOL requirements, they are unlikely to incur significant new costs since they would not be deviating much from prior practice.

24. Third, Canada and Mexico's arguments presuppose that U.S. slaughterhouses who choose to segregate cannot pass on any of these compliance costs to consumers. Similarly, Canada and Mexico do not account for the possibility that some slaughterhouses will continue to source both

⁶ U.S. First Written Submission, para. 169.

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.

25. Beyond segregation, Canada and Mexico's view of what is happening in the market is directly contradicted by the facts on the ground. On this issue, I would like to make three points as well. First, even 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.⁷ This indicates that these slaughterhouses do not consider the cost of processing foreign livestock under the regulations to be prohibitive. Further, these slaughterhouses have more than enough capacity to process all of the livestock that Canada and Mexico send to the United States.

26. To the extent that any U.S. slaughterhouse may decide to stop processing foreign livestock to comply with the COOL requirements, this would be the decision of that private market actor, and that private market actor alone. As noted earlier, 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 even to segregate livestock.

27. Second, Canada and Mexico's discussion of trade data ignores external factors unrelated to the measures that explain any reduction in their livestock exports in 2008 and 2009. In fact, while the COOL measures were being implemented, the world was in the throes of a global economic recession — a recession that economists in the United States have dubbed the worst recession the country has faced since the Great Depression. In 2009, trade in agricultural products was down 12 percent around the world⁸ and down 11 percent in the United States.⁹ Given the recession, it would have been a major surprise if Canadian and Mexican livestock exports did not decline as well.

28. Yet both Canada and Mexico's submissions and the economic studies they commissioned in support of their arguments 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.

⁷ Exhibit CDA-99.

⁸ Global Trade Atlas Data (Exhibit US-57).

⁹ U.S. Department of Agriculture, Economic Research Service, *Foreign Agricultural Trade of the United States (FATUS): Monthly Summary*, (Exhibit US-58).

29. Third, Canada and Mexico overstate the severity of the decline in their exports in 2008 and 2009, and they ignore recent market trends. For example, even in the midst of the recession in 2009, Canadian and Mexican cattle exports remained above their historical averages.¹⁰ Further, exports of both of these products are increasing significantly in 2010. U.S. imports of Canadian cattle are up 6 percent for the first seven months of 2010 compared with the same period in 2009 while imports of Mexican cattle are up 31 percent.¹¹ These trends are expected to continue.

30. Finally, setting aside the factual flaws in their position on segregation and their analysis of market conditions, Canada and Mexico's arguments regarding less favorable treatment are premised on an incorrect understanding of the commitments at issue and in particular the meaning of less favorable treatment under the GATT and TBT national treatment provisions. In its preamble, the TBT Agreement affirms the right of Members to regulate. Yet, any time a Member enacts a technical regulation, it likely imposes some costs on market participants. Furthermore, 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 within the meaning of the GATT or TBT national treatment provisions.

31. 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.

32. This conclusion is consistent with the Appellate Body's reasoning in *Dominican Republic – Cigarettes*. In that dispute, 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."¹²

33. Canada and Mexico's attempts to analogize the measures at issue in the instant dispute to those at issue in *Korea – Beef* and others involving GATT Article III:4 are not persuasive. Unlike the situation in *Korea – Beef*, where the measure at issue provided formally distinct treatment to imported and domestic products, the COOL measures treat all products equally. By

¹⁰ Exhibit US-28.

¹¹ Bureau of the Census, U.S. Department of Commerce, *Cattle: Monthly U.S. Exports* (Exhibit US-59).

¹² *Dominican Republic – Cigarettes (AB)*, para. 96.

contrast, in the disputes cited by Canada or Mexico where the measure at issue did not provide formally distinct treatment (*Dominican Republic – Cigarettes* and *Japan – Film*), as is the case here, WTO panels did not find that the measure modified the conditions of competition.

34. Finally, to demonstrate that a technical regulation provides less favorable treatment under TBT Article 2.1, Canada and Mexico must demonstrate that the less favorable treatment is “in respect of” the technical regulation.¹³ This makes clear that any less favorable treatment not directly attributable to the measure — for example, less favorable treatment resulting from a particular private market actor’s decision regarding how to comply with that measure — does not give rise to an inconsistency. Technical regulations may have inconsistent effects in the market as market actors adjust to the regulation, and these effects are not in themselves “less favorable treatment” “in respect of” the measure within the meaning of TBT 2.1 or GATT Article III:4.

35. For these reasons and others discussed in the U.S. submission, Canada and Mexico have failed to establish that any of the COOL measures breach TBT Article 2.1 or GATT Article III:4.

V. The COOL Measures Are Not Inconsistent with TBT Article 2.2

36. Canada and Mexico have also failed to prove that any of the measures breach TBT Article 2.2. Under Article 2.2, read in conjunction with the preamble to the TBT Agreement, 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.”¹⁴ As the *EC – Sardines* panel stated “Article 2.2 and this preambular text affirm that it is up to the Members to decide which policy objectives they wish to pursue and the levels at which they wish to pursue them.”¹⁵

37. In this instance, the COOL measures were enacted with the legitimate objective of providing consumers with certain information about the covered commodities they buy at the retail level. For these commodities, American consumers will receive new information that was not previously available to them.

38. At the same time, 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 statute and regulations only required retailers to list the country 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 very short time period before slaughter (perhaps less than 24 hours) would be designated as U.S. origin. Reading the label, a consumer would likely assume that the animal from which the meat was derived had been born and raised

¹³ TBT Article 2.1.

¹⁴ Preamble to the TBT Agreement.

¹⁵ *EC – Sardines (Panel)*, para. 7.120.

in the United States. The fact that this product might also carry a USDA grade label would only exacerbate this confusion.

39. To verify the objective of the COOL measures, the Panel should begin with their text. At the same time, the Panel may consider their “design, architecture, and revealing structure.”¹⁶ On the other hand, the Appellate Body has noted that “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. The subjective intentions inhabiting the minds of individual legislators or regulators do not bear upon the inquiry, if only because they are not accessible to treaty interpreters.”¹⁷

40. The text of the COOL statute and regulations 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.”¹⁸ Likewise, the Senate Committee Report accompanying the 2002 COOL statute states “Many American consumers want to know the country of origin of their food. This Act therefore requires retailers to notify consumers of the country of origin of beef, pork, lamb, fish, fruits, vegetables, and peanuts. This provision provides consumers with greater information about the food they buy.”¹⁹ The COOL measures are also designed to ensure that consumers receive information about the covered commodities and are structured to prevent consumer confusion.

41. As a number of third parties have noted,²⁰ and as even Canada did not appear to dispute at least before its opening statement today,²¹ the objectives of the U.S. measures — providing consumer information and preventing consumer confusion — are legitimate objectives within the meaning of the TBT Agreement. TBT Article 2.2 contains a non-exhaustive list of legitimate objectives, as confirmed by the use of the term “*inter alia*.”²² Thus, objectives not explicitly included in the list — such as consumer information and preventing consumer confusion — may also be legitimate. For example, the *EC – Sardines* panel found that market transparency and

¹⁶ *Chile – Alcohol (AB)*, para. 62 (citing *Japan – Alcohol (AB)*, p. 29).

¹⁷ *Chile – Alcohol (AB)*, para. 62.

¹⁸ Exhibit CDA-5, p. 2677.

¹⁹ Exhibit US-11, p. 93-94.

²⁰ Third Party Submission of Australia, para. 65; Third Party Written Submission by the European Union, para. 39.

²¹ Canada’s First Written Submission, para. 176.

²² Preamble to the TBT Agreement.

consumer protection — two objectives not included in the list — are legitimate objectives under the TBT Agreement.²³

42. 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 requirements. Additionally, one of the objectives listed in Article 2.2 — the prevention of deceptive practices — is closely related to the provision of consumer information and the prevention of consumer confusion. Indeed, in *EC – Sardines*, the panel supported its decision that market transparency and consumer protection are legitimate objectives by noting the close link between these objectives and the prevention of deceptive practices.²⁴

43. The COOL statute and regulations fulfill their legitimate objectives at the level that the United States has deemed appropriate. In particular, the COOL measures have provided millions of U.S. consumers with information that was previously unavailable to them and have helped prevent confusion related to the origin of muscle cuts of meat.

44. While the COOL measures do not require retailers to convey every detail regarding the product's origin, or cover every instance in which a U.S. consumer purchases an item of food, this does not support the conclusion that the measures' objective is something other than consumer information. In addition to wanting to provide as much consumer information as possible, the United States strived to reduce the costs of compliance. Thus, in certain instances, the United States created exceptions, such as the exceptions for processed foods or small retailers. In other instances, the United States added flexibility into the regulations, such as allowing retailers to use a mixed origin label when different categories of meat were commingled in a single production day or allowing retailers to use a label for ground meat that includes all countries of origin that were reasonably in the processor's inventory within the last 60 days. The United States also dropped the requirement that each production step be labeled, a proposal that was included in the 2003 Proposed Rule.

45. It is true that, if these exceptions and flexibilities were not included and that if certain modifications had not been made, the 2009 Final Rule would require retailers to provide even more information to consumers than it currently does. However, the Final Rule would also have imposed higher costs on the industry. Indeed, given that USDA made a number of changes to the proposed regulations to ease compliance costs in response to concerns expressed by interested parties (including Canada and Mexico), the United States finds it somewhat ironic that the complaining parties are now claiming that these changes mean that the measures do not meet the U.S. objectives.

²³ *EC – Sardines (Panel)*, para. 7.123.

²⁴ *EC – Sardines (Panel)*, para. 7.123.

46. Taking into account the U.S. objectives, and given all of the flexibilities that the United States built into its measures, the COOL statute and regulations 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. However, 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.

47. 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 very similar language to TBT Article 2.2, with the former prohibiting measures that are “more trade restrictive than required.”²⁵ In addition, the Appellate Body has noted the “strong conceptual similarities” between the two agreements.²⁶

48. Based on these similarities, Canada has urged the Panel to interpret TBT Article 2.2 in a manner similar to the way the Appellate Body has interpreted SPS Article 5.6, and in particular, to adopt a similar approach to determine whether a measure violates the provision.²⁷ The United States agrees. According to this approach, 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 Further, as noted, the complaining party must also demonstrate that the responding party’s measure restricts trade.

49. In this instance, Canada and Mexico have failed to prove that any of the COOL measures adopted by the United States are more trade restrictive than necessary. As a threshold matter, 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 and thereby directly undermine their arguments. Thus, the complaining parties have not substantiated their claims about the COOL measures’ impact on trade much less demonstrate that any such impact restricts trade more than is necessary.

²⁵ SPS Article 5.6.

²⁶ *EC – Sardines (AB)*, para. 274.

²⁷ Canada’s First Written Submission, para. 190.

²⁸ *Australia – Salmon (AB)*, para. 194.

50. In addition, Canada and Mexico have failed to demonstrate that 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 also 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.

51. A mandatory system based on substantial transformation would also fail to meet the U.S. legitimate objectives at the level the United States determined is appropriate. While this type of labeling system would provide more information than a voluntary system, it would not provide any information about the different countries in which an animal was born and raised in instances where 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. As one example, under a system based on substantial transformation, meat derived from an animal that spent nearly its entire life in another country before being slaughtered in the United States immediately after import would be characterized as U.S. origin. This would defy the perception of most consumers and could perpetuate confusion by implying that this meat was derived from an animal that spent its entire life in the United States. Thus, a system based on substantial transformation would not provide the level of information that the United States determined is appropriate and is not an alternative that would fulfill the U.S. objectives.

52. At the same time, Canada and Mexico have not shown that a system based on substantial transformation is significantly less trade restrictive than the system that the United States adopted. To the extent that the Panel were to determine that the COOL measures restrict trade in the first place, both measures require retailers to provide origin information to consumers and both measures require individuals in the supply chain to maintain adequate records as to the origin of the product they are processing.

53. For these reasons, neither Canada nor Mexico has proposed a viable reasonable alternative and neither party has demonstrated that any of the U.S. measures breaches TBT Article 2.2.

VI. The COOL Measures Are Not Inconsistent with TBT Article 2.4

54. Mexico has also failed to establish that any of the COOL measures breach TBT Article 2.4. While in our submission we have offered a number of reasons why Mexico's claim fails, in this statement I would simply emphasize that, in particular, Mexico has not demonstrated that the CODEX standard it advances (CODEX-STAN 1-1985) would be 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. Therefore, this standard suffers from the same deficiencies as the alternative just described.

VII. The COOL Measures Are Not Inconsistent with TBT Article 12.3

55. Mexico’s arguments under TBT Article 12.3 are also flawed and fail to establish that any of the COOL measures breach this provision. Even assuming *arguendo* that Mexico is a developing country, Mexico has not demonstrated that the United States did not take into account its needs during the preparation and application of the 2009 Final Rule. To the contrary, Mexico was afforded the opportunity to formally participate in the U.S. rule making process — an opportunity it took advantage of — and to share its concerns with the United States in other fora as well, including at listening sessions²⁹ and in meetings with U.S. officials.³⁰

56. The United States considered Mexico’s contributions as it developed the 2009 Final Rule. In fact, the United States even modified its regulations in response to concerns raised by Mexico and significantly reduced the record keeping burden associated with the rule.

57. For these reasons, Mexico has failed to demonstrate that the United States has breached its obligations under TBT Article 12.3.

VIII. The COOL Measures Are Not Inconsistent with GATT Article X:3

58. Canada and Mexico have also failed to demonstrate that any of the COOL measures are inconsistent with U.S. obligations under GATT Article X:3. Canada argues that the United States has breached this provision by administering the COOL measures in an unreasonable manner while Mexico argues that the U.S. administration of these measures has been both unreasonable and non-uniform.³¹ However, neither party offers a single piece of evidence to show that the administration of these measures has been unreasonable or non-uniform in any way.

59. Indeed, the complaining parties’ arguments do not appear to relate to the administration of the COOL measures at all. The Appellate Body has interpreted the term “administer” within the context of GATT Article X:3 to mean “putting into practical effect” or “applying” the types of measures that are enumerated in paragraph 1 of Article X.³² Yet, 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. Rather, the Vilsack Letter contains suggestions to the

²⁹ Exhibit CDA-11, p. 61945.

³⁰ U.S. First Written Submission, para. 274.

³¹ Canada’s First Written Submission, paras. 225-232; Mexico’s First Written Submission, paras. 374-378.

³² *EC – Bananas III (AB)*, para. 200.

industry on actions that they could voluntarily take that go beyond what is required by the measures themselves.

60. Mexico also argues that changes made to the implementing regulations during the regulatory process were somehow non-uniform or unreasonable; however, the changes to which Mexico refers merely reflect the U.S. notice and comment system of rule making and do not represent the application of the statute or the Final Rule. Additionally, the changes that were made to the Interim Rule were hardly non-uniform or unreasonable. To the contrary, these changes were made in response to the comments that USDA received from interested parties, including Canada and Mexico.

61. For these reasons, the arguments put forth by Canada and Mexico fail to establish that the United States has administered the COOL measures in breach of GATT Article X:3.

IX. The COOL Measures Are Not Inconsistent with GATT Article XXIII

62. Finally, Canada and Mexico have not demonstrated that the COOL measures nullify or impair any of their benefits under the WTO Agreements under GATT Article XXIII. 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. Neither party has provided a “clear correlation” between the enactment of these measures and whatever harm it is that they allege.

63. Thus, like the rest of their claims, the claims made by the complaining parties under GATT Article XXIII should be rejected by the Panel as well.

X. Conclusion

64. Mr. Chairman, members of the Panel, this concludes our opening statement. We would be pleased to respond to any questions you may have.

LIST OF EXHIBITS

- Exhibit US-57 Global Trade Atlas Data
- Exhibit US-58 U.S. Department of Agriculture, Economic Research Service,
*Foreign Agricultural Trade of the United States (FATUS): Monthly
Summary*
- Exhibit US-59 Bureau of the Census, U.S. Department of Commerce, *Cattle:
Monthly U.S. Exports*