

***UNITED STATES – CERTAIN COUNTRY OF ORIGIN LABELLING
(COOL) REQUIREMENTS
(WT/DS384/386)***

**EXECUTIVE SUMMARY OF
THE FIRST WRITTEN SUBMISSION OF
THE UNITED STATES OF AMERICA**

August 24, 2010

I. INTRODUCTION

1. The U.S. country of origin labeling measures are the product of a decade long legislative and regulatory process, driven by the desire to provide consumers with additional information about the origin of meat and other food products they buy at the retail level. Quite simply, consumers in the United States want better information about where their food comes from.

2. Previous U.S. labeling requirements did not require meat labeling at the retail level and did nothing to alleviate consumer confusion about origin, which for some products was compounded by the grade labeling program administered by the U.S. Department of Agriculture (“USDA”). The labeling provisions included in the 2002 Farm Bill, amended in 2008, and the 2009 implementing regulations, were the results of hard work to reconcile the views of U.S. consumer advocacy groups, who strongly supported stricter labeling requirements, and industry interests, who sought to minimize compliance costs. The legislative and regulatory record demonstrates the lengths to which the United States went to balance these interests, and the efforts made to address concerns of interested parties, including Canada and Mexico, while ensuring that U.S. consumers would receive better information about the products they buy.

3. The United States is not alone in seeking to provide consumers with information on country of origin. Motivated by the objective of providing consumer information, numerous WTO Members, including Canada and Mexico, have enacted mandatory country of origin labeling regimes, applying to a vast cross-section of products.

4. Despite the widespread acceptance of country of origin labeling requirements by WTO Members and U.S. efforts to carefully design the COOL measures, Canada and Mexico allege that they are inconsistent with U.S. obligations under the TBT Agreement, the GATT 1994, and nullify and impair their benefits under the GATT. Fundamentally, Canada and Mexico’s objections amount to nothing more than an attempt to re-weigh the complex balance of interests that led to the measures, and in the process prevent the United States from providing its consumers with information that is routinely available to consumers in other WTO Members.

5. They seek to do so *not* because the measures are discriminatory on their face, nor because they result in *de facto* discrimination vis-à-vis Canadian or Mexican meat, but because some U.S. slaughterhouses have allegedly modified certain policies in processing Canadian and Mexican livestock. On this basis alone, they seek to upend the entire U.S. statutory and regulatory framework, notwithstanding that nothing in the measures requires slaughterhouses to take the actions that some allegedly did. Canada and Mexico ignore the fact that slaughterhouses segregated livestock before the labeling requirements took effect, and that the measures were designed to provide market participants with as much flexibility as possible to minimize burdens on suppliers.

6. Nor in fact have those slaughterhouses’ actions had an appreciable impact on trade – indeed, cattle exports to the United States are sharply up in 2010. Only by ignoring basic market factors unrelated to the COOL measures – the global economic recession, high feed costs, animal disease issues, declining inventories, and a restructuring of the North American hog industry – can Canada and Mexico attempt to imply some commercial impact on their livestock attributable to the COOL measures. Indeed, it is telling that, in advancing a (remarkably underdeveloped) claim that their benefits have been nullified and impaired, neither complainant can even identify how they have been harmed. The failure of the complaining parties to put forward a colorable argument in this regard illustrates the weak foundations upon which their arguments rest.

7. The COOL measures do not provide less favorable treatment to Canadian and Mexican livestock. They fulfill the legitimate objective of providing consumer information without substantially restricting trade, are administered fairly, and were developed and applied in a manner that took into account a wide range of interests. Throughout the process, the United States carefully weighed competing objectives – the desire to provide better consumer information and the desire to limit the impact on market participants – and incorporated the views of interested parties in an

attempt to strike the correct balance. The COOL measures reflect these objectives and are not inconsistent with the WTO Agreements.

II. LEGAL ARGUMENT

8. Canada and Mexico describe the measures at issue as a single “COOL measure,” but as they define this term, their complaint rests on several substantively distinct measures: Section 10816 of the 2002 Farm Bill, as amended by Section 11002 of the 2008 Farm Bill, the 2008 Interim Final Rule, the 2009 Final Rule, and a February 20, 2009 letter from Secretary Vilsack. Mexico also characterizes the FSIS Final Rule as an additional element of the “COOL measure.”

9. In so doing, Canada and Mexico obscure the fact that the 2008 Interim Final Rule is not in effect. In addition, the Vilsack Letter (even if considered a U.S. measure) is not subject to the TBT disciplines that complainants claim the United States has breached because it is not “mandatory.” Finally, Canada and Mexico overlook important substantive differences between each of the elements of the “COOL measure,” which has important implications for their respective legal claims. For example, Canada and Mexico’s arguments do not address how the statute, apart from the 2009 Final Rule, is inconsistent with U.S. obligations, nor does Mexico explain how the FSIS Rule is inconsistent with U.S. obligations.

10. By treating these measures as a single “COOL measure,” Canada and Mexico attempt to sweep into the Panel’s analysis a document not subject to the relevant commitments, to obtain findings on a measure no longer in effect, and to avoid making their case with respect to other measures. Rather than evaluating them collectively, the Panel should assess each document on its own merits, consistent with the approach used in previous disputes.

III. THE COOL MEASURES ARE NOT INCONSISTENT WITH THE TBT AGREEMENT

11. Canada and Mexico discuss the Vilsack Letter at length in arguing that the “COOL measure” is inconsistent with U.S. obligations under the TBT Agreement. However, the Vilsack Letter does not meet the definition of a “technical regulation” – by its terms, compliance with it is not mandatory. In describing its suggestions, the Vilsack Letter states that the Secretary is simply recommending that the industry “voluntarily adopt . . . practices to ensure that consumers are adequately informed about the source of food products.” The Vilsack Letter also does not include any mechanism to ensure that companies follow its suggestions. While Canada and Mexico attempt to characterize the Secretary’s comment that he “will carefully consider whether modifications to the rule will be necessary to achieve the intent of Congress” as evidence of the Letter’s so-called “mandatory nature,” this statement merely reflects the fact that USDA (like any other regulator) has the ability to revisit its rule making. Finally, Canada and Mexico offer no evidence demonstrating that industry is following the letter’s suggestions.

12. The COOL measures are not inconsistent with TBT Article 2.1. To demonstrate that a measure is inconsistent with this obligation, the complaining party must demonstrate that: (1) the measure is a technical regulation; (2) the imported and domestic products at issue are “like” products; (3) the imported products receive less favorable treatment than the “like” domestic products; and (4) such treatment is in respect of the technical regulation.

13. As discussed above, the Vilsack Letter is not a technical regulation. With regard to the 2002 COOL Statute, as amended, 2009 Final Rule, and FSIS Rule, the requirements contained therein provide for labeling of beef and pork with country of origin information at the retail level regardless of whether the product is imported or produced domestically. Further, Canada and Mexico do not even address the fact the COOL measures apply to meat, not livestock.

14. Even if it were appropriate to evaluate a measure for consistency with Article 2.1 based on evidence regarding a product not regulated by that measure, Canada and Mexico have failed to show

that the COOL measures provide less favorable treatment to livestock. These measures require meat to be labeled with origin information regardless of where the livestock from which the meat was derived was born, raised, or slaughtered.

15. Rather than asserting that the COOL measures by their terms accord different treatment to their beef and pork, Canada and Mexico claim that the measures have modified the conditions of competition to the detriment of their livestock. Central to their argument is the assertion that the measures require U.S. processors to segregate their production lines. Further, the complainants allege that U.S. processors have avoided segregation costs by refusing foreign livestock. These arguments do not withstand scrutiny.

16. In law and in fact, the COOL measures do not require U.S. processors to segregate. Feeding operations and slaughter houses can meet the law's requirements in any way they choose. In fact, the 2009 Final Rule indicated that there are multiple ways a processing facility could comply with the law, which may or may not include segregation.

17. Not only does nothing in these measures require segregation, but the flexibility they provide reduces the likelihood that livestock will need to be segregated to comply with the law. For example, the 2009 Final Rule contains significant flexibility that allows processors to commingle muscle cuts of meat from various different sources and affix the same label to all of the meat that is processed. Retailers can use a Category B or C label when various combinations of Category A, B, and C meat are commingled during a single production day.

18. Even if a U.S. processor did not take advantage of these flexibilities and chose to segregate or only accept one type of livestock, nothing in these measures would require them to favor U.S. livestock. A processor could easily dedicate its processing line to Canadian or Mexican instead of U.S. livestock and still efficiently comply with the COOL measures.

19. In conclusion, a slaughter house has a number of options available to it to comply with the COOL measures without segregating. The slaughter house may: (1) process cattle of exclusively domestic origin; (2) process cattle of exclusively foreign origin; (3) process domestic cattle and imported cattle during the same production day when producing muscle cuts; or (4) process cattle and meat of varying origins when producing ground meat.

20. While none of the COOL measures require segregation, Canada and Mexico argue that this practice is widespread and has had a detrimental impact on their products. Canada and Mexico also allege that several slaughter houses have been rejecting their livestock entirely.

21. As a threshold matter, it is not clear that what Canada and Mexico assert is accurate. In addition, the evidence they cite show that four of the five largest cattle packers and four of the five largest swine packers are continuing to accept foreign cattle at some of their processing plants. Together, these plants have more than enough capacity to process all of Canada's and Mexico's exports. Canada's evidence also indicates that many producers are taking advantage of the law's flexibilities to continue processing domestic and foreign livestock without segregating.

22. Canada and Mexico also ignore the fact that certain U.S. processors segregated their processing lines before the 2009 Final Rule was implemented. This pre-existing segregation undermines Canada's and Mexico's argument that the COOL measures have generated high costs of compliance for processors that handle their livestock by requiring them to segregate processing lines. It also demonstrates that individual market actors have reasons for segregating products that have nothing to do with the COOL measures.

23. In addition to incorrectly asserting that the COOL measures require segregation, Canada and Mexico argue that these measures "create incentives" for U.S. industry to segregate, citing to the Appellate Body report in *Korea – Beef* to argue that this is sufficient to prove the measures afford

less favorable treatment. However, *Korea – Beef* provides no support for this position. The measure at issue there created a dual retail system for domestic and foreign beef – thus, the measure itself imposed on retailers “the *legal* necessity of making a choice” between domestic and foreign products. By contrast, the complainants argue that the U.S. law leads to a *commercial* necessity to segregate products. Indeed, the fact that some companies are not segregating demonstrates that it is not commercially necessary, and certainly not legally necessary. Processors can, and have been, accepting both types of meat, both in a segregated and non-segregated fashion.

24. Even if Canada and Mexico could prove that some producers began to segregate after adoption of the COOL measures, this does not establish less favorable treatment because this decision would have resulted from circumstances unrelated to these measures. Canada and Mexico both appear to acknowledge that any decision by U.S. packers to change their production practices results in large part from the complaining parties’ relatively small market shares.

25. Finally, the trade data does not support the conclusion that Canadian and Mexican livestock have been adversely impacted by the COOL measures. Canadian and Mexican cattle exports were close to their 10-year averages in 2009 and are expected to increase in 2010. Prices of Canadian and Mexican cattle are also expected to increase. Similarly, Canadian hog prices have been rising since late 2009. Although Canadian hog exports are still at low levels, this results from the significant restructuring of the industry, which has outweighed the positive momentum from other factors.

26. To the extent that economic conditions for Canadian and Mexican livestock were positive in 2008 and 2009, this results from factors unrelated to COOL. Canadian and Mexican cattle export volumes and prices have been influenced by the recession, feed costs, transportation costs, currency fluctuations, weather conditions, and animal diseases. The recent Canadian hog market conditions are consistent with the significant industry restructuring, the recession, falling inventories, high feed costs, currency fluctuations, and H1N1. A USDA analysis demonstrates that factors other than the 2009 Final Rule were responsible for the decline in Canadian exports of cattle and hogs to the United States in 2008 and 2009. In particular, USDA’s analysis shows that the economic recession is more likely the cause of the temporary decline in imports than the 2009 Final Rule.

27. The studies cited by Canada and Mexico to demonstrate that market conditions in 2008 and 2009 would have been more favorable but for the implementation of the 2009 Final Rule are flawed. The Informa Report suffers from four key limitations: (1) non-transparent methodologies; (2) a failure to account for previously occurring segregation; (3) a failure to account for impact of flexibilities in 2009 Final Rule; and (4) implausible conclusions given market trends. The two models developed by Professor Daniel Sumner are also flawed. Exhibit CDA-78 relies on the unsubstantiated and flawed results produced by the Informa Report. Likewise, Exhibit CDA-79 fails to account for key factors that drove North American livestock markets during this turbulent period, erroneously relies on the use of dummy variables to explain complex changes in U.S.-Canadian price differentials and U.S. livestock imports, and makes other methodological errors.

28. Canada and Mexico’s arguments about the COOL measures also ignore a fundamental reality of regulation: namely, that any time a government passes a new law or adopts a new technical regulation, it may impose significant compliance costs on industry or even impose a greater cost on some market participants versus others. This does not mean that the measure “modifies conditions of competition” so as to afford less favorable treatment. Rather, to the extent they exist, the “costs” identified by Canada and Mexico are at most simply transition and compliance costs – costs that typically arise whenever governments implement a new regulation.

29. Canada and Mexico additionally cite to alleged administrative and political “uncertainty” surrounding the adoption and implementation of the COOL measures. Incongruously, these objections appear to be directed at the transparent nature of the U.S. regulatory process, which provided multiple opportunities for stakeholder input, and changes that were made to take the input

into account in developing the 2009 Final Rule. Indeed, Canada and Mexico point to nothing in the process that disadvantaged imported products over domestic products.

30. Finally, while the COOL Statute and 2009 Final Rule contain labeling requirements that “relate to” the labeling of beef and pork, they are not “in respect of” the labeling of livestock. Accordingly, the Panel need not conduct an inquiry into whether the COOL measures have resulted in less favorable treatment to Canadian and Mexican livestock because these measures do not apply in respect of these products.

31. The COOL measures are not inconsistent with Article 2.2 of the TBT Agreement. The United States adopted these measures to achieve the legitimate objective of providing consumer information, information that, among other things, helps prevent consumer confusion related to the use of USDA grade labels. Further, the COOL measures were carefully constructed and modified during the legislative and regulatory processes to ensure that they were not more trade restrictive than necessary to achieve their objective.

32. To determine the objective of the COOL measures, the Panel should begin with their text and should consider their “design, architecture, and revealing structure.” The 2009 Final Rule’s text makes clear that its objective is to provide consumers with information about the food that they buy at the retail level. A number of aspects of the measures’ design and structure confirm this purpose. For meat, Congress determined that retailers should provide consumers with information about the country in which the animal from which the meat is derived was slaughtered and about where that animal was born and raised if that animal was slaughtered in the United States. Congress determined that this was necessary to reduce the likelihood that consumers would be confused about the origin of the meat in instances where the animal was slaughtered in the United States. In the absence of this requirement, meat from livestock that spent its entire life outside of the United States and was only present in the United States for a short time before slaughter could still be labeled as a U.S. product. Reading the label, a consumer could reasonably assume that the meat they purchased came from a cow that had spent most of its life within the United States. At the same time, this product would also carry a USDA grade label, which would further reinforce the erroneous impression that the meat was derived from a “U.S.” animal. The objective of the COOL measures is also evident in other elements of their design, such as record keeping requirements and fines to ensure the consumer receives accurate origin information.

33. The coverage of commodities under the COOL measures does not support the conclusion that their objective is not consumer information. The COOL measures cover products that make up more than 90 percent of the meat products consumed by Americans and require that all fruits and vegetables sold at the retail level be labeled. The fact that a measure does not cover every conceivable product within a sector for which the pursuit of the same objective would be legitimate is not evidence that the measure is protectionist any more than the fact that a Member had adopted labeling requirements for one sector but not another. Indeed, the fact that the COOL measures encompass much more than beef and pork argues against a finding that their intent is protectionism for the livestock sector.

34. Canada and Mexico argue that COOL’s protectionist intent is evidenced by the fact that the covered commodities are more likely to face import competition than those not covered. However, in making this argument, Canada and Mexico overlook the obvious – that if a measure’s objective is to provide consumers with information about where the food they buy comes from, that information is the most valuable precisely when consumers have the option of choosing among a mix of domestic and imported options. If there was no import competition for a particular product, there is less imperative to require an origin label because it is less likely to provide any additional information to the consumer or help clear up consumer confusion.

35. Putting this aside, the data that Canada and Mexico cite are misleading. With regard to omitted commodities, Canada appears to cite only the import statistics that support its theory while ignoring those that do not. And even within covered commodities, no pattern is discernable. Some covered commodities face significant competition while other commodities do not.

36. Congress' decisions to only apply the requirements to retailers who sell fresh fruits and vegetables in excess of \$230,000 and to exempt certain processed foods were also not irrational or motivated by protectionism. Rather, these decisions were made to help reduce compliance costs for both foreign and domestic producers.

37. Finally, Mexico's argument that the COOL measures were adopted for a protectionist purpose because the United States already had other consumer information measures in place does not withstand scrutiny. First, these requirements did not ensure that consumers had accurate information about certain food products at the retail level, including meat. Second, there is nothing inherently protectionist about adopting more than one measure to achieve the same objective. Third, the existing FSIS label pre-approval program by which packers and processors could apply for approval to use a "Product of the U.S.A." label was a voluntary program that did not ensure that consumers received adequate information about the majority of the agricultural products they buy.

38. Canada and Mexico also base their allegations of a "protectionist" intent for the COOL measures on a handful of statements of individual groups and legislators. In relying on these statements, Mexico and Canada vastly oversimplify the domestic policy debate surrounding COOL in the United States and ignore the large assortment of interested parties that participated in the multi-year legislative and regulatory process, while attempting to divine the intent of the measures at issue from an arbitrary selection of participants rather than the text itself.

39. First, the U.S. meat industry *opposed* the inclusion of beef and pork as covered commodities under the statute. Thus, to the extent that Canada and Mexico suggest that the coverage of the statute reflects the protectionist desires of U.S. industry as a whole, they are simply incorrect. Second, the principal sponsors of the legislation repeatedly referred to the desire for consumer information as the objective of the legislation. Third, Canada and Mexico ignore the hundreds of comments received during the rule making process by numerous consumers and consumer groups in unanimous support of the measures.

40. Article 2.2 interpreted in the context of the TBT Agreement preamble leaves each Member to decide on which legitimate objectives it wishes to pursue and the level at which it seeks to pursue them. TBT Article 2.2 contains a non-exhaustive list of legitimate objectives, as confirmed by the use of the term "*inter alia*." The text reflects that objectives other than those expressly listed in Article 2.2 may be "legitimate." Further, one of the specifically enumerated legitimate objectives is "the prevention of deceptive practices," which is closely related to consumer information.

41. Neither Canada nor Mexico assert that consumer information cannot constitute a legitimate objective. Canada does not deny that providing consumer information is a legitimate objective and Mexico's arguments do not withstand scrutiny. To the extent that Mexico suggests that consumer information is never a legitimate objective when the information supplied pertains to origin, it would appear to call into question all mandatory country of origin labeling systems maintained by Members, including its own programs. Further, to the extent Mexico is asserting that the information required by the COOL measures can be distinguished from that required under other origin labeling programs, it offers no meaningful basis on which to draw such a distinction.

42. The adoption of the COOL measures has also "fulfilled" the U.S. objective by providing millions of U.S. consumers with information about the origin of the products they buy at the retail level when this information was not previously available. Although the COOL measures do not

cover every conceivable scenario in which a consumer buys food, this does not mean that they do not fulfil their objective. After all, Article 2.2 does not require that a Member pursue an objective to the maximum possible degree without regard to costs or other considerations. In fact, when designing the COOL measures, Congress and USDA had to balance competing interests. On one hand, they sought to design measures that provided as much information to consumers as possible regarding origin. On the other hand, they wanted to ensure that the cost of compliance with these measures would not place too large a burden on foreign or domestic producers or retailers. As a result, Congress and USDA provided a range of flexibilities and exceptions to reduce compliance costs without jeopardizing the larger objective.

43. While Canada and Mexico assert that the meat labels prescribed by the COOL measures are “confusing” and cannot be viewed as fulfilling a consumer information objective, they have provided no evidence demonstrating that the current labeling scheme has caused or will cause any consumer confusion. To the contrary, COOL’s labeling of meat reflects the facts about these products’ origin much more accurately than the labels previously available to consumers.

44. Article 2.2 of the TBT Agreement provides that technical regulations shall not be “more trade-restrictive than necessary” to fulfill a legitimate objective. Based on the ordinary meaning of Article 2.2, and its relevant context, in order for a WTO Member to show that another government’s technical regulation is more trade restrictive than necessary for purposes of the second sentence of TBT Article 2.2, the complaining member must show that, first, there is another measure that is reasonably available to the government. Second, that measure must fulfill the government’s legitimate objectives. Finally, the measure must be *significantly* less restrictive to trade.

45. Both Canada and Mexico suggest that the United States adopt a voluntary labeling program. A voluntary labeling program fails to fulfill the objective of providing consumers with country of origin information on a wide range of products sold at the retail level. Indeed, before implementing mandatory country of origin labeling requirements for meat, the United States tried this option without success. The primary problem with voluntary labeling is that many businesses will not voluntarily make the choice to label their products with origin information when given the option.

46. Canada and Mexico also suggest that the United States adopt a meat labeling system based on substantial transformation. This alternative would not fulfill the U.S. objective because it would not provide consumers with information about where the various processing steps took place. The United States has determined that this must be a key part of any labeling regime due to the consumer confusion related to products that have been imported for immediate slaughter. Indeed, consumers do not expect meat derived from an animal that spent its entire life in a foreign country before coming into the United States for a very short period of time before it is slaughtered to be labeled U.S. origin. Similarly, for animals that spend significant periods of their lives in both the United States and a foreign country, a U.S. origin label does not provide complete information. As a result, consumers would have incomplete and misleading information, and significantly less information than under the system provided for by the COOL measures.

47. The COOL measures are not inconsistent with TBT Article 2.4. Mexico argues that they are inconsistent with this provision because they are not based on CODEX-STAN 1-1985. To constitute an international standard, the standard must be adopted by a body whose membership is open to the relevant bodies of all Members and is based on consensus. It is possible that CODEX-STAN 1-1985 may qualify as such, but Mexico bears the burden of demonstrating that this is the case.

48. Even assuming *arguendo* that CODEX-STAN 1-1985 is a “relevant international standard” and that the United States did not base the COOL measures on it, Mexico’s claim fails because, insofar as this standard addresses the provision of country of origin information of a product based

on a substantial transformation rule, it would fail to fulfill the legitimate objective pursued by the United States of providing consumer information and thus would be an ineffective and inappropriate means of fulfilling the objective of the COOL measures.

49. To the extent that CODEX-STAN 1-1985 addresses providing country of origin information based on a substantial transformation rule for all products, it would not provide meaningful information to consumers about the origin of the products at issue in this dispute. With respect to meat, a substantial transformation rule would mean that meat from a cow born and raised in Canada or Mexico would be labeled as a product of the United States simply because it was transported across the border for a single day to be slaughtered. This renders the rule “ineffective” because it does not have the function of accomplishing the legitimate objective pursued. Nor is a substantial transformation rule “appropriate,” as the type of information provided is in some cases misleading.

50. The COOL measures are not inconsistent with Articles 12.1 and 12.3 of the TBT agreement. Mexico does not argue that the United States has independently breached Article 12.1; rather its argument appears to rest on the premise that the United States has acted inconsistently with TBT Article 12.3, and as a result, also acted inconsistently with Article 12.1.

51. To establish a violation of Article 12.3, the complaining party must demonstrate that: (1) it is a developing country; (2) the other Member did not take account of its special development, financial or trade needs during the preparation and application of a technical regulation; and (3) that the Member did not take account of these needs *with a view* to ensuring that the technical regulation does not create unnecessary obstacles to export.

52. Mexico has failed to meet its burden to prove any of these elements. Even assuming *arguendo* that Mexico is a developing country, Mexico has not demonstrated that the United States did not take account of one or more special needs of Mexico in the preparation and application of the COOL measures. To the contrary, the United States offered Mexico numerous opportunities to formally comment on the development of the regulations and held meetings with Mexico to discuss the rule making. In addition, changes to the COOL measures are consistent with suggestions provided by Mexico during the regulatory process on ways to minimize their impact on trade and to facilitate compliance with the labeling requirements contained therein.

53. Moreover, Mexico’s argument that the United States has violated Article 12.3 because the COOL measures have created an unnecessary obstacle to trade applies the wrong legal standard. TBT Article 12.3 requires that Members take account of the needs of developing country Members in the “preparation and application” of a measure, “*with a view*” to ensuring that these measures do not create unnecessary obstacles to trade. This means that Members must consider the special needs of developing countries when developing their technical regulations with the goal of ensuring that their technical regulations do not constitute unnecessary obstacles to trade, which the United States has done. Article 12.3 does not actually prohibit the creation of unnecessary obstacles to trade. That obligation is set out in Article 2.2 of the TBT Agreement, and as demonstrated, the COOL Statute and Final Rule are not inconsistent with that obligation.

VI. THE COOL MEASURES ARE NOT INCONSISTENT WITH GATT 1994

54. The COOL measures are not inconsistent with GATT Article III:4. To demonstrate that a Member has acted inconsistently with Article III:4, a complaining party must establish three elements: (1) the imported and domestic products are “like products”; (2) the measure in question is a “law, regulation, or requirement” that affects the “internal sale, offering for sale, purchase, transportation, distribution, or use” of the imported products; and (3) the imported products are accorded “less favorable” treatment than “like” domestic products. Canada and Mexico’s arguments fail to satisfy these elements.

55. Canada and Mexico have not demonstrated that Canadian and Mexican livestock are like products with U.S. livestock under GATT Article III:4. Further, the complaining parties have not even made a case with regard to beef or pork.

56. Secretary Vilsack’s Letter to industry representatives is not a “law, regulation, or requirement” affecting the internal sale, offering for sale, purchase, distribution and use of imported livestock or beef and pork within the meaning of GATT Article III:4, nor do Canada and Mexico explain why they consider the Vilsack Letter to qualify as such. The letter is plainly not a “law” or “regulation.” Nor is it a “requirement.” The industry is not “legally bound” to carry out the Vilsack Letter’s suggestions, which by their terms are voluntary. In addition, the Vilsack Letter does not include suggestions that companies may “voluntarily accept in order to obtain an advantage from the government.” Canada and Mexico claim that the industry would benefit by “not being subjected to possibly stricter and more extensive regulation in the future.” However, the letter does not contain a commitment not to regulate, nor does the Secretary have legal authority to prevent Congress (or a future Secretary) from modifying the labeling requirements or requiring additional regulations.

57. Canada and Mexico have also failed to demonstrate that the statute and 2009 Final Rule treat their livestock less favorably than U.S. livestock. The United States will not repeat its arguments on this point that were already made in the context of TBT Article 2.1.

58. The COOL measures are not inconsistent with Article X:3(a) of GATT 1994. Canada’s entire Article X claim rests on its allegation that the Vilsack Letter constitutes an unreasonable administration of the COOL laws because the letter allegedly “threatened” U.S. companies and persons who did not go beyond the terms of the statute and 2009 Final Rule and “voluntarily” take certain actions. Mexico makes a similar argument that the administration of the COOL measures is non-uniform and unreasonable because the Vilsack Letter led to uncertainties regarding the administration of the measures.

59. The Vilsack Letter does not fall within the scope of Article X:3(a). Article X:3(a) applies to the manner in which WTO Members “administer” their laws, regulations, decisions and rulings referred to in paragraph 1. The Appellate Body has interpreted the term “administer” to mean “putting into practical effect” or “applying” those measures enumerated in paragraph 1 of Article X. The Vilsack Letter does not “apply” to the COOL measures or put them into “practical effect.”

60. Mexico alleges that the administration of the COOL measures has been non-uniform because of changes to the rule over time. Even assuming *arguendo* that the Vilsack Letter falls within the scope of Article X:3(a), Mexico has not provided evidence to demonstrate that the statute or 2009 Final Rule has been administered in a way that affected persons similarly situated in a non-uniform manner. At all times the United States has maintained a single set of regulations implementing the COOL Statute, and these regulations have been administered in a uniform fashion.

61. Canada and Mexico have also failed to establish that the COOL measures are being administered in an unreasonable fashion. Indeed, Canada and Mexico have not presented evidence establishing behavior by USDA in administering the COOL measures that has been unreasonable in any sense. First, because the Vilsack Letter does not administer the COOL measures, the complainants are wrong to argue that the Vilsack Letter is an “unreasonable” administration of those measures. Second, Mexico has adduced no evidence to suggest that any decisions made regarding the implementing regulations as they evolved through the process were “irrational” or “absurd.”

VII. THE COOL MEASURES DO NOT NULLIFY OR IMPAIR THE BENEFITS ACCRUING TO CANADA AND MEXICO UNDER THE WTO AGREEMENTS

62. Article XXIII:1(b) establishes three elements that a complaining party must demonstrate in order to make out a cognizable claim under Article XXIII:1(b): (1) application of a measure by a WTO Member; (2) a benefit accruing under the GATT 1994; and (3) nullification or impairment of the benefit as a result of the application of the measure.

63. Canada and Mexico bear the burden of proof of demonstrating that their benefits are being nullified or impaired and must “provid[e] a detailed justification” for their non-violation claims. Canada and Mexico also bear the burden of proving that the U.S. measures could not have been reasonably anticipated at the time the relevant tariff concessions were negotiated and that the challenged measures have directly upset the competitive relationship between domestic and imported products which existed as a consequence of the relevant tariff concessions. Canada and Mexico’s cursory treatment of these elements fails to establish even a *prima facie* case that the COOL measures have nullified or impaired any legitimate expectations that they fairly held.

64. First, neither Canada nor Mexico explains how a tariff benefit accruing to them directly or indirectly under the GATT 1994 is being nullified or impaired when their trade is not, in fact, relying on a tariff concession under the GATT 1994: each concede that it is a tariff concession under the NAFTA that provides them with market access. Second, Canada and Mexico assert, without support, that they are entitled to expect market access to the United States for their live cattle (and, for Canada, live hogs) that are related to the tariff concessions “that would apply, on an MFN basis ... under the WTO Agreement.” Even assuming *arguendo* that this claim can proceed, neither Canada nor Mexico specifically identify which tariff concession incorporated into the GATT 1994 allegedly gives rise to the benefits that they claim have been nullified or impaired.

65. Second, Canada and Mexico have not demonstrated that they could not have reasonably anticipated the COOL measures at the time the tariff concessions were negotiated. Indeed, many U.S. goods have been required to be labeled with origin information at the retail level since 1930, decades before the conclusion of the Uruguay Round or the NAFTA. In addition, the U.S. Congress has long contemplated various pieces of legislation that would require additional labeling requirements for meat. Finally, many other WTO Members have required country of origin labeling for various products (including meat) for many years. Accordingly, Canada and Mexico should have reasonably anticipated that the United States would maintain some kind of origin labeling on meat products when the tariff rates were negotiated.

66. Canada and Mexico have also failed to demonstrate that the benefits provided to their imported livestock under the relevant tariff concessions have been nullified or impaired by proving “a clear correlation” that the COOL measures have upset the competitive relationship between domestic and imported livestock in the United States to the detriment of imports. Other than submitting flawed and unverifiable economic models, Canada and Mexico have provided no evidence in their submissions to prove that COOL measures have negatively impacted imported livestock as a whole greater than domestic livestock or that such effects are clearly correlated to the COOL measures themselves rather than attributable to independent market forces.

VIII. CONCLUSION

67. For the foregoing reasons, the United States respectfully requests that the Panel reject the claims made by Canada and Mexico in their entirety.