

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

**FIRST WRITTEN SUBMISSION OF
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<i>Argentina – Bovine Hides</i>	Panel Report, <i>Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather</i> , WT/DS155/R, adopted 16 February 2001
<i>Australia – Salmon (AB)</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998
<i>Brazil – Tyres (Panel)</i>	Panel Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/R, adopted 17 December 2007, as modified by the Appellate Body Report, WT/DS332/AB/R
<i>Canada – Autos (Panel)</i>	Panel Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by the Appellate Body Report, WT/DS139/AB/R, WT/DS142/AB/R
<i>Canada – Wheat Exports (Panel)</i>	Panel Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/R, adopted 27 September 2004, as modified by the Appellate Body Report, WT/DS276/AB/R
<i>Chile – Alcohol (AB)</i>	Appellate Body Report, <i>Chile – Taxes on Alcoholic Beverages</i> , WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000
<i>China – Auto Parts (AB)</i>	Appellate Body Report, <i>China – Measures Affecting Imports of Automobile Parts</i> WT/DS339/AB/R, WT/DS340/AB/R, WT/DS340/AB/R, adopted 12 January 2009
<i>Dominican Republic – Cigarettes (Panel)</i>	Panel Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/R, adopted 19 May 2005, as modified by the Appellate Body Report, WT/DS302/AB/R
<i>Dominican Republic – Cigarettes (AB)</i>	Panel Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/AB/R, adopted 19 May 2005
<i>EC – Asbestos (Panel)</i>	Panel Report, <i>European Communities – Measures Affecting Asbestos and Products Containing Asbestos</i> , WT/DS135/R, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS135/AB/R

<i>EC – Asbestos (AB)</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Products Containing Asbestos</i> , WT/DS135/AB/R, adopted 5 April 2001
<i>EC – Bananas III (AB)</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997
<i>EC – Bananas III (Article 21.5) (EC) (Panel)</i>	Panel Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS27/RW/EEC, circulated 12 April 1999 (unadopted)
<i>EC – Geographical Indications (Australia)</i>	Panel Report, <i>European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs; Complaint by Australia</i> , WT/DS290/R, adopted 20 April 2005
<i>EEC – Oilseeds</i>	GATT Panel Report, <i>EEC – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins</i> , BISD 37S/86, adopted 25 January 1990
<i>EEC – Parts and Components</i>	GATT Panel Report, <i>EEC – Regulations on Imports of Parts and Components</i> , BISD 37S/132, adopted 16 May 1990
<i>EC – Sardines (Panel)</i>	Panel Report, <i>European Communities – Trade Description of Sardines</i> , WT/DS231/R, adopted 23 October 2002, as modified by the Appellate Body Report, WT/DS231/AB/R
<i>EC – Sardines (AB)</i>	Appellate Body Report, <i>European Communities – Trade Description of Sardines</i> , WT/DS231/AB/R, adopted 23 October 2002
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<i>US – Section 337</i>	GATT Panel Report, <i>United States – Section 337 of the Tariff Act of 1930</i> , BISD 36S/345, adopted 7 November 1989
<i>US – Stainless Steel</i>	Panel Report, <i>United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea</i> , WT/DS179/R, adopted 1 February 2001
<i>US – Textiles Rules of Origin</i>	Panel Report, <i>United States – Rules of Origin for Textiles and Apparel Products</i> , WT/DS243/R, adopted 21 July 2003

I. INTRODUCTION

1. The country of origin labeling measures at the center of this dispute 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. With respect to meat, previous U.S. labeling requirements did not do so – they did not include requirements for labeling of meat products at the retail level and did nothing to alleviate consumer confusion about the origin of meat products, which for some products was in fact 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, as well as the implementing regulations ultimately issued by the U.S. Department of Agriculture in 2009 (after an elaborate rule making process, with multiple opportunities for public comment), were the results of hard work to reconcile the views of U.S. consumer advocacy groups, who throughout the process strongly supported stricter labeling requirements, and industry interests, who sought to minimize the costs of such requirements. The legislative and regulatory record demonstrates the lengths to which both the U.S. Congress and U.S. regulators 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. The requirements presently contained in U.S. law reflect the results of this effort.

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, ranging from fruits and vegetables, meat, and other food products, to alcohol and consumer goods.

4. Despite the widespread acceptance of country of origin labeling requirements by WTO Members and U.S. efforts to carefully design the statute and regulations to minimize compliance costs while providing better information to consumers, Canada and Mexico allege that the COOL Statute, as amended, the 2009 Final Rule, and the FSIS Rule are inconsistent with U.S. obligations under the TBT Agreement and Articles III:4 and X:3(a) of the GATT 1994, and also nullify and impair their benefits under GATT Article XXIII:1(b). 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 a wide range of WTO Members.

5. They seek to do so *not* because the measures are discriminatory on their face, nor because they result in some *de facto* discrimination vis-a-vis Canadian or Mexican meat, but rather because, according to complainants, some U.S. slaughterhouses have 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 the fact that nothing in the measures requires slaughterhouses to take the actions that some allegedly did. As will be discussed, Canada

and Mexico ignore the fact that slaughterhouses segregated livestock for a variety of reasons long before the labeling requirements came into effect, and that the measures were designed to provide market participants with as much flexibility as possible to minimize burdens on suppliers. In fact, U.S. slaughterhouses that process U.S. and foreign origin meat without segregating are expressly permitted to continue to do so by commingling meat derived from various categories of livestock during a single production day.

6. Nor in fact have those slaughterhouses' actions had an appreciable impact on trade – indeed, as will be discussed below, cattle exports to the United States are sharply up in 2010. Only by ignoring basic market factors completely unrelated to the measures at issue – such as the global economic recession that severely affected trade flows, 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 measures at issue. Indeed, it is telling that, in advancing a (remarkably underdeveloped) claim that their benefits have been nullified and impaired as a result of the measures, neither Canada or Mexico 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. As explained below, the measures at issue do not provide less favorable treatment to Canadian and Mexican livestock. They fulfill the legitimate objective of providing consumer information, and do so without substantially restricting trade. They 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 as much consumer information as possible and the desire to limit the impact on market participants – and incorporated the views of interested parties (both consumers and market participants) in an attempt to strike the correct balance. The present statute and regulations fully reflect these objectives, and are not inconsistent with any of the provisions of the WTO Agreements cited by Canada and Mexico.

II. PROCEDURAL BACKGROUND

8. On December 1, 2008, Canada requested consultations with the United States pursuant to Articles 1 and 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”), Article XXII of the *General Agreement on Tariffs and Trade, 1994* (“GATT 1994”), Article 14 of the *Agreement on Technical Barriers to Trade* (“TBT Agreement”), Article 11 of the *Agreement of Sanitary and Phyto-Sanitary Measures* (“SPS Agreement”), and Article 7 of the *Agreement on Rules of Origin* (“ROO Agreement”) regarding U.S. mandatory country of origin labeling provisions in the Agricultural Marketing Act of 1946, as amended by the 2008

Farm Bill and as implemented through the Interim Final Rule of July 28, 2008.¹ Mexico requested to join in the consultations requested by Canada on December 12, 2008,² and made a separate request for consultations under the same agreements regarding the same measures on December 17, 2008.³ Canada requested to join in the consultations requested by Mexico on December 30, 2008.⁴

9. On May 7, 2009, Canada and Mexico both requested further consultations with the United States pursuant to Articles 1 and 4 of the DSU, Article XXII of the GATT 1994, Article 14 of the TBT Agreement, Article 11 of the SPS Agreement, and Article 7 of the ROO Agreement.⁵ In their further consultation requests, Canada and Mexico stated that the COOL measures they were challenging consisted of the Agricultural Marketing Act of 1946, as amended by the 2008 Farm Bill, the Interim Final Rule of August 1, 2008, the Final Rule of January 15, 2009, the letter to “Industry Representative” from the United States Secretary of Agriculture, Thomas J. Vilsack of February 20, 2009, and any modifications, administrative guidance, directives or policy announcements issued in relation to these items. Mexico also identified a USDA press release from February 20, 2009 as part of its additional consultations request. Canada and Mexico requested to join in their respective consultations on May 15, 2009.⁶

10. The United States and Canada held consultations on December 16, 2008 and June 5, 2009. The United States and Mexico held consultations on February 27, 2009 and June 5, 2009. Neither set of consultations was able to resolve the dispute.

11. Canada and Mexico requested the establishment of a panel on October 7, 2009 and October 9, 2009, respectively.⁷ The WTO Dispute Settlement Body (“DSB”) established a single panel with standard terms of reference on November 19, 2009. On April 30, 2010, Canada and Mexico requested that the Director General compose the panel pursuant to Article 8.7 of the DSU. The Director General composed the Panel on May 10, 2010.⁸

III. FACTUAL BACKGROUND

A. Introduction

¹ WT/DS384/1 (Dec. 4, 2008).

² WT/DS384/3 (Dec. 17, 2008).

³ WT/DS386/1 (Dec. 22, 2008).

⁴ WT/DS386/4 (Jan. 7, 2009).

⁵ WT/DS384/1/Add. 1 (May 11, 2009); WT/DS386/1/Add. 1 (May 11, 2009).

⁶ WT/DS386/4 (May 19, 2009); WT/DS384/5 (May 19, 2009).

⁷ WT/DS384/8 (Oct. 9, 2009); WT/DS386/7 (Oct. 13, 2009) and Corr.1.

⁸ WT/DS384/9 (May 11, 2010); WT/DS386/8 (May 11, 2010).

12. Under U.S. law, retailers are required to provide country of origin labeling for certain commodities, including domestic and foreign origin beef and pork. The United States adopted and implemented these requirements to provide consumers with country of origin information and, with respect to beef, to eliminate confusion regarding the country of origin resulting from United States Department of Agriculture (“USDA”) grade labeling. Although the U.S. Congress did not enact mandatory country of origin labeling (“COOL”) requirements for meat and other food products at the retail level until 2002, the United States (like many other WTO Members) has had country of origin labeling requirements that cover products at the retail level for over 80 years.⁹ With respect to meat, mandatory country of origin legislation has an early provenance, having first been considered by the U.S. Congress over 40 years ago.¹⁰

13. In this Part of its First Written Submission, the United States will provide an overview of mandatory country of origin labeling requirements, followed by an explanation of the specific statute and regulations that are the subject of this dispute. As will be explained below, what Canada and Mexico describe as “the COOL measure” in fact consists of several separate measures, including: (1) a statute on labeling of certain commodities; and (2) implementing regulations issued by USDA.¹¹ In addition, Canada and Mexico cite to a letter from the Secretary of Agriculture (which, as will be explained, does not prescribe any requirements with respect to labeling (or any other matter), and two interim regulations that are no longer in effect.¹²

14. As described in greater detail below, the current COOL Statute and regulations were the result of a multi-year legislative and regulatory process. This process involved numerous opportunities for interested parties to provide input through formal notice and comment procedures and multiple revisions to the statute and regulations. Many of these revisions responded to the views expressed by interested parties and were intended to ensure that the COOL requirements achieved their objective without unduly burdening retailers or domestic and foreign producers. Both the statute and regulations were adopted in order to provide consumers with additional information about the origin of the food that they purchase at the retail level. Congress’ decision to enact the COOL Statute was a legitimate response to U.S. consumers’ desire for better information about where their food comes from – an interest shared by other WTO Members as well, as evidenced by provisions in the WTO Agreements that contemplate country of origin

⁹ See 19 U.S.C. § 1304 (Exhibit MEX-25).

¹⁰ Legislation that would require some form of country of origin labeling for meat was first introduced in Congress as early as the 1960s.

¹¹ The Agricultural Marketing Service (“AMS”) issued regulations implementing the 2002 COOL Statute, as amended in 2009. The Food Safety and Inspection Service (“FSIS”) issued regulations conforming to the AMS regulations, once issued. Both of these regulations will be discussed below in Part C.

¹² Canada’s FWS refers to the 2008 Interim Final Rule, which was superceded by the 2009 Final Rule, and is no longer in effect. Mexico’s FWS refers to both the 2008 Interim Final Rule and the FSIS Interim Rule. Like the 2008 Interim Final Rule, the FSIS Interim Rule was superceded by the FSIS Final Rule and is no longer in effect either. Note that the 2008 Interim Final Rule ceased to have effect on January 15, 2009, and the FSIS Interim Rule ceased to have effect on March 20, 2009, before Canada and Mexico requested further consultations on May 7, 2009.

labeling regimes and the mandatory country of origin labeling requirements maintained by many other WTO Members.

15. Finally, the United States will provide an overview of the North American live cattle and hog industry. This section will describe the many factors that affect price and demand and will highlight significant developments that have impacted the market in recent years, many of which explain the market effects complainants improperly attribute to the COOL measures.

B. WTO Members and Consumers Widely Support Mandatory Country of Origin Labeling

16. Before turning to the U.S. country of origin labeling system, the United States notes that many WTO Members have mandatory country of origin labeling regimes, including the United States and both complainants in these disputes.¹³ A review of notifications to the WTO TBT Committee indicates that over forty Members maintain one or more country of origin labeling requirements on products ranging from fruits and vegetables, meat, and other food products, to alcohol and consumer goods.¹⁴ These notifications generally indicate that the principal rationale for such measures is consumer information.

17. Consumers widely support mandatory country of origin labeling. In fact, during the rule making, USDA received hundreds of comments in support of country of origin labeling from consumers¹⁵ as well as from pro-consumer groups such as the Consumers Union¹⁶ and the Consumers Federation of America,¹⁷ among others. For example, the Consumers Federation of America stated that the organization “has long supported a mandatory country of origin labeling (COOL) program as a means of providing consumers with important information about the source of their food” and noted that “[c]onsumers have repeatedly and overwhelmingly expressed their

¹³ See, e.g., Especificaciones Generales de Etiquetado para Alimentos y Bebidas no Alcohólicas Preenvasados-Información Comercial y Sanitaria, Primera Sección, PROY-NOM-051-SCFI/SSA1, Diario Oficial de la Federación [D.O.], 26 de Agosto de 2009 (Mex.) (Exhibit US-1); Meat Inspection Act, R.S., C-25 (1st Supp.) (1985) (Can.) (Exhibit US-2); Meat Inspection Regulations, SOR/90-288 (1990) (Can.) (Exhibit US-3).

¹⁴ See, e.g., Committee on Technical Barriers to Trade, *India Notification of Prevention of Food Adulteration Rules 2009*, G/TBT/N/IND/38 (Mar. 5, 2009); Committee on Technical Barriers to Trade, *Republic of Korea Notification of Draft Amendment of the Enforcement Decree of the Food Sanitation Act*, G/TBT/N/KOR/173 (May 7, 2008); Committee on Technical Barriers to Trade, *European Communities Notification of Regulation No. 1019/2002*, G/TBT/N/EEC/226 (Oct. 22, 2008); Committee on Technical Barriers to Trade, *Australia Notification of Final Assessment Report Proposal P292 – Country of Origin Labelling of Food*, G/TBT/N/AUS/45 (Dec. 13, 2005); Committee on Technical Barriers to Trade, *Chile Notification of Amendment to Decree No. 297 of 1992 Approving the Regulation on the Labelling of Packaged Food Products*, G/TBT/N/CHL/33 (Jun. 5, 2002); Committee on Technical Barriers to Trade, *Brazil Notification of Technical Regulation for Labelling Pre-Packaged Food*, G/TBT/N/BRA/12 (Jul. 12, 2001).

¹⁵ For example, during the comment period on the 2008 Interim Final Rule, USDA received 107 total comments from consumer groups representing 11,572 individuals. Nearly all of these consumers expressed support for COOL. All of the comments received during the rule making process can be viewed at www.regulations.gov.

¹⁶ Letter from the Consumers Union to USDA (Aug. 20, 2007) (Exhibit US-4).

¹⁷ Letter from the Consumers Federation of America to USDA (Aug. 20, 2007) (Exhibit US-5).

support for country of origin labeling.”¹⁸ These comments underscore the value consumers place on this information.

18. The United States has maintained some form of country of origin labeling requirements since 1930. For example, under the 1930 Tariff Act, the United States requires that every imported item be conspicuously and indelibly marked in English to indicate to its “ultimate purchaser” its country of origin.¹⁹ This requirement has helped ensure that U.S. consumers are aware of the origin of many of the products that they buy at the retail level.

19. While the 1930 Tariff Act ensures that the consumers of many goods are informed as to country of origin, the U.S. Customs and Border Protection (“CBP”) defines “ultimate purchaser” as the last U.S. person who will receive the article in the form in which it was imported.²⁰ As a result, there are instances in which a consumer would not receive country of origin information at the retail level, such as in the case of certain textile fabrics that receive further processing or meat products derived from animals raised in a foreign country and imported for slaughter in the United States. Moreover, some agricultural products, such as fruits, nuts, and vegetables, are exempt from the 1930 Tariff Act’s labeling requirements.

20. The United States adopted the country of origin labeling requirements at issue in this dispute in an effort to fill in some of the gaps in its country of origin labeling framework and to provide consumers with additional information regarding origin. Through a lengthy legislative and rule making process, the United States adopted a statute and published implementing regulations that respond to consumers’ desire for this information while reducing to the maximum extent possible the burdens on suppliers.

C. The U.S. Country of Origin Labeling System for Meat

1. Introduction

21. Congress enacted country of origin labeling requirements for meat as part of the Farm Security and Rural Investment Act of 2002 (“2002 Farm Bill”),²¹ and subsequently amended this statute in the Food, Conservation and Energy Act of 2008 (“2008 Farm Bill”).²² While this statute (hereinafter the “2002 COOL Statute, as amended”) establishes the framework for the U.S. COOL system for the commodities to which it applies, Congress directed USDA to promulgate the regulations necessary to implement the statute’s directives and objectives. It is these

¹⁸ Exhibit US-5.

¹⁹ See 19 U.S.C. § 1304 (Exhibit MEX-25).

²⁰ 19 C.F.R. §134.1 (d). The ultimate purchaser “is generally the last person in the United States who will receive the article in the form in which it was imported.”

²¹ Section 10816 of H.R. 2646, the *Farm Security and Rural Investment Act of 2002* (“2002 Farm Bill”) [P.L. 107-171] (Exhibit CDA-1).

²² Section 11002 of H.R. 6124, the *Food, Conservation, and Energy Act of 2008* (“2008 Farm Bill”) [P.L.110-246] (Exhibit CDA-2).

implementing regulations that set forth the detailed and specific requirements with which retailers and suppliers must comply when labeling meat for retail sale in the United States.

22. In designing the implementing regulations, USDA was required to decide how particular aspects of the COOL system for meat should be implemented. For example, Congress indicated that meat with multiple countries of origin should not be permitted to use a U.S.-origin label, but did not specify the particular labeling requirements for when this type of meat was commingled with other varieties. Thus, it is USDA's regulations that contain all of the applicable details with regard to commingling, among other issues.

23. Given this situation, it is important to understand both the statute and the implementing regulations, including the differences between them. Accordingly, the United States will begin with a detailed overview of the statute before turning to a description of USDA's implementing regulations.

2. The 2002 COOL Statute, as amended

24. Since 1930, U.S. law has provided U.S. consumers with country of origin information for many of the products that they buy at the retail level.²³ However, these requirements did not ensure that U.S. consumers received this information in all cases for all products. In particular, certain meat products, fruits, and vegetables were frequently not labeled with their country of origin at the retail level.

25. For at least the past 40 years, members of Congress have introduced legislation seeking to address this issue for meat, among other food products. In fact, legislation that would require some form of country of origin labeling for meat at the retail level was first introduced in Congress as early as the 1960s.²⁴ Members of Congress also introduced country of origin legislation for meat products in the 1970s,²⁵ 1980s,²⁶ and 1990s.²⁷

²³ See Exhibit MEX-25.

²⁴ See, e.g., "Supreme Court Invalidates Consumer Protections," 113th Cong. Rec. 1118 (daily ed. Jan. 23, 1967) (Exhibit US-6) (describing H.R. 432, legislation that "would protect the American consumer to make an informed choice in his purchases of meats.").

²⁵ E.g., H.R. 5395, 96th Cong. (1st Sess. 1979) (introduced by Rep. Berkley Bedell) (Exhibit US-7) (legislation which would require that imported meat and meat food products made in whole or in part of imported meat be subjected to certain tests and that such meat or products be labeled "imported" at all stages of distribution until delivery to the final consumer; to require that the cost of conducting such tests, and the cost of conducting certain inspections and identification procedures on imported meat and meat food products, be borne by the exporters of such articles; to require certain eating establishments, which serve imported meat, to inform customers of that fact; and for other purposes).

²⁶ E.g., Federal Meat Inspections Act of 1987, H.R. 2920, 100th Cong. (1st Sess. 1987) (introduced by Rep. Thomas Lewis) (Exhibit US-8) (legislation which would amend the Federal Meat Inspection Act to require that meat, and meat food products containing meat, be labeled as to country of origin even if further prepared after entry into

(continued...)

26. Despite a longstanding interest in the issue, Congress did not abruptly enact mandatory country of origin labeling requirements for meat. Instead, Congress considered this issue at length and held numerous hearings at which experts were able to share their views on the topic.²⁸ Only after thoroughly considering the issue did Congress finally incorporate mandatory COOL requirements for meat products into U.S. law as part of a larger effort to require origin information for many agricultural food products. The result was Section 10816 of the 2002 Farm Bill.

a. Objectives

27. As a Senate Agriculture Committee report accompanying the 2002 Farm Bill explains, the COOL Statute’s objective is to provide consumer information:

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. Most of the products U.S. consumers purchase today are already labeled, with the notable exception of many food products. This provision brings the United States in line with many of its current trading partners, who already have country of origin labeling. These countries include Canada, Japan, and the countries of the European Union . . .²⁹

28. Likewise, the Senate Committee Report accompanying the 2008 Farm Bill, which amended the statute, states that the purpose of the country of origin labeling statute is “to provide consumers with additional information regarding the origin of covered commodities.”³⁰ These sentiments

²⁶ (...continued)
the United States).

²⁷ *E.g.*, Country of Origin Meat Labeling Act of 1999, H.R. 1144, 106th Cong. (1st Sess. 1999) (introduced by Rep. Helen Chenoweth-Hage) (Exhibit CDA-9) (legislation which would amend the Federal Meat Inspection Act to require that all meat and meat food products, whether domestic or imported, bear a label notifying the ultimate purchaser of meat and meat food products of the country of origin of the livestock that is the source of the meat and meat food products).

²⁸ *E.g.*, “Country-of-Origin Labeling for Imported Meat and Other Food Products,” 134th Cong. Rec. D669 (daily ed. Sep. 27, 1988) (Committee on Ways and Means Hearing Notice) (Exhibit US-9); “Country of Origin Labeling - Meat and Produce,” 145th Cong. Rec. D214 (daily ed. Apr. 28, 1999) (Committee on Agriculture Hearing Notice) (Exhibit US-10); *Country-of-Origin Meat Labeling Act, Hearing on H.R. 1144 Before the Subcomm. on Livestock and Horticulture of the H. Comm. on Agriculture*, 106th Cong. (1st Sess. 2000) (Exhibit CDA-10).

²⁹ “Agriculture, Conservation, and Rural Enhancement Act of 2001,” Report of the Committee on Agriculture, Nutrition, and Forestry to Accompany S. 1731, S. Rep. No. 107-117, at 233 (2001) (Exhibit US-11).

³⁰ “Food Energy Security Act of 2007,” Report of the Committee on Agriculture, Nutrition, and Forestry on S.2302, S. Rep. No. 110-220, at 198 (2007) (Exhibit US-12).

were echoed by a range of Congressional representatives during consideration of both the 2002 and 2008 Farm Bill provisions on country of origin labeling.³¹

29. In addition to the desire to provide consumers with information, Congress' desire to require country of origin labeling with respect to meat products was also motivated by concerns about potential consumer confusion resulting from USDA grade labeling. Under its grade labeling program, the USDA provides quality grades – such as USDA Prime, USDA Choice, or USDA Select – to carcasses of beef (which can then be transferred to the cuts) based on factors that affect tenderness, juiciness, and flavor.³² Although USDA grade labeling is a voluntary service, nearly 95 percent of the federally inspected steer and heifer slaughter receives grade labels, which are then displayed on their retail packages.³³ The conspicuous appearance of a USDA Prime, Choice, or Select label on these retail packages, regardless of where the cattle from which the meat was derived was from, led numerous consumers to believe that the meat that they were buying was a product of the United States even when this was not the case. Numerous members of Congress and witnesses expressed concern about this issue.³⁴

30. In addition, members of Congress were also concerned that existing requirements imposed by USDA's Food Safety and Inspection Service ("FSIS") for the voluntary labeling of meat products were confusing consumers. FSIS has primary authority within the U.S. government for ensuring that meat and meat food products are safe, wholesome, and accurately labeled. Prior to implementation of the 2002 COOL Statute, as amended, FSIS policy had been to only allow the use of the "U.S.A. Beef" label for meat derived from an animal born, raised, slaughtered, and prepared in the United States. However, at the same time, FSIS permitted a "Product of the

³¹ 107th Cong. Rec. H1538 (daily ed. Apr. 24, 2002) (statement by Rep. John Thune) (Exhibit US-13) ("Why is this important? For several reasons. First, consumers have the right to know the origin of the meat that they buy in the grocery store. Second, ranchers deserve to have their product clearly identified. Third, current law creates a false impression about the origin of USDA grade meat. Fourth, most other consumer products are labeled as to country of origin. Meat should be no different. And fifth . . . numerous countries already are imposing country-of-origin labeling requirements, including Canada, Mexico, and the European Union . . ."); 110th Cong. Rec. S13761 (daily ed. Nov. 5, 2007) (statement by Sen. Charles Grassley) (Exhibit US-14) ("I am glad to see a compromise on legislation that we all call COOL . . . Hopefully, once and for all, it will be implemented, because it is a darned good time to let consumers know where their food comes from. The country of origin of their food is as important as knowing the country of origin of any other product they might buy as a consumer in the United States. That is the law for every other product that consumers buy - that they know what country it comes from - so why not the same requirement for food as well?").

³² USDA's grade labeling program also applies to veal, lamb, and poultry. "Inspection & Grading of Meat and Poultry: What Are the Differences," USDA Fact Sheet (Aug. 22, 2008) (Exhibit US-15).

³³ "National Summary of Meats Graded," Calendar Year 2009, USDA (Jan. 22, 2010) (Exhibit US-16) (indicating that 94.1 percent of total steer and heifer offered received a grade).

³⁴ For example, during a 2000 hearing on COOL requirements, Senator Tim Johnson noted: "American consumers today mistakenly all too often believe the meat they buy with the USDA Choice label is domestically produced. This is simply not always the case." Exhibit CDA-10, p. 24. Likewise, Loneta Rice, a consumer who testified at the hearing, noted: "I thought that the stamp USDA meant that that was American beef, and I really appreciate coming to these hearing[s] because I really received an education." Exhibit CDA-10, p. 71. Others at the hearing expressed similar concerns.

U.S.A.” designation to be placed on any meat product as long as the animal from which the meat was derived was prepared in some form in the United States.³⁵ This was the case even if that animal had only been in the United States for an extremely short period of time and had spent the majority of its life in another country. In these circumstances, the “Product of the U.S.A.” label was viewed by consumer groups and others as misleading.³⁶

31. The potential consumer confusion that these inconsistent labels could create led Congress in 2000 to direct FSIS to promulgate regulations regarding the use of the “Product of the U.S.A.” label.³⁷ FSIS ultimately discontinued its independent rule making after Congress passed the 2002 Farm Bill and the Agricultural Marketing Service (“AMS”) took over primary responsibility for determining when meat covered commodities could be designated as “U.S. origin,” or some derivative thereof.

32. The legislative history also reflects Congress’ desire to minimize burdens on all participants in the supply chain. In particular, in 2008, Congress passed legislation making a number of additional changes to the 2002 law, many of which responded to concerns expressed by suppliers regarding the costs of compliance and other aspects of the original legislation. These changes are described in Part D, *infra*.

b. Overview of Meat Labeling Provisions

33. U.S. statutory country of origin labeling requirements, as created by the 2002 Farm Bill and modified by the 2008 Farm Bill, are contained in Subtitle D (Sections 281-285) of the Agricultural Marketing Act of 1946 (7 U.S.C. §§ 1638-1638c).³⁸ The 2002 COOL Statute, as amended, requires that retailers inform consumers at the final point of sale of the country of origin of beef, lamb, pork, farm-raised fish, wild fish, perishable agricultural commodities (fruits and vegetables), goat meat, chicken, ginseng, pecans, macadamia nuts, and peanuts.³⁹

³⁵ Under FSIS’s policy, the animal did not even have to be slaughtered in the United States to receive the “Product of the U.S.A.” label. Rather, minor processing steps in the United States were sufficient. See “Product Labeling: Defining United States Cattle and United States Fresh Beef Products; Advance notice of proposed rulemaking,” Food Safety and Inspection Service, USDA, 66 Fed. Reg. 152,41160 (Aug. 7, 2001) (to be codified at 9 C.F.R. pts. 317 and 327) (Exhibit MEX-32), p. 41160.

³⁶ See Letter from Public Citizen to USDA (Oct. 9, 2001) (stating that “[a]llowing cattle that were born and partially raised in another country to qualify for a label that signifies it is a product of the U.S. would be offensive to U.S. producers, not to mention misleading to consumers.”) (Exhibit US-17).

³⁷ See Exhibit MEX-32.

³⁸ The Agricultural Marketing Act of 1946 is codified at 7 U.S.C. § 1621. Subtitle D of the Agricultural Marketing Act, which is entitled “Country of Origin Labeling,” is codified at 7 U.S.C. § 1638 et seq (Exhibit MEX-1).

³⁹ 7 U.S.C. § 1638(2)(a).

34. The statute indicates that the term “retailer” is given the same meaning as provided in the Perishable Agricultural Commodities Act of 1930 (“PACA”).⁴⁰ Under the PACA, a retailer is any person who sells perishable agricultural commodities at retail with an invoice cost in any calendar year of more than \$230,000.⁴¹

35. The statute provides that no labeling is required for (1) food prepared or served at a “food service establishment” in normal quantities;⁴² and (2) food that “is an ingredient in a processed food item.”⁴³ The statute defines a “food service establishment” as a “restaurant, cafeteria, lunch room, food stand, saloon, tavern, bar, lounge, or other similar facility operated as an enterprise engaged in the business of selling food to the public.”⁴⁴ The statute does not define the terms “other similar facilities” or “processed food,” leaving the task of definition for USDA to complete through the rule making.

36. The statute sets forth several options for providing country of origin information. Retailers may provide country of origin information by means of a “label, stamp, mark, placard, or other clear and visible sign on the covered commodity or on the package, display, holding unit, or bin containing the commodity at the final point of sale to consumers.”⁴⁵ In addition, the law provides that a retailer need not provide any additional information if the covered commodity is already individually labeled for retail sale with country of origin information.

37. For each covered commodity, the statute sets forth general requirements regarding country of origin labeling. With respect to muscle cuts of meat, the statute provides four types of designations, depending on where the animal was born, raised, or slaughtered.

38. “United States country of origin” meat (described in 7 U.S.C. § 1638a(2)(A) and often referred to as Category A) refers to meat derived from animals (1) born, raised, and slaughtered in the United States, (2) born and raised in Alaska and Hawaii and transported through Canada for not more than 60 days and slaughtered in the United States, or (3) present in the United States on or before June 15, 2008. If meat is derived from an animal that meets these requirements, the retailer *may* designate the covered commodity as exclusively having U.S. origin.⁴⁶ This ensures that only meat derived from an animal that spent its entire life in the United States can receive a U.S.-origin label. However, the statute uses the word “may” instead of “shall,” which makes clear that a retailer is not required to use this label for every animal born, raised, and slaughtered in the United States. In this sense, the use of the word “may” provides some flexibility to use another

⁴⁰ 7 U.S.C. § 1638(6).

⁴¹ 7 U.S.C. § 499a(b).

⁴² 7 U.S.C. § 1638a(b).

⁴³ 7 U.S.C. § 1638(2)(B).

⁴⁴ 7 U.S.C. § 1638a(4).

⁴⁵ 7 U.S.C. § 1638a(c)(1).

⁴⁶ 7 U.S.C. § 1638a(a)(2)(A).

label for this type of meat, such as where the meat in question has been commingled with meat from other sources, which will be discussed later in the context of the implementing regulations.

39. “Multiple countries of origin” meat (described in 7 U.S.C. § 1638a(2)(B) and often referred to as Category B) refers to meat derived from animals (1) not exclusively born, raised, and slaughtered in the United States, or (2) born, raised, or slaughtered in the United States, but not imported into the United States for immediate slaughter. If meat is derived from an animal that meets these requirements, the retailer *may* designate the country of origin as all of the countries in which the animal may have been born, raised, and slaughtered.⁴⁷

40. As this description illustrates, the statute provides flexibility regarding the use of Category A and B labels as indicated by the use of the word “may.” Thus, the statute indicates that Category A and B labels “may” be used in certain circumstances, but it does not require that they “shall” be used in those circumstances.

41. “Imported for immediate slaughter” meat (described in 7 U.S.C. § 1638a(2)(C) and often referred to as Category C) refers to meat derived from animals born and raised in a foreign country and then imported into the United States for immediate slaughter. If meat is derived from an animal that meets these requirements, the retailer *shall* designate the country of origin as the country from which the animal was imported and the United States.⁴⁸

42. Finally, “foreign country of origin” meat (described in 7 U.S.C. § 1638a(2)(D) and often referred to as Category D) refers to meat derived from an animal not born, raised, and slaughtered in a foreign country. In this instance, a retailer shall designate a country other than the United States as the country of origin.⁴⁹

43. For ground meat products (described in 7 U.S.C. § 1638a(2)(E) and often referred to as Category E), the statute requires that the notice of country of origin include (1) a list of all countries of origin or (2) a list of all “reasonably possible” countries of origin.⁵⁰ The statute does not define the term “reasonably possible.”

44. The statute also includes certain record keeping requirements to ensure that consumers receive accurate country of origin information.⁵¹ In particular, the statute authorizes the Secretary to conduct an audit of any person that prepares, stores, handles, or distributes a commodity for retail sale to verify compliance. A person subject to an audit is required to provide verification based on records “maintained in the course of the normal course of business.” At the same time, the statute strictly prohibits the Secretary of Agriculture from requiring these persons to provide

⁴⁷ 7 U.S.C. § 1638a(a)(2)(B).

⁴⁸ 7 U.S.C. § 1638a(a)(2)(C).

⁴⁹ 7 U.S.C. § 1638a(a)(2)(D).

⁵⁰ 7 U.S.C. § 1638a(a)(2)(E).

⁵¹ 7 U.S.C. § 1638a(d)-(e).

any additional records, stating that “[t]he Secretary may not require a person that prepares, stores, handles, or distributes a covered commodity to maintain a record of the country of origin of a covered commodity other than those maintained in the course of the normal conduct of the business of such person.”⁵²

45. As noted, these provisions establish the framework for U.S. country of origin labeling requirements, but, in many cases, lack necessary details. Regulations are needed to implement these requirements and the statute explicitly directs USDA to issue implementing regulations on country of origin labeling.⁵³

3. The 2009 Final Rule

46. After a lengthy rule making process, two extensions to the statutory deadline for regulations, and an intervening change in the law designed to clarify and improve flexibility, AMS published its final rule implementing the 2002 COOL Statute, as amended, in the Federal Register on January 15, 2009 (hereinafter, the “2009 Final Rule”).⁵⁴ The 2009 Final Rule is the sole legal authority prescribing how the requirements set forth in the statute will be administered and enforced.⁵⁵ The 2009 Final Rule superceded the 2008 Interim Final Rule⁵⁶ upon its effective date of March 16, 2009. Accordingly, the 2008 Interim Final Rule has no effect in U.S. law.

47. The 2009 Final Rule implements labeling requirements for the covered commodities identified in the 2002 COOL Statute, as amended. In particular, the 2009 Final Rule sets forth detailed definitions of the covered entities and commodities, addresses issues such as commingling that were not directly addressed by the statute, and sets forth more specific labeling requirements applicable to muscle cut and ground meats. As stated in the 2009 Final Rule, “the intent of the law and this rule is to provide consumers with additional information on which to base their purchasing decisions.”⁵⁷

a. Scope

⁵² 7 U.S.C. § 1638a(4)(d)(B).

⁵³ 7 U.S.C. § 1638c (directing the Secretary of Agriculture to develop regulations for the purpose of implementing country of origin labeling).

⁵⁴ “Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts; Final Rule,” Agricultural Marketing Service, USDA, 74 Fed. Reg. 10,2658 (Jan. 15, 2009) (to be codified at 7 C.F.R. pts. 60 and 65) (“2009 Final Rule”) (Exhibit CDA-5).

⁵⁵ As will be discussed in para. 59, *infra* the FSIS Final Rule also has legal effect, but it simply adopts the requirements as established by AMS’s 2009 Final Rule without adding any substance.

⁵⁶ “Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts; Interim Final Rule,” Agricultural Marketing Service, USDA, 73 Fed. Reg. 149,45106 (Aug. 1, 2008) (to be codified at 7 C.F.R. pt. 65) (“2008 Interim Final Rule”) (Exhibit CDA-3).

⁵⁷ Exhibit CDA-5, p. 2677.

48. Under the 2009 Final Rule, covered commodities include: muscle cuts of beef (including veal), lamb, chicken, goat and pork; ground beef, lamb, chicken, goat and pork; wild and farm-raised fish and shellfish; perishable agricultural commodities (fruits and vegetables); macadamia nuts; pecans; ginseng; and peanuts.⁵⁸

49. The COOL requirements apply to “retailers.” The 2009 Final Rule defines “retailer” as the term is used in PACA.⁵⁹ This definition has the effect of excluding butcher shops, fish markets, and small grocery stores that handle less than \$230,000 worth of fruit and vegetables on an annual basis from COOL requirements.

50. The 2009 Final Rule excludes food service establishments (such as restaurants, cafeterias, and bars) from COOL’s labeling requirements. The statute also defines the term “similar facilities” such that all other food enterprises located within retail establishments that provide ready-to-eat foods that are consumed either on or outside the retailer’s premises are excluded.⁶⁰

51. The 2009 Final Rule excludes processed foods, which are defined as including retail items derived from covered commodities that (1) have undergone specific processing that results in a change in the character of the covered commodity;⁶¹ or (2) have been combined with at least one other covered commodity or substantive food component.

b. Method of Notification

52. The 2009 Final Rule provides retailers with flexibility to inform consumers of the country of origin in numerous different ways.⁶² Retailers may indicate this information by means of a label, placard, sign, stamp, band, twist tie, pin tag, or other clear and visible sign on the covered commodity or on the package, display, holding unit, or bin containing the commodity at the final point of sale for consumers. Further, if the product was already individually labeled for retail sale with origin information, the 2009 Final Rule does not require any additional labeling.

53. The 2009 Final Rule does not contain specific requirements as to the placement or the size of the label, but states that such declarations be legible and conspicuous so as to allow consumers to find the label easily and read the label without strain when making their purchases.⁶³

⁵⁸ Exhibit CDA-5, p. 2701, 2705.

⁵⁹ Exhibit CDA-5, p. 2705. As described above, retailers under this definition include any person who sells perishable agricultural commodities at retail with a cumulative invoice cost in any calendar year of more than \$230,000.

⁶⁰ Exhibit CDA-5, p. 2702, 2705.

⁶¹ According to the 2009 Final Rule, specific processing that results in a change of character includes cooking (*e.g.*, frying, broiling, grilling, boiling, steaming, baking, roasting), curing (*e.g.*, salt curing, sugar curing, drying), smoking (hot or cold), and restructuring (*e.g.*, emulsifying and extruding). Exhibit CDA-5, p. 2702, 2705.

⁶² Exhibit CDA-5, p. 2702-2703, 2706-2707.

⁶³ Exhibit CDA-5, p. 2703, 2706.

c. Country of Origin for Muscle Cuts of Meat

54. The 2009 Final Rule sets out four separate labels for muscle cuts of meat, depending on where the animal from which the meat was derived was born, raised, and slaughtered.⁶⁴ These categories are: A) exclusively U.S. origin; B) multiple countries of origin; C) animals imported for immediate slaughter; and D) exclusively foreign origin. The 2009 Final Rule also specifies the order in which the countries of origin should be listed on Category B and C labels. Specifically, the Final Rule provides that the label for Category B meat may list the applicable countries in any order. The label for Category C meat must first list the country from which the livestock was imported, followed by the United States. The categories, requirements, and corresponding labels are as follows:

Category A	Meat from animals born, raised, and slaughtered in the United States, or from animals present in the United States on or prior to July 15, 2008	<i>Product of the U.S.</i>
Category B	Meat from animals born in Country X and raised and slaughtered in the United States. (These animals were not exclusively born, raised and slaughtered in the United States or imported for immediate slaughter.)	<i>Product of the U.S., Country X, Country Y (if applicable; can appear in any order)</i>
Category C	Meat from animals imported into the United States for immediate slaughter	<i>Product of Country X, U.S.</i>
Category D	Foreign meat imported into the United States	<i>Product of Country X</i>

55. The 2009 Final Rule addresses the issue of commingling between categories.⁶⁵ In particular, the 2009 Final Rule allows for the use of a Category B or C label for meat derived from Category A and B animals commingled during a single production day, meat derived from Category A and C animals commingled during a single production day, or meat derived from B and C animals commingled during a single production day. In addition, the 2009 Final Rule allows for these same labels to be used if Category A, B, and C animals are all commingled during a single production day. These provisions are described in detail in the chart below:

⁶⁴ Exhibit CDA-5, p. 2706.

⁶⁵ Exhibit CDA-5, p. 2706.

A = A	When 100% of the animals are Category A animals, the meat must be labeled with Label A
B = B or C	When 100% of the animals are Category B animals, the meat may be labeled with Label B or C because the order of countries on the label is interchangeable in this circumstance
C = C	When all of the animals are Category C animals, the meat must be labeled with Label C
A & B = B or C	When Category A and B animals are commingled on a single production day, the meat may be labeled with Label B or C because the order of countries on the label is interchangeable in this circumstance
A & C = B or C	When Category A and C animals are commingled on a single production day, the meat may be labeled with Label B or C because the order of countries on the label is interchangeable in this circumstance
B & C = B or C	When Category B and C animals are commingled on a single production day, the meat may be labeled with Label B or C because the order of countries on the label is interchangeable in this circumstance
A & B & C = B or C	When Category A, B, and C animals are commingled on a single production day, the meat may be labeled with Label B or C because the order of countries on the label is interchangeable in this circumstance

d. Country of Origin for Ground Meat Products

56. With respect to ground meat, the 2009 Final Rule indicates that the label shall list (1) all countries of origin for meat contained therein; or (2) all “reasonably possible” countries of origin for meat contained therein. The 2009 Final Rule provides that a country may not be listed on the label if raw material from a specific origin has not been within the processor’s inventory within the last 60 days.⁶⁶

e. Record keeping Requirements

57. The 2009 Final Rule provides that, upon USDA request, suppliers and retailers must make available records maintained in the normal course of business to verify a particular origin claim as follows. The 2009 Final Rule requires that suppliers make information about the country of origin available to the subsequent purchaser and that suppliers maintain records to establish and identify the immediate previous source and immediate subsequent recipient for a period of one year.⁶⁷

58. The 2009 Final Rule makes a substantial effort to reduce the record keeping burden associated with meeting these requirements. For example, the 2009 Final Rule requires that suppliers and retailers produce only records already maintained in the ordinary course of business in order to verify an origin claim. Under the 2009 Final Rule, suppliers may use producer affidavits to initiate origin claims for all covered commodities. The 2009 Final Rule clarifies that these affidavits must be made by someone having first-hand knowledge of the commodity’s origin and must identify the commodity unique to the transaction.

4. FSIS Final Rule

59. On March 20, 2009, FSIS published a Final Rule in the Federal Register conforming its regulations to the 2009 Final Rule published by AMS (hereinafter “FSIS Final Rule”).⁶⁸ As noted above, FSIS is responsible for ensuring that information included on meat labels is accurate and had previously been the primary agency responsible for determining when it was permissible to designate a meat product as U.S. origin (either “U.S.A. Beef” or “Product of the U.S.A.”). Although FSIS no longer holds primary responsibility for this aspect of labeling, it still maintains jurisdiction over other types of information included on meat labels, and therefore needs to ensure that its practice is consistent with AMS’s new regulations. FSIS’s rule, which is substantively identical to the AMS 2009 Final Rule, ensures that FSIS’s practices conform with AMS’s 2009

⁶⁶ Exhibit CDA-5, p. 2706.

⁶⁷ Exhibit CDA-5, p. 2707.

⁶⁸ “Mandatory Country of Origin Labeling of Muscle Cuts of Beef (Including Veal), Lamb, Chicken, Goat, and Pork; Ground Beef, Ground Lamb, Ground Chicken, Ground Goat, and Ground Pork; Affirmation of interim final rule,” Food Safety and Inspection Service, USDA, 74 Fed. Reg. 52,11837 (Mar. 20, 2009) (to be codified at 9 C.F.R. pts. 317 and 381) (“FSIS Final Rule”) (Exhibit MEX-6).

Final Rule. Upon its effective date, the FSIS Final Rule supercedes the FSIS Interim Final Rule,⁶⁹ and thus, is the only FSIS COOL regulation with any legal effect.

5. The COOL Final Rule: Background on Development and Implementation

60. As noted above, AMS's 2009 Final Rule was the result of a lengthy regulatory process, with multiple formal notice and comment proceedings intended to ensure that the final regulations would minimize the impact on domestic and foreign suppliers while fulfilling the statutory objective of providing consumers with information on country of origin of, *inter alia*, beef and pork. In fact, interested parties were given at least four opportunities to formally provide comments on the COOL regulations as they applied to beef and pork products and three other opportunities to comment on the regulations as they applied to fish and shellfish.⁷⁰

⁶⁹ “Mandatory Country of Origin Labeling of Muscle Cuts of Beef (Including Veal), Lamb, Chicken, Goat, and Pork; Ground Beef, Ground Lamb, Ground Chicken, Ground Goat, and Ground Pork; Interim final rule,” Food Safety and Inspection Service, USDA, 73 Fed. Reg. 168,50701 (Aug. 28, 2008) (to be codified at 9 C.F.R. pts. 317 and 381) (“FSIS Interim Final Rule”) (Exhibit MEX-5).

⁷⁰ For beef and pork products specifically, interested parties were allowed to comment on the 2002 Voluntary Guidelines, the 2003 Proposed Rule, and the 2008 Interim Final Rule. AMS extended the comment period for the 2003 Proposed Rule and re-opened this comment period again in 2007. At the same time, AMS held three separate comment periods for the 2008 Interim Final Rule for fish and shellfish and extended the comment period once. Although the comment periods for fish and shellfish did not directly affect COOL for beef and pork products, some of the comments received during this period, such as those related to record keeping, among other issues, had implications for the 2009 Final Rule applying to all covered commodities. *See* “Establishment of Guidelines for the Interim Voluntary Country of Origin Labeling of Beef, Lamb, Pork, Fish, Perishable Agricultural Commodities, and Peanuts Under the Authority of the Agricultural Marketing Act of 1946,” Agricultural Marketing Service, USDA, 67 Fed. Reg. 198,63367 (Oct. 11, 2002) (“2002 Voluntary Guidelines”) (Exhibit MEX-13); “Mandatory Country of Origin Labeling of Beef, Lamb, Pork, Fish, Perishable Agricultural Commodities, and Peanuts; Proposed Rule,” 68 Fed. Reg. 210,61944 (Oct. 30, 2003) (to be codified at 7 C.F.R. pt. 60) (“2003 Proposed Rule”) (Exhibit MEX-14); Exhibit CDA-3; “Mandatory Country of Origin Labeling of Beef, Lamb, Pork, Fish, Perishable Agricultural Commodities, and Peanuts, Proposed rule; extension of comment period; correction,” Agricultural Marketing Service, USDA, 68 Fed. Reg. 245,71039 (Dec. 22, 2003) (to be codified at 7 C.F.R. pt. 60) (Exhibit MEX-15); “Mandatory Country of Origin Labeling of Beef, Lamb, Pork, Perishable Agricultural Commodities, and Peanuts, Proposed rule; reopening of comment period,” Agricultural Marketing Service, USDA, 72 Fed. Reg. 118,33917 (June 20, 2007) (to be codified at 7 C.F.R. pt. 60) (Exhibit MEX-16); “Mandatory Country of Origin Labeling of Fish and Shellfish, Interim final rule with request for comments,” Agricultural Marketing Service, USDA, 69 Fed. Reg. 192,59708 (Oct. 5, 2004) (to be codified at 7 C.F.R. pt. 60) (Exhibit CDA-13); “Mandatory Country of Origin Labeling of Fish and Shellfish, Interim final rule; extension of comment period,” Agricultural Marketing Service, USDA, 69 Fed. Reg. 248,77609 (Dec. 28, 2004) (to be codified at 7 C.F.R. pt. 60) (Exhibit MEX-18); “Mandatory Country of Origin Labeling of Fish and Shellfish, Interim final rule; reopening of the comment period,” Agricultural Marketing Service, USDA, 71 Fed. Reg. 227,68431 (Nov. 28, 2006) (to be codified at 7 C.F.R. pt. 60) (Exhibit MEX-19); “Mandatory Country of Origin Labeling of Fish and Shellfish, Interim final rule; reopening of the comment period,” Agricultural Marketing Service, USDA, 72 Fed. Reg. 118,33851 (June 20, 2007) (to be codified at 7 C.F.R. pt. 60) (Exhibit MEX-20).

61. In response to these comments, the implementing regulations evolved significantly as they were developed by USDA. In order to illustrate this evolution, the United States will briefly describe key aspects of the regulatory history.

a. The 2002 Voluntary Guidelines

62. USDA's AMS first published voluntary country of origin labeling guidelines in the Federal Register on October 11, 2002.⁷¹ These guidelines provided interested parties with an opportunity to provide input before mandatory requirements were adopted.⁷²

63. Consistent with the 2002 Farm Bill, the 2002 Voluntary Guidelines only allowed meat derived from animals born, raised, and slaughtered in the United States to be affixed with a U.S. origin label.⁷³ Because the statute did not specify how to label meat derived from non-U.S. animals or animals with multiple countries of origin, the guidelines were the first attempt at establishing how to label these products. For meat derived from animals produced entirely outside the United States, USDA stated that the country of origin would be the country where the last processing step took place.⁷⁴ For meat derived from animals with multiple countries of origin, USDA proposed a system where the label would identify which production steps occurred in a foreign country and which occurred in the United States.⁷⁵ USDA noted that the "Agency believes this level of detail is required under the statute and will be consistent with the law's purpose of providing meaningful information to consumers."⁷⁶ For blended products, including ground meat, the 2002 Voluntary Guidelines called for listing the countries of origin in order of prominence by weight.⁷⁷

b. The 2003 Proposed Rule

64. On October 30, 2003, USDA published the Proposed Rule for COOL with respect to meat.⁷⁸ In many instances, the 2003 Proposed Rule was quite similar to the 2002 Voluntary

⁷¹ Exhibit MEX-13.

⁷² According to the Federal Register notice, the mandatory regulations "will likely be based on these voluntary guidelines from the current interim period as well as related input the Agency receives." Exhibit MEX-13, p. 63367.

⁷³ Exhibit MEX-13, p. 63369.

⁷⁴ Under this system, beef from a cow born in Country X and raised and slaughtered in Country Y before being imported to the United States would be listed as a product of Country Y. Exhibit MEX-13, p. 63370.

⁷⁵ When production steps occurred in two countries prior to entering the United States for additional processing, the guidelines provided some flexibility in how to label the product. For instance, the product could be labeled either "Imported from Country Y and Slaughtered in the United States" or "Born in Country X, Raised in Country Y, and Slaughtered in the United States." Exhibit MEX-13, p. 66370.

⁷⁶ Exhibit MEX-13, p. 63370.

⁷⁷ Exhibit MEX-13, pp. 63370-63371.

⁷⁸ Exhibit MEX-14.

Guidelines. For example, with regard to the country of origin for muscle cuts of meat, the Proposed Rule retained the suggestion made by the guidelines.⁷⁹

65. In other instances, the 2003 Proposed Rule changed the proposals from the 2002 Voluntary Guidelines or included more detail. For example, the 2003 Proposed Rule changed the ground meat labeling requirements to require the countries to be listed in alphabetical order.⁸⁰ The 2003 Proposed Rule also outlined COOL's record keeping responsibilities, requiring any person engaged in the business of supplying a covered commodity to a retailer to maintain records to establish "the immediate previous source and immediate subsequent recipient of a covered commodity, in such a way that identifies the product unique to the transaction, for a period of two years."⁸¹ The rule stated that retailers would not be required to verify the accuracy of the information provided by suppliers, but they would be responsible if they use erroneous information that they should have suspected was incorrect.

66. As with the 2002 Voluntary Guidelines, interested parties were permitted to comment on the 2003 Proposed Rule. In their comments on these two proposals, many U.S. processors, meat packers, and retailers expressed concerns about the record keeping requirements⁸² and the proposed labeling of meat from multiple countries of origin.⁸³ Some interested parties also expressed concern that chicken was not included as a covered commodity because they believed this would reduce demand for beef, pork and other directly competitive products.⁸⁴ Others opposed the regulations because in their view they would disadvantage U.S. producers vis a vis foreign producers by significantly raising the cost of producing meat.⁸⁵

c. Legislation To Delay Implementation of COOL Regulations

⁷⁹ Like the 2002 Voluntary Guidelines, the 2003 Proposed Rule stated that a U.S. origin label was required for meat derived from animals born, raised, and slaughtered entirely within the United States. Similarly, for meat products processed completely in a foreign country or derived from animals with multiple countries of origin, the 2003 Proposed Rule retained the proposals from the 2002 Voluntary Guidelines. Exhibit MEX-14, p. 61949.

⁸⁰ Exhibit MEX-14, p. 61950.

⁸¹ Exhibit MEX-14, p. 61951.

⁸² *E.g.*, Letter from Rosemary Mucklow, Executive Director of the National Meat Association, to USDA (Feb. 21, 2003) (Exhibit US-P); Letter from Mexico to USDA (Feb. 23, 2004) (Exhibit US-19).

⁸³ *E.g.*, Letter from Nebraska Cattlemen (Apr. 7, 2003) (Exhibit US-20); Letter from the American Frozen Food Institute, Grocery Manufacturers of America, and National Food Processors Institute to USDA (Apr. 8, 2003) (Exhibit US-21).

⁸⁴ *E.g.*, Letter from the Canadian Pork Council to USDA (Apr. 9, 2003) (Exhibit US-22); Letter from Australia to USDA (Dec. 24, 2003) (Exhibit US-23).

⁸⁵ *E.g.*, Exhibit US-18.

67. Because of the numerous issues raised by the interested parties, Congress held hearings to examine further the COOL law,⁸⁶ and ultimately decided to delay issuance of implementing regulations on two separate occasions.⁸⁷

68. Following additional deliberation during the rule making delay, Congress determined that the best way to balance the concerns of interested parties while achieving the policy objective of providing consumer information was to revisit the COOL Statute in the 2008 Farm Bill. Accordingly, Congress amended the statute in 2008 to “resolve issues regarding implementation [of the 2002 COOL law] and provide further direction to the Department of Agriculture.”⁸⁸

d. The 2008 Interim Final Rule

69. After the amendments to the COOL Statute, USDA published the 2008 Interim Final Rule on August 1, 2008. Due to the statutory changes, the 2008 Interim Final Rule contained significant changes with respect to the labeling of covered commodities as compared with the 2003 Proposed Rule. As USDA noted:

The 2008 Farm Bill contains a number of provisions that amended the COOL provisions in the Act. In general, these changes provide for greater flexibility in labeling by retailers and suppliers and reduce the burden on livestock producers. For example, the 2008 Farm Bill provides for flexibility in labeling ground products by allowing the notice of country of origin to include a list of countries contained therein or that may reasonably be contained therein. In addition, the law provides flexibility in labeling meat covered commodities derived from animals of multiple countries of origin.⁸⁹

70. For muscle cuts of meat, the 2008 Interim Final Rule provided labeling requirements for the four different categories outlined in the statute: (a) meat from animals meeting the definition of U.S. origin; (b) meat from animals that were born in a foreign country and raised and slaughtered in the United States; (c) meat from animals that were born and raised in a foreign country and

⁸⁶ *E.g.*, *Mandatory Country of Origin Labeling, Hearing Before the H. Comm. on Agriculture* (June 26, 2003) (Exhibit MEX-51); “Review Mandatory Country of Origin Labeling,” 108th Cong. Rec. D551 (daily ed. Oct. 1, 2003) (Committee on Agriculture Hearing Notice) (Exhibit US-24).

⁸⁷ First, in 2004, Congress passed legislation to extend the implementation date to September 30, 2006. P.L.108-199, 118 Stat. 3 (Jan. 23, 2004) (Exhibit MEX-11). Later, in 2005, Congress extended the implementation date by another two years until September 30, 2008. P.L. 109-97, 119 Stat. 2120 (Nov. 10, 2005) (Exhibit MEX-12). These delays, which were intended to give USDA more time to develop its regulations, exempted fish and shellfish. Many of the concerns with meat and perishable agricultural commodities did not apply with regard to fish and shellfish.

⁸⁸ Exhibit US-12, p. 45.

⁸⁹ Exhibit CDA-3, p. 45127.

imported for immediate slaughter in the United States; and (d) imported meat.⁹⁰ With respect to ground meat, the 2008 Farm Bill specified that the country of origin declaration list all countries of origin contained therein or all countries of origin that may be reasonably contained therein.⁹¹

71. In conjunction with the release of the 2008 Interim Final Rule, USDA also released clarification documents to try to help interested parties understand the nuances of the proposal.⁹² Both the 2008 Interim Final Rule and the clarification documents were superseded once the 2009 Final Rule was published and became effective on March 16, 2009.

D. Key Changes to the COOL Statute and Regulations Minimizing Impact on Suppliers

72. As explained above, both the COOL Statute and implementing regulations evolved significantly throughout the process. Later versions provided greater flexibility in key areas and minimized the impact on domestic and foreign producers than previous iterations. As will be discussed, many of these changes were made in direct response to comments received from interested parties, including Canada and Mexico.

1. No Requirement to Label Every Production Step

73. The Final Rule's labeling requirements for meat derived from animals with multiple countries of origin require retailers to provide less detailed information than earlier proposals. The 2002 Farm Bill was silent on how to label this type of meat, and USDA had proposed in the 2002 Voluntary Guidelines and 2003 Proposed Rule that retailers provide detail on where each production step took place.

74. Numerous interested parties objected to this proposal,⁹³ and therefore Congress modified the statute in the 2008 Farm Bill. For meat derived from animals with multiple countries of origin (Category B), the statute specifies that retailers “*may* designate the country of origin as all of the countries in which the animal may have been born, raised, and slaughtered.” Likewise, for animals imported for immediate slaughter (Category C), the statute requires that retailers list “the country from which the animal was imported . . . and the United States.” At the same time, the statute also eliminates confusion regarding the labeling of older animals and permits more meat to be labeled

⁹⁰ Exhibit CDA-3, p. 45110.

⁹¹ In determining what is considered reasonable, the 2008 Interim Final Rule stated that when a raw material from a specific origin is not in a processor's inventory for more than 60 days, that country shall no longer be included as a possible country of origin. Exhibit CDA-3, p. 45110.

⁹² Exhibit CDA-29; Exhibit CDA-30; Exhibit CDA-31. These clarification documents are not legally binding instruments under U.S. law. Thus, a person who does not follow the guidance laid out in such documents could not be subject to any enforcement or other legal action for failure to comply with the statements in such documents.

⁹³ *E.g.*, Exhibit US-20; Exhibit US-21.

with Category A by adding in a grandfather clause that allows retailers to use a U.S. origin label for meat products derived from animals present in the United States on or before July 15, 2008.

75. Consistent with the flexibility specifically incorporated into the 2008 statute, the 2009 Final Rule does not require labels to reflect every production step.

2. Commingling and the Flexible Use of Labels

76. The statute includes permissive labeling requirements, simply indicating instances in which Category A and B labels *may* be used. The 2009 Final Rule provides the specific details on how this flexibility is to be utilized.

77. In that regard, the 2009 Final Rule allows retailers to use Category B and C labels in numerous situations where they are also permitted to use Category A and C labels. In the 2008 Interim Final Rule, retailers were not permitted to use Category B labels even when Category B cattle was commingled with Category C cattle on a single production day. During the comment period for the 2008 Interim Final Rule, USDA received comments on this issue from Canada, among other interested parties.⁹⁴ In response to these and other comments, the 2009 Final Rule permits retailers to use a Category B or C label on meat derived from Category A and C animals when either Category A and B or Category B and C animals are commingled during a single production day. Category B and C labels can also be used when Category A and C animals are commingled on a single production day or when Category A, B, and C animals are commingled on a single production day. Finally, the 2009 Final Rule specifies that the label for meat derived from mixed origin animals (Category B) may list the countries in any order.⁹⁵

3. More Flexibility on Ground Meat Labels

78. The COOL Statute, as amended, and 2009 Final Rule contain flexibility with regard to the labeling of ground meat that was not present in earlier iterations of the law and regulations. The 2002 Farm Bill was silent on how to list country of origin for ground meat. In the 2002 Voluntary Guidelines, USDA proposed listing countries of origin in order of prominence by weight. Numerous interested parties urged USDA to adopt a different policy.⁹⁶ In the 2003 Proposed Rule, USDA modified the policy to require alphabetical order labeling. This policy was modified further in the 2008 Farm Bill and the statute now requires the declaration for ground meat must list all countries of origin contained therein or that may be reasonably contained therein, with no requirements on the order in which these countries must be listed. The 2009 Final Rule specifies

⁹⁴ *E.g.*, Letter from Canada (Sep. 5, 2008) (Exhibit US-25).

⁹⁵ In essence, this change allows retailers to use a Category C label on covered commodities derived from Category B animals without any requirement for commingling because the primary difference between the Category B and C labels is the order in which the countries of origin are listed.

⁹⁶ *E.g.*, Exhibit US-21.

that ground meat labels may include the name of a particular country if raw material from that country has been within the processor's inventory in the last 60 days.

4. Broader Exemptions for Processed Foods

79. USDA broadened the exemption for processed foods as the rule evolved. The COOL Statute created the exemption for processed foods, but it is silent on the definition of a "processed food." USDA originally proposed a somewhat narrow definition of processed food in the 2003 Proposed Rule, but received numerous comments suggesting the definition be expanded to ease compliance.⁹⁷ USDA agreed and the new definition of processed food excludes from retail labeling items that have undergone processing (such as cooking, curing, smoking, restructuring) or have been combined with another covered commodity or other substantive food component.

5. Less Stringent Record Keeping Requirements

80. The COOL Statute and 2009 Final Rule significantly reduce the record keeping responsibilities of both suppliers and retailers compared with earlier proposals. The 2002 Farm Bill and 2003 Proposed Rule created an audit verification system that required retailers and suppliers to maintain records that would allow the Secretary to verify compliance with the law's requirements for two years. Many interested parties commented on this particular aspect of the rule making, arguing that it would impose a significant burden on their business operations.⁹⁸

81. Congress responded to these comments by amending the statute to specifically declare that no records beyond those maintained in the ordinary conduct of business would be required to verify compliance. The 2002 COOL Statute, as amended, lists the following types of records as examples of what may be maintained for compliance purposes: animal health papers, import or customs documents, or producer affidavits. The 2009 Final Rule conforms with the 2002 COOL Statute, as amended, and provides some additional detail on what types of producer affidavits and other normal business records are acceptable. The 2009 Final Rule reduces the period that these records must be maintained from two years to one.

6. Less Stringent Enforcement Standards and Fines

82. COOL's enforcement provisions also evolved during the legislative and regulatory process. Under the 2002 Farm Bill, a retailer could be fined up to \$10,000 per violation if the retailer continued to willfully violate the statute 30 days after receiving an initial notice of a violation. Interested parties raised concerns about the proposed level of penalties and the statute, as amended by the 2008 Farm Bill, reduced the maximum penalty to \$1,000 and added in a good faith safe harbor provision.

⁹⁷ *E.g.*, Exhibit US-21; Exhibit US-5.

⁹⁸ *E.g.*, Exhibit US-26; Exhibit US-18.

7. Addition of Chicken to the List of Covered Commodities

83. The 2002 Farm Bill and the 2003 Proposed Rule did not include chicken among the list of covered commodities. Certain interested parties expressed a concern about chicken's omission,⁹⁹ and Congress added chicken as a covered commodity in the statute in the 2008 Farm Bill. The 2009 Final Rule also covers chicken.

E. Letter from U.S. Secretary of Agriculture Thomas J. Vilsack

84. On February 20, 2009, Secretary Vilsack sent a letter to industry representatives discussing various aspects of the 2009 Final Rule.¹⁰⁰ Unlike the statute and 2009 Final Rule, Secretary Vilsack's letter contains no requirements and has no legal status.

85. In his letter, Secretary Vilsack suggested that the industry "*voluntarily* adopt . . . practices to ensure that consumers are adequately informed about the source of food products." In particular, Secretary Vilsack suggested that industry consider taking three voluntary actions to help achieve the law's intent of providing consumers with accurate country of origin information. First, the Secretary suggested that processors "*voluntarily* include information about what production steps occurred in each country when multiple countries appear on each label." Second, the Secretary stated that "if [processed] products [that are otherwise exempt] are subject to curing, smoking, broiling, grilling, or steaming, *voluntary* labeling would be appropriate." Third, the Secretary notes that "reducing the time allowance [since ground meat from a particular country was in a processor's inventory and is still listed on the label] to ten days would . . . enhance the credibility of the label." The letter by its terms contains no requirements and sets forth no means of enforcing compliance with any of the suggestions contained therein.

F. The North American Livestock Market

86. The North American markets for cattle and hogs are both highly integrated and extremely complex. Numerous factors influence livestock prices, demand and supply, and trade in these commodities between the United States and Canada and Mexico, respectively.

86. These markets have experienced substantial volatility over the last 10 years. Trade in cattle has been disrupted by the global economic recession, the emergence of bovine spongiform encephalopathy ("BSE"), fluctuating feed costs and currency rates, among other factors. Likewise, the Canadian hog industry has been going through a period of restructuring that began in 2005 and inventories have declined significantly. Although neither market has completely stabilized, trade

⁹⁹ *E.g.*, Exhibit US-22; Exhibit US-23; Letter from Canada to USDA (Aug. 14, 2007) (Exhibit US-27).

¹⁰⁰ Letter from USDA Secretary Thomas Vilsack to Industry (Feb. 20, 2009) (Exhibit CDA-6). On the same day, USDA also issued a press release indicating that the COOL regulations would be implemented as expected on March 16, 2009 (Exhibit MEX-23).

and prices have been increasing since early 2010 and both markets appear to be recovering from the 2009 retrenchment.

87. In this section, the United States will discuss the U.S. markets for Canadian cattle, Mexican cattle, and Canadian hogs. The United States will discuss the numerous factors that affect each of these markets as well as recent market trends, which in each case reflect an upward trajectory in prices and trade.

1. The U.S. Market for Canadian Cattle

a. Introduction

88. The U.S. and Canadian livestock markets are highly integrated, with production, feeding operations, and slaughter houses located on both sides of the border.¹⁰¹ As such, Canada has exported to the United States an annual average of approximately 950,000 head of cattle (feeder and slaughter) over the last 10 years, although there has been significant fluctuations in export numbers from year to year.¹⁰² The majority of Canadian live cattle exports are slaughter cattle, although Canada's feeder cattle exports are not insignificant.¹⁰³ At the same time, Canada slaughters a substantial portion of its own cattle and sends an annual average of 318,800 metric tons of beef to the United States.¹⁰⁴

89. While Canada exported between 25 and 40 percent of its cattle for slaughter to the United States from 2000 to 2009 (with the exception of the BSE-disrupted years),¹⁰⁵ these exports make up a small portion of total U.S. slaughter. Between 2000 and 2009, U.S. imports of Canadian cattle, relative to U.S. slaughter, averaged about 4 percent.¹⁰⁶ The share of the U.S. beef market supplied from Canadian beef and cattle ranges between 5 and 10 percent.¹⁰⁷

b. Factors that Affect the U.S. Market for Canadian Cattle

90. Traditionally, Canadian cattle prices track U.S. cattle prices due to the market's integrated nature. However, Canadian prices are generally lower than U.S. prices, reflecting the cost of

¹⁰¹ Canada's FWS, para. 37.

¹⁰² See Economic Data re: Cattle, Hog, Beef, and Pork Sectors of Canada, U.S. and Mexico, Table 3: Canadian live cattle exports to the United States (Exhibit US-28). Canada exported 10.236 million head of cattle to the United States between 2000 and 2009, or an average of 1 million head per year. Canada exported a high of 1.7 million head of cattle to the United States in 2002 and a low of 0 head in 2004.

¹⁰³ Exhibit US-28, Table 3: Canadian live cattle exports to the United States. Note that table 1 includes breeding animals in Canada's total export number while table 5 does not.

¹⁰⁴ See Exhibit US-28, Table 2: Canadian beef exports by country. Canada exported 3,188,000 metric tons of beef to the United States between 2000 and 2009, or an average of 318,800 metric tons per year.

¹⁰⁵ See Exhibit US-28, Table 1: Canadian Cattle Sector.

¹⁰⁶ Exhibit US-28, Tables 3 and 5.

¹⁰⁷ Charts re: Shares of US Beef from Imported Canadian Cattle (Exhibit US-29).

transportation to ship Canadian cattle to the United States.¹⁰⁸ This price following by the Canadian market reflects the fact that the U.S. market is much larger than the Canadian market.¹⁰⁹ Besides transportation costs, the price differential is also affected by exchange rate fluctuations, the relative feed costs in each country, and inventory, among other factors.

91. The relationship between the price differential and Canadian exports to the United States is not straightforward because of the many factors that affect trade flows. While in general there is an incentive to sell Canadian cattle in the U.S. market when the price differential increases, this relationship may not hold true due to other factors such as animal diseases, weather conditions, and the overall strength of the U.S. economy. In the following paragraphs, the United States will discuss these factors and their relationship with trade flows to the extent it can be summarized.

92. Exchange Rates: The exchange rate between the U.S. and Canadian dollars affects the cattle trade. In general, all other things being equal, when the Canadian dollar is weak compared to the U.S. dollar, exports of Canadian cattle increase. The reason for this is that U.S. market prices return a premium to Canadian cattle sellers who are paid in U.S. dollars and Canadian exports increase to capture that premium. By contrast, when the Canadian dollar is strong compared to the U.S. dollar, the incentive to sell cattle to the U.S. buyers declines. At the same time, the value of the U.S. and Canadian currencies relative to other major markets can also affect trade flows. For example, if the Canadian dollar is weak in global markets, this will increase the incentive for Canadian producers to export beef. And if the Canadian dollar is weaker compared to global markets than compared with the U.S. dollar, these producers may decide to slaughter and process the Canadian cattle themselves instead of sending the live animals to the United States.

93. Feed Costs: Feed costs can play a significant role in determining price and trade flows. When the cost of feed is high, the profitability of feeding cattle declines, perhaps encouraging either the slaughter or export of more animals. In addition, a differential between the price of feed in Canada and the United States can create an incentive to feed the cattle in the country where costs are lower.

94. Inventories: Changes in the inventory of cattle in either Canada or United States ultimately affect prices and exports. For example, the inventory of Canadian cattle grew significantly immediately following the outbreak of BSE because Canada was temporarily unable to export its cattle. As the supply of cattle in Canada increased, the price fell precipitously.

¹⁰⁸ Charts re: United States, Canada and Mexico Import and Export Prices, Inventories, Chart 1 (Exhibit US-30).

¹⁰⁹ The price differential between U.S. and Canadian prices is generally described as the “spread” (the difference between one region and another) or the “basis” (the difference between cash prices and a relevant futures price). As Canada notes in its submission, the terms “basis” and “spread” are often used interchangeably. *See* Canada’s FWS, para. 55.

95. *Transportation Costs*: Transportation costs can impact cattle trade between the United States and Canada. When transport costs, which are linked to the price of fuel, are high, the incentive to ship Canadian cattle to the United States diminishes. Therefore, U.S. slaughter houses will purchase fewer Canadian cattle and the price of Canadian cattle will decline.

96. *Weather Conditions*: A drought or other weather-related disruption can significantly impact export levels. U.S. and Canadian cattle feeding practices follow a similar pattern. Typically, feeder cattle are placed on pastures in the spring and summer months, and then are placed on feed during late fall or winter. This general pattern can be affected by unusual weather patterns. For example, a drought in western Canada in 2002 led to increased exports.

97. *Economic and Income Growth*: Broader economic factors also affect the cattle and beef markets. In times of economic recession, when incomes fall, consumers eat less meat products. This can have a significant effect on overall prices and demand, and ultimately prices and trade, as occurred in response to the recession that began in late 2007.

98. *Animal Diseases*: The effect of animal disease on the price of and demand for livestock can be significant. For example, following the discovery of BSE in the Canadian herd in 2003, the United States and other Canadian trading partners imposed a ban on the import of live cattle, beef, and beef products from Canada.¹¹⁰ The price of Canadian cattle plummeted almost immediately following these bans and continued to fall over the next two years as there was almost no trade in live animals during this time period.¹¹¹ The price of Canadian beef also fell as Canada was shut out of significant export markets, such as Japan and Korea.¹¹² Subsequent BSE discoveries in Canada have continued to affect the price of and demand for Canadian livestock and beef, which is reflected in changes in the basis.¹¹³

c. Recent Market Trends

99. During the period in which COOL implementing regulations were under consideration and thereafter, several factors had a significant negative impact on U.S. - Canada cattle trade. These factors included fluctuations in the value of the Canadian dollar, a sharp increase in feed and transportation costs, and the global economic recession.¹¹⁴ Together, these factors worked to the detriment of North American livestock industries, severely affecting profitability and economic viability, and therefore, reducing trade flows between the United States and Canada.

¹¹⁰ BSE Timeline of Events (Exhibit US-31).

¹¹¹ Exhibit US-28, Tables 3 and 4.

¹¹² Exhibit US-28, Table 2.

¹¹³ Table, "Events preceding low points in Canada-U.S. fed cattle price differentials post-2003" (Exhibit US-32).

¹¹⁴ Exhibit US-28, Charts 2, 3, and 4.

100. The global economic crisis resulted in a worldwide slowing of trade and an overall contraction of agricultural markets in 2009. U.S. livestock markets were not spared from the recession. In fact, in 2009, U.S. beef production fell by 2.2 percent and the price of cattle declined by 10.0 percent.¹¹⁵ U.S. consumption of beef fell 1.5 percent in 2009, and is projected to fall another 3 percent in 2010.¹¹⁶

101. Decreased demand for beef in the United States as a result of the economic slowdown and a strengthening Canadian dollar in 2009 resulted in a lower U.S. price premium for Canadian producers, and thus less incentive to market Canadian slaughter cattle in the United States.¹¹⁷ In addition, throughout 2009, U.S. cow slaughter remained high, reducing the need for Canadian slaughter steers and heifers.

102. Canadian feed prices began to decline from their peak in mid-2008, further encouraging feeder cattle to remain in Canada.¹¹⁸ This contributed to a shrinking price differential between U.S. and Canadian feeder cattle in 2009, reducing the incentive to export Canadian feeders to the United States.¹¹⁹

103. The discovery of BSE in Canada in 2003 has also had lingering effects on the Canadian market, up to and including the period during which the 2009 Final Rule was adopted. This event reshaped Canada's cattle and beef sector as the country had to respond to the global effects of this incident, as well as many trading partners' continued concerns about the 16 subsequent discoveries of BSE in Canada since that time (most recently in March 2010), despite Canadian mitigation measures for BSE.¹²⁰ Many of Canada's trading partners, including the United States, imposed a ban on imports of live cattle, beef, and beef products. While a significant portion of the U.S. ban was lifted in 2005, many of Canada's trading partners, including China and Korea, continue to close their markets to exports of Canadian beef and Canada has achieved only partial access in a number of other countries. While by 2007 and 2008, Canadian exports to the United States finally returned to pre-BSE levels, the restructuring of the industry and market access restrictions in third countries continue to affect Canadian prices.¹²¹

104. Although Canadian prices and exports were down in late 2008 and early 2009, the markets have begun rebounding in recent months. In fact, both Canadian and U.S. cattle prices are rising rapidly in 2010, recovering from the depressed levels of mid-2008 through mid-2009.¹²² Feed and

¹¹⁵ Exhibit US-28, Charts 6 and 7.

¹¹⁶ Exhibit US-28, Table 6; World Agricultural Supply and Demand Estimates, USDA (July 9, 2010) (Exhibit US-33).

¹¹⁷ Exhibit US-30, Charts 5 and 6.

¹¹⁸ Exhibit US-30, Chart 5.

¹¹⁹ Exhibit US-30, Chart 7.

¹²⁰ Exhibit US-31.

¹²¹ Exhibit US-28, Table 3.

¹²² Exhibit US-28, Tables 4 and 7; Exhibit US-30, Chart 1.

fuel costs have moderated from their peaks two years ago, making cattle production more profitable.

105. Canadian slaughter cattle exports to the United States experienced a rapid increase in early 2010.¹²³ U.S. slaughter cattle imports from Canada in March 2010 reached their highest level since October 2007 and U.S. imports of feeder cattle from Canada have also risen sharply in 2010. In addition, USDA projects U.S. steer prices in 2010 will be 10-14 percent higher than in 2009.¹²⁴ Canada's share of the U.S. beef market has also increased in recent months.¹²⁵

2. The U.S. Market for Mexican Cattle

a. Introduction

106. The U.S. and Mexican cattle and beef industries are also highly integrated, with cattle and beef flowing in both directions across the border. In general, cattle imports from Mexico into the United States tend to be lighter cattle for feeding rather than slaughter cattle.

107. Mexico exports a significant number of cattle and beef to the United States. Over the past 10 years Mexico has exported an average of 1.1 million head of cattle to the United States, which has ranged from 13 to 29 percent of slaughter in Mexico.¹²⁶ While this quantity is significant, Mexican exports only represents 3-5 percent of U.S. cattle slaughter.¹²⁷ Mexico has also been exporting an increasing amount of beef to the United States, with a record 23,673 metric tons sent to the United States in 2009.¹²⁸ In fact, Mexican beef exports to the United States have more than doubled in just the past five years.

b. Factors Affecting the U.S. Market for Mexican Cattle

108. The market dynamics affecting the U.S.-Mexican cattle trade are similar to those affecting U.S.-Canadian cattle trade. Like Canadian cattle prices, Mexican cattle prices also track U.S. cattle prices due to the market's highly integrated nature. In addition, animal diseases, feed costs, transportation costs, exchange rates, inventories, and U.S. economic conditions all affect the price of and demand for Mexican cattle. Occasionally, Mexican disease issues, such as tuberculosis, brucellosis, and ticks, have disrupted trade.¹²⁹

¹²³ Exhibit US-30, Chart 5.

¹²⁴ Exhibit US-33.

¹²⁵ Exhibit US-29.

¹²⁶ Exhibit US-28, Table 13.

¹²⁷ Exhibit US-28, Tables 5 and 13.

¹²⁸ Exhibit US-28, Table 14.

¹²⁹ See Articles re: Tick Infestation Along US-Mexico Border (Exhibit US-34).

109. In addition, weather conditions play a major role in the U.S. - Mexican cattle trade, with most Mexican cattle export originating from an area in Northern Mexico that is highly susceptible to drought. Mexican cattle are generally imported into the United States late in the year as pasture in Mexico begins to deteriorate.¹³⁰ If there is little moisture during the year, Mexican cattle may be sent to the United States much earlier. On the other hand, if rainfall allows for good pasture conditions, Mexican cattle may remain in Mexico for a longer time period and not be sold to the United States until much later. This could shift exports into a different month or year than would have been expected and distort trade flows. For example, a 2002 drought in Mexico forced many Mexican producers to sell animals due to a lack of food and water.

c. Recent Market Trends

110. The strong U.S. cattle market, especially feeder cattle prices, between 2005 and the end of 2007, attracted Mexican cattle imports to the United States. Price differentials between Mexican and U.S. cattle widened as low feed costs boosted U.S. cattle prices, encouraging Mexican cattle producers to ship their cattle north.¹³¹ At the same time, Mexican slaughter also increased, significantly depleting inventories. In fact, an agricultural census in 2007 showed total cattle inventory at 23.3 million head, confirming several years of contraction in the sector.¹³²

111. Mexico's beef and cattle sector, already contracting, began to face serious economic difficulties toward the end of 2007. Higher feed prices, the effects of the global economic recession, and a devaluation of the peso against the dollar contributed to stress in the sector. Mexican cattle prices, which had been strong, began to fall in 2009 as the economic situation deteriorated.¹³³

112. Weather also played a key role in reducing Mexican exports between 2007 and 2009. Dry conditions in many parts of the United States and wet conditions in Mexico in late 2007 and 2008 led Mexican producers to continue feeding their cattle in Mexico rather than sending them north.¹³⁴ Further, Mexican cattle producers were also able to receive a higher price for their cattle domestically as opposed to the price they would receive at the U.S. border.¹³⁵

113. Mexican cattle and beef exports started 2009 at somewhat low levels, but the trend started to turn around late in the year. Feed costs declined from the previous year's high and Mexican pasture conditions in key grazing areas were not as favorable as in 2008. As a result, Mexican cattle exports were about 25 percent higher in 2009 than 2008.

¹³⁰ Exhibit US-30, Chart 9.

¹³¹ Exhibit US-30, Chart 8.

¹³² Exhibit US-28, Table 13.

¹³³ Exhibit US-28, Table 15; Exhibit US-30, Chart 10.

¹³⁴ Exhibit US-28, Table 13; Exhibit US-34. Cumulative rainfall data for the 3 largest cattle exporting states shows 2008 rainfall was favorable for pasture growth, whereas 2009 rainfall dropped sharply.

¹³⁵ Exhibit US-30, Chart 10.

114. Mexican cattle exports have seen a strong surge in 2009 and 2010. Exports in November 2009 hit the highest monthly total since November 2007,¹³⁶ and exports for the first four months of 2010 are up 14 percent over the same period in 2009.¹³⁷ Although data on Mexican cattle prices are not available for 2010, Mexican prices tend to follow U.S. feeder cattle prices and are likely increasing.¹³⁸

3. The U.S. Market for Canadian Hogs

a. Introduction

115. Similar to the cattle and beef sector, the U.S. and Canadian hog and pork sector is highly integrated. Canada's hog industry grew rapidly beginning in the mid-1990s, and Canada became a major provider of live hogs and pork to the United States. Over the last 10 years, Canada's exports of live hogs to the United States have grown significantly from 4.3 million head in 2000 to 6.4 million head in 2009.¹³⁹ Over this same time period, Canadian pork exports to the United States have remained relatively steady, ranging from a low of 279,100 metric tons in 2008 to a high of 424,500 metric tons in 2003.¹⁴⁰ While Canada continues to export a significant amount of both live hogs and pork to the United States, this market has been in decline since Canadian producers started selling off the breeding herd in July 2005.¹⁴¹

b. Factors that Affect the U.S. Market for Canadian Hogs

116. Due to the market's highly integrated nature, the price of live U.S. and live Canadian hogs track each other quite closely.¹⁴² Like Canadian cattle prices, Canadian hog prices also trend below U.S. prices, reflecting the cost of transporting Canadian hogs to the United States for feeding or slaughter.

117. Prices and exports of Canadian hogs are influenced by numerous factors, which include the exchange rate, feed and transportation costs, inventories, and the overall strength of the U.S. and Canadian economies. The general impact of these particular factors is similar for Canadian hogs as Canadian cattle and will not be repeated here.¹⁴³ However, as will be discussed below, the restructuring of the hog industry and policies adopted by the Canadian government have also had a significant impact on trade in Canadian hogs in recent years.

¹³⁶ Exhibit US-30, Chart 8.

¹³⁷ Exhibit US-30, Chart 8.

¹³⁸ Exhibit US-30, Chart 10.

¹³⁹ Exhibit US-28, Table 13.

¹⁴⁰ Exhibit US-28, Table 9.

¹⁴¹ Exhibit US-30, Chart 8.

¹⁴² Exhibit US-30, Chart 12.

¹⁴³ See section 1, *supra*.

c. Recent Market Trends

118. An unusually powerful set of incentives led to the rapid expansion of the Canadian hog and pork sector beginning in the mid 1990s, which in turn led to sharply higher slaughter hog and feeder pig exports from Canada to the United States. Among the factors contributing to this trend include: (1) a structural shift toward specialized operations in U.S. hog production; (2) a decline in U.S. breeding numbers and increased demand for feeder pigs in the United States; (3) policy changes in Canada that created incentives to expand hog production; and (4) the low value of the Canadian dollar relative to the U.S. dollar.

119. The U.S. pork industry underwent a transformation in the decades leading up to the 1990s. The industry restructured, shifting away from smaller farrow-to-finish operations to very large operations specializing in one stage of production. Finishing operations in particular became prevalent because they are conducive to large-scale production and scale economies. As these operations began to aggressively bid to secure steady supplies of high quality hogs, the price of U.S. hogs increased significantly.¹⁴⁴

120. At around the same time, Canada's government made an important policy change that allowed Canada to take advantage of the increased demand for hogs in the United States. In particular, in 1995, Canada abolished the Western Grain Transportation Act, a program which had subsidized grain exports. This program's abolishment led to a surplus in feed grain in Canada and a decline in feed grain prices.¹⁴⁵ Further, the Canadian dollar in 1995 was trading at a very low level compared with the U.S. dollar, which also favored Canadian exports.¹⁴⁶ These favorable conditions attracted investment into Western Canada where the existing resource base – vast open spaces, low population density, and a cool climate – favored modern hog production.

121. Canada's hog industry entered into a boom period beginning in the late 1990s. Hog slaughter increased rapidly and the export of Canadian hogs to the United States more than doubled between 2000 and 2006. The most rapid growth in exports was in feeder animals. Pork exports also increased by about 75 percent from 2000 to 2009.¹⁴⁷

122. However, beginning in 2005, many of the factors that had favored the expansion of Canadian hog production and exports turned the other way. An increase in the value of the Canadian dollar hampered the competitiveness of Canadian hog and pork exports. And by 2007, rising feed costs exacerbated declining market prices for slaughter hogs.

¹⁴⁴ Exhibit CDA-50.

¹⁴⁵ Exhibit CDA-50.

¹⁴⁶ Exhibit US-30, Chart 3.

¹⁴⁷ Exhibit US-28, Table 8.

123. After years of very profitable production, hog producers were caught in a severe cost-price squeeze, as measured by the hog-feed price ratio.¹⁴⁸ With rising feed costs, many Canadian hog producers began shifting from farrowing operations to the more traditional farrow-finish operations. Producers started selling off their breeding herd, and inventories began a free fall from a peak of 15.2 million in October 2005 to 11.6 million on January 1, 2010, a 24 percent decline.¹⁴⁹ Canadian hog plant closures resulted in even higher levels of exports to the United States during 2007 and 2008. Hog exports began to fall in 2008.¹⁵⁰

124. The dire situation that Canadian hog producers were facing was further exacerbated by the global economic recession, which affected the demand for pork products. Hog price prospects were also hurt by the world-wide outbreak of the H1N1 influenza virus in 2009, which was mistakenly referred to as “swine flu.”

125. Despite these adverse factors, recent data suggests that Canada’s hog sector is beginning to rebound, in line with the U.S. hog sector. In fact, Canadian hog prices began rebounding in 2010 after falling to very low levels in mid-2009. On the other hand, Canadian exports have yet to rebound as Canadian hog inventory continues to shrink from historically high levels.¹⁵¹

IV. LEGAL ARGUMENT

A. **Threshold Issue: The Statute, Regulations, and Vilsack Letter Are Not a Single “COOL Measure”**

126. Canada and Mexico describe the measures at issue in this dispute as a single “COOL measure,” but as they define this term,¹⁵² their complaint in fact rests on several substantively distinct measures: Section 10816 of the 2002 Farm Bill, as amended by Section 11002 of the 2008 Farm Bill (7 U.S.C. §§ 1638-1638c) (“the 2002 COOL Statute, as amended”), the 2008 Interim Final Rule, the 2009 Final Rule, and the February 20, 2009 letter from Secretary Vilsack. Mexico additionally characterizes the FSIS Final Rule as an additional element of the “COOL measure.” In so doing, the complainants obscure the fact that one of the measures that they have identified is not in effect, and that another element of the “COOL measure” – the Vilsack Letter – even if considered a measure of the United States, is not subject to the TBT disciplines that Canada and Mexico claim the United States has breached. Furthermore, Canada and Mexico’s arguments overlook important substantive differences between each of the elements of the “COOL measure” (in particular the statute and regulations), and with respect to the FSIS Regulations, Mexico fails to explain precisely how it gives rise to an inconsistency with U.S. obligations.

¹⁴⁸ Exhibit US-28, Table 10; Exhibit US-30, Chart 13.

¹⁴⁹ Exhibit US-28, Table 7; Exhibit US-30, Chart 14.

¹⁵⁰ Exhibit US-30, Chart 15.

¹⁵¹ Exhibit US-28, Table 11; Exhibit US-30, Chart 14.

¹⁵² See Canada’s First Written Submission (“Canada’s FWS”), para. 1 n.1; Mexico’s First Written Submission (“Mexico’s FWS”), para. 9.

127. On the first point, as noted above, the 2008 Interim Final Rule is not in effect, having been superseded on March 16, 2009 by the 2009 Final Rule (and in its legal argument, Canada appears to address the 2009 Final Rule only).

128. On the second point, the Vilsack Letter is a letter from the Secretary of Agriculture to industry representatives providing the Secretary's views on actions industry could undertake on a voluntary basis to further enhance the information available to consumers. Even were it to qualify as a measure,¹⁵³ as discussed in more detail in Part V below, it does not constitute a "technical regulation." The provisions of the TBT Agreement cited by Canada and Mexico in their submissions only apply to "technical regulations," which among other things must be "mandatory." Neither Canada nor Mexico can demonstrate that the Vilsack Letter constitutes a "technical regulation," since by its terms, it contains no mandatory requirements (indeed, Canada does not even attempt to demonstrate that the Vilsack Letter meets this requirement).¹⁵⁴

129. On the third point, Canada and Mexico's attempt to conflate separate instruments as a single measure 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 (its legal argument on the FSIS Rule appears limited to the assertion that it is a "technical regulations"). Indeed, as noted, given Mexico's inclusion of the FSIS Rule, Canada and Mexico do not even define the "COOL measure" in the same way.

130. Thus, by treating all of these measures as a single "COOL measure," Canada and Mexico attempt to sweep into the Panel's analysis a document that is not itself subject to the relevant commitments, to obtain findings on a measure that was superseded over eighteen months ago by the 2009 Final Rule, and to avoid making their case with respect to other measures before the Panel. Given these issues, rather than evaluating them collectively, each document cited by Canada and Mexico should be assessed on its own merits in relation to each of Canada and Mexico's claims, consistent with the approach used by panels in previous disputes.¹⁵⁵

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

131. As the United States will demonstrate in this Part of its First Written Submission, each of the COOL measures is not inconsistent with Articles 2.1, 2.2, 2.4 and 12 of the TBT Agreement. The Vilsack Letter is not a technical regulation. As for the 2002 COOL Statute, as amended, and 2009 Final Rule, both are origin-neutral, applying to both domestic and foreign products, and

¹⁵³ In this regard, as the panel stated in *Japan - Film*, "not every utterance by a government official . . . can be viewed as a measure of a Member government." *Japan - Film*, para. 10.43.

¹⁵⁴ See Canada's FWS, paras. 69-74 (omitting reference to Vilsack Letter).

¹⁵⁵ *Japan - Film*, para. 10.88-10.89 (declining to evaluate measures in combination for purposes of causation analysis); *Turkey - Rice Licensing*, para. 7.279-7.281 (analyzing individual measures separately, then exercising judicial economy with respect to the measures considered jointly).

neither modifies the conditions of competition to the detriment of foreign producers. Both fulfill the legitimate objective of providing consumers with additional information about the food that they buy at the retail level while also helping to prevent consumer confusion, and do so in a manner that is no more trade restrictive than necessary. With respect to Mexico’s claim under Articles 2.4 the TBT Agreement, the CODEX standard identified by Mexico is not a relevant international standard that would fulfill the U.S. objective of providing meaningful information to consumers regarding the origin of meat. Finally, as for Mexico’s claim under Article 12 of the TBT Agreement, developing country Members were given ample opportunity to participate in the development of the 2009 Final Rule, as well as the FSIS Rule. The United States took into account the concerns of numerous interested parties, including those of the complaining parties in this dispute, while developing the 2002 COOL Statute, as amended, and the implementing regulations, and has made every effort to apply the measures in a manner that minimizes burdens, including on developing countries.

A. The Vilsack Letter is Not a Technical Regulation

132. While both discuss the Vilsack Letter at some length in arguing that the “COOL measure” is inconsistent with U.S. obligations under the TBT Agreement, neither Canada nor Mexico demonstrate that the letter is a “technical regulation” within the meaning of the TBT Agreement.¹⁵⁶ Indeed, Canada does not even attempt to prove that this is the case.¹⁵⁷ While Mexico attempts to address the issue, its argument largely centers on the simple assertion that the letter, and a subsequent press statement regarding the letter, “have a mandatory nature,” and fails to account for the fact that the documents are by their terms *voluntary*.¹⁵⁸

133. Article 2 of the TBT Agreement concerns the preparation, adoption, and application of “technical regulations” by central government bodies,¹⁵⁹ and by its terms only applies to measures that meet the definition of a “technical regulation” contained in Annex 1 of the TBT Agreement. Annex 1, in turn, defines a “technical regulation” as:

¹⁵⁶ In addition, the United States notes that neither Canada or Mexico has asserted that the Vilsack Letter is a standard, and thus, that it would be subject to the disciplines of the TBT Agreement for that reason.

¹⁵⁷ See Canada’s FWS, paras. 69-74 (omitting reference to Vilsack Letter). Canada argues that the United States notified the “COOL measure” to the TBT Committee, and therefore it constitutes a “technical regulation”. Canada’s FWS, para. 74. However, the United States did not notify the Vilsack Letter because as noted above, it does not constitute a technical regulation.

¹⁵⁸ Mexico’s FWS, para. 251.

¹⁵⁹ Article 2.1 requires Members to ensure that in respect of *technical regulations*, products from the territory of any Member are accorded treatment no less favorable than that accorded to like products of national origin and to like products originating in any other country. Article 2.2 requires Members to ensure that *technical regulations* are not prepared, adopted, or applied with a view to or with the effect of creating unnecessary obstacles to international trade and for this purpose requires Members to ensure that technical regulations are not more trade-restrictive than necessary to fulfill a legitimate objective. Finally, Article 2.4 requires Members to base their *technical regulations* on relevant international standards, or the relevant parts of them, except when such international standards or relevant parts of them would be an ineffective or inappropriate means to fulfill a legitimate objective.

a document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

134. The Vilsack Letter does not meet this definition of a “technical regulation” – by its terms, compliance with it is not mandatory.¹⁶⁰ In *EC – Asbestos*, the Appellate Body noted that a document that lays down product characteristics will be considered mandatory if it “regulates the ‘characteristics’ of products in a binding or compulsory fashion.”¹⁶¹ The terms used in the Vilsack Letter plainly indicate that it contains suggestions, compliance with which is voluntary, not mandatory. It does not contain binding obligations. In describing the three suggestions in the letter, 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 word “voluntary” is used three additional times in describing these suggestions. A press statement accompanying the letter likewise refers to the suggestions included in the letter as “voluntary.”

135. Reinforcing the fact that the Vilsack Letter is not mandatory is the absence of any mechanism to ensure that companies follow the suggestions contained therein.¹⁶² While Canada and Mexico both 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.¹⁶³

136. Indeed, the industry’s response to the letter and press release is telling. Eighteen months have passed since the letter was issued, yet Canada and Mexico offer no evidence demonstrating that industry is following the letter’s suggestions. The only evidence that Mexico cites concerns Tyson Foods’ deliberations on whether to use Category B labels on Category A meat,¹⁶⁴ yet the Tyson Foods letter precedes the Vilsack Letter by nearly six months and concerns issues unrelated

¹⁶⁰ Mexico’s assertion that a determination of whether a measure prescribes mandatory product characteristics “should not be decided based on the characterization given by the issuing authority to its own measures” is inapposite. Mexico’s FWS, para. 254. The United States is not asking this Panel to rely on USDA’s “characterization” of the Vilsack Letter – rather, the voluntary nature of the measure is evident from the terms used therein. Accepting Mexico’s assertion that a measure that is expressly voluntary and unenforceable somehow becomes mandatory merely owing to the possibility that future regulatory action would have the effect of converting any suggestion by a regulator into a “technical regulation” subject to the TBT Agreement.

¹⁶¹ *EC – Asbestos (AB)*, para. 68.

¹⁶² *Cf.* Canada’s FWS, para. 73 (noting the enforcement provisions in statute and regulations in support of argument that the “COOL measure” is a technical regulation).

¹⁶³ Canada’s FWS, paras. 29-30; Mexico’s FWS, paras. 253-259.

¹⁶⁴ Mexico’s FWS, para. 258.

to those described in the Vilsack Letter. Finally, it may be noted that, in the time that has passed since the letter was released, USDA has not taken any action to revisit the COOL rule making.

B. The 2002 COOL Statute, as amended, 2009 Final Rule, and FSIS Rule are Not Inconsistent with Article 2.1 of the TBT Agreement

137. Canada and Mexico assert that the “COOL measure” is inconsistent with Article 2.1 of the TBT Agreement,¹⁶⁵ which provides that:

Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favorable than that accorded to like products of national origin and to like products originating in any other country.

138. To demonstrate that a measure is inconsistent with this obligation, the complaining party must demonstrate that: (1) the measure at issue 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.¹⁶⁶

139. As noted above, the Vilsack Letter is not a technical regulation, and thus is not subject to the disciplines of TBT Article 2.1. 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, none of the measures identified by Canada and Mexico modifies the conditions of competition to the detriment of Canadian and Mexican producers of cattle and hogs. Finally, Canada and Mexico do not even address the fact the 2002 COOL Statute, as amended, 2009 Final Rule, and FSIS Rule apply to meat, not livestock, despite the fact that their entire argument rests on alleged effects on livestock. These measures are not inconsistent with TBT Article 2.1.

1. Canada and Mexico Have Failed to Demonstrate that Any of the Measures Provides Less Favorable Treatment to their Products

¹⁶⁵ Canada’s FWS, paras. 75-155; Mexico’s FWS, paras. 261-270.

¹⁶⁶ See *EC – Geographical Indications (Australia)*, para. 7.444, where the Panel stated that: “the essential elements of an inconsistency with Article 2.1 of the TBT Agreement are, *as a minimum*, that the measure at issue is a “technical regulation”; that the imported and domestic products at issue are “like products” within the meaning of that provision; and that the imported products are accorded “less favourable” treatment than that accorded to like domestic products.” (Emphasis added) In addition to these three “minimum” elements, the text of TBT Article 2.1 requires the complaining party to establish that such treatment is in respect of the technical regulation.

140. 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 make their case, as they have failed to show that either the 2002 COOL Statute, as amended, the 2009 Final Rule, or (in the case of Mexico) the FSIS Rule provide less favorable treatment, whether to meat or to livestock.

141. As an initial matter, as noted in Part III, *supra*, country of origin labeling is required by many WTO Members, and is widely regarded as a useful means of providing additional information to consumers. Further, in many cases, imported products may benefit from country of origin labeling, where, for example, consumer perception of the imported product is positive. Widespread marketing in the United States of Australian and New Zealand lamb emphasizing their country of origin is one such instance¹⁶⁷ – Australian and New Zealand producers recognize that their products are valued by consumers, and therefore for years have labeled them with their country of origin for marketing purposes. As this example demonstrates, there is nothing about country of origin labeling that is inherently unfavorable to imported products. Moreover, as explained below, the 2002 COOL Statute, as amended, the 2009 Final Rule, and (in the case of Mexico) the FSIS Rule do not afford less favorable treatment with respect to the products at issue in this dispute.

a. The COOL Measures Treat U.S. and Foreign Beef, Pork, and Livestock Identically

142. The 2002 COOL Statute, as amended, the 2009 Final Rule, and FSIS Rule do not accord less favorable treatment to imports. Rather, they treat beef, pork, and livestock identically regardless of origin. As the panel stated in *EC - Trademarks*, “the starting point for this analysis [of “less favourable treatment”] must be whether the measure at issue accords any difference in treatment.”¹⁶⁸

143. While nearly all of the cases cited by Canada and Mexico in their submissions involved a measure that accorded formally distinct treatment to domestic and imported products,¹⁶⁹ the

¹⁶⁷ New Zealand Lamb Cooperative, Inc. (USA), “About New Zealand Lamb,” available at <http://www.nzlamb.com/content/about.html> (accessed July 28, 2010) (Exhibit US-35); The Australian Lamb Company – USA and Canada, “Opal Valley,” available at <http://australianlamb.com/opalvalley/index.html> (accessed July 28, 2010) (Exhibit US-36).

¹⁶⁸ *EC – Geographical Indications (Australia)*, para. 7.464. The Panel in *EC – Geographical Indications* ultimately concluded that since Australia could not demonstrate that the EC measure subjected domestic and imported like products to different regulatory requirements, the measure did not provide less favorable treatment.

¹⁶⁹ Nearly all of the disputes cited in Canada’s and Mexico’s submissions in which the panel or Appellate Body found a GATT Article III:4 violation involved formally different treatment between imports and domestic products: *Brazil – Tyres (Panel)* (import ban); *Canada – Autos (Panel)* (domestic content requirement); *Canada – Wheat Exports (Panel)* (measures on the receipt of foreign grain and mixing and transport of domestic grain); *China – Auto Parts (AB)* (additional administrative procedures for users of imports); *EC – Bananas III* (Article 21.5) (EC)

(continued...)

complainants concede that the 2002 COOL Statute, as amended, 2009 Final Rule, and FSIS Final Rule do not “explicitly require that imported commodities be treated less favourably than domestic commodities.”¹⁷⁰ Indeed a cursory review of each of these measures demonstrates that they are facially neutral. Each requires that both domestic and foreign products be labeled in a manner that allows consumers to determine their country of origin at the retail level. They require meat to be labeled with origin information regardless of where the livestock from which the meat was derived was born, raised, or slaughtered.

b. The COOL Measures Have Not Modified the Conditions of Competition to the Detriment of Canadian and Mexican Livestock

144. Rather than asserting that the 2002 COOL Statute, as amended, 2009 Final Rule, and FSIS Final Rule by their terms accord different treatment to their beef and pork exports, Canada and Mexico claim that the measures accord less favorable treatment because they have modified the conditions of competition to the detriment of their livestock, reducing the price of and demand for these products in the U.S. market.¹⁷¹

145. In the context of GATT Article III:4, the Appellate Body has noted that requirements that apply equally to both domestic and imported products may in limited circumstances still provide less favorable treatment if they “modify the conditions of competition in the relevant market to the detriment of the imported products.”¹⁷²

146. The Appellate Body in *Dominican Republic – Cigarettes* clarified that it is not sufficient for a complaining party to simply demonstrate that a measure has had some detrimental effect on imported products in order to prove that the conditions of competition have been modified. In that dispute, the Appellate Body noted:

¹⁶⁹ (...continued)

(license allocations based on origin); *India – Autos* (domestic content requirement); *Korea – Beef (AB)* (retail system required different marketing channels for product based on origin); *Turkey – Rice Licensing* (domestic purchase requirement); *US – FSC (Art. 21.5) (Panel)* (domestic value requirement); *US – Gasoline (Panel)* (different compliance standards for imported and domestic products); *EEC – Parts and Components* (requirements to limit the use of imports); *EEC – Oilseeds* (domestic content subsidy); *Italian Agricultural Machinery* (domestic purchase subsidy); *US – Section 337* (additional enforcement regime for infringing imports). On the other hand, no national treatment violation was found in the two disputes cited by Canada and Mexico in which there was not formally distinct treatment: *Dominican Republic – Cigarettes (AB)* and *Japan – Film*. In these disputes, the Appellate Body and Panel, respectively, did not find that the measure at issue had modified the conditions of competition to the detriment of the imported product.

¹⁷⁰ Canada’s FWS, para. 89; Mexico’s FWS, para. 218 (conceding that “[t]he COOL measure by itself does not *de jure* distinguish between domestic and imported like products nor do the measures *de jure* distinguish between like Mexican and U.S. feeder cattle.”).

¹⁷¹ Canada’s FWS, para. 89; Mexico’s FWS, paras. 218-220 (argument made in the context of GATT Article III:4).

¹⁷² *Korea – Beef (AB)*, para. 137; *Dominican Republic – Cigarettes (AB)*, para. 93.

The existence of a detrimental effect on a given imported product resulting from a measure does not necessarily imply that this measure accords less favourable treatment to imports if the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product, such as the market share of the importer in this case.¹⁷³

147. The Appellate Body in *Korea – Beef* clarified further that any action by private actors not compelled by the measure at issue does not result in a violation of the GATT III:4 under this standard, stating the following:

We are not holding that a dual or parallel distribution system that is not imposed directly or indirectly by law or governmental regulation, but is rather solely the result of private entrepreneurs acting on their own calculations of comparative costs and benefits of differentiated distribution systems, is unlawful under Article III:4 of the GATT 1994. What is addressed by Article III:4 is merely the governmental intervention that affects the conditions under which like goods, domestic and imported, compete in the market within a Member's territory.¹⁷⁴

148. According to Canada and Mexico, compliance with the “COOL measure” has imposed a significant cost on market participants, and a higher cost on feeding operations and slaughter houses that process a mix of domestic and foreign livestock.¹⁷⁵ They allege that these higher compliance costs result from the fact that these processors must segregate domestic and foreign origin product in order to comply with the law (notwithstanding the fact that the law does not require segregation, as discussed below). Canada and Mexico argue further that instead of segregating, these processors have begun avoiding the use of foreign livestock altogether or are only accepting them in limited quantities, which has reduced the market value of their products.¹⁷⁶ Finally, Canada and Mexico argue that the manner in which the “COOL measure” was implemented created uncertainty in the marketplace that also hurt their products.¹⁷⁷

149. The United States in general agrees with Canada and Mexico that the Appellate Body’s discussion on the meaning of less favorable treatment in the GATT Article III context may be instructive in the context of interpreting TBT Article 2.1. However, application of the Appellate Body’s analysis in these past disputes leads to the opposite conclusion from that advanced by Canada and Mexico.

¹⁷³ *Dominican Republic – Cigarettes (AB)*, para. 96.

¹⁷⁴ *Korea – Beef (AB)*, para. 149.

¹⁷⁵ Canada’s FWS, paras. 92-106; Mexico’s FWS, para. 220 (arguments made in the context of GATT Article III:4).

¹⁷⁶ Canada’s FWS, paras. 107-129; Mexico’s FWS, paras. 221-223 (arguments made in the context of GATT Article III:4).

¹⁷⁷ Canada’s FWS, paras. 130-138; Mexico’s FWS, para. 225 (arguments made in the context of GATT Article III:4).

150. First, as explained below, Canada and Mexico’s argument rests on a number of erroneous factual assertions regarding the operation of the measures and their impact on the livestock market. As a factual matter, nothing in the 2002 COOL Statute, as amended, 2009 Final Rule, or FSIS Final Rule requires U.S. processors to segregate in order to comply with the law. Indeed, the measures were designed to reduce the need for segregation and many market participants have continued to operate without doing so.¹⁷⁸ Thus, to the extent that market participants are segregating their processing lines or demanding less foreign livestock, this results from the independent decisions of these private actors and is not attributable to the United States. Furthermore, Canada and Mexico have failed to consider the numerous external factors that explain any reduction in the demand for and price of their livestock. In fact, the detrimental effects that Canada and Mexico claim to have occurred in the market can be fully explained by factors not related to the COOL measures.¹⁷⁹ Finally, to the extent that Canada and Mexico’s argument amounts to an objection to the fact that the 2009 Final Rule carries with it compliance costs, and that these compliance costs are not shared equally among all market participants, that fact alone cannot support the conclusion that the measures “modif[y] the conditions of competition.”

151. In the sections that follow, the United States will discuss these and other major flaws in the arguments put forth by Canada and Mexico that the statute and 2009 Final Rule accord “less favorable treatment” to Canadian and Mexican products.

i. The COOL Measures Do Not Require Segregation

152. Central to Canada’s and Mexico’s less favorable treatment arguments is the assertion that the 2002 COOL Statute, as amended, and the 2009 Final Rule require U.S. feeding operations and slaughter houses to segregate their production lines to comply with the law.¹⁸⁰ Further, the complaining parties allege that these processors have avoided the cost of segregation by refusing foreign livestock and instead only accepting U.S. livestock. These arguments do not withstand scrutiny.

153. In law and in fact, the 2002 COOL Statute, as amended, 2009 Final Rule, and FSIS Final Rule do not require U.S. processors to segregate livestock.¹⁸¹ These measures simply require

¹⁷⁸ For a discussion of this issue, see paras. 160-167 below.

¹⁷⁹ For a discussion of other factors that explain the decline in Canadian and Mexican exports, see paras. 168-174 below.

¹⁸⁰ Canada’s FWS, paras. 92-107; Mexico’s FWS, paras. 220-221.

¹⁸¹ The only government documents cited by Mexico (*see* Mexico’s FWS, notes 112-113, 122, 164; para. 228) and Canada (*see* Canada’s FWS, note 117) to support this proposition is an AMS chart (Exhibit MEX-37) and an Appendix 2 of an AMS COOL guidance document (Exhibit CDA-65) posted on AMS’ web site. The chart is substantially the same document as Appendix 2, just an earlier version of Appendix 2. The documents are inaccurate and have been removed from the USDA web site. This COOL guidance document was initially drafted for the fish and shellfish program (and prior to the passage of the 2008 Farm Bill). Portions of the document were subsequently revised in 2009 after publication of the final rule; however, in error, Appendix 2 of the compliance guide was not

(continued...)

covered commodities to be labeled for retail sale, and they provide guidelines on how this is to be done depending on the product's origin. At the same time, they also require processors to keep certain records and to provide origin information to the next person in the supply chain to ensure that the origin information provided at the retail level is accurate. Feeding operations and slaughter houses can meet the law's requirements in any way they choose and certainly are not required to segregate to do so.

154. This fact was noted in the 2009 Final Rule, where USDA indicated that there were multiple ways a processing facility could comply with the law, which may or may not include segregation:

If an initiator of the claim chooses to mix commodities of different origins within the parameters of a production day, or if the retailer mixes product from different categories willingly, the resulting classification must reflect the broadest possible terms of inclusion and be labeled appropriately. The initiator *may* elect to segregate and specifically classify each different category within a production day *or* mix different sources and provide a mixed label as long as accurate records are kept.¹⁸²
(Emphasis added)

155. Not only does nothing in these measures require segregation, but the flexibility provided by the measures reduces the likelihood that livestock will need to be segregated to comply with them in the first place. For example, the statute states that retailers *may* use a Category A label when meat is derived solely from animals born, raised, and slaughtered in the United States; and states that retailers *may* use a Category B label when the animal is not born, raised, and slaughtered solely in the United States and not imported for immediate slaughter. The statute's use of the word "may" gives USDA the option of defining these requirements in different ways in the implementing regulations.

156. USDA followed the statute's non-prescriptive language and the 2009 Final Rule contains significant flexibility for the labeling of meat derived from animals from multiple countries of origin.¹⁸³ These flexibilities allow processors to commingle muscle cuts of meat from various different sources in a single production day and affix the same label to all of the meat that is processed. As noted earlier, 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.

157. It is also worth noting that even if a U.S. processor did not take advantage of these flexibilities and instead chose to segregate its production lines or only accept one type of livestock, nothing in these measures would require them to favor U.S. livestock over foreign livestock. A

¹⁸¹ (...continued)

accurately updated to reflect the flexibilities provided in the 2009 Final Rule. Appendix 1 accurately indicates that commingling is permissible and that segregation is not required.

¹⁸² Exhibit CDA-5, p. 2670.

¹⁸³ See paras. 39-40, *supra*.

processor could just as easily dedicate its new processing line to livestock from Canada or Mexico instead of domestic livestock and still achieve the same efficiencies in complying with the COOL measures.¹⁸⁴

158. In conclusion, a slaughter house has a number of options available to it to comply with the COOL measures without segregating, including the following:

- (1) the slaughter house may process cattle of exclusively domestic origin, in which case one label could be used for all meat derived from such cattle;
- (2) the slaughter house may process cattle of exclusively foreign origin, in which case one label could be used for all meat derived from such cattle;
- (3) the slaughter house may process domestic cattle and imported cattle during the same production day when producing muscle cuts, in which case labels “B” or “C” could be used for all meat derived from such cattle; or
- (4) the slaughter house may process cattle and meat of varying origins when producing ground meat, in which case the same label listing all countries of origin for raw materials that have been in the inventory for 60 days can be used for all such ground meat.

159. As the foregoing demonstrates, the 2002 COOL Statute, as amended, the 2009 Final Rule, and the FSIS Final Rule do not require segregation and the arguments by Canada and Mexico to the contrary should be rejected.

ii. Canada and Mexico Have Failed to Demonstrate that U.S. Processors Are Segregating or Rejecting Their Product On a Widespread Basis

160. While neither the 2002 COOL Statute, as amended, 2009 Final Rule, nor FSIS Final Rule requires segregation, Canada and Mexico nonetheless argue that this practice is widespread and that it has had a detrimental impact on their products.¹⁸⁵ In addition, Canada and Mexico allege that several slaughter houses have been rejecting their livestock entirely.

¹⁸⁴ See Letter from James Lochner, Senior Group Vice President, Tyson Fresh Meats, Inc. To Tyson Fresh Meats Cattle Supplier, Oct. 14, 2008 (Exhibit CDA-36) (noting that producers may choose “to produce and sell exclusively Category A or Category B livestock . . .” among other options).

¹⁸⁵ Canada’s FWS, paras. 113-129; Mexico’s FWS, paras. 153-167.

161. Canada states that, since the issuance of the 2009 Final Rule, the number of slaughter houses accepting its cattle has declined from 15 to nine¹⁸⁶ and the number accepting its hogs has declined from 28 to 10.¹⁸⁷ Likewise, Mexico states that only one Tyson plant, one Cargill plant, and one JBS plant are accepting its cattle.¹⁸⁸ However, Mexico does not state how many plants had been previously accepting its animals. Mexico also alleges that certain feed lots have stopped accepting its cattle, but it does not quantify this reduction either.¹⁸⁹ Canada concedes that no official records regarding plants accepting livestock prior to COOL exist; the information it provides consists of unverifiable compilations of data supplied by Canadian industry.

162. At the same time, Canada and Mexico argue that these plants are limiting the number of days during which they will accept their products.¹⁹⁰ Additionally, Canada argues that the price of its cattle has declined because of transportation delays that have hurt the quality of the meat and that it has had to pay higher costs for labor and transportation.¹⁹¹ Canada also argues that COOL has resulted in certain contracts being renegotiated.¹⁹²

163. As a threshold matter, it is not clear that what Canada and Mexico assert is accurate, and many of their points are inapposite. For example, Canada's claim that only nine U.S. slaughter houses are accepting its cattle is undermined by its own exhibit (Exhibit CDA-99), which indicates that up to 12 U.S. slaughter houses are accepting its cattle.¹⁹³ Similarly, Mexico implies that the number of Tyson, Cargill, and JBS plants accepting its cattle have declined dramatically, and points out that only one Cargill plant is accepting its cattle. However, Mexico does not state how many of these plants were previously accepting Mexican cattle or actually assert that this is a decrease.

164. In any case, Canada and Mexico have clearly failed to meet their burden of showing less favorable treatment. In fact, the data and affidavits cited by Canada and Mexico show that four out of the five largest packers are continuing to accept foreign cattle at some, if not all of their processing plants.¹⁹⁴ Together, these packers represent a slaughter capacity of over 93,300 head of

¹⁸⁶ Canada's FWS, para. 114.

¹⁸⁷ Canada's FWS, para. 115.

¹⁸⁸ Mexico's FWS, paras. 156-157.

¹⁸⁹ Mexico's FWS, paras. 160-162.

¹⁹⁰ Canada's FWS, paras. 118-124; Mexico's FWS, para. 159.

¹⁹¹ Canada's FWS, paras. 118-124.

¹⁹² Canada's FWS, para. 125-129.

¹⁹³ Exhibit CDA-99 demonstrates that nine facilities are "accepting B and C cattle" and that three facilities "may accept B."

¹⁹⁴ See CANFAX Update, "U.S. Packer procurement policies for Canadian cattle" (Apr. 24, 2009) (Exhibit CDA-41) (indicating that Cargill, Tyson, JBS, and American Foods Group are all taking either Canadian cows, B (feeder) cattle, or C (slaughter) cattle). Cargill (1st), Tyson (2nd), JBS (3rd), and American Foods Group (5th) are four of the five largest companies in the cattle slaughter business in the United States. "Top 30 Beef Packers," Cattle Buyers Weekly (Exhibit US-37).

cattle per day, or more than 75 percent of the U.S. daily capacity.¹⁹⁵ By comparison, Canadian and Mexican cattle imports make up less than 5 percent and 3 percent, respectively, of total U.S. slaughter.¹⁹⁶ Thus, the processing plants that continue to accept foreign origin cattle have more than enough capacity to process all of Canada's and Mexico's exports. Furthermore, while Canada claims that it incurs higher transportation costs to bring cattle to the remaining facilities accepting its cattle, its own evidence indicates that the few plants allegedly no longer accepting Canadian cattle are those *furthest* from the Canadian border.¹⁹⁷ Thus, at most, Canada's objection appears to lie with the decision of a handful of processors to handle Canadian livestock at appointed times rather than continuously throughout the week.

165. In addition, the information submitted by Canada also indicates that four out of the five largest swine packers are also accepting and processing foreign animals.¹⁹⁸ As is the case with cattle slaughter, the capacity of these plants is more than sufficient to process all imports of Canadian hogs, which represent less than 6 percent of the U.S. market,¹⁹⁹ and even based on the Canadian industry's own data, the remaining plants are generally located no further from the border than the ones that Canada claims were previously accepting Canadian swine.²⁰⁰

166. Further, Canada's own evidence indicates that numerous producers are taking advantage of the flexibilities inherent in the COOL measures to continue processing domestic and foreign origin livestock without segregating. For example, Exhibit CDA-41 notes that "Washington Beef has not made any changes to their procurement policy for Canadian cattle. No set discounts these are determined by the market. They do not have any specific day of the week set for Canadian cattle."²⁰¹

¹⁹⁵ These four packers have a daily estimated slaughter capacity of 93,300 head, representing 77.8 percent of the U.S. daily estimated slaughter of 120,000 head. *See* Exhibit US-37.

¹⁹⁶ "Total Canadian Cattle Exports as a Percentage of Weekly U.S. Cattle Slaughter," based on USDA AMS Market News Reports (Exhibit CDA-46). *See* Imports data of live cattle from Mexico, Source: U.S. Department of Commerce and the U.S. International Trade Commission (Exhibit MEX-36).

¹⁹⁷ *See* Canada FWS, para. 113 (claiming that "Canadian producers must now transport their cattle and hogs over greater distances, at increased cost, to those U.S. feeding operations and slaughter houses that are still accepting Canadian animals"); *but compare* Exhibit CDA-99 with Exhibit CDA-96.

¹⁹⁸ *See* Exhibit CDA-41 (indicating that Tyson Foods will continue to accept B and C category hogs); Letter from Wesley M. Batista, President & CEO, JBS USA, Inc. To Valued Customer, Oct. 23, 2008 (Exhibit CDA-39) (indicating that JBS will continue to accept and process foreign origin hogs); Tom Johnson, "Cargill boards the COOL train," Meatingplace.com, Oct. 17, 2008 (Exhibit CDA-77) (indicating that it will continue to accept and process foreign origin hogs); Letter from Doug England and Dean Seeck, Hormel Foods Corporation to All Pork Producers that sell hogs to Hormel Foods, Sep. 11, 2008 (Exhibit CDA-105) (indicating that Hormel Foods will continue to accept and process category B hogs). Tyson (2nd), JBS (3rd), Cargill (4th) and Hormel (5th) are four of the five largest companies in the commercial hog slaughter business in the United States. *See* Commercial Hog Slaughter, Source: USDA (Exhibit US-38).

¹⁹⁹ Total Canadian Hog Exports as a Percentage of Weekly U.S. Hog Slaughter, based on USDA AMS Market News Reports (Exhibit CDA-47).

²⁰⁰ *Compare* Exhibit CDA-100 with Exhibit CDA-104.

²⁰¹ Exhibit CDA-41.

167. In sum, the most that Canada and Mexico have demonstrated is that a limited number of processing plants may have altered their behavior in the short term in certain limited respects in response to the COOL measures. This does not constitute less favorable treatment.

iii. To the Extent Segregation is Occurring, It Is a Result of Market Forces, Not the 2002 COOL Statute, As Amended, 2009 Final Rule, or FSIS Final Rule

168. Even assuming that some processors are segregating their livestock production and this has had an effect on Canadian and Mexican livestock, this fact alone would not support the conclusion that the COOL measures are inconsistent with TBT Article 2.1. For, as the United States has explained, neither the 2002 COOL Statute, as amended, 2009 Final Rule, nor FSIS Final Rule requires segregation, and nothing in these measures requires any processor who chooses to segregate production lines to favor domestic livestock over foreign livestock. At the same time, certain processors segregated their processing lines prior to the adoption of the 2009 Final Rule; therefore, simply asserting that some level of segregation continues to occur proves nothing.

169. In making their arguments about segregation, Canada and Mexico ignore the fact that certain U.S. processors had been segregating their processing lines before the 2009 Final Rule was implemented. For example, Tyson Foods has explicitly stated that its pre-existing “premium programs already require separate labels and segregation in our plants, warehouses, and in most cases, at retail.”²⁰² At the same time, many other U.S. processors had been segregating to meet import requirements imposed by other countries.²⁰³ Finally, many U.S. packers have been segregating imported Canadian cattle due to BSE-related restrictions.²⁰⁴

170. This pre-existing segregation illustrates two separate points. First, it 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. Indeed, those processors already segregating livestock have not made significant changes to their business practices to process both U.S. and foreign origin meat following implementation of the 2009 Final

²⁰² Exhibit CDA-36.

²⁰³ For example, many U.S. trading partners (e.g., Korea, Japan, Taiwan, and Mexico) have age and/or source verification requirements for accepting meat products exported from the United States, which also necessitate segregation. More information on these requirements for export can be found at: http://www.fsis.usda.gov/Regulations_&Policies/Export_Requirements_EV_Countries/.

²⁰⁴ See “Protocol for the Importation of Cattle or Bison from Canada,” National Center for Import and Export, USDA, APHIS, Veterinary Services (Nov. 2007) (Exhibit US-39), demonstrating that Canadian cattle imported for immediate slaughter must be placed in sealed containers at the border and tracked to the slaughter house. Also see Exhibit US-40, which shows the markings put on a Canadian cattle in the United States prior to the implementation of the COOL measures.

Rule.²⁰⁵ Second, the fact that segregation is occurring demonstrates that individual market participants have reasons for segregating products that have nothing to do with the 2002 COOL Statute, as amended, the 2009 Final Rule, or the FSIS Final Rule.

171. In addition to incorrectly asserting that the COOL measures require producers to segregate, Canada and Mexico argue that they “create incentives” for U.S. industry to segregate. The complaining parties cite to the Appellate Body report in *Korea – Beef* to argue that this alone is sufficient to support the conclusion that the measures afford less favorable treatment to Canadian and Mexican livestock.²⁰⁶ However, *Korea – Beef* provides no support for this position. In fact, the measure at issue in that dispute created a dual retail system for domestic and foreign beef²⁰⁷ – thus, the measure itself imposed on retailers, as the Appellate Body described it, “the *legal* necessity of making a choice” between domestic and foreign products.²⁰⁸ By contrast, Canada’s and Mexico’s argument appears to rest on the notion that COOL leads to some producers experiencing a *commercial* necessity to segregate products. Indeed, the fact that some companies choose not to segregate demonstrates that segregation 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.

172. Further, 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, as explained below, any decision to segregate would have resulted from circumstances unrelated to the COOL measures or the foreign origin of the products imported.

173. In *Dominican Republic – Cigarettes*, the Appellate Body stated that the “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.”²⁰⁹ Accordingly, the Appellate Body determined that a showing that the per-unit cost for imported products was higher than domestic products was insufficient to provide less

²⁰⁵ See Exhibit US-43, p. 3. For example, in order to segregate U.S. and Canadian cattle imported for immediate slaughter because of BSE issues, plants put Canadian cattle in separate pens and killed them at the end of the shift. (These cattle's teeth are checked post-slaughter to make sure that the cattle are 30 months or younger, the low-risk age cutoff.) If a packer chose segregation as the means to implement country of origin labeling, the only additional action that would be needed to keep the B-C label carcasses separate from domestic carcasses would be to keep them on a separate rail and cut them separately from the A label carcasses, which again could be at the end of the cut shift. The only change the packers would need to make in the cut process is to change the labels on the boxes. This is a matter of computer programming as labels are printed out automatically when boxes cross the scales. One could use the same type of procedure for segregation of slaughter hogs if a producer decided to do so.

²⁰⁶ Canada’s FWS, paras. 91-92.

²⁰⁷ *Korea – Beef (AB)*, paras. 130-151 (describing Korean measure providing that a small Korean retailer could only sell foreign beef if it did not sell Korean beef and a large retailer had to sell these products in completely different areas in the store).

²⁰⁸ *Korea – Beef (AB)*, para. 146 (emphasis added).

²⁰⁹ *Dominican Republic – Cigarettes (AB)*, para. 96.

favorable treatment. The Appellate Body noted that “the difference between the per-unit costs of the bond requirement alleged by Honduras is explained by the fact that the importer of the Honduran cigarettes has a smaller market share than two domestic producers.”²¹⁰ Therefore, the Appellate Body determined that the origin-neutral measure did not accord less favorable treatment because the imposition of the higher costs on imports was related to an issue that “does not depend on the foreign origin of the imported cigarettes.”²¹¹

174. In this dispute, 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.²¹² In addition, as will be discussed in the section that follows, other factors, such as the global economic recession, animal diseases, and high feed costs, explain any dip in Canadian and Mexican livestock exports and prices during late 2008 and 2009.

iv. Any Reduction in the Demand For and Price of Canadian and Mexican Livestock Can Be Attributed to External Factors Not Related to the COOL Measures

175. As noted above, the evidence Canada and Mexico offer fails to demonstrate that segregation is required by any of the COOL measures or that it is occurring to a significant degree. Additionally, Canada and Mexico have not demonstrated that to the extent segregation is occurring, it is the result of one or more of the COOL measures. In fact, the attempts of the complaining parties to rely on export data to claim that implementation of the 2009 Final Rule affected trade in livestock are also flawed because Canada and Mexico overlook recent trends that explain the shifts in the trade and pricing data during 2008 and 2009.

176. With respect to exports, the trade data does not support the conclusion that Canada’s or Mexico’s cattle exports have been adversely impacted by the COOL measures. For example, Canada exported nearly 1 million head of cattle to the United States in 2009, a higher total than five of the last ten years and above its 10-year average of approximately 950,000 head.²¹³ For 2010, Canadian exports are expected to increase to nearly 1.2 million head.²¹⁴ Canadian cattle prices have also risen sharply in 2010 and are expected to continue their upward trajectory. Similarly, Mexico exported 980,000 cattle in 2009 (after the COOL measures went into effect), a

²¹⁰ *Dominican Republic – Cigarettes (AB)*, para. 96.

²¹¹ *Dominican Republic – Cigarettes (AB)*, para. 96.

²¹² In fact, in paragraph 96 of its submission, Canada ties segregation to its market share, stating the following: “Canadian-origin cattle and hogs represent such a small percentage of the overall supply of U.S. cattle and hogs that U.S. slaughter houses cannot economically switch to producing exclusively Label B or C meat. These parts of the U.S. industry still using Canadian animals must, therefore, factor segregation costs into the price offered for Canadian animals.” Similarly, in paragraph 220 of its submission, Mexico notes that “Mexican born cattle are a small portion of the cattle destined for slaughtering in the United States . . . therefore, it is very easy for the U.S. market to drop the Mexican cattle from the distribution chain”

²¹³ Exhibit US-28, Table 5.

²¹⁴ Exhibit US-28, Table 1.

33 percent increase over 2008 and just below its 10-year average of 1.1 million head.²¹⁵ Mexican cattle exports hit their highest total in over two years in November 2009 and exports for the first four months of 2010 are up 14 percent over the same period in 2009.²¹⁶ Although 2010 price data for Mexican cattle is unavailable at this time, prices are expected to increase in 2010 as well.²¹⁷

177. Likewise, Canadian hog prices have been rising since late 2009.²¹⁸ Although exports are still at low levels, this results from the significant restructuring of the industry, which is still ongoing and has outweighed the positive momentum resulting from other factors.

178. To the extent that economic conditions for Canadian and Mexican livestock were not as positive in 2008 and 2009 as they have been at other times during the decade, this results from factors unrelated to implementation of the 2009 Final Rule. As noted in Part III above, Canadian cattle export volumes and prices have been significantly influenced by the global economic recession, an increase in feed costs, an increase in transportation costs, currency fluctuations, and the continued effects of BSE.²¹⁹ Similarly, Mexican cattle export volumes and prices are consistent with what would be expected given the recession, feed prices, currency fluctuations, weather conditions, and a decreasing Mexican cattle inventory.²²⁰ Finally, the recent market conditions experienced by the Canadian hog sector are consistent with the significant restructuring of the industry, the effect of the recession, falling inventories, high feed costs, currency fluctuations, and the effects of H1N1.²²¹

v. Economic Analysis Demonstrates that any Reduction in the Exports and Prices of Canadian and Mexican Livestock Can Be Attributed to External Factors Not Related to the COOL Measures

179. To examine the relative impact of the economic recession on Canadian prices and exports during 2008 and 2009, USDA economists analyzed Canadian cattle markets, as well as Mexican exports, over the same time period. USDA's analysis also accounted for factors such as the economic recession, BSE, exchange rates, and fuel costs, – all factors that Canada and Mexico fail to address in their submissions. As the analysis demonstrates, factors other than the 2009 Final Rule were responsible for the decline in Canadian exports of cattle and hogs to the United States in

²¹⁵ Exhibit US-28, Table 8.

²¹⁶ Exhibit US-30, Chart 8.

²¹⁷ Exhibit US-30, Chart 10; Livestock and Poultry: World Markets and Trade, USDA, Apr. 2010 (Exhibit US-41), p. 4.

²¹⁸ Exhibit US-28, Table 14.

²¹⁹ See paras. 99-105, *supra*.

²²⁰ See paras. 110-114, *supra*.

²²¹ See paras. 118-125, *supra*.

2008 and 2009.²²² 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.

vi. The Studies that Canada and Mexico Rely on to Support Their Arguments Are Flawed

180. As further support for their argument that market conditions in 2008 and 2009 would have been more favorable but for the implementation of the 2009 Final Rule, Canada and Mexico rely on several economic studies. Both parties cite a study prepared by Informa Economics (“the Informa Report”), which indicates that the cost of complying with the 2009 Final Rule is largely borne by firms that process both foreign and domestic livestock.²²³ In addition, Canada cites two studies prepared by Professor Daniel Sumner to illustrate that the COOL measures have adversely affected the prices and exports of Canadian cattle and hogs.²²⁴ As the United States will demonstrate in this section, each of these studies suffers from serious flaws that call into question their fundamental conclusions. The specific shortcomings of each of the studies from an economic standpoint are addressed in greater detail in Exhibit US-43.²²⁵ The following sections provide an overview of the key limitations of each.

(a) Key Flaws in the Informa Report.

181. The Informa Report suffers from four key limitations: (1) non-transparent methodologies that render any results questionable; (2) a failure to account for previously occurring segregation; (3) a failure to account for impact of flexibilities in 2009 Final Rule; (4) implausible conclusions given market trends.

182. *Nontransparent methodologies.* As a general matter, it is difficult to assess any conclusions of the Informa Report because the report does not specify the time period in which the data was collected, the survey methodology used to gather the data, or the sample size surveyed. Much of the underlying data on which the report is based has not been supplied and therefore is impossible to verify. Further, some of the data, including cost information for 2009, appears to be based on estimates and not actual cost data.

²²² See Modeling the Impact of Country of Origin Labeling Requirements on U.S. Imports of Livestock from Canada and Mexico, USDA Office of the Chief Economist (Exhibit US-42).

²²³ Informa Economics, Update of Cost Assessments for Country of Origin Labeling - Beef & Pork (2009) (July 2010) (Exhibit MEX-24) (Exhibit CDA-64).

²²⁴ Daniel A. Sumner, *Effects of Mandatory Country of Origin Labeling on the United States Demand for Imports of Cattle and Hogs from Canada: Differential Implications of Regulatory Compliance*, June 17, 2010 (Exhibit CDA-78); Daniel A. Sumner, *Econometric Analysis of Differential Effects of Mandatory Country of Origin Labeling in the United States on Canadian Cattle Prices and Imports of Cattle and Hogs into the United States*, June 16, 2010 (Exhibit CDA-79).

²²⁵ Assessment of the Informa Report and Sumner Studies, USDA Office of the Chief Economist (Exhibit US-43).

183. *Failure to account for previously occurring segregation.* As the United States has noted, many U.S. processors were already engaged in segregation practices prior to the implementation of the COOL measures for purposes of obtaining grade labels, to meet export requirements, or due to issues related to BSE.²²⁶ To the extent that these processors chose to segregate to comply with the requirements of the COOL measures, their additional costs would be limited.²²⁷ The Informa Report does not appear to account for this fact.

184. *Failure to account for flexibilities in 2009 Final Rule in cost estimates.* As noted previously, the COOL regulations exempt processed meat items as well as food service establishments, where about one-third of beef and one-fourth of pork is eaten.²²⁸ Animals and meat that might have been classified as B or C if they were sold through other processing channels could end up in the food-service and processed meat markets, where no additional costs will be incurred. The Informa Report ignores these exceptions.

185. *Implausible conclusions given market trends.* The Informa Report contends that the costs of complying with COOL are 30-40 times higher for companies that process both domestic and foreign origin livestock compared with those that process only domestic livestock. However, were this the case, it would be prohibitively expensive for any company to continue to import Canadian or Mexican animals. Yet, as the data demonstrates, Canadian and Mexican cattle exports in 2009 were close to their historic averages, and are both up sharply in 2010. Even Canada's own exhibits highlight the fact that many packers are continuing to process foreign cattle.²²⁹

(b) Key Flaws in Canada's Sumner Studies

186. Canada submitted two exhibits that contain economic analysis by Professor Daniel Sumner in support of its argument that the COOL measures accord less favorable treatment to Canadian livestock and hogs.²³⁰ Professor Sumner characterizes the results of his studies as a reduction in the "willingness to pay" for Canadian cattle and hogs because of the much larger costs of handling those animals (and the meat from those animals) due to the 2009 Final Rule. However, both models developed by Prof. Sumner are flawed and inadequate to explain any potential economic effect of the 2009 Final Rule on Canadian livestock exports: (1) the model presented in Exhibit CDA-78 relies on the unsubstantiated and flawed results produced by the Informa Report; (2) the model in 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.

²²⁶ See para. 169, *supra*.

²²⁷ See Exhibit US-43.

²²⁸ U.S. Consumption of Fresh and Processed Pork and Beef at Home and Away From Home, USDA Economic Research Service (Exhibit US-55).

²²⁹ See Exhibit CDA-41. See discussion of this issue in paras. 160-167, *supra*.

²³⁰ Exhibit CDA-78; Exhibit CDA-79.

187. *Exhibit CDA-78 relies on flawed data from the Informa Report.* In arriving at its conclusions, Exhibit CDA-78 uncritically accepts the flawed data included in the Informa Report as the basis for its analysis. However, given the large cost differentials estimated by the Informa Report, any model examining the impact of the 2009 Final Rule would show large price impacts. Thus, Professor Sumner’s conclusion that the rule has significantly reduced the demand for Canadian cattle and hogs because of higher differential costs is itself flawed because of the flawed underlying assumptions on which it relies.

188. *Exhibit CDA-79 fails to account for range of factors that influenced market.* In Exhibit CDA-79, Professor Sumner attempts to demonstrate that, as a result of the “COOL measure,” the prices for fed cattle have declined relative to those of comparable fed cattle in the United States. In addition, Professor Sumner attempts to demonstrate that the “COOL measure” caused U.S. imports of Canadian fed cattle, feeder cattle, slaughter hogs, and pigs to decline relative to comparable U.S. numbers. However, as the United States explained in Section iv, *supra*, many factors were roiling North American livestock markets during the period when the implementation of the 2009 Final Rule was taking place. Professor Sumner’s model attempts to isolate the effects of the “COOL measure” on Canadian livestock prices and trade, but is seriously impaired by its failure to adequately capture the effects of the global economic situation, high feed and fuel costs, and the lingering effects of BSE. Any model that does not address these facts cannot be credible.

189. *Exhibit CDA-79 suffers from methodological errors.* In addition, Professor Sumner’s model makes an incorrect choice of the time periods for the dummy variables it uses for the implementation of the 2009 Final Rule and BSE and uses a ratio as the dependent variable, both of which can cause inaccurate and unreliable results. The use of ratios for the dependent variables and weekly data to estimate the model are also significant flaws in the model. These methodological flaws are discussed in further detail in Exhibit US-43.

vii. To the Extent that the COOL Measures Impose Costs, They are Merely Costs Inherent to Regulating

190. As noted above, Canada and Mexico have failed to demonstrate that the COOL measures impose appreciable costs on their livestock, such that the measures modify the conditions of competition to the detriment of their livestock. More fundamentally, however, to the extent that Canada and Mexico identify costs associated with the COOL measures, they 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 fact alone does not mean that the measure “modifies conditions of competition” so as to afford less favorable treatment.

191. In this vein, Canada and Mexico allot a significant portion of their submissions to describing purported costs of complying with the COOL measures and alleging that these costs

may be higher for some market participants than others.²³¹ These allegedly high costs and their allocation across processors, they argue, is clear evidence that the measures have modified the conditions of competition to the detriment of their livestock. They allege further that the uncertainty related to the transition to the new legal regime also contributed to the less favorable treatment received by their products.²³²

192. These arguments do not withstand scrutiny. 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 opt to implement a technical regulation.²³³ They do not constitute a modification in the conditions of competition between domestic and imported goods. It is not the case that a WTO Member violates its national treatment obligations whenever it adopts a measure that imposes compliance costs on market participants, even if those costs are distributed differently depending on the business model adopted by a given participant. New laws or technical regulations inevitably result in costs on market participants as they adapt their business practices to the new legal regime. Indeed, the TBT Agreement explicitly contemplates that WTO Members may adopt technical regulations.²³⁴

193. Moreover, it is inevitable that the cost of complying with a technical regulation will be different for different market participants.²³⁵ Numerous factors affect the compliance cost for a particular market participant, including that market participant’s size, its particular niche in the market, its relationship with others in the supply chain, and its relative market share.

194. Furthermore, a market participant’s compliance costs will rarely be constant over time. In the immediate aftermath of a particular regulatory change, compliance costs may be relatively high as the market participants take the necessary steps to comply with the new regulations, which may include changing internal policies or buying new equipment, among other things. Later, after necessary capital expenditures are made and these new practices have become part of businesses’ standard operating procedures, the cost of compliance may decline. The evidence that Canada and Mexico offer regarding the alleged costs of compliance pertains to a brief period after

²³¹ Canada’s FWS, paras. 92-106; Mexico’s FWS, para. 220 (made in the context of GATT Article III:4); Exhibit CDA-64.

²³² Canada’s FWS, paras. 130-138; Mexico’s FWS, para. 225 (made in the context of GATT Article III:4).

²³³ See OECD, OECD Guiding Principles for Regulatory Quality and Performance (2005) at 3 (stating that good regulation will “produce benefits that justify costs.”) (Exhibit US-44); See *infra*. note 288 (recognizing that OECD regulators must account for costs of regulation as well as benefits).

²³⁴ The preamble to the TBT Agreement explicitly mentions the concept of “technical regulations” and this term is defined in the Annex. Further, numerous articles place constraints on the adoption of technical regulations indicating that they are expressly permitted as long as the related requirements are adhered to.

²³⁵ See OECD, Recommendation of the Council of the OECD on Improving the Quality of Government Regulation (adopted Mar. 9, 1995) at para. 33 (“Often, costs are not imposed on the same segment of society that benefits from regulation . . . There may be disproportionate effects on particular groups, such as small and medium-sized enterprises, or on certain regions. Such effects may not mean that action is undesirable for society as a whole . . .”) (Exhibit US-45).

implementation of the 2009 Final Rule: Canada and Mexico’s economic analysis relies on data covering only an eight month period after the 2009 Final Rule came into effect.²³⁶

195. Finally, in support of their arguments regarding the costs of the measures at issue, Canada and Mexico additionally cite to alleged administrative and political “uncertainty” surrounding the adoption and implementation of the COOL measures.²³⁷ Incongruously, Canada and Mexico’s objections in this regard appear to be directed at the fact that the United States used a transparent regulatory process, providing multiple opportunities for stakeholder input, and the fact that it made changes in order 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. While an open regulatory process will inherently lead to some uncertainty as the rule evolves over time, providing opportunities for public comment and responding to comments received is a valuable mechanism for ensuring that measures address the concerns of all interested parties, including other Members. The fact that the United States adopted the 2009 Final Rule through a transparent rule making process simply does not support a finding of less favorable treatment.

2. 2002 COOL Statute, as amended, 2009 Final Rule, and FSIS Final Rule Do Not Result in Less Favorable Treatment “In Respect of” a Technical Regulation

196. As noted, to demonstrate that a measure is inconsistent with Article 2.1, a complaining party must, *inter alia*, show that the imported and domestic products in respect of which the measure applies are “like” products. In this dispute, while Canada and Mexico argue that Canadian and Mexican cattle are “like” U.S. cattle, and that Canadian hogs are “like” U.S. hogs,²³⁸ neither adduces evidence to demonstrate that U.S. beef and pork are like products with Canadian or Mexican beef and pork. In this regard, it should be noted that the COOL Statute and 2009 Final Rule do not contain labeling rules with respect to livestock; rather, they apply to meat.

197. Article 2.1 states, in relevant part, that “Members shall require that *in respect of* technical regulations, products imported from the territory of any Member shall be accorded treatment no less favorable than that accorded to like products of national origin” Applying the customary rules of interpretation, the ordinary meaning of the term “respect” is “be directed to; refer to; relate to; deal with; be concerned with.”²³⁹ Canada and Mexico have done nothing to demonstrate that the COOL Statute, the 2009 Final Rule, or the FSIS Rule treat cattle or hogs (as opposed to beef

²³⁶ See, e.g., Exhibit CDA-78 (analyzing survey and market data compiled in October and November 2009, and 2008-2009, respectively); Exhibit CDA-62 (estimating costs for 2009). These studies contain a number of other shortcomings, discussed in section b, *supra*.

²³⁷ Canada’s FWS, paras. 130-138; Mexico’s FWS, para. 225.

²³⁸ Canada’s FWS, paras. 79-85; Mexico’s FWS, paras. 199-205.

²³⁹ *The New Shorter Oxford English Dictionary* (4th ed. 1993), p. 2565 (Exhibit US-46).

and pork) less favorably, and thus they have done nothing to demonstrate that, “in respect of” those measures, there is any less favorable treatment for livestock.

198. The COOL Statute and 2009 Final Rule contain labeling requirements that “relate to” the labeling of beef and pork, but 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. In their first submissions, neither Canada nor Mexico even suggests that the COOL measures treat their beef and pork less favorably.

199. Indeed, as will be discussed further below, it is telling that Canada and Mexico focus on livestock – a product for which neither the statute nor 2009 Final Rule prescribe labeling requirements – while ignoring the application of the measures to Canadian and Mexican meat (which are subject to the requirements). In fact, as will be discussed, this aspect of their arguments belies the fact that both are attempting to attribute to the statute and 2009 Final Rule secondary and tertiary market effects and behavior by private actors nowhere prescribed by either measure.

C. The COOL Measures Are Not Inconsistent with Article 2.2 of the TBT Agreement

200. Contrary to what Canada and Mexico argue, neither the 2002 COOL Statute, as amended, nor the 2009 Final Rule or FSIS Final Rule, are 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.

201. Article 2.2 of the TBT Agreement provides as follows:

Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products.

202. As Canada notes, the first sentence of Article 2.2 establishes the general rule that Members shall ensure that technical regulations do not create unnecessary obstacles to international trade, while the second sentence explains that “for this purpose” technical regulations “shall not be more

trade-restrictive than necessary to fulfill a legitimate objective.” In other words, the second sentence explains what the first sentence means.²⁴⁰ It should be emphasized that Article 2.2 does not prohibit all technical regulations that create obstacles to trade, but rather only those that create *unnecessary* obstacles.

203. Article 2.2 provides deference to WTO Members in the pursuit of their policy objectives and must be read in conjunction with the preamble of the TBT Agreement. In the preamble, WTO Members recognized:

that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement.²⁴¹

204. This preambular paragraph provides relevant context with respect to the words “legitimate objective” in Article 2.2. In particular, it makes clear – through the use of the phrase “it considers” – that 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.”²⁴²

205. In their submissions, Canada and Mexico have failed to meet their burden to demonstrate that one or more of the COOL measures are more trade restrictive than necessary to fulfill the legitimate objective of providing consumers with information about the country of origin of the agricultural products they buy at the retail level.

1. The COOL Measures Were Adopted to Provide Consumer Information

206. To determine the objective of the COOL measures, the Panel should begin with the text of the measures, and also should consider their “design, architecture, and revealing structure.”²⁴³

²⁴⁰ Canada’s FWS, para. 157.

²⁴¹ TBT Agreement, 6th preambular paragraph.

²⁴² *EC – Sardines (Panel)*, para. 7.120.

²⁴³ *Chile – Alcohol (AB)*, para. 62 (citing *Japan – Alcohol (AB)*, p. 29).

207. As Canada concedes, the text of the 2009 Final Rule makes it clear that its objective is to provide consumers with information about the food that they buy at the retail level.²⁴⁴ For example, the 2009 Final Rule explicitly states: “the intent of the law and this rule is to provide consumers with additional information on which to base their purchasing decisions.”²⁴⁵ Furthermore, both the statute and 2009 Final Rule are structured around the requirement that retailers label the covered commodities that they sell so as to provide country of origin information to consumers in a legible and conspicuous manner.²⁴⁶ The emphasis in both measures on the provision of information to consumers demonstrates that this is indeed their objective.

208. A number of aspects of the measures’ design and structure demonstrate that their purpose is providing consumer information. As explained in Part III, *supra*, for meat products, Congress determined that retailers should provide consumers with information about the country in which the animal from which the meat is derived was slaughtered as well as information about where that animal was born and raised if that animal was slaughtered in the United States.²⁴⁷ Congress determined that this requirement was necessary to reduce the likelihood that consumers would be confused about the origin of the meat they buy in instances where the animal was slaughtered in the United States.

209. In the absence of the requirements contained in the statute and 2009 Final Rule, meat derived from livestock that spent its entire life outside of the United States and was only present in the United States for a short period of time before being slaughtered could nonetheless voluntarily be labeled as a U.S. product.²⁴⁸ Reading the label, a consumer could reasonably assume that the meat they purchased came from a cow that was itself a “product of the United States” — i.e., 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. Thus, to address this potential confusion, the COOL measures provide for labeling that more accurately reflects the origin of the product.

210. The objective of the COOL measures is also evident in other elements of their design. For example, the COOL measures impose certain record keeping requirements on individuals throughout the supply chain, including the requirement that processors provide origin information

²⁴⁴ See Canada’s FWS, para. 158 (noting that the 2009 Final Rule states “the COOL program is neither a food safety or traceability program, but rather a consumer information program.”)

²⁴⁵ Exhibit CDA-5, p. 2677.

²⁴⁶ 7 U.S.C. §1638a(a)(1) (providing that retailers “shall inform consumers . . . of the country of origin of the covered commodity”); Exhibit CDA-5, p. 2663 (noting that “[country of origin] declarations must be legible and conspicuous, and allow consumers to find the country(ies) of origin and method of production, as applicable, easily and read them without strain when making their purchases . . .”).

²⁴⁷ Exhibit US-26. Notwithstanding earlier notifications, this is the relevant one for purposes of this dispute.

²⁴⁸ Prior to the COOL measures, FSIS permitted meat products to be voluntarily labeled as a “Product of the U.S.” if they were slaughtered in the United States, regardless of how much time they had actually spent in the country.

to the next person in the supply chain.²⁴⁹ These requirements are designed specifically to ensure that the retailer, and ultimately the consumer, receives accurate country of origin information. The COOL measures also impose fines on retailers who do not provide accurate information on the labels, providing a strong incentive to provide consumers with the correct information.²⁵⁰ These elements of the design, architecture, and structure show that the COOL measures were adopted to ensure that the consumers are accurately informed of the origin of the product they buy at the retail level, not for some other purpose.

211. Finally, it is also worth noting that the Senate Committee Report that accompanied the 2002 Farm Bill 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.”²⁵¹ Likewise, the Senate Committee Report that accompanied the 2008 Farm Bill explained the objective of the COOL Statute as “to provide consumers with additional information regarding the origin of covered commodities.”²⁵² These relevant pieces of legislative history reinforce the fact that the objective of the COOL measures is consumer information.

a. The Objective of the COOL Measures Is Not Protectionism

212. While Canada concedes that the text of the measures describes the objective as consumer information,²⁵³ both Canada and Mexico proceed to rely on a flawed interpretation of the scope and application of the measures and select statements by certain U.S. lawmakers and a single U.S. interested party to argue that, notwithstanding the text, the measures do not have consumer information as their objective.²⁵⁴ Contrary to what Canada and Mexico assert, none of this material supports the conclusion that the objective of the statute and 2009 Final Rule is anything other than to provide consumer information.

213. The arguments that Canada and Mexico make with regard to scope focus on the following issues: (1) the commodities covered by the measures;²⁵⁵ (2) the definition of a “retailer”;²⁵⁶ (3) the definition of a “processed food”;²⁵⁷ and (4) existing labeling requirements.²⁵⁸ On each of these points, their arguments are not persuasive.

²⁴⁹ Exhibit CDA-5, p. 2663-2664; 7 U.S.C. §1638a(d)-(e).

²⁵⁰ Exhibit CDA-5, p. 2664; 7 U.S.C. §1638b.

²⁵¹ Exhibit US-11, p. 93-94.

²⁵² Exhibit US-12, p. 198.

²⁵³ Canada’s FWS, paras. 158-159.

²⁵⁴ Canada’s FWS, paras. 158-175; Mexico’s FWS, paras. 280-283.

²⁵⁵ Canada’s FWS, paras. 161-170; Mexico’s FWS, para. 280.

²⁵⁶ Mexico’s FWS, para. 280.

²⁵⁷ Mexico’s FWS, para. 280.

²⁵⁸ Mexico’s FWS, para. 280.

214. With regard to the first issue, the coverage of commodities under the COOL measures does not support the conclusion that their objective is something other than consumer information. The COOL Statute and 2009 Final Rule cover all retail sales of beef, pork, chicken, lamb, veal, fish, shellfish, and chicken. Together, these products make up more than 90 percent of all of the meat products consumed by Americans.²⁵⁹ By contrast, the meat products not covered by the COOL measures include more obscure and less frequently consumed products such as rabbit, ostrich, and bison. At the same time, COOL requires that all fruits and vegetables sold at the retail level be labeled.

215. Further, 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 (e.g., textiles or automobiles), but not another. Indeed, the fact that the COOL measures have such a broad scope, encompassing much more than just beef and pork, argues against a finding that the intent of the statute and 2009 Final Rule is protectionism for the livestock sector.

216. 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.

217. 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 that COOL is directed toward products that face import competition while ignoring those that do not. For example, Canada highlights the fact that a few of the omitted nut commodities (almonds, walnuts, and pistachios) face limited import competition but ignores the fact that hazelnuts, which face significant import competition, are also omitted.²⁶⁰

218. Even within covered commodities, no pattern is discernable. For example, some covered meat commodities - such as lamb (imports equal to 72.5 percent of domestic production) – face significant competition while other commodities – such as beef (11.4 percent), swine (4.6 percent),

²⁵⁹ See USDA data on disappearance available at: <http://www.ers.usda.gov/publications/ldp/LDPTables.htm>. Turkey is the only non-covered commodity with an appreciable disappearance volume. For example, disappearance data demonstrates that 5.2 million pounds of turkey disappeared in 2009 compared with 26.9 million pounds for beef, 19.8 million pounds of pork, 28.5 million pounds of broiler chicken.

²⁶⁰ See Exhibit US-47. U.S. imports of hazelnuts as a proportion of domestic production was 46.2 percent over the past thirteen years.

and chicken (0.1 percent) – do not.²⁶¹ The same holds within covered fruits and vegetables. Non-citrus fruits (87.3 percent) face significant import competition while citrus fruits (11.9 percent) face limited import competition.²⁶² Likewise, asparagus (176.2 percent), cucumbers (88.4 percent), and tomatoes (56.7 percent) face significant import competition while cabbage (4.1 percent), cauliflower (3.8 percent), and onions (8.8 percent) do not.²⁶³

219. Furthermore, while Canada asserts that one of the outliers under its theory – chicken – was included “at the request of the U.S. chicken industry” which, it claims “was concerned about foreign competition,”²⁶⁴ Canada ignores the fact that, during consideration of the 2003 Proposed Rule, *Canada itself* objected to the omission of chicken in the 2002 Farm Bill and 2003 Proposed Rule. Canada’s comment suggested that chicken should be added to the list of covered commodities to avoid disrupting the competitive balance with Canada’s beef and pork products.²⁶⁵ The Government of Australia and the Canadian Pork Council registered similar complaints.²⁶⁶ In fact, the inclusion of chicken in the current statute and 2009 Final Rule reflect an effort to take into account stakeholder concerns, including concerns expressed by Canada. As discussed further below, Canada and Mexico’s explanation of the supposed protectionist intent of the COOL measures depends largely on selective quotations from individual lawmakers and parties, while ignoring the many other entities, including consumer advocacy groups and other NGOs, that participated in the development of the statute and regulations.

220. Mexico’s arguments regarding COOL’s exceptions are equally unconvincing. Congress’ decision to apply the requirements only to retailers who sell fresh fruits and vegetables in excess of \$230,000 was not irrational or motivated by protectionism.²⁶⁷ Rather, Congress decided that certain small stores should be exempted from COOL’s requirements out of a concern that they would find it more difficult than large stores to absorb COOL’s compliance costs. The \$230,000 threshold was chosen as a “cut off” because it is based on the definition of a “retailer” that has been used in the Perishable Agricultural Commodities Act for many years.²⁶⁸ It was not irrational for Congress to attempt to reduce compliance costs or to use a definition for a retailer that was familiar to market participants. Indeed, the United States is somewhat puzzled that Mexico is complaining on the one hand about the restrictiveness of the COOL measures, yet also complaining about efforts made by Congress and USDA to reduce compliance costs by providing certain exemptions in the statute and implementing regulations.

²⁶¹ For information on beef, swine, and chicken, see Canada’s FWS, Table I. For information on lamb, see Exhibit US-NN.

²⁶² Canada’s FWS, Table I.

²⁶³ Exhibit US-47.

²⁶⁴ Canada’s FWS, para. 164.

²⁶⁵ See Exhibit US-27.

²⁶⁶ Exhibit US-22; Exhibit US-23.

²⁶⁷ Mexico’s FWS, para. 280.

²⁶⁸ PACA has included a definition for retailer for the past 70 years. The PACA limit was changed from \$200,000 to \$230,000 in 1981.

221. Similarly, Congress' decision to exempt certain processed foods fails to support the conclusion that the statute is protectionist in design.²⁶⁹ Again, Congress chose to exempt certain foods in an effort to reduce the compliance cost of the measures for both foreign and domestic producers. While it is certainly true that more information would be provided to consumers if every processed food was labeled with origin information, requiring labeling for these types of foods could significantly increase compliance costs and might even be unworkable in certain instances. Therefore, Congress made the rational decision to exempt processed foods, and Mexico has provided no evidence to suggest that doing so is protectionist.

222. Finally, Mexico's argument that the COOL measures must have been adopted for a protectionist purpose because the United States already had other consumer information measures in place does not withstand scrutiny. First, as the United States has noted throughout this submission, these existing requirements did not ensure that consumers had accurate information (or any information at all) about certain food products that they bought at the retail level, including meat. Second, there is nothing inherently protectionist about adopting more than one measure to achieve the same objective. Finally, 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 only a voluntary program that did not ensure that consumers received adequate information about the majority of the agricultural products they buy. Accordingly, it did not fulfill the U.S. objective for COOL, and as a result, does not establish that COOL had a protectionist purpose.

b. Supposed "Legislative History" Cited by Canada and Mexico is Inapposite

223. Canada and Mexico 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.

224. Consistent with past Appellate Body reports, the Panel should focus on the measures' text, as well as their design and structure, in determining their objective. As the Appellate Body noted in *Chile – Alcohol*: "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."²⁷⁰ Similarly, in *US – Textiles Rules of Origin*, the panel found that the legislative history, statements by legislators, and statements from outside parties

²⁶⁹ Mexico's FWS, para. 280.

²⁷⁰ *Chile – Alcohol (AB)*, para. 62.

advocating for or analyzing the measure in question were insufficient to establish the objective of that measure, noting that the panel was “not to base its inquiry into the objective of the . . . rule on such elements.”²⁷¹

225. Even insofar as the various statements cited by Canada and Mexico are relevant, they fail to accurately capture the complex politics behind the statute and 2009 Final Rule. First, as an article submitted by Canada notes, the U.S. meat industry *opposed* the inclusion of beef and pork as covered commodities under the statute.²⁷² 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.²⁷³ 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, including the Consumers Union and the Consumers Federation of America, among others.²⁷⁴

2. Providing Consumer Information so as to Minimize Consumer Confusion is a Legitimate Objective

226. As explained above, Article 2.2 interpreted in the context of the preamble of the TBT Agreement leaves each Member to decide on which legitimate objectives it wishes to pursue and the level at which it seeks to pursue those objectives.²⁷⁵ Governments routinely make policy decisions and choose among competing priorities based on their assessments of what will best serve the interests of the constituencies they represent. Nothing in the TBT Agreement specifies the priority that Members must give to one set of policy objectives over another.

²⁷¹ *US – Textiles Rules of Origin*, para. 6.93.

²⁷² Exhibit CDA-131 (“[M]ost beef and pork groups . . . have opposed labeling.”).

²⁷³ For example, Senator Johnson, the principal author of country of origin labeling for meat products in the U.S. Senate noted: “The purpose of the section is to inform consumers about the origin of the meat, fish, peanuts, and perishable commodities they purchase at the retail-level.” 107th Cong. Rec. S4024 (May 8, 2002) (statement by Senator Tim Johnson) (Exhibit US-48). Likewise, Representative Thune, a principal proponent of COOL for meat products in the U.S. House of Representatives stated: “Why is this important? For several reasons. First, consumers have the right to know the origin of the meat that they buy in the grocery store . . .” Exhibit US-13. By contrast, Canada handpicks a quote from Representative Chenoweth-Hage to demonstrate that COOL’s intent was protectionist. However, Canada fails to mention two key related points. First, Canada ignores the fact that H.R. 1144, COOL legislation introduced by Representative Chenoweth-Hage, specifically explains its purpose in its text as follows: “(1) Purpose - Country-of-origin labels are required under this section so that the ultimate purchasers of meat and meat food products in the United States are accurately informed of the country of origin of the livestock from which meat and meat food products are derived.” Exhibit CDA-9, p. 4. Second, Canada does not mention that Representative Chenoweth-Hage retired from the U.S. House of Representatives in 2000 and did not even vote on the 2002 Farm Bill.

²⁷⁴ *E.g.*, Exhibit US-4; Exhibit US-5.

²⁷⁵ *EC – Sardines (Panel)*, para. 7.120 (“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”).

227. Providing information to consumers so as to reduce consumer confusion is the legitimate objective pursued by the United States through the 2002 COOL Statute, as amended, the 2009 Final Rule, and the FSIS Final Rule. This objective is “legitimate” within the meaning of the TBT Agreement.

228. TBT Article 2.2 contains a non-exhaustive list of legitimate objectives, as confirmed by the use of the term “*inter alia*.” The text of the provision thus reflects that objectives other than those expressly listed in Article 2.2 may be “legitimate.” As noted, labeling meat from a cow that spent a significant portion of its life (or perhaps even its entire life) in Mexico or Canada and then was brought into the United States to be slaughtered before being sold at retail as “U.S.” meat is misleading to the consumer. This is compounded by the USDA grade label which can add to consumer confusion that the meat is U.S.-origin. The 2002 COOL Statute, as amended, the 2009 Final Rule, and the FSIS Final Rule address this confusion and prevent consumers from being misled about the origin of the meat. Seeking to address these issues by providing consumers information is legitimate.

229. Furthermore, one of the specifically enumerated legitimate objectives is “the prevention of deceptive practices,” an objective that is closely related to that of informing consumers. Similarly, in *EC – Sardines*, the panel recognized as legitimate the objectives advanced by the EC labeling requirement, which included market transparency and consumer protection.²⁷⁶

230. Neither Canada nor Mexico assert that consumer information cannot, as a general matter, constitute a legitimate objective. Canada does not deny that providing consumer information is a legitimate objective within the meaning of the TBT Agreement but instead argues that the Panel need not determine whether the objective of the “COOL measure” is legitimate.²⁷⁷ Mexico, on the other hand, argues that “while in certain circumstances providing consumer information can be a legitimate objective within the meaning of the provision, it is not a legitimate objective in all circumstances.”²⁷⁸ It asserts that depending on the “character and intrinsic value” of the consumer information being provided, the objective may not be legitimate, and asserts that in the case of the COOL measures at issue, the additional consumer information being provided by the measures is “detailed and specific information” with an “inherently protectionist” purpose.²⁷⁹

231. Mexico’s arguments do not withstand scrutiny. From a broad standpoint, 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

²⁷⁶ *EC – Sardines (Panel)*, para. 7.123.

²⁷⁷ See Canada’s FWS, para. 176.

²⁷⁸ Mexico’s FWS, para. 284.

²⁷⁹ Mexico’s FWS, para. 5. Mexico also characterizes the purpose of country of origin labeling as “solely protectionist” in para. 290.

labeling systems maintained by Members, including its own programs.²⁸⁰ As noted previously, many WTO Members, including both complainants in this dispute, maintain country of origin labeling requirements, and evidence suggests that Members have long identified consumer information as a basis for maintaining these types of measures. In 1995, the WTO Secretariat examined notifications made under the Tokyo Round TBT Agreement and noted that over the period 1980-94, the third most frequently cited objective and rationale for proposed technical regulations was “[p]revention of deceptive practices,” and the “greater part” of this category “concern[ed] the protection of consumers through *consumer information*, mostly in the form of labelling requirements.”²⁸¹ Moreover, in recent years, many WTO Members have notified various country of origin labeling regimes and identified the purpose as providing consumer information.²⁸²

232. To the extent that 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. The fact that the information provided by the measures at issue is, according to Mexico, “detailed and specific,” or is not “information necessary for health or safety purposes” cannot be the basis for concluding that the consumer information objective is “illegitimate” in the case of the COOL measures at issue in this dispute but legitimate in the case of, for example, Mexico’s origin labeling requirements for textiles.

Fundamentally, Mexico’s subjective assessment of the “character” and “intrinsic value” of the consumer information provided by the COOL measures at issue in this case is unsupported by the text and premised on a mis-characterization of the regulatory record, including the important role played by consumer advocacy groups in urging the adoption of these measures.²⁸³

233. As noted, labeling meat from a cow that spent its entire life in Mexico and then was brought into the United States for a single day to be slaughtered before being sold at retail as “U.S.” meat is misleading to the consumer. Contrary to what Mexico suggests, the United States

²⁸⁰ Exhibit US-1.

²⁸¹ See *Notifications Made under the Tokyo Round Agreement on Technical Barriers to Trade, Note by the Secretariat*, G/TBT/18, 26 January 1996, para. 12. (Emphasis added). Additional related objectives were also identified in the *EC – Sardines* dispute, where the European Communities proposed, and complainant Peru accepted, that the objectives of (a) consumer protection and (b) market transparency were legitimate. See *EC – Sardines (Panel)*, para. 7.113.

²⁸² See, e.g., Committee on Technical Barriers to Trade, *India Notification of Prevention of Food Adulteration Rules 2009*, G/TBT/N/IND/38 (Mar. 5, 2009); Committee on Technical Barriers to Trade, *Republic of Korea Notification of Draft Amendment of the Enforcement Decree of the Food Sanitation Act*, G/TBT/N/KOR/173 (May 7, 2008); Committee on Technical Barriers to Trade, *European Communities Notification of Regulation No. 1019/2002*, G/TBT/N/EEC/226 (Oct. 22, 2008); Committee on Technical Barriers to Trade, *Australia Notification of Final Assessment Report Proposal P292 – Country of Origin Labelling of Food*, G/TBT/N/AUS/45 (Dec. 13, 2005); Committee on Technical Barriers to Trade, *Chile Notification of Amendment to Decree No. 297 of 1992 Approving the Regulation on the Labelling of Packaged Food Products*, G/TBT/N/CHL/33 (Jun. 5, 2002); Committee on Technical Barriers to Trade, *Brazil Notification of Technical Regulation for Labelling Pre-Packaged Food*, G/TBT/N/BRA/12 (July 12, 2001).

²⁸³ Mexico’s FWS, paras. 293-295.

did not attempt to “shape consumer perception through regulatory intervention”²⁸⁴ (a concern raised by the panel in *EC – Sardines*) – rather, the design of the measures themselves and the role of consumer advocacy groups in urging their adoption reveal that the regulatory intervention was a *response* to consumer perception and misperception.²⁸⁵ Through the statute and 2009 Final Rule, the United States conformed its meat labeling requirements to existing consumer perceptions of what constitutes U.S. and non-U.S. origin product.

3. The COOL Measures Fulfill The Legitimate Objective of Providing Consumer Information

234. The COOL measures fulfill the legitimate objectives of providing consumers with additional information about the origin of the food that they buy at the retail level. At the same time, the COOL measures help prevent consumer confusion related to the labeling of certain products that were produced in part in a foreign country and carry a USDA grade label.

235. Article 2.2 requires that the challenged measure fulfill the legitimate objective of the Member. The meaning of the word “fulfill” in the context of TBT Article 2.2 has not been interpreted by a WTO panel or Appellate Body. Applying the customary rules of interpretation, the meaning of “fulfill” is to “[c]arry out, perform, do (something prescribed); obey or follow (a command, the law, etc.).”²⁸⁶ Thus, to fulfill its objective, a measure must perform the function for which it was adopted in this case, to provide consumers with information.

236. The adoption of the COOL measures has done exactly this – it has provided 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 to them.

237. At the same time, it is true that COOL does not apply in every instance that a U.S. consumer purchases an item of food. For example, as Mexico points out, certain commodities were not covered by COOL and certain exceptions were made, including for certain processed

²⁸⁴ Mexico’s FWS, para. 294-95.

²⁸⁵ See, e.g., note 34, *supra* (discussing comments by U.S. congressional representatives and consumers regarding confusion with regard to the origin of meat that was imported into the United States for slaughter and meat affixed with a USDA grade label). Also, in the context of FSIS’s efforts to develop a standard for when it was appropriate to permit entities to label their meat products as “Product of the U.S.A.” or “U.S.A. Beef,” consumer groups overwhelmingly supported a definition that required the meat to be derived from an animal that was born, raised, slaughtered, and processed in the United States. There was almost no support for any other labeling terminology and no support for a petition submitted by the beef industry that suggested that cattle born outside the United States and finished in U.S. feedlots for at least 100 days be permitted to be labeled as “Product of the U.S.A.” See, e.g., Exhibit US-FF, Letter from Vicki Allbritten to USDA (Oct. 4, 2001) (Exhibit US-49). Many of the other comments received by FSIS with regard to this rule making are available at:

http://www.fsis.usda.gov/OPPDE/rdad/FRPubs/Comments/cmt_00-036A-1.htm. (Search “Docket No. 00-036A.”)

²⁸⁶ *The New Shorter Oxford English Dictionary* (4th ed. 1993), p. 1039 (Exhibit US-50).

foods and small retailers.²⁸⁷ However, the fact that the COOL measures do not cover every conceivable scenario in which a consumer buys food does not mean that they do not fulfil their objective of providing consumer information. After all, the requirement in Article 2.2 is that the measure in question “fulfill [its] objective.” It does not require that a Member pursue the particular objective to the maximum possible degree without regard to costs or other considerations.²⁸⁸

238. In fact, when designing the COOL Statute and 2009 Final Rule, 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 the origin of the covered commodities. On the other hand, both Congress and USDA 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 of providing consumer information. Again, the United States finds it puzzling that Mexico is objecting to the costs of complying with the COOL measures and also the efforts made to reduce those costs.

239. While Canada and Mexico assert that the meat labels prescribed by the measures at issue are themselves “confusing” and therefore 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, as noted above, COOL’s labeling of meat reflects the true facts about these products’ origin much more accurately than the labels previously available to consumers. Moreover Canada’s and Mexico’s argument fails to account for the difficult choices Congress and USDA had to make about the best way to convey accurate information to consumers while not imposing a significant burden on the foreign or domestic industries.²⁸⁹ For both muscle cuts and ground meat, the United States chose an approach that balanced these concerns. Indeed, when discussing the labeling system developed for muscle cuts of meat in the 2009 Final Rule, USDA noted these competing objectives:

The Agency recognizes that the multitude of different production practices and possible sales transactions can influence the value determinations made throughout the supply chain resulting in instances of commingling of animal or covered commodities, which will have an impact when mixing occurs. However, the Agency feels it is necessary to ensure information accurately reflects the origin of any group, lot, box, or package in accordance with the intent of the statute while recognizing that regulated entities must still be able to operate in a manner that does

²⁸⁷ Mexico’s FWS, para. 298.

²⁸⁸ Indeed, the notion that a regulator must pursue his or her objective without regard to costs and benefits is at odds with the notion that a measure should be no more trade restrictive than necessary to achieve its legitimate objective. See WTO TBT Committee, Report of the Fourth Triennial Review, G/TBT/19, paragraph 12 (“[T]he Committee emphasizes the importance, when the option to regulate is considered, of assessing the costs and benefits of proposed regulations, including likely impact on consumers, trade and industry.”).

²⁸⁹ See Mexico’s FWS, paras. 299-301; Canada’s FWS, paras. 177-181.

not disrupt the normal conduct of business more than is necessary. Thus, allowing the marketplace to establish the demand of categories within the bounds of the regulations will provide the needed flexibility while maintaining the structure needed to enforce these clearly defined categories.²⁹⁰

240. Mexico now appears to suggest that requiring meat labels to include specific information about each processing step in the life of an animal from which the meat was derived would support the conclusion that the measure fulfills a consumer information objective, whereas the compromise approach adopted in the statute and 2009 Final Rule does not.²⁹¹ While it may be the case that the former approach would have resulted in more information to the consumer than the approach that USDA and Congress finally adopted, there is no question that this would have placed much larger costs on the industry (and indeed, both Canada and Mexico objected to this very proposal during the rule making process). The United States chose an approach that ensures that consumers will have much more information than was previously the case, while also minimizing potential market disruption. At the same time, the approach selected also addresses a key point of consumer confusion related to the origin of animals who are imported for immediate slaughter or partial processing within the United States.

241. For ground meat, Congress and USDA took a similar approach. Instead of requiring detailed information about the origin percentages of each country or taking some other similarly burdensome approach, Congress and USDA decided to simply require that retailers provide information about what types of meat are “reasonably contained therein.” While other approaches might have provided more detailed information, the United States again chose to balance the objective of providing consumers with additional information against the potential burdens on industry.²⁹² As a result, the statute and 2009 Final Rule ensure that consumers receive much more information than before at the retail level, without imposing unnecessary costs on industry.

4. The COOL Measures Are Not More Trade-Restrictive than Necessary to Fulfill Their Legitimate Objective

242. Article 2.2 of the TBT Agreement provides that technical regulations shall not be “more trade-restrictive than necessary” to fulfill a legitimate objective. As elaborated below, the COOL measures are not more trade-restrictive than necessary to meet their objective.

243. The TBT Agreement does not define the phrase “more trade-restrictive than necessary” and it has not been reviewed by a panel or the Appellate Body. Based on the text of Article 2.2, two general elements must be shown for a measure to be considered more trade-restrictive than necessary: (1) the measure must be trade-restrictive; and (2) the measure must restrict trade more than is necessary to fulfill the measure’s legitimate objective.

²⁹⁰ Exhibit CDA-5, p. 2670.

²⁹¹ Mexico’s FWS, para. 301.

²⁹² This change, too, conformed with comments received from interested parties. *See, e.g.*, Exhibit US-V.

244. With respect to the first element (and applying the customary rules of treaty interpretation), the ordinary meaning of the word “restrictive” is “having the nature or effect of a restriction; imposing a restriction.”²⁹³ “Restriction” is defined as “a thing that restricts someone or something . . . the act of restricting someone or something.”²⁹⁴ “Restrict” is defined as “to limit, bound, confine . . . restrain by prohibition, prevent.”²⁹⁵ A measure that is trade-restrictive, therefore, could include one that restricts trade, *i.e.*, that limits, prevents or confines trade, or restrains it by prohibition.

245. With respect to the second element, the ordinary meaning of the word “necessary” is “that cannot be dispensed with or done without; requisite, essential, needful . . . requiring to be done; that must be done.”²⁹⁶ A measure that is “more” trade-restrictive than “necessary” is therefore a measure that restricts trade more than is needed or required to fulfill the measure’s objective. The word “more” implies a comparison. In other words, the complaining party must show that there is another measure that can fulfill the legitimate objective that would restrict trade less.

246. The context also supports this conclusion. As Canada also notes, one important element of context is Article 5.6 of the SPS Agreement, which includes a provision similar to Article 2.2 of the TBT Agreement. The SPS Agreement and TBT Agreement are conceptually related; indeed, the Appellate Body had observed that there are “strong conceptual similarities” between aspects of the SPS Agreement and TBT Agreement.²⁹⁷ Moreover, while coverage of SPS Article 5.6 (sanitary and phytosanitary measures) and TBT Article 2.2 (technical regulations) may differ, the structure of the obligation as well as the nature of the discipline are similar.

247. SPS Article 5.6 provides in relevant part that “when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.” A footnote to Article 5.6 clarifies that “a measure is not more trade restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade.”²⁹⁸ The United States agrees with Canada

²⁹³ *The New Shorter Oxford English Dictionary* (4th ed. 1993), p. 2569 (Exhibit US-51).

²⁹⁴ Exhibit US-51, p. 2569.

²⁹⁵ Exhibit US-51, p. 2569.

²⁹⁶ *The New Shorter Oxford English Dictionary* (4th ed. 1993), p. 1895 (Exhibit US-52).

²⁹⁷ *EC – Sardines (AB)*, para. 274. In the *EC – Sardines* dispute, the Appellate Body consulted a parallel provision in the SPS Agreement as relevant context for its interpretation of Article 2.4 of the TBT Agreement.

²⁹⁸ SPS Agreement, Article 5.6, footnote 3. In *Australia – Salmon*, the Appellate Body confirmed that, in order to find a violation of SPS Article 5.6, three elements must be established. The three elements are that “there is an SPS measure which: (1) is reasonably available taking into account technical and economic feasibility; (2) achieves the Member’s appropriate level of sanitary or phytosanitary protection; and (3) is significantly less restrictive to trade than the SPS measure contested.” The Appellate Body observed that the three prongs are

(continued...)

that Article 5.6 provides relevant context for the interpretation of Article 2.2 of the TBT Agreement and confirms that determining whether a measure is “more trade-restrictive than necessary” within the meaning of Article 2.2 of the TBT Agreement involves determining whether there is an alternative measure that could fulfill the measure’s objective that is *significantly* less trade-restrictive.

248. This interpretation is confirmed by a December 15, 1993 letter from the Director-General of the GATT to the Chief U.S. Negotiator concerning the application of Article 2.2 of the TBT Agreement. That letter explains that “it was clear from our consultations at expert level that participants felt it was obvious from other provisions of the [TBT] Agreement that the Agreement does not concern itself with insignificant trade effects nor could a measure be considered more trade restrictive than necessary in the absence of a reasonably available alternative.”²⁹⁹ This letter provides supplemental means of interpretation, in particular as circumstances of the TBT Agreement’s conclusion, that confirms the meaning derived from the ordinary meaning, in context, and in light of the object and purpose of the TBT Agreement.³⁰⁰ As noted, in its submission, Canada agrees with this interpretation of Article 2.2.³⁰¹

249. Based on the ordinary meaning of the second sentence 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 – here, Canada and Mexico – 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. In the instant disputes, Canada and Mexico must establish that there is a reasonably available alternative measure that fulfills the U.S. objective and is significantly less trade-restrictive.

a. Canada and Mexico Have Not Demonstrated that there is an Alternative that is Reasonably Available and Fulfills the U.S. Legitimate Objective

250. Under Article 2.2, the complaining party must demonstrate that their specific alternative measure is reasonably available and fulfills the U.S. objective. Canada and Mexico argue that a voluntary labeling regime for country-of-origin labeling on beef and pork is reasonably available

²⁹⁸ (...continued)

cumulative in nature, in that in order to establish inconsistency all of them have to be satisfied. *Australia – Salmon (AB)*, para. 194. And if any of those elements is not fulfilled, the measure in dispute would be consistent with Article 5.6. *Australia – Salmon (AB)*, para. 194.

²⁹⁹ Letter from Peter D. Sutherland, Director-General of the GATT to Ambassador John Schmidt, Chief U.S. Negotiator (December 15, 1993) (Exhibit US-53).

³⁰⁰ Vienna Convention, Article 32.

³⁰¹ Canada’s FWS, paras. 187-190.

and also would accomplish the U.S. goals.³⁰² Alternately, the complaining parties argue that a mandatory labeling regime based on substantial transformation would also be less trade restrictive and fulfil the U.S. objectives.³⁰³ However, neither of these options would achieve the objectives identified by the United States. The problem with a voluntary system is that suppliers of covered commodities did not participate in the program when given the opportunity; therefore, the voluntary system would fail to fulfill the U.S. objective. At the same time, a regime based on substantial transformation does not convey accurate information regarding livestock that may have spent only a short period of its life in the United States before being slaughtered.

i. A Voluntary Labeling Regime Fails to Meet the Legitimate Objective of Providing Consumer Information

251. In their submissions, both Canada and Mexico suggest that the United States simply 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.

252. 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. For example, even after USDA published the 2002 Voluntary Guidelines, producers and retailers chose not to utilize them, thereby hampering the objective of providing information to consumers. In this way, a voluntary system would not meet the U.S. objective because origin information would not be consistently and accurately provided to U.S. consumers of meat, fruits, and vegetables, and other commodities at the retail level.

253. Insofar as Canada and Mexico suggest that voluntary labeling requirements are always a reasonably available, less trade restrictive alternative to mandatory labeling requirements, their argument proves too much. Indeed, taken to their logical conclusion, Canada and Mexico's position would suggest that mandatory labeling requirements are never permissible under TBT Article 2.2. Yet both Canada and Mexico – and as noted previously, many other WTO Members – maintain such requirements with respect to a wide variety of products.

254. Thus, Canada and Mexico have failed to demonstrate that a voluntary labeling system is an alternative measure that fulfills the legitimate U.S. objective achieved by the COOL measures.

ii. A Labeling System Based on Substantial Transformation Fails to Fulfil the U.S. Legitimate Objective

³⁰² Canada's FWS, paras. 192-200; Mexico's FWS, para. 316.

³⁰³ Canada's FWS, paras. 201-212; Mexico's FWS, para. 317.

255. Canada and Mexico also suggest that the United States adopt a mandatory system with the labels for muscle cuts of meat based on substantial transformation. Again, even if reasonably available, Canada and Mexico have failed to demonstrate that this alternative would fulfill the U.S. objective.

256. Canada's and Mexico's suggested alternative would not fulfill the U.S. objectives because it would not provide consumers with any information about where the various processing steps took place during the production of beef, pork, and other meat products. The United States has determined that this must be a key part of any labeling regime that it adopts due to the consumer confusion related to products that have been imported for immediate slaughter. Indeed, as the United States has explained, 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 (perhaps only one day) before it is slaughtered to be labeled U.S. origin.

257. Similarly, for animals that are not imported for immediate slaughter but that spend significant periods of their lives in both the United States and a foreign country, a simple U.S. origin label does not provide complete information as to the animal's origin. Under a substantial transformation system, no meat product would be listed as a product of more than one country. As a result, consumers would have incomplete and misleading information, and significantly less information than under the system provided for by the U.S. COOL measures.

258. In sum, Canada and Mexico have failed to establish each element of their Article 2.2 claims. In particular, they have not established that the objectives of the U.S. measures are not legitimate nor that the measures are more trade-restrictive than necessary to fulfill the U.S. objective. For these reasons, Canada and Mexico have failed to establish that the COOL Statute and 2009 Final Rule are inconsistent with Article 2.2.

D. The COOL Measures Are Not Inconsistent With Article 2.4 of the TBT Agreement

259. Mexico (but not Canada) argues that the COOL measures are inconsistent with TBT Article 2.4 because they are not based on CODEX-STAN 1-1985 (the Codex³⁰⁴ "General Standard for the Labelling of Prepackaged Foods").³⁰⁵ As explained below, even if CODEX-STAN 1-1985 is a relevant international standard, and even if the United States did not base its standard on CODEX-STAN 1-1985, Mexico fails to demonstrate that CODEX-STAN 1-1985 would be an effective or appropriate means of fulfilling the legitimate objectives pursued by the United States.

260. In this regard, Article 2.4 of the TBT Agreement provides as follows:

³⁰⁴ CODEX refers to the CODEX Commission.

³⁰⁵ See Labeling of Prepackaged Foods (CODEX STAN 1-1985) (Exhibit US-54).

Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.

261. According to Mexico, CODEX-STAN 1-1985 is an international standard because it meets the definition of standard contained in Annex 1.2 of the TBT Agreement and was approved by an international body.³⁰⁶ The mere fact that CODEX-STAN 1-1985 is a “standard” and that CODEX is an “international body” is not sufficient to support the conclusion that it constitutes an international standard for purposes of the TBT Agreement. To constitute an international standard, the standard must be adopted by a body whose membership is open to the relevant bodies of at least all Members and is based on consensus.³⁰⁷ It is possible that CODEX-STAN 1-1985 may in fact qualify as an international standard. Consistent with the Appellate Body’s reasoning in *EC – Sardines*, however, Mexico bears the burden of demonstrating that this is in fact the case.

262. As for whether CODEX-STAN 1-1985 is a “relevant” international standard, Mexico notes that CODEX-STAN 1-1985 applies to all “prepackaged foods” and thereby includes within its scope certain muscle cuts and ground beef.³⁰⁸ The United States also does not dispute that at least some (though not all) of the products subject to the COOL requirements contained in the statute and 2009 Final Rule would constitute “prepackaged foods,” as those terms are defined in Article 2 of CODEX-STAN 1-1985,³⁰⁹ and that the CODEX standard concerns the provision of country of origin information. With regard to country of origin labeling, as Mexico notes, Article 4 of CODEX-STAN 1-1985 provides as follows:

- 4.5.1 The country of origin shall be declared if its omission would mislead or deceive the customer.
- 4.5.2 When a food undergoes processing in a second country which changes its nature, the country in which the processing is

³⁰⁶ Mexico’s FWS, para. 328.

³⁰⁷ See TBT Agreement, Annex 1, chapeau (stating that terms used in the TBT Agreement have the same meaning as given in ISO/IEC Guide 2: 1991); ISO/IEC Guide 2: 1991, para. 3.2.1 (defining “international standard” as a standard “that is adopted by an international standardizing/standards organization and made available to the public”); TBT, Annex 1, para. 4 (defining “international body” as a “body . . . whose membership is open to the relevant bodies of at least all Members”).

³⁰⁸ Mexico’s FWS, para. 337.

³⁰⁹ However, some products covered by the COOL Statute and 2009 Final Rule are not addressed by the CODEX-STAN 1-1985. In particular, meat that is not prepackaged but instead is sold from bins or displays does not fall within the scope of CODEX-STAN 1-1985. CODEX-STAN 1-1985, art. 2 (defining “prepackaged” as “packaged or made up in advance in a container, ready for offer to the consumer, or for catering purposes.”).

performed shall be considered to be the country of origin for the purposes of labeling.

263. Mexico argues that the United States did not base its regulation on CODEX-STAN 1-1985, which in its view is the relevant international standard. In this regard, the CODEX standard does not explain the term “processing,” and therefore it is unclear whether Article 4 is in fact, as Mexico claims, based on a substantial transformation test.

264. However, even assuming *arguendo* that this standard is a “relevant international standard” and that the United States did not base the statute, 2009 Final Rule, or FSIS Rule on it, Mexico’s claim ultimately fails because, insofar as the CODEX standard address the provision of country of origin information of a product based a substantial transformation rule, for the reasons explained above, 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.

265. In *EC – Sardines*, the Appellate Body observed that it is the complaining party that bears the burden of proof in demonstrating that a “relevant international standard” is not ineffective or inappropriate to fulfill the legitimate objectives of the responding Member. In this case, therefore, the burden falls on Mexico.³¹⁰ The panel in *EC – Sardines* interpreted the terms “ineffective” or “inappropriate” within the meaning of TBT Article 2.4 as follows:

Concerning the terms “ineffective” and “inappropriate”, we note that “ineffective refers to something which is not “having the function of accomplishing”, “having a result”, or “brought to bear”, whereas “inappropriate” refers to something which is not “specially suitable”, “proper”, or “fitting”. Thus, in the context of Article 2.4 an ineffective means is a means which does not have the function of accomplishing the legitimate objective pursued, whereas an inappropriate means is a means which is not specially suitable for the fulfilment of the legitimate objective pursued. ... The question of effectiveness bears upon the *results* of the means employed, whereas the question of appropriateness relates more to the *nature* of the means employed.³¹¹

266. The Appellate Body agreed with the Panel’s interpretation.³¹²

267. Basing the COOL measures on CODEX-STAN 1-1985 is both an “ineffective” and “inappropriate” means of fulfilling the U.S. legitimate objective of providing consumer information. As discussed above, 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

³¹⁰ See *EC – Sardines (AB)*, para. 289. (“Peru has the burden of showing that CODEX Stan 94 is both effective and appropriate.”) (emphasis omitted).

³¹¹ *EC – Sardines (Panel)*, para. 7.116.

³¹² *EC – Sardines (AB)*, para. 285.

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. When consumers see a product of the United States label, however, they do not realize that meat so labeled may be derived from an animal that spent less than a day of its life in the United States. For meat, a labeling rule based on substantial transformation does not accurately convey information to consumers about the true origin of the product. This renders the rule “ineffective” because it does not have the function of accomplishing the legitimate objective pursued – i.e., providing meaningful consumer information about the origin of meat. Nor is a substantial transformation rule “appropriate,” as the type of information provided is in some cases misleading, and thus the rule in fact operates at odds with the U.S. consumer information objective.

268. Indeed, insofar as it contemplates the provision of country of origin information where “its omission would mislead or deceive the consumer,” it is not clear that CODEX-STAN 1-1985 is aimed at requiring a substantial transformation rule for all products, no matter how misleading the results of that rule may be. Indeed, the CODEX standard has been the subject of ongoing negotiations regarding additional detail on country of origin, including with respect to meat.³¹³

269. Article 2.4 permits Members to depart from relevant international standards when “such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued.” The United States has explained its legitimate objectives in adopting COOL in section C, *supra*.³¹⁴ As noted above, the Appellate Body has made clear that a relevant international standard would be “effective” if it has the *capacity* to accomplish the legitimate objectives and would be “appropriate” if it were suitable for the fulfilment of the legitimate objectives. In this case, Mexico has failed to demonstrate that the relevant aspects of the CODEX Pre-Packaged Food Standard are “effective” and “appropriate” for meeting the United States’ legitimate objectives.

E. The COOL Measures Are Not Inconsistent with Articles 12.1 and 12.3 of the TBT Agreement

270. Mexico argues that the COOL measures are inconsistent with Articles 12.1 and 12.3 of the TBT agreement.³¹⁵ According to Mexico, the United States did not “take into account” Mexico’s special development, financial, and trade needs in the preparation and application of the measures.

³¹³ See e.g., CODEX (CX/FL 02/11) (UK Proposal on amendments to CODEX standard for meat products, proposing that “for meat, the country of origin is the place of birth, rearing, and slaughter. If these places differ, then each shall be declared.”).

³¹⁴ With respect to the “fulfilment of legitimate objectives” prong of the second part of Article 2.4, the Appellate Body confirmed that “legitimate objectives” in Article 2.4 must be interpreted in light of Article 2.2. See *EC – Sardines (AB)*, para. 286.

³¹⁵ Mexico’s FWS, paras. 359-373.

Further, in its view the COOL measures create unnecessary obstacles to trade. Contrary to Mexico's claim, the COOL Statute and 2009 Final Rule are not inconsistent with Article 12.1 or 12.3 of the TBT Agreement.

271. TBT Article 12.1 provides:

Members shall provide differential and more favourable treatment to developing country Members to this Agreement, through the following provisions as well as through the relevant provisions of other Articles of this Agreement.

272. 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. Article 12.3 provides:

Members shall, in the preparation and application of technical regulations, standards and conformity assessment procedures, take account of the special development, financial and trade needs of developing country Members, with a view to ensuring that such technical regulations, standards and conformity assessment procedures do not create unnecessary obstacles to exports from developing country Members.

273. In order to establish a violation of Article 12.3, the complaining party must demonstrate the following: (1) that it is a developing country; (2) that 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.

274. In the instant disputes, 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 Statute and 2009 Final Rule.³¹⁶ To the contrary, during its consideration of the COOL regulations, the United States offered Mexico and other interested parties numerous opportunities to formally comment on the development of the regulations³¹⁷ and held meetings with Mexico and others to discuss the rule making.³¹⁸ In addition, changes to the 2002 COOL Statute and implementing regulations are consistent with suggestions

³¹⁶ Mexico's FWS, paras. 364-370.

³¹⁷ As noted above, Mexico had at least four independent opportunities to comment on the rule making as it applies to beef.

³¹⁸ Among other meetings, officials from the Mexican Embassy met with AMS Administrator Lloyd Day on September 11, 2008, to discuss COOL. In addition, USDA held a briefing for embassy officials on August 27, 2008, during which embassy officials were able to share their views on the rule making.

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.³¹⁹

275. 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.³²⁰ 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 are required to 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. The United States has done this. Article 12.3 does not contain a substantive obligation prohibiting the creation of unnecessary obstacles to trade. That obligation is set out in Article 2.2 of the TBT Agreement, and for the reasons described in Section c, *supra*, the COOL Statute and Final Rule are not inconsistent with that obligation.

276. Insofar as Mexico is a developing country, it has failed to establish that the statute and 2009 Final Rule were developed and applied in a manner that did not take account of its special trade needs.³²¹ For these reasons, Mexico’s claim that the 2002 COOL Statute, as amended, 2009 Final Rule, and FSIS Rule are inconsistent with Article 12.1 and 12.3 should be rejected.

VI. THE COOL MEASURES ARE NOT INCONSISTENT WITH GATT 1994

A. The COOL Measures Are Not Inconsistent with GATT Article III:4

277. While Canada and Mexico claim that the COOL measures are inconsistent with Article III:4 of the GATT 1994, as the United States noted in its discussion of TBT Article 2.1, the statute and 2009 Final Rule are origin-neutral measures that require beef and pork products be labeled with country of origin information at the retail level regardless of what the origin of these products may be.³²² Further, they do not alter conditions of competition to the detriment of Canadian and Mexican livestock.³²³ Accordingly, the statute and 2009 Final Rule are not inconsistent with GATT Article III:4. With regard to the Vilsack Letter, as explained in section 2, *infra*, it is not a “law, regulation, or requirement” within the meaning of Article III:4.

³¹⁹ See Exhibit US-19 (requesting that the United States reduce the record keeping burden on suppliers by eliminating the audit verification system).

³²⁰ Mexico’s FWS, para. 371.

³²¹ Furthermore, as described above, Mexico has claimed but failed to establish that the United States acted inconsistently with TBT Article 2.2, which provides that “Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade.” It follows that Mexico has therefore also failed to establish that the United States failed to meet the requirements of Article 12.3, which applies a lesser standard and does not even apply to the “adoption” of TBT measures.

³²² See paras. 54-56, *supra*.

³²³ See paras. 144-11, *supra*.

278. Article III:4 of GATT 1994 states:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

279. In order 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.³²⁴ Canada and Mexico’s arguments fail to satisfy these elements.

1. Canada and Mexico Have Not Demonstrated that Canadian and Mexican Livestock are Like Products with U.S. Livestock

280. Canada and Mexico have failed to meet their burden of demonstrating that Canadian and Mexican livestock are like products with U.S. livestock.

281. As discussed in the context of TBT Article 2.1, the Appellate Body has noted that a determination of likeness is “fundamentally, a determination about the nature and extent of a competitive relationship between and among products.”³²⁵ Appellate Body reports examining this issue have focused on four general criteria to make a determination about whether products are “like” products: (1) the properties, nature and quality of the products; (2) the end-uses of the products; (3) consumer tastes and habits; and (4) the tariff classifications of the products.³²⁶

282. As was the case under TBT Article 2.1, 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.

2. Secretary Vilsack’s Letter Is Not a Law, Regulation, or Requirement Within the Meaning of GATT Article III:4

³²⁴ E.g., *Korea – Beef (AB)*, para. 133.

³²⁵ E.g., *EC – Asbestos (AB)*, para. 99.

³²⁶ E.g., *EC – Asbestos (AB)*, para. 101.

283. 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.” Past panels have interpreted the term “requirement” in GATT Article III:4 to encompass two distinct situations: (1) obligations which an enterprise is legally bound to carry out; and (2) obligations which an enterprise voluntarily accepts in order to obtain an advantage from the government.³²⁷ As the United States has stated previously, the industry is not “legally bound” to carry out the Vilsack Letter’s suggestions, which by their terms are voluntary.³²⁸ In addition, the Vilsack Letter does not include suggestions that companies may “voluntarily accept in order to obtain an advantage from the government.”

284. Canada and Mexico claim that the industry would benefit by “not being subjected to possibly stricter and more extensive regulation in the future.”³²⁹ However, the Secretary’s 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.

285. Thus, because the Vilsack Letter is not a law, regulation, or requirement, it is not subject to GATT Article III:4.

3. The COOL Measures Do Not Afford Canadian and Mexican Livestock with Less Favorable Treatment than U.S. Livestock

286. Assuming, *arguendo*, that Canada and Mexico are able to demonstrate that foreign and domestic livestock are “like” products under GATT Article III:4, they must also demonstrate that the statute and 2009 Final Rule treat their livestock less favorably than U.S. livestock. According to the reasoning of the Appellate Body in *Korea – Beef*, a complaining party can show less favorable treatment by demonstrating that a particular measure has modified the conditions of competition to the detriment of its products.³³⁰ Canada and Mexico have failed to make this showing. Again, the United States will not repeat its arguments on this point, but respectfully requests that the Panel refer to its arguments made in the context of TBT Article 2.1.³³¹

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

287. Mexico and Canada assert that the COOL measures are inconsistent with Article X:3(a) of GATT 1994. Canada argues that the Vilsack Letter “created uncertainty” regarding the

³²⁷ *E.g.*, *India – Autos*, paras. 7.189-7.191; *China – Auto Parts (Panel)*, para. 7.240.

³²⁸ *See* paras. 135-135, *supra*.

³²⁹ Canada’s FWS, para. 219.

³³⁰ *Korea – Beef (AB)*, para. 137.

³³¹ *See* paras. 196-199, *supra*.

requirements of the COOL measures and that the United States administered the COOL Statute and 2009 Final Rule in an unreasonable manner.³³² Mexico – relying on a similar characterization of the Vilsack letter and additionally on the regulatory process leading to the adoption of the 2009 Final Rule – asserts that the administration of the COOL measures is neither “reasonable” nor “uniform.”³³³ Both complainants’ arguments rest upon a misinterpretation of Article X:3, as well as a mis-characterization of the legal effect of the Vilsack Letter.

288. Article X:3(a) concerns the day-to-day administration of trade laws, rules and regulations.³³⁴ Specifically, it provides that Members “shall administer in a uniform, reasonable and impartial manner all of its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.”³³⁵

289. In their first submissions, Canada and Mexico have failed to produce evidence to make a showing that U.S. administration of the COOL measures fails to meet the standards of Article X:3(a). In fact, they have not produced any evidence relating to the administration of the COOL measures at all.

1. Canada and Mexico Cannot Base Their Article X Claims on the Vilsack Letter

290. 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.³³⁶ 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.³³⁷

291. Canada’s and Mexico’s arguments regarding the Vilsack Letter are incorrect because the issuance of 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

³³² Canada’s FWS, para. 227.

³³³ Mexico’s FWS, para. 378.

³³⁴ *EC – Bananas III (AB)*, para. 200. In *EC – Bananas III*, the Appellate Body noted that “the requirements of ‘uniformity, impartiality, and reasonableness’ do not apply to the laws, regulations, decisions, and rulings themselves, but rather to the administration of those laws, regulations, decisions and rulings.”

³³⁵ Paragraph 1 of Article X indicates that it applies to “laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes, or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transference, warehousing, inspection, exhibition, processing, mixing or other use”

³³⁶ Canada’s FWS, paras. 227-231.

³³⁷ Mexico’s FWS, para. 378.

mean “putting into practical effect” or “applying” those measures enumerated in paragraph 1 of Article X.³³⁸ The Vilsack Letter does not “apply” to the COOL measures at issue in this dispute or put them into “practical effect.”

292. The Vilsack Letter has nothing to do with the administration of either the statute or the 2009 Final Rule. By contrast, the letter refers to voluntary actions that certain market participants may take that would go beyond what the statute or 2009 Final Rule require. The voluntary actions mentioned in the Vilsack Letter are not referred to in the measures themselves and a discussion of these actions can in no way be construed as the administration of these measures or of any of their requirements.³³⁹

2. Canada and Mexico Have Failed to Demonstrate that the COOL Measures Have Been Administered in a Non-Uniform or Unreasonable Manner

a. Mexico Has Failed to Demonstrate that the COOL Measures Have Been Administered in a Non-Uniform Manner

293. As mentioned above, Mexico alleges that the administration of the COOL measures has been non-uniform because of changes to the rule over time. However, Mexico has failed to produce any evidence that the United States has administered the COOL measures (either through changes made to the implementing regulations or the issuance of the Vilsack Letter) in a non-uniform fashion.

294. In *Argentina – Bovine Hides*, the panel noted that the Article X:3(a) requirement of uniform administration requires that Members ensure that their laws are applied consistently and predictably.³⁴⁰ In *US – Stainless Steel*, the panel noted that, “. . . the requirement of uniform administration of laws and regulations must be understood to mean uniformity of treatment in respect of persons similarly situated; it cannot be understood to require identical results where relevant facts differ.”³⁴¹ Further, the panel clarified that Article X:3(a) does not require that the administration of a regulation be fixed and unvarying over time. Rather, the administration of a regulation must only be uniform at a given time.

295. 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. Indeed, at all times the United States has maintained a single set of regulations implementing the COOL

³³⁸ *EC – Bananas III (AB)*, para. 200.

³³⁹ Canada’s assertion in paragraph 231 of its first written submission that the Vilsack Letter constitutes “a method . . . of prescribing requirements” is simply incorrect.

³⁴⁰ *Argentina – Bovine Hides (Panel)*, para. 11.83.

³⁴¹ *US – Stainless Steel (Panel)*, para 6.51.

Statute, and these regulations have been administered in a uniform fashion. With respect to the period after that date, Mexico has also not adduced evidence to suggest that the 2009 Final Rule has affected persons similarly situated in different ways, or in any other way provided evidence of supposed non-uniform administration.

296. Thus, Mexico has not shown that the COOL measures have been administered in a non-uniform manner within the meaning of GATT Article X:3(a).

b. Canada and Mexico Have Failed to Demonstrate that the COOL Measures Have Been Administered in an Unreasonable Manner

297. Canada and Mexico have also failed to establish that the COOL measures are being administered in an unreasonable fashion, either through the issuance of the Vilsack letter or changes made to the implementing regulations during their development.

298. In *Dominican Republic – Cigarettes*, the Panel noted that the ordinary meaning of the term “reasonable” refers to notions such as “in accordance with reason”, “not irrational or absurd”, “having sound judgement”, or “within the limits of reason”.³⁴² Thus, to demonstrate that a measure has not been administered in a reasonable fashion, the complaining party must demonstrate that there has been a pattern of decision making by an administrator that is “irrational or absurd” or “not within the limits of reason.”

299. Canada and Mexico have not presented evidence establishing behavior by USDA in administering the COOL measures that has been unreasonable in any sense. First, as described above, the Vilsack Letter does not administer the COOL measures, but instead only makes voluntary suggestions for actions beyond the COOL measures’ requirements. Thus, because the Vilsack Letter does not administer the COOL measures at all, Canada and Mexico 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 to the implementing regulations as they evolved through the regulatory process were “irrational” or “absurd.” In short, Mexico and Canada have not presented any evidence to suggest that USDA administration of the 2009 Final Rule has been unreasonable in any way.

300. In sum, Canada and Mexico have failed to sustain any of their Article X:3(a) claims.

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

301. Article XXIII:1(b) of the GATT 1994 provides the following:

³⁴² *Dominican Republic – Cigarettes (Panel)*, para. 7.385.

If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of . . .

- (b) the application of another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement . . .

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned.

302. 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.³⁴³

303. As the Appellate Body in *EC – Asbestos* emphasized, “the remedy in Article XXIII:1(b) ‘should be approached with caution and should remain an exceptional remedy.’”³⁴⁴ The Appellate Body also quoted the following passage from *Japan – Film* to explain its reasoning: “The reason for this caution is straightforward. Members negotiate the rules that they agree to follow and only exceptionally would expect to be challenged for actions not in contravention of those rules.”³⁴⁵

304. 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.³⁴⁶ It is not sufficient for the complaining parties to simply prove that they enjoy a tariff concession and that the United States has adopted a measure that allegedly affects the value of the concession. Canada and Mexico also bear the burden of proving that the challenged measures could not have been reasonably anticipated at the time the relevant tariff concessions were negotiated³⁴⁷ and must further demonstrate 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.³⁴⁸ As discussed below, Canada’s and Mexico’s cursory treatment of these elements in

³⁴³ *Japan – Film*, para. 10.41.

³⁴⁴ *EC – Asbestos (AB)*, para. 186.

³⁴⁵ *EC – Asbestos (AB)*, para. 186 (quoting *Japan – Film*, para. 10.36).

³⁴⁶ DSU Article 26.1(a); see also *Japan – Film*, para. 10.32.

³⁴⁷ *Japan – Film*, para. 10.76.

³⁴⁸ *Japan – Film*, para. 10.82. As a preliminary matter, the United States observes that the non-violation remedy is available only with regard to measures that are currently being applied; see *Japan – Film*, para. 10.5. Consequently, the only measures that are subject to Article XXIII:1(b) examination in this dispute are the COOL Statute and the 2009 Final Rule. To the extent Canada and Mexico challenge the Vilsack Letter under Article XXIII:1(b), the Vilsack Letter is not subject to that Article because it has no legal effect. See paras. 283-285, *supra*.

their first written submissions fails to establish even a *prima facie* case that the COOL measures have nullified or impaired any legitimate expectations fairly held by the complaining parties.

A. Canada and Mexico Have Failed to Identify the Relevant “Benefits” That Are Allegedly Being Nullified or Impaired

305. In the first place, neither Canada nor Mexico explains how a tariff benefit accruing to them directly or indirectly under this Agreement 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, not the GATT 1994, that provides them with market access. Thus, both Canada and Mexico acknowledge that “current tariff concessions between [them] and the United States are currently based on the [North American Free Trade Agreement (NAFTA)].”³⁴⁹ However, Article XXIII:1(b) applies to benefits accruing “directly or indirectly under this Agreement” – that is, under the GATT 1994, not under the NAFTA.³⁵⁰

306. Second, Canada and Mexico assert, without support, that they are entitled to expect market access to the United States for their live cattle (and, in Canada’s case, also live hogs) that are related to the tariff concessions “that would apply, on an MFN basis, between Canada and the United States under the WTO Agreement.”³⁵¹ Even assuming *arguendo* that this claim can proceed, neither Canada nor Mexico specifically identify which tariff concession incorporated into the GATT 1994 (*i.e.*, granted under which round of multilateral trade negotiations) allegedly gives rise to the benefits that they claim have been nullified or impaired.³⁵²

B. Canada and Mexico Have Failed to Prove That They Could Not Have Reasonably Anticipated the United States Would Adopt Retail Country of Origin Labeling for Meat Products

307. To prove that they had a legitimate expectation that market access for their livestock products would be totally unaffected by COOL labeling requirements on the downstream meat products, Canada and Mexico must demonstrate that they could not have reasonably anticipated the COOL measures at the time the tariff concessions were negotiated. “If the measures were

³⁴⁸ (...continued)

The FSIS Final Rule, on the other hand has legal effect, but it simply adopts the requirements as established by AMS’s 2009 Final Rule for purposes of FSIS’ voluntary labeling regime without adding any substance.

³⁴⁹ Canada’s FWS, para. 237; Mexico’s FWS, para. 389.

³⁵⁰ See also DSU Article 1.1, which makes clear that the NAFTA is not a “covered agreement” (because it is not listed in Appendix 1 of the DSU), and DSU Article 26.1, which provides that “a panel or the Appellate Body may only make rulings and recommendations where a party to the dispute considers that any benefit accruing to it directly or indirectly *under the relevant covered agreement* is being nullified or impaired” (emphasis added).

³⁵¹ Canada’s FWS, para. 237; Mexico’s FWS, para. 389.

³⁵² Paragraph 1(b)(i) of the GATT 1994 provides that the GATT 1994 includes the provisions of protocols and certifications relating to tariff concessions that entered into force under the GATT 1947 before the date of entry into force of the WTO Agreement.

anticipated, a Member could not have had a legitimate expectation of improved market access to the extent of the impairment caused by these measures.”³⁵³ Moreover, the burden of proof for a claim concerning concessions made many years ago “must be all the heavier inasmuch as the intervening period has been so long.”³⁵⁴

308. As the United States has noted, imported meat, along with a host of other agricultural and non-agricultural goods, has been required to be labeled at the retail level with its country of origin since 1930, decades before the conclusion of the Uruguay Round or the NAFTA.³⁵⁵ Given that long history, Canada and Mexico should have reasonably anticipated that the United States would maintain some kind of country of origin labeling on meat products when the tariff rates were negotiated. Instead, Canada and Mexico assert, without providing any further evidence or justification, that “the extent of restrictions” on market access resulting from the COOL measures (not the COOL measures themselves) could not have been reasonably expected.³⁵⁶

309. To the extent that Canada and Mexico are implying that they could not have reasonably anticipated that the United States would modify or supplement its existing country of origin labeling requirements for meat products since the Uruguay Round or in exactly what way the United States might have modified or supplemented these requirements during these intervening years, such argument is incorrect. As noted above, for at least the last 40 years, since the 1960s, the U.S. Congress has contemplated various pieces of legislation that would have required additional requirements for country of origin labeling for meat at the retail level.³⁵⁷ Moreover, several of these bills contained requirements to label meat derived from imported livestock with country of origin information similar to the requirement contained in the COOL measures ultimately adopted.³⁵⁸

310. In addition, many other WTO Members have required country of origin labeling for various products (including meat) for many years.³⁵⁹ Indeed, for over 50 years, GATT parties, and now WTO Members, have recognized the importance and the practice of labeling products with their country of origin.

311. Thus, both the United States’ own long history of labeling laws and policy discussion on meat and other products, as well as the proliferation of similar labeling regimes by other WTO Members, prior to the time the Uruguay Round was concluded, “could not do other than create a climate which should have led [Canada and Mexico] to anticipate a change in the attitude of the importing countries” towards embracing more origin information being disclosed to consumers at

³⁵³ *Japan – Film*, para. 10.76.

³⁵⁴ *EC – Asbestos (Panel)*, para. 8.292.

³⁵⁵ See para. 18, *supra*.

³⁵⁶ Canada’s FWS, para. 239, Mexico’s FWS, para. 390 (noting it is “arguable” whether certain regulations on country of origin labelling could have been reasonably anticipated when the tariff rates were negotiated).

³⁵⁷ See para. 25, *supra*.

³⁵⁸ See, e.g., Exhibit CDA-9.

³⁵⁹ See note 14, *supra*.

the retail level.³⁶⁰ Particularly in light of the many years that have elapsed since the Uruguay Round, Canada and Mexico “could not assume that, over such a long period, there would not be” changes to the U.S. labeling regime with the risk that meat products derived from imported livestock would have to be labeled.³⁶¹

312. Accordingly, Canada and Mexico have not demonstrated they could not have reasonably anticipated the COOL measures. Consequently, their Article XXIII:1(b) claim must fail.

C. Canada and Mexico Have Not Shown That the COOL Measures Have Nullified Or Impaired the Competitive Position of Imported Livestock

313. In addition to establishing both the application of the relevant measure and a legitimate expectation of a benefit accruing to them, Canada and Mexico must further demonstrate that benefits provided to their imported livestock under the relevant tariff concessions have been nullified or impaired. Accordingly, the complaining parties must prove “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.³⁶²

314. As explained in the context of TBT Article 2.1, Canada and Mexico, other than submitting flawed and unverifiable economic models, 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.

315. As discussed previously, the global recession, animal diseases, the impact of higher feed prices, and currency fluctuations, among other factors, have all exerted a serious impact on the economic vitality of the integrated United States and Canadian livestock markets as well as the United States and Mexican livestock markets, which were also highly influenced by weather conditions. The United States and Canadian hog markets were affected by similar factors in addition to the contraction in the United States and Canadian hog industries due to overproduction associated with the excess supply of breeding hogs.

³⁶⁰ *EC – Asbestos (Panel)*, para. 8.297.

³⁶¹ *Cf. EC – Asbestos (Panel)*, para. 8.292 (noting that “it is for Canada to present detailed evidence showing why it could legitimately expect the 1947 and 1962 concessions not to be affected and could not reasonably anticipate that France might adopt measures restricting the use of all asbestos products 50 and 35 years, respectively, after the negotiation of the concessions concerned. . . . Indeed, it is very difficult to anticipate what a Member will do in 50 years time. It would therefore be easy for a Member to establish that he could not reasonably anticipate the adoption of a measure if the burden of proof were not made heavier.)

³⁶² *Japan – Film*, para. 10.82.

316. Consequently, neither Canada nor Mexico has met its burden of proof to demonstrate, with the required “detailed justification” and with clear and solid evidence, that it has suffered a nullification or impairment of benefits “as a result of the application of” the COOL measures.

VIII. CONCLUSION

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

LIST OF EXHIBITS

- Exhibit US-1 Especificaciones Generales de Etiquetado para Alimentos y Bebidas no Alcohólicas Preenvasados-Información Comercial y Sanitaria, Primera Sección, PROY-NOM-051-SCFI/SSA1, Diario Oficial de la Federación [D.O.], 26 de Agosto de 2009 (Mex.)
- Exhibit US-2 Meat Inspection Act, R.S., C-25 (1st Supp.) (1985) (Can.)
- Exhibit US-3 Meat Inspection Regulations, SOR/90-288 (1990) (Can.)
- Exhibit US-4 Letter from the Consumers Union to USDA (Aug. 20, 2007)
- Exhibit US-5 Letter from Consumer Federation of America to USDA (Aug. 20, 2007)
- Exhibit US-6 “Supreme Court Invalidates Consumer Protections,” 113th Cong. Rec. 1118 (daily ed. Jan. 23, 1967)
- Exhibit US-7 H.R. 5395, 96th Cong. (1st Sess. 1979) (introduced by Rep. Berkley Bedell)
- Exhibit US-8 Federal Meat Inspections Act of 1987, H.R. 2920, 100th Cong. (1st Sess. 1987) (introduced by Rep. Thomas Lewis)
- Exhibit US-9 “Country-of-Origin Labeling for Imported Meat and Other Food Products,” 134th Cong. Rec. D669 (daily ed. Sep. 27, 1988) (Committee on Ways and Means Hearing Notice)
- Exhibit US-10 “Country of Origin Labeling - Meat and Produce,” 145th Cong. Rec. D214 (daily ed. Apr. 28, 1999) (Committee on Agriculture Hearing Notice)
- Exhibit US-11 “Agriculture, Conservation, and Rural Enhancement Act of 2001,” Report of the Committee on Agriculture, Nutrition, and Forestry to Accompany S. 1731, S. Rep. No. 107-117, at 233 (2001)
- Exhibit US-12 “Food Energy Security Act of 2007,” Report of the Committee on Agriculture, Nutrition, and Forestry on S.2302, S. Rep. No. 110-220, at 198 (2007)

- Exhibit US-13 107th Cong. Rec. H1538 (daily ed. Apr. 24, 2002) (statement by Rep. John Thune)
- Exhibit US-14 110th Cong. Rec. S13761 (daily ed. Nov. 5, 2007) (statement by Sen. Charles Grassley)
- Exhibit US-15 “Inspection & Grading of Meat and Poultry: What Are the Differences,” USDA Fact Sheet (Aug. 22, 2008)
- Exhibit US-16 “National Summary of Meats Graded,” Calendar Year 2009, USDA (Jan. 22, 2010)
- Exhibit US-17 Letter from Public Citizen to USDA (Oct. 9, 2001).
- Exhibit US-18 Letter from Rosemary Mucklow, Executive Director of the National Meat Association, to USDA (Feb. 21, 2003)
- Exhibit US-19 Letter from Mexico to USDA (Feb. 23, 2004)
- Exhibit US-20 Letter from Nebraska Cattlemen to USDA (Apr. 7, 2003)
- Exhibit US-21 Letter from the American Frozen Food Institute, Grocery Manufacturers Association of America, and National Food Processors Institute to USDA (Apr. 8, 2003)
- Exhibit US-22 Letter from the Canadian Pork Council to USDA (Apr. 9, 2003)
- Exhibit US-23 Letter from Australia to USDA (Dec. 24, 2003)
- Exhibit US-24 “Review Mandatory Country of Origin Labeling,” 108th Cong. Rec. D551 (daily ed. Oct. 1, 2003) (Committee on Agriculture Hearing Notice)
- Exhibit US-25 Letter from Canada to USDA (Sep. 5, 2008)
- Exhibit US-26 Committee on Technical Barriers to Trade, *United States Notification of Addenda*, G/TBT/N/USA/281/Add.1, (Aug. 7, 2008)
- Exhibit US-27 Letter from Canada to USDA (Aug. 14, 2007)

Exhibit US-28	Economic Data re: Cattle, Hog, Beef, and Pork Sectors of Canada, U.S. and Mexico
Exhibit US-29	Charts re: Shares of US Beef from Imported Canadian Cattle
Exhibit US-30	Charts re: United States, Canada and Mexico Import and Export Prices, Inventories
Exhibit US-31	BSE Timeline of Events
Exhibit US-32	Table, "Events preceding low points in Canada-U.S. fed cattle price differentials post-2003"
Exhibit US-33	World Agricultural Supply and Demand Estimates, USDA (July 9, 2010)
Exhibit US-34	Articles re: Tick Infestation Along US-Mexico Border
Exhibit US-35	New Zealand Lamb Cooperative, Inc. (USA), "About New Zealand Lamb," <i>available at</i> http://www.nzlamb.com/content/about.html (accessed July 28, 2010)
Exhibit US-36	The Australian Lamb Company – USA and Canada, "Opal Valley," <i>available at:</i> http://australianlamb.com/opalvalley/index.html (accessed July 28, 2010)
Exhibit US-37	"Top 30 Beef Packers," Cattle Buyers Weekly
Exhibit US-38	Commercial Hog Slaughter, Source: USDA
Exhibit US-39	"Protocol for the Importation of Cattle or Bison from Canada," National Center for Import and Export, USDA, APHIS, Veterinary Services (Nov. 2007)
Exhibit US-40	Image of Marking on Canadian Cow Prior to COOL Measures
Exhibit US-41	Livestock and Poultry: World Markets and Trade, USDA, Apr. 2010
Exhibit US-42	Modeling the Impact of Country of Origin Labeling Requirements on U.S. Imports of Livestock from Canada and Mexico, USDA Office of

the Chief Economist

- Exhibit US-43 Assessment of the Informa Report and Sumner Studies, USDA Office of the Chief Economist
- Exhibit US-44 OECD, OECD Guiding Principles for Regulatory Quality and Performance (2005)
- Exhibit US-45 OECD, Recommendation of the Council of the OECD on Improving the Quality of Government Regulation (adopted Mar. 9, 1995)
- Exhibit US-46 *The New Shorter Oxford English Dictionary* (4th ed. 1993), p. 2565
- Exhibit US-47 Agricultural Products Import Share Data, Source: USDA Economic Research Service
- Exhibit US-48 107th Cong. Rec. S4024 (May 8, 2002) (statement by Senator Tim Johnson)
- Exhibit US-49 Letter from Vicki Allbritten to USDA (Oct. 4, 2001)
- Exhibit US-50 *The New Shorter Oxford English Dictionary* (4th ed. 1993), p. 1039
- Exhibit US-51 *The New Shorter Oxford English Dictionary* (4th ed. 1993), p. 2569
- Exhibit US-52 *The New Shorter Oxford English Dictionary* (4th ed. 1993), p. 1895
- Exhibit US-53 Letter from Peter D. Sutherland, Director-General of the GATT to Ambassador John Schmidt, Chief U.S. Negotiator (December 15, 1993)
- Exhibit US-54 Labeling of Prepackaged Foods (CODEX STAN 1-1985)
- Exhibit US-55 U.S. Consumption of Fresh and Processed Pork and Beef at Home and Away From Home, USDA Economic Research Service
- Exhibit US-56 James Rude, Jared Carlberg, and Scott Pellow, "Integration to Fragmentation: Post-BSE Canadian Cattle Markets, Processing Capacity, and Cattle Prices," *Canadian Journal of Agricultural Economics* 55 (2007), 197-216.