

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

(DS384/DS386)

**Executive Summary of the
Second Written Submission
of the United States of America**

November 18, 2010

I. INTRODUCTION

1. Canada and Mexico's core claims in this dispute are predicated on three basic factual and legal fallacies: first, that the U.S. COOL measures were a response to protectionist demands rather than consumers' desire for information about where their food comes from; second, that the U.S. *measures* discriminate against imports because *some* U.S. processors allegedly *chose* to modify their handling of imported livestock; and third, that the measures adversely affected imports. Consumers overwhelmingly demanded the COOL measures, these measures do not discriminate against imports, and – given current trade volumes and import prices – it cannot be the case that the measures have resulted in significant additional costs on imports.

2. In their oral statements, Canada and Mexico have introduced a fourth fallacy: that accepting their arguments would *not* require the conclusion that most – and perhaps all – mandatory country of origin labeling regimes maintained by WTO Members are inconsistent with the WTO agreements. In fact, notwithstanding the fact that both complaining parties maintain labeling laws of their own, were Canada and Mexico's arguments accepted, it is difficult to conceive of a mandatory country of origin labeling system that would be found WTO-consistent.

3. In particular, Canada and Mexico would have the Panel believe that the U.S. COOL measures are “more trade restrictive than necessary” because they require retailers to provide too much information about the meat that they sell – but at the same time that they do not fulfill their legitimate objective because the amount of information that they provide is not enough. Putting aside that many of the flexibilities and exceptions contained in the measures were added at the request of the complaining parties, accepting their arguments would put all WTO Members with country of origin labeling laws in an impossible position.

4. The Panel should reject Canada and Mexico's attempts to turn the question of whether a Member's measures comply with TBT Article 2.2 into a re-evaluation of every choice the Member made in the process of developing a complex regulatory regime. Designing a technical regulation necessitates difficult choices, especially when balancing the views of numerous interested parties, such as U.S. consumers and trading partners. The Panel need not – and should not – stand in the shoes of the regulator and attempt to re-calibrate the balance that was struck. Rather, all the Panel need determine is whether the U.S. measures, as designed, fulfill their legitimate objectives at the level the United States considers appropriate without restricting trade more than is necessary.

5. Likewise, the labeling systems that Canada and Mexico put forward as “reasonably available alternatives” to the U.S. regime – if accepted as such – would call into question the WTO-consistency of the origin labeling requirements maintained by nearly half of the WTO membership. Were the Panel to accept voluntary labeling as a reasonably available alternative, and ergo one that fulfills the consumer information objective at the same level as a mandatory regime, it would raise doubts about the systems of over 70 WTO Members who maintain mandatory origin labeling requirements. Similarly, finding that labeling based on substantial transformation is a reasonably available alternative would suggest that the labeling requirements of many of these same Members who do not base their origin designations on substantial transformation principles, may likewise be inconsistent with TBT Article 2.2.

II. THE PANEL SHOULD ANALYZE THE DIFFERENT U.S. INSTRUMENTS SEPARATELY FROM EACH OTHER

6. Given the differences between the instruments that Canada and Mexico challenge in this dispute, and the fact that some have been superseded, are not acts attributable to the United States, or do not create binding legal obligations, the Panel should reject Canada and Mexico's attempt to characterize the instruments at issue as a single “COOL measure.” By glossing over these substantive differences – differences which, among other things, have implications for how the

obligations at issue apply – Canada and Mexico avoid making their case with regard to each instrument that is the subject of the dispute. Further, the previous WTO reports that Canada cites in support of the proposition that the Panel should consider the instruments as a single measure are inapposite.

7. Unlike the 2009 Final Rule and COOL statute, the Vilsack Letter is not mandatory and has no legal status. The fact that the Vilsack Letter is not mandatory and not a technical regulation is confirmed by the text of the letter itself, which clearly identifies the suggestions as “voluntary” in four separate instances, as well as the industry’s decision not to follow the Vilsack Letter. Canada and Mexico ignore the text of the letter and are unable to adduce any evidence to show that industry is following the Vilsack Letter’s suggestions.

8. Due to significant differences between the COOL statute and the 2009 Final Rule, these instruments should be examined as separate measures. The COOL statute establishes the framework for U.S. COOL requirements, but requires separate implementing regulations to provide necessary details before any requirements could take effect. For example, for muscle cuts of meat, the 2009 Final Rule provides necessary details about what is included on each label and specifies when there is flexibility between the different labels. The 2009 Final Rule also defines many key terms and establishes the final record keeping requirements. These details are relevant to Canada and Mexico’s legal and factual arguments, and thus, these two instruments should not be examined together. It is also worth noting that Canada and Mexico have never explained how the COOL statute breaches U.S. WTO obligations, separate and apart from the 2009 Final Rule; thus, they have failed to make a *prima facie* case with regard to this measure.

9. The Interim Final Rule no longer exists under U.S. law and has been replaced by a 2009 Final Rule that contains substantively different provisions. Further, the Interim Final Rule did not exist at the time when the Panel was established. With regard to the FSIS Interim Rule and FSIS Final Rule, Mexico has failed to make a *prima facie* case with regard to either instrument. The FSIS Final Rule is a distinct legal instrument from the 2009 Final Rule and COOL statute, yet Mexico has not even attempted to explain how this instrument is inconsistent with U.S. WTO obligations. Further, the FSIS Interim Rule no longer exists. And contrary to new assertions advanced by Canada, an alleged statement in a meeting that was held between Representative Collin Peterson and the U.S. industry and USDA clarification documents are not a “measures”. Representative Peterson’s statements are not an “act or omission” of the United States and the USDA clarification documents have no status under U.S. law. Moreover, neither Canada nor Mexico identified either as measures in their consultations or panel requests; thus, they are not within the Panel’s terms of reference.

III. NONE OF THE COOL MEASURES BREACH TBT ARTICLE 2.1 OR GATT ARTICLE III:4

10. Canada and Mexico have failed to demonstrate that any of the COOL measures breach TBT Article 2.1 or GATT Article III:4. These provisions obligate Members to ensure that its measures do not accord imported products “less favorable treatment” than like products of national origin.

11. Based on past WTO reports, Canada and Mexico’s arguments that the COOL measures breach TBT Article 2.1 or GATT Article III:4 must fail. The COOL measures do not treat domestic and imported like products differently. Rather, they require retailers to label all covered meat commodities at the retail level, regardless of whether they are derived from imported animals or not, and the exact same record keeping requirements apply to imported livestock as domestic livestock. In addition, to the extent that Canadian and Mexican livestock have experienced any detrimental effects, these effects are not attributable to the origin of the livestock and are not attributable to the

COOL measures. Any detrimental effects can be attributed to external factors, such as Canada and Mexico's limited market share, the economic downturn, and the independent decisions of private market actors on how to respond to the COOL measures.

12. In arguing to the contrary, Canada and Mexico misapply both the *Korea – Beef* and *Dominican Republic – Cigarettes* reports. The measures in *Korea – Beef* required separate distribution channels based on origin, whereas the measures here do not. Unlike in *Korea – Beef*, the COOL measures do not restrict a processor's ability to process or a retailer's ability to sell all types of products together (for example, by commingling) as long as adequate records are maintained and accurate labels affixed to the product. Thus, the most that Canada and Mexico can allege is that U.S. processors have somehow responded to the COOL measures by processing different types of meat in different distribution channels; however, even if this were factually accurate, it does not establish a breach. The complaining parties also mis-characterize the Appellate Body's findings and the facts in *Dominican Republic – Cigarettes*, arguing that it is "not analogous because there is no dispute here over a single origin-neutral measure imposed equally on companies, some of which happen to be foreign and have a lower market share." Contrary to this assertion, the COOL measures apply equally to all companies, requiring slaughter houses to maintain adequate records and all retailers to label their products regardless of the origin of the product. Both domestic and foreign livestock must be tracked in some way to ensure that the resulting product is correctly labeled.

13. Contrary to Canada and Mexico's arguments, the COOL statute and 2009 Final Rule do not require segregation. By allowing for a single label to be used for meat derived from livestock with different origins, the commingling flexibility obviates the need for a slaughter house to segregate the livestock that it is processing. In addition, a slaughter house may comply with the COOL requirements and process muscle cuts without segregating by processing only livestock of foreign or domestic origin, or process domestic and mixed origin livestock on separate days, and on each given day label the resulting meat as appropriate.

14. Canada and Mexico's claims that the U.S. industry is not utilizing the commingling flexibility is directly refuted by their own evidence and other evidence obtained by the United States. For example, the Can Fax updates indicate that some U.S. slaughter houses are commingling and that at least 14 U.S. slaughter houses are accepting Canadian and Mexican animals. Similarly, the letter from the American Meat Institute indicates that approximately 5 percent of animals are being commingled and photographs taken around the country indicate that commingling is occurring as do industry affidavits and other information collected by USDA. As this indicates, U.S. slaughter houses have not found it cost prohibitive to use the commingling flexibility or to continue producing Category B meat.

15. Canada and Mexico also dramatically overstate the costs associated with segregation for slaughter houses and others who choose to segregate in response to the 2009 Final Rule. They ignore all of the pre-existing segregation programs that exist in the United States, including (1) USDA's grade labeling program; (2) private premium label programs; (3) export market requirements for at least 22 countries; (4) animal production and raising label programs. U.S. processors and others in the supply chain have long segregated for these purposes and thus have developed synergies that can be applied to any segregation done in response to the COOL measures. If the cost of segregation was as high as Canada and Mexico assert, and segregation was truly the only way that U.S. slaughter houses could comply with the COOL measures, then there is no reason that U.S. feed lots and slaughter houses would ever continue to accept Canadian and Mexican livestock. Yet, the export numbers tell a different story. Over the first eight months of 2010,

Canadian cattle exports are up 7.5 percent and Mexican cattle exports are up 29 percent over last year's levels.

16. These export numbers contradict the picture of economic distress that Canada and Mexico have attempted to paint during this dispute. Canada and Mexico have presented “evidence” that some U.S. feedlots and slaughter houses have limited their purchase of Canadian and Mexican livestock, but the most this evidence can prove is that some processors have made the independent decision to modify their business practices after the COOL measures were enacted in a way that is detrimental to some Canadian and Mexican livestock. None of these decisions were required by the COOL measures, and indeed, as the United States explained, there are numerous options for these entities to comply with COOL without changing their sourcing patterns.

17. Not only is Canada and Mexico's evidence of little relevance from a legal standpoint, but much of it is inaccurate. Mexico's claim that the number of feed lots accepting their feeder cattle has declined from 24 to 3 is directly contradicted by evidence on the ground: not all of the 24 facilities that Mexico identifies accepted their cattle in the first instance and more than 3 are accepting their cattle now. Similarly, Canada's claim that none of the 12 slaughter houses are accepting Canadian origin livestock without limitations is not substantiated by any evidence that Canada has submitted and is actually refuted by Exhibit CDA-41.

18. Canada and Mexico attempt to downplay the increase in their exports during 2010 in various ways. For example, Canada argues that although exports have risen significantly in 2010, their market share has decreased. However, as Canada indicates “looking at market share alone is deceptive” because it captures larger trends in the U.S. market that have nothing to do with Canadian imports. Regardless, if one were to believe that market share were a reliable indicator, Canada and Mexico's share of the U.S. market remains at levels consistent with their historical averages. Second, Canada points out that although its exports of cattle have increased in 2010, its hog exports have not rebounded, but Canadian hog exports are declining for reasons that have nothing to do with the COOL measures; namely Canada's rapidly declining hog inventories fully explain the decline in Canada's exports.

19. Canada and Mexico also both attempt to minimize the export data by focusing on price data, but Canadian and Mexican livestock prices are at high levels. The price paid for Canadian slaughter cattle is up 15.3 percent while the price being paid for Canadian feeder cattle is up 18.9 percent. These price increases are higher than the increase in the prices for U.S. feeder and slaughter cattle, indicating that Canadian animals are not being discounted due to the COOL measures. The price paid for Mexican feeder cattle and Canadian hogs have also risen significantly, directly contradicting claims by Mexico that the COOL measures have resulted in discounting.

20. To the extent that there has been any negative impact on Canadian and Mexican cattle exports in recent years, it is not due to the COOL measures. While the COOL measures were being implemented, the world was in the throes of a global economic recession. As a result, it would have been a major surprise had Canadian and Mexican livestock exports and prices not declined. Consistent with these expectations, a USDA analysis that examined the decline in Canadian and Mexican exports in 2008 and 2009 concluded that the economic recession is more likely the cause of the temporary decline than the 2009 Final Rule.

IV. NONE OF THE COOL MEASURES BREACH TBT ARTICLE 2.2

21. Canada and Mexico have failed to demonstrate that the COOL statute or 2009 Final Rule breach TBT Article 2.2. This provision prohibits technical regulations from being “more trade restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment

would create.” Article 2.2 does not prohibit all technical regulations that create obstacles to trade, rather only those that create “unnecessary obstacles.” The text of Article 2.2, interpreted in light of the relevant context provided by the preamble to the TBT Agreement, permits WTO Members to adopt measures to achieve legitimate objectives at the levels they consider appropriate. Thus, WTO Members who adopt measures to achieve the same or similar objectives need not design these measures in the exact same way. They are permitted to design their measures in the way that best suits their objectives as long as they are not more trade restrictive than necessary.

22. Past Appellate Body reports that have interpreted SPS Article 5.6 provide useful insights for the interpretation of TBT Article 2.2 based on the textual similarities between the provisions, the similarities between the TBT and SPS Agreements themselves, and a letter from the Director-General of the GATT to the Chief U.S. Negotiator confirming that TBT Article 2.2 should be interpreted similarly to SPS Article 5.6. Thus, to prove that any of the COOL measures are inconsistent with TBT Article 2.2, Canada and Mexico must first show that the COOL measures restrict trade. If the complaining parties make this showing, then the Panel may examine whether the measures in question are “more trade restrictive than necessary” in the sense that: (1) there is another measure that is reasonably available to the government, taking into account economic and technical feasibility; (2) that measure fulfills the legitimate objective at the level that the United States has determined is appropriate; and (3) is significantly less trade restrictive.

23. In conducting the “more trade restrictive than necessary” analysis, it would not be appropriate to apply the same interpretive approach panels and the Appellate Body have undertaken in connection with the word “necessary” as it appears in GATT Article XX. The term “necessary” there is used in a different context than in TBT Article 2.2. Further, there is no textual basis to apply the panel and Appellate Body’s interpretive approach to GATT Article XX to Article 2.2 of the TBT Agreement.

24. Providing consumer information about origin and preventing consumer confusion are legitimate objectives under TBT Article 2.2. Neither complaining party has directly challenged the U.S. assertion that providing consumer information about origin and preventing consumer confusion are legitimate objectives and many of the third parties have acknowledged that they are. The legitimacy of these objectives is supported by their connection to the prevention of deceptive practices, which also relates to ensuring that consumers in the territory of the WTO Member are not misled or mistaken about the products they buy, whether about the product’s origin or some other product characteristic. Other WTO Members have also recognized the connection between country of origin labeling and the prevention of deceptive practices as evidenced by their TBT notifications, including Colombia, the EU, and Korea. Finally, the strong consumer support for country of origin labeling in the United States and internationally and the fact that many WTO Members have notified their country of origin labeling requirements to the TBT Committee, identifying their objective as consumer information, supports the legitimacy of these objectives.

25. U.S. consumers and consumer organizations widely support country of origin information on the food products they buy at the retail level. Nearly all the leading U.S. consumer organizations have expressed support for country of origin labeling for consumer information purposes and to prevent consumer confusion. For example, the Consumers Federation of America (CFA) indicated that it “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.” In a joint letter with the National Consumers League and Public Citizen, two other leading U.S. consumer organizations, CFA wrote that “[w]ithout country-of-origin labeling, these consumers are unable to make an informed choice between U.S. and imported products. In fact, under the Agriculture

Department's grade stamp system, they could be misled into thinking some imported meat is produced in this country." Similarly, the Consumers Union wrote that "it is clear that consumers desire to know where their food is coming from." Individual U.S. consumers have also expressed strong support for country of origin labeling in order to provide consumer information and prevent consumer confusion.

26. The support of pro-consumer organizations for country of origin labeling for consumer information purposes is not confined to the United States. In 2008, the Trans Atlantic Consumer Dialogue ("TACD"), a forum of 27 U.S. consumer organizations, 49 EU consumer organizations, and 3 observer organizations from Canada and Australia, adopted a resolution on country of origin labeling stating that "consumers have repeatedly and overwhelmingly expressed their support for country of origin labeling of food products both in the United States and in European countries." Numerous domestic and international polls also indicate strong consumer support for mandatory country of origin labeling.

27. Providing consumer information about origin and preventing consumer confusion are indisputably the objectives of the COOL measures. To determine the objective of the U.S. measures, the Panel should start with their text and may consider their design, architecture, and structure. The 2009 Final Rule states: "the intent of the law and this rule is to provide consumers with additional information on which to base their purchasing decisions." The design, architecture, and structure of the COOL measures reinforce the fact that these are their objectives, with both the statute and 2009 Final Rule structured around the requirement that retailers provide country of origin information to consumers on the covered commodities they buy at the retail level. At the same time, the measures prevent consumer confusion by requiring retailers to list more than one country when an animal was not exclusively born, raised, and slaughtered in the United States.

28. To the extent that the Panel considers the legislative history relevant, it confirms that the objective of COOL measures is consumer information and the prevention of consumer confusion. The conference reports accompanying the statute clearly indicate that it was enacted with the objective of providing consumers with information about origin and the floor statements of the legislators involved with the enactment of the statute indicate that the objective of the measure was consumer information and the prevention of consumer confusion. As one example, Representative John Thune 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. Second, ranchers deserve to have their product clearly identified. Third, current law creates a false impression about the origin of USDA grade meat..."

29. The numerous changes made to the implementing regulations to reduce the costs of compliance for foreign and domestic producers also demonstrate that the U.S. objective was not protectionism. After all, it would not have made these changes to help reduce compliance costs if its objective were to protect the domestic industry. Certain changes to the Interim Final Rule – such as the clarification in the 2009 Final Rule that Category B labels cannot be used on Category A meat that is not commingled – are not evidence of protectionism either. To the contrary, these changes were made at the request of U.S. consumer organizations, such as Food & Water Watch and others.

30. To the extent that U.S. consumers, the domestic industry, or Members of Congress expressed a desire to enact the COOL measures to help U.S. farmers through the enactment of the COOL measures, their advocacy was premised on a desire to help U.S. farmers differentiate their products from their competitors, not as a form of protectionism. For example, one U.S. consumer wrote: "American farmers and ranchers produce a superior product and they deserve the right to receive credit for their efforts. Label it and let the market decide." Similar points were echoed by

the U.S. producers groups and Members of Congress, all of whom noted a desire to increase competition by providing this information with the hope that the U.S. products would fare well in a competitive market. Thus, it is incorrect to construe the support of the U.S. domestic industry or the support of those that indicated they wanted to help the domestic industry as a protectionist motive. Rather, country of origin labeling was intended to help these producers respond to consumer demand and differentiate their products in a competitive market place, a legitimate motive.

31. The COOL statute and 2009 Final Rule fulfill the legitimate objectives of providing consumer information and preventing consumer confusion at the level that the United States considers appropriate. They have provided millions of consumers with information that was not previously available to them. With regard to meat, these measures ensure that consumers are provided with information about all of the countries in which an animal that was slaughtered in the United States was born and raised.

32. Of course, the United States could have designed the measures to provide even more information to consumers than they currently do. The United States could have required point of production labeling for meat products, could have omitted any flexibility between the use of different labels, and could have omitted certain exemptions. If the United States had designed its measures in this way, consumers would have even more information. However, the United States did not do this. Rather, it responded to the concerns raised by interested parties – including Canada and Mexico – during the regulatory process and sought to design its measures so that they achieved their objectives at a reduced cost of compliance.

33. These efforts by the United States do not demonstrate that the COOL measures do not fulfill their objectives. As a result of the 2009 Final Rule, most of the meat derived from animals born, raised, and slaughtered in the United States is accurately and appropriately being labeled as U.S. origin, consistent with the requests of U.S. consumers. The 2009 Final Rule also ensures that consumers who purchase Category B or C meat are informed of all of the countries in which at least one processing step occurred. Consumers who purchase Category D meat are also informed of that meat's country of origin. Although the commingling provisions may reduce the level of detail provided in certain circumstances, consumers will never be misled by commingled meat because meat will never be labeled as U.S. origin unless it was in fact derived from an animal born, raised, and slaughtered in the United States. Additionally, the COOL measures help resolve the confusion related to USDA grade labeling and FSIS's "Product of the USA" program by adopting a standard definition of U.S. origin meat that comports with consumer expectations and by adding an origin label to meat products so that the USDA grade label does not mislead the consumer into believing that the meat is derived from a U.S. origin animal when that is not the case.

34. Canada and Mexico's arguments, if accepted, would mean that no Member could adopt a labeling system and achieve its legitimate objective without covering every possible scenario in which a consumer buys food, and would make it extremely difficult to adopt commonsense flexibilities to help reduce compliance costs without jeopardizing the measure itself. At the same time, it would make it challenging to design a measure that is not more trade restrictive than necessary because a Member would always be required to cover every commodity and every scenario even if that particular Member did not believe that it was cost effective or desirable to do so. Additionally, the Member would not be able to adopt flexibilities even when it believes those flexibilities would reduce the overall burden without fear that those efforts would then be used against them in the WTO dispute settlement context as evidence of how the Member did not fulfill its objective. In this sense, Canada and Mexico's arguments illustrate the importance of ensuring that WTO Members are allowed to weigh costs and benefits in the design of their technical

regulations. Members must be able to make their own decisions on how to weigh competing interests and should not be discouraged from taking into account the views of interested parties or adopting flexibilities to meet the needs of those parties. Such an approach is entirely consistent with the TBT Agreement.

35. Thus, the Panel should reject Canada and Mexico's attempt to turn the question of whether a particular Member's labeling measure fulfills its objective into a question of whether that Member could have conceivably designed its measure in a different, and perhaps better way. Deciding how to design a technical regulation often necessitates difficult choices, especially when balancing the views of numerous interested parties, and it is quite possible that some parties might choose to make different choices than the United States did in this instance. Some Members might have chosen to err more on the side of consumer information while others might have decided to err on the side of reduced costs. Regardless, the Panel need not decide whether it would have been appropriate for the United States to lean more in one direction or the other as it attempted to weigh the views of interested parties such as Canada, Mexico, and U.S. consumers. Rather all the Panel must decide in this part of its analysis is whether the U.S. measures fulfill the U.S. objectives at the level the United States considers appropriate. And as the United States explained, the COOL statute and 2009 Final Rule do just that.

36. Canada and Mexico's arguments about the scope of the COOL statute and 2009 Final Rule also would implicate the labeling systems of many other WTO Members. Canada and Mexico argue that the COOL measures are both protectionist and fail to fulfill their objective because of the scope of the products covered and the exemptions that are included. Yet many other Members' labeling systems include similar characteristics. For example, Australia's mandatory labeling requirements apply to pork and fish but not to beef, chicken, or lamb. Australia's requirements also apply at the retail level, but exempt food sold in restaurants. The labeling requirements of Brazil, Colombia, Canada, and the EU, and Korea, among others, share similar characteristics with regard to scope and exemptions.

37. Canada and Mexico have failed to present any reasonably available alternatives to the U.S. COOL measures. A voluntary country of origin labeling system is a not a reasonably available alternative because it would not achieve the U.S. legitimate objectives at the level that the United States considers appropriate. In particular, a voluntary labeling system would not provide consistent and reliable country of origin information to consumers about the covered commodities that they buy at the retail level. This is clear from the fact that the United States proposed a voluntary labeling system, but this system was not followed by U.S. retailers. Most consumer organizations oppose voluntary labeling because they do not believe that it is effective in providing consumers with information. Accepting that voluntary labeling is a reasonably available alternative to mandatory labeling would raise doubts about mandatory labeling systems applied at the retail level by over 70 WTO Members.

38. A system based on substantial transformation is also not a reasonably available alternative; it would fail to achieve the U.S. legitimate objectives for at least three reasons. First, it would not provide any information about the multiple countries where an animal spent its life when it was not born, raised, and slaughtered in more than a single country, information that U.S. consumers and consumer organizations indicated was important to them. Second, it would perpetuate confusion about the origin of animals that were only in the United States for a short period of time before being slaughtered. Third, it would require a definition of origin that is at odds with the views of U.S. consumers and consumer organizations. Indeed, a recent Consumers Union poll confirms the fact that consumers do not support a definition of origin based on substantial transformation and

would find such a definition misleading. When asked how they would expect beef derived from a cow born and partially raised in Mexico before being sent to the United States to be fattened for two months and slaughtered to be labeled, 72 percent of consumers picked a definition other than substantial transformation. Given the lack of consumer support for such a definition of origin, it is clearly not a reasonably available alternative.

39. Finally, Canada and Mexico’s arguments that a country of origin labeling system must be based on substantial transformation is inconsistent with the country of origin labeling requirements adopted by many WTO Members, and thus, would call into question the WTO-consistency of these systems. Examples of labeling requirements that do not solely define origin using substantial transformation principles include: (1) Australia’s mandatory country of origin labeling requirements for all packaged foods and unpackaged fresh or processed fruit, vegetables, seafood and pork sold at retail; (2) Canada’s voluntary “Product of Canada” labeling requirements; (3) Colombia’s labeling requirements for honey; (4) the EU’s labeling requirements for beef sold at retail; (5) Japan’s labeling requirements for fresh food sold at retail; and (6) Korea’s labeling requirements for beef, pork, chicken, rice, and *kim chi*.

V. NONE OF THE COOL MEASURES BREACH TBT ARTICLE 2.4

40. Mexico has failed to meet its burden to show that any of the COOL measures breach TBT Article 2.4. To meet its burden, Mexico must first demonstrate that CODEX-STAN 1-1985 is a relevant international standard for the particular labeling requirements at issue in this dispute, which requires the standard in question to be an international standard and to bear upon or relate to the particular requirements at issue. Mexico has failed to meet its burden with regard to CODEX-STAN 1-1985 because it has not shown that it bears upon or relates to the labeling requirements for a significant number of products at issue in this dispute; namely, the COOL requirements as they apply to meat that is not pre-packaged. A significant portion of meat sold in stores covered by the COOL measures is not pre-packaged, which raises serious questions about whether CODEX-STAN 1-1985 is a relevant standard. Mexico appears to admit as much, conceding that “the standard does not apply to meat that is not prepackaged...”

41. Mexico has also failed to demonstrate that the CODEX standard is not an ineffective or inappropriate means of achieving the U.S. legitimate objectives. In this case, CODEX-STAN 1-1985 is both ineffective and inappropriate because it is based on substantial transformation. Thus, it does not fulfill the legitimate objectives of the United States for the reasons discussed in the preceding section.

VI. NONE OF THE COOL MEASURES BREACH TBT ARTICLE 12.3

42. Mexico has failed to meet its burden to demonstrate that any of the COOL measures breach TBT Article 12.3. The text of Article 12.3 requires the developed country Member to take account of a developing country Members’ needs *with a view* to avoiding unnecessary obstacles to trade, not to accept every recommendation presented by the developing country Member. Examined in the context of other provisions of the TBT Agreement, such as the most favored nation provisions, Article 12.3 does not require the developed country Member to treat the developing country Member more favorably than other similarly situated parties. Similar provisions in other agreements, such as SPS Article 10.1, may also provide relevant context and disputes concerning this provision may be instructive. In *EC – Biotech*, the panel found that the EC had not breached SPS Article 10.1 despite its failure to produce evidence suggesting it had taken Argentina’s needs as a developing country Member into account during the preparation and application of its measure.

43. Mexico has also failed to meet its burden to establish a violation of Article 12.3 of the TBT

Agreement. Mexico has not adduced any evidence to demonstrate that the United States did not take its needs into account, but rather implies that the burden is on the United States to show that it did. While the United States does not bear this burden as the responding party, the United States has repeatedly demonstrated the steps it took to take Mexico's concerns into account. For example: (1) USDA provided Mexico with multiple opportunities to comment on development of the COOL implementing regulations and took Mexico's concerns into consideration; (2) USDA held a briefing on the Interim Final Rule for embassy officials, including those from Mexico, who were provided the opportunity to share their views; (3) AMS individually met with officials from the Mexican Embassy to discuss the COOL rule making and took their views into account; and (4) the United States discussed the COOL rule making at meetings of the United States - Mexico Consultative Committee on Agriculture (CCA).

44. The United States also modified the COOL measures to address Mexico's concerns by significantly reducing the record keeping burden and introducing significant flexibility (such as commingling) into the 2009 Final Rule that has helped mitigate any potential impact on exports from Mexico. Although the United States did not adopt every single suggestion put forward by Mexico, TBT Article 12.3 does not require it to do so. Rather, a developed country developing a regulation is expected to balance developing country considerations against the views of other interested parties, such as consumers and retailers. In this instance, the United States weighed the views of all interested parties as it designed the 2009 Final Rule in a way that would provide consumer information without imposing an undue burden on foreign and domestic producers. Thus, even if Mexico had put forth information to show that the United States did not take account of its views, the information that the United States has put forth is sufficient to rebut it.

VII. NONE OF THE COOL MEASURES BREACH GATT ARTICLE X:3

45. Canada and Mexico have failed to demonstrate that any of the COOL measures breach GATT Article X:3. Both parties continue to focus on actions that are not the "administration" of the COOL measures. The meaning of the term "administer" is to "put into practical effect" or to "apply" the measures referred to in paragraph 1 of Article X:3. Contrary to Mexico's suggestion, the meaning of the word "administration" does not include all of the "steps, actions, or events that are taken or occur in relation to the making of an administrative decision." The Appellate Body explicitly rejected this interpretation, clarifying that "under Article X:3(a), it is the application of a legal instrument of the kind described in Article X:1 that is required to be uniform, but not the processes leading to administrative decisions, or the tools that might be used in the exercise of administration." Thus, Canada and Mexico's focus on the Vilsack Letter and the development of the 2009 Final Rule is legally inapposite. Neither action "puts into practical effect" or "applies" any of the COOL measures.

46. Canada and Mexico's arguments also lack any evidentiary support for the proposition that the U.S. administration has been non-uniform or unreasonable. The complaining parties have not produced any evidence to suggest that the COOL measures were not applied equally to all entities subject to their requirements or that the issuance of the Vilsack Letter or the development of the 2009 Final Rule were unreasonable. The Vilsack Letter was issued in accordance with a directive from the Obama Administration to review pending regulations while the development of the 2009 Final Rule proceeded in accordance with the normal U.S. rule making process. While the implementing regulations evolved, this is commonplace in a transparent system and many changes were made in response to comments received by Canada and Mexico to reduce the 2009 Final Rule's burden.