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

(DS384/386)

Second Written Submission
of the United States of America

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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 at issue in the dispute were a response to protectionist demands rather than consumers' genuine desire for more 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 in response; and third, that the measures adversely affected imports. As explained in previous submissions, and as will be discussed in further detail below, consumers overwhelmingly demanded the COOL measures, those measures did not discriminate against imports, and – given current trade volumes and import prices – it simply 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.[1] 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. For example, in their arguments under TBT Article 2.2, 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 for a moment that many of the flexibilities and exceptions to the labeling requirements contained in the 2009 Final Rule were added at the specific request of the complaining parties, accepting their arguments would put the United States and all other WTO Members with country of origin labeling laws in an impossible position. Canada and Mexico's arguments call into question any labeling system that does not provide detailed information in every scenario in which a consumer buys food without consideration to the cost of implementing such a system, while at the same time condemning the very same system for requiring businesses to take any steps at all to provide this information in the first place.

4. Indeed, it is for this very reason that 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 wholesale re-evaluation of every choice the Member made in the process of developing a complex regulatory regime. Designing a technical regulation, such as the 2009 Final Rule, necessitates difficult choices, especially when balancing the views of numerous interested parties, such as U.S. consumers and trading partners like Canada and Mexico. Some interested

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[1] Canada's Opening Oral Statement, para. 1 (stating that "[t]his case is not about country of origin labelling generally"); Mexico's Opening Oral Statement, para. 17 (stating that it is "not challenging mandatory country of origin labeling in general.").

parties advocated for a labeling system that provided more information, while others advocated for a system that was less costly. 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. Indeed, 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, including the laws of at least five of the third parties in this dispute who do not base their origin designations on substantial transformation principles, may likewise be inconsistent with TBT Article 2.2.

6. Returning to the three fallacies that have defined Canada and Mexico's arguments from the outset of this dispute, a few points merit emphasis. First, while Canada and Mexico persist in claiming that the U.S. objective in enacting the COOL measures was *not* to provide U.S. consumers with additional origin information on which to base their purchasing decisions, nor to prevent consumer confusion regarding the origin of the meat they buy at the retail level, the facts plainly demonstrate otherwise. Both the text of the measures as well as their design, and extensive evidence regarding the role that U.S. consumers and consumer organizations played in advocating for the adoption of the COOL measures – detailed later in this submission – demonstrate that the U.S. consumer was a central figure in the effort to adopt the COOL measures at issue.

7. It is difficult to overstate the role played by the U.S. consumers and consumer organizations both in the United States and abroad in the U.S. legislative and regulatory process that led to adoption of the measures at issue. All of the leading consumer organizations in the United States – the Consumers Union, the Consumers Federation of America, the National Consumers League, Public Citizen, and Food & Water Watch, among others – weighed in with the U.S. Congress and the U.S. Department of Agriculture, urging the United States to adopt the COOL measures and protect the interests of U.S. consumers. Thousands of individual U.S. consumers joined in the effort as well, blanketing the USDA with letters of support. These efforts were not just confined to the United States. In fact, the Trans - Atlantic Consumer Dialogue, a consortium of 76 U.S. and European Union pro-consumer organizations, joined by three observer organizations from Canada and Australia, passed a resolution specifically asking the United States to adopt a mandatory country of origin labeling regime.

8. Second, regarding Canada and Mexico's theory of discrimination, both continue to

advance the theory that the COOL measures somehow provide their imports with less favorable treatment despite the fact that they apply equally to domestic and imported products. Indeed all covered commodities – whether of domestic or some other origin – must be labeled at the retail level.

9. Third, not only do the complaining parties' *de facto* claims mis-characterize the actions of private market participants that are *not* required by the COOL measures as less favorable treatment attributable to the measure itself, but the facts on the ground simply do not support the conclusion that Canada and Mexico's livestock imports are being harmed in any way. To the contrary, U.S. feedlots and slaughter houses continue to accept Canadian and Mexican livestock at extremely high levels, and over the first 8 months of 2010, Canadian cattle exports to the United States are up 7.5 percent over last year, while Mexican cattle exports to the United States are up nearly 30 percent. Moreover, the price being paid for Canadian and Mexican livestock is rising considerably and stands at levels consistent with historical norms. Based on the evidence, Canada and Mexico's arguments regarding less favorable treatment simply cannot be sustained.

10. The arguments that Canada and Mexico make under other provisions of the WTO Agreements are equally unconvincing. Rather, as the United States will explain, the COOL measures fulfill their important legitimate objectives by ensuring that millions of U.S. consumers are now informed about the country of origin of the meat and other food products that they buy at the retail level, and they do so in a WTO-consistent manner.

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

11. As explained in the U.S. First Written Submission, given the substantive differences between the various instruments that Canada and Mexico challenge in this dispute, and the fact that some of these instruments 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 all of the instruments at issue as a single "COOL measure." By glossing over these substantive differences in their argument – 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. Furthermore, 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. Unlike the facts before the Appellate Body in *EC – Asbestos*, the so-called "measures" at issue are not contained in a single legal instrument. Contrary to the case in *Japan – Apples*, the facts and applicable obligations are not identical for each instrument.[2] Quite simply, neither the facts, nor the treaty text at issue, nor prior WTO panel or Appellate Body reports support findings on a so-called single "COOL

[2] Canada's Responses to the Panel's Questions ("Canada's Responses"), para. 1.

measure" in this case.[3]

A. The Vilsack Letter Is Substantively Different From the COOL Statute and 2009 Final Rule

12. While Canada and Mexico continue to argue that the Vilsack Letter is part of a single COOL "measure,"[4] unlike the 2009 Final Rule and COOL statute, the Vilsack Letter is not mandatory and has no legal status under U.S. law. In addition, the Vilsack Letter's voluntary suggestions are substantively different from the mandatory requirements imposed by the COOL statute and 2009 Final Rule. Any review of Canada's and Mexico's claims with respect to the Vilsack Letter would need to take into account these differences in its status under U.S. law and substantive content, and indeed these differences argue in favor of a separate examination altogether.

1. The Vilsack Letter is Not A Technical Regulation

13. The Vilsack Letter is not a technical regulation within the meaning of Annex 1 of the TBT Agreement. According to the TBT Agreement, technical regulations include documents that "lay down product characteristics or their related processes and production methods...with which compliance is mandatory."[5] The Vilsack Letter is not a technical regulation because compliance with its suggestions is not mandatory[6] – as 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.

14. With regard to the text of the letter, Canada and Mexico ignore the multiple references to "voluntary" suggestions, and attempt to rely on a statement in the Vilsack Letter that USDA will "carefully consider whether modifications to the rule will be necessary to achieve the intent of Congress."[7] Yet this statement does not support the conclusion that the letter is mandatory. As the United States noted in its Answers to the Panel's Questions, the Secretary was merely reiterating his existing authority, and indeed, such a statement is not atypical in correspondence

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[3] *Japan – Film*, para. 10.88-10.89; *Turkey – Rice Licensing*, para. 7.279-7.281.

[4] Canada's First Written Submission ("Canada's FWS"), para. 1, fn. 1; Mexico's First Written Submission ("Mexico's FWS"), para. 9.

[5] TBT Agreement, Annex 1.

[6] U.S. First Written Submission ("U.S. FWS"), para. 132-137.

[7] Canada's Responses, para. 12.

from U.S. heads of agencies.[8]

15. With regard to evidence of industry compliance, in their responses to a question from the Panel on the issue, neither Canada nor Mexico adduces any evidence to show that industry is following the Vilsack Letter's suggestions.[9] Rather than substantiate their assertions, Canada and Mexico claim that industry is following the Vilsack Letter's suggestion to include point of production labeling on meat products by producing Category A meat that *does not* include point of production labeling.[10] Not only is this answer contradictory and non-responsive to the Panel's question (Category A meat is not even mentioned in the Vilsack Letter), but it is factually inaccurate. U.S. slaughterhouses continue to process Category B meat[11] and numerous U.S. retailers continue to display Category B meat in grocery stores.[12] They do so in accordance with the 2009 Final Rule, notwithstanding the suggestions contained in the Vilsack Letter.

16. The letter from the American Meat Institute (AMI) that Mexico cites also does not support a conclusion that the letter is mandatory.[13] AMI's statement that "we anticipate that almost 95 percent of the beef and pork products eligible to bear a "Product of the USA" will bear

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[8] *See* U.S. Answers to the Panel's Questions ("U.S. Answers"), para. 8 and Exhibit US-63 (providing examples of other agency heads who have indicated that they will continue to monitor the implementation of a rule to determine whether additional action is necessary).

[9] Canada's Responses, para. 8-11; Mexico's Responses to the Panel's Questions ("Mexico's Responses"), para. 22-27.

[10] Canada's Responses, para. 8 (" The Vilsack Letter expressed concern about "the regulation's treatment of product from multiple countries" and in that regard urged point–of–production labelling of muscle cuts. This concern can be readily addressed by using only livestock that was born, raised and slaughtered in the United States and by selling only meat derived from such livestock. This is what happened in practice."); Mexico's Responses, para. 24 ("The least cumbersome and expensive way for the US industry to comply with the Vilsack letter is to entirely avoid using the B label. The evidence indicates that US processors have chosen to comply with the letter in that manner."). Neither Canada nor Mexico even attempt to make an argument that the industry is following the Vilsack Letter's other two suggestions.

[11] *E.g.*, Exhibit CDA-41 (indicating that 14 slaughter houses are processing Canadian and Mexican-origin livestock, or both); Canada's FWS, para. 114 (alleging that the number of slaughter houses accepting Canadian-origin cattle increased to nine), para. 115 (alleging that thirteen slaughter houses still accepted Label B Canadian-origin hogs); Mexico's FWS, para. 157 (alleging that three of the four major U.S. beef processors slaughter and process Mexican cattle at one of their plants).

[12] *E.g.*, Photographs of B label meat taken at Trader Joe's in Falls Church, Virginia (Oct. 17, 2010) (Exhibit US-94); Photographs of B label meat taken at Pick N' Save in Kenosha, Wisconsin (Oct. 18, 2010) (Exhibit US-95); Photograph of B label meat taken at Safeway in Washington, DC (Aug. 22, 2010) (Exhibit US-96); Photograph of B label meat taken at Trader Joe's in Bethesda, Maryland (Oct. 27, 2010) (Exhibit US-97); Photographs of B label meat taken at Walmart in Austin, Texas (Oct. 27, 2010) (Exhibit US-98).

[13] Mexico's Responses, para. 25.

such labeling"[14] does not refer to any of the Vilsack Letter's suggestions and does not support Mexico's claim that meat packers are shifting production from B to A label meat. To the contrary, the AMI letter actually shows industry's belief that a decision whether or not to follow the Vilsack Letter's voluntary suggestions is "an individual company's decision,"[15] and thus inherently voluntary. Further, its reference to the fact that 95 percent of meat eligible to bear an A label will receive that label simply indicates that most meat derived from animals, born, raised, and slaughtered in the United States will be labeled as such, not that AMI companies plan to shift production to A meat. In other words, AMI's statement indicates that 95 percent of meat derived from U.S.-origin animals will not be commingled with other types of meat and thus most A meat will be labeled U.S. origin. Nothing in this statement supports the conclusion that the Vilsack Letter mandates a particular course of action.

2. The Vilsack Letter Has No Status Under U.S. Law

17. Another substantive difference between the Vilsack Letter and the COOL statute and 2009 Final Rule is its status under U.S. law. While the 2009 Final Rule and COOL statute were adopted under the formal legislative and regulatory process for making law in the United States, and therefore, have legal significance, the Vilsack Letter has no such status. Rather, the Vilsack Letter reflects the decision of the Secretary of Agriculture to send a letter to industry to inform them of his decision to allow the 2009 Final Rule to go into effect as designed by the previous Administration (after being asked to review the regulation by the Obama Administration).[16] It does not require private actors to take any action in response and has no legal status under U.S. law. This difference also argues in favor of a separate examination.

3. The Vilsack Letter's Voluntary Suggestions Are Substantively Different From the COOL Statute and 2009 Final Rule's Mandatory Requirements

18. Not only does the Vilsack Letter differ from the COOL statute and 2009 Final Rule because it does not include any mandatory requirements and has no status under U.S. law, but the Vilsack Letter's suggestions are substantively different from the other measures' requirements:

- *Labeling for Muscle Cuts of Meat*: The Vilsack Letter recommends point of production labeling while the COOL statute and 2009 Final Rule do not. The United States dropped point of production labeling from the COOL statute and 2009 Final Rule in an effort to reduce the costs of compliance in response to

[14] Exhibit MEX-67.

[15] Exhibit MEX-67.

[16] U.S. Answers, para. 6-7.

comments received by Canada, Mexico, and other interested parties.[17]

- *Labeling for Ground Meat*: The Vilsack Letter recommends that retailers only list the name of a country on a label if raw material from that country was in the processor's inventory within the last 10 days, instead of 60 days as provided by the 2009 Final Rule. The United States adopted the 60 day requirement in order to reduce the costs of compliance for foreign and domestic interested parties.[18]

- *Definition of Processed Food*: The Vilsack Letter recommends adopting a narrower definition of processed food than required by the 2009 Final Rule. The United States adopted a fairly broad definition in the 2009 Final Rule in order to reduce compliance costs and based on the recommendations of interested parties.[19]

19. Thus, even apart from their legal differences (the fact that the Vilsack Letter is voluntary while the 2009 Final Rule and COOL statute are mandatory, and the Vilsack letter has no status under U.S. law), these basic factual differences support the conclusion that a separate analysis is warranted.

B. The COOL Statute and 2009 Final Rule Are Substantively Different and Should Be Examined Separately

20. Due to the significant substantive differences between the COOL statute and the 2009 Final Rule, these instruments should also be examined as separate measures. As the United States has noted, the COOL statute establishes the framework for U.S. country of origin labeling requirements for the covered commodities, but requires separate implementing regulations and the details to be provided in such regulations before any labeling requirement would actually be in effect.[20] The COOL statute leaves many decisions about the COOL requirements to the discretion of USDA and USDA used this discretion in the design of the 2009 Final Rule. The resulting differences are relevant to Canada and Mexico's legal and factual arguments, and thus these two instruments should not be examined together.

21. Among the issues that the COOL statute left to USDA to decide in the 2009 Final Rule are the following:

- *Muscle cuts of meat*: The COOL statute creates four categories for the labeling of

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[17] U.S. FWS, para. 73-75.

[18] U.S. FWS, para. 78.

[19] U.S. FWS, para. 79.

[20] U.S. FWS, para. 45.

muscle cuts of meat and indicates the circumstances in which products "may" be labeled with a Category A or B label. However, the statute does not specify the label in all cases nor does it require that a Category A or B label be used on all cuts of meat that meet their respective definitions, leaving to USDA the decision about when each specific label is required and when there may be flexibility between the different labels. The COOL statute also does not specify the order of countries to be listed on Category B meat and does not specify all the details on how to label Category D meat. These issues all needed to be resolved in USDA's rule making.[21]

- *Ground meat*: The COOL statute does not define the term "reasonably possible countries of origin," leaving this decision to USDA in the rule making.[22]

- *Processed food*: The COOL statute does not define the term "processed food" for purposes of the exemption, again leaving this decision to USDA in the rule making.[23]

- *Food service establishments*: The COOL statute does not define "other similar facilities" for purposes of determining what meets the definition of a "food service establishment"[24] and does not clarify the scope of the exception, such as what it means to be "offered for sale or sold at the food service establishment in normal retail quantities."[25]

- *Record keeping requirements*: The COOL statute does not specify the different ways in which a retailer or supplier may comply with the record keeping requirements.[26]

22. Although the 2009 Final Rule and COOL statute are not unrelated instruments, these substantive differences between them argue in favor of a separate examination. Further, when examining the COOL statute, it is worth noting that in this dispute, Canada and Mexico have never attempted to explain how the COOL statute breaches the U.S. WTO obligations, separate and apart from the 2009 Final Rule; thus, they have failed to make a *prima facie* case with regard

[21] 7 U.S.C. § 1638a(a)(2); 7 C.F.R. § 65.300.

[22] 7 U.S.C. § 1638a(a)(2)(E); 7 C.F.R. § 65.300.

[23] 7 U.S.C. § 1638(2)(B); 7 C.F.R. § 65.220.

[24] 7 U.S.C. § 1638(4); 7 C.F.R. § 65.140.

[25] 7 U.S.C. § 1638a(b)(2)(A); 7 C.F.R. § 65.140.

[26] 7 U.S.C. § 1638a(d)-(e); 7 C.F.R. § 65.500.

to this measure.

C. The Interim Final Rule No Longer Exists

23. The Interim Final Rule no longer exists as a matter of U.S. law – a fact that both Canada and Mexico acknowledge in their Responses to the Panel's Questions[27] – and it has been replaced by a 2009 Final Rule that contains substantively different provisions. Further, this measure did not exist at the time when the Panel was established.[28] An examination of this measure would not help achieve a satisfactory settlement of the matter at issue.

24. Mexico no longer argues that the Interim Final Rule is part of the COOL measure, but only that it provides supporting evidence to corroborate Mexico's claims about the implementation, operation, and administration of the 2009 Final Rule.[29] However, owing to the substantive differences between this instrument and the 2009 Final Rule, the Interim Final Rule does not provide evidence of the administration of the 2009 Final Rule.

25. Contrary to Canada's assertion that the 2009 Final Rule merely "carried forward" the contents of the Interim Final Rule with "minor modifications," the differences between the 2009 Final Rule and Interim Final Rule are quite significant.[30] Most notably, the 2009 Final Rule includes provisions to provide flexibility with regard to the use of B and C labels that did not exist under the Interim Final Rule. In particular, the 2009 Final Rule: (1) allows for a C label to be used on meat derived from a B animal in any circumstance;[31] and (2) allows for B and C labels to be used when Category A, B, and C animals are commingled within a single production day in any combination.[32] Neither flexibility existed in the Interim Final Rule. At the same time,

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[27] The Interim Final Rule was superceded by the Final Rule on March 16, 2009 and no longer exists. (U.S. FWS, para. 127) Canada and Mexico both acknowledge this fact. For example, Canada notes: "...the Interim Rule has expired..." (Canada's Responses, para. 5) Likewise, Mexico states: "Mexico agrees that the 2008 Interim Final Rules adopted by AMS and FSIS have been superceded by the 2009 Final Rules and therefore currently have no legal effect under US law." (Mexico's Responses, para. 8)

[28] The Panel was established on November 19, 2009.

[29] In para. 12 of its Responses, Mexico argues that "the 2008 Interim Final Rules are evidence of the implementation, operation, and administration of the COOL measure in a manner that unjustifiably discriminates against and restricts imports of Mexican cattle into the United States," citing to the Appellate Body report in *EC – Customs Matters* to distinguish between measures and evidence to substantiate claims and arguing that the 2008 Interim Rules are of the latter character.

[30] Canada's Responses, para. 3.

[31] Exhibit CDA-5, p. 2706.

[32] Exhibit CDA-5, p. 2706. Both of these changes were made at the request of the complaining parties or interested parties representing the relevant industries in the territory of the complaining parties. *See, e.g., "*Final Rule on COOL Should Maintain/Expand Flexibility Reflected in Interim Final Rule and USDA Guidance,"

as Canada and Mexico have pointed out, the 2009 Final Rule clarified that B labels could not be used on Category A meat when it is not commingled.[33] Other differences between the Interim Final Rule and the 2009 Final Rule include the following:

- different definition of key terms, such as "commingled covered commodities," "ground beef," "lamb," "pre-labeled," and "produced";[34]
- changes to labeling requirements to allow for additional abbreviations to be used to identify the country of origin in certain circumstances;[35]
- changes to the record keeping requirements to reduce the record keeping burden;[36]
- the inclusion of "safe harbor" language to protect retailers from fines when those retailers receive erroneous origin information from suppliers that they reasonably should have been able to rely upon as being accurate;[37] and
- the inclusion of a clarification that packers who slaughter animals not tagged with an official identification number or otherwise marked indicating that the country of origin is something other than the United States may use that information as the basis of making a U.S.-origin claim while also allowing packers who slaughter animals with a Canadian or Mexican ear tag to use that as the basis for verifying origin.[38]

D. Mexico Has Not Made a *Prima Facie* Case With Regard to the FSIS Interim

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document provided by the Canadian Pork Council to the United States at an OMB 12866 Meeting on COOL held on December 12, 2009 (Exhibit US-99). The Government of Canada also made similar requests to the United States.

[33] *E.g.*, Canada's Responses, para. 5. This change was made at the request of consumer groups, among other interested parties, who believed that meat derived from animals born, raised, and slaughtered in the United States should largely be labeled as U.S.-origin. *See* Letter from Food & Water Watch to USDA (Sept. 30, 2008) (Exhibit US-100) (stating that "it is extremely disappointing that the interim final rule seems to have provided a loophole for meatpackers who wish to use a more generic North American label...We believe this section runs contrary to what Congress intended and to what consumers and producers expect from this labeling program. [USDA] Secretary Schaefer recently told that National Association of State Departments of Agriculture that he supports a U.S. beef label. We hope that this support translates to a directive to AMS to revise this language...").

[34] Exhibit CDA-5, p. 2659.

[35] Exhibit CDA-5, p. 2659.

[36] Exhibit CDA-5, p. 2659-2660.

[37] Exhibit CDA-5, p. 2660.

[38] Exhibit CDA-5, p. 2660.

Rule or FSIS Final Rule

26. With regard to the FSIS Interim Rule and FSIS Final Rule referenced by Mexico in its definition of the "COOL measure," Mexico has failed to make a *prima facie* case with regard to either instrument. As the United States explained in its First Written Submission, the FSIS Final Rule is a distinct legal instrument from the 2009 Final Rule and COOL statute,[39] 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. Accordingly, if the Panel were to examine these instruments at all, the United States respectfully requests the Panel to find that Mexico has failed to make a *prima facie* case with regard to them.

E. Statements by Congressman Peterson and Other Congressional Representatives Are Not Measures

27. Contrary to a new assertion advanced by Canada in its Oral Statement, an alleged statement in a meeting that was held between Representative Collin Peterson and the U.S. industry is not a "measure" and should not be included in the Panel's analysis either.[40] The Appellate Body has described a measure as "any act or omission attributable to a WTO Member."[41] Assuming *arguendo* that what Canada alleges about the industry meeting with Representative Peterson is true, Representative Peterson's statements are not an "act or omission" of the United States. Representative Peterson is one member of the U.S. House of Representatives. He is not a member of the executive branch and cannot alter industry's legal obligations on his own. Under the U.S. system, a statement by an individual legislator has no legal force or effect. Thus, whatever Representative Peterson may have said at a particular meeting (Canada's claims in this regard are unsubstantiated), it would not be a "measure" of the United States. Moreover, neither Canada nor Mexico identified this statement as a measure in their consultations or panel requests,[42] and therefore, even aside from that fact that a statement at such a meeting cannot be considered a "measure," such a "measure" would not be within the Panel's terms of reference.

F. USDA's Clarification Documents Are Not Measures

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[39] U.S. FWS, para. 59.

[40] *See* Canada's Opening Oral Statement, para. 7 (arguing that "[t]he action by Collin Peterson, Chairman of the Committee on Agriculture of the U.S. House of Representatives, on September 17, 2008, where he instructed representatives of the U.S. industry not to use Label "B" for the majority of their products" forms an integral part of the COOL measure.).

[41] *US – Corrosion Resistant Steel Sunset Review (AB)*, para. 81.

[42] *See* WT/DS384/1/Add.1 (May 11, 2009); WT/DS386/1/Add.1 (May 11, 2009); WT/384/8 (Oct. 9, 2009); WT/DS386/7 (Oct. 13, 2009) and Corr. 1 (failing to identify a meeting between Representative Peterson and U.S. industry as a measure at issue in the dispute).

28. Also for the first time in its Oral Statement, Canada asserted that USDA's clarification documents are measures. Canada's position in this regard does not withstand scrutiny.[43] These documents have no status under U.S. law and were issued by USDA to help explain the requirements of the Interim Final Rule to interested parties so that they could provide comments on its contents and prepare for the implementation of the 2009 Final Rule after it was developed. Moreover, like the Interim Final Rule, these clarification documents are obsolete – they refer to an expired instrument that has been superceded by a substantively different 2009 Final Rule. Finally, like the meeting held by Representative Peterson, the USDA clarification documents were not identified by Canada as "measures" in its consultations or panel requests, and as such 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

29. Canada and Mexico have failed to demonstrate that any of the COOL measures breach the national treatment provisions of TBT Article 2.1 or GATT Article III:4. The COOL statute and 2009 Final Rule require that all covered commodities, including meat, be labeled with country of origin, regardless of what the particular country of origin may be. Therefore, the COOL measures do not provide less favorable treatment to imported products, but treat imports and domestic products identically.

30. Despite the fact that the COOL measures treat beef and pork equally regardless of origin, Canada and Mexico unpersuasively assert that these measures *de facto* distinguish based on origin and treat imported livestock less favorably than U.S. livestock.[44] However, these arguments are based on a flawed legal interpretation of the GATT 1994 and TBT national treatment provisions and a misapplication of the reasoning contained in past panel and Appellate Body reports that have examined the meaning of "less favorable treatment" within the context of Article III:4 of the GATT 1994. Further, the complaining parties' arguments are premised on a number of factual inaccuracies, both with respect to the COOL measures and market conditions for livestock and meat.

A. Canada and Mexico Misinterpret the Meaning of Past WTO Reports Regarding "Less Favorable Treatment" and Misapply These Reports in the Instant Dispute

31. Article 2.1 of the TBT Agreement obligates Members to ensure that technical regulations do not accord imported products "less favorable treatment" than like products of national origin. No WTO panel or Appellate Body report has interpreted the meaning of "less favorable treatment" in the context of TBT Article 2.1. As a result, Canada and Mexico rely on numerous

[43] *See* Canada's Opening Oral Statement, para. 7 (indicating that the USDA clarification documents form an integral part of the COOL measure).

[44] *E.g.,* Mexico's Opening Oral Statement, para. 22-24 ("The De Facto Nature of Mexico's Claims").

reports that have examined the meaning of this term in the context of Article III:4 of the GATT 1994,[45] although the texts of the two provisions differ. Furthermore, Canada and Mexico have overlooked key aspects of these reports in their attempt to demonstrate that the COOL measures provide less favorable treatment to their livestock.

32. As an initial matter it is important to recall the immediate context of Article III:4 of the GATT 1994, specifically Article III:1 of the GATT 1994. Article III:1 of the GATT 1994 states that internal laws, regulations and requirements affecting the internal sale of products "should not be applied to imported or domestic products so as to afford protection to domestic production." The Appellate Body has explained that Article III:1 sets out a general principle that "'informs the rest of Article III and acts 'as a guide to understanding and interpreting the specific obligations contained' in the other paragraphs of Article III, including paragraph 4"[46] and "[t]he broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures."[47] In the context of Article III:4, this general principle supports that Article III:4 should not be interpreted to prohibit measures that may result in some detrimental effect on imported products as compares to some like domestic products; instead, what Article III:4 prohibits is measures that afford less favorable treatment to imported products as compared to like domestic products based on origin. Measures that do not treat products differently based on origin, and for which the effects resulting from the measure are not a result of the origin of the product, are not measures that afford protection to domestic production.

33. In general, past WTO reports have found that a measure accords "less favorable treatment" to imported products within the meaning of GATT Article III:4 if it treats domestic products one way and provides different, less favorable treatment to imported like products. For example, the Appellate Body in *Korea – Beef* found that the Korean measure at issue provided different treatment to imported and domestic products by requiring them to be distributed through separate distribution channels.[48] After finding that the measures provided different treatment, the Appellate Body turned to examine whether this different treatment meant that imported products were treated less favorably by examining whether the measure "modified the conditions of competition in the Korean beef market to the disadvantage of the imported product."[49] The Appellate Body concluded that because the Korean measure itself imposed on retailers the "necessity of making a choice" between domestic and imported beef, it limited the

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[45] *E.g.*, *Korea – Beef (AB)*; *Dominican Republic – Cigarettes (AB); Mexico – Soft Drinks (AB)*.

[46] Appellate Body Report, *EC – Asbestos*, para. 93 (quoting Appellate Body Report, *Japan – Alcohol*).

[47] Appellate Body Report, *EC – Asbestos*, para. 97 (quoting Appellate Body Report, *Japan – Alcohol*).

[48] *Korea – Beef (AB)*, para. 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 different areas of the store).

[49] *Korea – Beef (AB)*, para. 144.

marketing opportunities for imported beef, and thereby modified the conditions of competition to the detriment of this product.[50] In every dispute that Canada and Mexico have cited where the WTO panel or Appellate Body found a breach of GATT Article III:4, the measure in question has itself provided different treatment to imported products compared to domestic products, and this different treatment resulted in less favorable treatment for the imported like product.[51]

34. By contrast, where a measure applies equally to domestic and imported products, the Appellate Body has found that where there is a detrimental effect on a given imported product, the measure is not necessarily inconsistent with Article III:4 if that detrimental effect is unrelated to the foreign origin of the product and due to some other factor, such as the composition of the market.[52] In *Dominican Republic – Cigarettes*, the Appellate Body noted that "the existence of a detrimental effect on a given imported product resulting from a measure does not necessarily imply that this measure accords less 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."[53] Accordingly, the Appellate Body found that a Dominican Republic measure did not accord less favorable treatment to imports even though it imposed higher per-unit costs on these products than domestic like products, because these higher per-unit costs were related to existing market conditions that had nothing to do with origin.

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[50] *Korea – Beef (AB)*, para. 146.

[51] Nearly all of the disputes cited by Canada and Mexico in which a WTO panel or Appellate Body found a GATT Article III:4 violation involved distinct treatment between imports and domestic products as well as less favorable treatment: *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); (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 no different treatment: *Dominican Republic – Cigarettes (AB)* and *Japan – Film*.

[52] One of the only WTO reports where a WTO panel or Appellate Body has found distinct treatment on a *de facto* rather than a *de jure* basis is *Mexico – Soft Drinks*. In that dispute, the panel found that a Mexican measure that imposed a 20 percent tax on the use of non-cane sugar sweeteners (such as high fructose corn syrup) discriminated against imports because the sweeteners produced in Mexico at the time the tax was adopted consisted overwhelmingly of cane sugar, whereas almost 100 percent of imported sweeteners consisted of high fructose corn syrup. Thus, in applying a 20 percent tax on the use of non-cane sugar sweeteners that it did not impose on the use of cane sugar, Mexico was in practice singling out imported sweeteners and beverages containing them for higher taxation.

[53] *Dominican Republic – Cigarettes (AB)*, para. 96.

35. In *Korea – Beef*, the Appellate Body made the point that where it is the decision of private actors rather than the governmental measure that results in the segregation of imported and domestic like products, this would not be a breach of Article III:4 of the GATT 1994. The Appellate Body stated:

> 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 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.[54]

36. Based on these past reports, it is clear that Canada and Mexico's arguments that the COOL measures breach TBT Article 2.1 or GATT Article III:4 fail. First of all, as Canada and Mexico have conceded, the COOL measures, on their face, do not treat domestic and imported like products differently. Rather, these measures 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. Rather, 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.[55]

37. In arguing to the contrary, Canada and Mexico misapply both the *Korea – Beef* and *Dominican Republic – Cigarettes* reports. For example, Canada and Mexico attempt to analogize the instant situation to *Korea – Beef* by stating that in both instances the measures at issue required separate distribution chains for domestic and imported products in a manner that favored the domestic product.[56] However, this is not correct. The measures in *Korea – Beef* did require 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 or by other means) as long as adequate records are maintained and accurate labels affixed to the product at the retail level.

38. Thus, the most that Canada and Mexico can allege is that U.S. processors have somehow

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[54] *Korea – Beef (AB)*, para. 149.

[55] *Korea – Beef (AB)*, para. 149.

[56] Canada's Opening Oral Statement, para. 33-34.

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 of Article III:4 of the GATT 1994. In fact, the Appellate Body in *Korea – Beef* directly stated that it was "not holding that a dual or parallel distribution system that...is 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."[57] Therefore, Canada and Mexico's unsubstantiated evidence regarding the manner in which the private market actors have responded to the COOL measures does not demonstrate that the U.S. COOL measures distinguish based on origin.

39. In attempting to distinguish the Appellate Body report in *Dominican Republic – Cigarettes*, Canada and Mexico mis-characterize the Appellate Body's findings, as well as the facts in that case. In particular, Canada argues: "This case 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. Rather, the COOL measure requires all imported cattle and hogs to be treated differently from domestic competitors. Imported cattle and hogs, and meat derived from them, must be tracked in some way (in practice by segregation)."[58] Canada's statement is simply without basis in fact.

40. Contrary to Canada's assertion, the COOL measures apply equally to all companies, requiring all slaughter houses to maintain adequate records and all retailers to label their products regardless of the origin of the product. In addition, Canada's argument that the COOL measures require imported cattle and hogs to be treated differently is simply untrue. Both domestic and foreign livestock must be tracked in some way in order to ensure that the resulting product is correctly labeled. Further, as Canada and Mexico have admitted, their limited market share is also of direct relevance in this dispute,[59] since it explains in large part any differential effects that may have resulted from processor decisions in response to the COOL measures.

B. Canada and Mexico's Arguments Regarding Segregation Rest on a Number of Erroneous Assertions Regarding the Role of Segregation in the Market

41. As the United States has explained, Canada and Mexico's "less favorable treatment" arguments are highly flawed from a legal standpoint. In this section of its submission, the United States will elaborate further on many of the factual flaws in the arguments advanced by the complaining parties.

1. The COOL Measures Do Not Require Segregation

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[57] *Korea – Beef (AB)*, para. 149.

[58] Canada's Opening Oral Statement, para. 32.

[59] Canada's FWS, para. 96; Mexico's FWS, para. 220.

42. Contrary to Canada and Mexico's arguments, the COOL statute and 2009 Final Rule do not require that processing plants segregate domestic and imported products. In fact, based on a request that the United States received from the Canadian Pork Council and that was reiterated by the complaining parties during exchanges with the United States, USDA added commingling flexibility into the 2009 Final Rule in order to help reduce compliance costs.[60] This commingling flexibility permits a retailer to use either a Category B or C label on any combination of Category A, B, and C livestock that are commingled during a single production day.[61] 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.

43. In addition to using the commingling flexibility, there are at least three other ways in which a particular slaughter house may comply with the COOL requirements and process muscle cuts of meat without segregating. In total, the slaughter house's four options include the following:

1) the slaughter house could process livestock of exclusively domestic origin, in which case one label could be used for all meat derived from such livestock;

2) the slaughter house could process livestock of exclusively mixed origin, in which case one label could be used for all meat derived from such livestock;

3) the slaughter house could use the commingling provisions and process domestic and mixed origin livestock on the same production day, in which case labels "B" or "C" could be used for all meat derived from such livestock; and

4) the slaughter house could process domestic and mixed origin livestock on separate days, and on each given day label the resulting meat as appropriate.

44. Although the United States identified the majority of these options in its First Written Submission,[62] to date, Canada and Mexico have largely ignored them or have failed to explain why many of these different options are not viable. However, it is important to consider these different options for the slaughter house in light of Canada and Mexico's arguments regarding less favorable treatment, and the United States will explore each of these options a bit further in the next section.

2. The Costs of the Different Options for Complying with the COOL Measures Without Segregating Are Not Significantly Different

[60] Exhibit US-99.

[61] Exhibit CDA-5, p. 2706 (7 C.F.R. § 65.300 (d)-(e)); US FWS, para. 55.

[62] U.S. FWS, para. 158.

45. Canada and Mexico argue that a fundamental reason that the COOL measures modify the conditions of competition to the detriment of their products is because they impose higher costs on slaughter houses and others in the supply chain who process multiple origin livestock as compared with U.S.-origin livestock, and therefore, they argue that U.S. slaughter houses have modified their procurement policies to only process U.S. origin livestock.[63] However, a quick comparison of the options that the United States has presented above show that the cost of processing only U.S. origin livestock is not significantly different from the cost of complying with COOL by other means that also do not require segregation. Therefore, there is simply no need for these slaughter houses to switch to processing only U.S. origin livestock.

a. Comparison of Options 1 and 2 – Processing Only Domestic Origin Livestock and Processing Only Mixed Origin Livestock

46. As a threshold point, it should be clear that a slaughter house (and all subsequent entities in the supply chain) would have the same cost if they chose to accept only domestic livestock or mixed-origin livestock (option 1 or 2 above), even by Canada and Mexico's logic. In both instances, the slaughter house would not have to segregate, nor would any entities elsewhere in the supply chain. Rather, all the livestock could be processed together and all the meat could be affixed with the appropriate label. Given that the steps that would need to be taken to comply are identical, the costs would be identical and there is no reason why a processor who chooses only to process one origin of livestock would be required to choose U.S. over mixed-origin livestock. This option alone demonstrates that the COOL measures themselves do not require U.S. processors to process only domestic origin livestock.

47. Although Canada attempts to dismiss this possibility by analogizing this situation to *Korea – Beef*, these situations are simply not analogous.[64] In *Korea – Beef*, it was the Korean measure itself that required retailers to accept only domestic or foreign meat. Here, accepting only one type of livestock is merely one option of many that a processor can choose to comply with the 2009 Final Rule. It is not the only option, and thus, the COOL measures do not force slaughter houses or anyone else in the supply chain to process either domestic or mixed origin livestock, and not both.

b. Comparison with Option 3 – Using the Commingling Flexibility

48. In addition, it should also be clear that a processor who uses the commingling provision and processes domestic and mixed origin livestock on the same production day (option 3) will not have significantly different compliance costs from the processor who chooses to process only

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[63] Canada's FWS, para. 91; Mexico's FWS, para. 220-203.

[64] Canada's Opening Oral Statement, para. 14.

one type of livestock – whether it be domestic or mixed origin livestock – on that same day (options 1 and 2).[65] In all instances, the slaughter house can process all of the livestock together and the retailer can affix the resulting product with the same label. Thus, as in the case where the slaughter house only processes one type of livestock, there is absolutely no need to segregate when a slaughter house uses the commingling flexibility provided in the 2009 Final Rule.

49. Canada attempts to rebut this argument by stating that "because of the mandatory tracking requirement, a slaughter house must segregate imported and domestic livestock so that it knows whether it has used only U.S.-born and -raised livestock...or whether it has used both U.S.-born and imported livestock..." in a given production day.[66] However, this argument is not persuasive.

50. First, the 2009 Final Rule does not require a "mandatory tracking requirement." In fact, Congress explicitly rejected a mandatory tracking requirement and both the COOL statute and 2009 Final Rule make clear that slaughter houses and other suppliers are only required to maintain the records that they would retain in the ordinary course of business.[67]

51. Second, whether a processor slaughters only domestic livestock, as Canada and Mexico allege, or mixed origin, a slaughter house will always need to keep sufficient information about the origin of the animals to provide accurate origin information to subsequent purchasers.

52. Third, as a practical matter, U.S. slaughter houses place their order for livestock so that they receive the animals the night before or on the same day as they are slaughtered. Thus, a slaughter house will always be aware of the origin of the livestock that it is slaughtering on any given day.

53. Finally, Canada's comment regarding the possibility that the livestock may "slip into the [wrong] day" and result in a violation proves nothing. Indeed, the COOL statute and 2009 Final Rule make clear that USDA will only impose a fine if a particular supplier was found to "knowingly and willfully" continue to violate the COOL requirements for 30 days after being warned about any particular violation.[68] Based on this standard, any innocent "slip up" would not result in a violation that results in a fine.

c. Comparison with Option 4 – Processing Different Origin

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[65] In fact, the 2009 Final Rule stated that"[p]rocessors handling only domestic origin products or products from a single country of origin may have lower implementation costs compared with processors handling products from multiple origins, although such costs would likely be mitigated in those cases where firms are only using covered commodities which are multiple-origin labeled." (Exhibit CDA-5, p. 2685).

[66] Canada's Opening Oral Statement, para. 15.

[67] 7 U.S.C. § 1638a(4)(d)(B); Exhibit CDA-5, p. 2707.

[68] 7 U.S.C. § 1638b; U.S. Answers, para. 49-50; U.S. Answers, fn. 41.

Livestock on Different Production Days

54. Deciding to process different origin livestock on different production days (option 4) would also not be significantly more costly than simply producing solely domestic or mixed origin livestock (options 1 and 2). In particular, on each given day, the slaughter house – which usually obtains its livestock within 24 hours of slaughter – must simply determine whether all of the livestock that it has obtained are domestic origin or whether there is some combination of domestic and mixed origin livestock. If it is the former, the slaughter house simply needs to ensure that the resulting meat is labeled with a Category A label and if it is the latter, the slaughter house can simply use a mixed origin (either B or C) label. While there may be some minor cost associated with determining whether a given slaughter house has processed both types of livestock in a given day or in deciding how to schedule different production runs, these costs are unlikely to be significant.

3. Post – Slaughter House Segregation

55. Canada's suggestion that the COOL measures impose high segregation costs for mixed origin meat after its leaves the slaughter house is not persuasive.[69] First, as just discussed, any member of the supply chain who is only trading in one type of meat – whether it be U.S. origin, mixed origin, or commingled – would not need to segregate either before, at, or after the slaughter house because all of the products would use the same label at retail. Second, to the extent that segregation were needed post-slaughter house, the same cost would be imposed on both the domestic origin and mixed origin meat. After all, it is not simply that the mixed origin meat has to be segregated from the domestic origin meat, but the domestic origin meat would also have to be segregated from the mixed origin meat. Thus, to the extent that choosing to segregate would impose any costs at all, it imposes costs equally on Label A as well as Label B and C meat. Further, as will be discussed in the following section, the costs of any segregation related to the COOL measures certainly cannot be on the order of magnitude alleged by Canada and Mexico as evidenced by the industry's long history of segregating different types of meat post-slaughter house.

4. There is No Need to Segregate Category B and C Meat

56. Canada and Mexico's arguments that a slaughter house and others in the supply chain will need to segregate Label B and C meat and livestock from each other is inaccurate.[70] According to the same request that was made by the Canadian Pork Council and repeated by Canada, a Category C label may be used in every instance in which a Category B label may be

[69] Canada's Opening Oral Statement, para. 15.

[70] Canada's Opening Oral Statement, para. 17.

used.[71] Thus, these animals and the meat that is derived from them will never have to be segregated because the same label (Category C) may always be used.

5. U.S. Slaughter Houses Are Taking Advantage of the Commingling Provisions and Are Continuing to Process Canadian and Mexican Origin Cattle

57. Canada and Mexico's claims that the U.S. industry is not utilizing the commingling flexibility provided in the 2009 Final Rule is directly refuted by their own evidence as well as evidence on the ground. For example:

- According to industry updates provided by Can Fax, at least some U.S. slaughter houses are commingling.[72] As Can Fax notes, "[t]he flexibility in the Final Rule has encouraged plants that were intending to accept only B or C cattle to accept both with processing on the same production day." The Can Fax update also indicates that U.S. slaughter houses are accepting Canadian and Mexican animals, or both, in at least 14 plants: JBS plants in Greely, Colorado and Hyrum, Utah; Smithfield Beef plants in Souderton, Pennsylvania and Green Bay, Wisconsin; Tyson Food plants in Lexington, Nebraska, Genesco, Illinois, and Pasco, Washington; Cargill plants in Fort Morgan, Colorado, Wyalusing, Pennsylvania, and Milwaukee, Wisconsin; Washington Beef's plant in Toppenish, Washington; and American Foods Group plants in Green Bay, Wisconsin, South St. Paul, Minnesota, and Long Prairie, Minnesota.

- A letter from the American Meat Institute indicates that its members intend to label 95 percent of the meat products eligible for a Category A label with a Category A label.[73] Accordingly, the remaining 5 percent of these Category A animals will be commingled and the meat derived from them labeled with a Category B or C label.

- Photographs taken at supermarkets around the country in the last few weeks indicate that the industry is taking advantage of the commingling provisions and labeling their product as Product of the United States, Canada, and Mexico.[74] These photographs also indicate that supermarkets around the country are selling

[71] Exhibit US-99.

[72] Exhibit CDA-41.

[73] Exhibit MEX-67.

[74] *E.g.*, Exhibit US-95, Exhibit US-96; Exhibit US-98 (photographs of meat products labeled as "Product of USA, Canada, Mexico," indicating that the cattle from which is the meat is derived was commingled).

B label meat, which may also be commingled meat.[75]

- Industry affidavits indicate that U.S. feedlots and slaughter houses are commingling U.S. origin hogs and cattle with Canadian and Mexican mixed-origin animals. The feed lots are commingling and sending their entire lots to U.S. slaughter houses to be slaughtered on the same production day while the slaughter houses are accepting both U.S. origin and mixed-origin animals on the same production day from different sources and then processing them together.[76]

- USDA has verified through communications with the industry that at least one major U.S. company is commingling U.S., Canadian, and Mexican mixed-origin animals at one of its facilities.[77]

As this evidence indicates, U.S. slaughter houses have not found it cost prohibitive to use the commingling flexibility provided by the 2009 Final Rule or to continue producing Category B meat, directly contradicting claims made by the complaining parties.

6. Canada and Mexico Overstate the Cost of Compliance For Market Participants Who Choose to Respond to the COOL Measures by Segregating

58. In addition to ignoring the fact that the COOL measures do not require segregation, Canada and Mexico dramatically overstate the costs associated with this practice that might be incurred by slaughter houses and others in the supply chain that choose to segregate in response to the 2009 Final Rule. Canada and Mexico overstate segregation costs for at least two reasons. First, they ignore all of the pre-existing segregation programs that exist in the United States. Second, the economic models that they rely on for their estimate of segregation costs are highly flawed.

a. Canada and Mexico Do Not Account for the Fact that Many U.S. Producers, Slaughter Houses, Suppliers, and Retailers Have Long Been Segregating Livestock and Meat

59. As the United States has noted throughout this dispute, U.S. processors and others in the supply chain post-slaughter house have long segregated their production lines for various

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[75] *E.g.,* Exhibit US-94; Exhibit US-95; Exhibit US-96; Exhibit US-97; Exhibit US-98 (photographs of B label meat products).

[76] *E.g.*, Producer Affidavits: Continuous Country of Origin Affidavit/Declarations Provided to USDA in 2009/2010 (Exhibit US-101). These affidavits are provided to USDA by suppliers during ordinary supplier compliance reviews to verify origin claims.

[77] Witness Statement of Larry R. Meadows dated October 28, 2010 (Exhibit US-102).

purposes, including participation in marketing programs, to meet the requirements of export markets, and to respond to animal disease issues.[78] Canada and Mexico claim these programs do not segregate based on the same criteria as COOL and therefore do not reduce segregation costs, but this ignores the real synergies available to packers who already have pre-existing segregation programs. These programs include the following:

- *USDA Grade Labels*: USDA assesses the quality and yield of beef and pork while the meat is still in the slaughter house.[79] Once the meat has received a grade label, it must be marked as such and segregated from the meat that received a different grade from the slaughter house all the way to the retail level if the retailer intends to label the product with its grade at the retail level. Given that 95 percent of meat is graded by USDA and the majority of this meat is labeled with the appropriate grade at the retail level, most processors and others in the supply chain have significant experience with segregation and would be able to segregate for origin purposes just as easily as they currently segregate for grading purposes.

- *Private Premium Label Programs*: Over 100 packers have established their own "value added" or "premium" programs for higher quality meat.[80] In fact, AMS currently certifies approximately 7 million beef carcasses under these programs each year. After a carcass has been certified by AMS as meeting the requirements of the particular program, these cuts of meat carry separate labels and must be segregated from other cuts of meat from the slaughter house all the way to the retail level. Again, these programs have provided slaughter houses, suppliers, and retailers with both the expertise in segregating and a pre-existing mechanism for doing so that could be used to defray the costs of segregation associated with complying with the COOL measures.

- *Export Market Requirements*: At least 22 countries to which the United States exports meat maintain specific age, source, specified risk material (SRM) or disease verification requirements for accepting meat products from the United States.[81] Eligible products exported to these countries must be produced under an approved AMS Export Verification (EV) Program and be identified as meeting the requirements of the applicable EV Program. In order to comply with such export requirements, packers must generally segregate their supply of meat destined to these markets from the supply destined for domestic consumption and

[78] U.S. FWS, para. 169-170.

[79] U.S. Answers, para. 77-78.

[80] U.S. Answers, para. 79-80.

[81] U.S. Answers, para. 81-82.

maintain very specific records on the products.

Several EV Programs have an assortment of requirements that require segregation of Canadian and U.S. cattle. For example, Colombia, Korea, Mexico, Peru, Singapore, and Taiwan all ban products derived from certain Canadian cattle.[82] In fact, one of Tyson's plants has indicated that its decision not to accept Canadian products "has to do with Korean shipments."[83] This, again, demonstrates that any slaughter house's decision on whether or not to accept a particular type of livestock is the decision of that slaughter house alone based on business considerations unique to the facility.

- *Animal Production and Raising Label Programs*: USDA provides verification services for many animal production and raising label programs found in the marketplace.[84] Raising animals and producing meat that meets the specific requirements of each of these individual programs – such as "raised without antibiotics," "free range," or "vegetarian fed diet" – requires business to segregate the animals that meet these requirements and the meat produced from them from other types of animals and meats. Like all of these other existing programs, this demonstrates that many suppliers already have existing mechanisms that could be employed to segregate for origin in a cost-effective manner.

60. Canada and Mexico's arguments about the high cost of segregation are directly undermined by the existence of these programs. U.S. businesses throughout the supply chain are already accustomed to segregating their animals and cuts of meat for various purposes and could utilize their existing expertise and mechanisms in order to reduce the costs of segregation associated with complying with the COOL measures if this is the manner in which business choose to comply.

61. Putting aside all of the reasons that Canada and Mexico have exaggerated the costs of segregation, their arguments simply do not pass scrutiny for another reason: if the cost of segregation was as high as Canada and Mexico assert, and segregation was truly the only way

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[82] Colombia - direct imports for slaughter from Canada are ineligible; Korea - direct imports for slaughter from Canada are ineligible, but Canadian cattle that have been legally imported and resided in the US for at least 100 days are eligible; Mexico - beef, offal, and veal imported from Canada are ineligible, but Canadian cattle that are directly imported for slaughter are eligible; Peru - direct imports for slaughter from Canada are ineligible; Singapore - beef and beef products imported from Canada are ineligible; Taiwan - beef and beef products of cattle from Canada fed less than 100 days prior to slaughter in the United States is limited to deboned beef, while cattle raised in the United States for at least 100 days prior to slaughter are eligible. Complete information on the various EV programs is available at the following web site: http://www.fsis.usda.gov/Regulations_&_Policies/Export_Requirements_EV_Countries/index.asp.

[83] Exhibit CDA-90.

[84] U.S. Answers, para. 83-85.

that U.S. slaughter houses could comply with the COOL measures, then there is absolutely 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. Indeed, 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.[85]

7. Canada and Mexico Overlook the Fact that Some Slaughter Houses May Segregate and Continue to Accept Their Product

62. Another flaw in Canada and Mexico's arguments regarding segregation is that they presuppose that U.S. slaughter houses will not simply decide to absorb the costs of segregation or pass these costs on to their consumers through the supply chain instead of rejecting their product altogether. To the contrary, passing on costs may be the most appropriate response for many U.S. slaughter houses because these slaughter houses may have long-established business models that rely on a supply of mixed origin animals to ensure that the plant runs at full capacity and at maximum efficiency.[86] Two examples include Tyson's slaughter plant in Pasco, Washington and Washington Beef's slaughter plant in Toppenish, Washington. Both of these plants rely heavily on Canadian imports and continue to operate with Canadian cattle today.[87]

C. Canada and Mexico Present a Misleading View of the North American Livestock Market and the Effects-Based Evidence They Have Presented Does Not Demonstrate Less Favorable Treatment Within the Meaning of GATT Article III:4 or TBT Article 2.1

63. Throughout this dispute, Canada and Mexico have attempted to paint a picture of economic distress caused by the COOL measures. They have complained that the COOL measures have harmed their livestock exports and reduced the prices paid for these animals,[88] and they have provided a few examples of individual slaughter houses who have made the independent choice to alter their behavior in response to these measures.[89] Yet, these arguments do not demonstrate that the COOL measures are according less favorable treatment to their

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[85] U.S. Cattle Imports from Canada, Source: U.S. Bureau of the Census (Exhibit US-103); U.S. Cattle Imports from Mexico, Source: U.S. Bureau of the Census (Exhibit US-104).

[86] *See* Exhibit CDA-174 (Informa letter noting that the U.S. packing industry is passing on many of the costs associated with complying with the COOL measures on to consumers and others in the supply chain).

[87] Exhibit CDA-41; Exhibit CDA-99; *See also* "Tyson Sell[s] Canadian Beef Operations," Leather International, Latest News (Mar. 4, 2009) (indicating that the Tyson plant in Pasco, Washington will continue to source Canadian livestock) (Exhibit US-105).

[88] Canada's FWS, para. 140-152; Mexico's FWS, para. 220-223.

[89] Canada's FWS, para. 113-129; Mexico's FWS, para. 153-167.

imported livestock for three primary reasons:

1) The evidence that Canada and Mexico have presented, to the extent it is reliable, represents the actions of individual market participants, none of which was required by the COOL measures;

2) The facts on the ground directly contradicts much of the evidence presented by Canada and Mexico; and

3) The economic analyses presented by Canada and Mexico that purport to show the differential effects of the COOL measures are highly flawed and do not adequately capture what is happening in the North American livestock market.

The United States will discuss these and other flaws with Canada and Mexico's arguments in the sections that follow.

1. Canada and Mexico Have Not Presented Any Evidence that the COOL Measures Are Responsible for Less Favorable Treatment

64. In this dispute, both Canada and Mexico have argued that the COOL measures have led U.S. feed lots and slaughter houses to reject their product and instead to purchase only U.S. origin livestock. In support of this theory, Canada and Mexico provide some evidence that certain feed lots and slaughter houses are not buying their cattle.[90] Putting aside for a moment the fact that Canadian and Mexican cattle exports to the United States are at extremely high levels, the evidence that the complaining parties present on this point does not support their claims.

65. In *Korea – Beef*, the Appellate Body stated that any action by private actors not compelled by the measure at issue does not result in a violation of Article III:4 of the GATT 1994.[91] Similarly, in *Dominican Republic – Cigarettes*, the Appellate Body made clear that the existence of a detrimental effect on imports does not constitute a breach of Article III:4 if that detrimental effect is due to external factors unrelated to origin.[92] Applying these principles here, the evidence that Canada and Mexico cite is not evidence of less favorable treatment because it merely represents the action of private parties not required by the COOL measures.

66. To the extent that Canada and Mexico's evidence is to be believed to be an accurate representation of what is happening in the market, it is not evidence of less favorable treatment

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[90] Canada's Opening Oral Statement, para. 27-28; Mexico's Opening Oral Statement, para. 15-16.

[91] *Korea – Beef (AB)*, para. 149.

[92] *Dominican Republic – Cigarettes (AB)*, para. 96.

within the meaning of Article III:4 of the GATT 1994. For example, Canada and Mexico have presented "evidence" that some U.S. feedlots and slaughter houses have limited their purchase of Canadian and Mexican livestock.[93] For example, Canada claims that only 12 of 15 U.S. slaughter houses that previously accepted their cattle are still doing so and claims that all of these plants are imposing limits on their acceptance of Canadian cattle.[94] Mexico, for its part, claims that the number of U.S. feed lots accepting its feeder cattle has declined from 24 to 3.[95] Canada and Mexico have also both presented affidavits from individual producers who claim that their product is not being accepted. However, the most that this evidence can possibly prove is that some U.S. slaughter houses and feed lots 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 producers. 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. Thus, because none of these actions are required by the COOL measures, they are not evidence of less favorable treatment within the meaning of Article III:4 of the GATT 1994.

67. Not only is Canada and Mexico's evidence of little relevance, but much of the evidence does not appear to be accurate. For example, Mexico's claims that the number of feed lots accepting their feeder cattle has declined from 24 to 3 is directly contradicted by evidence on the ground. In fact, 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.[96] 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. In fact, its own exhibit merely notes that 9 of these 12 "may impose daily limits or price discounts" without any supporting documentation.[97] In addition, Exhibit CDA-41 demonstrates that at least 14 plants are accepting

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[93] Canada's Opening Oral Statement, para. 27-28; Mexico's Opening Oral Statement, para. 15-16.

[94] Canada's Opening Oral Statement, para. 28.

[95] Mexico's Opening Oral Statement, para. 16.

[96] The slides that Mexico submitted along with its Opening Oral Statement show the location of 24 plants that Mexico claims accepted Mexican feeder cattle before the enactment of the COOL measures and the location of the 3 plants that Mexico claims are accepting Mexican feeder cattle now. However, both Mexico's claim that 24 plants were previously accepting its cattle and its claim that only 3 are accepting it now are doubtful. For example, Mexico claims that numerous plants throughout the northern United States accepted its cattle, such as plants in Pennsylvania, Wisconsin, and Idaho, but does not submit any evidence to support this claim. Based on the significant transportation costs that would be required to transport Mexican cattle to these locations, it is unlikely that these more distant plants would have accepted Mexican cattle on a regular basis. This raises serious questions about Mexico's claim that 24 U.S. plants previously accepted its cattle. *See also* Exhibit US-102 (discussing the fact that Mexican feeder cattle has not historically been sold to the Northern United States). Likewise, USDA has learned that at least one plant not located on Mexico's map continues to accept Mexican cattle. (Exhibit US-102). This evidence raises serious questions about Mexico's claim that only 3 plants are currently accepting its cattle.

[97] Exhibit CDA-99.

Canadian cattle.[98]

2. Canadian and Mexican Livestock Exports to the United States Are Thriving

68. As the United States has just explained, Canada and Mexico's evidence regarding the practice of individual companies is largely irrelevant and unreliable. In addition, this evidence and the larger trend it attempts to suggest is refuted by the larger economic picture and the fact that Canadian and Mexican exports in 2010 are extremely strong.

69. Canada's exports of both cattle and beef to the United States are up considerably in 2010. Canadian cattle exports are up 7.5 percent over the first eight months of the year compared with 2009 and Canadian beef exports are up 13 percent over last year's level.[99] These increased levels of exports are consistent with expectations for a recovering economy.

70. Although Canada's increasing beef exports may not at first glance appear to be relevant to Canada's claims since Canada has not alleged that any of the COOL measures have affected its beef exports, they are actually of great significance. After all, a Canadian cattle producer has the option of slaughtering its cattle in Canada and producing beef for domestic consumption or export or sending the Canadian cattle directly to the United States for feeding or slaughter. Thus, the growth in Canadian beef exports is actually undercutting the growth in Canada's cattle exports, and the increase in Canadian cattle exports in 2010 would likely be higher than 7.5 percent if Canada was not so successful at selling large quantities of its beef into the U.S. market.

71. During 2010, Mexican feeder cattle exports are also increasing rapidly. In fact, over the first eight months of the year, these exports are up 29 percent,[100] not the type of figures one would expect if the COOL measures were forcing U.S. producers to reject Mexican cattle altogether. The 29 percent increase in Mexican feeder cattle is even more remarkable considering that it followed an increase of 34 percent in 2009.[101]

72. Not only does this data raise doubts about Canada and Mexico's arguments regarding the practice of individual entities, but it also raises doubts about their arguments on both commingling and segregation. After all, if it was true that commingling was not a viable option for U.S. slaughter houses and that segregation costs were so high that U.S. slaughter houses were not accepting mixed-origin livestock, one would expect Canadian and Mexican exports to be

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[98] Exhibit CDA-41.

[99] Exhibit US-103; Canadian Beef Export Data, Source: Bureau of the Census (Exhibit US-106).

[100] Exhibit US-104.

[101] Exhibit US-104.

plummeting. Thus, when it comes to the arguments advanced by Canada and Mexico, something truly does not add up.

73. Canada and Mexico attempt to downplay the increase in their exports during 2010 by focusing on three different issues. First, Canada argues that although exports have risen significantly in 2010, their market share has decreased.[102] However, as Canada itself indicates "looking at market share alone is deceptive."[103] The reason for this is that the import ratio that Canada uses to illustrate market share uses the amount of U.S. slaughter or placements in any given year as the denominator, and thus, 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.[104]

74. In its Responses to the Panel's Questions, Canada argues that its market share has declined, but these arguments are based on a flawed methodology.[105] Instead of using official U.S. Bureau of the Census monthly data, Canada relies on non-official weekly data derived from veterinary certificates collected by USDA's Animal and Plant Health Inspection Service (APHIS). This is not the appropriate data to use because APHIS's responsibility is to ensure that health certificates are in order, not to track import numbers for official purposes. Accordingly, its numbers are not official statistics and they differ quite considerably from official U.S. data.[106] Further, the use of this data is inappropriate because of the significant "noise" associated with using weekly data instead of monthly data. Putting this aside, the data that Canada submits does not support its point – it shows that the ratio of U.S. slaughter cattle imports to U.S. slaughter is higher in 2010 relative to 2009, directly undermining Canada's argument on market share.

75. Second, Canada points out that although its exports of cattle have increased in 2010, its hog exports have not rebounded. This argument is not persuasive because Canadian hog exports are declining for reasons that have nothing to do with the COOL measures. As the United States explained in its First Written Submission, Canada's rapidly declining hog inventories fully explain the decline in Canada's exports.[107] Indeed, given that Canada's hog inventories have

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[102] Canada's Responses, para. 85.

[103] Canada's Responses, para. 85.

[104] Exhibit US-86.

[105] Exhibit CDA-159.

[106] Comparison of APHIS/AMS and U.S. Census Export Data for Canadian Livestock (Exhibit US-107). Professor Sumner's model also relies on this flawed data, raising further questions about the validity of the results predicted by his models.

[107] U.S. FWS, para. 118-125.

gone down by 25 percent in recent years,[108] it would be surprising if Canada was able to meet domestic demand while still exporting the same number of hogs to the United States.

76. Third, Canada and Mexico both attempt to minimize the fact that their exports are increasing significantly by focusing on price data. However, as the United States will explain in the section that follows, Canada and Mexico are receiving high and increasing prices for their livestock at the present time.

3. Canadian and Mexican Livestock Prices Remain At Historical Levels

77. Contrary to the arguments presented by Canada and Mexico, Canadian and Mexican livestock prices are at high levels. This confirms that U.S. feed lots and slaughter houses are not as a general matter discounting the price that they pay for these products in response to the COOL measures.

78. The price paid for Canadian cattle has risen significantly in 2010 – the price being paid for Canadian slaughter cattle is up 15.3 percent while the price being paid for Canadian feeder cattle is up 18.9 percent.[109] These price increases are both 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. By comparison, the price of U.S. slaughter cattle is only up 14.5 percent over 2009 levels, and the price of comparable U.S. feeder cattle has only grown 16.6 percent, both less than the price increase for comparable Canadian cattle.[110]

79. The price paid for Mexican feeder cattle has also risen significantly, directly contradicting claims by Mexico that the COOL measures have resulted in substantial discounting. Indeed, the price being paid for Mexican feeder cattle has increased 23.2 percent during the first eight months of 2010, almost 9 percentage points higher than the price increase for comparable U.S. feeder cattle, which has only increased by 12.6 percent.[111]

80. Canadian hog prices are also continuing to grow, up 20.9 percent in 2010.[112] This is

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[108] Exhibit US-28.

[109] North American Cattle and Hog Price Data, Sources: Sources: LMIC database for U.S. and Canadian cattle, AMS data for Mexico feeder prices; ERS Exchange Rate Data Base; Statistics Canada for hogs (Exhibit US-108).

[110] Exhibit US-108.

[111] Exhibit US-108. A different U.S. feeder price is compared to Canadian and Mexican feeder prices because the average weight of the animals differs by country. Mexican animals are generally shipped at lighter weights than Canadian feeders.

[112] Exhibit US-108.

comparable to the growth in U.S. hog prices, which are up 21.8 percent over the same time period. As with the increase in exports, these significant price increases simply do not comport with the story that Canada and Mexico are telling the Panel.

81. As the United States indicated in its First Written Submission, the prices paid for Canadian and Mexican animals have historically been discounted compared with the price paid for U.S. cattle. The discount reflects transportation costs for moving the animals into the United States, as well as possible quality discounts, given the difference in types of animals and grading systems.[113]

82. During 2009, the price differential between U.S. cattle and imported cattle widened slightly due to the economic downturn, but this price differential has returned to historic levels.[114] The lack of evidence of price discounting due to COOL can be demonstrated using the price data from CDA-152 on Alberta steer and breaking the data into 3 distinct periods: (1) the pre-COOL period prior to the publication of the Interim Final Rule in August 2008; (2) the period between the publication of the Interim Final Rule and the effective date of the 2009 Final Rule in March 2009; and (3) the period since the effective date of the 2009 Final Rule.[115] As Table 1 shows, the largest price differential occurred in March 2007, more than a year before the publication of the Interim Final Rule. In fact, since the effective date of the 2009 Final Rule in March 2009, the price differential has actually narrowed.

[113] For example, Canadian and U.S. beef and cattle grading systems are different; the Canadian system down-grades fatter cattle. The U.S. system has two kinds of grades, a quality grade (Prime, Choice, Select, Standard) where fat, particularly intra-muscular fat, increases the grade, and a quantity or yield grade (1-5) where fat decreases the grade. Canadian steers and heifers tend to grade U.S. Select 1 or 2 while the typical Nebraska steer is a Choice 2-3. Thus, because the Canadian animal tends to be a lower-quality animal (based on the U.S. grading system), the Alberta price may not be strictly comparable to the Nebraska steer price.

[114] Table 1. Nebraska-Alberta Steer Prices (Exhibit CDA-152).

[115] A close review of the data in CDA-152 shows the data may be misaligned by one week. This likely reflects the problem that Prof. Sumner noted with matching data from different sources. The data in the chart have been adjusted by one week. The United States notes again the shortcomings of the weekly data that would be avoided by the use of monthly data.

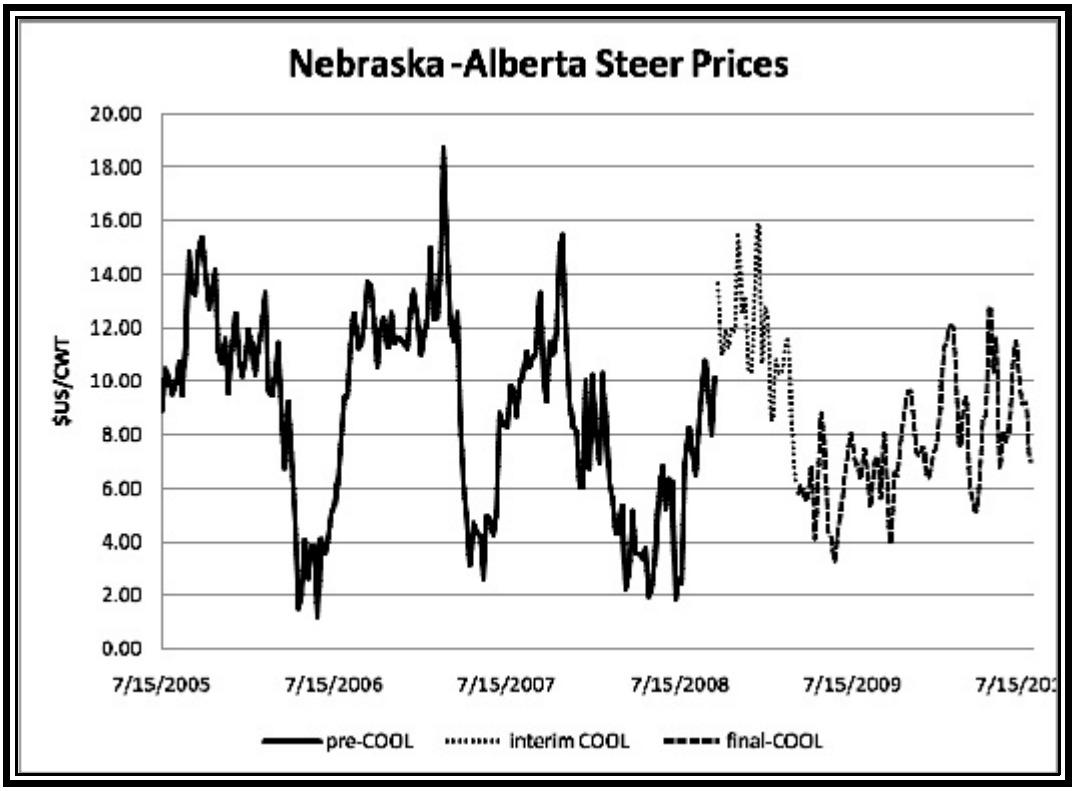

Table. 1 Price Differential Between Canadian and U.S. Cattle

83. To put this in other terms, the average price differential prior to the publication of the Interim Final Rule in August 2008 was $8.95, in U.S. dollars, whereas the average price differential following the implementation of the 2009 Final Rule is $7.59, in U.S. dollars, a decline of 15.2 percent. Thus, contrary to Canada and Mexico's arguments, the price differential has actually declined in the post-COOL world.

4. The Economic Recession and Other Factors Are Responsible For Any Decline In Canadian and Mexican Livestock Exports and Prices

84. As the United States has demonstrated, Canadian and Mexican livestock exports are skyrocketing and the prices being paid for Canadian and Mexican livestock are increasing at the same or an even higher rate than U.S. prices in 2010, directly undermining the complaining parties' arguments about the expected effect of the COOL measures. While Canadian and Mexican exports and prices in 2008 and 2009 were depressed,[116] along with U.S. prices, any

[116] Mexican exports began to increase in 2009. However, as the United States explained in its First Written Submission (U.S. FWS, para. 110-114), this is principally because of a change in weather conditions in 2009, which had a larger impact on trade volumes than the economic recession.

detrimental effect experienced by these products did not result from the COOL measures. Rather, as the United States has explained, these market conditions can be explained by the global economic recession and declining Canadian hog inventories, among many other factors that the United States detailed at length in its First Written Submission.[117]

85. At around the time that the COOL measures were being implemented, the world was in the throes of a global economic recession – a recession that economists in the United States have dubbed the worst recession the country has faced since the Great Depression. As a result of this major recession, it would have been a major surprise had Canadian and Mexican livestock exports and prices not declined. In fact, trade in agricultural products was down 12 percent around the world[118] and down 11 percent in the United States in 2009.[119] 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.[120]

86. Despite this, Canada and Mexico's submissions and the economic studies Canada commissioned in support of their arguments fail to take notice of this major economic shock, and instead blame the COOL measures for their economic difficulties. In other words, Canada and Mexico would have the Panel believe that had the United States not enacted the COOL measures, their livestock would have entered the United States at levels and prices unaffected by the recession. This position simply does not withstand scrutiny.

87. Canada also continues to ignore the fact that its hog industry is undergoing a period of major restructuring with inventories that have declined over 25 percent in recent years. Given this situation, Canada is correct to assert that "exports of hogs have not increased in 2010 compared to 2009."[121] They have not increased because Canada does not have nearly as many hogs to export.

5. Canada's and Mexico's Economic Models Are Highly Flawed

88. The economic reports and studies that Canada and Mexico submit to illustrate the high

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[117] *See* U.S. FWS, para. 99-105; 110-114; 118-125 (discussing the numerous factors that have affected Canadian and Mexican livestock exports in recent years, such as the global economic recession, declining inventories, weather conditions, transportation costs, energy costs, animal disease issues, and currency fluctuations, among many other factors).

[118] Exhibit US-57.

[119] Exhibit US-58.

[120] Exhibit US-42.

[121] Canada's Responses, para. 84.

costs of segregation are highly flawed. Indeed, the Informa Report estimates such high costs of segregation that if its results were to be believed, one would expect that U.S. feeding lots and slaughter houses would never import Canadian or Mexican livestock. Canada's studies produced by Professor Daniel Sumner also suggest that Canadian cattle are being discounted by high margins, but if these arguments are to be believed, Canadian producers would not have any economic incentive in exporting their cattle to the United States and would instead slaughter all of the animals domestically. This outcome is directly contradicted by the facts on the ground.

89. As the United States noted in its First Written Submission, the Informa Report suffers from four key limitations: (1) non-transparent methodologies; (2) a failure to account for previously occurring segregation; (3) a failure to account for the impact of flexibilities in the 2009 Final Rule; and (4) implausible conclusions.[122] The United States appreciates the additional information presented by Informa in response to the U.S. critiques of its report, but does not find its points persuasive.[123] Indeed, Informa's response to the U.S. point regarding the transparency of its methodologies provides no new information about its methodologies other than attempting to explain why they are non-transparent. For example, the United States still has no information about the time period during which the data was collected, the survey methodology used, or the sample size surveyed. Without this information it is impossible to determine whether Informa's analysis of pre-existing segregation or the flexiblities included in the 2009 Final Rule fully accounted for the significance of both of these factual matters on the cost of complying with the COOL measures. Further, Informa has not explained how it is possible that complying with the COOL measures could possibly be as costly as it asserts and yet, Canadian and Mexican livestock continues to enter the United States at extremely high levels.

90. The Informa response also makes a few key points that directly undermine Canada and Mexico's arguments in this dispute. For example, Informa's response points out that U.S. slaughter houses are adjusting to potential costs associated with COOL and their costs are diminishing over time, thus undermining Canada and Mexico's arguments about the level of the cost of compliance. In addition, Informa also points out that packers are passing costs both up and down the supply chain, contrary to Professor Sumner's assumption that all costs are being borne by Canadian cattle and hog exports.

91. The Sumner models submitted by Canada also suffer from serious methodological flaws. The first study produced by Professor Sumner (Exhibit CDA-78) relies on the flawed Informa data, fails to account for pre-existing segregation, and fails to account for commingling, among other deficiencies.[124] The second Sumner study (Exhibit CDA-79), which purports to show the differential effects of the COOL measures, suffers from these same flaws, as well as some that

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[122] U.S. FWS, para. 181-185.

[123] Exhibit CDA-174.

[124] U.S. FWS, para. 186.

are considerably more severe.

92. Exhibit CDA-79 (and updated in CDA-152) uses a reduced form model to estimate alleged effects of COOL on the basis for Canadian fed cattle and the effect on Canadian exports of cattle and hogs; however, this type of model is simply not adequate to explain any potential effects of the COOL measures. A model of this nature is easier to solve than a more complex structural model, but it may suffer from improper specification. In particular, the model does not include a complete set of supply and demand equations that flow from economic theory, but rather attempts to identify particular relationships between variables. As such, it is highly dependent upon the variables chosen and requires a large number of variables to be chosen to produce results with any level of confidence. In the revised basis model in CDA-152, out of 18 explanatory variables, only seven are significant. That does not provide a solid foundation for accepting the model results.

93. Canada claims that Sumner's model can account for differential effects of the COOL measures by using an import ratio as the dependent variable, but the model does not actually do this. Instead of showing the differential effects of the COOL measures, it actually only shows how the ratio between Canadian exports and total U.S. slaughter changes by examining a series of 18 variables, only seven of which are significant. On top of this, the use of an import ratio for this purpose is flawed both conceptually and empirically. It is flawed conceptually because it does not account for anything occurring in the Canadian market and it is flawed empirically because the weekly data that Professor Sumner uses for exports are not unreliable.[125] For these reasons, a model of this nature is simply not appropriate for explaining the differential effects of the COOL measures as Professor Sumner and Canada claims that it does.

94. It is also important to note that there is a fundamental inconsistency between the Sumner model and the claims that Canadian livestock prices have been adversely affected by the COOL measures. Based on the design of his model and key assumptions made about the export supply elasticity of animals from Canada, Professor Sumner cannot find price effects from the COOL measures except for fed cattle.[126] Otherwise, the model results are limited to analyzing a change in Canadian livestock exports. Although one might question the structure of the model that produces such a result (that is, a change in import demand results in only changes in exports and no changes in price), the lack of results on price effects do not support Canada's argument that the COOL measures have adversely affected its livestock prices.

95. Canada's attempts to rebut the U.S. critiques of its flawed models are not persuasive. In its Opening Oral Statement, Canada presented numerous purported flaws in the U.S. approach, but Canada's arguments do not survive scrutiny:

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[125] Exhibit US-107.

[126] Exhibit CDA-79, p. 8-12.

- Canada argues that the United States has not disputed that "segregation has potentially large negative differential effects on the demand for imported livestock relative to comparable domestic livestock."[127] As a threshold matter, the "potential" for differential effects is very different than a differential effect itself and proves nothing. Further, the United States has disputed the Exhibit CDA-78's "potential" differential effects by pointing out the numerous flaws in the model, including the fact that the model makes the implausible assumption that the full cost of complying with the COOL measures will be borne only by Canadian livestock and will not be absorbed, passed on to others in the supply chain, spread among all entities in the supply chain, or passed on to the consumers, a fact that is also contradicted by Informa's most recent letter.[128] Rather than account for these realistic outcomes that reflect the position of each individual firm, Exhibit CDA-78 makes the unrealistic assumption that every single firm in the United States will decide to pass on all of these costs to Canadian livestock producers. Other flaws in the model were discussed in the immediately preceding section of this submission.

- Canada argues that the U.S. critique of its use of import ratios is inapposite.[129] While the United States agrees with Canada that "it would be a mistake to examine imports without considering what is happening in the U.S. market,"[130] it would also be a mistake to examine exports without considering what is happening in the Canadian market. Thus, the use of an import ratio based on a U.S. market measure does not provide an accurate explanation of what was driving cattle prices and exports during this period and overlooks major disruptions in the Canadian market, such as the recovery from BSE, a major contraction in the Canadian hog inventory, and a somewhat smaller, but still significant contraction in the Canadian cattle inventory. Using the Sumner model's flawed import ratio would lead one to believe that even if Canada has 25 percent fewer hogs in its inventory, it should still export the exact same number to the United States while continuing to meet its domestic and export demand.

- Canada argues that the economic recession should not affect its exports to the United States on a differential basis and thereby attempts to undermine the U.S. discussion of the economic recession as a factor that affected the demand for

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[127] Canada's Opening Oral Statement, para. 40-41.

[128] Exhibit CDA-174.

[129] Canada's Opening Oral Statement, para. 43.

[130] Canada's Opening Oral Statement, para. 43.

Canadian livestock.[131] However, a closer look at the structure of the Canadian livestock industry clearly shows why the impact would be differential. A large share of Canada's meat and livestock exports are destined for the United States, and thus, the Canadian livestock sector is highly reliant on consumer demand in the United States. Thus, a decline in U.S. beef consumption, as occurred during the latest recession, will differentially affect Canada's livestock sector as compared with the livestock sector in the United States, which is not so export dependent. Additionally, because the recession was not as deep in Canada as in the United States and the recovery began earlier, Canadian consumption of beef remained more constant than U.S. consumption and some of Canada's livestock may have been diverted to Canadian slaughter houses to meet domestic demand.[132] As a result, Canadian inventories declined, and as is the case with Canadian hogs, when the inventory goes down, there are less animals to export, and exports decline as well.[133]

- Canada criticizes the constant factor that the United States used to model the recession in the alternative model that it submitted to the Panel (Exhibit US-42),[134] but Canada's critique proves too much. Interestingly, if the Panel were to accept Canada's critique of the U.S. model, it would significantly undermine the validity of Sumner's model. After all, the United States used the same type of factor (that is, a dummy variable) to model the recession that Professor Sumner used to model the effects of the COOL measures. In a similar fashion, as producers, processors, and retail stores adjust to COOL requirements, any possible adjustment costs would decline. They are not simply switched "on or off."

- Canada argues that Professor Sumner's analysis properly accounted for BSE and that it was appropriate to begin treating the market as if there were no lingering effects of BSE as early as July 2005.[135] However, the North American market was hardly re-integrated at that time. In fact, as the United States pointed out in it First Written Submission, cattle over 30 months of age, which include slaughter cows and bulls that account for a large portion of Canada's exports to the United States, were not allowed back into the United States until November 2007. Following the complete lift of the ban, Canadian exports of such animals spiked.

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[131] Canada's Opening Oral Statement, para. 44.

[132] Real Retail Sales Growth for Beef and Veal, Monthly, Source: IHS Global Insight Economic and Financial Data (Exhibit US-109).

[133] Exhibit US-28.

[134] Canada's Opening Oral Statement, para. 44.

[135] Canada's Opening Oral Statement, para. 45-46.

Clearly, a market in which a significant portion of Canada's exports are allowed back into the United States after a four-year absence is anything but a normal market, will have inflated export levels, and does not provide a proper basis for comparison with the situation during 2009, let alone the current situation.

- Canada argues that the U.S. critique regarding transportation costs was not as significant as the United States suggested it was in its First Written Submission and Canada criticizes the use of CPI for transportation costs rather than PPI. As a threshold matter, the United States is pleased that Sumner recognized the flaw in his original model and has now added transportation costs into the equation; however, the United States continues to question the results of any basis model that does not find transportation costs to be a significant factor affecting the basis. Transportation costs are one of the principal reasons that Canadian cattle is discounted vis à vis U.S. cattle in the first place. Further, as was fully explained, the use of CPI was chosen because PPI data is not available over a long enough time period to adequately analyze the changes in the North American livestock market.

96. As these points illustrate, Canada's models and the arguments that they use in an attempt to defend them, are highly flawed.

IV. NONE OF THE COOL MEASURES BREACH TBT ARTICLE 2.2

97. Canada and Mexico have failed to demonstrate that the COOL statute or 2009 Final Rule breach TBT Article 2.2. As a threshold matter, Canada and Mexico's arguments about the trade restrictiveness of the U.S. measures rely on their erroneous assertions that these measures require segregation and ignore the significant increase in their exports in recent months. Further, the COOL measures fulfill their objectives of providing consumer information and preventing consumer confusion at the levels that the United States considers appropriate. As a result of these measures, millions of U.S. consumers have information about the country of origin of the meat and other products that they buy at the retail level, are much less likely to be confused by USDA's grade labels, and are less likely to mistakenly believe that the meat from an animal imported into the United States for further feeding or immediate slaughter is actually meat from an animal that was born, raised, and slaughtered in the United States. Finally, Canada and Mexico have failed to present any alternatives that would fulfill the U.S. objectives at the levels that the United States considers appropriate while also being significantly less trade restrictive.

A. Canada and Mexico's Interpretation of TBT Article 2.2 Would Make It Difficult for a WTO Member to Ever Enact a WTO-Consistent Technical Regulation

98. Throughout this dispute, Canada and Mexico have advocated an interpretation of TBT Article 2.2 that would make it extremely difficult for a WTO Member to ever enact a technical

regulation to achieve a legitimate objective without breaching TBT Article 2.2. For example, both Canada and Mexico argue that the U.S. measures are "more trade restrictive than necessary" because they impose compliance costs on industry, yet they complain that every effort taken by the United States to reduce these costs of compliance is evidence of the failure of the U.S. measures to achieve their legitimate objectives. Similarly, Canada and Mexico suggest that the threshold for presenting a reasonably available alternative should be quite low, yet accepting the alternatives that they present would render labeling systems around the world extremely susceptible to challenge on the same basis, an absurd result given the prevalence of country of origin labeling among WTO Members. In this section, the United States will first discuss the appropriate legal test to be applied under TBT Article 2.2 before turning to a longer discussion of the errors in the approach and arguments put forward by the complaining parties.

99. An appropriate interpretation of TBT Article 2.2 begins with the text. The text of 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."[136] At the same time, Article 2.2 is clear that it does not prohibit all technical regulations that create obstacles to trade, rather only those that create *"unnecessary* obstacles."[137]

100. 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.[138] This makes clear that WTO Members who adopt measures to achieve the same or similar objectives need not all design these measures in the exact same way. Rather they are permitted to design their measures in the way that best suits their specific objectives as long as these measures are not more trade restrictive than necessary to meet their objectives.[139]

101. This point is reinforced by the work of relevant international bodies. For example, the OECD explicitly encourages regulators within different countries to "estimate the total expected costs and benefits of each regulatory proposal" and to examine different alternatives and design

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[136] Article 2.1 of the TBT Agreement, second sentence.

[137] Article 2.2 of the TBT Agreement, first sentence.

[138] The TBT Preamble states 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...and are otherwise in accordance with the provisions of this Agreement."

[139] As the EU notes, based on the arbitrary distinctions that must necessarily be made in designing a technical regulation, it makes sense to provide WTO Members with significant latitude in the design of these regulations. (Replies to Questions from the Panel Following the First Hearing by the European Union ("EU's Replies"), para. 37).

in order to achieve their objectives.[140] In light of this well accepted regulatory practice, it is not surprising that WTO Members retained their ability to weigh costs and benefits and did not agree on an obligation to implement measures that achieve their legitimate objective without regard to cost. Similarly, here, Canada and Mexico should not be allowed to use the U.S. efforts to reduce compliance costs as evidence against it, in particular in light of the fact that many of the changes made to reduce costs were made in response to requests from the complaining parties.

102. While no WTO adjudicative body has examined the meaning of TBT Article 2.2, the United States agrees with Canada that past Appellate Body reports that have looked at the interpretation of Article 5.6 of the SPS Agreement provide useful insights for the interpretation of this provision.[141] Indeed, it makes sense to interpret TBT Article 2.2 similarly to SPS Article 5.6 based on the textual similarities between the provisions as well as the similarities between the TBT and SPS Agreements themselves.[142]

103. Accordingly, 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 successfully 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 feasability; (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.[143]

104. 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. In particular, the term "necessary" is used in GATT Article XX in a different context than in TBT Article 2.2.[144] Under TBT Article 2.2, a panel is inquiring as to whether a measure fulfills a legitimate objective is "more trade restrictive than necessary" to fulfill that objective. On the other hand, under GATT Article XX, the question is whether it is "necessary" to breach the GATT 1994 to protect human, animal or plant life or health or public morals or to secure

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[140] Exhibit US-66.

[141] *E.g.*, *Australia – Salmon (AB)*.

[142] Article 5.6 of the SPS Agreement requires a Member to ensure that its SPS measures are "not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection" while Article 2.2 of the TBT Agreement prohibits measures that are "more trade-restrictive than necessary to fulfill a legitimate objective." The Appellate Body has also noted the similarities between the SPS and TBT Agreements (*EC – Sardines (AB)*, para. 274).

[143] *Australia – Salmon (AB)*, para. 194.

[144] *See also* Guatemala's Responses to the Questions of the Panel ("Guatemala's Responses"), Question 5 ("Article XX provides for exceptions while Articles 5.6 and 2.2 provide for rights and obligations.").

compliance with laws or regulations. Thus, the alternatives that are being compared under TBT Article 2.2 are two alternatives that are WTO-consistent while the alternatives being compared under GATT Article XX are an alternative that is WTO-inconsistent and another that is WTO-consistent. And, unlike under Article XX, it is the complaining party that has the burden of establishing that the measure is "more trade-restrictive than necessary" under Article 2.2.

105. 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. Under the Vienna Convention on the Law of Treaties, the terms of a treaty must be interpreted based on their ordinary meaning in their context in light of the object and purpose of the treaty. The ordinary meaning of "more trade restrictive than necessary" is outlined above and, as noted, relevant context for Article 2.2 of the TBT Agreement is Article 5.6 of the SPS Agreement. The Vienna Convention on the Law of Treaties also provides that recourse may also be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion. As noted in the U.S. First Written Submission, a letter from the Director-General of the GATT to the Chief U.S. Negotiator confirms that Article 2.2 of the TBT Agreement should be interpreted similarly to Article 5.6 of the TBT Agreement.[145] In light of the different context in which the word "necessary" appears in Article 2.2 as compared to Article XX and the different circumstances surrounding conclusion of those provisions, it would not be appropriate to apply the same meaning or interpretive approach to both provisions.

B. The U.S. Objectives of Providing Consumer Information and Preventing Consumer Confusion Are Legitimate Objectives Within the Meaning of the TBT Agreement

106. Providing consumer information about origin and preventing consumer confusion are legitimate objectives within the meaning of TBT Article 2.2. This provision contains a non-exhaustive list of legitimate objectives, as confirmed by the use of the term "*inter alia.*"[146] Thus, objectives not explicitly included in the list – such as providing consumer information and preventing consumer confusion – may also be legitimate. For example, the *EC – Sardines* panel found two objectives not listed in TBT Article 2.2 to be legitimate – market transparency and consumer protection.[147]

107. As a threshold matter, 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. For example, neither Canada nor Mexico argue that country of origin labeling is *per se* inconsistent

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[145] Exhibit US-53.

[146] TBT Article 2.2.

[147] *EC – Sardines (Panel)*, para. 7.123.

with the WTO Agreements,[148] and thus both appear implicitly to acknowledge the legitimacy of providing consumer information. In addition, in their submissions, Australia, the EU, and Korea all indicate that they believe that providing consumer information is a legitimate objective.[149]

108. Furthermore, the fact that providing consumer information about origin and preventing consumer confusion are legitimate objectives is supported by their connection to an objective listed in TBT Article 2.2 – the prevention of deceptive practices.[150] While the United States does not assert that providing consumer information, preventing consumer confusion, and preventing deceptive practices are the same objective, each of these objectives relates to the same end – namely, ensuring that consumers in the territory of the WTO Member are not misled or mistaken about the product they buy, whether about the product's origin or some other product characteristic. The *EC – Sardines* panel recognized the link between this explicitly enumerated legitimate objective and other objectives related to the provision of consumer information.[151]

109. Other WTO Members have also recognized the connection between country of origin labeling requirements and the prevention of deceptive practices. For example, both Colombia and Korea's TBT notifications for their country of origin labeling requirements list the prevention of deceptive practices as the objective of their measure while the EU lists both consumer information and the prevention of deceptive practices as the objectives of its labeling requirements for olive oil.[152] Indeed, Australia states in its Third Party Submission it accepts the U.S. view that its objectives are "closely related to preventing deceptive practices."[153]

110. Finally, the strong consumer support for country of origin labeling in the United States and internationally as well as the fact that many WTO Members have notified their country of origin labeling requirements to the TBT Committee, explicitly identifying their objective as

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[148] Canada's Responses, para. 73; Mexico's Responses, para. 103.

[149] *See* Australia's Opening Oral Statement, para. 22 ("In Australia's view, the United States, through the COOL measure, is seeking to provide consumers with additional useful information. Australia considers that such an objective is a legitimate objective, and accepts the US view that this objective is "closely related" to preventing deceptive practices."); EU's Replies, para. 75 ("The European Union considers that it would not be open to the Panel in these proceedings to find that, as a matter of principle and in general terms, the provision of information to consumers on origin is not "legitimate" within the meaning of Article 2.2 of the TBT Agreement.");

[150] U.S. FWS, para. 229.

[151] *EC – Sardines (Panel)*, para. 7.123.

[152] G/TBT/N/COL/69 (Aug. 31, 2005); G/TBT/N/KOR/156 (Sep. 18, 2007); G/TBT/N/EEC/26 (Oct. 22, 2008) (Exhibit US-69).

[153] Australia's Opening Oral Statement, para. 22; Also see G/TBT/N/AUS/45 (Dec. 13, 2006) (stating that "all changes to its country of origin labeling requirements must be assessed in light of "(a) the protection of public health and safety; (b) the provision of adequate information relating to food to enable consumers to make informed choices; and (c) the prevention of misleading or deceptive conduct.").

consumer information also support the conclusion that providing consumer information about origin and preventing consumer confusion are legitimate objectives within the meaning of TBT Article 2.2. The United States will discuss these issues at greater length in the sections that follow.

1. U.S. Consumers Want Information about the Country of Origin of the Meat Products They Buy, Including Information About Where the Source Animals were Born, Raised, and Slaughtered

111. U.S. consumers and consumer organizations widely support country of origin information on the food products they buy at the retail level. In fact, nearly all of the leading consumer organizations in the United States have expressed support for country of origin labeling for consumer information purposes and as a means of preventing consumer confusion. As one example, the Consumers Federation of America – a consumer advocacy group that represents 300 organizations with a combined membership of over 50 million Americans nationwide – 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."[154] In a joint letter with the National Consumers League and Public Citizen, two other leading U.S. consumer organizations, the Consumers Federation of America 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."[155] Similarly, the Consumers Union wrote that "it is clear that consumers desire to know where there food is coming from."[156]

112. 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,[157] 49 EU consumer

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[154] Exhibit US-5.

[155] Exhibit US-61, p. S13275.

[156] Exhibit US-4.

[157] TACD Members from the United States include the following: American Association of Retired Persons (AARP); American Civil Liberties Union (ACLU); American Council on Consumer Interests (ACCI); Center for Digital Democracy (CDD); Center for Food Safety (CFS); Center for Media and Democracy; Center for Science in the Public Interest (CSPI); Community Nutrition Institute; Consumer Action; Consumer Federation of America (CFA); Consumers Union (CU); Economic Justice Institute; Electronic Frontier Foundation (EFF); Electronic Privacy Information Center (EPIC); Health Action International; Institute for Agriculture and Trade Policy (IATP); International Centre for Technology Assessment (ICTA); Knowledge Ecology International (KEI); National Association of Consumer Advocates (NACA); National Association of Consumer Agency Administrators (NACAA); National Consumers League; Prevention Institute; Privacy Rights Clearinghouse; Public Citizen; Public Interest Research Group (PIRG); Public Knowledge; and World Privacy Forum (Exhibit US-110).

organizations,[158] and 3 observer organizations from Canada and Australia,[159] 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."[160] TACD's objective is to develop policy recommendations to the U.S. government and EU to promote the consumer interest and the organizations often adopts recommendations and resolutions by consensus of its members.[161] In TACD's resolution on country of origin labeling, these 79 different consumer organizations espoused the benefits of country of origin labeling as follows:

> Country of origin labeling can provide consumers with additional information to make informed choices about the food they wish to purchase and consume. Many consumers may wish to purchase food from producers in their own country or may wish to purchase food products from another country known for producing a particular food. Reasons for this vary from environmental and ethical principles to food quality and food standard choices.

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[158] TACD Members from the EU include the following: Alliance for Social and Ecological Consumer Organisations (ASECO) (EU); European Association for the Coordination of Consumer Representation (ANEC) (EU); European Community of Consumer Co-operatives (EUROCOOP) (EU); he European Consumers' Organisation (BEUC) (EU); European Public Health Alliance (EU); Verein für Konsumenteninformation (VKI) (Austria); Test - Aankoop / Test - Achats (Belgium); Bulgarian National Consumers Association (BNAP) (Bulgaria); Consumers Defence Association of the Czech Republic (SOS) (Czech Republic); Aktive Forbrugere (Denmark); Forbrugerraadet (Danish Consumer Council - FBR) (Denmark); Kuluttajat Konsumenterna (Finland); Suomen Kuluttajaliitto/Finnish Consumers' Association (Finland); Consommation, Logement et Cadre de Vie (CLCV) (France); Organisation Generale des Consommateurs (France); Union Fédérale des Consommateurs-UFC Que Choisir (France); Verbraucherzentrale Bundesverband (VZBV) (Germany); Consumers' Association (EKPIZO) (Greece); Consumers' Federation of Greece (INKA) (Greece); Consumer Protection Centre (KEPKA) (Greece); Országos Fogyasztóvédelmi Egyesület (OFE) (Hungary); Tudatos Vásárlók Egyesülete (TVE) (Hungary); Consumers' Association of Ireland (Ireland); ADUSBEF (Italy); Altroconsumo (Italy); Associazione Consumatori Utenti (ACU) (Italy); Associazione per la Difesa e l'Orientamento dei Consumatori (ADOC) (Italy); Comitato CODACONS (Italy); Federconsumatori (Italy); Movimento Consumatori (Italy); Consumentenbond (The Netherlands); Forbrukerradet (Consumer Council of Norway) (Norway); Centro de Arbitragem de Conflictos de Consumo (CPS) (Portugal);Romanian Association for Consumers Protection (Romania); Slovene Consumers Association (ZPS) (Slovenia); Asociacion Valenciana de Consumidores y Usuarios (Spain); Confederacion Estatal de Consumidores y Usuarios (CECU) (Spain); Organizacion de Consumidores y Usuarios (OCU) (Spain); Union Nacional de Asociaciones Espanolas (UNAE) (Spain); Union de Consumidores de Espana (UCE) (Spain); Sveriges Konsumenter (Sweden); Sveriges Konsumenter i Samverkan (SKIS) (Sweden); Swedish Consumer Co-operatives (KF) (Sweden); Consumer Focus (United Kingdom); Open Rights Group (United Kingdom); Privacy International (United Kingdom); Sustain (United Kingdom); and Which? (United Kingdom) (Exhibit US-110).

[159] TACD's three observer organizations include the following: Choice (Australia); Public Interest Advocacy Centre (Canada); and Union des Consommateurs (Canada) (Exhibit US-110).

[160] TACD Resolution on Country of Origin Labeling, Doc. No. Food 29-08 (March 2008) (Exhibit US-111), p. 1.

[161] TACD Annual Recommendations (Exhibit US-112).

> Without labeling that identifies where that food has been produced, consumers are unable to make those choices in an informed manner when they are at the point of purchase.[162]

113. Individual consumers have also expressed strong support for country of origin labeling in order to provide consumer information and prevent consumer confusion. For example, Gregory Cook of Fircrest, Washington wrote to USDA: "I am writing in support of regulations requiring country-of-origin labeling (COOL) of meats sold in the U.S. I believe that we – consumers and citizens – should be able to make informed choices when purchasing meat and other foods. Labels stating country of origin would be a big help in those choices."[163] Similarly, Becky McManus of Volin, South Dakota wrote to USDA: "I completely support country of origin labeling. As consumers we have the right to know where the food we consume comes from."[164] Thousands of other consumers expressed a similar view during the rule making process, urging USDA to adopt the COOL implementing regulations for these purposes.

114. Numerous polls also indicate strong consumer support for mandatory country of origin labeling. Among the polls cited in various submissions received by USDA during the regulatory process are the following:

- 92 percent of respondents in a 2007 Consumers Union poll believed that imported foods should be labeled with their country of origin[165]
- 88 percent of respondents in a 2007 Zogby poll indicated that they want all retail foods labeled with country of origin information[166]
- 95 percent of respondents in 2007 Zogby poll indicated that they have a right to country of origin information for food[167]
- 82 percent of respondents in a 2007 Food & Water Watch poll supported mandatory country of origin labeling[168]

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[162] Exhibit US-111, p. 2.

[163] Comments submitted by Gregory Cook to USDA (July 18, 2007) (Exhibit US-113).

[164] Comments submitted by Becky McManus to USDA (July 2007) (Exhibit US-114).

[165] *See* Exhibit US-5.

[166] *See* Exhibit US-5.

[167] *See* Exhibit US-5.

[168] *See* Exhibit US-5.

- 82 percent of respondents in a 2004 nationwide poll conducted for the National Farmers Union supported country of origin labeling[169]

- 86 percent of respondents in a 2002 survey for Packer magazine supported country of origin labeling[170]

2. WTO Members Agree that Providing Consumer Information and Preventing Consumer Confusion Are Legitimate Objectives in the Context of Country of Origin Labeling Requirements for Food Products

115. As the United States noted in its Responses to the Panel's Questions, it has identified nearly 70 other WTO Members that maintain some form of mandatory country of origin labeling for food and other products intended for human consumption.[171] Many of these mandatory labeling systems apply to food products at the retail level.[172]

116. Among the WTO Members with mandatory labeling systems, many explicitly identified consumer information as the objective of their labeling requirements in their TBT notifications. For example, Australia's TBT notification for its labeling law notes that the measure's principal objective is "[t]o ensure that adequate information is provided about the origin of food products to enable consumers to make informed choices."[173] Similarly, Brazil's TBT notification states that its objective is "[t]o provide information to consumers"[174] and Chinese Taipei's TBT

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[169] *See* Exhibit US-5.

[170] *See* Exhibit US-5.

[171] *See* Exhibit US-68 (listing Argentina, Australia, Barbados, Brazil, Canada, China, Chile, Costa Rica, Colombia, Dominica, the Dominican Republic, Egypt, El Salvador, the European Union and its 27 Member States (Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Republic of Ireland, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom), Ghana, the six members of the Gulf Cooperation Council (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates), India, Indonesia, Israel, Japan, Kenya, Korea, Malaysia, Mexico, New Zealand, Nigeria, Panama, Peru, the Phillippines, Singapore, South Africa, Switzerland, Chinese Taipei, Thailand, and Vietnam as WTO Members with mandatory country of origin labeling requirements.) In addition to these 67 WTO Members, the United States has learned that Guatemala also has mandatory country of origin labeling requirements (Guatemala's Responses to the Panel's Questions).

[172] Many of the country of origin labeling systems that the United States identified in Exhibit US-68 apply at the retail level. Among the third parties, Australia, Brazil, Colombia, the EU, Japan, Guatemala, Korea, and Chinese Taipei all maintain mandatory country of origin labeling requirements that apply at the retail level. Others with such requirements include Chile, Malaysia, the Phillippines, and Vietnam, among other WTO Members.

[173] G/TBT/N/AUS/45 (Dec. 13, 2006) (Exhibit US-69).

[174] G/TBT/N/BRA/12 (July 12, 2001) (Exhibit US-69).

notification indicates that its objective is "consumer information."[175] In its Responses to the Panel's Questions, Korea stated that the objective of its labeling law was "to further ensure consumers' right-to-know and right-to-choose."[176] Other WTO Members who identified the objective of their food labeling laws as providing consumer information include Barbados, Chile, Dominica, and the EU.[177]

117. Likewise, many other WTO Members indicated that their mandatory country of origin labeling requirements for food products were adopted to prevent deceptive practices or prevent consumers from being misled or confused. For example, Colombia's TBT notification indicates that the objective of its law is the "prevention of deceptive practices."[178] In addition, the EU lists the objectives of its mandatory country of origin labeling at the retail level for olive oil as "consumer information, prevention of deceptive practices,"[179] Korea lists its objective as "[t]o prevent deceptive practices,"[180] and Switzerland lists the objective of its labeling requirements for pre-packaged foods as "to prevent the consumer from being mislead."[181] Other WTO Members citing the prevention of deceptive practices as an objective of their labeling requirements include Dominica, Malaysia, and Qatar.[182] Were one to conclude that consumer information and preventing consumer confusion are not legitimate objectives, this would suggest that none of these regimes was adopted to achieve a legitimate objective.

C. The U.S. COOL Measures Were Adopted to Achieve the Legitimate Objectives of Providing Consumer Information and Preventing Consumer Confusion

118. Not only are providing consumer information about origin and preventing consumer confusion legitimate objectives, but these are indisputably the objectives of the COOL measures. This is clear from the text of the measures themselves. To the extent that the Panel also believes that COOL's legislative and regulatory histories are relevant, these histories also demonstrate that the COOL measures were adopted for these legitimate purposes.

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[175] G/TBT/N/TPKM/41 (Exhibit US-69).

[176] Responses of the Republic of Korea to the Panel Questions ("Korea's Responses"), Question 1.

[177] Exhibit US-69.

[178] G/TBT/N/COL/69 (Aug. 31, 2005) (Exhibit US-69).

[179] G/TBT/N/EEC/26 (Oct. 22, 2008) (Exhibit US-69).

[180] G/TBT/N/KOR/156 (Sep. 18, 2007) (Exhibit US-69).

[181] G/TBT/Notif.99.548 (Nov. 1, 1999) (Exhibit US-69).

[182] Exhibit US-69.

1. The Text of the COOL Measures, Together With Their Design, Architecture, and Structure Indicate that their Objectives are Providing Consumer Information and Preventing Consumer Confusion

119. To determine the objective of the U.S. COOL measures, the Panel should start with their text and may also consider their design, architecture, and structure.[183]

120. An examination of the text of the COOL measures clearly indicates that their objectives are consumer information and the prevention of consumer confusion. Indeed, 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."[184]

121. The design, architecture, and structure of the COOL measures reinforce the fact that their objectives are consumer information and preventing consumer confusion. Both the statute and 2009 Final Rule are structured around the requirement that retailers provide country of origin information to consumers on the covered commodities they buy at the retail level. In addition, both measures require that this information be provided in a legible and conspicuous manner, both measures place record keeping requirements on others in the supply chain to ensure that this information is accurately conveyed, and both measures include enforcement provisions to ensure that retailers and suppliers actually adhere to these requirements. As a result, millions of U.S. consumers now have information available to them that previously was not.

122. At the same time, the measures are structured to prevent consumer confusion. Numerous consumers have stated that labeling meat derived from animals not solely born, raised, and slaughtered in the United States as U.S. origin would be misleading.[185] It simply defies consumer expectations to label an animal that spent its entire life in another country up until the day it was slaughtered as a product of the United States. Additionally, consumers complained that the presence of USDA grade labels on this meat perpetuated their confusion. Therefore, in order to accurately convey the country of origin of meat products consistent with consumer expectations and in an effort to ameliorate consumer confusion, the COOL statute and 2009 Final Rule require retailers to list more than one country of origin when an animal was not exclusively born, raised, and slaughtered in the United States.

2. To the Extent that it is Relevant, the Legislative and Regulatory

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[183] *Chile – Alcohol (AB)*, para. 62.

[184] Exhibit CDA-5, p. 2677.

[185] *See, e.g.,* Exhibit US-17; Exhibit US-85; Letter from Ross Vincent to FSIS (Oct. 2, 2001) (Exhibit US-115) (indicating that it would be misleading to consumers to label meat as U.S. origin if the source animal was not born, raised, and slaughtered in the United States).

History of the COOL Measures Indicate that Their Objectives are to Provide Consumer Information and Prevent Consumer Confusion

123. To the extent that it is relevant, the legislative and regulatory history of the COOL measures support the conclusion that their objectives are to provide consumer information and prevent consumer confusion. In this regard, the Appellate Body has cautioned against relying on statements of individual legislators in assessing a measure's objective. According to the Appellate Body, "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."[186]

124. The Panel in this dispute should follow the Appellate Body's reasoning and should not attempt to weigh all of the comments made by individual U.S. legislators against each other to determine the objective of the COOL statute and 2009 Final Rule.[187] Comments made by individual legislators during a measure's consideration do not represent the view of the entire Congress but only the view of that individual, nor is it practicable for a Panel to sift through all of the different comments made by these legislators and attempt to weigh them against each other.

125. As explained in the U.S. First Written Submission and Answers to Panel's Questions, this is consistent with the approach that panels have taken in previous disputes, including that of the panel in *EC – Biotech*. There, the panel examined statements of legislators and other forms of legislative history to determine the existence of a measure, not its objective.[188] As the *EC – Biotech* panel noted: "[...] our approach is consistent with the view expressed by the Appellate Body that in identifying the purposes of the measure, panels need not seek to determine the subjective intent of the legislators or regulators who adopted the measure. According to the Appellate Body, the purposes of a measure may and should rather be ascertained on the basis of objective considerations, for instance by examining whether there is an objective relationship between the stated purposes and the text and structural features of the relevant measure."[189] Based on its Responses to the Panel's Questions, Canada appears to share the U.S. view that the Panel should focus its inquiry on the text of the COOL statute and 2009 Final Rule instead of the

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[186] *Chile – Alcohol (AB)*, para. 62 (citing *Japan – Alcohol (AB)*, p. 29). *See also US – Textiles Rules of Origin*, para. 6.93 (indicating that the legislative history, statements by legislators, and statements from outside parties advocating for the measure were insufficient to establish the objective of the measure).

[187] *See also* EU's Replies, para. 50-51 (encouraging the Panel to focus on the text of the measure itself and stating that "[a] panel should be very cautious about using such additional material to derive an object and purpose that is different from the object and purpose apparent from the measure itself.");

[188] U.S. Answers, para. 1-5.

[189] *EC – Biotech*, para. 7.2558.

statements made by individual legislators.[190]

126. Mexico's argument that the panel's reasoning in *EC – Biotech* supports the Panel's examination of individual comments made by legislators and regulators does not withstand scrutiny.[191] Contrary to Mexico's argument, the *EC – Biotech* panel's statement that "it is clear that statements by individual government officials and similar evidence must be given proper weight" has nothing to do with determining a measure's objective. Rather, the panel's statement was intended to support the central point of that paragraph, which was that there "appears to be no disagreement among the parties that EC documents or statements by EC or member State officials may constitute evidence of the existence of a measure."[192] (Emphasis added)

127. As the United States has indicated, the Panel should focus on the text and not the regulatory history in determining the objective of the COOL measures. However, to the extent that the Panel considers an analysis of the legislative and regulatory history relevant, this analysis will demonstrate that the objective of these measures is the provision of consumer information and prevention of consumer confusion.

a. The 2002 and 2008 Farm Bill Conference Reports Indicate that the Purpose of the COOL Statue is Consumer Information

128. The conference reports accompanying both the 2002 and 2008 Farm Bills clearly indicate that the measures were enacted with the objective of providing consumers with information about origin. As an indication of the measure's objective, these statements provide a much more significant piece of legislative history than the statements of individual legislators since they represent the view of the entire legislative body. For example, the Senate Committee Report accompanying 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."[193] Likewise, the Senate Committee Report accompanying the 2008 Farm Bill explained the objective of the COOL Statute as "to provide consumers with additional information regarding the origin of covered

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[190] *See* Canada's Responses, para. 6 (quoting *EC – Biotech* for the proposition that "in identifying the purposes of a measure, panels need not seek to determine the subjective intent of the legislators or regulators who adopted the measure" and noting that it only cited statements by U.S. legislators to assist the Panel in determining the objective, but not that these statements reflect the objective).

[191] *See* Mexico's Responses, para. 13-17 (encouraging the Panel to examine statements made by two U.S. representatives out of a body of 435 and two mid-level USDA officials in order to determine the measures' objective.)

[192] *EC – Biotech*, para. 7.522.

[193] Exhibit US-11, p. 93-94.

commodities."[194]

b. The Majority of the Statements of the Principal Legislators Involved with the Enactment of the COOL Statute Indicate that its Objectives are Consumer Information and Preventing Consumer Confusion

129. The floor statements of the principal legislators involved with the enactment of the COOL statute all clearly indicate that the objective of the measure was consumer information and the prevention of consumer confusion. A few examples are as follows:

- On May 8, 2002, Senator Tim Johnson stated: "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."[195]

- During a 2000 hearing, Senator Tim Johnson stated: "American consumers today mistakenly all too often believe the meat they buy with the USDA choice label is domestically produced. This is simply not the case."[196]

- On April 24, 2002, 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. 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 . . . "[197]

- On November 5, 2007, Senator Charles Grassley stated: "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

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[194] Exhibit US-12, p. 198.

[195] Exhibit US-48.

[196] Exhibit CDA-10, p. 24.

[197] Exhibit US-13.

requirement for food as well?"[198]

- On September 26, 2000, Representative Debbie Stabenow stated: "This issue of food country-of-origin labeling for all food products, not just meat as this legislation would mandate, is garnering increased attention. I have been in contact with numerous consumer groups as well as producers and ranchers in Michigan who believe that such labeling provides needed information to consumers so that they may make informed decisions about the food they purchase."[199]

- On June 26, 2003, Representative Charles Pickering submitted a statement that said the following: "I support the intent of the country-of-origin labeling legislation that passed in the farm bill. I think its important for consumers to know where their food comes from..."[200]

c. U.S. Consumer Organizations and Individual Consumers Were a Driving Force Behind the Enactment of the COOL Statute and 2009 Final Rule

130. U.S. consumer groups and individuals were instrumental in lobbying for the passage of the COOL statute and 2009 Final Rule. In assessing the objective of the COOL measures, their role cannot be overemphasized. During their lobbying efforts, these organizations and individuals strong advocated for mandatory country of origin labeling, citing the provision of consumer information and prevention of consumer confusion as the key reasons for their support. In addition, these consumers clearly indicated a preference for mandatory country of origin labeling, expressed an interest in all of the countries in which different processing steps took place, and shared the belief that a system based on substantial transformation would be misleading.

131. In the United States, five key consumer groups – the Consumers Union, the Consumers Federation of America, the National Consumers League, Public Citizen, and Food & Water Watch – led the lobbying effort for country of origin labeling. These organizations sent numerous letters of support to members of Congress urging them to pass the COOL statute in a manner that would provide accurate information to consumers and help prevent consumer confusion. Many of these same groups also wrote to USDA urging for the adoption of the COOL implementing regulations. A few examples are as follows:

- *Consumers Union ("CU")*: The Consumers Union is an expert, independent,

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[198] Exhibit US-14.

[199] Exhibit MEX-49, p. 22.

[200] Exhibit MEX-51, p. 5.

non-profit organization who defines its mission as "to work for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves."[201] The CU sent numerous letters to the U.S. Congress and USDA expressing its support for country of origin labeling.[202] In addition, CU issued a press release applauding the statute's implementation. The CU press release "hailed the long-awaited implementation of mandatory federal country of origin labeling on all meats, fish, poultry and produce sold in retails stores in the United States..."[203]

- *Consumer Federation of America ("CFA")*: The Consumer Federation of America is a consumer advocacy group that represents 300 organizations with a combined membership of over 50 million Americans nationwide.[204] CFA also sent many letters in support of COOL to the U.S. Congress and USDA.[205] An August 20, 2007 letter to USDA stated that "CFA 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."[206] Likewise, in a letter sent to FSIS, CFA stated that "[o]nly cattle born, raised, slaughtered, and processed in this country should be considered products of the United States for labeling purposes. This is what most consumers would assume from either 'Product of the USA' of 'USA Beef' on a label."[207]

- *National Consumers League ("NCL")*: The National Consumers League is America's oldest consumer organization, representing consumers on marketplace and workplace issues since 1899.[208] During the legislative process, the NCL strongly advocated for mandatory COOL. One letter sent by the organization to

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[201] The Consumers Union is a leading U.S. consumer organization that publishes the reputable Consumer Reports series in the United States. These publications have more than 8 million U.S. subscribers. Additional information on the Consumers Union can be found at the following web site: www.consumersunion.org.

[202] *E.g.*, Exhibit US-4; Consumers Union letter to Congress (Feb. 26, 2007) (Exhibit US-116).

[203] Exhibit US-89.

[204] Exhibit US-5. Additional information on the Consumers Federation of America can be found at the following web site: www.consumerfed.org.

[205] *E.g.*, Exhibit US-5; Exhibit US-61.

[206] Exhibit US-5.

[207] Exhibit US-84.

[208] Additional information about the National Consumers League can be found at the following web site: www.nclnet.org.

all 100 U.S. Senators stated its support for COOL and its opposition to a proposal based on substantial transformation, noting "[p]lease oppose efforts to water down country-of-origin labeling legislation by allowing domestic origin labels on beef that has been slaughtered and processed—but not born—in this country."[209] The letter continues to assert that a system based on substantial transformation principles could be misleading to consumers, stating that a proposal to allow cattle that has been in the United States for over 100 days to be labeled U.S. origin "could mislead consumers into thinking a product is of U.S. origin when, in fact, it is not." In addition, the NCL opposes voluntary labeling, noting that "industry already has voluntary labeling authorization and it has not resulted in country-of-origin labeling for beef."

- *Public Citizen*: Public Citizen identifies itself as a non-profit consumer organization that advocates for consumer protection and for government and corporate accountability.[210] Public Citizen also strongly supported COOL and advocated for its passage.[211] Public Citizen made clear that U.S. consumers would not be well served by a voluntary labeling system or a system with substantial transformation principles that allowed a U.S. origin label to be used on meat products that were not derived from animals born, raised, and slaughtered in the United States. In fact, a Public Citizen press release sent out during the legislative and regulatory processes states that "Congress Should Expedite Mandatory Labeling Requirements, Not Substitute Weak Voluntary Measures."[212]

- *Food & Water Watch*: Food & Water Watch is a non-profit U.S. consumer advocacy group that seeks to protect the interests of consumers in the food and other products that they buy.[213] On September 30, 2008, Food & Water Watch submitted a letter to USDA stating that its "members and supporters across the country are strong supporters of country of origin labeling...Food & Water Watch believes that labeling provides consumers with vital information they need to make informed choices about where their food is from and how it was raised..."[214]

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[209] Exhibit US-61.

[210] Exhibit US-17. Additional information about Public Citizen can be found at the following web site: www.citizen.org.

[211] *E.g.*, Exhibit US-61.

[212] "New Poll Shows Consumers Overwhelming Support Country-of-Origin Labeling on Food," Public Citizen Press Release (June 20, 2005) (Exhibit US-117).

[213] Additional information about Food & Water Watch can be found at the following web site: www.foodandwaterwatch.org.

[214] Exhibit US-100.

> Later, the letter clearly states that origin for meat products should not be based on substantial transformation: "[W]e were happy with several aspects of the [interim final] rule which followed the clarifying language included in the 2008 Farm Bill. Specifically, we were pleased to see the interim final rule follow the intent and language of the 2008 Farm Bill on labeling for ground meat products [and] the inclusion of the "born, raised, and slaughtered" standard for "Product of the U.S." meat labels..."

132. TACD, the international coalition of 76 different U.S. and EU consumer organizations (and 3 observer organizations from Australia and Canada), also advocated for the adoption of a mandatory country of origin labeling system in the United States. To recall, one of TACD's principal functions is to develop policy recommendations to the U.S. government and EU to promote the consumer interest. In 2008, TACD adopted a recommendation that the United States "implement the country of origin labeling law as outlined in the 2002 Farm Bill and further clarified in the House and Senate versions of the 2007 Farm Bill."[215] The 2008 TACD recommendations, which were endorsed by a consensus of all 79 groups, explicitly favored mandatory over voluntary COOL, stating: "TACD supports a mandatory country of origin labeling program to assure that consumers are provided necessary information about the origin of the food they purchase and consume. Voluntary labeling programs do not offer the same benefit as a mandatory labeling program since, by definition, voluntary programs do not require all foods in a particular category to be labeled."[216]

133. In addition, thousands of U.S. consumers submitted comments to the U.S. Congress and USDA in support of country of origin labeling. A few examples are as follows:

- Charles Rich of Newton, Massachusetts wrote to USDA: "I strongly support COOL for as many food products as possible. Along with nutritional information, this is the PERFECT role for government: giving people information needed to make their own choices."[217]

- Elizabeth Brennan of Los Angeles, California wrote to USDA: "I support the mandatory labeling of foods and would like to see country of origin labels on all foods."[218]

- Sherri Vinton of Norwalk, Connecticut wrote to USDA: "Country of Origin

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[215] Trans Atlantic Consumer Dialogue (TACD) 2008 Recommendations Report (Exhibit US-118), p.7.

[216] Exhibit US-118, p. 7.

[217] Comments submitted by Charles Rich to USDA (July 19, 2007) (Exhibit US-119).

[218] Comments submitted by Elizabeth Brennan to USDA (Aug. 2007) (Exhibit US-120).

Labelling is essential to providing consumers with information that they want and deserve."[219]

- Richard Leithiser of Lake Pleasant, New York wrote to USDA: "I favor implementation of the COOL Rules to allow consumers to make choices on the origin of the products they purchase."[220]

- John and Rita Lesch of Bloomington, Minnesota wrote to USDA: "We support the implementation of country of origin labeling (COOL). U.S. consumers have the right to know the origin [of] their beef, lamb, and pork meat. The cost will be outweighed by the benefit of knowing the origin of the beef we are eating."[221]

134. At the same time, U.S. consumers clearly indicated that only meat derived from animals born, raised, and slaughtered in the United States should be considered U.S. origin and expressed a desire for information about all of the countries in which an animal spent different periods of its life, as well as where it was slaughtered and processed. For example:

- Ross Vincent of Pueblo, Colorado wrote to FSIS: "As a consumer who is concerned about what I feed my family, I strongly support the definition of U.S. cattle and beef products for labeling purposes as "born, raised, slaughtered and processed in the United States." All other definitions mislead consumers... [c]attle and beef products that were born and partially raised in another country should not be labeled as a product of the U.S." Later on, the letter states: "I strongly support a mandatory labeling program with a uniform, consistent definition for domestic origin as born, raised, slaughtered and processed in the United States."[222]

- Danila Oder of Los Angeles, California wrote to FSIS: "It is misleading to consumers to allow 'Product of the U.S.' labeling for animals that are born in another country and live in the U.S. for as little as 100 days."[223]

- Ron Krisher of Snellville, Georgia wrote to USDA: "I urge the USDA to require country of origin labeling on fish, shellfish, beef, lamb, pork, perishable agricultural commodities, peanuts and all other edible products as soon as

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[219] Comments submitted by Sherri Vinton to USDA (Nov. 18, 2003) (Exhibit US-121).

[220] Comments submitted by Richard Leithiser to USDA (Aug. 2007) (Exhibit US-122).

[221] Comments submitted by John and Rita Lesch to USDA (Aug. 2007) (Exhibit US-123).

[222] Exhibit US-115.

[223] Exhibit US-85.

possible. Americans deserve to know where these products were grown, raised and processed."[224]

- Jennifer Walla of Fargo, North Dakota wrote to USDA: "I support the country-of-origin labeling law...I think it's very important for me and other consumers to know where our meat is from and how it was raised and processed; therefore meat should be labeled with the animal's country of birth, feeding, and processing."[225]

- Dan Downs of Molt, Montana wrote to USDA: "Thank you for giving consumers the opportunity to comment on Country of Origin labeling. If it is born and/or raised here, then it should be labeled a product of the United States. If it's not, then it should be labeled as such. We should have the right in the United States to know where our food is produced and processed."[226]

135. During U.S. consideration of the COOL statute and 2009 Final Rule, many consumers and consumer organizations also expressed concern about confusion under existing USDA grade labeling rules, and urged Congress and USDA to adopt clear mandatory country of origin labeling requirements to address this. According to the Consumers Federation of America: "[U]nder other USDA regulations, consumers could be mislead into thinking some imported meat is produced in this country. This is because imported meat can also receive a USDA inspection seal and grade stamp under the voluntary meat grading program."[227] Similarly, Loneta Rice, a U.S. consumer stated: "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."[228]

136. Prior to the enactment of the COOL measures, many consumers may also have been misled by FSIS's "Product of the U.S.A." labeling system, which allowed producers to voluntarily use this label if the meat products received minimal processing in the United States.[229] The Consumers Federation of America also addressed this potential source of confusion in a letter to FSIS, noting: "the Agriculture Department's geographic labeling policies are confusing at best...beef products prepared in this country apparently can be labeled "Product

[224] Comments submitted by Ron Krishner to USDA (July 2007) (Exhibit US-124).

[225] Comments submitted by Jennifer Walla to USDA (July 2007) (Exhibit US-125).

[226] Comments submitted by Dan Downs to USDA (Aug. 2, 2002) (Exhibit US-126).

[227] Exhibit US-84.

[228] Exhibit CDA-10, p. 71.

[229] U.S. FWS, para. 30-31.

of the USA" even though they originate from cattle born beyond our borders."[230]

d. Changes Made to the COOL Implementing Regulations Indicate that Their Objective Was Not to Protect the Domestic Industry

137. As the United States has noted, USDA made numerous changes to the implementing regulations to reduce the costs of compliance for foreign and domestic producers, changes it would not have made if the U.S. objective was to protect the domestic industry.[231] For example, in response to requests received by Canada and Canadian producer groups, USDA added flexibility into the 2009 Final Rule with regard to the use of the B and C labels for meat products. In particular, USDA complied with a request that it received from the Canadian Pork Council to: (1) maintain the flexibility to use a B label on covered commodities derived from A animals when A and B origin animals are commingled during a production day; (2) establish the same flexibility for use of a B label on covered commodities derived from C animals as for use of a B label on products derived from A animals and a C label on products derived from B animals; and (3) expand the existing flexibility to use a C label on covered commodities derived from B animals by eliminating the requirement of commingling.[232] In addition, USDA reduced the record keeping requirements and made other changes consistent with requests made by one or both of the complaining parties.[233]

e. Consumer and Congressional Comments Regarding the Desire to Help the U.S. Industry Relate to Helping the U.S. Industry Market their Products, Not For Protectionist Purposes

138. 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, a letter sent from the American Farm Bureau Federation and National Farmers Union stated that "[p]roducers and consumers both benefit. Country of origin labeling is a valuable marketing opportunity that may improve the ability of U.S. producers to compete in a highly regulated market and costly

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[230] Exhibit US-84.

[231] U.S. FWS, para. 72-83.

[232] Exhibit US-99. Canada made similar requests orally and in its formal comments on the Interim Final Rule (Exhibit US-25).

[233] *See*, *e.g.*, Exhibit US-19; Letter from Jorge Kondo Lopez, the Secretary of Agriculture, Livestock, and Fisheries for the State of Sinaloa and the President of the Mexican Association of Secretaries of Rural Development (AMSDA) and George Groeneveld, Alberta Minister of Agriculture and Rural Development to USDA Secretary Edward Schafer (Aug. 15, 2008) (Exhibit US-127) (Mexico's request to reduce the record keeping requirements).

environment."[234] Similarly, Nolan Johnsrud of Washburn, North Dakota wrote to USDA: "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."[235] Likewise, Representative John Thune stated:

> U.S. consumers demand quality and consistency in meat products, and U.S. livestock producers meet those demands better than any other livestock producers in the world. Unfortunately, under the current labeling system, it is often difficult for producers to identify which specific products meet consumer demands and which products do not. A country-of-origin label will give consumers a tool to make informed decisions when they purchase meat products. Furthermore, such a label will allow competition and market forces to determine the relative value of meat from different countries. Mr. Chairman, that is exactly the way it should be – competition should be the key. I'm confident that American producers, when given a level playing field, will out-compete any other producers in the world.[236]

139. 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.

f. Congressional Statements Cited by Canada and Mexico Do Not Support the Conclusion that the Objective of the COOL measures is Protectionism

140. Throughout this dispute, Canada and Mexico have cited to statements from the legislative history to support their argument that the COOL measures were enacted to protect the domestic industry.[237] However, these statements are taken out of context and do not support the overall views of the U.S. Congress or the United States. Further, many of the statements do not even support the point that Canada and Mexico purport that they do. For example:

- *Statement of Representative Chenoweth-Hage*: Canada and Mexico claims that a statement from Representative Chenoweth-Hage illustrates COOL's protectionist objective.[238] However, this statement is taken out of context, and earlier in the

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[234] Exhibit US-61, p. S13274.

[235] Comments submitted by Nolan Johnsrud to USDA (Aug. 2007) (Exhibit US-128).

[236] Exhibit MEX-49, p. 20.

[237] Mexico's Responses, para. 13-17; Canada's FWS, para. 172.

[238] Mexico's Responses, para. 17; Canada's FWS, para. 172.

congressional hearing, Representative Chenoweth-Hage clearly stated that COOL "is a strong right-to-know issue."[239] Later, Representative Chenoweth-Hage clarifies that "the reason I put together the country-of-origin meat labeling...was not to provide at barrier at the border at all...but simply to give the consumer the right to know and give that person the ability to choose at the retail level."[240] Putting this aside, it is important to note that Representative Chenoweth-Hage retired from Congress in 2000 and never voted on any of the COOL measures. Thus, it is unclear how one of her statements could be taken as a reliable indicator of overall congressional intent, let alone the objective of the COOL statute as agreed and voted upon by 535 Members of Congress while she was not a Congresswoman.

- *Question by Representative Richard Pombo*: Mexico claims that a question from Representative Richard Pombo at a hearing on COOL "reflect[s] the protectionist objective of the COOL measure."[241] Although Mexico does not identify which specific question it is referring to, Representative Pombo inquired about the Administration's position on the WTO consistency of country of origin labeling as well as the potential costs of COOL on the relevant page (37) of the transcript of the congressional hearing that Mexico cites to in its Responses.[242] In the first instance, it is unclear how by its very nature a question could reflect someone's intent. Further, it is unclear how either of Representative Pombo's questions does so. Rather, Representative Pombo's inquiry focuses on how to design the COOL statute so that it is WTO-consistent and imposes minimal costs on industry, hardly protectionist motives.

- *Statements by USDA Employees Caren Wilcox and Keith Collins*: Mexico refers to comments made by the Deputy Undersecretary for Food Safety, Caren Wilcox, and the Chief USDA Economist, Keith Collins, at congressional hearings as further evidence of "the protectionist objective of the COOL measure."[243] As a threshold matter, the United States would note that neither official is from AMS, the relevant USDA agency responsible for designing the COOL implementing regulations. Further, it is unclear how either comment illustrates a protectionist objective of the COOL measures. Ms. Wilcox's statements explain her views on how to design a country of origin label in a WTO-consistent manner, noting that

[239] Exhibit MEX-49, p. 6.

[240] Exhibit MEX-49, p. 6.

[241] Mexico's Responses, para. 17.

[242] Exhibit MEX-49.

[243] Mexico's Responses, para. 17.

"there are obviously ways that one could make a WTO label that would be appropriate and legal."[244] Likewise, Mr. Collins' comments express his view that industry would have an incentive to label products with origin if they believe that they will receive a price premium for it.[245] Additionally, any comments made by either USDA employee about the costs were in response to legitimate inquiries from Members of Congress about what the cost estimates would be so that the measures could be tweaked to reduce the costs of compliance. Thus, these statements do not prove a protectionist objective, but reinforce the position of the United States – first, that the COOL measures could be and were designed in a WTO-consistent fashion; second, that the voluntary labeling system was not successful because industry did not believe it would receive a price premium for U.S. origin meat, not because consumers did not want this information; and third, that Congress and USDA had a long discussion on costs so that they could work together to reduce them.

- *Statements by R-CALF*: Mexico and Canada both claim that statements by R-CALF illustrate COOL's protectionist objective.[246] As a threshold matter, it is important to note that R-CALF is a private entity with no relationship with the U.S. government. Therefore, comments by R-CALF cannot be deemed to represent the view of the U.S. government. Second, even if R-CALF supported COOL because it believed that it would help the U.S. domestic livestock industry, this is irrelevant. Many different entities may have wanted COOL for different reasons, but the key question for purposes of Article 2.2 is the objective for which the U.S. government enacted it. Ample evidence demonstrates that the objectives were consumer information and the prevention of consumer confusion. Further, R-CALF's position appears at odds with that of much of the U.S. meat industry who opposed COOL.[247] Thus, statements by R-CALF are not informative of the objective of the measures at issue.

g. Other Arguments Made By Canada and Mexico Regarding the Objective of the COOL Measures Are Not Persuasive

141. Canada and Mexico's arguments notwithstanding, changes to the Interim Final Rule – such as the clarification in the 2009 Final Rule that Category B labels cannot be used on

[244] Exhibit MEX-49, p. 37.

[245] Exhibit MEX-51, p. 12.

[246] Canada's FWS, para. 171; Mexico's FWS, para. 177-183.

[247] Exhibit CDA-131 ("[M]ost beef and pork groups...have opposed labeling."). .

Category A meat that is not commingled – are not evidence of protectionism either.[248] To the contrary, these changes were made at the request of U.S. consumer organizations, such as Food & Water Watch and others. For example, in a letter to USDA, Food & Water Watch stated that "it is extremely disappointing that the interim final rule seems to have provided a loophole for meatpackers who wish to use a more generic North American label...We believe this section runs contrary to what Congress intended and to what consumers and producers expect from this labeling program. [USDA] Secretary Schaefer recently told that National Association of State Departments of Agriculture that he supports a U.S. beef label. We hope that this support translates to a directive to AMS to revise this language..."[249] Food & Water Watch and other consumers and consumer groups considered that the effectiveness of the COOL requirements would be reduced if Label A product were more often than not labeled with a multiple origin label. In response to these comments, USDA clarified the 2009 Final Rule to ensure that most U.S.-origin meat products would receive a U.S.-origin label. This decision was not based on protectionist impulses, but was a response to the desire of U.S. consumers.

142. Regarding Canada's attempt to infer that COOL's objective was not consumer information because most of the Members of Congress the United States referenced as advocates of COOL come from cattle and hog producing states, Canada's position is incorrect as a factual matter. In fact, Members of Congress who voted in favor of the legislation that contained the country of origin labeling requirements in 2002 and 2008 represent all 50 U.S. states.[250] In addition, Members of Congress representing 42 of the 50 U.S. states voted for an amendment in

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[248] Canada's FWS, para. 21.

[249] Exhibit US-100.

[250] *See* Final Vote Results for Roll Call 123, On Agreeing to the Conference Report for H.R. 2646, the Farm Security Act ("2002 Farm Bill") (May 2, 2002) (Exhibit US-129); U.S. Senate Roll Call Votes, On the Conference Report (H.R. 2646) (Exhibit US-130); Final Vote Results for Roll Call 353, On Motion to Suspend the Rules and Pass H.R. 6124, the Food, Conservation, and Energy Act of 2008 ("2008 Farm Bill") (May 22, 2008) (Exhibit US-131); U.S. Senate Roll Call Votes, On Passage of the Bill (H.R. 6124) (June 5, 2008) (Exhibit US-132). U.S. Representatives and Senators from 48 of the 50 U.S. States voted for the 2002 Farm Bill. This includes Members of Congress from states with little livestock production or inventories, such as Alaska, Connecticut, Delaware, Hawaii, Maine, Maryland, Massachusetts, Nevada, New Jersey, Utah, and Vermont, among others. (*See* Cattle and Calves - Inventory and Sales: 2007 and 2002, Information from USDA, National Agricultural Statistics Service 2007 Census of Agriculture - State Data (Exhibit US-133); and Hogs and Pigs - Inventory and Sales: 2007 and 2002, Information from USDA, National Agricultural Statistics Service 2007 Census of Agriculture - State Data (Exhibit US-134) for production by U.S. state.) The only two states that did not have a Member of Congress vote for the 2002 Farm Bill were New Hampshire and Rhode Island. U.S. Representatives from all 50 U.S. States voted for the 2008 Farm Bill. Thus, again, the 2008 Farm Bill containing the COOL statute was supported from numerous Members from states without significant livestock production or inventories, directly contradicting Canada's claims to the contrary.

2003 in support of the country of origin labeling provisions specifically and independently.[251] Thus, to assert that COOL supporters only came from states with livestock production is simply untrue.

143. Canada and Mexico's argument that the U.S. experience in attempting to implement voluntary labeling is evidence of a lack of consumer support for this information does not survive scrutiny.[252] All that the lack of participation in the voluntary program shows is that U.S. retailers did not believe that they would gain enough of a competitive advantage by providing origin information to justify the costs of providing this information to the consumer. In fact, if one accepts the fact that consumers distinguish between products based on the perceived quality associated with meat with different origins, a fact which at least Canada appears to accept,[253] it is easy to see why this would be the case. The retailer marketing the product that consumers do not desire as much (such as non-Argentine, non-Japanese beef or non-Australian, non-New Zealand lamb) would be unwilling to provide that information because it could put that retailer at a competitive disadvantage.

144. In this context, it is also important to distinguish between consumer desire for information and willingness to pay for that information. Throughout this dispute, Canada and Mexico have attempted to conflate these issues in an effort to demonstrate that U.S. consumers do not want country of origin information. In fact, Canada cites to the success of the voluntary U.S. organic labeling program in support of its claim that voluntary labeling will always be successful where consumers desire certain information.[254] However, Canada overlooks the fact that the organic labeling program's success is not premised on the desire for this information *per se*, but is premised on the fact that many consumers prefer organic products and businesses have taken advantage of this preference to obtain a price premium for their product. In other words,

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[251] *See* Final Vote Results for Roll Call 354, On Agreeing to the Amendment (July 14, 2003) (Exhibit US-135). During consideration of the Fiscal Year 2004 Agriculture Appropriations Act in the U.S. House of Representatives, Representative Rehberg offered an amendment that would strike a provision in the underlying bill prohibiting USDA from using funds to implement country of origin labeling for that fiscal year. A vote in favor of the amendment represented direct support for the immediate implementation of country of origin labeling. Members who voted against the amendment did not necessarily oppose country of origin labeling, but believed that USDA needed more time to develop the COOL implementing regulations. Members who voted for the immediate implementation of COOL came from 42 of the 50 U.S. states, including Connecticut, Hawaii, Maine, Maryland, Massachusetts, Nevada, New Jersey, and Utah, among other states with limited numbers of livestock. Interestingly, no Member from South Dakota, a state that Canada specifically identified in its Oral Statement (Canada's Opening Oral Statement, para. 50) as having a "proportionally very few consumers of meat but very many producers of cattle and hogs" voted in favor of the COOL amendment. This raises further questions about Canada's efforts to link support for COOL with livestock production.

[252] Canada's FWS, para. 193; Canada's Opening Oral Statement, para. 59; Mexico's FWS, para. 280.

[253] *See* Canada's Opening Oral Statement, para. 59 (noting that voluntary labeling does work where there is consumer interest, such as in the case of New Zealand or Australian lamb).

[254] Canada's Opening Oral Statement, para. 59.

voluntary organic labeling only works because business believe that consumers are willing to pay more for the organic product than the product that is non-organic, and thus, they absorb the labeling costs. On the other hand, as just described, not all retailers may believe that consumers are willing to pay more for a product labeled with origin *vis à vis* product not labeled with origin, perhaps especially so in the case where the retailer is attempting to sell a product with an origin that not all consumers perceive as high quality. Thus, these retailers do not take the steps necessary to determine and then market the product's origin in the absence of a government mandate.

145. This market failure with regard to origin labeling does not prove that consumers do not want this information. Indeed, markets often fail to provide information that consumers want, including vital information regarding health and safety, as evidenced by the wide range of labeling regulations that Members routinely adopt to address these issues.

146. Finally, for the reasons just described, Canada and Mexico's citations to 2003 Proposed Rule and 2009 Final Rule for the proposition that there is little evidence that COOL will increases the sales of U.S. origin meat[255] clearly does not demonstrate that consumers do not want country of origin information. After all, the point of COOL was not to get consumers to buy one product over another, but simply to provide them with the information needed to make an informed choice as to which product they buy. Armed with this information, U.S. consumers may decide to buy more U.S.-origin product or they may choose to buy more product from other countries, such as Argentine or Japanese beef or Australian or New Zealand lamb.

D. The COOL Measures Fulfill Their Legitimate Objectives at the Level the United States Considers Appropriate

147. 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. As a result of these measures, millions of consumers now have information that was not previously available to them about the beef, pork, chicken, lamb, veal, fish, shellfish, and fruits and vegetables that they buy at the retail level. With regard to meat, the COOL statute and 2009 Final Rule 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.

148. In light of this accomplishment, consumer organizations around the country sent out press releases hailing the occasion. For example, a Consumers Union press release stated: "The Consumers Union today hailed the long-awaited implementation of mandatory federal country of

[255] Canada's FWS, para. 193 (citing to the 2003 Proposed Rule (Exhibit CDA-11, p. 61956), which states that U.S. suppliers did not participate in a program that allowed them to place U.S.-origin labels on their products and the 2009 Final Rule (Exhibit CDA-5, p. 2682), which states that USDA did not find evidence that U.S. products would receive a price premium).

origin labeling (COOL) on all meats, fish, poultry, and produce sold in retail stores in the United States beginning September 30, 2008."[256] Likewise, the Consumers Federation of America stated: "Today is a good day for consumer right-to-know...mandatory COOL is finally a reality and consumers will be able to identify where much of their food comes from."[257]

149. While many consumers and consumer organizations are pleased with the COOL measures, the United States of course 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.[258]

150. Contrary to Canada and Mexico's arguments, these efforts by the United States do not support the conclusion that the COOL measures do not fulfill their legitimate objectives.[259] Indeed, as a result of the 2009 Final Rule, most of the meat that is 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.[260] In addition, the 2009 Final Rule 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.[261] Even though the commingling provisions may

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[256] Exhibit US-89.

[257] Exhibit US-90.

[258] U.S. FWS, para. 72-83.

[259] Canada's Opening Oral Statement, para. 56-57; Mexico's FWS, para. 297-298.

[260] *E.g.*, Exhibit MEX-67 (explaining that 95 percent of the meat products derived from U.S. origin livestock are expected to be labeled as U.S. origin).

[261] As Guatemala noted in its Opening Oral Statement, the 2009 Final Rule does not require that multiple countries of origin be listed on all Category D meat. (Guatemala's Opening Oral Statement, p.2) Rather, the United States only requires that Category D labels list the names of the country required for customs purposes, leaving it up to the retailer whether they want to add additional information to the label. The United States did not require additional countries to be listed on a Category D label for multiple reasons, including the following: (1) this issue affects a very small amount of meat products sold at the retail level in the United States because few countries around the world import significant quantities of live cattle and hogs and even fewer represent major beef or pork suppliers to the United States; (2) requiring Category D meat to be labeled with more than one country would require the United States to impose record keeping requirements on slaughter houses not located in the United States, requirements which would be difficult to enforce given USDA's lack of jurisdiction over these countries; (3) it is possible that the burden imposed on other countries in requiring them to monitor the origin of their livestock would

reduce the level of detail provided in certain circumstances, consumers will still never be mislead 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.

151. In addition to ensuring that consumers would be provided with country of origin labeling, the COOL statute and 2009 Final Rule help resolve the confusion related to USDA grade labeling and FSIS's "Product of the USA" program. They do so 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 an animal born, raised, and slaughtered in the United States when that is not the case.

152. Contrary to Canada's claims, the United States could not have achieved its objectives and addressed concerns about consumer confusion simply by eliminating USDA grade labels or clarifying that USDA grade labels apply to both domestic and foreign meat.[262] Eliminating USDA's grade labels might help reduce confusion, but it would deprive both domestic and foreign marketers of a tool they use to market their products based on quality characteristics. Further, while clarifying that USDA grade labels apply to both domestic and foreign meat might reduce consumer confusion, it would do nothing to achieve the U.S. objective of providing consumer information. The United States did not adopt the COOL statute and 2009 Final Rule to merely address deficiencies in existing laws, but rather to provide additional information to consumers on a widespread basis. Putting this aside, it is the prerogative of every WTO Member to determine how to fulfill its legitimate objectives, and in this instance, the United States determined that the best way to provide consumer information, while also clearing up consumer confusion and permitting both foreign and domestic producers to benefit from the grade labeling program, was to enact the measures that it did.

153. In addition to ignoring all of these facts, Canada and Mexico's arguments, if accepted, would put the United States in an impossible position. After all, following their arguments to their logical conclusion 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

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not justify the costs given the extremely limited amount of products it would affect; and (4) consumers in the United States had not expressed concerns about confusion regarding this type of situation to the extent that they had regarding non-U.S.-origin meat being affixed with a USDA grade label.

[262] Canada's Opening Oral Statement, para. 55.

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.

154. 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. And as the United States has pointed out, such an approach is entirely consistent with the TBT Agreement. The preamble allows Members to design their measures to achieve legitimate objectives at the level they consider appropriate and the Agreement does not require a Member to design a measure that fulfills its objective to maximum effect or without regard to costs.

155. 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 measure could have conceivably designed its measure in a different, and perhaps even 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. For example, some Members might have chosen to err more on the side of consumer information than the United States did while others might decide 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.

156. Not only do Canada and Mexico's arguments about the scope of the COOL statute and 2009 Final Rule attempt to place the United States in an impossible position, but if accepted, they would implicate the labeling systems of many other WTO Members. For example, 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 – such as for processed food and restaurants – that are included.[263] Yet many other Members' labeling systems include similar characteristics. For example:

- Australia's mandatory labeling requirements apply to pork and fish but not to

[263] Canada's Opening Oral Statement, para. 56-57; Mexico's FWS, para. 297-298.

beef, chicken, or lamb.[264] Australia's requirements also apply at the retail level, but exempt food sold in restaurants.

- Brazil's mandatory labeling requirements apply to apples, mangoes, melons, oranges, papayas, pears, and tangerines, among other fruits. They do not apply to bananas, blueberries, cranberries, or plums, among others.[265]

- Canada has mandatory labeling requirements for honey and maple products, but not for other products like olive oil or vinegar.[266] The EU, on the other hand, has mandatory labeling requirements for honey and olive oil, but not maple products or vinegar.[267] A third WTO Member, Colombia, has mandatory labeling requirements for honey and vinegar, but not maple products or olive oil.[268]

- The EU's labeling requirements apply at the retail level but exempt food sold in restaurants.[269]

- Korea's mandatory labeling requirements apply to red meat, pork, chicken, rice, and *Kimchi*, but not to fish, lamb, or other similar products.[270] Korea's requirements also apply in restaurants but not at the retail level.

157. Canada and Mexico's arguments about the flexibilities and potential confusion that these requirements may cause would also be problematic for other Members' requirements, including their own. In fact, many Canadian consumers have recently registered complaints about the confusing nature of Canada's "Product of Canada" labeling requirements. An October 2010 article in the Ontario Star reported that "[t]he federal government is testing out labelling options to promote Canadian food products in the wake of new rules that producers complain are too restrictive and consumers say are confusing. The newly released results of multiple surveys and focus groups, commissioned by Agriculture Canada and the Canadian Food Inspection Agency to test the effectiveness of current Canadian origin labelling and determine the best way to fix what

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[264] Australia's Responses to Questions of the Panel Following the First Substantive Meeting with the Panel ("Australia's Responses"), Question 1.

[265] Exhibit BRA-1.

[266] Exhibit CDA-167; Exhibit CDA-173.

[267] Exhibit EU-1.

[268] Colombia's Answers to the Panel's Questions for the Third Parties ("Colombia's Answers"), p. 10-16.

[269] Exhibit EU-1.

[270] Korea's Responses, Question 1.

consumers say is a "highly confusing" system..."[271]

E. The Risks of Non-Fulfillment Include Consumers Not Receiving Information About the Products They Buy and Continued Consumer Confusion

158. Article 2.2 of the TBT Agreement states that "technical regulations shall not be more trade-restrictive than necessary, taking account of the risks that non-fulfillment would create." The phrase "taking account of the risks that non-fulfillment would create" refers to the fact that Members should take into account what would happen if a measure were not adopted when determining the level it considers appropriate for the particular legitimate objective it is seeking to fulfill. As the preamble confirms, Members are free to determine the level that is appropriate to achieve a particular legitimate objective. In assessing the risks of non-fulfillment, a Member may consider a number of elements, such as the consumer confusion that would result from not enacting the measure or the consumer desire for the information. This inquiry can help the Panel to understand what level a WTO Member considers appropriate in achieving a particular legitimate objective.

159. In this instance, the Panel may consider relevant the U.S. assessment of the risk of consumer confusion related to USDA's grade labeling system when it was designing its measures.[272] The Panel may also find relevant the considerable consumer support for country of origin labeling as evidenced by the numerous comments by individual consumers and consumer organizations urging Congress and USDA to adopt these measures. In this sense, another risk of non-fulfillment is that these consumers would not receive the information that they strongly desire in order to make informed purchasing decisions.

F. Canada and Mexico Have Failed to Present A Reasonably Available Alternative to the U.S. COOL Measures

160. Canada and Mexico have failed to present any reasonably available alternatives to the U.S. COOL measures. Neither of the options that they propose – a voluntary labeling system or a system based on substantial transformation – would fulfill the U.S. legitimate objectives at the level that the United States considers appropriate.

1. Voluntary Labeling is Not a Reasonably Available Alternative

161. 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

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[271] "Testing Begins on Pro-Canadian Food Labels," Windsor Star (Ontario) (Oct. 8, 2010) (Exhibit US-136).

[272] U.S. FWS, para. 29.

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.

162. Most consumer organizations oppose voluntary labeling because they do not believe that it is effective in providing consumers with information. For example, the Consumers Federation of America, the National Consumers League, and Public Citizen asked the U.S. Senate to oppose voluntary labeling, noting that "industry already has voluntary labeling authorization and it has not resulted in country-of-origin labeling for beef."[273] Similarly, TACD, a group comprised of 27 U.S. and 49 EU consumer organizations, expressed opposition to voluntary labeling, stating that "[v]oluntary labeling programs do not offer the same benefit as a mandatory labeling program since, by definition, voluntary programs do not require all foods in a particular category to be labeled."[274]

163. Finally, 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 all WTO Members, including third parties Australia, Colombia, the EU, Guatemala, Japan, and Korea, among others.

2. Labeling Based on Substantial Transformation is Not a Reasonably Available Alternative

164. A system based on substantial transformation is also not a reasonably available alternative. This type of labeling system would not fulfill the U.S. legitimate objectives at the level that the United States considers appropriate and it would not be substantially less trade restrictive than the system that the United States adopted.

165. A system based on substantial transformation does not achieve the U.S. legitimate objective at the level that the U.S. considers appropriate because it does 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. Many U.S. consumers indicated that this level of information was important to them. As one example, Ron Krisher wrote "Americans deserve to know where these products were grown, raised and processed."[275] Similarly, Jennifer Walla stated that "meat should be labeled with the animal's country of birth, feeding, and processing."[276] Many other consumers shared these views, and in fact, even Canada at one time

[273] Exhibit US-61.

[274] Exhibit US-118, p. 7.

[275] Exhibit US-124.

[276] Exhibit US-125.

indicated that "requiring meat products other than those eligible under the provision for a 'U.S.' label to be labelled as originating in a single country denies the reality that production segments in the meat industry are internationally integrated."[277] Instead of providing the level of information requested by U.S. consumers, a system based on substantial transformation would only provide the name of the country where the animal was slaughtered and would not distinguish between an animal that spent its entire life in the United States and an animal that spent a substantial portion of its life in another country, including an animal that spent its entire life in another country except for the day that it was slaughtered. In this sense, Canada and Mexico's current proposal would provide significantly less information than the U.S. system.

166. Because a system based on substantial transformation would list all forms of meat derived from animals slaughtered in the United States as U.S. origin it would also fail to meet the U.S. objective because it would be confusing to consumers. For example, Ross Vincent wrote: "I strongly support the definition of U.S. cattle and beef products for labeling purposes as 'born, raised, slaughtered and processed in the United States.' All other definitions mislead consumers... [c]attle and beef products that were born and partially raised in another country should not be labeled as a product of the U.S."[278] Another consumer, Danila Oder, wrote that "[i]t is misleading to consumers to allow 'Product of the U.S.' labeling for animals that are born in another country and live in the U.S. for as little as 100 days."[279] Many other consumers shared this view.

167. 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.[280] In fact, 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. Nearly half of consumers indicated that the label should list both Mexico and the United States as the countries of origin, while another 25 percent of consumers indicated that the label should list only Mexico as the country of origin. Substantial transformation ranked third, with a mere 21 percent indicating that the label should define origin based on where the cow was slaughtered. Given the lack of consumer support for such a definition of origin, it is clearly not a reasonably available alternative.

168. Consumer organizations, such as the Consumers Federation of America, National

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[277] Letter from William R. Crosbie, Minister-Counsellor (Trade and Economic Policy), Canadian Embassy to Barry L. Carpenter, Deputy Administrator, AMS (July 9, 2002) (Exhibit US-137).

[278] Exhibit US-115.

[279] Exhibit US-85.

[280] "Country of Origin Labeling Poll," Consumer Reports National Research Center (Oct. 4, 2010) (Exhibit US-138).

Consumers League, and Public Citizen share the views of the Consumers Union and individual consumers that country of origin labeling for meat products should not be based on substantial transformation. In fact, in a letter to Congress, these three organizations stated that a proposal to allow cattle that has been in the United States for over 100 days to be labeled U.S. origin "could mislead consumers into thinking a product is of U.S. origin when, in fact, it is not."[281] As a result, these four organizations, along with Food & Water Watch, all advocated a mandatory labeling system that defines U.S. origin meat as meat derived from animals born, raised, and slaughtered in the United States. In another letter, the Consumers Federation of America wrote that "[o]nly cattle born, raised, slaughtered, and processed in this country should be considered products of the United States for labeling purposes. This is what most consumers would assume from either 'Product of the USA' of 'USA Beef' on a label."[282]

169. Thus, as the United States has explained, a system based on substantial transformation would fail to achieve the U.S. legitimate objectives for at least three reasons. First, it would provide less information than currently provided about the countries in which an animal spent periods of its life when it was born, raised, and slaughtered in more than one country. 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.

170. Not only would a system based on substantial transformation fail to achieve the U.S. legitimate objectives, but Canada and Mexico have failed to explain how this type of system would be less trade restrictive than the one adopted by the United States. In particular, both systems would still mandate labeling at the retail level, and thus, both systems would require individuals in the supply chain to maintain adequate records as to the origin of the products they are processing. Accordingly, it is unclear how this system is less trade restrictive.

171. 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 around the world, and thus, would call into question the WTO-consistency of these systems. A few examples of labeling requirements that other WTO Members have adopted that do not solely define origin using substantial transformation principles are as follows:

- *Australia*: Australia's mandatory country of origin labeling requirements for all packaged foods and unpackaged fresh or processed fruit, vegetables, seafood and pork sold in Australia do not entirely rely on substantial transformation principles. In fact, in order to qualify for the use of "Product of" label for a particular country, "virtually all the processes of production or manufacture of the goods must have

[281] Exhibit US-61.

[282] Exhibit US-84.

happened in the country of origin claimed."[283] Similarly, to qualify for the use of the "Made in" label for a particular country, "more than 50 percent of the costs of production must have been carried out in the country claimed to be the origin."[284]

- *Canada*: Canada's voluntary "Product of Canada" labeling requirements are not entirely based on substantial transformation. To make a "Product of Canada" claim, "all or virtually all (at least 98 percent) of the total direct costs of producing or manufacturing the good [must] have been incurred in Canada."[285] Similarly, a "Made in Canada" claim requires that "at least 51 percent of the total direct costs of producing or manufacturing the good have been incurred in Canada."[286]

- *Colombia*: Some of Colombia's labeling requirements are not based on the principle of substantial transformation and require more than one country to be listed on the label. For example, in the case of honey, Colombia requires that "the label must indicate the country where the honey has been collected; or the countries when it is a mix of honeys from several countries, clarifying the proportion of the mix."[287]

- *The European Union*: The EU's labeling requirements for beef are not based on substantial transformation. As the EU notes in its Replies to the Panel's Questions, "in the situation where there is more than one country concerned, the label requires information about the country of birth, the country of fattening and the country where slaughter occurred, and eventually also about the place of cutting."[288]

- *Japan*: Japan's labeling requirements for fresh food are not based on substantial

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[283] Australia's Responses, Question 1.

[284] Australia's Responses, Question 1.

[285] Exhibit CDA-163, p.16. In response, Canada may note that in addition to requiring 98 percent of the costs of production to occur in Canada, the last substantial transformation must also occur in Canada, and therefore, their country of origin labeling requirements are based on substantial transformation principles. However, by that logic, the U.S. country of origin labeling requirements for meat products are also based on substantial transformation principles. After all, in order to be labeled as U.S. origin, the livestock from which the meat is derived must have been last substantially transformed (slaughtered) in the United States and must also have been born and raised in the United States. Thus, accepting Canada's own arguments would mean that a reasonably available alternative to its own labeling requirements would be a system based on substantial transformation alone.

[286] Exhibit CDA-163, p. 16.

[287] Colombia's Answers, Appendix 1, Entry 23; G/TBT/N/COL/133/Add.1 (Apr. 22, 2010).

[288] EU's Replies, para. 27; Exhibit EU-4.

transformation principles. Japan determines the origin of livestock for meat labeling in the following way: "Where the livestock was raised in no less than two countries, the country of origin is the country with a longer raising period."[289]

- *Korea*: Korea's labeling requirements for beef, pork, chicken, rice, and *kim chi* are not based on substantial transformation principles. In the case of meat, a domestic label may only be used for meat if the source cattle was raised in Korea for at least six months while a domestic label may only be used for chicken and pork if the source animal was raised in Korea for at least two months. If these requirements are not met, such as in the case of an animal imported for immediate slaughter, the label must indicate that it is "Domestic Product" and indicate the name of the importing country in parentheses.[290]

172. For the foregoing reasons, Canada and Mexico have failed to present a reasonably available alternative and have failed to meet their burden of showing that any of the U.S. COOL measures breach TBT Article 2.2.

V. NONE OF THE COOL MEASURES BREACH TBT ARTICLE 2.4

173. Mexico has failed to meet its burden to show that any of the COOL measures breach TBT Article 2.4. In particular, Mexico has failed to prove that CODEX-STAN 1-1985 is a relevant international standard for the specific labeling requirements at issue in this dispute and has failed to show that this standard is not an ineffective or inappropriate means for achieving the legitimate objectives of the United States.

174. To meet its burden under TBT Article 2.4, Mexico must first demonstrate that CODEX-STAN 1-1985 is a relevant international standard for the particular labeling requirements at issue in this dispute. According to the text of TBT Article 2.4,[291] an international standard is a standard that has been adopted by a body whose membership is open to the relevant bodies of at

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[289] Japan's Replies to Questions from the Panel Following the First Substantive Meeting ("Japan's Replies"), para. 5.

[290] Republic of Korea Public gazette Issue 16786, July 7th 2008 (available in Korean, 4~6 pages), Issue 16787, July 8th 2008 (available in Korean, 30~37 pages), available at the following web site: http://www.gwanbo.korea.go.kr. English translation of Korean labeling law provided by the European Union (Exhibit US-139).

[291] Annex 1, explanatory note 2 of the TBT Agreement states that "[s]tandards prepared by the international standardization community are based on consensus." ISO/IEC Guide 2:1991 defines "international standard" as a standard that "is adopted by an international standardizing/standards organization and made available to the public." ISO/IEC Guide 2: 1991, para. 3.2.1. The chapeau of Annex 1 of the TBT Agreement states that terms used in the agreement "have the same meaning as given" in "the sixth edition of the ISO/IEC Guide 2: 1991, General Terms and Their Definitions Concerning Standardization and Related Activities."

least all WTO Members and is based on consensus.[292] The ordinary meaning of the term relevant is "bearing upon or relating to the matter at hand; pertinent."[293] Thus, to be a relevant international standard, the standard in question must not only meet the criteria for an international standard, but it also must bear upon or relate to the particular requirements at issue.

175. In this dispute, Mexico has not demonstrated that CODEX-STAN 1-1985 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.[294] The COOL measures apply to both pre-packaged meat and meat that is not pre-packaged. However, a significant portion of meat sold in stores covered by the COOL measures is not pre-packaged. This raises serious questions about whether CODEX-STAN 1-1985 is a relevant standard for all meat products, and in particular, the subset of meat products that are not pre-packaged. Mexico appears to admit as much in its Responses to the Panel's Questions, conceding that "the standard does not apply to meat that is not prepackaged..."[295]

176. Mexico has also failed to demonstrate that the CODEX standard is not an ineffective or inappropriate means of achieving the U.S. legitimate objectives.[296] The *EC – Sardines* panel stated that "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 fulfillment of the legitimate objective pursued."[297] 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; namely, it does not provide consumers with information about the different countries in which the source animal for the meat they eat was born, raised, and slaughtered and it does nothing to eliminate confusion related to meat derived from an animal that spent a portion of its life in another country before being brought into the

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[292] A standard must also be made publicly available to be considered an "international standard." *See* ISO/IEC Guide 2:1991, para. 3.2.1.

[293] *EC — Sardines (AB)*, para. 229.

[294] As Mexico clarified in its FWS and it Responses, it is only challenging the application of the COOL measures to its livestock, which is only affected by COOL's labeling requirements as they apply to muscle cuts of meat and ground meat. (Mexico's First Written Submission, para. 335-338 (only discussing the applicability of the standard to muscle cuts of meat and ground meat); Mexico's Responses, para. 111 (indicating that Mexico's claims only relate to "the treatment accorded Mexican exports of live feeder cattle," which can only be alleged to be affected by the COOL requirements as they apply to muscle cuts of meat and ground meat)).

[295] Mexico's Responses, para. 209.

[296] *See EC – Sardines* (AB), para. 289 (stating that "Peru has the burden of showing that CODEX Stan 94 is both effective and appropriate").

[297] *EC – Sardines (Panel)*, para. 7.116.

United States for slaughter, allowing this meat to be labeled U.S. origin in defiance of consumer expectations. Accordingly, Mexico's claim under TBT Article 2.4 must fail.

VI. NONE OF THE COOL MEASURES BREACH TBT ARTICLE 12.3

177. In this dispute, Mexico has failed to meet its burden to demonstrate that any of the COOL measures breach TBT Article 12.3. In particular, Mexico has failed to adduce evidence to demonstrate that the United States did not take account of its special development, financial or trade needs during the preparation and application of the COOL measures *with a view* to ensuring that these measures do not create unnecessary obstacles to exports.[298] Accordingly, Mexico's Article 12.3 claim should be rejected.

178. The text of Article 12.3 only requires the developed country Member to take account of a developing country Members' needs *with a view* to avoiding unnecessary obstacles to trade. The ordinary meaning of the phrase "with a view" is "with the aim of attaining or accomplishing" or "with the hope or intention of."[299] In this sense, Article 12.3 does not require the developed country Member to accept every recommendation presented by the developing country Member but only to proceed with the aim of ensuring that its measure does not create an unnecessary obstacle to exports.

179. The text of Article 12.3 examined in the context of other provisions of the TBT Agreement also indicates that this provision does not require the developed country Member to treat the developing country Member more favorably than other similarly situated parties. For example, another provision of the TBT Agreement that provides relevant context is TBT Article 2.1, which includes the most favored nation principle and prohibits Members from providing treatment less favorable to "like products originating in any other country."[300]

180. Similar provisions in other agreements, such as Article 10.1 of the SPS Agreement, may provide relevant context. Like TBT Article 12.3, SPS Article 10.1 requires developed country Members to "take account of the special needs of developing country Members."[301] Based on the textual similarities, WTO reports that have dealt with SPS Article 10.1 may be instructive to the Panel in this dispute.

181. In *EC – Biotech*, the panel found that the European Communities (EC) had not breached SPS Article 10.1 despite its failure to produce evidence suggesting it had taken Argentina's needs

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[298] U.S. FWS, para. 273-276.

[299] *The New Shorter Oxford English Dictionary* (4th ed. 1993), p. 3578 (Exhibit US-140).

[300] TBT Article 2.1.

[301] SPS Article 10.1.

as a developing country Member into account during the preparation and application of its measure.[302] According to the panel, the developing country has the burden of establishing a breach. Therefore, the EC's failure to produce evidence or to mention this issue in the measure itself did not result in a breach.[303]

182. The *EC – Biotech* panel also noted that "there is nothing in Article 10.1 to suggest that in weighing and balancing the various interests at stake, the [EC] must necessarily give priority to the needs of Argentina as a developing country."[304] Rather, the panel indicated that the developed country Member may decide that other issues (such as the views of consumers) are of greater importance than the need of the developing country. Similarly, the panel rejected the notion that the developed country Member is required to provide the developing country Member with special and differential treatment vis-à-vis other developed country exporters.[305]

183. In the instant dispute, Mexico has also failed to meet its burden to establish a violation of a special and differential treatment provision – this time Article 12.3 of the TBT Agreement. Mexico has failed to adduce 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.[306] Even though the United States does not bear this burden as the responding party, the United States throughout this dispute has repeatedly demonstrated the steps it took to take Mexico's concerns into account during the rule making process. For example:

- USDA provided Mexico with four unique opportunities to formally comment on development of the COOL implementing regulations and to discuss their impact on Mexican producers.[307] Mexico submitted comments but did not explain any special needs it had as a developing country.[308] USDA took Mexico's concerns

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[302] *EC – Biotech*, para. 7.1605-7.1627.

[303] *EC – Biotech*, para. 7.1622-7.1623.

[304] *EC – Biotech*, para. 7.1621.

[305] *EC – Biotech*, para. 7.1621.

[306] Contrary to Mexico's arguments in its Responses, TBT Article 12.3 does not require the United States to provide evidence that it "looked at attentively" or "reflected upon" Mexico's views or evidence that the United States responded to every comment it received regarding developing country issues. Nor is the United States required to make a showing that it considered how the measures would affect developing countries, to show the steps it took to avoid these effects, or to discuss all of the alternatives considered and provide reasons as to why those alternatives were not accepted. (Mexico's Responses, para. 220)

[307] U.S. FWS, para. 60.

[308] *See, e.g.*, Exhibit US-19; Exhibit US-127. In *EC – Biotech*, the Panel found it relevant that Argentina had failed to make any specific claims about its special needs as a developing country during the EC's development of its legislation. (*EC – Biotech*, para. 7.1625)

into consideration as it does with all comments submitted during a rule making. In fact, a September 2003 letter from USDA Undersecretary Bill Hawks to the Mexican Secretary of Agriculture, Javier Bernardo Usabiaga Arroyo stated: "We will fully consider your comments...as we develop the final rule."[309] Similarly, an October 2008 letter from USDA Secretary Ed Schaefer to Secretary Jorge Kondo Lopez of the of the Mexican Association of Secretaries of Rural Development asked the Mexican Secretary to provide additional input on the rule making as part of the Canada-Mexico Working Group, noting: "I encourage the Canada-Mexico Working Group to submit comments on this COOL regulation so that we can implement the program in a way that incorporates your input."[310]

- On August 27, 2008, USDA held a briefing on the Interim Final Rule for embassy officials.[311] Mexican officials attended this briefing and were provided the opportunity to share their views.

- On September 11, 2008, AMS Administrator Lloyd Day met with officials from the Mexican Embassy to discuss the COOL rule making.[312] Administrator Day provided the Mexican officials with the opportunity to share their views on the rule making and to ask questions. Administrator Day took these views into account as AMS worked on the 2009 Final Rule.

- The United States discussed the COOL rule making at meetings of the United States - Mexico Consultative Committee on Agriculture (CCA) in October 2002, April 2003, May 2004, May 2007, and January 2008.[313] USDA officials co-chaired these meetings along with USTR officials for the United States.

This evidence clearly demonstrates that the United States took Mexico's views into account during the rule making process.

184. Not only did the United States take Mexico views into account, but it modified the COOL

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[309] Letter from USDA Undersecretary Bill Hawks to the Mexican Secretary of Agriculture, Javier Bernardo Usabiaga Arroyo (Sep. 22, 2003) (Exhibit US-141).

[310] Letter from USDA Secretary Edward Schaefer to Jorge Kondo Lopez, the Secretary of Agriculture, Livestock, and Fisheries for the State of Sinaloa and the President of the Mexican Association of Secretaries of Rural Development (AMSDA) (Oct. 6, 2008) (Exhibit US-142).

[311] U.S. FWS, para. 274.

[312] U.S. FWS, para. 274.

[313] The Consultative Council on Agriculture (CCA) is a council that was established by the United States and Mexico to discuss bilateral agricultural trade issues on a semi-annual basis. According to meeting minutes, this issue was discussed at nearly every CCA meeting between 2002 and 2008.

measures to address them. Among other issues, Mexican officials raised concerns with USDA about the COOL record keeping requirements and the impact a rigid interpretation of the COOL statutory requirements could potentially have on the demand for Mexican livestock.[314] In response to these and similar concerns raised by other interested parties, the United States significantly reduced the record keeping burden and it introduced significant flexibility (such as commingling) into the 2009 Final Rule that has helped mitigate any potential impact on exports from Mexico.[315]

185. 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.[316] And 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 any 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. Accordingly, the United States has not breached its obligations under TBT Article 12.3.

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

186. 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 and neither party has put forward any evidence to suggest that the U.S. administration of these measures has been unreasonable or non-uniform in any way.

187. Canada and Mexico's arguments under GATT Article X:3 continue to focus on actions that do not constitute the "administration" of any of the U.S. COOL measures. GATT Article X:3 governs the "administration" of trade laws, rules and regulations.[317] The United States agrees with Canada and Mexico that the meaning of the term "administer" is to "put into practical effect" or to "apply" the measures referred to in paragraph 1 of the Article X:3.[318] On the other hand, 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

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[314] *See, e.g.*, Exhibit US-19; Exhibit US-127 (requesting that the United States reduce the record keeping burden on suppliers).

[315] U.S. FWS, paras. 76-77, 80-81.

[316] *EC – Biotech*, para. 7.1621.

[317] *EC – Bananas III (AB)*, para. 200.

[318] *EC – Bananas (III) (AB)*, para. 200.

an administrative decision."[319] In fact, the Appellate Body report that Mexico cites 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."[320] 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.

188. The Vilsack Letter does not represent the administration of the 2009 Final Rule or the COOL statute, or any other measure at issue in this dispute. Rather, the Vilsack Letter makes voluntary suggestions that industry can choose to follow outside the context of these measures. The Vilsack Letter's suggestions are not included in the COOL statute or 2009 Final Rule, and thus the Vilsack Letter cannot be characterized as applying or putting these measures into practical effect.

189. The development of the 2009 Final Rule also does not constitute the "administration" of the COOL statute or the 2009 Final Rule. The development of the 2009 Final Rule does not constitute the administration of the COOL statute because it does not apply the statute or put it into practical effect. Rather, it is the 2009 Final Rule itself that does this, and the development of the 2009 Final Rule necessarily occurs before the 2009 Final Rule itself is being applied. For this reason, the development of the 2009 Final Rule does not represent the administration of the 2009 Final Rule either.

190. In addition to focusing on actions that do not represent the "administration" of any of the

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[319] *See* Mexico's Responses, para. 222 (citing *EC – Customs Matters (AB)*, para. 224).

[320] *EC – Customs Matters (AB)*, para. 224. The full citation is as follows (with the sections Mexico omitted underlined):

> We turn to the question of whether the term "administer" in Article X:3(a) may include administrative processes and whether it requires uniformity of administrative processes. We agree with the Panel that the term "administer" may include administrative processes. In its broadest sense, an administrative process may be understood as a series of steps, actions, or events that are taken or occur in relation to the making of an administrative decision. Given this broad definition of administrative process, it appears to us that Article X:3(a) of the GATT 1994 does not contemplate uniformity of administrative processes. In other words, non-uniformity or differences in administrative processes do not, by themselves, constitute a violation of Article X:3(a). This Article contains an obligation to administer in a uniform manner legal instruments of the kind described in Article X:1—laws, regulations, judicial decisions, and administrative rulings of general application pertaining to the subject matters set out in that provision. We agree with the Panel that the term "administer" in Article X:3(a) refers to *putting into practical effect*, or *applying*, a legal instrument of the kind described in Article X:1. Thus, 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. (Emphasis added) (Footnotes omitted)

COOL measures, Canada and Mexico's arguments lack any evidentiary support for the proposition that the United States has administered the COOL statute or 2009 Final Rule in a non-uniform way. Indeed, 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.

191. Canada and Mexico have also failed to produce evidence to suggest 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 developed by the previous Administration.[321] Likewise, the development of the 2009 Final Rule proceeded in accordance with the normal notice and comment rule making process in the United States.[322] As Canada and Mexico point out, the implementing regulations did evolve throughout the process, but this is commonplace in a transparent rule making system. Further, many of the changes made to the regulations as they evolved, such as the addition of commingling, were made in response to comments received by Canada and Mexico to help ensure that the 2009 Final Rule would have the least burdensome effect on foreign and domestic market participants possible. Accordingly, these positive changes are not evidence of the unreasonable administration of any of the COOL measures.

192. The additional arguments that Canada and Mexico have made to the contrary are not compelling. For example, Mexico argues that the Vilsack Letter is one of many efforts by the United States to discourage U.S. slaughter houses from accepting foreign livestock.[323] Yet, as noted above, the Vilsack Letter is not only voluntary, but it does not even suggest that foreign livestock be treated differently than domestic livestock. Rather, it suggests that companies voluntarily engage in point of production labeling where that type of labeling would convey more information than the labeling requirements included in the 2009 Final Rule. Similarly, the statements by various Members of Congress referenced by the complaining parties do not constitute actions of the United States.

VIII. NONE OF THE COOL MEASURES NULLIFY OR IMPAIR ANY OF CANADA OR MEXICO'S BENEFITS UNDER THE COVERED AGREEMENTS

193. Canada and Mexico have failed to demonstrate that any of the COOL measures nullify or impair their benefits under the covered agreements. Indeed, the complaining parties both continue to treat this claim in a cursory fashion and have not provided further evidence or argumentation to support their allegations.

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[321] *See* U.S. Answers, para. 6-8 (discussing the circumstances in which the Vilsack Letter was issued).

[322] *See* U.S. FWS, para. 60-83 (discussing the U.S. regulatory process and the numerous changes that were made to the implementing regulations to accommodate the issues raised by interested parties.)

[323] Mexico's Opening Oral Statement, para. 50; Mexico's Responses, para. 225.

194. In their first written submissions, neither Canada nor Mexico identified a relevant benefit under any of the WTO Agreements that had allegedly been impaired, and they have still failed to do so. Article XXIII:1(b) applies to benefits accruing "directly or indirectly under this Agreement. In their Responses to the Panel's Questions, Canada and Mexico now identify the U.S. bound tariff rate for livestock under the WTO.[324] However, both parties admit that it is not this concession that they are benefitting from, but the lower tariff rate negotiated in conjunction with the North American Free Trade Agreement (NAFTA). Thus, because the parties have still failed to identify a relevant tariff concession, their claims necessarily must fail.[325]

195. Canada and Mexico have also both failed to demonstrate that they could not have reasonably anticipated the COOL measures at the time that the WTO tariff concessions were negotiated.[326] The United States has long had country of origin labeling requirements in place for meat products and has long been considering enhanced requirements such as those included in the 2009 Final Rule. At the same time, as the United States has shown, many other WTO Members also have country of origin labeling requirements for meat. As a result, Canada and Mexico could have anticipated the requirements that are at the center of this dispute.

196. Finally, Canada and Mexico have not shown how the COOL requirements have nullifed or impaired their tariff concessions as they have not shown a "clear correlation" between the harm that they allege and the COOL measures.[327] As the United States has pointed out repeatedly, any minor deterioration in the health of the Canadian and Mexican livestock industries was due to the global economic recession and other factors that the complaining parties have not addressed in their arguments.[328] And in light of the improving economic outlook in the United States, Canadian and Mexican livestock exports are surging in 2010.

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[324] Canada's Responses, para. 130; Mexico's Responses, para. 227.

[325] *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 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).

[326] U.S. FWS, para. 307-312.

[327] *Japan – Film*, para. 10.82.

[328] *See* U.S. FWS, paras. 99-105 (discussing factors that affected the U.S. market for Canadian cattle in recent years such as the global economic recession, animal disease issues, and high feed and transportation costs, among other factors); 110-114 (discussing factors that affected the U.S. market for Mexican cattle in recent years such as the global economic recession, weather conditions, and high feed and transportation costs, among other factors); 118-125 (discussing factors that affected the U.S. market for Canadian hogs in recent years such as the global economic recession, industry restructuring, and high feed and transportation costs, among other factors); 179 (explaining a model from USDA's Economic Research Service that indicates that the global economic recession had the largest impact on Canadian and Mexican livestock exports to the United States in 2008 and 2009).

IX. CONCLUSION

197. 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-94	Photographs of B label meat taken at Trader Joe's in Falls Church, Virginia (Oct. 17, 2010)
Exhibit US-95	Photographs of B label and commingled meat taken at Pick N' Save in Kenosha, Wisconsin (Oct. 18, 2010)
Exhibit US-96	Photographs of B label and commingled meat taken at Safeway in Washington, DC (Aug.22, 2010)
Exhibit US-97	Photograph of B label meat taken at Trader Joe's in Bethesda, Maryland (Oct. 27, 2010)
Exhibit US-98	Photographs of B label and commingled meat taken at Walmart in Austin, Texas (Oct. 27, 2010)
Exhibit US-99	"Final Rule on COOL Should Maintain/Expand Flexibility Reflected in Interim Final Rule and USDA Guidance," document provided by the Canadian Pork Council to the United States at an OMB 12866 Meeting on COOL held on December 12, 2009
Exhibit US-100	Letter from Food & Water Watch to USDA (Sept. 30, 2008)
Exhibit US-101	Producer Affidavits: Continuous Country of Origin Affidavit/Declarations Provided to USDA in 2009/2010 **(Contains BCI)**
Exhibit US-102	Witness Statement of Larry R. Meadows dated October 28, 2010 **(Contains BCI)**
Exhibit US-103	U.S. Cattle Imports from Canada, Source: U.S. Bureau of the Census
Exhibit US-104	U.S. Cattle Imports from Mexico, Source: U.S. Bureau of the Census
Exhibit US-105	"Tyson Sell[s] Canadian Beef Operations," Leather International, Latest News (Mar. 4, 2009)
Exhibit US-106	Canadian Beef Export Data, Source: Bureau of the Census
Exhibit US-107	Comparison of APHIS/AMS and U.S. Census Export Data for Canadian Livestock
Exhibit US-108	North American Cattle and Hog Price Data, Sources: Sources: LMIC database for U.S. and Canadian cattle, AMS data for Mexico feeder prices; ERS Exchange Rate Data Base; Statistics Canada for hogs

Exhibit US-109	Real Retail Sales Growth for Beef and Veal, Monthly, Source: IHS Global Insight Economic and Financial Data
Exhibit US-110	TACD Members, available at www.tacd.org.
Exhibit US-111	TACD Resolution on Country of Origin Labeling, Doc. No. Food 29-08 (March 2008)
Exhibit US-112	TACD Annual Recommendations, available at www.tacd.org.
Exhibit US-113	Comments submitted by Gregory Cook to USDA (July 18, 2007)
Exhibit US-114	Comments submitted by Becky McManus to USDA (July 2007)
Exhibit US-115	Letter from Ross Vincent to FSIS (Oct. 2, 2001)
Exhibit US-116	Consumers Union letter to Congress (Feb. 26, 2007)
Exhibit US-117	"New Poll Shows Consumers Overwhelming Support Country-of-Origin Labeling on Food," Public Citizen Press Release (June 20, 2005)
Exhibit US-118	Trans Atlantic Consumer Dialogue (TACD) 2008 Recommendations Report
Exhibit US-119	Comments submitted by Charles Rich to USDA (July 19, 2007)
Exhibit US-120	Comments submitted by Elizabeth Brennan to USDA (Aug. 2007)
Exhibit US-121	Comments submitted by Sherri Vinton to USDA (Nov. 18, 2003)
Exhibit US-122	Comments submitted by Richard Leithiser to USDA (Aug. 2007)
Exhibit US-123	Comments submitted by John and Rita Lesch to USDA (Aug. 2007)
Exhibit US-124	Comments submitted by Ron Krishner to USDA (July 2007)
Exhibit US-125	Comments submitted by Jennifer Walla to USDA (July 2007)
Exhibit US-126	Comments submitted by Dan Downs to USDA (Aug. 2, 2002)
Exhibit US-127	Letter from Jorge Kondo Lopez, the Secretary of Agriculture, Livestock, and Fisheries for the State of Sinaloa and the President of the Mexican Association of Secretaries of Rural Development (AMSDA) and George

	Groeneveld, Alberta Minister of Agriculture and Rural Development to USDA Secretary Edward Schafer (Aug. 15, 2008)
Exhibit US-128	Comments submitted by Nolan Johnsrud to USDA (Aug. 2007)
Exhibit US-129	Final Vote Results for Roll Call 123, On Agreeing to the Conference Report for H.R. 2646, the Farm Security Act ("2002 Farm Bill") (May 2, 2002)
Exhibit US-130	U.S. Senate Roll Call Votes, On the Conference Report (H.R. 2646) (May 8, 2002)
Exhibit US-131	Final Vote Results for Roll Call 353, On Motion to Suspend the Rules and Pass H.R. 6124, the Food, Conservation, and Energy Act of 2008 ("2008 Farm Bill") (May 22, 2008)
Exhibit US-132	U.S. Senate Roll Call Votes, On Passage of the Bill (H.R. 6124) (June 5, 2008)
Exhibit US-133	Cattle and Calves - Inventory and Sales: 2007 and 2002, Information from USDA, National Agricultural Statistics Service 2007 Census of Agriculture - State Data
Exhibit US-134	Hogs and Pigs - Inventory and Sales: 2007 and 2002, Information from USDA, National Agricultural Statistics Service 2007 Census of Agriculture - State Data
Exhibit US-135	Final Vote Results for Roll Call 354, On Agreeing to the Amendment (July 14, 2003)
Exhibit US-136	"Testing Begins on Pro-Canadian Food Labels," Windsor Star (Ontario) (Oct. 8, 2010)
Exhibit US-137	Letter from William R. Crosbie, Minister-Counsellor (Trade and Economic Policy), Canadian Embassy to Barry L. Carpenter, Deputy Administrator, AMS (July 9, 2002)
Exhibit US-138	"Country of Origin Labeling Poll," Consumer Reports National Research Center (Oct. 4, 2010)
Exhibit US-139	Republic of Korea Public gazette Issue 16786, July 7th 2008 (available in Korean, 4~6 pages), Issue 16787, July 8th 2008 (available in Korean, 30~37 pages), available at the following web site:

http://www.gwanbo.korea.go.kr. English translation of Korean labeling law provided by the European Union

Exhibit US-140 *The New Shorter Oxford English Dictionary* (4th ed. 1993), p. 3578

Exhibit US-141 Letter from USDA Undersecretary Bill Hawks to the Mexican Secretary of Agriculture, Javier Bernardo Usabiaga Arroyo (Sep. 22, 2003)

Exhibit US-142 Letter from USDA Secretary Edward Schaefer to Jorge Kondo Lopez, the Secretary of Agriculture, Livestock, and Fisheries for the State of Sinaloa and the President of the Mexican Association of Secretaries of Rural Development (AMSDA) (Oct. 6, 2008)