ANNEX A

EXECUTIVE SUMMARIES OF THE FIRST WRITTEN SUBMISSIONS OF THE PARTIES

ANNEX A-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF CANADA

I. INTRODUCTION

1. This dispute concerns the establishment by the United States of country-of-origin labelling requirements (the "COOL measure"). The COOL measure has many negative effects on Canadian cattle and hogs:

- It disrupts long-established practices regarding the importation of Canadian cattle and hogs to the United States and the subsequent production of beef and pork derived from them.

- It imposes additional and unnecessary costs and burdens on US feeding operations, slaughter houses and retailers that use Canadian animals or sell meat derived from them.

- It reduces demand for Canadian animals or meat derived from them in the US market by discouraging US feeding operations and slaughter houses from buying Canadian animals and US retailers from selling beef and pork derived from such animals.

2. The end result of the COOL measure has been a significant decline in exports of Canadian cattle and hogs to the United States and a reduction in the prices being offered by US purchasers for certain Canadian livestock .

II. BACKGROUND TO THE DISPUTE

A. THE COOL MEASURE

3. The COOL measure includes:

- the 2008 Farm Bill, enacted on June 18, 2008;

- the Interim Final Rule, published on 1 August 2008;

- the Final Rule, published on 15 January 2009; and

- the "Vilsack Letter" of US Secretary of Agriculture Tom Vilsack, issued on 20 February 2009.

4. The 2008 Farm Bill requires certain US retailers to identify the country of origin of muscle cuts of beef (including veal), lamb, chicken, goat, and pork; ground beef, ground lamb, ground chicken, ground goat, and ground pork; wild and farm-raised fish and shellfish; perishable agricultural commodities (fresh and frozen fruits and vegetables); peanuts; pecans; ginseng; and macadamia nuts.

5. The COOL measure applies only to retail establishments that sell more than US $230,000 worth of perishable agricultural commodities during a calendar year. Butcher shops and food service establishments are exempt from the COOL measure.

6. The country of origin of meat must be identified through the use of one of five labels:

- Label A – "Product of the United States" – used only for muscle cuts derived from animals, born, raised, and slaughtered in the United States.

- Label B – "Product of United States and Country X" – used for muscle cuts from animals born in country X, but raised and slaughtered in the United States.

- Label C – "Product of Country X and the United States" – used for muscle cuts derived from animals born and raised in Country X and imported for immediate slaughter in the United States.

- Label D – "Product of Country X" – used for imported muscle cuts.

- Label E – "Product of Country X, Country Y, Country Z" – used for ground meat; the label must list all countries of origin of the meat contained in the ground meat or that may reasonably be contained in it.

7. The main responsibility for maintaining accurate records on the country of origin of the covered commodities falls on retailers. However, the responsibility for maintaining accurate records flows through the entire production chain from producers to feeding operations to slaughter houses and, ultimately, to retailers. Any supplier of a covered commodity who is responsible for making a country-of-origin declaration must possess records to substantiate the country-of-origin claim.

8. The Interim Rule provided the initial regulatory basis for the implementation of the COOL legislation.

9. On the basis of the language of the Interim Final Rule, and to avoid the costs of segregation that multiple labels would impose, several major US slaughter houses indicated their intent to use Label B for the bulk of their products - even those derived from exclusively US-origin cattle and hogs (and so entitled to Label A). In response, the USDA issued a series of clarification documents that provided direction on various aspects of the Interim Final Rule, including a statement that it was not permissible to label meat derived from US-origin livestock with a mixed-origin label if solely US-origin meat was produced during the production day. There was also a meeting between select members of the US slaughter industry and US congressional leaders where such leaders threatened to modify the COOL legislation to remove any flexibility allowing the commingling of animals during slaughter, if US industry did not abandon its plans to use primarily Label B. The combination of the clarification documents and the meeting had a profound effect on the US slaughter industry. Major US slaughter houses indicated that they would change their procurement practices, so that the majority of their meat would carry Label A.

10. On 15 January 2009, the USDA published the Final Rule, which allowed for greater flexibility in the use of B or C Labels. However, the Final Rule removed the flexibility of labelling products from only US-origin animals as Label B, unless there is commingling with non-US-origin animals during a single production day.

11. On 20 February 2009, USDA Secretary Tom Vilsack issued an open letter ("Vilsack Letter") to industry outlining his concerns about the flexibility still contained in the Final Rule. He asked industry to adopt labelling practices that are even more stringent than the requirements found in the Final Rule, including asking industry to "voluntarily" adopt labelling by production point (i.e., Born in Country X, Raised in Country Y and Slaughtered in Country Z). The Letter stated that failure to comply with the "voluntary" suggestions could result in modifications to the Final Rule.

B. CANADA-UNITED STATES CATTLE AND HOG MARKETS: INTEGRATED INDUSTRIES

12. The Canadian and US cattle and hog markets are highly integrated, with producers, feeding operations and slaughter houses located on both sides of the Canada-United States border.

13. The United States is Canada's largest export market for cattle and hogs. In 2007, prior to the COOL measure, Canadian cattle exports totalled approximately 1.4 million head and Canadian hog exports totalled approximately 10 million head. In 2009, the first full year after the COOL measure went into effect, exports of cattle declined to approximately 1.1 million head and exports of hogs declined to approximately 6.4 million head, reductions of 23% and 36% respectively.

14. Canadian cattle and hog exports to the United States are a major percentage of Canadian production (30% in 2007). The United States is essentially Canada's only export market for cattle and hogs for non-breeding purposes, due to its proximity and the practical limitations on the transportation of live animals to other countries.

15. In contrast, US feeding operations and slaughter houses in most regions are able to quite easily find domestic substitutes for Canadian imports when the costs of using Canadian animals are higher than the costs of using US animals. Because of the size of the US market, Canadian exports of cattle and hogs are a small percentage of US slaughter - a percentage that has dropped since the introduction of the COOL measure:

- for cattle 4.2% of US slaughter in 2007, dropping to 3.1% in 2009;
- for hogs 9.2% of US slaughter in 2007, dropping to 5.5% in 2009.

C. EFFECTS OF THE COOL MEASURE

16. The COOL measure has caused significant differential effects on Canadian cattle and hogs as compared to US cattle and hogs. It imposes significantly greater costs and burdens on the use of Canadian rather than on US cattle and hogs in the production of beef and pork, mainly in the form of requirements for product segregation. Therefore, the COOL measure creates a significant incentive to use exclusively US-origin animals.

17. As a result of the COOL measure, there has been decreased demand from US feeding operations and slaughter houses for Canadian cattle and hogs. That decreased demand has led to a significant reduction in both quantity of US imports of Canadian cattle and hogs and a reduction in the prices being offered by US purchasers for certain Canadian livestock.

III. LEGAL ARGUMENTS

18. The COOL measure is inconsistent with the following WTO obligations of the United States:

- TBT Agreement Articles 2.1 and 2.2; and
- GATT 1994 Articles III:4, X:3(a), and XXIII:1(b).

1. TBT Agreement

(a) The COOL measure is a technical regulation

19. A measure is a technical regulation under the TBT Agreement if: it applies to an identifiable product or group of products; it lays down a product characteristic; and compliance with the product characteristics laid down in the measure is mandatory. The COOL measure is a technical regulation because it applies to specific commodities; lays down product characteristics by requiring labels that contain a means of identification of the products based on their origin; and is mandatory.

(b) The COOL measure violates Article 2.1 of the TBT Agreement

20. There is a violation of Article 2.1 if a technical regulation applies to "like" products and the technical regulation treats imported products less favourably than like domestic products. A measure provides less favourable treatment to an imported product if it modifies the conditions of competition in the relevant market to the detriment of imported products.

21. Imported and domestic cattle and hogs are like products for the purposes of Article 2.1 because the only basis of distinction between imported and domestic cattle and hogs is their origin.

22. The COOL measure accords less favourable treatment to Canadian cattle and hogs than their US counterparts because it imposes substantial additional costs and burdens on use of Canadian cattle and hogs. In particular:

- The COOL measure imposes segregation costs and burdens on feeding operations, slaughter houses and retailers that use Canadian-origin cattle and hogs or meat derived from them.

- Such costs and burdens have resulted in many US feeding operations and slaughter houses no longer accepting Canadian cattle and hogs. As a result, those animals that are exported must be transported over greater distances, at increased costs, to those US feeding operations and slaughter houses that are still accepting Canadian animals.

- In order to accommodate the need to segregate Canadian cattle and hogs from US cattle and hogs, US slaughter houses that are still accepting Canadian cattle and hogs have restricted the days of the week and often the times of the day when Canadian animals will be accepted at their facilities. Such restricted days and times have caused border delays, increased transport costs and created other logistical problems for Canadian producers.

- The COOL measure has forced US feeding operations and slaughter houses to modify their contracting practices to the detriment of Canadian cattle and hogs.

- The COOL measure has created administrative and political uncertainty for the use of Canadian cattle and hogs. The USDA and Congress have provided contradictory and confusing direction as to the implementation of the COOL measure. This has created uncertainty for US feeding operations and slaughter houses that use Canadian cattle and hogs – uncertainty that does not exist for feeding operations and slaughter houses that use only US cattle and hogs.

23. As the COOL measure imposes substantial additional costs and burdens in the use of Canadian cattle and hogs as compared to the use of US animals in the United States, there is decreased demand for Canadian cattle and hogs. The decrease in demand has resulted in a significant

decline in imports of Canadian animals and a reduction in the prices being offered by US purchasers for certain Canadian livestock, as confirmed by econometric analyses and the U.S Congressional Research Service.

24. The COOL measure has therefore modified the conditions of competition in the US market to the detriment of Canadian livestock, contrary to Article 2.1.

(c) The COOL measure violates Article 2.2 of the TBT Agreement

25. A technical regulation violates Article 2.2 if:

- Its objective is not a legitimate one;
- It fails to fulfil the legitimate objective; or
- The technical regulation is more trade restrictive than necessary to fulfil the legitimate objective. An important consideration in this element of the test is whether a reasonably available and less trade-restrictive alternative measure exists that would fulfil the legitimate objective.

26. The true objective of the COOL measure is trade protectionism, which is shown by the selection of the commodities covered by the COOL measure as well by statements of US lawmakers and industry groups during the development and enactment of the COOL measure. Trade protectionism can never be a justifiable or legitimate objective under Article 2.2 of the TBT Agreement. Therefore the COOL measure violates Article 2.2.

27. The COOL measure does not fulfil its purported objective of providing consumers with accurate country-of-origin information because it actually provides inaccurate or misleading information about the country-of-origin of the meat consumers are purchasing.

28. The COOL measure is more trade-restrictive than necessary to achieve the US purported objective. There are less trade-restrictive alternatives reasonably available to the United States that can meet the US objective of providing consumer information. These include voluntary country-of-origin labelling and labelling based on substantial transformation.

29. Voluntary labelling is an appropriate alternative as there is limited consumer demand in the United States for country-of-origin information and there is no compelling justification, such as health or safety, which would warrant mandating its provision. Voluntary country-of-origin labelling would make country-of-origin information available to consumers who consider such information sufficiently important to their purchasing decisions that they are willing to pay for it. It would also be less trade-restrictive than the COOL measure by removing or reducing the differential costs and burdens on the use of Canadian cattle and hogs.

30. Labelling based on substantial transformation, which would determine the country of origin on the basis of whether processing in a second country changes the nature of a product, is also an appropriate alternative. It would provide clear and relevant country-of-origin information to consumers, while being less confusing and easier to understand than the COOL measure. It would also be simple, and both technically and economically feasible, to use this approach for retail labelling. Finally, it would not impose differential costs on the use of imported cattle and hogs as there would be no costs associated with segregating animals during production.

2. GATT 1994

(a) The COOL measure violates Article III:4 of the GATT 1994

31. Three elements must be satisfied for a measure to violate Article III:4: (1) the imported and domestic products must be "like"; (2) the measure must constitute a law, regulation or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution or use; and (3) the measure must accord less favourable treatment to the imported product by modifying the conditions of competition in the relevant market to the detriment of imported products.

32. Imported and domestic cattle and hogs are like products for the purposes of Article III:4 because the only basis of distinction between imported and domestic cattle and hogs is their origin.

33. The COOL measure is a law, regulation or requirement that affects the internal sale, offering for sale, purchase, distribution and use of imported cattle and hogs, as well as beef and pork derived from imported cattle and hogs. The COOL measure affects the competitive opportunities for Canadian cattle and hogs by imposing greater costs and burdens on US industry when using Canadian cattle and hogs. This has resulted in a significant decrease in demand for Canadian cattle and hogs, therefore affecting the sale, purchase and use of Canadian animals.

34. The COOL measure modifies the conditions of competition in the US market to the detriment of imported Canadian products. Therefore, it is inconsistent with Article III:4 of the GATT 1994 because it accords to imported products treatment less favourable than the treatment it accords to "like" domestic products.

(b) The COOL measure violates Article X:3(a) of the GATT 1994

35. Article X:3(a) requires a WTO Member to administer laws, regulations, and administrative rulings of general application affecting the sale, distribution, processing or other use of imports in a uniform, impartial and reasonable manner.

36. The COOL measure is a law, regulation and administrative ruling of general application affecting the sale, distribution, processing or other use of imports.

37. The United States prescribed requirements through the Vilsack Letter that are not found in laws and regulations of the United States. It enforced that prescription by a threat of regulatory amendments. This constitutes an unreasonable administration of the COOL legislation and the Final Rule. The United States has therefore violated its obligation under Article X:3(a) of the GATT 1994 to administer its laws, regulations and administrative rulings of general application in a reasonable manner.

(c) The COOL measure has nullified or impaired Canada's benefits as a result of the application of the COOL measure

38. A complaining party must establish three elements for a claim under Article XXIII:1(b): 1) the application of a measure by a WTO member; 2) a benefit accruing under the relevant agreement; and 3) the nullification or impairment of the benefit as the result of the application of the measure.

39. The United States has applied the COOL measure thus satisfying the first element. Canada is entitled to expect market access to the United States for its cattle and hogs that is related to the tariff concessions that would apply, on a MFN basis, between the United States and Canada under the WTO Agreement, thereby satisfying the second element.

Canada reasonably expected that its access to the US market for live cattle and hogs would be virtually unrestricted, given the low MFN rates. The extent of the restrictions on market access due to the COOL measure could not reasonably have been expected. By requiring US retailers to label beef and pork in a manner that is fundamentally at odds with the normal practice applied in other areas of US customs law – i.e., substantial transformation – the United States has nullified or impaired the benefits that Canada negotiated at the time off the conclusion of the Uruguay Round and is entitled to under Article XXIII:1(b) of the GATT 1994.

ANNEX A-2

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF MEXICO

I. INTRODUCTION

1. This dispute concerns a mandatory country of origin labelling measure (hereinafter the COOL measure) that is applied in a manner and in circumstances such that it unjustifiably discriminates against and restricts imports of Mexican cattle into the United States.

2. Historically, Mexico has been an important supplier of cattle to the United States and the largest importer of US beef. Mexico and the United States have established an integrated market on this sector.

3. The COOL measure has modified the conditions of competition to the disadvantage of Mexican cattle compared to like US cattle. It has also reduced the export opportunities available to, increased the handling cost of, and reduced the price of Mexican cattle. The COOL measure has resulted in adverse effects to the Mexican cattle industry.

4. The COOL measure is a mandatory internal country of origin labelling measure that, by virtue of its design, structure and application, unjustifiably discriminates against and restricts imports of Mexican cattle into the United States. Its purpose and effect is to protect the US cattle industry and other domestic industries that produce covered commodities against competition with like imported products and it has achieved that purpose and effect in the case of cattle from Mexico.

5. The COOL measure violates the provisions of GATT Article III:4 and X:3 and Articles 2.1, 2.2, 2.4 and 12 of the TBT Agreement, and cannot be justified under other WTO provisions. It also nullifies or impairs benefits accruing to Mexico under the GATT 1994 within the meaning of Article XXIII:1(b) of the GATT 1994.

II. LEGAL BACKGROUND

A. THE MEASURE AT ISSUE

6. The measure at issue in this dispute – the COOL measure – comprises the following legal instruments: *(i)* the Agricultural Marketing Act of 1946, as amended by the Farm, Security and Rural Investment Act of 2002 (hereinafter Farm Bill 2002) and the Food, Conservation and Energy Act of 2008 (hereinafter Farm Bill 2008); *(ii)* the Interim Final Rule on Mandatory Country of Origin Labelling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Gingseng, and Macadamia Nuts; *(iii)* the Interim Final Rule on Mandatory Country of Origin Labelling of Muscle Cuts of Beef (including Veal), Lamb, Chicken, Goat and Pork, Ground Beef, Ground Lamb, Ground Chicken, Ground Goat, and Ground Pork, and its affirmation; *(iv)* the Final Rule on Mandatory Country of Origin Labelling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Gingseng and Macadamia Nuts; *(v)* the Letter from the United States Secretary of Agriculture, Thomas J. Vilsack, to Industry Representatives; *(vi)* any modifications, amendments, administrative guidance, directives or policy announcements issued in relations to items i through v above.

B. THE STATUTORY COOL PROVISIONS

7. The Farm Bill 2002 amended the Agricultural Marketing Act of 1946, adding Subtitle D-*Country of Origin Labelling*. The Farm Bill 2008 modified some of the statutory country of origin labelling provisions that were first introduced by the Farm Bill 2002.

1. The contents of the statutory COOL provisions

8. The main requirement of the statutory COOL provisions is that retailers must notify consumers of the country of origin of the covered commodities.

9. In order for an entity to be considered a "retailer" for purposes of COOL, it must sell perishable agricultural commodities (i.e. fruits and vegetables, including cherries in brine) at a level above a $230,000 per year threshold. Entities that make sales below the threshold or do not sell any fruits and vegetables are not covered by COOL provisions.

10. The commodities covered by COOL requirements in the statutory provisions are: *(i)* muscle cuts of beef, lamb and pork, *(ii)* ground beef, ground lamb and ground pork; *(iii)* farm raised fish; *(iv)* wild fish*; (v)* a perishable agricultural commodity; *(vi)* peanuts; *(vii)* meat produced from goats; *(viii)* chicken, in whole or in part; *(ix)* ginseng; *(x)* pecans; and *(xi)* macadamia nuts.

11. The statutory provisions exclude from the scope of the COOL requirements those covered commodities used as an ingredient in a further processed food item, and those prepared in a food service establishment.

12. In relation to muscle cuts of beef, the statutory provisions include four labelling rules: *(i)* US Country of Origin[1]; (ii) Multiple Countries Of Origin[2]; (iii) Imported for Immediate Slaughter[3]; and Foreign Country of Origin[4]

13. Regarding ground meat, according to the statutory COOL provisions, it must be labelled indicating a list of all countries of origin of such ground meat, or a list of all reasonably possible countries of origin of such ground meat.

14. *Audit Verification System:* The statutory COOL provisions give the US Department of Agriculture (USDA) authority to conduct audits of any person that prepares, stores, handles, or distributes a covered commodity for retail sale.

15. The statutory COOL provisions include specific provisions for audit verification system for suppliers and retailers, informational obligations for suppliers, and its enforcement procedures.

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[1] In order for a muscle cut to be labelled as having a US country of origin, it has to derive from *(i)* an animal exclusively born, raised and slaughtered in the United States; *(ii)* an animal present in the United States on or before 15 July 2008, or *(iii)* an animal born and raised in Alaska and Hawaii and transported to the United States through Canada within 60 days.

[2] Meat derived from an animal that was not exclusively born, raised and slaughtered in the United States, or that was either born, raised or slaughtered in the United States and not imported for immediate slaughter, must be labelled indicating all of the countries in which the animal may have been born, raised, or slaughtered.

[3] Meat products derived from animals imported for immediate slaughter must be labelled indicating both the country from which the animal was imported, and the United States.

[4] Meat products with a foreign country of origin must be labelled indicating the country of origin of the meat.

C. THE REGULATIONS

16. On 1 August 2008, the Agricultural Marketing Service (AMS) of the USDA published the interim final rule for covered commodities other than fish and shellfish. On 15 January 2009 the AMS published the final rule for the mandatory country of origin labelling for all covered commodities, which came into effect on 16 March 2009.

1. The contents of the regulations implementing the statutory COOL provisions

17. The US origin for meat was defined in the regulations as the meat derived from animals exclusively born, raised and slaughtered in the United States.

18. The regulations further developed the statutory rule for Multiple Countries of Origin. Muscle cuts with multiple countries of origin "may" be labelled indicating first the United States, and second, the country or countries of foreign origin. Also, if the muscle cut covered commodities derived from animals born in a foreign country, and raised and slaughtered in the United States are commingled in a single production day with animals born raised and slaughtered in the United States, the origin "may" be designated as Product of the United States, Country X, and (as applicable) Country Y.

19. The regulations further developed the statutory rule for Imported for Immediate Slaughter. Muscle cuts derived from animals that were imported for immediate slaughter "*shall*" be labelled indicating first the country of foreign origin, and second, the United States. Also, if the muscle cut covered commodities derived from animals imported into the United States for immediate slaughter are commingled in a single production day with animals born in a foreign country, and raised and slaughtered in the United States, the origin may be designated as Product of the United States, Country X, and (as applicable) Country Y.

20. Regarding Foreign Country Of Origin, the regulations provide that the normal customs border labelling requirements continue to apply to muscle cuts of foreign origin.

21. Also, the regulations further developed the statutory rule for ground products, specifying that the labelling of ground meat, must list all countries of origin contained in it, or all countries that may be reasonably contained in it. Regarding the term "reasonable", when a raw material from a specific origin is not in a processor's inventory for more than 60 days, that country cannot be included on the label as a possible country of origin.

22. *Recordkeeping Requirements:* Regarding the authority given to the USDA by the statutory provisions for the audit verification system and enforcement, the regulations include a section describing the recordkeeping requirements.

D. THE VILSACK LETTER AND COMMENTS

23. On 20 February 2009, Thomas Vilsack, Secretary of Agriculture of the United States, issued a news release announcing that he had sent a letter inviting stakeholders to follow additional voluntary labelling practices. Mr. Vilsack's letter was addressed to industry representatives, and it suggested that, after the effective date of the final rule, the industry voluntarily follow the practices contained in his letter. The practices consist of:

- *Multiple countries of origin:* Including information about the production steps that occurred in each country.

- *Processed foods:* Labelling the products that are subject to curing, smoking, broiling, grilling, or steaming.

- *Inventory Allowance for Ground Meat:* Reducing from 60 to 10 days the time a raw material must be in a processor's inventory in order to be included in the notice of country of origin.

24. Mr. Vilsack's letter included a warning, stating that based on industry compliance with his suggestions, the USDA would consider whether or not it is necessary to modify the regulations.

III. FACTUAL BACKGROUND: THE IMPACT OF COOL ON IMPORTS OF MEXICAN CATTLE

A. OVERVIEW

25. The cattle and beef industries of Mexico and the United States have been historically integrated and interrelated. Mexico produces and exports feeder cattle to the United States where it is raised in grasslands and feedlots and subsequently slaughtered. The industry of feeder cattle for export has become of such importance for Mexico, that from 2003 to 2007, the years prior to COOL implementation, Mexico exported an average of over 1,200,000 head of cattle per year, with a value of over USD$500 million dollars per year.

B. THE PRODUCTION PROCESS OF BEEF DERIVED FROM LIVESTOCK BORN IN MEXICO

26. The Mexican industry dedicated to the production of feeder cattle for export is composed by a large number of independent cow-calf operators. The core business of the cow-calf operators is to generate the birth of calves and then raise them until they are weaned and ready to be sent to the grasslands. Therefore, the usual commercial practice is to sell calves at a weight ranging between 300 and 400 pounds.

27. There are different ways through which Mexican cattle for export are sold to the US market. Depending on a cow-calf operator's capacity, it can either sell calves directly to the buyer in the United States, or sell calves to a broker who will complete the transaction with the buyer in the United States. The sale of the calves from the broker or cow-calf operator to their clients in the US usually takes the form of a direct transaction between them.

28. The selling price of Mexican calves for export is usually determined in advance by the buyer and the seller before the cattle crosses the Mexico-US border. The selling price is negotiated between the buyer and the seller taking into account several factors, which include the market demand for calves, the quality of the calves determined by the USDA grading system, the reference prices used in the livestock auctions in the United States, the costs for transporting the calves, the future prices and the costs of feeding. Because the feeder cattle are a commodity product, Mexican sellers must maintain a competitive price in order to retain their clients in the Unites States. A small increase in the cost of the cattle can result in lost clients.

29. In general, the calves from the Mexican exporting states, mostly located in the Northern region of Mexico, have the same genetic features as the calves from the South-western regions of the United States. There are no qualitative differences between the Mexican calves for export and calves that are born in the United States.

30. Once the cattle are exported to the United States, they are shipped throughout US territory. The cattle are sent to grasslands where they are raised and fed with grass. They remain grazing on the grasslands until they reach a weight ranging between 600 to 700 pounds.

31. Once the cattle reach 600 to 700 pounds, they are sent to feedlots where it receives intensive feeding based on grains. They remain confined in the feedlots until it reaches a weight between 1,100 to 1,200 pounds.

32. When the animals reach 1,200 pounds, they are considered as fed cattle ready for slaughter, and thus, the animals are sent to the slaughterhouses. The chilled carcass is broken down in to pieces of meat that are placed in boxes. The boxed meat is then transported to distribution centres, and subsequently to retail markets.

C. CHANGES IN THE BEEF PRODUCTION PROCESS AFTER THE IMPLEMENTATION OF THE COOL PROVISIONS

33. The implementation of the COOL provisions disrupted the well integrated cattle-beef market between Mexico and the United States. Before COOL, beef labelled as "Product of the US" could refer to beef derived from an animal that was born in Mexico but slaughtered in the United States. This allowed Mexican-born cattle and US-born cattle to be fed, slaughtered, processed, boxed and sent to the retail market together without having to segregate them in each of those steps.

34. After the COOL measure, meat derived from cattle born in Mexico and raised and slaughtered in the United States must be labelled as "Product of US and Mexico. This makes it impossible for the meat derived from cattle born in Mexico to be slaughtered and processed in US plants together with cattle born and raised in the United States. Implementation of the COOL measure necessarily requires segregation through the cattle-to-beef chain.

35. The US beef processors must now incur additional costs to segregate cattle throughout the production process of beef and keep evidentiary records of such segregation. To limit those costs, each of the four major US beef processors has decided to slaughter and process Mexican cattle at only one of their plants. Also, in the case of one processor, its facilities may process Mexican born cattle only limited days per week and with a 14-day advance notice.

36. In the feedlots and grasslands cattle has to be segregated as well. Also, considering that the few processing facilities that accept Mexican-born cattle are located near the US–Mexico border, it has become economically unviable for grasslands and feedlots other than those located near the border to acquire Mexican calves. Thus, some backgrounders and feedlot operators who formerly purchased Mexican-born cattle have simply decided to suspend those purchases, in order to avoid the costs of compliance with the COOL measure and also to adjust to the new policies of the US processors.

37. In addition, the need to segregate has caused a price decrease of Mexican feeder cattle relative to comparable US cattle, which ranges between US $40 and US $60 dollars per head.

38. For an industry that has historically operated using domestic and imported cattle without distinction, the enactment of the COOL measure signifies a drastic modification of its operations, which in turn has resulted in significant losses in the volume and value of the Mexican exports of cattle to the United States.

IV. THE PROTECTIONIST OBJECTIVE OF COOL

39. The true purpose of the COOL measure by virtue of its design, structure and application is to protect domestic producers in the United States by altering the operation of the US beef industry in favour of US feeder cattle. A measure that creates a new system, independent from an existing one, and provides information on the country of origin of inputs of a product manufactured in the United States but only for *some* products that are purchased in *certain* retail stores and that excludes such information for inputs into *certain* processed products cannot be characterized as being designed and structured to achieve a legitimate consumer information objective.

40. The protective effect of the COOL measure is confirmed by its legislative history and the actions of the Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of America (R-CALF), the main proponents and supporters of the COOL measure. Country of origin labelling was seen by R-CALF and its supporters as a means to protect the US cattle industry from foreign competition.

V. LEGAL ARGUMENT

41. The measure at issue in this dispute is inconsistent with the obligations of the United States under the following provisions: *(i)* Articles III and X of the GATT 1994, and *(ii)* Articles 2 and 12 of the TBT Agreement. *(iii)* It also nullifies or impairs benefits that accrue to Mexico under the GATT 1994 within the meaning of GATT Article XXIII:1(b).

A. ARTICLE III OF THE GATT 1994

42. The COOL measure accords Mexican feeder cattle treatment less favourable than that accorded to US feeder cattle in a manner that is inconsistent with Article III:4 of the GATT 1994.

43. In *Korea – Various Measures on Beef*, the Appellate Body explained that a Member's measure is deemed to breach Article III:4 if three elements are met: *(i)* imported and domestic products at issue are "like products"; *(ii)* the measure at issue is a law, regulation or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use; *(ii)*the imported products are accorded "less favourable" treatment than that accorded to like domestic products. The three elements are met by the COOL measure.

1. Like products

44. Mexico's claims relate to the treatment accorded to Mexican exports of live feeder cattle produced by Mexican cow-calf operators. Live feeder cattle born in Mexico, and raised in the United States, and live feeder cattle born, raised and slaughtered in the United States are "like products", considering the criteria established in the findings and recommendations from the WTO DSB on this specific issue:

- The physical properties of Mexican feeder cattle are equivalent to US feeder cattle. Feeder cattle, whether from Mexico or the United States, meet the same standards and industry requirements.

- Regarding end-uses, the feeder cattle, whether from Mexico or the United States are used principally to produce beef. Prior to the COOL measure, Mexican and US cattle were employed without distinction in the production and processing of beef.

- As to the perceptions and behaviour of consumers, the consumers of feeder cattle are the US backgrounders, feedlots and the packing plants in which the cattle are processed.

Prior to the COOL measure, such backgrounders, feedlots and packing plants perceived and treated Mexican and US feeder cattle identically.

- Finally, both Mexican and US cattle are classified under subheading 0102.90 of the Harmonized System (live bovine animals – other).

45. Accordingly, by all relevant criteria, Mexican and US feeder cattle are like products.

2. Laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use

46. The COOL measure comprises a series of laws and regulations that set out the country of origin labelling requirement. These laws, regulations and requirements "affect the internal sale, offering for sale, purchase, transportation, distribution or use" of feeder cattle.

47. The COOL measure applies to a specified group of "covered commodities", among which is beef. The COOL measure imposes a requirement on retailers to notify their customers of the country of origin of beef. The measure also imposes recordkeeping and verification requirements to substantiate the origin claims that apply to all persons engaged, either directly or indirectly, in the supply of beef to retailers including stockbreeders, backgrounders, feedlot operators and meat processors and packers. While the COOL measure does not directly regulate feeder cattle, it *affects* the internal sale, offering for sale, purchase, transportation, distribution or use of feeder cattle because it regulates retail beef, which is derived from those cattle.

48. The COOL measure therefore pertains to the category of laws, regulations and requirements that *affect* the internal sale, offering for sale, purchase, transportation, distribution or use of Mexican feeder cattle within the meaning of Article III:4. Thus, the national treatment obligation in that article applies.

3. Less favourable treatment

49. The COOL measure requires that beef sold at the retail level be labelled with information indicating the place where the cattle are born, raised and slaughtered and impose record keeping and verification requirements to support the labels. The COOL measure by itself does not *de jure* distinguish between domestic and imported like products nor do the measures *de jure* distinguish between like Mexican and US feeder cattle. However, GATT Article III:4 applies to both *de jure* and *de facto* inconsistency. The focus is whether the measure modifies the conditions of competition, and the COOL measure gives US feeder cattle a competitive advantage over like Mexican feeder cattle in the US feeder cattle market.

50. The COOL measure has caused US packing plants to cease commingling fed cattle born in Mexico and raised in the United States with fed cattle born and raised in the United States and instead segregate by: *(i)* reducing the number of plants that slaughter and process fed cattle that was born in Mexico and raised in the United States. *(ii)* reducing the number of days per week that such cattle are slaughtered and processed; (iii) reducing the overall number of such cattle that are slaughtered and processed; and *(iv)* requiring advance notice prior to accepting such cattle.

51. The COOL measure has also caused US packing plants to reduce the price paid for fed cattle that was born in Mexico and raised in the United States, by means of applying an additional discount to the purchase price. The discount ranges between US$ 40 and US$ 60 dollars per head.

52. These actions have had the following direct adverse upstream effects: *(i)* some backgrounders and feedlots have simply stopped buying feeder calves born in Mexico; *(ii)* the only backgrounders and feedlots that are willing to receive feeder calves that were born in Mexico are those that are close to the packing plants that are still receiving finished cattle that were born in Mexico; *(iii)* finished cattle that were born in Mexico and raised in the United States are segregated from finished cattle born in the United States for shipping and transportation to packing plants and, in some cases, at backgrounding and feedlot facilities. *(iv)* the discount applied by packing plants against the purchase price of finished cattle that were born in Mexico and raised in the United States has been ultimately passed on to the Mexican cow-calf operators that produce the Mexican feeder calves.

53. In addition, the uncertainty created by Secretary Vilsack's letter has had the effect of encouraging the US packing plants, backgrounders and feedlots to make the actions described above even stricter.

54. Similar actions have not been taken in respect of the stockbreeding, backgrounding, feeding and transport of like US born cattle.

55. These actions have modified the conditions of competition in the US market to the detriment of Mexican feeder cattle. In this way, the COOL measure gives US feeder cattle a competitive advantage over like Mexican feeder cattle in the US feeder cattle market and thereby violate the national treatment obligation in Article III:4.

B. AGREEMENT ON TECHNICAL BARRIERS TO TRADE

56. The COOL measure is a technical regulation within the meaning of Annex 1.1 of the TBT Agreement that is inconsistent with Articles 2.1, 2.2, 2.4, 12.1 and 12.3 of the Agreement.

1. The COOL measure is a "technical regulation" for purposes of the TBT Agreement

57. The obligations in Articles 2.1, 2.2 and 2.4 of the TBT Agreement apply to technical regulations, as defined by Annex 1.1 of the TBT Agreement. The COOL measure falls within the scope of the TBT Agreement, because it constitutes a "technical regulation" pursuant to the definition contained in Annex 1.1, for the following reasons:

- The COOL measure is contained in a set of published legal instruments that are undoubtedly "documents" within the meaning of Annex 1.1 of the TBT Agreement. These documents meet the three criteria to be considered a "technical regulation": *(i)* they apply to an identifiable product or group of products; *(ii)* they lay down one or more characteristics of the product; *(iii)* compliance with those product characteristics is mandatory.

- The COOL provisions expressly state that the country of origin labelling requirements apply to a specific group of "covered commodities". Muscle cuts of beef and ground beef are included among those covered commodities. Secretary Vilsack's letter and its press release apply to the same group of "covered commodities". Thus, the COOL measure expressly applies to an identifiable group of products.

- Regarding the second criterion, the definition of "technical regulation" expressly includes "marking or labelling requirements". The Appellate Body in *EC – Asbestos* clarified that a "labelling requirement" is a product characteristic. The COOL measure imposes on retailers the obligation of informing consumers of the country of origin of the covered commodities. It further describes the method for identifying the country of origin of the

covered commodities, namely, by means of a label, stamp, mark, placard, or other visible sign. In the case of some covered commodities, such as muscle cuts of beef, the COOL measure lays down rules for determining when this product can be labelled as having a US origin, multiple countries of origin or foreign countries of origin. These features contained in the COOL measure leave no doubt that they fulfil the second criterion of laying down product characteristics consisting of marking or labelling requirements.

- Finally, the COOL measure imposes a mandatory obligation on retailers to inform consumers about the country of origin of the covered commodities. It is clear from the statutory COOL provisions that the United States imposes a mandatory scheme. With respect to the letter of Secretary Vilsack and its press release, they also have a mandatory nature, evident from the threat implied therein, that additional modifications will depend on the industry's compliance, threat that is seriously taken by the industry.

58. In conclusion, the COOL measure falls within the scope of the TBT Agreement, for it constitutes a "technical regulation" pursuant to the definition contained in Annex 1.1 of the TBT Agreement.

2. The COOL measure is inconsistent with Article 2.1 of the TBT Agreement

59. As already explained when analyzing Article III of The GATT 1994, the COOL measure accords Mexican feeder cattle treatment less favourable than that accorded to US feeder cattle, contrary to Article 2.1 of the TBT Agreement.

60. There is a close resemblance between the terms used in Article 2.1 of the TBT Agreement with those of Article III:4 of the GATT 1994. Accordingly, the essential elements of an inconsistency with Article 2.1 are: *(i)* that the measure at issue is a "technical regulation"; *(ii)* that the imported and domestic products at issue are "like products" within the meaning of that provision; and *(iii)* that the imported products are accorded "less favourable" treatment than that accorded to like domestic products.

61. As already explained, the COOL measure indeed is a "technical regulation", the products at issue are "like products", and the COOL measure accords products imported from Mexico, treatment less favourable than that accorded to like products of national origin. For these reasons, the COOL measure is inconsistent with Article 2.1 of the TBT Agreement.

3. The COOL measure is inconsistent with Article 2.2 of the TBT Agreement

62. The COOL measure is inconsistent with Article 2.2 of the TBT Agreement because it was prepared, adopted and applied with a view to, and with the effect of, creating unnecessary obstacles to international trade, and is more trade restrictive than necessary to fulfil a legitimate objective taking account of the risks non-fulfilment would create.

63. Two issues must be addressed under this provision, specifically, whether the technical regulation: *(i)* fulfils or is capable of fulfilling a legitimate objective; *(ii)* is not more trade-restrictive than necessary to fulfil such objective taking account of the risks non-fulfilment would create.

64. The COOL measure does not fulfil a legitimate objective nor is it capable of fulfilling such an objective as described hereinafter. If the Panel disagrees with that assertion, Mexico submits that the measure is certainly more trade restrictive than necessary to fulfil that objective, taking account of the risks non-fulfilment would create. Therefore, the COOL measure constitutes an unnecessary obstacle to international trade.

(a) The COOL measure does not fulfil a legitimate objective

65. In the case at issue, the objective of the COOL measure is not legitimate for the following reasons:

66. As explained above, the COOL measure does not pursue a legitimate objective since the real objective of the measure is to protect domestic producers in the United States by altering the operation of the US beef industry in favour of US feeder cattle to the disadvantage of like Mexican feeder cattle. The objective of the measure is clearly protectionist.

67. However, if this Panel finds that the objective of the COOL measure is the provision of consumer information, Mexico is of the view that while in certain circumstances providing consumer information can be a legitimate objective within the meaning of the provision, it is not a legitimate objective in *all* circumstances. Whether the objective is legitimate will depend on the specific type of information being provided to consumers and whether the provision of that information is "justifiable" in the light of all relevant circumstances relating to that information.

68. In the case of the COOL measure, both the character and the intrinsic value of the information given to consumers are inherently protectionist.

69. Regarding the character of the information, it is that US origin beef is produced from cattle that are "born, raised, slaughtered and processed" in the United States. Such detailed and specific information has only one purpose which is inherently protectionist.

70. As to the value of the information, the COOL measure provides a type of information whose value to the consumer is, as well, solely protectionist. By enacting the COOL measure, the United States is trying to shape consumer perception through regulatory intervention, and justify the legitimacy of this intervention on the basis of a governmentally created consumer perception. In such circumstances, it cannot be said that the provision of consumer information conforming to this regulatory intervention is a "legitimate objective".

71. Furthermore, if the Panel finds that, in the circumstances of this dispute, the provision of consumer information is a legitimate objective, Mexico submits that the COOL measure does not fulfil that consumer information objective because of the substantial gaps in its coverage and because of the ambiguity and uncertainty that it creates.

72. Regarding the gaps in the coverage, the COOL measure is limited to certain commodities, only governs certain retailers, and certain processed food items are excluded from the coverage. A measure that provides information on the country of origin of inputs in a product manufactured in the United States but only for some products that are purchased in certain retail stores and that excludes such information for inputs into certain processed products cannot reasonably be characterized as intended to "fulfil" a consumer information objective.

73. Regarding the ambiguity and uncertainty created by the COOL measure, first, the United States has long had a comprehensive system in place for regulating the information provided to consumers on packaging of meat products; second, the labelling "Product of USA and Mexico" under the COOL, in itself, is confusing because consumers will not know that the entire process of meat production took place in the United States while only the birth and minimal raising of the animal occurred in Mexico. A measure that creates new rules for determining the origin of beef for labelling purposes that differ from pre-existent criteria, and imposes such confusing labels cannot fulfil a legitimate consumer information objective.

(b) Even if the COOL measure was considered to fulfil a legitimate objective, the measure is more trade-restrictive than necessary to fulfil that objective, taking account of the risks non-fulfilment would create.

74. In the event that the Panel concludes that the COOL measure fulfils a legitimate objective, Mexico submits that the COOL measure is more trade restrictive than necessary to fulfil that objective, taking account of the risks non-fulfilment would create.

75. The USDA has found that the value of the information provided and its contribution to the needs of a US consumer is minimal and restricted to a limited sub-set of US consumers. Thus, the importance of the objective of providing consumer information is low. Likewise, the possibility of adverse consequences arising should the objective not be carried out is low and to the extent that those consequences arise they will be restricted to a limited sub-set of US consumers.

76. It is clear that the COOL measure is more trade-restrictive than necessary to fulfil a legitimate objective, taking into account the risks that non-fulfilment would create. The measure is highly trade restrictive as evidenced by its adverse effect on imports of Mexican feeder cattle.

77. Finally, there are at least other alternative measures that are reasonably available that provide the equivalent contribution to the objective. The first alternative is a *voluntary* country of origin labelling requirement. A second alternative is to modify the labelling criteria to conform to the pre-existing criteria (change of tariff classification and processing, both including the rule of substantial transformation or a change in nature).

78. In this way, the US measure is inconsistent with Article 2.2 of the TBT Agreement.

4. The COOL measure is inconsistent with Article 2.4 of the TBT Agreement

79. The COOL measure is not based on an existing relevant international standard, contrary to the obligation contained in Article 2.4 of the TBT Agreement.

80. The COOL measure is inconsistent with Article 2.4 of the TBT Agreement because: *(i)* a relevant international standard exists; *(ii)* the United States failed to base its regulation on that international standard; and *(iii)* the relevant international standard is not an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued.

81. CODEX-STAN 1-1985 is the "General Standard for the Labelling of Prepackaged Foods." It is a standard because it falls within the definition of "standard" contained in Annex 1.2 of the TBT Agreement. It is relevant because it contains rules for the labelling of pre-packaged foods, including rules regarding the country of origin for labelling such foods, and muscle cuts of beef and ground beef are within its the scope. It is international because it was approved by an international body.

82. According to the CODEX-STAN 1-1985, if labelling with a country of origin is considered necessary, meat that is derived from cattle that are born in Mexico and subsequently raised and slaughtered in the United States should be labelled as having a US country of origin. In direct contradiction to this international standard, the COOL measure confers the United States country of origin only to muscle cuts of beef and ground beef that derive from cattle that are exclusively born, raised, and slaughtered in the United States. Thus, the United States failed to base its regulation on the relevant international standard,

83. Finally, in the event that the Panel concludes that the COOL measure pursues a legitimate objective, Mexico submits that the rule in CODEX-STAN 1-1985 is an effective and appropriate means for the fulfilment of a legitimate objective.

84. The United States has stated that the objective of COOL measure is to inform consumers and give them accurate information pertaining to the country of origin, for the purposes of making purchasing decisions. CODEX-STAN 1-1985 is an effective means for achieving the pursued objective because it seeks to protect consumers from deceptive practices, and information on the country of origin is conveyed through a label. It is an appropriate means for informing consumers of the country of origin of the covered commodities because the rules regarding country of origin contained therein are specially designed, and thus suitable, for achieving the purpose of informing consumers about the country of origin of prepackaged foods.

85. In this way, the US measure is inconsistent with Article 2.4 of the TBT Agreement.

5. The COOL measure is inconsistent with Articles 12.1 and 12.3 of the TBT Agreement

86. The COOL measure is contrary to the obligations of the United States under articles 12.1 and 12.3 of the TBT Agreement of providing special and differential treatment to developing countries.

87. The obligation set forth in Article 12.3 can be divided into two elements: *(i)* the obligation of the United States to take into account the special development, financial and trade needs of Mexico as a developing country in the preparation and application of technical regulations; and *(ii)* the obligation of the United States to ensure that the COOL measure does not create unnecessary obstacles to exports from Mexico as a developing country.

88. Neither of those two actions was carried out by the United States.

89. First, during the preparation process of the COOL measure, both the US Congress and the USDA were made aware that the COOL measure would harm imports of Mexican feeder cattle. There is no doubt that the United States was cognizant of the possible negative effects on Mexican exports of feeder cattle. The US Congress and the USDA, however, did not address those comments and consequently made no effort to take into account the special development and financial trade needs of Mexico in its capacity of developing country.

90. Last, the COOL measure has the effect of creating unnecessary obstacles to trade, and thus the United States failed to comply with its obligation of ensuring that the technical regulations do not create unnecessary obstacles to exports from Mexico as a developing country Member.

C. ARTICLE X:3(A) OF THE GATT 1994

91. The COOL measure is inconsistent with Article X:3(a) of the GATT 1994, because the administration of the COOL measure has been anything but predictable and reasonable. The administration of the details of the measure changed over the course of the interim final rule and the final rule and the associated guidelines issued by USDA over this period. These uncertainties continued with Vilsack's letter. Administration of a law or regulation in such a manner cannot amount to uniform (i.e., predictable) and reasonable administration.

D. NON-VIOLATION NULLIFICATION OR IMPAIRMENT: ARTICLE XXIII:1(B) OF THE GATT 1994

92. The COOL measure also nullifies or impairs benefits accruing to Mexico based on tariff concessions made by the US in respect of live cattle at the end of successive multilateral rounds of trade negotiations, in a manner that is inconsistent with Article XXIII:1(b) of the GATT 1994.

93. The Article provides that a Member may have recourse to WTO dispute settlement if it considers that any benefit accruing to it directly *or indirectly* under the GATT 1994 is being nullified or impaired as the result of the application by another Member of any measure, whether or not it conflicts with the provisions of the GATT 1994.

94. In the case at issue, first, the United States enacted and implemented the COOL measure through a series measures including statutory provisions, regulations and other implementing guidance, directives of policy announcements issued in relation to those measures. Thus, a measure was applied.

95. Second, Mexico is entitled under Article XXIII:I(b) of the GATT 1994 to expect market access to the United States for its feeder cattle that is related to the tariff concessions that would apply, on a Most-Favoured-Nation (MFN) basis, between Mexico and the United States under the WTO Agreement. Mexico does not view these tariff concessions as creating a guarantee of trade volumes, but rather as creating trade expectations as to the competitive relationship between Mexican and US feeder cattle. Thus, there are benefits accruing to Mexico under the GATT 1994.

96. Last, given the low MFN rates of the United States in respect of feeder cattle, Mexico reasonably expected that its access to the US market for feeder cattle would be virtually unrestricted. The COOL measure drastically restricts this access in a manner that could not have been anticipated at the time of the conclusion of the Uruguay Round. It therefore nullifies and impairs the benefits under the GATT 1994 that Mexico negotiated during the Round.

VI. CONCLUSIONS

97. On the basis of the foregoing, Mexico respectfully requests that the Panel find that US measures are inconsistent with Articles III:4 and X:3 of the GATT 1994 and Articles 2.1, 2.2, 2.4 and 12 of the TBT Agreement. Mexico also requests that Panel find the US measure also nullifies or impairs benefits accruing to Mexico under the GATT 1994 within the meaning of Article XXIII:1(b) of the GATT 1994.

ANNEX A-3

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

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

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

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

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

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

6. Nor in fact have those slaughterhouses' actions had an appreciable impact on trade – indeed, cattle exports to the United States are sharply up in 2010. Only by ignoring basic market factors unrelated to the COOL measures – the global economic recession, high feed costs, animal disease issues, declining inventories, and a restructuring of the North American hog industry – can Canada and Mexico attempt to imply some commercial impact on their livestock attributable to the COOL measures. Indeed, it is telling that, in advancing a (remarkably underdeveloped) claim that their

benefits have been nullified and impaired, neither complainant can even identify how they have been harmed. The failure of the complaining parties to put forward a colourable argument in this regard illustrates the weak foundations upon which their arguments rest. The COOL measures do not provide less favourable treatment to Canadian and Mexican livestock. They fulfil the legitimate objective of providing consumer information without substantially restricting trade, are administered fairly, and were developed and applied in a manner that took into account a wide range of interests. Throughout the process, the United States carefully weighed competing objectives – the desire to provide better consumer information and the desire to limit the impact on market participants – and incorporated the views of interested parties in an attempt to strike the correct balance. The COOL measures reflect these objectives and are not inconsistent with the WTO Agreements.

II. LEGAL ARGUMENT

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

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

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

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

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

11. The COOL measures are not inconsistent with TBT Article 2.1. To demonstrate that a measure is inconsistent with this obligation, the complaining party must demonstrate that: (1) the

measure is a technical regulation; (2) the imported and domestic products at issue are "like" products; (3) the imported products receive less favourable treatment than the "like" domestic products; and (4) such treatment is in respect of the technical regulation.

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

13. Even if it were appropriate to evaluate a measure for consistency with Article 2.1 based on evidence regarding a product not regulated by that measure, Canada and Mexico have failed to show that the COOL measures provide less favourable treatment to livestock. These measures require meat to be labelled with origin information regardless of where the livestock from which the meat was derived was born, raised, or slaughtered.

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

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

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

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

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

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

20. As a threshold matter, it is not clear that what Canada and Mexico assert is accurate. In addition, the evidence they cite show that four of the five largest cattle packers and four of the five

largest swine packers are continuing to accept foreign cattle at some of their processing plants. Together, these plants have more than enough capacity to process all of Canada's and Mexico's exports. Canada's evidence also indicates that many producers are taking advantage of the law's flexibilities to continue processing domestic and foreign livestock without segregating.

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

22. In addition to incorrectly asserting that the COOL measures require segregation, Canada and Mexico argue that these measures "create incentives" for US industry to segregate, citing to the Appellate Body report in *Korea – Various Measures on Beef* to argue that this is sufficient to prove the measures afford less favourable treatment. However, *Korea – Various Measures on Beef* provides no support for this position. The measure at issue there created a dual retail system for domestic and foreign beef – thus, the measure itself imposed on retailers "the *legal* necessity of making a choice" between domestic and foreign products. By contrast, the complainants argue that the US law leads to a *commercial* necessity to segregate products. Indeed, the fact that some companies are not segregating demonstrates that it is not commercially necessary, and certainly not legally necessary. Processors can, and have been, accepting both types of meat, both in a segregated and non-segregated fashion.

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

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

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

26. The studies cited by Canada and Mexico to demonstrate that market conditions in 2008 and 2009 would have been more favourable but for the implementation of the 2009 Final Rule are flawed. The Informa Report suffers from four key limitations: (1) non-transparent methodologies; (2) a failure to account for previously occurring segregation; (3) a failure to account for impact of flexibilities in 2009 Final Rule; and (4) implausible conclusions given market trends. The two models developed by

Professor Daniel Sumner are also flawed. Exhibit CDA-78 relies on the unsubstantiated and flawed results produced by the Informa Report. Likewise, Exhibit CDA-79 fails to account for key factors that drove North American livestock markets during this turbulent period, erroneously relies on the use of dummy variables to explain complex changes in U.S.-Canadian price differentials and US livestock imports, and makes other methodological errors.

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

28. Canada and Mexico additionally cite to alleged administrative and political "uncertainty" surrounding the adoption and implementation of the COOL measures. Incongruously, these objections appear to be directed at a the transparent nature of the US regulatory process, which provided multiple opportunities for stakeholder input, and changes that were made to take the input into account in developing the 2009 Final Rule. Indeed, Canada and Mexico point to nothing in the process that disadvantaged imported products over domestic products.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

45. Canada and Mexico also suggest that the United States adopt a meat labelling system based on substantial transformation. This alternative would not fulfil the US objective because it would not

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

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

47. Even assuming *arguendo* that CODEX-STAN 1-1985 is a "relevant international standard" and that the United States did not base the COOL measures on it, Mexico's claim fails because, insofar as this standard addresses the provision of country of origin information of a product based on a substantial transformation rule, it would fail to fulfil the legitimate objective pursued by the United States of providing consumer information and thus would be an ineffective and inappropriate means of fulfilling the objective of the COOL measures.

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

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

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

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

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

IV. THE COOL MEASURES ARE NOT INCONSISTENT WITH GATT 1994

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

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

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

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

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

58. The Vilsack Letter does not fall within the scope of Article X:3(a). Article X:3(a) applies to the manner in which WTO Members "administer" their laws, regulations, decisions and rulings referred to in paragraph 1. The Appellate Body has interpreted the term "administer" to mean "putting

into practical effect" or "applying" those measures enumerated in paragraph 1 of Article X. The Vilsack Letter does not "apply" to the COOL measures or put them into "practical effect".

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

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

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

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

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

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

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

anticipated that the United States would maintain some kind of origin labelling on meat products when the tariff rates were negotiated.

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

VI. CONCLUSION

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