ANNEX B

EXECUTIVE SUMMARIES OF THE SECOND WRITTEN SUBMISSIONS OF THE PARTIES

Contents		Page
Annex B-1	Executive summary of the second written submission of Canada	B-2
Annex B-2	Executive summary of the second written submission of Mexico	B-10
Annex B-3	Executive summary of the second written submission of the United States	B-24

ANNEX B-1

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF CANADA

I. INTRODUCTION

1. The United States has challenged few of Canada's legal arguments or evidence in this case. Where the United States has, it has done so in a cursory way. That is particularly the case regarding Canada's claims of discrimination under GATT Article III:4 and TBT Article 2.1, where the United States has made only bare assertions to counter the wealth of Canadian and Mexican evidence of discrimination.

2. Canada therefore takes this opportunity to review its key claims and arguments and, to the extent that it has not yet done so, to address arguments and evidence put forward by the United States.

II. TBT ARTICLE 2.1/GATT ARTICLE III:4

A. INTRODUCTION

3. TBT Article 2.1 and GATT Article III:4 prohibit the United States from according less favourable treatment to Canadian-born livestock by changing the conditions of competition to the detriment of that livestock in the US market. The inconsistency of the COOL measure with these obligations is at the heart of the dispute: discrimination against Canadian-born livestock, which was the fundamental reason for Canada to bring this case.

B. US LEGAL ARGUMENTS TO JUSTIFY A VIOLATION OF TBT ARTICLE 2.1 ARE WITHOUT MERIT.

4. In its defence, the United States tries to argue that since it endeavoured to consult with industry in developing the COOL measure and, after doing so, made certain accommodations in the measure to address industry concerns, there is no violation of Article 2.1 of the TBT Agreement. It also suggests that all technical regulations result in costs and benefits that are not always spread evenly among market actors. Even if these points are valid, TBT Article 2.1 still requires that technical regulations do not accord less favourable treatment to imported products.

5. In the context of its argument that all regulations cause costs and benefits that are not always evenly spread, the United States explicitly refers to the OECD Checklist for Regulatory Decision Making. This document does not support the assertion of the United States that the COOL measure is consistent with its national treatment obligation: it only provides guidelines for OECD members to consider when developing regulations; there is no reference in the Checklist to trade effects or discrimination on imports; and in any case the United States has not claimed that it followed the Checklist. There is nothing in TBT Article 2.1 or GATT Article III:4 that justifies a measure that would otherwise violate those provisions because a certain approach was taken to regulatory decision-making.

6. The United States argues that the national treatment obligation under TBT Article 2.1 does not apply to products not explicitly covered by a technical regulation, contending that "less favourable treatment" accorded to Canadian-born cattle and hogs would not be "in respect of" the COOL measure because the measure applies only to beef and pork. That argument is flawed. First, the COOL measure applies to livestock and thus is "in respect of" livestock because it requires tracking, which in practical terms requires segregation of both livestock and the resulting meat. Second, TBT Article 2.1 requires that WTO Members shall ensure national treatment is accorded to imported products. The

words "in respect of" refer to the technical regulations, not the products that are the subject of the discrimination claim. If the United States' interpretation were accepted, a WTO Member would be free under TBT Article 2.1 (but not GATT Article III:4) to discriminate against imported products that are the contents, inputs or ingredients of a final product as long as the technical regulation did not discriminate against the final product on the basis of origin.

7. The United States argues that the words "in respect of" in TBT Article 2.1 require a WTO Member to ensure that no less favourable treatment of like products only when the treatment can be directly attributed to a Member. A WTO Member cannot divorce itself from the response by industry to its technical regulation. The actions of private actors can be attributed to the WTO Member, particularly where a measure creates incentives for those actors to act in such a manner that has adverse effects on the conditions of competition. Having imposed the COOL measure, the US government is more than sufficiently involved in the industry's response to be held responsible for the resulting violation of TBT Article 2.1.

C. MEASURES OF OTHER WTO MEMBERS ARE NOT AT ISSUE IN THIS DISPUTE, AND IN ANY EVENT DO NOT ASSIST THE UNITED STATES IN JUSTIFYING THE COOL MEASURE.

8. The United States has referred to a number of WTO Members that maintain country-of-origin labelling measures. Those measures are not relevant to this dispute for a number of reasons: they are not at issue in this dispute; they do not make the COOL measure any less inconsistent with the WTO Agreement; and Canada does not contend that country-of-origin labelling generally violates the WTO Agreement.

9. In any case, those other measures are not similar to the COOL measure in a number of significant ways: none of them explicitly deals with meat obtained from livestock slaughtered within the territory of the WTO Member; many of the measures recognize substantial transformation as conferring origin; most of the measures cited refer to labelling of pre-packaged foods; many do not have the objective of providing information to consumers; and some of the measures relate to voluntary labelling. Even if those measures were similar to the COOL measure, these can only be legally relevant if they collectively represent a "concordant, common and consistent" sequence of acts or pronouncements implying the agreement of the WTO Members regarding an interpretation of the WTO Agreements, which they do not.

D. LIMITED PRE-EXISTING SEGREGATION AND CERTAIN FLEXIBILITIES IN THE COOL MEASURE DO NOT PREVENT THE COOL MEASURE FROM CAUSING DISCRIMINATORY TREATMENT TO CANADIAN LIVESTOCK.

10. The United States has asserted that the US industry has not changed its practices because of the COOL measure due to pre-existing segregation practices; and that there is flexibility in the design and architecture of the COOL measure. That is not correct.

11. The limited segregation prior to the COOL measure was not for origin, but principally for premium programs concerning meat quality. The voluntary pre-existing segregation under those programs to meet the limited demand for such products did not have the effect of lowering the widespread segregation costs of the COOL measure. To participate in such programs, the vast majority of which apply only to beef (not pork), US slaughter houses absorbed the costs of operation, including the costs of segregation, in order to obtain the price premium associated with meat products labelled as meeting a particular program's criteria. Similarly, the voluntary USDA carcass grading program identifies the quality of beef produced from a particular animal and does not require plants to segregate their slaughter animals. There is no grade labelling for pork.

12. There was very limited pre-COOL segregation for export, again principally for beef: total beef exports account for just 6.4% of US production, and of that well over half goes to countries that do not limit imports based on the origin of livestock. Where origin is an issue, it is based on a number of factors that vary by destination, and importantly, the cuts from those animals which are not exported under the Export Verification (EV) Program move seamlessly into the US domestic supply chain. The EV programs are voluntary, with slaughter houses participating when the premium derived from the export sale is greater than the cost to comply with the EV program.

13. US industry was also engaged in segregation by origin for the domestic market on a limited basis whenever it decided to participate in any voluntary country-of-origin labelling programs. Again, slaughter houses were willing to absorb the costs of segregation but only to the extent that the premium available for these origin-label products exceeded those costs.

14. Finally, the US position that the COOL measure does not require segregation or did not force US industry to alter its pre-existing segregation practices is directly contrary to the extensive unchallenged evidence that the COOL measure caused slaughter houses to terminate or limit their acceptance of Canadian-born livestock.

15. The United States asserts that there is some flexibility in the Final Rule that allows implementation of the COOL measure at lower cost than if the COOL measure had been less flexible. Any such flexibility is without legal significance. There is no flexibility in the requirement that all beef and pork, being "covered commodities" subject to the COOL measure, must be labelled by covered retailers. Any flexibility in the COOL measure does not apply to Label "A".

E. FLAWS IN THE US CRITIQUE OF CANADA'S ECONOMETRIC ANALYSIS AND ECONOMIC DATA

16. Contrary to the assertion of the United States, Dr. Sumner's analysis and the Informa Report took into account pre-existing costs of segregation, whether for health and safety reasons or otherwise. Dr. Sumner's statistical analysis shows that the COOL measure caused specific reductions in the Canadian price of fed cattle compared to US fed cattle and reductions in US imports of Canadian fed and feeder cattle, slaughter hogs and feeder pigs relative to the use of domestic animals.

17. The United States has offered monthly trade data to challenge Dr. Sumner's economic analysis. The United States bases its statistical analysis on monthly data, despite the ready availability of weekly data from the US Animal and Plant Health and Inspection Service (US-APHIS) for cattle imports as used by Dr. Sumner. By only using monthly observations rather than the weekly data from the US-APHIS, the United States reduces the size of the available data set and reduces the precision with which the effects of the COOL measure may be measured. In contrast, by using additional weekly observations, Dr. Sumner improves the ability to test hypotheses and measure effects with precision. There is no bias in the weekly data. As a result, Dr. Sumner's analysis based on these data is superior.

18. Contrary to what the United States asserts, changes in export numbers do not change the fundamental point that the COOL measure continues to impose differential discriminatory burdens on imports of Canadian-born livestock. The chart prepared by the United States in answer to Panel Question 50 is consistent with the weekly data available from the US APHIS which Canada uses, and as a result does not serve to disprove any of Canada's economic data or econometric analysis.

III. THE COOL MEASURE VIOLATES TBT ARTICLE 2.2.

19. As Canada indicated in its response to Panel Questions, the proper interpretation of a technical regulation's compliance with this Article requires a five-step test:

- Determine if the technical regulation restricts international trade. If it does not, the measure cannot violate Article 2.2.

- Identify the objective of the technical regulation.

- Determine if it the objective of the technical regulation is legitimate. If it is not, the technical regulation violates Article 2.2.

- Determine if the technical regulation, alone or in connection with other measures, fulfils the legitimate objective. If it does not do that, the technical regulation violates Article 2.2.

- Assess other alternative measures that would fulfil the legitimate objective in a less trade-restrictive way, "taking into account the risks non-fulfilment would create". If there are such alternative measures, the technical regulation violates Article 2.2.

20. Applying the elements of that test shows that the COOL measure violates TBT Article 2.2 in each of steps 3, 4, and 5 of the test.

A. THE COOL MEASURE RESTRICTS INTERNATIONAL TRADE.

21. If a technical regulation imposes any restriction on international trade, it meets the first element of the test. There is abundant unchallenged evidence that the COOL measure has restricted international trade by reducing the ability of Canadian-born livestock to be exported to the United States.

B. THE OBJECTIVE OF THE COOL MEASURE IS PROTECTIONISM.

22. The Panel should determine the objective of a measure. This determination should focus on the "design, the architecture and the structure" of that measure, not the text of the measure. That focus should be supplemented as necessary with additional information to determine the objective of the measure, including its legislative history. If the objective of a measure is one that is explicitly listed in TBT Article 2.2, then it is not necessary to provide more precision in defining the objective. If the measure's objective is not specifically listed in TBT Article 2.2, then it is necessary to define the objective with an appropriate level of specificity, which in this instance needs to be high, because "consumer information" as an objective can be for both legitimate and illegitimate purposes.

23. The design, architecture and the structure of the COOL measure show that the measure's objective is not to provide consumer information but rather to provide protection to US producers of cattle and hogs. That is evident in the special rules and reporting requirements applied to imported livestock that do not apply to other covered commodities; the selection of covered commodities itself; and the very limited information provided by the COOL measure.

24. The protectionist objective of the COOL measure is confirmed by other evidence showing that the intent of the makers of the measure was to economically help US farmers and ranchers: its introduction in the 2002 Farm Bill (not with a package of other consumer information measures); statements made by the principal architect of the COOL provisions in the Farm Bill in connection with its introduction in the US Senate; and the interventions reflecting producer interests in its support.

25. The United States has highlighted a letter submitted during the legislative process by a number of consumer groups. But that letter, which itself discloses protectionist interests as part of its motivation, is the only one included in the Congressional Record from consumer groups. All the

other letters come from producer groups. The three other pieces of secondary evidence presented by the United States deal mostly with country-of-origin labelling generally; wrongly suggest the COOL measure will assist in enhancing food safety; focus on issues not addressed in the COOL measure; and focus on protectionist purposes.

26. Although the United States has conceded that the COOL measure was not enacted in direct response to deceptive practices, it has more recently asserted that the objective of the COOL measure is related to deceptive practices because of consumer confusion. The design, architecture, and structure of the COOL measure do not support a finding that the objective is to counter consumer confusion, much less deception. Nor does legislative history or related context reveal an objective to counter confusion. Further, even if there was evidence of consumers being deceived by the USDA grading stamp, the appropriate solution would have been to refine the USDA grading program to address that confusion. The United States cannot use confusion caused by its own voluntary programs to justify the COOL measure.

C. THE OBJECTIVE OF THE COOL MEASURE IS NOT LEGITIMATE WITHIN THE MEANING OF TBT ARTICLE 2.2.

27. Since the alleged objective of the COOL measure is not specifically listed, the United States must prove that the COOL objective is legitimate. This requires clear and compelling evidence of legitimacy, including evidence of a wider intent to implement a particular policy goal.

28. The general term of "inter alia" followed by specific terms means that the general term is limited to the type of items listed in the specific terms (a principle often referred to by the Latin term ejusdem generis). The list of specific legitimate objectives in Article 2.2 are all important objectives recognized elsewhere in exceptions in the covered agreements: national security requirements; protection of human health or safety, animal or plant life or health; protection of the environment; and the prevention of deceptive practices. It would therefore be reasonable to conclude that the type of items listed in the specific terms covers objectives set out as general exceptions or other similar situations in the covered agreements. Even if the Panel finds that the objective of the COOL measure is not to provide protection to US livestock producers but to "provide information to consumers", this is not an objective of the type listed in TBT Article 2.2. "Consumer information" is a broad term. It is therefore particularly important to define the objective with more precision for the analysis under TBT Article 2.2. Any specific definition of the objective is either not legitimate (providing information to consumers is to encourage them to favour US domestic producers of livestock over foreign competitors), or not an objective addressed by the COOL measure (health and safety, environment).

D. IF THE OBJECTIVE OF THE COOL MEASURE IS LEGITIMATE, IT DOES NOT FULFIL THAT OBJECTIVE.

29. Even if the Panel rejects Canada's position and determines that providing "consumer information" is a legitimate objective, the COOL measure does not fulfil its objective. In order to fulfil that objective, the COOL measure must provide clear and accurate information to consumers. If not, the consumers are given misinformation. Most consumers do not understand the subtle differences between Label "A", "B", and "C" meat. Even if a consumer did understand the intricate difference between Label "A", "B", and "C", because of the way the COOL measure operates, it provides virtually no useful information.

30. In order to fulfil the objective of providing consumers with information, the information must provide consumers with information that is desired by them, or at least information on which they are willing to act. The COOL measure provides information that US consumers generally are not interested in knowing and it is therefore not meaningful. The vast majority of consumers express no

interest in country-of-origin labelling, even at a general level, much less in the kind of information required to be provided by the COOL measure.

E. OTHER ALTERNATIVE MEASURES WOULD FULFIL ANY LEGITIMATE OBJECTIVE OF THE COOL MEASURE IN A LESS TRADE-RESTRICTIVE WAY, "TAKING ACCOUNT OF THE RISKS NON-FULFILMENT WOULD CREATE".

31. TBT Article 2.2 requires an assessment of another less trade-restrictive alternative measure against the challenged technical regulation. An assessment of the risks non-fulfilment would create requires a consideration of both the type of risk and the importance of legitimate objective. A challenged technical regulation, the objective of which is very important, is easier to justify than a technical regulation that addresses a less important objective. Technical regulations that discriminate against imports cannot be justified when the objective could be fulfilled in other, less trade-restrictive ways. That is particularly the case when the risks created by the failure to fulfil the objective are low. It is also important here where the COOL measure requires distinctions with discriminatory effects that are not based on neutral technical criteria but based on origin.

32. The United States has suggested that the test for an alternative measure is rather whether it meets a WTO Member's objective "at the level [it] deems appropriate while also being significantly less restrictive to trade". The suggestion that the level is that "deemed appropriate" by a WTO Member is misplaced because it relies on text found in SPS Article 5.6 that is not in TBT Article 2.2, and text in the preamble to the TBT Agreement that can only be useful as an aid to interpretation, and in any case, applies only to a closed list of objectives. The argument that alternative measures must be "significantly" less trade-restrictive lacks merit because that language is not found in the text of the Agreement, and the 1993 letter submitted by the United States in support demonstrates that an attempt by the United States to include that test for a closed list of objectives was rejected by other WTO Members.

33. Even if the test is to meet an objective at a level that a WTO Member considers appropriate, the determination of that level has to involve an objective assessment of what level of protection the challenged technical regulation actually provides. Because the COOL measure provides information that is neither accurate nor meaningful, the "level" of protection established by the United States for providing information to consumers is also very low. Consequently, non-fulfilment of that objective would pose few risks.

34. A legitimate objective that the COOL measure fulfils would have to bear some relation to informing consumers where the livestock used to produce the meat they are purchasing was born, raised, and slaughtered. The COOL measure fails to fulfil any reasonably defined legitimate objective because it does not cover purchases at places such as restaurants, specialty stores that do not sell fruits and vegetables, and smaller grocery stores; it allows commingling; and it allows transformed meat (i.e., processed meats), but not livestock, to escape from the coverage of the COOL measure. Canada is not suggesting that if those limitations were removed, the COOL measure would be consistent with the WTO Agreement. Many of these limitations mitigate (but do not eliminate) the loss of competitive position (contrary to TBT Article 2.1 and GATT Article III:4) that would have been suffered by Canadian cattle and hogs in the US market if the COOL measure did not have those limitations. But those limitations are also indicia that the United States does not consider the risk of non-fulfilment of the objective of providing information to consumers to be very high since it is willing to accept non-fulfilment of that allegedly legitimate objective in a number of significant ways.

35. Voluntary labelling is a less trade-restrictive alternative that already exists and could be expanded or modified as required. Voluntary labelling provides interested consumers with information about where livestock is born, raised, and slaughtered. It can apply to all points of sale (so could include restaurants, small grocery stores, etc.) The segregation costs and other burdens

associated with providing that information would apply only to the livestock and resulting meat that is produced to satisfy that specialized market. Other livestock and resulting meat would remain free to be traded without facing the costs and burdens of a mandatory country-of-origin labelling measure.

36. Applying substantial transformation would also be significantly less trade- restrictive as there would be no need to track an animal and its meat throughout the supply chain. Mandatory labelling based on substantial transformation would provide consumers who want to know "where their meat comes from" with that information. They would get that: labelling of meat based on the state it arrives at the border, with transformation within the country serving to change the origin to the last place of transformation. As with voluntary labelling, it could also provide greater information to consumers by including additional points of sale. It would be less trade-restrictive as it would be much simpler to label meat, removing costly segregation costs on imported livestock.

IV. THE VILSACK LETTER

37. Canada disagrees with the United States' characterization of the Vilsack Letter as being non-binding and its suggestion that the letter was of a routine nature.

38. The Vilsack Letter is extraordinary because of its timing and circumstances, the position of the person who signed the letter, the public nature of the letter, the directions given to US industry, and the fact that the Secretary's directions were backed up by an explicit threat (to reopen the Final Rule if the directions contained in the letter were not complied with by the US industry).

39. The Vilsack Letter was not a routine letter. There were multiple instances in which the new Administration reviewed pending regulations that were issued in the final days of the previous Administration. None of these resulted in a letter like that from Secretary Vilsack.

40. The Vilsack Letter expressed concern about "the regulation's treatment of product from multiple countries" and in that regard urged point–of–production labelling of muscle cuts, rather than the use of the labels and corresponding designations provided for in the Final Rule. Secretary Vilsack's concern was able to be readily addressed by US industry shifting to the use of only livestock that were born, raised and slaughtered in the United States and by selling only meat derived from such livestock. This is what has happened in practice. Thereby the US industry avoids practices that potentially conflict with the directions of the Vilsack Letter. The shift by the US industry away from livestock born in Canada was demonstrated by Canada through witness statements and confirmed by economic and econometric analyses. This shift demonstrates compliance with the directions of Secretary Vilsack.

41. Regardless of the legal status of the Vilsack Letter in US law, the Panel should characterize the directions in the Vilsack Letter as "mandatory", within the meaning of the TBT Agreement. In this respect the Panel should take into account the threat in the letter to reopen the Final Rule following a review of compliance by US industry with the directions contained in the letter as well the reference in the letter to the "intent of Congress". These factors lead to the conclusion that the directions in the Letter are mandatory.

V. ARTICLE X:3(A) OF GATT 1994

42. Canada's claim under GATT Article X:3(a) concerns the unreasonable administration by the United States Government, through the Vilsack Letter, of the Final Rule and the underlying statutory COOL provisions.

43. The Vilsack letter is being complied with through a shift by US industry away from Canadian-born livestock and is thus a form of enforcing the Final Rule and the underlying statutory COOL provisions.

44. The Vilsack Letter is an unreasonable manner of administering and enforcing the Final Rule and the underlying COOL legislation because the Letter addresses the implementation of the Final Rule, and at the same time adds further rules, while invoking the intent of Congress and threatening to reopen the provisions of the Final Rule. This amounts to regulation-making by the government of the United States through a public letter addressed to US industry. Its is an unreasonable manner of administering the Final Rule and the underlying COOL legislation, in contravention of GATT Article X:3(a).

VI. GATT ARTICLE XXIII:1(B)

45. In relation to Canada's claim under GATT Article XXIII:1(b), Canada clarified that its claim is based on the tariff concessions granted by the United States in its MFN tariff schedule that was negotiated in the Uruguay Round.

46. The current MFN rate of the United States for cattle, other than cattle for dairy or breeding, is US $ 0.01 per kilogram, in accordance with the bound rate of duty of US $ 0.01 per kilogram in the US MFN tariff. As to hogs, the same MFN tariff schedule of the United States ensures duty-free imports of hogs into the United States; this pre-dates the WTO Agreement (and even the Canada-United States Free Trade Agreement, of 1988, and the NAFTA, of 1992).

VII. CONCLUSION

47. Canada respectfully requests that the Panel find that the COOL measure of the United States is inconsistent with its obligations under the TBT Agreement, in particular Articles 2.1 and 2.2; and with its obligations under the GATT 1994, in particular Articles III:4, X:3(a) and XXIII:1(b); and that the Panel recommend that the United States bring the COOL measure into conformity with these obligations, subject to the provision of Article 26.1 of the DSU in respect of GATT Article XXIII:1(b).

ANNEX B-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF MEXICO

I. INTRODUCTION

1. This dispute concerns a particularly egregious type of country of origin labelling measure as it applies to specific facts and circumstances. Mexico's case is not a broad challenge to country of origin labelling. Mexico's case highlights that country of origin labelling measures are subject to the application of the disciplines in the WTO Agreements and are permissible only when they are in compliance with those disciplines.

2. In its first written submission, Mexico established a prima facie case with respect to each of the elements of its claims in respect of the COOL measure and the United States has failed to rebut that case.

3. The design, structure and application of the COOL measure, in respect of muscle cuts of beef and ground beef, unjustifiably discriminates against and restrict imports of Mexican cattle into the United States. Prior to the COOL measure, Mexican cattle were processed throughout the United States at various packing plants without the need for segregation by origin. The COOL measure changed this. Mexican cattle are now segregated from US cattle and processed at a limited number of packing plants, during a limited number of days and subject to additional conditions such as advance notification. Not only has this reduced the packing plants and processing opportunities available to Mexican cattle, it has reduced the feedlots and backgrounders that are willing to take Mexican cattle. This adverse change in the conditions of competition is a direct result of the COOL measure. It is clear from the case presented by Mexico that the purpose and effect of COOL measure is to protect the US cattle industry against competition with Mexican like products – live cattle.

4. On the basis of the argument and evidence presented by Mexico, it requests that the Panel find that the COOL measure is inconsistent with Articles III:4, X:3 and XXIII:1(b) of the GATT 1994 and Articles 2.1, 2.2, 2.4 and 12 of the TBT Agreement and make such recommendations that are necessary for the United States to bring itself into conformity with these provisions.

II. THE MEASURE AT ISSUE

A. THE COOL MEASURE IS DISTINGUISHABLE FROM OTHER COUNTRY OF ORIGIN LABELLING MEASURES

5. Mexico recognizes that country of origin labelling is used by WTO Members. However, most of those measures differ from the COOL measure in their design and structure and are applied in different circumstances.

6. The most common form of country of origin labelling measures relate to imported products that are to be consumed in the importing WTO Member in the form in which they are imported. This type of labelling measure is often mandatory and is applied at the border.

7. Another form of country of origin labelling measures relates to products manufactured within the territory of a WTO Member from domestic and/or imported inputs. This type of measure can be mandatory or voluntary, it can employ different types of rules and conditions for application and it can employ different forms of compliance mechanisms (e.g., certification and audit, trace back).

8. The COOL measure falls within this second form of measures. However, it occupies a very specific sub-category of such measures. The features that distinguish the COOL measure are: (i) it is mandatory; (ii) it applies very strict rules and conditions for application, related to place of birth, developing and processing of the input used to produce the final food product; (iii) it employs a certification and audit compliance mechanism; and (iv) it implicitly discriminates in the treatment between domestic and imported cattle.

B. COOL IS A SINGLE MEASURE

9. The COOL measure, like most measures created by WTO Members, is made up of various instruments. It comprises the statutory provisions, the regulations, and the administrative guidance including the Vilsack letter. Each instrument is dependent upon others and it is the collection of the instruments as a whole that creates the measure that is being challenged by Mexico. Therefore, Mexico requests that the Panel rule on these instruments as a whole. It is in this context that Mexico refers to the instruments as the "COOL measure".

C. THE COMPONENTS OF THE SINGLE MEASURE

1. The statute

10. The Statute comprises the Agricultural Marketing Act of 1946, as amended by the Farm Bill 2002 and Farm Bill 2008. It is in the Statute where the country of origin labelling requirements were created, and specifically, where the rules for labelling muscle cuts of meat and ground products were created.

2. The regulations

11. The regulations comprise the AMS Interim Final Rule, the FSIS Interim Final Rule, the AMS Final Rule and the FSIS Final Rule. These regulations implemented the statutory COOL provisions. Without the statutory provisions the regulations would not have been issued, but without the regulations, the statutory provisions could not be implemented and put into force.

3. The Vilsack letter and the administrative guidance

12. The Vilsack letter is part of the COOL measure and is subject to the TBT Agreement and GATT Article III. Even if viewed in isolation, the Vilsack letter is a "requirement" and a "technical regulation".

13. At the very least, the Vilsack letter confirms the strict interpretation of the COOL measure that has been applied by the USDA — i.e., that it is not possible for the US industry to use multiple country of origin labels in order to avoid the segregation and other costs associated with using the A label.

14. In addition to the Vilsack letter, the guidance received by the industry from the USDA further confirms the strict interpretation of the rules adopted by the US authorities.

D. THE COOL PROVISIONS FOR MEAT PRODUCTS: LABELLING CATEGORIES BASED ON THE ORIGIN OF THE CATTLE

15. The COOL measure has created a new system for labelling muscle cuts of meat and ground meat, through labelling categories based on the place where the animal from which the meat is derived was born and raised, and not on the place where the meat was produced from that animal. In this way, it ignores the substantial transformation processes that occur in the United States.

16. The COOL measure creates a labelling system with four labelling categories for muscle cuts of meat and one labelling category for ground beef. These categories do not apply to any other edible parts of the same animal and they do not apply to butcher shops and specialty meat stores, or to food service establishments.

17. In relation with Category "B", it does not make sense that the meat derived from a Mexican animal will never be able to obtain a "Product of the United States" labelling when it: (i) was born in Mexico and has the same genetic features of the cattle born in the United States, (ii) was sent to the United States at a very early period in its life to be fed in the same grasslands on which cattle born in the United States are fed, (iii) was sent thereafter to a feedlot to be fed with the same grains with which cattle born in the United States are fed, (iv) obtained more than 70% of its weight in the United States, and (v) was slaughtered and processed into meat in the same facilities as the cattle born in the United States, and further (vi) its meat was classified with the same quality grading as meat derived from an animal born in the United States

18. Furthermore, the end consumer might think that parts of the cuts come from Mexico and parts of the cuts come from the United States. This creates confusion between what is truly a "Product of Mexico" and what is considered by the COOL measure as a "Product of the United States and Mexico".

19. Importantly, the "B" label can be used in several other instances, so the end consumer might never be able to know whether a product labelled as "Product of the United States and Mexico" derived from a cattle born in Mexico and transported at a very early stage, raised, slaughtered and processed into meat in the United States.

E. THE SUPPOSED EFFORTS TO BALANCE COMPETING INTERESTS

1. The reduction of the costs of compliance

20. Although the United States attempted to reduce the burdens on US domestic retailers and producers, it is not true that it tried to reduce the burden for foreign producers or industry participants using foreign cattle.

21. The first way in which the United States tried to reduce compliance for its own market participants was through an express prohibition of the creation of any mandatory identification system to verify the country of origin of the covered commodities, and from requiring additional records other than those maintained in the course of the normal business. This prohibition does not reduce the impact of the COOL measure for Mexican cow calf producers; rather, it was designed to protect US cow calf producers.

22. The COOL measure also excludes retailers such as butcher shops and specialty meat shops from its application. This minimizes the impact of the measure on US domestic interests but keeps untouched the protectionist objective and effect of the measure because the principal distribution channels remain covered.

23. Finally, the US "compromise" excludes so many products from the scope of the COOL measure, that it has created a complex matrix of rules which would confound the most diligent consumer. This further clarifies that protectionism – not consumer information – was the true objective of the law.

2. The "flexibilities" regarding commingling

24. The United States argues that the flexibilities in the labelling rules minimize the impact on foreign cattle. This is simply incorrect. There is no flexibility regarding label "A" beef which cannot be used for beef produced from Mexican cattle notwithstanding that such cattle have the same genetic features as US cattle, were raised in the United States and were processed in the United States into beef.

25. Also, to the extent there is any practical flexibility to commingle US and Mexican cattle and use label B, the USDA's strict interpretation of the provisions has effectively discouraged this commingling. Furthermore, the flexibility to choose between label "B" or "C" does not facilitate the use of foreign cattle.

26. These flexibilities serve mainly to protect label "A", but do not provide any meaningful benefits to foreign cattle.

F. THE OBJECTIVES OF THE COOL MEASURE

1. Determining the objectives

27. Mexico presented detailed argument and evidence that 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 the US feeder cattle. Its protectionist purpose and objective is reflected in, *inter alia*, its scope being limited to certain commodities, the targeting of the principal downstream products (i.e., muscle cuts of beef) and distribution network (i.e., large diversified retailers), the exclusion of small retailers and the US processed food industry, and the departure from the established comprehensive system that was in place for regulating consumer information. The United States has not rebutted this evidence.

28. In determining the objectives of the COOL measure it is necessary for the Panel to examine the measure at a high degree of detail. If the objectives were self-defining and beyond scrutiny by a Panel, it would be difficult if not impossible for developing country Members such as Mexico to challenge such measures.

2. Protectionist intent and effect

29. It is Mexico's view that the evidence demonstrates that the intent of the COOL measure is overwhelmingly protectionist. The protectionist intent of the COOL measure is reflected in the circumstances in which the measure was introduced, its design and structure and in secondary corroborating evidence in the form of statements of US legislators and officials and of members of the US cattle industry.

(a) Circumstances in which the measure was introduced

30. It is clear that consumers supported the idea of country of origin labelling for fruits, vegetables and meat in general, although that idea was firstly introduced and supported not by consumers, but by producers.

31. To the extent some US consumers stated they wanted information on the country in which the cattle used to produce beef products were born and raised, the proportion of those consumers to the entire population of US beef consumers was very small, and unwilling to pay higher prices for any country of origin information.

32. The interests of the US cattle producers were the motivating factor in the design of the special COOL provisions for beef. In other words, the motivation was protectionism.

(b) Design and structure of the measure

33. The design and structure of the COOL measure denotes its protectionist intent. By virtue of the design and structure of the COOL measure, the only label that provides relatively precise information is the A label. The intent of the United States was to draw a distinction between beef produced exclusively from US cattle and beef produced from imported cattle or commingled imported and domestic cattle.

34. Evidence of the protectionist intent of the COOL measure is the fact that the design and structure of the COOL measure favours the use of the label A and that US authorities are interpreting and applying the measure strictly so that US beef producers maximize the use of the label A and production of A label beef and minimize the use of the multiple country of origin label and therefore the production of beef from imported cattle.

35. Also, all the efforts to reduce burdens and costs were designed to help the cow-calf operators, processors and suppliers in the United States, not to reduce the cost of compliance of foreign producers.

36. Finally, the compliance mechanism implemented in the COOL measure is designed so that the lowest cost alternative for compliance is to exclude all non-U.S. animals from the processing stream or segregate those animals in the processing stream. If there were trace back to the originating farm, there would likely be no incentive to exclude imported Mexican cattle or shift the cost of compliance solely to Mexican animals.

(c) Corroborating statements of legislators, regulators and industry

37. The legislative history of the COOL measure during the discussion of the 2002 Farm Bill clearly reflects the protectionist intent of the COOL measure.

38. Also, the protectionist intent of the COOL measure is reflected in public statements of R-CALF, the main proponents and supporters of the COOL measure. Country of origin labelling was seen by R-CALF, other producer groups and their supporters as a means to protect the US cattle industry from foreign competition.

(d) Protectionist effect

39. The protectionist intent of the COOL measure is reflected in the adverse effects of the COOL measure. If the effects of the COOL measure were simply a reflection of consumer choice, there would be very little adverse effect in the market because such a small proportion of consumers care about the country of origin of the beef they are purchasing. Instead, the actual adverse effects of the COOL measure on Mexican cattle are market-wide. This manifestly reflects protectionism and not consumer choice.

3. The consumer information objective: two principal objectives

40. Assuming *arguendo* that the Panel accepts that the COOL measure is not merely protectionist, it is Mexico's view that the COOL measure could be viewed as a labelling measure that, at a very general level, is intended to provide information to consumers on where the cattle that were processed into beef in the United States were born, raised and slaughtered. However, it is not

sufficient for the Panel to define the objectives of the COOL measure at this general level. It must go further to determine the true objectives of the measure.

41. Although the A, B, and C labels purport to provide various combinations of origin information, the two underlying and primary objectives of the COOL measure are: (i) to provide information on label A, namely beef produced from cattle that are born, raised and slaughtered in the United States; and (ii) to ensure that most of the beef sold at retail in US stores is label A beef. This second objective goes beyond simply informing consumers of the origin of the inputs used to produce the beef they purchase and promotes the production of beef from cattle born, raised and slaughtered in the United States.

42. The first objective is apparent when the design, structure and circumstances of application of the COOL measure are analyzed against the stated objective of the measure. It is not clear that the average consumer is aware of what the B and C labels actually mean. It is impossible for US consumers to accurately determine the origin of beef identified with the label "B". The only label giving accurate information is label "A".

43. With respect to the second objective, the Statute requires that to use label A (i.e., "product of the United States"), the beef must be produced from cattle that are exclusively born, raised and slaughtered in the United States. Moreover, in the Final Rule there is no practical flexibility in labelling when label A beef is produced. Finally, the Final Rule does not allow the use of "or" or "and/or" when connecting a string of two or more countries of origin on a declaration of origin, further restricting flexibility. These aspects promote the use of the label A and beef production meeting that label and make it harder to use alternative labels.

44. To the extent that the Final Rule provides any flexibility for US producers to commingle production and use the B and/or C labels, USDA has interpreted the Statute and applied the Final Rule strictly to discourage US producers from commingling imported and domestic cattle and beef and therefore label most of their beef production as label A. This strict interpretation and application is confirmed by the Vilsack letter.

4. Shaping consumer expectations

45. The strict standard for the use of the label "A" was developed with the intent of ensuring that the beef sold at retail in US stores is label A beef, thereby affecting both the consumers of the cattle (i.e. backgrounders, feedlot operators and processors) and the end consumers of beef.

46. The Panel in *EC – Sardines* stated that *"the danger is that Members, by shaping consumer expectations through regulatory intervention in the market, would be able to justify thereafter the legitimacy of that very same regulatory intervention on the basis of governmentally created consumer expectations."* In this dispute, through the COOL measure, the United States is trying to shape consumer expectations and perceptions through regulatory intervention, and to justify the legitimacy of this intervention on the basis of a governmentally created consumer perception and expectation.

III. FACTUAL INFORMATION

A. THE COOL MEASURE CONTINUES TO UPSET THE BALANCE OF COMPETITIVE OPPORTUNITIES TO THE DETRIMENT OF MEXICAN CATTLE

47. The COOL measure continues to upset the balance of competitive opportunities to the detriment of Mexican cattle compared to like US cattle. Mexico summarizes these as follows: *(i)* the reduction in the number of plants that slaughter and process fed cattle that were born in Mexico and raised in the United States; *(ii)* the reduction of the number of days per week that such cattle are

slaughtered or processed; *(iii)* the reduction in the number of backgrounders and feedlots taking Mexican cattle; and *(iv)* the imposition of additional requirements in the form of advance notice prior to accepting Mexican cattle for slaughter and processing.

48. These factors that evidence the upsetting of the balance of competitive opportunities continue. Over the summer, this continued to be reflected in a price discount being applied to Mexican cattle. For example, Mexico is submitting evidence of transactions in July and August in which different processors applied downward adjustments of $40 per head and $25 per head to Mexican cattle.

B. THE OTHER FACTORS IDENTIFIED BY THE US DO NOT EXPLAIN THE LOSS OF COMPETITIVE OPPORTUNITIES

49. Mexico acknowledges that the North American market for cattle is affected by factors outside of the COOL measure and that those factors affect both the price of cattle and the volume of trade flows within North America. Nonetheless, the available recent documentation shows that the US processors are still imposing COOL-based downward adjustments to the prices they pay for Mexican born cattle, and the Mexican industry will continue to have to bear the burden of that differential during times of both rising and declining prices.

50. Independent of those factors, the COOL measure is upsetting the balance of competitive opportunities against Mexican cattle in favour of like US cattle. Mexican cattle have been denied competitive opportunities that existed prior to the COOL measure and, irrespective of North American market conditions, would be better off if those competitive opportunities were restored through the elimination of the COOL measure.

IV. LEGAL ARGUMENT

A. GENERALLY

51. Mexico has presented a prima facie case with respect to all of the elements of its claims. None of the arguments raised by the United States rebut the case that Mexico has presented.

B. MEXICO'S *DE FACTO* DISCRIMINATION CLAIMS UNDER ARTICLE III:2 OF THE GATT 1994 AND ARTICLE 2.1 OF THE TBT AGREEMENT

1. The burden of proof in a *de facto* claim

52. Contrary to what the EU suggests, there is no basis for increasing the evidentiary threshold for *de facto* discrimination claims. *De facto* discrimination claims go back to the GATT 1947 and nowhere has such a high evidentiary threshold been applied to such claims. The normal burden of proof applies. Mexico must establish a prima facie case with respect to each element of its *de facto* discrimination claims. Mexico has met this burden.

2. The timeframe for examining *de facto* discrimination claims

53. The EU also argues that "the immediate regulatory shock" of a regulation does not, in itself, necessarily demonstrate less favourable treatment. There is no legal basis for this argument. Whether or not a challenged measure *de facto* discriminates in a manner that violates a provision of a WTO agreement must be assessed by a Panel on the basis of the facts existing at the time of the establishment of the Panel.

54. Mexico's *de facto* discrimination claims are grounded in the fact that the economically rational way for US processors to comply with the COOL measure is to either stop processing

Mexican cattle or to segregate the processing of those cattle in a way that restricts the access to Mexican cattle. This fact will not change over time.

3. Like products

55. In the view of the United States, the like product analysis should focus on beef. Mexico disagrees. The COOL measure explicitly applies to *both* beef and cattle. This is evident from the text of the Statute and the Final Rule which links the relevant label for beef to the country in which the cattle were born, raised and slaughtered. Moreover, Mexico's challenge of the COOL measure relates to its effect on imported inputs (i.e., Mexican cattle). The relevant like product is therefore domestic cattle. Mexican and US cattle are clearly like.

56. In regards to Mexico's *de facto* discrimination claim under Article 2.1 of the TBT Agreement, the United States argument regarding the term "in respect of" is misplaced. That term simply clarifies that the non-discrimination obligation in Article 2.1 applies only to technical regulations. It does not prevent Mexico from challenging the *de facto* discrimination created between like imported and domestic inputs.

4. Private actions and market forces

57. The United States argues that any action by private actors not compelled by the measure at issue does not result in a violation of the non-discrimination provisions. In this sense, the Appellate Body stated in *Korea – Various Measures on Beef* that *"[w]hat is addressed by Article III:4 is merely the governmental intervention that affects the conditions under which like goods, domestic and imported, compete in the market within a Member's territory"*.

58. It is the COOL measure that is imposing the legal necessity of making the choice of either not accepting Mexican cattle or restricting their access. The reduced access Mexican cattle have to the US market is a direct consequence of the COOL measure. To the extent some element of private choice is involved, it does not relieve the United States of responsibility for the resulting establishment of competitive conditions less favourable for imported Mexican cattle than like US cattle.

5. Costs inherent to regulating

59. The United States argues that to the extent that the COOL measure imposes costs, they are merely costs inherent to regulating. In its view, compliance costs may and often do vary among market participants based on their pre-existing makeup and market participants may respond to new costs in different ways.

60. While the United States' observations about the distribution of costs of regulation among market participants may be correct in certain circumstances, they are inapplicable to the facts of this dispute. This dispute is not about the distribution of costs among individual market participants; it is about the discriminatory and trade restrictive effects of the COOL measure on imported cattle. It is about the disproportionate or possibly even complete allocation of costs to one market participant (the Mexican cattle producers and other participants carrying Mexican cattle) over others based solely on the origin of the cattle they provide.

61. While regulations can distribute costs throughout the market in a variable manner, they cannot discriminate on the basis of origin as does the COOL measure.

6. Less favourable treatment

(a) Mexico is not arguing that market participants are being "forced" to discontinue the purchase of Mexican cattle

62. The United States argues that Mexico's arguments regarding less favourable treatment are flawed because "they presuppose that market participants will all choose to comply, and in fact, are *forced* to comply with the regulations by discontinuing the purchase of Canadian and Mexican livestock".

63. This characterization of Mexico's arguments is incorrect. Mexico is arguing that the COOL measure is imposing the necessity of making a choice and in the light of the normal economic conditions in the market that choice is to either stop carrying Mexican cattle or to segregate Mexican cattle in a way that restricts trade in those cattle. By law, relevant US market participants must comply with the COOL measure. The design and structure of the measure is such that when complying with the measure the market participants will discontinue or restrict the purchase of Mexican cattle.

(b) Differential effect on different market participants

64. The EU argues that the effects arising from different volumes of trade do not, in themselves, necessarily demonstrate less favourable treatment. The EU misconstrues Mexico's arguments. Mexico is not arguing that the COOL measure is imposing the same total cost on imported and like domestic cattle but a higher per unit cost on imported cattle. Rather, the COOL measure is structured so that the most commercially rational means of compliance is to stop carrying Mexican cattle or to segregate Mexican cattle in a way that restricts trade in those cattle. Mexico's *de facto* discrimination claims have nothing to do with per unit costs.

(c) Sufficient remaining US capacity to process all Mexico's cattle exports

65. Whether or not the remaining US slaughterhouses have enough capacity to process all of the Mexican cattle exports is immaterial. What matters is that access to the US market for Mexican cattle is being limited to certain slaughterhouses on certain days and under certain circumstances. This reduces the competitive opportunities for the sale of Mexican cattle compared to like US cattle.

(d) Segregation

66. The United States argues that the provisions of the COOL measure do not require segregation and that the flexibility provided by the measures reduces the likelihood that livestock will need to be segregated.

67. The United States misplaced the point made by Mexico. Mexico is arguing that the COOL measure is structured so that the most commercially rational means of compliance is to stop carrying Mexican cattle or to segregate Mexican cattle in a way that restricts trade in those cattle. Also, the flexibility provided by the measures does *not* reduce the likelihood that livestock will need to be segregated. Given the restrictive conditions applicable to the application of the multiple origin label to label A beef the use of the multiple label is severely restricted and is therefore of little practical use to avoid segregation.

68. Mexico has presented prima facie evidence that segregation was an understood consequence of the COOL measure and that it is in fact occurring.

(e) Small market shares

69. The United States argues that Canada and Mexico both appear to acknowledge that any decision by US packers to change their production practices results in large part from their relatively small market shares.

70. In assessing whether the COOL measure *de facto* discriminates against Mexican cattle, the Panel must assess the facts and circumstances related to the trade in Mexican cattle that would normally exist in the absence of the measure and then examine how the facts change when the measure is applied. Mexico's share of the US market may be one of the facts that is taken into account in this analysis, however, the fact Mexico has a small market share does not mean that any *de facto* discrimination against Mexican imports resulting from the COOL measure is to be ignored. To do so would fundamentally prejudice developing country Members who generally account for only a small portion of the trade with any given developing country Member.

(f) Other factors affecting the reduction in the demand for Mexican cattle

71. The United States argues that Canada and Mexico have failed to consider the numerous external factors that explain any reduction in the demand for and price of their livestock.

72. Mexico acknowledges that there are many economic factors that could affect the demand for cattle in the North American market. However, the detrimental effects Mexico is challenging relate to the upsetting of the balance of competitive opportunities between Mexican cattle and like US cattle. These effects include the reduction in the number of slaughterhouses accepting Mexican cattle, the reduction in the number of days Mexican cattle are being accepted, the additional conditions required for Mexican cattle, and the consequent reduction in the number of market participants carrying Mexican cattle or segregating Mexican cattle. None of these important facts can be attributed to the external factors highlighted by the United States. Those factors affect the North American market as a whole and do not discriminate against Mexican cattle. The factors at issue in this dispute are a direct consequence of the COOL measure and discriminate against Mexican cattle.

7. The COOL measure is inconsistent with Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement

73. In the context of Mexico's challenge, the fundamental thrust of the COOL measure is the protection of US domestic cattle to the detriment of like Mexican cattle. In other words, pure protectionism. This is reflected in the upsetting of the balance of competitive opportunities to the disadvantage of Mexican cattle.

C. TBT AGREEMENT

1. The COOL measure is a technical regulation

74. Mexico has demonstrated that the COOL Measure is a technical regulation. The only point upon which Mexico and the United States disagree is whether the Vilsack letter, viewed in isolation, constitutes a technical regulation. In Mexico's view the Vilsack letter is a "requirement" and a "technical regulation". However, even if it is not a "requirement" or "technical regulation" when viewed in isolation, it clearly is when viewed as part of the COOL measure as a whole, which is unquestionably a "requirement" and "technical regulation".

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

(a) Preamble to the TBT Agreement

75. The United States argues that Article 2.2 provides deference to WTO Members in the pursuit of their policy objectives and must be read in conjunction with the sixth recital in the preamble of the TBT Agreement.

76. The United States ignores an important caveat in this recital—i.e., "subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade". It is crucial that this language in the preamble is given meaning. Otherwise, WTO Members could define the objectives of their technical regulations so narrowly and with such high levels of protection that no other alternative measure could fulfil those objectives. This would insulate such measures from challenge under the TBT Agreement.

77. In Mexico's view the COOL measure is "applied in a manner which […]constitute[s] a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail" and it is a "disguised restriction on international trade".

78. The objective of the measure is protectionist and, in the light of the failure of the measure to fulfil its stated objective of consumer information and the reduction of consumer confusion, it is clearly arbitrary. Also, the COOL measure is being taken under the guise of a "consumer information" measure that is clearly aimed not at consumers but at protecting US domestic industry so it is a disguised restriction on international trade.

(b) The objectives of the COOL measure

79. It is essential to the proper interpretation and application of Article 2.2 that the Panel first objectively determines the objective of the COOL measure to the necessary level of specificity.

(c) The objectives are not legitimate

80. The COOL measure is applied in a manner which constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail and it is a disguised restriction on international trade. Its objectives are overwhelmingly protectionist. Such objectives cannot be "legitimate" within the meaning of Article 2.2. They go against the object and purpose of the WTO Agreements. If there ever was a measure whose true objective was not legitimate, the COOL is such a measure. A finding that the objectives of the COOL measure are legitimate would render this element of Article 2.2 inutile.

(d) If the objectives are found to be legitimate, the COOL measure does not fulfil those objectives

81. If the Panel finds that the objectives of the COOL measure are legitimate, it is Mexico's position that the COOL measure does not fulfil those objectives. There are substantial gaps in the retail coverage of the measure and the information provided further confuses rather than clarifies the origin of the beef that is being purchased.

(e) If the COOL measure fulfils those objectives, it is more trade-restrictive than necessary taking account of the risks non-fulfilment would create

82. Mexico proposed two alternative measures: (i) voluntary country of origin labelling that uses the same strict transformation rule and other requirements currently utilized in the COOL measure; or (ii) mandatory country of origin labelling that uses the transformation rule applied by US Customs to imported products.

83. The United States has not sufficiently explained how these two alternative measures do not fulfil the objectives of the COOL measure. Moreover, it fails to address an important element of this final step in the application of Article 2.2, namely "taking into account the risks non-fulfilment would create". Mexico addresses this element in its first written submission. The value of the information provided by the COOL measure "to the consumer" is minimal and to the extent it has value to US consumers it is to a very limited sub-set of those consumers. In such circumstances, a voluntary measure or a measure that employs the substantial transformation test applied by US Customs is sufficient to meet the objectives of the COOL measure.

84. There is also a third alternative measure that, depending on how it is implemented, may be less trade restrictive in the sense that it may eliminate the discrimination currently facing Mexican cattle imports. That alternative is a country of origin labelling measure that employs the strict requirements of the COOL measure but that also employs a trace back compliance mechanism.

D. THE COOL MEASURE IS INCONSISTENT WITH ARTICLE 2.4 OF THE TBT AGREEMENT

1. CODEX STAN 1-1985 is a relevant international standard

85. The United States suggested that Mexico had failed to establish that CODEX STAN 1-1985 was "adopted by a body whose membership is open to the relevant bodies of at least all Members and is based on consensus." *EC – Sardines* involved another standard of the CODEX Alimentarius, which the Appellate Body affirmed was a relevant standard. In *EC – Sardines*, the EU argued that the complainant had the burden of proving that the standard at issue had been adopted by consensus. The Appellate Body expressly disagreed.

86. The United States has already conceded that CODEX STAN 1-1985 is "relevant".

87. The United States questions whether the CODEX standard is actually equivalent to the "substantial transformation" standard, noting that the word "processing" in CODEX STAN 1-1985 is undefined. However, the complete relevant term in the CODEX standard is "When a food undergoes processing in a second country which changes its nature,". The "change in nature" standard is closely similar, if not identical, to substantial transformation, which under US law is a change that results in a different name, character or use.

88. In any event, it cannot be seriously questioned that the conversion of a live animal into cuts of beef meets both standards, however they are interpreted. The end of temporal existence is a fundamental change of condition in and of itself. The death of the animal followed by dismemberment and slicing into cuts of meat is certainly "processing … which changes [the] nature" of the cattle" within the meaning of the standard.

2. The CODEX standard would be both effective and appropriate

89. The United States argues that CODEX STAN 1-1985 would not be effective or appropriate because the substantial transformation test would provide misleading information in some situations.

The example offered by the United States is a situation in which cattle would be in US territory only one day prior to slaughter.

90. Mexico has previously explained, and the United States has not disputed, that Mexican cattle are brought to the United States at a young age, gain 70% of their weight in the United States, and are fed on the grasslands and in the same feedlots as US born cattle. Accordingly, the US example is wholly inapplicable to Mexico.

91. In any event, Mexico observes that: *(i)* CODEX Stan-1985 was adopted twenty five years ago and reflects a multilateral consensus on how origin should be identified on prepackaged food products to as to avoid misleading consumers; *(ii)* as a factual matter the processing of live animals into cuts of beef is an extremely extensive form of processing, and relying on the substantial transformation/processing test cannot fairly be characterized as misleading. *(iii)* the United States, in effect, applied the CODEX standard to meat processed within its territory for many years, without considering it misleading.

92. The United States seems to be arguing that CODEX STAN 1-1985 is ineffective and inappropriate because it is different than the COOL measure. That approach would turn the obligations of the TBT Agreement on their head and render Article 2.4 meaningless. CODEX STAN 1-1985 deals specifically with the purported objective of the COOL measure as claimed by the United States – to inform consumers of the origin of food products. The COOL measure is not based on CODEX STAN 1-1985, but rather conflicts with it.

E. THE COOL MEASURE IS INCONSISTENT WITH ARTICLES 12.1 AND 12.3 OF THE TBT AGREEMENT

93. The United States argues that developing country Members were given ample opportunity to participate in the development of the measure. While it is true that the United States gave some opportunity to Mexico to comment on the development of the 2009 Final Rule, it is not true that the United States gave Mexico the opportunity to participate in the development of the 2002 Farm Bill. The only opportunity that Mexico had to provide comments was when the COOL provisions were already established and only needed to be implemented.

94. At that point, there was little flexibility in the measure, and thus, contrary to Article 12 of the TBT Agreement, the United States did not take into account the special development, financial and trade needs of Mexico as a developing country in the formulation of the 2002 Farm Bill, and thus, in the formulation of the country of origin provisions and the rules for labelling meat products.

95. Also, Mexico summarizes the type of evidence that the US would have to present in order to show that it "took into account" Mexico's special needs: *(i)* evidence that the United States has "looked at attentively", "reflected on", or "weighed the merits of" the special development, financial and trade needs of Mexico and evidence that, in undertaking these steps, the United States has made certain that the COOL measure does not create unnecessary obstacles to exports from Mexico; *(ii)* public comments during the preparation process of the COOL Measure made Congress and the USDA cognizant of the possible negative effects on Mexican exports. Neither Congress nor the USDA responded to these comments; *(iii)* the Regulatory Flexibility Act requires US agencies to consider the impact of their regulatory proposals on small entities, analyze effective alternatives that minimize the impact, and make their analyses available for public comment; and *(iv)* evidence that the "special needs" referred to in Article 12.3 have been taken into account would require a showing that consideration was given to how the measure may impact developing countries, that steps were taken to minimize the impact of the measure on developing countries, and that less onerous alternatives were considered.

96. There is no evidence that the United States took any of these actions.

F. GATT ARTICLE X:3(A)

97. The administration of the COOL measure has been characterized by shifts in interpretation and guidance by USDA on its implementation of the statutory and regulatory provisions, as reflected in USDA's guidelines, non-public pressure by the US government of individual companies, and the Vilsack letter. The final interpretation by USDA was both partial (favouring US producers of cow-calves) and unreasonable.

98. The USDA privately contacted major US. Processors to tell them not to use mixed origin labels. USDA later issued the Vilsack letter to put more pressure on the industry, by stating that processors and retailers should "voluntarily" adopt additional burdens if they used a multiple country of origin label (B or C); this made obvious that USDA preferred that labels B and C not be used at all. The continuing changes in USDA policy – first indicating that mixed origin labels were permissible, then discouraging them – significantly contributed to the disruptions experienced by the Mexican industry. It is also evidence of unreasonable, arbitrary administration of the law, as USDA's change in position was made in reaction to pressure motivated by protectionism.

99. Plainly, the COOL measure has not been administered in a uniform, impartial and reasonable manner, contrary to the obligation of GATT Article X.3(a).

G. NON-VIOLATION NULLIFICATION OR IMPAIRMENT UNDER GATT ARTICLE XXIII:1(B)

100. Mexico has demonstrated with sufficient evidence that the benefits provided to its imports of livestock to the US under the relevant tariff concessions have been nullified or impaired.

101. The US bound tariff is 1 cent per kilogram, which is about $1.36 to $1.81 for a 300 to 400 pound animal. Based on this WTO tariff binding, Mexico could legitimately expect that its cattle would have a competitive disadvantage of $1.36 to $1.81 per animal compared to like US products. The actual price discount created by the COOL measure has been up to $60 for the same 300-400 pound animal. The competitive disadvantage or level of protection reflected in this price discount vastly exceeds Mexico's legitimate expectation of $1.36 to $1.81 per animal. Thus, the COOL measure nullifies or impairs benefits accruing to Mexico under the WTO tariff bindings of the United States.

102. The United States argues that Mexico could have reasonably anticipated that the United States would enact the COOL measure's origin labelling requirements for meat products. None of the legislative proposals submitted by the United States included the born/raised/slaughtered origin rule for meat products. Those proposals involved general requirements for origin labelling, unrelated to Mexico's claims in this proceeding.

V. CONCLUSIONS

103. On the basis of the foregoing, Mexico requests that the Panel find that the COOL measure is inconsistent with Articles III:4, X:3 and XXIII:1(b) of the GATT 1994 and Articles 2.1, 2.2, 2.4 and 12 of the TBT Agreement and make such recommendations that are necessary for the United States to bring itself into conformity with these provisions.

ANNEX B-3

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

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

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

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

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

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

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

6. Given the differences between the instruments that Canada and Mexico challenge in this dispute, and the fact that some have been superseded, are not acts attributable to the United States, or do not create binding legal obligations, the Panel should reject Canada and Mexico's attempt to characterize the instruments at issue as a single "COOL measure". By glossing over these substantive differences – differences which, among other things, have implications for how the obligations at issue apply – Canada and Mexico avoid making their case with regard to each instrument that is the subject of the dispute. Further, the previous WTO reports that Canada cites in support of the proposition that the Panel should consider the instruments as a single measure are inapposite.

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

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

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

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

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

11. Based on past WTO reports, Canada and Mexico's arguments that the COOL measures breach TBT Article 2.1 or GATT Article III:4 must fail. The COOL measures do not treat domestic and

imported like products differently. Rather, they require retailers to label all covered meat commodities at the retail level, regardless of whether they are derived from imported animals or not, and the exact same record keeping requirements apply to imported livestock as domestic livestock. In addition, to the extent that Canadian and Mexican livestock have experienced any detrimental effects, these effects are not attributable to the origin of the livestock and are not attributable to the COOL measures. Any detrimental effects can be attributed to external factors, such as Canada and Mexico's limited market share, the economic downturn, and the independent decisions of private market actors on how to respond to the COOL measures.

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

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

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

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

different story. Over the first eight months of 2010, Canadian cattle exports are up 7.5 per cent and Mexican cattle exports are up 29 per cent over last year's levels.

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

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

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

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

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

IV. NONE OF THE COOL MEASURES BREACH TBT ARTICLE 2.2

21. Canada and Mexico have failed to demonstrate that the COOL statute or 2009 Final Rule breach TBT Article 2.2. This provision prohibits technical regulations from being "more trade restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create". Article 2.2 does not prohibit all technical regulations that create obstacles to trade,

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

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

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

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

25. US consumers and consumer organizations widely support country of origin information on the food products they buy at the retail level. Nearly all the leading US consumer organizations have expressed support for country of origin labelling for consumer information purposes and to prevent consumer confusion. For example, the Consumers Federation of America (CFA) indicated that it "has long supported a mandatory country of origin labelling (COOL) program as a means of providing consumers with important information about the source of their food". In a joint letter with the National Consumers League and Public Citizen, two other leading US consumer organizations, CFA wrote that "[w]ithout country-of-origin labelling, these consumers are unable to make an informed choice between US and imported products. In fact, under the Agriculture Department's grade stamp system, they could be misled into thinking some imported meat is produced in this country." Similarly, the Consumers Union wrote that "it is clear that consumers desire to know where there food is coming from". Individual US consumers have also expressed strong support for country of origin labelling in order to provide consumer information and prevent consumer confusion.

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

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

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

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

30. To the extent that US consumers, the domestic industry, or Members of Congress expressed a desire to enact the COOL measures to help US farmers through the enactment of the COOL measures, their advocacy was premised on a desire to help US farmers differentiate their products from their competitors, not as a form of protectionism. For example, one US consumer wrote: "American farmers and ranchers produce a superior product and they deserve the right to receive credit for their efforts. Label it and let the market decide." Similar points were echoed by the US producers groups and Members of Congress, all of whom noted a desire to increase competition by providing this information with the hope that the US products would fare well in a competitive market. Thus, it is incorrect to construe the support of the US domestic industry or the support of those that indicated they wanted to help the domestic industry as a protectionist motive. Rather, country of origin labelling was intended to help these producers respond to consumer demand and differentiate their products in a competitive market place, a legitimate motive.

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

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

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

34. Canada and Mexico's arguments, if accepted, would mean that no Member could adopt a labelling system and achieve its legitimate objective without covering every possible scenario in which a consumer buys food, and would make it extremely difficult to adopt commonsense flexibilities to help reduce compliance costs without jeopardizing the measure itself. At the same time, it would make it challenging to design a measure that is not more trade restrictive than necessary because a Member would always be required to cover every commodity and every scenario even if that particular Member did not believe that it was cost effective or desirable to do so. Additionally, the Member would not be able to adopt flexibilities even when it believes those flexibilities would reduce the overall burden without fear that those efforts would then be used against them in the WTO dispute settlement context as evidence of how the Member did not fulfil its objective. In this sense, Canada and Mexico's arguments illustrate the importance of ensuring that WTO Members are allowed to weigh costs and benefits in the design of their technical regulations. Members must be able to make their own decisions on how to weigh competing interests and should not be discouraged from taking into account the views of interested parties or adopting flexibilities to meet the needs of those parties. Such an approach is entirely consistent with the TBT Agreement.

35. Thus, the Panel should reject Canada and Mexico's attempt to turn the question of whether a particular Member's labelling measure fulfils its objective into a question of whether that Member could have conceivably designed its measure in a different, and perhaps better way. Deciding how to design a technical regulation often necessitates difficult choices, especially when balancing the views of numerous interested parties, and it is quite possible that some parties might choose to make different choices than the United States did in this instance. Some Members might have chosen to err

more on the side of consumer information while others might have decided to err on the side of reduced costs. Regardless, the Panel need not decide whether it would have been appropriate for the United States to lean more in one direction or the other as it attempted to weigh the views of interested parties such as Canada, Mexico, and US consumers. Rather all the Panel must decide in this part of its analysis is whether the US measures fulfil the US objectives at the level the United States considers appropriate. And as the United States explained, the COOL statute and 2009 Final Rule do just that.

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

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

38. A system based on substantial transformation is also not a reasonably available alternative; it would fail to achieve the US legitimate objectives for at least three reasons. First, it would not provide any information about the multiple countries where an animal spent its life when it was not born, raised, and slaughtered in more than a single country, information that US consumers and consumer organizations indicated was important to them. Second, it would perpetuate confusion about the origin of animals that were only in the United States for a short period of time before being slaughtered. Third, it would require a definition of origin that is at odds with the views of US consumers and consumer organizations. Indeed, a recent Consumers Union poll confirms the fact that consumers do not support a definition of origin based on substantial transformation and would find such a definition misleading. When asked how they would expect beef derived from a cow born and partially raised in Mexico before being sent to the United States to be fattened for two months and slaughtered to be labelled, 72 per cent of consumers picked a definition other than substantial transformation. Given the lack of consumer support for such a definition of origin, it is clearly not a reasonably available alternative.

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

labelling requirements for fresh food sold at retail; and (6) Korea's labelling requirements for beef, pork, chicken, rice, and *kim chi*.

V. NONE OF THE COOL MEASURES BREACH TBT ARTICLE 2.4

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

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

VI. NONE OF THE COOL MEASURES BREACH TBT ARTICLE 12.3

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

43. Mexico has also failed to meet its burden to establish a violation of Article 12.3 of the TBT Agreement. Mexico has not adduced any evidence to demonstrate that the United States did not take its needs into account, but rather implies that the burden is on the United States to show that it did. While the United States does not bear this burden as the responding party, the United States has repeatedly demonstrated the steps it took to take Mexico's concerns into account. For example: (1) USDA provided Mexico with multiple opportunities to comment on development of the COOL implementing regulations and took Mexico's concerns into consideration; (2) USDA held a briefing on the Interim Final Rule for embassy officials, including those from Mexico, who were provided the opportunity to share their views; (3) AMS individually met with officials from the Mexican Embassy to discuss the COOL rule making and took their views into account; and (4) the United States discussed the COOL rule making at meetings of the United States - Mexico Consultative Committee on Agriculture (CCA).

44. The United States also modified the COOL measures to address Mexico's concerns by significantly reducing the record keeping burden and introducing significant flexibility (such as

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

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

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

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