ANNEX D

ORAL STATEMENTS OF THE PARTIES AT THE FIRST AND SECOND SUBSTANTIVE MEETINGS

ANNEX D-1

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF CANADA AT THE FIRST SUBSTANTIVE MEETING

I. INTRODUCTION

1. The COOL measure requires different labels to be placed on meat from cattle and hogs slaughtered in the United States depending on where those animals were born and raised. The COOL measure was not designed or implemented to provide consumers with accurate information to further a legitimate objective. The objective of the COOL measure was to distort the conditions of competition in the US market to favour US cattle and hogs compared to imported livestock.

II. THE COOL MEASURE CHALLENGED BY CANADA

2. The US measure challenged by Canada consists of multiple legal instruments and governmental actions:

- The Final Rule, which came into force on March 16, 2009.
- The Interim Final Rule, which was an integral part of the measure when it became operative on September 30, 2008. Well before the Final Rule took effect the Interim Final Rule caused slaughter houses and feeding operations to take critically important decisions to restructure their operations in order to comply with the COOL measure.
- The action by Collin Peterson, Chairman of the Committee on Agriculture of the US House of Representatives, in instructing representatives of the US industry not to use Label "B" for the majority of their products.
- Clarification documents of the US Department of Agriculture that took away the flexibility to use Label "B" for meat from livestock born, raised, and slaughtered in the United States.
- The Vilsack Letter, which introduced additional uncertainty for industry regarding the proper application of the measure.

3. Regardless of whether the COOL measure is characterized as one overall measure made up of several legal instruments and governmental actions, or as several related measures that work together to achieve the same policy objective, the legal analysis is the same.

III. THE COOL MEASURE HAS ADVERSELY MODIFIED THE CONDITIONS OF COMPETITION FOR CANADIAN CATTLE AND HOGS, IN VIOLATION OF TBT ARTICLE 2.1 AND GATT ARTICLE III:4.

4. The United States has agreed that in the context of GATT Article III:4, a measure provides less favourable treatment if it "modif[ies] the conditions of competition in the relevant market to the detriment of the imported product". It has also agreed that the meaning of less favourable treatment in the GATT context is relevant to interpreting the obligation in TBT Article 2.1. That this modification has actually happened is established by two types of evidence: (1) witness statements and other evidence showing that the US market responded to the COOL measure by favouring US-born and -

raised livestock over imported livestock; and (2) Dr. Sumner's econometric analysis, which quantifies the amount of the adverse effects.

1. The COOL measure effectively requires segregation of imported livestock

5. The COOL measure requires US participants throughout the supply chain - from the importer through to the retailer that sells the meat - to track the country of birth, raising, and slaughter of cattle and hogs and meat produced from those cattle and hogs. In practice this requires segregation.

6. The United States wrongly suggests that the discriminatory costs of segregation can be avoided. The first option presented by the United States is to only buy livestock born in a single country. That would establish separate but nominally equal distribution chains that in practice favour domestic product. Such a discriminatory system was found WTO-inconsistent in Korea – Various Measures on Beef. The second option would be to commingle on the same day, but that still imposes additional segregation costs on operations that use both US-born livestock and livestock born abroad. Either option changes the conditions of competition to the advantage of US-born livestock.

7. Canada presents three slides to illustrate how the COOL measure effectively requires segregation and the differential impact that has had on Canadian cattle and hog imports to the United States.

8. Basic economic logic based on the facts leads to the result that firms that use imported livestock or meat derived therefrom can only recover their added costs by paying less for the imported livestock. The lower US demand for imported cattle and hogs is reflected in lower import quantities or in lower prices relative to the use of comparable domestic livestock.

9. Canada has submitted unchallenged specific evidence, in the form of witness statements and letters, on the loss of competitive position caused by the COOL measure. That evidence establishes that the COOL measure has modified the conditions of competition in the US market to the detriment of imported Canadian livestock.

10. The US argued that because of Canada's low market share, the "conditions of competition" have not really been altered, relying on the Appellate Body report in Dominican Republic – Import and Sale of Cigarettes. The present case is not analogous because there is no dispute here over a single origin-neutral measure imposed equally on companies, some of which happen to be foreign and have a lower market share. The present case is more analogous to the case of Korea – Various Measures on Beef, in which the measure at issue required separate channels of distribution for imported and domestic beef that in practice resulted in the limited use of imported beef.

11. The US also argues that the COOL measure does not "require" segregation. However, as the United States concedes, the COOL measure requires processors to track information about where livestock is born and raised, which in practice is done through segregation.

12. It is not necessary for the Panel to decide at this stage the precise degree of impairment that Canada has suffered. However, the economic analysis prepared by Dr. Sumner supports and quantifies the degree of loss of competitive position.

2. Canada's econometric analysis

13. US criticisms of Dr. Sumner's analysis are not well founded. Dr. Sumner's econometric analysis explores whether the conditions of competition for Canadian exports of cattle and hogs have

been differentially affected as a result of the COOL measure. Therefore much of the US criticism, which is focussed on issues such as the general economic situation at the time and the ratio of imports, misses the point.

14. The United States does not dispute that segregation has potentially large negative differential effects on the demand for imported livestock relative to comparable domestic livestock. The unchallenged specific evidence presented by Canada shows that the costs of segregation caused most major slaughter houses to limit or terminate the use of Canadian cattle and hogs. Dr Sumner's simulation analysis shows that even low segregation costs cause substantial effects.

15. Unlike the US analysis, Canada's data analysis properly avoids the BSE period and the associated structural disruptions; it includes a BSE variable only to account for any potential cross-effects related to import restrictions on older cattle from July 16, 2005 to November 19, 2007. The model tests the importance of this variable and finds no significant effect.

16. Canadian cattle exported to the United States typically travel farther than their US competitors, and did so before the COOL measure. But the US analysis that suggests that including this factor reduces the harm caused by the COOL measure is incorrect. This is because the United States used the wrong index in its analysis (one that is focussed on what consumers pay for items such as new cars, parking fees and tolls, airline fares, and tickets for public transit). Dr. Sumner used the relevant right data (the producer price index for trucking) in his revised analysis and found that the harm caused by the COOL measure is actually higher when transportation is included.

IV. THE COOL MEASURE VIOLATES TBT ARTICLE 2.2.

17. The United States argues that "the objective" of the COOL measure is to "provide consumer information". Any determination of whether providing consumer information is a legitimate objective must consider the nature of the information that is provided under the measure.

18. The United States has not seriously disputed that certain US cattle and hog producers and political leaders advocating on their behalf were the driving force behind the COOL measure. Most of the US evidence of consumer support for country-of-origin labelling is focussed on support for elements of the COOL regime that are not at issue in this dispute, such as the protection of animal and human health. The United States has presented very limited evidence of consumer desire for information related specifically to the origin of meat derived from imported livestock. Furthermore the "consumer interest" expressed in that limited evidence does not support a legitimate objective. Specifically, the "consumer interest" evidence is from certain hog and cattle producers or their representatives, whose advocacy on behalf of consumers is highly suspect; it is focussed on labelling for health and safety reasons, which is an objective disavowed by the United States; it relates to the protectionist objective to "support US farmers", which cannot be a legitimate; or it relates to information the COOL measure does not provide, such as a desire to "support the family farm" or to buy meat that is produced close to home.

19. The United States has provided virtually no evidence of consumers being concerned about deception. As to possible confusion on the part of consumers about the USDA grading of meat and country of origin, this could have been addressed by clarifying that USDA grading does not indicate country of origin.

20. Even if the objective of the COOL measure was to provide consumer information for a legitimate purpose, it does not fulfil this purported objective. Canada provides a further slide illustrating the COOL regime as it applies to products other than meat derived from imported

livestock slaughtered in the United States, to demonstrate that the regime hardly serves the purpose of providing information to consumers. The information provided to consumers through this process, even if it were to further a legitimate objective (which Canada disputes) is confusing at best and deceptive at worst.

21. Even if the COOL measure furthers a legitimate objective, it does not do so in the least trade-restrictive way. Canada has suggested two less trade-restrictive alternatives: voluntary labelling and substantial transformation.

22. The United States stated that voluntary labelling was attempted but failed. However, the evidence demonstrates, in fact, that where there is a true consumer demand for it, voluntary labelling does succeed, for example in programs such as organic labelling, certified Angus, and Australian and New Zealand lamb.

23. On substantial transformation, the United States essentially argues that it would not provide consumers with information about where the various processing steps take place. However, the United States has not explained why substantial transformation is an appropriate basis for labelling meat slaughtered outside of the United States (such as on meat from a US-born and-raised animal slaughtered in Canada, classified as Label "D" under the COOL measure), but is not an appropriate basis for labelling meat slaughtered in the United States.

V. CONCLUSION

24. On the basis of the evidence showing that the COOL measure has changed the conditions of competition of Canadian livestock in the US market, the COOL measure violates TBT Article 2.1 and GATT Article III:4. The United States' criticism of Canada's supporting economic analysis is flawed in many fundamental ways. The COOL measure also violates TBT Article 2.2 because it does not achieve a legitimate objective and even if it did, it does not do so in a least trade-restrictive way. In the interest of time, Canada has not specifically addressed Articles X:3(a) and XXIII:1(b) of GATT in this Statement but will be pleased to do so in answer to questions.

ANNEX D-2

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF MEXICO AT THE FIRST SUBSTANTIVE MEETING

I. INTRODUCTION

1. This case is about a US measure "the COOL measure" that discourages the use of Mexican cattle in the production of beef products in the United States. The COOL measure has adversely modified the competitive conditions to the disadvantage of Mexican producers and has distorted the market with the sole purpose of protecting the US cattle industry, and thereby disrupted what was previously a mutually beneficial trade relationship.

II. OVERVIEW OF MEXICAN CATTLE EXPORTS TO THE US

2. The productions of cattle in Mexico and beefs in the US have been closely integrated for many decades. The Mexican cow-calf industry produces high quality, genetically desirable cattle for the US market. They have the same genetic features as calves from the United States, and are pastured on grass or winter wheat, similar to US calves. The US and Mexican cattle are clearly like products.

3. The United States has conceded that the COOL measure is not an SPS measure, or any other type of safety measure. Mexico wishes to highlight that separately the United States subjects the Mexican cattle to stringent SPS requirements. Mexico fully complies with those stringent measures.

4. In the case of Mexico, the overwhelming majority of cattle exported are young animals, usually no more than seven or eight months old, and weighing in the range of 300 to 400 pounds. At the time of slaughter, this is, when they reach 1100 to 1200 pounds, approximately 70% of the weight and value of the animal has been added within the US territory.

III. THE MEASURE

5. This dispute concerns a mandatory country of origin labelling requirement that is applied in a manner and in circumstances such that it unjustifiably discriminates against and restricts imports of Mexican cattle into the United States. The COOL measure comprises statutory provisions, regulations and other administrative actions by the US government. All of the components identified by Mexico in its First Written Submission are legal elements of the COOL measure.

6. The COOL measure is an internal measure applied to US processed beef that has an adverse effect on imported inputs for that product – that is, cattle. US producers of beef products have segregated cattle of different origins entirely in order to comply with the measure, and have passed along the resulting costs to the Mexican cattle industry.

7. The COOL measure has disrupted the integrated Mexico-US market and has modified the conditions of competition to the disadvantage of Mexican cattle compared to like US cattle. It has also reduced the export opportunities available to, increased the handling cost of, and reduced the price of Mexican cattle. The adverse effects of the COOL measure on the Mexican cattle industry have been substantial. Specifically:

- US processors have restricted the number of plants that will process Mexican cattle;

- US processors have restricted the days on which plants will accept Mexican cattle;
- US processors have imposed special notice requirements;
- US processors have lowered the price of Mexican cattle expressly because of the costs of complying with the COOL measure; and
- Some US backgrounders and feedlot operators have stopped purchasing Mexican cattle entirely.

8. Mexico has presented evidence of each of these effects.

IV. IN THE CIRCUMSTANCES OF THIS DISPUTE, THE US COOL MEASURE IS INCONSISTENT WITH THE WTO

9. Mexico is not challenging mandatory country of origin labelling in general. Whether a particular mandatory country of origin labelling is WTO-consistent will depend on the specific circumstances at issue and must necessarily be assessed on a case-by-case basis.

10. For example, mandatory country of origin labelling imposed on imported products at the border is generally viewed as WTO-consistent. But the COOL measure is an internal measure that has effects only with respect to goods that are processed in the United States.

11. The COOL measure has requirements and procedures that result in a loss of competitive opportunities for imported cattle. In particular, under the COOL measure the United States refuses to acknowledge that any processing of cattle is relevant – notwithstanding that the imported Mexican cattle spend the great majority of their lives in the United States and are slaughtered and processed there under the supervision of US agricultural officials.

V. THE DE FACTO NATURE OF MEXICO'S CLAIMS

12. Mexico has been very clear that its claim is based on the de facto effects of the COOL measure.

VI. LEGAL CLAIMS

A. DISCRIMINATION CLAIMS UNDER ARTICLE 2.1 OF TBT AGREEMENT AND ARTICLE III:4 OF THE GATT 1994

1. Like product

13. Mexico's claim concerns the treatment of Mexican cattle that are imported into the United States for processing into beef. By its structure and design, the COOL measure applies indirectly to cattle. In other words, the effect of the COOL measure – indeed its core purpose – is to regulate the inputs to beef products – namely, cattle. Mexico presented prima facie evidence that Mexican and US cattle, both of which compete for the same processing market, are like products. The United States did not refute that evidence.

14. Long before the COOL measure came into existence, the high quality Mexican cattle exported to the US market were treated as completely interchangeable with US cattle. There is no question that Mexican and US cattle are "like products".

2. Less favourable treatment under 2.1. of the TBT Agreement and GATT Article III:4

15. By its design and structure, the COOL measure creates a situation where the most economically rational and low-cost method for compliance with the measure is to restrict the processing of Mexican cattle in the United States. What I mean by "restrict" is the reduction of processing facilities, the reduction of processing days, the imposition of advance notification requirements, and the imposition of a discount against the price of Mexican cattle.

16. By any standard, these effects are clearly a denial of competitive opportunities.

B. OBSTACLES TO TRADE UNDER TBT ARTICLE 2.2

17. The COOL measure not only discriminates against Mexican cattle, it also creates a restriction against imports of such cattle. This restriction is in the form of an unnecessary obstacle to trade, which violates TBT Article 2.2.

18. The United States argues that the legitimate objective is "consumer information". Mexico does not deny that providing consumer information, in the abstract, can be a legitimate objective. However, the legitimate objective must be defined at a level of specificity that accurately describes the measure that is being justified. In this dispute, the objective has to be defined as informing the consumer where the cattle incorporated in the beef were born.

19. Consumer information objectives must be assessed on a spectrum. If the consumer information provided is to protect safety or health, such as a listing of ingredients, or to provide economic protection to purchasers, such as mandating accurate data about weight and volume, the measure is likely to be legitimate. If the information is in fact misleading, or intended to discourage purchases of products made with foreign inputs, the objective likely is not legitimate.

20. In this instance, when viewed from the perspective of its design, structure, application and all other relevant circumstances, the objective of this measure is solely protectionist and, therefore, clearly not legitimate.

21. In this regard, the sole reason to provide information on the birthplace of the cattle incorporated into the beef is to give US domestic cattle a competitive advantage. Moreover, a fundamental flaw of the COOL measure is that it does not provide accurate information to consumers.

C. TBT ARTICLE 2.4

22. The COOL measure is not based on the applicable CODEX standard, and therefore is inconsistent with TBT Article 2.4. The US position is that if a relevant international standard would prevent the United States from implementing a measure, the international standard must be inappropriate and ineffective. Obviously, the US approach to this issue would make Article 2.4 completely meaningless.

23. In this regard, the United States has asserted that the CODEX standard does not define the word "processing", and suggests that this constitutes a gap in the standard. In fact, the United States has rejected the CODEX standard entirely for beef products. The COOL measure disallows the possibility that any processing – including raising the animal from a young age, slaughtering and processing – could affect the country of origin of the resulting beef product.

24. At the same time, the United States determines country of origin consistently with the CODEX standard for beef products imported from other countries, for parts of the cattle other than muscle cuts and ground beef, and for the great majority of other food products.

D. TBT ARTICLES 12.1 AND 12.3

25. Regarding TBT Articles 12.1 and 12.3, the United States has taken the position that simply allowing Mexico to submit comments on the regulations was sufficient to satisfy the US obligation to take into account of the special needs of developing countries. That interpretation of Articles 12.1 and 12.3 would render them meaningless. The United States does not, and can not, point to anything it did in the preparation and application of the COOL measure with a view to avoid creating an unnecessary obstacle to exports from Mexico. Rather, it ignored Mexico's comments and the impact that it knew the COOL measure would have on Mexican exports.

E. GATT ARTICLE X

26. Mexico's claim under GATT Article X helps to emphasize the inconsistent and arbitrary manner in which the COOL measure has been implemented. The COOL measure has truly been a "moving target". There have been changes to the statute and changes to the regulations, as well as both formal and informal pressure by the US authorities to restrict the manner in which US processors can comply with their legal obligations.

27. The Vilsack letter is part of continuing actions by the United States government, under authority of the COOL statute, to pressure the US industry not to use foreign cattle

28. Furthermore, the Vilsack letter pressured the industry to undertake additional labelling requirements when using the multiple label. This is evidence of US government pressure on companies not to use the multiple origin label. This in turn eliminated the economic feasibility of commingling Mexican and US cattle.

F. NON-VIOLATION NULLIFICATION AND IMPAIRMENT

29. With regard to Mexico's non-violation nullification or impairment claim, the United States argues that Mexican cattle enter the United States under the NAFTA tariff concessions and not those of the WTO. The NAFTA tariff is zero and the US MFN 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 $1.36-1.81 per animal compared to like US products. The actual price discount created by the COOL measure is between $40.00-$60.00 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 $1.36-1.81 per animal.

30. Thus, the COOL measure nullifies or impairs benefits accruing to Mexico under both its NAFTA and WTO tariff bindings.

VII. CONCLUSION

31. From the facts of this dispute and the evidence provided by Mexico it is clear that the COOL measure adopted by the United States adversely affects Mexican exports of cattle. Even though US is trying to justify its measure by characterizing it as a facially neutral measure aimed at providing additional information to the consumers, the measure is discriminatory because it upsets the conditions of competition of Mexican cattle in favour of like US cattle and creates an unnecessary obstacle to trade. Such a measure is not permitted by the WTO rules.

ANNEX D-3

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF THE UNITED STATES AT THE FIRST SUBSTANTIVE MEETING

1. Countries around the world have recognized that consumers desire – and have the right to know – the origin of the products they buy at the retail level. In fact, at least 40 WTO Members have enacted COOL requirements in recent years. These requirements apply to a broad range of products including consumer goods, apparel, and food, among others.

2. In this dispute, Canada and Mexico challenge US COOL requirements as they apply to beef and pork. These measures are the result of a longstanding effort by the US Congress and USDA to update and improve upon COOL requirements first adopted in the United States in 1930. The objective of these updated requirements is to ensure that consumers are provided information about the meat and other food products they buy at the retail level and to prevent consumer confusion regarding the origin of muscle cuts of meat.

3. The updated US COOL system is the product of deliberative legislative and regulatory processes. The United States made substantial efforts to ensure its measures provide consumers with as much information as possible without imposing unduly burdensome compliance costs on market participants. The United States formally solicited input on its regulations and received thousands of comments. Many commentators strongly supported enhanced COOL requirements for meat, including consumer groups and individual consumers. The United States received comments from others, including industry and trading partners such as Canada and Mexico, opposing new labelling requirements as overly burdensome. In response, the United States modified its proposed measures to make them less burdensome and to reduce compliance costs.

4. While Canada and Mexico have brought claims under numerous WTO provisions, their arguments focus on two issues. First, they challenge the specific manner in which the United States designed its COOL measures. They focus on the 2009 Final Rule's requirement that retailers list more than one country of origin for meat derived from animals who were born and/or raised in another country before being slaughtered in the United States. They argue that this requirement renders the measures more trade restrictive than necessary. Accordingly, they suggest that the United States abandon its carefully crafted system in favour of a voluntary labelling system or one based on substantial transformation.

5. These alternatives were proposed by the complaining parties during the regulatory process; they were not accepted then because, quite simply, they do not work: they do not ensure that consumers get meaningful information about the origin of meat at the retail level. These suggestions also do nothing to provide clarity in the one area where meat labels have the greatest potential to be confusing – where the meat is derived from an animal that crossed the US border before being slaughtered. Thus, these suggestions should not be accepted now.

6. The United States went to great lengths to accommodate the cost-related concerns of Canada, Mexico, and others while ensuring that its measures provide consumers with meaningful information. Canada and Mexico's arguments on this point overlook these efforts and ignore the TBT Agreement's recognition that any WTO Member may take measures necessary to achieve legitimate regulatory objectives "at the levels it considers appropriate". The United States decided that consumers should be provided with origin information about the food products they buy at the retail level, including where the source animal for meat products was born, raised, and slaughtered to prevent consumer

confusion. None of the alternatives that Canada and Mexico propose would fulfil the US objective at the level the United States determined is appropriate.

7. Second, Canada and Mexico argue that the COOL regulations accord less favourable treatment to their livestock because they force US slaughterhouses to stop purchasing their animals to avoid allegedly high costs associated with processing both foreign and domestic livestock. A major problem with these arguments is that they misrepresent the details of the COOL measures, inaccurately asserting that they require segregation. To the contrary, the regulations were designed so that segregation would not be necessary. Canada and Mexico also overstate the costs associated with segregation for those firms who may choose to do so and they ignore market conditions unrelated to COOL that explain the recent experience of their livestock producers. Finally, Canada and Mexico's claims regarding the impact of the measures cannot be reconciled with recent trade data. US processors continue to buy livestock from Canada and Mexico with strong increases in US livestock imports in 2010.

8. Canada and Mexico's less favourable treatment arguments are also 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. This is simply not the case. Rather, the COOL measures establish origin neutral labelling requirements for retailers of meat. Nothing in the measures prescribes how market participants in the upstream supply chain must respond. These market participants are allowed to, and in fact they have been, complying with the regulations in many different ways, including in ways that allow them to continue to purchase significant amounts of Canadian and Mexican livestock. Even Canada and Mexico's own evidence indicates that some market participants have not altered their purchasing behaviour in response to the regulations. And even if the complaining parties could prove that some market participants decided to buy less foreign livestock, this reflects independent decisions of private market actors and cannot be attributed to the measures.

9. Canada and Mexico argue that various instruments (the COOL statute; the 2008 Interim Rule; the 2009 Final Rule; the Vilsack Letter; and for Mexico, the FSIS Interim Rule and FSIS Final Rule) constitute one "COOL measure". By defining the various US instruments this way, Canada and Mexico attempt to sweep into the analysis measures that no longer exist and, with regard to others, to avoid proving their case. For example, the Vilsack Letter does not include mandatory labelling requirements and is not a technical regulation under the TBT Agreement. Similarly, neither party has explained how the COOL statute and FSIS Final Rule, when examined separately from the 2009 Final Rule, are inconsistent with US WTO obligations. The Panel should reject Canada and Mexico's characterization of a single measure and instead analyze each of these measures and documents on its own, consistent with the approach taken in past disputes.

10. Turning to their substantive claims, neither Canada nor Mexico prove that the COOL measures are inconsistent with TBT Article 2.1 or GATT Article III:4 because all of the measures at issue in this dispute treat beef, pork, and livestock identically regardless of origin. Despite this, Canada and Mexico argue that the COOL measures are *de facto* inconsistent with US national treatment obligations because they modify the conditions of competition to the detriment of their livestock.

11. These arguments are flawed for multiple reasons. First, they are founded on the erroneous assertion that a US slaughterhouse can only process both foreign and domestic livestock by segregating its production lines. To the contrary, the regulations do not require segregation. Rather, they permit US slaughterhouses to commingle US and foreign origin cattle within a single production day and affix the resulting muscle cuts of meat with a mixed origin label.

12. Second, to the extent that US processors might choose to comply with COOL by segregating instead of commingling, the cost of doing so is not as high as Canada and Mexico assert, and it is not prohibitive. The complaining parties overstate the costs, in part, because they overlook the fact that many US processors have long segregated their production lines to meet grade labelling requirements, for other marketing programs, and to meet export requirements. Insofar as these processors may segregate to meet the COOL requirements, they are unlikely to incur significant new costs since they would not be deviating much from prior practice.

13. Third, these arguments presuppose that US slaughterhouses who choose to segregate cannot pass on any compliance costs to consumers and do not account for the possibility that some slaughterhouses will continue to source both foreign and domestic livestock even if there is an added expense. The reason for this is that their business models are based on a supply of mixed origin animals to ensure that the plant runs at full capacity and at maximum efficiency.

14. Beyond segregation, Canada and Mexico's view of what is happening in the market is inaccurate. According to the evidence presented by Canada and Mexico, at least 12 of the 15 US slaughterhouses that were accepting foreign and domestic livestock in 2008 are continuing to do so. This indicates that these slaughterhouses do not consider the cost of processing foreign livestock under the regulations to be prohibitive. These slaughterhouses have more than enough capacity to process all Canadian and Mexican livestock sent to the United States.

15. To the extent that any US slaughterhouse may decide to stop processing foreign livestock to comply with COOL, this would be the decision of that private market actor alone. The COOL measures permit processors to comply with the labelling requirements in any way they see fit as long as they provide accurate information to retailers. Nothing in the regulations compels them to stop accepting foreign livestock or to segregate.

16. Canada and Mexico's discussion of trade data ignores external factors that explain any reduction in their livestock exports. In fact, while the COOL measures were being implemented, the world was in the throes of a global economic recession. In 2009, trade in agricultural products was down 12 per cent around the world and down 11 per cent in the United States. Given the recession, it would have been a major surprise if Canadian and Mexican livestock exports did not decline as well. Yet both Canada and Mexico's submissions and the economic studies they commissioned fail to take notice of this major economic shock, much less to account for it in their analysis. Canada and Mexico would have the Panel believe that had the United States not enacted the COOL measures, their livestock would have entered the United States at levels and prices unaffected by the recession. This position does not withstand scrutiny.

17. Third, Canada and Mexico overstate the severity of the decline in their exports and they ignore recent market trends. Even during the recession, Canadian and Mexican cattle exports remained above their historical averages and exports of both of these products are increasing significantly in 2010. US imports of Canadian cattle are up 6 per cent while imports of Mexican cattle are up 31 percent. These trends are expected to continue.

18. Canada and Mexico's arguments regarding less favourable treatment are premised on an incorrect understanding of the meaning of less favourable treatment under the national treatment provisions. The TBT Agreement preamble affirms the right of Members to regulate. Any time a Member enacts a technical regulation, it likely imposes some costs on market participants. Further, depending on their situation, some market actors will face higher costs than others, and they will respond to these costs in different, and often unpredictable, ways. The fact that some market actors

may decide to change their behaviour in a manner that disfavours products from some Members does not establish that the measures accord those products less favourable treatment.

19. Here, the measures themselves are neutral on their face. The changes in the market that Canada and Mexico identify are not mandated by the measures themselves, but at most reflect how some private entities have decided to structure their business based on their assessment of costs and other commercial considerations. As such, the measures do not accord "less favourable treatment" to Canadian and Mexican livestock.

20. This conclusion is consistent with the Appellate Body's reasoning in *Dominican Republic – Import and Sale of Cigarettes* where the Appellate Body noted that "the existence of a detrimental effect on a given imported product resulting from a measure does not necessarily imply that this measure accords less favourable treatment to imports if the detrimental effect is explained by factors and circumstances unrelated to the origin of the product, such as the market share of the importer in this case."

21. Canada and Mexico have failed to prove that any of the measures breach TBT Article 2.2. Under Article 2.2, read in conjunction with the TBT Agreement preamble, each Member has the right to decide for itself which legitimate objectives to pursue and to take measures to meet those objectives "at the levels it considers appropriate". The *EC – Sardines* panel agreed with this interpretation.

22. The COOL measures were enacted with the legitimate objective of providing consumers with information about the covered commodities they buy at the retail level. For muscle cuts of meat, the United States decided that retailers should provide information about all the countries where the source animal was born, raised, and slaughtered. If the measures only required retailers to list where the animal was slaughtered, meat derived from livestock that spent its entire life outside of the United States and was only present in the country for a short time period (perhaps less than 24 hours) would be designated US origin. Reading the label, a consumer would assume that the source animal had been born and raised in the United States. The fact that this product might also carry a USDA grade label would only exacerbate this confusion.

23. To verify the objective, the Panel should begin with their text and may consider their design, architecture, and revealing structure. As the Appellate Body noted, "it is not necessary for a panel to sort through the many reasons legislators and regulators often have for what they do and weigh the relative significance of those reasons to establish legislative or regulatory intent."

24. The text of the COOL measures clearly indicate that their objective is consumer information. The 2009 Final Rule states that "the intent of the law and this rule is to provide consumers with additional information on which to base their purchasing decisions". The COOL measures are also designed to ensure that consumers receive information about the covered commodities and are structured to prevent consumer confusion.

25. As a number of third parties have noted, the objectives of the US measures are legitimate. TBT Article 2.2 contains a non-exhaustive list of legitimate objectives, as confirmed by the use of the term "*inter alia*". Thus, objectives not included in the list may also be legitimate. The legitimacy of the US objectives are validated by the widespread consumer support for this information and the fact that over 40 WTO Members have country of origin labelling systems. Additionally, one of the objectives listed in Article 2.2 (the prevention of deceptive practices) is closely related to consumer information and the prevention of consumer confusion.

26. The COOL measures fulfil their objectives at the level that the United States has deemed appropriate. They provide US consumers with information previously unavailable to them and have helped prevent confusion. While they do not require retailers to convey every detail regarding the product's origin or cover every instance in which a consumer purchases food, this does not support the conclusion that the measures' objective is something other than consumer information or demonstrate that the measures do not fulfil their objectives. It is true that if exceptions and flexibilities were not included and certain modifications were not made, the 2009 Final Rule would require retailers to provide more information to consumers than it does. However, the rule would also have imposed higher costs on industry. Given that USDA made a number of changes in response to concerns expressed by Canada and Mexico, the United States finds it somewhat ironic that the complaining parties now attempt to use these changes against the United States.

27. Taking into account the US objectives, and given the flexibilities the United States built into its measures, they are not "more trade restrictive than necessary". The TBT Agreement does not define the phrase "more trade restrictive than necessary" and it has not been interpreted by any WTO adjudicative body. Based on the text, a complaining party must demonstrate (1) that a particular measure is trade restrictive and (2) that the measure restricts trade more than is necessary to fulfil the measure's legitimate objective. The United States agrees with Canada that SPS Article 5.6 provides useful context for the interpretation of the phrase "more trade restrictive than necessary". SPS Article 5.6 includes similar language to TBT Article 2.2 and the Appellate Body has noted the "strong conceptual similarities" between the two agreements. Therefore, a Member asserting a breach of this provision must demonstrate that there is another measure that (1) is reasonably available to the government, taking into account technical and economic feasibility; (2) fulfils the government's legitimate objectives at the level the government has determined is appropriate; and (3) is significantly less trade restrictive.

28. Canada and Mexico have failed to prove that any of the COOL measures adopted by the United States are more trade restrictive than necessary. Canada and Mexico's arguments in this regard rest on their erroneous assertions that the US measures require segregation and that there are high costs associated with that practice that have forced US processors to completely reject foreign livestock. Additionally, the complaining parties ignore recent trade data that illustrate a significant increase in Canadian and Mexican livestock exports in 2010.

29. Canada and Mexico have failed to demonstrate there is another measure that would meet the US objectives of providing consumer information and preventing consumer confusion at the level the United States deems appropriate while being significantly less restrictive to trade. Both of the measures that Canada and Mexico suggest – a voluntary labelling system and a mandatory system based on substantial transformation – fall short. A voluntary system would clearly not meet the US objective. Indeed, the United States at one time attempted to implement a voluntary system, but US retailers simply opted not to label their products.

30. A system based on substantial transformation would fail to meet the US legitimate objectives. This system would not provide any information about the different countries in which an animal was born and raised when the animal was born and/or raised in a foreign country and then slaughtered in the United States. Further, it would not prevent consumer confusion. Under this system, meat derived from an animal that spent its entire life in another country before being slaughtered in the United States would be characterized as US origin. This would defy consumer perception and could perpetuate confusion. Finally, Canada and Mexico have not shown that a substantial transformation system is significantly less trade restrictive.

31. Mexico has also failed to establish the COOL measures breach TBT Article 2.4. In particular, Mexico has not demonstrated that the CODEX standard it advances is an effective or appropriate means of fulfilling the legitimate objectives pursued by the United States. CODEX-STAN 1-1985 appears to be based on substantial transformation. Thus, this standard suffers from the same deficiencies as the alternative just discussed.

32. Mexico's arguments under TBT Article 12.3 fail to establish that any of the COOL measures breach this provision. Mexico has not demonstrated that the United States did not take its needs into account during the preparation and application of the 2009 Final Rule. Rather, the United States gave Mexico the opportunity to participate in the US rule making process and to share its concerns with the United States in other fora. The United States considered Mexico's contributions and even modified its regulations in response to concerns raised by Mexico.

33. Canada and Mexico have failed to demonstrate that any of the COOL measures are inconsistent with US obligations under GATT Article X:3. Neither party offers evidence to show that the administration of these measures has been unreasonable or non-uniform. Indeed, their arguments do not even relate to the administration of the COOL measures. Rather, Canada and Mexico focus on the issuance of the Vilsack Letter, an action that did not in any way "put into practical effect" or "apply" the COOL statute or regulations. Further, changes the United States made to the regulations were not non-uniform or unreasonable. In fact, many changes were made at the request of interested parties, including Canada and Mexico.

34. Finally, Canada and Mexico have not demonstrated that any of the COOL measures nullify or impair their benefits under the WTO Agreements. In fact, neither party is able even to identify the relevant benefits under the covered agreements that have been affected, let alone establish that they could not have reasonably anticipated the enactment of the COOL measures.

ANNEX D-4

CLOSING ORAL STATEMENT OF CANADA AT THE FIRST SUBSTANTIVE MEETING

1. Mr. Chairman, members of the Panel, we thank you for the opportunity to provide a few concluding comments.

2. We appreciate the contributions made by the third parties through their written submissions, their statements and answers to questions.

3. Canada considers that we had a useful first discussion in this case. However, Canada is struck by the fact that we have not really engaged in detailed discussion of some key evidentiary issues. Perhaps this is because the United States has offered no credible evidence, and in some cases no evidence at all, to rebut the complainants' case.

4. The adverse effects of the COOL measure on the conditions of competition for Canadian cattle and hogs in the US market is a critical issue in this case. The United States has not contested the letters and witness statements produced by Canada demonstrating the adverse effects. However, the United States did criticize certain aspects of Dr. Sumner's econometric analysis on the effect of the COOL measure. Canada has responded to this criticism in its Oral Statement.

5. Yesterday, the United States filed further exhibits (US-57, US-58 and US-59) and discussed the data in paragraphs 27-29 of its Oral Statement. These exhibits are so elementary and general in nature that they cannot be considered any response to the serious and thorough analysis submitted by Canada (in CDA-79 and updated in Canada's new exhibit CDA-152).

6. Canada has pointed out that simple pictures of broad trade patterns provide no useful information to help the Panel understand how the COOL measure has actually affected the US demand for imported cattle and hogs relative to comparable animals in the United States.

7. Using detailed weekly time patterns of import ratios (and differences between prices of domestic livestock and comparable imported livestock), as Canada does in its analysis of recent data, helps account for potential factors such as economy-wide fluctuations, that affect the market as a whole. Canada has shown the significant degree to which imports relative to US feedlot placements and slaughter use have been directly and specifically caused by the COOL measure, after accounting for trends, seasonality and other events.

8. Comparing overall cattle imports during the severely depressed first half of 2009 with the first half of 2010 (which is done in exhibit US-59) is irrelevant and misleading. First, such data say nothing about the continued lower prices received for Canadian fed cattle. And second, the United States does not provide any data on hogs. On this point, we note how little emphasis there has been on the exports of hogs as compared to cattle. In fact, US hog imports from Canada have declined consistently since the COOL measure went into effect.

9. We trust that there will be more opportunity to explore these aspects in answers to written questions and also at the next meeting, in December.

10. As to other evidence, the United States provides vague suggestions on what the objective of the COOL measure is. It suggests that it provides some kind of information to consumers (though

what exactly is unclear) in response to an alleged strong demand for this unclear information. It conflates consumer information with deceptive practices without providing any evidence, or even persuasive logic, to explain how any consumers have been deceived prior to the COOL measure and are now not deceived any more. Consumer deception or addressing consumer confusion cannot be a legitimate objective when such deception or confusion is a result of the WTO Member's own laws and regulations. Ultimately, where there is an unnecessary obstacle to trade in the absence of a decipherable legitimate objective, there is a violation of Article 2.2 of the TBT Agreement.

11. Furthermore, the United States continues to deny the link between the COOL measure and segregation in practice, and attributes any segregation to private business decisions. Yet as Canada has already pointed out in detail in its Opening Statement at paragraphs 27 and 28, and Mexico has also shown (such as in exhibit MEX-41), slaughtering operations imposed segregation as a necessary response to the COOL measure. The US suggestion that segregation is a private business decision unconnected to COOL is disingenuous in the light of that evidence.

12. Mr. Chairman, Members of the Panel, we thank you for your attention and your continuing work on this very important matter for Canada and the other Members of the World Trade Organization. We would also like to express our appreciation to the Secretariat for organizing this meeting. We look forward to receiving your written questions.

ANNEX D-5

CLOSING ORAL STATEMENT OF MEXICO AT THE FIRST SUBSTANTIVE MEETING[1]

1. Mr Chairman and Members of the Panel, a number of issues have been discussed during this substantive meeting. In this final statement, I intend to focus on a few key points only.

I. INTEGRATION OF THE MEXICAN MARKET

2. To begin with, it needs to be stressed that the cattle and beef industries of Mexico and the United States have historically been integrated and inter-related. Mexico's comparative advantage in this relationship has involved producing feeder cattle to be sent at a very early stage to be raised and slaughtered in the United States.

3. The comparative advantage of the United States has consisted in feeding the cattle, slaughtering it, producing and marketing the meat and sending it to its domestic market, to Mexico and to other countries. This is a historical relationship.

4. Today, Mexico is celebrating the 200th anniversary of its fight for independence and the 100th anniversary of its Revolution. Since those times, the market has become naturally integrated to the benefit of both countries.

5. Mexico has had to adapt to all of the sanitary requirements imposed by the United States; and in spite of this, the United States has disrupted a natural trade relationship by introducing the COOL measure.

II. DISCRIMINATION ARGUMENTS

6. Mexico's discrimination arguments with regard to Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994 are fundamental to its case.

7. The COOL measure has adversely influenced the competitive opportunities of Mexican cattle imports in favour of United States cattle by directly producing the following effects:

Reducing the number of plants that slaughter and process feed cattle that was born in Mexico and raised in the United States;
reducing the number of days per week that such cattle are slaughtered and processed in the remaining plants;
requiring advance notice prior to accepting such cattle;
reducing the number of US feeders that are ready to accept Mexican cattle.

8. US cattle has suffered no such loss of competitive opportunities. These losses have reduced the price paid for Mexican cattle as compared to the price paid for cattle born in the United States, thereby adversely affecting the conditions of competition for Mexico.

9. Mexico has presented a clear case of *de facto* discrimination in violation of Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994.

[1] This oral statement was originally made in Spanish.

III. EVIDENCE

10. Let me emphasize that Mexico has made a prima facie case with respect to every fact and legal element involved, particularly as regards the direct effect of the COOL measure on the balance of competitive opportunities in the United States market.

11. Turning to the Vilsack letter, Mexico notes that one of the ways in which the industry can comply with the letter is to avoid using the Category B label. The evidence that Mexico has adduced with respect to the limitations imposed on exports of Mexican cattle would indicate that the main processors have been forced to do just that.

IV. PRIVATE ACTORS

12. In its written and oral submissions, the United States argues that the effects identified by Mexico as being the direct result of the COOL measure are in fact the result of action by private actors in the industry.

13. The United States cites the report of the Appellate Body in *Korea – Various Measures on Beef* in support of its argument.

14. The United States erroneously interprets the Appellate Body's decision. What the Appellate Body said in paragraph 146 of its report was the following:

> "146. We are aware that the dramatic reduction in number of retail outlets for imported beef followed from the decisions of individual retailers who could choose freely to sell the domestic product or the imported product. **The legal necessity of making a choice was, however, imposed by the measure itself.** The restricted nature of that choice should be noted. The choice given to the meat retailers was *not* an option between remaining with the pre-existing unified distribution set-up or going to a dual retail system. The choice was limited to selling domestic beef only or imported beef only. Thus, the reduction of access to normal retail channels is, in legal contemplation, the effect of that measure. **In these circumstances, the intervention of some element of private choice does not relieve Korea of responsibility under the GATT 1994 for the resulting establishment of competitive conditions less favourable for the imported product than for the domestic product.**" (Emphasis added)

15. This is exactly what is happening in this dispute. The COOL measure is limiting the options available to US processors, so that the private sector actions can be attributed to the measure itself.

V. THE UNITED STATES' OBJECTIVE

16. As Mexico has said, the true objective of the COOL measure is "protectionism". It is also clear to Mexico that the objective is not legitimate.

17. The objective adduced by the United States has been made clear: "to eliminate consumer confusion".

18. To the extent that such confusion may have existed, it was due to an already existing legal system in the United States.

19. It is clear from our discussions with the United States during this meeting that the measure merely causes confusion.

VI. ACKNOWLEDGEMENTS

20. We would like to thank the Panel for its attention during this meeting, and the Secretariat and interpreters for their assistance.

ANNEX D-6

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF THE UNITED STATES AT THE SECOND SUBSTANTIVE MEETING

1. Canada and Mexico have asserted that they are not challenging country of origin labelling requirements in general. They acknowledge that many WTO Members maintain country of origin labelling requirements for food and that this practice is not necessarily WTO-inconsistent. They both maintain country of origin labelling requirements as do many third parties.

2. Canada and Mexico necessarily claim then, that their concern is not with country of origin labelling *in general*, but only with the particular measures that the United States adopted with respect to beef and pork. However, Canada and Mexico's arguments regarding the WTO obligations at issue cannot be reconciled with this position: were their arguments accepted, it is difficult to conceive of any country of origin labelling system that would survive WTO scrutiny.

3. The complaining parties assert the US measures do not fulfil their legitimate objectives and are protectionist because they apply only to some food products; yet even a cursory review of the labelling systems of the third parties shows they do not apply to all products either. Canada and Mexico find fault with the fact that the US measures are mandatory and apply at retail; yet again, the United States has identified nearly 70 Members with mandatory requirements, many of which apply at retail. Canada and Mexico criticize the US measures because they are not based on the concept of substantial transformation; but the United States is hardly the only WTO Member not to base its labelling requirements on this concept. Thus, if the US measures are WTO-inconsistent due to their scope, their mandatory nature, the fact that they apply at the retail level, or the fact that they rely on criteria other than substantial transformation, this would raise questions about many other labelling requirements maintained by WTO Members.

4. Canada and Mexico criticize the US measures as not providing complete information to consumers, in particular because the United States strived to reduce compliance costs by adding, at Canada's request, commingling provisions. When coupled with their argument that compliance costs are too high, Canada and Mexico's complaint regarding commingling puts the United States and other WTO Members with labelling requirements in an impossible position. Canada and Mexico condemn the US measures as "more trade restrictive than necessary" because of their compliance costs, yet at the same time claim that they fail to fulfil their legitimate objectives because of efforts made by the United States to reduce these costs. In effect, Canada and Mexico's theory presupposes that WTO panels should stand in the shoes of the regulator, re-calibrate the costs and benefits of a given measure, and in the process undermine the right of WTO Members to adopt measures to provide origin information to their consumers at the level they consider appropriate.

5. In addition to making overly-broad arguments that would jeopardize the ability of WTO Members to adopt origin labelling requirements, Canada and Mexico argue that the US measures are WTO-inconsistent because of their alleged effects in the market. However, Canada and Mexico have not identified any aspects of the COOL measures *themselves* that accord less favourable treatment to their livestock exports. While the complaining parties have provided limited evidence suggesting some private market actors changed their policies in response to the measures, much of this information is inaccurate and any such actions are not required by the measures. The measures only require retailers to label their products with origin information, regardless of what that origin may be, and they require suppliers to provide accurate information to those retailers. They do not require feed lots or slaughter houses to segregate and do not prevent them from accepting foreign livestock.

Further, Canada and Mexico's assertions regarding the impact of the measures cannot be reconciled with recent data showing Canadian and Mexican livestock exports and prices are up.

6. Canada and Mexico's theory that the COOL measures were adopted for protectionist reasons is contradicted by the text of the measures, their design, and extensive evidence demonstrating that US consumers and consumer organizations actively supported and sought the enactment of the US measures. The United States provided substantial evidence regarding the role played by the consumer, including letters of support from individual consumers, extensive lobbying efforts by the leading consumer organizations in the United States, and even a recommendation adopted by the Trans-Atlantic Consumer Dialogue (TACD), a coalition of 27 US and 49 EU consumer organizations, explicitly endorsing the COOL statute.

7. Instead of making their case with regard to all of the instruments, Canada and Mexico urge the Panel to make findings with regard to a single "COOL measure". This characterization overlooks substantive differences between the instruments that have implications for how the various WTO obligations apply. In addition, many of the instruments Canada and Mexico characterize as part of the single "COOL measure" have expired or are not within the Panel's terms of reference. Further, the WTO reports that Canada and Mexico cite to support their "single measure" theory are not applicable to the instant dispute. Thus, the Panel should examine each instrument separately as was done in *Japan – Film* and *Turkey – Rice*.

8. By advancing the "single measure" theory, Canada and Mexico attempt to hide deficiencies in their case, such as the fact that the Vilsack Letter is not a technical regulation under the TBT Agreement or a "requirement" under GATT Article III:4. The Vilsack Letter does not meet these definitions because it is not mandatory. This is obvious from the letter's text, its lack of an enforcement mechanism, and the fact that it has no legal status. Tellingly, the evidence before the Panel also indicates that industry is not following the letter's suggestions.

9. Canada and Mexico have failed to demonstrate that the COOL measures breach TBT Article 2.1 or GATT Article III:4. The COOL measures treat covered commodities of all origins identically, requiring products to be labelled with origin regardless of what their origin may be. To the extent that these measures apply to livestock, they apply to them identically – requiring that meat derived from these livestock be labelled at the retail level, regardless of where the source animal was born, raised, and slaughtered.

10. Canada and Mexico's arguments to the contrary are premised on a misunderstanding of the legal obligations at issue and a misapplication of past reports examining the meaning of "less favourable treatment". A Member does not act inconsistently with these provisions unless its measure treats domestic products one way and provides different, less favourable treatment to imported products based on origin. A Member will not breach these provisions as a result of the behaviour of private market actors not required by the measure itself. Neither the GATT 1994 nor the TBT Agreement guarantees a Member a particular outcome in the hands of an individual market actor or a particular level of sales for their product. The question is whether any of the COOL measures provides for different treatment based on origin, and if so, whether that different treatment is less favourable for imported products. Not only do the COOL measures not provide for different treatment based on origin, but the detrimental effects complained about are based on the actions of private market actors or due to external market factors.

11. Canada and Mexico's attempts to analogize the instant situation to *Korea – Various Measures on Beef* by asserting that the COOL measures impose a choice on market actors that requires them to accord less favourable treatment to imports are not persuasive. The *Korea – Various Measures on*

Beef measure on its face accorded different treatment to imported and domestic products and required small retailers to choose between selling only domestic or only imported products; they could not sell both. The COOL measures are origin neutral and do not require retailers or any other private market actors to make a choice between domestic and imported products or to take any particular action at all that would harm imports. In fact, the COOL measures allow market actors to comply in any fashion they choose as long as the end product bears an accurate label. Feed lots and slaughter houses may respond in many different ways, including by accepting all domestic livestock, accepting all foreign livestock, commingling different origin livestock on the same production day, accepting different origin livestock on different days, or by segregating if they so choose.

12. In addition to misapplying the legal standard, Canada and Mexico ignore the commingling provisions, which obviate the need to segregate. Using these provisions, feed lots can feed different types of livestock together and send these animals to be slaughtered on the same production day without segregation. The slaughter house can process these animals together or commingle them further and characterize the resulting meat as mixed origin. Finally, after the meat derived from this livestock leaves the slaughter house, it does not need to be segregated because it can all be affixed with the same label at the retail level. Evidence before the Panel demonstrates that US processors are taking advantage of the commingling flexibility, directly contradicting Mexico's vague assertion that USDA is somehow adopting a strict interpretation of the 2009 Final Rule that has discouraged the use of these provisions.

13. Even if some feed lots and slaughter houses choose to respond to the COOL measures by segregating, this does not establish that the *measures* accord different treatment based on origin, let alone less favourable treatment. Segregation is but one among many options that these entities have to respond to the measures, and the feed lots and slaughter houses who choose to respond to the COOL measures by segregating are not required to reduce the price they pay for livestock (imported or domestic) in order to offset any costs they choose to bear as a result. Rather, these entities can absorb any associated costs, pass these costs on to consumers, or distribute these costs throughout the supply chain. Nothing in these measures requires them to impose these costs solely or disproportionately on imported livestock through price discounting.

14. In addition to ignoring the commingling provisions and pre-supposing that any segregation costs will be imposed only on their products, Canada and Mexico downplay the significance of the segregation that has long been occurring in the market independent of the COOL measures. The significance of this pre-existing segregation is not merely that slaughter houses who choose to respond to the COOL measures by segregating can use existing segregation mechanisms at limited additional cost, but that segregation is extremely common and US processors can use their experience and existing synergies to establish new segregation practices at a lower cost than if they had not previously segregated for other purposes.

15. The evidence and economic studies that Canada and Mexico submit do not demonstrate that the COOL measures accord less favourable treatment to their livestock. First, the evidence is of questionable accuracy, and to the extent that it is accurate, it does not represent less favourable treatment accorded by the measures. Second, Canada and Mexico's argument that the COOL measures have forced US feed lots and slaughter houses to reject their livestock and discount the price paid for these animals is contradicted by recent economic data. Third, the economic models and reports the complaining parties have submitted are highly flawed.

16. Canada and Mexico have failed to demonstrate the COOL measures breach TBT Article 2.2. If their arguments were accepted, it is unclear whether a Member could ever adopt country of origin labelling requirements without breaching its WTO obligations. Canada and Mexico's arguments that

the COOL measures are "more trade restrictive than necessary" because they require too much information and fail to fulfil their objectives because they do not provide enough put the United States in an impossible position. The Panel should reject Canada and Mexico's attempts to turn the TBT Article 2.2 analysis into a wholesale re-evaluation of every choice the United States made in the process of developing a complex regime. Designing a technical regulation necessitates difficult choices, especially when balancing the interests of US consumers and trading partners like Canada and Mexico. Some interested parties advocated for a labelling system that provided more information, while others advocated for a less costly system. 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 measures fulfil their legitimate objectives at the level the United States considers appropriate without restricting trade more than necessary.

17. The objectives of the COOL measures – providing consumer information about origin and preventing consumer confusion regarding origin – are legitimate. Many third parties agree and neither Canada nor Mexico dispute this fact. The legitimacy of these objectives is also confirmed by the strong consumer support for country of origin labelling as well as the fact that many WTO Members have adopted country of origin labelling requirements and explicitly identified "consumer information" as their objective in their TBT notifications.

18. Providing consumer information about origin and preventing consumer confusion are the objectives of the COOL measures. To determine the objectives, the Panel should focus on the measures' text and may also consider their design, architecture, and revealing structure. The text and design of the COOL measures clearly indicate that their objectives are consumer information about origin and the prevention of consumer confusion. For example, the 2009 Final Rule states that "the intent of the law and this rule is to provide consumers with additional information on which to base their purchasing decisions".

19. Canada and Mexico's arguments that the COOL measures are protectionist because of their product coverage or origin definition would imply that most, if not all, of the labelling systems maintained by WTO Members are also protectionist. Similarly, the fact that the 2009 Final Rule does not provide the most detailed information possible in all circumstances does not imply that its objective is protectionism. The commingling provisions were specifically included at Canada's request and they have reduced implementation costs. The fact that the COOL measures do not require retailers to list more than one country on a Category D label when processing steps occur in more than one country does not illustrate a protectionist objective either. The amount of meat to which this applies is trivial and requiring multiple countries to be listed on a Category D label would increase compliance costs for foreign producers.

20. To the extent that the legislative and regulatory history of the COOL measures are relevant, it confirms the objectives as providing consumer information about origin and preventing consumer confusion. This is obvious from the Committee Reports, statements of legislators, statements of interest groups, and statements of US consumers on the record.

21. The COOL measures fulfil their objectives at the levels the United States considers appropriate. As a result of the measures, millions of consumers have information not previously available to them. With regard to meat, consumers have information on all the countries in which processing steps took place when the meat is slaughtered in the United States and will not be misled into believing that meat labelled as US origin was derived from an animal born, raised, and slaughtered in the United States when this is not the case.

22. While many consumers are pleased with the COOL measures and the information they provide, the United States could have designed these measures to provide even more information by omitting the commingling flexibility or requiring point-of-production labelling. However, the TBT Agreement does not require Members to take every step possible to fulfil its legitimate objectives without regard to cost, and for this reason, Canada and Mexico's arguments regarding product coverage and imperfect information must fail.

23. Canada and Mexico have not identified a reasonably available alternative. The suggestion of a voluntary labelling system is not a reasonably available alternative because the United States attempted this option without success; therefore, it failed to fulfil the US objectives in a very fundamental way. The suggestion that the United States adopt a system based on substantial transformation fails to fulfil the US objectives because it does not provide any information about the multiple countries in which an animal spent its life when it was not born, raised, and slaughtered in a single country; thus, it does not provide as much information as the US system and does nothing to reduce consumer confusion regarding meat products from animals born and/or raised in another country and slaughtered in the United States. Many US consumers and consumer organizations indicated that this level of information is important, and they rejected a definition based on substantial transformation. Accompanying the 2009 Final Rule with a trace back system is not a reasonably available alternative either. It is unclear how this alternative could possibly be less trade restrictive.

24. Mexico has failed to demonstrate that the COOL measures breach TBT Article 2.4. Mexico asserts that the United States has conceded that the CODEX standard is relevant, but this mis-characterizes the US position and fails to address the fact that the CODEX cannot be a relevant standard for a large portion of the meat at issue (meat not pre-packaged) since it does not apply to these products. Mexico has also failed to explain how substantial transformation would be an "effective" or "appropriate" means of achieving the US legitimate objectives.

25. Mexico has also failed to demonstrate that the COOL measures breach TBT Article 12.3 and has failed to identify what "special needs" it had. Mexico's arguments are based on a flawed legal interpretation that ignores the text of Article 12.3, the context provided by other TBT provisions, and the context provided by the special and differential treatment provisions of the SPS Agreement in addition to past reports that have interpreted the SPS provision. Based on this, it is clear that Mexico bears the burden of proof under this provision and that the United States was not required to take any particular actions in response to comments it received from Mexico. In addition, the United States has provided evidence on how it has taken Mexico's concerns into consideration *with a view* to avoiding unnecessary obstacles to Mexico's exports.

26. Canada and Mexico have failed to demonstrate that any of the COOL measures breach GATT Article X:3(a). Their arguments focus on actions that do not represent the "administration" of the COOL measures and neither party has put forward any evidence to suggest that the US administration of the measures was unreasonable or non-uniform.

27. Finally, Canada and Mexico have continued to treat their nullification and impairment claims in a cursory fashion. They have failed to present "a detailed justification in support" of their claim that the COOL measures violate GATT Article XXIII(b) as required by DSU Article 26.1(a).

ANNEX D-7

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF CANADA AT THE SECOND SUBSTANTIVE MEETING

I. INTRODUCTION

1. Canada is challenging the COOL measure principally because it has caused a serious disruption to the conditions of competition in the US livestock market.

2. As a first preliminary point, Canada notes that it is not a defence to a violation of either TBT Article 2.1 or 2.2, for a WTO Member to argue that it took into account competing interests in developing a measure and provided flexibility to accommodate all such interests. As a second preliminary point, Canada notes that it is illogical to argue, as the United States does, that Canada has to prove a violation of the statutory COOL provisions separate from the Final Rule when the United States itself has stated that the statutory COOL provisions needed to be implemented by regulations (i.e., the Interim Final Rule, and later the Final Rule).

II. TBT ARTICLE 2.1 AND GATT ARTICLE III:4

3. Findings regarding Canada's claims under TBT Article 2.1 and GATT Article III:4 are important to achieve a "positive solution to the dispute", within the meaning of DSU Article 3.7. As the TBT Agreement deals "specifically, and in detail" with technical regulations, the COOL measure should be assessed first under that Article; a similar finding of a violation of GATT Article III:4 will follow from a finding of a violation of TBT Article 2.1.

4. The COOL measure has negatively affected the conditions of competition for Canadian-born cattle and hogs. Like all country-of-origin labelling, the COOL measure treats imported and domestic products differently. US claims to the contrary, apparently to equate the COOL measure with origin-neutral technical regulations, are incorrect. It is also not relevant that that not all US slaughter houses have rejected Canadian-born cattle and hogs. What is necessary is to show that the COOL measure has negatively changed the conditions of competition for Canadian livestock by creating a disincentive in the US market to use Canadian-born cattle and hogs.

5. Nothing in the TBT Agreement or the GATT supports the United States' apparent argument that a measure that causes harm to the conditions of competition for one category of products – cattle –may somehow be "saved" if the product in question is an input into other products – beef –, the sales of which have increased.

6. Despite its suggestion that the COOL measure did not cause slaughter houses in the United States to stop or limit their use of Canadian-born cattle and hogs, the United States has effectively conceded that the response by private actors can be attributed to the COOL measure. The US reference to Dominican Republic – Cigarettes case is not of assistance to it either. In that case the Dominican Republic applied this requirement identically to different individual companies without reference to the origin of the product they sold. In contrast, the COOL measure makes product distinctions solely based on the origin of the livestock.

A. SEGREGATION

7. The COOL measure requires participants throughout the meat supply chain to track the origin of the livestock and meat derived from that livestock. This tracking in practice requires segregation.

8. The United States proposes four "options" to avoid segregation, which focus only on slaughter houses. Options one and two require separate supply chains. In Korea-Beef, retailers had a choice to sell Korean or imported beef, or to place both types of beef in separate display cabinets in large stores. The Appellate Body found that this created "obstacles" for imported beef that negatively affected its conditions of competition. Similarly, the COOL measure denies foreign-born cattle and hogs access to the "normal" distribution chain: the exclusive Label "A" distribution chain that has little or no segregation costs. Option three (commingling), does not eliminate segregation costs that create an economic disincentive to use Canadian-born livestock. Meat from commingled livestock must still be labelled differently –segregated from the majority of meat in the US market (being, Label "A"). Option four (processing "B" or "C" Label meat on different days than Label "A" meat) was adopted by slaughter houses that limited (but did not stop) their purchase of Canadian-born cattle and hogs. It requires significant segregation costs.

9. The United States speculates (with no evidence) that pre-existing segregation programs may reduce (but not eliminate) segregation costs related to the COOL measure. Those pre-existing programs cannot reduce the disincentive to the use of Canadian-born cattle and hogs for at least three reasons. First, very few such programs relate to segregation on the basis of origin. Second, segregation throughout the supply chain under those pre-existing programs remains voluntary. Third, the costs of those programs were taken into account in both the Informa Report and Dr. Sumner's simulation analysis.

10. The United States also claims that post-segregation costs are low, ignoring the fact that a great deal of meat is cut and packaged by distributors or retailers, and that therefore there are costs of segregation throughout the meat distribution chain. Similarly, the US alleges that a retailer that sells meat bearing only one type of label will not have additional segregation costs. This ignores the fact that added costs incurred to sell meat under an additional label will be incurred overwhelmingly for adding Label "B" or "C" meat, resulting in more favourable treatment for domestic products (Label "A"). Finally, it is not relevant that the magnitude of the disincentive caused by the COOL measure varies over time as a result of responses by market actors and particular market conditions because these fluctuations do not remove the ongoing negative effects on the conditions of competition for Canadian-born livestock.

B. ECONOMIC FACTORS

11. Adverse trade effects, which is what the United States focuses on, are not necessary to establish a violation of the WTO Agreement. Prices and volumes of Canadian exports of cattle and hogs did drop during the recession, but that does not address the differential detrimental effect caused by the COOL measure on those Canadian exports. Similarly, Canadian livestock exporters' reliance on consumer demand in the United States does not explain differential effects when the market at issue for both Canadian-born and US-born livestock in this case is the US market. The gradual decline in hog inventories in Canada does not explain the extensive unchallenged evidence that the COOL measure caused slaughter houses to reduce or eliminate their purchase of Canadian-born hogs. The decline began in 2005, but Canadian exports to the United States increased until 2008 when the effects of the COOL measure began to be felt, and market share dropped precipitously while inventories continued to decline gradually.

C. ECONOMIC ANALYSIS QUANTIFYING THE LOSS OF COMPETITIVE POSITION

12. Criticism of Dr. Sumner's econometric analysis by the United States is ill-founded, and unsupported by a revised econometric analysis of its own.

13. The United States wrongly argues that weekly APHIS data used by Canada differ "quite considerably" from official US census data. In fact, as demonstrated in Exhibit CDA-196, differences are the result of errors by the United States. Notably, the United States compares census data that included cows and bulls to APHIS numbers that appropriately excluded them. Cows and bulls are not included in Dr. Sumner's analysis because the lower quality of their meat means that it is generally not subject to "A", "B", or "C" labelling. The United States also mistakenly compares eight-week lagged APHIS data in Exhibit CDA-160 with real-time census data.

14. The United States wrongly criticizes the use of a market share ratio that rightly eliminates market factors that do not have **differential** impacts on imported livestock.

15. The United States misleadingly compares prices in 2009 (after the COOL measure went into effect) to 2010, instead of comparing 2007 (the year before the COOL measure came into effect) to 2010. In any event, while the price gap caused by the COOL measure may decrease in tight market conditions, it will increase again when supplies are not as tight and slaughter houses can avoid absorbing any of the additional costs of segregation by using only US-born and -raised cattle.

16. Dr. Sumner's analysis controls for long-term trends in the Canadian market, but it would be a serious mistake to include in that analysis factors that are also in part caused by the COOL measure such as the quantity of livestock in Canada. Similarly, increased Canadian beef exports were caused by market reaction to distortions caused by the COOL measure.

17. There is no evidence that the recession, starting in 2007 had differential effects in the US market. Finally, the United States misunderstands that the BSE ban in force from 2005 to 2007 applied only to mature animals, and that Dr. Sumner's statistical analysis explicitly accounted for any potential spillover effects.

III. MEASURES OF OTHER WTO MEMBERS

18. The country-of-origin labelling measures of other WTO Members cited by the United States include measures that vary in their product coverage and their mandatory or voluntary nature. Canada is not challenging those measures, nor country-of-origin labelling generally. A country-of-origin labelling measure may well be consistent with the *TBT Agreement* and the GATT 1994 if that measure does not negatively affect the conditions of competition for imports, and it fulfils a legitimate objective in the least trade-restrictive way.

IV. TBT ARTICLE 2.2

19. Canada applies the five step test for an analysis under TBT Article 2.2 to issues raised in the Second Written Submission of the United States.

20. The United States has raised no new issues on this first element, *i.e.*, the determination whether the technical regulation restricts international trade.

21. On the second element of the test, the objective of the measure, the United States presents evidence that many consumers are interested in mandatory country-of-origin labelling generally (*i.e.*,

not specifically for meat obtained by slaughter of imported livestock). That evidence is not relevant to whether the COOL measure's specific labelling requirements that affect imported livestock have as their objective the provision of consumer information. Most of the new evidence adduced by the United States does not address what origin definition should be used for meat. And all but one of the limited interventions specifically related to the definition of origin for meat either reflect producer interests or are based on a connection between the COOL measure and food safety that the United States agrees does not exist. The Consumers Union survey prepared in October 2010 was prepared as an advocacy piece to support US submissions in this dispute. It reveals key errors, bias and has no probative value.

22. The United States argues that the objective of the COOL measure is not protectionism because a variety of political representatives voted in favour of the Farm Bill or elements of it, and because some principal supporters of the COOL measure sometimes cited consumer information as a reason to support the COOL measure. These facts do not refute the extensive legislative history and other material showing that those instrumental in bringing the COOL measure into force favoured US cattle and hog producer interests.

23. On the third element, whether the objective is legitimate, support of certain consumer interest groups and measures of many WTO Members generally does not support the legitimacy of the objective of the COOL measure. Canada is challenging the COOL measure under TBT Article 2.2 because of its particular characteristics, including its structure, its objective, and the limited information it provides. Therefore other measures of WTO Members with different characteristics are not relevant to determining that the objective of the COOL measure is not legitimate.

24. On the fourth element, whether the challenged measure fulfils a legitimate objective, the limited evidence of consumer interest cited by the United States does not assist it for reasons already discussed. Further, the limited information that the COOL measure provides does not fulfil the objective of providing meaningful information to consumers.

25. On the final element, assessing the challenged measure against other less trade-restrictive alternatives, the comparisons of mandatory labelling to a voluntary alternative must be fact-specific, not based on general characteristics of measures by other WTO Members. For example, a mandatory system of "trace back" for meat would provide extensive detail on where the animal from which the meat was derived was born, where it was raised, and where it was slaughtered. Such a system would also have the practical advantage of being potentially useful for animal health and food safety purposes. A trace back system would no doubt impose higher costs, but those costs could (if the system were designed correctly) be imposed equally on both domestic and imported livestock. However, the COOL measure provides none of those advantages.

26. Canada also notes that mandatory US country-of-origin labelling for meat, based on where the livestock was slaughtered, could be combined with voluntary information about where the animal is born and raised for any consumers that want such additional information.

V. GATT ARTICLE X:3(A)

27. Through the Vilsack Letter, the United States government issued directives, backed up by a threat of regulatory amendments. This constitutes an unreasonable administration of the COOL legislation and the Final Rule, contrary to GATT Article X:3(a), because on the one hand the Letter invokes "the intent of Congress" and on the other hand it issues directives to US industry for which no authority exists.

VI. GATT ARTICLE XXIII:1(B)

28. Canada is entitled under Article XXIII:1(b) of the GATT 1994 to expect market access to the United States for its live cattle and hogs that corresponds to the tariff concessions that would apply, on a MFN basis, between the United States and Canada, under the *WTO Agreement*. Given the absence of any tariff on imported live hogs and a very low tariff rate in respect of live cattle under the US MFN schedule, Canada was entitled to reasonably expect that its access to the US market for live cattle and hogs would not be restricted through the effects of the COOL measure. Canada could not have expected the possibility of a labelling regime formulated in the manner of the COOL measure, which requires US retailers to label the origin of meat in a manner that is fundamentally at odds with the long-standing rule of US customs law – *i.e.*, the recognition of substantial transformation.

ANNEX D-8

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF MEXICO AT THE SECOND SUBSTANTIVE MEETING

I. INTRODUCTION

1. The COOL measure constitutes an attempt by the US to disguise a restriction on trade as a consumer information measure.

2. Mexico has a competitive advantage in the production of feeder cattle and an efficient and competitive industry has developed in this sector. For decades, Mexican cattle exports were fully integrated into the US market and were commingled with US cattle at all of the production stages. The COOL measure has broken this integration and has adversely affected the conditions of competition of Mexican cattle compared to like US cattle.

3. The COOL measure is made up of statutory provisions, regulations and administrative guidance, all of which Mexico is challenging as a single measure.

4. The scope of Mexico's challenge is narrow. It concerns an internal measure that discourages the use of imported inputs, specifically Mexican feeder cattle, to produce domestic US beef products.

5. Non-tariff measures such as the COOL measure are particularly problematic for developing country Members. It is important that the Panel carefully review the measure and cumulatively apply, in a strict manner, the WTO provisions raised in Mexico's claims.

6. Mexico requests that the Panel rule on each of Mexico's claims and avoid the exercise of judicial economy. This is necessary to achieve a satisfactory resolution of this dispute.

II. MEXICO'S *DE FACTO* DISCRIMINATION CLAIMS UNDER ARTICLE III:4 OF THE GATT 1994 AND ARTICLE 2.1 OF THE TBT AGREEMENT

7. The WTO-inconsistent nature of the COOL measure is most apparent in the *de facto* discrimination it creates against imports of Mexican cattle.

A. LESS FAVOURABLE TREATMENT

8. The United States argues that Mexico misinterprets past WTO Reports, (*Korea – Various Measures on Beef* and *Dominican Republic – Import and Sale of Cigarettes*). Contrary, these reports support Mexico's claims.

9. Mexico is citing these reports for two principles. First, whether or not imported products are treated less favourably than like domestic products should be assessed by examining whether a measure modifies the *conditions of competition* in the relevant market to the detriment of imported products. Second, that a measure accords less favourable treatment to imported products if it gives domestic like products a competitive advantage in the market over imported like products. The facts in *Korea – Various Measures on Beef* are similar to this dispute, the effect of the COOL measure is to restrict Mexican born cattle access to the normal distribution chain.

10. As a direct result of the COOL measure, the conditions of competition in the relevant market have been modified to the detriment of imported Mexican cattle in the following ways: *(i)* reduction in processing plants accepting Mexican cattle; *(ii)* reduction in the number of days per week Mexican cattle are processed; *(iii)* reduction in backgrounders and feedlots that will accept Mexican cattle; *(iv)* and advanced notification requirements for processing.

11. The COOL measure has also caused US packing plants to reduce the price paid for fed cattle that were born in Mexico and raised in the United States, by means of applying a discount to the purchase price. This discount continues.

12. The United Stated affirms that Mexico has presented only "*anecdotical evidence*" to substantiate its claims. Contrary of the United States' assertion, Mexico has filed *positive evidence* in the following manner: *(i)* Current invoices; *(ii)* affidavits provided by the Mexican industry; and *(iii)* documentary evidence from packers and US processors.

13. These factors demonstrate how the COOL measure has disrupted the integrated North American market for cattle and the conditions of competition within that market to the detriment of Mexican cattle. US "like" cattle have *not* faced a reduction in processing plants, processing days, backgrounders, and feedlots, additional requirements or a COOL discount.

14. The United States also argues that there are many factors other than the COOL measure that are affecting price and trade volumes of Mexican cattle. Mexico acknowledges these other factors; however, they are irrelevant to the assessment of "conditions of competition" and Mexico need only demonstrate that the measure modifies the conditions of competition in the relevant market to the detriment of imported products. Mexico has clearly done so.

B. SEGREGATION

15. The United States wrongly argues that Mexico has not proven that the COOL measure requires segregation. Although segregation is not explicitly required by the COOL measure, in practice it is necessary for the industry to comply with the measure. Mexico has demonstrated that segregation exists as a consequence of the COOL measure: *(i)* in light of how the COOL measure is structured and designed, as a practical matter there is no way to comply with the measure without segregating; *(ii)* USDA has recognized that segregation is a necessary means; *(iii)* US packing companies are segregating; and *(iv)* studies show that segregation is required, all of these in order to comply with the COOL measure.

16. The United States asserts that the COOL measure does not require segregation. It attempts to support its assertion by pointing to 4 different options which, in its view, show that it is possible to avoid segregation. Its assertion is without merit for the following reasons: *(i)* the first option is that US slaughterhouses could process only livestock of domestic origin. This option inherently involves segregation because it excludes non-U.S. origin cattle from the processing stream and thereby segregates that source completely; *(ii)* the second option is that slaughterhouses could process livestock of exclusively mixed non-U.S. origin. This option is not economically feasible; *(iii)* the third option is that slaughterhouses could process domestic and mixed non-U.S. origin livestock on the same production day. Even though a slaughterhouse could agree on using label "B" only, it would still need to segregate; and *(iv)* under the final option, the slaughterhouses could process domestic and mixed origin livestock on separate days. This option inherently involves segregation.

17. Thus, it is clear that segregation in some form is required by the COOL measure.

C. THE COSTS OF COMPLIANCE WITH COOL CAN BE MINIMIZED BY USING US BORN CATTLE ONLY

18. The United States argues that a comparison of the four options will show that the cost of processing only US origin livestock is not significantly different from the cost of complying with COOL by other means. This is incorrect. Segregation represents compliance costs, and meat processors can minimize the costs of compliance by using US born cattle only.

19. Regarding the US arguments that commingling avoids segregation, even if slaughterhouses use the commingling rules, they need to segregate to be certain that they are complying with the rules and therefore must bear the attendant segregation costs.

20. The US argument that processing cattle from different origins during different days does not result in additional costs is wrong. This requires segregation in order to identify the cattle and gather animals from the same weight and the same origin.

D. THE INCREASE OF EXPORTS OF MEXICAN CATTLE RELATIVE TO THE PREVIOUS YEAR DOES NOT ELIMINATE THE DESCRIBED EFFECTS OF THE COOL MEASURE

21. The United States refers to the recent increase in exports of Mexican cattle to the US Increased exports have been due to factors such as general supply and demand conditions in the US market.

22. However, the modification of conditions of competition continues. But for the COOL measure, the volume and selling prices of Mexican cattle would be even higher. Also, it is not necessary for Mexico's claims to demonstrate adverse trade effects. It only needs to demonstrate that the conditions of competition have been modified by the COOL measure. Mexico has done this.

E. ACTIONS OF PRIVATE PARTIES

23. The United States argues that it is not the COOL measure that is causing the problems facing Mexican cattle but, rather, the actions of private participants in the US market. The United States misinterprets and misapplies the Appellate Body's reasoning in *Korea – Various Measures on Beef*.

24. In this dispute, the necessity of US market participants to take action to reduce the number of plants processing Mexican cattle, reduce the number of processing days, reduce the number of backgrounders and feedlots that will accept Mexican cattle and impose advance notice requirements is imposed by the COOL measure itself. If not for the COOL measure, these actions would not have taken place. It is the measure and not private choice that is modifying the conditions of competition.

F. ORIGIN NEUTRAL MEASURES

25. The United States argues that the COOL measure is origin neutral. In support of its argument, it cites as authority the Appellate Body report in *Dominican Republic – Import and Sale of Cigarettes*. However, the discrimination in this dispute does not depend on the characteristics of individual importers but, rather, on the origin of the cattle. In this dispute *it does matter* from which country the importer/re-seller purchased the cattle.

26. It is notable that the examples that the United States presents of pre-COOL segregation are origin neutral. The COOL measure is *not* origin neutral. The origin of the cattle is precisely what the COOL measure is about.

III. THE COOL MEASURE IS INCONSISTENT WITH ARTICLE 2.2. OF THE TBT AGREEMENT

A. INTRODUCTION

27. The United States has not raised any new arguments regarding Mexico's claim.

B. THE EVIDENCE PRESENTED BY THE UNITED STATES ABOUT CONSUMERS DEMANDING COUNTRY OF ORIGIN INFORMATION DOES NOT SUPPORT THE US ARGUMENTS

28. The United States presents comments from individual consumers indicating their desire to know the origin of the food that they buy, which do not support the US arguments.

29. The vast majority of the statements presented by the United States relate to country of origin in general and not for the specific origin rules created for meat products, and, specifically not for the origin of the input used to produce the meat. In the narrow context of the subject matter of this dispute, they cannot be used to justify the COOL measure.

30. Also, all the statements were made after the creation of the 2002 Farm Bill, so they do not serve as evidence of the reasons why the US government created the COOL measure.

31. In *EC – Sardines* the panel 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."

32. The introduction of the COOL measure in the 2002 Farm Bill and the discussions concerning that measure would have shaped consumer expectations and perceptions rather than the expectations and perceptions that would exist in the absence of the measure.

33. The evidence presented by Mexico clearly shows that the intent of the measure was to protect US ranchers and cattle producers with the political cover of providing information to the consumer at the retail level.

34. Finally, the consumer poll referred to by the US does not represent a reliable source to demonstrate what consumers want in the context of this dispute.

C. THE COOL MEASURE DOES NOT FULFIL THE STATED OBJECTIVE OF THE UNITED STATES AND INSTEAD FULFILS A PROTECTIONIST OBJECTIVE

35. The objective of the COOL measure is protectionist and is not legitimate.

36. If the Panel finds that the objective of the measure is legitimate, the COOL measure does not fulfil that objective. The COOL measure does not achieve the stated objective. Rather, it misleads consumers when labels other than the "A" label are used.

37. In the case of Mexico, it misleads the consumer when label B (Product of the United States and Mexico) is used. The most diligent consumer will never know that the meat labelled as "B" was produced in the United States from an animal that *(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 *(vi)* its meat was classified with the same quality grading as meat derived from an animal born in the United States.

38. The United States refers to the ability of US producers to distinguish their products for their quality. This assertion is without merit. The beef produced from cattle that was born in Mexico, has identical quality from beef produced from a cattle born in the United States.

39. The only label giving accurate information to the consumer is label "A". The United States argues that the COOL measure fulfils its stated objective of consumer information at the level it considers appropriate. However, the level it considers appropriate is the level that will allow the United States to achieve its protectionist objective by isolating label "A" beef and maximizing production under that label.

D. MEXICO HAS PRESENTED AT LEAST THREE REASONABLY AVAILABLE ALTERNATIVES

40. Mexico has identified three less trade restrictive alternatives that fulfil any legitimate consumer information objective.

2. Voluntary labelling with "born, raised, slaughtered rule" is a reasonably available alternative

41. Although the first alternative will satisfy consumers interested in this information, it is not accepted by the United States because in the view of the United States it will not be sufficiently adopted by participants in the US market. It is notable that this alternative will transfer the costs of the labelling to their domestic industries and their consumers.

3. Mandatory lbailing based on substantial transformation is a reasonably available alternative

42. The benefit of this second alternative is that it can be a mandatory measure that does not depend on voluntary implementation in the US market. This alternative is not acceptable to the United States because it would not target meat based on where the animal was born. In other words, it would not support the protectionist element.

4. A real traceback system is a reasonably available alternative

43. The third alternative is a tracing system that should ensure tracking from the farm where the animal was born to the table where the meat is consumed. Since such a measure tracks cattle based on the farm on which they originate, it does not discriminate based on national origin. There is no incentive under such a system to reduce access for Mexican cattle. The same costs will have to be incurred irrespective of the country of origin of the cattle. However, the United States cattle producers, which strongly support the COOL measure, have strongly opposed a tracing system that would create equal costs to every participant, instead of creating a disproportionate cost on Mexican cattle.

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

44. The COOL measure is not based on the relevant international standard that is effective and appropriate for informing consumers about the country of origin of the product at issue.

45. The United States argues that some meat sold in US stores is not prepackaged but it offers no defence to the fact that the Codex standard applies to the prepackaged meat products that compose most of the meat sales by large grocery stores.

46. The very purpose of the Codex standard is to avoid deception and confusion for consumers. The United States has not explained why the substantial transformation rule is not effective or appropriate. It is only protectionism that cannot be achieved.

V. THE COOL MEASURE IS INCONSISTENT WITH ARTICLE 12.3 OF THE TBT AGREEMENT

47. Contrary to the US assertions, it did not take into account Mexico's special financial and trade needs as a developing country as required by Article 12.3.

48. The United States did not notify or give any opportunity to Mexico to participate in the drafting of the 2002 Farm Bill. Only after the COOL Measure was approved, signed and ready to be implemented, was Mexico able to provide comments to the United States. This situation cannot amount to compliance with Article 12.3 of the TBT Agreement.

49. Also, the United States did not undertake any discernible effort to take into account Mexico's special needs as a developing country in the creation of the COOL Measure. The issue is that the US did not take seriously the special needs of Mexico as a developing country in accordance with Article 12.3 of the TBT Agreement.

VI. THE COOL MEASURE IS INCONSISTENT WITH ARTICLE X:3 OF THE GATT 1994

50. The United States argues that the COOL Measure is not in breach of Article X:3, and focuses on the Vilsack letter and the development of the 2009 Final Rule, claiming that neither put the COOL measure into practical effect. Mexico does not see how those actions taken for purposes of the administration of the measure cannot be considered as part of the administration of the measure. The United States ignores the evidence put forward by Mexico that USDA pressured US processors not to commingle US cattle with imported cattle and is wrong in its interpretation of "administration" under Article X:3.

51. The continuing change in the criteria expressed by the USDA with regard to the compliance with the COOL measures, which included but was not limited to the issuance of the Vilsack letter, are clear examples of a measure that is not administered in a reasonable and predictable manner within the meaning of GATT Article X:3.

VII. THE COOL MEASURE NULLIFIES OR IMPAIRS BENEFITS ACCRUING TO MEXICO WITHIN THE MEANING OF ARTICLE XXIII:1(B) OF THE GATT 1994

52. The United States argues that Mexico has failed to identify a relevant benefit under the covered agreement. The nullification or impairment not only exceeds the NAFTA tariff but also the WTO tariff, and thus, nullifies and impairs benefits under the covered agreements.

53. Also, none of the previous initiatives presented by the United States demonstrates that Mexico, after years of trade in cattle with the United States, could have expected a rule that would require the labelling of the meat derived from cattle born in Mexico, but raised and slaughtered in the United States as "Product of the United States and Mexico". A reasonable assessment of the facts demonstrated that Mexico could have not expected such rule.

VIII. CONCLUSION

54. Mexico has presented a prima facie case that demonstrates that the COOL measure is a protectionist measure that is inconsistent with core provisions of the WTO.

55. Mexico respectfully requests that the Panel find that the COOL measure is inconsistent with the aforementioned provisions of the WTO.

ANNEX D-9

**CLOSING ORAL STATEMENT OF CANADA
AT THE SECOND SUBSTANTIVE MEETING**

I. INTRODUCTION

1. Mr. Chairman, members of the Panel, we thank you for the opportunity to provide a few concluding comments.

2. We appreciate the contributions made by the parties and third parties through their statements and answers to questions at the second substantive meeting.

II. TBT ARTICLE 2.1 AND GATT ARTICLE III:4

3. In respect of Canada's claims under TBT Article 2.1 and GATT Article III:4, Canada is pleased that there was more of an exchange at the second substantive meeting about the effects of the COOL measure. As noted by Canada, the discriminatory effects of the COOL measure are at the heart of this dispute.

4. Canada wishes to emphasize again that proof of actual trade effects is not a prerequisite for a finding of less favourable treatment and that all that is required for such a finding is proof that the conditions of competition for Canadian-born cattle and hogs have been adversely affected by the COOL measure, as compared with US-born cattle and hogs. Canada has provided abundant documentary and econometric evidence demonstrating these adverse effects on the conditions of competition. Moreover, despite attempts to impugn Dr. Sumner's work, the United States has not been able to undermine Canada's documentary and econometric evidence, which stands unrefuted.

5. Canada appreciates the Panel's useful questions on Canada's econometric analysis quantifying the negative effects the COOL measure has had and is having on fed and feeder cattle and market hogs and feeder pigs from Canada. Canada looks forward to further assisting the Panel in assessing the quantification of these negative effects. Specifically, we will seek to assist the Panel in that endeavour by further developing and explaining, with reference to the appropriate economic literature, the strengths of particular economic and econometric approaches to incorporate the influence of the state of the general economy (including strong economic conditions and recessions) on meat demand and the derived demand for livestock.

6. Canada objects to the characterization by the United States of the multiple witness statements submitted by Canada as "anecdotal evidence" (in paragraph 30 of the Second Opening Statement of the United States). These witness statements, confirmed by letters from major US slaughter houses, are not "anecdotal" but demonstrate the actual effects of the COOL measure in the US market. Nor have these "anecdotes" been rebutted by any evidence from the United States. This is direct evidence of less favourable treatment of Canadian-born cattle and hogs from private actors in the US market. If it were not true that slaughter houses and others limited or stopped their acceptance of Canadian-born cattle and hogs because of the COOL measure, surely the United States could have provided a myriad of statements to that effect. They have provided none: not on that key point, nor even on its secondary argument that pre-existing segregation for other purposes somehow reduces the costs of segregation imposed by the COOL measure.

III. TBT ARTICLE 2.2

7. As to TBT Article 2.2, there has been extensive discussion about the stated objective of the United States (providing information to consumers) and what evidence the United States has that consumers in the United States want country-of-origin labelling of beef and pork.

8. The United States remains unable to explain what additional information the COOL measure provides to consumers. In particular, in the context of the discussion of USDA grading and health certification, it has been unable to explain what additional value the confusing information provided by the COOL measure gives to consumers. While the United States has alleged generally that consumers may make origin distinctions on the basis of "quality", it has presented no evidence that on the specific facts of this case there is any difference in quality, nor that consumers perceive that there is. Canada emphasizes that this case deals with livestock imported into the United States, often raised for the majority of their life in the United States, slaughtered in the United States, and subject to the same USDA grading and food safety certification (and other US quality, health and safety, and animal welfare programs) as US-born and –raised livestock. While some consumer groups have supported COOL, none has cited alleged quality differences as a reason for that support – consumer support overwhelmingly is based either on protectionist purposes or a false connection between the COOL measure and health and safety.

9. Canada notes also that the United States has presented no evidence that consumers would obtain any less information related to quality or other objective criteria from the "mixed-origin" label, i.e., "Product of Canada, Mexico, or the United States". This is essentially the option the European Union advocates in paragraph 14 of its Second Oral Statement. Canada does not agree with the EU that consideration of this option obviates the need to find a violation of TBT Article 2.1. However, Canada notes that this option is another alternative measure that would better fulfil the United States' purported legitimate objective than the COOL measure.

10. US industry planned to use the mixed-origin label (Label "B") after the Interim Final Rule was issued until certain US producer interests (not consumer interests) pressured Congress and the USDA to prevent that. It was not until after that, following pressure by Chairman Peterson on slaughter houses to use mostly Label "A", and the issuance by USDA of new guidance documents, that the first communication stating consumer interest on the question was received. It is therefore obvious that consumer interests did not influence the formulation of the COOL measure.

11. Mr. Chairman, Members of the Panel, we thank you for your attention and your ongoing work on this very important matter for Canada and the other Members of the World Trade Organization. In addition, we would like to express our appreciation to the members of the WTO Secretariat for organizing this meeting, and to the interpreters. We look forward to receiving your written questions.

ANNEX D-10

**CLOSING ORAL STATEMENT OF MEXICO
AT THE SECOND SUBSTANTIVE MEETING**

I. INTRODUCTION

1. I would like to follow up on the *amicus curiae* issue and the points raised by Canada. On further reflection Mexico agrees with Canada that letter contains some elements that are different from the exhibit presented by the United States. Mexico agrees with Canada's comments on this point.

2. The COOL measure has the effect of protecting producers not informing consumers. The historic integration between the Mexican and US cattle industries has been destroyed by a system that provides no useful information to US consumers. COOL ignores the fact that the Mexican Cattle and US are alike in every respect, except the place where they were born. The only purpose for this provision is to impose additional cost on Mexican cattle, thus benefiting the US industry.

3. I would like to re-iterate Mexico's request that the Panel rule on all of the claims before it and not exercise judicial economy with respect to any of those claims.

4. In its third party statement today, the European Union suggested that this dispute could be resolved through a ruling on Mexico and Canada's claim under Article 2.2 of the TBT Agreement and that the Panel could judicially economize on the remainder of the claims. This is incorrect.

5. Mexico's discrimination claims are very important to its challenge and it is essential that the Panel rule on both discrimination claims under Article 2.1 and III:4 of the GATT. It is also necessary that the Panel rule on the remainder of the claims because this is the first time a mandatory country of origin labelling measure has been challenged and such rulings will allow for the satisfactory resolution of this dispute.

II. MEXICO'S DISCRIMINATION CLAIMS

6. Starting with Mexico's discrimination claims, Mexico is requesting that the Panel make findings under both Article 2.1 of the TBT Agreement *and* Article III:4 of the GATT 1994.

7. Mexico has presented evidence establishing a prima facie case that the COOL measure modifies the *conditions of competition* in the relevant market to the detriment of imported products in the following ways:

- reduction in processing plants accepting Mexican cattle;
- reduction in the number of days per week Mexican cattle are processed;
- reduction in backgrounders and feedlots that will accept Mexican cattle; and
- additional requirements imposed on Mexican cattle in the form of advanced notification requirements for processing.

8. The COOL measure has also caused US packing plants to reduce the price paid for fed cattle that were born in Mexico and raised in the United States, by means of applying a discount to the purchase price.

9. US "like" cattle have *not* faced a reduction in processing plants, processing days, backgrounders, and feedlots. They have not faced additional requirements such as advanced notification requirements. Finally, they have not faced the COOL discount.

10. The United States' defence is limited to arguing that Mexico is relying on "anecdotal" evidence limited to certain participants and is not reflective of conditions in the market as a whole. These points are completely without merit.

11. The United States' position that Mexico's evidence is "anecdotal" goes to the quality of the evidence. The term is used to refer to evidence that is in the form of an "anecdote" and there is doubt about its veracity. It is also used where evidence is considered untrustworthy.

12. This is plainly *not* the case for the evidence put forward by Mexico to establish the modification of conditions of competition. The evidence put forward by Mexico is "positive evidence" of an affirmative, objective and verifiable character. It is credible evidence. That evidence is in the form of documents and invoices from large US beef processors and affidavits from the Mexican cattle industry. For instance, MEX-42, containing BCI, presents a communication from a major slaughterhouse indicating that Mexican-born cattle may be processed only in one plant due to COOL segregation. Other exhibits of Mexico showing the reduction of competitive conditions against Mexican-born cattle are MEX-33, MEX-37, MEX-46, MEX-64 and MEX-97. This evidence is corroborated by other evidence in the form of price statistics and industry reports that the United States has failed to rebut.

13. The United States' argument that the evidence is not reflective of conditions in the US market as a whole is equally without merit.

14. In light of this, Mexico has focused its evidence on the top three US beef processors (Tyson, Cargill and JBS) as well as a few others. These processors are market leaders and their actions are reflective of the market as a whole. The US cattle market is a commodity market which inherently will drive actions and prices to similar levels across the market. Canada's evidence on the modification of conditions of competition corroborates the fact that the effects are throughout the US market as a whole.

15. Mexico's evidence on the price discount is reflected in the invoices of specific processors *as well as* in the pricing data for the US cattle market as a whole (Exhibits MEX-37 and MEX-48). For instance, MEX-97, containing BCI, presents recent invoices from July and August 2010 where the price of Mexican-born cattle was subject to a direct reduction in price for a COOL adjustment. Even the evidence on US market prices that was filed by the United States confirms that the discounts on Mexican feeder cattle are market-wide (Exhibit US-108).

16. Thus, contrary to the argument of the United States, Mexico has presented a prima facie case that the modification of conditions of competition in the relevant market to the detriment of imported products is occurring across the US cattle market.

17. The United States also argues that there are many factors that influence the trade effects related to Mexican cattle exports and that the cost of the COOL measure to the industry is not significant.

18. Mexico's case focuses on conditions of competition not trade effects. It is not a legal requirement that Mexico prove adverse trade effects in order to succeed in its *de facto* discrimination claims (*AB, Japan – Alcoholic Beverages*, p. 16; AB, *US – FSC*, para. 215). It is also not necessary

for it to demonstrate the costs of the COOL measure in financial terms. It is sufficient for Mexico to demonstrate that the conditions of competition have been modified. We has clearly done so.

19. The European Union focuses on the costs that are inherent in regulating and the fact that those costs might be felt differently among participants. Mexico acknowledges this fact. However, it is not relevant to Mexico's discrimination claims. Mexico's claims do not focus on the cost associated with the COOL measure. To the extent that costs are relevant, Mexico focuses on the distribution of those costs to Mexican cattle compared to like US cattle. Moreover, Mexico is not arguing about the magnitude of those costs but rather how the conditions of competition are modified by the COOL measure as a result of the disincentives to carry Mexican cattle.

20. The European Union also argues that in a situation such as this, a complainant like Mexico must:

> "necessarily have to adduce evidence of other facts (at least two or more) and explain how they work together to support the finding of other facts, of which there is no direct evidence, so as to build a reasoned and adequate explanation between the facts thus established and any finding of inconsistency". (paragraph 6 of oral statement)

21. Mexico fundamentally disagrees with this characterization of Mexico's case. Mexico has *direct evidence* of the modification of conditions of competition and this is supported by both positive evidence from numerous sources as well as by corroborating evidence. Even if the European Union's characterization of Mexico's case was accurate, Mexico has in any event met the evidentiary standard stated by the European Union, that is Mexico has adduced evidence of at least two or more facts and has explained how they work together to support the finding of other facts.

III. MEXICO'S CLAIMS UNDER ARTICLE 2.2 OF THE TBT AGREEMENT

22. The obligations in Article 2.2 are complex. It is therefore important that the Panel apply each of the elements of that Article in a comprehensive manner starting with the determination of the "objective" of the COOL measure.

23. Where the substantive content of an obligation is complex such as it is in the case of Article 2.2, it is helpful to have an established methodology to interpret and apply the provision. Mexico has set out such a methodology in its first written submission as has Canada.

24. The objective of the measure is the starting point for this obligation and it must be carefully defined at the outset.

25. Mexico has explained why the objective of the measure is overwhelmingly protectionist.

26. However, if the Panel concludes that there is a consumer information objective within the measure, Mexico considers that it is important that the Panel examine and define not just the general categorization of the objective (e.g., "the provision of consumer information" or "the provision of consumer information on country of origin") but examine and define all relevant details. What exact type of consumer information on country of origin? In the case of the COOL measure, the objective is to provide information to consumers concerning whether the cattle that were an input into the beef were born outside the US

27. This objective would be clear from the design and structure of the COOL measure. The only accurate information provided by the COOL measure is whether the beef is from cattle born, raised and slaughtered in the United States.

28. The next question is whether the objective of providing information to consumers concerning whether the cattle that were an input into the beef were born in the US or, by negative implication, they were born in a foreign country, is legitimate.

29. In Mexico's view, the COOL measure as structured has the sole purpose of distinguishing between domestic and foreign inputs in a protectionist manner. The objective of protectionism can never be found to be legitimate within the meaning of Article 2.2 because it goes against the fundamental purpose of the WTO Agreements—i.e., to avoid protectionism.

30. If there ever was a measure that had an objective that was not legitimate it is the COOL measure. If this measure is found to be legitimate it will rob the "legitimacy" requirement in Article 2.2 of any meaning.

31. If the Panel disagrees with Mexico on this point, it is Mexico's alternative position that the COOL measure does not fulfil the legitimate objective. The reasons for this are set out in Mexico's written submissions and answers to questions of the Panel.

32. The United States argues that the gaps in product and sector coverage in the COOL measure are the result of flexibility to take into account the various interests including the interest of Mexico. Mexico disagrees. The flexibility has no value to Mexican cattle. The only value that flexibility had was to US domestic interests. As noted in Mexico's written submission, that flexibility minimizes the adverse impact of the COOL measure on US domestic interests while maintaining the effect of the measure on the main distribution channel for beef and, therefore, maximizing its adverse effect on imported Mexican cattle.

33. If the Panel finds that the COOL measure fulfils a legitimate objective, Mexico has presented three less trade restrictive alternatives to the COOL measure that would meet the same legitimate objectives taking into account the risks non-fulfilment would create.

34. As explained in response to questions during this meeting, the more precise the information provided in a consumer information measure the fewer options that are available to implement that measure in a manner that is consistent with Article 2.2.

35. If the United States wishes to provide the highest level and quality of consumer information related to origin it may be limited to the third alternative proposed by Mexico, which would be a fairly implemented traceback system. As explained in paragraph 78 of Mexico's second written submission, such a system is technologically and economically feasible in the United States.

IV. MEXICO'S CLAIMS UNDER ARTICLE 12 OF THE TBT AGREEMENT

36. This case presents crucial issues regarding the interpretation of Article 12.3, in particular whether it has any meaning at all.

37. The United States has asserted that it adjusted the COOL measure at the request of Mexico. There is no evidence that the United States took any steps to accommodate Mexico, as opposed to US interests, such as excluding restaurants and small butcher shops. Indeed, as we have shown, the burden of the costs of the measure has been disproportionately shifted to Mexico.

38. It is Mexico's position that it is not sufficient for a Member simply to make a new measure available for comment, as the United States is arguing. That would make Article 12.3 of the TBT meaningless.

39. In any event, the United States did not notify or give any opportunity to Mexico to participate in or comment upon the drafting of the original COOL measure (i.e., in the drafting of the 2002 Farm Bill). It is this original law that established the requirement to base origin on where the cattle were born. Mexico was given the opportunity to comment only after the enactment into law. This situation cannot amount to compliance with Article 12.3 of the TBT Agreement.