

UNITED STATES – CERTAIN COUNTRY OF ORIGIN  
LABELLING REQUIREMENTS

(WT/DS386)



**EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION  
OF THE UNITED MEXICAN STATES**

**November 12, 2010**

## **INTRODUCTION**

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

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

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

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

## **THE MEASURE AT ISSUE**

### **The COOL Measure Is Distinguishable From Other Country Of Origin Labeling Measures**

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

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

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

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

### **COOL is a Single Measure**

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

## **The Components of the Single Measure**

### **The Statute**

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

### **The Regulations**

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

### **The Vilsack Letter And The Administrative Guidance**

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

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

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

### **The COOL Provisions for Meat Products: Labeling Categories Based on the Origin of the Cattle**

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

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

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

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

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

### **The Supposed Efforts to Balance Competing Interests**

#### **The Reduction of the Costs of Compliance**

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

The first way in which the United States tried to reduce compliance for its own market participants was through an express prohibition of the creation of any mandatory identification system to verify the country of origin of

the covered commodities, and from requiring additional records other than those maintained in the course of the normal business. This prohibition does not reduce the impact of the COOL measure for Mexican cow calf producers; rather, it was designed to protect U.S. cow calf producers.

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

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

#### **The “Flexibilities” Regarding Commingling**

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

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

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

#### **The Objectives Of The COOL Measure**

##### **Determining the Objectives**

Mexico presented detailed argument and evidence that the true purpose of the COOL measure, by virtue of its design, structure and application, is to protect domestic producers in the United States by altering the operation of the U.S. beef industry in favour of the U.S. feeder cattle. Its protectionist purpose and objective is reflected in, *inter alia*, its scope being limited to certain commodities, the targeting of the principal downstream products (i.e., muscle cuts of beef) and distribution network (i.e., large diversified retailers), the exclusion of small retailers and the U.S. processed food industry, and the departure from the established comprehensive system that was in place for regulating consumer information. The United States has not rebutted this evidence.

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

##### **Protectionist Intent and Effect**

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

##### **Circumstances in Which the Measure was Introduced**

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

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

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

##### **Design and Structure of the Measure**

The design and structure of the COOL measure denotes its protectionist intent. By virtue of the design and structure of the COOL measure, the only label that provides relatively precise information is the A label. The

intent of the United States was to draw a distinction between beef produced exclusively from U.S. cattle and beef produced from imported cattle or commingled imported and domestic cattle.

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

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

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

### **Corroborating Statements of Legislators, Regulators and Industry**

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

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

### **Protectionist Effect**

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

### **The Consumer Information Objective: Two Principal Objectives**

Assuming *arguendo* that the Panel accepts that the COOL measure is not merely protectionist, it is Mexico's view that the COOL measure could be viewed as a labeling measure that, at a very general level, is intended to provide information to consumers on where the cattle that were processed into beef in the United States were born, raised and slaughtered. However, it is not sufficient for the Panel to define the objectives of the COOL measure at this general level. It must go further to determine the true objectives of the measure.

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

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

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

To the extent that the Final Rule provides any flexibility for U.S. producers to commingle production and use the B and/or C labels, USDA has interpreted the Statute and applied the Final Rule strictly to discourage U.S.

producers from commingling imported and domestic cattle and beef and therefore label most of their beef production as label A. This strict interpretation and application is confirmed by the Vilsack letter.

### **Shaping consumer expectations**

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

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

## **FACTUAL INFORMATION**

### **The COOL Measure Continues to Upset the Balance of Competitive Opportunities to the Detriment of Mexican Cattle**

The COOL measure continues to upset the balance of competitive opportunities to the detriment of Mexican cattle compared to like US cattle. Mexico summarizes these as follows: (i) the reduction in the number of plants that slaughter and process fed cattle that were born in Mexico and raised in the United States; (ii) the reduction of the number of days per week that such cattle are slaughtered or processed; (iii) the reduction in the number of backgrounders and feedlots taking Mexican cattle; and (iv) the imposition of additional requirements in the form of advance notice prior to accepting Mexican cattle for slaughter and processing.

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

### **The Other Factors Identified by the US do not Explain the Loss of Competitive Opportunities**

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

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

## **LEGAL ARGUMENT**

### **Generally**

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

### **Mexico’s De Facto Discrimination Claims under Article III:2 of the GATT 1994 and Article 2.1 of the TBT Agreement**

#### **The Burden of Proof in a De Facto Claim**

Contrary to what the EU suggests, there is no basis for increasing the evidentiary threshold for *de facto* discrimination claims. *De facto* discrimination claims go back to the GATT 1947 and nowhere has such a high

evidentiary threshold been applied to such claims. The normal burden of proof applies. Mexico must establish a *prima facie* case with respect to each element of its *de facto* discrimination claims. Mexico has met this burden.

### **The Timeframe for Examining *De Facto* Discrimination Claims**

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

Mexico’s *de facto* discrimination claims are grounded in the fact that the economically rational way for US processors to comply with the COOL measure is to either stop processing Mexican cattle or to segregate the processing of those cattle in a way that restricts the access to Mexican cattle. This fact will not change over time.

### **Like Products**

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

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

### **Private Actions and Market Forces**

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

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

### **Costs Inherent to Regulating**

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

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

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

### **Less Favourable Treatment**

#### **Mexico is not Arguing that Market Participants are being “Forced” to Discontinue the purchase of Mexican Cattle**

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

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

#### **Differential Effect on Different Market Participants**

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

#### **Sufficient Remaining US Capacity to Process all Mexico's Cattle Exports**

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

#### **Segregation**

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

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

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

#### **Small Market Shares**

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

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

#### **Other Factors Affecting the Reduction in the Demand for Mexican Cattle**

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

Mexico acknowledges that there are many economic factors that could affect the demand for cattle in the North American market. However, the detrimental effects Mexico is challenging relate to the upsetting of the balance

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

**The COOL Measure is Inconsistent with Article III:4 of the GATT 1994 and  
Article 2.1 of the TBT Agreement**

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

**TBT Agreement**

**The COOL Measure is a Technical Regulation**

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

**The COOL Measure is Inconsistent with Article 2.2 of the TBT Agreement**

**Preamble to the TBT Agreement**

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

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

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

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

**The Objectives of the COOL Measure**

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

**The Objectives Are Not Legitimate**

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

**If the Objectives are Found to be Legitimate, the COOL Measure Does Not Fulfil those Objectives**

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

**If the COOL Measure fulfils those Objectives, it is more Trade-Restrictive than Necessary Taking Account of the Risks Non-Fulfillment would Create**

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

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

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

**The COOL Measure is Inconsistent with Article 2.4 of the TBT Agreement**

**CODEX STAN 1-1985 Is A Relevant International Standard**

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

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

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

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

**The CODEX Standard Would Be Both Effective And Appropriate**

The United States argues that CODEX STAN 1-1985 would not be effective or appropriate because the substantial transformation test would provide misleading information in some situations. The example offered by the United States is a situation in which cattle would be in U.S. territory only one day prior to slaughter.

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

In any event, Mexico observes that: (i) CODEX Stan-1985 was adopted twenty five years ago and reflects a multilateral consensus on how origin should be identified on prepackaged food products to as to avoid

misleading consumers; *(ii)* as a factual matter the processing of live animals into cuts of beef is an extremely extensive form of processing, and relying on the substantial transformation/processing test cannot fairly be characterized as misleading. *(iii)* the United States, in effect, applied the CODEX standard to meat processed within its territory for many years, without considering it misleading.

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

#### **The COOL Measure is Inconsistent with Articles 12.1 and 12.3 of the TBT Agreement**

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

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

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

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

#### **GATT Article X:3(a)**

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

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

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

**Non-Violation Nullification or Impairment under GATT Article XXIII:1(b)**

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

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

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

**CONCLUSIONS**

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