BEFORE THE WORLD TRADE ORGANIZATION

# UNITED STATES – CERTAIN COUNTRY OF ORIGIN LABELLING REQUIREMENTS

RECOURSE TO ARTICLE 21.5 OF THE DSU BY MEXICO

**(DS386)**

**EXECUTIVE SUMMARY OF THE UNITED MEXICAN STATES**

**26 March 2014**

## TABLE OF CONTENTS

# I. INTRODUCTION AND BACKGROUND INFORMATION

1. This proceeding, under Article 21.5 of the DSU, concerns a disagreement as to the consistency with the covered agreements of measures taken to comply with the recommendations and rulings of the DSB in the dispute *United States – Certain Country of Origin Labelling (COOL) Requirements*.

2. Mexico has initiated this proceeding to address the failure of the United States to comply with its WTO obligations in relation to its mandatory "country of origin" labeling system ("COOL") for muscle cuts of beef. A measure that is found to be inconsistent with a core non-discrimination provision cannot later be found by a compliance Panel to be consistent with that obligation if the arbitrary and unjustifiable discriminatory effects of the measure have not been removed, or, as in the present case, have been increased.

3. This dispute was initiated by Mexico in December 2008 and it has been ongoing for more than five years without a positive resolution. It is now 2014, and Mexico's cattle producers face even worse discrimination and trade restrictions than they did in 2010. The Amended COOL Measure still has the effect of requiring all imported cattle to be segregated. The measure continues to discourage the use of imported cattle in meat production and there is still a "COOL discount" imposed on Mexican cattle. There are still restrictions on the number of U.S. processing plants that will accept Mexican cattle and on the days at which Mexican cattle can be delivered.

4. The Panel and Appellate Body ("AB") Reports found that the "COOL Measure", particularly in regard to the muscle cut meat labels, is inconsistent with Article 2.1 of the TBT Agreement because it accords less favourable treatment to imported livestock than to like domestic livestock. The DSB recommended that the United States bring the COOL Measure into conformity with the United States' obligations under the covered agreements.

5. The reasonable period of time was determined through binding arbitration under Article 21.3(c) of the DSU, to be the 23 May 2013. On 12 March 2013, the United States published in the Federal Register a proposed rule to amend the COOL regulations. On 23 May 2013 USDA published the "Final Rule on Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts" (the "2013 Final Rule"), which made only minor changes to the proposed rule. The Final Rule purportedly entered into force on that same date, although the notice published with the rule indicates that the new regulation would not actually be enforced for an additional six months. Although the COOL Statute was part of the measure found by the Panel and the AB to be inconsistent with Article 2.1 of the TBT Agreement, the United States did not modify the Statute. In this sense, the United States has failed to bring the COOL Measure – as a whole – into compliance.

6. The Amended COOL Measure has in fact strengthened the incentive to favour domestic livestock in meat production by imposing higher segregation costs and further adversely affecting competitive conditions in the U.S. market to the detriment of imported livestock. The measure continues to discourage the use of imported cattle in meat production and there is still a "COOL discount" imposed on Mexican cattle.

## II. THE AMENDED COOL MEASURE

7. The Amended COOL Measure includes the COOL Statute and the 2009 Final Rule, as amended by the 2013 Final Rule. As stated by the Panel and confirmed by the AB the statutory and regulatory provisions were an integral part of one single COOL measure. The COOL Statute maintains a close legal and substantive link with the 2013 Final Rule and remains an integral part of the Amended COOL Measure.

8. The Amended COOL Measure entailed changes only in the implementing regulations, and not in the COOL Statute. The COOL Statute is contained in the Agricultural Marketing Act of 1946, as amended by the Farm Bill 2002 and the Farm Bill 2008. These provisions were codified in the United States Code ("U.S.C."), in Title 7 (Agriculture), Chapter 38 (Distribution and Marketing of Agricultural Products), Subchapter IV (Country of Origin Labeling) (hereinafter the "COOL Statute").

9. The COOL Statute excludes from the scope of the COOL requirements covered commodities that are used as an ingredient in a processed food item, those that are served or sold in "food service establishments" (e.g., restaurants, cafeterias, etc.). The law also does not apply to retailers who do not sell fruits and/or vegetables (e.g., butcher shops) or to products destined for export.

10. The 2009 Final Rule repeated the requirements from the statute for origin labeling for covered beef products. As described by the Panel, the options were as follows. For a product to be eligible to be labelled as U.S. origin – the animals from which the meat was derived must have been born, raised and slaughtered in the United States (known as "Label A"). For products made from animals born in another country/ies, and raised and slaughtered in the United States, the regulations authorized the use of a label that would say "Product of the United States, Country X and (as applicable) Country Y" (known as "Label B"). For products made from animals born and raised in another country and imported for immediately slaughter, the regulations required that the name of the foreign country be listed first: "Product of Country X and the United States" (known as "Label C").

11. The 2009 Final Rule added a feature to the rules that was not addressed by the statute. Specifically, the commingling provisions allows that muscle cuts processed on the same production day contained meat from animals born in another country and animals born in the United States could be labelled "Product of the United States, Country X, and (as applicable) Country Y." The 2013 Final Rule eliminated these flexibilities.

12. For ground beef, the label must list all countries of origin contained therein or that may be reasonably contained therein. In determining what is considered reasonable, when a raw material from a specific origin is not in a processor's inventrory for more than 60 days, that country may no longer be included as a possible country of origin. Mexico is not challenging the application of the Amended COOL Measure to ground beef.

13. The Amended COOL Measure has not changed in relation to the scope of coverage, the definitions of "origin," the labeling requirements for imported meat products, the recordkeeping, verification and enforcement provisions, or the labelling rules for ground meat. As with the original COOL Measure, the Amended COOL Measure applies only to: (i) meat in the form of muscle cuts and ground beef, and not to other edible portions of the animal such as the liver, tongue and head; (ii) only to covered products sold in major grocery stores, and not to such items sold in food service establishments (e.g., restaurants and cafeterias) and smaller retailers, including butcher shops; and does not apply to: (i)

covered products that are an ingredient in a processed food item; and (ii) to exported products, which in the case of beef constitutes about 10 percent of total U.S. production.

## III. LEGAL ARGUMENT

14. The Amended COOL Measure is inconsistent with the obligations of the United States under Articles 2.1 and 2.2 of the TBT Agreement, and Article III:4 of the GATT 1994. It also nullifies or impairs benefits that accrue to Mexico under the GATT 1994 within the meaning of Article XXIII:1(b). Mexico requests that the Panel rule on each of Mexico's claims and avoid exercising judicial economy. This is necessary to achieve a satisfactory resolution of this dispute.

### A. TERMS OF REFERENCE OF THE PANEL

15. It is necessary for the Panel to rule on all of Mexico's claims under Articles 2.1 and 2.2 of the TBT Agreement and Article III:4 of the GATT 1994, its obligations scope and content are not the same.

16. In *US – Tuna II (Mexico)*, the AB clarified the boundaries of judicial economy. It criticized the panel for exercising false judicial economy by not ruling on Mexico's claims under Articles I and III:4 of the GATT 1994 ("panels may refrain from ruling on every claim as long as it does not lead to a "partial resolution of the matter"). This finding is particularly relevant given the differences of Articles 2.1 and 2.2 of the TBT Agreement and Article III:4 of the GATT 1994.

17. If the Panel does not make all findings under Mexico's other claims and there is an appeal, the AB would be unable to complete the analysis of those claims, and there would only be a partial resolution. Taking into account that in the original proceedings the AB was unable to complete the legal analysis under Article 2.2 of the TBT Agreement due to the absence of relevant factual findings by the Panel and of sufficient undisputed facts on the record, the Panel should make clear findings regarding all factors of the Amended COOL Measure and proposed less trade-restrictive alternative measure.

18. The claims advanced by Mexico are raised exclusively in respect of the measure "taken to comply" –"that is, in principle, a new and different measure" –and do not, as the United States alleges, constitute attempts to re-open the adopted findings of the DSB. Further to the original proceedings, the DSB adopted the finding that the original COOL Measure was inconsistent with Article 2.1 of the TBT Agreement, but as for Article 2.2 there were insufficient factual findings and undisputed evidence on the record for the AB to complete the analysis.

19. Similarly, no findings were made in respect of Mexico's claims under Articles III:4 and XXIII:1(b) of the GATT 1994 due to the exercise of judicial economy. None of the claims raised by Mexico against the Amended COOL Measure under Articles 2.1 and 2.2 of the TBT Agreement and Articles III:4 and XXIII:1(b) of the GATT 1994 impinge on the finality of any findings, recommendations, or rulings adopted by the DSB in relation to the original proceedings. Hence, nothing precludes the Panel from considering these claims in respect of the Amended COOL Measure in the present proceedings.

### B. THE AMENDED COOL MEASURE IS INCONSISTENT WITH ARTICLE 2.1 OF THE TBT AGREEMENT

20. For a violation of the national treatment obligation in Article 2.1 to be established, three elements must be satisfied: (i) the measure at issue must be a "technical regulation"; (ii) the imported and domestic products at issue must be like products; and (iii) the treatment accorded to imported products must be less favourable than that accorded to like domestic products.

### 1. Technical Regulation

21. In order to qualify as a "technical regulation" within the meaning of the definition in Annex 1.1, a document must: (i) apply to an identifiable product or group of products; (ii) lay down one or more characteristics of the product; and (iii) require mandatory compliance with the product characteristics.

22. The Amended COOL Measure is a "technical regulation". The AB acknowledged the Panel's finding that the original COOL Measure is a "technical regulation" which is subject to the requirements of Article 2 of the TBT Agreement, and observed that this finding was not challenged in the appeal. For the same reasons as those on which the Panel's finding was based in respect of the COOL Measure, the Amended COOL Measure continues to be a "technical regulation" for the purposes of the TBT Agreement.

### 2. Like Products

23. The relevant imported and domestic products – in the case of Mexico's cattle, in particular feeder cattle – also continue to be "like". Although the labeling requirements at issue apply to muscle cuts of beef, by its structure and design, the Amended COOL Measure applies indirectly to cattle. The effect of that measure –indeed its core purpose– is to regulate the inputs to muscle cuts –namely, cattle.

24. Before the Panel, the United States did not contest the arguments presented by the complainants that the products at issue are "like" and did not dispute the proposition that the only basis of distinction between the products at issue is that of origin. The factual circumstances of the relevant imported and domestic products have neither changed nor been affected in any way by the adoption of the Amended COOL Measure. The same kinds of Mexican cattle and the same kinds of U.S. cattle remain the products at issue. Hence, the relevant imported and domestic products continue to be "like".

### 3. Treatment no Less Favourable

25. The AB has established a two-step approach for assessing whether a technical regulation accords less favourable treatment under Article 2.1: (i) whether the measure at issue modifies the conditions of competition in the relevant market to the detriment of imported products as compared to like domestic products or products originating in any other Member; and (ii) whether any detrimental impact reflects discrimination against the imported products.

#### a. The Amended COOL Measure Modifies Competitive Opportunities to the Detriment of Imports

26. As explained by the AB in *US – COOL*, when a panel determines whether the operation of a measure, in the relevant market, has a *de facto* detrimental impact on the group of like imported products, its analysis must take into consideration the totality of the facts and circumstances before it, including any implications for competitive conditions discernible from the design and structure of the measure itself, as well as all features of the market at issue that are relevant to the measure's operation within that market.

27. There have been no material changes made in the Amended COOL Measure to the design and structure of the COOL Measure that were found by the Panel and the AB to modify the competitive opportunities in the U.S. market to the detriment of the imported products at issue. The key elements of the design and structure of the measure that operated together to deny competitive opportunities were: (i) the mandatory labelling requirement, (ii) the "born, raised and slaughtered" requirement to determine origin, (iii) the recordkeeping requirement and verification requirement, and (iv) the

enforcement requirement. These elements remain integral components of the Amended COOL Measure.

28. Although the Panel and the AB highlighted the recordkeeping and verification requirements of the COOL Measure, it was not these requirements, in isolation, that modified the competitive opportunities. These requirements operate in conjunction with other important elements of the measure explained below, that collectively deny competitive opportunities. Accordingly, as was the case with the original COOL Measure, it is the collective effect of the foregoing four elements of the Amended COOL Measure that continues to deny competitive opportunities.

29. Because the features of the relevant market also remain unchanged, the denial of competitive opportunities for Mexican cattle that the Panel and the AB found to be caused by the COOL Measure has continued unabated under the Amended COOL Measure. Moreover, the available evidence indicates that the Amended COOL Measure is exacerbating the discriminatory impact of the original COOL Measure. The impact of the Amended COOL Measure can be separated into two categories of analysis: (i) the failure to eliminate the discriminatory impact of the original measure and (ii) the increase in discriminatory effects caused by the new regulations.

30. The Panel in the original proceedings undertook a detailed examination of the impact of the COOL Measure on imported livestock. The Panel found that competitive opportunities were reduced in significant ways. No aspect of the new regulations is aimed at eliminating or reducing the burdens and discriminatory impact of the COOL Measure. Thus, it is reasonable to assume that all of these instances of the denial of competitive opportunities continue under the Amended COOL Measure.

31. For the second category of the impact analysis, the three major areas in which increased effects are expected are (i) increased requirements to segregate cattle of different nationalities; (ii) greater reductions in the value of Mexican cattle resulting directly from the Amended COOL Measure; and (iii) heightened disincentives to purchase Mexican cattle.

### b. The Detrimental Impact Reflects Discrimination against Imports

32. Based on the two-step approach of the AB in *US-COOL*, the Panel must analyze whether the above-noted detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products. In making this determination, the Panel must carefully scrutinize the particular circumstances of this dispute -the design, architecture, revealing structure, operation, and application of the Amended COOL Measure- and, in particular, whether it is even-handed, in order to determine whether it discriminates against the group of imported products.

### c. Relevant Regulatory Distinctions

33. In conducting its assessment of the COOL Measure, the AB first identified the relevant regulatory distinctions made by the COOL Measure, namely the distinctions between the three production steps, as well as between the types of country of origin labels that must be affixed to muscle cuts of beef and pork. The Amended COOL Measure makes the same distinctions among the three production steps.

34. The Panel must examine, based on the particular circumstances of this dispute, whether the distinctions (i.e., born, raised and slaughtered) are designed and applied in an even-handed manner, or

whether they lack even-handedness because, for example, they are designed or applied in a manner that constitutes arbitrary or unjustifiable discrimination.

35. The AB found that the COOL Measure is inconsistent with Article 2.1 on the basis that the regulatory distinctions imposed by the COOL Measure amount to arbitrary and unjustifiable discrimination against imported livestock, such that the distinctions could not be said to be applied in an even-handed manner. On this basis, it found that the detrimental impact on imported livestock did not stem exclusively from a legitimate regulatory distinction but, instead, reflected discrimination in violation of Article 2.1. In particular, the AB considered that the manner in which the COOL measure seeks to provide information to consumers on origin, through the regulatory distinctions described above, to be arbitrary, and the disproportionate burden imposed on upstream producers and processors to be unjustifiable.

36. This finding was anchored in the AB's finding that the detrimental impact caused by the COOL Measure could not be explained by the need to provide origin information to consumers. This finding, in turn, was based on the existence of two major information asymmetries between the origin information collected and the origin information communicated to the consumer. First, the COOL Measure did not impose labelling requirements for meat products that provide consumers with origin information commensurate with the type of origin information that upstream livestock producers and processors were required to maintain and transmit. Second, information regarding the origin of all livestock had to be identified, tracked, and transmitted along the chain of production by upstream producers in accordance with the recordkeeping and verification requirements of the COOL Measure, even though a considerable proportion of the beef derived from this livestock was ultimately exempted from the COOL requirements under the exclusions for processed food items, food service establishments, and other establishments that are not a "retailer" within the meaning of the COOL Measure.

### d. The Distintions are not applied in an Even-Handed Manner

37. The factors raised by Mexico that demonstrate a lack of even-handedness relate to the "facts and circumstances related to the design and application of the relevant regulatory distinctions of the COOL Measure" found by the AB.

38. In *US -COOL*, the AB applied its reasoning from *US – Tuna II (Mexico)* when it found that the COOL measure modifies the conditions of competition in the U.S. market to the detriment of imported livestock by creating an incentive in favour of processing exclusively domestic livestock and a disincentive against handling imported livestock (para. 292). The AB concluded that the original COOL Measure was not even-handed because of the two information asymmetries. These information asymmetries are "facts and circumstances" related to the design and application of the "relevant regulatory distinctions". They are not, in themselves, relevant regulatory distinctions.

39. The two information asymmetries identified by the AB demonstrate the expansive nature of the inquiry into the "facts and circumstances" related to the design and application of the relevant regulatory distinctions. In principle, every fact or circumstance that can demonstrate that the relevant regulatory distinctions are not even-handed should be covered by this expansive inquiry. The four additional factors raised by Mexico to demonstrate that the measure is not even handed clearly fall within this scope.

### e. Additional factors that demonstrate that the Amended COOL Measure is not Even-Handed

40. In addition to the two information asymmetries, Mexico identified four additional factors to demonstrate that the discrimination is against imported products.

41. First, according to the United States, a key justification for the COOL label is to avoid "consumer confusion" it claims is caused by the USDA's own grade labelling system. To the extent that the Amended COOL Measure is designed to override the positive impression for beef products with a USDA Prime, Choice or Select label when the product is made from imported cattle, the Amended COOL Measure is intentionally discriminatory and not even-handed. Second, the Amended COOL Measure maintains different labelling rules for different forms of beef, namely muscle cuts of beef and ground beef. Specifically, it allows a processor to reference a country of origin on its ground meat label even if the processor has not had ground meat from that particular country in its inventory for the last 60 days or less. Thus, the allegedly needed consumer information is provided with the flexibility of a 60-day inventory allowance for ground beef but with no inventory allowance for muscle cuts of beef. Third, "Trace-back", a less trade restrictive alternative measure is prohibited under the Amended COOL Measure. Such a system would accurately track information on where the livestock contained in beef were born, raised and slaughtered, and it would do so in a less trade restrictive manner. The Amended COOL Measure, like the COOL Measure, employs a certification and audit compliance mechanism that inherently shifts the costs of complying with the COOL Measure to imported cattle. The fact that a trace-back alternative is expressly prohibited demonstrates that the detrimental impact on imported livestock does not stem exclusively from a legitimate regulatory distinction. The exclusion is arbitrary and, because it prohibits the substitution of the certification and audit compliance mechanism with a less trade restrictive mechanism and even the simple consideration of such an alternative, is evidence that the Amended COOL Measure is a disguised restriction on international trade. It is therefore not even-handed.

42. Finally, only a very small sub-set of U.S. consumers is interested in information on the origin of beef. To the extent that the Amended COOL Measure mandates the communication of origin information to a broader group of U.S. consumers, those additional consumers will not pay any attention to the information and will not benefit from it. The only beneficiary of this unnecessary additional coverage is the U.S. cattle industry, which directly benefits from the discriminatory effects of the measure. In this sense, this unnecessary additional coverage is further evidence that the Amended COOL Measure is a disguised restriction on international trade. It is therefore not even-handed.

43. For the above reasons, the detrimental impact that continues to be caused by the Amended COOL Measure cannot be explained or justified by the need to provide origin information to consumers.

## C. ARTICLE III:4 OF THE GATT 1994

44. The Amended COOL Measure accords Mexican cattle treatment less favourable than that accorded to U.S. feeder cattle in a manner that is inconsistent with Article III:4. The AB has made clear that the scope and content of the provisions of Article III:4 and Article 2.1 of the TBT Agreement are different. Accordingly, the Panel's decision on Mexico's claim under Article 2.1 will not necessarily resolve Mexico's Article III:4 claim, and it is therefore crucial the Panel's findings on the Article III:4 claim.

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

### 1. Like Products

46. The imported and domestic products at issue (i.e., Mexican and U.S. cattle) are like products.

### 2. Laws, Regulations and Requirements Affecting Their Internal Sale, Offering for Sale, Purchase, Transportation, Distribution or Use

47. Article III:4 applies to those "laws, regulations and requirements" that affect "the internal sale, offering for sale, purchase, transportation, distribution or use" of the products at issue. The Amended COOL Measure, which comprises a group of laws and regulations that set out the country of origin labeling requirement, pertains to the category of "laws, regulations and requirements". These instruments include the COOL Statute the 2009 Final Rule (AMS); and the 2013 Final Rule, which "affect the internal sale, offering for sale, purchase, transportation, distribution or use" of feeder cattle.

### 3. Less Favourable Treatment

48. The collective effect of the four elements of the Amended COOL Measure identified above (i.e., the mandatory requirement, the born/raised/slaughtered requirement, the recordkeeping and verification requirement, and the enforcement requirement) continue to deny competitive opportunities to imported cattle. In particular, the failure of the Amended COOL Measure to eliminate the various discriminatory effects of the original measure and the increase in discriminatory effects caused by the new regulations.

49. In the original proceedings, the Panel observed that in the absence of a large share of US consumers willing to pay a price premium for country of origin labelling, the cheapest way to comply with the COOL Measure is to process only US-origin livestock, all other things being equal, that the other possibility is to continue processing imported livestock through segregation, which entails additional costs in virtually all cases and that either process configuration is likely to cause a decrease in the volume and price of imported livestock. Those effects continue under the Amended COOL Measure, and indeed are becoming worse.

50. The Amended COOL Measure accords less favourable treatment to Mexican cattle compared to U.S. cattle, providing U.S. cattle with a competitive advantage in the U.S. market.

### 4. Article 2.1 of the TBT Agreement and Article III:4 of the GATT

51. The United States and the European Union argue that the meaning of "treatment no less favourable" should be the same in Article 2.1 and Article III:4. In their view, the two-step approach to determining treatment no less favourable under Article 2.1 should be applied when interpreting "treatment no less favourable" under Article III:4. This interpretation is incorrect.

52. In the recent disputes *US – Clove Cigarettes*, *US – Tuna II* and *US –COOL*, the AB provided useful guidance on the relationship between the non-discrimination provisions – Article 2.1 and Article III.4 –. The AB noted that both provisions maintain some close similarities in terms of their language, but at the same time recognized that "the scope and the content" of both provisions are not the same.

53. Mexico's interpretation of Article III:4 follows the interpretation developed in a long series of WTO and GATT 1947 reports i.e., a measure confers less favourable treatment under Article III:4 where it modifies conditions of competition in the relevant market to the detriment of imported products compared to like domestic products. Therefore, in order to analyze whether the amended COOL measure accords "less favorable treatment" to imported livestock under GATT Article III:4, the only relevant inquiry is whether the measure modifies the conditions of competition in the relevant market to the detriment of the group of imported products vis-à-vis the group of domestic like products.

## D. THE AMENDED COOL MEASURE IS INCONSISTENT WITH ARTICLE 2.2 OF THE TBT AGREEMENT

54. In ruling on the claims raised by Canada and Mexico under Article 2.2 in the original proceedings, the Panel found that the COOL measure is "trade-restrictive"; that the objective pursued by the United States through the COOL measure is "to provide consumer information on origin" and that this objective is "legitimate" within the meaning of Article 2.2. The AB confirmed these findings.

55. Ultimately, the Panel found that the COOL measure does not fulfil the identified objective within the meaning of Article 2.2 and therefore violated Article 2.2. The AB reversed the ultimate finding and attempted to complete the legal analysis under Article 2.2, but found it could not do so because the Panel had not made relevant factual findings and there were not sufficient uncontested facts.

56. In this proceeding, therefore, it is crucial that the Panel make "clear and precise" findings, in particular, with respect to: (i) the Amended COOL Measure: the degree of its contribution to the objective of providing consumers with information on origin, the degree of its trade-restrictiveness, the relative importance of the common interests or values furthered by the challenged measure, the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the legitimate objective; and (ii) each proposed alternative measure: the degree of its contribution to the objective of providing consumers with information on origin, taking account of the risks non-fulfilment would create, the degree of its trade-restrictiveness and whether it is reasonably available.

57. The United States misinterprets the Panel's and the AB's findings when it states that the objective pursued through the original COOL Measure was to provide consumers with information on origin, namely, with respect to meat, where the animal was born, raised and slaughtered. This misinterpretation should be rejected. The original Panel and the AB found that the objective pursued by the United States through the COOL Measure was "to provide consumer information on origin".

58. The new United States' argument that the objective of the Amended COOL Measure is specifically to provide information on where the livestock from which muscle cuts are produced were born, raised and slaughtered is contradicted by the facts, including the Amended COOL Measure itself. The United States attempts to redefine the objective to an artificially narrow and self-serving one.

### 1. The Two-Step Necessity Test under Article 2.2 of the TBT Agreement

59. Article 2.2 requires a two-step analysis: first, examination of the measure at issue and second, comparison of this measure with the identified alternative measures. The Panel should objectively examine the trade-restrictiveness of the Amended COOL Measure to determine whether it is "necessary", in itself and independently of less trade restrictive alternative measures. Before moving to

the second step of the legal analysis and conducting an assessment of each proposed alternative measure, the Panel should assess the Amended COOL Measure.

### a. Application of the First Step of the Necessity Test to the Amended COOL Measure

60. Under the first step of the necessity test, the following factors are relevant to the weighing and balancing analysis in respect of the Amended COOL Measure: (i) the "relative importance" of the interests or values furthered by the Amended COOL Measure; (ii) the degree of contribution made by the Amended COOL Measure to the legitimate objective at issue; (iii) the trade-restrictiveness of the Amended COOL Measure; and (iv) the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the United States through the Amended COOL Measure. In conducting this holistic analysis, the Panel should find that the trade restrictiveness of the Amended COOL Measure is not necessary because it is disproportionate to the risk non-fulfilment would create.

61. The interests and values furthered by the Amended COOL Measure fall on the low end of the spectrum of importance. The relative importance of the provision of consumer information is substantially lower than protecting the environment or protecting human beings from health risks, both of which are vital and important in the highest degree; and protecting public morals, which a panel observed ranks among the most important values or interests pursued by Members as a matter of public policy. Importantly, the interests or values furthered by the Amended COOL Measure are not *common*. The USDA has acknowledged that there is "interest by *certain* U.S. consumers in information disclosing the countries of birth, raising and slaughter on muscle cut product labels".

62. The following facts demonstrate that the Amended COOL Measure has a very low degree of contribution to the objective of providing consumer information on origin: (i) the Panel and AB already determined that the labelling scheme for muscle cuts under the COOL Measure did not provide clear and accurate information, (ii) the Amended COOL Measure does not apply to all beef sold within the United States because the measure's labelling requirements do not apply to all entities that sell beef or to all beef products, the labeling requirements apply only to a very limited portion of the meat products produced in the United States – about 18 to 21 percent, (iii) like the COOL Measure, the Amended COOL Measure continues to provide unclear, imperfect, or inaccurate information to consumers, the information conveyed by the point of production information will not in all cases be accurate. It is questionable whether consumers will understand the meaning of a label that says "brn in Mexico, rsd and slghtrd in US". The COOL information is normally printed in very small typeface on labels, and often is on the bottom (rear) of the packaging; (iv) Mexico is not aware of any information published by USDA to educate consumers on what the COOL labelling information means.

63. The Amended COOL Measure does nothing to eliminate these negative effects on competitive opportunities of imported livestock. The U.S. meat processing industry has stated that the Amended COOL Measure, through its prohibition of commingling, will increase the burdens of using imported cattle even more. There will be increased burdens and effects relating to the need to segregate, the application of the "COOL discount" to Mexican cattle, and the disincentive to purchase Mexican cattle.

64. The risks at issue and the consequences that may arise from non-fulfilment of the objective are certainly very minor, in light of the following facts: (i) the COOL Measure is not a food safety measure, only a small percentage of U.S. consumers are even aware of the measure, (ii) the meaning of

the labels is unclear, (iii) consumers value a label that says "Product of North America" at least as much as a label that says "Product of United States, (iv) the COOL Measure has not affected sales of meat products, (v) USDA itself sees little economic value in the COOL Measure and the Amended COOL Measure, (vi) USDA has reported that a comprehensive analysis of consumer reaction to COOL requirements for shrimp – implemented in 2005 – shows that COOL had no effect on consumer behavior.

65. In conducting the first step of the necessity test, it is clear from these factors that the trade-restrictiveness of the Amended COOL Measure is disproportionate to the risks that non-fulfilment would create. The fact that the Amended COOL Measure might make some contribution to the objective does not outweigh the other relevant factors. Accordingly, the trade-restrictiveness of the Amended COOL Measure is unnecessary and it is inconsistent with Article 2.2 of the TBT Agreement.

### b. Application of the Second Step of the Necessity Test to the Amended COOL Measure: Evaluation of the Alternative measures proposed by Mexico

66. If the Panel finds that the trade-restrictiveness of the Amended COOL Measure is necessary, under the second step, all relevant factors of each alternative measure are considered and a comparison is undertaken between the challenged measure and each possible alternative measure. The Panel must consider whether the proposed alternative is less trade restrictive, whether it would make an equivalent contribution to the relevant legitimate objective, taking account of the risks non-fulfilment would create, and whether it is reasonably available.

67. As in the case of the COOL Measure, alternative measures exist that are less trade-restrictive than the Amended COOL measure, make an equivalent contribution to the legitimate objective of providing consumer information on origin taking account of the risks non-fulfilment would create, and are reasonably available to the United States. The alternatives are: (i) mandatory labeling based on a substantial transformation rule of origin combined with voluntary labelling of specific information (i.e., born, raised and slaughtered); (ii) mandatory labeling based on the 60-day inventory allowance rule currently used for ground beef; (iii) mandatory labelling of more specific information (i.e., born, raised and slaughtered) using a "trace-back" system under which the precise source of each animal and muscle cut must be traceable through the production process, and (iv) a state/province labeling presented by Canada and adopted by Mexico.

68. The first proposed alternative will provide all consumers with mandatory required information on the origin of beef products based on the substantive transformation rule and those consumers, who are interested in further details, with voluntary information on where livestock were born, raised and slaughtered. Under this alternative, the exemptions of products (i.e., processed food items) and market segments (i.e., beef sold in food service establishments and retailers) are eliminated, giving the mandatory labelling element of this alternative labelling a broader scope of application than the Amended COOL Measure. This alternative measure is not trade restrictive.

69. It would have a greater contribution to the provision of origin information to consumers than the Amended COOL Measure. At the very least, through the combination of mandatory and voluntary labelling requirements, this alternative measure would make an equivalent contribution to the objective of providing consumers with information on origin, taking account of the risks non-fulfilment would create. A weighing and balancing of the relevant factors of both the Amended COOL Measure and the

alternative measure demonstrates that compared to the challenged measure, this alternative is less-trade restrictive and more proportionate to the risks non-fulfilment would create. The voluntary labelling element of this alternative is reasonably available and is used in the United States in many other contexts.

70. The second proposed alternative is to extend the mandatory country of origin labelling rule that is currently applied to ground beef to apply to muscle cuts of beef and to processed food items made of beef. Under this alternative, the exemptions of products (i.e., processed food items) and market segments (i.e., beef sold in food service establishments and small retailers) are eliminated, giving the mandatory labelling a broader scope of application. For ground beef, the label must list all countries of origin contained therein or that may be reasonably contained therein. In determining what is considered reasonable, when a raw material from a specific origin is not in a processor's inventory for more than 60 days, that country may no longer be included as a possible country of origin. By extending this rule to muscle cuts of beef and processed food items, such products must be labeled in a manner that lists all countries of origin contained therein or that may be reasonably contained therein in accordance with the 60-day inventory allowance. The COOL rules for ground beef are less trade restrictive than the Amended COOL Measure for muscle cuts, because they provide more flexibility to cattle producers and meat processors. Since the flexibility relates to the inputs in meat processing, the same beneficial effects will occur if the ground beef rules are applied to muscle cuts and processed food items. This alternative is reasonably available. The ground beef requirement fulfils this objective for 40 percent of the beef products consumed in the United States, and there is no objective basis for distinguishing between ground beef and muscle cuts and processed food items in this context.

71. The third proposed alternative measure is a trace-back system. During the original proceedings, Mexico and Canada proposed a trace-back system as a reasonably available less trade-restrictive alternative. This alternative would accurately and comprehensively fulfil the objective of the COOL Measure and yet not discriminate against imports in the sense that it would eliminate the option of restricting trade in imports and as well as the option of discounting the price of imports as the most commercially viable option to comply with the Amended COOL Measure. Thus, costs of the mandatory labelling would be spread evenly throughout the market. The employment of a trace-back system to meet the objectives of the COOL measure is discussed in a paper written by Dermot J. Hayes and Steve R. Meyer entitled *Impact of Mandatory Country of Origin Labeling on U.S. Pork Exports* ("Hayes and Meyer Paper"). Although it focuses on pork, its analysis and conclusions apply equally to beef. The authors discuss this system as a potential method to implement COOL.

72. In Mexico's view, if there were trace-back system in place, there would be no incentive to exclude imported Mexican cattle or shift the cost of compliance solely to Mexican animals. A mandatory trace-back alternative will provide detailed information on where the animals were born, raised and slaughtered on all beef covered commodities. The Hayes and Meyer Paper suggests that trace-back is technically and economically feasible in the United States and, therefore, is a reasonably available alternative. Trace-back systems are used in the EU, Korea, Japan and other countries. For example, Uruguay has implemented a comprehensive trace back system which allows tracking livestock and the meat derived from those animals. The Mexican system provides all the information needed for a trace-back system for Mexican cattle. The applicable rules require that cattle exported to the United States bear an ear-tag that can be used to trace the animal, including the State of origin, the ranch which the cattle belongs to, and complete information about its producer.

73. Finally, Canada presented a fourth alternative measure which involves state/province labelling. Mexico acknowledged to the Panel that Canada presented this fourth alterative measure and Mexico endorsed and adopted this alternative by agreeing with Canada's submissions on this alternative and the fact it (i) would provide a greater contribution to the objective than the Amended COOL Measure, (ii) would be less trade restrictive and (iii) is reasonably available. The arguments and evidence that were endorsed and adopted by Mexico were presented by Canada in its Second Written Submission. Given that Mexico and Canada have separately filed submissions rather than a single joint submission, Mexico endorsed and adopted the arguments and evidence at the first available opportunity in its Opening Statement to the Panel. Thus, Mexico is clearly entitled to endorse and incorporate the arguments and evidence of Canada pertaining to the third and fourth alternative measures.

74. A weighing and balancing the relevant factors of both the Amended COOL Measure and the alternative measure demonstrates that the Amended COOL Measure is more trade-restrictive than necessary within the meaning of Article 2.2 and is, therefore, inconsistent with that provision.

### 2. Allocation of the Burden of Proof under Article 2.2

75. It is clear that, in addition to making a prima facie case that the challenged measure is more trade restrictive than necessary to achieve the contribution it make to the legitimate objective, taking account of the risks non-fulfilment would create, a complainant may seek "to identify" a possible alternative measure. Mexico's burden is simply to "identify possible alternatives", which it has done so. In this dispute, Mexico has identified three possible alternative measures that are less trade restrictive, make an equivalent contribution to the relevant objective, taking account of the risks non-fulfilment would create, and are reasonably available. The burden is on the United States to present sufficient evidence and arguments showing that these alternative measures are not less trade restrictive, do not make an equivalent contribution to the objective pursued, taking account of the risks non-fulfilment would crate and are not reasonably available. The United States failed to do so.

### 3. The Test of Article 5.6 of the SPS Agreement is Not Applicable to Article 2.2 of the TBT Agreement

76. As in the original proceedings, the United States attempts to incorporate Article 5.6 of the SPS Agreement into Article 2.2 of the TBT Agreement, by arguing that the test of Article 2.2 was equivalent to Article 5.6 and that an alternative measure should be *significantly* less trade restrictive as required by footnote 3 of Article 5.6. These arguments failed in the original proceedings. The test described in paragraph 378 of the AB Report clearly indicates that: (i) Article 2.2 requires evaluation of the challenged measure, and in some cases a comparative analysis with a proposed alternative; and (ii) when comparing with an alternative measure, it may be relevant to consider "whether the proposed alternative is less trade restrictive".

77. Second, Article 2.2 neither contains the word "significant" nor a footnote similar to footnote 3 to Article 5.6 of the SPS Agreement. Third, Article 1.4 of the SPS Agreement provides that the different regimes, rules and the scope of application of it and that of the TBT Agreement are mutually exclusive, and therefore provisions of the SPS Agreement cannot be incorporated into the provisions of the TBT Agreement. Fourth, with regard to the letter from Peter D. Sutherland to John Schmidt on December 15, 1993, offered by the United States, Mexico considers that it is not relevant because there is no footnote in Article 2.2 that clarifies the meaning of the phrase "more trade-restrictive than necessary". Such letter cannot be considered as a supplementary means of interpretation within the meaning of Article 32 of the *Vienna Convention on the Law of Treaties*.

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

78. The Amended COOL Measure nullifies or impairs benefits accruing to Mexico based on tariff concessions made by the United States in respect of live cattle at the end of successive multilateral rounds of trade negotiations, in a manner that is inconsistent with Article XXIII:1(b).

79. The Panel in *Japan – Film* dispute summarized the elements of a non-violation nullification and impairment claim, and stated that in order to make out a cognizable claim under Article XXIII:1(b) the complaining party must demonstrate the following three elements: (i) an application of any measure by a WTO Member; (ii) a benefit accruing under the relevant agreement; and (iii) nullification or impairment of the benefit as a result of the application of the measure.

80. The first element relates to the phrase "the application by another Member of any measure", the word "any" indicates that Article XXIII:1(b) does not distinguish between, or exclude, certain types of measures. The United States enacted and implemented the COOL Measure and the Amended COOL Measure through a series measures including statutory provision, regulations and other implementing guidance, directives of policy announcements issued in relation to those measures. The application of such measures by the United States meets this element of Mexico's claim under Article XXIII:1(b).

81. The second element requires demonstrating the existence of a "benefit accruing" to the complaining Member. This benefit can be measured in terms of "legitimate expectations" of improved market-access opportunities. An expectation is considered to be legitimate if the challenged measure could not have been "reasonably anticipated" at the time the tariff concession was negotiated.

82. Although the tariff concessions between Mexico and the United States are currently based on the NAFTA, Mexico is entitled under Article XXIII:I(b) to expect market access to the United States for its feeder cattle that is related to the tariff concessions that would apply, on a Most-Favoured-Nation (MFN) basis, between Mexico and the United States under the WTO Agreement. The extent of the restrictions on market access resulting from the Amended COOL Measure clearly could not have been expected. Mexico was entitled to expect for exports of its feeder cattle.

83. The third required element is that the benefit accruing to the WTO Member (e.g., improved market access from tariff concessions) is nullified or impaired as the result of the application of a measure by another WTO Member. In this sense, the Panel affirmed that it must be demonstrated that the competitive position of the imported products subject to and benefitting from a relevant market access (tariff) concession is being upset by ("nullified or impaired ... as the result of") the application of a measure not reasonably anticipated. Given the low U.S. MFN rates in respect of feeder cattle, Mexico reasonably expected that its access to the U.S. market for feeder cattle would be unrestricted. The Amended COOL measure drastically restricts this access in a manner that could not have been anticipated at the time of the conclusion of the Uruguay Round.

## F. MEXICO'S CLAIM UNDER ARTICLE XXIII:1(B) OF THE GATT 1994 IS WITHIN THE SCOPE OF THE PANEL'S TERMS OF REFERENCE

84. Mexico's non-violation nullification or impairment ("NVNI") claim raised under Article XXIII:1(b) is within this Panel's terms of reference in these Article 21.5 proceedings. The purpose of Article 21.5 proceedings is to resolve, on an expedited basis, "disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and

rulings" adopted by the DSB. This mandate encompasses claims by the complaining party that a measure "taken to comply" is inconsistent with a covered agreement. A measure "taken to comply" that results in the non-violation nullification or impairment of any benefit which accrues to a party under the GATT 1994 is no less inconsistent with the GATT 1994 than a measure which results in a violation of one or more provisions. The mere existence and operation of Article XXIII:1(b) indicates that the application of a measure does not need to result in a violation of a provision of the GATT 1994 to be considered inconsistent with the GATT 1994 if it nullifies or impairs a benefit accruing under the GATT 1994. Hence, a claim to this effect under Article XXIII:1(b) is entirely within the scope of Article 21.5 proceedings.

85. Article 26.1 of the DSU clearly establishes that a panel or the AB has jurisdiction to consider and resolve claims under Article XXIII:1(b), "whether or not" the measure at issue conflicts with the provisions of the relevant covered agreement, and provides additional guidance for circumstances in which the measure at issue does not conflict with the provisions of the relevant covered agreement.

## IV. CONCLUSION

86. As Mexico has shown, the Amended COOL Measure is inconsistent with the national treatment obligation under 2.1 of the TBT Agreement and Article III:4 of the GATT, also constitutes an unnecessary obstacle to trade in violation of Article 2.2. of the TBT Agreement, and nullifies and impairs benefits accruing to Mexico under the GATT 1994, within the meaning of Article XXIII:1(b). United States has not brought itself into compliance with its obligations through the adoption of the Amended COOL Measure.