UNITED STATES – CERTAIN COUNTRY OF ORIGIN LABELLING REQUIREMENTS

RECOURSE TO ARTICLE 21.5 OF THE DSU BY MEXICO

(WT/DS386/RW)

Comments of the United Mexican States on the Interim Report

8 July 2014

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I. INTRODUCTION

1. Mexico would like to thank the Panel and the Secretariat for their work to date and for the analysis contained in the interim report.

2. Pursuant to Article 15.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and the Panel's Working Procedures, Mexico sets out substantive and general comments to make necessary corrections or clarifications where the Panel appears to have misunderstood or mis-described facts or arguments.[1] These comments include Mexico's suggestions to edit or adjust the specific paragraphs identified in this submission. Additionally, Mexico has identified minor typographical errors which are listed in the final section.

II. EVIDENCE OF LABELS

3. In paragraphs 7.255 to 7.256, the Interim Report discusses Mexico's arguments with regard to the appearance and placement of labels. The Panel determined that it was unable to draw conclusions on the impact of the discretion given to retailers on how to convey information to consumers. However, the Interim Report omits to mention another key aspect of Mexico's evidence, which was that no retailers complied with the new regulations prior to late November 2013 (six months after the end of the RPT) and that some still do not comply, and therefore the labels of those retailers do not convey the purportedly required information at all.[2] Mexico therefore requests that the Panel add a new paragraph after paragraph 7.256 to read as follows:

> Mexico submitted evidence that retailers were not complyng with the point of production labelling requirements during the six-month period after the effective date of the 2013 final rule, and that some retailers have continued not to comply with the amended COOL measure. The labels of those retailers and do not provide any point-of-production information.

4. Mexico requests that a similar adjustment be made to paragraph 7.354 to reflect Mexico's evidence:

> . . . This potential for inaccurate or incomplete information lowers the amended COOL measure's degree of contribution for Category B muscle cuts. Conversely, Category A muscle cuts have only US origin and, as explained, Category C muscle cuts would typically show that only the animal's slaughter occurred in the United States. To the extent that

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[1] Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R and Add.1, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS135/AB/R, Footnote 3; Panel Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/R, adopted 25 November 1998, as reversed by the Appellate Body Report, WT/DS60/AB/R, para. 6.2.

[2] Paragraph 7.8 of the Interim Report references USDA's final rule as being "effective 23 May 2013". Footnote 25 includes a quotation from the Federal Register notice that explains that USDA did not expect full compliance during the initial six month period. The significance of this quotation is not explained, however. Mexico requests that the Panel acknowledge Mexico's evidence that no retailers included point of production information on labels until the end of the "education" period on November 23, 2013.

> retailers do not comply with the amended COOL measure, as reflected in evidence submitted by Mexico, the degree of contribution would be further limited.

III. RELATIVE SHARES OF ORIGIN CATEGORIES AND EXEMPTIONS

5. In discussing the relative proportions of meat products falling into the different labelling categories and the exemptions, the Interim Report cites collectively to the responses of the Parties to Question A, but does not accurately reflect Mexico's response to that question.

6. Paragraph 7.258 states that data provided by the Parties indicates that of total beef consumption, between 33.3% and 42.3% is subject to the labelling requirements of the amended COOL measure (for muscle cuts and ground beef). In Mexico's response to Question A, Mexico identified alternative sources of information available for determining the share of beef products subject to the amended COOL measure. The evidence submitted by Mexico gave alternative potential shares of 25 percent, 30 percent, 33 percent, and 35 percent.[3] Mexico therefore requests that the Panel revise paragraph 7.258 to state as follows:

> Data provided by the parties indicate that, of total (muscle cut and ground) beef consumption in the United States, between 25% ~~33.3%~~ and 42.3% is subject to the labelling requirements of the amended COOL measure. Of total US beef consumption, between 12.25% ~~16.3%~~ and 24.5% are muscle cuts carrying Labels A-D, and between 12.75% ~~16.6%~~ and 17.8% are ground meat carrying Label E. The remaining share of beef products – between 57.7% and 75% ~~66.7%~~ – falls into one of the three exemptions and does not get labelled.

Mexico observes that the total of the maximum ranges of exemptions listed in existing footnote 575 total to 75%, which is consistent with Mexico's suggested revision to paragraph 7.258. The adjustments to the portions of beef consumption that are muscle custs and ground beef reflect the 49% muscle cut / 51% ground beef shares applied by the Panel.

7. Mexico requests that a corresponding adjustment also be made to the figures in paragraphs 7.273 and 7.347, to reflect Mexico's evidence that the low end of the range of beef porducts subject to the amended COOL measure is 25%.

8. Mexico notes that in paragraph 7.273, the Interim Report incorrectly refers to muscle cuts instead of beef products. Specifically, the third sentence should state: "It is therefore 'of central importantce to our overall analysis under Article 2.1" that between 57.7% and 75% ~~66.7%~~ of beef products ~~muscle cuts~~. . . ."

IV. LEGITIMATE REGULATORY DISTINCTION AND EVEN-HANDEDNESS UNDER ARTICLE 2.1

A. Relevant Regulatory Distinction

9. The footnote 454 should read: "… Mexico's first written submission, para. 133-137, and second written submission, paras. 49 and 61-65." (emphasis added). Paragraph 7.200 of the

[3] Mexico's responses to the Panel's questions, paras. 178-192.

Interim Report states that: "With regard to the relevance of this exemptions, the complainants highlight the Appellate Body's reference in its Article 2.1 analysis to exempted products, and point out that the exemptions under the original COOL measure are unchanged by the 2013 Final Rule". The central idea of that part of the paragraph is Appellate Body's analysis of Article 2.1. Mexico highlighted such analysis not only in paragraphs 133-137 of its first written submission and 61 of the second written submission, but also in paragraphs 49 and 62-65 of Mexico's second written submission. Therefore, Mexico suggests including a reference to the above-mentioned paragraphs.

10. In footnote 467 to paragraph 7.203, the Panel discusses Canada's arguments regarding the relevant regulatory distinctions and the scope of evidence that can be assessed to determine whether the detrimental impact reflects discrimination. No mention is made of Mexico's argument that a distinction must be made between three different concepts - "detrimental impact", "relevant regulatory distinction(s)" and "facts and circumstances related to the design and application of the relevant regulatory distinction(s)".[4] The factors raised by Mexico that demonstrate a lack of even-handedness relate to the third of these three concepts, i.e., facts and circumstances related to the design and application of the relevant regulatory distinctions of the COOL Measure found by the Appellate Body. Contrary to the argument of the United States, the factors raised by Mexico are not, in themselves, "regulatory distinctions".[5]

B. Factor that Demonstrates a Lack of Even-handeness – Label E

11. At paragraphs 7.206-7.207, the Panel's discussion does not fully reflect Mexico's argument regarding Label E, the "ground meat" label. The Panel is correct that Mexico argues that "the ground meat label evidences a lack of even-handedness or legitimacy of regulatory distinctions under Article 2.1". However, it goes on to find that the "ground meat label does not constitute a relevant regulatory distinction of the amended COOL measure for the purposes of Article 2.1".

12. Mexico's argument is not contingent upon the ground meat label being found to be a "relevant regulatory distinction". Consistent with Mexico's above comment regarding the Panel's reasoning regarding the "relevant regulatory distinction", Label E is a fact or circumstance related to the design and application of the relevant regulatory distinctions. It demonstrates that the labeling requirements for muscle cuts (which are accepted by the Panel to be part of the relevant regulatory distinction at paragraph 7.198 of the Interim Report), are not even-handed. Specifically, Mexico argues that "[i]n light of the ostensible consumer information objective of the measure, providing such flexibility for one form of beef product [i.e., ground meat] and not for another form [i.e., muscle cuts] is completely arbitrary and is further evidence that the measure is a disguised restriction on international trade and is, therefore, not even-handed".[6] Mexico further argues that "there is no rational connection between the objective pursued by the United States through the Amended COOL Measure (i.e., the provision of consumer information on origin) and the application of a different origin rule for different types of beef", that it "is irrelevant that a different production method is used for the beef. Ground beef

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4 Opening Statement of Mexico, para. 28.

5 Ibid.

6 First Written Submission of Mexico, para. 140.

and muscle cuts are sold to the same U.S. consumers" and that "[u]nder the second step of the test, there is no cause or rationale that can justify the distinction".[7] Finally, Mexico argues:

> The only rationale raised by the United States is that a different production method is used. If this difference justified the different labelling rules then the Amended COOL Measure should also recognize the long-established production method used for muscle cuts of beef whereby cattle from Mexico and the United States were fully integrated and commingled at all stages of the production process. On the facts of this dispute, permitting a different label based on production processes for one beef product but not for another cannot be justified. The objective at issue does not relate to the method of processing but, rather, to the origin content of the processed beef when viewed from the perspective of the U.S. consumer. It is arbitrary that less precise origin information can be provided for some processed beef (i.e., ground beef) but not others (i.e., muscle cuts).[8]

13. Paragraph 7.280 similarly does not fully reflect Mexico's above argument regarding Label E.

V. TWO-STEP NECESSITY TEST UNDER ARTICLE 2.2

14. At footnote 628 refers to paragraphs 177-178 of Mexico's first written submission. Mexico suggests expanding this reference to refer to paragraphs 177-179 of Mexico's first written submission and paragraph 94 of Mexico's second written submission.

15. At paragraph 7.298, the Interim Report states:

> Mexico has not explained why the Panel is faced with such exceptional circumstances in this case. In particular, Mexico does not argue that the amended COOL measure falls into either of the two exceptional scenarios identified by the Appellate Body; rather, Mexico contends that amended COOL measure represents a third scenario under which it should be found inconsistent without looking at alternatives. However, Mexico fails to identify what this third exceptional scenario entails in the context of the amended COOL measure.

16. This statement concerns the application of the first step of Mexico's proposed two-step necessity test. It does not fully reflect Mexico's argument. In paragraphs 165-178 of its first written submission and paragraphs 95-109 of its second written submission, Mexico provides detailed submissions that apply this first step to the Amended COOL Measure and explain why the measure is not necessary under this step. Mexico explained that several factors demonstrate that trade restrictiveness the Amended COOL Measure is disproportionate to the risks that non-fulfilment world create.[9] In this way, Mexico's submissions explain why the Panel is faced with

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[7] Second Written Submission of Mexico, para. 70.

[8] Ibid.

[9] See First Written Submission of Mexico, paras. 177-178.

such exceptional circumstances in this case and they identify in detail what this third exception scenario entails in the context of the amended COOL measure.

VI. ARTICLE 2.2: THE OBJECTIVE OF THE AMENDED COOL MEASURE

17. In paragraph 7.318, the Panel discussed that the 2013 Final Rule did not change the objective of the original COOL measure; rather, it merely adjusted the design of the original COOL measure. However, the Panel concluded that the 2013 Final Rule was issued "primarily to comply with the DSB recommendations and rulings…." In footnote 697, the Panel quotes the 2013 Final Rule where it states that the primarily reason for the rule was to "provide consumers with more specific information", "to improve the overall operation of the program" and "*also* bring the current COOL requirements into compliance…" (emphasis added). Therefore, Mexico suggests to adjust the last sentence of paragraph 7.318 as follows:

> The 2013 Final Rule did not change the objective of the original COOL measure; rather, it merely adjusted the design of the original COOL measure – ~~primarily~~ with the additional purpose to comply with the DSB recommendations and rulings in the original dispute. (Footnote omitted)

VII. ARTICLE 2.2: DEGREE OF CONTRIBUTION OF THE MEASURE

18. In paragraph 7.347, the Panel discusses that the objective of the amended COOL measure is to provide consumer information on origin, and that for beef and pork products covered by the three exemptions the degree of contribution is zero. In this paragraph, the Panel references the percentages of products that are exempted, using the figures 57.7% to 66.7% for beef products. Mexico has above requested that those figures be adjusted to reflect Mexico's evidence, so that the range is 57.7% to 75%.

19. In the following paragraph, the Panel states that it is only the portion of muscle cuts that is actually required to be labelled for which origin information can be conveyed. Consistent with the Panel's findings elsewhere, such as in paragraph 7.345, the Panel is focusing on muscle cuts with Labels A, B and C, and excluding Label E for ground beef. In Mexico's view, therefore, to accurately describe the degree of contribution of the amended COOL measure it is necessary to include in this discussion the Panel's conclusions on the percentage of beef products that are subject to Labels A – D. As discussed above, the evidence submitted by the parties gives a range of between 12.25% and 24.5%.

20. To incorporate this factual point, Mexico's suggests a revision to paragraph 7.348 to add a new sentence following the first sentence, as follows:

> It is only the portion of muscle cuts that is actually required to be labelled for which any origin information can possibly be conveyed. Of total US beef consumption, between 12.25% and 24.5% are muscle cuts carrying Labels A-D.

Not including this revision would result in giving the incorrect impression that the relevant degrees of contribution are the higher percentages referenced in paragraph 7.347, which discusses the coverage of the amended COOL measure as a whole, including Label E for ground beef.

VIII. FOOTNOTE 842

21. With regard to footnote 842, Mexico suggests to add references to additional paragraphs of Mexico's first written submission that relate to the issue being discussed, as follows: "Canada's first written submission, paras. 141-144, response to Panel question No. 36, para. 67, and comments on responses to Panel question No. 36, para. 45; Mexico's first written submission, paras. 95, 175,176, 185 and 228". Paragraphs 95, 175, 185 and 228 of Mexico's first written submission discuss the unwillingness of consumers to pay for the additional information.

IX. ARTICLE 2.2: ALTERNATIVE MEASURES

22. In paragraph 7.491, the Interim Report states that the Panel need not address all three factors of the comparative analysis of alternative measures if it finds that any one of the factors is not satisfied. On this basis, the Panel has declined to make determinations, with respect to the first and second alternatives, on whether they are less trade restrictive and reasonably available. With respect to the third and fourth alternative measure, the Panel declined to address their contribution to the relevant objective.

23. To facilitate the resolution of the dispute, Mexico requests that the Panel complete the analysis of the alternatives by making findings on all three factors for each of the four alternatives.

24. In paragraph 7.513, the Panel's interim report references the National Animal Identification System (NAIS) and the 2013 Final Rule on Traceability for Livestock Moving Interstate. The corresponding footnotes omit to cite to the relevant exhibits submitted by Mexico. Mexico suggests adding citations to a footnote to paragraph 7.515 to Exhibits MEX-82, MEX-83, MEX-84, and MEX-85.

X. ARTICLE XXIII:1(B) OF THE GATT 1994

25. At footnote 7.648, the Panel references paragraphs 149-151 of Mexico's second written submission for the statement that "the parties appear to concur in treating 'conflict' and 'violation' as equivalent…". Mexico suggests expanding this reference to cite paragraphs 145-152 of Mexico's second written submission.

XI. TYPOGRAPHICAL ERRORS

26. Mexico identified some typographical errors in the document, which are described below.

A. List of Exhibits

27. The following exhibits of Mexico are cited in the report, but they are not included in the list: MEX-55 (cited in foonote 371), MEX-48, MEX-49, MEX-50, MEX-51, MEX-52 (cited in footnote 573), MEX-42, MEX-43, MEX-44 (cited in footnote 1167).

28. The title of Exhibit "MEX-15-V" should be "MEX-15-C".

B. Report

29. The first page number of the Interim Report is 18 rather than 1.

30. Mexico suggests the following edits:

- Para. 1.3. There does not appear the full name of TBT Agreement followed by its acronym.
- Para. 1.4. DSB was fully cited in para. 1.1, therefore it is not necessary to include the full name again.
- Para. 7.43 (second line). In "countr*i*es", the "i" should not be in italics.
- Footnote 14. The italics are missing in *Canada – Wheat Exports and Grain Imports.*
- Footnote 17. The italics are missing in: *EC – Sardines*; *US – Clove Cigarettes*; *US – Tuna II (Mexico)*; and *EC – Seal Products*.
- Footnote 625. The end of this footnote states between parentheses: "emphasis added". Mexico suggests removing this statement because there is no emphasis added. The words "relative importance", in paragraph 164 of Mexico's first written submission were already highlighted by Mexico in the original text.
- Footnote 822. This footnote should read "Mexico's ~~first~~ second written submission, para. 103 (citing Appellate Body Reports, US – COOL, para. 477 and 479).
- Footnote 930. This footnote should read: "Mexico's second written submission para. 11~~6~~8". The para. 166 does not correspond to Mexico's second written submission. Furthermore, the letter "t" should be placed within brackets as follows, indicating the quote: *"*[*t*]*he burden is ...."*.
- Footnotes 953 and 954. These notes should be both corrected as follows: "Mexico's second written submission, para. 12~~2~~3".
- Paragraph 7.470. The word "where" is missing the "h".
- Footnote 1091: This footnote should read: "Mexico's first ~~second~~ written submission, para. 200".
- Footnote 1096. This footnote should read: "Canada's first written submission, para. 177; Mexico's first written submission, paras. 200-210~~, and 204~~.".
- Footnote 1401. This footnote should read as follows: "Canada's first written submission, para. 190; Mexico's first written submission, para~~s~~. ~~233 and~~ 238." Paragraph 233 does not address the explanation in paragraph 7.675.
- Footnote 1402. This footnote should read as follows: "Canada's first written submission, para. 183; Mexico's first written submission, paras. 23~~3~~9-241; United States' first written submission, para. 208." In both quotes the paragraph 233 of Mexico's first written submission is eliminated since it does not reflect the issue referenced by the Panel.
- Footnote 1384. The italics are missing in *US – Softwood Lumber IV*.
- Footnote 1416. The italics are missing in *EC – Bananas III*.
- Footnote 1420. The italics are missing in *EC – Bananas III.*

31. The name of the cited cases should be underlined:
    - Footnotes: 863, 1216, 1382.
32. Not underlined text: The "s" should be deleted after abbreviated paragraph in singular:
    - Footnote 15. "… *EC – Seal products*, para**s**. 7.63".
33. Missing "s" after abbreviated paragraph in plural:
    - Footnote 194. "paras. 7.304-7.308".
    - Footnote 386. "paras. 7.374-7.380 … paras. 315 and 318-323".
    - Footnote 1428. "paras. 7.678-7.680".
34. Space missing between letters or number in bold:
    - Footnote 38 (last sentence). "para. 7.1**7r**egarding…".
    - Footnote 68. "section 7.3.**5b**elow".
    - Footnote 305. "para. 7.8**6a**bove".
    - Footnote 307. "paras. 7.1**1a**nd …".
    - Footnote 734. "para~~.graph~~ 7.32**7a**bove".
    - Footnote 762. "paras. 7.4**8a**nd 7.129 above".
    - Footnote 767. "paras. 7.25**8a**nd 7.262".
    - Footnote 776. "paras. 7.236-7.24**5a**nd Table".
    - Footnote 778. "and 7.246-7.25**4a**nd Table".
    - Footnote 837. "7.6.**1a**bove".
    - Footnote 902. "para. 7.39**6a**bove".
    - Footnote 1211. "para. 7.51**2a**bove".
    - Footnote 1268. "paras. 7.55**4a**nd 7.557".
    - Foonote 1432. "2009 Final Rule, **p.2**658… 2009 Final Rule, **p.2**693".
    - Footnote 1480. "sections 7.6.2.**1a**nd 7.6.2.2".
35. Missing quotation marks:
    - Footnote 379. "… like products"".
36. Missing dot after abbreviation of paragraph:
    - Footnote 551. "para**.** 16".
    - Footnote 1465. "paras**.** 40-44".
37. Missing dot at the end of the sentence:
    - Footnote 709. "para. 394."

- Para. 7.448.
- Footnotes 1055, 1061, 1068, 1140, 1190, and 1221.

38. An extra space should be deleted:

- Para. 7.201. "…the United States that the …".
- Para. 7.510. "…alternative measure's reasonable …".
- Footnote 1295. "submission , para. 149".

39. vis-à-vis or *vis-à-vis*: This phrase appears some times in regular font (paras. 7.61, 7.285, 7.365), but sometimes it appears in italics (paras. 7.641, 7.649).