BEFORE THE WORLD TRADE ORGANIZATION

UNITED STATES – CERTAIN COUNTRY OF ORIGIN LABELLING REQUIREMENTS

(DS386)

EXECUTIVE SUMMARY OF THE OPENING STATEMENT OF MEXICO AT THE SECOND MEETING WITH THE PANEL

Geneva

22 December 2010

I. Introduction

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

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

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

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

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

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

II. Mexico's De Facto Discrimination Claims under Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement

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

A. Less Favourable Treatment

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

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

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

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

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

13. These factors demonstrate how the COOL measure has disrupted the integrated North American market for cattle and the conditions of competition within that market to the

detriment of Mexican cattle. U.S. "like" cattle have *not* faced a reduction in processing plants, processing days, backgrounders, and feedlots, additional requirements or a COOL discount.

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

B. Segregation

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

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

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

C. The Costs of Compliance with COOL can be Minimized by using U.S. Born Cattle Only

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

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

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

D. The Increase of Exports of Mexican Cattle Relative to the Previous Year Does not Eliminate the Described Effects of the COOL Measure

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

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

demonstrate that the conditions of competition have been modified by the COOL measure. Mexico has done this.

E. Actions of Private Parties

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

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

F. Origin Neutral Measures

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

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

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

A. Introduction

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

B. The Evidence Presented by the United States About Consumers Demanding Country of Origin Information does not Support the US Arguments

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

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

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

31. In *EC – Sardines* the panel stated that "the danger is that Members, by shaping consumer expectations through regulatory intervention in the market, would be able to justify thereafter the legitimacy of that very same regulatory intervention on the basis of governmentally created consumer expectations."

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

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

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

C. The COOL Measure does not Fulfill the Stated Objective of the United States and Instead Fulfill's a Protectionist Objective

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

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

37. In the case of Mexico, it misleads the consumer when label B (Product of the United States and Mexico) is used. The most diligent consumer will never know that the meat labeled as "B" was produced in the United States from an animal that *(i)* was born in Mexico and has the same genetic features of the cattle born in the United States, *(ii)* was sent to the United States at a very early period in its life to be fed in the same grasslands on which cattle born in the United States are fed, *(iii)* was sent thereafter to a feedlot to be fed with the same grains with which cattle born in the United States are fed, *(iv)* obtained more than 70% of its weight in the United States, and *(v)* was slaughtered and processed into meat in the same facilities as the cattle born in the United States, and *(vi)* its meat was classified with the same quality grading as meat derived from an animal born in the United States.

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

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

D. Mexico has Presented at Least Three Reasonably Available Alternatives

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

1. Voluntary Labeling with "Born, Raised, Slaughtered rule" is a Reasonably Available Alternative

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

2. Mandatory Labeling Based on Substantial Transformation is a Reasonably Available Alternative

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

3. A Real Traceback System is a Reasonably Available Alternative

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

IV. The COOL Measure is Inconsistent With Article 2.4 of the TBT Agreement

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

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

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

V. The COOL Measure is Inconsistent with Article 12.3 of the TBT Agreement

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

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

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

VI. The COOL Measure is Inconsistent with Article X:3 of the GATT 1994

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

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

VII. The COOL Measure Nullifies or Impairs Benefits Accruing to Mexico within the Meaning of Article XXIII:1(b) of the GATT 1994

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

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

VIII. Conclusion

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

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