

(COURTESY TRANSLATION)

BEFORE THE WORLD TRADE ORGANIZATION

UNITED STATES – CERTAIN COUNTRY OF ORIGIN LABELLING REQUIREMENTS

(DS386)

**OPENING STATEMENT OF MEXICO
AT THE FIRST MEETING WITH THE PANEL**

**Geneva
14 September 2010**

I. INTRODUCTION

Mr. Chairman, members of the Panel:

1. On behalf of the Mexican delegation, it is our privilege to appear before you today to present the views of Mexico concerning some of the key issues in this dispute. I would like to thank you for agreeing to serve on this Panel and for your efforts – and those of the Secretariat and interpreters – in preparing for this first substantive meeting of this Panel.
2. In this opening statement, we do not intend to provide an exhaustive presentation of our arguments in this dispute which have been set out in detail in Mexico's first written submission. Instead, we limit our discussion to certain key points which form the foundation for our specific arguments and some of those points upon which Mexico and the US disagree.
3. This case is about a US measure that discourages the use of Mexican cattle in the production of beef products in the United States.
4. The COOL measure has adversely modified the competitive conditions to the disadvantage of Mexican producers. It is affecting an important industry which provides over 1 million direct jobs and over 2 million indirect jobs in Mexico. Mexico's cattle industry and the US beef industry historically have maintained substantial sales to each other's countries. Indeed, Mexico is the largest importer of US beef products. The COOL measure has distorted the market with the sole purpose of protecting the US cattle industry, and thereby disrupted what was previously a mutually beneficial trade relationship.

5. The COOL measure is inconsistent with core obligations in the TBT Agreement as well as the national treatment obligation in GATT Article III. It is also inconsistent with GATT Article X and nullifies or impairs benefits accruing to Mexico within the meaning of Article XXIII:1(b) of the GATT 1994.

II. OVERVIEW OF MEXICAN CATTLE EXPORTS TO THE US

6. I would like to emphasize the importance to Mexico of exports of cattle to the US market.

7. The productions of cattle in Mexico and beefs in the US have been closely integrated for many decades. The Mexican cow-calf industry produces high quality, genetically desirable cattle for the US market. As explained in paragraphs 134 and 135 of the Mexican submission, the calves produced by Mexico for export to the United States are derived from breeds developed in the United States and Europe. They have the same genetic features as calves from the United States, and are pastured on grass or winter wheat, similar to US calves. The US and Mexican cattle are clearly like products.

8. The United States has conceded that the COOL measure is not an SPS measure, or any other type of safety measure. Mexico wishes to highlight that separately the United States subjects the Mexican cattle to stringent SPS requirements. For example, each Mexican heifer and steer is individually inspected by a US government veterinarian prior to even crossing the border. Each Mexican animal bears an ear tag identifying its source. Each of the regions of Mexico that produce cattle for export to the US has been certified by the US Department of Agriculture, applying strict sanitary protocols. Mexico fully complies with those stringent measures.

9. This case is not about an SPS measure.

10. For purposes of facilitating our discussions with the Panel, I would also like to briefly review the key relevant elements of the production process. In the case of Mexico, the overwhelming majority of cattle exported are young animals, usually no more than seven or eight months old, and weighing in the range of 300 to 400 pounds. After importation into the United States, these cattle typically spend four to five months being further grass-fed by “backgrounders.” When the cattle reach a suitable size – usually 600 to 700 pounds – they are transferred to feedlot operators, who increase the weight of the cattle by grain feeding them to 1100 to 1200 pounds over a period of six to seven months. At the time of slaughter, approximately 70% of the weight and value of the animal has been added within the US territory.

11. The animal is then brought to a slaughterhouse where it is killed. The carcass is obtained by separating the body from the head, the hide and the internal organs. After a period of chilling, the carcass is broken down into pieces of meat that are placed in boxes. The boxed meat is then transported to distribution centers, and subsequently to retail markets. In many cases, the retailers themselves further process the beef into individual muscle cuts and ground beef; in other cases, grocery chains arrange for packers to process and package the beef products for them.

12. These aspects of the production process are described in greater detail in paragraphs 137 to 148 of Mexico’s submission.

III. THE MEASURE

13. This dispute concerns a mandatory country of origin labeling requirement, which I will refer to as the “COOL measure”. That measure is applied in a manner and in circumstances such that it unjustifiably discriminates against and restricts imports of Mexican cattle into the United

States. The COOL measure comprises statutory provisions, regulations and other administrative actions by the US government. All of the components identified by Mexico in its First Written Submission are legal elements of the COOL measure.

14. The COOL measure is an internal measure applied to US processed beef that has an adverse effect on imported inputs for that product – that is, cattle. The COOL measure requires that beef products made in the US identify the country in which the cattle were born as the country of origin of the beef product. US producers of beef products have segregated cattle of different origins entirely in order to comply with the measure, and have passed along the resulting costs to the Mexican cattle industry. The US producers have segregated Mexican cattle because tracking the origin of cattle in commingled inventory would be even more expensive and burdensome, and it would be more difficult to pass along the costs to the cattle producers. This situation, directly resulting from the COOL measure, has had a number of adverse effects on imports of Mexican cattle.

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

- US processors have restricted the number of plants that will process Mexican cattle;
- US processors have restricted the days on which plants will accept Mexican cattle;

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

16. Mexico has presented evidence of each of these effects:

- The number of major processing plants that will accept Mexican-born cattle for processing has dropped from 24 to 3, as shown in paragraphs 156 and 157 of Mexico's submission, and Exhibits 37 and 42. This can be seen in Slides 1 and 2, which compare the locations of plants that accepted Mexican cattle prior to the COOL measure with those that accept Mexican cattle now.
- Exhibit 46 contains documents from one of the major US processors demonstrating the special notice requirements and restrictions on the days on which plants will accept Mexican born cattle.
- Paragraphs 164 and 165 of Mexico's submission describe the documents from US processors in which they imposed lower prices for Mexican cattle expressly because of the costs imposed by the COOL measure.
- Paragraph 162 of Mexico's submission describes the evidence, presented in Mexico's exhibit 37, that some US backgrounders and feedlot operators have avoided the costs of compliance with the COOL measure and adjusted to the new policies of the US processors by not purchasing any Mexican cattle.

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

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

18. For example, mandatory country of origin labeling imposed on imported products at the border is generally viewed as WTO-consistent. But the COOL measure, as applied to beef products, is not a border measure. It is an internal measure that has effects only with respect to

goods that are processed in the United States. The US maintains two systems for labeling beef. The border regime applies a marking rule that labels beef from cattle processed in Mexico as “product of Mexico” regardless of where the cattle are born. The internal regime imposes a different marking rule for beef processed in the United States, in effect relying exclusively on where the cattle are born and disregarding the US production process.

19. Mexico emphasizes that internal country of origin labeling measures potentially can be WTO consistent, for example, where such measures allow voluntary labeling.

20. If such measures are mandatory, their requirements and procedures must not deny competitive opportunities to the imported inputs that are manufactured into processed products. For example, if the COOL measure determined origin in a manner consistent with the regular rules applying to internationally traded goods – such as the US customs law rules of origin that are applied at the border or the CODEX standard – it could be consistent with WTO obligations.

21. However, the COOL measure has requirements and procedures that result in a loss of competitive opportunities for imported cattle. In particular, under the COOL measure the United States refuses to acknowledge that any processing of cattle is relevant – notwithstanding that the imported Mexican cattle spend the great majority of their lives in the United States and are slaughtered and processed there under the supervision of US agricultural officials. But for the COOL measure, Mexican cattle could be processed at more facilities, without restriction to certain days, without special notification requirements and without being subject to a COOL-specific price discount.

V. THE DE FACTO NATURE OF MEXICO'S CLAIMS

22. Throughout its submission, the United States argues that the COOL measure is facially neutral and does not modify the conditions of competition for imported cattle. It also argues that the adverse effects Mexico is challenging are due to private action.

23. Mexico has been very clear that its claim is based on the de facto effects of the COOL measure. For example, see paragraphs 218, 220, and 263 of Mexico's submission. Indeed, as described in paragraphs 83 to 88 of Mexico's submission, the US Department of Agriculture acknowledged in advance of implementation that the COOL measure would impose substantial costs on the industry and that processors would have lower costs if they handled only domestic products.

24. Although Mexico recognizes that the COOL measure is facially neutral, when applied to the facts and circumstances of Mexico-US cattle trade, the measure denies competitive opportunities to Mexican cattle.

25. I will next turn to Mexico's legal claims.

VI. LEGAL CLAIMS

A. Claims under the TBT Agreement and the GATT 1994

26. Mexico recognizes that it is accepted practice to first address claims under the TBT Agreement and then under the GATT 1994. For the purposes of this statement, Mexico will address the claims together.

27. I will not be addressing the threshold issue of whether the COOL measure is a “technical regulation” under Article 2 of the TBT Agreement or a “law, regulation or requirement” under Article III:4 of the GATT 1994. These issues are addressed in detail in Mexico’s first written submission.

B. Discrimination Claims Under Article 2.1 of TBT Agreement and Article III:4 of the GATT 1994

28. I will start with Mexico’s discrimination claims under Article 2.1 of the TBT Agreement and GATT Article III:4.

1. Like Product

29. As a starting point, both provisions require a comparison of the treatment of like products. The same test for like product can be used for both the Articles 2.1 of the TBT Agreement and GATT Article III:4.

30. The United States argues that Mexico has not proven that Mexican and US beef are “like products”. Mexico’s claim, however, does not concern imported Mexican beef products, for which, incidentally, US law still applies the normal customs law substantial transformation test to determine country of origin. Instead, Mexico’s claim concerns the treatment of Mexican cattle that are imported into the United States for processing into beef. By its structure and design, the COOL measure applies indirectly to cattle. In other words, the effect of the COOL measure – indeed its core purpose – is to regulate the inputs to beef products – namely, cattle. Mexico presented prima facie evidence in paragraphs 134 and 135 of its submission that Mexican and

US cattle, both of which compete for the same processing market, are like products. The United States did not refute that evidence.

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

2. Less Favorable Treatment under 2.1. of the TBT Agreement and GATT Article III:4

32. The next step is to examine the treatment accorded to Mexican cattle in comparison to that accorded to US cattle.

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

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

C. Obstacles to Trade Under TBT Article 2.2

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

36. The United States argues that the legitimate objective is “consumer information.” Mexico does not deny that providing consumer information, in the abstract, can be a legitimate objective. However, it is not enough to define the legitimate objective at such a high level of generality. The legitimate objective must be defined at a level of specificity that accurately describes the measure that is being justified. Otherwise, whether or not a measure has a legitimate objective would essentially become entirely self-judging and would circumvent the disciplines of Article 2.2.

37. It is therefore necessary to go beyond the general claim of a “consumer information” objective and to examine the exact nature of the information that is being supplied through the measure. This requires an analysis of the design, structure and application of the measure at issue.

38. In this dispute, the objective has to be defined as informing the consumer where the cattle incorporated in the beef were born.

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

40. It is necessary to examine each measure on a case-by-case basis to determine where it falls on this spectrum.

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

42. In this regard, the sole reason to provide information on the birthplace of the cattle incorporated into the beef is to give US domestic cattle a competitive advantage. Moreover, a fundamental flaw of the COOL measure is that it does not provide accurate information to consumers. Rather, it creates a mandatory labeling rule and a rule of origin that are inconsistent with the labeling requirements and rules of origin applied to both similar and identical products.

43. As Slide 3 illustrates, the labeling requirements and rule of origin for muscle cuts of beef differ depending on the type of store in which they are sold, and whether the muscle cut was produced in the United States or a foreign country. Moreover, different parts of the exact same animal, processed in the same slaughterhouse, also have different labeling and rule of origin requirements. No reasonable person could conclude that the COOL measure provides accurate or clear information to consumers.

D. TBT Article 2.4

44. As explained in Mexico's written submission, the applicable CODEX standard states:

“When a food undergoes processing in a second country which changes its nature, the country in which the processing is performed shall be considered to be the country of origin for the purposes of labeling.”

45. The COOL measure obviously is not based on this standard, and therefore is inconsistent with TBT Article 2.4. The United States set out some perfunctory arguments about the possibility that CODEX STAN-1-1985 might not be an international standard or a relevant

standard, but its main argument is that the CODEX standard would be an inappropriate and ineffective means to accomplish the US objective of “consumer information.” In other words, the US position is that if a relevant international standard would prevent the United States from implementing a measure, the international standard must be inappropriate and ineffective. Obviously, the US approach to this issue would make Article 2.4 completely meaningless.

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

47. At the same time, the United States determines country of origin consistently with the CODEX standard for beef products imported from other countries, for parts of the cattle other than muscle cuts and ground beef, and for the great majority of other food products. Thus, the United States rejected the CODEX standard only for a very narrow subset of the prepackaged products to which it applies. The selective nature of the failure of the United States to follow the CODEX rule speaks volumes about the structure and effect of the COOL measure.

E. TBT Articles 12.1 and 12.3

48. Regarding TBT Articles 12.1 and 12.3, the United States has taken the position that simply allowing Mexico to submit comments on the regulations was sufficient to satisfy the US obligation to take into account of the special needs of developing countries. That interpretation of Articles 12.1 and 12.3 would render them meaningless. The United States does not, and can

not, point to anything it did in the preparation and application of the COOL measure with a view to avoid creating an unnecessary obstacle to exports from Mexico. Rather, it ignored Mexico's comments and the impact that it knew the COOL measure would have on Mexican exports.

F. GATT Article X

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

50. In response to Mexico's Article X claim, the United States argues that the Vilsack letter is not a measure. But the Vilsack letter is part of continuing actions by the United States government, under authority of the COOL statute, to pressure the US industry not to use foreign cattle. For example, Mexico's Exhibit 20, page 13, reproduces a letter from a major food processor sent to its customers on October 14, 2008. With respect to using multi-country Category B label, the letter includes the following statement:

"Based on the input we have since received from government officials and various industry groups, we now believe this initial compliance approach will not be viable in the longterm. If we do not take measures to more fully meet the desires of mCOOL advocates and many lawmakers, and label a large percentage of retail, fresh meat cuts as a product of the U.S., it is likely some of the flexibility in the current regulations will be eliminated."

51. Obviously the "government officials" referenced in this letter were from the US Department of Agriculture. Furthermore, the Vilsack letter pressured the industry to undertake additional labeling requirements when using the multiple label. This is evidence of US

government pressure on companies not to use the multiple origin label. This in turn eliminated the economic feasibility of commingling Mexican and US cattle.

G. Non-Violation Nullification and Impairment

52. With regard to Mexico's non-violation nullification or impairment claim, the United States argues that Mexican cattle enter the United States under the NAFTA tariff concessions and not those of the WTO. The NAFTA tariff is zero and the US MFN bound tariff is 1 cent per kilogram, which is about \$1.36 to 1.81 for a 300 to 400 pound animal. Based on this WTO tariff binding, Mexico could legitimately expect that its cattle would have a competitive disadvantage of \$1.36-1.81 per animal compared to like US products. The actual price discount created by the COOL measure is between \$40.00-\$60.00 for the same 300-400 pound animal. The competitive disadvantage or level of protection reflected in this price discount vastly exceeds Mexico's legitimate expectation of \$1.36-1.81 per animal.

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

54. The United States' argument that Mexico should have expected that there would be mandatory labeling requirements for meat products is without merit. As Mexico has explained, it is not asserting that all mandatory labeling requirements are inconsistent with WTO obligations. Indeed, the examples of prior proposed legislation cited by the United States all dealt with labeling of imported meat products, not with imports of cattle to be manufactured into beef products within the United States. Mexico did not expect a measure like the COOL measure that disrupts competitive opportunities.

55. Finally, contrary to the US assertion of lack of proof, Mexico has presented substantial evidence that the competitive position of Mexican cattle has been impaired specifically because of COOL. As I have explained previously, US processors have restricted the number of plants that will process Mexican cattle; restricted the days on which those plants will accept Mexican cattle; imposed special notice requirements; and imposed a mandatory discount on the price of Mexican cattle expressly on the basis of the COOL measure.

VII. CONCLUSION

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

57. This concludes our opening statement. We would be pleased to respond to any questions you may have.
