CHECK AGAINST DELIVERY

BEFORE THE WORLD TRADE ORGANIZATION
APPELLATE BODY

UNITED STATES – CERTAIN COUNTRY OF ORIGIN LABELLING REQUIREMENTS

(AB-2012-3 / DS386)

OPENING STATEMENT OF MEXICO

2 May 2012

I. INTRODUCTION

1. Mr. President and members of the Division, on behalf of the Mexican delegation, it is our privilege to appear before you today to present the views of Mexico on the issues that have been raised in this appeal.

2. This dispute involves a country of origin labeling requirement that imposes extra and discriminatory burdens on imported cattle, thereby favouring the use of domestic cattle. Mexico emphasizes that its challenge of the COOL measure is not a challenge to general country of origin labeling. Indeed, the Panel found there was no evidence that any other WTO Member has adopted the same definition of origin as the U.S.[1] Normal origin labeling requirements are implemented in an even-handed manner. The COOL measure is not. It is an obvious example of a denial of national treatment and an unnecessary obstacle to international trade.

3. The United States has suggested that the Panel's findings somehow could threaten the status under the WTO of general origin labeling measures. To the contrary, the scope of Mexico's challenge is narrow and relates to the specific measure and circumstances of this dispute.

4. In an effort to justify the defects of the COOL measure, the United States has argued that origin labeling for meat is more complex than for other products because animals are movable. However, many types of products – including products derived from animals, plants, metal, wood, and other materials – can be processed in multiple countries. There is nothing unique

[1] Panel Report, fn. 888.

about meat in that respect. As Mexico has pointed out, the COOL measure only applies to certain parts of an animal and not to other parts of the same animal, and only to certain categories of retailers. The measure is carefully designed to protect U.S. cattle producers and falls far short of fulfiling the purported U.S. objective of providing clear and accurate information to consumers. The design, revealing structure and architecture of the COOL measure make clear that it is discriminatory and unnecessary.

5. The position taken by the United States in this appeal raises systemic concerns, particularly for developing countries. If the COOL measure were found to be consistent with WTO obligations, that would create a blueprint for new trade barriers to be justified as permissible technical regulations. Developing countries would suffer disproportionately.

6. As we will discuss, the Panel correctly found that the COOL measure is inconsistent with the national treatment obligation of Article 2.1 of the *TBT Agreement*, and that it constitutes an unnecessary obstacle to international trade in violation of Article 2.2.

II. KEY FACTS

7. It is undisputed that U.S. and Mexican cattle are like products.[2] It is also undisputed that previous to the adoption of the COOL measure, the livestock-to-beef market in North America was highly integrated.[3]

[2] Panel Report, para. 7.253.

[3] Panel Report, paras. 7.387-7.389.

8. The U.S. agrees that the COOL measure is not a sanitary or safety measure. Strict U.S. SPS measures exist independent of COOL, and require that each Mexican heifer and steer be individually inspected by a U.S. government veterinarian prior to even crossing the border. Each exported Mexican animal bears an ear tag identifying its breeder, feeder, exporter and U.S. importer, enabling full traceability back to the farm. Each of the regions of Mexico that produce cattle for export to the U.S. has been certified by the U.S. Department of Agriculture. Mexico fully complies with those stringent requirements, which are unrelated to the COOL measure.[4]

9. It is also useful to know that in the case of Mexico, the cattle exported generally are calves, weighing in the range of 300 to 400 pounds. At the time of slaughter, approximately 70% of the weight and value of the animal has been added within the United States, where the animal has spent most of its life.[5]

10. The Panel found that the COOL measure modified the conditions of competition of Mexican livestock exports in the U.S. market in a number of significant ways. For example, major U.S. meat processors have been imposing a direct COOL-specific discount of 40 to 60 dollars per head on purchases of Mexican-born cattle[6]. Fewer U.S. plants accept Mexican cattle for processing, and those that do limit the days on which they will accept Mexican cattle. Further, some processors require 14 days advance notice if Mexican cattle are to be delivered.[7]

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4 Letter from U.S. Department of Agriculture to Mexico's Secretaría de Agricultura (March 10, 2009), Exhibit MEX-52.

5 Mexico's First Written Submission, paras. 116-144.

6 Panel Report, para. 7.356.

7 Panel Report, paras. 7.373-7.381.

In fact, the Panel concluded that the least expensive manner in which U.S. processors can comply with the COOL measure is to avoid processing foreign-born cattle entirely.[8] Thus, the Panel found that the COOL measure creates an incentive in favour of processing exclusively domestic livestock and a disincentive against handling imported livestock.[9]

11. These adverse impacts on imported cattle derive precisely from the fact that they were simply born outside the United States, because the COOL measure targets foreign born cattle, in favour of cattle born in the United States.

12. Another key fact is that the COOL measure is confusing for consumers. In this regard, the COOL measure has large gaps and is extraordinarily complex in ways that undercut its effectiveness. The COOL measure applies only to muscle cuts of meat, and not to other parts of the cattle, such as the liver and offal. The COOL measure also does not apply to meat in processed foods, or to muscle cuts of meat sold in restaurants or in small retail outlets, such as butcher shops.[10]

13. For meat products, the labels required by the COOL measure have a variety of different and often inconsistent meanings. Meat eligible to be labelled as U.S. origin, known as Category A meat, must be derived from animals exclusively born, raised and slaughtered in the United States. Category B meat is derived from cattle that were either born outside the United States, and raised and slaughtered in the United States; or born outside the United States and partially

[8] Panel Report, para. 7.357.

[9] Panel Report, para. 7.372.

raised in the United States; or born, raised and slaughtered in the United States and commingled with non-U.S. born cattle during processing on the same day. Category C meat is derived from animals that were imported into the United States for immediate slaughter after being fully grown outside the United States. Categories B and C apply to a total of eleven different origin combinations.[11]

14. As the Panel recognized, with this bewildering mixture of definitions, not even a consumer with perfect knowledge of the different categories could be assured that a label precisely reflects the origin of meat as defined under the COOL measure.[12] The inconsistent and limited range of coverage of the COOL measure contributes to the confusion, as does the fact that the origin rules are different from those the United States applies at the border for customs purposes, and even for meat exported from the United States to another country.

III. THE PANEL CORRECTLY FOUND THAT THE COOL MEASURE IS INCONSISTENT WITH ARTICLE 2.1 OF THE *TBT AGREEMENT*

15. The Panel's finding that the COOL measure is inconsistent Article 2.1 of the *TBT Agreement* is consistent with previous findings of the Appellate Body, including in *US – Clove Cigarettes*.

16. Consistent with the Appellate Body's test in *Clove Cigarettes*, the Panel observed that according "treatment no less favourable" means according *conditions of competition* no less

[10] Panel Report, paras. 7.101, 7.104-7.108; Mexico's Second Written Submission ,para. 44.

[11] Panel Report, para. 7.100.

[12] Panel Report, para. 7.702.

favourable to the imported product than to the like domestic product.[13] The Panel correctly concluded that Article 2.1 covers both *de facto* as well as *de jure* discrimination and cited previous disputes in which government measures that create an incentive to use domestic over imported input products were found to be inconsistent with Article III:4.[14]

17. The Panel correctly examined whether the COOL measure modifies the conditions of competition in the market of the regulating Member to the detriment of the group of imported products *vis-à-vis* the group of like domestic products. It found sixteen examples of reduced competitive opportunities for *imported* cattle, none of which relate to like domestic cattle. In this way, the modification of conditions of competition was to the detriment of the *entire* group of imported products and *none of* the like domestic products were similarly affected.[15] The disincentive to use Mexican cattle arises from the fact that the least expensive way for U.S. producers to comply with the COOL measure is to use exclusively domestic cattle whenever possible. As previously discussed, this has resulted in effects such as fewer plants accepting Mexican cattle, and limits on the processing of Mexican cattle to specific days of the week. Further, the COOL measure has caused producers to shift the costs of compliance to Mexican cattle producers by making downward "COOL" adjustments to the prices paid for Mexican cattle.

18. On this basis, the Panel determined that the COOL measure creates an incentive in favour of processing domestic livestock and a disincentive against handling imported livestock.

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13 Panel Report, paras. 7.275-7.727.

14 Panel Report, para. 7.299.

Accordingly, the Panel found that the muscle cut labels under the COOL measure accord *de facto* less favourable treatment to imported than to domestic livestock and *de facto* modify the conditions of competition in the U.S. market to the detriment of imported livestock.[16]

19. Under the Appellate Body's recent decision in *US – Clove Cigarettes*, a panel should carefully scrutinize the design, architecture, revealing structure, operation, and application of the technical regulation at issue, and, in particular, whether that technical regulation is even-handed, in order to determine whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products.[17] It is evident from the Panel's findings that the COOL measure, by imposing costs and other burdens on livestock disproportionately, is *not* even-handed and that the detrimental impact on imports does *not* stem "exclusively from a legitimate regulatory distinction"; rather, it clearly reflects discrimination against the group of imported products.

20. In addition to the points set out in paragraph 58 of Mexico's Appellee Submission, the COOL measure is not even-handed because:

- The trade restrictive effect of the COOL measure is completely disproportionate to the risk and the objective to reduce or eliminate that risk, particularly in light of the fact that the COOL measure does the opposite of its objective. Instead of providing clear and accurate information to consumers, the COOL measure provides information that is "inaccurate and confusing" and "fails to convey meaningful origin information".[18]

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15 Panel Report, paras. 7.373-7.381.

16 Panel Report, paras. 7.398, 7.420.

17 *US – Clove Cigarettes*, para. 95.

18 Panel Report, paras. 7.715 and 7.719.

- The U.S. efforts to reduce costs associated with the COOL measure do nothing to reduce the loss of competitive opportunities to imports caused by the measure. Rather, they reduce costs only for domestic constituencies.
- There is a sound and equitable way to provide clear and accurate information on origin through a trace back regime, but the COOL measure prohibits it.[19]

21. As observed in the EU third participant submission, the Panel's conclusion was that the COOL measure does not seek to even-handedly inform consumers about origin, but, rather to facilitate or incentivize the switching of demand towards U.S. cattle.[20]

22. Mexico notes that if the Appellate Body were to decide that the COOL measure is consistent with Article 2.1, it would be crucial for the Appellate Body to reverse the Panel's decision to exercise judicial economy in not addressing Mexico's claim under Article III and to complete the analysis of that claim.

IV. THE PANEL CORRECTLY FOUND THAT THE COOL MEASURE IS INCONSISTENT WITH ARTICLE 2.2 OF THE *TBT AGREEMENT*

23. The Panel correctly found that the COOL measure is "trade-restrictive" within the meaning of Article 2.2 on the basis of its finding that the COOL measure negatively affects conditions of competition for imported livestock in relation to like domestic livestock. The elimination of competitive opportunities is trade-restrictive.[21]

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[19] Mexico Second Written Submission, para. 28, Exhibit MEX-2.

[20] Third Participant Written Submission by EU, para. 37,

[21] Panel Report, para. 7.570-7.575.

24. The U.S. interprets the test in Article 2.2 to be simply whether a Member could have adopted a less trade restrictive measure that still fulfils its legitimate objective at its chosen level. There are several problems with this interpretation.

25. First, under the U.S. test, the focus is solely on an alternative measure. The Panel correctly disagreed with this interpretation. The obligation that an obstacle to trade created by a technical regulation be "necessary" is independent of the obligation that the technical regulation be the least trade restrictive. Consistent with Appellate Body rulings on the meaning of "necessary", the Panel found that in determining whether a measure makes a contribution to an objective, a contribution exists when there is *a genuine relationship of ends and means* between the objective pursued and the measure at issue.[22] After a complete and coherent assessment of the relevant facts and arguments, the Panel found that merely providing *more* information than under the previous labelling regime falls short of fulfilling the objective.[23] On this basis, the Panel found that the COOL measure did not fulfil the identified objective within the meaning of Article 2.2.[24] Contrary to the argument of the U.S., the text of Article 2.2 does not make it necessary to determine "at what level the United States considers it appropriate to fulfil the objective", such that the lack of fulfillment can be excused.

26. The approach followed by the Panel is essential because it is impossible to assess whether there is a less trade restrictive alternative if the existing measure does not fulfil its purported

[22] Panel Report, para. 7.693.

[23] Panel Report, para. 7.716.

[24] Panel Report, para. 7.719-7.120.

objective. Moreover, it would be impossible to take into "account of the risks non-fulfilment would create" if, in fact, there is not already a genuine relationship between the existing COOL measure and its objective. It follows that a trade-restrictive measure in such circumstances is an "unnecessary obstacle to international trade" that is inconsistent with Article 2.2.

27. Second, the U.S. seeks to improperly import into Article 2.2 language from Article 5.6 of the *SPS Agreement*. The one-step approach developed for claims under Article 5.6 of the *SPS Agreement* is not appropriate in the context of Article 2.2 of the *TBT Agreement*. The *SPS Agreement* and *TBT Agreement* provide different regimes and rules, their application is mutually exclusive, and provisions of one Agreement should not be automatically incorporated into the provisions of the other, as this was not the intention of the Members.

28. The United States concedes that the COOL measure is not fully reliable, but argues that its ineffectiveness can be justified as based on an effort to avoid imposing excessive costs on industry participants. The Panel specifically found, however, that the "balance" that the United States says is reflected in the COOL measure resulted in the imposition of discriminatorily higher costs on the use of imported livestock and adverse effects on competitive conditions in the U.S. market to the detriment of imported livestock. Reducing costs on industry participants by discouraging the use of imported cattle does not provide a justification for a violation of Article 2.2.

29. Article 2.2 of the TBT requires Members to use those technical regulations which have the least degree of trade restrictiveness. Consideration of the degree of trade-restrictiveness necessary to fulfil the legitimate objective should be based on the risks that not fulfilling the

objectives would create. In assessing such risks, relevant elements of consideration include available scientific and technical information, related processing technology or intended end-uses of products. Technical regulations should be proportional to these risks.[25]

30. Importantly, the objective of the COOL measure is not the fulfillment of important values such as human health and the prevention of deceptive practices. The trade-restrictiveness of the COOL measure is disproportionally very high in comparison to the risk of non-fulfillment given its objective and the fact there is already a lack of fulfillment. Therefore, the COOL measure is an unnecessary obstacle to international trade.

31. Mexico observes that in any event, there is undisputed evidence that alternative, less trade restrictive measures would fulfil the objective of the COOL measure. For example, the customs law substantial transformation rule is already incorporated into the COOL measure for application to imported covered products, which are known as Category D, and therefore has already been accepted by the US as fulfilling its objective.[26] There is also evidence in the record that a trace back system would be reasonable and provide more accurate information in an even handed manner.[27]

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25 *TBT Agreement*, Art. 2.2, 2.3; see also TRE/W/16/Rev. 1 (14 Oct. 1993), paras. 8-12.

26 74 Fed. Reg. 2678, Exhibit MEX-7 ("With regard to the origin of imported covered commodities, the Agency follows existing regulations, including those of CBP [Customs and Border Protection], regarding the origin of such products and requires that such origin be retained for retail labeling.").

27 D. Hayes and S. Meyer, "Impact of Mandatory Country of Origin Labeling on U.S. Pork Exports", Exhibit MEX-88.

V. CONCLUSIONS

32. For the above reasons, Mexico respectfully requests that the Appellate Body confirm the Panel's findings and conclusions.

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