

BEFORE THE WORLD TRADE ORGANIZATION

UNITED STATES – CERTAIN COUNTRY OF ORIGIN LABELLING REQUIREMENTS

(DS386)



**EXECUTIVE SUMMARY OF THE CLOSING STATEMENT OF MEXICO
AT THE SECOND MEETING WITH THE PANEL**

Geneva

22 December 2010

1. I would like to follow up on the *amicus curiae* issue and the points raised by Canada. On further reflection Mexico agrees with Canada that letter contains some elements that are different from the exhibit presented by the United States. Mexico agrees with Canada's comments on this point.

2. The COOL measure has the effect of protecting producers not informing consumers. The historic integration between the Mexican and US cattle industries has been destroyed by a system that provides no useful information to US consumers. COOL ignores the fact that the Mexican Cattle and US are alike in every respect, except the place where they were born. The only purpose for this provision is to impose additional cost on Mexican cattle, thus benefiting the US industry.

3. I would like to re-iterate Mexico's request that the Panel rule on all of the claims before it and not exercise judicial economy with respect to any of those claims.

4. In its third party statement today, the European Union suggested that this dispute could be resolved through a ruling on Mexico and Canada's claim under Article 2.2 of the TBT Agreement and that the Panel could judicially economize on the remainder of the claims. This is incorrect.

5. Mexico's discrimination claims are very important to its challenge and it is essential that the Panel rule on both discrimination claims under Article 2.1 and III:4 of the GATT. It is also necessary that the Panel rule on the remainder of the claims because this is the first time a mandatory country of origin labeling measure has been challenged and such rulings will allow for the satisfactory resolution of this dispute.

Mexico's Discrimination Claims

6. Starting with Mexico's discrimination claims, Mexico is requesting that the Panel make findings under both Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994.

7. Mexico has presented evidence establishing a *prima facie* case that the COOL measure modifies the *conditions of competition* in the relevant market to the detriment of imported products in the following ways:

- reduction in processing plants accepting Mexican cattle;
- reduction in the number of days per week Mexican cattle are processed;
- reduction in backgrounders and feedlots that will accept Mexican cattle; and
- additional requirements imposed on Mexican cattle in the form of advanced notification requirements for processing.

8. 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.

9. U.S. "like" cattle have *not* faced a reduction in processing plants, processing days, backgrounders, and feedlots. They have not faced additional requirements such as advanced notification requirements. Finally, they have not faced the COOL discount.

10. The United States' defence is limited to arguing that Mexico is relying on "anecdotal" evidence limited to certain participants and is not reflective of conditions in the market as a whole. These points are completely without merit.

11. The United States' position that Mexico's evidence is "anecdotal" goes to the quality of the evidence. The term is used to refer to evidence that is in the form of an "anecdote" and there is doubt about its veracity. It is also used where evidence is considered untrustworthy.

12. This is plainly *not* the case for the evidence put forward by Mexico to establish the modification of conditions of competition. The evidence put forward by Mexico is "positive evidence" of an affirmative, objective and verifiable character. It is credible evidence. That evidence is in the form of documents and invoices from large U.S. beef processors and affidavits from the Mexican cattle industry. For instance, MEX-42, containing BCI, presents a communication from a major slaughterhouse indicating that

Mexican-born cattle may be processed only in one plant due to COOL segregation. Other exhibits of Mexico showing the reduction of competitive conditions against Mexican-born cattle are MEX-33, MEX-37, MEX-46, MEX-64 and MEX-97. This evidence is corroborated by other evidence in the form of price statistics and industry reports that the United States has failed to rebut.

13. The United States' argument that the evidence is not reflective of conditions in the U.S. market as a whole is equally without merit.

14. In light of this, Mexico has focused its evidence on the top three U.S. beef processors (Tyson, Cargill and JBS) as well as a few others. These processors are market leaders and their actions are reflective of the market as a whole. The U.S. cattle market is a commodity market which inherently will drive actions and prices to similar levels across the market. Canada's evidence on the modification of conditions of competition corroborates the fact that the effects are throughout the U.S. market as a whole.

15. Mexico's evidence on the price discount is reflected in the invoices of specific processors *as well as* in the pricing data for the U.S. cattle market as a whole (Exhibits MEX-37 and MEX-48). For instance, MEX-97, containing BCI, presents recent invoices from July and August 2010 where the price of Mexican-born cattle was subject to a direct reduction in price for a COOL adjustment. Even the evidence on U.S. market prices that was filed by the United States confirms that the discounts on Mexican feeder cattle are market-wide (Exhibit US-108).

16. Thus, contrary to the argument of the United States, Mexico has presented a *prima facie* case that the modification of conditions of competition in the relevant market to the detriment of imported products is occurring across the U.S. cattle market.

17. The United States also argues that there are many factors that influence the trade effects related to Mexican cattle exports and that the cost of the COOL measure to the industry is not significant.

18. Mexico's case focuses on conditions of competition not trade effects. It is not a legal requirement that Mexico prove adverse trade effects in order to succeed in its *de facto* discrimination claims (*AB, Japan – Alcoholic Beverages*, p. 16; AB, *US – FSC*, paragraph 215). It is also not necessary for it to demonstrate the costs of the COOL measure in financial terms. It is sufficient for Mexico to demonstrate that the conditions of competition have been modified. We have clearly done so.

19. The European Union focuses on the costs that are inherent in regulating and the fact that those costs might be felt differently among participants. Mexico acknowledges this fact. However, it is not relevant to Mexico's discrimination claims. Mexico's claims do not focus on the cost associated with the COOL measure. To the extent that costs are relevant, Mexico focuses on the distribution of those costs to Mexican cattle compared to like U.S. cattle. Moreover, Mexico is not arguing about the magnitude of those costs but rather how the conditions of competition are modified by the COOL measure as a result of the disincentives to carry Mexican cattle.

20. The European Union also argues that in a situation such as this, a complainant like Mexico must:

“necessarily have to adduce evidence of other facts (at least two or more) and explain how they work together to support the finding of other facts, of which there is no direct evidence, so as to build a reasoned and adequate explanation between the facts thus established and any finding of inconsistency”. (paragraph 6 of oral statement)

21. Mexico fundamentally disagrees with this characterization of Mexico's case. Mexico has *direct evidence* of the modification of conditions of competition and this is supported by both positive evidence from numerous sources as well as by corroborating evidence. Even if the European Union's characterization of Mexico's case was accurate, Mexico has in any event met the evidentiary standard stated by the European Union, that is Mexico has adduced evidence of at least two or more facts and has explained how they work together to support the finding of other facts.

Mexico's Claims under Article 2.2 of the TBT Agreement

22. The obligations in Article 2.2 are complex. It is therefore important that the Panel apply each of the elements of that Article in a comprehensive manner starting with the determination of the “objective” of the COOL measure.

23. Where the substantive content of an obligation is complex such as it is in the case of Article 2.2, it is helpful to have an established methodology to interpret and apply the provision. Mexico has set out such a methodology in its first written submission as has Canada.

24. The objective of the measure is the starting point for this obligation and it must be carefully defined at the outset.

25. Mexico has explained why the objective of the measure is overwhelmingly protectionist.

26. However, if the Panel concludes that there is a consumer information objective within the measure, Mexico considers that it is important that the Panel examine and define not just the general categorization of the objective (e.g., “the provision of consumer information” or “the provision of consumer information on country of origin”) but examine and define all relevant details. What exact type of consumer information on country of origin? In the case of the COOL measure, the objective is to provide information to consumers concerning whether the cattle that were an input into the beef were born outside the U.S.

27. This objective would be clear from the design and structure of the COOL measure. The only accurate information provided by the COOL measure is whether the beef is from cattle born, raised and slaughtered in the United States.

28. The next question is whether the objective of providing information to consumers concerning whether the cattle that were an input into the beef were born in the U.S. or, by negative implication, they were born in a foreign country, is legitimate.

29. In Mexico’s view, the COOL measure as structured has the sole purpose of distinguishing between domestic and foreign inputs in a protectionist manner. The objective of protectionism can never be found to be legitimate within the meaning of Article 2.2 because it goes against the fundamental purpose of the WTO Agreements—i.e., to avoid protectionism.

30. If there ever was a measure that had an objective that was not legitimate it is the COOL measure. If this measure is found to be legitimate it will rob the “legitimacy” requirement in Article 2.2 of any meaning.

31. If the Panel disagrees with Mexico on this point, it is Mexico’s alternative position that the COOL measure does not fulfill the legitimate objective. The reasons for this are set out in Mexico’s written submissions and answers to questions of the Panel.

32. The United States argues that the gaps in product and sector coverage in the COOL measure are the result of flexibility to take into account the various interests including the interest of Mexico. Mexico disagrees. The flexibility has no value to Mexican cattle. The only value that flexibility had was to U.S. domestic interests. As noted in Mexico’s written submission, that flexibility minimizes the adverse impact of the COOL measure on U.S. domestic interests while maintaining the effect of the measure on the main distribution channel for beef and, therefore, maximizing its adverse effect on imported Mexican cattle.

33. If the Panel finds that the COOL measure fulfills a legitimate objective, Mexico has presented three less trade restrictive alternatives to the COOL measure that would meet the same legitimate objectives taking into account the risks non-fulfillment would create.

34. As explained in response to questions during this meeting, the more precise the information provided in a consumer information measure the fewer options that are available to implement that measure in a manner that is consistent with Article 2.2.

35. If the United States wishes to provide the highest level and quality of consumer information related to origin it may be limited to the third alternative proposed by Mexico, which would be a fairly implemented traceback system. As explained in paragraph 78 of Mexico’s second written submission, such a system is technologically and economically feasible in the United States.

Mexico’s Claims under Article 12 of the TBT Agreement

36. This case presents crucial issues regarding the interpretation of Article 12.3, in particular whether it has any meaning at all.

37. The United States has asserted that it adjusted the COOL measure at the request of Mexico. There is no evidence that the United States took any steps to accommodate Mexico, as opposed to U.S. interests, such as excluding restaurants and small butcher shops. Indeed, as we have shown, the burden of the costs of the measure has been disproportionately shifted to Mexico.

38. It is Mexico's position that it is not sufficient for a Member simply to make a new measure available for comment, as the United States is arguing. That would make Article 12.3 of the TBT meaningless.

39. In any event, the United States did not notify or give any opportunity to Mexico to participate in or comment upon the drafting of the original COOL Measure (i.e., in the drafting of the 2002 Farm Bill). It is this original law that established the requirement to base origin on where the cattle were born. Mexico was given the opportunity to comment only after the enactment into law. This situation cannot amount to compliance with Article 12.3 of the TBT Agreement.