CHECK AGAINST DELIVERY

(COURTESY TRANSLATION)

BEFORE THE WORLD TRADE ORGANIZATION
APPELLATE BODY

UNITED STATES – CERTAIN COUNTRY OF ORIGIN LABELLING REQUIREMENTS

(AB-2014-10 / DS386)

OPENING STATEMENT OF MEXICO

16 February 2015

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 product labeling requirement that has a detrimental impact on imports by creating disincentives for U.S. companies to use imported cattle to produce beef products and corresponding incentives to process domestic U.S. cattle instead. The amended COOL measure is a classic example of a discriminatory measure and an unnecessary obstacle to international trade. In fact, as the 21.5 Panel confirmed that "the amended COOL measure increases the practical necessity for private actors to choose domestic over imported livestock, and has an increased negative effect on the competitive conditions of imported livestock in the US market".

3. The U.S. does not dispute that the amended COOL measure does not eliminate the detrimental impact on Mexican cattle. This is confirmed by the facts as found by the Panel. Over six years after it was first introduced, the amended COOL Measure still adversely affects imports, and has the effect of requiring all imported cattle to be segregated. There is still a "COOL discount" imposed on Mexican cattle by U.S. purchasers. There are still restrictions on the number of U.S. processing plants that will accept Mexican cattle. There are still restrictions on the days on which Mexican cattle can be delivered. All of the other burdens found by the original Panel remain. US livestock producers do not face these additional costs and burdens. The United States did not take any actions to eliminate these adverse effects on Mexico's exports to the United States.

4. The key question in this appeal, therefore, is whether under Article 2.1 of the TBT Agreement the detrimental impact stemmed exclusively from a legitimate regulatory

distinction. The Panel fully analyzed the design, architecture and revealing structure of the measure and concluded that the detrimental impact did not stem exclusively from such a distinction, and, therefore, the measure violated Article 2.1. Since the United States did not invoke, let alone establish, a defence under Article XX of the GATT 1994, the Panel correctly found that the measure violates Article III:4.

5. Mexico emphasizes that its challenge is not aimed at country of origin labeling in general. In the view of Mexico, the COOL measure reflects protectionist interests. This is confirmed by the fact that the measure detrimentally impacts 100 percent of Mexican cattle yet excludes from point-of-production labelling for 75 to 84 percent of all U.S. beef products. As found by the Panel, of total US beef consumption, between 16.3% and 24.5% are muscle cuts carrying Labels A-D, and between 16.6% and 17.8% are ground meat carrying Label E. The remaining share of beef products – between 57.7% and 66.7% – falls into one of the three exemptions. Thus, the primary beneficiaries of the measures are not U.S. consumers but, rather, U.S. cattle producers.

6. As we will discuss, the Panel correctly found that the COOL measure is inconsistent with the national treatment obligations of Article 2.1 of the TBT Agreement and GATT Article III:4. The Panel erred in finding that the amended COOL measure did not violate Article 2.2 of the TBT Agreement. Mexico's appeal of this finding is motivated by a systemic concern and the desire to give meaning to the obligation in Article 2.2. The Panel appropriately established a factual basis for a finding that the amended COOL measure nullifies and impairs benefits accruing to Mexico under the GATT 1994, within the meaning of Article XXIII:1(b) of the GATT 1994, but incorrectly exercised judicial economy and did not make that finding.

II. SCOPE OF APPEAL

7. The scope of this appeal is governed by Article 17.6 of the DSU, which limits this appeal to issues of law covered in the Panel report and the legal interpretations of the Panel. The United States did not raise Article 11 of the DSU in its Notice of Appeal nor in its Appellant Submission. Accordingly, to the extent that the United States is challenging factual findings of the Panel, those challenges are not properly before the Appellate Body.

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

8. I will not go into the details of Mexico's written rebuttal of the United States' arguments. The United States has raised three arguments relating to the increased recordkeeping burden, the inaccuracy of the B and C labels, and the exemption of a large portion of muscle cuts. The first two arguments are addressed in Mexico's appellee submission. I will focus on the third argument.

9. The Appellate Body emphasized that the "lack of correspondence between the recordkeeping and verification requirements, on the one hand, and the limited consumer information conveyed through the retail labelling requirements and exemptions therefrom, on the other hand, [was] of central importance to [its] overall analysis under Article 2.1" (para. 348). Thus, the exemptions were central to the Appellate Body finding that Article 2.1 had been violated.

10. Nothing has changed in the factual or legal circumstances related to the exemptions. The United States admits that it deliberately chose not to change the exemptions, notwithstanding the Appellate Body's clear findings.

11. The failure of the United States to remedy the informational disconnect caused by the exemptions clearly illustrates why the detrimental impact does not stem exclusively

from a legitimate regulatory distinction. The exemptions exclude 58-67 percent of meat products from the labeling requirements. Included in the exemptions are butchers and specialty meat shops. These are the retail outlets where one would expect consumers interested in the origin of their beef to shop. It is impossible to explain such exemptions in relation to the objective of the measure, which is to provide information to U.S. consumers on the origin of beef products. In fact, the exemptions directly undermine that objective.

12. Clearly, the Appellate Body's reasoning and findings with respect to the exemptions continue to apply. The same "disconnect" found by the Appellate Body in relation to the exemptions continues to exist. Accordingly, the exemptions continue to be conclusive proof that the detrimental impact does not stem exclusively from legitimate regulatory distinctions.

13. In addition to responding to the United States' appeal, Mexico has appealed the Panel's exclusion from its analysis of the role of Label E, which applies to ground beef. Label E does not provide point of production information. It also provides a substantial degree of commingling flexibility, allowing the label to include the name of any country from which the beef was produced if that beef was in inventory during the prior 60 days. A correct assessment of the amended COOL measure's even-handedness must include consideration of the ground beef labelling rules as a component of the measure's overall design and architecture. As is the case with the exemptions, Label E provides evidence of the measure's lack of even-handedness, arbitrariness and the discriminatory nature of its detrimental impact.

IV. THE PANEL CORRECTLY FOUND THAT THE AMENDED COOL MEASURE IS INCONSISTENT WITH ARTICLE III:4 OF THE GATT 1994

14. In finding that the amended COOL measure is inconsistent with Article III:4, the Panel interpreted and applied Article III:4 in a manner that is fully consistent with the long established and carefully considered interpretation of that provision. The United States is asking the Appellate Body to depart from this interpretation. There is no legal basis for this argument.

15. There is also no basis for the United States to invoke a defence under Article XX of the GATT 1994. Had the United States wanted to invoke such a defence, it should have done so before the Panel.

V. THE PANEL ERRED IN FINDING THAT THE AMENDED COOL MEASURE IS CONSISTENT WITH ARTICLE 2.2 OF THE TBT AGREEMENT

16. Mexico has appealed the Panel's conclusion that Mexico did not establish a *prima facie* case that the amended COOL measure is more trade restrictive than necessary within the meaning of Article 2.2 of the TBT Agreement. The Panel's conclusion derives from incorrect legal interpretations, which caused the Panel to improperly exclude from its analysis relevant facts.

17. It is clear that the necessity test under Article 2.2 must include a relational analysis – that is, an evaluation of the challenged measure's degree of contribution to the fulfillment of the relevant objective, its trade restrictiveness, and the nature of the risks at issue and the gravity of the consequences that would arise from non-fulfillment of the objective. A key point is the interpretation of the Appellate Body's prior statements regarding the circumstances in which the application of Article 2.2 also requires a comparative analysis – that is, a comparison of the challenged measure with possible alternatives. Specifically, the Appellate Body has identified as examples two instances in which the comparative analysis

would not be required, and stated that in most instances it would be necessary. Mexico's view is that the relational analysis must be given meaning, and that a panel should not automatically rely solely on the results of a comparative analysis in every instance. This is particularly the case where a panel finds that the comparative analysis indicates that there are no less trade-restrictive alternative measures that meet the requirements of the test. To find a measure to be necessary based solely on the results of a comparative analysis creates a significant gap in the necessity test because a comparative analysis assumes that the trade-restrictiveness is itself necessary.

18. The Appellate Body has recognized that the trade-restrictiveness of a measure could be found *not* to be necessary under a relational analysis where the measure makes no contribution to the objective. Given the wide variance in the facts and circumstances surrounding the application and operation of technical regulations, there could be other circumstances in which a relational analysis could indicate that the trade-restrictiveness of a measure is not necessary, such as those in the case at hand. Since it is impossible to foresee all of the facts and circumstances that could arise, it is necessary for the Appellate Body to establish under Article 2.2 a comprehensive necessity test. That necessity test must include a relational analysis. Mexico believes that the logical approach to applying a necessity test under Article 2.2 should start with a relational analysis and, if the trade-restrictiveness of the measure is provisionally determined to be necessary, move on to a comparative analysis. A comparative analysis could be undertaken first and, if it indicates that the trade-restrictiveness is necessary, a relational analysis could then be undertaken. Whatever approach is taken, it is essential that both analyses be undertaken before the trade-restrictiveness of a measure could be found to be necessary.

19. The Panel decided to create a new legal standard to resolve this issue, declaring that Mexico had the burden of showing that there were "exceptional circumstances" that justified

not making a comparative analysis of alternative measures. In Mexico's view, the Panel departed from the Appellate Body's findings and guidance in creating this new legal test. The Appellate Body's findings in the original proceeding do not support a conclusion that a comparative analysis is always required. Article 2.2 requires a determination whether the trade-restrictiveness of the challenged measure itself is "necessary" to fulfil the legitimate objective.

20. Where the weighing and balancing in the relational analysis is sufficient to demonstrate that the measure is more trade restrictive than necessary, taking into account the risks non-fulfilment would create, a comparative analysis may not be required. The Panel's error was that it failed to complete the analysis in this respect and make a finding on whether the trade-restrictiveness of the amended COOL measure is "necessary" to fulfil its objective – that is, whether the amended COOL measure is prepared, adopted or applied with the effect of creating an "unnecessary" obstacle to trade.

21. In addition, to the extent that the Panel reviewed the elements or factors of the relational analysis, it made further errors of both legal and factual natures, which are described in Mexico's Other Appeal submission.

22. In any event, the Panel also erred in its analysis of the alternative measures presented by Mexico. The Panel stated that it could not determine the gravity of the consequences that would arise from not fulfilling the objective of providing consumer information, in the context of evaluating the interplay between less detailed information and more coverage. On that basis, it asserted that it could not complete an analysis of Mexico's first and second proposed alternatives. This was an error. The Panel had a duty to make findings on the risks that non-fulfilment would create, including the gravity of the

consequences that would arise from non-fulfilment, based on the substantial evidence submitted by the parties.

23. Mexico's Article 11 claims all relate to the portion of the report in which the panel evaluated the risks of non-fulfillment and the gravity of consequences of non-fulfillment. In Mexico's view, the Panel strained overly hard to find reasons to reject Mexico's and Canada's evidence of consumers' lack of interest in COOL and unwillingness to pay for the information, while also straining overly hard to find merit in certain of the U.S. evidence. Especially in relation to a measure such as COOL that does not provide any information useful for health, safety, quality or any other benefit, the panel exceeded the bounds of its discretion when it did not make a fully objective assessment of the relevant facts.

24. With regard to the third and fourth alternatives, involving forms of traceback requirements, the Panel imposed a new and unjustifiable burden of proof to "adequately identify" the alternatives. The Panel required Mexico to adduce detailed explanations of exactly how the United States would implement the traceback alternatives, including precise and complete cost estimates, , amounting to "an actual, concrete proposal". Not only was this standard of proof impossible to satisfy, but it effectively relieved the United States of its burden to adduce evidence and arguments in rebuttal, i.e., to demonstrate specific obstacles, costs, or difficulties facing the implementation of each alternative measure proposed by Mexico. It was not sufficient for the United States to merely assert without evidence that the alternative measures were "exceedingly complex" and that Mexico had failed to meet its burden.

25. To the contrary, Mexico met its burden of "adequately identifying" each alternative measure and, moreover, of establishing a *prima facie* case for each traceback alternative.

The United States should have then been required to demonstrate whether the alternatives, as proposed, were not "reasonably available", or were not less trade-restrictive, or could not make an equivalent contribution to the fulfilment of the objective. The Panel's misinterpretation and misapplication of the legal burden in a manner that imposed such a strict standard on Mexico while relieving the United States' burden of rebuttal constitutes a legal error with serious systemic implications for the comparative analysis to be carried out under the second step of the Article 2.2 "necessity test."

26. Contrary to the arguments advanced by the United States, the evidentiary burden required to "adequately identify" an alternative measure is not a function of the alleged complexity of the measure that is proposed. In Mexico's view, the objective of adequately identifying an alternative measure is not to establish a precise explanation of exactly how the measure will be implemented in the responding Member's territory or to set out a detailed and complete cost estimate respecting such implementation. Rather, the complainant's description needs to be sufficiently detailed to permit the responding Member to respond with evidence and arguments on each point and to allow the Panel to assess whether the alternative is less trade-restrictive, capable of making an equivalent contribution, and is reasonably available.

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