** CHECK AGAINST DELIVERY*

BEFORE THE WORLD TRADE ORGANIZATION

UNITED STATES – CERTAIN COUNTRY OF ORIGIN LABELLING REQUIREMENTS

WT / DS386

ARBITRATION UNDER ARTICLE 21.3(C) OF THE DSU

OPENING STATEMENT OF MEXICO

1 November 2012

I. INTRODUCTION

1. It is our privilege to appear before you to present the views of Mexico on the reasonable period of time ("RPT") for the United States to bring its COOL measure into compliance.

2. In Mexico's view the 18 months the United States has proposed as the RPT in this case is not "reasonable". Instead an RPT of no more than 8 months should be awarded in this case.

3. I would like to emphasize the importance of the determination of the RPT to Mexico. The conditions of competition of Mexican cattle exports are continuingly affected by the COOL measure. Mexico has faced these discriminatory burdens, particularly since the issuance of the Interim Final Rule in 1 August 2008. The COOL measure has thus affected Mexican exports of cattle for more than 4 years. The United States should not maintain a measure that has been found to be inconsistent with the TBT Agreement any longer than absolutely necessary.

4. There are key factual findings that are relevant to recall for this arbitration. The COOL measure had the effect – one desired by certain parts of the U.S. cattle industry – of creating special administrative burdens on the use of Mexican cattle by the U.S. processing industry. It was established during the panel and Appellate Body proceedings that because of the COOL Measure, Mexican cattle are burdened by a number of discriminatory effects. For example, (i) suppliers of Mexican cattle are being required to accept a "COOL discount" in the form of lower prices, (ii) U.S. processors limited the number of plants that accept Mexican cattle, (iii) for those plants that accept Mexican cattle, Mexican cattle is exclusively received on certain days, (iv) and special advance notice of 14 days must be given before Mexican cattle are delivered to the

plant.[1] Mexico is requesting that the Arbitrator give consideration to these severe and continuing effects in reviewing the proposed RPT and in particular should give "[p]articular attention" to "matters affecting the interests" of Mexico as a developing country Member, in accordance with DSU Article 21.2.

5. Mexico observes that the United States has requested an unusually long RPT of 18 months. The United States has not identified any genuine complexity, or indeed any special circumstances, that could justify an RPT of that extreme length. Indeed, the United States has not even identified which kind of implementing measure it plans to adopt to comply with the recommendation and rulings in this dispute. In light of all the relevant circumstances, the United States has not met its burden of proof and the RPT should be much shorter than requested.

6. The *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") Article 21.1 provides that "[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members." As stated in the *Canada – Pharmaceutical Patents* arbitration, "immediate compliance is clearly the preferred option under Article 21.3"[2].

7. If immediate compliance is genuinely impracticable, the RPT should be the "shortest period of time possible within the legal system" of the implementing Member.[3] The

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1 See *US – COOL (Panel Report),* paras. 7.356-7.357, 7.360-7.361, and 7.372-7.381; *US – COOL (AB)*, paras. 263, 264, 289, 292, 319, and 348.

2 *Canada – Pharmaceutical Patents (Article 21.3(c))*, para. 47.

3 *Brazil – Retreaded Tyres (Article 21.3(c))*, para. 51; *EC – Export Subsidies on Sugar (Article 21.3(c))*, para. 61).

implementing Member "must utilize all the flexibility and discretion available within its legal and administrative system in order to implement within the shortest period of time possible."[4] The implementing Member bears the burden of showing that its proposed timeline is the shortest period possible.[5]

II. THE UNITED STATES HAS NOT IDENTIFIED ANY POTENTIAL MEASURE IT MAY TAKE TO BRING ITSELF INTO COMPLIANCE

8. In Mexico's view, the U.S. arguments regarding the RPT should be viewed in the overall context of the current circumstances. In particular, it is now over three months since the Dispute Settlement Body ("DSB") adopted the final reports of the Appellate Body and the Panel. Yet the United States has not proposed any new regulation or legislation, or indicated a timetable for doing so. In the absence of any concrete proposal, the U.S. arguments regarding the time required for implementation are all based on abstract theory.

9. Unfortunately, there is no evidence that the United States has taken even an initial step towards finding a solution to the inconsistency of the COOL Measure with the TBT Agreement. That of course does not provide an excuse to extend the RPT. To the contrary, the lack of action by the United States is a factor that supports establishing an RPT much shorter than the one requested by the implementing Member.[6]

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4 *EC – Export Subsidies on Sugar (Article 21.3(c))*, para. 61 (emphasis added). See also *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, para. 42; *EC – Hormones (Article 21.3(c)),* para. 26.

5 *US – 1916 Act (EC) (Article 21.3(c))*, para. 33.

6 *Chile—Price Band System (Article 21.3(c))*, para. 43; *US-Section 110(5) Copyright Act (Article 21.3(c))*, para. 46.

III. THE TBT AGREEMENT DOES NOT REQUIRE THAT THE UNITED STATES BE GIVEN AN ADDITIONAL SIX MONTHS FOR IMPLEMENTATION

10. In its written submission, the United States proposed that it be given an extra six months beyond the time it would require to adopt new regulations in order to satisfy what it claims are obligations under TBT Article 2.12. In support of this claim, the United States cites the Appellate Body's ruling in *US – Clove Cigarettes* that the United States acted inconsistently with TBT Article 2.12 by not allowing at least six months for foreign exporters to adjust to a new technical regulation.[7] Mexico finds the U.S. argument very disturbing, both with respect to this dispute and for systemic reasons.

11. TBT Article 2.12 is intended to protect producers in exporting Members, and particularly in developing country Members such as Mexico, from adverse impacts that may potentially be caused by new technical regulations. To interpret Article 2.12 as the United States requests would have the effect of prolonging a measure already found to be inconsistent with the TBT Agreement. That would be directly contrary to the purpose of Article 2.12.

12. Mexico is troubled by the implication of the U.S. argument that it intends to replace the COOL Measure with a measure that creates equally complex, burdensome and discriminatory restrictions that will perpetuate the disincentives for U.S. producers to purchase Mexican cattle. In that case, of course, delaying implementation for an additional six months would not eliminate the inconsistency of the measure with TBT Article 2.1 in any event.

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[7] U.S. Submission, paras. 26-28.

13. In its written submission, Mexico highlighted that the RPT must be determined based on the shortest period of time possible within the U.S. legal system.[8] Mexico noted that WTO obligations are not part of the U.S. legal system, and in fact that U.S. law expressly provides that WTO obligations are not self-executing under U.S. domestic law.[9] Because TBT Article 2.12 is not part of the U.S. legal system, it is not relevant to the determination of the RPT.

IV. EIGHT MONTHS IS MORE THAN SUFFICIENT FOR THE UNITED STATES TO IMPLEMENT A REVISED MEASURE

A. U.S. Proposal to Issue New Regulations

14. The United States stated that it needs 12 months to issue new regulations. That is an exaggeration for several reasons.

15. First, the United States requests five months for a "preparatory phase".[10] The United States has provided no justification for its unusual request. If the United States has not yet started any preparations, that of course cannot be an excuse for extending the RPT. Mexico's suggestion of three months for the preparatory phase is very generous. The initial implementing regulations for the COOL measure itself were published as an "interim final rule" just over two months after the 2008 Farm Bill became law. Thus, the preparatory phase for the initial COOL regulations was only two months.

16. The United States goes on to describe a long list of statutory requirements for regulations. However, those requirements are routine and there are many examples of regulations that have

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8 Mexico's Submission, para. 61.

9 Mexico's Submission, para. 61.

been issued and implemented very quickly – including the interim final regulations for the COOL measure itself. Because the United States has not proposed any new regulation, it cannot identify any specific impediment that would prevent the regulation from being implemented on the schedule described by Mexico in its written submission.[11]

17. Mexico reiterates that a total maximum RPT for regulations of eight months or shorter would be sufficient to allow for public comments, review by the Office of Management and Budget, and the fulfilment of the other relevant U.S. legal requirements.

B. Potential Legislation

18. Although the United States stated that it was not requesting extra time in the RPT for legislation, it provided comments on how long it would take to enact legislation amending the COOL Measure. Mexico again observes that in the absence of a concrete U.S. proposal for implementation, any discussion remains purely theoretical. More specifically, the United States has not provided any evidence that legislation is drafted, or that the Executive Branch has engaged in any discussion with Congress on the schedule for the introduction of potential new legislation. In fact, the time needed to amend the COOL statute could be relatively short, and even shorter than the time needed to issue regulations.

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[10] U.S. Submission, para. 16.

[11] Mexico's submission, para. 47.

19. The United States seeks to make the legislative process seem highly complicated and drawn out.[12] However, in *US — 1916 Act*, the arbitrator characterized the U.S. legislative process as extremely flexible.[13]

20. Mexico gave several examples of substantive U.S. statutes that were enacted from between five and one half months to three days.[14] Mexico also explained that the U.S. legislation known as the Farm Bill is currently pending before the U.S. Congress. The COOL Measure was contained in the 2008 version of that legislation, and therefore it is an appropriate legislative vehicle for amending the COOL measure. Because a number of unrelated, important U.S. agricultural programs have expired, it is crucial for the U.S. Congress to pass the legislation as quickly as possible.

21. Mexico also explained that the Congress has broad flexibility in determining how to implement changes to the COOL Measure. For example, it could repeal the measure entirely or change the labeling requirements of the COOL measure to be consistent with the rule of origin that is used for customs law purposes. It could provide sufficient detail in the statute so that it would be unnecessary to issue regulations to implement the new statute. The legislation could be made effective immediately, or require the U.S. Department of Agriculture to issue regulations

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12 U.S. Submission, paras. 40-48.

13 "[T]he United States' legislative process, while complex, is characterized by a considerable degree of flexibility. That this flexibility is exercised to achieve the prompt passage of legislation when this is considered necessary and appropriate is revealed by the fact that bills have been passed by the United States Congress within short periods of time, using its "normal" legislative process". *US — 1916 Act (EC) (Article 21.3)*, para. 39.

14 Mexico's Submission, para. 57.

by a short deadline. Any regulations that were inconsistent with the amended statute would cease to be enforceable.[15]

22. Under the current circumstances, therefore, the COOL Measure could be amended by the U.S. Congress, with immediate effect, by the end of December when the current session of the Congress ends. That would be within five months of the adoption of the report.

23. Whether the COOL Measure is amended through the vehicle of the Farm Bill or other legislation, plainly the RPT of no greater than eight months proposed by Mexico is completely reasonable and appropriate.

V. PURSUANT TO ARTICLE 21.2, MEXICO'S PARTICULAR CIRCUMSTANCES AS A DEVELOPING COUNTRY SHOULD BE CONSIDERED

24. Mexico as a developing country is requesting that the arbitrator give particular attention to how the RPT will affect its interests in terms of DSU Article 21.2. As we described in our submission, the COOL measure has a direct nexus to the interests of Mexico and directly affects the interests of Mexico. Mexican cattle producers are being economically harmed during every single day in which the United States delays in bringing the COOL measure into compliance with its WTO obligations.

VI. CONCLUSIONS

25. For the above reasons, Mexico respectfully requests that the Arbitrator set the RPT maximum than eight months. This concludes our opening statement. We would be pleased to respond to any questions you may have.

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[15] See Mexico's Submission, para. 55.