UNITED STATES – CERTAIN COUNTRY OF ORIGIN LABELLING REQUIREMENTS

RECOURSE TO ARTICLE 21.5 OF THE DSU BY MEXICO

(WT/DS386/RW)

Comments by Mexico on the
United States' Comments on the Interim Report

15 July 2014

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I. GENERAL COMMENTS

1. The purpose of the interim review stage is to make necessary corrections or clarifications where the Panel has misunderstood or misrepresented facts or arguments.[1] It is recognized that a Panel maintains discretion to decide which evidence it chooses to utilize in making findings[2], and Panels are not required to accord to factual evidence of the parties the same meaning and weight as do the parties.[3]

2. Moreover, the comments to the interim report are not the stage for the complainant to seek a finding related to the general exceptions of the GATT 1994, particularly considering that this defense was not raised by the United States during the Article 21.5 proceeding. It is inappropriate for the United States to raise new arguments in the interim review related to Article XX of GATT 1994. The United States acknowledges that it is making a new argument, but justifies its action by arguing that the current circumstances are extraordinary. Mexico does not agree. There is no change in the circumstances that can support the US to ask the panel to address Article XX in its report. The *EC – Seals* finding was not unforeseeable reasoning of the Appellate Body considering previous disputes related to the TBT Agreement, including the decision of the panel in *EC – Seals* itself.

3. Many of the changes proposed by the United States appear to be efforts to change the substantive findings of the Panel, to enter into debate with the Panel, or to have the Panel place special emphasis on U.S. arguments. Moreover, many of the U.S. comments are more in the nature of requests for reconsideration which are not appropriate for this phase of the proceedings. For such proposals of the United States, the Panel should reject the requests for changes to the Interim Report.

4. The following are Mexico's specific comments on the U.S. comments on the Interim Report.[4]

II. PARAGRAPH 7.124

5. In its second comment on paragraph 7.124 (in paragraph 9 of the U.S. submission), the United States mischaracterizes the language of an exhibit and improperly seeks to change the Panel's factual findings. The U.S. criticism focuses on an exhibit containing comments of the American Meat Institute (AMI) on the proposed rule (Exhibit CDA-23), which stated that there were at least fifteen large cattle slaughter facilities and at last six hog slaughter facilities that processed mixed origin livestock.

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[1] Panel Report, *EC – Asbestos*, footnote 3 to Section VII; Report, Panel Report, *Guatemala – Cement*, para. 6.2.

[2] Appellate Body Report, *US – Carbon Steel*, para. 142 (quoting Appellate Body Report, *EC – Hormones*, para. 135).

[3] Appellate Body Report, *Australia – Salmon*, para. 267.

[4] The absence of comments by Mexico on any proposed changes to the Interim Report made by the United States should not be interpreted as indicating Mexico's agreement with such changes.

6. Specifically, according to the United States, "[t]hese slaughterhouses could have processed B or C category animals without commingling."[5] The United States then proposes that the reference in the Interim Report to the evidence of the AMI letter be moved from the text to a footnote and that it be qualified with a new sentence that questions the relevance of the letter.

7. Mexico observes that the United States seems to have assumed that the term "mixed origin," as used in AMI's letter, refers to animals born in Mexico or Canada and slaughtered in the United States, which under the original COOL measure were included within the scope of Label B. But in the context of the AMI letter, it is clear that the term "mixed origin" refers to animals born in different countries and processed in the United States. The AMI letter discusses the economic costs associated with the requirement of the amended COOL Measure that livestock born in different countries be strictly segregated. The Panel's conclusion that the AMI letter is evidence that commingling was taking place is entirely justified, and the edits proposed by the United States are unnecessary and inappropriate.

III. PARAGRAPH 7.125

8. Mexico observes that the United States has not explained why its proposed new second sentence (beginning with "The USDA came to these estimates …") is necessary or appropriate.[6] The Interim Report already provides a citation to the paragraph of the United States' first written submission where the U.S. argument is set out in detail. The United States in particular does not explain why the Panel should adopt its highlighting of the word "all" as those that were a word that the Panel should emphasize.

IV. PARAGRAPH 7.135

9. In paragraph 11 of its submission, the United States seeks to have the Panel add a sentence to paragraph 7.135 that accepts the U.S. argument that the 2013 Final Rule will not have a "material impact" on "large beef processors as Tysons [sic] Food."[7]

10. Mexico notes that the argument to which the United States cites from its second written submission (paragraph 48) relies on evidence relating only to Tyson Foods and no other beef processor, and is an extrapolation based on the fact that Tyson Food's annual report filed with the U.S. Securities and Exchange Commission for its fiscal year ended September 28, 2013 – prior to the first date of enforcement of the 2013 Final Rule on November 24, after the end of the six-month period for "education" – does not mention the 2013 Final Rule. Mexico observes as follows:

- A regulation that was not enforced during the relevant fiscal year to which the annual report applies would not normally be considered a material development for that year.

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[5] United States' request for review of precise aspects of the interim report, para. 9.

[6] United States' request for review of precise aspects of the interim report, para. 10.

[7] United States' request for review of precise aspects of the interim report, para. 11.

- The Panel has separately cited the evidence that the costs of amended COOL measure are being passed "upstream" to cattle producers and that there is an increased "COOL discount" for Mexican cattle.[8]
- Whether or not Tyson Foods is profitable bears no relation to the issue discussed in paragraph 7.135, which is whether the amended COOL measure involves increased segregation.

For these reasons, the Panel was correct not to mention Tyson Foods' annual report in this paragraph, and there is no reason to add it now.

V. PARAGRAPHS 7.146-7.149

11. In paragraph 13 of its submission, the United States seeks to appeal the Panel's factual finding on the additional recordkeeping burdens imposed by the amended COOL measure. The United States claims not to see the "logic" that adding information to a "bill of lading" results in an increase in a recordkeeping "burden," and asserts that the Panel cited no evidence for its conclusion in paragraph 7.149. But the Interim Report does not state that the finding is based exclusively on information requirements for bills of lading; the Panel cites to information from USDA itself that states that additional information must be added to "a firm's bills of lading, invoices and other records associated with movement of covered commodities from purchase to sale."[9] Moreover, the Interim Report cites substantial evidence in footnote 344 for the conclusion set out in paragraph 7.149, including Exhibits CDA-22, CDA-25, CDA-28, CDA-29, CDA-30, CDA-32, CDA-33, CDA-34, CDA-35, CDA-36, CDA-37, MEX-21, MEX-25, and MEX-26.

12. Accordingly, the United States' request to modify paragraphs 7.146 through 7.149 should be rejected.

VI. PARAGRAPH 7.148

13. In paragraph 14 of its submission, the United States proposes to expand a quotation in a manner that would make the paragraph as a whole confusing. Mexico believes that the United States' concern about indicating that there are other "major cost drivers" can be addressed by adding "inter alia" between the word "including" and the quotation that begins "when livestock …".

VII. PARAGRAPH 7.149

14. Paragraph 7.149 summarizes the Panel's findings on the increase in the burdensomeness of recordkeeping requirements imposed by the amended COOL measure. In paragraph 16 of its submission, the United States seeks to alter the Panel's findings by incorporating its own arguments into the Panel's conclusions. This is improper for comments on the Interim Report.

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[8] Interim Report, paras. 7.162, 7.170.

[9] Interim Report, footnote 338.

15. The United States' argument that the recordkeeping requirements are unchanged is already reflected in paragraph 7.138 ("The United States counters that the 2013 Final Rule makes no changes to the recordkeeping provisions contained in the original COOL measure ….") . The Panel reasonably could decide to add the citations to the United States' first and second written submissions the United States proposes for a new footnote 345 into existing footnote 313, which supports the above-referenced description of the U.S. argument in paragraph 7.138.

VIII. PARAGRAPH 7.162

16. In paragraph 17 of its submission, the United States again proposes to alter findings of the Panel, requesting the incorporation of language that would denigrate the reliability of evidence to which the Panel has cited. Mexico notes that the phrase "but do not substantiate with specific evidence" could be applied to virtually all of the evidence submitted by the United States in these proceedings.

17. It is axiomatic that it is within the discretion of the panel to decide which evidence it chooses to utilize in making findings, and that panels are not required to accord to factual evidence of the parties the same meaning and weight as do the parties.[10] It is inappropriate for the United States to seek to substitute its own views of the evidence for that of the Panel, as it is has done with its proposed edits to paragraph 7.162. The Panel should reject those edits.

IX. PARAGRAPH 7.229

18. In paragraph 19 of its submission, the United States proposes to add a new sentence that inaccurately describes its own argument regarding Label D. The United States gave several reasons for not requiring born, raised and slaughtered information on Label D: (i) it would be inconsistent with "long-standing customs rules"; (ii) requiring multiple and overlapping labels would cause confusion among retailer as to what recordkeeping they need to maintain; (iii) it would be difficult for AMS to verify compliance; and (iv) "it would not appear" that the more detailed label "would add much, if any, additional information."[11] The United States now requests that the Panel incorporate only the fourth reason as a finding by the Panel and uses the word "explained" to imply that the Panel accepted the U.S. argument.

19. Mexico observes that the United States did not "substantiate with specific evidence" its claim that imported meat is always produced from cattle grown and raised in the country of slaughter. More importantly, the United States never explained why it is crucial to provide the information in Label A ("born, raised and slaughtered in the United States") to consumers but it is not crucial to provide the same information for Label D ("product of Mexico" instead of "born, raised and slaughtered in Mexico").

20. The key point, however, is that the statement in paragraph 7.229 that "Label D remains unchanged in this respect and therefore continues to allow omission of such information on

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[10] See, e.g., Appellate Body Report, *Brazil – Retreaded Tyres*, para. 168.

[11] United States' first written submission, paras. 83-86.

specific production steps" is fully accurate and there is no need to qualify the statement. Accordingly, the United States' request to modify paragraph 7.229 should be rejected.

X. PARAGRAPH 7.240

21. In paragraph 20 of its submission, the United States' proposes to insert a new sentence citing its argument in the middle of the paragraph, which would have the result of making the following sentence incoherent. The content of the U.S. sentence is also inappropriate, as the United States appears to be seeking to have the Panel adopt the U.S. argument as its own through the use of words such as "on multiple occasions" and "explained".[12] If a sentence with the U.S. argument were to be included, it should be modified to state that the United States "asserts" that the situation is unlikely.

XI. PARAGRAPH 7.347

22. In paragraph 21 of its submission, the United States seeks to manipulate the Panel's factual findings. The U.S. proposal to delete the word "only" in the first sentence of the paragraph is unsupported and should be rejected.

23. Similarly, the United States offers no justification for its request that the Panel find that the amended COOL measure makes some contribution to the providing consumer information on origin for products that are not required to have any origin information at all. The U.S. proposal to substitute "directly" for "at all" and to replace "zero" with "unknown" should be rejected.

XII. PARAGRAPH 7.489

24. In paragraph 22 of its submission, the United States, remarkably, requests that the Panel delete an entire paragraph in which it discussed the potential benefits to simplifying the information on labels – even though the Panel decided it could draw no conclusions on that issue. The Panel's comments on this subject are supported by, *inter alia*, the evidence of inconsistent and difficult-to-understand labels submitted by Mexico in Exhibits MEX-15-A, 15-B, 15-C, 48, 49, 50, 51, 52 and 53.

XIII. SECTION 7.7

25. In paragraphs 23-29 of its submission, the United States comments on the Panel's reliance on the Appellate Body report in *EC – Seal Products*. It comments that "the Panels' analysis in the interim report would suggest that one would expect there to be a COOL measure that causes a detrimental impact on imports yet is consistent with Article 2.1 of the TBT Agreement… According to the Appellate Body's approach [in *EC – Seal Products*], then, there must be an Article XX exception that would be available for COOL" (emphasis added).[13] The United States requests that the Panel "address this aspect of the Article III:4/Article 2.1

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[12] There are a number of arguments that Mexico made "on multiple occasions," but Mexico has not requested the use of that phrase in the report.

[13] United States' request for review of precise aspects of the interim report, paras. 25-26.

relationship and address the availability of Article XX as an exception for Article III:4 with respect to COOL".[14]

26. It is inappropriate for the United States to raise new arguments in the interim review.[15] The United States acknowledges that it is making a new argument, but justifies its action by arguing that the current circumstances are extraordinary.[16] Mexico disagrees with the United States' interpretation of the Appellate Body's report. Moreover, contrary to the United States' allegation, the Appellate Body's interpretation of Article III:4 was not extraordinary. Rather, the Appellate Body's interpretation was entirely predictable and could have been addressed by the United States in the original proceeding by presenting alternative arguments. Irrespective of these points, the United States' request is conditioned on the existence of a measure that is consistent with Article 2.1 and inconsistent with Article III:4. This condition precedent is not met in the present case because the Panel found that the Amended COOL Measure is inconsistent with both Article 2.1 and Article III:4. Thus, the United States' request is based on a hypothetical set of circumstances that does not exist in this dispute. Accordingly, it is not necessary for the Panel to consider the United States' new arguments.[17]

27. Finally, to the extent that the United States is trying to invoke a defense under Article XX of the GATT 1994 in respect of the Panel's finding that the amended COOL measure is

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[14] *Ibid*.

[15] See e.g., Panel Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 7.26 ("The purpose of the interim review stage is not to allow a party to raise new arguments or develop arguments which were at most merely alluded to during the course of the proceeding"); Panel Report, *Japan – Apples (Article 21.5 – US)*, paras. 7.23-7.24 ("We believe that the interim review is not the appropriate stage for rearguing the case on new grounds. … For these reasons, we are of the view that we should not address Japan's comments which do not relate to specific paragraphs of our findings, since Japan failed to comply with the requirements of Article 15.2 of the DSU in this respect"); Panel Report, *US – 1916 Act (EC)*, para. 5.18 ("The fact that the interim review takes place at the very end of those proceedings, once all submissions have been made, hearings have taken place and a draft report has been issued to the parties is evidence that this stage of the proceedings is not meant to address issues which could have been better addressed in the written and oral proceedings conducted by the Panel") and footnote 279 ("The limited function of the interim review stage is confirmed by the existence of an appeal procedure, where parties may address issues of law covered in the panel report and challenge legal interpretations developed by the panel (Article 17.6 of the DSU)"); and Panel Report, *US – Poultry (China)*, para. 6.32 ("The United States' other argumentation in support of its position on judicial economy seems to repeat or expand its prior submissions to this Panel on its views of the substantive interpretation of the provisions of the SPS Agreement and the GATT 1994. We note that the interim review is not the appropriate forum for relitigating arguments already put before a panel and that the Panel has already addressed the United States' arguments where appropriate in its findings. We will therefore briefly address the United States' arguments and will thus refrain from engaging in a new analysis of the United States' substantive arguments on these provisions").

[16] United States' request for review of precise aspects of the interim report, para. 27.

[17] The United States is incorrect in asserting in footnote 5 of its submission that findings made under Articles 2.1 and 2.2 of the TBT Agreement automatically can be applied under Article XX of the GATT 1994. Specifically, the Panel did not find that there is "no alternative measure" within the meaning of Article XX. Further, in paragraph 7.615 of the Interim Report, the Panel stated: "[w]e do not wish to exclude that some variation of the alternatives suggested by the complainants might provide a WTO-consistent solution for pursuing the legitimate objective of providing consumer information on origin". Contrary to the assertion of the United States, it would not be "even-handed" to reopen the proceedings to allow the United States to make new legal arguments.

inconsistent with Article III:4, the burden was on the United States during the proceedings to present a *prima facie* case that the Amended COOL Measure falls within the general exceptions in Article XX. However, the United States chose not to invoke Article XX in this dispute, or to make any arguments whatsoever in this regard, and it would be inappropriate for the Panel to invoke this defense on the United States' behalf.