

UNITED STATES – CERTAIN COUNTRY OF ORIGIN LABELLING REQUIREMENTS

(AB-2012-3/DS386)



Executive Summary

Other Appellant Submission of Mexico

28 March 2012

EXECUTIVE SUMMARY

I. INTRODUCTION

1. This dispute concerns a mandatory country of origin labelling measure (hereinafter the “COOL measure”) that is applied in a manner and in circumstances such that it unjustifiably discriminates against and restricts imports of Mexican cattle into the United States.

2. Historically, Mexico has been an important supplier of cattle to the United States and one of the largest importers of U.S. beef. This is a reflection of the integrated nature of the cattle and beef markets in the two countries.

3. The COOL measure has disrupted this integrated market and has modified the conditions of competition to the disadvantage of Mexican cattle compared to like U.S. cattle. It has also reduced the export opportunities available to, increased the handling cost of, and reduced the price of Mexican cattle. The adverse effect of the COOL measure on the Mexican cattle industry has been substantial.

4. This dispute concerns a particularly egregious type of country of origin labelling measure as it applies to specific facts and circumstances. It does not concern country of origin labelling in general nor does it concern all aspects and applications of the challenged COOL measure.

5. By virtue of its design, architecture and structure, the mandatory country of origin labelling regime implemented in the COOL measure is discriminatory, creates an unnecessary obstacle to trade, constitutes arbitrary and unjustifiable discrimination between countries where the same conditions prevail, and amounts to a disguised restriction on international trade. The Panel correctly found that the COOL measure violates Articles 2.1 and 2.2 of the TBT Agreement.

II. CONDITIONAL APPEALS CONCERNING ARTICLE 2.2 OF THE TBT AGREEMENT

A. The Objective of the COOL Measure Is Not “Legitimate”

6. Should the Appellate Body overturn the Panel’s finding that the COOL measure is inconsistent with Article 2.2, Mexico appeals the Panel’s finding that the objective of the COOL measure is to “provide as much clear and accurate information as possible to consumers”¹ and that “providing consumer information on origin is a legitimate objective within the meaning of Article 2.2”.²

¹ Panel Report, para. 7.620.

² Panel Report, para. 7.651.

7. The Panel's approach to identifying the objective of the COOL measure is legally erroneous. The Panel failed to take into account the design, architecture and structure, as well as the legislative history and surrounding circumstances of the COOL measure in order to confirm its objective as characterized by the United States. This approach could undermine the effectiveness of the disciplines in Article 2.2 and open them to circumvention. Additionally, the Panel did not understand Mexico's position on the interpretation and application of the first and second sentences of Article 2.2. These legal errors led to the exclusion of relevant facts presented by Mexico regarding the protectionist nature of the COOL measure. As a consequence, the Panel's approach is also factually erroneous. The Panel therefore failed to make an objective assessment of the matter before it and acted inconsistently with Article 11 of the DSU.

8. In Mexico's view, instead of accepting the U.S. characterization of its objective, the Panel should have verified the objective and ensured that it was congruent with the design, structure and architecture of the COOL measure as well as its legislative history and surrounding circumstances. This approach is supported by the Panel Reports in *US – Tuna Dolphin II* and *US – Clove Cigarettes*.

9. Had the Panel taken into account the relevant evidence, it would have been able to identify the genuine objective of the COOL measure. The legislative history of the measure confirms that its objective is to regain for domestic cattle producers the market share that was captured by Mexican cattle producers by removing foreign cattle from the market. The design, structure and architecture of the COOL measure further confirm its protectionist intent.

10. Mexico respectfully requests that the Appellate Body find that the Panel's interpretation of Article 2.2 and its consequent refusal to consider relevant evidence was in error and overturn that finding.

11. Mexico further requests that the Appellate Body complete the analysis by considering the relevant evidence and concluding that the real policy objective was not consumer information, but to the protection of the U.S. domestic cattle industry.

12. If the Panel accepts Mexico's conditional appeal on the definition of the objective of the measure, and concludes that the objective of the COOL Measure is trade protectionism, it comes automatically that trade protectionism can never be a legitimate objective.

B. An Alternative Measure Exists that is Less Trade Restrictive and that Fulfills the Legitimate Objective Taking into Account the Risks Non-fulfilment Would Create

13. Should the Appellate Body overturn the Panel's finding that the COOL measure is inconsistent with Article 2.2 and confirm the Panel's finding that the objective of the COOL measure is legitimate, Mexico appeals the Panel's decision to exercise judicial economy in respect of the existence of an alternative measure that is less trade restrictive and that fulfils the legitimate objective, taking into account the risks non-fulfilment would create. It further requests that the Appellate Body complete the analysis of this claim and find that the COOL measure is inconsistent with Article 2.2.

14. In Mexico's view, the COOL measure is still inconsistent with Article 2.2 even if the Panel's findings under this provision are overturned, because it is more trade-restrictive than necessary and there are alternative measures that are less trade restrictive and which fulfil the legitimate objective, taking into account the risks non-fulfilment would create.

15. In Mexico's view, measures that are "trade restrictive" include those that impose any form of limitation on imports, discriminate against imports or deny competitive opportunities to imports. The Panel agreed with this interpretation. The COOL measure is highly trade restrictive, as evidenced by its adverse effect on imports of Mexican feeder cattle.

16. Further, the USDA has found that the value of the information provided under the COOL measure and its contribution to the needs of a U.S. consumer is minimal and restricted to a limited sub-set of U.S. consumers. The importance of the objective of providing consumer information is therefore low. Likewise, the possibility of adverse consequences arising should the objective not be carried out is low and, to the extent that those consequences arise, they will be restricted to a limited sub-set of U.S. consumers.

17. Finally, there are other alternative measures that are reasonably available which would provide the equivalent contribution to the objective, including: (i) a voluntary country of origin labelling requirement; (ii) modification of the labeling criteria to conform to the pre-existing criteria, namely the substantial transformation test, and (iii) a trace back regime, under which retailers would be required to be able to trace a meat product back to the specific animal from which it was made, regardless of its origin.

III. CONDITIONAL APPEAL CONCERNING ARTICLE III:4 OF THE GATT 1994

18. Should the Appellate Body overturn the Panel's finding that the COOL measure is inconsistent with Article 2.1, Mexico appeals the Panel's decision to exercise judicial economy in respect of Mexico's claim under Article III:4 of the GATT 1994 and requests that the Appellate Body complete the analysis of this claim and find that the COOL measure is inconsistent with Article III:4.

19. Article III of the GATT 1994 establishes that WTO Members must accord to imported products treatment no less favourable than that accorded to products of national origin. Article III:4 is informed by the general principle in Article III:1 to ensure that internal measures not be applied to imported and domestic products so as to afford protection to domestic production. As the COOL measure has both the purpose and effect of affording protection to U.S. cattle producers, it is fundamentally incompatible with this general principle.

20. The imported and domestic products at issue (i.e. cattle) are "like products" within meaning of Article III:4. Further, the COOL measure is a law, regulation and requirement that *affects* the internal sale, offering for sale, purchase, transportation, distribution or use of Mexican feeder cattle within the meaning of Article III:4. Finally, the COOL measure gives U.S. feeder cattle a competitive advantage over like Mexican feeder cattle in the U.S. feeder cattle market, which is a violation of the national treatment obligation in Article III:4.

IV. CONDITIONAL APPEAL CONCERNING ARTICLE XXIII:1(B) OF THE GATT 1994

21. Mexico presented a claim under Article XXIII:1(b) of the GATT 1994 that the COOL measure nullifies and impairs tariff concessions made by the United States and inscribed in its WTO tariff bindings. The Panel declined to rule on that claim, on the basis that U.S. compliance with the its finding of violation of TBT Agreement 2.1 would remove the basis of the non-violation claims of nullification or impairment. In effect, the Panel exercised judicial economy.

22. Should the Appellate Body decide that the Panel erred in finding a violation of TBT Agreement Articles 2.1 and does not make a finding of a violation by the United States under GATT Article III:4, Mexico appeals the Panel's decision to exercise judicial economy in respect of Mexico's claim under Article XXIII:1(b) of the GATT 1994 and requests that the Appellate Body complete the analysis of this claim and find that the COOL measure is inconsistent with Article XXIII:1(b).

23. The U.S. bound tariff is 1 cent per kilogram, which is about \$1.36 to \$1.81 for a 300 to 400 pound animal. Based on this WTO tariff binding, Mexico could legitimately expect that its cattle would have a competitive disadvantage of \$1.36 to \$1.81 per animal compared to like US products. The actual price discount created by the COOL measure has been up to \$60 for the same 300-400 pound animal. Moreover, the COOL measure reduced the number of U.S. plants processing U.S. cattle, limited the days on which the remaining plants would accept cattle from Mexico, and introduced new requirements for advance notice of delivery. The competitive disadvantage or level of protection reflected in the price discount and other restrictions vastly exceeds Mexico's legitimate expectation of a \$1.36 to \$1.81 tariff disadvantage per animal. The COOL accordingly measure nullifies or impairs benefits accruing to Mexico under the WTO tariff bindings of the United States.

24. The Panel's statement that that compliance by the United States with its findings of violation of TBT Agreement Article 2.2 and Article X:3(a) of the GATT 1994 would eliminate the basis of the non-violation nullification or impairment claim under Article XXIII:1(b) is erroneous, as measures taken to comply with those findings would not necessarily eliminate all of the discrimination and resulting nullification and impairment of tariff concessions.

25. Mexico therefore requests a finding under Article XXIII:1(b), regardless of the Appellate Body's decision regarding the TBT Agreement Article 2.2 claim, if the Appellate Body does not uphold the Panel's finding of violation by the United States in respect of TBT Agreement Article 2.1 and does not make a finding of a violation by the United States under GATT Article III:4.