

# **UNITED STATES – CERTAIN COUNTRY OF ORIGIN LABELLING REQUIREMENTS**

(AB-2012-3/DS386)



## **EXECUTIVE SUMMARY**

**Appellee Submission of Mexico**

**10 April 2012**

## EXECUTIVE SUMMARY

### I. INTRODUCTION

1. This appeal offers the Appellate Body the opportunity to clarify several important points of law for the benefit of all WTO members.

2. The Panel correctly found that the COOL Measure is inconsistent with Article 2.1 of the *TBT Agreement* in the context of country of origin labels for muscle cut beef products on the basis that the COOL measure accords *de facto* less favourable treatment to imported than to domestic livestock by creating a financial incentive for beef suppliers within the U.S. market to use only domestic import products and a corresponding disincentive in respect of imported input products. The Panel was also correct in its finding that the COOL measure is inconsistent with Article 2.2 of the *TBT Agreement* on the basis that it fails to fulfill its legitimate objective and is therefore more restrictive than necessary, taking into account the risks non-fulfillment would create. These findings of the Panel are based on the correct interpretation and application of the relevant legal principles and are well-supported by the evidence.

### II. LEGAL ARGUMENT

#### A. The Panel Correctly Found that the COOL Measure is Inconsistent with Article 2.1 of the TBT Agreement in the Context of Muscle Cut Labels

3. The United States challenges the Panel's findings in respect of the third element of the legal test under Article 2.1 of the *TBT Agreement*, that is, whether there is less favourable treatment accorded to imported cattle than to like domestic cattle in the context of muscle cut labels under the COOL measure. It argues that the Panel made both legal and factual errors in respect of this element of the test and requests that the Appellate Body reverse the Panel's findings with respect to Mexico's claim under Article 2.1.

4. The United States arguments regarding the Panel's finding under Article 2.1 of the *TBT Agreement* are without merit. The Panel's analysis is legally sound and consistent with Article 11 of the *DSU*.

5. Although the Panel did not have the benefit of the Appellate Body's reasoning and conclusions in *US – Clove Cigarettes* to guide it when interpreting and applying Article 2.1, the Panel's finding of inconsistency with Article 2.1 is nevertheless legally correct and consistent with the Appellate Body's test.

6. Consistent with the Appellate Body's test in *US – Clove Cigarettes*, the Panel observed that according "treatment no less favourable" means according *conditions of competition* no less favourable to the imported product than to the like domestic product. In this respect, it found that a measure accords less favourable treatment to imported products if it gives domestic like

products a competitive advantage in the market over imported like products, and that according “treatment no less favourable” means according conditions of competition no less favourable to the imported product than to the like domestic product. In the Panel’s view, this means that no competitive disadvantage shall be accorded to imported products as compared to like domestic products. It found that Article 2.1 covers both *de jure* and *de facto* discrimination and cited previous disputes in which government measures that create an incentive to use domestic over imported input products were found to be inconsistent with Article III:4. On this basis, it found that a similar incentive to use domestic input products and a correlating disincentive to use imported input products exist under the COOL measure.

7. The Panel correctly examined the treatment accorded to products imported from the complaining Members (Mexico and Canada) and compared it with that accorded to like domestic products. The Panel also correctly examined whether the technical regulation at issue—the COOL measure—modifies the conditions of competition in the market of the regulating Member to the detriment of the group of imported products *vis-à-vis* the group of like domestic products. The Panel found sixteen examples of reduced competitive opportunities relating solely to *imported* cattle, none of which relate to like domestic cattle. In this way, the modification of conditions of competition was to the detriment of the *entire* group of imported products and *none* of the like domestic products were similarly affected. On this basis, the Panel determined that the muscle cut labels under the COOL measure accord *de facto* less favourable treatment to imported than to domestic livestock and *de facto* modify the conditions of competition in the U.S. market to the detriment of imported livestock

8. The Panel did not undertake the last step of the recent Appellate Body’s test in *US – Clove Cigarettes* which applies to situations involving *de facto* discrimination. According to the Appellate Body, a panel must carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue, and, in particular, whether that technical regulation is even-handed, in order to determine whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products. However, it is clearly evident from the Panel’s findings that the technical regulation is *not* even-handed and that the detrimental impact on imports does *not* stem “exclusively from a legitimate regulatory distinction”; rather, it clearly reflects discrimination against the group of imported products.

9. The U.S. makes specific arguments that criticize the Panel’s reasoning and findings. However, these arguments reflect a mischaracterization of the substance of the Panel’s reasoning and findings.

10. The United States argues that the Panel did not assess whether the COOL measure modifies the conditions of competition in the relevant market to the detriment of imported products, even though the Panel explicitly addressed the modification of conditions of competition in great detail.

11. The United States proposes a new test for “treatment no less favourable” which has no basis in law and which fails to distinguish between *de jure* and *de facto* discrimination. It cites

three Appellant Body reports as authorities for this test: *Thailand – Cigarettes from the Philippines*, *Korea – Beef* and *Dominican Republic – Cigarettes*. It argues that, unlike the measure at issue in *Korea – Beef*, *Thailand – Cigarettes from the Philippines*, and other similar disputes, the COOL measure *itself* does not treat imports differently than domestic products. However, the United States misinterprets and misapplies the findings in these Appellate Body reports and introduces several unprecedented legal elements into its proposed test.

12. Finally, the United States claims that the Panel failed to make an objective assessment as required by Article 11 of the *DSU* in relation to (i) its assessment of the facts related to segregation and commingling of cattle and (ii) the price differentials for U.S. and foreign cattle as a result of discounts on imported cattle caused by the COOL measure. Contrary to the U.S. claim, however, the Panel carefully reviewed the relevant evidence and made an objective assessment consistent with Article 11.

**B. The Panel Correctly Found that the COOL Measure is Inconsistent with Article 2.2 of the TBT Agreement**

13. The United States appeals the Panel's finding that the COOL measure is "trade restrictive" for the purposes of Article 2.2. It also alleges that the Panel failed to make an objective assessment of the matter before it as required under Article 11 of the *DSU*. Finally, it appeals the method of analysis and the ultimate finding of the Panel in regard to whether the COOL measure is "more trade-restrictive than necessary to fulfil a legitimate objective." The appeal of the United States is without merit and should be rejected. The Panel's analysis is legally sound and its examination of the evidence is consistent with Article 11 of the *DSU*.

14. The Panel correctly found that the COOL measure is "trade-restrictive" within the meaning of Article 2.2 on the basis of its finding under the Article 2.1 analysis that the COOL measure negatively affects imported livestock's conditions of competition in the U.S. market in relation to like domestic livestock by imposing higher segregation costs on imported livestock.

15. The United States argues that, for the same reasons it argues that the COOL measure does not violate Article 2.1, the Panel erred when it found that COOL measure negatively affects conditions of competition and therefore was trade restrictive for purposes of Article 2.2. Although Articles 2.1 and 2.2 of the *TBT Agreement* are two separate obligations that contain different legal tests, the evidence that shows inconsistency of the COOL measure under one obligation may be relevant to its analysis under the other obligation.

16. As the evidence demonstrating that the COOL measure negatively affects imported livestock's conditions of competition in the U.S. market under Article 2.1 is relevant for the analysis of the COOL measure under Article 2.2 of the *TBT Agreement*, the Panel's analysis and findings that the COOL measure is trade restrictive are legally and factually sound.

17. The U.S. interpretation of the test under Article 2.2 of the *TBT Agreement* appears to be an attempt to unilaterally modify the language of the multilateral agreement, by incorrectly importing into Article 2.2 language from Article 5.6 of the *SPS Agreement*. The one-step approach developed for claims under Article 5.6 of the *SPS Agreement* is *not* appropriate for the

purposes of Article 2.2 of the *TBT Agreement*. The *SPS Agreement* and *TBT Agreement* provide different regimes and rules, their application is mutually exclusive, and provisions of one Agreement should not be automatically incorporated into the provisions of the other, as this was not the intention of the Members. The United States argues that the analysis of the objective pursued by the measure under Article 2.2 should include, in particular, a determination of the level of fulfillment considered appropriate by the United States. This is incorrect.

18. The level of fulfillment of the measure is to be objectively determined by a Panel based on the comparison of the technical regulation at issue against the legitimate objective. If the measure at issue does not fulfil the legitimate objective, as in this case, it is not necessary to continue analysis and examine an alternative measure. However, if the measure at issue does fulfil the legitimate objective, an alternative measure should equally fulfil the legitimate objective.

19. If the U.S. interpretation is accepted, then the legal test under Article 2.2 would mean that, although the COOL measure fails to achieve the desired theoretical level of fulfillment of the legitimate objective, an alternative measure must reach that level. Moreover, if determination of “the level of fulfillment” is based on the statements of the defending Member, then it would give a Member every incentive to inflate the desired theoretical “level of fulfillment” so that a proposed alternative measure can never achieve it.

20. After carefully considering the U.S. arguments and evidence, and referencing the several ways in which the United States identified its objective, the Panel found that the objective pursued by the United States through the COOL measure was “to provide as much clear and accurate origin information as possible to consumers”. This finding was based on a complete and coherent assessment of the relevant facts and arguments, including the U.S. indication of the level at which it aims to achieve the identified objective. The Panel did not act inconsistently with Article 11 of the *DSU* with respect to its finding regarding the objective for the purpose of determining the claim under Article 2.2 of the *TBT Agreement*.

21. Whether the technical regulation at issue is more trade-restrictive than necessary is a “two-step” analysis. This is in line with the Appellate Body clarification in *US – Gambling* and in *Brazil – Retreaded Tyres* that weighing and balancing involves *two steps*: *first*, a preliminary analysis of the necessity of the *original measure* on the basis of all relevant factors, and *second*, the conclusion of the preliminary analysis must be confirmed by comparing the measure with its possible *alternatives*. The Panel was therefore legally correct when it interpreted Article 2.2 to incorporate a two-step approach.

22. The Panel correctly determined that the COOL measure does not fulfil its legitimate objective. In its appeal of this finding, the United States exaggerates or otherwise takes liberties with the Panel’s findings and the evidence, asserting that it is an uncontested fact that meat carrying the A label constitutes at least 71% of the meat sold in the United States. The reality, however, is that meat carrying Label A constitutes less than 39% of the meat sold in the United States, based on uncontested facts on the record and the United States’ own calculation of the percentage of muscle cuts and ground beef sold through non-covered restaurant and other food service entities.

23. The United States concedes that the COOL measure is not fully reliable, but argues that its ineffectiveness can be justified as based on an effort to avoid imposing excessive costs on industry participants. The Panel specifically found, however, that the “balance” that the United States says is reflected in the COOL measure resulted in imposition of discriminatorily higher costs on the use of imported livestock and adverse effects on competitive conditions in the U.S. market to the detriment of imported livestock.

24. The Panel’s conclusion that the COOL measure is inconsistent with Article 2.2 of the *TBT Agreement* is legally and factually sound.

### **III. CONCLUSION**

25. On the basis of the foregoing, Mexico respectfully requests that the Appellate Body reject the US appeal on its entirety and to uphold the Panel findings and recommendations.