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UNITED STATES - CERTAIN COUNTRY OF ORIGIN LABELLING (COOL) REQUIREMENTS

RECOURSE TO ARTICLE 21.5 OF THE DSU BY MEXICO

Request for the Establishment of a Panel

The following communication, dated 19 August 2013, from the delegation of Mexico to the Chairperson of the Dispute Settlement Body, is circulated pursuant to Article 21.5 of the DSU.

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On 23 July 2012, the Dispute Settlement Body ("DSB") adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report, in *United States — Certain Country of Origin Labelling Requirements* (WT/DS386) (*US - COOL (Mexico)*).[1] The DSB ruled that the "COOL Measure" (comprising the "COOL statute"[2] passed by the US Congress, and its implementing regulation, the "2009 Final Rule (AMS)"[3] issued by the US Department of Agriculture), particularly in regard to the muscle cut meat labels, was inconsistent with Article 2.1 of the TBT Agreement because it accords less favourable treatment to imported livestock than to like domestic livestock[4] and recommended that the United States bring its measure into conformity with the Agreement.[5]

On 21 August 2012, the United States informed the DSB that it intended to comply with its WTO obligations in this dispute, but that it would require a reasonable period of time to do so.[6] Mexico and Canada, on the one hand, and the United States on the other, were unable to agree on a reasonable period of time for implementation.

On 13 September 2012, Mexico requested that the reasonable period of time be determined through binding arbitration pursuant to Article 21.3(c) of the DSU.[7] On 4 December 2012, the Arbitrator determined that the reasonable period of time ("RPT") for the United States to implement the recommendations and rulings of the DSB in the COOL disputes was 10 months from

[1] Minutes of DSB Meeting, WT/DSB/M/320, para. 110 (23 July 2012). See Appellate Body Report, *US – COOL (Mexico)*, WT/DS386/AB/R (29 June 2012); Panel Report, *US – COOL (Mexico),* WT/DS386/R (18 November 2011).

[2] Agricultural Marketing Act of 1946, as amended by the "2002 Farm Bill" and the "2008 Farm Bill" (60 Stat. 1087, *United States Code*, Title 7, section 1621 *et seq*., as amended). (See Appellate Body Report, *US – COOL (Mexico)*, para. 1(a) and footnotes 4 and 5 thereto).

[3] Final Rule on Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, published in 74 Fed. Reg. 2658 (15 Jan. 2009). In its reports, the Appellate Body referred to the regulations as the "2009 Final Rule (AMS)". (See Appellate Body Report, *US – COOL*, para. 1(b) and footnote 6 thereto).

[4] Panel Report, *US – COOL (Mexico)*, paras. 7.548 and 8.3(b); Appellate Body Reports, *US – COOL*, para. 496(a)(iv).

[5] Appellate Body Report, *US – COOL (Mexico)*, para. 497.

[6] Communication from the United States, WT/DS384/19 and WT/DS386/18 (21 August 2012). See Minutes of DSB Meeting, WT/DSB/M/321, para. 58, (31 August 2012).

[7] Request by Mexico for Arbitration under Article 21.3(c) of the DSU, WT/DS386/19, 17 September 2012.

the date of adoption of the Panel and Appellate Body Reports on 23 July 2012.[8] In reaching this conclusion, the Arbitrator considered that this period of time should allow the United States to implement the recommendations and rulings of the DSB regardless of whether it decides to do so by regulatory action alone or by legislative action followed by regulatory action.[9] The RPT ended on 23 May 2013.

On the same date, the United States published the Final Rule on Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts (the "2013 Final Rule").[10] The 2013 Final Rule made only minor changes to the Proposed Rule. Like the Proposed Rule, it was limited to changes to the 2009 Final Rule and did not modify the COOL statute. In addition, the 2013 Final Rule indicated that the COOL measure as revised by the 2013 Final Rule (which is part of the "Amended COOL Measure") will not be fully enforced for an additional six months past the 23 May 2013 deadline.

The Amended COOL Measure does not eliminate the trade restrictive effects of the measure nor does it eliminate the effects of the measure that modify the conditions of competition in the US market to the detriment of imported livestock by creating an incentive in favour of processing exclusively domestic livestock and a disincentive against handling imported livestock. The Amended COOL Measure requires that labels for muscle cut covered commodities from animals that are slaughtered in the United States identify the country(ies) in which each of the three designated production steps occurs—i.e., born, raised and slaughtered. It also eliminates the prior allowance to use the mixed origin label ("Product of United States, Country X") on muscle cuts produced from animals commingled on a single production day. These changes increase the need for segregation and impose an even higher burden and associated costs for entities that process livestock of different origins, including Mexican cattle. In this way, the Amended COOL Measure is even more trade-restrictive and discriminatory than the COOL Measure.

There is a disagreement between Mexico and the United States as to "the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB in the COOL disputes. Mexico considers that changes made by the 2013 Final Rule to the 2009 Final Rule (AMS) do not bring the COOL Measure into compliance with the DSB's recommendations and rulings. Moreover, the Amended COOL Measure is not consistent with the United States' obligations under the covered Agreements.

The following measures comprise the Amended COOL Measure:

i) COOL Statute - The Agricultural Marketing Act of 1946 (7 U.S.C. 1621 et seq.), as amended by the Farm Security and Rural Investment Act of 2002 (Section 10816 of Public Law 107-171) and the Food, Conservation, and Energy Act of 2008 (Section 11002 of Public Law 110-246);

ii) Final Rule 2009 (AMS) – Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts (7 CFR Parts 60 and 65), 74 Fed. Reg. 2658 (Jan. 15, 2009);

iii) 2013 Final Rule – Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, 78 Federal Register 31367 (May 24, 2013);

[8] *Award of the Arbitrator*, *US – COOL,* Arbitration under Article 21.3(c) of the DSU, WT/DS386/23, (4 December 2012), para. 123.

[9] *Ibid*.

[10] 78 Fed. Reg. 31367-31385 (May 24, 2013). USDA published the Proposed Rule to amend the COOL regulations on 12 March 2013 (78 Fed. Reg. 15645-15653 (March 12, 2013). On 11 April 2013, in response to USDA' invitation to the public to provide comments, Mexico submitted a letter stating its view that the Proposed Rule would not bring the United States into compliance with its WTO obligations. Letter from Secretaría de Economía and Secretaría de Agricultura, Ganadería, Desarrollo Rural, Pesca y Alimentación to US Department of Agriculture (April 11, 2013), available at http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0798.

iv) Any modifications or amendments to instruments (i) through (iii) above, including any further implementing guidance, directives, policy announcements or any other document issued in relation to those instruments.

Mexico considers that the United States has failed to implement the recommendations and rulings of the DSB in this dispute. The Amended COOL Measure is also inconsistent with the covered Agreements. The claims in respect of which Mexico is seeking the establishment of a panel include:

i) The Amended COOL Measure is inconsistent with Article 2.1 of the TBT Agreement because continues to accord imported livestock treatment less favourable than that accorded to like domestic livestock;

ii) The Amended COOL Measure is inconsistent with Article 2.2 of the TBT Agreement because it creates an unnecessary obstacle to international trade and is more trade restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create.

iii) The Amended COOL Measure is inconsistent with Article III:4 of the GATT 1994 because it modifies the conditions of competition in the relevant market to the detriment of imported products as compared to like domestic products and, therefore, violates the national treatment obligation.

iv) The Amended COOL Measure nullifies or impairs benefits that accrue to Mexico under the GATT 1994 within the meaning of GATT Article XXIII:1(b).

On 10 June 2013, Mexico and the United States concluded a Sequencing Agreement with a view to facilitating the procedures for a resolution of this dispute under Articles 21 and 22 of the DSU. Since "there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB between Mexico and the United States, Mexico requests that a panel be established under Articles 6 and 21.5 of the DSU, Article 14 of the TBT Agreement, and Article XXIII of the GATT 1994 with standard terms of reference, as set forth in Article 7.1 of the DSU, and that the DSB refer the matter to the original panel, if possible, pursuant to Article 21.5 of the DSU.

Pursuant to paragraph 2 of the Sequencing Agreement, Mexico notes that it is not required to hold consultations with the United States prior to requesting the establishment of an Article 21.5 panel.

Mexico asks that this request be placed on the agenda of the DSB meeting scheduled for 30 August 2013.

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