



16 December 2014

(14-7280)

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Original: English

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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY MEXICO

NOTIFICATION OF AN OTHER APPEAL BY MEXICO UNDER ARTICLE 16.4 AND ARTICLE 17 OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU), AND UNDER RULE 23(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW

The following notification, dated 12 December 2014, from the Delegation of Mexico, is being circulated to Members.

1. Pursuant to Articles 16.4 and 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) and Rule 23(1) of the *Working Procedures for Appellate Review*, the United Mexican States (Mexico) hereby notifies its decision to appeal to the Appellate Body certain issues of law and certain legal interpretations developed by the Panel in *United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Mexico* (WT/DS386/RW) (Panel Report), and the Panel's failure to make an objective assessment of the matter as required by Article 11 of the DSU.

2. Pursuant to Rule 23(2)(c)(ii) of the *Working Procedures for Appellate Review*, this Notice of Other Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to Mexico's ability to refer to other paragraphs of the Panel Report in the context of this appeal.

I. Appeal of the Panel's conclusion that Mexico did not make a *prima facie* case that the amended COOL measure is more trade restrictive than necessary within the meaning of Article 2.2 of the TBT Agreement and the Panel's failure to make an objective assessment of the matter before it as required under Article 11 of the DSU

3. Mexico seeks review by the Appellate Body of the Panel's findings that Mexico did not make a *prima facie* case that the amended COOL measure is more trade restrictive than necessary within the meaning of Article 2.2 of the Agreement on Technical Barriers to Trade (TBT Agreement).¹ The Panel's conclusion is in error and is based on erroneous findings on issues of law, related interpretations, and the Panel's failure to make an objective assessment of the matter before it as required by Article 11 of the DSU. The Panel erred:

- a. by finding that overall conclusions under Article 2.2 may not be drawn from the "relational analysis" in the first step of the "necessity test"², by improperly applying an "exceptional circumstances" requirement³, by failing to complete the "relational

¹ Panel Reports, *US – COOL (Article 21.5)*, paras. 7.612-7.613; Panel Report, *US – COOL (Article 21.5 – Mexico)*, para. 8.3(c).

² Panel Reports, *US – COOL (Article 21.5)*, para. 7.298.

³ *Ibid.*

analysis", and by failing to make a finding as to whether the amended COOL measure is more trade-restrictive than necessary at the conclusion of the "relational analysis".⁴

- b. by failing to properly consider and take into account the design and operation of Label E (the ground beef label) in its assessment of the amended COOL measure's degree of contribution to the fulfilment of the legitimate objective.⁵
- c. by limiting its assessment of the risks that non-fulfilment of the amended COOL measure's objective would create to consumer interest in country of origin information, and the willingness of consumers to pay the costs of obtaining country of origin information on product labels.⁶
- d. by failing to consider and take into account the relative importance of the interests or values furthered by the amended COOL measure and the design, architecture, revealing structure, operation and application of the measure in its assessment of the risks that non-fulfilment of the measure's objective would create.⁷
- e. by applying an erroneous approach to its assessment of the gravity of the consequences that would arise from non-fulfilment of the amended COOL measure's objective⁸, by failing to make an objective assessment of the matter before it as required by Article 11 of the DSU with respect to the arguments and evidence put forward by the parties for the purpose of assessing the gravity⁹, and by failing to make a finding on the gravity of the consequences that would arise from non-fulfilment of the amended COOL measure's objective.¹⁰
- f. by not completing the "comparative analysis" of the amended COOL measure with the first and second alternative measures because it was unable to determine the specific implications of risks of non-fulfilment of the amended COOL measure's objective¹¹ for the purposes of evaluating whether the first and second alternative measures make an equivalent degree of contribution, taking into account the risks non-fulfilment would create.¹²
- g. by failing to undertake an assessment of whether the first and second alternative measures are reasonably available, less trade-restrictive and provide an equivalent contribution to the fulfilment of the amended COOL measure's objective.¹³
- h. by requiring Mexico to adduce unnecessarily precise explanations as to how the third and fourth alternative measures proposed by Mexico would be implemented in the United States¹⁴ and by failing to make an objective assessment of the matter before it as required by Article 11 of the DSU.

⁴ Panel Reports, *US – COOL (Article 21.5)*, paras. 7.424-7.425.

⁵ Panel Reports, *US – COOL (Article 21.5)*, paras. 7.343-7.345, 7.346-7.356 and footnote 785 to para. 7.347, citing data in paragraphs 7.258 and 7.262.

⁶ Panel Reports, *US – COOL (Article 21.5)*, paras. 7.375, 7.381, 7.383, and 7.418. In this respect, the Panel erred in its interpretation of the Appellate Body's reasons respecting the assessment of the risks that non-fulfilment would create under Article 2.2 in the original proceedings. See Panel Reports, *US – COOL (Article 21.5)*, para. 7.375, citing Appellate Body Report, *US – COOL*, para. 478.

⁷ Panel Reports, *US – COOL (Article 21.5)*, para. 7.379-7.380.

⁸ Panel Reports, *US – COOL (Article 21.5)*, paras. 7.383, 7.418-7.420, 7.422-7.424.

⁹ Panel Reports, *US – COOL (Article 21.5)*, 7.384-7.414, 7.416, 7.418-7.422.

¹⁰ Panel Reports, *US – COOL (Article 21.5)*, paras. 7.423-7.424, 7.488, 7.501, and 7.611.

¹¹ Panel Reports, *US – COOL (Article 21.5)*, paras. 7.488 and 7.501.

¹² Panel Reports, *US – COOL (Article 21.5)*, paras. 7.488-7.491 and 7.501-7.503.

¹³ Panel Reports, *US – COOL (Article 21.5)*, paras. 7.488, 7.491, 7.500, and 7.503. This includes the Panel's error in interpreting and applying Article 2.2 of the TBT Agreement by failing to make a finding that Mexico's second alternative measure would provide a contribution to the fulfilment of the amended COOL measure's objective that would be at least equivalent to that of the amended COOL measure, because it would provide exactly the same origin information as that required under Label E (the ground beef label) of the amended COOL measure.

¹⁴ Panel Reports, *US – COOL (Article 21.5)*, paras. 7.564, 7.601-7.602, and 7.608-7.610. See also Panel Reports, *US – COOL (Article 21.5)*, paras. 7.522, 7.525, 7.526, 7.538, 7.542, 7.551-7.553, 7.556-7.557, 7.559-7.560, 7.562-7.563, 7.599, 7.601, 7.602 and 7.609-7.610.

II. Appeal of the Panel's finding that Label E (the ground meat label) is not relevant to the legal analysis under Article 2.1 of the TBT Agreement

4. Mexico seeks review by the Appellate Body of the Panel's erroneous finding that Label E (the ground meat label) is not relevant to the legal analysis under Article 2.1 of the TBT Agreement.¹⁵

III. Conditional appeal of the Panel's decision to exercise judicial economy with respect to Mexico's claim of non-violation nullification or impairment under Article XXIII:1(b) of the GATT 1994

5. In the event that the Appellate Body overturns the Panel's findings that the COOL measure is inconsistent with Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994, Mexico appeals the Panel's decision to exercise judicial economy with respect to Mexico's claim of non-violation nullification or impairment under Article XXIII:1(b) of the GATT 1994 and asks the Appellate Body to complete the analysis.¹⁶

¹⁵ Panel Reports, *US – COOL (Article 21.5)*, paras. 7.206-7.207 and 7.280.

¹⁶ Panel Reports, *US – COOL (Article 21.5)*, paras. 7.716 and 8.4.