ANNEX I

WORLD TRADE ORGANIZATION

WT/DS384/12
WT/DS386/11
28 March 2012

(12-1654)

Original: English

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

Notification of an Appeal by the United States
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 20(1) of the *Working Procedures for Appellate Review*

The following notification, dated 23 March 2012, from the Delegation of the United States, is being circulated to Members.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the *Working Procedures for Appellate Review*, the United States hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Reports of the Panel in *United States – Certain Country of Origin Labelling (COOL) Requirements* (WT/DS384/R and WT/DS386/R) ("Panel Reports") and certain legal interpretations developed by the Panel.

1. The United States seeks review by the Appellate Body of the Panel's findings and conclusion that U.S. country of origin labeling requirements[1] are inconsistent with Article 2.1 of the *Agreement on Technical Barriers to Trade* (the "TBT Agreement").[2] This conclusion is in error and is based on erroneous findings on issues of law and legal interpretations including:

(a) the Panel's finding that the U.S. COOL requirements treat imported livestock differently than domestic livestock.[3]

[1]The U.S. COOL requirements consist of the relevant sections of the Agricultural Marketing Act of 1946 (7 U.S.C. __ 1638-1638c) ("the COOL statute") and regulations promulgated by the United States Department of Agriculture's Agricultural Marketing Service on January 15, 2009, entitled "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, which are codified at 7 C.F.R. Parts 60 and 65 ("2009 Final Rule"). *See* Panel Reports, para. 7.61.

[2]*See, e.g.*, Panel Reports, paras.7.420, 7.548, 8.3(b).

[3]*See, e.g.*, Panel Reports, paras.7.295-7.296.

(b) the Panel's finding that the U.S. COOL requirements accord less favorable treatment to imported livestock than that accorded to domestic livestock by modifying the conditions of competition to the detriment of imported products.[4]

2. The United States also requests the Appellate Body to find that the Panel acted inconsistently with Article 11 of the DSU by failing to make an objective assessment of the facts related to these issues, specifically that segregation of livestock is "necessitated" by the COOL requirements, that commingling is not occurring on a widespread basis, and that the COOL requirements resulted in a "price differential" between domestic and imported livestock,[5] and by using these faulty factual findings to support its conclusions with regard to different treatment and less favorable treatment.

3. The United States also seeks review of the Panel's findings and conclusion that the COOL requirements are inconsistent with Article 2.2 of the TBT Agreement.[6] This conclusion is in error and is based on erroneous findings on issues of law and legal interpretations including:

(a) with regard to section VII.D.3(b) of the Panel Reports, the Panel's finding that the COOL measure is "trade restrictive" for purposes of Article 2.2.[7]

(b) with regard to section VII.D.3(c) of the Panel Reports, the Panel's failure to consider all relevant information regarding the U.S. chosen level of fulfillment of the legitimate objective.[8]

(c) with regard to sections VII.D.3(d)-(e) of the Panel Reports: (1) the Panel's legal framework for determining whether a measure is "more trade-restrictive than necessary to fulfil a legitimate objective";[9] (2) the Panel's finding that the COOL requirements do not fulfill the legitimate objective at the level the United States considers appropriate;[10] and (3) the Panel's failure to require the complaining parties to meet their burden to prove that the measure is "more trade-restrictive than necessary" based on the availability of a significantly less trade-restrictive alternative measure that also fulfills the objective at the level the United States considers appropriate.[11]

4. The United States also requests the Appellate Body to find that the Panel acted inconsistently with Article 11 of the DSU by failing to make an objective assessment of the facts related to these issues, specifically the Panel's findings regarding the level at which the United States considers it appropriate to fulfill its objective.[12]

The United States is providing a copy of this letter directly to Canada, Mexico and to the third parties.

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[4] *See, e.g.*, Panel Reports, paras. 7.420, 7.548

[5] *See, e.g.*, Panel Reports, paras. 7.316, 7.327, 7.336, 7.352-353, 7.356, 7.364, 7.366-368, 7.379. 7.487, and 7.542.

[6] *See, e.g.*, Panel Reports, para. 8.3(c).

[7] *See, e.g.*, Panel Reports, paras. 7.565-7.575.

[8] *See, e.g.*, Panel Reports, paras. 7.590-7.620.

[9] *See* Panel Reports, paras. 7.652, 7.666-7.670, 7.692-7.720.

[10] *See, e.g.*, Panel Reports, paras. 7.692-7.720.

[11] *See* Panel Reports, para. 7.719.

[12] *See, e.g.*, Panel Reports, paras. 7.619-7.620, 7.715.

ANNEX II

WORLD TRADE ORGANIZATION

WT/DS384/13
2 April 2012

(12-1706)

Original: English

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

Notification of an Other Appeal by Canada
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 28 March 2012, from the Delegation of Canada, is being circulated to Members.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) and Rule 23 of the *Working Procedures for Appellate Review*, Canada hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Report of the Panel in *United States – Certain Country of Origin Labelling (COOL) Requirements* (WT/DS384/R) (Panel Report) and certain legal interpretations developed by the Panel.

1. Canada seeks review by the Appellate Body of the Panel's legal conclusions that:

   (a) Article 2.2 of the Agreement on Technical Barriers to Trade requires identifying a potential objective of a challenged measure rather than the actual objective of that measure; and

   (b) the objective of the COOL measure[1] is legitimate within the meaning of Article 2.2 of the Agreement on Technical Barriers to Trade.

2. Canada also appeals the Panel's failure, in contravention of Article 11 of the DSU, to make an objective assessment of the facts demonstrating that the objective of the COOL measure is protectionism. In the alternative, if the objective of the COOL measure is not protectionism, the Panel erred by failing to define the objective at a sufficiently detailed level.

3. If the Appellate Body does not uphold the Panel's finding that the COOL measure fails to fulfil a legitimate objective, then Canada seeks a finding by the Appellate Body that there are less

[1]The COOL measure includes the COOL Statute and the Final Rule, as set out in the Panel Report, paras. 7.21, 7.34, and 7.63.

trade-restrictive alternative measures that fulfil that objective, and that therefore the COOL measure violates Article 2.2 of the Agreement on Technical Barriers to Trade.

4. Canada further seeks review by the Appellate Body of the Panel's exercise in judicial economy on Canada's GATT Article III:4 claim regarding the COOL measure and the Vilsack letter[2].

5. Finally, Canada seeks conditional review by the Appellate Body of the Panel's failure to find that the COOL measure and the Vilsack letter constitute an instance of non-violation nullification or impairment under GATT Article XXIII:1(b). That request for review is conditional on the Appellate Body not finding a violation of either Article 2.1 of the TBT Agreement or Article III:4 of the GATT.

[2]Defined in the Table of Abbreviations of the Panel as "Letter to 'Industry Representative' from the United States Secretary of Agriculture, Thomas J. Vilsack, of 20 February 2009".

ANNEX III

WORLD TRADE ORGANIZATION

WT/DS386/12
2 April 2012

(12-1707)

Original: English

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

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 28 March 2012, from the Delegation of Mexico, is being circulated to Members.

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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* (WT/DS386) ("Panel Report").

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. Conditional Appeal of the Panel's Decision to Exercise Judicial Economy with Respect to Mexico's Claims under Article III:4 of the GATT 1994

3. This appeal is conditional in the event that the Appellate Body overturns the Panel's finding that the COOL measure is inconsistent with Article 2.1 of the TBT Agreement.

4. If this condition is triggered, Mexico appeals the Panel's decision to exercise judicial economy in respect of Mexico's claim under Article III:4 of the GATT 1994.[1]

5. The Panel erred in its decision to exercise judicial economy with respect to Mexico's claims under Article III:4 of the GATT 1994, considering the particular circumstances of this case, where, if the Panel's finding on inconsistency of Article 2.1 of the TBT Agreement is overturned, the Panel's

[1]Panel Report, 7.807, 8.4(a).

legal basis for exercising judicial economy will no longer exist and Mexico will be left with no positive solution to its discrimination claims under Article III:4 of the GATT 1994.

6. As a result of the foregoing error, Mexico requests the Appellate Body to modify the Panel's legal conclusions and findings in paragraph 8.4 (a) and paragraph 7.807 of the Panel Report, complete the analysis of Mexico's claims under Article III:4 of the GATT 1994, and find that the COOL Measure is inconsistent with Article III:4 of the GATT 1994.

II. Conditional Appeal of the Panel's Finding Regarding the Identification of the Objective Pursued by the COOL Measure and the Examination of Its Legitimacy

7. This appeal is conditional in the event that the Appellate Body overturns the Panel's finding that the COOL measure is inconsistent with Article 2.2.

8. If this condition is triggered, 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*"[2] and that "*providing consumer information on origin is a legitimate objective within the meaning of Article 2.2*".[3]

9. The Panel applied an incorrect legal analysis to determine the objective and, by doing so, it incorrectly identified that objective. Having erred in identifying the objective, the Panel incorrectly found that the objective was legitimate.

10. Moreover, because the legal errors led to the exclusion of relevant facts, the approach is also factually erroneous. In this sense, the Panel failed to make an objective assessment of the matter before it and thereby acted inconsistently with Article 11 of the DSU.

11. As a result of the foregoing errors, Mexico requests the Appellate Body to modify the Panel's legal conclusions and findings in paragraphs 7.620, 7.651, *inter alia*, of the Panel Report, apply the correct analysis to identify the objective and examine its legitimacy, and find that the objective is inconsistent with Article 2.2 of the TBT Agreement.

III. Conditional Appeal of 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

12. This appeal is conditional in the event that the Appellate Body overturns the Panel's finding that the COOL measure is inconsistent with Article 2.2 of the TBT Agreement.

13. If this condition is triggered, Mexico appeals the Panel's decision to exercise judicial economy in respect of "whether the COOL measure is 'more trade-restrictive than necessary' based on the availability of less trade-restrictive alternative measure that can equally fulfil the identified objective".[4]

14. The Panel erred in its decision to exercise judicial economy in respect to Mexico's claims that the COOL measure is more trade restrictive than necessary. In particular, there are alternative measures that are less trade restrictive and that fulfil the legitimate objective taking into account the risks non-fulfilment would create and, considering the particular circumstances of this case, if the Panel's finding on inconsistency of Article 2.2 of the TBT is overturned, the Panel's legal basis for

[2]Panel Report, 7.620.
[3]Panel Report, 7.651.
[4]Panel Report, 7.719.

exercising judicial economy will no longer exist and Mexico will be left with no positive solution to its claims under Article 2.2 of the TBT Agreement.

15. As a result of the foregoing error, Mexico requests that the Appellate Body modify the Panel's legal conclusions and findings in the second sentence of paragraph 7.719 of the Panel Report, complete the analysis and find that the COOL measure is inconsistent with Article 2.2 of the TBT Agreement.

IV. 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.

16. This appeal is conditional 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 does not complete the analysis and find that the measure is inconsistent with Article III:4 of the GATT 1994.

17. If this condition is triggered, 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.[5]

18. The Panel erred in its 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, considering the particular circumstances of this case, where, if the Panel's finding on inconsistency of Article 2.1 is overturned and there is not a finding that the measure is inconsistent with Article III:4 of the GATT 1994, the Panel's legal basis for exercising judicial economy will no longer exist and Mexico will be left with no positive solution to its claim of non-violation nullification or impairment under Article XXIII:1(b) of the GATT 1994.

19. As a result of the foregoing error, Mexico requests the Appellate Body to modify the Panel's legal conclusions and findings in paragraph 8.5 and paragraph 7.907, inter alia, of the Panel Report, complete the analysis of Mexico's claim, and find that the COOL measure nullifies or impairs benefits accruing to Mexico under the GATT 1994 within the meaning of Article XXIII:1(b) of the GATT 1994.

[5]Panel Report, 7.907, 8.5.

ANNEX IV

United States – Certain Country of Origin Labelling (COOL) Requirements

AB-2012-3

Procedural Ruling

1. On 5 April 2012, we received a joint communication from the participants in the above appellate proceedings. In that letter, Canada and the United States request that we allow observation by the public of the oral hearing. Mexico indicates that it does not object to allowing such public observation of the hearing, but requests that we reflect in our report that its position in these proceedings is without prejudice to its systemic views on the matter.[1]

1. Specifically, Canada and the United States jointly request that all WTO Members and the public be allowed to observe the statements and answers to questions of the participants and third participants that agree to make their statements and answers public. The participants observe that nothing in the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU") or the *Working Procedures for Appellate Review* (the "*Working Procedures*") precludes the Appellate Body from authorizing public observation of the oral hearing. The participants also rely on the rulings by the Appellate Body in eight previous proceedings authorizing public observation of the oral hearing.[2]

2. The participants recall that Article 18.2 of the DSU affirms the right of WTO Members to disclose statements of their positions to the public, and that this includes statements and answers to questions during an Appellate Body hearing. Thus, they maintain, when the parties to a dispute so request, it is appropriate to have such statements and answers made public at the time that they are uttered. The participants further observe that public observation has operated smoothly in previous appellate proceedings, and that the rights of those third participants that have not wanted their oral statements to be subject to public observation have been fully protected.

3. The participants add that the request is made on the understanding that any information that was designated as confidential in the documents filed in the Panel proceedings would be adequately protected in the course of the hearing. They propose that public observation be permitted via simultaneous closed-circuit television broadcasting, with the option for the transmission to be turned off should the participants find it necessary to discuss issues that involve confidential information, as

[1]Mexico pointed to a similar statement made by the Panel in paragraph 2.5 of its Reports.

[2]These proceedings are: *United States – Continued Suspension of Obligations in the EC – Hormones Dispute* (WT/DS320/AB/R) and *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute* (WT/DS321/AB/R); *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador* (WT/DS27/AB/RW2/ECU) and *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States* (WT/DS27/AB/RW/USA); *United States – Continued Existence and Application of Zeroing Methodology* (WT/DS350/AB/R); *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities* (WT/DS294/AB/RW); *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan* (WT/DS322/AB/RW); *Australia – Measures Affecting the Importation of Apples from New Zealand* (WT/DS367/AB/R); *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft* (WT/DS316/AB/R); and *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)* (WT/DS353/AB/R).

well as for those third participants that do not wish to have their oral statements subject to public observation.

4. On the day that we received the communication from the participants, we invited the third participants to comment in writing on the request by noon on 12 April 2012. By that deadline, we received responses from Brazil, China, Colombia, and the European Union. Brazil and Colombia indicated that they do not object to allowing public observation of the hearing, but requested that the Appellate Body reflect in its report that their acceptance of an open hearing in these proceedings is without prejudice to their systemic views on the matter. China indicated that it had no comments on the request to allow public observation of the hearing, but that it reserved the right to make an oral statement in closed session. The European Union indicated that it had no objection to the request by Canada and the United States for public observation of the oral hearing, or to the specific logistical arrangements proposed, and expressed its intent to make its submissions during the public hearing.[3]

5. We recall that requests to allow public observation of the oral hearing have been made, and have been authorized, in eight previous appeals.[4] In its rulings, the Appellate Body has held that it has the power to authorize such requests by the participants, provided that this does not affect the confidentiality in the relationship between the third participants and the Appellate Body, or impair the integrity of the appellate process. We concur with the reasons previously expressed by the Appellate Body, and its interpretation of Article 17.10 of the DSU, in this regard, and consider that it applies equally in circumstances such as those prevailing in these appellate proceedings.

6. In this appeal, Canada and the United States have suggested that the Appellate Body allow observation by the public of the oral hearing by means of simultaneous closed-circuit television broadcasting. They have further suggested that provision be made for transmission to be turned off should the participants find it necessary to discuss issues that involve information that was designated as confidential by any participant in the documents filed with the Panel, as well as for the oral statements and responses to questions by those third participants who have indicated that they do not wish to have such statements and responses subject to public observation. We agree that such modalities would operate to protect confidential information in the context of a hearing that is open to public observation, and would not have an adverse impact on the integrity of the adjudicative function performed by the Appellate Body. We also consider that during public observation in previous appeals, the rights of those third participants that did not wish to have their oral statements made subject to public observation have been fully protected.

7. For these reasons, the Appellate Body Division in these appellate proceedings authorizes the public observation of the oral hearing on the terms set out below. Accordingly, pursuant to Rule 16(1) of the *Working Procedures*, we adopt the following additional procedures for the purpose of this appeal:

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[3]We also received a number of responses after the deadline of noon on 12 April 2012. Australia and New Zealand stated that they have no objection to the request for public observation of the oral hearing, or to the logistical arrangements proposed, and added that any oral statement that they may make will be made in the open session. Guatemala stated that, although it does not oppose the request for public observation of the oral hearing in these proceedings, this is without prejudice to Guatemala's position on this matter within the framework of the DSU review, and does not prejudge Guatemala's position in future cases. India recalled that it has consistently taken the view that the DSU does not permit open hearings. India stipulated that, should the Appellate Body agree to the request from the United States and Canada, it would make its oral statement, if any, in the session closed to public, and further requested the Appellate Body to reflect in its report India's systemic concerns on this issue. It was not compulsory for the third participants to submit comments on the joint communication from the participants. Yet, for those that chose to do so, we recall the importance of the timely filing of documents in appeals.

[4]See *supra*, footnote 2.

(a) The oral hearing will be open to public observation by means of simultaneous closed-circuit television broadcast, shown in a separate room to which duly registered delegates of WTO Members and members of the general public will have access.

(b) Oral statements and responses to questions by the third participants that have indicated their wish to maintain the confidentiality of their submissions, as well as —at the request of any participant—any discussion of information that the participants designated as confidential in documents submitted to the Panel, will not be subject to public observation.

(c) Any request by a third participant wishing to maintain the confidentiality of its oral statements and responses to questions should be received by the Appellate Body Secretariat no later than 17:00 p.m. Geneva time on Wednesday, 25 April 2012.

(d) An appropriate number of seats will be reserved for delegates of WTO Members in the room where the closed-circuit television broadcast will be shown. WTO delegates wishing to observe the oral hearing are requested to register in advance with the Appellate Body Secretariat.

(e) Notice of the oral hearing will be provided to the general public on the WTO website. Members of the general public wishing to observe the oral hearing will be required to register in advance with the Appellate Body Secretariat, in accordance with the instructions set out in the WTO website notice.

Geneva, 16 April 2012