WORLD TRADE ORGANIZATION

WT/DS384/30

16 December 2014

(14-7279)

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Original: English

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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY CANADA

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 12 December 2014, 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 – Recourse to Article 21.5 of the DSU by Canada* (WT/DS384/RW) (Panel Report) and certain legal interpretations developed by the Panel.

Canada seeks review by the Appellate Body of the Panel's legal conclusion that Canada has not made 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.[1] This conclusion is incorrect as a matter of law, and is based on erroneous intermediate findings on issues of law and legal interpretation, including:

a. the Panel's exclusions of Labels D and E from the scope of its analysis of the degree of contribution to the legitimate objective achieved by the amended COOL measure[2] and its subsequent erroneous finding that the amended COOL measure makes a "considerable but necessarily partial contribution to its objective"[3];

b. the Panel's articulation and application of an incorrect legal test under Article 2.2[4] in that it failed to articulate and apply a proper relational analysis of the relevant factors and to consider its findings under the relational and comparative analyses together before reaching a conclusion on the claim of violation;

c. the Panel's exclusion of certain relevant factors from the assessment of the "risks non-fulfilment would create"[5] and its resulting incorrect finding that it was unable to ascertain the gravity of the consequences of not fulfilling the amended COOL measure's objective[6]; and

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[1] See e.g. Panel Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 7.613.
[2] See e.g. ibid. para. 7.345.
[3] See e.g. ibid. para. 7.356.
[4] See e.g. ibid. paras. 7.303 and 7.424.
[5] See e.g. ibid. paras. 7.374-7.383.
[6] See e.g. ibid. paras. 7.423-7.424.

d. the Panel's findings that Canada failed to make a *prima facie* case that the first and second alternative measures would make a contribution to the legitimate objective that is at least equivalent to the contribution made by the amended COOL measure[7], which resulted from the Panel's failure to correctly assess the "risks non-fulfilment would create".

In addition, Canada seeks review by the Appellate Body of the Panel's finding under TBT Article 2.2 that Canada has not sufficiently and adequately identified the third and fourth alternative measures for assessing their reasonable availability and for comparing their respective trade-restrictiveness and degrees of contribution with the amended COOL measure.[8] In reaching this finding, the Panel erred by imposing on Canada an obligation to describe the alternative measures with an excessively high level of precision. In particular, Canada seeks review by the Appellate Body of the Panel's finding that, for the purpose of making a *prima facie* case that an alternative measure is reasonably available, a complainant bears the burden of providing a cost estimate of the alternative measure or evidence substantiating the likely magnitude of the costs that would be associated with the alternative measure.[9]

Canada also requests the Appellate Body to find that the Panel failed to make an objective assessment of the matter at issue, including an objective assessment of the facts, as required by Article 11 of the DSU, with respect to the above-referenced intermediate finding that the amended COOL measure makes a "considerable but necessarily partial contribution to its objective".[10]

While Canada does not take issue with the Panel's overall conclusion and most of its analysis under Article 2.1 of the TBT Agreement, Canada seeks review by the Appellate Body of:

a. the Panel's legal reasoning in respect of its legitimate regulatory distinction (LRD) analysis under Article 2.1 of the TBT Agreement that caused it to exclude Labels D and E as well as the amended COOL measure's prohibition of trace-back from the LRD analysis[11]; and

b. the Panel's failure to make an objective assessment of the facts, as required by Article 11 of the DSU, because its exclusion of Label E from its LRD analysis also lacked a basis in the evidence contained in the Panel record.[12]

In the event that the Appellate Body finds that there is no violation of either Article 2.1 of the TBT Agreement or Article III:4 of the GATT 1994, Canada also seeks review by the Appellate Body of the exercise of judicial economy by the Panel with regard to Canada's non-violation claim under Article XXIII:1(b) of the GATT 1994.[13]

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[7] See e.g. ibid. paras. 7.490 and 7.503.
[8] See e.g. ibid. paras. 7.553 and 7.602.
[9] See e.g. ibid. paras. 7.556 and 7.603.
[10] See e.g. ibid. para. 7.356.
[11] See e.g. ibid. paras. 7.279, 7.280, and 7.281.
[12] See e.g. ibid. para. 7.280.
[13] See e.g. Panel Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 7.716.