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Page: 1/2

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

COMMUNICATION FROM THE EUROPEAN UNION

The following communication, dated 9 December 2015, from the delegation of the European Union to the Chairperson of the Dispute Settlement Body, is circulated at the request of that delegation.

The European Union refers to paragraphs 2.1 to 2.18 of the "Decisions by the Arbitrator" dated 7 December 2015 in *United States – Certain Country of Origin Labelling (COOL) Requirements (Recourse to Article 22.6 of the DSU by the United States)*, which address the procedural question raised by the European Union, namely whether referrals to arbitration under Article 22.6 are done by the DSB or by the party objecting to the request for authorization to suspend concessions made pursuant to Article 22.2 of the DSU.

The European Union welcomes the fact that the Arbitration Panel expressly decides to follow the guidance previously provided by the Appellate Body to the effect that, as a matter of due process and the proper exercise of its judicial function, and in order to ensure that issues of a fundamental nature are addressed and disposed of, it was appropriate for the Arbitration Panel to deal with the issue raised by the European Union.¹

However, we consider that the Arbitration Panel should have provided the European Union, and any other Members wishing to participate, with an opportunity to make their views known to the Arbitration Panel. We consider that this was particularly appropriate in this case given that both parties disagreed with the European Union and rather agreed with each other.² The Arbitration Panel has thus decided without hearing all interested parties, which we believe substantially diminishes the weight of its decision.

In this respect, we particularly note that the summary of the EU position³ is very substantially incomplete insofar as it fails to address the two most salient points. First, there is no discussion of the relationship between the first sentence of Article 22.6 and the second sentence of Article 22.6, which begins with the term "However,". Second, the Arbitration Panel relies throughout its analysis on a supposed distinction between "arbitrations" and "panels"⁴ but fails to address the express terms of Article 22.6, which state clearly that the arbitration is to be conducted "by the original panel". In referring to this part of the provision, the Arbitration Panel alters to the terms actually used by the treaty, replacing them with the phrase "by the original panellists".⁵ Thus, whilst professing adherence to the "text" of Article 22.6,⁶ the Arbitration Panel's interpretation is, in fact, not faithful to that text, and in departing from it, provides no explanation. Furthermore, in other respects, it is not consistent with the customary rules of interpretation of public international law, as codified, at least in part, in Articles 31 to 33 of the Vienna Convention.

¹ Arbitration Panel Report, paras. 2.6 to 2.7.

² Arbitration Panel Report, para. 2.9.

³ Arbitration Panel Report, paras. 2.4 to 2.6.

⁴ For example, Arbitration Panel Report, para. 2.13.

⁵ Arbitration Panel Report, para. 1.9.

⁶ Arbitration Panel Report, para. 2.17.

The European Union disagrees with the substantive analysis and conclusion of the Arbitration Panel on this point for the reasons set out in our prior communication.⁷ We note that it has not had the benefit of appellate review and we doubt that will occur in this particular case. We further take note of the fact that the Arbitration Panel bases its conclusion, in this particular case, on the absence of any disagreement between the parties.⁸ At the same time it recognises that this "is a contentious issue among Members";⁹ that Article 22.6 "does not provide clear guidance";¹⁰ and that "a resolution of this issue by Members would be desirable".¹¹

Pending such resolution, either by Members or by the Appellate Body, and given the substantial legal uncertainty thus persisting, for its part the European Union intends to continue the practice used in the past in almost all cases. In particular, as complainant, we do not intend to incur the unnecessary legal risk of withdrawing an Article 22.2 request from the DSB agenda following an objection from the defendant. Rather, we intend to prefer the legal certainty that results from the referral to arbitration taking place in the DSB meeting itself, and we respectfully invite other Members to consider continuing with the same approach.

⁷ WT/DS386/38 of 10 July 2015.

⁸ Arbitration Panel Report, para. 2.9.

⁹ Arbitration Panel Report, para. 2.11.

¹⁰ Arbitration Panel Report, para. 2.11.

¹¹ Arbitration Panel Report, para. 2.17.