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

### COMMUNICATION FROM THE EUROPEAN UNION

The following communication, dated 9 July 2015, was received from the delegation of the European Union with the request that it be circulated to the Dispute Settlement Body (DSB).

The European Union would respectfully like to express its views on document WT/DS386/36 of 23 June 2015 concerning certain recent procedural developments in *United States – Certain Country of Origin Labelling (COOL) Requirements*. That document states that Mexico's Article 22.2 DSU request to the DSB has been referred to arbitration, even though the DSB meeting originally scheduled to make that referral on 29 June 2015 was cancelled. The European Union does not agree that an Article 22.2 DSU request to the DSB may be referred to arbitration other than by the DSB.

The European Union recalls that Article 22.6 of the DSU provides as follows:

When the situation described in paragraph 2 occurs, the DSB, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request. However, if the Member concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in paragraph 3 have not been followed where a complaining party has requested authorization to suspend concessions or other obligations pursuant to paragraph 3(b) or (c), the matter shall be referred to arbitration. Such arbitration shall be carried out by the original panel, if members are available, or by an arbitrator appointed by the Director-General and shall be completed within 60 days after the date of expiry of the reasonable period of time. Concessions or other obligations shall not be suspended during the course of the arbitration. (underline emphasis added) (footnote omitted)

The European Union considers that the phrase "shall be referred" indicates that there is an actor that does the referring and that the actor is the DSB, just as the phrase "shall be established" in Article 6 of the DSU means that the panel is established by the DSB, and the phrase "shall be adopted" in Articles 16.4 and 17.14 of the DSU means that panel and Appellate Body reports are adopted by the DSB.

We consider that the term "However" at the beginning of the second sentence of Article 22.6 of the DSU establishes a link between the first and second sentences. The first sentence refers to Article 22.2, which in turn refers to a complainant's request for authorization *from the DSB* to suspend concessions or other obligations. The first sentence then re-iterates that it is *the DSB* that shall, upon request, grant such authorization, unless *the DSB* decides by consensus to reject the request. The second sentence also refers to a situation in which "a complaining party has requested authorization" *from the DSB*. The final sentence of Article 22.7 re-iterates that it shall be *the DSB*, upon request, that grants authorization, unless *the DSB* decides by consensus to reject the request. We consider that this context strongly supports the view that it is also *the DSB* that refers the matter to arbitration, unless *the DSB* decides by consensus not to do so.

We consider that there are good reasons why the referral to arbitration of an Article 22.2 DSU request to the DSB is done by the DSB.

First, this procedure reflects the fact that, under Article 22 of the DSU, the authority for binding dispute settlement flows from the Members acting together, through the DSB, by negative consensus, just as in the case of original panels or compliance panels.

Second, this procedure ensures that other Members are fully informed in a timely manner of the scope and nature of the arbitration panel proceedings, as framed in the specific terms of the Article 22.2 request to the DSB and in the specific terms of the Article 22.6 objection, considered together, in the same way that Members are informed of panel requests leading to the establishment by the DSB of panels in original or compliance panel proceedings.

Third, this procedure ensures that Members have an opportunity to "express their views", in exactly the same way that they may express their views when an original or compliance panel is established by the DSB, or when an original or compliance panel or Appellate Body report is adopted by the DSB, these views being recorded in the minutes of the DSB.

Fourth, this procedure ensures that Members have an opportunity to consider whether or not to seek to participate in the proceedings. That could be a matter of particular interest if there is a significant risk that an arbitration panel might seek to consider matters of compliance, which would not be within its jurisdiction.

The European Union recalls that Members are free to bilaterally agree to surrender their DSU rights, but they are not free to unilaterally diminish or condition in any way the DSU rights of other Members.

The European Union does not intend at this time to intervene further in these particular proceedings. However, since the opportunity to express our views was lost when the scheduled DSB was cancelled we have placed this item on the DSB agenda, and circulated this communication.

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