

Statements by the United States at the Meeting of the WTO Dispute Settlement Body

Geneva, May 29, 2015

UNITED STATES – CERTAIN COUNTRY OF ORIGIN LABELLING (COOL) REQUIREMENTS: RECOURSE TO ARTICLE 21.5 OF THE DSU BY CANADA (DS384) / RECOURSE TO ARTICLE 21.5 OF THE DSU BY MEXICO (DS386)

- A. REPORT OF THE APPELLATE BODY (WT/DS384/AB/RW) AND REPORT OF THE PANEL (WT/DS384/RW)
- B. REPORT OF THE APPELLATE BODY (WT/DS386/AB/RW) AND REPORT OF THE PANEL (WT/DS386/RW)

- The United States would like to thank the members of the compliance Panels, the Appellate Body, and the Secretariat assisting them for their work on these proceedings.
- These proceedings involved U.S. country of origin labeling (COOL) requirements for beef and pork products sold at the retail level, which were amended in direct response to the original findings of the panel and Appellate Body.
- In particular, the original panel and Appellate Body found that the 2009 Final Rule breached Article 2.1 of the *Agreement on Technical Barriers to Trade* (“TBT Agreement”) because it required producers throughout the supply chain to collect information on where animals were born, raised, and slaughtered, while not requiring retailers to provide the same level of detail on the labels placed on meat products sold at retail outlets.
- The United States changed its labels in the 2013 Final Rule to be directly responsive to this finding, and retailers are now required to inform consumers of the place of birth, raising, and slaughtering for every piece of labeled meat that they buy.
- As such, the findings of the compliance Panels and Appellate Body are particularly disappointing. Instead of recognizing that the United States had modified its measure in the manner suggested by the Appellate Body such that it would come into compliance with Article 2.1, the Panels continued to find the U.S. measure to be in breach of this provision based primarily on two factors: 1) the fact that some meat is not required to be labeled – which is similar to the exceptions other Members have for their country of origin measures, and 2) because in theory there could be some slightly more detailed information provided on the label in a few cases. Unfortunately, the Appellate Body’s somewhat cursory analysis did not reverse these findings.

- On the other hand, the Panels and the Appellate Body left undisturbed the finding in the original proceeding that the provision of origin information to consumers is a legitimate objective under the covered agreements.
- Paradoxically however, it would appear from those findings that there is no clear way under the covered agreements for a Member to achieve that legitimate objective. When examined as a whole, the Panel and Appellate Body findings appear to mean that the United States cannot require U.S. retailers to inform consumers of beef and pork about where the animals were born, raised, and slaughtered. This is a conclusion with which the United States strongly disagrees.
- More specifically, with respect to whether the amended measure treats imports less favorably than domestic products under Article 2.1 of the TBT Agreement, neither of the issues on which the findings were based goes to the question presented, at least as the Appellate Body had explained it in the original proceedings. There the Appellate Body had explained that the question is whether the detrimental impact stems exclusively from legitimate regulatory distinctions or reflects discrimination.
- But here, there was no explanation as to why either the fact that there could be some slightly more detailed information provided in a few cases or that not all beef and pork sold was required to be labeled would “reflect discrimination.” And after all, Article 2.1 addresses discrimination. It is not concerned with whether a technical regulation is “perfect” or “could be better or even more accurate” or “could apply to even more products.”
- The findings regarding the 2013 Final Rule’s recordkeeping burden further illustrate the concern. For those findings, the Panels relied on hypothetical scenarios that do not actually occur and would not be expected to ever occur. However, the Appellate Body appears to avoid engaging with the U.S. argument by noting that one of the scenarios the Panels relied on was not a pure hypothetical.
- But even that hypothetical scenario fails to show that the amended COOL measure reflects discrimination. The scenario relied on by the Appellate Body involved the change in labeling for meat that represents an exceedingly small percentage of the market. And by affirming the Panels’ finding that recordkeeping increased through the change to this one very minor label, the Appellate Body makes no real evaluation of whether the recordkeeping has increased under the amended measure. Accordingly, the Appellate Body makes no real evaluation of *why* the amended measure impacts the competitive opportunities for Mexico and Canada in the U.S. livestock market at all¹ – which, indeed, is what the Panel ultimately should have been examining when answering the question of whether the detrimental impact reflects discrimination.

¹ *US – COOL (Article 21.5 – Canada/Mexico) (AB)*, paras. 5.17-18.

- Regarding the accuracy of the 2013 Final Rule’s labeling requirements, the Appellate Body never engaged with the fundamental issue. That is, whether the fact that the United States could have required the B Label to contain even more detailed information by listing all countries where the animal resided as a country of “raising” means, in fact, that such “inaccuracy” supports a finding that the detrimental impact does not stem exclusively from a legitimate regulatory distinction.²
- Regarding the exemptions to the amended measure, the United States is very concerned by the Appellate Body’s affirmation of the Panels’ finding that regulatory distinctions that have no impact whatsoever on the detrimental impact are nonetheless somehow relevant in assessing whether the detrimental impact stems exclusively from a legitimate regulatory distinction.
- Exemptions, such as the ones that are part of the amended measure, are a normal public policy tool used by Members to balance benefits and costs. In this case, the exemptions do not contribute to any detrimental impact on foreign livestock exports to the United States.
- Moreover, even taking into account the exemptions, the amended measure requires over 30,000 grocery stores and other retailers throughout the United States to provide country of origin information to their customers on the \$38.5 billion worth of beef and \$8.0 billion worth of pork they sell annually. As such, it can hardly be said that the costs of the amended measure are so disproportionate to the information actually provided to consumers that the detrimental impact reflects arbitrary discrimination against Canadian and Mexican livestock.
- The findings with respect to Articles III:4 and XX of the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”), and their connection to Article 2.1 of the TBT Agreement, are also troubling. Indeed, the Panels and Appellate Body continue to fail to adequately address the fact that there may be measures whose objective is legitimate under the TBT Agreement, and whose detrimental impact flows exclusively from legitimate regulatory distinctions, such that these measures are consistent with Article 2.1, but at the same time would be inconsistent with Article III:4 of the GATT 1994 because the legitimate objective does not directly correspond to an exception available under Article XX. This is clearly not a sustainable reading of the two agreements.
- Despite the United States directly raising these serious and systemic concerns, the Appellate Body reports do nothing to address the “balance” between Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994, nor do they facilitate an understanding of the scope of Article XX of the GATT 1994.

² See *US – COOL (Article 21.5 – Canada/Mexico) (AB)*, paras. 5.64-66.

- With respect to Article 2.2 of the TBT Agreement, the United States is pleased that the Panels and the Appellate Body all agreed the amended COOL measure is not “more trade restrictive than necessary.” In so doing, the Panels and the Appellate Body both appropriately concluded that demonstrating that a measure is “more trade restrictive than necessary” will in most cases require a comparison of the measure at issue with another measure that a complaining party asserts would fulfill the Member’s objective at a level equivalent to the challenged measure, but in a less trade restrictive manner. Nonetheless, the Panels’ and Appellate Body’s reasoning and apparent modification of the burden of proof requirements raise serious concerns.
- For instance, the Appellate Body found that in principle it would be possible for a proposed alternative measure to fail to achieve a Member’s legitimate objective at the Member’s chosen level if the alternative could somehow be perceived to compensate for that failure in some other area such that the overall degree of contribution of the alternative would be equivalent to the measure at issue.³ The United States is concerned that this approach undermines a Member’s ability to address legitimate objectives at the level the Member considers appropriate.
- Furthermore, it calls on panels and the Appellate Body to make judgments as to how to value contributions to an objective in one way in an area compared to a different way in another area. This is a task for which panels and the Appellate Body have no guidance in the covered agreements and would appear to be a task unsuited to them, yet the consequences for Members could be quite significant.
- The United States is also concerned by the Appellate Body’s finding that the Panels did not properly allocate the burden of proof under Article 2.2 of the TBT Agreement. Specifically, when bringing a claim under Article 2.2, and as approached under past analyses, it should be for the complainant to provide sufficient evidence to demonstrate that a proposed alternative measure is reasonably available, makes an equivalent contribution to the legitimate objective, and is less trade-restrictive.
- The Appellate Body now suggests that a panel should consider examples of the proposed alternative elsewhere in the world as potential evidence that the costs of a proposed measure are not *a priori* prohibitive.⁴ The Appellate Body further suggests that the responding party is in a better position to provide evidence on this point. The United States is concerned that this relieves the complainants of the burden of demonstrating that a particular measure is available to the Member in question by eliminating the need for specific information on availability of the proposed alternative in the context of that Member’s market and regulatory regime.

³ See *US – COOL (Article 21.5 – Canada/Mexico) (AB)*, para. 5.269.

⁴ See *US – COOL (Article 21.5 – Canada/Mexico) (AB)*, para. 5.339.

- Finally, the United States would like to conclude its statement by touching on a familiar systemic issue that was raised by these panel and Appellate Body reports – the length of the proceedings.
- Article 21.5 of the DSU states that a “panel shall circulate its report within 90 days after the date of referral of the matter to it.” However, this provision also provides a panel with the flexibility to go beyond 90 days “when the panel considers that it cannot provide its report within this timeframe,” although the United States can appreciate Mexico and Canada’s frustration that the Panel proceedings took 13 months in light of the specific circumstances of this proceeding.
- As Members are aware, Article 17.5 of the DSU also includes a deadline, and this provision explicitly states that “in no case shall [Appellate Body] proceedings exceed 90 days.” However, this provision has no clause equivalent to that in Article 21.5 permitting the report to be circulated beyond the mandatory time frame “when the [Division] considers that it cannot provide its report within this time frame”.
- As a result, the fact that the Appellate Body did not circulate its report for 172 days is not consistent with the text of this provision.
- The United States fully understands the difficulty that the Appellate Body had in meeting this 90-day deadline in this dispute, which was in part due to the fact that the disputing parties requested a modified timeline for their submissions, among other legitimate reasons. As a result, when the Appellate Body sent a notice to all three parties indicating that it would not be able to circulate its report within 90 days, the three parties wrote to the Appellate Body to express their understanding of this situation, to provide their consent to the need for more time, and to request a meeting so that the Appellate Body could provide more information as to the date when the report would be circulated.
- For reasons that have still not been explained, the Appellate Body rejected this joint request to meet with the parties to the dispute, contrary to its past practice.
- Despite this, the United States continues to offer its willingness to meet with the Appellate Body when this issue comes up in other disputes as well as to try to find a solution to both this ongoing problem of failing to adhere to the text of Article 17.5 and the equally significant problem of Appellate Body workload. In fact, it is hard to conceive of a way that Members and the Appellate Body will be able to resolve these problems without engaging with each other directly. The United States stands by fully ready to engage constructively in such a dialogue.
- Thank you.