

Options Available to the United States to Reinstate MCOOL for Beef in the Face of the Adverse WTO Ruling

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Resolving the WTO COOL dispute through a negotiated trade settlement: The best solution to the WTO COOL case is to reach a solution that allows the U.S. to maintain mandatory COOL for beef by negotiating a settlement with Canada and Mexico in the context of ongoing trade discussions or commercial disputes.

The United States could also pursue a more reasoned approach that allows mandatory COOL for beef by addressing other ongoing commercial disputes with Canada and Mexico to allow the mutual resolution of multiple issues to every party's satisfaction. These could include ongoing negotiations over long-standing disputes and settlements, an agreement to not bring future trade disputes, or an agreement to rescind or weaken antidumping orders or other trade concessions.

Negotiated trade settlements are common and can preserve domestic standards: It is common for WTO cases to reach a negotiated settlement that avoids trade penalties without necessarily changing the measure that was challenged as a trade barrier. More than a third (34 percent) of WTO cases have been settled, withdrawn, terminated or reached mutually agreed solutions.¹ More than two-fifths (43 percent) of the North American Free Trade Agreement (NAFTA) disputes were mutually terminated.² Plaintiffs in WTO cases can suspend trade penalties even if the WTO authorizes tariff retaliation. This is particularly true of disputes between close commercial partners like the NAFTA countries. Canada suspended penalties after winning a dispute over the Byrd Amendment antidumping rule and Mexico suspended penalties when it prevailed in a dispute over a U.S. antidumping case on stainless steel.³

The United States resolved the Brazil-U.S. cotton case in the face of retaliatory tariffs with a one-time cash payment: The U.S. was embroiled in a decade-long dispute brought by Brazil against the United States at the WTO regarding domestic support for cotton. In August 2009, WTO arbitrators provided the level of countermeasures that Brazil could impose against U.S. trade. In 2014, the U.S. entered into a MOU with Brazil that diplomatically resolved the dispute before the implementation of countermeasures (presumably retaliatory tariffs).⁴ As part of the MOU, the U.S. contributed a one-time final contribution of \$300 million to the Brazil Cotton Institute. The United States did not

¹ World Trade Organization. "Current status of disputes." There were 347 WTO disputes that have gone beyond the consultation phase, and 117 of those were terminated, withdrawn, settled or reached a mutually agreed upon solution. Available at https://www.wto.org/english/tratop_e/dispu_e/dispu_current_status_e.htm. Accessed August 2015.

² North American Free Trade Agreement (NAFTA) Secretariat. "Status Report of Panel Proceedings." Of the 202 completed NAFTA disputes, 87 were terminated by joint consent of the participants. Available at <https://www.nafta-sec-alena.org/Home/Dispute-Settlement/Status-Report-of-Panel-Proceedings>. Accessed August 2015.

³ WTO. Communication from Canada. "United States — Continued Dumping and Subsidy Offset Act of 2000." WT/DS234/33. May 4, 2005; WTO. Communication of a mutually agreed solution. "United States — Final Anti-Dumping Measures on Stainless Steel from Mexico." WT/DS344/26. April 10, 2013.

⁴ USTR. *United States and Brazil Reach Agreement to End WTO Cotton Dispute*, Oct. 1, 2014. Available at [United States and Brazil Reach Agreement to End WTO Cotton Dispute | United States Trade Representative \(ustr.gov\)](https://ustr.gov/Trade-Disputes/United-States-and-Brazil-Reach-Agreement-to-End-WTO-Cotton-Dispute).

attempt to negotiate a settlement in the COOL case. However, the American Beef Labeling Act of 2021 (S.2716) directs both the USTR and USDA to establish the means of implementing COOL for beef in compliance with WTO rules. That compliance could also be achieved through negotiations with the parties.

The 2014 MOU provides for additional support for the technical assistance and capacity building activities begun under the 2010 Memorandum of Understanding. The United States will make a one-time final contribution of \$300 million to the Brazil Cotton Institute, or IBA. The 2014 MOU also provides for additional uses for the funds, such as research in conjunction with U.S. institutions.

Settlement of the WTO clove cigarette dispute provides model for combining commercial disputes to maintain important domestic standards: In 2012, the WTO ruled that the U.S. ban on clove and flavored cigarettes, designed to prevent children from smoking, violated the WTO because the ban discriminated against flavored tobacco imports from Indonesia since the United States still permitted the sale of menthol cigarettes, a comparable product.⁵ Although the WTO authorized Indonesia to impose \$55 million in annual tariff retaliation, the United States negotiated a settlement that maintained the U.S. ban and suspended the tariff penalties (although the ban is still considered WTO-illegal).⁶ Importantly, although the settlement included some terms that were pertinent to the dispute (the United States agreed not to extend the ban on flavored cigarettes to cigars or cigarillos), it also included several provisions that were beyond the scope of the original dispute. The memorandum of understanding included increased market access for certain Indonesian insulated wire exports to the United States, a commitment that the United States would not bring a dispute against Indonesia's export restrictions on mineral products and provisions to strengthen Indonesia's intellectual property enforcement.⁷

Potential commercial areas that could be part of a settlement that maintains mandatory COOL: In the clove cigarette case, the United States maintained a public interest protection by offering concessions in unrelated commercial trade tensions (U.S. wire tariffs, Indonesian rare earth mineral export controls and anti-piracy measures). The United States could use the approach from the clove cigarette case to negotiate a broader settlement with Canada and Mexico that maintained mandatory COOL by combining it with other commercial trade tensions. The following commercial issues represent a menu of individual commercial trade issues that could be combined to resolve the COOL dispute.

- ***Establish more permanent solutions to long-standing trade tensions over softwood lumber and sugar:*** In October 2015, the U.S.-Canadian Softwood Lumber Agreement expired, a commercial compact that established a trade dispute détente over a commercial dispute that has lasted more than a century.⁸ The dispute hinges on whether Canada's low fees for lumber collected from public lands amounts to an illegal subsidy. The United States applied

⁵ Miles, Tom and Doug Palmer. "WTO dents U.S. ban on clove cigarettes." *Reuters*. April 4, 2012.

⁶ International Centre for Trade and Sustainable Development. "Indonesia announces deal with US on clove cigarettes trade dispute." *Bridges*. Vol. 18, No. 33. October 9, 2014.

⁷ Needham, Vicki. "US, Indonesia settle fight over clove cigarettes." *The Hill*. October 3, 2014.

⁸ "Blame game already on as Canada-U.S. softwood deal expires." *Canadian Press*. October 13, 2015.

\$5 billion in countervailing duties (mostly refunded under the agreement) and the issue was the subject of both WTO and NAFTA disputes.⁹ In May 2015, the United States suspended both antidumping and countervailing duty investigations and penalties against Mexican sugar exports to the United States in exchange for establishing limits for sugar imports.¹⁰ The suspension agreement withstood several administrative challenges that found that the sugar deal provided appropriate protection for the U.S. domestic sugar industry, although candy and other food manufacturers continue to press to have the deal eliminated.¹¹ These two commercial areas might benefit from long-term negotiated solutions.

- *Suspend or reduce antidumping orders against Canada and Mexico:* The United States is reviewing several antidumping orders against Canada and Mexico; revisiting these orders could be included in a memorandum of understanding that maintained mandatory COOL. Three antidumping orders are currently being reviewed as part of the 5-year sunset reassessment (Mexican certain magnesia carbon bricks, order established September 2010, currently up for 5-year sunset review; Canadian iron construction castings, sunset review upheld October 2010, currently up for review; Mexican seamless refined copper pipe, sunset review November 2010, currently up for review).¹² There are other antidumping orders against products from Mexico and Canada that could be considered as well.¹³
- *Withdraw pending WTO or NAFTA trade disputes against Canada and Mexico:* The United States has a pending WTO dispute against Canada (a complaint against Canada's provisional antidumping corn investigation in 2006), a pending WTO dispute with Mexico (against Mexico's regulations on the import of live U.S. hogs) and two NAFTA disputes with Mexico (against Mexico's antidumping duties on U.S. chicken thighs and legs and against Mexico's antidumping duties on ethylene glycol monobutyl ether).¹⁴
- *Agree not to pursue future trade disputes or complaints identified in USTR's National Trade Estimate Report:* Every year, USTR catalogs the foreign laws, rules, regulations and measures it contends are trade barriers that subvert U.S. export opportunities. The United States identified 15 Canadian and 10 Mexican measures that are potential trade barriers and could represent future U.S. WTO trade complaints. Like in the clove cigarette case, the

⁹ International Centre for Trade and Sustainable Development. "US-Canada softwood lumber deal expires." *BioRes*. October 19, 2015.

¹⁰ 80 Fed. Reg. 25278. May 4, 2015.

¹¹ Pates, Mikkell. "Commission votes in favor of U.S. sugar producers in dispute with Mexico." *Grand Forks Herald*. October 20, 2015.

¹² 75 Fed. Reg. 57257; 75 Fed. Reg. 70900; 75 Fed. Reg. 71070.

¹³ The antidumping orders include Canadian citric acid (80 Fed. Reg. 36318), Mexican carbon steel wire (79 Fed. Reg. 38008), Mexican circular welded pipes (77 Fed. Reg. 41967), Mexican large residential washers (78 Fed. Reg. 11148), Mexican light-walled rectangular pipe (79 Fed. Reg. 355522), Mexican prestressed concrete steel rail tie wire (79 Fed. Reg. 35727), Mexican prestressed concrete steel wire strand (80 Fed. Reg. 22708), and Mexican steel concrete reinforcing bar (79 Fed. Reg. 66925).

¹⁴ WTO disputes WT/DS338 and WT/DS203 and NAFTA disputes MEX-USA-2012-1904-01 and MEX-USA-2012-1904-02.

United States could stipulate that it would not bring a trade challenge over one or more of these measures to resolve the COOL dispute.¹⁵

Conclusion: The United States can negotiate a settlement that allows the reinstatement of mandatory COOL for beef by either combining the COOL dispute with other trade and commercial frictions and/or modifying certain of the COOL regulations as they apply to beef to address the WTO dispute.

¹⁵ USTR. “2015 National Trade Estimate Report on Foreign Trade Barriers.” March 2015. Canada measures include: Restrictions on U.S. seed exports; cheese composition standards; supply management for dairy, chicken, turkey, eggs; geographic indicators in Canada-EU Trade Agreement; restrictions on wheat and barley grading; personal duty exemption for 24-hour visits; export credits/R&D support for civil aviation/Bombardier; procurement by Canada’s Crown Corporations; utility patents for pharmaceuticals, insufficient counterfeiting/piracy protections; foreign stake in telecommunications limitations; Canadian television/broadcasting content requirements; review of foreign investments require “net benefit” to Canada; Port Hawkesbury paper mill bailout; the McInnis Cement subsidy; and government data security limitations on cross-border data transfers (NTE at 57 to 63). Mexico’s measures include: Processed food labeling for nutritional content; overly burdensome energy efficiency ratings regulations; suspension of fresh potato market access permitted in 2014; raw milk for pasteurization in Mexico; quarantine provisions on stone fruit for oriental fruit moth et al.; steel/footwear/apparel import licenses; Special 301 watch list on intellectual property protection/piracy; foreign ownership of telecommunications/new telecommunications authority; advertising access on pay-television; and local content requirements/investment rules on energy sector (NTE at 267 to 272).