

July 1, 2009

Attn: Daniel Brinza
Assistant United States Trade Representative for Monitoring and Enforcement
Office of the United States Trade Representative
600 17th Street, N.W.
Washington, D.C. 20508

**Re: WTO Dispute Settlement Proceeding Regarding *United States –
Certain Country of Origin Labeling Requirements***

Dear Mr. Brinza:

This letter is filed on behalf of the United States Cattlemen's Association, Women Involved in Farm Economics, and the National Farmers Union in response to a request for comments published in the Federal Register on May 22, 2009.¹ These organizations are national associations of cattle ranchers and farmers in the United States, including farmers who raise livestock.

We submit these comments regarding two requests for consultations filed by Canada and Mexico at the World Trade Organization regarding certain mandatory country of origin labeling ("COOL") requirements in U.S. statute and regulations.²

¹ *WTO Dispute Settlement Proceeding Regarding United States—Certain Country of Origin Labeling Requirements*, 74 Fed. Reg. 24,059 (USTR May 22, 2009).

² See Request for Consultations by Canada, Addendum, *United States – Certain Country of Origin Labeling (COOL) Requirements*, WT/DS384/1/Add.1 (May 11, 2009); Request for Consultations by Mexico, Addendum, *United States – Certain Country of Origin Labeling Requirements*, WT/DS386/1/Add.1 (May 11, 2009).



While the requests for consultations filed by Canada and Mexico do not identify which aspects of COOL the countries seek to challenge, press reports and other statements indicate that the countries are particularly concerned with labeling requirements for meat products, including beef.³ Like many U.S. ranchers and farmers, consumers, and others, we strongly support COOL and its effective implementation. COOL increases transparency in the marketplace, and it permits consumers to differentiate among products and have a choice regarding the meat they purchase. We believe COOL is fully consistent with U.S. international obligations, and we look forward to working with you to mount a vigorous defense of this important law at the WTO.

The requests from Canada and Mexico identify various GATT Articles and three WTO agreements with which they believe COOL may be inconsistent:

- 1) Articles III:4, IX:2, IX:4, and X:3 of GATT 1994;
- 2) Article 2 of the Agreement of Technical Barriers to Trade (“TBT Agreement”);
- 3) alternatively to the TBT Agreement claims, Articles 2, 5, and 7 of the Agreement on Sanitary and Phytosanitary Measures (“SPS Agreement”); and
- 4) Article 2 of the Agreement on Rules of Origin (“ROO Agreement”).

The requests also claim that COOL appears to nullify or impair the benefits accruing to Canada and Mexico in the sense of Article XXIII:1(b) of GATT 1994.⁴

³ See, e.g., “Canada Requests Further Round of WTO Consultations on U.S. Country-of-Origin Labeling,” Government of Canada Press Release (May 7, 2009) available at <http://news.gc.ca/web/article-eng.do?m=/index&nid=448359> .

⁴ This summary is based on the request for consultations from Canada, which is more specific in the articles cited than the request for consultations from Mexico.

We address each of these claims in turn below, but begin with a short summary of the COOL provisions relating to labeling of beef products. These provisions accord imported products the exact same treatment accorded to domestic products, they are transparent and reasonable, and they serve an important and legitimate objective of increasing the amount of information available to consumers who purchase meat products from retailers. The COOL law and regulations do not discriminate against imported goods nor impose other trade restrictions, and they have not been shown to have any such discriminatory or trade-restrictive effects on goods from other countries.

I. Country-of-Origin Labeling for Beef Products

Congress first enacted COOL as part of the Farm Security and Rural Investment Act of 2002.⁵ The law states that “a retailer of a covered commodity shall inform consumers, at the final point of sale of the covered commodity to consumers, of the country of origin of the covered commodity.”⁶ The law further specifies additional information to be provided to consumers for certain products, particularly information on the animals from which meat is derived. As explained by Congress, the purpose of the law is to increase the information available to consumers at the point of sale of certain agricultural items, noting that the law “provides consumers with greater information about the food they buy.”⁷

In a 2003 report on the law, the Government Accountability Office noted that COOL served to provide consumers with information about the source of their food that was not provided by the rule of origin marking requirements administered by U.S.

⁵ Farm Security and Rural Investment Act of 2002 § 10816, 7 U.S.C. § 1638 *et seq.* (2008).

⁶ 7 U.S.C. § 1638a(a)(1) (2008).

Customs and Border Protection.⁸ For example, Customs rules require the crates or other packaging in which fresh produce is shipped to bear origin information, but little information was generally available at the point of retail sale of such items to consumers.⁹ In addition, the report found that consumers lacked information regarding the source of the meat they purchased, particularly regarding the cattle from which the meat was derived.¹⁰ In some cases, the lack of information could lead to consumer deception where other markings, such as the USDA grade stamp with an American flag symbol borne by most beef products, misled consumers into believing a product was in fact produced in the U.S. from U.S. cattle when that may not have been the case.

Due to these concerns, the 2002 law permitted retailers to designate beef as being a product of solely the United States only if such beef “is exclusively from an animal that is exclusively born, raised, and slaughtered in the United States.”¹¹ Implementation of the labeling requirement was subsequently delayed, and Congress revisited the requirement in the 2008 Farm Bill, adding more detail on the manner in which beef and other meat products should be labeled to ensure transparency and enhance consumer

⁷ S. REP. NO. 107-117, at 93-94 (2002).

⁸ U.S. Government Accountability Office, *Country-of-Origin Labeling: Opportunities for USDA and Industry to Implement Challenging Aspects of the New Law*, GAO-03-780 (Aug. 2003) (hereinafter “2003 GAO Report”) at 10-12.

⁹ *Id.* at 10-11.

¹⁰ *Id.* at 11-12.

¹¹ 7 U.S.C. § 1638a(a)(2)(A) (2008). In addition, beef exclusively from animals exclusively born and raised in Alaska or Hawaii and transported for a period not to exceed 60 days through Canada to the United States and slaughtered in the United States is eligible to be designated as having a United States country of origin. *Id.*

information.¹² Final implementing regulations for the labeling requirements were issued on January 15, 2009 and went into effect on March 16, 2009.¹³

COOL only imposes additional labeling requirements on U.S. meat products. Imported meat products may retain the origin markings already required by Customs and be in full compliance with COOL.¹⁴ While COOL does not prevent retailers of imported meat from including additional source information on the labels for that meat as well, such additional information is not required.

The law as amended and implemented operates to provide additional information to consumers regarding the animals from which U.S. meat is derived. COOL requires the label on beef to indicate the country or countries in which the animal from which the meat is derived was born, raised, and slaughtered. In some cases, where an animal is born, raised, and slaughtered all in the same country, the meat from which it is derived bears a label naming only that one country, that is, the United States.¹⁵ In other cases, where an animal is born and/or raised in a foreign country, but slaughtered in the United States, the label will bear the name of all relevant countries, listed in any order.¹⁶ Under

¹² See Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 11002, 122 Stat. 1651, 2113–2114 (2008).

¹³ *Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts; Final Rule*, 74 Fed. Reg. 2,658 (U.S. Dep’t Agriculture Jan. 15, 2009) (hereinafter “*Final Rule*”).

¹⁴ See *Final Rule* at 7 C.F.R. § 65.300(f).

¹⁵ Rules for labeling product with a single country of origin are found in the *Final Rule* at 7 C.F.R. §§ 65.260, 65.300(d). The U.S. label may also be used on: 1) meat from animals born and raised in Alaska or Hawaii and transported for a period of not more than 60 days through Canada to be slaughtered in the United States; and 2) meat from animals present in the United States on or before July 15, 2008.

¹⁶ Rules for labeling meat from animals that have undergone processing steps in more than one country and labeling rules for meat from animals imported for immediate slaughter are found in the *Final Rule* at 7 C.F.R. § 65.300(e). Minimal raising in another country does not require adding that country to the label if the animal was also raised in the United States. *Id.* at 2,659, 2,662.

current regulations, meat that would otherwise qualify for the U.S. label that is commingled during a single production day with meat from animals not exclusively born, raised and slaughtered in the U.S. may bear the same label as the multiple source product.¹⁷ Finally, where meat from different sources is combined into one product, such as in ground beef, the label may list all source countries or all reasonably possible source countries.¹⁸

Subsequent to issuance of the final implementing regulations, the Secretary of Agriculture issued a letter to industry representatives suggesting the industry voluntarily adopt several additional practices to ensure consumers are adequately informed about the source of food products.¹⁹ The voluntary practices suggested by the Secretary included: 1) adding information to meat labels regarding which animal processing steps (birth, raising, and slaughtering) occurred in which country; and 2) reducing the amount of time meat from a particular country could be absent from a processor's inventory and still be considered a reasonably possible source country listed on a ground beef label from 60 days to 10 days. The Secretary's suggested actions were purely voluntary, with no means for enforcing compliance.

In sum, COOL requires retailers to provide consumers with more specific information regarding the source of beef and other agricultural products. In addition to labeling beef with the name of the country in which the animal from which that meat is

¹⁷ *Final Rule* at 7 C.F.R. § 65.300(e)(2).

¹⁸ *Final Rule* at 7 C.F.R. § 65.300(h). The rule provides that, if product from a particular country has not been in the processor's inventory for more than 60 days, that country shall no longer be included as a reasonably possible source country for labeling purposes.

¹⁹ Letter from Secretary Vilsack to Industry Representatives (Feb. 20, 2009), available on-line at http://www.usda.gov/documents/0220_IndustryLetterCOOL.pdf.

derived was slaughtered, COOL requires retailers to inform consumers of any other countries in which the animal was born and/or raised. The requirement to inform consumers of the country or countries in which these additional steps occurred only applies if the meat is from an animal slaughtered in the United States. Retailers may include such additional information for imported meat slaughtered in a foreign country, but such meat is permitted to bear a simpler label that merely lists the country of origin as determined under Customs rules. Finally, where meats from various sources are commingled, retailers have some leeway to identify the sources which may be contained therein.

II. Country-of-Origin Labeling Requirements Comply with U.S. WTO Obligations

The COOL statute and regulations are fully consistent with U.S. obligations under the WTO Agreements, including GATT 1994, the TBT Agreement, the SPS Agreement, and the ROO Agreement.

A. COOL Accords Imported Goods Treatment No Less Favorable than that Accorded to U.S. Goods

Article III:4 of GATT 1994 provides as follows:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

In order to establish a violation of the Article, the complaining party has the burden of proof to demonstrate that three elements are satisfied: 1) that the imported and domestic products at issue are “like” products; 2) that the challenged measures are laws, regulations, or requirements that affect the internal sale or use of the products; and 3) that

the treatment accorded to imported products is less favorable than that accorded to the like domestic goods.²⁰ A measure will accord less favorable treatment to imports if it fails to provide equality of competitive conditions for imported products in relation to domestic products; in other words, the purpose of the requirement is to ensure that governments provide “effective equality of opportunities” to imported goods.²¹

COOL accords no less favorable treatment to imported goods than it accords to domestic goods. If the like product to be examined is one directly regulated by COOL, beef, there is no less favorable treatment accorded to Canadian or Mexican beef than the treatment accorded to U.S. beef. To the contrary, only beef from an animal slaughtered in the U.S. must bear additional information regarding any other countries in which the animal may have been born or raised. These additional requirements do not apply to Canadian and Mexican beef, for which the country of origin declared on the Customs form provides sufficient information for the purposes of COOL.²² Nothing in COOL prohibits retailers from providing additional animal source information in labels on Canadian and Mexican beef if they choose to do so.

Canada and Mexico may argue that the imported product allegedly accorded less favorable treatment is not the meat directly regulated by COOL, but the live animals from which that meat is derived. Assuming that Canadian and Mexican live cattle on the one hand, and U.S. live cattle, on the other, are like products, the complainants must

²⁰ Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R (adopted Jan. 10, 2001), para. 133 (establishing three prong test). See also Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R (adopted Apr. 22, 1998), para. 10.372 (establishing that the complaining party has the burden of proof).

²¹ See, e.g., Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R (adopted Apr. 22, 1998), para. 10.379.

demonstrate that COOL affects the internal sale, purchase, distribution, or use of such cattle in a manner that denies Canadian and Mexican cattle effective equality of competitive opportunities compared to U.S. cattle.

On its face, COOL does not directly regulate cattle, but the beef derived from such cattle. However, Article III:4 may encompass measures that do not directly regulate a product as long as they affect the internal sale or use of such product. For example, the WTO has considered a number of disputes in which government measures require a minimum level of domestic content in certain downstream goods.²³ In such cases, even though it is the downstream goods that are directly regulated by the measures, and not the inputs, the requirements have been found to affect the internal sale or use of the inputs. Such measures will violate Article III:4 if they accord less favorable treatment to imported inputs than domestic inputs, which is exactly what domestic content requirements do.

By contrast, COOL does not accord less favorable treatment to Canadian or Mexican cattle than the treatment it accords to U.S. cattle. COOL does not impose any requirements on, nor condition any benefits to, retailers or beef producers based on the origin of the cattle from which the beef is made. Instead, it merely requires that information about the cattle be included in the beef label, and this requirement applies equally whether the beef is derived from domestic or imported cattle. COOL is thus

²² See *Final Rule* at 7 C.F.R. § 65.300(f).

²³ See, e.g., Appellate Body Report, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R (adopted Jan. 12, 2009), paras. 194-197; Appellate Body Report, *United States – Tax Treatment for “Foreign Sales Corporations” (Article 21.5 – EC)*, WT/DS108/AB/RW (adopted Jan. 29, 2002), para. 218; Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R (adopted Apr. 5, 2002), paras. 7.196, 7.201-202.

fundamentally different from the domestic content measures reviewed in prior Article III:4 cases.

Finally, in some cases the WTO Appellate Body has found that a government measure which is facially neutral may nonetheless accord less favorable treatment if it denies equality of competitive opportunities to imported products relative to domestic products.²⁴ According to materials released by the government of Canada, Canadian cattle producers claim that meatpackers have responded to COOL by segregating their production lines to only process cattle of a single source in order to simplify labeling.²⁵ They further allege that such segregation disproportionately harms Canadian cattle, because packers who choose to operate single-source lines operate them to process U.S. cattle rather than Canadian cattle.²⁶

Assuming *arguendo* that there were any merit to such allegations, nothing in the COOL law or regulations requires processors to segregate processing of cattle of different sources on dedicated production lines. While private action taken in response to government measures may be subject to scrutiny under Article III:4, this is only the case if that private action is either required by the government measure or if a benefit is conditioned on undertaking the private action.²⁷ Neither is the case with COOL, which only mandates the content of the labels that must be placed on beef for retail sale, and

²⁴ See, e.g., Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R (adopted Apr. 22, 1998), para. 10.379.

²⁵ See, e.g., “Canada Requests Further Round of WTO Consultations on U.S. Country-of-Origin Labeling,” Government of Canada Press Release (May 7, 2009) available at <http://news.gc.ca/web/article-eng.do?m=/index&nid=448359> .

²⁶ See *id.*

does not prescribe the methods processors must use to track such information through their production process.

Moreover, there is no inherent reason why segregation of production lines would disadvantage imported cattle relative to domestic cattle. A producer who chose to segregate production could just as easily opt to dedicate a processing line to cattle from Canada, Mexico, or any other country and achieve the exact same efficiencies in complying with the requirements of COOL as he would if the line were dedicated to processing domestic cattle. To the extent there were any greater economies of scale or other conveniences in dedicating a line to domestic animals over imported animals, this would result from the relative market share of each – a circumstance predating COOL – rather than any requirement imposed by COOL itself.

In order to establish a violation of Article III:4, the alleged inequality of competitive conditions suffered by imports must be a result of the challenged measures themselves, not some extraneous factors such as relative market shares. In *Dominican Republic – Cigarettes*, the WTO Appellate Body rejected a claim that a fixed bond amount applying to cigarette importers and domestic manufacturers violated Article III:4 because the per-unit amount of the bond was greater for importers than domestic producers due to the smaller volume of imported cigarettes compared to domestic ones.

The Appellate Body explained as follows:

{T}he existence of a detrimental effect on a given imported product resulting from a measure does not necessarily imply that this measure accords less favorable treatment to imports if the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product, such as the market share of the importer in this case. In this

²⁷ See, e.g., Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R (adopted as modified by the Appellate Body June 19, 2000), para. 10.123.

specific case, the mere demonstration that the per-unit cost of the bond requirement for imported cigarettes was higher than for some domestic cigarettes during a particular period is not, in our view, sufficient to establish “less favorable treatment” under Article III:4 of the GATT 1994. Indeed, the difference between the per-unit costs of the bond requirement alleged by Honduras is explained by the fact that the importer of Honduran cigarettes has a smaller market share than two domestic producers (the per-unit cost of the bond requirement being the result of dividing the cost of the bond by the number of cigarettes sold on the Dominican Republic market). In this case, the difference between the per-unit costs of the bond requirement alleged by Honduras does not depend on the foreign origin of the imported cigarettes. Therefore, in our view, the Panel was correct in dismissing the argument that the bond requirement accords less favorable treatment to imported cigarettes because the per-unit cost of the bond was higher for the importer of Honduran cigarettes than for two domestic producers.²⁸

In the case of COOL, any detrimental affect alleged to be suffered by Canadian or Mexican cattle is fully explained by their relative share of the U.S. market prior to COOL. To the extent that processors may dedicate processing lines to cattle from a single source in order to facilitate labeling beef in compliance with COOL requirements, this practice would only disfavor cattle from a particular source to the extent that cattle had a smaller market share than cattle from another source. Yet the differences in market share have nothing to do with the foreign origin of the cattle itself and certainly not with the provisions of COOL.

Therefore, any argument that COOL itself has caused any alleged inequality of competitive conditions must be rejected as irrelevant to consistency with WTO obligations. COOL does not discriminate between domestic and imported beef, and it does not accord imported cattle treatment any less favorable than that accorded to

²⁸ Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R (adopted May 19, 2005), para. 96.

domestic cattle. COOL is non-discriminatory on its face and operates neutrally in the market place. It preserves equal competitive opportunities for domestic and imported cattle, and therefore is fully consistent with Article III:4 of GATT 1994.

B. COOL Does Not Violate U.S. Rule of Origin Obligations under the WTO

Canada and Mexico claim that COOL violates Article IX of GATT 1994 and Article 2 of the ROO Agreement. COOL does not fall within the scope of these rule of origin disciplines. Article IX of GATT 1994 contains rules regarding “marks of origin,” but does not define the term. In 1956, the GATT Working Party on Trade and Customs Regulations issued a report that examined the requirements of Article IX and made recommendations for further disciplines.²⁹ The Working Party Report distinguished marks of origin, that apply to goods upon their importation, and more general labeling requirements that may require more information than the customs-determined country of origin of a good.³⁰ The report noted that such additional labeling requirements were beyond the scope of the Committee’s work under Article IX, but noted that such requirements would have to comply with the general national treatment obligations of Article III.³¹ The ROO Agreement is similar in scope, covering rules of origin used to determine a good’s country of origin, including rules used in origin marking requirements under Article IX of GATT 1994.³²

COOL is not a rule of origin in the sense contemplated by these provisions. It is not imposed on goods at the border – to the contrary, the origin marking already required

²⁹ Report of the Working Party on Trade and Customs Regulations, *Certificates of Origin, Marks of Origin and Consular Formalities*, GATT Doc. No. L/595 (Nov. 15, 1956).

³⁰ *Id.* at para. 13.

³¹ *Id.*

by Customs at the border for imported beef need merely be retained to meet the labeling requirement for imported meat under COOL.³³ Nor does COOL make any changes to the origin marking obligations for cattle imported into the United States. The only additional labeling requirements imposed by COOL apply to beef processed in the United States – that is, beef produced in the U.S. from animals slaughtered in the U.S. Thus, COOL is exactly the type of labeling requirement distinguished by the Working Party Report: it is an internal requirement of general application that is subject to the national treatment obligations of Article III of GATT 1994 but not the rules of origin disciplines of Article IX of GATT 1994 nor the ROO Agreement.

C. COOL Is Consistent with U.S. Obligations under the TBT Agreement

Canada and Mexico both assert that COOL violates either Article 2 of the TBT Agreement or Articles 2, 5, and 7 of the SPS Agreement. The TBT Agreement applies to technical regulations, which are defined as documents which lay down product characteristics or their related processes and production methods, including regulations which deal exclusively with marking or labeling requirements as they apply to a product.³⁴ Assuming that COOL is a technical regulation, Article 2 of the TBT Agreement requires that the regulation accord imports no less favorable treatment than domestic like products, not be more trade restrictive than necessary to meet a legitimate objective, and be based on relevant international standards unless those standards would be an ineffective or inappropriate means for achieving the regulation's legitimate objective. COOL complies with each of these requirements.

³² See ROO Agreement, Art. 1.

³³ See *Final Rule* at 7 C.F.R. § 65.300(f).

First, as reviewed in section II.A, above, COOL is fully consistent with the national treatment obligations in Article III:4 of GATT 1994. For the same reasons, it is also consistent with the national treatment obligation in Article 2.1 of the TBT Agreement.

Second, COOL also complies with the obligation in Article 2.2 of the TBT Agreement to not be more trade-restrictive than necessary to fulfill a legitimate objective. One of the examples of a legitimate objective listed in Article 2.2 is the prevention of deceptive practices. As noted in Section I, above, one of the legitimate objectives served by COOL is the prevention of consumer deception that may result if specific and consistent information regarding the source of food items is not available at the point of retail sale. The list in Article 2.2 is not exhaustive, however, and technical regulations may be justified on the basis of additional legitimate objectives.³⁵ The panel in *EC – Sardines* explained that, under Article 2.2 of the TBT Agreement, “it is up to the Members to decide which policy objectives they wish to pursue and the levels at which they wish to pursue them.”³⁶ In that case, the legitimate objectives pursued by the EC labeling requirement and recognized by the panel included “market transparency” and “consumer protection.”³⁷

³⁴ TBT Agreement, Annex 1.

³⁵ See Panel Report, *European Communities – Trade Description of Sardines*, WT/DS231/R (adopted as modified by the Appellate Body Oct. 23, 2002), para. 7.118. This finding was not appealed to the Appellate Body.

³⁶ *Id.* at para. 7.120. This finding was not appealed to the Appellate Body.

³⁷ *Id.* at para. 7.123. This finding was not appealed to the Appellate Body.

COOL is designed to meet the legitimate objective of providing “consumers with greater information about the food they buy.”³⁸ Similar to the EC labeling regulation, the goal is market transparency and protection of consumers from deceptive practices. The level of information Congress determined to provide consumers includes information not just about the country in which an animal from which meat is derived is slaughtered, but also regarding the country in which the animal is born and raised. In order to provide consumers with this level of information about the food they purchase, COOL requires retailers to label meat products at the point of sale as detailed in the law and its implementing regulations.

There is no evidence that COOL in fact restricts trade in pursuit of this legitimate objective, especially given its equal treatment of domestic and imported products. However, even assuming that Canada or Mexico could demonstrate that COOL does restrict trade in some manner, in order to establish that COOL is more trade restrictive than necessary to fulfill a legitimate objective, they must demonstrate that there is an alternative measure to COOL that meets each of the three following criteria: 1) it is reasonably available taking into account technical and economic feasibility; 2) it achieves COOL’s legitimate objective at the level deemed appropriate by the U.S.; and 3) it is significantly less restrictive to trade than COOL itself.³⁹ It is difficult to conceive of a measure which would inform consumers of the source of covered products at the level of specificity intended by Congress which does not consist of the same basic elements of

³⁸ See S. REP. NO. 107-117, at 93-94 (2002).

³⁹ See Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R (adopted Nov. 6, 1998), para. 194 (interpreting similar language in Art. 5.6 of the SPS Agreement).

COOL – that is, a mandatory requirement to label meat with information regarding the source of the animal or animals from which meat is derived.

For example, a proposal that retailers be allowed to label ground beef with a label so vague as to be meaningless – that is, a label stating nothing more than “May contain U.S. and imported meats” – was properly rejected by the U.S. Department of Agriculture in the rule-making stage as insufficient to meet the intent of the statute.⁴⁰ Furthermore, a voluntary labeling program, which has been urged by some opponents of COOL, would also fail to achieve the legitimate objective of informing consumers, as it would provide no guarantee of consistent and precise information available at all retail outlets. Indeed, the failure of retailers to provide such information voluntarily was the very impetus for the mandatory COOL requirements.⁴¹

Third, COOL is fully consistent with the obligation in Article 2.4 of the TBT Agreement to base technical regulations on relevant international standards as long as those standards provide an effective and appropriate means for fulfilling the legitimate objective pursued. The WTO work program to harmonize rules of origin under the ROO Agreement may define some relevant standards for determining the origin of imported food products, but, as explained in Section II.B, above, COOL is not a rule of origin for imported meat but a labeling requirement which only imposes additional labeling requirements on meat products processed in the United States. Another potential source of international standards is the Codex General Standard for the Labeling of Prepackaged Foods, which provides that the country in which the last substantial transformation of a

⁴⁰ See *Final Rule* at 2,679.

⁴¹ See S. REP. NO. 107-117, at 93-94 (2002) and 2003 GAO Report.

prepackaged food occurs shall be the country of origin for labeling purposes.⁴² However, because the explicit purpose of COOL is to provide consumers with additional information regarding the food they purchase beyond the mere Customs origin markings, this minimal Codex requirement is, on its face, insufficient and inappropriate to meet that legitimate objective. Therefore, the U.S. determination to require that more specific source information be provided on U.S. meat products is fully consistent with Art. 2.4 of the TBT Agreement.

D. COOL Is Not Subject to the SPS Agreement

As an alternative to their claims under the TBT Agreement, Canada and Mexico assert that COOL violates Articles 2, 5, and 7 of the SPS Agreement. COOL does not appear to be squarely within the scope of the SPS Agreement, because it is a measure designed to increase the information available to consumers rather than a measure applied primarily to protect human or animal life or health.⁴³ However, COOL may have important incidental health and safety benefits by virtue of the additional information it provides in labels on U.S. meat products. For example, if a food safety emergency were to occur that only implicated U.S. meat or only U.S. meat derived from cattle from a certain source country, COOL would permit retailers, consumers, and health and safety officials to, at a minimum, identify safe product which was clearly not implicated by the outbreak and focus food safety efforts on products within the scope of legitimate concern. This would permit authorities to address a food safety emergency without unnecessarily restricting products that pose no risk. Without imposing any requirements on other

⁴² Codex General Standard for the Labeling of Prepackaged Foods, § 4.5.2.

⁴³ See the definition of “sanitary or phytosanitary measure” in Annex A of the SPS Agreement.

countries to create a traceback system or otherwise change their internal regulations, and without imposing any bans or requirements at the border, COOL increases the ability to identify meat with more specificity should there be a food safety emergency.

Despite the potential benefits of COOL for health and safety, COOL as such does not create a health and safety standard and therefore is not directly subject to the disciplines of the SPS Agreement. Nonetheless, COOL is consistent with the principles of the SPS Agreement. As discussed in Sections II.A and C, above, COOL does not accord less favorable treatment to imports, it does not create unnecessary barriers to trade, and there are no relevant international standards that would be appropriate and effective in meeting the legitimate objectives of COOL. While Article 5.1 of the SPS Agreement requires Members to base their SPS measures on risk assessments, such assessments are only required “as appropriate to the circumstances.” In the case of COOL, because the primary goal of the measure is to increase consumer information in all cases regardless of health or safety concerns, no risk assessment was appropriate or necessary. COOL is thus fully consistent with U.S. obligations under the SPS Agreement.

III. Conclusion

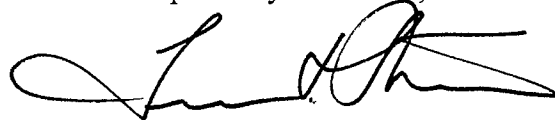
COOL is a vital tool for increasing market transparency, permitting producers to differentiate their product, and ensuring consumers have the ability to make an informed decision regarding the meat and other agricultural products they purchase. For beef products, COOL imposes no additional requirements on imported meat and merely requires that additional information regarding the animals from which meat is derived be included on the labels for meat products processed in the United States. The information

required is the same whether the meat is derived from domestic or imported animals, and leeway is provided where meat from animals of varying sources is commingled.

COOL accords imported products treatment just as favorable, if not more so, than the treatment accorded to like domestic products. COOL does not restrict trade, and it serves an important and legitimate objective of improving consumer information and preventing deceptive practices. COOL is neither a rule of origin nor a health and safety measure, but the additional animal source information it provides to consumers of U.S. meat may assist in addressing health and safety concerns while minimizing trade restrictions. In every respect, COOL is fully consistent with the WTO obligations of the United States.

U.S. ranchers and farmers strongly support COOL and believe its vigorous implementation and enforcement are vitally important. COOL ensures U.S. consumers have access to accurate, specific, and consistent information about the food they buy for themselves and their families. We look forward to working closely with USTR to defend this important law.

Respectfully submitted,



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