WHERE IS MY FOOD FROM? DEVELOPMENTS IN THE WTO DISPUTE OVER COUNTRY-OF-ORIGIN LABELING FOR FOOD IN THE UNITED STATES

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I. INTRODUCTION

Throughout history, food recurrently appears as the centerpiece of local customs and traditions. In the United States, few meals bring people together like Thanksgiving dinner. A second look at the contents of that Thanksgiving dinner plate, however, reveals that today, a meal reflects more than just local traditions of food production and consumption—it also reflects the increasingly globalized system of agricultural trade. Certainly, those mashed potatoes may have come from Idaho-grown potatoes. Considering that the United States is a net importer of cranberries, though, it is possible that the contents of the cranberry sauce originated in Canada or Chile[1] and the pecans in Grandma's pecan pie may have come from Mexico.[2]

Advancements in transportation and communication which allow for the expansion of international agricultural trade, combined with the declining number of farmers in the United States, push an ever-growing disconnect between consumers and the production of the food they eat. In the United States, farmers make up less than one percent of the population.[3] This means that not only does one percent of the nation's citizens grow food for the rest of the domestic population, but also, in 2012, that one percent of people exported almost 136 billion dollars in agricultural products.[4] In addition, in 2012, the United States imported approximately 103 billion dollars in agricultural products.[5] The rapid globalization of food production and agricultural trade increases the importance of efforts to inform consumers about the source of their food. Country-of-Origin-Labeling (COOL) constitutes one effective mechanism to convey food origin to consumers.

Congress enacted COOL for food in the 2002 Farm Bill and the provision fully entered into force in the 2008 Farm Bill.[6] COOL requires retailers to

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1. Malinda Geisler, *Cranberries Profile*, AGRIC. MKTG. RES. CTR. (Mar. 2012), http://www.agmrc.org/commodities__products/fruits/cranberries_profile.cfm.

2. Malinda Geisler, *Pecans*, AGRIC. MKTG. RES. CTR. (Apr. 2013), http://www.agmrc.org/commodities__products/nuts/pecans.cfm.

3. *Ag 101: Demographics*, ENVTL. PROT. AGENCY, http://www.epa.gov/agriculture/ag101/demographics.html (last updated Apr. 15, 2013).

4. *Fiscal Year*, ECON. RESEARCH SERV., USDA, http://www.ers.usda.gov/data-products/foreign-agricultural-trade-of-the-united-states-(fatus)/fiscal-year.aspx.Uj9BSSg8m0x (select "Value of U.S. agricultural trade, by fiscal year") (last updated Sept. 12, 2012).

5. *Id.*

6. Farm Security a–nd Rural Investment Act of 2002, Pub. L. No. 107–171, §§ 281–285, 116 Stat. 134, 533 (2002); Food, Conservation, and Energy Act of 2008, Pub. L. No. 110–246, § 11002, 122 Stat. 1651, 2113 (2008).

place labels on certain raw food products that indicate to the consumer the country in which the food was grown.[7] The United States is not alone in its efforts to employ country-of-origin labeling mechanisms. Forty-eight out of fifty-seven U.S. trading partners that the U.S. General Accounting Office (GAO) surveyed also use some form of labeling program to indicate the origins of food that retailers sell within their borders.[8]

This mechanism recently came under fire in the World Trade Organization (WTO) when Canada and Mexico filed complaints in 2009 against the United States over its COOL policies as they apply to meat.[9] Canada and Mexico claim that the U.S. COOL policy gives preferential treatment to domestic products because the label distinguishes U.S.-grown food from international products on the market.[10] On November 18, 2011, the WTO Dispute Settlement Panel released its report to the public which found that, while COOL is a valid policy in theory, the U.S. application of the law violates WTO obligations.[11]

While COOL does present a barrier to free trade, the many benefits of the policy suggest that there should be room for COOL in international agricultural trade. The fact that so many countries employ these sorts of labeling policies shows the international desire for origin-indicators in food. In addition, factors such as consumers' rights to know where their food comes from, the environmental deterioration that excessive transportation for food causes, food safety concerns, and food security necessities further demonstrate the need for COOL.

II. COUNTRY-OF-ORIGIN LABELING IN THE UNITED STATES

Although the implementation of country-of-origin labeling practices for food products began relatively recently, the use of such labels for other types of products extends back more than 100 years in American history. In the United

7. 7 U.S.C. § 1638a (2012).

8. U.S. GEN. ACCOUNTING OFFICE, GAO-03-780, COUNTRY-OF-ORIGIN-LABELING: OPPORTUNITIES FOR USDA AND INDUSTRY TO IMPLEMENT CHALLENGING ASPECTS OF THE NEW LAW 6 (2003) [hereinafter COOL: NEW LAW], *available at* http://www.gao.gov/new.items/d03780.pdf.

9. Request for the Establishment of a Panel by Canada, *United States—Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/8 (Oct. 9, 2009) [hereinafter Request for Panel by Canada]; Request for the Establishment of a Panel by Mexico, *United States—Certain Country of Origin Labelling Requirements*, WT/DS386/7 (Oct. 13, 2009) [hereinafter Request for Panel by Mexico].

10. Request for Panel by Canada, *supra* note 9; Request for Panel by Mexico, *supra* note 9.

11. Panel Report, *United States – Certain Country of Origin Labelling* [*sic*] *(COOL) Requirements*, ¶¶ 8.2–8.7, WT/DS384/R, WT/DS386/R (Nov. 18, 2011).

States, country-of-origin labeling first appeared in the post-Civil War era.[12] The McKinley Tariff Act of 1890 imposed country-of-origin labeling requirements on "all articles of foreign manufacture, such as are usually or ordinarily marked."[13] The two primary issues that Congress sought to address through this provision related to the elimination of "misbranded and counterfeit foreign goods" and protection against the price-lowering effect of foreign goods on the domestic market.[14]

The McKinley Tariff Act contained many ambiguities and so Congress passed the Tariff Act of 1930 with country-of-origin labeling laws embedded in section 304 of the Act.[15] In particular, the Tariff Act of 1930 attempted to close a gap in the McKinley Tariff Act which allowed imported products that might be wrapped for shipping but "could not be or were not ordinarily labeled" to avoid the labeling mandate.[16] Jars of olives, for example, did not need labels under the McKinley Tariff Act.[17] Country-of-origin labeling expanded progressively after the enactment of the Tariff Act of 1930 until the passage of today's modern COOL policy in the 2002 and 2008 Farm Bills.[18]

A. *Tariff Act of 1930*

Consumers in the United States benefit from country-of-origin labeling on the products that they use every day, whether it is a "Made in Mexico" tag inside a t-shirt or a stamp on a child's toy indicating that it was imported from China. The Tariff Act of 1930 provided the basic foundation for these types of labels. In its codified form, section 1304 of the Act broadly requires country-of-origin labeling for foreign articles imported into the United States and does not limit itself to food products.[19]

The law does not require that all products contain country-of-origin labels during every part of the importation and selling process. Instead, the product must indicate to the "ultimate purchaser" where it originated.[20] U.S. Customs and Border Protection interprets the term "ultimate purchaser" to mean "the last

12. Peter Chang, *Country of Origin Labeling: History and Public Choice Theory*, 64 FOOD & DRUG L.J. 693, 695 (2009).
13. McKinley Tariff Act of 1890, ch. 1244, § 6, 26 Stat. 567, 613 (1891).
14. Chang, *supra* note 12, at 696.
15. *Id.* at 697; Tariff Act of 1930, 19 U.S.C. § 1304 (2006).
16. Chang, *supra* note 12, at 697.
17. *Id.*
18. *See generally id.* at 698 (explaining the development of COOL in the United States).
19. 19 U.S.C. § 1304(a).
20. *Id.*

U.S. person to receive the article in the form in which it was imported."[21] This means that if a product reaches the consumer in the same form in which it was imported, it will still contain its country-of-origin label. In contrast, a product that undergoes "substantial transformation" once it reaches the United States will not contain a label with its country-of-origin by the time it reaches the consumer.[22] Furthermore, the law only requires labeling on wrapped products.[23] Fruits and vegetables in loose bins at the grocery store, for example, receive an exemption from the labeling mandate.[24]

In addition to the substantially transformed or unwrapped products that the Tariff Act of 1930 does not cover, the Secretary of the Treasury may exercise discretion and grant exemptions from the labeling mandate to products that would otherwise fall under the scope of the law.[25] These products—known as the "J List" because the provision that grants this discretion to the Secretary is in subsection J of the statute—include "natural products, such as vegetables, fruits, nuts, berries, and live or dead animals, fish, and birds; all the foregoing which are in their natural state or not advanced in any manner further than is necessary for their safe transportation."[26] The J list also provides exemptions for agricultural products such as eggs, flowers, livestock, and Christmas trees.[27] These provisions, in effect, eliminate country-of-origin labeling requirements for a large portion of agricultural products.

B. *COOL in the 2002 and 2008 Farm Bills*

Since the J List exempts a wide scope of agricultural products from country-of-origin labeling requirements, prior to the enactment of COOL legislation in the 2002 and 2008 Farm Bills, very few opportunities existed for consumers to gain information about food origin.[28] The new COOL law, therefore, primarily aims to ensure that consumers know where their food comes from and gives them the choice between domestic and foreign-grown products.[29] The law,

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21. REMY JURENAS, CONG. RESEARCH SERV., RS22955, COUNTRY-OF-ORIGIN-LABELING FOR FOODS 2 (2010).
22. *Id.* at 2–3.
23. 19 U.S.C. § 1304(a)(3)(A) (2012); *see also* COOL: NEW LAW, *supra* note 8, at 2 (explaining the differences between COOL and the Tariff Act of 1930).
24. COOL: NEW LAW, *supra* note 8, at 2–3.
25. 19 U.S.C. § 1304(a)(3)(J).
26. 19 C.F.R. § 134.33 (2013); JURENAS, *supra* note 21, at 3.
27. 19 C.F.R. § 134.33.
28. *See generally id.* (identifying the agricultural exceptions to the Tariff Act of 1930).
29. COOL: NEW LAW, *supra* note 8, at 1.

however, does not cover all types of agricultural products and the implementation of it moved slowly until 2008.[30]

In 2002, Congress passed the first version of COOL as a part of the Farm Security and Rural Investment Act of 2002.[31] The 2002 COOL provision called for mandatory country-of-origin labels for certain raw agricultural products—but not until 2004.[32] Then, the Fiscal Year 2004 Omnibus Appropriations Act postponed the implementation of COOL for all products except seafood until 2006.[33] In Fiscal Year 2006, however, the agriculture appropriations legislation pushed the implementation of COOL back even farther, to 2008.[34] Finally, the Food, Conservation, and Energy Act of 2008 called for the full implementation of mandatory COOL for food.[35] In addition, this law expanded on the 2002 provision by adding goat meat, chicken, macadamia nuts, pecans, and ginseng to the commodities covered under the law.[36]

COOL as it exists in its current, codified form, amends the Agricultural Marketing Act of 1946 to require that certain food products contain labels that convey their country-of-origin to the consumer.[37] COOL differs from the country-of-origin labeling requirements in the Tariff Act of 1930 because COOL requires labels for products that originated both in the United States and abroad, whereas the Tariff Act only mandates labels for foreign products.[38] Furthermore, while the Tariff Act applies broadly to all products unless they receive an express exemption under the J List, COOL applies only to a certain set of "covered commodities."[39] The "covered commodities" under COOL include beef, lamb, pork, fish (both farm-raised and wild), perishable agricultural commodities, pea-

30. *See generally* JURENAS, *supra* note 21, at 2 (explaining the legislative history of COOL).

31. Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, §§ 281–285, 116 Stat. 134, 533–35 (2002).

32. *Id.* at § 285.

33. Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 749, 118 Stat. 3, 37 (2004).

34. Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 2006, Pub. L. No. 109-97, § 792, 119 Stat. 2120, 2164 (2005).

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

36. *Compare* Farm Security and Rural Investment Act, §§ 281–285, (enacting the initial COOL provisions), *with* Food, Conservation, and Energy Act, § 11002 (expanding and further clarifying the law); *see also* JURENAS, *supra* note 21, at 2 (explaining the differences between the 2002 and 2008 COOL provisions).

37. 7 U.S.C. § 1638a(a)(1) (2012).

38. *Compare* Tariff Act of 1930, 19 U.S.C. § 1304 (2006) (requiring country of origin labels for foreign, imported products), *with* 7 U.S.C. § 1638a(a)(1) (mandating country-of-origin labels for all designated products, regardless of origin).

39. 19 U.S.C. § 1304; 7 U.S.C. § 1638.

nuts, goat meat, chicken, ginseng, pecans, and macadamia nuts.[40] COOL does not cover all of the food products that consumers eat in the United States. In particular, the law specifically excludes processed foods and any product served in the food services industry from the mandate.[41]

COOL's implementation in the meat industry is particularly complicated. Unlike fruits and vegetables, which are planted, grown, and harvested all in one location, a calf may be born in one country, fed and raised in another, and slaughtered in yet another country. The COOL provision requires that if an animal is "not exclusively born, raised, and slaughtered in the United States," and "not imported into the United States for immediate slaughter," packers may identify the country-of-origin "as all of the countries in which the animal may have been born, raised, or slaughtered."[42] Similarly, if the animal is "imported into the United States for immediate slaughter," the label identifies the country-of-origin as "the country from which the animal was imported" and the United States.[43] The USDA Agricultural Marketing Service (AMS) published a final rule interpreting COOL, which further attempts to clarify the labeling provisions for meat.[44] The AMS rule identifies the acceptable language to use on a label for meat products with multiple countries-of-origin. A product, for example, that comes from animals born in one or more countries, raised and slaughtered in the United States, and "not derived from animals imported for immediate slaughter," may designate origin "as Product[s] of the United States, Country X, and (as applicable) Country Y."[45]

In addition, Secretary Vilsack issued a letter to agriculture industry representatives encouraging the implementation of voluntary COOL measures to identify which step of production occurred in each country on a mixed origin label.[46] This means that "[f]or example, animals born and raised in Country X and slaughtered in Country Y might be labeled as 'Born and Raised in Country X and slaughtered in Country Y,'" as opposed to a label that reads "Product of Country X and Country Y."[47]

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40. 7 U.S.C. § 1638(2)(A).
41. *Id.* §§ 1638(2)(B), 1638a(b).
42. *Id.* § 1638a(a)(2)(B)(i).
43. *Id.* § 1638a(a)(2)(C).
44. 7 C.F.R. § 65.300(e) (2013).
45. *Id.* § 65.300(e)(1).
46. Letter from Thomas J. Vilsack, Sec'y, USDA, to Industry Representative (Feb. 20, 2009), *available at* http://www.usda.gov/documents/0220_IndustryLetterCOOL.pdf.
47. *Compare Id.* (explaining the voluntary COOL standards for meat suggested by the USDA), *with* 7 C.F.R. § 65.300(e) (identifying the mandatory COOL standards as promulgated by AMS).

The labeling requirements for the meat industry in particular provide insight into the challenges that agricultural producers face when they implement COOL. The law, however, provides valuable information to consumers and an opportunity for producers from different countries to distinguish their products from each other. In fact, the United States does not stand alone in its desire to utilize country-of-origin labeling mechanisms to inform consumers about the food they purchase in the globalized food system. COOL for food appears in some form or another in the laws of many other countries around the world.[48]

III. COUNTRY-OF-ORIGIN LABELING AROUND THE WORLD

In 2003, the U.S. GAO surveyed fifty-seven countries that conduct trade with the United States about their country-of-origin labeling practices.[49] The results of the surveys show that most countries require at least some minimal form of country-of-origin labeling at the retail level for both imported and domestic agricultural products.[50] Many of the countries that GAO surveyed employ comprehensive policies that cover a range of commodities similar to those that the U.S. COOL policy covers.[51] Furthermore, all of the United States' largest trading partners, including Canada, China, Mexico, and Japan, mandate country-of-origin labels on at least some agricultural food products.[52]

A. *General Trends in Global Country-of-Origin Labeling Policies*

Out of the fifty-seven countries that GAO surveyed, forty-eight require some form of country-of-origin labeling for products that the U.S. policy also covers.[53] The agricultural trade that these countries conduct every year accounts for a significant amount of the total international agricultural trade.[54] In fact, in 2010, fourteen out of the World Trade Organization's fifteen leading importers of agricultural products required country-of-origin labels on fruits and vegetables or meat.[55] These countries imported about sixty-seven percent of the world's total

48. U.S. GEN. ACCOUNTING OFFICE, GAO-03-781SP, COUNTRY-OF-ORIGIN-LABELING FOR CERTAIN FOODS – SURVEY RESULTS (2003) [hereinafter COOL – SURVEY RESULTS], *available at* http://www.gao.gov/special.pubs/gao-03-781sp/food15.html.

49. COOL: NEW LAW, *supra* note 8, at 23.

50. *Id.*

51. *Id.*

52. COOL – SURVEY RESULTS, *supra* note 48.

53. COOL: NEW LAW, *supra* note 8, at 2.

54. *See generally* WORLD TRADE ORG., INTERNATIONAL TRADE STATISTICS 2011, at 67 (2011), *available at* http://www.wto.org/english/res_e/statis_e/its2011_e/its2011_e.pdf.

55. *Id.*; COOL – SURVEY RESULTS, *supra* note 48.

agricultural imports–not including the 8.2% of products that the United States imports.[56] In total, nine countries require country-of-origin labels for *all* fruits, vegetables, and meats.[57]

In general, GAO breaks labeling for fruits and vegetables into three different categories: fresh and sold prepackaged; fresh and sold loose in bins; and frozen.[58] Twenty-seven countries require labels on all fresh fruits and vegetables and an additional twelve countries require labels for only fresh fruits and vegetables that retailers sell prepackaged to consumers.[59] Thirty-three countries mandate labels for frozen fruits and vegetables.[60] Finally, fourteen countries require labels for *all* fresh and frozen fruits and vegetables.[61] Some of these countries, however, do not extend these requirements to domestic products. In Australia and Turkey, domestic, fresh products sold loose in bins enjoy an exemption from country-of-origin label laws and in France and Spain, domestic, frozen products are exempt.[62]

Meat products are broken down into categories as well: cuts, carcasses, ground, frozen, and processed meats.[63] Thirty countries require labels for all kinds of meat except processed meat—which is also exempt under the U.S. COOL provision.[64] In total, sixteen countries require country-of-origin labels for all meats.[65] Out of these sixteen countries, Thailand exempts all domestic meats from the label laws, the United Arab Emirates exempts all domestic carcasses, and Turkey exempts all domestic carcasses, ground meats, and frozen meats.[66]

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56. WORLD TRADE ORG., *supra* note 54, at 67.

57. COOL – SURVEY RESULTS, *supra* note 48. The GAO study shows that Argentina, Australia, Japan, Korea, Portugal, Spain, Switzerland, Turkey, and the United Arab Emirates all require country-of-origin labeling for all fruits, vegetables, and meats.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. 7 U.S.C. § 1638(2)(B) (2012); COOL – SURVEY RESULTS, *supra* note 48.

65. COOL – SURVEY RESULTS, *supra* note 48.

66. *Id.*

B. *Country-of-Origin Labeling Policies in the United States' Largest Agricultural Trading Partners*

1. *Canada*

Canada is among the United States' largest partners in agricultural trade.[67] In fact, in Fiscal Year 2010, Canada was the largest destination for U.S. agricultural exports.[68] It is also one of the lead parties in the WTO dispute brought against the United States regarding its COOL policies.[69] Canada's labeling laws, however, are not completely void of country-of-origin mandates.[70]

While Canada does not maintain as thorough and stringent country-of-origin labeling requirements as the United States, it does require labels for foreign produce.[71] Specifically, "processed fruit and vegetable products wholly manufactured in a country other than Canada" must contain some sort of label that asserts the product's country-of-origin.[72] The term "wholly manufactured" refers to a product that did not undergo any processing in Canada that changed the form of the product when it was sold.[73] Produce that underwent processing in Canada, regardless of the origin of the initial product, is only subject to optional country-of-origin labeling.[74]

The Canadian country-of-origin labeling laws differ from those of the United States in three key ways. First, they do not cover the range of products that the U.S. law covers.[75] Second, the Canadian law applies only to processed products whereas the U.S. law exempts such products.[76] Finally, in Canada, only

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67. *Fiscal Year*, ECON. RESEARCH SERV., USDA [hereinafter TOP EXPORT DESTINATIONS], *available at* http://www.ers.usda.gov/data-products/foreign-agricultural-trade-of-the-united-states-(fatus)/fiscal-year.aspx#.Uj9BSSg8m0x (select "Top 15 U.S. agricultural export destinations, by fiscal year, U.S. value") (last updated Sept. 12, 2012).

68. *Id.*

69. Request for Panel by Canada, *supra* note 9.

70. CANADIAN FOOD INSPECTION AGENCY, GUIDE TO FOOD LABELLING AND ADVERTISING: CHAPTER 11 PROCESSED FRUITS AND VEGETABLES at 11-8 to 11-9 (2011) *available at* http://www.inspection.gc.ca/english/fssa/labeti/guide/ch11e.pdf.

71. *Compare id.* (explaining that Canada's mandatory country-of-origin labels apply only to processed produce "wholly manufactured" in a foreign country), *with* 7 U.S.C. § 1638(2)(A) (2012) (identifying the range of products covered under COOL).

72. CANADIAN FOOD INSPECTION AGENCY, *supra* note 69, at 11-8 to 11-9.

73. *Id.* at 11-9.

74. *Id.* at 11-8 to 11-9.

75. *Compare id.* (explaining that Canada's mandatory country-of-origin labels apply only to processed produce "wholly manufactured" in a foreign country), *with* 7 U.S.C. § 1638(2)(A) (identifying the range of products covered under COOL).

76. *Compare* CANADIAN FOOD INSPECTION AGENCY, *supra* note 70, at 8–9 (explaining that Canada's mandatory country-of-origin labels apply only to processed produce "wholly manu-

foreign products are subject to mandatory COOL.[77] In contrast, the U.S. law applies equally to both foreign and domestic products.[78]

2. *China*

In Fiscal Year 2010, China was the second largest destination for U.S. agricultural exports.[79] The Chinese government maintains relatively minimal requirements for country-of-origin labeling. The laws generally require country-of-origin labeling for frozen fruits and vegetables and for processed meats.[80] China's Ministry of Health planned to adopt new rules for the labeling of pre-packaged food on April 20, 2012.[81] Under these new rules, "[f]or imported pre-packaged food, the country or region (Hong Kong, Macao[,] or Taiwan) of origin, and the name, address, and contact information of the agent, importer[,] or distributor registered in the People's Republic of China, shall be declared."[82] Similar to Canada, this law applies to imported foods but does not mention domestic products.[83]

3. *Mexico*

Mexico was the third largest destination for U.S. agricultural exports in Fiscal Year 2010.[84] In addition, Mexico joined Canada in its dispute with the United States over its COOL policies in the WTO.[85] Like Canada, Mexico also maintains country-of-origin labeling laws.[86]

factured" in a foreign country), *with* 7 U.S.C. § 1638(2)(B) (exempting processed products from the products covered under COOL).

77. CANADIAN FOOD INSPECTION AGENCY, *supra* note 70, at 11-8 to 11-9.

78. 7 U.S.C. § 1638a.

79. TOP EXPORT DESTINATIONS, *supra* note 67.

80. COOL – SURVEY RESULTS, *supra* note 48.

81. GLOBAL AGRIC. INFO. NETWORK, FOREIGN AGRIC. SERV., USDA, PEOPLE'S REPUBLIC OF CHINA: GENERAL RULES FOR THE LABELING OF PREPACKAGED FOODS § 1 (2011), available at http://gain.fas.usda.gov/Recent%20GAIN%20Publications/General%20Rules%20for%20the%20Labeling%20of%20Prepackaged%20Foods_Beijing_China%20-%20Peoples%20Republic%20of_5-25-2011.pdf.

82. *Id.* § 4.1.6.3.

83. *Compare id.* (explaining China's country-of-origin labeling law that does not mention domestic products), *with* CANADIAN FOOD INSPECTION AGENCY, *supra* note 70, at 11-8 to 11-9 (explaining Canada's country-of-origin labeling laws that specifically exclude domestic products).

84. TOP EXPORT DESTINATIONS, *supra* note 67.

85. Request for Panel by Mexico, *supra* note 9.

86. Norma Oficial Mexicana NOM-051-SCFI/SSA1-2010, Especificaciones Generales de Etiquetado para Alimentos y Bebidas no Alcohólicas Preenvasados – Información Comercial y Sanitaria, [Mexican Official Norm NOM-051-SCFI/SSA1-2010, General Labeling Specifications

According to GAO's survey of country-of-origin labeling policies, Mexico requires origin labels for all prepackaged, fresh fruits and vegetables; frozen fruits and vegetables; ground meat; frozen meat; and processed meat.[87] Interestingly, for fresh fruits and vegetables sold loose in bins, only domestic products must contain country-of-origin labels.[88] Mexico recently amended its labeling laws so that "national or foreign origin pre-packaged food and non-alcoholic beverages must incorporate a statement that identifies the product's country-of-origin."[89]

4. *Japan*

In Fiscal Year 2010, Japan was the fourth largest destination for U.S. agricultural exports.[90] Japanese law calls for comprehensive country-of-origin labeling that surpasses the United States in its coverage.[91]

The law requires "place of origin" labels for all fresh foods that are sold to consumers—except when the foods are served at a restaurant.[92] If any fresh food product contains a mixture of products from different countries, Japan also requires that the labels indicate the place of origin for each product.[93] In addition, for processed products, Japan requires that labels indicate the place of origin for the main ingredient in the product.[94] The main ingredient is defined as "a fresh food which has the largest percent by weight and of which weight is no less than [fifty percent] in total ingredients."[95]

Countries around the world implement country-of-origin labeling policies to provide consumers within their borders with information about the food

for Pre-Packaged Food and Non-Alcoholic Beverages – Commercial and Food Safety Information], 5 de Abril de 2010 [Apr. 5, 2010], translation available at http://www.mexico-usda.com.mx/home/media/NEW_NOM-051-SCFI-SSA1-ENGLISH.pdf.

87. COOL – SURVEY RESULTS, *supra* note 48.

88. *Id.*

89. Norma Oficial Mexicana, *supra* note 86, ¶ 4.2.5.1.

90. TOP EXPORT DESTINATIONS, *supra* note 67.

91. *See generally* 7 U.S.C. § 1638 (2012); MINISTRY OF AGRIC., FORESTRY & FISHERIES, JAPAN, QUALITY LABELING STANDARD FOR FRESH FOODS (UNOFFICIAL TRANSLATION) (2000), *available at* http://www.maff.go.jp/e/jas/labeling/pdf/fresh01.pdf.

92. MINISTRY OF AGRIC., JAPAN STANDARD FOR FRESH FOODS, *supra* note 91, at 1–2.

93. *Id.* at 2.

94. MINISTRY OF AGRIC., FORESTRY & FISHERIES, JAPAN, QUALITY LABELING STANDARD FOR PROCESSED FOODS (UNOFFICIAL TRANSLATION) 7 (2000), *available at* http://www.maff.go.jp/e/jas/labeling/pdf/pro01.pdf.

95. *Id.*

that they eat. Recently, however, the U.S. COOL policy came under attack in the WTO when Canada and Mexico challenged its validity.[96]

IV. COOL IN DISPUTE AT THE WORLD TRADE ORGANIZATION

Despite the widespread use of country-of-origin labels on food products around the world, in December 2008, Canada and Mexico both complained to the WTO about the U.S. COOL law as it applies to meat products.[97] The complaints issued by Canada and Mexico overlap in many respects. Both parties identified several sources that they claimed combine to make up the COOL policy.[98] These sources include the 2008 COOL statute, the 2009 AMS Rule on COOL, the letter Secretary Vilsack issued to industry representatives about voluntary labeling initiatives for meat, and finally, any issued changes or guidance related to the law.[99] Canada and Mexico stated that all of these provisions violated the United States' WTO obligations.[100]

Specifically, under the Agreement on Technical Barriers to Trade ("TBT Agreement"), both countries claimed that COOL violated Articles 2.1 and 2.2.[101] In addition, under this agreement, Mexico asserted that COOL violates Articles 2.4 and 12.[102] Under the 1994 General Agreement on Tariffs and Trade ("GATT 1994"), both parties asserted that COOL violates articles III:4, X:3(a), and XXIII:1(b).[103] Both countries requested that the Panel make recommendations to the United States to bring COOL into compliance with these agreements.[104]

Procedurally, Canada and Mexico requested separate consultations with the United States in December 2008, and then requested supplemental consultations with the United States in May 2009 on the issue of COOL.[105] The complaining parties also requested to join each other's consultations.[106] In addition, Nicaragua and Peru joined Canada's consultations while Peru also joined Mexi-

96. Request for Panel by Canada, *supra* note 9; Request for Panel by Mexico, *supra* note 9.
97. Panel Report, *supra* note 11, ¶ 2.1.
98. *Id.* ¶¶ 2.1–2.3.
99. *Id.*
100. *Id.*, ¶¶ 1.1, 2.1–2.3, 3.1–3.3.
101. *Id.* ¶¶ 3.1(a), 3.3(a).
102. *Id.* ¶ 3.3(a).
103. *Id.* ¶¶ 3.1(b), 3.3(a)–(b).
104. *Id.* ¶¶ 3.2, 3.4.
105. *Id.* ¶ 1.1.
106. *Id.* ¶ 1.2.

co's consultations.[107] These consultations occurred in 2008 and 2009 but did not result in a "mutually satisfactory resolution."[108]

As a result of the inconclusive consultations, the WTO formed a single dispute settlement panel to review Canada and Mexico's complaints.[109] Argentina, Australia, Brazil, China, Colombia, the European Union, Guatemala, India, Japan, Korea, New Zealand, Peru, and Chinese Taipei reserved third party rights to participate in the proceedings.[110] The Panel issued its Interim Reports to the parties on May 20, 2011 and issued the final report on July 29, 2011.[111] The Panel released the final report to the public on November 18, 2011.[112]

A. *TBT Agreement Complaints*

Members of the WTO signed the TBT Agreement in order to further the promotion of trade liberalization under the principles of GATT 1994 and the Uruguay round of multilateral trade negotiations.[113] The agreement aims to advance the purposes of the WTO by establishing limits on member countries' technical regulations and standards, such as labeling regulations, that may unnecessarily harm the free movement of goods in trade.[114] Canada and Mexico's complaints assert that COOL labels violate several provisions of this agreement as they apply to cattle, hogs, beef, and pork.[115]

In order to determine whether COOL violates these provisions, the Panel first established that the law—including the statute and federal rule, but not the Vilsack letter—constitutes a "technical regulation" under the definition of the agreement.[116] The Panel found that since the COOL statute and federal rule (1) are mandatory, (2) are applicable to an identifiable product—specifically beef, pork, cattle, and hogs, and (3) identify the product characteristics through labeling requirements, namely country-of-origin, it is a technical regulation within the scope of the agreement and must therefore comply with its standards for labeling.[117]

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107. *Id.*
108. *Id.* ¶ 1.3.
109. *Id.* ¶ 1.5.
110. *Id.* ¶ 1.9.
111. *Id.* ¶ 1.11.
112. *See generally id.*
113. Agreement on Technical Barriers to Trade preamble, Dec. 8, 1994, 108 Stat. 4809, 1868 U.N.T.S. 120.
114. *Id.*
115. Panel Report, *supra* note 11, ¶ 7.64.
116. *Id.* ¶¶ 7.145, 7.212–7.215.
117. *Id.* ¶¶ 7.162, 7.207, 7.214, 7.216.

1. *Article 2.1.*

TBT Article 2.1 requires that "Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favo[rable] than that accorded to like products of national origin and to like products originating in any other country."[118] Essentially, this means that WTO member states cannot treat domestic products better than products they import from other member states.

Canada, Mexico, and the United States agree that for the purposes of the COOL labeling system, meat and livestock from all three countries are "like products" under Article 2.1.[119] Their disagreement arises over whether the products that the United States imports from Canada and Mexico receive treatment "no less favo[rable]" than domestic products.[120] While Canada and Mexico argue that livestock from their countries receive less favorable treatment under COOL, the United States asserts that the complaining countries failed to prove this disparate treatment.[121] The Panel looks at three factors to determine whether COOL violates Article 2.1:

> (a) whether the different categories of labels under the COOL measure accord different treatment to imported livestock;
>
> (b) whether the COOL measure involves segregation and, consequently, differential costs for imported livestock; and
>
> (c) whether, through the compliance costs involved, the COOL measure creates any incentive to process domestic livestock, thus reducing the competitive opportunities of imported livestock.[122]

Ultimately, the Panel found that COOL satisfied all three of these factors and therefore, does violate Article 2.1 by affording less favorable treatment to imported products from Canada and Mexico than like domestic products.[123]

2. *Article 2.2*

TBT Article 2.2 requires WTO members to:

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118. Agreement on Technical Barriers to Trade, *supra* note 113, ¶ 2.1.
119. Panel Report, *supra* note 11, ¶ 7.253.
120. *Id.* ¶ 7.258.
121. *Id.*
122. *Id.* ¶ 7.279.
123. *Id.* ¶¶ 7.547–7.548.

> [E]nsure that technical regulations are not prepared, adopted[,] or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil[l] a legitimate objective, taking account of the risks non-fulfil[lment] would create.[124]

The three-pronged test the Panel uses to determine compliancy with this rule is (a) whether "[t]he COOL measure is trade-restrictive within the meaning of Article 2.2," (b) whether "[t]he objective pursued by the United States through the COOL measure is not legitimate," and (c) whether "[i]f the objective is legitimate, the COOL measure is more trade-restrictive than necessary to fulfill a legitimate objective[]."[125]

First, the Panel found that the measure is trade-restrictive because it affects "the competitive conditions of imported livestock."[126] In addition, the Panel accepted that the U.S. objective in the implementation of COOL "is to provide as much clear and accurate origin information as possible to consumers."[127]

In a review of the legitimacy of this purpose, the Panel noted the existence of mandatory labeling requirements in Canada, Mexico, and the additional third parties in the dispute that also aim to provide information to consumers about food origin.[128] The Panel notes that the widespread usage of country-of-origin labels "suggests that consumer information on country[-]of[-]origin is considered by a considerable proportion of the WTO Membership to be a legitimate objective under the TBT Agreement."[129] The Panel found that consumer information is, therefore, a legitimate purpose for regulations under TBT.[130]

The Panel, however, also found that, while COOL aims to fulfill the legitimate purpose of providing consumer information about country-of-origin, it does not actually fulfill this purpose sufficiently for meat products.[131] In particular, the Panel took issue with the system's failure to identify on labels for meats with multiple countries-of-origin the particular country in which each step of meat production took place.[132] Because the labels only need to say that the meat is a product of "countries x, y, and z," consumers would not know which country the animal was born in, raised in, and slaughtered in, but rather would only know

124. Agreement on Technical Barriers to Trade, *supra* note 113, ¶ 2.2.
125. Panel Report, *supra* note 11, ¶ 7.558.
126. *Id.* ¶ 7.575.
127. *Id.* ¶ 7.620.
128. *Id.* ¶ 7.638.
129. *Id.*
130. *Id.* ¶ 7.651.
131. *Id.* ¶ 7.719.
132. *Id.* ¶¶ 7.699–7.707.

the combination of countries associated with the meat in the package.[133] The Panel asserts that the labeling system for meats is therefore too confusing to possibly give consumers meaningful information.[134] Since the Panel found that COOL does not fulfill its objective, it concluded that the law violates Article 2.2 and there would be no need to evaluate whether it is more trade-restrictive than necessary.[135]

3. *Article 2.4*

Mexico alone argued that COOL violates Article 2.4 which states that when international standards exist for regulations, member countries should use such standards as a basis for their regulations to fulfill their objectives.[136] Mexico specifically asserted that the United States should have based COOL on the General Standard for the Labeling of Prepackaged Foods.[137] The Panel, however, found that the General Standard would not effectively achieve the United States' legitimate objectives in COOL and so COOL does not violate Article 2.4.[138]

4. *Articles 12.1 and 12.3*

Mexico also raised complaints about COOL's compliancy with TBT Articles 12.1 and 12.3.[139] These articles require WTO member states to consider the special needs of developing countries in the enforcement of technical regulations.[140] Mexico argued that the United States did not give adequate consideration to the sensitivities of the cattle industry in Mexico and its needs as a developing nation.[141] The Panel reviewed the extent of the United States' consideration of Mexico's needs and found that Mexico failed to establish that the United States did not satisfy its obligation to consider these needs.[142] COOL, therefore, is not inconsistent with Article 12.3 and the Panel did not evaluate the 12.1 claim in light of this decision.[143]

133. *Id.* ¶ 7.705.
134. *Id.*
135. *Id.* ¶ 7.720.
136. *Id.* ¶ 7.722; Agreement on Technical Barriers to Trade, *supra* note 113, ¶ 2.4.
137. Panel Report, *supra* note 11, ¶ 7.722.
138. *Id.* ¶ 7.735.
139. *Id.* ¶ 7.737.
140. Agreement on Technical Barriers to Trade, *supra* note 113, ¶¶ 12.1, 12.3.
141. Panel Report, *supra* note 11, at ¶¶ 7.738–7.739.
142. *Id.* ¶ 7.799.
143. *Id.* ¶ 7.803.

B. *GATT 1994 Complaints*

In addition to complaints under the TBT Agreement, Canada and Mexico challenged COOL's compliance with GATT 1994 Articles III:4, X:3(a), and XXIII:1(b).[144] The Panel noted, however, that GATT 1994 Article III:4 is closely related to TBT Article 2.1 in that, like Article 2.1, it requires treatment of imported products that is "no less favo[rable] 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."[145] In light of this relationship, the Panel did not see a need to evaluate COOL's compliancy with Article III:4 and proceeded only to evaluate the X:3(a) and XXIII:1(b) complaints.[146]

The XXIII:1(b) claim, however, was a non-violation claim alleging COOL infringes on benefits owed to Canada and Mexico in previous rounds of multilateral trade negotiations.[147] The Panel reasoned that since the United States violated TBT Article 2.1, there was no basis for a non-violation claim and stopped its evaluation of the Article XXIII:1(b) complaint.[148]

1. *Article X:3(a)*

Article X:3(a) requires that member states "administer in a uniform, impartial[,] and reasonable manner all its laws, regulations, decisions[,] and rulings . . . ."[149] The Panel concluded the parties failed to establish that the United States administered the COOL statute and subsequent federal rule in an unfair manner.[150] The Panel found, however, that the USDA issuance of Secretary Vilsack's letter to encourage the meat industry to adopt additional, voluntary labeling outside of the COOL requirements was an unreasonable administration of the regulation inconsistent with Article X:3(a).[151] According to the Panel, the Vilsack letter undermines the existing COOL rule, causes excessive confusion in the labeling system, and suggests that the 2009 Final COOL Rule could change.[152] The Panel reasoned that the Vilsack letter, therefore, does not comport with the

144. *Id.* ¶¶ 3.1(b), 3.3(a)–(b).
145. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, art. III, ¶ 4; Panel Report, *supra* note 11, ¶ 7.807.
146. Panel Report, *supra* note 11, ¶ 7.807.
147. *Id.* ¶¶ 7.888, 7.889.
148. *Id.* ¶¶ 7.906, 7.907.
149. General Agreement on Tariffs and Trade, *supra* note 145, at art. X, ¶ 3(a).
150. Panel Report, *supra* note 11, ¶ 7.887.
151. *Id.* ¶ 7.886.
152. *Id.* ¶¶ 7.859–7.860.

standards of transparency and fairness that Article X:3(a) demands in the implementation of domestic law.[153]

C. *Summary of WTO Panel Holdings*

In summary, the WTO Panel found that the COOL statute and federal rule violate TBT Articles 2.1 and 2.2 because it affords less favorable treatment to non-domestic products from Canada and Mexico, and the policy fails to adequately achieve its purpose of providing information to consumers about country-of-origin.[154] The Panel also found that the Vilsack letter violated GATT 1994 Article X:3(a) as an unreasonable way to administer COOL.[155] In light of these findings, the Panel requested that the United States bring COOL into conformity with these provisions.[156]

V. REACTION TO WTO PANEL REPORT

In the United States, domestic reactions to the WTO Panel decision on COOL range substantially. In particular, the U.S. agricultural sector remains divided as to the value of COOL as a policy.

The Office of the U.S. Trade Representative issued a statement lauding the Panel's recognition of country-of-origin labeling as a legitimate policy, despite its assertion that the implementation of COOL violates WTO obligations.[157] Andrea Mead, Press Secretary for the Office of the U.S. Trade Representative, said that despite the Panel's decision, "we remain committed to providing consumers with accurate and relevant information with respect to the origin of meat products that they buy at the retail level."[158] The U.S. Trade Representative plans to consider all of the available options to respond to the Panel decision, including an appeal.[159]

Several industry organizations that supported the initial passage of COOL are encouraging the U.S. Trade Representative to appeal the Panel decision instead of resorting to a settlement or legislative changes to bring the law

153. *Id.* ¶¶ 7.861–7.863.
154. *Id.* ¶ 8.3.
155. *Id.* ¶ 8.4.
156. *Id.* ¶¶ 8.6, 8.7.
157. Press Release, Office of the U.S. Trade Rep., Statement by the Office of the U.S. Trade Rep. in Response to WTO Panel Decision on Country of Origin Labeling (Nov. 18, 2011), *available at* http://www.ustr.gov/about-us/press-office/press-releases/2011/november/statement-office-us-trade-representative-response.
158. *Id.*
159. *Id.*

into accordance with the Panel decision. National Farmers Union President Roger Johnson said in a press release, "We will oppose any attempt to change that law. Fortunately, the WTO decision against U.S. country-of-origin-labeling did not find fault with our law. It simply found fault with the rules and regulations which were used to implement the law."[160] Similarly, Bill Bullard, CEO of R-CALF USA, a national coalition of cattle producers, sent a letter to U.S. Trade Representative Ron Kirk and Secretary Vilsack urging an appeal of the Panel decision and included a memorandum that detailed the errors the Panel made in its findings.[161]

In contrast, Colin Woodall, National Cattlemen's Beef Association's Vice President of Government Affairs, issued a statement in support of the WTO ruling against COOL. He said, "We look forward to working closely with Ambassador Kirk and members of Congress to ensure cattlemen are not put in a position to lose access to two very valuable global markets. An appeal is not the answer. Bringing the United States into compliance is the answer."[162]

Meanwhile, in Congress, Senator Tim Johnson (D-SD) and Senator Mike Enzi (R-WY) led a bipartisan group of nineteen Senators in calling on Ambassador Kirk and Secretary Vilsack to appeal the Panel decision.[163] In a letter to the Ambassador and Secretary, the Senators acknowledged the WTO's affirmation of COOL as a legitimate policy objective.[164] In relation to the implementation of COOL, the letter stated, "While we believe that improvements should have been made to the final rule, we believe that it appropriately establishes a labeling sys-

160. Press Release, Nat'l Farmers Union, NFU Will Not Support Legislative Changes to COOL (Jan. 27, 2012), *available at* http://www.nfu.org/news/212-international-policy/900-nfu-will-not-support-legislative-changes-to-cool.

161. Letter from Bill Bullard, CEO, R-CALF USA, to Ron Kirk, Ambassador, U.S. Trade Rep. & Tom Vilsack, Sec'y of Agric. (Jan. 20, 2012), *available at* http://www.r-calfusa.com/COOL/120120COOLMemo.pdf.

162. Press Release, Nat'l Cattlemen's Beef Assoc., Statement from NCBA Vice Pres. of Gov't Affairs Colin Woodall Regarding WTO Ruling on US Country of Origin Labeling (Nov. 18, 2011), *available at* http://www.beefusa.org/newsreleases1.aspx?newsid=1248.

163. Press Release, Office of U.S. Sen. Tim Johnson, Johnson, Enzi to Administration: Keep COOL Strong (Dec. 15, 2011), *available at* http://www.johnson.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=e170a35a-1920-4157-999b-d0ad56a4cb05&ContentType_id=c3d73cfe-c14b-4676-96ed-43a65aea57c0&Group_id=6ae28060-e7a2-46ba-bbab-cce51bb5cb91.

164. Letter from Tim Johnson, U.S. Sen., et al., to Ron Kirk, Ambassador, U.S. Trade Rep. and Tom Vilsack, Sec'y of Agric. (Dec. 15, 2011), *available at* http://www.johnson.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=e170a35a-1920-4157-999b-d0ad56a4cb05&%2520ContentType_id=c3d73cfe-c14b-4676-96ed-43a65aea57c0&Group_%2520id=6ae28060-e7a2-46ba-bbab-cce51bb5cb91.

tem which provides important and useful information to consumers while not placing an undue burden on the industry."[165]

The range of responses from both government and industry regarding the Panel decision suggests that the United States' two primary options moving forward were either to bring COOL into compliance with the Panel decision through some sort of legislative or rulemaking process or to appeal the holding. The deadline to appeal was March 23, 2012.[166]

VI. APPELLATE BODY REPORT

The United States ultimately decided to appeal the Panel's findings that COOL fails to comply with WTO obligations under TBT Articles 2.1 and 2.2.[167] The Appellate Body released its findings and report on June 29, 2012.[168] In short, the Appellate Body upheld the Panel finding that COOL violates TBT Article 2.1, but approaches the issue with a different analysis.[169] The Appellate Body reversed the Panel's finding that COOL violates TBT Article 2.2 based on insufficient facts to support these findings on the part of the Panel.[170]

The United States' appeal in relation to the Panel's holding on COOL and TBT Article 2.1 claimed the Panel used a "faulty and unprecedented test" for the assessment of "less favo[rable] treatment" and the Panel failed to make an objective assessment of the facts.[171] In particular, the United States appealed the Panel's assertion that the law grants less favorable treatment to foreign products.[172] In support of this appeal, the United States notes the manner in which the COOL provision requires both foreign and domestic meat laws to comply with exactly the same labeling procedures.[173]

The Appellate Body examined the *Korea – Various Measures on Beef* case and noted that the direct, practical effect of a measure should be considered in addition to the plain language of the law to determine whether discrimination exists.[174] The Appellate Body found that because segregation of foreign and do-

165. *Id.*
166. *United States – Certain Country of Origin Labelling (COOL) Requirements*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds384_e.htm (last visited Sept. 24, 2013).
167. *See generally* Appellate Body Report, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R, WT/DS386/AB/R (Jun. 29, 2012).
168. *See generally Id.*
169. *Id.* ¶ 496(a)(iv).
170. *Id.* ¶ 496(b)(iv)–(v).
171. *Id.* ¶ 17.
172. *Id.* ¶ 254.
173. *Id.*
174. *Id.* ¶ 288.

mestic meat products is the most practical manner to comply with COOL, the law does grant less favorable treatment to foreign meat.[175] Extending beyond the Panel's analysis, the Appellate Body examined "whether the circumstances of this case indicate that the detrimental impact stems exclusively from a legitimate regulatory distinction, or whether the COOL measure lacks even-handedness."[176] The Appellate Body found that the level of recording requirements COOL demands compared to the amount of information the consumer receives about product origin is disproportionate.[177] Furthermore, the use of U.S.-raised meat constitutes the least costly way to comply with COOL and, as a result, the law accords less favorable treatment to foreign meat.[178] The Appellate Body, therefore, upheld the Panel's finding in relation to COOL's violations of Article 2.1, albeit for different reasons.[179]

The Appellate Body also examined the Panel's findings that COOL violates TBT Article 2.2. In its findings, the Appellate Body concluded that "Label A" meats which read "Product of the US" fulfill COOL's objective to provide consumers with meaningful information about product origin.[180] Nevertheless, the Panel failed to consider sufficient facts to determine the degree to which COOL contributes to the overall objective of providing consumers with meaningful information about product origin.[181] As a result, the Appellate Body overturned the Panel's finding that COOL violates TBT Article 2.2.[182]

Ultimately the Appellate Body recommended that the United States bring COOL into compliance with WTO obligations, in accordance with the Appellate Report.[183] A subsequent Arbitrator's Report granted the United States a "reasonable period" of ten months to bring COOL into compliance with WTO obligations, setting a deadline of May 23, 2013.[184]

175. *Id.* ¶¶ 287, 291.
176. *Id.* ¶ 293.
177. *Id.* ¶ 346.
178. *Id.*
179. *Id.*
180. *Id.* ¶ 476.
181. *Id.*
182. *Id.* ¶ 496(b)(vi).
183. *Id.* ¶ 497.
184. Arbitration, *United States – Certain Country of Origin Labelling (COOL) Requirements*, ¶ 98, WT/DS384/24, WT/DS386/23 (Dec. 4, 2012).

VII. USDA'S FINAL RULE

On March 8, 2013, USDA published a proposed rule in the Federal Register to bring COOL into compliance with the Appellate Body report.[185] The comment period for this rule ended April 11, 2013.[186] The final rule went into effect on May 23, 2013.[187] The final rule contains four components: definitional changes, new labeling requirements, new prohibitions on the commingling of muscle cuts with different origins, and changes to origin specifications after a product reaches U.S. Customs and Border Protection.[188]

First, the rule changes the definition of "retailer" of fish, shellfish, and covered commodities to include any retailer under the Perishable Agricultural Commodities Act (PACA).[189] This change serves to "more closely align[] with the language contained in the PACA regulation and [to clarify] that all retailers that meet the PACA definition of a retailer, whether or not they actually have a PACA license, are also covered by COOL."[190]

Second, the rule changes the requirements for country-of-origin labels.[191] A product that was born, raised, and slaughtered in the United States may not read simply "Product of the United States."[192] It must instead specify that the meat was born, raised, and slaughtered in the United States.[193] In addition, all meat labels must specify which stage of the production process occurred in each country on the country-of-origin designation.[194] Specifically, a label would read "born in country A, raised in country B, slaughtered in country C."[195] The only exception would be instances where a product was raised in the United States predominantly, but did spend time in another country.[196] In those circumstances, the second country's name may be omitted, provided that the animal was not

185. *See generally* 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 Macademia Nuts, 78 Fed. Reg. 15,645 (Mar. 12, 2013) (to be codified at 7 C.F.R. pts. 60 & 65).
186. *Id.*
187. *Id.* at 31,367.
188. *Id.* at 31,385.
189. *Id.*
190. *Id.* at 31,368.
191. *Id.* at 31,385.
192. *Id.* at 31,368–69.
193. *Id.*
194. *Id.*
195. *See id.*
196. *Id.* at 31,368.

born in the United States, raised exclusively in another country, and then returned to the United States for slaughter.[197]

Third, the final rule eliminates the allowance of commingling of muscle cuts from different countries.[198] The elimination arises from the nature of the new rule which requires all origin labels "to include specific information as to the place of birth, raising, and slaughter of the animal from which the meat is derived."[199] According to USDA, "[r]emoving the commingling allowance lets consumers benefit from more specific labels."[200]

Finally, muscle cuts and covered commodities maintain their country-of-origin as reported to the U.S. Customs and Border Protection "at the time the product entered the United States."[201] This provision is consistent with earlier COOL regulations.[202]

VIII. COMPLIANCE WITH THE WTO APPELLATE BODY REPORT

The USDA's final rule will likely comply with the WTO Appellate Body Report because it increases the amount of information the consumer receives about country-of-origin and clarifies the manner in which it communicates this information to the consumer. These changes and clarifications serve to increase the amount of information the consumer receives compared to the burden of implementation of the policy in order to come into compliance with the Appellate Body Report.

Under circumstances where a meat product was derived from an animal that was born in Country A, raised in Country B, and slaughtered in Country C, the old USDA COOL rule allowed the label to read "Product of Countries A, B, and C."[203] The Appellate Body held that, while providing information about meat product origin to consumers constituted a "legitimate objective" under TBT 2.1, this type of label does not effectively tell a consumer the product origin.[204] The new rule requires labels to identify which stage of the production of the product occurred in which country.[205] The old COOL rule also left room for confusion under circumstances where a meat product in the grocery store contained commingled meat from different countries. It would be almost impossible to put

197. *Id.* at 15,645, 15,646, 15,652.
198. *Id.* at 31,369, 31,385.
199. *Id.* at 31,369.
200. *Id.*
201. *Id.*
202. *Id.*
203. *See* 7 C.F.R. § 65.300(e)(1) (2013).
204. *See generally* Appellate Body Report, *supra* note 167.
205. Mandatory Country of Origin Labeling, 78 Fed. Reg. at 31,385.

an accurate COOL label on that type of product. The new rule expressly forbids commingling of meats from different countries and allows consumers to benefit from more specific labels.[206]

The new proposed COOL rule substantially increases the amount of information the consumer receives from a country-of-origin label. The Appellate Body was primarily concerned that under TBT Article 2.1, the implementation of COOL granted domestic meat more favorable circumstances than foreign meat and, in particular, that the burden of implementation of the law outweighed the value of information the consumer received.[207] The more accurate, detailed labels under the new rule provide substantially more meaningful information to consumers about product origin and will likely address the concerns of the WTO Appellate Body.

IX. CONCLUSION

There is a reason that agriculture remains one of the most contentious topics in WTO negotiations.[208] Food is a necessity for all people and so the regulations on agricultural production and trade have implications that reach every corner of the globe.[209] Today, as the gap between food producers and consumers widens and the landscape of agriculture continues to change, new challenges exist that are paramount to the trade regime. The Food and Agriculture Organization of the United Nations explains that, "[a]s the world becomes more global, trade in agricultural, fishery[,] and forestry commodities has increased. At the same time, the task of ensuring our world has safe food while protecting our natural resources from pests and diseases, including invasive species, has become more complicated."[210]

The cornerstone that drives COOL is the concept of consumer choice. In today's vastly globalized system of agriculture, consumers want an opportunity to choose what they eat, where it comes from, and how it was produced. The USDA's new final rule on COOL should both serve consumers' growing desire

206. *Id.* at 31,369, 31,385.

207. Appellate Body Report, *supra* note 167.

208. *See, e.g.*, *Lamy Rebuts UN Food Rapporteur's Claim that WTO Talks Hold Food Rights 'Hostage,'* WORLD TRADE ORG. (Dec. 14, 2011), http://wto.org/english/news_e/news11_e/agcom_14dec11_e.htm.

209. OLIVIER DE SCHUTTER, THE WORLD TRADE ORGANIZATION AND THE POST-GLOBAL FOOD CRISIS AGENDA: PUTTING FOOD SECURITY FIRST IN THE INTERNATIONAL TRADE SYSTEM 14 (2011), *available at* http://wto.org/english/news_e/news11_e/deschutter_2011_e.pdf.

210. FOOD & AGRIC. ORG. OF THE UNITED NATIONS, INTERNATIONAL STANDARDS AND CODES, *available at* http://www.fao.org/docrep/014/am859e/am859e14.pdf (last visited Sept 23, 2013).

to know where their food comes from and satisfy the obligations of the United States at the WTO.