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## In the Hot House: Will Canada's WTO Challenge Slaughter U.S. Cool Regulations?

Carrie Ross

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# IN THE HOT HOUSE: WILL CANADA'S WTO CHALLENGE SLAUGHTER U.S. COOL REGULATIONS?

## INTRODUCTION

It has been a long time coming, but when you enter your grocery store these days, you might be able to figure out where your meat came from.<sup>1</sup> The United States Department of Agriculture's ("USDA") mandatory Country-of-Origin Labeling ("COOL") system requires retail labels on muscle cuts and ground beef, lamb, goat, pork, and chicken, among other things.<sup>2</sup> COOL is intended to provide consumers with information about the origin of their purchases.<sup>3</sup>

Origin labeling is common to many products we buy. It is a reflection of the Tariff Act of 1930, as amended (19 U.S.C. 1304), that requires, unless otherwise specified, the origin of all imports to be conspicuously labeled.<sup>4</sup> Consumers are probably familiar with such labels on things like cars and clothes.<sup>5</sup> Prior to COOL, many agricultural products were exempt or became products of the U.S. through additional manufacturing or

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1. News Release No. 0006.09, U.S. Dep't of Agric., *USDA Issues Final Rule on Mandatory Country of Origin Labeling*, Jan. 12, 2009, available at [www.usda.gov](http://www.usda.gov).

2. Country of Origin Labeling on Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Macadamia Nuts, Pecans, Peanuts, and Ginseng, 7 C.F.R. §65 (2009).

3. 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, 74 Fed. Reg. 2658 (Dep't of Agric. Jan. 15, 2009) (final rule) [hereinafter COOL].

4. The Tariff Act of 1930, 19 U.S.C. 1304 (1999).

5. *See Made in the USA? The Truth behind the labels*, CONSUMER REPORTS, (Mar. 2008), <http://www.consumerreports.org/cro/money/shopping/shopping-tips/country-of-origin-3-08/overview/country-of-origin-ov.htm>. For further description of labeling requirements for car parts and die cast model cars look to U.S. International Trade Commission rulings such as HQ 562393 (Aug. 5, 2002) and HQ 561165 (Feb. 12, 1999), available through the Customs Rulings Online Search System at <http://rulings.cbp.gov>. Both the Federal Trade Commission ("FTC") and the U.S. Customs Border Protection ("CBP") have country of origin labeling laws for textile products, which translates to a familiar "Made in India" on the tag of your T-shirt. India is just one example of the numerous places from where we import clothing. *See* BUREAU OF CONSUMER PROT., FED. TRADE COMM'N, *THREADING YOUR WAY THROUGH THE LABELING REQUIREMENTS UNDER THE TEXTILE AND WOOL ACTS* (May 2005), available at <http://www.ftc.gov/bcp/edu/pubs/business/textile/bus21.shtm#origin>; CBP Rules of Origin for Textile and Apparel Products, 19 C.F.R. § 102.21 (2008).

processing.<sup>6</sup> COOL requirements now ensure that all of your ground meat (and many other foodstuffs) at the meat counter has an origin label, too.<sup>7</sup> Despite a long history of labeling, Canada has challenged COOL at the World Trade Organization (“WTO”), saying it is inconsistent with obligations the U.S. has committed to under a number of international trade agreements.<sup>8</sup>

This note argues that COOL is a proper measure for providing consumers with desired information, but that it creates an inappropriate restriction on international trade in violation of U.S. obligations to the WTO. Part I explains why the U.S. finally created labeling regulations, exploring the different mechanisms considered, but not adopted, and illustrating the type of regulation COOL embodies. This background Section details the requirements of COOL, walking through the changes made to the final rule in an attempt to clarify what COOL means for domestic producers and importers. Part II expands upon what COOL does for interested consumers and makes a case for the recognition of consumers’ *right* to know as a legitimate objective. Part III gives a brief explanation of U.S. WTO obligations and attendant agreements, and Part IV argues that COOL is inconsistent with a number of those provisions, thus compromising the validity of the regulation.

## I. BACKGROUND

This Section strives to put forth the reasoning behind the new U.S. legislation. The first Part begins with an explanation of the increased concern over the safety and source of our foodstuffs. It reviews the power of consumer preferences and willingness to pay principles that make labeling an attractive option of conveying source information to the consumer. The second Section describes the types of labeling and the issues involved in each scheme. The final Section explains COOL requirements.

### A. Consumer knowledge and power

A number of Latin terms, scientific codes, and acronyms have been splashed across newspapers lately: H1N1 (formerly called swine flu) on the subway, *Salmonella* in your peanut butter, *E. coli* with your fresh

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6. *Reading Rooms: Country of Origin Labeling (COOL)*, THE NAT’L AGRIC. LAW CTR., <http://www.nationalaglawcenter.org/readingrooms/cool/> (last updated July 2010).

7. *Id.*

8. 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].

spinach, or *bovine spongiform encephalopathy* (also known as mad cow disease) on your beef.<sup>9</sup> These outbreaks have become so numerous and frequent that a recent study by the Center for Food Integrity showed food safety as the highest ranked non-economic issue among consumers.<sup>10</sup> Labels do not curb the incidence of disease, but they can help consumers make informed choices about what they purchase. Labels give consumers

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9. There has not been any link between eating pork, or any meat products, and contracting “swine flu.” See Clifford Krauss, *Canadian Hog Industry Seeks Redress on U.S. Food-Labeling Law*, N.Y. TIMES, Oct. 13, 2009, at B3.

10. *Food Safety, Affordability Top List of Consumer Concerns*, FOOD PRODUCT DESIGN (Sept. 24, 2009), <http://www.foodproductdesign.com/news/2009/09/food-safety-cost-worry-consumers.aspx> (citing THE CENTER FOR FOOD INTEGRITY, CONSUMER TRUST IN THE FOOD SYSTEM QUANTITATIVE RESEARCH STUDY HIGHLIGHTS (Oct. 2009), available at [http://www.foodintegrity.org/pdf/2009\\_research\\_summary.pdf](http://www.foodintegrity.org/pdf/2009_research_summary.pdf)). A number of new efforts have been undertaken to address these concerns. With regard to the recent *salmonella* outbreak, criminal proceedings have been initiated on behalf of those who were sickened, and Georgia passed a bill requiring food processors to report contamination within twenty-four hours of testing. See *Peanut Butter Salmonella Outbreak 2009*, FOOD SAFETY RESEARCH AND RESPONSE NETWORK, <http://www.fsrn.net/modules/content/index.php?id=163> (last visited Oct. 9, 2009). This twenty-four-hour turnaround is stricter than the Food and Drug Administration (“FDA”) requirement mandating food-processing facilities to report when there is a reasonable probability that food could have harmful health consequences. See Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §350d (2002). In response to the first confirmation of mad cow disease in the U.S. in 2003, the U.S. Department of Agriculture (“USDA”) ordered a voluntary recall. See Matthew L. Wald & Eric Lichtblau, *U.S. is Examining a Mad Cow Case, First in Country*, N.Y. TIMES, Dec. 24, 2003, at A1. The U.S., among other countries, has taken strict measures to prevent the spread of the disease, including prohibiting the use of nerve and spine material in animal feed. See 21 C.F.R. § 589.2000 (2003); Michael Abramson, *Mad Cow Disease: An Approach to its Containment*, 7 J. HEALTH CARE L. & POL’Y 316, 334 (2004). But even though the risk of getting sick is low, specialists suggest consumers avoid eating beef from places where problems have been found. See GREG LARDY ET AL., BOVINE SPONGIFORM ENCEPHALOPATHY (BSE: MAD COW DISEASE), N.D. STATE UNIV. EXTENSION SERV. (April 2004), available at [www.ag.ndsu.edu/pubs/ansci/beef/as1206.pdf](http://www.ag.ndsu.edu/pubs/ansci/beef/as1206.pdf). Labels can help consumers do so. See HYUN J. JIN ET. AL., THE EFFECTS OF BSE OUTBREAKS IN THE UNITED STATES ON THE BEEF AND CATTLE INDUSTRY, N.D. ST. U. SPECIAL REPORT 03-4 11 (2004). And in part, as a response to the 2006 *E. coli* outbreak in spinach, which sickened 205 people, the USDA is currently considering a marketing agreement for handling leafy green vegetables. See *USDA Regulation for Leafy Green Industries?*, E. COLI BLOG (Nov. 29, 2007) <http://www.ecoliblog.com/2007/11/articles/e-coli-watch/usda-regulation-for-leafy-green-industries/>. The proposed agreement, currently open for public comment, would create voluntary standards for production and handling practices, and those who participate may use a certification mark on their product packages. That certification mark is intended to enhance consumer confidence. See *Leafy Green Vegetables Handled in the United States*, 74 Fed. Reg. 45565–01 (to be codified at 7 C.F.R. pt. 970).

the option of avoiding meat from places experiencing outbreaks.<sup>11</sup> Better identification and tracking can also help governments take swift and effective action in case of an outbreak.<sup>12</sup> There have been numerous studies showing that consumers overwhelmingly support country of origin labels on their meat.<sup>13</sup> There are many ways information can be conveyed to consumers, and different labeling schemes work for different situations; these systems are briefly explored below.

### B. Labeling

Product packages convey various kinds of information to the consumer. Food packages now convey information about nutrient content, possible allergens, and methods of preparation, among other things.<sup>14</sup> Some packages are so loaded with tiny print that a consumer cannot be expected to understand the intended message, let alone read the entire box. Some of what is found on packaging is intended for marketing purposes, but an increasing portion of it is in response to consumer demands.<sup>15</sup> The following Sections explain the different types of labeling systems, illu-

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11. JIN ET. AL, *supra* note 10, at 11.

12. Caroline Smith DeWaal, Dir. of Food Safety, Ctr. for Sci. in the Pub. Interest, Statement at National Press Club: Chasing Tomatoes? (July 3, 2008), available at [http://www.cspinet.org/new/pdf/tracability\\_\\_\\_st\\_paul\\_outbreak\\_statement\\_\\_july\\_31.pdf](http://www.cspinet.org/new/pdf/tracability___st_paul_outbreak_statement__july_31.pdf).

13. Surveys show that 80 to 90 percent of respondents want origin labels on their food. See Press Release, Food & Water Watch Org., Food Labeling: 82% Support COOL (Mar. 25, 2007) [hereinafter Press Release, Food Labeling], available at <http://www.foodandwaterwatch.org/press/releases/food-labeling-82-percent-support-cool-article03252007?searchterm=support+cool>; *Consumer Reports Food-Labeling Poll Shows Consumers Want to Know Where Their Food Comes From and Expect Higher Label Standards*, GREENER CHOICES (July 7, 2007) [hereinafter *Consumer Reports*], [http://mangroveactionproject.org/news/current\\_headlines/consumer-reports-food-labeling-poll-shows-consumers-want-to-know-where-their-food-comes-from-and-expect-higher-label-standards/](http://mangroveactionproject.org/news/current_headlines/consumer-reports-food-labeling-poll-shows-consumers-want-to-know-where-their-food-comes-from-and-expect-higher-label-standards/); *Zogby Poll: 85% Want to Know Where Their Food Comes From*, ZOGBY INT'L (Aug. 9, 2007), <http://www.zogby.com/News/ReadNews.cfm?ID=1345> [hereinafter *Zogby Poll*].

14. Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 343 (2006).

15. 74 Fed. Reg. 2658. See also PHIL HOWARD, THE CENTER FOR AGROECOLOGICAL AND SUSTAINABLE FOOD SYSTEMS, UC SANTA CRUZ, WHAT DO PEOPLE WANT TO KNOW ABOUT THEIR FOOD? MEASURING CENTRAL COAST CONSUMERS' INTEREST IN FOOD SYSTEMS ISSUES (2005), available at <http://escholarship.org/uc/item/75s222dm>; Elliot B. Staffin, *Trade Barrier or Trade Boon? A Critical Evaluation of Environmental Labeling and its Role in the "Greening" of World Trade*, 21 COLUM. J. ENVTL. L. 205, 215 (1996) (discussing the use of voluntary labels for marketing purposes); Atsuko Okubo, *Environmental Labeling Programs and the GATT/WTO Regime*, 11 GEO. INT'L ENVTL. L. REV. 599, 605 (1999).

strating the purposes of each type of system, and lay out the reasoning behind COOL's formulation.

### 1. Types of labeling systems

Although there are many different labeling programs, they can generally be categorized into three groups: "(1) mandatory government-sponsored schemes; (2) voluntary government-sponsored schemes; and (3) voluntary private-sponsored schemes."<sup>16</sup>

Mandatory government-sponsored schemes are those that require packages to contain certain information. Negative-content labeling schemes warn consumers about a product's adverse environmental or health effects.<sup>17</sup> One example is warning labels on cigarettes. In contrast, positive-content labeling schemes illustrate the benefits of a particular product over its competitors, like dolphin-safe tuna labels.<sup>18</sup> The theory behind positive labeling is that when consumers are aware of the impacts of their purchases, they will create demand for more friendly or healthy products.<sup>19</sup> In turn, those friendly and healthy products will benefit by gaining market share.<sup>20</sup> Neutral labeling schemes disclose information to the consumer that the government has deemed important to their decision-making, like fuel efficiency ratings on new cars sold in the U.S.<sup>21</sup>

Governments often play a role in voluntary labeling schemes as well.<sup>22</sup> As long as their products fulfill the predetermined conditions, producers may opt to use these labels because of market pressure.<sup>23</sup> Government-based voluntary schemes provide: "(1) consistency in criteria; (2) balance of views of the different parties; (3) greater accountability to the public; and (4) greater program transparency."<sup>24</sup> For instance, U.S. producers may elect to label their products "grass fed" through an application for certification by the USDA and submitting documentation and

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16. John J. Emslie, *Labeling Programs as a Reasonably Available Least Restrictive Trade Measure Under Article XX's Nexus Requirement*, 30 BROOK. J. INT'L L. 485, 494 (2005). See generally STEVE SUPPAN, INST. FOR AGRIC. & TRADE POL'Y, THE CANADIAN AND MEXICAN WTO CHALLENGES TO U.S. COUNTRY OF ORIGIN LABELING, (2009), available at <http://www.iatp.org/iatp/publications.cfm?refid=105552> (arguing that proponents of COOL believe the labeling program can give them market leverage).

17. See Staffin, *supra* note 15, at 211.

18. See Emslie, *supra* note 16, at 495.

19. See Okubo, *supra* note 15, at 601.

20. See *id.*

21. See *id.* at 604; Emslie, *supra* note 16, at 495.

22. Okubo, *supra* note 15, at 605.

23. *Id.*

24. *Id.*

testimony for review.<sup>25</sup> The government creates the standards producers must meet, such as defining “grass fed,” after accounting for various interests.<sup>26</sup> The proposed marketing agreement for leafy greens is another example of a voluntary labeling program.<sup>27</sup>

Voluntary labeling schemes supported by private sponsors have shown up on many grocery shelves.<sup>28</sup> There is no government oversight or participation in these schemes.<sup>29</sup> Private voluntary systems may be organized by third party independents.<sup>30</sup> The American Heart Association offers a “heart healthy” stamp of approval for products that have whole grains, are low fat, or are high in fiber.<sup>31</sup> “Smart Choices” is another such labeling system that indicates a product is a healthy choice.<sup>32</sup> Producers pay to be a part of such labeling schemes.<sup>33</sup>

Private voluntary systems can also be based on self-assessment—i.e. claims the producers make about themselves.<sup>34</sup> According to guidelines put forth by the International Standards Organization, producers can add any label to their goods if there is no definition or criteria for it yet, though they must be sure to be specific and not misleading.<sup>35</sup> The recycling symbol, seen on the bottom of many packages indicating recyclable content, is a widely recognized self-declaration label.<sup>36</sup>

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25. See FARM SANCTUARY, *THE TRUTH BEHIND THE LABELS: FARM ANIMAL WELFARE STANDARDS AND LABELING PRACTICES* 17 (April 2009).

26. See *id.* However, the certification program is also voluntary which means that producers may use the label without submitting their documentation for review. This makes the label itself open to the subjective interpretation of the producer who may choose to use it as a marketing tool. The value of such a label for consumer interests is therefore negligible.

27. See Leafy Green Vegetables Handled in the United States, 74 Fed. Reg. 45565–01 (to be codified at 7 C.F.R. pt. 970).

28. Rebecca Ruiz, *Eight Puzzling Food Labels*, FORBES.COM (Sept. 23, 2009, 4:15 PM), <http://www.forbes.com/2009/09/23/food-labels-healthy-lifestyle-health-smart-choices-nutrition.html> [hereinafter Ruiz, *Eight*].

29. Emslie, *supra* note 16, at 497.

30. See *id.*; Okubo, *supra* note 15, at 607.

31. Ruiz, *Eight*, *supra* note 28.

32. Paying to participate and help craft the labeling schemes may introduce bias. Rebecca Ruiz, *Smart Choices Foods: Dumb As They Look?* FORBES.COM (Sept. 17, 2009, 6:25 PM), <http://www.forbes.com/2009/09/17/smart-choices-labels-lifestyle-health-foods.html>.

33. Ruiz, *Eight*, *supra* note 28.

34. See Emslie, *supra* note 16, at 497.

35. See Okubo, *supra* note 15, at 608–609.

36. See *id.* at 609.

## 2. COOL: A Mandatory Labeling System

Country-of-origin labels are an example of neutral government-mandated schemes. They do not provide the consumer with any suggestive information; COOL seeks only to help the consumer make an informed decision.<sup>37</sup> Yet, these labels may induce positive or negative responses depending on a consumer's own interests. Some companies voluntarily affix country-of-origin labels such as 'made in America' or 'product of USA' to appeal to consumer desires to support American manufacturing.<sup>38</sup> Often, origin is an integral part of the value of the good itself. For instance, people may be willing to pay more for a leather bag or shoes made from Italian leather, because they believe Italian leather products are superior.<sup>39</sup> It is this perceived value of a "product of USA" label that led Canada to denounce COOL as a protectionist measure.<sup>40</sup>

U.S. lawmakers suggested a voluntary program, which may have had more traction in the WTO, but ultimately, the mandatory scheme became law.<sup>41</sup> Prior to final implementation of the regulation, labeling was voluntary, though few producers complied.<sup>42</sup> It was said that the costs of labeling outweighed consumers' willingness to pay more for the labeled product, but the USDA believes that the costs and benefits will balance out.<sup>43</sup> The costs to producers are a concern only to the extent to which it

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37. Staffin, *supra* note 15, at 214.

38. These labels are strictly regulated by the Federal Trade Commission. *See generally* FED. TRADE COMM'N, COMPLYING WITH THE MADE IN THE USA STANDARD (1998), available at [www.ftc.gov/bcp/edu/pubs/business/adv/bus03.shtm](http://www.ftc.gov/bcp/edu/pubs/business/adv/bus03.shtm); ROGER SIMMERMAKER, HOW AMERICANS CAN BUY AMERICAN: THE POWER OF CONSUMER PATRIOTISM (2008) (explaining strategies to keep profits and jobs within the domestic economy).

39. Personal interview with Amy Handler, student and avid shopper (Nov. 16, 2009). Geographic indicators, although a trademark issue, not a matter of country-of-origin, illustrate this point as well. Appellations such as Champagne and Roquefort are stringently protected in France lest they be used in such a way as to devalue the name. *See* Jim Chen, *A Sober Second Look at Appellations of Origin: How the United States Will Crash France's Wine and Cheese Party*, 5 MINN. J. GLOBAL TRADE 29, 32-33 (1996).

40. *See* Krauss, *supra* note 9; *FMI Backgrounder: Country of Origin Labeling for Food*, FOOD MARKETING INSTITUTE, [http://www.fmi.org/media/bg/COL\\_backgrounder.pdf](http://www.fmi.org/media/bg/COL_backgrounder.pdf) (last visited Nov. 25, 2009) [hereinafter *FMI Backgrounder*].

41. *See* FMI Backgrounder, *supra* note 40.

42. *See* *Trying Voluntary COOL . . . Again*, NEBRASKA FARMER (May 26, 2004), available at <http://nebraskafarmer.com/story.aspx?s=627&c=8>.

43. *See* Wendy J. Umberger, *Will Consumers Pay a Premium for Country-of-Origin Labeled Meat?*, CHOICES: THE MAGAZINE OF FOOD, FARM, AND RESOURCE ISSUES, 4th Quarter 2004, at 15 [hereinafter Umberger, CHOICES]; COOL, 74 Fed. Reg. 2658, 2681-91.

restrains trade and, to that end, whether the consumers' right to know justifies that infringement. Before going any further into the rights of the public and the requirements of international agreements, it is important to know what COOL demands and how it differs from prior regulations.

*C. COOL: The new U.S. food labeling requirements*

"[U]nder the Tariff Act of 1930, 19 U.S.C. §§ 1202-1681b, nearly every item imported into the United States must indicate to the ultimate purchaser its country of origin."<sup>44</sup> The "ultimate purchaser" under this act was the importer, the grocer; origin information was passed to the last person receiving "the article in the form in which it was imported."<sup>45</sup> So, the information was only passed on to consumers if the good was imported in packages ready for retail.<sup>46</sup> If the product was slated for additional processing, the U.S. manufacturer was considered the ultimate purchaser.<sup>47</sup> In practice, an article that underwent a "substantial transformation"—a manufacturing or combining process that results in a change of name, character, or use of the item—would be deemed to originate in the country in which it was last substantially transformed.<sup>48</sup> Additionally, many items, such as fruits, vegetables, nuts, and animals (dead or alive) were exempt from this labeling requirement.<sup>49</sup> The Farm Security and Rural Investment Act of 2002 ("2002 Farm Bill") shifted the labeling requirements of the 1930 Tariff Act to require indication of country of origin at the point of final sale to the consumer.<sup>50</sup> Whereas under the old law, a grocery received shipments with an origin stamp on the box, now the consumer will get origin information not just on pre-packaged goods, but also on goods in the produce department and at the butcher counter.

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44. THE NAT'L AGRIC. LAW CTR., COUNTRY OF ORIGIN LABELING (COOL): AN OVERVIEW (2009) [hereinafter NAT'L AGRIC. LAW CTR.], available at <http://www.nationalaglawcenter.org/assets/overviews/cool.html>.

45. See GEOFFREY S. BECKER, CONG. RESEARCH SERV., COUNTRY-OF-ORIGIN LABELING FOR FOODS I (2008).

46. Daisuke Kojo, *The Importance of the Geographic Origin of Agricultural Products: A Comparison of Japanese and American Approaches*, 14 MO. ENVTL. L. & POL'Y REV. 275, 301 (2007).

47. BECKER, *supra* note 45.

48. Country of Origin Marking, 19 C.F.R. § 134.35 (2009).

49. See NAT'L AGRIC. LAW CTR., *supra* note 44. According to customs, substantial transformation occurs when the manufacturing process changes the name, character, or use of the product. 19 C.F.R. §§ 134.35, 134.33.

50. COOL, 74 Fed. Reg. at 2658.

In effect, the 2002 Farm Bill, and provisions of the “2008 Farm Bill[] amended the Agricultural Marketing Act of 1946 (Act) to require *retailers* to notify *consumers* of the country of origin of covered commodities.”<sup>51</sup> COOL creates new labeling requirements, mandating labels on many commodities formerly excluded and labeling those products until they actually get to the consumer instead of just stopping with the importer/retailer/wholesaler.<sup>52</sup> The implementation of COOL was delayed twice, and only became effective on March 16, 2009.<sup>53</sup> In its ultimate form, COOL covers country of origin labeling for beef, pork, lamb, chicken, perishable agricultural commodities, macadamia nuts, pecans, peanuts, and ginseng.<sup>54</sup> The rule goes on to explain that no matter how the commodity is offered for sale, whether in bulk, cluster, or individual package, it must contain a country of origin label.<sup>55</sup>

The USDA has laid out acceptable labeling terms for all covered commodities. For muscle cuts of meat born, raised, and slaughtered in the U.S., the label may say “Product of U.S.(A).” or simply “U.S.(A).”<sup>56</sup> For those animals born elsewhere but raised and slaughtered in the U.S., the label must contain every location in which the animal has been, but it does not matter in what order they are listed.<sup>57</sup> Animals that have been imported into the U.S. for immediate slaughter must be labeled “Product of Country X and U.S.(A).”<sup>58</sup> Muscle cuts of meat that have been commingled during production with cuts of different categories, i.e. varying degrees of production in the U.S., must include all countries from

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51. *Id.* at 2658 (emphasis added).

52. *See supra* notes 44–51 and accompanying text.

53. 7 C.F.R. § 65. This note will only discuss the regulations as they pertain to meat; for brevity’s sake it does not dwell on the rules about fish and shellfish (7 C.F.R. §60, effective as of April 2005), and largely disregards those regarding perishable agricultural commodities, nuts, and ginseng (7 C.F.R. § 65).

54. 7 C.F.R. § 65.100.

55. 7 C.F.R. § 65.300(a). For the label itself, there are no requirements as to size or placement; the only requirement is that all designations are legible and conspicuous. *See* COOL, 74 Fed. Reg. at 2662. As long as the location is reasonably known, state or region may be designated instead of country for perishable commodities and nuts. *See* 7 C.F.R. § 65.400(f). For all covered commodities, abbreviations approved by the United States Postal Service or the United States Customs and Border Patrol are permitted for use because these are unmistakable indicators of country of origin. *See* COOL, 74 Fed. Reg. at 2673.

56. Country of Origin Notification, 7 C.F.R. § 65.300(d) (2009). *See also* United States Country of Origin, 7 C.F.R. § 65.260 (2009). For those animals present in the U.S. before July 15, 2008, where the animal was born and raised does not matter. *Id.* § 65.260.

57. *Id.* § 65.300(e)(1).

58. *Id.* § 65.300(e)(3).

whence the meat came, but may do so in any order.<sup>59</sup> For ground meat the label must list all countries that may have contributed meat to the product.<sup>60</sup> This scheme has come under scrutiny; a director of the Canadian Cattlemen's Association suggests instead that the label reflect the place in which the product undergoes its last substantial transformation.<sup>61</sup>

Two important exceptions in COOL are for food service establishments and for processed food items.<sup>62</sup> The first applies to all facilities engaged in the business of selling food to the public, both salad bar types of establishments and those providing ready-to-eat foods.<sup>63</sup> On one hand, granting exemptions to all restaurants indicates that COOL's primary concern is about what consumers are bringing into their own kitchens, not necessarily what they are consuming in general. However, Canada may use these exceptions to illustrate the willingness of U.S. lawmakers to make some exceptions, and thereby compromise the U.S. position on the consumers' right to know, since consumers presumably want to know origin information for all food wherever it is eaten.

The exemption for processed food items created quite a bit of controversy domestically.<sup>64</sup> Under the final rule, "products . . . subject to curing, smoking, broiling, grilling, or steaming" are not covered.<sup>65</sup> Products

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59. *Id.* § 65.300(e)(2).

60. *Id.* § 65.300(h).

61. Interview by Brian Allmer with John Masswohl, Director of Gov't & Int'l Relations, Canadian Cattlemen's Association, Briggsdale, Colo (Oct. 8, 2009) [hereinafter Interview with John Masswohl], *available at* <http://briannallmerradionetwork.wordpress.com/2009/10/08/10-08-09-canada-files-wto-challenge-on-cool/> (last visited Oct. 26, 2009). Doing so would basically be a reversion back to the policy the U.S. had since 1930 that COOL sought to change.

62. 7 C.F.R. §§ 65.125, 65.145.

63. *See* COOL, 74 Fed. Reg. at 2660.

64. *See* Chris Waldrop, Consumer Fed'n of Am., Statement on the Implementation of Country of Origin Labeling, (Sept. 30, 2008), *available at* <http://www.consumerfed.org> (hyperlink to "press releases"); Comment from Land Stewardship Project, to Country of Origin Labeling Program, USDA Agricultural Marketing Service (Sept. 30, 2008) [hereinafter Land Stewardship Project] *available at* [regulations.gov](http://www.regulations.gov) (search "Country of Origin Labeling"; then search within search for "Land Stewardship Project"; then follow "AMS-LS-07-0081-0756" hyperlink under ID); Comment from Iowa Citizens for Community Improvement, to Country of Origin Labeling Program, USDA Agricultural Marketing Service (Sept. 30, 2008) [hereinafter Iowa Citizens for Community Improvement], *available at* [regulations.gov](http://www.regulations.gov) (search "Country of Origin Labeling"; then search within search for "Iowa Citizens for Community Improvement"; then follow "AMS-LS-07-0081-0744" hyperlink under ID).

65. Letter from Thomas Vilsack, Sec'y of the U.S. Dep't of Agric., to Industry Representatives (Feb. 20, 2009) [hereinafter Vilsack Letter], *available at* [www.usda.gov/documents/0220\\_IndustryLetterCOOL.pdf](http://www.usda.gov/documents/0220_IndustryLetterCOOL.pdf).

that are combined with different covered commodities are exempt, meaning large portions of purchases remain off the map.<sup>66</sup> The Agricultural Marketing Service believes the rule establishes a bright line test.<sup>67</sup> Yet, others have argued that the definition is too broad and contravenes the intent of the regulation: a bag of frozen peas must be labeled, but a bag of frozen peas and carrots need not be.<sup>68</sup>

Much has been said about the increased cost of maintaining separate production lines and records to satisfy COOL requirements. Some believe the cost of COOL will easily pass to the consumer, while others think the cost of compliance will be so high that some will simply use a multiple origin label rather than maintain separate records.<sup>69</sup> Studies on willingness to pay have shown mixed results, consumers express opinions about theoretical preferences, but according to objective choices in

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66. For example, a bag of mixed vegetables. COOL, 74 Fed. Reg. at 2667. See Waldrop, *supra* note 63; COOL, 74 Fed. Reg. at 2660–61 (listing the types of items that will be exempt). See also Land Stewardship Project, *supra* note 64. See generally *New Consumer Research Unveiled at the Annual Meat Conference*, American Meat Institute (Feb. 19, 2007), <http://www.meatami.com/sites/amif.org/ht/d/ReleaseDetails/i/2833> (explaining that some 70% of U.S. consumers buy their meat from conventional supermarkets).

67. 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, 73 Fed. Reg. 45106, 45115 (Dep't of Agric. Aug. 1, 2008) (Interim final rule with request for comments) [hereinafter Interim final rule]. The rule uses the same definition as was used in the seafood regulation to create consistency. 7 C.F.R. § 60. The Food Marketing Institute supports the exemption because it provides for ease of use by creating a single standard across the board. See Letter from Deborah R. White, Senior Vice President, Food Marketing Inst., to COOL Program Administrators (Sept. 30, 2008), *available at* [regulations.gov](http://www.regulations.gov) (search "Country of Origin Labeling"; then search within search for "Food Marketing Institute"; then follow "AMS-LS-07-0081-0801" hyperlink under Docket ID).

68. Waldrop, *supra* note 63. Some have gone so far as to say that consumers will become distrustful of the labeling system that acknowledges the origin of a raw whole chicken but not a roasted chicken. Land Stewardship Project, *supra* note 64; Iowa Citizens for Community Improvement, *supra* note 64.

69. See COOL, 74 Fed. Reg. at 2681–93; *U.S. Cattlemen Praise Tyson & Cargill for Decision on COOL Compliance*, CATTLE NETWORK.COM (Oct. 21, 2008), <http://www.cattlenetwork.com/U-S—Cattlemen-Praise-Tyson—Cargill-For-Decision-On-COOL-Compliance/2008-10-21/Article.aspx?oid=564366>; *National Pork Producers Council (NPPC) says country-of-origin labeling (COOL) is too costly*, NAT'L HOG FARMER (Oct. 9, 2008), <http://nationalhogfarmer.com/marketing/1009-nppc-cool-costly/index.html>; *R-CALF USA 2007 Stampede Fact Sheet: Country of Origin Labeling for Beef*, R-CALF USA, [http://www.r-calfusa.com/COOL/country\\_of\\_origin\\_labeling.htm](http://www.r-calfusa.com/COOL/country_of_origin_labeling.htm) (last visited Dec. 20, 2009); *NFU Applauds Strengthened COOL Standards*, NAT'L FARMERS UNION (Feb. 20, 2009), <http://nfu.org/news/2009/02/20/nfu-applauds-strengthened-cool-standards.html>.

the supermarket, origin is not always the motivating concern.<sup>70</sup> It is worth noting that although U.S. consumers have indicated a preference for U.S. products, COOL will not necessarily bring any added economic benefit to U.S. producers if the cost of compliance is not offset by increased sales or higher prices.<sup>71</sup> However, even if there is no measurable economic benefit, consumers are the ones who bear the cost, and therefore, they are the ones whose concerns should be appeased by providing the desired labels.<sup>72</sup>

## II. CONSUMER RIGHT TO KNOW

Numerous studies show that consumers support country of origin labels on their meat. A 2007 study by Food & Water Watch, a consumer group, found that eighty-two percent of respondents supported COOL.<sup>73</sup> A study conducted in that same year by Consumers Union showed that ninety-two percent of respondents believed country of origin labels should be affixed to all imported foods.<sup>74</sup> Respondents to a poll conducted by Zogby International said they did not *just* want to know where their food was coming from; ninety-four percent believed it was their *right* to know the country of origin of their purchases.<sup>75</sup> With such overwhelmingly popular support for COOL, comfort should be taken in the fact that political bodies are responding positively to the public's demands.<sup>76</sup> Nevertheless, policy-making is about striking a balance between numerous interests and obligations; one of those obligations is to uphold promises made to the international community. So the question becomes: does the consumer have the *right* to know? And does that right

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70. See generally Wendy Umberger, Dillon M. Feuz, Chris R. Calkins & Bethany M. Sitz, *Country-of-Origin Labeling of Beef Products: U.S. Consumers' Perceptions*, 34 J. FOOD DISTRIBUTION RES. 103–16 (2003) [hereinafter Umberger, *Country-of-Origin Labeling*] (finding that the amount people were willing to pay depended upon a number of concerns regarding food safety, preference for different sources, quality perceptions, and desire to support U.S. farmers); Maria L. Loureiro & Wendy Umberger, *Assessing Consumer Preferences for Country-of-Origin Labeling*, 37 J. OF AGRIC. & APPLIED ECON. 49 (2005) (finding respondents were concerned about food safety and therefore wanted their meat certified U.S. but were not willing to pay nearly enough to cover the cost of COOL).

71. See Kojo, *supra* note 46, at 304.

72. *Id.* at 305.

73. See Press Release, Food Labeling, *supra* note 13.

74. *Consumer Reports*, *supra* note 13.

75. *Zogby Poll*, *supra* note 13.

76. See Press Release, Food Labeling, *supra* note 13; *Consumer Reports*, *supra* note 13; *Zogby Poll*, *supra* note 13.

justify restrictions on international trade that are otherwise in violation of international obligations?

In the context of labeling, the concept of a “right to know” is that consumers have an interest in any fact that they “deem[] important about a food or commodity before being forced to make a purchasing decision.”<sup>77</sup> The issue has cropped up in a number of different areas, most notably, in the EU, where labeling for genetically modified foods was driven by “the principle of informed consumer choice.”<sup>78</sup> Previously, U.S. Courts have supported the Food and Drug Administration’s (“FDA”) position that it is not authorized to issue labeling requirements based solely on consumer demands.<sup>79</sup> However, since Congressional action authorized the promulgation of COOL as a way to inform consumers—reflecting the public desire to have the information—it will therefore be upheld in U.S. Courts.<sup>80</sup>

While barriers to passing the bill have already been overcome, COOL may now create a barrier to international trade. Country-of-origin labels are not new, and thirty-four of fifty-seven U.S. trading partners have some type of origin labeling law to cover imported cut and ground

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77. See Frederick Degnan, *The Food Label and the Right to Know*, 52 FOOD & DRUG L.J. 49, 50 (1997).

78. M.J. Sadler, *Modified Foods and Ingredients*, in FOOD LABELLING, 221, 221 (J. Ralph Blanchfield ed., 2000).

79. See *Alliance for Bio-Integrity v. Shalala*, 116 F. Supp. 2d 166, 179 (2000); *Staubert v. Shalala*, 895 F. Supp. 1178, 1193 (W.D. Wis. 1995) (holding that “the use of consumer demand as the rationale for labeling would violate the Food, Drug, and Cosmetic Act” in support of the FDA decision not to mandate labels for milk from cows treated with synthetic hormones); *Int’l Dairy Foods Ass’n v. Amestoy*, 92 F.3d 67, 73 (2d Cir. 1996) (The court held that consumer concern alone was an insufficient state interest to justify restriction on constitutionally protected rights to free speech. The right upheld here is to be free from mandatory labeling requirements that are not deemed material to prevent the consumer from being misled.). See also Degnan, *supra* note 77, at 56–57; *Tupman Thurlow Co. v. Moss*, 252 F. Supp 641, 645 (D.C. Tenn. 1966) (the court struck down a state requirement to label meat as “foreign origin” or “domestic,” in an attempt to protect consumers against fraud and deception, as a violation of the Commerce Clause). Nonetheless, these cases only indicate that in the past, consumer interest has not been enough to convince the court to hold a federal agency responsible for creating labeling requirements. There is nothing prohibiting a federal agency from creating mandatory labels within the language of their authorizing statute.

80. In fact, a recent case brought against the USDA to enjoin COOL was dismissed, because there was no showing that the action was arbitrary and capricious. See *Easterday Ranches Inc. v. U.S. Dep’t of Agric.*, 2008 WL 4426004 (E.D. Wash. Sept. 25, 2008).

meat.<sup>81</sup> The EU origin labeling requirements are much more extensive than in the U.S., requiring all beef to be labeled by country of birth, fattening, slaughter, cutting, and deboning.<sup>82</sup> “None of these long-standing requirements have ever been challenged as barriers to trade.”<sup>83</sup> Apparently, COOL has made a significant enough impact on trade that Canada feels it is necessary to challenge its validity. Whether or not the consumer’s right is strong enough to justify an infringement upon international trade will likely be the crux of the challenge the U.S. will have to overcome.

### III. WTO DISPUTE AND RELEVANT AGREEMENTS

The USDA said it considered international trade obligations in developing the COOL regulations, yet Canada filed a complaint with the WTO on December 1, 2008, before the rule was finalized.<sup>84</sup> Canada alleges that COOL regulations are inconsistent with a number of obligations under the Agreement on Technical Barriers to Trade (“TBT” Agreement) or the Agreement on the Application of Sanitary and Phytosanitary Measures (“SPS” Agreement), the General Agreement on Trade and Tariffs 1994 (“GATT 1994”), and Article 2 of the Agreement on Rules of Origin.<sup>85</sup> This Section explains the WTO dispute process, the method of treaty interpretation, and the relevant agreements at issue in Canada’s allegations.

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81. U.S. GEN. ACCOUNTING OFFICE, COUNTRY-OF-ORIGIN LABELING: OPPORTUNITIES FOR USDA AND INDUSTRY TO IMPLEMENT CHALLENGING ASPECTS OF THE NEW LAW, 23–24 (2003) [hereinafter GAO, COOL].

82. Council Regulation 1760/2000, 2000 O.J. (L 204) 1 [hereinafter Council Regulation 1760/2000].

83. Letter from Wenonah Hauter, Exec. Dir., Food & Water Watch, to Office of the U.S. Trade Representative (Jul. 1, 2009), *available at* <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=09000064809104c7>.

84. *See* COOL, 74 Fed. Reg. at 2679; Request for Consultation by Canada, United States—Certain Country of Origin Labelling (COOL) Requirements, WT/DS348/1/Add.1 (May 11, 2009) [hereinafter Request for Consultation].

85. Request for Panel, *supra* note 8. There is no WTO agreement that directly deals with food labeling laws. Food safety rules are under the purview of the SPS Agreement, which relies on scientific support. Because COOL is premised upon consumer protection, it is unlikely to fall under SPS Agreement obligations. However, because food safety issues, like mad cow disease, played a major role in pushing this legislation forward, SPS Agreement obligations may very well apply. *See generally* Steve Keane, *Can a Consumer’s Right to Know Survive the WTO?: The Case of Food Labeling*, 16 TRANSNAT’L L. & CONTEMP. PROBS. 291, 315–19 (2007).

### A. Dispute process and treaty interpretation

The 1994 Dispute Settlement Understanding (“DSU”) provides a forum in which members may bring claims against one another for non-compliance with any WTO agreement.<sup>86</sup> The parties are to engage in a series of consultations in an attempt to settle their differences by mutual agreement.<sup>87</sup> Upon request, a panel is convened to hear arguments and issue a binding report that is reviewable by a standing appellate body.<sup>88</sup> Pursuant to the DSU, a Panel was convened on November 19, 2009 to address Canada’s complaints against the U.S. in regards to COOL.<sup>89</sup>

The DSU requires agreements to be interpreted “in accordance with customary rules of interpretation of public international law.”<sup>90</sup> “[C]ustomary rules,” the Appellate Body has explained, are those laid out in the Vienna Convention on the Law of Treaties (“Vienna Convention”).<sup>91</sup> The Vienna Convention requires that “a treaty . . . be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context in light of its object and purpose.”<sup>92</sup> The body of reports that have been issued in accordance with these DSU provisions serve as guidance to the interpretation of the following agreements raised in Canada’s complaint.

### B. The Agreement on Technical Barriers to Trade

The TBT Agreement governs technical regulations and standards, including both mandatory and voluntary labeling requirements, to avoid the creation of unnecessary obstacles to trade or discrimination between

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86. See Understanding on Rules and Procedures Governing Settlement of Disputes art. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

87. *Id.* art. 4.

88. *Id.* arts. 4, 8, 11, 12, 16, 17.

89. DSB authorizes Brazil countermeasures in “cotton” case, establishes “COOL” and poultry panels, WTO NEW ITEMS (Nov. 19, 2009), [http://www.wto.org/english/news\\_e/news09\\_e/dsb\\_19nov09\\_e.htm](http://www.wto.org/english/news_e/news09_e/dsb_19nov09_e.htm).

90. DSU, *supra* note 86, art. 3.2.

91. See Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, 17, WT/DS2/AB (Apr. 29, 1996) [hereinafter *U.S.—Gasoline*].

92. Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. Context includes any additional text about and any agreements made between all parties of the dispute, taking into account any subsequent agreement and practice the parties have developed.

countries.<sup>93</sup> Article 2.1 states that “products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.”<sup>94</sup> Therefore, among WTO members, all “like products,”<sup>95</sup> whether imported or domestic, must be treated equally with respect to taxes, charges, and regulations.<sup>96</sup>

TBT Agreement Article 2.2 requires that technical regulations not “creat[e] unnecessary obstacles to international trade . . . [and] shall not be more trade-restrictive than necessary to fulfill a legitimate objective . . . .”<sup>97</sup> The agreement lists a number of objectives that would be considered legitimate, the most pertinent to COOL is the prevention of deceptive practices.<sup>98</sup> Members are supposed to account for the risks that non-fulfillment, like not preventing deception, would create based on “available scientific and technical information . . . [and] intended end-uses of products.”<sup>99</sup>

Article 2.4 requires that relevant international standards be used as a basis for technical regulations whenever available.<sup>100</sup> Canada alleges that the *Codex General Standard for the Labelling of Prepackaged Foods* is one such standard.<sup>101</sup> The *Codex* requires prepackaged food to be labeled

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93. See Agreement on Technical Barriers to Trade pmbl, arts. 1–2, Apr. 15, 1994, Marrakesh Agreement Establishing the WTO, Annex 1A, 1869 U.N.T.S. 14 [hereinafter TBT Agreement], available at [http://www.wto.org/english/docs\\_e/legal\\_e/17-tbt.pdf](http://www.wto.org/english/docs_e/legal_e/17-tbt.pdf).

94. TBT Agreement, *supra* note 93, art. 2.1. This requirement is a reflection of GATT obligations Most Favored Nations and national treatment. But, as stated in its preamble, the TBT Agreement grants an exception allowing members to take measures necessary to protect security. *See id.*

95. The term “like products” will be more fully discussed as it is used in the GATT Art. III:4 see *infra* text accompanying notes 114 to 122.

96. Arthur E. Appleton, Colloquium Article: *The Labeling of GMO Products Pursuant to International Trade Rules*, 8 N.Y.U. ENVTL. L. J. 566, 575 (2000).

97. TBT Agreement, *supra* note 93, art. 2.2.

98. *Id.* The others include national security requirements, protection of human health or safety, animal or plant life or health, or the environment.

99. *Id.*

100. *Id.* art 2.4.

101. Request for Panel, *supra* note 8. The *Codex* is developed by a joint commission of the United Nations Food and Agriculture Organization (“FAO”) and the United Nations World Health Organization (“WHO”), to create food standards to protect consumer health and fair practices in international trade. For more information, see *FAO/WHO Standards*, CODEX ALIMENTARIUS, [http://www.codexalimentarius.net/web/index\\_en.jsp](http://www.codexalimentarius.net/web/index_en.jsp) (last visited Aug. 26, 2010), [hereinafter CODEX ALIMENTARIUS]. The WTO recognizes the *Codex* as a point of reference for international standards. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Es-

with the country-of-origin “if its omission would mislead or deceive the consumer.”<sup>102</sup> While this requirement applies to all prepackaged foods being sold to the individual consumer, it does not apply to unpackaged foodstuffs.<sup>103</sup>

*C. The Agreement on the Application of Sanitary and Phytosanitary Measures*

Any food labeling requirements directly related to food safety must fulfill the obligations of the SPS Agreement.<sup>104</sup> Under the agreement, members may take sanitary and phytosanitary “measures necessary for the protection of human, animal or plant life[,] or health,” as long as the measure is based on scientific principles and is not simply protectionism in a disguised form.<sup>105</sup> The measures may not “arbitrarily or unjustifiably discriminate between Members . . . .”<sup>106</sup>

The SPS Agreement excuses trade restrictions that protect food safety, animal health, or plant health.<sup>107</sup> However, SPS measures must be based on assessed risks and should restrict trade as little as possible to achieve the appropriate level of protection, “taking into account technical and economic feasibility.”<sup>108</sup> Further, for such measures to be justified they must be “based on scientific principles” and supported by “sufficient scientific evidence.”<sup>109</sup> Exceptions are made when scientific evidence is insufficient if Members can show their measures are comparable to other Member’s measures and based on available information from relevant international organizations.<sup>110</sup> Measures are “based on” evidence produced through a risk assessment, if there is a “rational relationship” be-

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tablishing the WTO, Annex 1A, 1867 U.N.T.S. 493 [hereinafter SPS Agreement], *available at* [http://www.wto.org/english/docs\\_e/legal\\_e/15-sps.pdf](http://www.wto.org/english/docs_e/legal_e/15-sps.pdf).

102. Codex Alimentarius: Food Labelling-Codex General Standard for the Labelling of Prepackaged Foods, CODEX STAN 1-1985 (Rev. 1-1991) ¶ 4.5.1.

103. *Id.* ¶¶ 1–2.

104. SPS Agreement, *supra* note 101.

105. *Id.* art. 2.1.

106. *Id.* It is worth mentioning that, although the SPS Agreement has higher standards for measures affecting food safety, there are no provisions explicitly requiring the principles of most favored nation or national treatment be met, as there are in the TBT Agreement.

107. See Keane, *supra* note 85, at 316.

108. SPS Agreement, *supra* note 101, art. 5.

109. *Id.* art. 2.2.

110. See SPS Agreement, *supra* note 101, art. 5.7.

tween the SPS measure and the risk assessment itself.<sup>111</sup> Generally, if the measures substantially differ from international standards and will significantly impact trade, early notice must be given so others may become acquainted with the new measures while amendments and comments are still being considered.<sup>112</sup>

#### *D. General Agreement on Tariffs and Trade 1994*

The principle of national treatment colors Canada's entire allegation. The 1947 GATT supplies that no internal taxes or charges of any sort may be applied "to imported or domestic products so as to afford protection to domestic production."<sup>113</sup> National treatment, under GATT, requires imports from member countries be treated "no less favorabl[y]" than like products of domestic origin.<sup>114</sup> What is considered a like product is determined on a case-by-case basis, but its determination is vital to the analysis.<sup>115</sup> If products are not found to be "like," then there are no further requirements of equal treatment.<sup>116</sup> If products are considered like they may still be treated differently; the focus of a WTO inquiry is whether the different treatment results in unequal conditions of competition.<sup>117</sup> The following four factors may be used to analyze likeness:

- (i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits—more comprehensively termed consumers' perceptions and behavior—in respect of the products; and (iv) the tariff classification of the products.<sup>118</sup>

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111. Appellate Body Report, *EC—Measures Concerning Meat and Meat Products (Hormones)*, ¶ 193, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) [hereinafter *EC—Hormones*].

112. SPS Agreement, *supra* note 101, at Annex B, ¶ 5.

113. General Agreement on Tariffs and Trade, Oct. 30, 1947, Art. III.1, 61 Stat. A-11, 55 U.N.T.S. 914 [hereinafter GATT].

114. *Id.* art. III.4.

115. Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, at 21, WT/DS8, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996). [hereinafter *Japan—Alcoholic Beverages*].

116. Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶¶ 133–35, WT/DS161 & 169/AB/R (Dec. 11, 2000) [hereinafter *Korea—Beef*].

117. See *Korea—Beef*, *supra* note 116, ¶¶ 135–36; *Japan—Alcoholic Beverages*, *supra* note 113, ¶¶ 16–17.

118. Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-containing Products*, ¶ 101, WT/DS135/AB/R, 01-1157 (Mar. 12, 2001) [hereinafter *EC—Asbestos*]. The Appellate Body declined to determine the precise scope of Article III.4. The Appellate Body explained that the "like" in Article III.4 is broader in

Article IX speaks to marks of origin, requiring countries to minimize any difficulty or inconvenience a measures may put on exporters.<sup>119</sup> Further, no law or regulation on marking imports may require “seriously damaging the products, or materially reducing their value, or unreasonably increasing their costs.”<sup>120</sup> There is no jurisprudence or decision of the WTO dispute Panel over the interpretation or application of Article IX.<sup>121</sup> This is likely attributable to the fact that the Agreement on Rules of Origin was created at the same time, which provides much broader detail.<sup>122</sup>

#### *E. The Agreement on Rules of Origin*

Although the Canadian complaint alleges violation of the Agreement on Rules of Origin, it is not entirely clear that the dispute panel will address these concerns because the Agreement is still in provisional stages. Therefore, this note will not address the possible application of the agreement. However, the following is a rough outline of what a panel may look for should they address the issue.

“Rules of origin are not [to be] used as instruments to pursue trade objectives directly or indirectly.”<sup>123</sup> The Panel looks to the objective purposes of the measure as may be determined from its design, architecture, and structure.<sup>124</sup> The measure may not create “restrictive, distorting, or

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scope than that in the first sentence of Article III.2, but does not extend to products that are “directly competitive or substitutable,” and therefore is not as broad as Article III.2 overall. *Id.* ¶ 99.

119. GATT, *supra* note 113, art. IX.2.

120. *Id.* art. IX.4.

121. WORLD TRADE ORGANIZATION, WTO ANALYTICAL INDEX: GUIDE TO WTO LAW AND PRACTICE 261 (2003).

122. John J. Barceló III, *Harmonizing Preferential Rules of Origin in the WTO System* 6 (Cornell L. Sch. Legal Stud. Res. Paper Series Paper No. 06-049, 2006), available at [http://scholarship.law.cornell.edu/lrsp\\_papers/72](http://scholarship.law.cornell.edu/lrsp_papers/72).

123. Agreement on the Rules of Origin, art. 2(b), Apr. 15, 1994, Marrakesh Agreement Establishing the WTO, Annex A1, [hereinafter Agreement on Rules of Origin], available at [http://www.wto.org/english/docs\\_e/legal\\_e/22-roo.pdf](http://www.wto.org/english/docs_e/legal_e/22-roo.pdf).

124. See Panel Report, *United States—Rules of Origin for Textiles and Apparel Products*, ¶ 6.37, WT/DS243/R (June 20, 2003) [hereinafter *US—Origin Rules*]; see also *Dispute Settlement Commentary on US—Origin Rules* 3, WORLDTRADELAW.NET, [www.worldtradelaw.net/dsc/panel/us-originrules\(dsc\)\(panel\).pdf](http://www.worldtradelaw.net/dsc/panel/us-originrules(dsc)(panel).pdf) (last visited Aug. 29, 2010) [hereinafter *Dispute Settlement Commentary*]. Canada may complain that country of origin determination should be based on the place in which a product was “substantially transformed” as their own laws dictate. But, Art. 2(b) does not require the use of any particular rule, and so Members are free to create them as they see fit. See COOL, 74 Fed. Reg. at 2658.

disruptive effects on international trade.”<sup>125</sup> This does not prohibit the restrictive or disruptive impacts commercial policy measures may have, but rather speaks directly to whether the rules are administered in such a way as to create additional distortion.<sup>126</sup> Although the causation need not be deliberate, there must be a “causal link” between the rules and the alleged grievance to constitute a violation of Article 2(c).<sup>127</sup> The Panel has not definitively outlined the scope of the term “effects on international trade.” Yet, adverse effects on one member’s trade are not necessarily sufficient evidence to prove effects on international trade, since in the marketplace some lose and others gain.<sup>128</sup> Still, no showing of actual effects is required if the rules create the conditions to restrict, distort, or disrupt competition.<sup>129</sup> Whatever the effects, the rules must be administered impartially.<sup>130</sup>

#### IV. ANALYSIS OF COOL COMPLIANCE WITH WTO OBLIGATIONS

##### *A. Basis of Canada’s allegation*

The WTO is exactly what it says it is—a world trade organization. Simply stated, its main goal is to liberalize trade by breaking down barriers to entry.<sup>131</sup> However, during the sixteen years since the formal development of this rules-based system of coordinating global trade, there have been numerous conflicts with the desires of domestic industries and public preferences.<sup>132</sup> This appeal is just one more illustration of that

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125. Agreement on the Rules of Origin, art. 2(c). The allegations are only made with regard to Article 2, which apply during the transition period, since the Agreement has not yet been adopted.

126. *US—Origin Rules*, *supra* note 124, ¶ 6.136. *See also Dispute Settlement Commentary*, *supra* note 124, at 7.

127. *US—Origin Rules*, *supra* note 124, ¶ 6.140.

128. *Id.* ¶ 6.148.

129. *Id.* ¶ 6.149 (Panel agrees with India’s argument set forth in their Second Written Submission ¶ 2(c)(iii)).

130. Agreement on Rules of Origin, *supra* note 123, art. 2(d).

131. *What is the WTO? About the WTO—a statement by the Director-General*, WORLD TRADE ORG., [www.wto.org/english/thewto\\_e/whatis\\_e/wto\\_dg\\_stat\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm) (last visited Aug., 2010).

132. WTO Agreements are not self-executing, meaning they must be turned into domestic law by Members to have any effect. Decisions of the Panel similarly have no effect unless incorporated at the domestic level. For instance, a decision finding U.S. prohibition on the import of tuna fish not caught using dolphin-safe technology was not adopted by the pre-WTO dispute settlement procedure (which was based on consensus). For more information see GATT, *supra* note 113, art. XXIII. Instead, the U.S. committed

conflict; the question being whether or not American consumers have the right to know where their food comes from.<sup>133</sup> At stake are the echoes of protectionism: the struggle between sovereignty and compliance.

Canada alleges that, as applied, COOL results in less favorable treatment for Canadian beef, pork, and livestock.<sup>134</sup> The director of government and international relations for the Canadian Cattlemen's Association, John Masswohl, says that both cattle and hog exports have fallen by one third since the enactment of the regulation and that COOL unfairly discriminates against Canadian producers.<sup>135</sup> He says that meat packers are refusing to buy Canadian animals instead of taking on the added costs of segregating and labeling their livestock supplies.<sup>136</sup> The effect of the labeling regulation may be particularly hard on Canadian producers because sixty-five percent of U.S. cattle imports and thirty three percent of U.S. beef imports were from Canada in 2008.<sup>137</sup> Yet, disparate effects alone do not necessarily amount to a violation of WTO obligations.

The SPS and TBT agreements are two WTO agreements that directly bear upon food labeling requirements, although neither considers the

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to redesign its legislation. See Paul J. Yechout, *In the Wake of New Possibilities for GATT-Compliant Environmental Standards*, 5 MINN. J. GLOBAL TRADE 247, 259 (1996).

133. There has been a noticeable shift in WTO decisions. In the Tuna/Dolphin case the panel found that the ban could not be justified because the harvesting techniques did not affect tuna as a product. See Panel Report, *United States—Restrictions on Imports of Tuna*, ¶¶ 5.10–5.15, DS21/R-39S/155 (Sept. 3, 1991). But now, the WTO is increasingly concerned with process and production methods, evidenced by the implementation of the TBT and SPS Agreements, which are concerned with safety standards. Under U.S.—Shrimp/Turtle, the WTO has allowed for restrictions on shrimp imports that do not employ mechanisms for turtles to escape, as long as the restrictions are not arbitrary and unjustifiably discriminatory. See DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, *INTERNATIONAL TRADE LAW: PROBLEMS, CASES, AND MATERIALS* 507–09 (2008). It is possible then that moral concerns, like giving consumers the information to make a choice about where their meat comes from will have more leverage in the WTO than previously assumed. For a discussion of the history and possibility of moral exceptions, see Steve Charnovitz, *The Moral Exception in Trade Policy*, 38 VA. J. INT'L L. 689 (1998).

134. Request for Panel, *supra* note 8.

135. Interview with John Masswohl, *supra* note 61.

136. *Id.*

137. *Background Statistics: US Beef and Cattle Industry*, U.S. DEP'T OF AGRIC. ECON. RESEARCH SERV., <http://www.ers.usda.gov/news/bsecoverage.htm> (last visited Aug. 29, 2010) [hereinafter *US Beef and Cattle Industry*]. In total sales, the value of Canadian exports of cattle and beef to the US is \$2.866 billion (Canadian dollars), but these numbers pale in comparison to the total consumption and value of consumption of beef in the US market. In 2008, beef imports from Canada accounted for 3.1 percent of total US beef consumption tallied at 27.3 billion pounds. *Id.*

consumer's right to know.<sup>138</sup> While both agreements have provisions for non-discrimination, consistent application, and assurances that the measures are not more trade restrictive than necessary to achieve a legitimate goal, "a measure will not fall under both agreements simultaneously."<sup>139</sup> Determining which agreement applies is important because the SPS Agreement does not have national treatment provisions.<sup>140</sup> The TBT Agreement does have these provisions and would therefore prohibit certain forms of trade discrimination that might be permitted under the SPS. The following Sections break down the possible analysis a Panel would undertake to determine COOL's compliance with each agreement Canada alleges is violated. A measure will be found to violate a country's WTO obligations if any one element of an applicable agreement is not met. As the following analysis shows, COOL complies with most of the requirements, but ultimately, the regulation's survival hinges upon a finding of a legitimate objective in order to overcome the infringement it causes upon international trade.

#### *B. Application of the SPS Agreement*

In all likelihood, the WTO Dispute Panel will find that the SPS agreement does not apply to COOL, because the USDA has explicitly stated that the regulations are not intended to, and do not, address food safety concerns.<sup>141</sup> Whether the SPS Agreement is even applicable is a question

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138. See Keane, *supra* note 85, at 315.

139. Michele M. Compton, *Applying World Trade Organization Rules to the Labeling of Genetically Modified Foods*, 15 PACE INT'L L. REV. 359, 374 (2003); TBT Agreement, *supra* note 93, arts. 1.5, 2; SPS Agreement, *supra* note 101, art. 5. See also Kevin C. Kennedy, *Resolving International Sanitary and Phytosanitary Disputes in the WTO: Lessons and Future Directions*, 55 FOOD DRUG L.J. 81, 91 (2000). But see Joanne Scott, *European Regulations of GMOs and the WTO*, 9 COLUM. J. EUR. L. 213, 228–31 (2003) (arguing that GMO labeling regulations would fall under the purview of both the SPS and TBT Agreements). The EC—Biotech panel dismissed Canada's argument that some of the safeguard measures could be considered under the TBT Agreement in addition to the SPS Agreement. The panel said that the measures were entirely SPS measures and were not in part covered under the TBT agreement. Panel Report, *European Communities—Measures Affecting the Approval & Marketing of Biotech Products*, ¶ 7.3412, WT/DS291, 292, 293/R (Sept. 26, 2006) [hereinafter *EC—Biotech*].

140. Appleton, *supra* note 96, at 571.

141. See COOL, 74 Fed. Reg. at 2677. The agency explained that

the intent of the law . . . is to provide consumers with additional information on which to base their purchasing decisions. COOL is a retail labeling program and as such does not provide a basis for addressing food safety. Food products,

of whether COOL is a sanitary or phytosanitary measure that directly or indirectly affects international trade.<sup>142</sup> The SPS agreement covers measures intended to protect against risks from diseases, pests, disease causing or carrying organisms, contaminants, toxins, or additives.<sup>143</sup> Unlike disputes over hormones given to dairy cows or genetic modification of genes in plant life, country-of-origin labels do not directly implicate any unknown aspects of science so the SPS agreement may not apply to COOL. According to the *EC—Biotech* Panel, one looks to the objective of the measure, its form, and its nature to determine if it is an SPS measure.<sup>144</sup> The USDA claims the measure is intended solely to provide “consumers with additional information about the source of food products and to help[] producers differentiate their products.”<sup>145</sup> Thus, this marketing measure does not have the purpose characteristic of an SPS measure. Admittedly, COOL does have the form and nature of an SPS measure because the regulation is a mandatory requirement created by an administrative agency. But, such a finding is irrelevant because it is lacking the “purpose to protect” that invokes the SPS Agreement in the first place.

Should the Panel hold otherwise and seek to determine whether COOL fulfills the obligations of the SPS agreement, the U.S. will be hard pressed to prove compliance. The SPS agreement relies upon scientific evidence to justify the imposition of regulation.<sup>146</sup> When relevant scientific evidence is insufficient, a Member may take measures on the basis of available and relevant information, drawing on international standards and measures applied in other countries.<sup>147</sup> The U.S. has not made any claims about the relative health and safety of meat from Canada, or anywhere in particular, since it is not a question of insufficiency of scientific

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both imported and domestic, must meet the food safety standards of the FDA and FSIS.

Failure to comply with this law will not trigger any recall of meat products, as violations of FDA and FSIS food safety standards would. COOL, 74 Fed. Reg. at 2677–78.

142. *EC—Biotech*, *supra* note 139, ¶ 7.2552.

143. See SPS Agreement, *supra* note 101, at Annex A(1)(a)–(d); Norbert L. W. Wilson, *Clarifying the Alphabet Soup of the TBT and the SPS in the WTO*, 8 DRAKE J. AGRIC. L. 703, 720 (2003).

144. *EC—Biotech*, *supra* note 139, ¶¶ 7.1333–34.

145. Vilsack Letter, *supra* note 65.

146. SPS Agreement, *supra* note 101, art. 2.2 (“measure is applied to the extent necessary to protect human, animal or plant health or life, is based on scientific principles and is not maintained without sufficient scientific evidence”). See also *EC—Biotech*, *supra* note 139, ¶ 7.1424.

147. SPS Agreement, *supra* note 101, arts 2.2, 3.1, 5.7.

proof. The regulation is not based on science, but rather on the consumers' right to know where their food is coming from.<sup>148</sup>

Article 5.1 requires, when read together with Article 2.2, that results from a risk assessment reasonably support the measure based on objective evaluation.<sup>149</sup> The measure should only be adopted after evaluation of the risks and likelihoods of adverse effects on human and animal health.<sup>150</sup> The risks must be ascertainable in order to serve as the basis for a restriction on trade.<sup>151</sup> Looking at the recent history of imports, the proportion of beef and veal imports from Canada parallel the total beef and veal consumption in the U.S.<sup>152</sup> Cattle imports from Canada dipped after 2003 because of a case of mad cow disease but have rebounded since.<sup>153</sup> It does not seem that the regulations were based on any statistical risk or effort to protect U.S. meat eaters. The U.S. would gain no traction arguing that the circumstances of food safety concerns elsewhere require origin-labeling regulation; there is no apparent relationship between the mandatory labeling laws and any evidence of risks associated with human, animal, or plant health based on where the food originates. COOL does not serve as a replacement for food safety standards or traceability efforts and will not be a substitute for countries that may not have as stringent regulations as the U.S.<sup>154</sup> Therefore, if the SPS Agreement is applied, COOL will not have met its requirements and the panel will find the U.S. to have violated its WTO obligations.

### *C. Application of the TBT Agreement*

Given the nature of the regulation, COOL is likely to fall under the scrutiny of the TBT Agreement. The TBT Agreement is intended to protect against unnecessary obstacles to international trade as a result of un-

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148. It would be inappropriate to explore the contours of a science-based argument for these measures because the rationale would probably be found in Member's differences in standards for control, inspection, and permitted inputs like fertilizers and feedstuffs.

149. *EC—Hormones*, *supra* note 111, ¶ 189.

150. See also *Dispute Settlement Commentary on EC—Biotech* (2006), WORLDTRADELAW.NET, at 74, [www.worldtradelaw.net/dsc/panel/ec-biotech\(dsc\)\(panel\).pdf](http://www.worldtradelaw.net/dsc/panel/ec-biotech(dsc)(panel).pdf).

151. Appleton, *supra* note 96, at 572.

152. See *USDA Beef and Cattle Industry*, *supra* note 137; *Briefing Room—Cattle: Trade*, U.S. Dep't of Agric. Econ. Research Serv., <http://www.ers.usda.gov/Briefing/Cattle/trade.htm> (last visited Aug. 29, 2010) [hereinafter *Briefing Room—Cattle: Trade*].

153. See *USDA Beef and Cattle Industry*, *supra* note 137; *Briefing Room—Cattle: Trade*, *supra* note 152.

154. See COOL, 74 Fed. Reg. at 2679.

justifiable or arbitrarily discriminatory technical requirements.<sup>155</sup> It applies to all mandatory provisions that deal with packaging, marking, or labeling requirements related to a product's characteristics, production, or processing method.<sup>156</sup> A WTO Panel explains, "a document that lays down a requirement that a product label must contain a particular detail, in fact, lays down a product characteristic."<sup>157</sup> Thus, the mandatory COOL requirements, which are not designed for food safety purposes, apply to a product's characteristics as covered by the TBT agreement.<sup>158</sup>

The agreement requires any technical regulation to be justified by a legitimate objective.<sup>159</sup> One such legitimate objective is the prevention of deceptive practices, which may be broad enough to include allowances for a consumer's right to know but has not yet been interpreted by a panel.<sup>160</sup> The idea of market transparency, of giving the consumer all of the information the retailer knows, has not been questioned in disputes over labeling preserved sardines or creating dual retail outlets for imported and domestic beef.<sup>161</sup> Many nations have origin labeling requirements, including the EU,<sup>162</sup> which implemented extensive meat labeling regulations in 2000 with the express purpose of "strengthening consumer con-

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155. See TBT Agreement, *supra* note 93, at pmb1.

156. See *id.* at Annex 1.1.

157. Panel Report, *European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, at ¶ 7.451, WT/DS174/R, WT/DS290/R (Mar. 15, 2005) [hereinafter *EC—Trademarks GI*].

158. See TBT Agreement, *supra* note 93, art. 1.5. The TBT Agreement does not apply to sanitary and phytosanitary measures, which according to the definition of such measures in the SPS Agreement includes those directed at food safety.

159. See *id.* art. 2.2.

160. See *id.* The European Court of Justice held that in order to protect the authenticity and quality of a product granted a protected geographic indicator, conditions can be placed on the slicing and packaging of the product. Although geographic indicators are a trademark issue that falls under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPs"), and therefore are distinct from country-of-origin, the restrictions on the use of the protected label is instructive. The risk of consumers wrongfully attributing a product to a particular place could change the value of the product in the mind of the consumer. See Case C-108/01 *Consorzio del Prosciutto Di Parma v. Asda Stores*, 2003 E.C.R. I-5121. With country-of-origin labels there is no inherent value in a product from Canada versus a product from the U.S., but the consumer might wish to exercise his/her purchasing power and have other considerations in mind when deciding between ground beef from different sources. See SUPPAN, *supra* note 16.

161. See Appellate Body Report, *European Communities—Trade Description of Sardines*, ¶¶ 269–83 WT/DS231/AB/R (Sept. 26, 2002) [hereinafter *EC—Sardines*]; *Korea—Beef*, *supra* note 116, ¶¶ 133–35 (both measures were found to violate various WTO requirements despite having legitimate objectives).

162. GAO, COOL, *supra* note 81, at 24.

fidence in beef and [to] avoid misleading them.”<sup>163</sup> Although in the past the U.S. has resisted implementing labeling regulations on the basis of consumer interest alone, Congressional support legitimizes the consumer’s right to know as an objective.<sup>164</sup> It is possible, at least at this stage of the inquiry, that consumer’s right to know the origin of their meat will be considered a legitimate objective.<sup>165</sup>

If providing consumers with information is a legitimate objective in and of itself,<sup>166</sup> the measure must still meet a number of other criteria to be compliant with the TBT agreement. First, imported products must be treated no less favorably than “like products” of domestic origin.<sup>167</sup> Although it seems obvious that a rack of lamb from an animal born in the U.S. is no different than one born in Canada, it is first necessary to determine what constitutes “like products.” Because so little jurisprudence under the TBT agreement exists, determinations made under GATT Article III:4 inform this analysis.<sup>168</sup> A “like product” refers to products in a competitive relationship.<sup>169</sup> The Panel describes four factors to look to

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163. Council Regulation 1760/2000, *supra* note 82, at 4.

164. The WTO is not a self-executing agreement; instead it relies on its Members to implement agreements through domestic law. In order to gain legitimacy and effectiveness, it must have the support of the major nations. Support from major players, like in any international setting, is key to moving an agenda forward. In this instance, a policy goal may be deemed legitimate simply because it is held by a number of, or at least a powerful few, Members. *See generally* Joost Pauwelyn, *The Transformation of World Trade*, 104 MICH. L. REV. 1, 6 (2005) (discussing the evolution of international trade agreements resulting in law rather than resulting from politics).

165. The idea of a legitimate objective will be analyzed again under the GATT where I will argue that the consumer’s right to know will not be enough to support the infringement COOL creates upon international trade.

166. Although it is unlikely to be a legitimate objective, this Note will consider the rest of the elements necessary under the TBT Agreement to show that COOL would otherwise comply with WTO obligations. For an excellent argument that consumer information and, in particular, origin labeling is a legitimate objective, see Letter from Terence P. Stewart & Elizabeth J. Drake, Law Offices of Stewart and Stewart, on behalf of the U.S. Cattlemen’s Ass’n & the Nat’l Farmers Union, to Daniel Brinza, Assistant U.S. Trade Representative for Monitoring & Enforcement, Office of the U.S. Trade Representative (Jan. 8, 2010), *available at* regulations.gov (search “Elizabeth Drake”; then follow “USTR-2009-0004-0017” hyperlink under ID)).

167. TBT Agreement, *supra* note 93, art. 2.1.

168. *See* Okubo, *supra* note 15, at 616. Interpretations of similar clauses in the GATT will serve as guidance in this Note to determine the scope and meaning of the TBT Agreement.

169. CHOW & SCHOENBAUM, *supra* note 133, at 517–18 n.2 (commenting on the Appellate Body’s analysis of Article III in *EC—Asbestos*, *supra* note 118, ¶¶ 96–98, 99, 101).

when evaluating “like products:” nature and quality of the products, end uses of the products, tariff classification of the products, and consumer perceptions as indicated by their habits and behavior.<sup>170</sup> In the case of COOL, it is clear that meat products affected by the labeling requirements would meet the first three factors of this test. The quality and nature of the products should be the same, as they all need to follow the rules and standards of the FDA and USDA’s Food Safety and Inspection Service (“FSIS”). The end use of muscle cuts and ground meat are for consumption in one way or another, no matter their origin.<sup>171</sup> The goods will be classified according to the appropriate label under the Harmonized Tariff Schedule, where no distinction is made for country of origin.<sup>172</sup>

In spite of this, these products may not be “like” based on consumer perceptions and behavior. Consumers cannot differentiate products based on origin or processes without additional information, but a number of studies have shown that some people are willing to pay more for products based on where they are from.<sup>173</sup> People’s perceptions and behavior have changed since the recent food scares, and they want to be able to choose whether or not to buy meat from countries with food safety problems.<sup>174</sup> To those people, there may not be competition between products.

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170. *EC—Asbestos*, *supra* note 118, ¶ 101.

171. In *EC—Asbestos* the panel noted that a prior panel had looked at end uses and consumers’ taste as ways of analyzing likeness. *Id.* ¶ 85. This statement does not mean that similar cuts of meat will have the exact same fat to protein ratio, or similar marbling patterns. These distinctions are governed under other FDA and USDA regulations and grading systems.

172. Harmonized Tariff Schedule of the United States, Section I: Live Animals; Animal Products, available at <http://hts.usitc.gov/> (last visited Aug. 31, 2010), also published in looseleaf format. U.S. International Trade Commission, Washington, D.C., 1987.

173. Umberger, *Country-of-Origin Labeling*, *supra* note 70. Not to belittle expert taste buds, but to the average consumer, a hamburger made from cattle raised in Montana will be no different from that made from cattle raised four miles across the border in Canada, yet they will pay more for one than the other. *See id.* (finding people are willing to pay a premium for steak labeled as USA Guaranteed born and raised); Jutta Roosen, Jason L. Lusk & John A. Fox, *Consumer Beef Demand for and Attitudes Toward Alternative Beef Labeling Strategies in France, Germany, and the UK*, 19 *AGRIBUSINESS: AN INT’L J.* 77 (2003) (determining European consumers’ preference of origin indications over other product attributes).

174. David Kesmodel & Julie Jargon, *Labels Will Say If Your Beef Was Born in the USA*, *WALL ST. J.*, Sept. 23, 2008, at D1.

There is a distinction to be made: given the information, these consumers would exercise their purchasing power to buy a preferred good. This is the underlying argument for the consumer's right to know. But, just because a consumer would prefer one type over another does not indicate that the products are not "like." In fact, it probably only boosts the argument that they are directly competitive.<sup>175</sup> On balance, it is likely a Panel could justifiably find that the products regulated under COOL are "like." If they are found not "like," then they may be treated differently, and Canada's claim under the TBT Agreement should fail. Yet, given the relative weakness of the consumer perception argument, the next question becomes whether COOL discriminates between "like" products.

Article 2.1 requires that imported products be treated "no less favourably than . . . like products of national origin."<sup>176</sup> At first glance, COOL regulations are facially neutral. All retailers must "notify their customers of the country of origin of covered commodities."<sup>177</sup> No distinction is made between imported or domestic commodities; each must have the requisite label. The rules do distinguish between "commodities" and "processed food items." A wide range of foodstuffs are not covered by the statute and therefore are excluded from the labeling requirements.<sup>178</sup> Is this exclusion grounds for finding discrimination within the meaning of the TBT agreement? Under the final rule, a "processed food item" is "a retail item derived from a covered commodity that has undergone specific processing resulting in a change in the character of the covered commodity, or that has been combined with at least one other covered commodity or other substantive food component."<sup>179</sup> This essen-

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175. For example, different colored fresh bell peppers. One may have a preference for yellow bell peppers over orange but the tariff classification for both of them is 0709.60.40 with further classification granted based upon where the peppers are grown, not their color. Harmonized Tariff Schedule of the United States, Section II: Vegetable Products, United States International Trade Commission, *available at* <http://hts.usitc.gov/> (last visited Aug. 31, 2010), also published in looseleaf format. U.S. International Trade Commission. Washington, D.C., 1987.

176. TBT Agreement, *supra* note 93, art 2.1.

177. COOL, 74 Fed. Reg. at 2658.

178. *Id.* at 2660.

179. 7 C.F.R. § 65.220. The rule carves out those foods that have added components such as water, salt, or sugar, "that enhances or represents a further step in the preparation of the product for consumption." It gives an incomplete list of processing methods that would result in a change of character "includ[ing] cooking (e.g., frying, broiling, grilling, boiling, steaming, baking, roasting), curing (e.g., salt curing, sugar curing, drying), smoking (hot or cold), and restructuring (e.g., emulsifying and extruding)." *Id.* In the summary of changes from the interim rule, to the final rule the USDA gives examples of what would be included and excluded as follows:

tially means that bacon need not be labeled while ham does, and beef patty mix need not be labeled while hamburger does.<sup>180</sup> A consumer who looks at the origin label on a hamburger would also care to know the origin of beef patty mix.<sup>181</sup> However, according to COOL, if in fact these products are different, requiring labels on one but not the other is not discriminatory since they are not like products and can, thus, be treated differently. COOL's exception for processed food items, although harmful to the legitimate objective argument, does not create a violation of the TBT Agreement as long as a Panel agrees that they are not like products.

Canada alleges that COOL is applied in a manner that results in less favorable treatment to beef, pork, and livestock from Canada than that from the U.S.,<sup>182</sup> evidenced by a precipitous drop in exports since the measure went into effect.<sup>183</sup> Once again:

a detrimental effect on a given imported product resulting from a measure does not necessarily imply that this measure accords less favourable 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.<sup>184</sup>

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As examples of processing steps that are considered to further prepare product for consumption, meat products that have been needle-tenderized or chemically tenderized using papain or other similar additive are not considered processed food items. Likewise, meat products that have been injected with sodium phosphate or other similar solution are also not considered processed food items as the solution has not changed the character of the covered commodity. In contrast, meat products that have been marinated with a particular flavor such as lemon-pepper, Cajun, etc. have been changed in character and thus are considered processed food items.

COOL, 74 Fed. Reg. at 2660–61.

180. See COOL, 74 Fed. Reg. at 2666. Ham must be labeled unless it has been cured, and beef patty mix is not a covered commodity because it likely includes a number of binders and extenders that the USDA believes will be too costly and burdensome to segregate and identify.

181. Ground beef marketed as hamburger is allowed to have added fat, whereas beef patty mix may contain beef heart meat and tongue meat. The USDA “believes that the costs associated with this segregation and identification” of variety meats is overly burdensome and thus are not included as covered commodities. *Id.*

182. See Request for Panel, *supra* note 8.

183. The Canadian Cattlemen's Association says that cattle and hog exports to the U.S. have fallen by one-third since the measure went into effect. See Interview with John Masswohl, *supra* note 61.

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

The Canadian Cattlemen's Association said the decrease in Canadian meat imports to the U.S. is because of the costs associated with separating and labeling meat from different sources.<sup>185</sup> However, since the measure requires labels on all meat no matter the source, it seems Canada is complaining about a shift in U.S. consumer demand, rather than any shift in producer's supply.

Beef imports from all sources increased by 12.5 percent comparing a six-month period in 2008 to the same period in 2009.<sup>186</sup> In that time-frame, imports from Canada dropped by 2.84 percent.<sup>187</sup> If the issue were cost disparity to packers who must segregate and label supplies, one would expect a unilateral drop in imports, but the evidence shows otherwise. Yet, there is no reason to believe it costs packers any more to segregate and label beef from Canada than it does beef from Australia or New Zealand. The disparate impact on Canadian imports seems to be an expression of consumer preference rather than discriminatory effects. As such, the WTO could find that imported products are not treated any less favorably than domestic products, and thus, COOL does not violate the TBT Agreement on this account.

Under Article 2.2, the TBT Agreement requires three things. First, COOL may not be, or create the effect of, an unnecessary obstacle to trade.<sup>188</sup> Second, it must be the least restrictive measure possible to achieve the desired effect.<sup>189</sup> Finally, it must fulfill a legitimate objective.<sup>190</sup> These items are cumulative; if the measure does not meet any one of these obligations it will be inconsistent with the obligations of the agreement.

The TBT Agreement allows for measures that encroach upon trade as long as they are the least restrictive measures possible to achieve a legitimate purpose.<sup>191</sup> The stated objective, to provide consumers with information about the origin of the food they are buying, is probably not enough to justify the labeling requirements.<sup>192</sup> Still, if the Panel finds

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185. Interview with John Masswohl, *supra* note 61.

186. Rob Cook, *US Beef Imports by Country (2008 vs. 2009)*, CATTLE NETWORK (July 30, 2009), <http://www.cattlenetwork.com/U-S—Beef-Imports-By-Country—2008-vs—2009/2009-07-30/Article.aspx?oid=481339>.

187. *Id.*

188. TBT Agreement, *supra* note 93, art 2.2.

189. *Id.*

190. *Id.*

191. *Id.*

192. See *supra* notes 72–82 and accompanying text; Degnan, *supra* note 77.

otherwise, labeling is the most effective means of providing the information to consumers.

The complaining party, Canada, likely has the burden of proving there are less restrictive measures available to achieve the same objectives.<sup>193</sup> Canada has suggested linking the label requirements to where the product takes on the form in which it will be consumed, rather than citing where it was born, raised, and slaughtered.<sup>194</sup> Canada's food labeling rules follow that theory, requiring the label only to mention the place where the food was last processed.<sup>195</sup> This method is based on the principal of substantial transformation, which refers to the place where the item acquired its name, character, or use.<sup>196</sup>

While using this standard of determining origin would bring the regulation in line with the existing U.S. marking and classification rules for things like optical fiber connectors and toner cartridges, it contravenes the purpose and intent of COOL.<sup>197</sup> Since 1938, the U.S. has required labels to include information about ingredients, weight of the food, shelf life, and the name and address of the manufacturer.<sup>198</sup> Customs regulation requires most imports to be marked with the country of origin, as discussed above.<sup>199</sup> But COOL was not intended to restate what these rules already require; it was intended to go a step beyond and provide

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193. The Panel has not yet ruled on the burden of proof involved in TBT Agreement art 2.2, but will likely apply the same standard of burden of proof as was applied in art 2.4 in the *EC—Sardines* case, where the complaining party bears the burden of proving that the *Codex* standards are applicable and are an effective means of fulfilling the legitimate objective. *EC—Sardines*, *supra* note 161, ¶ 272. *See also* Okubo, *supra* note 15, at 614 (arguing that under the test for TBT Art 2.2, the member challenging the measure has the burden to prove it is more trade-restrictive than necessary. It is up to the challenger to show that “there is another measure which is not only reasonably available to fulfill the legitimate objectives of the government, but is also significantly less restrictive to trade”).

194. Interview with John Masswohl, *supra* note 61.

195. Carly Weeks, *Canadian Food Labelling Rules Leave Room For Confusion*, THE GLOBE AND MAIL, (Jul. 8, 2009, 12:00 AM), <http://www.theglobeandmail.com/life/made-in-canada/article1210354/>.

196. *See Re: County of Origin Marking of Insulated Electrical Conductors*, HQ 561392 (June 21, 1999), available at 1999 WL 549175.

197. *See Re: The Country of Origin of Optical Fiber Connectors*, NY N022765 (Feb. 20, 2008), available at 2008 WL 588084; *Re: Country of Origin marking of Imported Toner Cartridges*, NYN018311 (Nov. 02, 2007), available at 2007 WL 4188128.

198. *See* Federal Food, Drug, & Cosmetic Act, 21 U.S.C. §§ 301, 343 (1938); Degnan, *supra* note 77, at 51.

199. *See* Tariff Act of 1930, 19 USCA § 1304 (1999). For a complete discussion please refer to text accompanying notes 46–78.

consumers with information on the source of the food they purchase.<sup>200</sup> Labeling origin only as the last place of substantial transformation would not be an adequate means of transferring information to the consumer. With this suggested method, Canada would not be able to make a case that there are less restrictive alternatives to COOL since it would not accomplish the stated goal.

The U.S. must show that the legitimate objective it seeks to address is serious enough that a voluntary program is not enough to correct the problem.<sup>201</sup> Manufacturers may resist voluntary labels, because they give competitors an opportunity to use misleading labels.<sup>202</sup> After COOL was first enacted into legislation in 2002, labeling was voluntary, but few processors and packers elected to participate.<sup>203</sup> Besides, consumers do not have much trust in voluntary country-of-origin information and prefer mandatory labeling.<sup>204</sup> Despite the success of voluntary certification programs for some food products, voluntary COOL would not be an adequate alternative to fulfill its desired purpose in the eyes of consumers.<sup>205</sup> Voluntary measures would be a reasonable alternative to provide more information to consumers only if mandatory COOL fails to show a legitimate objective.

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200. Letter from Ron Sparks, The Nat'l Ass'n of State Dep'ts of Agric., to COOL Program Administrators (Sept. 29, 2008) [hereinafter Letter from Ron Sparks], *available at* [www.regulations.gov](http://www.regulations.gov) (search "Country of Origin Labeling"; then search within search for "Ron Sparks"; then follow "AMS-LS-07-0081-0760.1" hyperlink under ID).

201. *See* Okubo, *supra* note 15, at 615. The USDA is careful to point out that the regulation allows for flexibility in implementation, leaving recordkeeping requirements and methods of identification up to the producer. *See* Letter from Ron Sparks, *supra* note 200.

202. Keane, *supra* note 85, at 305 (one example of this resistance is illustrated by a dispute between manufacturers complaining when their competitors place labels on their product advertising that they do not contain hormones, implying that products that contain hormones are bad).

203. PUBLIC CITIZEN, TABLED LABELS: CONSUMERS EAT BLIND WHILE CONGRESS FEASTS ON CAMPAIGN CASH 4 (2005), *available at* [www.issueab.org/research/tabled\\_labels\\_consumers\\_eat\\_blind\\_while\\_congress\\_feasts\\_on\\_campaign\\_cash](http://www.issueab.org/research/tabled_labels_consumers_eat_blind_while_congress_feasts_on_campaign_cash).

204. *See id.*; Keane, *supra* note 85, at 303 (citing to two domestic cases in which consumers challenged the FDA's decision not to require labeling of milk treated with synthetic growth hormones or genetically modified foods).

205. Kosher certification serves as one example of successful independent voluntary labeling programs. The public is willing to pay the cost to obtain the products they desire and so companies are willing to pay for the certification to tap into the kosher market. *See* Michael Abramson, *Mad Cow Disease: An Approach to its Containment*, 7 J. HEALTH CARE L. & POL'Y 316, 359-61 (2004). There is more regulation surrounding voluntary certification for organic foods. Benjamin N. Gutman, *Ethical Eating: Applying the Kosher Food Regulatory Regime to Organic Food*, 108 YALE L.J. 2351, 2370-71 (1999).

The TBT Agreement requires that where “relevant international standards exist or their completion is imminent, Members shall use them” to craft their technical regulations.<sup>206</sup> When measures are inconsistent with international standards, it offends the spirit and purpose of the WTO to harmonize and facilitate trade.<sup>207</sup> Canada asserts that the *Codex General Standard for the Labelling of Prepackaged Foods* provides a relevant international standard for measures like COOL.<sup>208</sup> The *Codex* requires country-of-origin labels on prepackaged food;<sup>209</sup> there are no requirements therein for unprocessed, non-packaged food, such as the meat products covered by COOL. In fact, no international standard exists regarding the products under COOL. Thus, while COOL must be constantly revisited to ensure compliance with any new standards that may be adopted, it is not inherently inconsistent with Article 2.4 of the TBT Agreement. Nevertheless, even if the U.S. can show compliance with one or more elements of the TBT Agreement, COOL must comply with every element and therefore the measure will still be found inconsistent if the consumer’s right to know is not a legitimate objective.

#### *D. Application of the GATT Agreement*

Where applicable, the TBT Agreement is the preferred standard of assessing a measure because of its specificity, whereas the GATT only sets forth general obligations.<sup>210</sup> This Section will only address those issues not otherwise covered under the TBT Agreement.

Canada alleges that COOL does not minimize the “difficulties and inconveniences” the regulation causes and, therefore, is inconsistent with the requirements of GATT Article IX:2.<sup>211</sup> Although there is no jurisprudence to help distinguish the scope of this requirement, it is likely that it will be the complaining party’s burden to show that there are alternatives that would reduce the burdens imposed by the measure. There are already a number of other labels applied to these commodities, so it may not be an intolerable burden to add the product origin.<sup>212</sup> If no alterna-

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206. TBT Agreement, *supra* note 93, art. 2.4.

207. See *EC—Sardines*, *supra* note 161, at ¶¶ 212–15.

208. See Request for Panel, *supra* note 8.

209. See CODEX ALIMENTARIUS, *supra* note 101.

210. Okubo, *supra* note 15, at 616.

211. Request for Panel, *supra* note 8. The Agency explains that the rule provides for considerable flexibility to allow for the least disruption of cost-efficient production and trade flows. See COOL, 74 Fed. Reg. at 2680–81.

212. Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §343 (2006). Letter from Bill Bullard, CEO of R-CALF USA, to U.S. Trade Representative (July 1, 2009), *available at*

tives are proven that could further minimize the difficulties and inconveniences, the measure will be in compliance with the requirements of GATT Article IX:2.

Canada alleges that COOL violates the requirements of GATT Article IX:4 by “materially reduc[ing] the value of imported livestock.”<sup>213</sup> Asserting compliance with this measure will depend upon the interpretation of “materially.” Using the Vienna Convention to interpret the term, the first step is to look to its ordinary meaning.<sup>214</sup> The dictionary meaning of “materially” is substantial effect, meaning that the reduction in value that COOL causes must be a significant proportion of the value of the good.<sup>215</sup>

COOL will affect the entire supply chain, because information will need to be maintained and transferred throughout.<sup>216</sup> Packers have a number of options to obtain origin information on livestock already in place, limiting the burden upon them.<sup>217</sup> The cost of implementation and compliance with COOL will be absorbed by the entire supply chain, hitting intermediaries and retailers the hardest.<sup>218</sup> Only a small part of the cost will be passed on to consumers.<sup>219</sup> Cost of the regulation to producers is estimated to be \$9 per head of cattle and \$1 per hog.<sup>220</sup> These estimates are industry-wide, and there is no showing that the costs will affect Canadian livestock differently than livestock from any other origin except with regard to whatever choices consumers may make armed with the power to discern the origin of their meat.<sup>221</sup> Though these figures

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www.regulations.gov (search “Country of Origin Labeling”; then search within search for “Bill Bullard”; then follow “USTR-2009-0004-0014” hyperlink under ID).

213. Request for Panel, *supra* note 8.

214. Vienna Convention, *supra* note 92, art. 31(1).

215. The American Heritage Dictionary defines material[ly] as “3. To a significant extent or degree; substantially.” THE AMERICAN HERITAGE DICTIONARY 1080 (Houghton Mifflin Co., 4th ed. 2000); Black’s Law Dictionary explains it as “3: of such a nature that knowledge of the item would affect a person’s decision-making; significant; essential.” BLACK’S LAW DICTIONARY (Bryan A. Garner ed., 9th ed. 2009).

216. COOL, 74 Fed. Reg. at 2684.

217. *See id.* at 2676.

218. *Id.* at 2680.

219. *Id.* at 2683.

220. *Id.* at 2687.

221. Meat labeled solely as from the U.S. may be able to pass on more of the cost of labeling to consumers, since there is some evidence to support that consumers are willing to pay more for meat designated as such. *See Umberger, CHOICES, supra* note 43. It is also worth noting that processors may have different implementation costs if they only handle one type of meat—be it from a single country or origin or multiple-origin—than those who handle both types. The USDA suggests that

suggest no violation of Article IX:4, ultimately the determination will be based on the economic evidence the parties submit, and that information is not available at the time of this writing.<sup>222</sup>

The GATT does provide a small window through narrow exceptions in Article XX for measures that do not otherwise comply with its obligations. It is through these exceptions that the U.S. could hope to prove COOL meets the legitimate objective requirements of the TBT Agreement. The relevant provisions to “save” COOL are found in Article XX(d). This Article authorizes governments to apply otherwise illegal measures when “necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to . . . the prevention of deceptive practices.”<sup>223</sup> Once a specific provision is found, the measure must be “further appraised . . . under the introductory clauses of Art. XX.”<sup>224</sup>

In *Korea—Beef*, the Panel held the dual retail system for domestic and imported beef secured compliance with legislation against deceptive practices and, thus, deterred butchers from “misrepresent[ing] less expensive foreign beef for more expensive domestic beef.”<sup>225</sup> Likewise, a Panel could find COOL secured compliance with legislation to inform

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[p]rourement costs also may be unaffected in this case, if the processor is able to continue sourcing products from the same suppliers. Alternatively it is possible that a processor currently sourcing products from multiple countries may choose to limit its source to fewer countries. In this case, such cost avoidance may be partially offset by additional procurement costs to source supplies from a narrower country of origin. Additional procurement costs of a narrower supply chain may include . . . higher acquisition costs due to supply and demand conditions for products from a particular country of origin, whether domestic or foreign.

COOL, 74 FR at 2685.

222. SUPPAN, *supra* note 16.

223. GATT, *supra* note 113, art. XX(d). It must be presumed that because each term is given its full meaning, the clause requiring measures to be consistent with the provisions of the agreement is not intended to rule out any application of the exception. See Andrew Kelly, Comment, *The GATT Obstacle: International Trade as a Barrier to Enforcement of Environmental Conservation on the High Seas*, 12. FLA. J. INT’L L. 153, 165 (1998). See also Salman Bal, *International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT*, 10 MINN. J. GLOBAL TRADE 62, 92 (2001) (proposing that “GATT inconsistent measures are authorized if they are linked to the enforcement of obligations under laws or regulations consistent with GATT provisions”).

224. U.S.—*Gasoline*, *supra* note 91, at 22.

225. Panel Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 658, WT/DS161/R, WT/DS169/R (Jul. 31, 2000).

consumers of the origin of their food purchases, encouraging producers to maintain records and separate processing lines.

Whether a measure is necessary to secure compliance is not so narrowly defined as that which is “indispensable or absolutely necessary.”<sup>226</sup> There is a whole range of what can be considered necessary from “indispensable” to that which “makes a contribution to” securing compliance.<sup>227</sup> It is up to the Member to decide what it considers necessary, but it is up to the Panel to weigh the degree to which the measure contributes to the goal and the degree to which it restricts trade.<sup>228</sup> The Panel generally looks to see if there is an alternative measure that has less trade restrictive effects.<sup>229</sup> The U.S. has a strong case that COOL is *necessary* to convey origin information to consumers, given the conspicuous lack of data showing labeling was widely adopted during the seven year period when COOL was still voluntary.<sup>230</sup>

Although the measure can be provisionally justified through Article XX(d), it must still meet the procedural requirements stated in the introductory clauses, or the “chapeau,” of the Article: a measure may “not [be] applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination . . . or a disguised restriction on international trade.”<sup>231</sup> The “chapeau,” is intended to reign in measures that are provisionally justified to ensure that, in effect, they are not any more trade restrictive than absolutely necessary.<sup>232</sup>

COOL does not create unjustifiable discrimination; it holds imports from all Members where the same conditions prevail to the same labeling requirements. The numerous changes from the initial rule to the final rule reflect information gleaned from consultations between the USDA and various affected parties.<sup>233</sup> Essentially, through consultations, the USDA showed a good faith effort to create a measure in compliance with WTO obligations.<sup>234</sup>

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226. *Id.* ¶ 161. For a discussion on the application of necessity tests, see Benn McGra-  
dy, *Necessity Exceptions in WTO Law: Retreaded Tyres, Regulatory Purpose and Cumu-  
lative Regulatory Measures*, 12 J. INT'L ECON. L 153 (2009).

227. *Korea—Beef*, *supra* note 116, ¶ 161.

228. *Id.* ¶¶ 162–64, 176.

229. *Id.* ¶ 167.

230. *See* COOL, 74 Fed. Reg. at 2682.

231. *U.S.—Gasoline*, *supra* note 91, at 22; GATT, *supra* note 113, art. XX.

232. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and  
Shrimp Products*, ¶¶ 147, 150, WT/DS58/AB/R (Nov. 6, 1998).

233. COOL, 74 Fed. Reg. at 2664.

234. *See id.* at 2678–79.

In application, COOL may result in arbitrary discrimination. The regulation creates numerous exceptions to labeling requirements for processed foods and food service establishments and allows for mixed origin labels.<sup>235</sup> These exceptions are so broad that they undermine the goal of the regulation. The information will be displayed on such limited types of consumer goods that consumers will not know when to look for it or not. Such uneven application allocates the burden of labeling in a way that may seem arbitrary.

Finally, it may be difficult for the U.S. to disprove that the measure is a disguised restriction on international trade. At its core, COOL is a marketing act, enabling producers to capture a higher price for goods labeled “product of the U.S.” Despite an obvious desire to support U.S. producers, COOL does not make any effort to treat imported or domestic goods differently. Marketing interests do not restrict international trade. Rather, Canada will claim that the decrease in Canadian imports to the U.S. is evidence enough of restrictive effects.<sup>236</sup> Should the Panel find COOL to be arbitrary or unjustified discrimination, or a disguised restriction on trade, Article XX will not excuse COOL from WTO obligations.

#### V. CONCLUSION: OUTCOMES & ALTERNATIVES

COOL has the support of the people, the USDA, and the current administration; it is a shame that it has to come under the scrutiny of the WTO. The DSU Panel’s inquiry will hinge on whether the consumers’ right to know can justify COOL’s imposition on international trade.<sup>237</sup> Given the limited success of GATT Article XX exceptions thus far, the U.S. Trade Representative ought to re-double efforts to make assurances to Canada that trade will resume its normal flows as soon as processors adjust to the separation and tracking systems necessary to uphold the spirit of the measure. Should the U.S. fail to convince Canada (and the Panel) otherwise, the Panel will likely find COOL violates the TBT Agreement and GATT obligations requiring measures not be any more trade restrictive than necessary to fulfill a legitimate objective.

While a Member gets to decide the level of protection it wants, it is up to the Panel to determine what degree of enforcement is necessary to

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235. See 7 C.F.R. §§ 65.140, 65.220, 65.300.

236. Interview with John Masswohl, *supra* note 61.

237. For a complimentary look at these issues, see Wendy A Johncheck, *Consumer Information, Marks of Origin and WTO Law: A Case Study of the US-Certain Country of Origin Labeling Requirements Dispute* (Food Policy and Applied Nutrition Program Discussion Paper No. 43), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1579828](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1579828).

meet the desired goal.<sup>238</sup> For instance, France was able to say they wanted absolute protection from the health hazards of exposure to asbestos, but it was still up to the Panel to determine if this goal warranted an absolute ban.<sup>239</sup> Perhaps more analogous to the case at hand is that of *Korea—Beef*, where the dual retail system for domestic and imported beef was found to violate WTO obligations. The Panel looked at numerous other instances of misrepresentation in the markets for pork and seafood, as well as an exemption from separating restaurants that serve imported and domestic beef, and found it was unfair to restrict trade in one market when the same problems plagued other markets as well.<sup>240</sup> COOL creates exemptions for processed foods and food service, despite consumer desire to know the origin of meat in any situation. These inconsistencies weaken the validity of the measure.

Upon a finding of a violation, the U.S. has a number of options it may choose to pursue. The U.S. can simply ignore the Panel's finding. Since decisions by the Panel have no effect on domestic law, it will take political will to make changes. But ignoring the decision hurts the strength of the WTO and the reputation of the U.S. as a part of the global trade community. Moreover, if the U.S. fails to take action, Canada can retaliate with the authorization of the WTO.<sup>241</sup> Acknowledging the violation and switching to a voluntary system might better serve the U.S. By the time the Panel makes its report, the labeling system will already have been in place for some time. The upfront costs will already be fully invested, and consumers will have grown accustomed to having origin labels. Therefore, it would be in producers' best interest to keep up with consumer confidence and maintain voluntary labeling practices.

Carrie Ross\*

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238. *Korea—Beef*, *supra* note 116, ¶¶ 162–64, 176.

239. *EC—Asbestos*, *supra* note 118, ¶¶ 168, 175.

240. *Korea—Beef*, *supra* note 116, ¶ 168.

241. DSU, *supra* note 86, art. 22.

\* B.S., Cornell University (2005); M.P.A., Cornell University (2006); J.D., Brooklyn Law School (expected 2011). Thank you to the editorial staff of the *Brooklyn Journal of International Law* for their thoughtful guidance and thorough assistance. I would also like to thank my family and friends for their unending encouragement. All errors and omissions are my own.