AMERICAN MEAT INSTITUTE

January 8, 2010

Office of the United States Trade Representative
600 17th Street, N.W.
Washington, DC 20508

Re: *WTO Dispute Settlement Proceeding Regarding United States—Certain Country of Origin Labeling (COOL) Requirements: Docket No. WTO/DS384 and WTO/DS386*; Notice -- Request for Comments, 74 *Fed. Reg.* 63814 (Dec. 4, 2009). Docket Number USTR—2009—0004.

Dear Sir/Madam:

The American Meat Institute (AMI or the Institute) submits the following comments regarding the above-referenced notice. AMI represents the interests of packers and processors of beef, pork, lamb, veal and turkey products and their suppliers throughout North America. Together, AMI's members produce 95 percent of the beef, pork, lamb, and veal products and 70 percent of the turkey products in the United States. The Institute provides legislative, regulatory, public relations, technical, scientific, and educational services to the meat and poultry packing and processing industry.

Many AMI members are directly affected by the country-of-origin labeling rule (COOL) that went into in 2009. Given the substantial costs that COOL imposes on those companies and their customers, as well as the adverse impact that COOL has had on many suppliers of livestock, both foreign and domestic, to many AMI members, AMI respectfully submits the following comments for your consideration.

<u>The United States Must Honor its International Trade Obligations.</u>

Equitable enforcement of international trade rules is a high priority for everyone in the U.S. meat production system, from producers to packers and processors. All too often market access for U.S. meat products has been threatened or cut off with little or no legitimate justification. American challenges to these actions have been based upon the rights provided under international trade agreements. These challenges will continue, as demonstrated by a recent limitation to an important market for beef.

Critical to the United States' ability to enforce successfully World Trade Organization (WTO) and North American Free Trade Agreement (NAFTA) obligations is consistency in U.S. behavior and actions. In that regard, the United States' credibility is undermined when U.S. legislation violates America's commitments pursuant to those international agreements. In the instant case, the U.S. Country of

Origin Labeling (COOL) requirements, as provided for in the 2002 Farm Bill (and modified in the 2008 Farm Bill) and as implemented through regulations that became effective March 16, 2009, are not consistent with U.S. obligations under both WTO and the General Agreement on Tariffs and Trade ("GATT") and NAFTA. A more detailed discussion regarding why COOL is inconsistent follows.

COOL is not Consistent with GATT Article III, which Requires that there not be Any Discriminatory Effect on Imported Meat and Imported Live Animals

Pursuant to Article III:4 of GATT the United States must ensure that the products of other countries "imported into the territory of [the United States]…be accorded treatment no less favorable than that accorded to like products of [U.S.] origin in respect of all laws…affecting their internal sale."[1] Interestingly, the United States relied on this very provision when it brought an action against Korea to eliminate Korean discrimination against U.S. imports in its meat retail and distribution system. In that matter, the U.S. successfully argued that Korea's measures discriminated against U.S. beef because they modified the "conditions of competition between imported and domestic like products."[2]

In a similar manner COOL violates Article III:4 for the following reasons.[3] Foreign- and U.S.-origin live animals are "like products."[4] Moreover, COOL affects the internal sale of meat derived from foreign animals in the United States by creating notable disadvantages in selling imported foreign meat, as well as selling "foreign" animals to U.S. meat packing facilities.[5] Significantly, Article III:4 provides that "formal" identical treatment, *i.e.*, that both U.S. and imported products must be marked with the country of origin, does not justify a law such as COOL where that law discriminates against imports in practice.[6] The result is that COOL is *de facto* discrimination against foreign products, a result even contemplated by sponsors of the legislation who declared that it would be "helpful to a lot of American agricultural

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[1] General Agreement on Tariffs and Trade, art. III:4 (Oct. 30, 1947).
[2] WTO Appellate Body Report on Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef, WT/DS161/AB/R, para. 136 (Dec. 11, 2000).
[3] Id. at para. 133.
[4] See WTO Panel Report on Dominican Republic—Measures Affecting the Importation and Internal Sale of Cigarettes, WT/DS302/R, para. 7.165 (Nov. 26, 2004); and WTO Panel Report on Mexico—Tax Measures on Soft Drinks and Other Beverages, WT/DS308/R, para.8.105 (Oct. 7, 2005).

[5] See WTO Appellate Body Report on European Communities—Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R, para. 220 (Sep. 9, 1997); and WTO Panel Report on Canada—Certain Measures Affecting the Automotive Industry, WT/DS139/R, para. 10.80 (Feb. 11, 2000).

[6] In Dominican Republic—Cigarettes, the Dominican Republic (DR) required that tax stamps be affixed to cigarette boxes in the territory of the DR. Although formally neutral, the measure in practice meant that importers had to open the packaged cigarettes in DR, affix the stamps, and repackage the cigarettes—and therefore led to costs for imported but not domestic cigarettes. *Supra* note 4 at para. 7.172. In determining that the tax stamp measure constituted less favorable treatment, the Panel held that a party may not apply a measure "in a formally identical manner that does not take those differences into account, since this would, in practice, accord less favorable treatment to imported products." *Supra* note 4 at para. 7.195.

producers" and force companies to rely "on our independent producers here in this country."[7]

COOL is not Consistent with the WTO Agreement on Technical Barriers to Trade

COOL is a technical regulation subject to the Agreement on Technical Barriers to Trade (TBT Agreement), which governs any law that "lays down product characteristics…with which compliance is mandatory."[8] The TBT Agreement specifically governs any technical regulation which, like COOL, "deal[s] exclusively with…marking or labelling requirements as they apply to a product."[9]

Article 2.4 of the TBT Agreement requires that the United States use international standards as the basis for its technical regulations.[10] COOL breaches those U.S. obligations by failing to use two such standards. First, the Codex General Standard for the Labelling of Prepackaged Foods provides that "when a food undergoes processing in a second country which changes its nature, the country in which the processing is performed shall be considered to be the country of origin for the purposes of labelling."[11] COOL does not meet this international standard. In addition, the Codex General Standard provides that "the country of origin of the food shall be declared if its omission would mislead or deceive the consumer."[12] The U.S. Government, however, has never claimed that customers were misled or deceived.

Second, the WTO Rules of Origin Agreement stipulates that the final harmonization work program must determine a country of origin as "the country where

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[7] Tom Harkin, *Congressional Record*—Senate, S13098 (Dec. 13, 2001); Paul Wellstone, *Congressional Record*—Senate, S3918 (May 7, 2002). See also, a General Accounting Office report on country of origin labeling that correctly predicted that "Packers, processors, distributors, and retailers may also try to reduce their costs by deciding to handle only domestic livestock and meat products." United States General Accounting Office, Beef and Lamb: Implications of Labeling by Country of Origin (Jan. 2000).

[8] Agreement on Technical Barriers to Trade (Apr. 15, 1994) at annex 1.1. WTO cases have interpreted this provision to mean that a measure qualifies as a technical regulation if it (1) "lays down a requirement that a product label must contain a particular detail;" WTO Panel Report on European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, WT/DS290/R, para. 7.451 (Mar. 15, 2005); and (2) if it "regulate[s] the 'characteristics' of products in a binding or compulsory fashion." WTO Appellate Body Report on European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R, para. 68 (Mar. 12, 2001).

[9] *Id*. at annex 1.1.

[10] The TBT Agreement stipulates that these standards may either be existing or imminent: "where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations." Id. at article 2.4.

[11] CODEX General Standard for the Labelling of Prepackaged Foods, CODEX STAN 1-1985 (Rev. 1-1991) (adopted by the Codex Alimentarius Commission at its 14th Session, 1981and subsequently revised in 1985 and 1991 by the 16th and 19th Sessions and amended by the 23rd and 24th Sessions, 1999 and 2001), § 4.5.2, available at http://www.fao.org/docrep/005/y2770e/y2770e02.htm (visited April 24, 2007). At present, the Committee on Food Labelling has stated that it will not undertake any new work to develop further rules in this area. Report of the 33rd Session.

[12] *Id*. at § 4.5.1

the last substantial transformation has been carried out."[13] COOL, however, denies U.S. country of origin to animals and meat products that are substantially transformed in the United States, and thus fails to conform to this international standard.

COOL Violates the WTO Agreement on Technical Barriers to Trade by Creating Unnecessary Obstacles to International Trade

COOL violates the TBT Agreement because its non-trade objectives are minimal. Specifically, COOL does not meet any of the "legitimate objectives" enumerated under the TBT Agreement.[14] In that regard, COOL does not have as an objective protecting "human health or safety, animal or plant life or health, or the environment." Indeed, the U.S. Government has repeatedly stated that COOL "is not a food safety or animal health measure."[15] Likewise, COOL is not a "national security requirement" nor does COOL does have as its purpose preventing "deceptive practices." Neither sponsor of the legislation nor U.S. Government agencies have made such a claim.

The putative objective of COOL is to provide "consumer information," but this yields scant benefit.[16] AMS found that the "expected benefits from implementation of this rule are difficult to quantify. The Agency's conclusion remains unchanged, which is that the economic benefits will be small and will accrue mainly to those consumers who desire country of origin information" and that all available evidence shows that "consumers do not have a strong preference for country of origin labeling."[17] COOL is not "necessary" to satisfy the objective of consumer information, and might even undermine this objective.

Given the minimal non-trade objectives of COOL, little or no restriction of trade can be justified under the TBT Agreement. But COOL has imposed significant restrictions on the importation of livestock. U.S. meat processing facilities historically have processed both U.S. and imported livestock, routinely on the same day and even during the same hour. It is extremely difficult for packers to trace cuts of meat back to a specific animal and therefore it is quite difficult to comply with COOL and maintain historical livestock procurement practices.

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[13] *Supra* note 8 at art. 3(b).
[14] *Id.* at art. 2.2.
[15] See, e.g., *Proposed Rule on Mandatory Country of Origin Labeling of Beef, Lamb, Pork, Fish, Perishable Agricultural Commodities, and Peanuts*, 68 *Fed. Reg*. 61944, 61945 (Oct. 30, 2003); "The intent of this 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." Interim Final Rule with Request for Comments: *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, 45109 (August 1, 2008).
[16] According to the Senate, "This provision provides consumers with greater information about the food that they buy." Report of the Senate Committee on Agriculture, Nutrition, and Forestry, to Accompany S. 1731, Report 107117, p. 93 (2001). According to the U.S. Government, "the benefits will…accrue mainly to those customers who desire country of origin information." *Supra* note 15 at 61955.
[17] Final Rule: *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, 2683 (January 15, 2009) and see *Supra* note 15 at 61955-56.

In a number of cases meat packers have chosen either to cease buying imported livestock – an extreme trade restriction – or have confined the processing of imported livestock to limited dates and times. These practices, in turn, have significantly restricted trade. Moreover, importers are forced to abandon just-in-time logistics, and instead ship in large lots, or not ship at all. USDA border inspectors are sometimes not able to process large-lot shipments in a timely manner, which can force importers to pay – on a discriminatory basis – extra for expensive holding pens and longer transport times. The net effect of COOL has been to reduce U.S. market access for foreign livestock producers.[18]

The TBT Agreement, however, mandates that "less trade-restrictive" measures be applied wherever they are available[19] and in the case of COOL, less trade restrictive measures are available, e.g., a voluntary labeling scheme. To comply with the TBT Agreement, COOL must be implemented without causing these effects on trade. For example, complying with the NAFTA rule – designating as U.S.-origin meat that has been produced in a U.S. processing plant – and eliminating the mixed origin labeling requirements for meat products, would satisfy the TBT Agreement requirement.

To be Consistent with GATT Article IX COOL must not Materially Reduce the Value of Products Imported from WTO Members.

As part of its GATT obligations, the United States agreed to take into consideration the "difficulties and inconveniences" that its marking measures would inflict on the commerce and industry of other Parties. Moreover, GATT Article IX:4 requires that U.S. laws and regulations "relating to the marking of imported products shall be such as to permit compliance without materially reducing their value, or unreasonably increasing their cost." COOL, however, discourages American companies from importing foreign livestock and meat products because of the cost of tracking country of origin information. The attendant slump in U.S. demand for livestock and meat products has materially reduced the value of foreign livestock and meat products.

To be Consistent with GATT Article X:3(a) COOL must be Structured so that it can be Administered Uniformly and Reasonably.

The United States must administer COOL in "a uniform, impartial and reasonable manner."[20] The administration of COOL is not uniform because uniformity requires "consistency" and "predictability" in the application of laws.[21] COOL, however, applies only to "covered commodities" and not to a host of products such as turkey, processed foods, *etc*. and, therefore, is not consistent.[22] Nor is the administration of

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[18] The term "trade-restrictive" encompasses the reduction of "market access" for foreign products. WTO Panel Report on Australia—Measures Affecting Importation of Salmon, WT/DS18/RW, para. 7.151 (Feb. 18, 2000).
[19] "Technical regulations shall not be maintained if the… objectives can be addressed in a less trade-restrictive manner." *Supra* note 14 at art. 2.3.
[20] *Supra* note 1 at art 10.3.

[21] WTO Panel Report on Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather, WT/DS 155/R and Corr.1, para. 11.83 (Feb. 16, 2001).
[22] See definition of covered commodity, 7 CFR 65.135; Final Rule -- *Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable*

COOL reasonable. Reasonableness requires that the administration of laws be "proportionate" and "appropriate" and, comparing the significant costs imposed on the U.S. importers and the foreign producers of animals and meat products to the scant legitimate benefit identified by the U.S. government, COOL cannot be deemed to be reasonable.[23]

COOL is not Consistent with GATT Article XXIII because COOL Nullifies or Impairs the Benefits that May Exist under WTO Rules

Pursuant to Article XXIII of GATT, a Party to the WTO may seek "satisfactory adjustments" from the United States if COOL serves to nullify or impair a benefit accruing to that Party under the WTO. Here, COOL constitutes the "application of a measure" and parties affected by COOL have a robust nullification or impairment claim in that they have a benefit under the WTO with respect to the balance of concessions made on livestock and meat products in the Uruguay Round. COOL causes the nullification or impairment of this benefit because the significant costs incurred in tracking country of origin information adversely affect foreign producers of livestock and animal products. As such COOL upsets the "relative conditions of competition between domestic and foreign products as a consequence of the relevant tariff concessions."[24]

COOL is not Consistent with NAFTA Requirements that Meat Undergoing Substantial Transformation in U.S. Meat Processing Facilities be Designated as U.S. Origin

Although USTR's notice is WTO oriented, a brief discussion about NAFTA is warranted. To comply with NAFTA, mandatory COOL must treat as U.S.-origin any meat that has been produced from an animal that is slaughtered in the United States. Specifically, NAFTA Annex 311.1 and the corresponding NAFTA "Marking Rules," as implemented by the United States in 1996, provide that the production of meat from an imported live animal results in the meat becoming a good of the United States. COOL, however, determines that only cuts of meat and ground meat from cattle, sheep, hogs, and chickens that are born, raised, and slaughtered in the United States may be labeled as products of U.S.-origin.

NAFTA Annex 311.5(b) requires the United States to "exempt from a country of origin marking requirement a good…[that] (viii) is to undergo production in [the United States]…in a manner that would result in the good becoming a good of the [United States] under the Marking Rules."[25] This obligation applies to any measure involving country of origin marking, whether enforced at the time of importation, at retail sale, or

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Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, 74 *Fed. Reg*. 2658, 2705 (January 15, 2009)

[23] WTO Panel Report on Dominican Republic—Measures Affecting the Importation and Internal Sale of Cigarettes, WT/DS302/R, para. 7.385 (May 19, 2005) (modified by Appellate Body Report, WT/DS302/AB/R).

[24] WTO Panel Report on Japan—Measures Affecting Consumer Photographic Film and Paper, WT/DS44/R, para. 10.82 (Apr. 22, 1998).

[25] North American Free Trade Agreement, annex 311.5 (Dec. 17, 1992).

both.[26] COOL, however, negates the NAFTA exemption of animals and meat from country of origin labeling requirements, by requiring retailers to mark the final product with the country of origin of the imported animal or meat.

In addition, NAFTA Annex 311.4 further requires that country of origin marking requirements minimize the difficulties, costs, and inconveniences that the measure may cause to the commerce and industry of the other NAFTA Parties.[27] Estimates from both industry and the U.S. Government conclude that the implementation of mandatory COOL is immensely expensive.[28] Moreover, the Mexican and Canadian Governments, who have initiated the above-referenced matter, have indicated on numerous occasions that their producers and suppliers are being seriously harmed financially in that the compliance costs and loss of business because tracking country of birth, country of maturation, and country of slaughter information for animals and meat products that are shipped to the United States has proven to be expensive for U.S. importers and resulted in Canadian and Mexican producers experiencing significant market difficulties.

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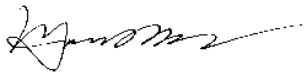
For the foregoing reasons, AMI submits that COOL is inconsistent with inconsistent with the *General Agreement on Tariffs and Trade1994,* Articles III:4, IX:2, IX:4, and X:3(a), the *Agreement on Technical Barriers to Trade*, Articles 2.1, 2.2, and 2.4, or in the alternative, the *Agreement on the Application of Sanitary and Phytosanitary Measures*, Articles 2, 5, and 7, and the *Agreement on Rules of Origin,* Articles 2(b), 2(c), 2(e), and 2(j). If you have any questions about these comments or would like to discuss the issue in more detail, please contact me at (202) 587-4229 or mdopp@meatami.com.

Respectfully submitted,



Mark D. Dopp
Senior Vice President, Regulatory
Affairs & General Counsel

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[26] Id. at annex 311.4.
[27] *Id.*
[28] Final Rule -- *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, 2683-2693 (January 15, 2009)