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## Memo

From: Todd Tucker, Public Citizen

To: Consumer and Food Groups

Date: January 5, 2012

Re: Considerations for U.S. in Appellate Body Review of Lower Panel WTO COOL Ruling

### Summary

On November 18, 2011, a panel report ruling against the U.S. country of origin labeling (COOL) scheme was circulated to World Trade Organization (WTO) members after Mexico and Canada successfully challenged the measure.<sup>1</sup> The panel found that COOL constituted a mandatory technical regulation that altered the conditions of competition against foreign cattle and hogs in favor of “like” U.S. cattle and hogs in violation of the WTO’s Agreement on Technical Barriers to Trade (TBT) Article 2.1, and that was trade-restrictive while failing to “fulfil a legitimate objective” in violation of TBT Article 2.2.

In nearly 200 rulings over 16 years, this was only the second time that the WTO has ever found a violation under each of these articles, which have long been of concern to consumer groups.<sup>2</sup> It was one of the first rulings under the TBT, which is one of 17 agreements administered by the WTO. It followed two other WTO rulings in September against two other popular U.S. consumer policies (dolphin-safe tuna labels and a ban on flavored cigarettes used to hook teenagers) under novel interpretations of the TBT.

The U.S. has worked with Mexico and Canada and the Dispute Settlement Body (DSB) to extend the deadline for notifying the DSB whether it will appeal from January 17 (as would normally be the deadline) until March 23, 2012.<sup>3</sup> **Given the profoundly negative implications for this particular policy and for the precedent the lower panel’s interpretations of these two TBT articles sets against consumer and environmental protection policies in general, the U.S. should notify the DSB of its intent to appeal the lower panel ruling.**<sup>4</sup>

This memo outlines some substantive considerations for this appeal. At a minimum, an appeal will buy time (around two years, when compliance proceedings are taken into account). It also offers a necessary opportunity to carve back the new overreaching TBT jurisprudence before it opens the door to further attacks on legitimate consumer and environmental regulations. Given the popularity and importance of the COOL policy, however, the U.S. should also be poised to maintain the policy and challenge the legitimacy of any sanctions authorized by the DSB.

(The panel also found that a February 2009 letter from U.S. Agriculture Secretary Tom Vilsack urging that industry voluntarily disclose more information than required by COOL was deemed an unreasonable administration of the regulation in violation of the WTO’s General Agreement

on Tariffs and Trade (GATT) Article X:3(a). This is also of concern as a precedent, and should be appealed.)<sup>5</sup>

### **Brief summary of the ruling and its implications**

On May 13, 2002, President Bush signed the Farm Security and Rural Investment Act of 2002 (Farm Bill 2002) into law, which contained provisions on country of origin labeling – many of which were never fully implemented. On June 18, 2008, overriding a presidential veto, Congress passed the Food, Conservation, and Energy Act of 2008 (Farm Bill 2008), which strengthened these COOL provisions. In September 2008, interim COOL rules entered into force, and in March 2009, final COOL rules went into force.<sup>6</sup>

Before the final rule was even implemented, on December 1, 2008, Canada began WTO dispute settlement proceedings against the U.S, and Mexico followed on December 17, 2008. This process culminated on November 18, 2011 when a joint DSB ruling on both challenges was circulated to WTO members. The WTO panel was comprised of Christian Häberli (Switzerland), Manzoor Ahmad (Pakistan) and João Magalhães (Portugal).

The panel ordered the U.S. to bring its policy into compliance with the WTO rules. The general obligation each signatory has to the WTO is: “Countries shall ensure the conformity of their law, regulations and administrative procedures<sup>7</sup>” with the WTO rules. As briefly described in this section, the breadth of the ruling leaves the U.S. really little-to-no means to “tweak” the COOL regulations in a manner that would fix the violations that the panel enumerated. For instance, the U.S. could institute more flexibilities in COOL to reduce segregation costs to deal with the panel’s logic in finding an Article 2.1 violation, but as described below, the flexibilities are precisely what got the U.S. on trouble on the Article 2.2 front, with the panel concluding that the existing flexibilities meant that consumers were not actually being fully informed about the origin of their beef and thus the measure did not fulfill its objective.<sup>8</sup> The scope of the ruling creates a stack of Catch 22 situations that highlight why the ruling must be appealed.

**If the ruling is upheld, the U.S. will risk trade sanctions if it does not water down or eliminate COOL for meats.<sup>9</sup>** The implications are dire, especially in the context of a long battle to obtain COOL stretching back decades. This struggle has been beset by countless obstacles, from presidential vetoes to adverse Supreme Court rulings in cases brought by food processors. It was only in 2009 that a meaningful COOL regime was finally implemented. **The legitimacy of the WTO is likely to be further undermined if the Appellate Body upholds the lower panel ruling. Such an outcome would provide evidence to consumer groups that the WTO allows anti-consumer forces a second (or third) bite at the apple, even when these forces fail to undermine a consumer safeguard using their domestic legal and political efforts.**

#### ***Article 2.1 finding – Discrimination***

Article 2.1 of the TBT reads:

“2.1 Members shall ensure that in respect of technical regulations, 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.”

As an initial matter, it is extremely troubling that the panel found that the data did not show a consistent pattern of actual damage to Mexico and Canada’s trade from COOL, yet still ruled that the measure was discriminatory. The panel examined eight sets of numbers on total imports of livestock from Canada and Mexico, but only half of them (including some provided by the complainants) showed a decline in imports starting in 2008, the year that COOL was approved. Specifically, Mexican cattle (as measured by total imports or share of slaughter) in 2009 and 2010 exceeded historical levels<sup>10</sup>, while Canadian cattle (by either measure) were at or only slightly below historic levels.<sup>11</sup> Canadian hogs, meanwhile, appeared to be somewhat below historical levels by both measures.<sup>12</sup> In all instances, however, the import levels appeared to be more responsive to factors other than COOL – currency values, consumer demand based on economic conditions, etc. Indeed, some data showed an increase in livestock imports since COOL implementation. The panel also examined econometric studies presented by the parties that showed conflicting results.<sup>13</sup>

Despite this conflicting data, the panel still found a *de facto* TBT national treatment violation. First, the panel took it upon itself to adopt an “upstream” analysis that conflated the labeling requirements and the record keeping requirements of the policy. It established that the “products” under consideration should be cattle and hogs – to which only the record-keeping obligations apply – and then used this to find problems with that the actual country of origin labels, which are affixed to a different product – processed meat.<sup>14</sup> Second, the panel established that U.S. and Canadian/Mexican cattle are “like products,” despite providing almost no reasoning.<sup>15</sup> Finally, the panel found that Canadian/Mexican meats are treated “less favorably” than like domestic products. To do so, the panel focused on whether the measure altered the “conditions of competition.”

This worrisome approach is premised on considering whether the existence of a new policy alters the costs and structures of the market, rather than on whether a law on its face or in effect discriminates against imports. Most regulations impose some new costs on business, if only in adapting to the new requirements. And, the government does not always control how private businesses choose to comply with new rules. In the case of COOL, a burden was imposed irrespective of the origin of the cattle or hogs. After all, the record-keeping requirements on business are comparable whether documenting a U.S., Mexican, Canadian or combined origin of a meat product.

The panel then created various hypothetical scenarios and found an Article 2.1 violation for muscle cuts based not on what the statute or regulation required, but on the panel’s assumption of how it would “necessarily” be implemented. In other words, the panel did not find that segregation (only slaughtering animal from a specific country on a specific day, for instance) was actually required by the U.S. policy, but that “*for all practical purposes*, the COOL measure necessitates segregation of meat and livestock according to its origin, even though this segregation is subject to certain flexibilities” (emphasis added).<sup>16</sup> The panel’s business scenarios of “processing domestic and imported livestock and meat solely according to price and quality” (scenario A), of “processing exclusively domestic and exclusively imported livestock at different

times” (scenario D), or of “commingling domestic and imported livestock and meat on the same production day” (scenario E) as permissible under COOL, were found to be inherently disadvantageous for the use of foreign meats. This was simply because of the practicalities of tracking the origin of the cuts, which the panel simply assumed would entail segregation.<sup>17</sup>

While compliance costs increase somewhat for slaughterhouses that co-mingle beef of diverse national origins over the course of a short production schedule, the panel concluded that the costs would be the same (all else equal) for facilities that specialized in All-U.S., All-Canada or All-Mexico muscle cuts. In order to find an Article 2.1 violation, the panel concluded that the All-Canada or All-Mexico business scenarios were not as viable as the All-U.S. scenario, because foreign cattle had a lower market share before COOL went into effect, and perhaps also because of distances from foreign range to U.S. processor.<sup>18</sup> In essence, COOL dis-incentivized the All-Canada or All-Mexico scenarios (scenario C) relative to the All-U.S. scenario (scenario B), simply because of the preexisting lower market share of foreign muscle cuts. Considering that the complainants had fewer animals to send to slaughter (and adopting the panel’s assumption that processors would segregate their slaughter lines by country of origin), the panel concluded that it could be more difficult for the complainants’ livestock to find opportunities for processing. ***However, this is a market structure factor – the realities of the complainants’ share of the U.S. market and how processing plants choose to implement neutral obligations – over which the U.S. government has no control and for which the U.S. government is not responsible.*** Yet, the panel held the U.S. liable for these possibilities.

Curiously, the panel did not find that COOL as it applied to ground beef violated TBT Article 2.1. This was because the 60-day “inventory allowance” permitted single labels for ground beef based on a listing of all the countries of origin of beef present at a given facility in the previous 60 days. USDA claimed that it permitted this flexibility in light of the “normal business practices” in the grinding industry of combining beef from sources of multiple origins.<sup>19</sup> The panel found that this reduced or eliminated labeling and segregation costs.<sup>20</sup> In other words, COOL as applied to ground beef does not violate TBT Article 2.1 because the labeling requirement can be complied with in a less costly manner that does not inform the consumer precisely about the country of origin of the ground beef. While the complainants apparently did not make specific arguments in response to the U.S. arguments on this point, they may seek to appeal this part of the ruling.

### ***Article 2.2 finding – trade restrictiveness***

Article 2.2 of the TBT reads:

“2.2 Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, inter

alia: available scientific and technical information, related processing technology or intended end-uses of products.”

There are seven prongs to analysis under Article 2.2, including identifying:

- The objective of the measure;
- The legitimacy of the objective (taking into consideration the third sentence);
- Whether the measure fulfills the legitimate objective;
- The risks of non-fulfillment of the legitimate objective (taking into consideration the fourth sentence);
- Whether the measure is trade restrictive;
- Whether the measure is more trade restrictive than necessary to fulfill the legitimate objective; and
- Whether the measure had the intent or effect (or both) of “creating unnecessary obstacles to international trade,” and whether this was through the preparation, adoption, or application (or some combination thereby) of the measure.

In order to find an Article 2.2 violation, the panel simply imported the empirically suspect Article 2.1 “conditions of competition” analysis to find that COOL had restricted trade.<sup>21</sup>

On that basis, the panel proceeded to question whether COOL was intended to provide accurate information about meats’ origin to consumers, and whether that objective was legitimate. The panel sided with the U.S. in the affirmative on both counts. In a separate analysis, the panel went so far as to note that the *status quo ante* labeling regime – based on substantial transformation and CODEX – was inappropriate to providing information at the level of detail sought, i.e. on the country where livestock were born, raised and slaughtered.<sup>22</sup>

(The value of this finding should not be overstated, however. In only one case (*EC – Tariff Preferences*) has a panel ruled against the legitimacy of a policy *per se* when similar clauses from other WTO agreements were under consideration. The default stance of panelists and the Appellate Body is to affirm the legitimacy of the *purpose* of a domestic policy, but then rule against the *ways* in which a country sought to achieve that goal. In many cases, the policy “means” are virtually dictated by the “ends” for technical or political reasons, rendering the WTO baby-splitting “a distinction without a difference.” Because the WTO rules are so broad in constraining how policies may be formulated, the possibility of a conflict between a policy aimed at what the WTO considers a “legitimate” policy goal and the WTO rules is a constant concern.)

But the panel found that COOL – despite being connected to a “legitimate objective” – did not fulfill the objective, because of the flexibilities provided to the complainants and to industry to comply with the labeling requirements.<sup>23</sup> Specifically, when livestock are raised and slaughtered in the U.S. but born in Mexico, the meat would receive a so-called “Label B”: “Product of U.S., Mexico.” Meanwhile, if the livestock were imported into the U.S. for immediate slaughter after being born and raised in Mexico, the meat would attain a so-called “Label C”: “Product of Mexico, the U.S.”

The complainants argued that this labeling scheme did not provide adequate information to the consumer on where production processes took place, nor was the order of the country names particularly informative.<sup>24</sup> Perhaps the most worrying consideration about this aspect of the ruling is that it effectively struck down the domestic negotiations between stakeholders that were necessary to finally get mandatory COOL implemented after a decade-plus of effort. Moreover, as the panel acknowledged, this flexibility was actually part of an attempt to accommodate the complainants' concerns.<sup>25</sup>

While at first glance, this could be understood to be the WTO calling for a stronger COOL regime, in practice another prong of the Article 2.2 standard would counter that. Because the panel found that the policy did not fulfill the permissible objective, it never got to the analysis of whether the measure was not "more trade restrictive than necessary." This is a test that is almost never successfully met.<sup>26</sup> Thus, even if the law were more stringent so that it met the "fulfill" test, it could fail on the trade restrictive test.

Consider, for instance, a new Label B that stated "Product was born in Mexico, raised in the U.S. and slaughtered in the U.S." and a new Label C that stated "Product was born in Mexico, raised in Mexico, and brought into the U.S. for immediate slaughter." All of a sudden, in order to satisfy one plank of the Article 2.2 test, we have a label that is much longer, more burdensome to commerce, and somewhat gruesome. As a practical matter, it is unlikely that even the most carnivorous legislator or court would approve a labeling regime that reminded consumers in graphic terms that they are eating dead animals. (Indeed, graphic labels on tobacco products were recently blocked in a suit brought against the FDA by tobacco companies, who successfully argued that such labels constitute forced speech in violation of the First Amendment.<sup>27</sup>) But such an outcome would satisfy this plank of the "fulfill" test under Article 2.2, while probably increasing the prospects for violating the trade restrictiveness test.

### *Other Claims*

As noted, a February 2009 letter from U.S. Agriculture Secretary Tom Vilsack urging that industry voluntarily disclose more information than required by COOL was deemed an unreasonable administration of the regulation in violation of the WTO's General Agreement on Tariffs and Trade (GATT) Article X:3(a).<sup>28</sup>

Mexico was unsuccessful in its claims under TBT Article 12, related to special procedural and substantive treatment to be accorded developing nations under the TBT.<sup>29</sup> Mexico was also unsuccessful in its claims under Article 2.4, where it argued that COOL should have been based on the substantial transformation standard for meat labels.<sup>30</sup>

The panel refused to examine the complaints' other gripes under the GATT, on the basis of judicial economy.

### *Summary*

**The Article 2.1 and 2.2 claims were the major planks of the argument.<sup>31</sup> The U.S. lost on the Article 2.1 count because COOL was too strict, while it lost on the Article 2.2 count**

**because COOL was not strict enough. This absurd situation highlights the problematic nature of the WTO's rules constraining WTO-permissible consumer labeling.**

The bases for the findings under these provisions require a strong appeal, not just to seek to preserve policy space to maintain a mandatory COOL policy, but also to do so for other forms of consumer labeling. While the U.S. successfully argued against Mexico's argument that its meat COOL regime should be based on the substantial transformation standards of CODEX,<sup>32</sup> the same arguments might not be upheld in the case of COOL for fruits or vegetables. This is because the panel sided with the U.S. that COOL actually goes beyond substantial transformation requirements because the former provides information on the country of birth, raising and slaughter. Such life cycle distinctions would not be relevant in an examination of fruit labeling, for instance. Such considerations undergird the need to push back on these worrying precedents.

### **Grounds for appellate review**

The next stage in the proceedings (should the U.S., Canada or Mexico opt to take it) is to have the case heard by a three-member panel (i.e. "division") selected from the WTO's Appellate Body, which is composed of seven Members<sup>33</sup> who are appointed by the DSB to serve for four-year terms.<sup>34</sup> Article 6(2) of the WTO's Working Procedures for Appellate Review states that: "The Members constituting a division shall be selected on the basis of rotation, while taking into account the principles of random selection, unpredictability and opportunity for all Members to serve regardless of their national origin."<sup>35</sup>

Under WTO dispute resolution rules, the parties are not normally supposed to make new factual arguments or invoke new defenses at the appellate stage. As Article 17.6 of the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes states, "An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel."<sup>36</sup> This means that USTR will not be able to claim that COOL is for any purpose other than providing consumer information and preventing consumer misinformation (this was the narrower contention that USTR contended to the lower panel). USTR will not be able to argue that COOL is a permissible deviation from TBT under GATT Article XX, which provides an exception for policies that violate other WTO rules but are necessary for protection of human health, among other goals. (USTR did not raise this defense to the lower panel, perhaps choosing not to use this case to pursue a decision on whether GATT Article XX can be raised as a defense to an alleged violation of the TBT agreement, a structural question that has been a subject of considerable debate and to date no formal WTO rulings). USTR will also be limited in its ability to present new econometric data on the impact of COOL on livestock trade flows or consumer information (since, most likely, the WTO Appellate Body will not examine new evidence).

Nonetheless, this section of the memo will outline a range of objections to the ruling – some articulated in legal interpretation *per se*, while others on the basis of policy and political objections to which the Appellate Body should be attentive.

### ***Appeal arguments that the U.S. might make***

*In the absence of any discriminatory structure, aim or effect, the panel should have found no violation of Article 2.1.*

The panel's findings that all meat processors have to equally comply with COOL and that some data sets show that U.S. imports of Canadian and Mexican cattle are essentially at or above historic levels should have led the panel to find that no violation of Article 2.1 occurred. (This would have forestalled its convoluted analysis of hypothetical upstream livestock slaughter practices that was the basis for finding an Article 2.1 violation.) The U.S. could argue that, when the empirical evidence does not point in the clear direction of a discriminatory outcome, the Appellate Body should defer to national policies, especially in light of the TBT's preamble that "no country should be prevented from taking measures necessary... for the prevention of deceptive practices, at the levels it considers appropriate..."

*Analysis of "upstream" effects is inappropriate.*

Country of origin labels are affixed on meats, not cattle or hogs. Upstream cattle producers face certain record-keeping requirements under the COOL policy to enable retailers to comply with the labeling aspect of COOL. The panel could have conducted an analysis of whether the rules applying to livestock record-keeping were discriminatory (which is improbable because they apply equally to domestic and foreign producers.) But it is inappropriate generally for the WTO to import "upstream" effects on one product (livestock with its own tariff classifications) as the basis to find that consumer labeling of another product (various meat products with their own tariff classifications) is discriminatory. Doing so massively expands the scope of the TBT Agreement's practical application. Virtually any type of consumer labeling would have economic repercussions throughout the economy. Therefore, it is in the consumers' interest to require a tighter nexus between a label and the product to which it is affixed as a basis for finding a TBT violation relating to the labeling.

*Lower market penetration shouldn't form the basis of a discrimination finding.*

In the "best practices" of the dolphin-safe tuna labeling case, the WTO panel (in its Article 2.1 analysis) noted that lower market share doesn't necessarily indicate that the conditions of competition have been stacked against foreign products.<sup>37</sup> In this COOL case, however, the fact that "Livestock imports have been and remain small compared to overall US livestock production and demand" and that "US livestock is often geographically closer to most if not all US domestic markets" formed the basis for how two of the panel's hypothetical business scenarios that should be equally competitive (i.e. utilizing All-U.S. or All-foreign beef) are allegedly more detrimental to foreign cuts.<sup>38</sup> USTR should argue that lower initial market penetration can't form the basis of a WTO violation.

*Even if COOL modifies the conditions of competition to the detriment of foreign meats, the panel wrongly attributed these actions to the government.*

The U.S. obligation to the WTO is to ensure that its policies do not violate WTO rules, not that market conditions (Mexican producers' share of the U.S. market pre-COOL) or private firms' decisions on how to implement a neutral policy might result in realities that foreign producers do

not like. In this vein, the U.S. could continue to hone the arguments it made in the initial case that COOL does not require segregation. Further, the U.S. could argue that how supply chain participants choose to comply with regulation is their choice and that to rule otherwise creates a scenario where governments are held responsible for actions over which they have no control. USTR could continue to advance the argument that, unlike the *Korea- Various Measures on Beef* case, COOL does not impose the “legal necessity” of making a choice against imported meats. In essence, USTR could argue that the lower panel misapplied the precedent.

*The panel misidentified the U.S. objective.*

Although the panel appeared to accept the U.S. characterization of the objective of COOL as providing consumer information and preventing misinformation on country of origin, the panel seems to have actually imputed a broader objective in its Article 2.2 analysis: the provision of as much information as possible about origin and processing. This is of course a much more substantial objective, and any government would have a difficult time actually meeting this bar. Accordingly, USTR could ask the Appellate Body to interpret whether its objective had been fulfilled under a looser characterization such as “providing more or some information about country of origin.”

(A comparison with the other two consumer cases is informative. In the *U.S.-Tuna II* case, Mexico suggested that the U.S. objectives were more specific than what the U.S. claimed. The panel then ruled that the U.S. dolphin-safe tuna labels had not met the more broadly defined objective claimed by the U.S.<sup>39</sup> In other words, the U.S. lost its Article 2.2 argument in the tuna-dolphin case by claiming too broad an objective that its labels could not fulfill, while the U.S. lost its Article 2.2 argument in the COOL case because the panel attributed too broad an objective to the U.S. In the *U.S.-Clove Cigarettes* case, the panel appeared to accept that a ban on flavored cigarettes was geared at reducing but not eliminating teen smoking.<sup>40</sup> It seems that only the latter panel was close-to-sufficiently deferential in its identification-of-objective exercise.)

*The panel wrongly employed the “fulfillment of objective” analysis.*

USTR could argue that the panel erred in finding that COOL does not fulfill its objective as required by Article 2.2 by not examining the actual effects on consumers. For instance, the complainants argued (and the panel found) that the labeling flexibilities meant that COOL “provides information on meat with regard to the *possible*, but not necessarily the actual, or for that matter accurate, origin as defined by the measure.”<sup>41</sup> Therefore, COOL cannot fulfill the legitimate objective of providing consumers with information.

USTR raised the point that there was no evidence that consumers were actually being misled, and suggested the need for quantitative analysis. The panel simply stated that “a certain degree of latitude is afforded to panels in adopting methodology to assess a measure’s fulfillment of the objective. We are thus free to rely on either quantitative or qualitative evidence, or both.”<sup>42</sup> USTR could argue that the panel exceeded this discretion, and that it needed to assess whether consumers were actually being misled before accepting the complainants’ contention as fact.

*The panel wrongly imported the Article 2.1 modification of conditions of competition analysis into the Article 2.2 “trade restrictiveness” test.*

USTR might argue that Article 2.2 requires a fundamentally different examination from Article 2.1, and that actual trade effects must be rigorously assessed in the former (if not the latter). The panel wrongfully equated the two, and a “trade restrictive” violation should only be found based on an analysis of the actual provisions of Article 2.2. (The panel in the *U.S.-Clove Cigarettes* appropriately found that “our finding that the measure is inconsistent with Article 2.1 does not prejudice the answer to the question of whether the measure is consistent with Article 2.2.”<sup>43</sup>)

*The panel’s interpretation of the TBT produces a “manifestly absurd or unreasonable” result.*

Given the ruling found the policy violated Article 2.1 because it was too strict and Article 2.2 because it was too flexible, many alterations that the U.S. might make to the policy to render COOL permissible under TBT Article 2.1 (discrimination) might make it less likely to survive scrutiny under Article 2.2 (trade restrictive.) In other words, the ruling produced an absurd result of attacking a policy for both being too much and too little and thus providing no means to fulfill what the panel deems a legitimate policy goal.

USTR could take this interpretative mess head on. It could argue that the panel should have consulted supplementary means of interpretation so that the TBT did not lead to a “manifestly absurd” situation where the only way to make a measure more compliant with Article 2.1 is to make it less compliant with Article 2.2. Even more to the point, the U.S. could only fulfill the objective of providing consumer information by making the measure even more trade restrictive, which could introduce contradictory recommendations under the Article 2.2 analysis itself.<sup>44</sup> The U.S. could argue that consultation of supplementary materials is recommended under the Vienna Convention on the Law of Treaties:

*“Article 31*

*General rule of interpretation*

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
  - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
  - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
  - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
  - (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

#### Article 32

##### *Supplementary means of interpretation*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.”<sup>45</sup>

Given the novelty of interpretations of these TBT provisions (and the fact that the VCLT does not delimit the universe of supplementary means of interpretation), the AB should consult as many supplementary means as possible, including the writings of experts on consumer and administrative law.

*The panel should have not examined the Vilsack letter.*

The U.S. might also argue that the panel should not have considered the hortatory Vilsack letter as an actual administration of the COOL regulations. Making an appeal on these grounds has precedential value: WTO members shouldn't be able to challenge political speech.

### **CONCLUSION**

Consumers have been fighting for country of origin labeling for decades. It is untenable that the WTO would rule against such labels, which are popular in the U.S. and around the world.

The U.S. lost on the TBT Article 2.1 count because COOL was too strict, while it lost on the Article 2.2 count because COOL was not strict enough. The Catch 22 situation that this ruling creates casts a very negative light on the WTO's rules.

While some observers may note that the WTO panel did not rule that COOL is illegitimate per se, this is a distinction without a difference. All COOLs would require that businesses keep track of the records necessary to accurately increase consumer levels of information. In industries (like slaughterhouses) that utilize business practices that many consumers would find disgusting (like combing meat from dozens of animals from dozens of countries), this may even entail alterations to their supply chain methods. This is a reasonable cost of doing business in a country that cares about consumers.

USTR should vigorously pursue its appeal rights and argue for the WTO Appellate Body to overturn the COOL and other two recent WTO rulings against consumer safeguards in the U.S. (and consumers') favor.

## ENDNOTES

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<sup>1</sup> Panel Report, *U.S. – Certain Country of Origin Labeling Requirements*, WT/DS384/R and WT/DS386/R, circulated 18 November 2011. Documentation available at: [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds386\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds386_e.htm)

<sup>2</sup> When the U.S. Congress debated the Uruguay Round Agreements Implementation Act in a lame-duck session in 1994, Rep. Peter DeFazio (D-Ore.) said: “This agreement will put at risk the environmental, food, consumer, health and safety laws of this Nation to something called a World Trade Organization, an organization that will settle disputes over trade barriers, and trade barriers is interpreted as anything that restricts the free movement of goods, whether it is restrictions against child labor, whether it is restrictions against dangerous substances in food and pesticides.... We are lowering ourselves to the worst standards, to the lowest common denominator, in order to get something that a few multinational corporations desperately want.” Senator Robert Byrd (D-W.V.), a noted expert on the legislative process who recently passed, warned: “U.S. laws and State laws in many areas must comport first with the WTO’s trade rules, or such laws can be challenged as an ‘illegal trade barrier’ by other countries. Federal and State laws dealing with toxics and hazardous waste, consumer protection, recycling and waste reduction, pesticides and food safety, energy conservation, wildlife protection, and natural resource and wilderness protection, would all be vulnerable to WTO challenge. The new GATT would prevent countries from rejecting products based on how they are made; for example, with child labor or with ozone depleting chemical processes.... If environmental laws get in the way of trade, they must fall. If consumer protection gets in the way, if standards of innumerable kinds, get in the way of trade, they go. Humane methods of trapping tuna, in order to protect dolphins go out the window. Flipper loses. Rigid pesticide controls which make products more expensive are GATT illegal. Out they go. Child labor laws restricting trade are illegal. Who cares? Only trade matters. What happens when our laws are declared a violation of GATT? The Administration would like us to accept the proposition that no U.S. laws are wiped out here, and technically they are not. What will happen is that other member nations, perhaps prodded, or even dominated by one or a group of multinational corporations, will bring a complaint against the U.S. before the WTO, and a Dispute Panel could rule in secret against a U.S. law, as being GATT illegal. The room for pernicious manufactured claims should be obvious to all of us. This puts great pressure on us to change our laws.”

<sup>3</sup> See [http://www.wto.org/english/news\\_e/news12\\_e/dsb\\_05jan12\\_e.htm](http://www.wto.org/english/news_e/news12_e/dsb_05jan12_e.htm)

<sup>4</sup> While there is no doctrine of binding precedent at the WTO, panels often cite each other and the Appellate Body in increasingly consistent fashion.

<sup>5</sup> Panel Report, *U.S.-COOL*, paras. 8.1-8.7.

<sup>6</sup> Panel Report, *U.S.-COOL*, para. 7.76.

<sup>7</sup> Agreement Establishing the World Trade Organization Art. XVI(4).

<sup>8</sup> This quandary doesn’t just affect the United States. Canada, for instance, argued that COOL does not fulfill the legitimate objective of consumer information with respect to ground beef on Article 2.2 grounds because a package of ground beef under the inventory allowance may have a label indicating that the package “contains meat from a specified country when in fact it does not.”<sup>8</sup> But this flexibility is precisely what was seen as favoring Canada and thus being permissible under Article 2.1.

<sup>9</sup> As we note in the summary, however, the U.S. should not face this prospect passively.

<sup>10</sup> Panel Report, *U.S.-COOL*, paras. 7.465, 7.467, 7.483.

<sup>11</sup> Panel Report, *U.S.-COOL*, paras. 7.457, 7.458, 7.475.

<sup>12</sup> Panel Report, *U.S.-COOL*, paras. 7.470, 7.484.

<sup>13</sup> Panel Report, *U.S.-COOL*, paras. 7.438-548. At the core of the U.S. argument was that inclusion of a wide-range of dummy variables referencing recessions, currency movements and other exogenous factors would show little to no impact on trade from COOL.

<sup>14</sup> The panel wrote: “Formally speaking, the category of ‘covered commodities’ under the COOL measure includes only beef and pork, not livestock, and the labelling requirements under the COOL measure apply to beef and pork only ‘at the final point of sale of the covered commodity to consumers’. As we explained above, however, without upstream livestock producers and processors providing the necessary information on origin as defined by the COOL measure, these retail labeling requirements are impossible to fulfil. The COOL measure recognizes this by creating obligations not only for retailers of beef and pork but also for the broad category of ‘any person engaged in the business of supplying [these] to a retailer’. The latter category of upstream market participants ‘shall provide information to the retailer indicating the country of origin of the covered commodity’. The COOL measure supports this obligation with an enforcement mechanism, including fines – again, applicable to both retailers and their suppliers.” See Panel Report, *U.S.-COOL*, para 7.246.

<sup>15</sup> Panel Report, *U.S.-COOL*, para. 7.256.

<sup>16</sup> Panel Report, *U.S.-COOL*, para. 7.327.

<sup>17</sup> Panel Report, *U.S.-COOL*, paras. 7.336 and 7.340 and 7.344.

<sup>18</sup> Panel Report, *U.S.-COOL*, paras. 7.333-350.

<sup>19</sup> Panel Report, *U.S.-COOL*, paras. 7.431-434.

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<sup>20</sup> Panel Report, *U.S.-COOL*, paras. 7.435-437.

<sup>21</sup> Panel Report, *U.S.-COOL*, para. 7.574.

<sup>22</sup> Panel Report, *U.S.-COOL*, para. 7.734.

<sup>23</sup> Panel Report, *U.S.-COOL*, paras. 7.576-651.

<sup>24</sup> Panel Report, *U.S.-COOL*, paras. 7.697-701.

<sup>25</sup> This saved the U.S. from being found in violation of TBT Article 12. Panel Report, *U.S.-COOL*, para. 7.794.

<sup>26</sup> In past WTO cases, respondents have had a particularly difficult time surviving the so-called “necessity” test, failing in over 75 percent of the applicable cases. In the GATT and GATS jurisprudence, it’s essentially a four-part, two-phase argument. In the first phase, the measure must be shown to be taken for important ends, and that the measure contributes (significantly) towards those ends. This is then balanced against the impact on trade. If a measure passes this first *prima facie* phase, it moves on to a consideration of less trade-restrictive alternatives that are reasonably available to the respondent – typically those suggested by the complainant.

<sup>27</sup> *R.J. Reynolds Tobacco Co. v. U.S. Food and Drug Admin.*, United States District Court, District of Columbia, November 7, 2011.

<sup>28</sup> Panel Report, *U.S.-COOL*, paras. 8.1-8.7.

<sup>29</sup> Panel Report, *U.S.-COOL*, paras. 7.794.

<sup>30</sup> Panel Report, *U.S.-COOL*, para. 7.734.

<sup>31</sup> As noted, the Vilsack letter was also found to violate the GATT. It would be wise for the U.S. to appeal that aspect of the finding as well. The U.S. should also be prepared to make arguments with respect to the complainants’ claims under the GATT and TBT Articles 2.4, 12.3 and 12.1.

<sup>32</sup> Panel Report, *U.S.-COOL*, para. 7.734. This argument was made under Mexico’s TBT Article 2.4 claim. That article reads: “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 except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.”

<sup>33</sup> More information on the Appellate Body can be found here:

[http://www.wto.org/english/tratop\\_e/dispu\\_e/ab\\_members\\_descrp\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm) By January 2012, the members will be: Peter Van den Bossche (Belgium), Ricardo Ramírez-Hernández (Mexico), Shotaro Oshima (Japan), David Unterhalter (South Africa), Yuejiao Zhang (China), Thomas Graham (US), and Ujal Bhatia (India).

<sup>34</sup> An accessible introduction to the WTO dispute settlement process can be found here:

[http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/displ\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm)

<sup>35</sup> Text available at: [http://www.wto.org/english/tratop\\_e/dispu\\_e/ab\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/ab_e.htm)

<sup>36</sup> See text at: [http://wto.org/english/docs\\_e/legal\\_e/28-dsu\\_e.htm](http://wto.org/english/docs_e/legal_e/28-dsu_e.htm)

<sup>37</sup> “... the fact that Mexican imports represent only 1 per cent of tuna on the US market, in itself, only indicates that Mexico has a relatively limited penetration on the US tuna market. In the absence of further information as to what share of the US market Mexico might expect to secure in the absence of the measures at issue, we are not in a position to assess whether Mexico’s level of participation in the US tuna market reflects a modification of the conditions of competition to the detriment of Mexican tuna products or whether it simply reflects Mexico’s expected level of participation in the US market.” Panel Report, *U.S.-Tuna II*, at para 7.359.

<sup>38</sup> Panel Report, *U.S.-COOL*, para 7.349.

<sup>39</sup> Panel Report, *U.S. – Measures Concerning the Importation, Marketing And Sale Of Tuna And Tuna Products*, WT/DS381/R, circulated 15 September 2011, at para 7.394.

<sup>40</sup> Panel Report, *U.S.-Clove Cigarettes*, para. 7.377.

<sup>41</sup> Panel Report, *U.S.-COOL*, para. 7.707.

<sup>42</sup> Panel Report, *U.S.-COOL*, para. 7.708.

<sup>43</sup> Panel Report, *U.S.-Clove Cigarettes*, para. 7.332.

<sup>44</sup> Similar tensions were exhibited by the panels’ recommendations in the recent tuna-dolphin and clove cigarettes cases. In those cases, the U.S. might have had to employ even more trade restrictive measures (extending burdensome compliance costs on more fishing fleets and extending cigarette bans to menthols, respectively) in order to survive scrutiny under TBT Article 2.

<sup>45</sup> See full text at [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf)