Fighting for the U.S. Cattle Producer!
R-CALF USA

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Docket No. WTO/DS384 and WTO/DS386 (Docket No. USTR-2009-0004)
United States Trade Representative
600 17th Street, NW.
Washington, DC 20508

Sent Via Federal eRulemaking Portal

Re: R-CALF USA Comments in Docket No. USTR-2009-0004: Notice; Request for Comments in the Matter of the WTO Dispute Settlement Proceeding Regarding United States – Certain Country of Origin Labeling Requirements

Dear United States Trade Representative:

R-CALF USA (Ranchers-Cattlemen Action Legal Fund, United Stockgrowers of America) is a national, nonprofit organization dedicated to ensuring the continued profitability and viability of the U.S. cattle industry. R-CALF USA represents thousands of U.S. cattle producers on trade and marketing issues. Our members are located across the U.S. and are primarily cow/calf operators, cattle backgrounders, and/or feedlot owners, and there are numerous affiliated organizations and various main-street businesses that are associate members. R-CALF USA appreciates this opportunity to comment on Docket No. USTR-2009-0004, found at 74 Fed. Reg., 24059-24061 ("USTR Notice").

I. INTRODUCTION

R-CALF USA believes it is fundamentally contrary to our U.S. Constitution for the United States Trade Representative ("USTR") to agree that foreign governments – specifically Canada and Mexico – have any standing whatsoever to bring a complaint against our constitutionally passed mandatory country-of-labeling ("COOL") law.

Our domestic COOL law imposes no duty or restrictions on any foreign government; it does not impose any limits on the volume or type of commodities that a foreign country may export to the United States; foreign countries are not obligated, in any way, to export to the United States any of the commodities that would be subject to our COOL law – hence, a foreign country's decision to market their products in the U.S. market and under the rules of the U.S. market is purely voluntary; and, COOL jurisdiction is exclusively limited to United States retailers, as defined exclusively by U.S. law, and subjects all covered commodities marketed by U.S. retailers to identical information requirements, regardless of where the commodities originate. Thus, our domestic COOL law does not affect international trade agreements and it is fundamentally

inappropriate for the World Trade Organization ("WTO") to even entertain a foreign country's complaint against our domestic COOL law. Further, and for the foregoing reasons, the USTR should not consent to WTO jurisdiction over our domestic COOL law.

Assuming, but only hypothetically, that United States officials had inadvertently surrendered the right of its sovereign U.S. citizens to govern themselves – as guaranteed by our U.S. Constitution – to the WTO, the complaints by Canada and Mexico against our domestic COOL law would still be baseless and wholly without legitimacy. **The following comments, therefore, are offered assuming a worst case, hypothetical scenario – that United States officials have surrendered the sovereign right of U.S. citizens to govern themselves to an international tribunal, the WTO:**

II. THE COMPLAINTS BY CANADA AND MEXICO AGAINST THE U.S. COOL LAW ARE BASELESS

The U.S. Department of Agriculture ("USDA"), after a prolonged and comprehensive rulemaking process that began in 2002[1], has determined that the final COOL rule is consistent with U.S. international trade obligations.[2] R-CALF USA agrees with USDA's determination and finds that Canada's and Mexico's complaints are baseless. Unfortunately, the complaints filed by Canada and Mexico fail to provide any factual allegations against the COOL law, are vague, and lack sufficient specificity to refute.[3] As such, the very process of this WTO dispute places U.S. citizens in the unenviable position of having to expend valuable resources to prove a negative – to prove that the COOL law does not violate the numerous international standards identified by Canada and Mexico without even the benefit of knowing how Canada or Mexico believe those standards have been breached. Because the burden of initiating a complaint is so minimal, this WTO dispute procedure appears to invite frivolous complaints from countries such as Canada and Mexico as it grants them an overly simplified forum to retaliate against U.S. citizens' exercise of their constitutional rights.

A. Contrary to the Complaints of Canada and Mexico, the U.S. COOL Law is Consistent with GATT 1994, Article III.4.

Article III: 4 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") addresses the national treatment of imported products and suggests that such imported products be accorded treatment no less favorable than that accorded to like products of national origin. The U.S. COOL law requires labeling of all covered commodities regardless of their specific origin, thereby imposing identical requirements on both U.S.-origin products and foreign-origin products. The only factor that determines what country or countries are included on the actual COOL label of a given covered commodity is a factual determination – the actual origin or origins of the covered commodity. There can be no bias or disparate treatment under this inherently just approach. In fact, it can be argued that the U.S. COOL law imposes stricter requirements on domestic meat products to be designated with a United States country of origin.

[1] *See* 67 Fed. Reg. 63367-63375 (USDA initiated its rulemaking for mandatory COOL on Oct. 11, 2002).
[2] *See* 74 Fed. Reg. 2679, col. 1.
[3] *See* Request for Consultations by Canada, Addendum, 11 May 2009; *see also* Request for Consultations by Mexico, Addendum, 11 May 2009.

Only meat exclusively from an animal that is exclusively born, raised, and slaughtered in the United States may bear a label designating only the United States as the product's country of origin.[4] However, the COOL law's requirement for imported meat, i.e., meat from either Canada or Mexico, does not require such a rigorous origin standard in order to achieve a single-country designation for their respective countries. Meat imported from either Canada and Mexico enjoy a lesser standard under the COOL law as such meat retains its single-country origin based on the origin declared to U.S. Customs and Border Protection at the time the product entered the United States.[5] Thus, the COOL law actually provides meat imported from Canada and Mexico *more* favorable treatment than it provides to domestic meat, but this disparity could be corrected by Canada and Mexico by following U.S. Agriculture Secretary Vilsack's Feb. 20, 2009, request that all meat be labeled to designate where each of the production steps occurred, i.e., where the animal from which the meat was derived was born, raised, and slaughtered.[6] Because products from Canada and Mexico are accorded treatment no less favorable to national products, Canada's and Mexico's complaint must be rejected.

B. Contrary to the Complaints of Canada and Mexico, the U.S. COOL Law is Consistent with GATT 1994, Article IX: 2.

Article IX: 2 of the GATT 1994 addresses marks of origin and suggests that the difficulty or inconvenience of applying such marks of origin be reduced to a minimum; and it also emphasizes the necessity of protecting consumers against fraudulent or misleading indications. Any argument regarding alleged difficulty or inconvenience in affixing labels required by the COOL law to covered commodities is immediately contradicted by the various labels – including voluntary country of origin labels, brand labels, product description and weight labels, and nutrition labels – which are already applied to such commodities by either or both commodity suppliers, including meatpackers, and commodity retailers. It is frivolous for Canada and Mexico to claim that adding additional ink to a label to denote the products origin is unreasonably difficult or inconvenient. Moreover, the U.S. COOL law is intended to protect consumers against misleading indications that have resulted for years due to USDA's practice of affixing quality grade information, e.g., prime, choice, and select quality grade stamps, on meat derived from animals that originate in foreign countries, and of affixing the USDA's official inspection sticker, e.g., "U.S. INSPECTED AND PASSED BY DEPARTMENT OF AGRICULTURE." For many years these practices resulted in consumers being mislead to believe that all meat bearing such labels must be of U.S. origin. In the agency's interim final COOL rule, USDA referenced the removal of information distortions associated with not knowing the origin of products as a consumer-oriented benefit of the COOL law identified by several analysts.[7] R-CALF USA believes the COOL law's clarification of origin for a product that also bears the USDA grade stamp and inspection sticker is an even greater benefit. Canada's and Mexico's claim that the COOL law violates GATT 1994, Article IX: 2, is meritless.

[4] See 74 Fed. Reg. 2706, col. 1 (note exception for animals imported from Alaska and Hawaii via Canada).
[5] *See* 74 Fed. Reg. 2706, col. 2.
[6] *See* Letter to Industry Participants, U.S. Secretary of Agriculture Tom Vilsack, February 20, 2009.
[7] *See* 73 Fed. Reg. 45128, col. 1.

C. Contrary to the Complaints of Canada and Mexico, the U.S. COOL Law is Consistent with GATT 1994, Article IX: 4.

Article IX: 4 of the GATT 1994 further addresses marks of origin and suggests that marks of origin should be applied in a manner that does not damage the product, materially reduce its value, or unreasonably increase costs. As discussed in Section B above, any claim by Canada and Mexico that COOL requirements would damage their products would be frivolous. As would any claim be that alleged COOL would reduce their products' value. While the attributes a consumer may ascribe to a particular country's food production and food safety regime may well affect a consumer's perceived value for a given product, any difference in the product's value would be the result of the consumer's knowledge about the specific country, not the result of a label that disclosed the product's origin. Finally, the issue of cost has been carefully and thoroughly weighed by USDA during its lengthy and comprehensive rulemaking process for COOL and neither Canada nor Mexico would be subject to any costs that would not also be borne by the U.S. in the administration of COOL. Because the COOL law is consistent with GATT 1994, Article IX: 4, Canada's and Mexico's claim must be rejected.

D. Contrary to the Complaints of Canada and Mexico, the U.S. COOL Law is Consistent with GATT 1994, Article X: 3.

Article X: 3 of the GATT 1994 address the publication and administration of trade regulations that would impact custom matters and potentially affect the sale or distribution of imports or exports, and suggests that such information be promptly communicated to governments and traders. As stated previously, the COOL law imposes no requirements on countries that export products to the United States. Section A, above, explains that imported products retain the same origin designation that is already declared, under preexisting law, to U.S. Customs and Border Protection at the time the product enters the United States. In addition, neither the COOL law nor the COOL rule require any certification requirements for imported livestock that do not already exist under preexisting law. And, both Canada and Mexico have had equal access to USDA rules and policy notices at the same time such information was available in the U.S. via the agency's website. There is no basis for Canada's and Mexico's claim that the COOL law is inconsistent with GATT 1994, Article X:3, and their claims must be rejected.

E. Contrary to the Complaints of Canada and Mexico, the U.S. COOL Law is Consistent with the Agreement on Technical Barriers to Trade, Article 2.

Article 2 of the Agreement on Technical Barriers to Trade ("TBT Agreement") essentially reiterates the provisions of the GATT 1994 Articles described in Sections A through D, above, and applies them in the context of technical regulations or standards that could raise potential trade barriers. The TBT Agreement expressly lists examples of technical regulations and standard deemed legitimate and they include, 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. It is important to note that COOL does not constitute a technical regulation that would in any way restrict international trade. As previously stated, products exported from Canada and Mexico retain their origin designation pursuant to preexisting law. Thus, it is only while exported products are under U.S. jurisdiction, and only if the foreign

county's product is comingled, transformed, or, in the case of livestock, converted to meat in a U.S. slaughtering establishment, would the COOL law require the addition of another county's name on the origin label of a covered commodity exported by either Canada or Mexico and sold in a U.S. retail establishment.

As stated in Section B, above, the COOL law fulfills the TBT Agreement's objective of preventing ongoing and misleading indications on meat products, i.e., the USDA grade stamp and inspection stickers. In addition, the born, raised, and slaughtered standard required for meat bearing a U.S. designation has long been in use by USDA to ensure the safety of beef originating in foreign countries that were deemed susceptible to the introduction of foot and mouth disease ("FMD"). For example, the U.S. requires beef imported from Uruguay to be certified as originating from cattle that were born, raised, and slaughtered in Uruguay – the very same standard adopted by the COOL law for food products eligible to bear the USA label. The United States Code of Federal Regulations at 9 CFR state:

> **§ 94.22 Restrictions on importation of beef from Uruguay.**
>
> Notwithstanding any other provisions of this part, fresh (chilled or frozen) beef from Uruguay may be exported to the United States under the following conditions:
>
> (a) The meat is beef from bovines that have been born, raised, and slaughtered in Uruguay . . .
>
> (j) An authorized veterinary official of the Government of Uruguay certifies on the foreign meat inspection certificate that the above conditions have been met.

Thus, the transmittal of origin information, as required by the COOL law, is a practiced and proven means of ensuring food safety and food product integrity. Only with origin information can verification be made that the final food product underwent the food production practices of a particular country's food production regime. Such verification simply cannot be made through mere inspection of the final food product, either by official government inspectors or by consumers.

In addition, the COOL law provides consumers with a first line of defense in the event of food safety problems that have already occurred in foreign countries and that will likely reoccur in the future. For example, COOL could have benefited both food safety and the integrity of U.S.-produced beef following Canada's detection of bovine spongiform encephalopathy ("BSE") in May 2003. Consumers at that time could have used COOL to avoid Canadian beef products. However, COOL was not available and when the Canadian-origin cow slaughtered in Mabton, Washington, was diagnosed with BSE later that year, in late December 2003, consumers had no means of differentiating Canadian beef from U.S. beef and, therefore, no means of avoiding the beef from that cow that entered the U.S. food system before the disease was detected. A COOL label would have allowed consumers to avoid Canadian-labeled beef, rather than to avoid all

beef, while the Food Safety Inspection Service was conducting its recall of the 10,410 pounds of raw, undifferentiated beef thought to include meat derived from the infected cow.[8]

The recent melamine contamination problem further demonstrates that food production practices within a particular country impact food safety and food product integrity. Only by transmitting information as to origin can consumers distinguish food products based on the particular production regime to which the food product was subjected.

Further, past experience shows that reliance upon U.S. government inspections to ensure food safety is inadequate. For example, a report issued by the Office of Inspector General (OIG) in December 2005 revealed that Canadian plants were allowed to circumvent U.S. equivalency requirements for nearly two years:

> In July 2003, FSIS found that Canadian inspection officials were not enforcing pathogen reduction and HACCP system regulations. These same types of concerns were identified again in June 2005, almost 2 years later. However, as of September 2005, FSIS has not made a determination whether the identified concerns are serious enough to limit the import of Canadian products. As a result, FSIS has allowed the importation of almost 700 million pounds of meat and poultry from plants that did not receive daily inspection, a requirement for all U.S. meat and poultry plants. Additionally, FSIS allowed the import of over 261 million pounds of ready-to-eat meat and poultry that had not been subjected to finished product testing for *Listeria monocytogenes,* as is required of U.S. plants.[9]

Thus, there is a disparity between what the food safety inspection system is supposed to require of foreign plants that ship products to the U.S. and what is actually practiced. The result, according to the OIG report, is that "FSIS did not institute compensating controls to ensure that public health was not compromised while deficiencies were present."[10] Clearly, COOL affords consumers with the ability to achieve an additional level of food safety protection against breaches in food safety inspection systems that operate in plants in foreign countries.

For the reasons stated above, the TBT Agreement is not applicable to the COOL law and even if it was, the COOL law fulfills critical objectives that include, *inter alia*, national security, the prevention of deceptive practices and misleading indications, the protection of human health and safety, and the protection of animal health. As a result, Canada's and Mexico's claims are baseless and must be rejected.

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[8] *See* Transcript of Tele-News Conference Briefing Updating Presumptive Positive BSE Case, Washington, D.C., December 24, 2003, available at http://www.usda.gov/wps/portal/!ut/p/_s.7_0_A/7_0_1OB/.cmd/ad/.ar/sa.retrievecontent/.c/6_2_1UH/.ce/7_2_5JM/.p/5_2_4TQ/.d/3/_th/J_2_9D/_s.7_0_A/7_0_1OB?PC_7_2_5JM_contentid=2003%2F12%2F0435.html&PC_7_2_5JM_parentnav=TRANSCRIPTS_SPEECHES&PC_7_2_5JM_navid=TRANSCRIPT#7_2_5JM

[9] Audit Report Food Safety and Inspection Service Assessment of the Equivalence of the Canadian Inspection System, U.S. Department of Agriculture, Office of Inspector General, Northeast Region, Report No. 24601-05-Hy, December 2005, at 4, hereafter referred to as "OIG Audit Report."

[10] OIG Audit Report at 4.

F. Contrary to the Complaints of Canada and Mexico, the U.S. COOL Law is Consistent with the Agreement on the Application of Sanitary and Phytosanitary Measures, Articles 2, 5, and 7.

Articles 2, 5, and 7 of the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement") suggests that countries may implement legitimate sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health. Clearly, the examples provided in Section E, above, demonstrate that the U.S. COOL law is vital to the achievement of these national security-related objectives and is fully consistent with Articles 2, 5, and 7 of the SPS Agreement. Canada and Mexico have no basis to challenge the U.S. COOL law under the SPS Agreement.

G. Contrary to the Complaints of Canada and Mexico, the U.S. COOL Law is Consistent with the Agreement on Rules of Origin, Article 2.

Article 2 of the Agreement on Rules of Origin ("ARO") essentially suggests that rules of origin should not create restrictive, distorting, or disruptive effects on international trade, should not impose stricter standards on imports than are imposed on domestic products, and should be based on a positive standard. As stated in Section A, above, the U.S. COOL does not impose a new standard on products entering the United States. Further, and as previously discussed above, the COOL law does not discriminate against imported products and imposes labeling requirements on all covered commodities, regardless of their origins. And, as specifically discussed in Section E, above, the standards applied under the COOL law serve the positive purpose of ensuring the health and safety of human and animal health.

H. Contrary to the Complaints of Canada and Mexico, the U.S. COOL Law Does Not Nullify or Impair any Benefits They Claim Accrue to Them.

Attached hereto is the R-CALF USA presentation provided to the USTR on June 1, 2009, and that provides statistical data that show that Canada's and Mexico's claims that the U.S. COOL Law somehow nullifies or impairs benefits they believe are owed to them are baseless.

III. CONCLUSION

R-CALF USA appreciates the opportunity to submit these comments and it urges the USTR to take deliberate and decisive steps to quash Canada's and Mexico's attempts to interfere with the United States sovereign right to inform U.S. consumers, using the most accurate and truthful means possible, about the origins of the food they purchase for themselves and their families.

Sincerely,

Bill Bullard
CEO, R-CALF USA

Attachment