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

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January 20, 2012

The Honorable Ron Kirk
United States Trade Representative
600 17th Street NW
Washington, DC 20208

The Honorable Tom Vilsack
United States Secretary of Agriculture
1400 Independence Ave., S.W.
Washington, D.C. 20250

Dear Ambassador Kirk and Secretary Vilsack:

On behalf of its thousands of cattle producing members from across the United States, R-CALF USA urges the United States to aggressively appeal the November 18, 2011, anti-COOL ruling by the World Trade Organization (WTO). R-CALF USA was instrumental in the passage of the U.S. COOL law and believes it empowers U.S. consumers to exercise choices in the marketplace, which is an indispensable element for the promotion of marketplace competition.

Attached to this letter is a 17-page memorandum that provides numerous arguments the United States may consider as a basis for an aggressive appeal of the WTO's reprehensible attack on COOL. In addition, the memorandum urges the U.S. Department of Agriculture to immediately initiate a rulemaking to strengthen the COOL law to further expand benefits to U.S. consumers who now have basic information regarding the origins of their food.

The attached memorandum demonstrates the WTO has employed inexplicable tactics to undermine the COOL law. It wrongfully ignores the United States' limited jurisdiction with respect to the COOL law and wrongfully assigns culpability to the United States for actions perpetrated by multinational meatpackers. It fabricates non-existent distinctions between the COOL law's various labeling regimes; it fabricates a non-existent segregation regime and then assigns phantom, unqualified costs to its fabricated segregation regime to undercut our free market system; it establishes fictitious standards with which to fault the COOL law and, without quantifying any costs, adopts assumptions that are clearly contradicted by marketplace realities; it fails to consider major structural changes that directly impact trade flows; it ignores the basic tenants of the COOL law that ubiquitously requires all livestock to be identified as to origin; it short-circuits its own analytical process for the purpose of attacking the COOL law; and, its actions constitute a politically motivated effort to deprive U.S. citizens of critical information regarding the origins of their food.

Sincerely,

Bill Bullard, CEO

Attachment: Memorandum

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Memorandum

Date: January 20, 2012

To: The Honorable Ron Kirk, United States Trade Representative
The Honorable Tom Vilsack, United States Secretary of Agriculture

From: Bill Bullard, R-CALF USA

Re: Arguments in Support of an Aggressive United States Appeal of the World Trade Organization's (WTO's) Attack on the United States Country of Origin Labeling (COOL) Law and Additional Recommendations

An analysis of the World Trade Organization's (WTO's) 233-page decision that declares our domestic country of origin labeling (COOL) law noncompliant with international trade agreements reveals that the heart of the complaint filed by Canada and Mexico is fundamental:

Canada and Mexico contend they are entitled to export as many cattle to the U.S. as they want, regardless of whether COOL labels have empowered consumers to send new demand signals for meat derived from their cattle. Canada, in fact, specifically complained that COOL "has nullified the unrestricted market access that Canada was entitled to expect for its cattle and hogs exports." (Reports of the Panel, WTO, WT/DS 384/R, WT/DS 386/R, Nov. 18, 2011, at ¶ 7.897, hereafter "¶".)

Whereas COOL facilitates marketplace competition by differentiating products, the WTO fails completely not only to attribute any of Canada's or Mexico's numerous complaints to marketplace forces created by consumer buying preferences, but also, it fails even to consider the possibility that marketplace competition created by new product information (*i.e.* COOL) *is expected* to send new demand signals through the upstream supply chain. The entire WTO decision is void of any consideration regarding the effect of such newly created, consumer-driven demand signals and is, in essence, nothing more than an exercise to undermined genuine competition in the U.S. market. Indeed, the WTO's entire dispute resolution process in regard to COOL is predicated on the notion that competition driven by consumer preference is irrelevant.

I. INTRODUCTION

With the help of the nation's handful of multinational meatpackers that generated numerous exhibits and provided several anti-COOL arguments in support of Canada's and Mexico's claims against our constitutionally passed COOL law (*see, e.g.*, ¶¶ 7.166, 361, 378 ("evergreen

contracts"), 410, 832, 836-838), the WTO tribunal sided with Mexico, Canada and the multinational packers to diminish market competition and replace it with a One-World Government edict. The effect of the WTO's decision is two-fold: First, it undermines the United States' sovereign right to self-governance by striking down our constitutionally-passed domestic law. Second, it erases consumer choice as the preferred method for determining the demand for imported food in our U.S. grocery stores.

COOL has begun to do exactly what we expected: It is removing from the hands of the multinational meatpackers, foreign export countries, and importers the power to decide from what country to source their cattle when producing beef for the U.S. market, and it has properly placed that power into the hands of U.S. consumers who now can choose from what country they want their beef sourced. Thus, it is now the consumer that dictates demand for foreign beef, not multinational packers and other importers. Thus, COOL has empowered marketplace competition between domestic beef and foreign beef, which could not and did not occur prior to COOL because imported beef was not differentiated *in any way* from domestic beef.

II. THE WTO IMPROPERLY CONCLUDED THAT COOL LABELS VIOLATE THE WTO'S NATIONAL TREATMENT STANDARD

The WTO's 233-page decision is purposely and necessarily convoluted in order to deceptively legitimize its incongruent and absurd attack on our United States Constitution-based COOL law.

Below we will untwine the WTO's insidious, incongruent, and illegitimate attacks on our constitutionally passed COOL law that informs consumers about where the meat they purchase for their families is produced.

A. The WTO Misapprehends USDA's Limited Jurisdiction Regarding Livestock.

Before we begin, it is important to note that the WTO complaint filed by Canada and Mexico and supported by the multinational meatpackers involves only the treatment of live imported animals, and the entire dispute, therefore, centers on those live imported animals and not on the commodities that are actually covered by the COOL law, such as beef and pork and ground beef and ground pork. (¶¶ 7.65-7.67.) Recall that the COOL law did not grant the U.S. Department of Agriculture (USDA) any jurisdiction over livestock and the USDA addressed this withholding of jurisdictional authority by requiring persons to transmit information and to maintain records regarding the origins of livestock delivered for slaughter, but did not require any labels or markings on livestock. (*See, e.g.*, ¶ 7.282.)

In fact, the COOL law, contrary to the WTO's erroneous finding that to process domestic and imported livestock and meat solely according to price and quality "involves the identification by origin of each and every livestock and piece of meat throughout the supply and distribution chain" (emphasis added) (¶ 7.336), does not require suppliers to identify the origins of each livestock throughout the supply chain. Instead, the COOL law, *e.g.*, allows the person that slaughters livestock (*i.e.*, the packer) to rely solely on official ear tags and foreign brand, or the lack thereof, to initiate an origin claim, thus bypassing completely any need to additionally identify the origins of livestock throughout the livestock's supply chain. (*See* 7 CFR § 65.500

(b)(1) (lacking a foreign brand, packers may use 840 tags and can rely on official foreign ear tags or devices, *i.e.*, foreign brands, as a basis for initiating an origin claim.)

The WTO certainly does not have the authority to hold the USDA accountable for any circumstances that arise outside the scope of the USDA's jurisdictional authority granted by Congress. In this case, and to the extent that any of the WTO's allegations against the COOL law are legitimate, those allegations must necessarily be directed at private participants, which principally are the multinational and market-dominant meatpackers. The effect of holding the USDA or the United States accountable for the behavior of private market participants would be to grant market-dominant meatpackers the ability to willfully behave in a manner that facilitates international complaints against domestic laws, thus providing such multinational meatpackers a circuitous avenue with which to undermine domestic laws they do not like.

As will be discussed more fully below, the WTO's anti-COOL decision hinges largely on the discretionary behavior of multinational meatpackers that oppose the COOL law and that are working in concert with the governments of Canada and Mexico to overturn it.

B. The WTO's Findings are Inconsistent and Based on False Information, Erroneous Assumptions, and Faulty Logic.

1. The WTO fabricates a non-existent distinction between muscle cut labels and ground meat labels

So now we begin. First, the WTO concluded the COOL law violates the WTO's One-World Government standard that prohibits any country from implementing a technical regulation that has the effect of treating imported products less favorably than domestic products (known as the "national treatment" standard). The WTO found:

> [T]he COOL measure, particularly in regard to the muscle cut meat labels, violates Article 2.1 because it affords imported livestock treatment less favourable [sic] than that accorded to like domestic livestock. (¶ 8.3 (b).)

The seemingly unnecessary phrase, "particularly in regard to the muscle cut meat labels," in the WTO's finding reveals the WTO's charade. This is because the WTO did *not* find that our COOL measure, in regard to the ground beef label, violates the WTO's national treatment standard. The WTO stated:

> Accordingly, we find that the complainants [Canada and Mexico] have not demonstrated that the ground meat label under the COOL measure results in less favourable [sic] treatment for imported livestock. (¶ 7.437.)

A brief analysis demonstrates that the WTO's inconsistent and incongruent finding that COOL violates the WTO's national treatment standard with respect to labels required for muscle cuts but not for ground beef is baseless.

The WTO purported to use a three-prong test to conclude that our COOL law violates the national treatment standard in regard to muscle cut labels. First, the WTO found that our COOL law prescribes different categories of muscle cut labels that accord different treatment to imported livestock because, according to the WTO:

> [I]mported livestock is ineligible for the label reserved for meat from exclusively US-origin livestock, whereas in certain circumstance meat from domestic livestock is eligible for a label that involves imported livestock. (¶ 7.295.)

It is important to note that our COOL law reserves a declaration for an exclusively United States origin only for products that are exclusively born, raised, and slaughtered in the United States, and this necessarily applies to ground meat. (*See* 7 CFR § 65.300 (d), (h).) This is because, under the COOL law, ground meat must be derived exclusively from U.S. origin livestock if the United States is declared its sole source of origin. (*See id*.) In practice, there is no way for a ground meat label to circumvent this requirement. Yet, while imported livestock remain ineligible for an exclusively United States origin declaration on ground meat, and ground meat from exclusively domestic cattle remains eligible for a label that involves imported cattle, the WTO nevertheless remains silent and does not address the fact that the functionality of muscle cut labels and ground meat labels is identical with respect to eligibility for an exclusively United States origin declaration.

2. The WTO fabricates a non-existent segregation regime under the COOL law.

The second prong of the WTO's test was whether our COOL law involves segregation and, consequently, differential costs for imported livestock. The United States correctly argued that, long before the COOL law, imported livestock were necessarily excluded from certain origin-based voluntary labeling programs administered by USDA as well as by export requirements imposed by foreign countries under the U.S. beef export verification program (Singapore, *e.g*., disallows any U.S. beef exports that are derived from Canadian cattle. (*See* http://www.fsis.usda.gov/regulations_&_policies/Index_of_Import_Requirements_by_Country/index.asp.)

It is unclear the extent to which the United States may have asserted that beef from Canadian cattle imported for direct slaughter has long been prohibited from the United States National School Lunch program and all other federal procurement programs. As an example, the USDA's Agricultural Marketing Service's April 2005 federal procurement purchasing requirements for meat or meat products provides:

> All meat or meat products used in fulfilling contracts awarded under Announcement LS-120 must be produced in the United States. United States produced (hereafter referred to as U.S.-produced) beef means manufactured from cattle raised in the United States, its territories, possessions, Puerto Rico, or the Trust Territories of the Pacific Islands (hereinafter referred to as the United States). U.S.-produced does not include imported beef or cattle imported for direct slaughter. (emphasis added)

(Announcement LS-120, April 2005, Domestic Products, Section I.F, available at http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5056338.)

The significance of this federal *mandate* in the context of the WTO's decision is that it eviscerates the WTO's basis for its dismissal of the relevance of preexisting U.S. programs that precluded imported livestock. The WTO erroneously concludes:

> [U]nlike the COOL measure, the pre-existing segregation programmes [sic] evoked by the United States are voluntary and exist to the extent that they meet consumer demand, i.e., they are also contingent upon consumers' willingness to pay for the type and quality of beef covered by such programmes [sic]. (¶ 7.411.)

The WTO's conclusion is erroneous. Clearly, the federally mandated domestic product requirements for federal procurement programs that preclude beef from foreign cattle are neither voluntary nor are they contingent upon consumers' (*i.e.*, school children and participants in child nutrition programs) willingness to pay.

But, such facts do not dissuade the WTO from helping Canada, Mexico, and the multinational meatpackers derail the COOL law.

The WTO found the COOL law "does not explicitly require segregation, let alone the segregation of domestic and imported livestock." (¶ 7.315.) Instead, the WTO found the COOL law "prescribes an unbroken chain of reliable country of origin information with regard to every animal and muscle cut." (¶ 7.317.) Based on this finding, the WTO then concludes that, while it is not necessary to segregate foreign cattle to achieve appropriate muscle cut labels, "a practical way to ensure that the chain of reliable information . . . remains unbroken is [] segregation. . ." (¶ 7.320.) However, as discussed above in Section II. A., *supra*, the WTO has misapprehended the COOL law's requirement for *initiating* an origin claim, which is the point at which the chain of reliable information begins. The COOL law's methodology described at 7 CFR 7 CFR § 65.500 (b)(1) that enables packers to initiate an origin claim and further enables a cattle feeder (*i.e.*, a producer) who sells cattle to a packer to initiate an origin claim based on a visual inspection establishes a much more practical way to identify foreign cattle than segregation to ensure the unbroken chain of reliable information for livestock.

So, without a finding that the COOL law requires segregation, and oblivious to the fact that foreign cattle already are precluded from both preexisting voluntary programs and preexisting *mandatory* federal programs, and, further, with only a finding that *one* way to comply with the COOL law is to segregate, the WTO nevertheless concludes that, "for all practical purposes, the COOL measure necessitates segregation of meat and livestock according to origin." (¶7.327.)

Armed with its fabricated conclusion that the COOL law that does *not* require segregation nevertheless necessitates segregation, the WTO proceeds to find a violation of the national treatment standard by determining "whether the segregation of livestock . . . imposes higher costs on imported livestock than on like domestic livestock" (¶ 7.329), and whether those higher costs create "any incentive to process domestic livestock, thus reducing the competitive opportunities of imported livestock. (¶ 7.279.)

The WTO's machinations regarding the word "segregation" is itself telling. Throughout its 233-page ruling, the WTO meticulously defined pivotal terms that guided its anti-COOL conclusions ad nauseam. For example, The WTO expressly defined such ordinary terms as "mandatory" (¶ 7.150), "de facto" (¶ 7.396), "restrictive" (¶ 7.567), "legitimate" (¶ 7. 630), "fulfill" (¶ 7.692), "reasonable" (¶ 7.850), and "uniform" (¶7.876), to name a few. Yet, despite the WTO's definitive conclusion that the COOL law violates the national treatment standard because it imposes "higher segregation costs on imported livestock" (¶ 7.574.), it nevertheless fails to even attempt to define the pivotal term "segregation." The reason for this ominous omission is clear: had the WTO assigned the typical and customary meaning to the term "segregation," (*i.e*., "enforced separation of groups" (Encarta World English Dictionary); "the separation or isolation of a race, class, or ethnic group by enforced or voluntary residence in a restricted area, by barriers to social intercourse, by separate educational facilities, or by other discriminatory means," and "the separation for special treatment or observation of individuals or items from a larger group" (Merriam-Webster)), it would not be able to find that the COOL law even has the effect of such a pejorative term as "segregation."

Instead, while the COOL law neither requires nor has the effect of segregation, the COOL law does require the identification and subsequent differentiation (*i.e*., the "development from one into many" and "the establishment of differences or a difference among two or more things" (Encarta World English Dictionary)). The COOL law differentiates products according to their origin: from the universe of beef, *e.g.*, the COOL law establishes that products are identified and differentiated based on their differing origins.

The COOL law does not require, nor does it have the effect of, segregation. In fact, the COOL law requires only the identification and subsequent differentiation of product based on origin just as the USDA carcass grading system differentiates carcasses and meat from those carcasses according to their grade, without any requirement that either the livestock or the meat be segregated. Moreover, the COOL law actually envisions non-separation and it facilitates such non-separation by allowing the use of a mixed label (Label B) when a meatpacker chooses not to separate domestic livestock from imported livestock during any day's production of meat.

Only under a perverted interpretation of the term "segregation," or, as in this case, by failing and refusing to even define "segregation," could the WTO find that the COOL law causes "segregation."

3. The WTO fabricates phantom and unqualified costs under the COOL law's non-existent segregation regime to undercut the United States free market system.

From here, the WTO's entangled and convoluted logic only deepens. After acknowledging that the COOL law "does not necessarily impose differential implementation costs on imported and domestic products" (¶7.330), it nevertheless pulls from thin air a finding that, "Yet, it is evident that the more origins and the more types of muscle cut labels involved, the more intensive the need for segregation throughout the livestock and meat supply and distribution chain." (¶ 7.331.) This conclusion is absurd when one considers that there are more grades and labels under the

USDA carcass grading program (i.e., Prime, Choice, Select, Standard, and etcetera) than there are origins and COOL labels under consideration by the WTO and these do not require any intensive need to segregate. Nevertheless, such baseless assumptions are only the beginning.

Even after concluding that the COOL law does not prohibit meatpackers from processing livestock according to price and quality, *i.e.*, "based on purely competitive considerations and irrespective of the origin of livestock" (¶ 7.335), the WTO nevertheless imputes its own uninformed and anti-competitive opinion by stating that such a competitive decision "seems a rather costly way of complying with the COOL measure." (¶ 7.336.) Further, the WTO states:

> To ensure the unbroken chain of reliable country of origin information required under the COOL measure, this business scenario [that of making competition-based decisions involving price and quality] involves the identification by origin of each and every livestock and piece of meat throughout the supply and distribution chain. This entails extensive segregation, and relatively high compliance costs at every stage. (¶ 7.336.)

Thus, the WTO has flatly rejected the United States' free market principle that competition can, does, and should drive livestock procurement decisions and further rejects the fact, without any foundation, that the origin of a product is a competitive attribute subject to consumer choice, just as are price and quality considerations. The WTO could not accomplish such a feat with facts, but rather, it had to impute its own uninformed and baseless opinions regarding the functionality of the United States' free market, capitalistic system. Indeed, the WTO's conclusion is based on its unfounded opinion that competitive considerations are overrun by its mischaracterization of the COOL law's identification requirements. As discussed above, the WTO erroneously opines that the identification by origin of each and every livestock and piece of meat throughout the supply and distribution chain "entails extensive segregation, and relatively high compliance costs at every stage." (¶ 7.336; *see also* Sections II. A., *supra*; Section II. B. 2., *supra*.)

As stated above and discussed more fully below, however, the ground meat supply chain is subject to the same identification requirements, but the WTO fails completely to recognize that such requirements exist regardless of whether the meat from livestock is labeled with a muscle cut label or ground beef label.

As an example of the WTO's complicity in assisting the efforts of the multinational meatpackers, Canada, and Mexico to undermine the COOL law, as well as an example of the WTO's unfounded and wrongful assignment of culpability to the COOL law for the willful actions of private actors, the WTO asserts that it found direct evidence that proves the COOL law was causing "a considerable COOL discount" for imported livestock. (¶ 7.356.) The WTO states:

> In fact, there is direct evidence of major slaughterhouses applying a considerable COOL discount of USD 40-60 per head for imported livestock. This proves that major processors are passing on at least some of the additional costs of the COOL measure upstream to suppliers of imported livestock. (¶ 7.356.)

Yet, nowhere does the WTO even attempt to ascertain whether the wholesale price or retail price of the meat actually produced from the allegedly discounted livestock was discounted commensurate with the alleged livestock discount, or if the "major slaughterhouses" were simply opportunists engaged in price gouging. Further, the WTO provides no analysis of whether the alleged discounts were associated with an underlying marketing agreement that one or more packers were simply exploiting while the feeder was prohibited from seeking alternative buyers. Also, the WTO provides no analysis as to what other packers in the same region were offering for imported livestock of similar type and quality.

With ever-increasing retail beef prices and ever-shrinking livestock supplies, it is as likely as not that multinational meatpackers that enjoy tremendous market power in the U.S. livestock market have willfully and without justification discounted imported livestock for the sole purpose of providing Canada and Mexico with evidence, albeit fabricated, with which to undermine the COOL law. Given the WTO has provided no collaborative evidence linking the alleged discount to the COOL law, nor any evidence indicating whether such alleged discounts were commensurate with wholesale or retail prices, it appears the WTO is a willful participant in the meatpackers' unabashed efforts to undermine the COOL law.

4. The WTO establishes a fictitious standard with which to compare the effects of the COOL law.

In yet another illogical leap, the WTO concluded that as between processing either exclusively domestic or exclusively imported livestock, "it seems logical that the scenario of processing exclusively domestic livestock and meat is in general less costly and more viable than processing exclusively imported livestock." (¶ 7.349.) In support of this unfounded claim, the WTO explains that "US livestock demand cannot be fulfilled with exclusively foreign livestock." (¶ 7.349) This, of course, constitutes a fictitious and absurd standard because U.S. livestock demand also has not been, and can not be, fulfilled with exclusively domestic livestock either. The numbers of United States cattle have been insufficient to satisfy domestic consumption of beef for at least the past 40 years, if not longer, and the U.S. has always relied on imports of foreign beef and/or cattle to satisfy the production shortfall of U.S. produced beef. (*See, e.g.*, USDA Foreign Agricultural Service's Production, Supply and Distribution Online (until 2010 U.S. production remained much less than U.S. domestic consumption even though the USDA includes the millions of foreign cattle slaughtered in the U.S. each year (*see* ¶¶7.461-464) in its total domestic production calculation).)

Based on its systematic stacking of one unfounded assumption upon anther, the WTO concluded that the least costly way of complying with the COOL law "is to rely on exclusively domestic livestock" (¶ 7.350.) This, again, is impossible because there is not enough U.S. livestock to even satisfy domestic consumption of beef, let alone U.S. beef export demand. (*See supra.*) Again, by not allowing facts to interfere with its anti-COOL agenda, the WTO concludes that all livestock procurement scenarios involving imported livestock are overall more costly than the approach that involves the exclusive use of domestic livestock, which, yet again, is an impossible approach due to the lack of sufficient U.S. cattle numbers to satisfy domestic consumption, let alone U.S. export demand.

Based on this absurd rationale, the WTO determined that the COOL law "creates a *de facto* incentive in favour [sic] of domestic, and to the detriment of imported livestock." (¶ 7.398.)

5. The WTO fails to quantify *any* cost savings associated with its least-cost approach to compliance with the COOL law and relies on assumptions that are contradicted by marketplace realities.

Importantly, and alarmingly, the WTO did not quantify any cost savings, nor even a range of cost savings, associated with its conclusion that the least costly way to comply with the COOL law, *albeit an impossible way to satisfy domestic beef consumption and U.S. beef export demand*, was to rely exclusively on domestic livestock. Instead, Canada submitted a study asserting that:

> Retailers who propose mixed-origin meat need to sell this meat at a price at least equal or lower than the price of U.S.-origin meat in order to remain competitive with other retailers selling only US-origin meat." (¶ 7.501.)

Though this assertion is completely void of any competitive considerations, *e.g.*, consumer preferences for perceived quality and wholesomeness associated with foreign beef, the WTO nevertheless adopts this assertion as fact and proceeds to layer yet another false assumption – the assumption that U.S. consumers are unwilling to pay a price premium for country of origin labeling (*see* ¶ 7.506) – to conclude first that the COOL law "is likely to cause a decrease in the volume and price of imported livestock" (emphasis added) (¶ 7.506); and, second, that Canada's study "makes a prima facie case that the COOL measure negatively and significantly affected the import shares and price basis of Canadian livestock." (emphasis added) (¶ 7.542.) Note that a *prima facie case* by definition is not a proven case, but this does not interfere with Canada's ultimate conclusion that the COOL law treats foreign cattle less favorably than domestic cattle and violates the WTO trade agreements. (*See* ¶¶ 7.547, 546.)

The WTO's finding that consumers are unwilling to pay a price premium for country of origin labeling is directly contradicted by a 2003 survey conducted by Colorado State University titled, *Country-of-Origin Labeling of Beef Products: U.S. Consumers' Perception*, which stated:

> Survey results indicate that the majority of consumers (73%) were willing to pay an 11% and 24% premium for COOL of steak and hamburger, respectively. (Available at: http://www.r-calfusa.com/COOL/030320-COOL%20Beef%20Products%20Consumers%20Perception%20Survey.pdf.)

The WTO's erroneous assumption underpinning its finding that it is the COOL label on beef, and not the consumer's response to that label, that determines the price and volume of imported livestock cannot be squared with marketplace realities. First, average beef prices have reached new record highs after the 2009 implementation of the COOL law, with USDA reporting that during the past several months, while COOL was in effect, beef prices have continually reached new nominal price records. (*See* http://www.ers.usda.gov/Data/meatpricespreads/index.htm.) This fact provides no basis whatsoever for WTO's claim that consumers are unwilling to pay the additional cost, whatever that cost may be, for having COOL labels on their beef purchases. Moreover, consumers do not need to pay any premium for the labeling of beef products in order for labels to facilitate true competition. When consumers respond to labels through their buying

preferences, they generate demand signals in the marketplace for each differentiated product and it is the consumers' buying choices that determine the price and volume of products sourced from either domestic livestock or imported livestock. There simply is no basis for the premise underlying the WTO's conclusion that consumer preference for domestic beef is identical to their preference for imported beef.

6. The WTO fails completely to consider widely known structural changes to Canada's and Mexico's cattle and beef industries that influence the availability of cattle for export.

In addition, there is no consideration whatsoever by the WTO for the fact that Canada, in response to its significant and lingering disease problem first discovered in 2003, increased its domestic slaughter capacity so it would become less dependent on U.S. slaughtering plants to process its domestic livestock. For example, Statistics Canada reported in 2007 that Canadian slaughter hit record highs that "were fuelled by increase slaughter capacity. . ." (Cattle Statistics 2007, Statistics Canada, Catalogue No. 23-012-XIE, at 8.) This factor alone would significantly reduce the volume of live cattle that Canada would be expected to export to the United States.

Like Canada, Mexico also increased its domestic slaughter capacity by increasing the number of Mexican slaughtering plants eligible to export meat to the United States. *See* http://www.cattlenetwork.com/e-newsletters/drovers-daily/USDA-US-importing-more-beef-from-Mexico--137688303.html. And, like in Canada, this additional slaughter capacity significantly influences (decreases) the number of live Mexican cattle available for export to the United States.

Ultimately, however, the WTO found that:

> [I]n the context of the muscle cut labels, the COOL measure creates an incentive in favour [sic] of processing exclusively domestic livestock and a disincentive against handling imported livestock. Accordingly, we also find that, in the context of muscle cut labels, the COOL measure *de facto* discriminates against imported livestock by according less favourable [sic] treatment to Canadian cattle and hogs, and to Mexican cattle, especially Mexican feeder cattle, than to like domestic livestock. (¶ 7.420.)

And, consequently, the WTO ruled that the COOL law violates the national treatment standard.

7. The WTO misapprehends the identical livestock origin identification requirements associated with all COOL labels except for the exclusively foreign country of label for imported beef commodities.

As mentioned above, however, and as inferred by the WTO's clarification that it is referring to muscle cut labels only, the WTO did not find that the COOL law's ground beef label results in segregation costs that create an incentive in favor of processing domestic cattle only. And, therefore, the WTO concluded that the ground beef label does not violate the national treatment

standard. Moreover, of the four muscle cut labels (*i.e.*, Label A, reserved for USA beef; Label B, reserved for mixed-origin beef; Label C, reserved for beef derived from cattle imported for immediate slaughter; and, Label D, reserved for beef imported as a commodity, which is labeled in accordance with U.S. Customs and Border Protection protocols), the WTO should not have included Label D as among the labels that it believes violates the national treatment standard either. Indeed, Label D has nothing to do with live animal imports that *are* the exclusive focus of the WTO complaint and, therefore, could not be found to violate the national treatment standard in regard to the importation of live animals. (*See supra* ¶¶ 7.65-7.67.)

Thus, the WTO erred by not making the qualification that like ground beef labels, the label determined by U.S. Customs and Border Protection – Label D – reserved for foreign beef, likewise does not violate the national treatment standard.

The WTO further erroneously assumed that because the COOL law specifies only a single label for ground meat, that label was "[u]nlike [the labels] for muscle cuts" and it "applies equally to ground meat of imported and domestic origin." (¶ 7.421.) However, the only dissimilarity between the ground meat label and the muscle cut labels is that when the ground meat label contains the United States and at least one other country, there is no required order for the list of the countries on the label as there is under certain circumstances in regard to Label C, reserved for livestock imported for immediate slaughter. Like muscle cut Label A, reserved for a declaration that the U.S. is the sole country of origin, a ground meat label declaring the U.S. as the sole origin likewise must be associated with meat from livestock exclusively born, raised, and slaughtered in the United States. Like muscle cut Label D, reserved for a single foreign country's declaration, a ground meat label likewise declaring a single foreign country as the origin must be associated with meat that is imported under Label D – as a commodity bearing the U.S. Customs and Border Protection declaration of origin. And, like muscle cut labels B and C, reserved for muscle cuts from multiple countries and muscle cuts from livestock imported for immediate slaughter, respectively, a ground meat label that declares multiple countries of origin likewise must be associated with meat from each multiple country, including meat from livestock imported for immediate slaughter.

Thus, the ground meat label is nearly identical to the muscle cut labels and, as discussed below, the only difference between the ground meat label and the muscle cut labels is the degree to which the ground meat label may inaccurately declare a country of origin of the associated ground meat product that is not actually included in the product. However, like the muscle cut labels, under no circumstances would meat from a country not included on the ground meat label be included in the ground meat product. This is an important distinction, particularly for consumers that may desire to avoid meat from any particular country.

There is no substantive difference between the ground meat label and the three relevant muscle cut labels (i.e., Labels A-C). For both the ground meat label and the three muscle cut labels, the declaration of an exclusive United States origin is only possible if the meat is derived from livestock exclusively born, raised and slaughtered in the United States. (*See supra*, 7 CFR § 65.300 (d), (h).) For a label declaring a United States origin on the ground meat label and for all other relevant labels (*i.e.*, Labels A-C and a ground meat label that includes more than one country) suppliers must maintain the identical "unbroken chain of reliable country of origin

information with regard to every animal and muscle cut" (¶ 7.317) *as well as for each package of ground meat.* This is because an audit of a ground meat package must be able to retrace the unbroken chain of COOL information in order to verify the authenticity of the ground meat package's label.

Now, the WTO found that the maintenance of this "unbroken chain of reliable country of origin information with regard to every animal and muscle cut" resulted in harms to imported livestock. But, even if all imported livestock were destined to be processed into ground meat, they all still would be subject to the same unbroken chain of information that they are subject to if they are destined to be processed into muscle cuts.

The only genuine distinction between the ground beef label and the three muscle cut labels is the requirement imposed on the person that actually processes the ground meat from slaughtered animals or imported commodities, *i.e.*, commodities bearing the U.S. Customs and Border Protection origin declaration. Under the ground meat label regime, the processor that manufactures ground meat must list each source of meat on the ground meat package that was in the processors inventory anytime during the previous 60 days. This means a processor that exclusively uses domestic livestock to produce ground meat that is labeled as an exclusive product of the United States would avoid any costs associated with maintaining an unbroken chain of origin information on imported livestock. Thus, if the WTO's finding with regard to muscle cuts was correct and the least costly way to comply with the COOL law's muscle cut provisions is for a processor to process exclusively domestic livestock, the same would have to be true for the COOL law's ground meat provision.

Further, the 60-day inventory requirement imposed on ground meat purveyors does not alleviate, in theory or in practice, the necessity of maintaining the same unbroken chain of origin information that purveyors of muscle cuts are required to maintain. Indeed, the meat from a single animal can, and most often is, processed into both muscle cuts and ground meat.

The WTO made a fatal error in assuming that because the COOL law specified only one type of label for ground meat, livestock destined to be processed into ground meat would not be subject to the same origin information requirements as are livestock destined for muscle cuts. Indeed, the WTO missed completely the fact that the effect of the COOL law is that like muscle cuts, only ground meat that is exclusively of U.S. origin can bear the sole declaration as a product of the United States. In fact, the requirement is even more rigid for ground meat because the sole U.S. declaration can only be made if the processor has not included any foreign meat in its inventories during the previous 60-day period. The muscle cut labeling regime is far more flexible as a processor can include foreign beef in one days production, resulting in a mixed-origin label, and then revert back to a sole U.S. label the following day simply by not including any foreign beef in that days production.

The WTO's different conclusions in regard to the effects of the COOL law's three relevant muscle cut labels versus its ground meat label, when all labels require the same unbroken chain of origin information, reveal that the WTO's anti-COOL ruling is politically motivated and unjustified with respect to the facts.

8. The WTO's anti-COOL decision constitutes a politically motivated effort to prevent consumers from differentiating U.S. meat from foreign meat.

It is R-CALF USA's opinion that the WTO carved out the ground meat label as being the only label in compliance with the national treatment standard only because it erroneously perceived the ground meat label to function exclusively as a mixed origin label; when, in fact, the ground meat label functions identically to muscle cut labels because it reserves a declaration of a United States origin only for ground meat that is derived exclusively from livestock born, raised, and slaughtered in the United States. It is apparent to R-CALF USA that the WTO's ruling attempts to facilitate a mixed-origin label for all products, *i.e.*, a label that does not distinguish U.S. origin meat from either Mexican or Canadian meat.

R-CALF USA's opinion is supported by the WTO's numerous inferences throughout its ruling indicating that the WTO favored the Interim Final COOL (Interim) rule that would have allowed multinational meatpackers to label exclusively U.S. beef with a mixed-country label at the meatpackers' discretion. For example, the WTO characterized the Interim rule's authorization to use a mixed label even on meat exclusively from domestic livestock as a "major flexibility" (¶ 7.290), an "unqualified flexibility" (¶ 7.360), and it referenced the pre-COOL regime as one in which "domestic and imported livestock were processed according to competitive considerations of price and quality, irrespective of origin" (¶ 7.399), which, again, is a clear indication the WTO fails completely to understand that a product's origin, itself, can be and is a competitive consideration. Then, the WTO proceeds to describe the COOL law as disruptive because, unlike the Interim rule that "did not completely disrupt this pattern [of precluding origin among competitive considerations]" (¶ 7.400), the COOL law closed the loophole contained in the Interim rule that would have allowed domestic meat to be labeled as mixed-origin meat solely at the meatpackers' discretion.

III. THE WTO IMPROPERLY CONCLUDED THAT COOL LABELS ARE UNECESSARILY TRADE RESTRICTIVE

Having concluded that the COOL law fails the national treatment test and, therefore, violates the national treatment standard, a conclusion made possible only by the WTO's application of faulty information, erroneous assumptions, undefined but highly-charged, pejorative terms, and inconsistent analysis of like labels, the WTO then proceeds to conclude that a finding of a violation of the national treatment standard also is an automatic finding that the COOL law violates the One-World Government standard that prohibits a country from adopting a technical regulation that creates unnecessary obstacles to international trade. (*See* ¶ 7.549.) The WTO found that because it already determined that the COOL law affords imported livestock less favorable treatment, the COOL law also must be trade restrictive:

> We therefore conclude that the complainants [Canada and Mexico] have demonstrated that the COOL measure is "trade-restrictive" within the meaning of Article 2.2 by affecting the competitive conditions of imported livestock. (¶ 7. 575.)

Emboldened by its slam-dunk conclusion that the COOL law is trade restrictive, the WTO purports to use another test to determine 1) if the United States' objective in implementing the COOL law is not legitimate; and 2) if it is legitimate, is it more trade-restrictive than necessary. (¶ 7. 558.)

Knowing the political backlash that would immediately occur from countries around the world that, like the United States, have their own country of origin labeling programs, the WTO dared not, and did not, find that the United States' objective of providing information to consumers regarding the origins of the food they purchase for their families was not legitimate. The WTO stated: "[W]e conclude that providing consumer information on origin is a legitimate objective within the meaning of Article 2.2." (¶ 7.651)

Free from the prospect of marginalizing itself as would occur if the WTO concluded the United States' objective for the COOL law – to provide consumers with information about the origins of their meat – illegitimate, the WTO nevertheless continues its machinations in order to delegitimize the United States' legitimate objective by making the incredible claim that the COOL law does not fulfill the objective of providing consumers with origin information. The WTO stated, "[T]he COOL measure does not fulfil [sic] the identified objective within the meaning of Article 2.2 because it fails to convey meaningful origin information to consumers." (¶ 7.719)

A. The WTO's Conclusion that the COOL Law Does Not Fulfill the United States Objective Is Demonstrably False.

The WTO misapprehends the basis for the COOL law's definition of the origin of meat, and further misapprehends the purpose of providing origin information to consumers. Regarding the former, while the WTO properly assumes the definition of origin of meat is "based on the places where animals used to produce meat were born, raised and slaughtered" (¶ 7.675), it erroneously assumes that only by conveying information to consumers regarding the specific country in which each of those specific production steps occurred can the latter purpose be fulfilled.

The COOL law's definition of origin as the country or countries in which an animal was born, raised and slaughtered is recognition of the long biological cycle of livestock and further recognition that during their long biological cycles, livestock can be moved among and between countries. The COOL law does not require the specificity claimed by the WTO to identify in which specific country each segment of the livestock's life cycle occurred. Indeed, the Final COOL rule allows livestock suppliers to <u>voluntarily</u> identify the country in which each specific production step occurred, but does not require that such information be included on a label. (*See* 7 CFR § 65.300 (e)(4).)

The COOL law empowers consumers by providing them with information that enables them to exercise choices in the marketplace. Thus, the ultimate objective of the COOL law is to promote competition in the marketplace. The COOL law clearly accomplishes this objective by differentiating products according to their origins. On one end of the COOL label continuum, consumers who choose to purchase an exclusively imported product can do so by purchasing products differentiated with Label D, which denotes a product that is "100% imported foreign meat." (¶7.100.) On the other end of the COOL label continuum, consumers who desire to

purchase an exclusively domestic product can do so by purchasing products differentiated with Label A, which denotes a product that is 100% domestic. (¶7.100.) In the middle of the continuum, consumers who have no particular inclination to purchase meat from a particular country, but who may nevertheless desire to purchase meat with at least some domestic or some imported element, or who may wish to avoid the possibility of purchasing meat from a particular country, can do so by purchasing meat labeled with either Label B or Label C, both of which denote imported and domestic content and, importantly, both of which exclude meat from any country that is not listed on the mixed origin label. In other words, if a consumer, *e.g.*, chooses to avoid the possibility of purchasing meat from Canada, the consumer can accurately rely on either a Label B or a Label C (provided that both labels list only the United States and Mexico) to be assured that the meat they purchase does not include any Canadian element. Put another way, every COOL label (*i.e.*, each of the four muscle cut labels and the ground meat label) enables consumers to avoid purchasing meat from any country they choose to avoid because none of the labels allow the inclusion of a meat product from a country that is not listed on the label.

The foregoing discussion addresses the WTO's lament that:

> We [the WTO decision makers] do not see how providing general information about the various countries in which an animal has spent time and slaughtered is in keeping with the objective that the United States claims the measure seeks to achieve. (¶ 7.710)

The WTO's claim that the COOL law does not fulfill the objective of providing information that empowers consumers to exercise choices in the marketplace is baseless and absurd.

B. The WTO short-circuited its own analytical process in order to find the COOL law in violation of a prohibition against being unnecessarily trade restrictive.

It is interesting, if not telling, that whereas the WTO excluded the ground meat label from its finding that the COOL law violated the national treatment standard by stating its finding was "particularly in regard to the muscle cut labels" (emphasis added) (¶ 8.3 (b)), it does not appear that the WTO excluded the ground meat label from its finding that the COOL law also violated the standard prohibiting unnecessary trade restrictions. For that standard, the WTO's finding was "particularly with respect to meat products." (emphasis added) (¶ 7.720.)

As ground meat clearly is a meat product (*see, e.g.*, ¶ 7.89 ("ground meat products")), this is perplexing. While the WTO relied exclusively on its findings that the COOL law's muscle cut labels were "trade restrictive" based on its finding that the COOL law imposes "higher segregation costs on imported livestock" (¶ 7.574; *see also* ¶ 7.575), such a finding was not made with respect to ground meat labels. (*See supra*, ¶ 7.437) Therefore, the WTO could not have found that ground meat labels likewise were "trade restrictive." As a result, the WTO's inclusion of ground meat labels as being inconsistent with Article 2.2, which prohibits unnecessary trade restrictions, is unsupported and baseless. Even if the WTO believes, as it does, that ground meat labels do not fulfill the COOL law's objective, the WTO has no authority to cite ground meat labels under Article 2.2 without a finding that ground meat labels are trade restrictive.

Based on the WTO's inconsistent approach to ground meat labels, the effect of the WTO decision is to strike down the COOL law's ground meat label even though the ground meat label was not found to be in violation of the national treatment standard (under Article 2.1) nor could it found to be unnecessarily trade restrictive (under Article 2.2) by the WTO's short-circuiting of its own analytical process. The WTO has provided no basis, fabricated or otherwise, for striking down the ground meat label. Such an outcome should not be tolerated.

Further, and inasmuch as the WTO chose to selectively attack the various meat product labeling regimes contained under the COOL law (*i.e*., ground meat labels versus other meat labels), the WTO provides no basis, fabricated or otherwise, for including muscle cut Labels A or D as among the labels it believes are in violation of Article 2.1 and inconsistent with Article 2.2. Indeed, the WTO's analysis, which focused only on the COOL labels effects on <u>imported live animals</u> (*see supra*, ¶¶ 7.65-7.67), is outside the scope of Label D (which has no imported live animal element) and necessarily outside the scope of Label A (which likewise has no imported live animal element). Thus, the WTO could not have found that either Label A provisions or Label D provisions adversely affected imported live animals within the scope of its analysis.

Thus, only muscle cut Labels B and C fall within the purview of the WTO's decision (though ground meat also falls under this purview, the WTO's inconsistent treatment of ground meat is already discussed above) and, as demonstrated by the foregoing discussion, the WTO's ruling with respect to these labels is based on faulty information and erroneous assumptions. In fact, even if the WTO's analysis were supported by facts, the WTO's ruling constitutes an untenable outcome, which effectively renders the controlling international trade agreements nonsensical and irrational. This is because the WTO's ruling (with respect to Labels B and C) strikes down the COOL law because on the one hand it is too rigid to avoid a violation of one standard within the agreement (the national treatment standard under Article 2.1) while on the other hand it simultaneously strikes down the COOL law because it is too flexible (*i.e*., its flexibility for Labels B and C result in the nullification of the COOL law's objective) and violates another section of the agreement (Article 2.2). An agreement in which the same set of facts produces two conflicting outcomes, as is the case here (*i.e*. citations for being too rigid and too flexible), exemplifies an unenforceable agreement that must be ignored, if not fully rescinded.

IV. SUMMARY AND RECOMMENDATIONS

The WTO has employed inexplicable tactics to undermine the COOL law. It wrongfully ignores the United States' limited jurisdiction with respect to the COOL law and wrongfully assigns culpability to the United States for actions perpetrated by multinational meatpackers. It fabricates non-existent distinctions between the COOL law's various labeling regimes; it fabricates a non-existent segregation regime and then assigns phantom, unqualified costs to its fabricated segregation regime to undercut our free market system; it establishes fictitious standards with which to fault the COOL law and, without quantifying any costs, adopts assumptions that are clearly contradicted by marketplace realities; it fails to consider major structural changes that directly impact trade flows; it ignores the basic tenants of the COOL law that ubiquitously requires all livestock to be identified as to origin; it short-circuits its own analytical process for

the purpose of attacking the COOL law; and, its actions constitute a politically motivated effort to deprive U.S. citizens of critical information regarding the origins of their food.

The United States must aggressively appeal the WTO's reprehensible attack on our domestic COOL law and must send a strong signal to the WTO indicating the United States will not tolerate the international tribunal's complicity in the underhanded effort by the multinational meatpackers, Canada, and Mexico to undermine our constitutionally-passed COOL law.

Anything less would be an abrogation of the United States absolute duty to defend the United States Constitution, and by extension United States laws passed under the Constitution, against any and all threats, whether domestic or foreign, against the sovereignty of the United States of America.

During the pendency of the United States appeal of the WTO's ruling, the United States Department of Agriculture should expeditiously undertake a new rulemaking to strengthen the COOL law by removing the loopholes contained in the COOL law that were included for the express purpose of accommodating the unreasonable requests of the multinational meatpackers, Canada, and Mexico to allow meat that is exclusively of U.S. origin to nevertheless bear a mixed country of origin label. The new rulemaking should further restrict the ground meat label to only those countries from which the meat product bearing the ground meat label was actually sourced. In addition, the new rulemaking should expand the scope of products required to be labeled to include all product sold at retail, regardless of the retailer's size, as well as all food products sold at food service establishments. Finally, the new rulemaking should require all processed foods and ingredients to processed foods to be labeled as to their country of origin.