NOTES

THE TBT AGREEMENT'S FAILURE TO SOLVE U.S.–COOL

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I. INTRODUCTION

Country of origin labeling (COOL) has a long history in the United States. The first COOL law was implemented in 1890 as part of the McKinley Tariff Act, which required labels on all articles of foreign manufacture.[1] House Committee reports demonstrate that the lawmakers who passed the McKinley Tariff Act freely admitted the law was meant to establish preferential treatment for domestic goods.[2] Today, meat, seafood, and raw food products require country of origin labels,[3] and lawmakers claim the purpose is to meet consumers' demand for information.[4]

Regardless of its purpose, COOL creates obstacles for producers engaged in international trade, and these obstacles are exactly why the World Trade Organization (WTO) was formed.[5] Nations frustrated by barriers to trade initially addressed their concerns in the General Agreement on Tariffs and Trade (GATT),[6] which promoted free trade by requiring nations to treat all trading partners equally.[7] In 1979, members to the GATT established the Technical Barriers to Trade Agreement (TBT Agreement)[8] to further ensure that technical regulations would not create unnecessary obstacles between trading nations.[9] However, the TBT Agreement leaves room for trading nations to pursue public objectives, like the protection of human health and safety, and environmental concerns.[10] In furthering these objectives, the

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[1] McKinley Act of 1890, ch. 1244, § 6; *see also* Peter Chang, *Country of Origin Labeling: History and Public Choice Theory*, 64 FOOD & DRUG L.J. 693, 695 (2009) (describing the purpose and implementation of the first COOL laws and practices enacted in the U.S.).

[2] Chang, *supra* note 1, at 696.

[3] 7 U.S.C. § 1638a (2012).

[4] *See* Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18, 24 (D.C. Cir. 2014) (en banc) (stating that the "[s]upporting members of Congress identified the statute's purpose as enabling customers to make informed choices based on characteristics of the products they wished to purchase").

[5] *See* WORLD TRADE ORGANIZATION [WTO], UNDERSTANDING THE WTO 9–10 (5th ed. 2015), *available at* https://www.wto.org/english/thewto_e/whatis_e/understanding_e.pdf (explaining the purposes of the WTO).

[6] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

[7] WTO, *supra* note 5, at 10–11.

[8] Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120 [hereinafter TBT Agreement], *available at* http://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm.

[9] UNDERSTANDING THE WTO, *supra* note 5, at 31; *Technical Information on Technical Barriers to Trade*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/tbt_e/tbt_info_e.htm.

[10] UNDERSTANDING THE WTO, *supra* note 5, at 31.

WTO allows countries to use potentially invalid "technical regulations" under the TBT, as long as the regulations are not "more trade-restrictive than necessary to fulfil [sic] a legitimate objective."[11]

Despite the permissive exception for regulations aimed at consumer protection, the U.S.' COOL regulations for packaged meat have not avoided legal challenges. Since their adoption, Canada and Mexico have each brought two separate challenges arguing that COOL violates the TBT Agreement.[12] At the time of the first complaint,[13] COOL required labels to include information regarding whether meat was exclusively from the U.S., exclusively foreign, or of mixed origin.[14] Canada argued these requirements violated both the GATT and the TBT Agreement because they treated imported products less favorably than domestic products.[15] A WTO compliance body agreed that COOL violated the TBT Agreement, as the labeling requirements were not necessary to fulfill a legitimate purpose.[16] The U.S. appealed this decision to the WTO's Appellate Body, but was unsuccessful.[17]

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[11] TBT Agreement, *supra* note 8, art. 2.2. Consumer demand for information has consistently been recognized as a legitimate objective for regulations that discriminate against trade. Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuan Products*, WT/DS381/R, ¶¶ 7.379–.623 (Sept. 15, 2011) [hereinafter Panel Report, *U.S.–Tuna II*] (finding a legitimate objective in consumers' interest to know whether tuna had been collected using dolphin-safe nets).

[12] *See* Charles Abbott, *New U.S. Meat Label Rule Survive Challenge by Meat Packers*, REUTERS (Sept. 11, 2013, 2:04 PM), http://www.reuters.com/article/2013/09/11/usa-meat-labeling-idUSL2N0H71H320130911#fvOqGzjKM2J8gkcz.97 (describing the challenges to COOL regulations by Canada and Mexico).

[13] Canada initiated the first complaint by requesting consultations with the U.S. on December 1, 2008. Request for Consultations by Canada, *United States – Certain Country of Origin Labeling (COOL) Requirements*, WT/DS384/1 (Dec. 1, 2008).

[14] Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, 74 Fed. Reg. 2658 (Jan. 15, 2009) [hereinafter 2009 Mandatory Country of Origin Labeling] (to be codified at 7 C.F.R. pt. 60 and 65).

[15] Request for Consultations by Canada, *supra* note 13.

[16] Panel Report, *United States – Certain Country of Origin Labelling (COOL) Requirements*, ¶ 7.720, WT/DS384/R, WT/DS386/R (Nov. 18, 2011) [hereinafter Panel Report, *U.S.–COOL*]. At the request of the U.S., the Panel issued two reports in the form of a single document that utilizes separate document numbers and symbols for Canada (WT/DS384) and Mexico (WT/DS386) to denote its specific conclusions and recommendations for each respective complainant. *Id.* ¶ 2.11.

[17] Appellate Body Report, *United States – Certain Country of Origin Labelling (COOL) Requirements*, ¶ 349, WT/DS384/AB/R, WT/DS38/AB/R (June 29, 2012) [hereinafter Appellate Body Report, *U.S.–COOL*]. At the request of the U.S., the Appellate Body issued two reports in the form of a single document with common descriptive and analytical sections,

Based on the Appellate Body's ruling, the U.S. revised its labeling requirements.[18] These amended COOL measures required point of origin information regarding where an animal was born, raised, and slaughtered.[19] While the U.S. believed the amended regulations would bring them into compliance with the WTO, Canada argued that the amendments to the regulations were more restrictive and harmful to trade than the previous regulations.[20] Canada once again challenged the COOL measures, and the WTO again invalidated the regulations.[21] With Canada threatening retaliation, the U.S. appealed the decision.[22] In May 2015, the WTO Appellate Body responded by upholding the Panel's decision in a ruling that may lead to the repeal of COOL regulations altogether.[23]

This Note argues that this entire controversy could have been avoided if the original WTO Panel and Appellate Body reports had not counterintuitively implied that increasing the amount of information collected and conveyed to consumers might justify the COOL measures. In doing so, it will examine the WTO's review of the TBT Agreement challenges, and determine whether the approach is effective in carrying out the Agreement's overriding purpose. Part II provides information about the history and purpose of the TBT Agreement, and explains the review process utilized by the WTO compliance bodies that hear disputes between member

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and separate sections containing specific findings and conclusions for Canada (WT/DS384) and Mexico (WT/DS386) respectively. *Id.* ¶ 15.

[18] Alan Bjerga & Jen Skerritt, *Tighter U.S. Rule on Imported Meat May Cost $192 Million*, BLOOMBERG (May 23, 2013, 8:00 PM), http://www.bloomberg.com/news/2013-05-23/u-s-tightens-country-of-origin-meat-labeling-after-wto-ruling.html (quoting statement of U.S. Sec'y of Agriculture Tom Vilsack) ("USDA remains confident that these changes will improve the overall operation of the program.").

[19] 2013 Mandatory Country of Origin Labeling, *supra* note 18, at 31368.

[20] *See* Nirmala Menon, *WTO Panel Decides Against U.S. in Meat-Labeling Dispute*, WALL ST. J., Aug. 21, 2014, http://online.wsj.com/articles/wto-panel-decides-against-u-s-in-meat-labeling-dispute-1408645566 (explaining Canada and Mexico's claims to the WTO regarding the new U.S. COOL regulations).

[21] Panel Report, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/RW, WT/DS386/RW (Oct. 20, 2014) [hereinafter Panel Report, *U.S.–COOL II*].

[22] *See* Tom Miles & Krista Hughes, *U.S. Risks Trade Sanctions in WTO Meat Label Dispute*, REUTERS (Oct. 20, 2014, 8:22 PM), http://www.reuters.com/article/2014/10/21/us-wto-usa-food-idUSKCN0I91J420141021 (explaining Canada's opposition to the U.S. COOL regulations and the U.S.'s continued support of those regulations); *see also* Menon, *supra* note 20 (reporting that Canada threatened to retaliate with punitive tariffs to recoup their losses estimated at $911.5 million annually).

[23] *WTO Upholds Key Rulings Against COOL, Dealing Definitive Blow to U.S.*, INSIDE U.S. TRADE'S DAILY REP., May 19, 2015, *available at* 2015 WLNR 14614575; *House Agriculture Committee Approves COOL Repeal Bill After WTO Ruling*, INSIDE U.S. TRADE, May 22, 2015, *available at* 2015 WLNR 15216788.

nations. Part II also provides a history of the U.S.–COOL dispute. Part III analyzes whether the review process achieves the objectives of the TBT Agreement by considering the Agreement's application in *U.S.–COOL*. Part IV concludes that the current application of the "legitimate objective" analysis does not achieve the purpose of the TBT Agreement, and that the analysis must be modified to prevent future trade-restrictive regulations.[24]

II. LEGAL FRAMEWORK FOR THE EVALUATION OF INTERNATIONAL TRADE DISPUTES

A. The Technical Barriers to Trade Agreement

Prior to establishing the WTO, unnecessary technical requirements made trade difficult, causing some nations to call for change.[25] GATT was the first major attempt at creating cooperation between nations in international trade matters.[26] It established the "General Most-Favored-Nation Treatment" principle, which provided that any privilege granted to one trading partner must be similarly granted to all other GATT members.[27] In 1979, countries established the TBT Agreement in order to further specify the meaning of the GATT and better prevent the adoption of protectionist regulations by clarifying the exceptions for the protection of human health and safety.[28] In 1995, the WTO was officially formed and the TBT Agreement was incorporated into its jurisdiction.[29] Since that time, the WTO has strengthened the TBT Agreement and made it an integral restriction on non-tariff measures that affect trade.[30]

Currently, the TBT Agreement aims to eliminate regulations that unnecessarily burden trade between nations.[31] Article 2.1 states that "Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no

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[24] TBT Agreement, *supra* note 8.

[25] UNDERSTANDING THE WTO, *supra* note 5, at 31.

[26] *Id.*

[27] *Id.* at 10–12.

[28] *See* Norbert L.W. Wilson, *Clarifying the Alphabet Soup of the TBT and the SPS in the WTO*, 8 DRAKE J. AGRIC. L. 703, 707–08 (2003) (describing the history and establishment of the TBT Agreement); *see also* TBT Agreement, *supra* note 8, pmbl. (stating the reasons for the TBT Agreement implementation).

[29] WTO, THE WTO AGREEMENT SERIES: TECHNICAL BARRIERS TO TRADE 5 (2014), *available at* https://www.wto.org/english/res_e/publications_e/tbttotrade_e.pdf.

[30] Wilson, *supra* note 28, at 704–05.

[31] THE WTO AGREEMENT SERIES: TECHNICAL BARRIERS TO TRADE, *supra* note 29.

less favourable than that accorded to like products of national origin and to like products originating in any other country."[32] However, the TBT Agreement leaves room for trading nations to pursue legitimate objectives.[33] While Article 2.2 does not define legitimate objectives, it provides a list of illustrative examples including national security, the prevention of deceptive practices, protection of human health and safety, protection of animal and plant health, and protection of the environment.[34]

B. Interpreting the TBT Agreement

All disputes between WTO member nations arising under the TBT Agreement are settled by the WTO's Dispute Settlement Body (DSB).[35] If a member believes another member is violating the Agreement, it may initiate the dispute resolution process by requesting consultations between the countries.[36] If consultations fail, the member may request a panel be appointed by the DSB to settle the dispute.[37] Panel proceedings are governed by the 1994 Dispute Settlement Understanding (DSU).[38] The DSU states that panels should interpret agreements "in accordance with customary rules of interpretation of public international law."[39]

The customary rules that the DSU refers to are the rules established at the Vienna Convention on the Law of Treaties (Vienna Convention).[40] The Vienna Convention establishes that treaties should be interpreted according to the ordinary meaning of the text and "in light of [the treaty's] object and

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[32] TBT Agreement, *supra* note 8, art. 2.1.

[33] *Id.* art. 2.2.

[34] *Id.* The list of examples provided in Article 2.2 is not exhaustive; that is, it merely serves as a reference point for evaluating other objectives. Appellate Body Report, *U.S.–Tuna II*, ¶ 313, WT/DS381/AB/R (May 16, 2012).

[35] *See generally* UNDERSTANDING THE WTO, *supra* note 5, at 55–58 (describing the settlement dispute process of the TBT Agreement).

[36] *Id.* at 56.

[37] *Id.*

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

[39] *Id.* art. 3.2.

[40] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]; *see also* Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, at 17, WT/DS2/AB/R (Apr. 29, 1996) (finding that the "general rule of interpretation" set out in Article 31 of the Vienna Convention has reached the level of customary international law); Appellate Body Report, *Japan – Taxes on Alcoholic Beverages II*, at 10–12, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4, 1996) (reaffirming the use of the Vienna Convention to define the customary rules).

purpose."[41] Thus, any interpretation of the TBT Agreement should be consistent with its object and purpose.

The preamble of the TBT Agreement states one of the purposes of the Agreement is to ensure that technical regulations "do not create unnecessary obstacles to international trade."[42] However, the Agreement also recognizes that "no country should be prevented from taking measures necessary . . . for the prevention of deceptive practices," and that the WTO will not invalidate those regulations unless they "constitute a means of arbitrary or unjustifiable discrimination between countries."[43] Together, these provisions allow countries to implement certain technical regulations as long as those regulations are not discriminatory.[44]

C. Unjustifiable Discrimination

Claims of unjustifiable discrimination under Article 2 of the TBT Agreement first require a determination that the measure in question is a "technical regulation."[45] A technical regulation is a "[d]ocument which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions. . . ."[46] Labeling requirements fall within this definition.[47] Next, the panel must determine that the products at issue are "like products,"[48] which depends on the nature and extent of the competitive relationship between products.[49] Finally, the panel must determine if foreign products receive less favorable treatment than similar domestic products as a result of the technical regulation.[50] If competition is adversely affected to the detriment of the producer of the

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[41] Vienna Convention, *supra* note 40, art. 31.

[42] TBT Agreement, *supra* note 8, pmbl.

[43] *Id.*

[44] Panel Report, *European Communities – Trade Description of Sardines*, ¶¶ 7.119–.120, WT/DS231/R (May 29, 2002) [hereinafter Panel Report, *EC–Sardines*].

[45] PEROS C. MAVROIDIS ET AL., THE LAW OF THE WORLD TRADE ORGANIZATION (WTO): DOCUMENTS, CASES & ANALYSIS, AMERICAN CASEBOOK SERIES 264 (2010).

[46] TBT Agreement, *supra* note 8, Annex 1, para. 1.

[47] *Id.*

[48] *Id.* art. 2.1.

[49] Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 99, WT/DS135/AB/R (Mar. 12, 2001); *see also* Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, ¶ 7.248, WT/DS406/R (Sept. 2, 2011) [hereinafter Panel Report, *U.S.–Clove Cigarettes*] (concluding that clove cigarettes and menthol cigarettes are like products for the purpose of Article 2.1).

[50] TBT Agreement, *supra* note 8, art. 2.1.

imported products, then the panel deems the regulation as providing less favorable treatment.[51]

The analysis does not end there. The panel must still determine whether the regulation is justified under Article 2.2.[52] This analysis requires the panel to identify the regulation's purpose and determine if that purpose is a "legitimate objective."[53] If there is no legitimate objective, then the regulation violates Article 2.2.[54] Legitimate objectives detailed in Article 2.2, include national security, the prevention of deceptive practices, protection of human health and safety, protection of animal and plant health, and protection of the environment.[55]

Of particular relevance to this Note is the fact that pervious WTO panels have found that meeting consumer demand for information is a legitimate objective in the context of food labeling requirements.[56] Specifically, these panels reasoned that such technical regulations aided in preventing deceptive consumer practices—an objective explicitly enumerated in Article 2.2.[57] Merely finding a legitimate objective, however, is not sufficient to justify the regulation under Article 2.2.

After finding a legitimate objective, the panel must decide whether the technical regulation is "more restrictive than necessary" to achieve that objective.[58] If the regulation is more restrictive than necessary, the panel will deem it an unnecessary obstacle to trade in violation of the TBT Agreement.[59] When making its decision, the panel considers whether a regulation makes a "material contribution" to achieving the objective and whether there are "less-trade [sic] restrictive alternatives" that would make an equal contribution.[60] Article 2.2 notes that this analysis should account

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[51] Panel Report, *U.S.–Clove Cigarettes*, *supra* note 49, ¶ 7.208.

[52] TBT Agreement, *supra* note 8, art. 2.2.

[53] *Id.*

[54] Wilson, *supra* note 28, at 710.

[55] TBT Agreement, *supra* note 8, art. 2.2.

[56] Panel Report, *U.S.–Tuna II*, *supra* note 11, ¶¶ 7.379–.623.

[57] *Id.* ¶ 4.88 (stating that dolphin-safe labeling requirements warn consumers about tuna caught with nets not safe for dolphins and encourage fishermen to use dolphin safe fishing methods).

[58] *Id.* ¶ 7.388 (calling for a two-step analysis to determine whether the technical regulation pursues a legitimate objective and whether the regulation is more trade restrictive than necessary to achieve that objective).

[59] Wilson, *supra* note 28, at 710.

[60] Panel Report, *U.S.–Clove Cigarettes*, *supra* note 49, ¶¶ 7.326, 7.325–.432 (finding that a ban on clove cigarettes made a material contribution to the objective of reducing youth smoking, and that there was no proof that less restrictive measures would have the same effect); *see also* Panel Report, *U.S.–Tuna II*, *supra* note 11, ¶¶ 7.379–.623 (finding that less

for the risks of non-fulfillment of the objective by considering available technical and scientific information, technology, and end-uses of the product.[61] If risks of non-fulfillment are too great then the panel may decide the regulation is not more restrictive than necessary.[62]

III. HISTORY OF THE U.S. COOL DISPUTE

A. COOL Legislation in the United States

1. Congressional Enactment

COOL was established as part of the 2002 Farm Bill,[63] which required suppliers of certain foods to provide country of origin information to retailers, and further required retailers to inform consumers of the information.[64] The U.S. Department of Agriculture (USDA) charged the Agricultural Marketing Service (AMS) with implementing COOL requirements, and the AMS published its final rule detailing the requirements in 2005.[65] However, Congress elected to delay implementation of COOL and, in the interim, passed the 2008 Farm Bill.[66] As a result, the AMS published a new rule in 2009, which stated that labels must provide whether meat comes exclusively from the U.S., exclusively from a foreign country, or whether it has mixed origin.[67]

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restrictive alternatives to the dolphin-safe labeling requirements would achieve the same level of protection against consumer deception).

[61] TBT Agreement, *supra* note 8, art. 2.2.

[62] *Id.*

[63] *See* DANIELLE GUNN & C. WILSON GRAY, UNIV. OF IDAHO EXTENSION, PUB. NO. C15 1146, COUNTRY OF ORIGIN LABELING (COOL) AND LIVESTOCK PRODUCERS 1 (2009), *available at* http://www.cals.uidaho.edu/edcomm/pdf/CIS/CIS1146.pdf (describing the inception of the COOL requirements).

[64] Covered commodities include meats, fish, shellfish, nuts, fruits, and vegetables. 7 U.S.C. § 1638(a).

[65] MELVIN S. DROZEN & ALISSA D. JIJON, A BRIEF HISTORY AND OVERVIEW OF COUNTRY OF ORIGIN LABELING REQUIREMENTS (Jan. 2, 2014), *available at* https://www.khlaw.com/A-BRIEF-HISTORY-AND-OVERVIEW-OF-COUNTRY-OF-ORIGIN-LABELING-REQUIREMENTS.

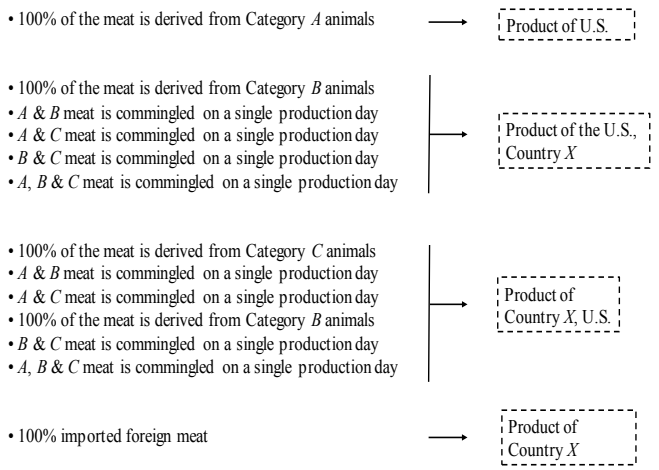
[66] *Id.*

[67] 2009 Mandatory Country of Origin Labeling, *supra* note 14.

2. Key Provisions and Requirements

Four types of labels existed under the regulation.[68] Label A applied to meat derived from livestock exclusively born, raised, and slaughtered in the U.S.[69] Label B applied to meat from countries of mixed origin.[70] Label C was used for meat derived from livestock imported into the U.S. for immediate slaughter.[71] Label D was used for meat when the animals were neither born, raised, nor slaughtered in the U.S.[72]

The regulations also allowed labeling of commingled meat, which included meat from different categories that was commingled in a processing facility during a single production day. The chart below represents the regulations under the original labeling system:[73]



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[68] *Id.* at 2659.

[69] *Id.*

[70] *Id.* The mixed origin label applied to meat that was not exclusively from the U.S. or meat that was born, raised, or slaughtered in the U.S., but not imported into the U.S. for immediate slaughter. *Id.*

[71] *Id.*

[72] *Id.*

[73] Appellate Body Report, *U.S.–COOL*, *supra* note 17, ¶ 247.

B. International Challenges to COOL Legislation

1. The Initial Challenge: U.S.–COOL I

In 2008, Canada alerted the WTO to its concerns regarding the validity of COOL for packaged meat.[74] Canada argued that the regulations violated both the GATT and the TBT Agreement.[75] The Panel agreed, finding that COOL violated Article 2.1 of the TBT Agreement because the measures accorded less favorable treatment to imported meat as compared to like domestic meat products.[76] The Panel also determined that COOL violated Article 2.2, in part, because the measures did not fulfill the regulation's stated purpose of providing consumers information and preventing deception.[77] The labels lacked meaningful information that would allow consumers to make informed purchasing decisions.[78] For example, a mixed origin label notified consumers that their meat was derived from Country *X* and Country *Y*, but it did not explain which part of the process took place in which country.[79] As a result, more accurate information was necessary to adequately inform consumers and fulfill the purpose of the regulation.[80]

Importantly, the Panel did recognize the regulation achieved some degree of success. Specifically, it found that the labels provided better information to consumers than the consumers would have had prior to the implementation of the regulations.[81] Nonetheless, since the COOL measures did not fulfill their legitimate purpose, the Panel ultimately concluded the measures were in violation of Article 2.2.[82] Additionally, since the Panel had already invalidated the regulation, it did not go on to decide whether the regulation was more restrictive than necessary to achieve its purpose.[83]

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[74] Request for Consultations by Canada, *supra* note 13.

[75] *Id.*

[76] Panel Report, *U.S.–COOL*, *supra* note 16, ¶¶ 7.546–.548 (relying on a Canadian study that found a significant negative impact on the import of Canadian livestock as a result of COOL regulations).

[77] *Id.* ¶ 7.720.

[78] *Id.* ¶ 7.718.

[79] *Id.* (explaining that certain labels are "confusing in terms of the meaning of multiple country names").

[80] *Id.* ¶ 7.715.

[81] *See id.* (stating that COOL provides more information to consumers than existed previously).

[82] *Id.* ¶ 7.719.

[83] *Id.*

In 2012, the U.S. appealed the Panel's decision that COOL measures violated the TBT Agreement.[84] On appeal, the Appellate Body upheld the Panel's ruling that COOL violated the TBT Agreement, but disagreed with the Panel's reasoning.[85] The Appellate Body found that the Panel should have decided whether the detrimental impacts on foreign products resulted from discrimination or from a legitimate regulatory distinction.[86] Although it went on to complete this analysis, it still determined that COOL violated Article 2.1 because the detrimental impacts did not result from a legitimate distinction.[87] Instead, the detriment occurred because the regulation placed disproportionate burdens on upstream producers to track and record country of origin information,[88] which led most producers to process exclusively domestic livestock in order to avoid the record-keeping costs.[89] Since the regulation's detrimental impact was not sufficiently related to the legitimate objective of conveying information to consumers, the COOL measures remained in violation of Article 2.1 of the TBT Agreement.[90]

Notably, however, the Appellate Body reversed the Panel's ruling that COOL was inconsistent with Article 2.2.[91] It explained that the Panel improperly required proof that "either all of the labels had to provide 100% accurate and clear information, or that the COOL measure had to meet or surpass some minimum threshold."[92] Instead, the Panel should have evaluated the degree of contribution the regulations made in fulfilling their purpose,[93] and should not have required the regulations to fulfill their objective "completely."[94]

The Appellate Body also noted that even though the Panel found less restrictive alternatives were available, it still should have gone through a full analysis under Article 2.2 to decide whether the regulations were more trade

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[84] Appellate Body Report, *U.S.–COOL*, *supra* note 17, ¶ 1 (explaining that the U.S., Canada, and Mexico all appealed the Panel's decision for various reasons).

[85] *Id.* ¶ 293.

[86] *Id.* (noting that the Panel's analysis was "incomplete").

[87] *Id.* ¶ 349.

[88] *Id.* ¶ 347.

[89] *Id.* ¶ 287.

[90] *Id.* ¶ 349.

[91] *Id.* ¶ 468.

[92] *Id.* ¶ 467. *See also id.* ¶ 468 (explaining the panel must have relied on this reasoning because the labels provided some valuable consumer information).

[93] *Id.* ¶ 461 (explaining that the degree of achievement "may be discerned from the design, structure, and operation of the technical regulation, as well as from evidence relating to the application of the measure").

[94] *Id.* ¶ 468.

restrictive than necessary to achieve COOL's purpose.[95] Unfortunately, the Appellate Body could not complete the "more restrictive than necessary" analysis because the record on appeal did not provide a sufficient basis for the decision.[96] The fact that the regulations created a disproportionate burden on upstream producers suggested the regulations might be overly restrictive, but the Appellate Body refused to decide the issue.[97] In doing so, the Appellate Body left open the question as to whether COOL was more restrictive than necessary, and suggested that COOL measures might be made valid under the TBT Agreement.

2. Revising the Rule: The United States' Response to the WTO Ruling

Based on the Appellate Body's ruling, the U.S. revised its labeling requirements in 2013.[98] The amended regulation modified the previous COOL measures by expanding the amount of required information on labels. Under the amended COOL regulations, meat labels were required to provide in which country an animal was born, raised, and slaughtered.[99] These requirements differed from the original COOL measures, which allowed for mixed origin designation.[100] Instead, retailers acting under the amended measures had to provide specific point of production information.[101]

As a result of the amendments, several of the Appellate Body's concerns were seemingly remedied. For example, in *U.S.–COOL*, both the Panel and Appellate Body found the original COOL measures placed a disproportionate burden on upstream producers to track information, and encouraged U.S. retailers to buy exclusively domestic meat.[102] The amended COOL measures, however, attempted to remedy imposing record-keeping costs on all producers, regardless of an animal's country of origin. In theory, this should have eliminated the incentive to buy exclusively domestic livestock because the price of domestic livestock would similarly reflect the costs of record keeping under amended COOL. The U.S. likely believed that if the disadvantages to imported livestock were eliminated, then less favorable treatment would also be eliminated.

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[95] *Id.* ¶ 469.
[96] *Id.* ¶ 491.
[97] *Id.*
[98] 2013 Mandatory Country of Origin Labeling, *supra* note 18.
[99] *Id.* at 31368.
[100] 2009 Mandatory Country of Origin Labeling, *supra* note 14, at 2659.
[101] Panel Report, *U.S.–COOL II*, *supra* note 21, ¶ 7.18.
[102] Appellate Body Report, *U.S.–COOL*, *supra* note 17, ¶ 287.

The U.S. also believed that the amended regulations would resolve the Panel's original finding that the detrimental impact on imported products was not the result of a legitimate regulatory distinction.[103] The Panel previously concluded that the detrimental impact on imported livestock was not the result of legitimate regulatory distinction because much of the information collected by upstream producers was not actually passed on to the consumer.[104] In part, it recognized that the information was not passed on to the consumer due to exceptions in the regulations.[105] These exceptions left a large portion of the meat industry entirely excluded from COOL regulations. Nonetheless, producers were still required to track information for all of their livestock since they had no way of knowing where or how the meat would eventually be sold. This unnecessary tracking created costs and led to a detrimental impact on imported livestock that could not be deemed legitimate.[106]

Furthermore, even when the original labels conveyed information to consumers, the information provided did not correspond to the amount of information that producers were obligated to track under the original COOL measures.[107] Producers complying with the original COOL measures had to keep records of where livestock was born, raised, and slaughtered in order to provide retailers with the necessary origin information. However, the original measures did not include all of this information on labels, and instead arbitrarily listed countries of origin without providing which stage of the production process occurred in which country.

The U.S. believed that amending the COOL measures to include the stages of production would solve this unfair burden on producers because consumers would actually see all of the information collected.[108] This

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[103] 2013 Mandatory Country of Origin Labeling, *supra* note 18, at 31367.

[104] The Appellate Body did not find sufficient information in the record on appeal to decide the issue, but it noted that evidence suggested the regulations were more trade restrictive than necessary to fulfill a legitimate purpose. Appellate Body Report, *U.S.–COOL*, *supra* note 17, ¶ 491.

[105] The original regulations exempted entities that were not considered retailers, ingredients in processed food items, and products served at food-service establishments. 7 U.S.C. § 1638(a).

[106] The amended regulations did not modify the exceptions to COOL, and for this reason the Panel in *U.S.–COOL II* still found the detrimental impact did not result from a legitimate regulatory distinction. Panel Report, *U.S.–COOL II*, *supra* note 21, ¶ 7.272.

[107] Appellate Body Report, *U.S.–COOL*, *supra* note 17, ¶ 349.

[108] The *U.S.–COOL II* Panel found that the amended measures still provided confusing information to consumers because livestock raised in more than one country could be labeled as raised exclusively in the U.S. if the U.S. served as at least one of the countries where the livestock was raised. *See* Panel Report, *U.S.–COOL II*, *supra* note 21, ¶ 7.354. The confusing nature of some labels coupled with the exceptions for processed foods and food-service

decision was understandable considering that the Panel and Appellate Body in the original *U.S.–COOL* dispute found that the amount of information on the original labels was inadequate. The ruling suggested that putting more information on labels might remedy the problem and the U.S. seized the opportunity to try to retain its COOL measures.

3. Dispute Renewed: U.S.–COOL II

Almost immediately after the U.S. adopted the amended regulations, producers of imported livestock expressed their belief that the regulations did not meet WTO standards and discriminated against imported products even more than the original regulations.[109] The Canadian government agreed with these industry groups and requested formation of a WTO panel to evaluate the amended COOL measures.[110] In 2014, the *U.S.–COOL II* Panel found the amended COOL measures continued to violate Article 2.1 of the TBT Agreement.[111]

The Panel in *U.S.–COOL II* found that the amended regulations still treated imported products less favorably than domestic products, and no legitimate regulatory reason justified the distinction.[112] Not only did segregation still exist under the amended measures, but it increased after the U.S. eliminated the commingling flexibility of the original regulations.[113]

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establishments led the Panel to conclude that the detrimental impact on imported livestock was not due to a legitimate regulatory distinction. *Id.* ¶¶ 7.282–.283.

[109] *See* North American Meat Institute, *Burdensome Country-of-Origin Labeling Rule Will Not Satisfy WTO or Trading Partners, But Will Harm U.S. Agriculture* (May 23, 2013), *available at* http://www.meatami.com/ht/display/ReleaseDetails/i/90194 ("[T]he U.S. government is essentially picking winners and losers in the international marketplace."); Canadian Cattlemen's Association, *U.S. Continues to Discriminate Against Cattle Imports* (May 23, 2013), *available at* http://www.cattle.ca/news-events/news/view/u.s.-continues-to-discriminate-against-cattle-imports/ ("The United States is continuing to inflict these costs on Canadian producers."); Canadian Pork Council, *US Flouting of WTO Ruling on COOL Shocking and Appalling* (May 23, 2013), *available at* http://www.cpc-ccp.com/documents/news-releases/COOL_May_23_media_release_2_.pdf (noting the "devastating discrimination" of the COOL regulations).

[110] Request for the Establishment of a Panel, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/26 (Aug. 19, 2013), *available at* https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=118873,117305,113648,104336,94619,61814,72904,99959,28101,1026&CurrentCatalogueIdIndex=0&FullTextSearch=.

[111] Panel Report, *U.S.–COOL II*, *supra* note 21.

[112] *Id.* ¶ 7.284.

[113] *Id.* ¶¶ 7.148, 7.169 (finding that when producers had the ability to commingle livestock, they could reduce the cost of tracking origin information for each individual animal by designating the livestock as having mixed origin). Under the original measures, an estimated 20% of producers utilized the commingling flexibility. *Id.* ¶ 7.126.

The amended measures also continued to provide confusing information to consumers regarding the point of production. For example, the amended regulations allowed retailers to utilize a "raised in the U.S." label, even when the animal was raised in more than one country.[114] The amended regulations also maintained exceptions for processed foods and food service establishments, which left a large number of products without any country of origin information.[115] As a result, the *U.S.–COOL II* Panel concluded that the amended measures negatively impacted imported goods, and the impact could not be justified as stemming from a legitimate purpose.[116]

IV. MODIFYING THE WTO'S COUNTERINTUITIVE LEGITIMATE OBJECTIVE ANALYSIS

The legitimate objective analysis utilized by the original Panel and Appellate Body gave reason for the U.S. to adopt more restrictive regulations by suggesting that if the U.S. provided more information to consumers the regulations could achieve a legitimate objective. The amended regulations appeared justified under the compliance bodies' reasoning, and the U.S. believed the changes would help to ensure compliance with their international obligations. However, the primary purpose of the TBT Agreement is to eliminate protectionist regulations. It fails to serve that purpose if any purely protectionist regulation passes scrutiny. Although the Panel and Appellate Body found the original COOL measures violated the TBT Agreement, their decisions made implications that prompted the U.S. to further specify the regulations, making them even more burdensome on trade. In order to prevent similarly contradictory results from occurring in the future, the current legitimate objective analysis must be modified to ensure it fulfills the purpose of the TBT Agreement.

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[114] If an animal was raised in multiple countries, and one of those countries was the U.S., then the label could designate the U.S. as the sole country of raising. 2013 Mandatory Country of Origin Labeling, *supra* note 18, at 31368. The Panel found this flexibility troubling since an animal was considered raised in the U.S. if it spent as little as fifteen days in the country before processing. Panel Report, *U.S.–COOL II*, *supra* note 21, ¶¶ 7.243–.244.

[115] Panel Report, *U.S.–COOL II*, *supra* note 21, ¶ 7.277. *See also id*. ¶ 7.489 (stating that simply providing more information may also confuse consumers who find the large amount of information difficult to understand).

[116] *Id.* ¶ 7.283.

A. The Counterintuitive Nature of the WTO's TBT Analysis

The WTO's current mode of analysis, as evidenced in the *U.S.–COOL* and *U.S.–COOL II* decisions, encourages countries to adopt more elaborate regulations as a means of demonstrating those regulations' justifiable purpose. Unfortunately, two wrongs do not make a right—enacting increasingly complex measures necessarily creates burdens within the marketplace. As a result, the WTO's analysis is counterintuitive to the purpose of the TBT Agreement, which was specifically designed to reduce burdens on trade.

1. Defeats the Primary Purpose of the TBT Agreement

Justifying unnecessary burdens on trade clearly violates the purpose of TBT Agreement, which was created to facilitate international trade and prevent technical regulations from interfering with access to international markets.[117] Underlying that purpose is the idea that member nations should not use regulations to favor domestic producers, which countries often refer to as protectionism.[118] Member nations agree that protectionist measures are disfavored because they reduce competition and harm consumers.[119] The TBT Agreement was designed to eliminate protectionist measures by ensuring that imported products received no less favorable treatment than similar domestic products.[120] Under Article 2.2, technical regulations are permissible insofar as the regulations are not "more trade-restrictive than necessary" to fulfill a legitimate purpose.[121] However, those regulations that are found to be protectionist must be remedied in accordance with WTO's recommendation, or face retaliation from the complaining country; usually in the form of tariffs.[122]

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[117] UNDERSTANDING THE WTO, *supra* note 5, at 31.

[118] *See* Alan O. Sykes, *Regulatory Protectionism and the Law of International Trade*, 66 U. CHI. L. REV. 1, 5 (1999) (describing protectionist regulations as socially wasteful because they encourage higher domestic prices and exclude consumers who would otherwise purchase the goods at a price exceeding the marginal price if low cost, foreign firms were able to enter the market).

[119] Michael Forman, *Foreword* to UNITED STATES TRADE REPRESENTATIVE 2014 REPORT ON TECHNICAL BARRIERS TO TRADE 4 (Apr. 2014) (stating that discriminatory measures "reduce competition, stifle innovation, and create unnecessary technical barriers to trade").

[120] TBT Agreement, *supra* note 8, art. 2.1.

[121] *Id.* art. 2.2.

[122] UNDERSTANDING THE WTO, *supra* note 5, at 56.

Debate exists as to whether the COOL measures are protectionist. Although the WTO has thus far refrained from expressly making this determination, its rejection of Canada and Mexico's arguments to the contrary[123] makes plain the counterintuitive nature of its current method of analysis, which disproportionately focuses on the degree to which a technical regulation achieves its stated purpose. Moreover, a recent decision by the U.S. Court of Appeals for the District of Columbia (D.C. Circuit) concluding that the amended COOL measures were motivated by a protectionist purpose further solidifies this point.

In its original brief to the WTO compliance body, Canada pointed to the structure and intent of the regulations as evidence of their protectionist nature.[124] Canada expressed suspicion about COOL's true purpose, in part because the regulations were implemented as part of the 2002 Farm Bill and not part of a larger bill aimed at consumer protection.[125] The Farm Bill has traditionally provided subsidies to American farms to help create domestic jobs.[126] Thus, the fact that the COOL measures were placed within the bill suggested the goal was not consumer protection, but domestic favoritism.

The U.S. initially justified the COOL measures as an effort to reduce consumer confusion under prior programs, but their solution did not attempt to refine these prior programs.[127] The original COOL measures clearly failed to achieve this stated objective. The *U.S.–COOL I* Panel found the original measures did not provide consumers with accurate country of origin information regarding the mixed origin labels, creating confusion with respect to commingling flexibility.[128] The amended regulations' more detailed requirements lessened this problem, but still left exceptions for processed foods and food service establishments. These exceptions prevented consumers from learning country of origin information for a large

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[123] Panel Report, *U.S.–COOL*, *supra* note 16, ¶ 7.580.

[124] *See generally* Executive Summaries of the Second Written Submissions of Canada, *U.S.–Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R, WT/DS386/R [hereinafter Executive Summary of 2nd Submission of Canada, *U.S.–COOL*], *available at* https://www.wto.org/English/tratop_e/dispu_e/384_386r_b_e.pdf (describing Canada's argument regarding COOL's validity under the TBT Agreement).

[125] *Id.* ¶ 24.

[126] RENÉE JOHNSON & JIM MONKE, CONG. RESEARCH SERV., RS22131, WHAT IS THE FARM BILL? 2 (2014).

[127] Executive Summary of 2nd Submission of Canada, *U.S.–COOL*, *supra* note 124, ¶ 26 (arguing that "[t]he United States cannot use confusion caused by its own voluntary programs to justify the COOL measure").

[128] *See* Panel Report, *U.S.–COOL*, *supra* note 16, ¶¶ 7.718–.720 (finding the original COOL measures' "mixed origin label" confused consumers by allowing commingling without point of production information).

percentage of the meat they consumed.[129] In *U.S.–COOL II*, the Panel once again found that the measures did not achieve the purpose of conveying information to consumers, and justified their finding in part because of the unchanged exceptions to the original COOL measures.[130] Although the Panel did not determine the regulations were protectionist, the fact that the U.S. continually failed to achieve its stated objective not only suggests that the measures were motivated by protectionism, but also highlights the compliance bodies' inability to identify and eliminate such regulations.

Mexico further alleged that COOL measures were protectionist because they shaped consumer expectations and generated bias against imported products when consumers would not otherwise care about the information.[131] The WTO previously acknowledged the possibility that nations could manipulate consumer expectations through regulatory intervention.[132] The claim is that governmental regulations requiring the provision of certain information may provoke a desire for information that consumers previously had no interest in prior to the implementation of the regulation. Once consumers develop these expectations, the government can then justify the regulations as stemming from a legitimate purpose, when in fact the regulation was not legitimate at the time of its creation.

Throughout the *U.S.–COOL* dispute, the WTO consistently recognized the legitimacy of the U.S.' goal to provide consumers information, but the extent to which consumers requested this information prior to its adoption in 2008 remains unclear.[133] If the market intervention theory that Mexico alleges is correct, then the objective may not have been legitimate at all. Instead the objective may only have appeared legitimate at the time the WTO decided the case because a consumer expectation had already been established. Regardless of their merit, however, Mexico's claims demonstrate the susceptibility of the WTO's current mode of analysis with respect to such market interventionist maneuvers.

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[129] Panel Report, *U.S.–COOL II*, *supra* note 21, ¶ 7.272.

[130] *Id.*

[131] Executive Summary of the Second Written Submission of Mexico, *U.S.–Certain Country of Origin Labelling (COOL) Requirements*, ¶ 46, WT/DS384/R,WT/DS386/R [hereinafter Executive Summary of 2nd Submission of Mexico, *U.S.–COOL*], *available at* https://www.wto.org/English/tratop_e/dispu_e/384_386r_b_e.pdf.

[132] *See* Panel Report, *EC–Sardines*, *supra* note 44, ¶ 7.127 (noting "the danger is that Members, by shaping consumer expectations through regulatory intervention in the market, would be able to justify thereafter the legitimacy of that very same regulatory intervention on the basis of governmentally created consumer expectations").

[133] Executive Summaries of 2nd Submission of Canada, *supra* note 16, ¶¶ 24–25 (arguing that U.S. cattle producers, and not consumers, were the motivating force behind the original COOL measures).

Finally, a recent ruling by the D.C. Circuit not only appears to foreclose any argument that the COOL measures were motivated by a purpose other than protectionism, but also serves to highlight the failure of the WTO's current legitimate objective mode of analysis. In *American Meat Institute*, the D.C. Circuit looked to COOL's legislative history in order to determine whether the mandatory labels violated the American Meat Institute's First Amendment right against compelled commercial speech.[134] In its evaluation the court considered whether the government's interest justified the regulations,[135] much like how a WTO compliance body evaluates a regulation's legitimate purpose. The court expressly rejected the government's claim of a legitimate interest in providing consumers with information.[136] Instead the court concluded that the COOL measures actually aimed at supporting American farmers, and that the government only denied this interest for fear of "international repercussions that might ensue."[137] By recognizing protectionism as the true purpose of the COOL measures, the court managed to uphold the regulations as justified by a substantial government interest.[138] While the court's justification would have invalidated the measure before the WTO, this justification served as the key reason for finding the regulation constitutional in the U.S.

If the D.C. Circuit is correct and the COOL regulations were in fact motivated by a protectionist purpose, then the compliance body should have invalidated them for that reason. Their continued justification proves a major failure for the compliance bodies' analysis because they should be able to identify and eliminate protectionist regulations without reaching for other justifications.

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[134] Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18, 24 (D.C. Cir. 2014) (en banc).

[135] The test for determining whether a First Amendment violation exists depends on "whether the asserted governmental interest is substantial[,] . . . whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Id.* at 28 (Rogers, J., concurring) (quoting Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 566 (1980) (internal quotation marks omitted)).

[136] *Id.* at 20 (majority opinion).

[137] *Id.* at 32 (Kavanaugh, J., concurring).

[138] *Id.* at 33 (stating there was no First Amendment violation because "the Government has a substantial interest in . . . supporting American farmers and ranchers against their foreign competitors").

2. Requiring More Information is More Burdensome on Trade

At first glance, the amended COOL measures may not appear more burdensome on trade. They require both foreign and domestic producers to track and record the same information, and both types of producers bear the general costs associated with implementing a new system.[139] In the amended COOL regulations, the AMA acknowledged these increased costs, but they did not recognize any disproportionate impact on foreign producers.[140] Rather, the AMA believed that the general costs of implementing the new system were nondiscriminatory, and therefore, would not be sufficient to support a finding that the regulations violated the TBT Agreement.

However, the amended COOL measures proved discriminatory in effect. Most notably, the amended measures discriminated against foreign producers by eliminating commingling flexibility.[141] Commingling flexibility is important because it allows domestic facilities to process both foreign and domestic livestock without tracking country of origin information for each individual animal. As a result, facilities are able to process entire groups of livestock in a single day and simply use a mixed origin label without knowing exactly which animals came from which country. Since the amended COOL measures required country of origin information for each and every specific product, facilities were unable to combine groups of livestock during production. This system incentivized domestic process facilities to segregate their operations and process exclusively domestic livestock.[142] Doing so allowed domestic producers to avoid tracking point of origin information for each individual animal; producers could easily record information for entire groups at the facility. Even though domestic production facilities could have chosen to segregate their operations so as to process exclusively foreign livestock, foreign importers alone were insufficient to meet U.S. demand.[143] As a result, many producers who

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[139] *See* 2013 Mandatory Country of Origin Labeling, *supra* note 18, at 31367 (recognizing costs would include developing the labels, printing additional information and purchasing equipment); *see also id.* at 31372 (noting commentators' objection to the proposed rules because it would result in increased printing and equipment costs).

[140] *Id.* at 31367 (estimating the cost of new labels at $32.8 million).

[141] Panel Report, *U.S.–COOL II*, *supra* note 16, ¶ 7.167. The AMA predicted the loss of the commingling flexibility would cost retailers and producers approximately $123.3 million, but it did not note any disproportionate impact. 2013 Mandatory Country of Origin Labeling, *supra* note 18, at 31368.

[142] Panel Report, *U.S.–COOL II*, *supra* note 21, ¶ 7.156.

[143] *See id.* (noting that even if imports could potentially meet U.S. demand, the imports would still come from more than one foreign origin and would lead to the same segregation problem).

previously utilized the commingling flexibility switched to purchasing exclusively domestic livestock, and imported products experienced a decrease in demand.[144]

The situation in *U.S.–COOL* is not unique. It is illustrative of the type of harm that results from requiring information in country of origin labeling systems. Segregation naturally occurs because it allows domestic producers to decrease their costs and avoid complicated record keeping. If foreign producers were capable of meeting processors' needs, then there may not be an issue; the processor could segregate by utilizing exclusively foreign material. However, in a point of production labeling system, like the system created by amended COOL measures, the raw materials must be purchased from only one foreign producer or else the domestic processors are left with the same complicated record keeping problem they were trying to avoid. Processors may be even more likely to segregate in this way considering the other potential benefits of a "Product of the U.S." label, including increased demand attributable to feelings of patriotism or efforts to support domestic job growth.[145] Accordingly, there is a strong incentive for processors to purchase exclusively domestic products at the expense of foreign imports.[146]

B. The Counterintuitive Effect of the WTO's TBT Analysis

The amended COOL measures were a direct response to the WTO's careful focus on the regulation's purpose in *U.S.–COOL I*. If the WTO had not suggested that a more tailored purpose could cure the regulations, then the U.S. may never have attempted to amend the COOL measures. Instead, the U.S. increased the regulation's burden on trade and may have even decreased other countries' abilities to bring successful future challenges. These effects directly conflict with the goal of the TBT Agreement itself.

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[144] *See id.* ¶ 7.174 (finding the existence of a price detriment to Canadian cattle between 2008 and 2014 and a widening of the price basis at 3% weekly).

[145] Brian E. Mennecke et al., *A Study of the Factors That Influence Consumer Attitudes Toward Beef Products Using the Conjoint Market Analysis Tool*, J. ANIMAL SCI. 2639 (2007) (finding that country of origin information is an important purchasing factor for U.S. consumers). *But see* Barry Krissoff et al., *Country-of-Origin Labeling: Theory and Observation*, ELECTRONIC OUTLOOK REP. FROM THE ECON. RES. SERV. (Jan. 2004), *available at* http://www.ers.usda.gov/media/326598/wrs0402_1_.pdf (finding that suppliers do not think U.S. country of origin labels attract consumers).

[146] Panel Report, *U.S.–COOL II*, *supra* note 21, ¶ 7.157 ("[P]rocessing exclusively domestic livestock and meat remains the least costly and most viable business scenario under the amended COOL measure.").

1. Encourages Countries to Implement Elaborate Requirements

The increased burden on trade resulting from the amended COOL regulations was unnecessary because the U.S. would have retained the original, less burdensome regulations if the WTO had not invalidated them. The U.S. believed the original program adequately informed consumers, as evidenced by the fact that it did not require detailed point of origin information from the outset.[147] The AMA only adopted the point of origin requirements in an effort to comply with the original Panel and Appellate Body rulings. While the original regulations may have burdened trade, the amended regulations only made the burden more pronounced. When the WTO aims at reducing obstacles to trade, this counterintuitive outcome cannot be justified.

After the most recent Appellate Body ruling invalidated the amended COOL measures once again, the U.S. will have to abandon or revise COOL.[148] In theory, the U.S. could decide to further specify COOL's requirements in an attempt to ensure that the legitimate purpose is fulfilled. The Panel's decision left this possibility open by finding that the amended COOL measures were not in violation of Article 2.2 of the TBT Agreement.[149] Despite the Panel's overall findings, this decision proved an important victory for the U.S.[150] Since the Panel did not find COOL in violation of Article 2.2, the regulation has potential for successful reform as long as the U.S. continues to justify its legitimate purpose. If the U.S. could prove that COOL was not more trade restrictive than necessary to achieve its purpose, then the measures could be upheld by the WTO.

Unfortunately, the Panel decision in *U.S.–COOL II* went even further and suggested that making COOL measures more burdensome might satisfy WTO obligations. The Panel ruled that the amended COOL measures did not fulfill their legitimate purpose because a large portion of the collected

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[147] *See* 2013 Mandatory Country of Origin Labeling, *supra* note 18, at 31368 (detailing the amendments requiring additional information about the origin of the animals).

[148] *House Agriculture Committee Approves COOL Repeal Bill After WTO Ruling*, *supra* note 23.

[149] Any revised COOL measures could still be invalidated under the Article 2.1 requirement of no less favorable treatment for imported products, but establishing a legitimate purpose under Article 2.2 increases the likelihood that the measures as a whole will be upheld. *See* Panel Report, *U.S.–COOL II*, *supra* note 21, ¶¶ 7.612–.613 (concluding that the complainants failed to make a prima facie case that the amended COOL measures violated Article 2.2 as being more trade restrictive than necessary to achieve a legitimate purpose).

[150] *Id.* ¶¶ 7.332–.333 (deciding that there was "no reason to re-open the issue" of COOL's legitimacy because both the original Panel and Appellate Body deemed the purpose legitimate and the matter was not raised in the complaints).

information never made it to consumers.[151] This problem primarily resulted from the exemptions for processed foods and food-service establishments.[152] The Panel noted that upstream producers tracked country of origin information for all livestock because they could not predict how the product would eventually be sold, and this unnecessary tracking created unjustifiable costs.[153] In its explanation the Panel implied that if the exceptions were removed and the measures applied to all products equally, then the legitimate purpose might be fulfilled.

The *U.S.–COOL II* decision is also troubling for other reasons. For example, the Panel found that the amended COOL regulations' flexibility for labeling where an animal was raised could potentially mislead consumers into believing livestock was raised exclusively in the U.S., when in fact it was raised in more than one country.[154] The Panel relied on this finding to determine that the purpose of the regulation was not fulfilled.[155] In doing so, the Panel appears to have suggested that eliminating this flexibility could justify the regulation—once again implying that increasing the regulations' requirements could strengthen their legitimacy. However, eliminating this type of flexibility would restrict trade even further, just as the elimination of the commingling flexibility placed additional burdens on imported livestock in the original dispute. The TBT Agreement should not incentivize additional discrimination, yet the Panel decision suggests that more burdensome regulations may be the solution to bring COOL measures into compliance with the WTO's standards.

The Panel's decision demonstrates the continuing inadequacy of the TBT Agreement analysis in that it focuses on the degree that a regulation achieves its purpose. This analysis suggests that a country may improve a regulation's validity by implementing even more elaborate requirements.[156] Increasing

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[151] *Id.* ¶ 7.356 (finding that the amended COOL measures made a "considerable but necessarily partial contribution to its objective").

[152] *Id.*

[153] *Id.* ¶¶ 7.220–.226 (finding the amended regulations increased the recordkeeping burden on producers without increasing the proportion of information conveyed to consumers).

[154] The amended regulations stated that if an animal was raised in multiple countries, and one of those countries was the U.S., then the label could designate the U.S. as the sole country of raising. Panel Report, *U.S.–COOL II*, *supra* note 21, ¶ 7.269.

[155] *Id.* ¶ 7.282.

[156] The original Panel found COOL measures invalid because they did not fully achieve their purpose. *See* Appellate Body Report, *U.S.–COOL*, *supra* note 17, ¶¶ 461–466 (discussing the flaws in the original Panel's fulfillment analysis). The Appellate Body reversed this finding, stating that a regulation does not have to fully achieve its objective purpose as long as it makes some contribution. *Id.* However, the Appellate Body did not decide what level of contribution is sufficient. *Id.*

the number and specificity of requirements makes a regulation appear more justified because more information is conveyed to the consumer. The recordkeeping burden also appears justified when the consumer receives the totality of the information collected. In the case of *U.S.–COOL*, removing the exceptions might justify the burden on producers, but it would do nothing to ease the burden.[157] Since easing burdens on international trade is the primary purpose of the TBT Agreement, the Panel's analysis should focus on this problem and refrain from focusing on the degree in which a regulation achieves its objectives.

2. Removes Possibility of Success in Future Challenges

If the U.S. decided to increase COOL's requirements in response to the WTO decisions, one of the only ways Canada and Mexico might successfully challenge the regulations would be by proving that consumers do not desire country of origin information at all. If the challenging country could prove that consumers do not care about COOL, then the purpose of the regulations would be illegitimate. This would allow a compliance body to avoid evaluating the degree to which COOL achieves its purpose by simply finding a violation resulted from de facto discrimination.

In *U.S.–COOL II*, Canada and Mexico attempted to make this argument. The countries presented several studies showing that consumers do not pay attention to country of origin information, and that other factors play more important roles in consumers' purchasing decisions.[158] For example, Canada relied heavily on an empirical study that examined the change in consumer demand for packaged meat following the implementation of the original COOL measures.[159] The study found that demand did not change after COOL was implemented, and it suggested that the country of origin

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[157] The producer's recordkeeping burden would likely remain the same if the exceptions were removed. However, the revised regulations would still require more information than before, and the costs of compliance would increase.

[158] *See generally* Executive Summary of 2nd Submission of Canada, *U.S.–COOL*, *supra* note 124. The U.S. provided similar empirical evidence reaching the opposite conclusion; consumers are in fact interested in country of origin information. *See, e.g.*, Press Release, Consumer Federation of America, Large Majority of Americans Strongly Support Requiring More Information on Origin of Fresh Meat (May 15, 2013), *available at* http://www.consumerfed.org/pdfs/CFA-COOL-poll-press-release-May-2013.pdf (stating that 90% of people surveyed either strongly favored or somewhat favored requiring food sellers to indicate country of origin on packages of meat).

[159] Panel Report, *U.S.–COOL II*, *supra* note 21, ¶ 7.385.

information must not influence consumers' decisions.[160] Other studies evaluating COOL measures have reached similar conclusions,[161] and support the finding that country of origin information does not play a significant role in consumer decision-making. As a result, these studies suggest that COOL labels do not serve a legitimate purpose under Article 2.2.

Despite efforts to prove COOL's illegitimacy, the Panel rejected Canada's empirical studies by finding substantive and procedural aspects of each study that made their application inappropriate.[162] In rejecting these studies, the Panel concluded that COOL was aimed at a legitimate purpose and then went on to consider the level at which COOL achieved this purpose. It was during this latter analysis that the Panel implied the U.S. might be able to bring COOL into compliance by eliminating the exceptions and flexibilities that remained in the amended regulations. As explained above, however, eliminating these exceptions would make the regulations even more burdensome, and the TBT Agreement aims to reduce burdensome regulations. Thus, the analysis that justifies these more restrictive changes must be flawed as it runs counter to the overall purpose of the Agreement.

Article 2.2 of the TBT Agreement states that a technical regulation may remain as long as it is not more restrictive than necessary to fulfill a legitimate purpose. The WTO's current approach focuses heavily on the degree of fulfillment a regulation achieves. As long as a regulation has adequate justification, it will survive scrutiny. In *U.S.–COOL*, this metric was insufficient to justify the burden and the regulation was invalidated. As a result, the U.S. amended the regulation in an attempt to further their stated purpose. The most obvious way to further the purpose of providing

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[160] Mykel R. Taylor & Glynn T. Tonsor, *Revealed Demand for Country-of-Origin Labeling of Meat in the United States*, 38 J. AGRIC. & RESOURCE ECON. 235, 245 (2013) (explaining that change in demand indicates the value consumers place on the information).

[161] *See* Katie L. Allen, Courtney Meyers, Todd Brashears & Scott Burris, *Out in the Cold about COOL: An Analysis of U.S. Consumer's Awareness of Mandatory Country-of-Origin Labels for Beef*, 1 J. AGRIC., FOOD SYSTEMS & COMMUNITY DEV. 205, 209 (2011) (finding that over 72% of people surveyed never heard of COOL before); Fred Kuchler, Barry Krissoff & David Harvey, *Do Consumers Respond To Country-Of-Origin Labeling?*, 33 J. CONSUMER POL'Y 323 (2010) (finding that country of origin labels on seafood did not affect consumer demand); Jayson L. Lusk & Brian C. Briggeman, *Food Values*, 91 AM. J. AGRIC. ECON. 184, 191 (2009) (finding price and safety are more significant than country of origin in a consumers decision to purchase).

[162] *See, e.g.*, Panel Report, *U.S.–COOL II*, *supra* note 21, ¶ 7.389 (noting that lack of public awareness of a legal program like COOL does not make the information meaningless to consumers); *see also id.* ¶ 7.394 (explaining that finding consumers care more about other variables does not necessarily mean that consumers do not care about country of origin information at all).

consumers information was to increase the amount of information consumers received. The WTO had already recognized the purpose as legitimate, so the more information the regulations provided, the more they would appear justified. The focus on achievement of purpose in the original Panel and Appellate Body decisions inevitably led to this result by analyzing the adequacy of the information that reached consumers. This approach was misguided since it prolonged—and may even continue to prolong—the existence of a technical regulation that significantly and unnecessarily burdens international trade.

V. CONCLUSION

The Panel and Appellate Body in *U.S.–COOL* failed in their roles as upholders of the purpose of the TBT Agreement. They gave too much weight to the degree in which COOL measures achieved their purpose. This focus led to the adoption of even more elaborate and burdensome regulations. These more burdensome regulations never should have been created after the original dispute, and their adoption proves counterintuitive. Although *U.S.–COOL II* invalidated the amended regulations, it still left open the possibility that a new set of amended regulations might conform to WTO obligations. Through their current analysis, the WTO allows member nations to continually manipulate the purpose of a regulation until it reaches an acceptable balance between burden and justification. This behavior cannot be justified under a trade agreement meant to reduce unnecessary burdens on trade. Therefore, the current approach must be modified to remove the heavy focus on the extent to which a regulation achieves its purpose and instead give more weight to analyzing the purpose itself. If the WTO did this in the original COOL dispute, they might have seen COOL for what it was: a purely protectionist regulation.