

April 30, 2013

Honorable Tom Vilsack  
Secretary of Agriculture  
U.S. Department of Agriculture  
1400 Independence Avenue SW  
Washington, DC 20250-3700

**Re: Docket No. AMS-LS-13-0004 – 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: Proposed Rule; 78 Fed. Reg. 15645 (March 12, 2013).**

Dear Mr. Secretary:

The undersigned organizations represent industries that have a significant interest in the above referenced rulemaking. Members of our organizations will be substantially affected if the Agricultural Marketing Service (AMS or the agency) promulgates a final rule that is identical or similar to the March 12 proposed rule. That adverse impact will be even more significant if the agency elects to implement a final rule before the parties to the World Trade Organization (WTO) case that is the genesis of this rulemaking have the opportunity to present to that body their positions as to whether the final rule brings the United States into compliance.<sup>1</sup>

As an initial matter, we would strongly encourage the Office of the United States Trade Representative (USTR) to negotiate a “sequencing agreement” with Canada and Mexico that would obviate the need for the complainants to put in a retaliation request within 30 days of the expiration of the compliance period on May 23, 2013. Such a sequencing agreement would preserve Canadian and Mexican legal rights until the completion of the compliance process (panel and appeal).

Second, the fact that the implementation of a final rule would post-date the expiration of the compliance period would not affect the ability of an Article 21.5 panel to adjudicate the WTO-consistency of this measure. Compliance panels have taken a pragmatic approach to such issues. For example, the compliance panel in *US – Shrimp (Article 21.5 – Malaysia)* reasoned as follows:

The Panel notes that the 13-month reasonable period of time agreed upon by the parties expired on 6 December 1999. However, the DSB only established this Article 21.5 Panel at its meeting on 23 October 2000. The Panel notes that the DSU is silent as to the date on which the existence or consistency of the implementing measure must be assessed....

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<sup>1</sup> See Appellate Body Reports, *United States – Certain Country of Origin Labeling (COOL) Requirements*, WT/DS384/AB/R, WT/DS386/AB/R, adopted 23 July 2012; Panel Reports, *United States – Certain Country of Origin Labeling (COOL) Requirements*, WT/DS384/R, WT/DS386/R adopted 18 November 2011.

The Panel takes the view that it should take into account all the relevant facts occurring until the date the matter was referred to it. By applying this approach, an Article 21.5 panel can reach a decision that favours a prompt settlement of the dispute. Indeed, it avoids situations where implementing measures allowing for compliance with the DSB recommendations and rulings would be disregarded simply because they occur after the end of the reasonable period of time. The Panel, while mindful of the obligation of the United States to bring its legislation into conformity by the end of the reasonable period of time, considers that it is consistent with the spirit of Article 3.3 of the DSU to take into account any relevant facts until the date on which the matter was referred to the Panel.<sup>2</sup>

The Appellate Body has also made clear that “if the compliance panel finds that compliance has been achieved at the time of its establishment, but not at the end of the reasonable period of time, the responding WTO Member will not need to take additional remedial action.”<sup>3</sup>

Finally, an Article 21.5 compliance panel would be able to rule on the WTO-consistency of the final rule prior to its implementation date. In other words, upon adoption of a final rule, an implementing measure would “exist” for the purposes of Article 21.5, even if the implementation date is delayed. The Appellate Body has stressed that:

A measure that is initiated before there has been recourse to an Article 21.5 panel, and which is completed during those Article 21.5 panel proceedings, may have a bearing on whether there is compliance with the DSB's recommendations and rulings.... To exclude such a measure from an Article 21.5 panel's terms of reference because the measure was not completed at the time of the panel request but, rather, was completed during the Article 21.5 proceedings, would mean that the disagreement "as to the existence or consistency with a covered agreement of measures taken to comply" would not be fully resolved by that Article 21.5 panel.... Thus, an *a priori* exclusion of measures completed during Article 21.5 proceedings could frustrate the function of compliance proceedings.<sup>4</sup>

The rule will be final in all aspects except the formal date of implementation, and thus will be “completed” during or after the compliance panel proceedings. Applying the reasoning of the Appellate Body, the final rule cannot be excluded *a priori* from a compliance panel review because of a delayed implementation date.

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<sup>2</sup> Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/RW, adopted 22 November 2000, at para. 5.12.

<sup>3</sup> Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”) – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/AB/RW, adopted 14 May 2009, at para. 412.

<sup>4</sup> Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/AB/RW, adopted 18 August 2009, at para. 121 – 122.

The undersigned organizations all submitted comments identifying the extensive costs and other dangers associated with the proposed rule.<sup>5</sup> Those comments also contended that the proposed rule, if promulgated as a final rule, will not bring the United States into compliance and because of its adverse impact the undersigned organizations all requested a delay in the effective date to allow the WTO process to work.

The discussion above demonstrates that there is no legal requirement for the United States to make the rule effective before the WTO Compliance Panel considers and decides whether a final rule is in compliance. When weighed against the harm that will befall the affected industry if the rule is prematurely implemented, we respectfully suggest that the prudent course is to delay the effective date of any final rule until after the WTO renders its compliance decision.

We would be pleased to meet with you to discuss in more detail our concerns in this matter.

Respectfully submitted,

American Meat Institute  
Food Marketing Institute  
National Cattlemen's Beef Association  
National Chicken Council  
National Grocers Association  
National Pork Producers Council  
North American Meat Association  
Southwest Meat Association

cc: Tim Reif  
David Shipman

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<sup>5</sup> For a more detailed discussion of the adverse impact a final rule will have on the various affected sectors, please see the comments submitted to the docket by the undersigned organizations.