Articles

The Domestic Standing of International Law: A Non-State Account

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Despite its central contribution to the construction of the global legal order, the United States has long been perceived to exclude itself from the reach of international law. Its exceptionalist image has been reinforced by statements of political leaders, federal law provisions, and court decisions. This Article argues, however, that in order to appropriately assess international law's standing in the United States, one must consider not only the position of its formal government but also the interpretation, application, and challenge of international law by non-State actors. Moreover, it stresses the importance of studying not only elite actors' engagement with international law but also that of individuals, groups, and organizations outside the formal bureaucracy.

The Article surveys interventions by government officials, producers, consumers, and civil society representatives in the context of a U.S. policy-making process initiated pursuant to a World Trade Organization ruling. It shows that, contrary to the United States' exceptionalist image, U.S. actors of all stripes invoked and relied on international law extensively, thereby carving a space for it as a non-negligible consideration in the decision-making process. Therefore, the Article argues that accounting for non-State stake-

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holders is imperative in evaluating the domestic standing of international law.

INTRODUCTION

The United States has been instrumental in building and maintaining the global legal order. And yet, it has often been perceived to exclude itself from the reach of international law.[1] The perceived U.S. resistance to international law is commonly reflected in either one of two claims. The first is that the United States *does not* subject itself to international law,[2] even though it promotes inter-

1. *See, e.g.*, Michael Ignatieff, *Introduction*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 1, 4–11 (Michael Ignatieff ed., 2005); Paul Kahn, *Popular Sovereignty and the Rule of Law*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS, *supra* note 1, at 198–99, 218, 221; Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1480 (2003). On the scholarly reflection of U.S. resistance to international law, see Peter J. Spiro, *The New Sovereigntists*, 79 FOREIGN AFF. 9, 9 (2000).

2. Craig Hayden, *Promoting America: U.S. Public Diplomacy and the Limits of Exceptionalism*, *in* THE RHETORIC OF AMERICAN EXCEPTIONALISM: CRITICAL ESSAYS 189, 189–90 (Jason A. Edwards & David Weiss eds., 2011) (arguing that exceptionalism constrained the range of justifiable foreign policy programs since the start of the Cold War but that there was a shift away from it in the Obama era); *cf.* NATSU TAYLOR SAITO, MEETING THE ENEMY: AMERICAN EXCEPTIONALISM AND INTERNATIONAL LAW (2010) (arguing that Obama's exceptionalist message is consistent with that of his predecessors); STEPHEN BROOKS, AMERICAN EXCEPTIONALISM IN THE AGE OF OBAMA (2012) (arguing that exceptionalism is likely to remain influential in foreign policy in the future); SIOBHÁN

national law's application to other countries. The second is the normative position that the United States *should not* view itself as obligated to comply with international law.[3] Some suggest that exceptionalism is a feature of the United States' national identity.[4] This image has been particularly strengthened since the election of President Donald Trump, whose pronounced distrust of international law is increasingly integrated in the practice of the U.S. government.[5]

MCEVOY-LEVY, AMERICAN EXCEPTIONALISM AND U.S. FOREIGN POLICY PUBLIC DIPLOMACY AT THE END OF THE COLD WAR (2001) (explaining that exceptionalism functions in U.S. foreign policy rhetoric as a tool for building sympathetic public ecologies, chiefly at home but also abroad). *But see* Rachel Brewster & Adam Chilton, *Supplying Compliance: Why and When the United States Complies with WTO Rulings*, 39 YALE J. INT'L L. 201 (2014) (arguing that U.S. compliance depends on the identity of the domestic actor required to supply compliance and finding that the executive is the actor most likely to do so).

3. For scholarly reflection of this normative claim, see JULIAN KU & JOHN YOO, TAMING GLOBALIZATION 11 (2012) (advocating new doctrines of interpretation that shift decision-making power from courts to the executive and legislature, who are "best positioned to reconcile the pressures of globalization" that threaten U.S. popular sovereignty); Julian Ku & John Yoo, *Globalization and Sovereignty*, 31 BERKELEY J. INT'L L. 210, 233 (2013) (calling on the United States to restrict legal limits on its sovereignty imposed by international organizations and multilateral treaties by withholding its consent to international regimes); John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175, 1177–78 (2006) (arguing that international law suffers from a major democracy deficit and thus should not be incorporated into U.S. law); Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1568 (2006) ("'[S]overeigntist' hostility to foreign and international law is often intertwined with particular views about the Constitution, the role of judges in expounding its content, and the American political project in general."); Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 2022–26 (2004) (advocating U.S. unilateralism as a means to defend U.S. self-government and its conception of democratic constitutionalism from the threat of international encroachment); Spiro, *supra* note 1, at 9 (describing a group of scholars that "calls for America to resist the incorporation of international norms and drapes the power to do so in the mantle of constitutional legitimacy."); *see also* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law As Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 817 (1997) (arguing that customary international law should not have the status of federal law absent authorization by the federal political branches).

4. Kahn, *supra* note 1, at 218–21 (equating U.S. exceptionalism with an "insistence on democratic self-government" and explaining that it is rooted in American self-perception molded by having achieved continued political autonomy).

5. Consider, for instance, the United States' decision to withdraw from (a) the Paris Agreement, President Donald Trump, Statement by President Trump on the Paris Climate Accord (June 1, 2017), https://www.whitehouse.gov/the-press-office/2017/06/01/statement-president-trump-paris-climate-accord [https://perma.cc/R725-GZ73]); (b) the Joint Comprehensive Plan of Action (the "Iran deal"), President Donald Trump, Remarks by President Trump on the Joint Comprehensive Plan of Action (May 8, 2018), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-joint-comprehensive-plan-action/ [https://perma.cc/5MYM-YKRR]; *Bolton: U.S. to Withdraw from Optional Protocol*

Scholars have painted American exceptionalism as particularly acute in matters of international trade by pointing to federal courts' strong reluctance[6] to enforce decisions of international trade tribunals.[7] Such depiction has no doubt been bolstered by President Trump's campaign-trail talk of the trade war waged against the American worker[8] and his promise to get a new, fair deal for America.[9] It has further been underscored by Trump's trade war with China[10] and his decisions to withdraw from the Trans-Pacific Partnership,[11] renegotiate the North American Free Trade Agreement,[12] and

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in Vienna Convention on Diplomatic Relations, WASH. POST, (Oct. 3, 2018), http://www.washingtonpost.com/video/politics/bolton-us-to-withdraw-from-optional-protocol-in-vienna-convention-on-diplomatic-relations/2018/10/03/c6ede600-c730-11e8-9c0f-2ffaf6d422aa_video.html [https://perma.cc/3V4X-NYHP]; and (c) 1955 Treaty of Amity, Economic Relations and Consular Rights with Iran, Edward Wong & David E. Sanger, *U.S. Withdraws From 1955 Treaty Normalizing Relations With Iran*, N.Y. TIMES (Oct. 3, 2018), https://www.nytimes.com/2018/10/03/world/middleeast/us-withdraws-treaty-iran.html [https://perma.cc/A8NS-6H2P].

6. *See, e.g.*, Timken Co. v. U.S., 354 F.3d 1334, 1344 (Fed. Cir. 2004) (holding that WTO rulings are "not binding on the United States, much less this Court"); Corus Staal BV v. Dep't of Commerce, 395 F.3d 1343, 1348 (Fed. Cir. 2005) (quoting *Timken*).

7. *See, e.g.*, Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897 (2015); Peter J. Spiro, *Sovereigntism's Twilight*, 31 BERKELEY J. INT'L L. 307, 315–21 (2013); Carlos M. Vazquez, *The Abiding Exceptionalism of Foreign Relations Doctrine*, 128 HARV. L. REV. F. 305 (2015); Stephen I. Vladeck, *The Exceptionalism of Foreign Relations Normalization*, 128 HARV. L. REV. F. 322 (2015). *But see* Curtis A. Bradley, *Foreign Relations Law and the Purported Shift Away from "Exceptionalism,"* 128 HARV. L. REV. F. 294 (2015).

8. *Read Donald Trump's Speech on Trade*, TIME (June 28, 2016), http://time.com/4386335/donald-trump-trade-speech-transcript/ [https://perma.cc/L75U-62GW].

9. *Trump Administration Sends Annual Trade Agenda Report to Congress*, OFFICE OF THE U.S. TRADE REPRESENTATIVE (Feb. 28, 2018), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/february/trump-administration-sends-annual [https://perma.cc/WR7L-6NW6].

10. *America and China Are in a Proper Trade War*, ECONOMIST (Sep. 20, 2018), https://www.economist.com/finance-and-economics/2018/09/20/america-and-china-are-in-a-proper-trade-war [https://perma.cc/RW34-PNQY].

11. Ylan Q. Mui, *Withdrawal from Trans-Pacific Partnership Shifts U.S. Role in World Economy*, WASH. POST (Jan. 23, 2017), https://www.washingtonpost.com/business/economy/withdrawal-from-trans-pacific-partnership-shifts-us-role-in-world-economy/2017/01/23/05720df6-e1a6-11e6-a453-19ec4b3d09ba_story.html [https://perma.cc/WRL8-DFV2].

12. Phil Levy, *The Trade Year in Review—Deals*, FORBES (Dec. 31, 2018), https://www.forbes.com/sites/phillevy/2018/12/31/the-trade-year-in-review-deals/ [https://perma.cc/7JAG-YVWQ]; Jennifer Epstein, Josh Wingrove & Eric Martin, *Trump Says He'll Give Notice of Nafta Exit in Bid to Pass USMCA*, BLOOMBERG (Dec. 1, 2018), https://www.bloomberg.com/news/articles/2018-12-02/trump-to-notify-congress-soon-that-he-s-terminating-nafta-accord.

obstruct appointments of World Trade Organization ("WTO") Appellate Body members.[13]

However, such talk of U.S. exceptionalism conceals a more complex picture. Domestic debates about U.S. national policy reveal that U.S. actors do not, in fact, ignore nor easily discount international law. This Article presents a novel case study of a U.S. national policy-making process dealing with the labeling of meat products. This seemingly mundane issue is in fact laden with sensitive questions of international trade law, sovereignty, and consumer rights. The case study analyzes hundreds of comments submitted by U.S. stakeholders regarding a rule the U.S. Department of Agriculture ("USDA") proposed following a WTO decision that found that the United States breached international trade law. The analysis provides insight into public deliberation about international law and its place in U.S. policy making. Surveying the views of consumers, farmers, industry actors, and others, the case study demonstrates that non-State stakeholders occupied a robust role in the deliberations. It also demonstrates that actors from all walks of life referred to and relied on international law when articulating their opinions on U.S. trade policy. These actors seized international law and worked to interpret, apply, and advance it—or to challenge its binding force.

The Article argues that, in order to assess whether the WTO ruling had any impact in the United States, one must consider not only the formal position of the United States as a State actor but also how non-State actors within the United States engaged with the ruling. By considering the United States as a "State actor," I refer to the analysis of its positions and actions as if it were a single, unitary actor. By "non-State actors," I refer to any actor who is not a State, including individuals, groups, and organizations both within and outside a government bureaucracy.[14]

By invoking international law and framing arguments in its language, non-State actors carved a space for international law in the U.S. policy-making process. As the case study indicates, the exceptionalism often attributed to the United States as a State actor is not reflected in the attitudes of non-State actors who participated in the decision-making process. Therefore, the Article argues that such ac-

13. Simon Nixon, *Trump Puts the WTO on the Ropes*, WALL ST. J. (July 11, 2018), https://www.wsj.com/articles/trump-puts-the-wto-on-the-ropes-1531340083 [https://perma.cc/2GKR-8WQQ]; John Brinkley, *Trump Is Close to Shutting Down the WTO's Appeals Court*, FORBES (Sept. 27, 2018), https://www.forbes.com/sites/johnbrinkley/2018/09/27/trump-is-close-to-shutting-down-the-wtos-appeals-court/ [https://perma.cc/3M8T-DVNT].

14. For a more detailed discussion, see Tamar Megiddo, *Methodological Individualism*, 60 HARV. INT'L L.J. (forthcoming 2019) (manuscript at pts. III, IV) (on file with *Columbia Journal of Transnational Law*).

tors must be accounted for when evaluating international law's standing in the United States, as opposed to solely examining the government's formal position.

Justice Steven Breyer once noted, "We in America know full well that in a democracy, law, perhaps most law, is not decreed from on high but bubbles up from the interested publics, affected groups, specialists, legislatures, and others, all interacting through meetings, journal articles, the popular press, legislative hearings, and in many other ways."[15] Justice Breyer's examples, which echo Jürgen Habermas's theory of deliberative democratic will-formation, suggest an intersubjective process that flows through, among others, "the informal networks of the public sphere."[16] I argue elsewhere that international law should similarly be understood as bubbling up from below.[17] As the case study shows, international law's presence and impact within the United States is shaped and influenced by individuals, groups, and organizations acting at the sub-national level. Therefore, in evaluating the standing of international law in a State—how it is perceived and regarded[18]—we should also account for the non-State actors participating in sub-State deliberative processes. Moreover, the study of non-State actors' regard for international law should not only include members of the social and political elite,[19] but it must also account for the part that each and every one of us plays in the everyday practice of international law.[20] Note that the

15. Stephen Breyer, Associate Justice of the Supreme Court of the United States, Keynote Address at Proceedings of the Ninety-Seventh Annual Meeting of the American Society of International Law (Apr. 4, 2003), *in* 97 AM. SOC'Y. INT'L L. PROC. 265, 268 (2003).

16. Jürgen Habermas, *Three Normative Models of Democracy*, 1 CONSTELLATIONS 1, 8 (1994); Jürgen Habermas, *The Public Sphere: An Encyclopedia Article*, NEW GER. CRIT. 49, 49 (1974).

17. Megiddo, *supra* note 14.

18. Thomas Franck used the term "pull" to refer to the normative aspect of law that draws actors to cooperate with its guidance. THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 24 (1990). Note that I choose not to follow him. I do so in order to detach the effect that law may have on action from the normative aroma that arises from the idea of "pull" that seems to me to connote a particular moral motivation to act according to the law's guidance.

19. Such as State officials or activists. *See* Eyal Benvenisti & George W. Downs, *National Courts, Domestic Democracy, and the Evolution of International Law*, 9 EUR. J. INT'L L. 59 (2009) (studying the role of national judges in developing international law); Michael S. Barr & Geoffrey P. Miller, *Global Administrative Law: The View from Basel*, 17 EUR. J. INT'L L. 15 (2006) (studying a transnational network of central bankers); MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS (1998) (discussing transnational networks of activists).

20. Megiddo, *supra* note 14, at 3.

Article does not aim to explain either the preference-formation of the United States as a State actor or its behavior. Rather, it aims to explore how non-State actors operating at the sub-State and transnational levels engage with international law.

The WTO is a profoundly State-centered, inter-governmental organization. Its Dispute Settlement Body has no individual redress mechanism and only considers grievances brought by States against States.[21] Its powerful sanction mechanism pivots whole economies against each other by authorizing States to retaliate against other States for breaches of the law, including in sectors different from the one in which the breach occurred.[22] This powerful economic incentive appears to explain States' responsiveness to the WTO and its relative effectiveness vis-à-vis other international legal regimes and tribunals.[23] However, studying the responses to WTO law and WTO rulings by non-State actors reveals that they, too, maintain channels of engagement and interaction with international law in addition to States. As the case study shows, non-State actors, individuals, and organizations championed WTO law. Moreover, they did so not only due to the fear of sanctions. They cited multiple other reasons in support of the position they advocated. It is this direct interaction by non-State actors with international law that makes it plausible to suggest that the dynamics described are not limited to the context of WTO law but are rather likely replicated in other areas of international law.

The Article's contribution is twofold. First, it demonstrates the theoretical and methodological value of considering the contributions of non-State actors to shaping the standing of international law within a State. The paper builds on Harold Koh's "transnational legal process" theory but takes it a step further by looking beyond government "insiders" and elite "outsiders"[24] to the ordinary voter, consumer, and farmer. Second, the Article challenges characterizations of the United States' approach to international law as strictly exceptionalist or parochial. Instead, it suggests that the United States' approach to international law is multifaceted and composed of aspects

21. Understanding on Rules and Procedures Governing the Settlement of Disputes, art 1.1, Apr. 15, 1994, 1869 U.N.T.S. 401 (which stipulates that the rules apply to "Members" of the covered agreement, namely, to States).

22. *Id.* art. 22(3)(b).

23. For more comprehensive analyses, see Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27 EUR. J. INT'L L. 9 (2016); Sivan Shlomo Agon, *Non-Compliance, Renegotiation and Justice in International Adjudication: A WTO Perspective*, 5 GLOB. CONST. 238 (2016).

24. Harold Hongju Koh, *The Trump Administration and International Law*, 56 WASHBURN L.J. 413, 416–19 (2017).

beyond the formal policies of an incumbent administration. Not only the leaders but also their constituents have a say in the matter. International law's standing within the United States must therefore be evaluated by also taking into account its perception among non-State actors operating within the United States. When these actors are taken into account, international law is in fact revealed to resonate to a great extent within the United States and to constitute a central factor in policy-making.

The Article proceeds as follows. Part I provides a critical reading of Koh's transnational legal process theory and suggests that its application ought to extend to non-officials and non-elite actors as well. Further, it argues that the practice of such actors should not be considered only as shaping their State's action or position. Rather, it should be acknowledged as significant in its own right: individuals, groups, and organizations have as much a claim to be accounted for in a depiction of a U.S. approach to international law as actions of the formal government. Part II provides some background for the case study, and Part III introduces the case study itself. The case study surveys and categorizes non-State actors' responses following a WTO ruling that the U.S. Country-of-Origin Labeling ("COOL") requirements breached international trade law. The case study shows that actors from diverse backgrounds invoked, relied on, and offered interpretations of the WTO ruling and thereby rendered international law a pertinent consideration in the domestic decision-making process. This robust engagement with the WTO ruling challenges the exceptionalist image of the United States. Part IV analyzes the case study's findings and explains that non-State actors succeeded in carving a space for international law in domestic decision-making. It therefore suggests that the ruling's impact in the United States cannot be appropriately understood without accounting for stakeholder engagement.

I. TRANSNATIONAL LEGAL PROCESS AND BEYOND

International law scholarship has long been invested in explaining whether and how international law works.[25] Harold Koh is a

25. *See, e.g.*, RYAN GOODMAN & DEREK JINKS, SOCIALIZING STATES (2013) (suggesting that social processes that operate at the international level influence state behavior and account for state compliance with international norms); BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS (2009) (exploring how international treaties alter domestic politics, empower local actors, and enhance the local actors' ability to pressure governments to comply with their international commitments); ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS (2008) (offering a rational-choice theory for state compliance with international law); JACK GOLDSMITH & ERIC POSNER, THE LIMITS OF INTERNATIONAL LAW (2006)

prominent contributor to this discussion. His "transnational legal process" model tracks how public and private actors interact to make, interpret, enforce, and internalize international law. The model aims to explain State "obedience" to international law, which he suggests follows from States' internalization of an international norm.[26]

Koh's transnational legal process model goes a long way in accounting for non-State actors' contribution to promoting international law's standing within a State. As he explains, such a process has three phases: (1) one or more transnational actors provokes an "*interaction*" with another; (2) one actor suggests to the other actor an "*interpretation*" of a certain international norm; and (3) the other actor undergoes a process of "*internalization*" of the new interpretation into its own normative system.[27]

Koh gives a place of pride to non-State actors in his theory, including government bureaucrats, media people, NGO activists, and "committed individuals."[28] And indeed, non-State actors play an important role in driving the first two stages of Koh's model: they engage in interactions with actors in other States and propose interpretations of international legal norms. In both stages, it is non-State actors who identify the appropriate interpretation and who actively work to convince their counterparts to adopt it. Nevertheless, Koh's third stage emphasizes the internalization of international legal norms by the State rather than by non-State actors. Although State internalization of an international norm may be achieved through the actions of social, political, or legal elites, it is not their subjective position towards the norm that is of relevance for Koh but rather the adoption of the norm into the State's legal system.[29] Thus, at this point, Koh circles back to a focus on the State actor, as opposed to the non-State actors.

Furthermore, despite recognizing the contribution of some

(likewise portraying states as rational, interest-maximizing actors whose compliance with international norms depends on their interests).

26. Harold Hongju Koh, *Trasnational Legal Process*, 75 NEB. L. REV. 181, 199 (1996); Koh, *supra* note 24, at 416.

27. Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2646 (1997).

28. Koh, *supra* note 24 at 415; Koh, *supra* note 26, at 183.

29. Koh, *supra* note 27 at 2657–58; Koh, *supra* note 1, at 1502 ("[T]he most overlooked determinant of compliance is what I call 'vertical process': when international law norms are internalized into domestic legal systems through a variety of legal, political, and social channels and obeyed as domestic law."). *See also* Harold Hongju Koh, *Jefferson Memorial Lecture—Transnational Legal Process after September 11th*, 22 BERKELEY J. INT'L L. 337, 340 (2004); Harold Hongju Koh, *How Is International Human Rights Law Enforced*, 74 IND. LAW J. 1397, 1410–11 (1998).

non-officials to the transnational legal process, Koh is primarily concerned with elite actors. This is evidenced by, among other things, his typology of the strategies non-State actors employ when participating in the process. In a recent article, Koh distinguishes between internal and external strategies, labeled in reference to the actors' relationship to the national government. An "outside" strategy for engaging in transnational legal process would thus include, for instance, the filing of a lawsuit by an NGO ("interaction") in order to force the government to accept their proposed interpretation and thereafter internalize it.[30] The "insider's" strategy is reserved for government lawyers or officials. They lead transnational legal processes in three ways. First, they engage in interaction with counterparts in other States. Second, they offer a translation and interpretation of legal rules. And third, they leverage their legal arguments by encouraging their own State and other States to internalize them using "other tools—including military force, diplomacy, development, technology, markets, and international institutions."[31]

I suggest that Koh's model should be taken a step further in two respects. First, with regard to the kind of actors taken into consideration. Koh nominally acknowledges that ordinary, individual people other than State officials take part in the international legal process, but his model gives little attention to their impact on international law or its domestic standing. Koh's focus is primarily on social and political elites: government lawyers and State officials on the one hand, and civil society activists on the other hand. However, the role of ordinary, individual people engaging with international law ought also to be considered when evaluating international law's standing in a State.

Second, I suggest expanding Koh's model to address additional kinds of outcomes besides State internalization of an international norm. Non-State actors render international law present in a State's public sphere in various ways that are not always directed at generating formal State internalization—or that are not always successful in doing so. They do so by familiarizing themselves with international law, framing arguments in its language, voicing political demands using its tools, or relying on it to justify their positions. Such mobilization is consequential even if the State is not ultimately responsive with respect to the particular issue, since it indicates the

30. Koh, *supra* note 24, at 417.

31. *Id*. at 417–19 ("Thus, these two strategies working together—the former implemented by committed nongovernmental activists, the latter by governmental officials committed to the rule of law—can lead us into a pattern of default compliance with international law that makes casual deviation from these rules more difficult than neophytes might believe.").

status of international law within the relevant community. International law's standing is further reflected when even actors who oppose it nonetheless accept international law as a premise for public deliberation. As I argue below, even if such actors do not genuinely embrace international law, their engagement with it suggests that they act on the presumption that their community has accepted it and thus expects them to address the demands of international law. If international law figures in public deliberation as an agreed premise, this fact would suggest that it has indeed been internalized in the said community.

In sum, I argue that in order to assess international law's standing in a State, it is insufficient to evaluate norm internalization by the formal government or even the social and political elites. The question of how non-State actors more generally perceive international law ought to become part of scholarly investigation. In the case of the United States, international law's posture should not be evaluated solely by examining the formal line of one administration or another. The evaluation must also account for how a variety of non-State actors operating in the United States regard international law.

II. *U.S.-COOL* AND OTHER ANIMALS

In June 2012, the WTO Appellate Body ruled that U.S. mandatory country-of-origin labeling requirements violated WTO law.[32] The domestic deliberation that followed the WTO *U.S.-COOL* ruling provides a good example for the contribution of non-State actors to shaping the way international law is received in the United States. This Part offers some background about the U.S. law regarding domestic reception of WTO rulings, the legislation and regulations on mandatory country-of-origin labeling, the notice-and-comment procedure that occurred following the WTO *U.S.-COOL* ruling, and the case study's methodology. Part III thereafter presents and categorizes the comments.

A. WTO Rulings in U.S. Law

WTO rulings are not automatically binding as a matter of domestic U.S. law. In fact, the Uruguay Round Agreements Act

32. Appellate Body Report, *United States—Certain Country Of Origin Labelling (COOL) Requirements*, WTO Doc. WT/DS384/AB/R (adopted June 29, 2012) [hereinafter U.S. COOL Appellate Body Report].

("URAA") stipulates that WTO decisions that find U.S. law in violation of WTO law do not have domestic effect.[33] Federal courts have held, furthermore, that WTO rulings are "not binding on the United States, much less [on federal courts]"[34] and are accorded, at most, "respectful consideration."[35]

In the event of adverse holdings by the WTO, the URAA stipulates that regulatory practices or regulations found inconsistent with WTO law "may not be amended, rescinded or otherwise modified" except through a designated, cumbersome process.[36] This process requires launching consultation procedures not only regarding how to implement the WTO ruling, but also whether to do so.[37] Federal courts have also afforded wide discretion to agencies in responding to adverse WTO decisions.[38] In line with the URAA, they have refused to serve as enforcers of adverse WTO decisions and have left it to agencies to decide whether and in what manner to amend their rules or practices.

B. A History of COOL

The Farm Security and Rural Investment Act of 2002[39]

33. Uruguay Round Agreements Act ("URAA") § 102, 19 U.S.C. § 3512 (2018); *see also* STATEMENT OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 103–316 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 4040, 4050.

34. Timken Co. v. United States, 354 F.3d 1334, 1344 (Fed. Cir. 2004); Corus Staal BV v. Dep't of Commerce, 395 F.3d 1343, 1348 (Fed. Cir. 2005). See similar language in Hyundai Electronics Co. v. United States, 53 F. Supp. 2d 1334, 1343 (Ct. Int'l Trade 1999); Cummins Inc. v. United States, 454 F.3d 1361, 1366 (Fed. Cir. 2006); Allegheny Ludlum Corp. v. United States, 367 F.3d 1339, 1348 (Fed. Cir. 2004).

35. *Cummins*, 454 F.3d at 1366.

36. 19 U.S.C. § 3553(g)(1) (2018).

37. The process includes several steps. First, consultation is required to be undertaken with the appropriate congressional committees. Second, the Trade Representative has to seek advice from relevant private sector advisory committees. Third, the agency or department head must provide an opportunity for public comments on the proposed modification and explain it. Fourth, the Trade Representative must submit a report describing the proposed modification, the reasons for it, and a summary of the advice obtained through consultations. Fifth, the Trade Representative and the agency head must consult with the appropriate congressional committees on the proposed contents of the modification. Finally, the final rule or other modification must be published in the Federal Register. 19 U.S.C. § 3553 (2018); *see also* STATEMENT OF ADMINISTRATIVE ACTION, *supra* note 33, at 268.

38. *See, e.g.*, *Hyundai*, 53 F. Supp. 2d at 1343; Koyo Seiko Co. v. United States, 551 F.3d 1286 (Fed. Cir. 2008).

39. Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, § 282, 116 Stat. 134, 534 (2002) [hereinafter 2002 COOL Statute].

amended the Agricultural Marketing Act of 1946, introducing a requirement that retailers of beef, lamb, and pork inform consumers of a product's country of origin. This requirement was amended once more by the Food, Conservation, and Energy Act of 2008,[40] and remained in force until its removal in 2015.[41] A notice of a product's country of origin was required to correspond to one of four designations: (a) United States Country of Origin, (b) Multiple Countries of Origin, (c) Imported for Immediate Slaughter, or (d) Foreign Country of Origin.[42] The first designation required that the product was derived from an animal that underwent all production steps (i.e., that it was born, raised, and slaughtered) in the United States. Such products were to be labeled as products of the United States. The second designation was applicable to products that underwent some production steps abroad and some in the United States. The Act required that the label of a product with multiple countries of origin list "all countries in which the animal may have been born, raised or slaughtered," but did not dictate a particular order in which to list the countries. The third designation was applicable to animal products that underwent some production step abroad and were then imported to the United States for slaughter. The corresponding label must note the country from which the animal was imported and the United States. The fourth designation required that all steps were completed outside the United States. Corresponding products were to be labeled as originating from a country other than the United States.[43]

The obligation to inform consumers of a product's country of origin was limited to retailers; food service establishments were exempted from the obligation.[44] Furthermore, meats that are ingredients in processed food items were excluded from the covered commodities.[45]

In 2009, the USDA issued a Final Rule on country-of-origin labeling (the "2009 Rule"),[46] which relaxed the Act's strict categorization by introducing two flexibility provisions. These are known,

40. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110–234, § 282, 122 Stat. 923, 1352 (2008). *See* Am. Meat Inst. v. U.S. Dep't of Agric., 968 F. Supp. 2d 38, 43 (D.D.C. 2013) (explaining this history).

41. Consolidated Appropriations Act Of 2016, Pub. L. No. 114-113, 129 Stat. 2242 (2015) (repealing the country-of-origin labeling requirements). *See also infra* note 165 and accompanying text.

42. Food, Conservation, and Energy Act of 2008, § 11002.

43. *Id*.

44. *Id*.

45. *Id*.

46. 7 C.F.R. §§ 60, 65 (2009).

respectively, as the "commingling flexibility" and the "country-order flexibility." The commingling flexibility permitted processing animals with different origins together on a single production day.[47] It allowed labeling the resultant products by listing "all countries of origin contained therein or that may be reasonably contained therein."[48] The country-order flexibility determined that the countries of origin may be listed in any order (i.e., "product of the United States, country X and Country Y" or "product of Country X, Country Y and the United States"). These flexibilities consequently rendered the second and third statutory designations interchangeable.[49] They also made it possible to designate products actually derived from U.S. animals as also originating elsewhere due to commingled production.[50]

C. WTO Proceedings

In 2008, Canada, later joined by Mexico, initiated WTO proceedings against the U.S. COOL provisions in the Agricultural Marketing Act, as amended in 2008 and as implemented by the Interim Final Rule published in August 2008. This Interim Final Rule later became, with minor amendments, the 2009 Rule introduced above.[51] Canada and Mexico claimed that these provisions provided for less favorable treatment to imported animals as compared to domestic animals. They created incentives for U.S. industry to exclusively use animals of U.S. origin, consequentially modifying the conditions of competition to the detriment of imported animals.[52]

The WTO panel upheld the claim that the "COOL measure"[53] created incentives for producers to use exclusively U.S.-origin livestock and a disincentive against using foreign livestock.[54] Producers

47. 7 C.F.R. §§ 65.300(g) (2009).

48. 7 C.F.R. § 65.300(h) (2009).

49. 7 C.F.R. § 65.300(e)(4) (2009).

50. *Id*.

51. 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) (codified at 7 C.F.R. ¶¶ 60, 65).

52. Panel Report, *United States—Certain Country of Origin Labelling (COOL) Requirements*, ¶ 7.372, WTO Doc. WT/DS384/R (adopted Nov. 18, 2011) [hereinafter U.S. COOL Panel Report].

53. The "COOL measure" is defined as the combination of the statutory provisions and the 2009 Rule. U.S. COOL Panel Report, *supra* note 52, ¶ 7.61 (referring jointly to the COOL Statute and the 2009 Final Rule).

54. U.S. COOL Panel Report, *supra* note 52, ¶ 7.420.

who used both U.S. and imported livestock incurred higher costs as a result of the COOL measure's requirements.[55] To comply with the requirements, producers were forced to maintain ongoing segregation of U.S.-origin and imported animals in order to be able to keep track of each product's country of origin.[56] Compliance also required producers to preserve an unbroken chain of reliable information for all stages of production, supply, and distribution for each animal and each piece of meat.[57] In effect, the requirements mandated the creation of additional production chains. Producers who exclusively processed U.S. animals or exclusively processed imported animals would not incur such costs, since they could continue to maintain a single production chain for a single type of animal.[58] However, producers could not exclusively use imported animals and still meet the U.S. market demand for meat,[59] and therefore exclusively processing U.S. livestock became the most economically viable business choice due to the COOL measure.[60] Additionally, rolling over the increased cost to consumers further impaired the competitiveness of products derived from imported animals.[61] The panel therefore held that the COOL measure discriminated against imported livestock, violating Article 2.1 of the Agreement on Technical Barriers to Trade ("TBT").[62]

The WTO panel also held that the COOL measure violated TBT Article 2.2,[63] which requires that technical regulations not be "more trade-restrictive than necessary to fulfil a legitimate objective."[64] The WTO panel found that the goal of providing consumers with origin information is a legitimate objective.[65] Nevertheless, the

55. *Id.* ¶¶ 7.316–50.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* ¶ 7.349.

60. *Id.* ¶¶ 7.345–50. Note the Appellate Body's analysis in this context, which relied on its earlier finding in *Korea—Various Measures on Beef* that the creation of a government-induced incentive for private actors "systematically to make choices in ways that benefit domestic products to the detriment of like imported products" constitutes less favorable treatment. U.S. COOL Appellate Body Report, *supra* note 32, ¶ 288.

61. U.S. COOL Panel Report, *supra* note 52, ¶ 7.357.

62. *Id.* ¶¶ 7.420, 7.548.

63. *Id.* ¶7.720.

64. Agreement on Technical Barriers to Trade art. 2.2, Apr. 15, 1994, 1868 U.N.T.S. 120.

65. U.S. COOL Panel Report, *supra* note 52, at ¶ 7.651.

panel held that the COOL measure did not fulfill this objective,[66] since the commingling and country-order flexibilities rendered the second and third designations interchangeable and therefore inaccurate.[67] Furthermore, due to the flexibilities, the second and third designations could be applied to products that did not meet their statutory requirements.[68] For instance, they could be applied to products that were in fact derived from U.S.-origin animals, if processed on the same day with imported animals. In addition, entire categories of products and providers were released from the labeling obligation altogether through the food service establishment exemption and the processed food item exclusion.[69]

The WTO Appellate Body reversed the panel's finding regarding the violation of TBT Article 2.2,[70] but upheld the panel's finding that the United States violated its obligations under TBT Article 2.1.[71] The Appellate Body embraced the bulk of the panel's reasoning about this violation but held that it should have further analyzed whether the detrimental impact to imported products stemmed exclusively from a legitimate regulatory distinction or whether the measure lacked even-handedness and was therefore illegitimate.[72]

The Appellate Body found that the COOL measure required upstream producers to track and transmit much more specific and accurate information than the information conveyed to consumers.[73] Therefore, the United States' goal of providing information to consumers could not justify the informational demands on producers.[74] Consequently, the regulatory distinctions amounted to arbitrary and unjustifiable discrimination against imported livestock, violating Article 2.1 of the TBT.[75] The United States was required to bring its COOL measure into compliance with the WTO's rulings and recommendations by May 23, 2013.[76]

66. *Id.* ¶¶ 7.620, 7.685.

67. *Id.* ¶¶ 7.716-19.

68. *Id.* ¶ 7.703.

69. *Id.* ¶¶ 7.415-17.

70. U.S. COOL Appellate Body Report, *supra* note 32, ¶ 468.

71. *Id.* ¶ 350.

72. *Id.* ¶ 293.

73. *Id.* ¶ 347.

74. *Id.* ¶ 453.

75. *Id.* ¶ 349.

76. Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, *United States: Certain Country of Origin Labelling (COOL) Requirement*, ¶ 123, WTO Doc. WT/DS384/24 (Dec. 4, 2012).

D. Notice-and-Comment

Responding to the WTO ruling, on March 12, 2013, the USDA's Agricultural Marketing Service ("AMS") published a proposed new country-of-origin labeling rule (the "Proposed Rule"),[77] launching a thirty-day notice-and-comment period.[78] The Proposed Rule suggested two major amendments to the 2009 Rule. The first would require specifying the country in which each production step occurred for all covered commodities ("production-step labeling").[79] The second eliminated the commingling flexibility.[80] The corresponding Final Rule came into effect on May 23, 2013.[81]

E. Multiple Voices: Methodology

The USDA is legally required to "give interested persons an opportunity to participate in the rule making" prior to adopting a new rule.[82] In response to the Proposed Rule, the USDA received 935 comments from a variety of participants.[83] The case study that follows explores these interventions, as well as the reasons and justifications offered by the USDA itself, analyzing them as a public deliberation on how to recalibrate policy in the wake of the WTO decision. The first participant in the deliberation was of course the USDA itself, offering arguments in support of the Proposed Rule as

77. 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, 78 Fed. Reg. 15,645, 15,646 (Mar. 12, 2013) (to be codified at 7 C.F.R. ¶¶ 60, 65) [hereinafter Proposed Rule Mandating Country of Origin Labeling].

78. *Id.* at 15,652.

79. For instance, "Born in Country X, Raised and Slaughtered in the United States" or "Born and Raised in Country X, Slaughtered in the United States." *Id.* at 15,648 (although animals slaughtered outside the United States are subject to no change).

80. *Id.* at 15,645.

81. 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, 78 Fed. Reg. 31,367 (May 24, 2013) [hereinafter Final Rule].

82. Administrative Procedure Act, 5 U.S.C. § 553(c) (2011); *see also* 19 U.S.C. § 3533 (g)(1)(c) (2009).

83. Final Rule, supra note 82, at 31,367 (stipulating that 936 comments were submitted; however, only 935 were made available on the Federal eRulemaking Portal at the time the data was derived from it for the purposes of this research, noting that two out of the original 937 comments were withdrawn, as one was a duplicate of another comment and a second was withdrawn when another comment was submitted to replace it).

part of the document published.[84]

The study analyzes the comments made publicly available on the E-Rulemaking portal "Regulations.gov," which also served as a platform for submitting the comments to the USDA.[85] In addition to their substantive comments, commenters provided their first and last name, city, state, country, and organization. Using the self-proclaimed organizational affiliation, the analysis below classifies commenters as belonging to one of six categories. The first, "meat producers," includes commenters associated with farms, ranches, plants, and companies involved in meat production, wholesale distribution, retail distribution, and those providing services to the meat industry. The second, "producers' associations," includes associations of farmers, feeders, breeders, processers, retailers, etc. The third, "consumer associations," collects comments noting affiliation with consumer groups. The fourth, "other associations," refers to associations not strictly oriented towards consumer or producer interests (mostly environmental groups). The fifth, "governmental authorities," includes governmental persons and agencies from the United States, Canada, and Mexico. Finally, under the sixth, "private individuals" were identified based on their self-characterization in response to the question about organization (answers ranged from "N/A"; "none"; "self"; "I am not an organization"; "Citizen"; "Consumer"; and "human being concerned with personal and community health").

Six (less than 1%) of the commenters were categorized as governmental authorities. Among these, U.S. state government officials submitted two comments.[86] In addition, foreign (Canadian and Mexican) governmental authorities submitted four comments.[87]

84. Proposed Rule Mandating Country of Origin Labeling, *supra* note 77, at 15,645–53.

85. *Id.* at 15,645.

86. Todd Staples, Tex. Dep't of Agric., Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 11, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0810; Gladys C. Baisa, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 10, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0526.

87. John Knapp, Deputy Minister, Alta. Agric. and Rural Dev., Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 11, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0775; Kenneth Smith Ramos, Minister for Trade and NAFTA Office, Embassy of Mex., Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 11, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0798; Alanna Koch, Deputy Minister, Sask. Ministry of Agric., Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 10, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0480; Ambassador Gary Doer, Embassy of Can., Comment Letter on Proposed Rule

However, the vast majority of commenters were not State officials. Meat producers submitted 435 comments (47%). Individuals affiliated with producers' associations submitted 107 comments (11%), of which eight were filed by Canadian or Mexican associations.[88] Individuals affiliated with consumers' associations submitted twenty-nine comments (3%). Similarly, commenters affiliated with other associations submitted twenty-nine comments (3%). Finally, private, unaffiliated individuals submitted 329 comments (35%).

Therefore, most commenters were private (i.e., non-public sector) actors. Some commented on behalf of commercial companies or not-for-profit organizations representing the interests or values of companies, communities, and individuals. Others participated in their own names. The format of submitted comments ranged from lengthy documents complete with legal memoranda[89] to just a line or two submitted through the online form.[90] Some mailed in hand-

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Mandating Country of Origin Labeling (Apr. 10, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0521.

88. Alejandro Gomez, President, Confederacion Nacional de Organizaciones Ganaderas, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 9, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0497; Jean-Guy Vincent, Chair, Canadian Pork Council, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 11, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0781; Trevor Atchison, President, Man. Beef Producers, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 10, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0417; William Jameson, Saskatchewan Cattlefeeders Association, Comment on Proposed Rule Mandating Country of Origin Labeling (Apr. 4, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0249; James M. Laws, Executive Director, Canadian Meat Council, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 8, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0390; Rogelio Sanchez, Asociación Ganadera Local de Satevo, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 11, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0560; Dori Gingera-Beauchemin, Deputy Minister, Man. Agric., Food and Rural Initiatives, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 10, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0815; B.C. Ass'n of Cattle Feeders, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 9, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0437. Note that "Manitoba Beef Producers" is the only organization that self-identified as an organization rather than submitting a comment via a named individual.

89. *See, e.g.*, Wenonah Hauter, Executive Director, Food & Water Watch, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 11, 2013), and attached Memorandum from Stewart and Stewart on Options for Coming into Compliance with WTO Ruling on Country of Origin Labeling (COOL) (Feb. 3, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0682.

90. *See, e.g.*, Lisa Meacham, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 5, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-

written notes.[91]

A survey[92] of the submitted comments conducted as part of the case study reveals that most commenters provided multiple reasons to support their position in favor of or against the Proposed Rule. In what follows, I work to pull apart the different threads of reasoning running through the comments in order to appreciate the kinds of concerns that inform the discussion.

III. DELIBERATING COOL

This Part categorizes commenters' responses as part of the U.S. deliberative process regarding country-of-origin labeling following the WTO ruling. In providing reasons and justifications for the policy outcome they advocated, commenters discussed U.S. national interests, national identity or values, interests of private parties, intra-U.S. power dynamics, the United States' role in the international or regional community of States, and international law. I present each of the threads briefly before exploring the comments addressing international law in greater depth.

A. Mapping the Discussion

The first group of issues commenters focused on was the United States' *national interests*. Commenters offered diverging views on the U.S. interest in promoting regional free trade and economic integration and the likelihood of the Proposed Rule to disrupt these interests.[93] Some expressed fear of retaliation by Canada and

13-0004-0283.

91. *See, e.g.*, Calvin Rice Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Mar. 23, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0926.

92. The survey included all comments belonging to the smaller group categories (government officials, consumers' associations, and other associations) and random samples of approximately ten percent of the comments categorized into the bigger groups (meat producers, producers' associations, and individuals). Where I read samples, rather than the entire group of comments, those were chosen randomly and could qualify as statistically representative of the group. *See* LEE EPSTEIN & ANDREW D. MARTIN, AN INTRODUCTION TO EMPIRICAL LEGAL RESEARCH 144–49 (2014); *Randomness*, *in* THE SAGE ENCYCLOPEDIA OF SOCIAL SCIENCE RESEARCH METHODS (Michael Lewis-Beck et al. eds., 2004). However, I do not make any statistically-grounded claim. Rather, I use the samples in order to get a glimpse into the kind of arguments put forward in a public deliberative process.

93. One opinion put forward was that regional economic integration has been good for all involved and that the weakening of the integrated market and consequent North American competitiveness is a threat to the region. *See* Knapp, *supra* note 87. Another

Mexico.[94] Others offered conflicting views of the Proposed Rule's costs (possible plant closures and job loss)[95] and benefits (economic

position, however, expressed reservations about free trade and about the WTO. One commenter maintained that country-of-origin labeling is a matter of national security, saying, "I feel this is a national security issue, the security of our health and economic well-being. Tell WTO to get out of our national security decisions." Lara Ramon, comment in a petition signed by 759 individuals, in Elizabeth Moran, W. Org. of Res. Councils (WORC), Comment Letter on Proposed Rule Mandating Country of Origin Labeling, 16 (Apr. 9, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0414. Another wrote: "Our food system should be as self reliant as possible, not only is this in the interest of our national food security, it is good for our economy." Simon Russell, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 10, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0445.

94. Comments submitted by Canadian and Mexican governmental authorities argued that the Proposed Rule will not bring the United States into compliance with its WTO obligations but will instead increase discrimination against imported products due to increased costs for using foreign-born animals compared to domestic animals. They further indicate that the Canadian and Mexican governments will pursue WTO remedies, including requesting compensation from the United States and seeking permission from the WTO to impose retaliatory measures. The Proposed Rule is further said to strain the trade relations between the United States and its neighbors and to be a breach of the United States' international trade obligations. Knapp, *supra* note 87; Smith Ramos, *supra* note 87; Koch, *supra* note 87; Doer, *supra* note 87. *See also* Thomas Wenning, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 11, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0751; Bill Tentinger, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 8, 2013), https://www.regulations.gov/document?D=AMS-LS-13-0004-0373; Teresa Carr, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 11, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0716; Bob Bloomer, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 8, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0389; Gomez, *supra* note 88; Vincent, *supra* note 88; Manitoba Beef Producers, *supra* note 88; Jim Quintaine, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 11, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0633. One commenter wrote, "Our country cannot afford to have embargos and trade restrictions placed on our import/export business in this already depressed economy. Such restrictions would drive domestic prices for goods (especially agricultural products) up even higher than their current levels, causing far reaching negative implications to our current economic status. . . . Please work to put a stop to MCOOL requirements before the economy of our great country is hurt once again by unnecessary legislation that obviously is not in compliance with the WTO." Verna Bennett, Tyson Inc., Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 11, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0750.

95. See comments from representatives of producers' associations: Wenning, *supra* note 94; Cash Berry, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 11, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0465; John Benzer, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 11, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0590; Jim Quintaine, *supra* note 94. See also comments from producers' associations: James Peters & Runnells Peters Feedyard, Comment Letter on Proposed Rule Mandating

gains) for the United States.[96]

The second set of issues raised by commenters expressed a sense of a U.S. *national identity or values*. Here, several commenters expressed their desire to support U.S. producers, which the Proposed Rule would make possible.[97] Others emphasized the importance of allowing producers who use U.S. animals to distinguish themselves from those who use non-U.S. animals.[98]

Country of Origin Labeling (Apr. 8, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0381; David Laks, Tyson, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 10, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0846; Steve Cherry, Tyson, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 9, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0733; Michael Burkham, Tyson, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 11, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0913. See also similar comments by private individuals: Mike Knobloch, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 11, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0922; Jason Getz, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 11, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0711.

96. An argument put forward by the AMS is that country-of-origin labeling would produce economic benefits. The AMS's assessment at the Proposed Rule stage is that it will bring small economic benefits, which are difficult to quantify. Proposed Rule Mandating Country of Origin Labeling, *supra* note 77, at 15,645–53. The agency is required to perform a cost-benefit analysis under Executive Orders 12866 and 13563. *Id.* at 15,647. In the Proposed Rule, there is no discussion of any non-economic benefits. But see discussion in the Final Rule, *supra* note 81, at 31,367–68.

97. Among consumers' associations and other associations, several commenters proclaimed their wish to be able to support U.S. producers by purchasing their products rather than imported products. *See* Nancy Thompson, Consumer Reports, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (March 26, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0087 ("We should be given the opportunity to support U.S. farmers"); *see also* Frederick Hesse, Consumer Reports, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 2, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0230. This reasoning was also echoed in the comments of private individuals. *See, e.g.*, Lexie Hensley, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 9, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0388.

98. For example, one producer wrote of his pride in the animals he raises and said he wants "all consumers to know that I raised the most safe and best animals in the world!" Wayne Soren, Comment Letter on Proposed Letter Mandating Country of Origin Labeling (Apr. 2, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0238. Supporters of the Proposed Rule among producers' associations similarly emphasized their wish to distinguish their products from imported ones and argued that consumers are interested in receiving accurate country-of-origin information, which the proposed rule facilitates. *See, e.g.*, Doug Sombke, S.D. Farmers Union, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 9, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0443. One commenter also opined that in order to

Another set of issues has to do with the *interests of private parties*. Many commenters discussed the increased costs the Proposed Rule would impose on the meat industry, and by extension, on consumers. As explained by commenters, significantly increased costs for the industry would arise from the need to invest in additional production and storage lines for each product category due to the commingling ban, the additional wording required on labels, the heightened record-keeping requirements, and the need to provide additional information to down-the-line commercial actors. These costs will eventually be rolled over to consumers, cumulating in an increased cost of meat.[99] These arguments were often coupled with the claim that consumers are not actually interested in country-of-origin information[100] and prefer paying less to knowing more.

Commenters affiliated with Tyson Foods, Inc., a multi-billion-dollar corporation[101] who represents over half of the meat producers' group (235 comments), comprised a noticeable block within the discussion of private party interests. Filing identical comments, Tyson commenters who were surveyed iterated their opposition to the Proposed Rule based on the considerations noted above.[102] Other commenters also made arguments opposing the Pro-

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compete with imports, U.S. products must be distinguished from imported products: Baisa, *supra* note 86.

99. Staples, *supra* note 86; Christina Sun, U.C. Hastings, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Mar. 28, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0207; J.D. Sartwelle, Jr., Sartwelle Brahman Ranch, LTD, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 11, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0934; Matt Teagarden, Kan. Livestock Ass'n, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 11, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0769.

100. This claim often relies on the following study that is repeatedly cited in comments: GLYNN T. TONSOR ET AL., MANDATORY COUNTRY OF ORIGIN LABELING: CONSUMER DEMAND IMPACT, KAN. ST. UNIV. DEP'T AGRIC. ECON. (2012), http://www.agmanager.info/livestock/policy/tonsor_ksu_factsheet_mcool_11-13-12.pdf [https://perma.cc/48D2-Q4K6].

101. Tyson Foods, Inc. produces "1 in 5 pounds of all chicken, beef, and pork in the U.S., making us the market leaders" and has sold at over $40 billion in 2018, mostly in the United States, according to the company's website. *What We Do*, TYSON, http://www.tysonfoods.com/Our-Story/Tyson-Overview.aspx [https://perma.cc/F5DQ-RAAP].

102. The identical "Tyson Block" contains six bullet points that raise the following issues, most of which pertain to increased industry and consumer costs as a result of the Proposed Rule: (1) The Proposed Rule entails more segregation and recordkeeping requirements that raise costs for the industry; (2) it requires almost double the words on labels than previously required (which presumably gives rise to additional costs); (3) prohibiting commingling will lead to a dramatically decreased use of non-U.S. cattle in the U.S. meat industry and will put the industry at a disadvantage; (4) this could lead to plant closures and loss of jobs; (5) a Kansas State University study found that consumers are

posed Rule along the same lines,[103] including non-Tyson producers,[104] producers' associations,[105] and private persons.[106]

However, other commenters stressed their interest in obtaining accurate information on the production of the meat they consume. Almost all commenters affiliated with consumer associations and other associations noted their wish to make "informed choices" when

unaware of country-of-origin labeling or are uninterested in it (Tonsor et al., *supra* note 100); and (6) the Proposed Rule is said to endanger relations with two of the U.S. meat industry's important trading partners, Canada and Mexico. *See* Burkham, *supra* note 95; Melody Beck, Tyson, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 11, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0776; Jeff Riherd, Tyson, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 10, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0510; Mark Janus, Tyson, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 10, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0538; Bradley Peterson, Tyson, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 11, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0596; Alonzo Pettigrew, Tyson, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 11, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0598; Kurt Schrock, Tyson, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 10, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0532; Jim Solsma, Tyson, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 11, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0692; Jennifer Boone, Tyson, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 11, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0700; Jay Krehbiel, Tyson, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 11, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0741.

103. First, the Rule was said to increase costs to producers and consumers in its creation of increased recordkeeping, segregation, and labeling costs. *See, e.g.*, Norman Beckman, Beckman Cattle Co. Inc., Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 10, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0502; Chuck Fries, Beef Source Int'l, LLC, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 11, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0774. This might lead to price inflation and lost trade, and consequently to plant closures and job loss. *See* Tentinger, *supra* note 94. The Proposed Rule will not benefit consumers, since consumers are not interested in country of origin information. Myron Williams, Black Hills Cattlemen's, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 11, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0582; Berry, *supra* note 95; Benzer, *supra* note 95. And the rule cannot assist in tackling food safety concerns. Williams, *supra* note 103; Jeanna Burns, C&S Wholesale Grocers, Inc., Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 11, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0793.

104. *See, e.g.*, Sartwelle, *supra* note 99.

105. Teagarden, *supra* note 99; Wenning, *supra* note 94.

106. *See, e.g.*, Knobloch, *supra* note 95.

buying food for themselves and their families. Many also asserted that consumers overall are interested in receiving such information.[107] Similarly, almost all comments by private persons surveyed noted an interest in obtaining country-of-origin information.[108]

The commenters offered a variety of reasons for wanting country-of-origin information. Some commenters noted that such information was required in order to ascertain food safety[109] or address health concerns[110] (including avoiding genetically-modified

107. Of the fifty-eight comments submitted by commenters affiliated with such associations, almost all indicated that they themselves were interested in knowing the origin of the meat products they consume or assessed that consumers overall are interested in receiving this information. Being able to make an "informed decision" when buying food is a wish repeatedly cited by these commenters. *See, e.g.*, Colleen O'Neil, Consumers Union, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Mar. 27, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0158; Sharon Mallory, Consumers Union, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Mar. 27, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0180; Carol Lauritzen, Or. Rural Action, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 11, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0586.

108. Twenty-eight out of the thirty-three private persons surveyed noted their interest in COOL information, two explicitly opined that consumers are not interested in COOL, and three did not explicitly express an opinion on this issue. *See* Staples, *supra* note 86; Sun, *supra* note 99; Sartwelle, *supra* note 99; Teagarden, *supra* note 99.

109. *See, e.g.*, Catherine Cox, Consumers Union, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Mar. 26, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0153 ("For the health & safety of all Americans we deserve to know where our food comes from and where it is processed."); Doris Preston, Consumers Union, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Mar. 26, 2013), https://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0135 ("I am in America, not some foreign country where I might be served something out of the ordinary. I deserve to know the makeup of what I purchase or what I am being served."). *See also* Karen Lyke, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 6, 2013), https://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0341; Robert Boyce, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Mar. 26, 2013), https://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0159; Harvey Harris, MD, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Mar. 27, 2013), https://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0167.

110. *See, e.g.*, Roberta Jenkins, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Mar. 26, 2013), https://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0052; Brian Laddy, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Mar. 26, 2013), https://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0110; Donna Brown, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Mar. 26, 2013), https://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0080; Alcock Garland, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Mar. 26, 2013), https://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0099.

foods[111]). Others opined that regulation of food products outside the United States is laxer than in the United States[112] and that U.S. products were safer or superior to foreign products.[113] A number of commenters expressed concerns that other meats (particularly, horse meat[114]) would be mixed into the products they consume without disclosure, tying this concern to non-U.S. products. They also thought labeling would help address such concerns or retrace foodborne illness back to its origins.[115] Other commenters, however, dismissed the claims that country-of-origin labeling can help address health and safety concerns.[116]

A fourth thread of comments referred to *intra-U.S. power dynamics*, expressing concern about government capture. Whereas some commenters worried about capture by multinational corporations and "Big Ags,"[117] others worried about the power that advo-

111. *See* Ethan Cruze, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Mar. 28, 2013), https://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0206.

112. *See* Michael Hewitt, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Mar. 26, 2013), https://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0073; Brown, *supra* note 110.

113. *See, e.g.*, Linda Newman, Women Involved in Farm Econ., Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 9, 2013), https://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0421; Hauter, *supra* note 89. *See also* Jerry Depew, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 11, 2013), https://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0833.

114. *See, e.g.*, Cheryl Fisher, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Mar. 26, 2013), https://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0051; Dan Magee, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Mar. 26, 2013), https://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0067.

115. *See, e.g.*, Joel Keierleber, S.D. Dist. 4 Farmers Union, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 3, 2013), https://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0251; Seif Saqallah, W. Bloomfield High Sch., Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Mar. 14, 2013), https://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0018; Margaret Mead, Or. Rural Action, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 11, 2013), https://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0585; Hauter, *supra* note 89.

116. *See, e.g.*, Burns, *supra* note 103; Michael Forbes, Hormel Foods Corp., Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 10, 2013), https://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0472; Pettigrew, *supra* note 102.

117. A petition signed by 759 individuals stated that "[t]he WTO decision on COOL puts the interests of international agribusinesses ahead of livestock producers and consumers." Moran, *supra* note 93; *see also* Thompson, *supra* note 97.

cates of increased country-of-origin information had gained.[118]

A fifth thread of discussion is framed around the United States' *role in the international or regional community of States*. Here, some commenters underscored the importance of the United States maintaining healthy trade relationships with Canada and Mexico, two of its biggest trading partners.[119] However, other commenters promoted an exceptionalist vision. They argued that the United States should withstand pressure from other countries or the WTO, and not cave in to demands that are against U.S. interests.[120] Food & Water Watch submitted a petition signed by 24,100 members and supporters, asserting that "[t]he World Trade Organization should not get to decide what information I get about the food I buy for my family."[121] Yet other commenters denounced this attitude as protection-

118. *See* Tonsor et al., *supra* note 100; *see also* Joel Rosenberger, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 11, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0702; Knapp, *supra* note 87; Sun, *supra* note 99; Teagarden, *supra* note 99; Kevin Stacy, Nat'l Ass'n of Agric. Educators, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 11, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0866; Burkham, *supra* note 95.

119. I am here referring to arguments raised regarding the economic and political relations between the countries rather than strictly their legal relations, although obviously this attempt to differentiate the two is somewhat artificial, as evidenced by the comments I cite below. I make the distinction following a similar distinction made by commenters. The Texas Department of Agriculture Commissioner, Todd Staples, urged the AMS to withdraw the Proposed Rule, as it burdens producers and consumers and harms trade relations with Canada and Mexico. Staples, *supra* note 86. *See also* Knobloch, *supra* note 95; Teagarden, *supra* note 99; Beckman, *supra* note 103; William Morris, Bovina Feeders Inc., Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 3, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0244; Bennett, *supra* note 94; Beck, *supra* note 102; Riherd, *supra* note 102 [Tyson Block Commenters]. One concern voiced by producers was that the Proposed Rule would harm U.S. trade relations with its neighbors. Morris, *supra* note 119; Beckman, *supra* note 103. They argued, further, that the Proposed Rule is not compatible with the WTO ruling, since it does not alleviate, but rather enhances, the discrimination against imported products. Forbes, *supra* note 116; Bloomer, *supra* note 94; Quintaine, *supra* note 94. Producers voiced concerns that the Proposed Rule might lead Canada and Mexico to seek retaliation at the WTO. Bloomer, *supra* note 94; Quintaine, *supra* note 94.

120. One commenter wrote, for instance, "Since when are we going to settle for other countries dictating what we do here, we need to stand firm and do what is best for the good old USA and be proud of our accomplishments." Newman, *supra* note 113.

121. Patrick Woodall, Coalition of 229 Farm, Rural, Faith, Envtl. and Consumer Org.s, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 2, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0231. Another example is Cathy Meyer, Lower Wind River Conservation Dist., Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 11, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0696 ("While we do not feel that the World Trade Organization has the right to tell the United States what food labeling rules

ist and misplaced, arguing instead that free trade benefits all.[122]

Finally, as the next section details, the United States' international legal obligations served as a distinct, non-negligible issue addressed by commenters.

B. International Law on the Table

As mentioned above, the United States is often characterized as international law-resistant.[123] As a result, one might not expect to see international law widely invoked or seriously considered in a domestic discussion on national policy. It is thus especially interesting that evidence now described suggests that this perception is overstated. Instead, international law is discussed by a variety of U.S. actors, spanning from the agency to private citizens, as a distinct, non-negligible consideration to be taken into account when making national policy decisions. Of the 152 comments surveyed, forty-six of them (representing a weighted average of 37.14%) referred explicitly to either international law, the WTO, the WTO ruling, or the ruling's finding of discrimination against imported products as a reason for the policy they were advocating. The following discussion elaborates on the various ways in which commenters used international law and their differing regard for it. As it shows, commenters relied on international law to oppose the Proposed Rule as well as to support it. Commenters on both sides of the debate claimed that the Proposed

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we can or cannot use, we do support the proposed rule."). This sentiment was also echoed in comments submitted by non-affiliated private individuals. Using language identical to that of the petition, two commenters expressed dissatisfaction with what they viewed as the WTO's unwarranted intervention. Meacham, *supra* note 90; B.A. Douglass, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 5, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0291. Another comment stipulated that ". . . the WTO often makes decisions that are based on politics, not logic or health safety." Sharon Coleman & Kent Coleman, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 11, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0924. Yet another urged the AMS: "Don't back down because of the World Trade Organization." Shirley Mount, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 6, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0342.

122. One producer characterized the increased demands of the Proposed Rule as protectionist and noted that international trade authorities demand that the United States reduce trading restrictions. Mark Feiner, Tyson, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 9, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0567. *See also* Man. Beef Producers, *supra* note 88 (making the claim that free trade has been beneficial for both Canadian and American producers).

123. *See supra* notes 1–3.

Rule should meet the demands of the ruling and opined as to whether it does meet these demands. Finally, even commenters who disapproved of the ruling or of the WTO found it necessary to address the issues raised and provide international law-relevant arguments to support the position they advocated.

Commenters' use of international law varied. Some referred to international law to base their opposition to the Proposed Rule. For instance, representatives of foreign governmental authorities asserted that the Proposed Rule breached the United States' international trade obligations by increasing the prohibited discrimination against imported products instead of eliminating it.[124] This position was by no means limited to Canadian or Mexican commenters. Rather, U.S. commenters from various backgrounds similarly argued that the Proposed Rule failed to comply with the WTO ruling and called on the United States to correct the violations of WTO law identified in the ruling. For example, some meat producers argued that the Proposed Rule "fails properly to address" the WTO ruling[125] and, rather, enhances discrimination against imported products.[126] One described it as "stick[ing] your thumb in the eye of the WTO by not only failing to address their concerns but doubling down on rules that they find out of compliance."[127] Others added: "[b]ased on the WTO ruling, I strongly believe that the only available corrective action is for Congress to amend the [Agricultural Marketing Act]."[128] Some producers' associations also worried that the Proposed Rule did not satisfy the WTO ruling or meet the United States' WTO obligations.[129] Several commenters affiliated with producers' associations declared that the Rule does not comply with the WTO ruling and opined that it ought to comply with it.[130] Finally, a private individual who also found the Proposed Rule wanting and urged compliance with the WTO ruling wrote: "I strongly feel that as a member

124. Knapp, Smith Ramos, Koch & Doer, *supra* note 87.

125. Forbes, *supra* note 116.

126. *Id*.; Patrick Florence, Ind't Food, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 10, 2013), http://www.regulations.gov/#!documentDetail; D=AMS-LS-13-0004-0529; Tentinger, *supra* note 94. *See also* Canadian producer Quintaine, *supra* note 94.

127. Ken Blight, Blight Farms Inc., Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Mar. 25, 2013), http://www.regulations.gov/#!documentDetail; D=AMS-LS-13-0004-0032.

128. Fries, *supra* note 103; *See* Benzer, *supra* note 95.

129. Wenning, *supra* note 94; Stephen Nelson, Neb. Farm Bureau Fed'n, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 11, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0779.

130. Forbes, *supra* note 116; Teagarden, *supra* note 99; Nelson, *supra* note 129.

of the WTO this great country of ours must abide by the rulings or close the gates to importing or exporting."[131]

But commenters also cited international law in support of the Proposed Rule and relied on the ruling as a reason to adopt it. One producer argued that the Proposed Rule "addresses the negative WTO ruling without ceding the United States' sovereign right to pass and enforce laws that require retailers to inform consumers about the origins of their food."[132] Commenters affiliated with producers' associations claimed that the Rule complies with the United States' international trade obligations or WTO ruling. Moreover, they commended the Proposed Rule for complying with the ruling while providing even more information to consumers, rather than eliminating the country-of-origin labeling requirement.[133] Recall, the Appellate Body found the disproportion between the amount of information provided to consumers and the amount of information producers were required to collect constituted arbitrary and unjustifiable discrimination against imported animals.[134] These commenters therefore suggested that increasing the information provided to consumers to compare with the information producers are required to generate best resolves the imbalance. Several consumers' associations and other associations likewise maintained that strengthening the labeling requirements was an acceptable way to address the WTO ruling.[135] Finally, one individual commenter concurred, adding: "[t]his is not restraint of trade, it is simply providing information for us [consum-

131. *See* Rosenberger, *supra* note 118.

132. Rose Bebo, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 7, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0362.

133. Gil Engdahl, Tex. Sheep & Goat Raisers' Ass'n, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 10, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0639; Scott Karel, Wis. Farmers Union, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 11, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0684; John Hansen, Neb. Farmers Union, Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr.11, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0791.

134. U.S. COOL Panel Report, *supra* note 52, ¶ 349.

135. Woodall, *supra* note 121. *See also* Chris Waldrop, Consumer Fed'n of Am., Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 8, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0394; Hauter, *supra* note 89; Ruth Laribee, Women Involved in Farm Econ., Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 11, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0825; Mabel Dobbs, W. Org. of Res. Councils (WORC), Comment Letter on Proposed Rule Mandating Country of Origin Labeling (Apr. 11, 2013), http://www.regulations.gov/#!documentDetail;D=AMS-LS-13-0004-0812.

ers] to make decisions."[136]

It is noteworthy that even commenters who clearly support American protectionism or exceptionalism nevertheless saw fit to refer to international law, WTO law, or the WTO itself. As could be expected, their position is that the ruling should be disobeyed or disregarded and their comments express an opposition to the WTO. Nevertheless, the fact that they found it necessary to address the ruling is revealing, as I discuss in Part IV. One private person who held this position commented that "[t]he World Trade Organization should not get to decide what information I get about the food I buy for my family."[137] Another wrote: "While we do not feel that the World Trade Organization has the right to tell the United States what food labeling rules we can or cannot use, we do support the proposed rule."[138]

The USDA was obviously also part of the deliberation. Although its role and the form of its interventions are different from those of other participants, it seems to me helpful to address them together as part of the same discussion. The USDA also relied on international law. This is less pronounced in the Proposed Rule document, and more apparent in later agency documents. The Proposed Rule document referred to the WTO ruling in relation to the "Purpose of Regulatory Action" and explained that the agency reviewed its regulatory program following the WTO decision. It noted that the Proposed Rule was expected to improve the program and to bring "the current mandatory COOL requirements into compliance with U.S. international trade obligations."[139] It later noted that the agency reviewed the regulatory program "in light of the WTO's finding" and that "the objective of this proposed rulemaking is to amend current mandatory COOL requirements to provide consumers with information on the country in which production steps occurred for muscle cut covered commodities, thus fulfilling the program's objective of providing consumers with information on origin."[140] The Proposed Rule document did not explicitly engage with the WTO holding about discrimination against imported products, nor did it explain how it expected to diminish it. Nonetheless, it appears that the Proposed Rule's primary purpose was to respond to the WTO ruling.

The USDA engaged with the WTO ruling in much greater length in the Final Rule document. First, under "Purpose of Regula-

136. Boyce, *supra* note 109.

137. Meacham, *supra* note 90; Douglass, *supra* note 121.

138. Meyer, *supra* note 121.

139. Proposed Rule Mandating Country of Origin Labeling, *supra* note 77, at 15,645.

140. *Id.* at 15,650–51.

tory Action," it echoed the Proposed Rule's explanation that the review of the regulatory program is a result of the WTO ruling.[141] Second, it noted that the WTO recognized the legitimacy of aiming to provide consumers with country-of-origin information.[142] It then explained that the WTO considered the recordkeeping requirements more onerous than necessary, in light of the actual information conveyed to consumers. The USDA then stipulated that the Final Rule addressed the WTO's concerns. Presumably, the implication was that expanding the information available to consumers repaired the imbalance identified by the WTO.[143] Third, the USDA clarified that the Agricultural Marketing Act established mandatory country-of-origin labeling (implicitly indicating that eliminating the requirement is beyond the powers of the agency).[144] But the USDA rejected claims made in the comments that complying with the WTO ruling could only occur through legislative change.[145] It emphasized that it "expects that these changes will bring the mandatory COOL requirements into compliance with U.S. international trade obligations."[146]

A subsequent proceeding provides additional insight into the position of different participants in the deliberation towards the WTO ruling. In July 2013, several producers' associations filed a complaint with the U.S. District Court for the District of Columbia against the AMS, the Secretary of Agriculture, and the AMS Administrator. The complaint alleged, first, that the Final Rule compelled their speech in violation of the First Amendment.[147] Second, it alleged that the Final Rule exceeded the authority of the AMS under the Agricultural Marketing Act, which does not provide for produc-

141. Final Rule, *supra* note 81, at 31,367.

142. *Id.* at 31,370–71.

143. *Id.* at 31,370–71. This link between providing more information and complying with the WTO ruling arguably relies on the Appellate Body's criticism that the recordkeeping requirement was incommensurate with the information conveyed to consumers. *See* U.S. COOL Appellate Body Rep., *supra* note 32, at 349.

144. Final Rule, *supra* note 81, at 31,671–72.

145. *Id.* at 31,371–72. Note that a May 2015 WTO Appellate Body Compliance Report rejected this claim and held that the U.S. COOL measure as updated in May 2013 still violates TBT art. 2.1 and art. III:4 to the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994), Appellate Body Compliance Report, *United States—Certain Country Of Origin Labelling (COOL) Requirements*, WTO Doc. WT/DS384/AB/RW (May 18, 2015).

146. Final Rule, *supra* note 81, at 31,370.

147. Complaint for Declaratory and Injunctive Relief ¶¶ 85–90, Am. Meat Inst. v. U.S. Dep't of Agric., 968 F.Supp.2d 38 (D.D.C. 2013) (No. 13-cv-1033).

tion-step labeling.[148] Finally, the complaint argued that the Final Rule violated the Administrative Procedure Act by being an "arbitrary and capricious" action.[149] The Plaintiffs also filed a motion for a preliminary injunction enjoining the Final Rule.[150] Among other things, they claimed that the Final Rule "will exacerbate, not cure, the United States' WTO violations by increasing discrimination against imported livestock without legitimate justification."[151] Therefore, they argued, the Final Rule was arbitrary and capricious and should be enjoined and declared invalid.[152]

The USDA's submissions to the Court in response to the motion for preliminary injunction stipulated that they promulgated the Final Rule for two reasons: first, to provide consumers with more accurate information, and second, "to comply with the United States' international obligations under the WTO Agreement on Technical Barriers to Trade."[153] The USDA explained that the Final Rule "addresses the concerns raised by the WTO Appellate Body"[154] because it rebalanced the informational demands on producers to better align with the information that must be provided to consumers. Finally, eliminating the commingling allowance ensured that more accurate information was provided to consumers.[155]

Rejecting the Plaintiffs' motion for preliminary injunction, the D.C. District Court confirmed that "[t]here is no doubt that the WTO determination provided an impetus for promulgating the Final Rule."[156] The District Court found that the Rule did not address all issues of concern for the WTO, but only those within the purview of the USDA's authority (namely, issues not dictated by the Agricultural Marketing Act). Nonetheless, it found that the agency, bound by the statute, "did the best it could" to respond to the WTO decision. Therefore, the Court held that the USDA's response was "neither arbitrary nor capricious."[157]

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148. *Id.*

149. *Id.*

150. Plaintiff's Motion for a Preliminary Injunction, Am. Meat Inst. v. U.S. Dep't of Agric., 968 F.Supp.2d 38 (D.D.C. 2013) (No. 13-cv-1033).

151. Complaint for Declaratory and Injunctive Relief, *supra* note 147, ¶¶ 87.

152. *Id.* ¶¶ 90.

153. Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction at 20, Am. Meat Inst. v. U.S. Dep't of Agric., 968 F.Supp.2d 38 (D.D.C. 2013) (No. 13-cv-1033).

154. *Id*. at 23.

155. *Id.* at 24–25.

156. Am. Meat Inst. v. U.S. Dep't of Agric., 968 F.Supp.2d 38, 71 (D.D.C. 2013).

157. *Id.* at 72–73. The Court explains, ". . . the AMS was stuck between a rock and a hard place after the WTO ruled. In the absence of a legislative solution to what the WTO

C. The Aftermath

The Final Rule was not eventually successful in addressing the WTO concerns. A 2015 WTO ruling in a compliance proceeding brought by Canada and Mexico rejected the United States' claims that the Final Rule rectified its violations. The Appellate Body upheld the panel's finding that the Final Rule's mandatory production-step labeling and its elimination of the commingling and country-order flexibilities resulted in increased segregation between foreign and U.S. animals and increased recordkeeping requirements.[158] It further upheld the panel's finding that these obligations on producers were disproportionate to the information provided to consumers.[159] Therefore, the Appellate Body upheld the panel's conclusion that the detrimental impact caused by the Final Rule could not be explained by the need to convey country-of-origin information to consumers and therefore it did not stem exclusively from a legitimate regulatory distinction. The Appellate Body therefore found that the Final Rule violated TBT Article 2.1.[160]

In 2013, the USDA could have responded to the WTO ruling in one of two ways. First, the USDA could have ignored the ruling and left it to Congress to amend the Agricultural Marketing Act and remove its mandatory COOL provisions. Second, the USDA could have brought the information-production and recordkeeping requirements in line with the WTO ruling to the extent its authority allowed. The USDA chose the latter option. This indicates that its officials regarded themselves as navigating between a rock—the Agricultural Marketing Act, which required the USDA to impose country-of-origin labeling—and a hard place—the WTO ruling, which required that it avoids discriminating against foreign producers.[161] Both direc-

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had identified as problematic, the agency had to attempt to bring the COOL regulations into compliance with the international tribunal's decision without running afoul of the COOL statute. Given these constraints, it is evident to the Court that the agency did the best it could and responded in a manner that was neither arbitrary nor capricious." *Id.* at 73. In the compliance proceedings, the Appellate Body similarly opined that rectifying the United States' violations required legislative amendment. U.S. COOL Appellate Body Compliance Rep., *supra* note 145, ¶ 5.121 (upholding the Panel's finding that the statutory exemptions are "of central importance" in the "overall architecture" and rendered the majority of beef and pork consumed exempted from the requirement to provide any origin information).

158. WTO US COOL Appellate Body Compliance Rep., *supra* note 145, ¶¶ 5.21, 5.27, 5.28.

159. *Id.* ¶ 5.46.

160. *Id.* ¶ 5.47.

161. This was also the language used by the D.C. District Court: "the AMS was stuck between a rock and a hard place after the WTO ruled. In the absence of a legislative solution to what the WTO had identified as problematic, the agency had to attempt to bring

tives seem to be operating similarly as robust, strict constraints on officials' discretion. USDA officials seem to regard both as binding on them and limiting their discretion, and the Proposed Rule and the Final Rule reflect their attempt to work out a way to meet the demands of both. In the words of the District Court, the agency "had to" at least try to bring its measure into compliance.[162] Given the international law-resistant image of the United States, and the fiery rhetoric of federal courts regarding WTO rulings,[163] this is far from an obvious result.

Following the compliance ruling, the WTO authorized Canada and Mexico to retaliate annually against the United States to the sum of $1 billion.[164] Responding to this authorization, Congress finally amended the Agricultural Marketing Act and removed the country-of-origin labeling requirement altogether.[165]

IV. ANALYSIS

Considering the United States' response to the 2012 WTO ruling only through the prism of the formal actions and positions of its government might lead us to think that the United States was unmoved by the ruling. Indeed, as a single, unitary State actor, the Final Rule the United States adopted was found to have failed to rectify

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the COOL regulations into compliance with the international tribunal's decision without running afoul of the COOL statute." Am. Meat Inst. v. U.S. Dep't of Agric., 968 F. Supp. 2d 38, 73 (D.D.C. 2013).

162. *Id*.

163. *See, e.g.*, Timken Co. v. United States, 354 F.3d 1334, 1344 (Fed. Cir. 2004); Corus Staal BV v. Dep't of Commerce, 395 F.3d 1343, 1348 (Fed. Cir. 2005) (holding, for instance, that WTO rulings are "not binding on the United States, much less this Court").

164. Appellate Body Compliance Rep., *United States—Certain Country Of Origin Labelling (COOL) Requirements*, ¶ 81–82, WTO Doc. WT/DS384/ARB (Dec 7, 2015) [hereinafter U.S. COOL 2015 Arbitration]; House Committee on Appropriations, *FY 2016 Omnibus Summary—Agriculture Appropriations* 4 (2015), https://republicans-appropriations.house.gov/uploadedfiles/12.15.15_fy_2016_omnibus_-_agriculture_-_summary.pdf [https://perma.cc/W435-RFRR]; Nancy Fink Huehnergarth, *Quashing Consumers' Right-To-Know, Congress Repeals Country-Of-Origin-Labeling For Beef And Pork*, FORBES (Dec. 21, 2015), https://www.forbes.com/sites/nancyhuehnergarth/2015/12/21/quashing-consumers-right-to-know-congress-repeals-country-of-origin-labeling-for-beef-and-pork/#6e7acaed36e5 [https://perma.cc/3KQ8-VZN3].

165. Consolidated Appropriations Act, *supra* note 41; Kelsey Gee, *Spending Bill Eliminates Rule for Labels Specifying Meat's Country of Origin*, WALL ST. J. (Dec. 18, 2015), https://www.wsj.com/articles/spending-bill-eliminates-rule-for-labels-specifying-meats-country-of-origin-1450471003 [https://perma.cc/WY83-F36H].

its violations.[166] As several commenters opined at the time, and as suggested by the D.C. District Court decision, the United States could only fully rectify the violations identified in the WTO ruling by repealing the mandatory COOL provisions in the Agricultural Marketing Act.[167] Such repeal passed only following the WTO's authorization to Canada and Mexico to retaliate against the United States' continued violation.[168] Granted on December 7, 2015, the authorization likely triggered the inclusion of the mandatory COOL provisions' repeal in the 2016 Appropriations Act, passed on December 18, 2015.[169]

However, as the case study demonstrates, the WTO ruling cannot be said to have made no difference in the United States prior to the authorization to retaliate. Rather, commenters on all sides of the issue referenced the ruling, and it informed the Final Rule's rulemaking process. Individual citizens, groups, and organizations regarded international law, as expressed by the WTO ruling, as a non-negligible consideration in the making of the national policy at hand. Many commenters not only acknowledged the relevance of international law to the making of national policy but also worked to fashion arguments in international legal language to support the course of action they believed the United States should take.[170] Even the commenters who objected to international law or to the WTO seemed to consider themselves obliged to address international law and argue within its framework in order to make a convincing case for their preferred policy. Finally, some commenters actively advocated for the application of international law in the United States and for compliance with the WTO ruling.[171] Therefore, the impact of the WTO ruling could only be appreciated by accounting for the robust engagement by non-State actors in the United States with this ruling. Through their engagement with the WTO ruling, non-State stakeholders carved a space for it as a central consideration in the national decision-making process.

Non-State actors have as much a claim to be accounted for in a depiction of a U.S. approach to international law as actions of the formal government. At the very least, the widespread engagement with international law by a multitude of U.S. actors calls into ques-

166. U.S. COOL Appellate Body Compliance Rep., *supra* note 145.

167. Berry, *supra* note 95; Benzer, *supra* note 95; Vincent, *supra* note 88; Am. Meat Inst. v. U.S. Dep't of Agric., 968 F. Supp. 2d 38, 72–73 (D.D.C. 2013).

168. U.S. COOL 2015 Arbitration, *supra* note 163, at 6.

169. Consolidated Appropriations Act, *supra* note 41.

170. *See supra* notes 124–136.

171. *See, e.g.*, *supra* note 131.

tion assertions made about the United States' characteristic resistance to international law. In fact, the deliberative process explored in the case study and the wide range of participating actors who viewed the United States' international obligations as a non-negligible consideration in domestic decision-making challenge the United States' exceptionalist reputation. The question is not solely whether the United States, as a country, views itself as bound by its international legal obligations, or whether certain political leaders such as the President perceive international law as binding. It is also how domestic stakeholders regard it. The standing of international law within the United States is also shaped by non-State actors' perception of it and their engagement with it.

Arguably, it is also the case elsewhere that international law's standing within a State depends on how citizens, consumers, businesspeople, and civil society actors perceive it. Furthermore, consideration of non-State stakeholders' regard for international law, especially those outside government bureaucracy, reveals a possible entry channel for international law into domestic law and politics that has received little attention.

The domestic engagement with the WTO ruling did not ultimately result in a change in policy that led to State compliance with the ruling. But that does not mean that the ruling was without impact. International law's standing within the United States was reflected in the widespread engagement with its norms among commenters. Shifting the scholarly attention to the contribution of non-State actors enables us to recognize that even if their efforts ultimately failed to achieve their desired result, international law still carried substantial weight. Commenters invoked international law, addressed its requirements, and gave reasons as to why the law's conditions were met or why they did not apply to the situation. Some made the point that the law should not be obeyed. International law figured as a central standard against which the Proposed Rule was evaluated and discussed.

It should be underscored that this engagement is instructive regardless of the sincerity of commenters. First, some may cite international law genuinely and hold a sincere belief that it should inform policy-making. But even if commenters invoked international law opportunistically or cynically, their use of international law reveals their belief that their interlocutors care about international law's applicability. It demonstrates that even if the speaker does not value international law herself, she recognizes that her fellow discussants are interested in the demands of international law. I argue that even if international law's only impact in a particular case is making actors contemplate it and feel bound to provide answers about the domestic

law's adherence to it, it has made a difference.[172]

Koh's model of transnational legal process would likely capture the contribution to the process on the part of USDA officials and civil society organizations. As noted above, his analysis focuses on the contributions of elite sub-State actors. However, it would not capture the contributions of the variety of other actors surveyed in the case study, which I argue are also pertinent to making room for international law in domestic decision-making.

Furthermore, Koh's primary focus is how such elite actors ultimately facilitate State compliance with international norms. My argument, however, is that the domestic impact of international law should not be estimated exclusively through questions of State compliance. Rather, international law's domestic standing should also be evaluated through its engagement by citizens, consumers, business owners, and others. It matters that international law mattered to these actors, even if their actions cannot ultimately be directly, causally linked to a complaint action at the level of the State. Regard for international law at the sub-State level is significant in carving a space for international law as part of domestic decision-making. Even if this does not result in international law-compliant State action, it still allows international law to inform domestic processes.

One way in which international law was significant despite not generating compliant State action was in helping to reopen the discussion on the issue of country-of-origin labeling. This is important as, politically, this would probably have been otherwise unfeasible at the time; the 2009 Rule reflected a long-sought solution for a years-long political standoff. And yet, following the WTO ruling, USDA officials seemed to view themselves compelled—or empowered—to reconsider their regulatory program and look for a way to address the WTO's concerns.

One could argue that international law's prominence in the discussion resulted from the fact that the entire process was initiated in the shadow of the WTO ruling. Furthermore, one could suggest that participants' invocations of international law should be interpreted simply as an attempt to cater to the concerns of the USDA. This is a possibility. Indeed, the USDA framed the debate as a response the WTO ruling. Notwithstanding this fact, however, some commenters nevertheless called on the United States to ignore international law altogether.[173] Therefore, the ruling's shadow was in no way determi-

172. And note that it has made a difference in the process, separately from (and prior to) the final outcome of whether or not international law was eventually complied with or not. *See generally* Howse & Teitel, *supra* note 29.

173. *See supra* note 137.

native.

The conversation that took place among the USDA and the various commenters represents only one avenue of public debate about country-of-origin labeling and the appropriate U.S. response to the WTO ruling. Public deliberation and mobilization also occurred in court litigation against the Final Rule,[174] online media,[175] and awareness-raising events.[176] One can also speculate that action took place in other ways, like citizen communications with elected representatives, direct lobbying efforts, public relations campaigns, and more.

As noted above, the case study does not aim to explain State behavior or national preference-formation. Rather, it aims to explore how non-State actors, including individuals, groups, and organizations operating within the United States and transnationally regard and engage with international law. Without tuning into the domestic process, we would have missed the cacophony of voices prevalent within the State. These voices play a significant part in defining the space that international law occupies in national policy-making. Without recognizing the contribution of non-State actors, we would be limited to trying to discern, from the final policy adopted at the State level, the reasons the State may have for making it. Overlooking non-State actors' actions and reason-giving means overlooking important avenues through which international law gains effectiveness.

CONCLUSION

A multitude of U.S. and foreign non-State actors participated in the United States country-of-origin labeling policy deliberations.

174. Am. Meat Inst. v. U.S. Dep't of Agric., 968 F. Supp. 2d 38, 38 (D.D.C. 2013).

175. *E.g.*, *Ross Wilson Urges Cattle Producers to File Comments NOW on Mandatory COOL Rule*, OKLA. FARM REP. (Apr. 9, 2013), http://www.oklahomafarmreport.com/wire/beefbuzz/2013/04/05895_Beef_Buzz04102013_160721.php#.XI7zHChKhPY [https://perma.cc/8L88-CNGX]; *Texas Cattle Feeders Association Urges Cattlemen to File Comments on MCOOL Rule*, FEEDLOT MAG. (Apr. 11, 2013), http://feedlotmagazine.com/texas-cattle-feeders-association-urges-cattlemen-to-file-comments-on-mcool-rule/ [https://perma.cc/6LX4-WPEC] (both publishing the Texas Cattle Feeders' Association's call to file comments opposing the Proposed Rule, together with a template comment). *See also* Jean Halloran, *Country of Origin Labels Need Your Support*, NOT IN MY FOOD (Mar. 25, 2013), notinmyfood.org/posts/3640-country-of-origin-labels-need-your-support [https://perma.cc/95GX-SS4G] (calling for submission of comments in support of the Rule).

176. *See e.g.*, Heritage Found., *WTO and Mandatory Country-of-Origin Labeling: What's Next?*, YOUTUBE (Nov. 5, 2014), https://www.youtube.com/watch?v=4BANVDJhM94 [https://perma.cc/B7FX-9XBT].

Many viewed international law as a distinct, non-negligible issue requiring consideration in national policy-making. This was the case notwithstanding skepticism towards WTO decisions reflected by the URAA, federal courts, and political leaders, or the resistance to international law sometimes attributed to the United States. By invoking international law and framing arguments in its language, these actors carved a space for international law in the United States' policy-making process. This article argues that such actors must be accounted for when evaluating international law's standing in a State. Solely examining the State's formal position to international law's applicability is insufficient. The engagement by non-State actors with international law has positioned it as a hard place against the rock of domestic law. That is no small matter.