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# AMERICAN TRADE NEWS HIGHLIGHTS FOR FALL 2013

## THE CHILLING EFFECT OF COOL ON THE LIVESTOCK TRADE OF MEXICO, CANADA, AND THE UNITED STATES

*Vanessa Humm\**

### INTRODUCTION

**T**HE livestock trade market between the United States and Canada and the United States and Mexico is a key issue before the World Trade Organization (WTO). The Country of Origin Labeling law (COOL) is a U.S. law that both Canada and Mexico argue is discriminatory against their respective livestock and meat exports to the United States. COOL imposes certain labeling requirements on meat sold by retailers covered by the measure that Mexico and Canada have successfully argued before the WTO are in conflict with certain trade agreements to which the United States is a party. While the conflict is not directly associated with NAFTA, the result of the WTO disputes has trade implications and could indirectly result in the United States, Mexico, or Canada taking direct steps in conflict with NAFTA's objectives.

This update will discuss the development of the COOL measures and what they require, the disputes brought before the WTO regarding the measures, litigation involving the measures, and the trade implications of the measures.

#### I. THE DEVELOPMENT AND CURRENT STATE OF COOL

In order to fully understand the dispute before the WTO between the United States, Canada, and Mexico, a background on the U.S. measures at issue is necessary. The relevant measures are the COOL statute itself,<sup>1</sup>

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1. 7 U.S.C.A. § 1638 (2013).

the final rule implementing the COOL statute,<sup>2</sup> and the “Vilsack letter.”<sup>3</sup> Canada and Mexico originally challenged two interim final rules, but both of these rules had expired by the time of the WTO Panel’s consideration of the issues and they were disregarded.<sup>4</sup> For purposes of this update, the focus will be on the COOL statute and the final implementing rule. The WTO Panel considered both of these together, referring to them as the “COOL measure.”<sup>5</sup>

Known as COOL for short, the Country of Origin Labeling law is a U.S. labeling law created by the 2002 and 2008 farm bills.<sup>6</sup> The final rule promulgated under the law became effective in 2009<sup>7</sup> for all “covered commodities.”<sup>8</sup>

COOL is an internal U.S. measure, imposing obligations on U.S. retailers to label specific products with their country of origin.<sup>9</sup> It mandates that “a retailer of a covered commodity shall inform consumers, at the final point of sale of the covered commodity to consumers, of the country of origin of the covered commodity.”<sup>10</sup> The law defines covered commodities to include:

- (i) muscle cuts of beef, lamb, and pork; (ii) ground beef, ground lamb, and ground pork; (iii) farm-raised fish; (iv) wild fish; (v) a perishable agricultural commodity; (vi) peanuts; and (vii) meat produced from goats; (viii) chicken, in whole and in part; (ix) ginseng; (x) pecans; and (xi) macadamia nuts.<sup>11</sup>

For purposes of this update, the focus will be on COOL’s livestock provisions, specifically cattle and hogs.<sup>12</sup>

COOL defines “origin” in terms of the country or countries where “production steps involving the animals from which the meat is derived took place.”<sup>13</sup> Specifically, the regulation states that origin is “established as defined by this law (*e.g.* born, raised, and slaughtered or produced).”<sup>14</sup> This makes the birth, raising, and slaughter of the animal the three relevant production steps for purposes of the definition of “origin”

2. 7 C.F.R. § 65 (2009).
3. Letter from Thomas J. Vilsack, Sec’y, U.S. Dep’t of Agric., to Indus. Representative (Feb. 20, 2009).
4. Appellate Body Report, *United States—Certain Country of Origin Labelling (COOL) Requirements*, ¶ 238, WT/DS384/AB/R, WTDS386/AB/R (June 29, 2012) [hereinafter Appellate Body Report].
5. *Id.*
6. 7 U.S.C. § 1638; Press Release, U.S. Dep’t of Agric., USDA Issues Final Rule on Mandatory Country of Origin Labeling (Jan. 12, 2009).
7. 7 C.F.R. §§ 60.101, 65.100 (2009).
8. *Country of Origin Labeling*, U.S. DEP’T OF AGRIC. (June 18, 2013), <http://www.ams.usda.gov/AMSV1.0/COOL>.
9. 7 U.S.C. § 1638a(a)(1); Appellate Body Report, *supra* note 4, ¶ 239.
10. 7 U.S.C. § 1638a(a)(1); U.S. DEP’T OF AGRIC., *supra* note 8.
11. 7 U.S.C. § 1638(2)(A).
12. Appellate Body Report, *supra* note 4, ¶ 239 (“the products at issue in the dispute are livestock, that is cattle and hogs.”).
13. *Id.* ¶ 240.
14. 7 C.F.R. § 65.300(f) (2009).

and how the meat will be labeled.<sup>15</sup>

This functional definition is realized in the categories of labeling contained in COOL. There are four categories of labeling meat with the country of origin for beef, lamb, pork, chicken, and goat meat.<sup>16</sup> The categories are: meat exclusively from the United States, meat with multiple countries of origin, meat from livestock imported to the United States for immediate slaughter, and meat that is exclusively foreign.<sup>17</sup> This results in meat labels with more than one country, even multiple countries, as the country of origin. Meat exclusively from the United States, under the functional definition of origin, includes only meat of animals where all three production steps—birth, raising, and slaughter—occurred in the United States.<sup>18</sup> The second and third categories include meat where at least one production step took place outside of the United States and at least one within the United States.<sup>19</sup> Meat imported for immediate slaughter in the United States is defined by the definition of “immediate slaughter,” meaning delivery directly from the port of entry into the United States to a recognized slaughter house and the animal is slaughtered within two weeks from the date of entry into the country.<sup>20</sup> The final category is exclusively meat from animals slaughtered outside the United States and imported to the country in the form of meat.<sup>21</sup>

The WTO Panel Body examined the different labeling possibilities for muscle cuts of meat and determined there were four different possibilities.<sup>22</sup> The labeling possibilities are: product of the United States; product of the United States, country X; product of country X, United States; or product of country X.<sup>23</sup> The order of the countries listed on the labels is determined by the composition of the meat or commingling of different category meat.<sup>24</sup>

The COOL measure also requires the country of origin information be provided “in the form of a placard, sign, label, sticker, band, twist tie, pin tie, or other format that allows consumers to identify the country of origin.”<sup>25</sup> The declaration “must be legible and placed in a conspicuous location” [so a customer] under normal conditions of purchase” will likely read and understand it.<sup>26</sup> Further, there are restrictions on the use of country abbreviations, with only those approved under U.S. Customs and

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15. 7 U.S.C. § 1638a(a)(2); 7 C.F.R. § 65.300(f) (2009); Appellate Body Report, *supra* note 4, ¶ 240.

16. 7 U.S.C. § 1638a(a)(2).

17. *Id.*

18. *Id.*

19. *Id.*

20. 7 C.F.R. § 65.180.

21. 7 C.F.R. § 1638a(a)(2).

22. Panel Body Report, *United States—Certain Country of Origin Labelling (COOL) Requirements*, ¶ 7.100, WT/DS384/R, WT/DS386/R (Nov. 18, 2011) [hereinafter Panel Body Report].

23. *Id.*; Appellate Body Report, *supra* note 4, ¶ 247.

24. Panel Body Report, *supra* note 22, ¶ 7.97.

25. 7 C.F.R. § 65.400(a).

26. 7 C.F.R. § 65.400(b).

Border Protection rules, regulations, and policies being acceptable.<sup>27</sup> Suppliers of covered commodities are also required to “make available information to the buyer about the country(ies) of origin of the covered commodity.”<sup>28</sup> This importance of the appropriate recordkeeping is understood when taken in consideration with the requirement that retailers label the meat with the countries in the correct order.<sup>29</sup>

The Agricultural Marketing Service (AMS), a subdivision of the U.S. Department of Agriculture, administers and enforces COOL.<sup>30</sup> If the Secretary of Agriculture determines a covered retailer has violated the COOL measures, the Secretary shall first notify the retailer of this decision and provide the retailer with thirty days from the date of notice to take steps to comply.<sup>31</sup> If the Secretary determines after the thirty days that the retailer has not made a good faith effort to comply and is in continuing violation, the Secretary may fine the retailer no more than \$1,000 per violation after providing notice and opportunity for a hearing.<sup>32</sup>

## II. THE WTO DISPUTE

Canada submitted a formal request to the United States for consultations about the COOL measures on December 4, 2008.<sup>33</sup> In the request, Canada stated that the mandatory COOL provisions “appear to be inconsistent with the United States’ obligations under the WTO Agreement.”<sup>34</sup> Specifically, Canada cites Articles III:4, IX:4, X:3 of GATT 1994,<sup>35</sup> Article 2 of the Technical Barriers to Trade Agreement (TBT),<sup>36</sup> or in the alternative, Articles 2, 5, and 7 of the Sanitary Phytosanitary Measures Agreement (SPS),<sup>37</sup> and Article 2 of the Agreement on Rules of Origin.<sup>38</sup> Mexico submitted its request to join the consultations requested on December 17, 2008.<sup>39</sup> The United States accepted the requests and held

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27. 7 C.F.R. § 65.400(e).

28. 7 C.F.R. § 65.500(b)(1).

29. Appellate Body Report, *supra* note 4, ¶ 249.

30. U.S. DEP’T AGRIC., *supra* note 8.

31. 7 U.S.C. § 1638b(a) (2012).

32. 7 U.S.C. § 1638b(b).

33. Request for Consultations by Canada, *United States—Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/1 (Dec. 4, 2008) [hereinafter Request for Consultations by Canada].

34. *Id.*

35. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

36. Agreement on Technical Barriers to Trade, art. 2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A [hereinafter TBT Agreement].

37. Agreement on the Application of Sanitary and Phytosanitary Measures, arts. 2, 5, 7, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A.

38. Agreement on Rules of Origin, art. 2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A.

39. Request to Join Consultations by Mexico, *United States—Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/3 (Dec. 17, 2008).

consultations with Canada on December 16, 2008, and June 5, 2009,<sup>40</sup> and with Mexico on February 27, 2009, and June 5, 2009.<sup>41</sup> But the countries could not reach a “mutually satisfactory resolution”<sup>42</sup> and Canada and Mexico each requested that a panel be established.<sup>43</sup> The WTO Panel, under the Dispute Settlement Body (DSB), was established November 19, 2009.<sup>44</sup>

The focus of this update is the Article 2.1 and Article 2.2 complaints. Canada and Mexico argued that the COOL measures treat livestock imported to the United States less favorably than similar U.S. livestock.<sup>45</sup> Compliance with COOL, according to Canada and Mexico, results in “higher segregation costs for imported livestock, which in turn adversely affects the competitive conditions for imported livestock in the US market.”<sup>46</sup> Further, the countries argue COOL measures are inconsistent with U.S. obligations under Articles 2.1<sup>47</sup> and 2.2<sup>48</sup> of the TBT Agreement because the COOL measures objectives are to protect domestic industry.<sup>49</sup> Mexico and Canada argue there are less restrictive alternatives to achieve the goal of informing the consumer, and that the COOL measures do not fulfill this goal anyway because they provide “confusing and inaccurate information on the origin of meat products.”<sup>50</sup> Mexico and Canada made additional arguments, but they are not the focus of this update. The United States, of course, requested the Panel reject Canada’s and Mexico’s claims entirely.<sup>51</sup>

The WTO Panel Board circulated its report to WTO members on November 18, 2011.<sup>52</sup> The Panel made several findings. First, regarding the

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40. Panel Body Report, *supra* note 22, ¶ 1.3.

41. *Id.*

42. *Id.*

43. *Id.* ¶ 1.4.

44. *Id.* ¶ 1.5; Appellate Body Report, *supra* note 4, ¶ 1.

45. Appellate Body Report, *supra* note 4, ¶ 4; Panel Body Report, *supra* note 22, ¶ 7.2.

46. Appellate Body Report, *supra* note 4, ¶ 4; Panel Body Report, *supra* note 22, ¶ 7.2.

47. TBT Agreement, *supra* note 36, art. 2.1 (“Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.”).

48. *Id.* art. 2.2 (“Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade.” Article 2.2 requires that technical regulations “shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products.”).

49. Appellate Body Report, *supra* note 4, ¶ 4; Panel Body Report, *supra* note 22, ¶ 7.3.

50. Panel Body Report, *supra* note 22, ¶ 7.3.

51. *Id.* ¶ 3.5.

52. *See id.*

claims under the TBT Agreement, it found that the COOL measure violates Article 2.1 of the TBT agreement because it treats imported livestock less favorably than domestic livestock and it “violates Article 2.2 because it does not fulfil the objective of providing consumer information on origin with respect to meat products.”<sup>53</sup> The COOL measure’s mandatory labeling scheme, according to the Panel Board, does not provide consumers with country of origin information of meat products “in an accurate and clear manner.”<sup>54</sup> The Panel Board concluded the only meaningful information the labels provide is on labels for meat exclusively from the United States.<sup>55</sup>

### III. APPEAL AND FURTHER DEVELOPMENTS

The United States, Mexico, and Canada all filed appeals for certain issues of law in the Panel Reports.<sup>56</sup> The United States appealed the Panel Board’s finding that the COOL measures are in conflict with Articles 2.1 and 2.2 of TBT, among other issues.<sup>57</sup> Canada and Mexico requested the Panel Board’s decisions with respect to Articles 2.1 and 2.2 be upheld. With respect to Article 2.2, the Appellate Board affirmed the Panel’s finding “that the COOL measure treats imported livestock differently than domestic livestock;”<sup>58</sup> that the COOL measure “modifies the conditions of competition in the US market to the detriment of imported livestock by creating an incentive in favour of processing exclusively domestic livestock and a disincentive against handling imported livestock;”<sup>59</sup> that the Panel objectively assessed facts;<sup>60</sup> and that the COOL measure is in conflict with Article 2.1 of TBT “because it accords less favourable treatment to imported livestock than to like domestic livestock” especially for muscle cut meat labels.<sup>61</sup>

The Appellate Board did not make a finding as to whether “the Panel erred in finding the COOL measure is ‘trade-restrictive’ under Article 2.2.”<sup>62</sup> This decision would require the Appellate Board to reverse the Panel.<sup>63</sup> But it did reverse the Panel’s decision “that the COOL measure is inconsistent with Article 2.2.”<sup>64</sup> It found that the Panel had in fact erred in interpreting Article 2.2 in determining whether the COOL measure is “more trade-restrictive than necessary to fulfill a legitimate objec-

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53. Appellate Body Report, *supra* note 4, ¶ 7 (citing Panel Body Report, *supra* note 22).

54. Panel Body Report, *supra* note 22, ¶ 7.716.

55. *Id.* ¶ 7.718.

56. Appellate Body Report, *supra* note 4, ¶ 11.

57. *Id.* ¶¶ 17, 33.

58. *Id.* ¶ 496(a)(i).

59. *Id.* ¶ 496(a)(ii).

60. *Id.* ¶ 496(a)(iii).

61. *Id.* ¶ 496(a)(iv).

62. *Id.* ¶ 496(b)(i).

63. *Id.* ¶ 496(b)(i).

64. *Id.* ¶ 496(b)(vi).

tive.”<sup>65</sup> The Panel incorrectly concluded “a measure could be consistent with Article 2.2 only if it fulfilled its objective completely or exceeded some minimum level of fulfilment.”<sup>66</sup>

The Appellate Body ended its report with a recommendation to the United States that, among other things, bring the COOL measure “into conformity with its obligations under [the TBT Agreement].”<sup>67</sup> Canada, Mexico, and the United States submitted to an arbitration to determine a reasonable time for the United States to bring its measures into compliance.<sup>68</sup> The arbiter recommended ten months from the time of adoption of the Panel and Appellate Body reports—July 23, 2012—as the reasonable period of time for the United States to implement the recommendations and rulings.<sup>69</sup> This gave the United States until May 23, 2013, to implement these changes.<sup>70</sup>

Canada and Mexico submitted a request to the WTO’s DSB on August 20, 2013, for the establishment of a panel.<sup>71</sup> The countries argued that, while the United States did amend its COOL measure, the amendments “failed to bring the United States into compliance with its obligations under the WTO Agreement.”<sup>72</sup> They further argued the amended COOL measure “will increase the discrimination that was previously found by the Panel and the Appellate Body.”<sup>73</sup> The request for a panel was placed on the agenda for the next DSB meeting, scheduled for August 30, 2013.<sup>74</sup> The United States blocked the request at the August meeting.<sup>75</sup> But Canada and Mexico can renew their request at the next DSB meeting scheduled for September 25, 2013.<sup>76</sup> If they were to submit a second request, the United States could not block it.<sup>77</sup>

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65. *Id.* ¶ 496(b)(v).

66. *United States—Certain Country of Origin Labelling (COOL) Requirements*, WTO, [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds384\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds384_e.htm) (last visited Nov. 19, 2013).

67. Appellate Body Report, *supra* note 4, ¶ 497.

68. Award of the Arbitrator, *United States—Certain Country of Origin Labelling (COOL) Requirements*, ¶ 4, WT/DS384/24, WT/DS386/23 (Dec. 4, 2012).

69. *Id.* ¶ 123.

70. *Id.*

71. *See* Request for the Establishment of a Panel, *United States—Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/26 (Aug. 20, 2013) [hereinafter Request for the Establishment of a Panel].

72. *Id.* at 2.

73. *Id.*

74. *Id.* at 3

75. Daniel Pruzin & Maja Wallengren, *U.S. Blocks Compliance Panel on COOL Rules, Mexico Weighs Response*, BUREAU OF NAT’L AFFAIRS, Sept. 3, 2013, [http://news.bna.com/tldn/TDLNWB/split\\_display.adp?fedfid=36102145&vname=itdbu-lallissues&wsn=499917000&searchid=21034120&doctypeid=1&type=date&mode=doc&split=0&scm=TDLNWB&pg=0](http://news.bna.com/tldn/TDLNWB/split_display.adp?fedfid=36102145&vname=itdbu-lallissues&wsn=499917000&searchid=21034120&doctypeid=1&type=date&mode=doc&split=0&scm=TDLNWB&pg=0) (last visited Sept. 18, 2013).

76. *Id.*

77. *Id.*



IV. IMPLICATIONS ON U.S.-CANADA AND  
U.S.-MEXICO TRADE

The WTO Panel Body made various findings on the livestock and meat market in Canada, Mexico, and the United States, which were integrated into the Appellate Body Report.<sup>78</sup> This market is highly integrated, with the relevant production stages—birth, raising, and slaughtering—often occurring in more than one of the countries.<sup>79</sup> Most of Canada's and Mexico's livestock exports go to the United States, but the Canadian and Mexican exports are only a small fraction of the total livestock slaughtered in the United States.<sup>80</sup> Most Canadian cattle exports to the United States are imported into the country for immediate slaughter, whereas most Mexican cattle exports to the United States are imported into the country to be raised and then later slaughtered.<sup>81</sup> The COOL measures affect how this meat is labeled, and in a discriminatory manner, according to the Appellate and Panel Reports discussed above. Canada and Mexico have said the initial COOL measures “helped drive down cattle and hog shipments from [their] countries by as much as 50 percent in four years.”<sup>82</sup>

After the United States blocked Mexico's and Canada's request for a compliance panel,<sup>83</sup> a Mexico Economy Ministry official stated his country is “quickly losing patience” with the United States in this matter.<sup>84</sup> According to the official, the fact that Mexico and Canada have been so patient is due to their NAFTA partnership with the United States.<sup>85</sup> But Mexico is considering retaliatory measures in the form of “punitive import duties on a wide range of products considered particularly sensitive to the U.S., such as corn syrup.”<sup>86</sup> This sort of retaliation, according to the Mexican official, is the best way to ensure the quickest response from other U.S. industries to work with Mexico in changing the COOL measures.<sup>87</sup> If either Mexico or Canada were to take this sort of retaliatory measure, the United States' hand would be forced into requesting a new dispute settlement panel to object to the retaliation.<sup>88</sup>

Further challenges by Mexico and Canada to the COOL measures will not be resolved until 2015.<sup>89</sup> But additional challenges have been made against the COOL measures. A group of meat industry trade associa-

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78. Appellate Body Report, *supra* note 4, ¶ 252.

79. *Id.*

80. *Id.*

81. *Id.*

82. Charles Abbot, *New U.S. Meat Label Rule Survives Challenge by Meat Packers*, REUTERS (Sept. 11, 2013), available at <http://www.reuters.com/article/2013/09/11/usa-meat-labeling-idUSL2N0H71H320130911>.

83. See Request for the Establishment of a Panel, *supra* note 71; see also Pruzin & Wallengren, *supra* note 75.

84. Pruzin & Wallengren, *supra* note 75.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. Abbot, *supra* note 82.

tions challenged the COOL measures in federal court.<sup>90</sup> They sought a preliminary injunction against the labeling requirements, arguing the COOL measures violate their First Amendment rights, exceed the Agricultural Marketing Service's authority under the implementing statute, violate the Administrative Procedure Act, and that "their members will be irreparably harmed absent a preliminary injunction."<sup>91</sup> But the district judge denied the request for the injunction.<sup>92</sup> It is likely this decision will be appealed.

## V. CONCLUSION

Under Article 703 of NAFTA, the member countries "shall work together to improve access to their respective markets through the reduction or elimination of import barriers to trade between them in agricultural goods."<sup>93</sup> If Mexico or Canada chooses to take retaliatory action against the United States in the form of punitive duties on imports, a conflict with this NAFTA provision will arise. This is not to say that a conflict has not already arisen—if the COOL measures may be interpreted as barriers to agricultural trade between the United States, Mexico, and Canada. Whether a specific violation of NAFTA is alleged by any of the member countries, and whether Mexico or Canada retaliate against the COOL measures in the form of punitive import duties on U.S. imports, the livestock trade between Mexico and the United States and Canada and the United States will remain litigious until the WTO resolves the COOL measure issue in 2015.

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90. *Am. Meat Inst. v. U.S. Dep't of Agric.*, No. 13-CV-1033 (KBJ), 2013 WL 4830778 at \*1 (D.D.C. Sept. 11, 2013).

91. *Id.*

92. *Id.* at \*37.

93. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289, art. 703 (1993).



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