APAC Agricultural Policy Analysis Center
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PolicyPennings by Daryll E. Ray & Harwood D. Schaffer

COOL itself is not ruled illegal by WTO but finds label wording to be a problem

On Friday, March 8, 2013, the United States Department of Agriculture (USDA) issued a new rule to bring the mandatory Country of Origin Labeling (COOL) regulations into compliance with the July 2012 decision of the World Trade Organization (WTO) Appellate Body (AB). The US first included COOL requirements in the 2002 Farm Bill though no regulations were issued for beef, pork, lamb, and a number of other agricultural products until after COOL was again included in the 2008 Farm Bill along with a firm date for issuing the implementing regulations—September 30, 2008.

The administration complied on August 1, 2008 by issuing rules implementing COOL, though in a way that left loopholes large enough to drive a train through it. As we will see it, in part, the loopholes put into place by an administration that consistently resisted COOL that, in part, provided the basis, in a case filed by Canada and joined by others, for the World Trade Organization (WTO) Appellate Body to rule that the COOL regulations violated US trade obligations under parts of the WTO Technical Barriers to Trade Agreement (TBT). A full history of the WTO case and the rulings of the Dispute Resolution Body and the Appellate Body can be found at (http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds384_e.htm).

In this week's column we will examine a legal opinion on the AB ruling. The legal analysis was conducted by the legal firm Stewart and Stewart (S&S) for the National Farmers Union, the United States Cattlemen's Organization, the Food and Water Watch, and Public Citizen's Global Trade Watch. Next week's column will be focused on the specific regulations being proposed by the current administration so that our readers can make the comparison between the S&S analysis and the changes in the regulations being sought by the USDA.

According to the S&S memorandum, the Appellate Body "ruled that the current COOL regime violates the obligations of the United States under Article 2.1 of the Agreement on Technical Barriers to Trade ('TBT Agreement')." In addition the panel was "was unable to complete the analysis to determine on its own whether COOL violates Article 2.2."

In their memorandum S&S "explains how the United States can come into compliance with its obligations under Article 2.1 of the TBT Agreement, as well as maintain compliance with Article 2.2, by strengthening the COOL regulations to provide more accurate and complete information on animal origin, raising, and processing to consumers."

While rejecting the rationale used by the Dispute Resolution Body that found the US COOL legislation in violation of the TBT, the Appellate Body found that it was elements of the implementing regulations that were responsible for the violations of Article 2.1.

According to the Appellate Body, the issue under examination is not whether the COOL law and its implementing regulations "have a detrimental impact on imports" but whether or not the measure "'stems exclusively from a regulatory distinction rather than reflecting discrimination against the group of imported products.'"

S&S write "The AB in the COOL dispute found that the detrimental impact of COOL on imported livestock does not stem exclusively from a legitimate regulatory objective but instead reflects discrimination, thus violating Article 2.1 of the TBT Agreement. This conclusion was based on the Appellate Body's finding that COOL's recordkeeping and verification requirements, which are the source of detrimental impact on imported livestock, impose a burden on upstream producers and processors that is disproportionate to the level of origin information conveyed to consumers under the regime. In other words, these recordkeeping and verification requirements were not found to stem exclusively from a legitimate regulatory objective, because the origin information tracked under these requirements is not necessarily conveyed to consumers under each of the labels that may be used under the COOL regime.

"The AB identified at least three ways in which the COOL regime fails to fully convey the origin information tracked by producers to consumers. First, the prescribed labels do not expressly identify specific production steps; instead, the COOL measure 'does not require the labels to mention production steps at all.' Second, labels B and C (the mixed origin labels) contain confusing or inaccurate origin information, not only because they do not require identification of which production step occurred in which country, but also because they may list countries of origin in any order and because the commingling flexibilities allowed under the regime may indicate that meat is of mixed origin when it in fact is of exclusively U.S. origin.

Third, and finally, upstream producers are required to track the origin of the cattle and meat they produce

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regardless of its end use (which they often will not know at their upstream stage of production), yet COOL exempts processed food items, items sold in food service establishments, and items not sold through a 'retailer' from labeling requirements.

"As a result of these weaknesses in the COOL labeling regime, the AB concluded that, 'the detail and accuracy of the origin information that upstream producers are required to track and transmit … {is} significantly greater than the origin information that retailers of muscle cuts of beef and pork are required to convey to their consumers.' Because the AB could adduce no rational basis for this disconnect, it concluded that the manner in which COOL seeks to provide information to consumers is 'arbitrary' and the disproportionate recordkeeping and verification requirements imposed on producers was 'unjustifiable.' As a result, the AB concluded that the detrimental impact of the COOL measure on imports reflects discrimination, does not stem exclusively for a legitimate regulatory distinction, and thus violates Article 2.1 of the TBT Agreement."

Based on this decision opponents of mandatory COOL have asserted that the AB ruled against the US COOL requirements, and thus all mandatory labeling can cease. However, looking at the above analysis, it appears that the problem is that the level of information collected by the producers was not transmitted to the consumers. Thus, making changes that will allow the consumers to easily identify where the animal that provides the meat they are purchasing was born, raise, and slaughtered would correct for the problems identifies by the AB.

In next week's column we will examine the proposed regulation and see to what extent it makes changes in a way that brings COOL into compliance with the WTO ruling.

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