



Institute for Agriculture and Trade Policy

# The Canadian and Mexican WTO Challenges to U.S. Country of Origin Labeling

## What is COOL?

U.S. Country of Origin Labeling (COOL) first became law as part of the 2002 Farm Bill. The law begins, “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.” (Title X: Miscellaneous. Section 282, H.R. 2646.<sup>1</sup>) Commodities covered by the law include beef, lamb, pork, chicken, goat meat, fresh and frozen fruits and vegetables, and peanuts. The text couldn’t be plainer and so its implementation might seem to be a simple matter of following the clear intent of the law.

## The example of beef

Despite the bill’s apparent clarity, a coalition of producer and consumer organizations, which fought for years to get Congress to pass COOL, has struggled to get the U.S. Department of Agriculture to implement the law through the rule-making process. For example, R-CALF USA had to disprove the USDA estimate of \$2 billion for cattle producers to implement COOL as hugely inflated.<sup>2</sup> One of the strongest opponents of COOL has been the tri-national feedlot and meatpacking industry, in which Mexican feeder livestock are fattened and slaughtered in the United States, and Canadian livestock are slaughtered and processed in U.S. plants.<sup>3</sup> The American Meat Institute (AMI) advised Canadian meatpackers on how to best take advantage of the broad exemptions from COOL for processed foods, e.g., cured hams and hamburger, which AMI lobbying had injected into the COOL rule.<sup>4</sup> Unable to kill COOL, the meatpacking industry and the USDA have sought to make it meaningless.

Consider the case of beef. The law states, “A retailer of a covered commodity may designate the covered commodity as having a United States country of origin only if . . . --(A) in the case of beef, is exclusively from an animal that is exclusively born, raised, and slaughtered in the United States.” On January 12, 2009, the USDA published its 260-page interim final rule for implementing COOL.<sup>5</sup> The rule became final on March 16. The rule dilutes the consumer choice and economic value of a “U.S. beef” label by allowing a “mixed country” label (e.g., “Canadian and U.S. beef”) if just one animal of Canadian origin were among hundreds of U.S. animals slaughtered a day in a U.S. plant. (The rule likewise applies for Canadian or Mexican hogs shipped to the U.S. “for immediate slaughter.”)

COOL proponents believe that the label and the premium associated with “U.S. beef” and other U.S. products can help provide them with market leverage they lack in selling to meatpackers and other food processors. Supporters argue that the extreme market share concentration of the beef processing industry (four companies slaughtered about 88 percent of all U.S. beef in 2007) results in anti-competitive practices in packer cattle purchases.<sup>6</sup> In 2006, the Office of the Inspector General of USDA reported that the USDA was unable to carry out the investigations necessary to enforce the Packer and Stockyards Act

against anti-competitive business practices.<sup>7</sup> In an anti-competitive environment with weak to non-existent anti-trust enforcement, labeling proponents argue that COOL would be a pro-competition marketing tool. In the case of beef, COOL enables consumers to exercise their preference for meat from cattle born, raised and slaughtered in the United States.

Advocates, such as the U.S. National Farmers Union, believe that the rule perverts the legal meaning of COOL and reverses much of the progress that had been made when the interim rule was published in September 2008.<sup>8</sup> The USDA weakened the rule not only in response to U.S. food industry lobbying, but also in response to Canadian and Mexican government claims that the interim COOL rule would violate U.S. commitments to the World Trade Organization. Now the COOL struggle begins again, not only against the food industry and its allies in the USDA, but also against the Canadian and Mexican governments in the WTO dispute settlement process.

### **WTO COOL dispute: On again, off again, for the moment**

On January 13, 2009, the Canadian government announced the suspension of its December 1 WTO challenge of the interim COOL rule. On December 22, 2008, Mexico filed a very similar claim that COOL was WTO illegal.<sup>9</sup> The challenges to the USDA's interim rule became legally irrelevant once the USDA published the interim final rule on January 12. Under WTO dispute settlement rules, a separate dispute process would have to be initiated to challenge the interim final rule. However, the suspension announcement also implied that the USDA had weakened COOL enough so that Canada determined it does not need to use the WTO dispute settlement system to get the anonymous U.S. market access it wants for its cattle and other products. In response, Agriculture Secretary Tom Vilsack wrote to the meatpackers to persuade them to avoid the inclusion of multiple countries in a meat product label. The meatpackers rejected the request for voluntary cooperation, with one of them saying, "it's a new guy's mistake."<sup>10</sup>

The Canadian government and the transnational meatpacking industry were pleased with the revised final interim rule. "We have gotten what we asked [USDA officials] to do," stated Canadian Minister of Agriculture Gerry Ritz. AMI president Patrick Boyle, speaking in support of Canada, calls COOL a "thinly veiled non-tariff trade barrier." Canada announced that it would challenge the final rule if it believed COOL's implementation violated WTO rules. U.S. meatpackers said they would assist the challenge by providing Canada with evidence of purported economic harm caused to Canadian cattle and hog producers because of COOL.<sup>11</sup>

However, the COOL rule may change yet again. In Secretary Vilsack's announcement of the final rule, he noted that an evaluation of COOL will take place following the March 16 implementation period. That evaluation period will inform Vilsack whether additional rulemaking is necessary to provide consumers with adequate information.<sup>12</sup> Six U.S. senators have written to Secretary Vilsack to ask that USDA-created loopholes in COOL be closed to implement the law as intended.<sup>13</sup>

### **Some background to the dispute**

COOL is already applied to a wide variety of products, both agricultural and non-agricultural, e.g., "Canadian Maple Syrup" or "Mexican Tequila," to enable consumer choice, rather than require consumers to accept whichever generic commodity transnational corporate supply chains provide. (Ironically, the Canadian Meat Council accuses the Canadian government of not enforcing its COOL rules against U.S. meat exported to Canada.<sup>14</sup> Less ironically, as a result of an agreement with the U.S. trade representative, Mexico gave up all control over the labeling and bottling of U.S.-imported "tequila" to U.S. officials.<sup>15</sup>) The Mexican and Canadian challenges to the USDA rule do not concern all products but only "certain"

of the many products covered by COOL. Chief among these products are live cattle and hogs from Canada and Mexican feeder cattle that eventually are processed into meat in U.S. plants.

The Canadian Cattleman's Association (CCA), the [U.S.] National Cattleman's Beef Association and the [U.S.] National Pork Producers Council continue to oppose COOL, while acknowledging that their lobbyists carved out "flexibilities" in the final rule.<sup>16</sup> The CCA maintains that under the rule its producers have to pay U.S. meatpackers C\$90 a head of cattle to transport and segregate Canadian cattle from U.S. cattle in holding pens prior to slaughter.<sup>17</sup> Since 1989, with the beginning of the U.S.-Canada Free Trade Agreement and the transnational corporate takeover of the Canadian meatpacking industry, cattle prices have plummeted to about 50 percent of the 1942-1988 inflation adjusted average. The National Farmers Union of Canada (NFU Canada), which supports COOL, suggests that the Canadian fear of COOL is a facet of the government's capitulation to transnational meatpackers and export dependence. For NFU Canada, COOL is a tool toward rebuilding national cattle and meat markets and reducing dependence on ruinous exports.<sup>18</sup>

The Mexican government has indicated that it will not withdraw its WTO challenge unless the U.S. makes COOL voluntary or labels beef from Mexican feeder cattle to be slaughtered in the U.S. as "U.S. beef." Otherwise, Mexico argues, its cattle producers will receive less money for their cattle from U.S. feedlots.<sup>19</sup> Mexican cattle producers believe that COOL is among the reasons that feeder cattle exports to the U.S. dropped by 50 percent from 2007 to 2008. They estimate that by paying U.S. meatpackers \$60 a head to mark and then segregate their cattle from U.S. cattle, Mexican producers will lose \$75 million in 2009.<sup>20</sup> (The larger reason for Mexican cattle industry distress: because most Mexican feed grains are imported, their feedlot industry has suffered as feed grain prices quadrupled between 2006 and July 2008.<sup>21</sup>)

### **The WTO legal basis for the dispute**

Both the Mexican and Canadian challenges to the interim COOL rule state that it violates U.S. commitments under Article 2 of the Agreement on Technical Barriers to Trade (TBT), "or alternatively" several articles of the Agreement on Sanitary and Phytosanitary Measures (SPS). Since COOL is not an SPS (food safety, animal health or plant health) measure, the latter claim is to discourage the U.S. from implying that COOL responds to an SPS policy objective, e.g., forcing foreign governments to enforce food safety and animal health rules.

Much of Article 2 concerns how WTO member governments prepare, adopt and communicate to other WTO member governments technical regulations that cover "all products, including industrial and agricultural products" (Article 1.3). However, the probable core of the Article 2 argument over COOL is whether or not the rule and its implementation are "not more trade restrictive than necessary to fulfill a legitimate objective" (Article 2.2). For the WTO, consumer choice is not a legitimate objective.<sup>22</sup> Under the General Agreement on Trade and Tariffs (GATT), governments had only to demonstrate that they applied technical regulations indiscriminately to both foreign and domestic companies,<sup>23</sup> as COOL does. This trade policy requirement is called "national treatment." But the TBT Agreement additionally places a difficult burden of proof on governments to demonstrate that their national and sub-federal regulations are "necessary" (Article 3). Among the illustrative list of legitimate objectives, probably the one that would be most relevant for COOL proponents is "the prevention of deceptive practices." But even if COOL were to qualify as "necessary to fulfill a legitimate objective," the government is under continual pressure to review the rule's implementation so that it is "less trade restrictive" (Article 2.3).

Mexico and Canada also charge that the interim COOL violates Articles 3, 9, 10 and 23 of the GATT, passed in 1947 and subsequently adopted by WTO members in 1994. Article 3 concerns “National Treatment on Internal Taxation and Regulation,” suggesting that COOL would be challenged as a regulation to favor U.S. producers over foreign ones. Article 9 concerns “marks of origin” on products to ensure that foreign parties are likewise ensured of “national treatment.” Article 10 requires that TBT rules are administered uniformly and impartially, with recourse to administrative appeal in the event that such rules result in impediments to customs clearance. Article 23 covers “nullification and impairment” of trade benefits of WTO members due to non-compliance with WTO agreements. The evidence presented to WTO dispute panelists about the first three articles will concern details of COOL’s implementation. Concerning alleged “nullification and impairment” of meat industry profits, the panelists will decide alleged Article 23 violations on the basis of economic evidence submitted through governments by meatpackers, feedlot owners and supporting livestock associations.

Finally, Mexico and Canada charge that the interim COOL rule violates Article 2 of the WTO Agreement on Rules of Origin. Here the fighting words will likely concern whether COOL poses “unduly strict requirements or require[s] the fulfillment of a certain condition not related to manufacturing or processing, as a prerequisite for the determination of country of origin” (Article 2.c). A sample question that dispute panelists might ask of the U.S. is whether segregating Mexican and Canadian cattle and hogs from U.S. livestock prior to slaughter is “unduly strict.” (It is unlikely that Canada and Mexico would dispute COOL under the less precise North American Free Trade Agreement rules on TBT and SPS standards (Chapter 9).<sup>24</sup>)

### **The outlook for COOL**

The COOL dispute is embedded in a larger conflict over what kind of food and agricultural system we want and whether the dominant system is economically and environmentally sustainable. The food journalist Michael Pollan writes, “Our [U.S.] food system depends on consumers not knowing much about it beyond the price disclosed by the checkout scanner. Cheapness and ignorance are mutually reinforcing. And it’s a short way from not knowing who’s at the other end of your food chain to not caring—to the carelessness of both producers and consumers.”<sup>25</sup> COOL is a small step toward knowing and caring more about our food and agriculture. The USDA’s resistance to implementing COOL and the Mexican and Canadian challenges to COOL testify to how, for agribusiness in all three countries, even a little knowledge can be a dangerous thing for their interests.

Whether the Obama administration will seek to revise the COOL rule to reflect the intent of Congress in the Farm Bill is an open question. (The Obama-Biden presidential campaign publicly stated its support for COOL.<sup>26</sup>) Another open question is whether the USDA, habituated to serving primarily food processing industry interests, will implement and enforce even the best drafted COOL rule. It also remains to be seen whether the U.S. Trade Representative’s office will effectively defend COOL against challenges from other governments. Any legal precedent that might be set by a WTO dispute panel ruling against COOL might be used to support a challenge to the WTO legality of government procurement programs, such as the “Buy American” provision in the current U.S. House-approved version of the economic stimulus package.

But winning a trade dispute is not everything. At a time when the stress on the natural resource base of agriculture augurs price volatility and global food insecurity, a larger question remains as to whether COOL can contribute to a sustainable food and agriculture system. Not only can that question not be answered within current WTO rules, it cannot even be posed in terms of those rules. Economic and environmental sustainability is neither a binding rule criterion nor even a non-binding “best endeavor” criterion in the WTO agricultural and TBT agreements.

## Notes

<sup>1</sup>2002 Farm Bill, available at <http://thomas.loc.gov/> (accessed January 29, 2009).

<sup>2</sup>R-CALF USA, “R-CALF-USA 2007 Stampede Fact Sheet: Country of Origin Labeling for Beef,” <http://www.r-calfusa.com/COOL/20070206%20R-CALF%20Stampede%20Factsheet%20COOL.pdf> (accessed January 26, 2009).

<sup>3</sup>Public Citizen, “Eating Blind: Why Congress and the Meat Industry Don’t Want You To Know Where Your Food Comes From,” September 22, 2004, [http://www.worc.org/userfiles/PublicCitizen-EatingBlindAA\(2\).pdf](http://www.worc.org/userfiles/PublicCitizen-EatingBlindAA(2).pdf) and Americans for Country of Origin Labeling, “Comments on the USDA’s interim COOL rule,” April 9, 2003, <http://www.worc.org/userfiles/JOINTCOMMENTS.pdf> (accessed January 20, 2009).

<sup>4</sup>Mark Dopp, “Mandatory Country of Origin Labeling,” American Meat Institute, Presentation to the Canadian Meat Council, September 10, 2008, [http://www.cmc-cvc.com/english/documents/COOL\\_Dopp.pdf](http://www.cmc-cvc.com/english/documents/COOL_Dopp.pdf) (accessed January 20, 2009).

<sup>5</sup>USDA Agricultural Marketing Service, “COOL Final Rule,” January 21, 2009, <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateN&navID=FinalRule&rightNav1=FinalRule&topNav=&leftNav=CommodityAreas&page=COOLRulesandRegulations&resultType=&acct=cntryoforgnbl> (accessed February 8, 2009).

<sup>6</sup>National Campaign for Sustainable Agriculture, “Agricultural Competition Issue Brief 13 of 18,” 2008, <http://ncsa.convio.net/site/DocServer/COOL.pdf?docID=1284> (accessed January 21, 2009).

<sup>7</sup>USDA, “Grain Inspection, Packers and Stockyards Administration’s Management and Oversight of the Packers and Stockyards Programs,” USDA Office of the Inspector General, Report No. 30601-01-Hy, January 2006, <http://www.usda.gov/oig> (accessed January 19, 2009).

<sup>8</sup>National Farmers Union, “USDA Issues Final Rules for COOL,” January 12, 2009, <http://nfu.org/news/2009/01/12/nfu-statement-usda-issues-final-rule-for-cool.html> (accessed February 2, 2009).

<sup>9</sup>“United States – Certain Country of Origin Labeling (COOL) Requirements” is filed as WT/DS384/1 (Canada) and WT/DS386 (Mexico) at [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_e.htm#disputes](http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#disputes) (accessed January 29, 2009).

<sup>10</sup>*Inside U.S. Trade*, “Vilsack Efforts to Strengthen COOL Fall Flat With Packers, Peterson,” February 27, 2009.

<sup>11</sup>Ian Elliott, “Canada holds COOL complaint” and Sally Schuff, “USDA publishes final COOL rule,” *Feedstuffs*, January 19, 2009. “Canada Cites TBT, GATT in WTO Consultation Request on U.S. COOL Law.” *Inside U.S. Trade*, December 5, 2008 (accessed January 22, 2009).

<sup>12</sup>U.S. Department of Agriculture News Release, “Vilsack Announces Implementation of Country of Origin Labeling Law,” February 20, 2009.

<sup>13</sup>Janie Gabbett, “Senators ask Vilsack to re-open COOL,” *MeatingPlace*, February 6, 2009, <http://www.meatingplace.com> (accessed February 7, 2009).

<sup>14</sup>Alex Binkley, “Canadian Meat Council accuses CFIA of not enforcing labels,” *Food Chemical News*, January 26, 2009.

<sup>15</sup>Tania Molina Ramírez, “Cedió México a EU control sobre el tequila,” *La Jornada*, March 24, 2008.



<sup>16</sup>Tom Johnston, “New COOL soothes Canadian livestock producers, for now,” MeatingPlace, January 13, 2009, <http://www.meatingplace.com>. National Pork Producers Council, “Final Rule On Meat Labeling Law Issued,” January 12, 2009, <http://www.nppc.org/News/PressRelease.aspx?DocumentID=24282> (accessed January 18, 2009).

<sup>17</sup>“Canada Shelves WTO COOL Case After Negotiating Changes with U.S.,” *Inside U.S. Trade*, January 16, 2009.

<sup>18</sup>National Farmers Union of Canada, “The Farm Crisis and the Cattle Sector: Towards a New Analysis and New Solutions” (Executive Summary), November 18, 2008, <http://www.nfu.ca/briefs/2008/LivestockEXECSUM-FINAL.pdf> (accessed January 18, 2009).

<sup>19</sup>Luke Engan, “New USDA Chief Announces Delay of Country-of-Origin Labeling Rule,” *Inside U.S. Trade*, January 23, 2009.

<sup>20</sup>“Se desploma 50 porciento la venta de carne a EU,” Asociación Mexicana de Engordadores de Ganado Bovino, January 17, 2009, <http://www.ameg.org.mx/>. “Perderá sector ganadero 75 mdd por nueva ley de etiquetado en EU,” Notimex/ *La Jornada* online, January 9, 2009, <http://www.jornada.unam.mx/ultimas/2009/01/09/perdera-sector-ganadero-75-mdd-por-nueva-ley-de-etiquetado-en-eu> (accessed January 29, 2009).

<sup>21</sup>Veronica Martínez, “Golpea la crisis a engordadores,” *La Reforma*, August 12, 2008, <http://www.cmp.org/noticias> (accessed January 23, 2009).

<sup>22</sup>Steve Suppan, “Codex standards and consumer rights,” *Consumer Policy Review* 16 (January/February 2006): 5-13.

<sup>23</sup>James Matthis, “The WTO Agreement on Technical Barriers to Trade (TBT)” in *Decision Making in the Global Market: Trade, Standards and the Consumer*, Consumers International, 2005: 112.

<sup>24</sup>North American Free Trade Agreement, Chapter 9, 1994, <http://tech.mit.edu/Bulletins/Nafta/09.standard> (accessed February 2, 2009).

<sup>25</sup>Michael Pollan, *The Omnivore’s Dilemma*, (New York: Penguin Books, 2006), 245.

<sup>26</sup>National Campaign for Sustainable Agriculture, “Agricultural Competition Issue Brief 13 of 18,” 2008, <http://nca.convio.net/site/DocServer/COOL.pdf?docID=1284> (accessed January 21, 2009).

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