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US Loses COOL In WTO Dispute

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On May 18, 2015, the World Trade Organization Appellate Body issued its long-awaited report rejecting the United States' efforts to remedy its country-of-origin labeling (COOL) requirements for imported beef and pork products. In the underlying dispute, initiated by Canada and Mexico, a WTO panel and the Appellate Body held that U.S. COOL requirements for meat products violated U.S. obligations under the WTO agreements.[1]

This latest decision is the United States' fourth adverse opinion in this dispute. Most recently, in October 2014, a WTO panel held that the United States' amended COOL measure not only fell short of bringing it into compliance with prior rulings but, in fact, worsened the United States' treaty violations.[2]

In the original dispute, Canada and Mexico challenged the Agricultural Marketing Act of 1946, as amended by the 2002 Farm Bill and the 2008 Farm Bill and the U.S. Department of Agriculture's 2009 final rule implementing the COOL statute.[3] The COOL statute defines the "origin" of muscle cuts of meat (i.e., non-ground meat) as a function of the country (or countries) in which the animal is born, raised and slaughtered. The statute establishes four categories of origin:

Category A — U.S. origin;
Category B — multiple countries of origin;
Category C — imported for immediate slaughter; and
Category D — foreign country of origin.

The statute also exempts a broad range of meat products from COOL requirements. Specifically, it exempts meat served in restaurants, meat that is an ingredient in processed foods and meat sold by entities that are not considered "retailers" within the meaning of the statute.[4] The 2009 final rule established the labeling requirements for each category, creating more onerous labeling requirements for products in categories B-D.

The original panel and the Appellate Body found that the original COOL measure violates Article 2.1 of the Agreement on Technical Barriers to Trade (TBT Agreement) by according less favorable treatment to imported livestock than to like domestic livestock. Specifically they held that the U.S. COOL measure necessitates additional recordkeeping and verification for imported livestock, thereby creating an incentive for meat processors to use domestic livestock exclusively. Additionally, the Appellate Body found that the U.S. COOL measure was not applied in an “even-handed manner” because its recordkeeping and verification requirements impose a disproportionate burden on upstream producers and processors of livestock as compared to the information conveyed to consumers through the mandatory labeling requirements for meat sold at the retail level. Meat sold in restaurants or as an ingredient in processed foods, for example, is not required to carry any origin markings and thus does not provide any origin information to the consumer. For these reasons the panel and Appellate Body found that the COOL measure violated Article 2.1 of the TBT Agreement.

The United States made limited effort to come into compliance with these adverse WTO opinions. The USDA amended its 2013 final rule, which replaced its 2009 regulation, to address the disparate treatment of meat products across the four statutory categories. The amended regulation altered the labeling guidelines to require meats from categories A-C to display origin information with regard to allproduction steps (i.e., country or countries in which the animal was born, raised and slaughtered). The U.S. Congress did not, however, amend the underlying COOL statute. This inaction garnered criticism from both industry leaders and global trade advocates, as the category designations and the broad exemptions for labeling at the retail level that were held to be WTO inconsistent remained unaltered.

In August 2013, Canada and Mexico requested the establishment of a WTO compliance panel pursuant to Article 21.5 of theUnderstanding on Rules and Procedures Governing the Settlement of Disputes (DSU) to examine the consistency of the United States’ amended COOL measure with the previous panel and Appellate Body opinions. In its October 2014 ruling, the compliance panel ceded that the United States had addressed the original COOL measure’s lack of “even-handedness” by requiring origin information for each production step. However, the panel noted that the amended COOL measure “fails to address in any way” the broad exemptions that prevent the additional information from reaching consumers while imposing even greater recordkeeping burdens on meat products.

The compliance panel noted that it “consider[s] the exemptions from the amended COOL measure’s coverage as evidence that the recordkeeping burden giving rise to the detrimental impact cannot be explained by the need to convey to consumers information regarding the countries where livestock were born, raised and slaughtered."[5] The panel found that the amended COOL measure actuallyincreased the original measure’s detrimental impact on the competitive opportunities of imported livestock, and that this impact does not stem exclusively from legitimate regulator distinctions. For these reasons, the panel held that the amended measure violates Article 2.1 of the TBT Agreement. The compliance panel also found that the amended COOL measure violates Article III:4 of the GATT 1994 because it provides less favorable treatment to imported livestock than to like domestic livestock, for the reasons discussed above.

In a move that was widely criticized by other WTO members as merely "buying time," the United States appealed the compliance panel's ruling to the Appellate Body.

On May 18, 2015, in its largely anticipated opinion, the WTO Appellate Body upheld the compliance panel's decision that the amended COOL measure continues to violate the United States' obligations under Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994 by according less favorable treatment to imported livestock than to “like” domestic livestock.

If the United States allows its current COOL measure to continue, in violation of its WTO obligations, Canada and Mexico may seek authorization to impose retaliatory measures through a separate WTO proceeding called Article 22.6 arbitration. Under Article 22.6 arbitration, another panel will be convened to calculate the extent to which the U.S. COOL measure has "nullified or impaired" the benefits Canada and Mexico would have otherwise received under the WTO agreements: i.e., the level of harm caused by import discrimination. This level of nullification or impairment of benefits will then be used to calculate the level of suspension of WTO concessions — i.e., the level of retaliatory measures — that Canada and Mexico will be authorized to impose against the United States.

On May 20, 2015, the House Agriculture Committee passed a bill that would repeal the COOL statute. "We cannot sit back and let American businesses be held hostage to the desires of a small minority who refuse to acknowledge that the battle is lost," Agriculture Committee Chairman Mike Conaway, R-Texas, told the press. On the Senate side, Senate Agriculture Committee Chairman Pat Roberts, R-Kan., has also indicated he will move quickly to respond to the latest WTO ruling, but he has yet to introduce a bill.

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[1] Panel Reports, United States – Certain Country of Origin Labelling (COOL) Requirements, WT/DS384/R, WT/DS386/R, adopted 23 July 2012, DSR 2012:VI, p. 2745; Appellate Body Reports, US – COOL, WT/DS384/AB/R, WT/DS386/AB/R, adopted 23 July 2012, DSR 2012:V, p. 2449.

[2] Panel Reports, US – COOL (Article 21.5 – Canada and Mexico), WT/DS384/RW and Add.1 / WT/DS386/RW and Add.1, circulated 20 October 2014.

[3] The original dispute also identified two interim rules, which were allowed to expire while the dispute

was ongoing, and a letter from Thomas Vilsack, Secretary of Agriculture, to Industry Representatives (dated February 20, 2009), which was subsequently withdrawn.

[4] The COOL statute defines "retailer" as "any person licensed as a retailer under the 'Perishable Agricultural Commodities Act of 1930' (PACA)," which only covers entities whose invoice costs of purchasers of perishable agricultural commodities exceed $230K per annum. See, Report of the Panel, US – COOL (Article 21.5 – Canada and Mexico), WT/DS384/RW, WT/DS386/RW, paras. 7.27-7.28.

[5] Panel Report, US – COOL (Article 21.5 – Canada and Mexico), para. 7.277.