CHALLENGING US COUNTRY OF ORIGIN LABELLING AT THE WTO: THE LAW, THE ISSUES AND THE EVIDENCE

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On March 16, 2009 the long-anticipated US mandatory country of origin labelling (COOL) legislation came into effect. Canada and Mexico believe that the provisions of the COOL constitute a disguised barrier to trade that violates the World Trade Organization (WTO) commitments of the United States. As a result, Canada and Mexico have separately challenged COOL at the WTO. Canada's request for a Disputes Settlement Panel was approved in November 2009 and a Panel was selected in May, 2010. Canada's written submission was filed on June 23, 2010 and hearings commenced on September 14, 2010. The Panel's report is expected to be released in the summer of 2011. As WTO Panel deliberations are not public, the objective of this policy brief is to outline the issues upon which a Canadian challenge to COOL could be based.

The implementation of US COOL legislation was a long process; the original legislation was included as part of the 2002 US Farm Security and Rural Investment Act – the US Farm Bill. How to operationalize the legislation was a hotly debated issue and the original legislation was amended and augmented until it finally came into force in 2009. The products covered are beef, veal, lamb, goat, pork, chicken, seafood, vegetables, fruits, peanuts, pecans, macadamia nuts and ginseng. The subset of meat products purchased in the US that are required to be labelled as to their country of origin are muscle cuts and ground products – basically products sold in supermarkets and other large retail outlets. Processed foods and food service providers such as hotels and restaurants are not included in COOL. COOL applies to products of both domestic and foreign origin that are sold in US supermarkets. Supermarkets are obligated to ensure the products they sell are labelled as to their country of origin.

For Canada, the major trade disruption arises in the case of beef cattle and pigs that begin and spend part of their life in Canada and then are exported as live animals to the US for fattening and/or slaughter. Under COOL, the meat arising from such animals cannot be labelled as *Product of the United States*. Instead, the meat from these animals must be labelled *Product of the United States and Canada*. While labelling is a relatively costless activity, retailers are required to be able to verify the labels presented to consumers. In effect, this means that cattle and hogs having a Canadian origin, and the meat derived from them, must be segregated from animals born, raised and slaughtered entirely within the US – *Product of the US*. This segregation, and tracking, must take place all along the supply chain. Segregation of meat and animals is expensive for US farmers and meat processors as well as supermarkets (McGivern, 2009). In some cases, US facilities have refused to handle cattle or hogs of Canadian origin; in others they have limited the days of the week they will accept Canadian animals; still others simply pass some of the added costs back down the supply chain to Canadian exporters (Sawka, 2010). The net result should be lower prices being paid for Canadian animals exported to the US – in effect a trade barrier.

The basis of a disputes challenge at the WTO lies in international trade law. In the case of the US COOL law, two aspects may apply – and the result of the Canadian challenge may well depend on which aspects of WTO law the Panelists choose to focus on. One of the aspects of international trade law that may apply in the case of COOL is firmly rooted in the old General Agreement on Tariffs and Trade (GATT) dating from 1947. The other aspect of international trade law that could be applied to COOL is based in the Agreement on Technical Barriers to Trade (TBT) negotiated in the Uruguay Round (1986-1994).

GATT Article IX deals with Marks of Origin and is rooted in the old GATT with its consensus based disputes system – Article IX of the GATT 1947 was incorporated without change into the Uruguay Round's GATT 1994. Article IX allows importing countries to require that products entering their customs territory be labelled as to its country of origin; but only under certain circumstances. Article IX:2 reads:

> The contracting parties recognize that, in adopting and enforcing laws and regulations relating to marks of origin, the *difficulties and inconveniences* which such measures may cause to the commerce and industry of exporting countries *should be reduced to a minimum*, due regard being had to the necessity of protecting consumers against fraudulent and misleading indications [emphasis added].

Canada could certainly argue that COOL has caused *difficulties and inconveniences* for exporters of beef cattle and pigs. Canada could also argue that the difficulties and inconveniences have not been *reduced to a minimum*. A problem, however, arises because *difficulties*, *inconveniences* and *reduced to a minimum* have never been defined in WTO case law.

The second section of Article IX where a case can be made that COOL violates WTO obligations is Article IX:4:

> The laws and regulations of contracting parties relating to the marking of imported products shall be such as to permit compliance without seriously damaging the product, or *materially reducing their value*, or *unreasonably increasing their cost* [emphasis added].

Canada could argue that COOL has been instrumental in, for the case of live animals exported to the US, *materially reducing their value* (or alternatively *unreasonably increasing their cost*). Recourse to this argument would require strong empirical evidence to support the claim. Again, however, there are no precedents in the WTO as to what *materially reduced* or *unreasonably* mean. Hence, while Canada should have a strong case, the lack of transparency regarding the meaning of important terms obscures the probable result of a Disputes Panel ruling.

Alternatively, the Panel could turn to the TBT. In its Article 2.2, WTO Members have agreed that technical regulations should not create *unnecessary obstacles to international trade*. Article 2.4 states: *Where technical regulations are required and relevant international standards exist ... Members shall use them* .... The SPS defers explicitly to three international standards organizations, one of which deals with establishing international standards for human food – the Codex Alimentarius Commission (Codex). The Members of the Codex, including Canada and the US, have agreed on a *General Standard for the Labelling of Prepackaged Foods*. COOL requires the labelling of prepackaged meat sold in supermarkets.

Section 4.5 of the *General Standard for the Labelling of Prepackaged Foods* is headed *Country of Origin***.** Section 4.5.2 states in a straightforward manner:

> When a food undergoes processing in a second country which changes its nature, the country in which the processing is performed shall be considered the country of origin for the purposes of labelling.

It would be hard to argue that turning live animals into meat cuts did not change the products *nature*.

Thus, the success of the Canadian challenge of US COOL would appear to depend on what part of WTO law is applicable and, if Article IX is chosen, how the Panel will interpret yet to be defined terms such as *difficulties, inconveniences, reduced to a minimum, materially reducing their value* and *unreasonably increasing their cost*. In any case, the WTO Disputes process takes a considerable period of time and, even if Canada wins the US will have a reasonable time to comply. All the while, the exporters of beef cattle and pigs to the US will continue to suffer from the disruptive effects of COOL on trade.

What are the trade policy lessons? First, never underestimate the tenaciousness and effectiveness of protectionists. COOL largely arose from a relatively small group of US cattle producers located near the Canadian border – the Ranchers-Cattlemen Action Legal Fund (R-Calf) that has consistently *punched above its weight* both in fostering COOL and keeping the US border closed to Canadian cattle in the wake of the discovery of *mad cow disease* in 2003. The long integration of the North American livestock industries pre-dates NAFTA and there were never any discernable US consumer concerns about the country of origin of the beef and pork they were eating, yet R-Calf was able to have COOL put in place.

The second lesson is that what is written in trade agreement matters. The vague terminology of GATT Article IX has survived since the GATT's inception in 1947. Canada is negotiating a number of preferential trade agreements, including a very important one with the European Union, not to mention the Doha Round. It seems clear that the language of trade agreements required careful scrutiny prior to their being signed.

References

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