

Mandatory Country of Origin Labeling of Meat: Consistency with U.S. NAFTA and WTO Obligations

Tough enforcement of international trade rules is a high priority for U.S. ranchers, hog farmers, poultry and meat producers. Market access for U.S. meat products all too often has been threatened or cut off—recent challenges include poultry exports to Russia, beef exports to Korea and Japan, and pork exports to Mexico. In each instance a major tool in the market-opening arsenal has been American rights under international trade agreements.

These challenges will continue. It is critical that the United States maintain its ability to enforce North American Free Trade Agreements (NAFTA) and World Trade Organization (WTO) obligations. U.S. credibility in enforcement is seriously undercut by U.S. legislation that violates America’s own commitments. Unfortunately, the U.S. Country of Origin Labeling (COOL) requirement for agricultural products, as currently written, violates U.S. obligations under both the NAFTA and the WTO. It is not that country of origin labeling per se is problematic, rather it is the current statutory/regulatory framework that is incompatible with U.S. treaty commitments.

Consistency with NAFTA requires that COOL Designate as U.S.-origin Meat that Undergoes a Substantial Transformation in U.S. Meat Processing Facilities

- To comply with NAFTA, mandatory COOL must treat as U.S.-origin any meat that has been produced from an animal that is slaughtered in the United States.
- NAFTA Annex 311.1 and the corresponding NAFTA “Marking Rules,” as implemented by the United States in 1996, provide that the production of meat from an imported live animal results in the meat becoming a good of the United States.
 - The “Marking Rules” establish that “the country of origin of a good is the country in which... that good undergoes an applicable change in tariff schedule set out in §120.20.” [1/](#)
 - 19 CFR §120.20 sets forth that the processing on U.S. territory of live animals (Chapter 1 of the Harmonized Tariff Schedule) into meat (Chapter 2) causes that meat to be U.S.-origin. [2/](#)
 - As adopted, however, COOL requires that only cuts of meat and ground meat from cattle, sheep and hogs, which are born, raised and

[1/](#) Rules for Determining the Country of Origin of a Good for Purposes of Annex 311 of the North American Free Trade Agreement, 61 Fed. Reg. 28932, 28956 (June 6, 1996).

[2/](#) 19 CFR §120.20 is set out in [id.](#) at 28957. See also Harmonized Tariff Schedule of the United States (2007), available at <http://www.usitc.gov/tata/hts/bychapter/index.htm>.

slaughtered in the United States, may be labeled as products of U.S.-origin.

- NAFTA Annex 311.5(b) requires the United States to “exempt from a country of origin marking requirement a good...[that] (viii) is to undergo production in [the United States]...in a manner that would result in the good becoming a good of the [United States] under the Marking Rules.” ^{3/}
 - This obligation applies to any measure involving country of origin marking, whether enforced at the time of importation, at retail sale, or both. ^{4/}
 - By requiring retailers to label meat with the country of origin of the imported animal from which it is produced, COOL negates this NAFTA exemption from country of origin labeling requirements as it applies to animals destined for slaughter.
- NAFTA Annex 311.4 further requires that country of origin marking requirements minimize the difficulties, costs and inconveniences that the measure may cause to the commerce and industry of the other NAFTA Parties. ^{5/}
 - Numerous estimates from both industry and the U.S. Government conclude that the implementation of mandatory COOL is going to be immensely expensive.
 - The Agricultural Marketing Service (AMS) estimates that recordkeeping and operating costs to U.S. companies may be \$3.9 billion for the first year alone. ^{6/}
 - Mexican and Canadian Governments have indicated that their producers and suppliers would be seriously damaged by the compliance costs and loss of business.
 - Tracking country of birth, country of maturation and country of slaughter information for animals and meat products that are shipped to the United States will be prohibitively expensive for U.S. importers and will result in Canadian and Mexican producers experiencing significant market difficulties.

^{3/} North American Free Trade Agreement, annex 311.5 (Dec. 17, 1992).

^{4/} Id. at annex 311.4.

^{5/} Id.

^{6/} Barry Krissoff, Fred Kuchler, Kenneth Nelson, Janet Perry, and Agapi Somwaru, Country of Origin Labeling: Theory and Observation, Electronic Outlook Report from the Economic Research Service, USDA, WRS-04-02, p. 13 (Jan. 2004).

Consistency with GATT Article III Requires that COOL Not Have Any Discriminatory Effect on Imported Meat and Imported Live Animals

- Under Article III:4 of the GATT, the United States must ensure that the products of other countries “imported into the territory of [the United States]...be accorded treatment no less favorable than that accorded to like products of [U.S.] origin in respect of all laws...affecting their internal sale.” [7/](#)
- The United States relied on this very provision when it brought an action against Korea to eliminate Korean discrimination against U.S. imports in its meat retail and distribution system. The U.S. successfully argued that Korea’s measures discriminated against U.S. beef because they modified the “conditions of competition between imported and domestic like products.” [8/](#)
- Mandatory COOL as implemented violates Article III:4 [9/](#).
 - Foreign- and U.S.-origin live animals are “like products.” [10/](#)
 - Mandatory COOL is a measure that affects the internal sale of meat from foreign animals in the United States by creating large disadvantages in selling imported foreign meat or foreign animals to U.S. meat packing facilities. [11/](#)
 - Article III:4 makes clear that “formal” identical treatment – the fact that both U.S. and imported products must be marked with the country of origin – is not sufficient to defend a law like COOL where that law discriminates against imports in practice. [12/](#)

[7/](#) General Agreement on Tariffs and Trade, art. III:4 (Oct. 30, 1947).

[8/](#) WTO Appellate Body Report on Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef, WT/DS161/AB/R, para. 136 (Dec. 11, 2000).

[9/](#) Id. at para. 133.

[10/](#) See WTO Panel Report on Dominican Republic—Measures Affecting the Importation and Internal Sale of Cigarettes, WT/DS302/R, para. 7.165 (Nov. 26, 2004); and WTO Panel Report on Mexico—Tax Measures on Soft Drinks and Other Beverages, WT/DS308/R, para. 8.105 (Oct. 7, 2005).

[11/](#) See WTO Appellate Body Report on European Communities—Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R, para. 220 (Sep. 9, 1997); and WTO Panel Report on Canada—Certain Measures Affecting the Automotive Industry, WT/DS139/R, para. 10.80 (Feb. 11, 2000).

[12/](#) In Dominican Republic—Cigarettes, the Dominican Republic (DR) required that tax stamps be affixed to cigarette boxes in the territory of the DR. Although formally neutral, the measure in practice meant that importers had to open the packaged cigarettes in the DR, affix the stamps, and repackage the cigarettes—and therefore led to costs for imported but not domestic cigarettes. Supra note 10 at para. 7.172. In determining that the tax stamp measure constituted

- As implemented, COOL will also likely result in *de facto* discrimination against foreign products.
 - Sponsors of the legislation declared it would be “helpful to a lot of American agricultural producers” and force companies to rely “on our independent producers here in this country.” [13/](#)
 - A General Accounting Office (GAO) report on country of origin labeling notes: “Packers, processors, distributors, and retailers may also try to reduce their costs by deciding to handle only domestic livestock and meat products.” [14/](#)

Consistency with the WTO Agreement on Technical Barriers to Trade Requires that COOL Not Violate International Standards [15/](#)

- As implemented, COOL is a technical regulation subject to the Agreement on Technical Barriers to Trade (TBT Agreement), which governs any law that “lays down product characteristics...with which compliance is mandatory.” [16/](#) The TBT Agreement also specifically governs any technical regulation which, like COOL, “deal[s] exclusively with...marking or labelling requirements as they apply to a product.”[17/](#)
- Article 2.4 of the TBT Agreement requires that the United States use international standards as the basis for its technical regulations. [18/](#) COOL

less favorable treatment, the Panel held that a party may not apply a measure “in a formally identical manner that does not take those differences into account, since this would, in practice, accord less favorable treatment to imported products.” *Supra* note 10 at para. 7.195.

[13/](#) Tom Harkin, *Congressional Record—Senate*, S13098 (Dec. 13, 2001); Paul Wellstone, *Congressional Record—Senate*, S3918 (May 7, 2002).

[14/](#) United States General Accounting Office, *Beef and Lamb: Implications of Labeling by Country of Origin* (Jan. 2000).

[15/](#) The outline that follows analyzes Articles 2.4 and 2.2, respectively, of the Agreement on Technical Barriers to Trade (Apr. 15, 1994). The same analysis, however, may be applied under similar provisions of NAFTA Chapter Nine (specifically, Articles 905 and 904).

[16/](#) *Id.* at annex 1.1. WTO cases have interpreted this provision to mean that a measure qualifies as a technical regulation if it (1) lays down a requirement that a product label must contain a particular detail;” *WTO Panel Report on European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, WT/DS290/R, para. 7.451 (Mar. 15, 2005); and (2) if it “regulate[s] the ‘characteristics’ of products in a binding or compulsory fashion.” *WTO Appellate Body Report on European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, para. 68 (Mar. 12, 2001).

[17/](#) *Id.* at annex 1.1.

[18/](#) The TBT Agreement stipulates that these standards may either be existing or imminent: “where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations.” *Id.* at article 2.4.

puts the United States in breach of the TBT Agreement by failing to use two such standards.

- The Codex General Standard for the Labelling of Prepackaged Foods provides that “when a food undergoes processing in a second country which changes its nature, the country in which the processing is performed shall be considered to be the country of origin for the purposes of labelling.”^{19/} COOL fails to conform to this international standard.
 - The Codex General Standard also provides that “the country of origin of the food shall be declared if its omission would mislead or deceive the consumer,”^{20/} but the U.S. Government has never claimed that customers are misled or deceived.
- The WTO Rules of Origin Agreement stipulates that the final harmonization work program must determine a country of origin as “the country where the last substantial transformation has been carried out.”^{21/} COOL, which denies U.S. country of origin to animals and meat products substantially transformed in the United States, fails to conform to this international standard.

As implemented, COOL Violates the WTO Agreement on Technical Barriers to Trade by Creating Unnecessary Obstacles to International Trade

- COOL as implemented violates the TBT Agreement because its non-trade objectives are minimal.
 - As implemented, COOL does not meet any of the “legitimate objectives” specifically enumerated under the TBT Agreement.^{22/}
 - COOL does not have the objective of protecting “human health or safety, animal or plant life or health, or the environment” –

^{19/} CODEX General Standard for the Labelling of Prepackaged Foods, CODEX STAN 1-1985 (Rev. 1-1991) (adopted by the Codex Alimentarius Commission at its 14th Session, 1981 and subsequently revised in 1985 and 1991 by the 16th and 19th Sessions and amended by the 23rd and 24th Sessions, 1999 and 2001), § 4.5.2, available at <http://www.fao.org/docrep/005/y2770e/y2770e02.htm> (visited April 24, 2007). At present, the Committee on Food Labelling has stated that it will not undertake any new work to develop further rules in this area. Report of the 33rd Session.

^{20/} *Id.* at § 4.5.1

^{21/} *Supra* note 15 at art. 3(b).

^{22/} *Id.* at art. 2.2.

the U.S. Government has formally stated that COOL “is not a food safety or animal health measure.” [23/](#)

- COOL is not a “national security requirement.”
 - COOL does not have the purpose of preventing “deceptive practices” – neither sponsors of the legislation nor U.S. Government agencies have made such a claim.
- The putative objective of mandatory COOL is “consumer information,” [24/](#) but this yields scant benefit.
- The U.S. Government itself has found that the benefits of consumer information “are difficult to quantify” and “small” and that all available evidence shows that “consumers do not have a strong preference for country of origin labeling.”[25/](#)
 - COOL is not “necessary” to fulfill the objective of consumer information, and in some instances might undermine this objective. For example, the identification of the country of birth of an animal could misleadingly suggest to a consumer that this information is pertinent to an evaluation of the quality of the meat product.
- Given the minimal non-trade objectives of COOL, little or no restriction of trade can be justified under the TBT Agreement. [26/](#) But COOL in fact is imposing significant restrictions on the importation of livestock.
- U.S. meat processing facilities historically processed both U.S. and imported livestock as they were delivered, frequently processing both U.S. and imported livestock on the same day, and even in the same hour.
 - U.S. meat processing facilities do not have the ability to trace cuts of meat back to a specific animal, and therefore cannot both comply with COOL and continue with established practices.

[23/](#) Proposed Rule on Mandatory Country of Origin Labeling of Beef, Lamb, Pork, Fish, Perishable Agricultural Commodities, and Peanuts, 68 Fed. Reg. 61944, 61945 (Oct. 30, 2003).

[24/](#) According to the Senate, “This provision provides consumers with greater information about the food that they buy.” Report of the Senate Committee on Agriculture, Nutrition, and Forestry, to Accompany S. 1731, Report 107117, p. 93 (2001). According to the U.S. Government, “the benefits will...accrue mainly to those customers who desire country of origin information.” Supra note 23 at 61955.

[25/](#) Supra note 23 at 61955-56.

[26/](#) Supra note 15 at art. 2.2.

- Meat processors have either ceased buying imported livestock – an extreme trade restriction – or confine processing of imported livestock to limited dates and times.
- These practices have and will continue to have a significant impact on trade. Importers are being forced to abandon just-in-time logistics, and instead ship in large lots. USDA border inspectors will likely not be able to process large-lot shipments on a timely basis forcing importers to pay – on a discriminatory basis – for expensive holding pens and longer transport times.
- The net effect of COOL as implemented is to reduce U.S. market access for foreign livestock producers. [27/](#)
- The TBT Agreement mandates that “less trade-restrictive” measures be applied wherever they are available. [28/](#) Less trade restrictive measures are available here: for example, a voluntary labeling scheme. [29/](#)

Consistency with GATT Article IX Requires that COOL Not Materially Reduce the Value of Products Imported from WTO Members.

- The United States agreed to take into consideration the “difficulties and inconveniences” that its marking measures would inflict on the commerce and industry of other Parties.
- Further, GATT Article IX:4 requires that U.S. laws and regulations “relating to the marking of imported products shall be such as to permit compliance without materially reducing their value, or unreasonably increasing their cost.”
 - COOL discourages American companies from importing foreign livestock and meat products—due to the significant cost of tracking country of origin information—and the slump in U.S. demand is materially reducing the value of foreign livestock and meat products.

Consistency with GATT Article X:3(a) Requires that any COOL Requirement be Structured so that It can be Administered Uniformly and Reasonably.

- The United States must administer COOL in “a uniform, impartial and reasonable manner.” [30/](#)

[27/](#) The term “trade-restrictive” clearly encompasses the reduction of “market access” for foreign products. WTO Panel Report on Australia—Measures Affecting Importation of Salmon, WT/DS18/RW, para. 7.151 (Feb. 18, 2000).

[28/](#) “Technical regulations shall not be maintained if the... objectives can be addressed in a less trade-restrictive manner.” Supra note 15 at art. 2.3.

[29/](#) See, e.g., <http://www.countryoforiginlabel.org> (visited Apr. 24, 2007).

- As adopted, the regulations administering COOL are not “uniform, impartial and reasonable.”
 - The administration of COOL is not uniform.
 - Uniformity requires “consistency” and “predictability” in the application of laws. [31/](#)
 - However, the administration COOL applies only to “covered commodities” but not other commodities and is therefore inconsistent.
 - The administration of COOL is not reasonable.
 - Reasonableness requires that the administration of laws be “proportionate” and “appropriate.” [32/](#)
 - However, the administration of COOL imposes significant costs on U.S. importers and foreign producers of animals and meat products, while providing scant legitimate benefit.

Consistency with GATT Article XXIII Requires that COOL Not Nullify or Impair the Benefits that May Exist under WTO Rules

- Under Article XXIII of GATT, a Party to the WTO may seek “satisfactory adjustments” from the United States if COOL serves to nullify or impair a benefit accruing to that Party under the WTO. [33/](#)
- Parties affected by COOL have a robust nullification or impairment claim.
 - COOL constitutes the “application of a measure.”
 - Parties have a benefit under the WTO with respect to the balance of concessions made on livestock and meat products in the Uruguay Round.

[30/](#) Supra note 7 at art 10.3.

[31/](#) WTO Panel Report on Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather, WT/DS 155/R and Corr.1, para. 11.83 (Feb. 16, 2001).

[32/](#) WTO Panel Report on Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes, WT/DS302/R, para. 7.385 (May 19, 2005) (modified by Appellate Body Report, WT/DS302/AB/R).

[33/](#) While the Appellate Body in EC – Asbestos agreed with the Japan – Film panel that “the remedy in Article XXIII:1(b) ‘should be approached with caution and should remain an exceptional remedy,’” the facts of this case provide a reasonable basis for a non-violation argument. Supra note 16 at para. 186.

- COOL causes the nullification or impairment of this benefit because the significant costs entailed in tracking country of origin information would hurt foreign producers of livestock and animal products. As such COOL upsets the “relative conditions of competition between domestic and foreign products as a consequence of the relevant tariff concessions.” [34/](#)

[34/](#) WTO Panel Report on Japan—Measures Affecting Consumer Photographic Film and Paper, WT/DS44/R, para. 10.82 (Apr. 22, 1998).