

# WTO DISPUTE: UNITED STATES – CERTAIN COUNTRY OF ORIGIN LABELLING (COOL) REQUIREMENTS (COMPLAINT BY CANADA)

P A N L I U \*

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## I. INTRODUCTION

Since the birth of the General Agreement on Tariffs and Trade (GATT) in 1947, tariffs have been progressively reduced and bound for a greater number of industrial and agricultural goods.<sup>1</sup> Attention is progressively shifting to the much less transparent non-tariff measures such as technical barriers to trade.<sup>2</sup>

In 2012, the World Trade Organization (WTO) Appellate Body (AB) issued three decisions concerning the Agreement on Technical Barriers to Trade (TBT): *US – Clove Cigarettes*<sup>3</sup>, *US – Tuna*<sup>4</sup>, and *US – Certain Country of*

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<sup>1</sup> WTO, *World Trade Report 2012: Trade and Public Policies: A Closer Look at Non-tariff Measures in the 21st Century*, (Switzerland: World Trade Organization, 2012) at 37, online: WTO <[http://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/world\\_trade\\_report12\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report12_e.pdf)>.

<sup>2</sup> *Ibid.*

<sup>3</sup> *United States Measures Affecting the Production and Sale of Clove Cigarettes (Complaint by Indonesia)*, WTO Doc WT/DS406/AB/R (2012), online: WTO <<http://docsonline.wto.org>> [US-Clove AB Report].

<sup>4</sup> *United States Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Complaint by Mexico)*, WTO Doc WT/DS381/AB/R (2012), online: WTO <<http://docsonline.wto.org>> [US-Tuna AB Report].

Origin Labelling (COOL)<sup>5</sup>. Since its establishment in 1995, the AB had only once dealt with a dispute concerning the TBT in *EC – Sardines*<sup>6</sup> in 2002,<sup>7</sup> however some key provisions were left un-interpreted. Hence, the interpretation by the AB in these three cases stands as a major development in the TBT jurisprudence.<sup>8</sup> This case law clarified the framework governing technical regulations under Articles 2.1 and 2.2 of the TBT.<sup>9</sup> *USCOOL*, challenged by Canada and Mexico on the grounds that United States (US) COOL rules<sup>10</sup> for meat products were discriminatory against imported livestock, is the last case in the trilogy.<sup>11</sup> That case will be the focus of this paper.

This paper will begin by explaining the COOL statute and its regulations, and the nature of the North American livestock trade. The paper will then summarize the TBT jurisprudence established by the three AB cases prior to *US – COOL*. Next, the paper will illustrate the application of the law by explaining how the Panel and the AB in *US – COOL* conducted their analyses under TBT Articles 2.1 and 2.2. Lastly, the paper follows up on what has happened since the WTO decisions, offers solutions to the Canadian livestock industry, provides an economic angle to the issue, argues that the motive behind COOL is protectionism, and gives some thoughts on non-tariff barriers.

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<sup>5</sup> *United States-Certain Country of Origin Labelling (COOL) Requirements (Complaint by Canada)*, WTO Doc WT/DS384/AB/R (2012), online: WTO <<http://docsonline.wto.org>> [US-COOL AB Report].

<sup>6</sup> *European Communities-Trade Description of Sardines (Complaint by Peru)*, WTO Doc WT/DS231/AB/R (2012), online: WTO <<http://docsonline.wto.org>> [EC-Sardines AB Report].

<sup>7</sup> Giorgio Sacerdoti, “Review-WTO Case Law in 2012”, Case Comment, (2013) Bocconi Legal Studies Research Paper No 2346678 at 2.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid* at 14.

<sup>10</sup> USDA, AMS, “Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts” 74 Fed Reg 2658, (2009) (to be codified at 7 CFR parts 60 & 65), online: <[www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5074926](http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5074926)> [2009 Final Rule].

The COOL rules comprise the COOL statute and its implementing regulations, 2009 Final Rule. Will be referred to as “COOL”, “the COOL measure”, “the COOL provision” or “the COOL requirement” in this paper.

<sup>11</sup> *US-COOL*, *supra* note 5 at para 52.

## II. BACKGROUND

### The *COOL* requirements

Prior to *COOL*, meat products were labeled under the name of the country that added the last substantial amount of value to the product – for example, if an imported cow was destined for a US processor where it would be slaughtered, cut, and packed, US origin would be labeled on the resulting product.<sup>12</sup> The *COOL* provision is substantially different. It requires covered retailers to use one of four types of labels.<sup>13</sup> In the process of determining the appropriate label, producers along the supply chain incur substantial costs because the origin of the animal, where it was born, raised and slaughtered must be determined, tracked, recorded, and passed on to the next producer in the supply chain.<sup>14</sup>

#### i. Overview

*COOL* went into force on March 16, 2009 in the US.<sup>15</sup> The statutory provisions of the *COOL* measure are contained in section 1638 of the *Agricultural Marketing Act of 1946*<sup>16</sup> (the Act). *COOL* applies irrespective of whether the products are imported or domestically produced. Section 1638a(a)(1) of the Act establishes the main obligation concerning country of origin information:

Except as provided in subsection (b) of this section, 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.<sup>17</sup>

“Retailer” is defined as an entity selling at least USD \$230,000 a year in fresh fruits and vegetables.<sup>18</sup> In other words, *COOL* does not apply to butcher shops or retailers that have an annual invoice cost of less than USD \$230,000 of fruits and vegetables. “Covered commodity” includes muscle cuts

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<sup>12</sup> Alexander Moens & Amos Vivancos-Leon, “MCOOL and the Politics of Country-of-Origin Labeling”, (Studies in Canada-US Relations, Fraser Institute, 2012) at iii.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> 2009 Final Rule, *supra* note 10 at 2658.

<sup>16</sup> 7 USC § 1638.

<sup>17</sup> 7 USC § 1638a(a)(1).

<sup>18</sup> 7 USC §§ 1638(6), 499a(b)(11), 499a(b)(4), 499a(b)(6).

of beef (meat produced from cattle), lamb, and pork (meat produced from hogs), ground beef, ground lamb, ground pork, farm-raised fish, wild fish, a perishable agricultural commodity, peanuts, meat produced from goats, chicken, ginseng, pecans, and macadamia nuts.<sup>19</sup>

The COOL statute provides for two major exemptions: first, it exempts a covered commodity if it is an ingredient in a processed food item.<sup>20</sup> The term “processed” is defined as smoking and restructuring.<sup>21</sup> Second, it exempts food service establishments from the COOL requirements.<sup>22</sup> “Food service establishments” include a restaurant, cafeteria, lunch room, food stand, saloon, tavern, bar, lounge,<sup>23</sup> salad bars, delicatessens, and other food enterprises located within retail establishments that provide ready-to-eat foods that are consumed either on or outside of the retailer’s premises.<sup>24</sup>

## ii. Main Requirements for Meat Products

Since this dispute only concerns beef and pork, this section is only going to cover requirements of the COOL measure relating to meat products. The COOL measure comprises the COOL statute and its implementing regulations, the 2009 Final Rule.

### a. The COOL statute

In the case of meat, “origin” is defined as a function of the country or countries in which the animal was born, raised, and slaughtered.<sup>25</sup> Section 1638a(a)(2) of the Act establishes four categories to classify muscle cut meat that retailers must use to inform consumers on the origin of meat:

#### (I) Category A: United States country of origin<sup>26</sup> – *Product of the US*

A retailer may designate the meat as exclusively having a United States country of origin only if the meat is derived from an animal that was: (i) exclusively born, raised, and slaughtered in the United States; (ii) born and raised in Alaska or Hawaii and transported for a

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<sup>19</sup> 7 USC § 1638(2)(A).

<sup>20</sup> 7 USC § 1638(2)(B).

<sup>21</sup> 2009 Final Rule, *supra* note 10 § 60.119.

<sup>22</sup> 7 USC § 1638a(b).

<sup>23</sup> 7 USC § 1638(4).

<sup>24</sup> 2009 Final Rule, *supra* note 10 § 65.140.

<sup>25</sup> *Ibid* at § 65.260.

<sup>26</sup> 7 USC § 1638a(a)(2)(A).

period not more than 60 days through Canada to United States and slaughtered in the United States; or (iii) present in the United States on or before 15 June 2008.

(II) **Category B: Multiple countries of origin**<sup>27</sup> – *Product of the US, product of country X*

For meat that is derived (i) not exclusively born, raised, and slaughtered in the United States; (ii) born, raised, or slaughtered in the United States; and (iii) not imported into the United States for immediate slaughter a retailer may designate the country of origin as all of the countries in which the animal may have been born, raised, or slaughtered.

(III) **Category C: Imported for immediate slaughter**<sup>28</sup> – *Product of country X, product of the US*

For meat that is derived from an animal that is imported into the United States for immediate slaughter, a retailer shall designate the origin as the country from which the animal was imported and the United States.

(IV) **Category D: Foreign country origin**<sup>29</sup> – *Product of country X*

For meat that is derived from an animal that is not born, raised, or slaughtered in the United States, a retailer shall designate a country other than the United States as the country of origin of such commodity.

## The 2009 Final Rule

The 2009 Final Rule allows the practice of commingling muscle meat. It sets forth two provisions regulating the commingling of meat in a single production day: first, when muscle cut derived from category A animals are commingled during a production day with muscle cut derived from category B animals, all of the resulting meat may be labeled as category B,<sup>30</sup> even though a particular piece of meat may have been derived from a category

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<sup>27</sup> 7 USC § 1638a(a)(2)(B).

<sup>28</sup> 7 USC § 1638a(a)(2)(C).

<sup>29</sup> 7 USC § 1638a(a)(2)(D).

<sup>30</sup> 2009 Final Rule, *supra* note 10 § 65.300(e)(2).

A animal. Second, when muscle cut derived from category B animals are commingled during a production day with muscle cut derived from category C animals, the origin may also be classified as category B,<sup>31</sup> even though a particular piece of meat may have been derived from a category C animal.

The 2009 Final Rule further provides that the countries may be listed in any order when (i) the meat is derived from animals classified as category B - which means labels for categories B and C meat could look the same in practice; or when (ii) meat falling under categories A and B, as well as B and C, is commingled during a single production day.<sup>32</sup>

To sum up, the different labeling possibilities as prescribed under the 2009 Final Rule are as follows:<sup>33</sup>

Label A	When 100% of the meat is derived from	Product of the US
Label B	(1) When 100% of the meat is derived from category B Animals	Product of the US, product of country X
	(2) When A and B meat is commingled on a single production day	
	(3) When A and C meat is commingled on a single production day	
	(4) When B and C meat is commingled on a single production day	
	(5) When A, B and C meat is commingled on a single production day	
Label C	(1) When 100% of the meat is derived from category C Animals	Product of country X, product of the US
	(2) When A and B meat is commingled on a single	
	(3) When A and C meat is commingled on a single	
	(4) When 100% of the meat is derived from category B Animals	
	(5) When B and C meat is commingled on a single production day	
	(6) When A, B and C meat is commingled on a single production day	
Label D	When it is 100% imported foreign meat	Product of country X

<sup>31</sup> *Ibid* at § 65.300(e)(4).

<sup>32</sup> *Ibid*.

<sup>33</sup> *United States-Certain Country of Origin Labelling (COOL) Requirements (Complaint by Canada)*, WTO Doc WT/DS384/R (2012) (Panel Report) at 45, online: WTO <<http://docsonline.wto.org>> [US-COOL Panel Report].

As is clear from the table, there is an overlap between Labels B and C. The practice of commingling and the interchangeable use of Labels B and C are important to note as they were found to be problematic in both the Panel and the AB decisions.

**iii. Other obligation prescribed by *COOL*: audit verification**

Secretary of Agriculture has the authority to “conduct an audit of any person that prepares, stores, handles, or distributes a covered commodity for retail sale to verify compliance”<sup>34</sup> with the *COOL* requirements.

The audit verification system also imposes recordkeeping requirements for producers along the meat production chain. Section 1638a(e) of the Act stipulates “any person engaged in the business of supplying a covered commodity to a retailer shall provide information to the retailer indicating the country of origin of the covered commodity.”<sup>35</sup> Suppliers have to keep records for one year from the date of transaction that can identify both the immediate previous source and the immediate subsequent recipient of a covered commodity.<sup>36</sup>

**iv. Enforcement of *COOL***

A retailer or supplier may be fined USD \$1,000 per violation if they are found to be in wilful noncompliance with the *COOL* measure.<sup>37</sup>

**C. North American livestock and meat industries and trade**

The Canadian cattle and hog sectors are the most severely impacted by *COOL* because of the integrated nature of the North American livestock trade. Before discussing livestock trade, we first have to understand the meat production process.

Commercial beef production involves four stages: cow-calf operations, backgrounding, feed lot finishing, slaughtering.<sup>38</sup> The production process from hogs to pork also involves four stages similar to that of cattle.<sup>39</sup>

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<sup>34</sup> 7 USC § 1638a(d)(1).

<sup>35</sup> 7 USC § 1638a(e).

<sup>36</sup> 2009 Final Rule, *supra* note 10 § 65.500(3).

<sup>37</sup> 7 USC §§ 1638b(a)-(b).

<sup>38</sup> US-COOL (Panel Report), *supra* note 33 at 51.

<sup>39</sup> *Ibid* at 52.

Most cattle and hogs change ownership several times before reaching the retailer; therefore, sorting and mixing imported animals once they are in the US may occur several times as animals are moved from backgrounder, feedlot operations, and slaughterhouses.<sup>40</sup>

Thanks to the Canada-US Free Trade Agreement in 1988 and North American Free Trade Agreement in 1994, Canada and the US have developed “an integrated supply chain for beef and pork in which calves and young pigs may be born in one country, raised in another, and/or slaughtered on either side of the border.”<sup>41</sup> It is the integrated nature of the meat production sector that makes COOL very costly for the livestock industry<sup>42</sup> because cow-calf producers, backgrounders, feeding operations, and slaughterhouses must each determine, track, and record the origin of the cattle and hogs they purchase from different suppliers in which some of the cattle and hogs may have mixed-origins. The estimated cost for companies to provide mixed-origin products was expected to increase by USD \$45.50-\$59.00 per head, compared to only USD \$1.50 per head for cattle of US-origin.<sup>43</sup>

### III. THE AGREEMENT ON TECHNICAL BARRIERS TO TRADE

In the 1970s, a GATT Working Group found that technical barriers were the main form of non-tariff barriers faced by exporters.<sup>44</sup> GATT contains a number of provisions that address technical barriers but, they were found to be deficient in tackling growing concerns of the GATT Contracting Parties.<sup>45</sup>

It was necessary to ensure that WTO Members do not circumvent their GATT commitments on reducing or eliminating tariff-barriers through introducing regulatory measures amounting to import-discrimination in their domestic policies.<sup>46</sup> As a result, during the Tokyo Round, a Standards Code

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<sup>40</sup> Wendy Umberger, “Animal Identification” (Department of Agricultural and Resource Economics, Colorado State University) at 4.7, online: <<http://cemendocino.ucanr.edu/files/17110.pdf>>.

<sup>41</sup> Moens, *supra* note 12 at iii.

<sup>42</sup> *Ibid* at vii.

<sup>43</sup> Informa Economics, *Update of Cost Assessments for Country of Origin Labeling – Beef & Pork* (2009), (Informa Economics Inc., 2010) at 6, online: <<http://www.informaecon.com/coolstudyupdate2010.pdf>>.

<sup>44</sup> Doaa Abdel Motaal, “Overview of the World Trade Organization Agreement on Technical Barriers to Trade” at 1, online: <[cuts-international.org/Doaa-paper.doc](http://cuts-international.org/Doaa-paper.doc)>.

<sup>45</sup> *Ibid*.

<sup>46</sup> Robert Howse & Philip Levy, “The TBT Panels: *US-Cloves*, *US-Tuna*, *US-COOL*” (2013) 12:2 World Trade Review 327 at 348.



was drafted.<sup>47</sup> Later in the Uruguay Round, the TBT, which built upon and strengthened the Standards Code, was negotiated and entered into force in 1995.<sup>48</sup> The TBT's objective is to ensure that unnecessary obstacles to international trade are not created while acknowledging the right of WTO Members to develop technical regulations such as labelling requirements and to ensure they are complied with.<sup>49</sup>

Since its coming into force in 1995 and before 2012, the AB had only once dealt with a dispute concerning the TBT in 2002 in *EC – Sardines*. That case left some key provisions uninterpreted. In 2011, three cases concerning the TBT were adjudicated almost simultaneously at the Panel-level.<sup>50</sup> The three Panel reports adopted irreconcilable approaches in interpreting some of the key terms in the TBT.<sup>51</sup> All three cases were appealed to the AB. The AB took the opportunity to clarify the provisions and establish the legal foundation for future challenges under TBT Articles 2.1 (non-discrimination) and 2.2 (unnecessary obstacles to trade).

This section outlines the jurisprudence on TBT Articles 2.1 and 2.2 established by the three cases prior to *US – COOL*. Afterward, the next section will demonstrate the application of the law in *US – COOL*.

### A. The Threshold Issue

The AB in *EC – Sardines* set out the threshold question for all claims under the TBT: whether the measure in issue is a technical regulation.<sup>52</sup> If it is not a technical regulation, it does not fall within the scope of the TBT. Annex 1.1 to the TBT defines “technical regulation” as a:

Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling

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<sup>47</sup> Motaal, *supra* note 44.

<sup>48</sup> *Ibid.*

<sup>49</sup> WTO, *Agreement on Technical Barriers to Trade*, (1995) Preamble at 117, online: WTO <[http://www.wto.org/english/docs\\_e/legal\\_e/17-tbt.pdf](http://www.wto.org/english/docs_e/legal_e/17-tbt.pdf)> [TBT].

<sup>50</sup> Petros Mavroidis, “Driftn’ too far from shore – Why the test for compliance with the TBT Agreement developed by the WTO Appellate Body is wrong, and what should the AB have done instead” (2013) 12:3 *World Trade Review* at 510.

<sup>51</sup> *Ibid.*

<sup>52</sup> *EC Sardines* (AB Report), *supra* note 6 at para 175.

requirements as they apply to a product, process or production method.<sup>53</sup>

Based on this definition, the AB in *EC – Sardines* developed a three-pronged test to determine whether a document qualifies as a technical regulation: (1) the document must apply to an identifiable product or group of products; however, the identifiable product or group of products need not be expressly identified in the document; (2) the document must lay down one or more characteristics of the product; and (3) compliance with the product characteristics must be mandatory.<sup>54</sup>

## B. Article 2.1 of the TBT

Article 2.1 of the TBT provides the following:

Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.<sup>55</sup>

In the AB's analysis in *US – Tuna*, three elements must be established in order to demonstrate a breach of Article 2.1: (1) that the challenged measures constitute a technical regulation within the meaning of Annex 1.1; (2) that the imported products are like the domestic products; and (3) that the treatment accorded to imported products is less favourable than that accorded to like domestic products.<sup>56</sup>

The AB in *US – Tuna* affirmed its ruling in *US – Clove Cigarettes* that in determining whether imported products are accorded less favourable treatment calls for an analysis of whether the measure at issue modifies the conditions of competition to the detriment of imported products as compared to the group of like domestic products.<sup>57</sup> However, the existence of a detrimental impact is not dispositive. The panel then has to analyze whether the detrimental impact (*de jure* or *de facto*) on imports stems exclusively from a

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<sup>53</sup> *Agreement on Technical Barriers to Trade*, *supra* note 49 at 132.

<sup>54</sup> *EC-Sardines* (AB Report), *supra* note 6 at para 176.

<sup>55</sup> *Agreement on Technical Barriers to Trade*, *supra* note 49 at 118.

<sup>56</sup> *US-Tuna* (AB Report), *supra* note 4 at para 202.

<sup>57</sup> *Ibid* at para 215.

legitimate regulatory distinction,<sup>58</sup> considering “the design, architecture, revealing structure, operation, and application”<sup>59</sup> of the regulation and whether it is even-handed.<sup>60</sup> In short, Article 2.1 does not prohibit discrimination that stems exclusively from a legitimate regulatory distinction.

### C. Article 2.2 of the TBT

Article 2.2 of the TBT provides:

Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products.<sup>61</sup>

A “legitimate objective” refers to an aim or target that is lawful, justifiable or proper.<sup>62</sup> The list of legitimate objectives in Article 2.2 is not closed. If the objective at issue does not fall among those specifically listed, a panel must make a determination of legitimacy by taking account of all the evidence before it, including “the texts of statutes, legislative history, and other evidence regarding the structure and operation”<sup>63</sup> of the technical regulation at issue.

In regards to the phrase “fulfill a legitimate objective”, the AB in *US – Tuna* clarified that “fulfill”, as used in Article 2.2, does not mean the complete achievement of something, but rather it is concerned with the degree of contribution that the technical regulation makes towards the achievement of the legitimate objective.<sup>64</sup> In particular, the AB wrote:

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<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid* at para 225.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Agreement on Technical Barriers to Trade*, *supra* note 49 at 118, s 2.2.

<sup>62</sup> *US:Tuna* (AB Report), *supra* note 4 at para 313.

<sup>63</sup> *Ibid* at para 314.

<sup>64</sup> *Ibid* at para 315.

...an assessment of whether a technical regulation is “more trade-restrictive than necessary” within the meaning of Article 2.2 of the TBT Agreement involves an evaluation of a number of factors. A panel should begin by considering factors that include:

(i) the degree of contribution made by the measure to the legitimate objective at issue;

(ii) the trade-restrictiveness of the measure; and

(iii) the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the measure.

In most cases, a comparison of the challenged measure and possible alternative measures should be undertaken. In particular, it may be relevant for the purposes of this comparison to consider whether the proposed alternative is less trade restrictive, whether it would make an equivalent contribution to the relevant legitimate objective, taking account of the risks non-fulfilment would create, and whether it is reasonably available.<sup>65</sup>

It follows that Article 2.2 does not prohibit measures that have any trade restrictive effect. Rather it is “concerned with restrictions on international trade that exceed what is necessary to achieve the degree of contribution that a technical regulation makes to the achievement of a legitimate objective.”<sup>66</sup>

#### IV. WTO DISPUTE ON COOL (*US-COOL*)

In late 2009, Canada challenged COOL in the WTO arguing that the COOL measure is so onerous on producers that handle imported livestock that it has a trade-distorting impact by reducing the value and number of cattle and hogs shipped to the US market.<sup>67</sup> Canada also argued that the objective of COOL is trade protectionism.<sup>68</sup> The US, on the other hand, argued that US consumers have a right to know where their food came from, and that the objective of COOL is legitimate, which is to “provide consumer information on origin”.<sup>69</sup> Further, the US argued that COOL is not

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<sup>65</sup> *Ibid* at para 322.

<sup>66</sup> *Ibid* at para 319.

<sup>67</sup> *US-COOL* (Panel Report), *supra* note 33 at paras 7.265-7.266.

<sup>68</sup> *Ibid* at para 7.590.

<sup>69</sup> *Ibid* at para 7.577.

discriminatory since it does not discriminate between domestic and imported beef and pork, it operates neutrally in the market place, and it does not impose any domestic content requirements.<sup>70</sup>

In November 2011, the Panel found that COOL violated Articles 2.1 and 2.2 of the TBT. The US appealed the findings to the AB. In June 2012, the AB upheld the Panel's determination on Article 2.1, but on different grounds. However, it overturned the Panel's determination on Article 2.2. The AB in *US – COOL* brought the interpretation of TBT Articles 2.1 and 2.2 in line with its recent decisions in *US – Clove Cigarettes* and *US – Tuna*.

## A. Article 2.1 of the TBT

### *i. Panel Report*

The Panel first examined whether the COOL measure at issue constitutes a technical regulation within the meaning contained in Annex 1.1 of the TBT. The Panel applied the three-pronged test set out in *EC – Sardines* and found that the COOL measure (1) applies to an identified product (beef and pork) or group of products (cattle and hogs)<sup>71</sup>; (2) imposes the criteria of origin labelling requirements<sup>72</sup>; and (3) compliance with COOL is mandatory since the wording of the COOL statute uses the word “shall” and it imposes fines for noncompliance.<sup>73</sup>

Having found that COOL met the threshold and that it is a technical regulation, the Panel started its Article 2.1 analysis by determining whether Canadian cattle and hogs and US cattle hogs are like products. Since there was no prior jurisprudence on interpreting “like products” contained in the TBT,<sup>74</sup> the Panel considered that GATT Article III:4 provides relevant context for interpreting Article 2.1. Under GATT Article III:4, products distinguished solely on the basis of origin are deemed “like products”. In the case in question, the Panel observed that COOL distinguished products solely on the basis of country of origin. Thus the Panel concluded that Canadian

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<sup>70</sup> *Ibid* at para 7.263.

<sup>71</sup> *Ibid* at paras 7.202-7.207.

<sup>72</sup> *Ibid* at paras 7.212-7.214.

<sup>73</sup> *Ibid* at paras 7.157-7.162.

<sup>74</sup> The Panel considered this case before the AB reports of *US-Clove Cigarettes* and *US-Tuna* were issued.

and US cattle, and Canadian and US hogs were like products.<sup>75</sup> The above findings were not appealed.

The Panel then assessed whether the COOL measure accorded imported livestock treatment less favourable in comparison to like domestic livestock by modifying conditions of competition in the US market to the detriment of imported livestock. In this regard, the Panel noted that, although COOL is facially neutral, it accorded *de facto* less favourable treatment to imported products because the design of COOL and its operation within the US market meant that segregation of livestock is a practical way to ensure compliance, and such segregation modified the conditions of competition to the detriment of imported livestock.

*ii. Segregation*

The Panel found that in order to accurately label muscle cuts under COOL, a retailer needs to possess information on where livestock processing steps have taken place. The Panel reasoned that this information can be obtained only from the upstream livestock and meat supply chain.<sup>76</sup> Hence the Panel concluded:

COOL measure prescribes an unbroken chain of reliable country of origin information with regard to every animal and muscle cut. In other words, to comply with the COOL measure, livestock and meat processors need to possess, at each and every stage of the supply and distribution chain, the kind of origin information required by the various COOL labels for which each animal or portion of meat is eligible, and they need to transmit such information to the next processing stage. A practical way to ensure [compliance] is the segregation of meat and livestock according to origin as defined by the COOL measure.<sup>77</sup>

*iii. Segregation modifying the conditions of competition*

Having concluded that COOL necessitates segregation, the Panel then determined whether such segregation modifies the conditions of competition to the disadvantage of imported livestock. The Panel examined various business models of compliance with COOL and found that the less costly methods would be choosing to process either exclusively domestic or

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<sup>75</sup> US-COOL (Panel Report), *supra* note 33 at paras 7.252-7.256.

<sup>76</sup> *Ibid* at para 7.316.

<sup>77</sup> *Ibid* at para 7.317.

exclusively imported livestock.<sup>78</sup> Given the particular circumstances of the US livestock market including the fact that livestock imports have been and remain small compared to overall US livestock production and demand, and that the US livestock demand cannot be fulfilled with exclusively foreign livestock, the Panel concluded that the least costly way of complying with COOL is to rely exclusively on domestic livestock.<sup>79</sup>

The Panel also accepted evidence provided by Canada that major US slaughterhouses are applying a discount of USD \$40-\$60 per head for imported livestock but not to domestic livestock.<sup>80</sup> Several major US meat processors, representing a total market share of more than 65% in 2008, indicated that they would move to using Label A for the vast majority of their beef and pork products because their “chief concern [is] the ability to ensure that cattle coming into their plants are properly segregated” and “to avoid passing higher costs [of COOL] onto consumers.”<sup>81</sup> Further, as a result of COOL, some plants are no longer accepting imported livestock.<sup>82</sup>

The Panel found that by buying and using only US-origin animals, livestock feeders, slaughter facilities and retailers could avoid many of the costs of COOL that result from animal and product segregation and associated record keeping and documentation.<sup>83</sup> Based on the above analysis and findings, along with its finding that the costs of compliance could not fully be passed on to consumers, the Panel found that COOL modified the conditions of competition in the US market to the detriment of imported livestock by creating an incentive in favour of processing exclusively domestic livestock and a disincentive against handling imported livestock. In sum, Article 2.1 of the TBT was found to be violated.

#### *iv. Appellate Body Report*

Confirming its approach in *US – Clove Cigarettes* and *US – Tuna*, the AB in this case found that the Panel erred in failing to consider whether or not the detrimental impact on imports was due exclusively to a legitimate regulatory distinction.

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<sup>78</sup> *Ibid* at paras 7.333-7.347.

<sup>79</sup> *Ibid* at paras 7.349-7.350.

<sup>80</sup> *Ibid* at para 7.356.

<sup>81</sup> *Ibid* at para 7.362.

<sup>82</sup> *Ibid* at para 7.375.

<sup>83</sup> *Ibid* at para 7.372.

The AB found that the detrimental impact caused by COOL did not stem exclusively from a legitimate regulatory distinction because the COOL's recordkeeping and verification requirements impose a disproportionate burden on upstream suppliers as compared to the information conveyed to consumers in an understandable or accurate manner, if they are communicated at all. This disproportionality was considered as not being even-handed which, in turn, was recognized as arbitrary and unjustifiable discrimination,<sup>84</sup> thus violating Article 2.1.

*v. Disproportionate burden on upstream producers and processors*

Based on the Panel's findings, the AB found that COOL does not impose labeling requirements for meat that provide consumers with origin information commensurate with the type of origin information that upstream livestock suppliers are required to maintain and transmit. For instance, a livestock producer must maintain and transmit information sufficient to enable its customers to differentiate between cattle born and raised in the United States and cattle born in Canada and raised in the US.<sup>85</sup> However, this information may not be communicated to consumers at all due to the exemptions COOL provides.

The AB found that because the ultimate disposition of a meat product is often not known at any particular stage of the production chain, upstream producers do not distinguish between livestock that will be used to produce a product that is exempt, and livestock that will be used to produce covered commodities that must be labeled. Consequently, upstream producers will be subject to the COOL's recordkeeping and verification requirements even when the meat derived from their animals is ultimately exempt from the labeling requirements.<sup>86</sup>

*vi. Confusing and inaccurate information being conveyed to consumers*

The AB further found that even when the information is communicated to consumers, it may be confusing and inaccurate. Firstly, the

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<sup>84</sup> The AB in this case explicitly associated the notion of "even-handedness", which was first mentioned in *US-Clove Cigarettes*, with that of arbitrary or unjustifiable discrimination.

<sup>85</sup> *US-COOL* (AB Report), *supra* note 5 at paras 342-343, 346-347.

<sup>86</sup> *Ibid* at para 344.



descriptions of origin on Labels B and C are confusing and do not deliver origin information as the average consumer might understand it. For example, a label stating “Product of US, Canada” does not describe what “US, Canada” means with respect to origin.<sup>87</sup> Secondly, since labels for Category B meat may list countries of origin in any order, a consumer cannot rely on the order of countries as an indicator of where certain production steps took place.<sup>88</sup> Lastly, given that meat could be commingled, the AB found that even a perfect consumer who is fully informed of the meaning of different categories of labels may never be assured that the label precisely reflects the origin of meat as defined under COOL since, for instance, meat that carries a Label B might contain a particular piece of meat that was exclusively born, raised, and slaughtered in the US (Label A).<sup>89</sup>

The AB reason that this more detailed information is what necessitated the segregation and reduced competitive opportunities for imported livestock, and nothing explained or justified this disconnect between the information provided to consumers and required of producers. Based on these findings, the AB concluded that COOL’s regulatory distinctions amount to arbitrary and unjustifiable discrimination against imported livestock.<sup>90</sup> It thus upheld the Panel’s finding, but for different reasons, that COOL’s meat labelling requirements accord less favourable treatment to imported livestock than to domestic livestock.<sup>91</sup>

## B. Article 2.2 of the TBT

The Panel found that COOL violated Article 2.2 because it did not fulfill its objective of providing consumer information on origin.<sup>92</sup> The AB overturned the decision, but was not able to complete its own analysis owing to the lack of relevant factual findings by the Panel.<sup>93</sup>

### *i. Panel Report*

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<sup>87</sup> *Ibid* at paras 343, 349.

<sup>88</sup> *Ibid* at para 343.

<sup>89</sup> *Ibid*.

<sup>90</sup> *Ibid* at para 349.

<sup>91</sup> *Ibid* at para 1(b).

<sup>92</sup> *Ibid* at para 7(c).

<sup>93</sup> *Ibid* at 496(b)(vii).

Canada argued that the text, design, architecture, and structure of COOL reveal its protectionist intent, and contended the objective of COOL is trade protectionism, not consumer information.<sup>94</sup> Referring to *US-Gambling*, which addressed Article XIV(a) of the GATS, and *Brazil – Retreaded Tyres*, which addressed Article XX(b) of the GATT 1994, the Panel concluded that when identifying the objective under Article 2.2, it is not necessary to consider the alleged intent behind the implementation of COOL, and that the characteristics of COOL including its design, architecture, structure, and legislative history are more properly addressed in the context of whether COOL fulfills the identified objective.<sup>95</sup>

The Panel found that the objective pursued by the US through COOL is “to provide consumer information on origin”.<sup>96</sup> The Panel rejected Canada’s argument that the policy objective pursued by a technical regulation must be linked in nature to those objectives explicitly listed in Article 2.2.<sup>97</sup> The Panel found the objective to be “legitimate” within the meaning of Article 2.2 because a considerable proportion of WTO Members have origin information requirements<sup>98</sup>, and it noted that “consumers generally are interested in having information on the origin of the products they purchase”.<sup>99</sup>

Panel continued its analysis to determine whether the COOL measure is more trade- restrictive than necessary to fulfill its legitimate objective. In the Panel’s view, the fulfillment of the objective of COOL depends on the capability of labels to convey clear and accurate information on origin.<sup>100</sup> In this regard, the Panel found that the interchangeable use of Labels B and C could confuse or mislead consumers.<sup>101</sup> In light of these findings, the Panel concluded that the COOL measure does not fulfill the identified objective.<sup>102</sup>

## *ii. Appellate Body Report*

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<sup>94</sup> *US-COOL* Panel Report, *supra* note 33 at para 7.576, 7.596, 7.607.

<sup>95</sup> *Ibid* at paras 7.608-7.610.

<sup>96</sup> *Ibid* at paras 7.616-7.620.

<sup>97</sup> *Ibid* at paras 7.632-7.634.

<sup>98</sup> *Ibid* at para 7.637-7.638.

<sup>99</sup> *Ibid* at para 7.650.

<sup>100</sup> *Ibid* at para 7.695.

<sup>101</sup> *Ibid* at paras 7.695-7.707.

<sup>102</sup> *Ibid* at para 7.719.

Recalling its finding in *US – Tuna*, the AB in this case noted that the determination of whether a measure ‘fulfills’ its legitimate objective concerns with the degree of contribution that the technical regulation makes towards the achievement of the legitimate objective.<sup>103</sup> The AB in this case further added that a measure does not need to reach any minimum threshold in order to fulfill its legitimate objective.<sup>104</sup>

In the AB’s view, the Panel erroneously considered that it is necessary for COOL to have fulfilled the objectives completely or satisfied some minimum level of fulfillment to be consistent with Article 2.2.<sup>105</sup> The AB found the COOL measure does convey more information to consumers than before it was implemented. On this basis, the AB found that the Panel erred in its determination, and it therefore reversed the Panel’s ultimate finding that the COOL measure is inconsistent with Article 2.2 of the TBT.

However, the AB was unable to complete its own legal analysis under Article 2.2 to determine whether COOL is more trade-restrictive than necessary to fulfill its legitimate objective within the meaning of Article 2.2.<sup>106</sup> This was due to the lack of relevant factual findings by the Panel.<sup>107</sup>

## V. DID CANADA “WIN”?

After the AB decision, a WTO arbitrator set a deadline of May 23, 2013 for the US to comply with the WTO findings.<sup>108</sup> Although Canada formally won the TBT Article 2.1 claim, it does not mean it will get the results it fought for. The AB faulted COOL not so much on origin-based discrimination but rather the way that the US designed its COOL requirements. It suggests that the violation of Article 2.1 could be corrected by increasing the stringency of COOL<sup>109</sup> by eliminating the exemptions and the flexibility of commingling muscle cut meat, and requiring each production steps to be listed. This is, in part, what the US opted for.

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<sup>103</sup> *US-COOL* (AB Report), *supra* note 5 at para 373.

<sup>104</sup> *Ibid* at para 468.

<sup>105</sup> *Ibid*.

<sup>106</sup> *Ibid* at para 491.

<sup>107</sup> *Ibid*.

<sup>108</sup> *United States- Certain Country of Origin Labelling (COOL) Requirements (Complaint by Canada)* (2012), WTO Doc WT/DS384/24 (Arbitration) at para 98, online: WTO <<http://docsonline.wto.org>>.

<sup>109</sup> Brett Grosko & Andrew Long, “The World Trade Organization’s Tuna Dolphin decision” (2012) 44:1 Trends (Section of Environment, Energy, and Resources of the American Bar Association) online: American Bar <[http://www.americanbar.org/publications/trends/2012\\_13/september\\_october/world\\_trade\\_organizations\\_tuna\\_dolphin\\_decision.html](http://www.americanbar.org/publications/trends/2012_13/september_october/world_trade_organizations_tuna_dolphin_decision.html)>.

## A. The Final Rule

The US Department of Agriculture (USDA) issued the final rule<sup>110</sup> on May 23, 2013 to amend the COOL regulations. The final rule revised labeling requirements for covered meat products. It now requires labels list where each production step (ie. born, raised, slaughtered occurs<sup>111</sup> and prohibits commingling of muscle cut meat from different origins.<sup>112</sup> Thus, under the final COOL rule, meat from animals that are exclusively US-origin can no longer be labeled “Product of US” but has to be now labeled “Born, Raised, and Slaughtered in the US”.<sup>113</sup> Moreover, producers can no longer commingle muscle cut meat that is derived from animals that are exclusively US-origin with meat derived from animals that are of mixed-origin.<sup>114</sup>

The final rule also eliminates the previous use of mixed origin labels, namely Labels B and C. Under the final rule, each production stage must be included on the label. For example, previous category B labels (“Product of US, country X) now has to be labeled as “Born in Country X, Raised and Slaughtered in the United States.”<sup>115</sup> Previous category C labels (“Product of country X, US”) would now have to read “Born and Raised in Country X, Slaughtered in the United States.”<sup>116</sup>

## B. Is the final rule in compliance with TBT Article 2.1?

There is no doubt that the final rule addressed the AB’s concern that the labels do not provide information in a way that consumers might understand it. Now, US consumers know precisely where the animal from which the meat is derived was born, raised and slaughtered. However the AB had also noted that much of the meat sold in the US, including meat sold in restaurants and many processed products, are exempt from COOL. The new rule did not alter these exemptions. As a matter of fact, due to the exemptions, only about 30% of all US beef supply and 11% of all pork supply

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<sup>110</sup> USDA, AMS, “Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts” 78 *Fed Reg* 101, (2013) at 101, online: <<http://www.gpo.gov/fdsys/pkg/FR-2013-05-24/html/2013-12366.htm>>.

<sup>111</sup> *Ibid* at 31368.

<sup>112</sup> *Ibid* at 31369.

<sup>113</sup> *Ibid* at 31368.

<sup>114</sup> *Ibid* at 31377.

<sup>115</sup> *Ibid* at 31368.

<sup>116</sup> *Ibid* at 31369.

may be covered by COOL at the retail level.<sup>117</sup> Thus, Canada could make a strong argument that the recordkeeping burden is still disproportionate to the information conveyed to consumers in light of the fact that the majority of meat products need not be labeled at all.

The US could argue that, by providing exemptions, the government tries to strike a balance between the level at which COOL achieves its objective of providing consumers information on origin and the costs that COOL imposes on market participants. However, this argument would likely fail because it did not convince the AB when it reached its conclusion on Article 2.1. The US would need to bring additional evidence to explain this “disconnect”.

### C. Possible retaliation

Canada has stated its belief that the final rule will not bring the US into compliance.<sup>118</sup> On August 19, 2013, Canada requested the establishment of a compliance panel.<sup>119</sup> Canada has also released a preliminary list of products imported from the US that could be targeted for retaliation.<sup>120</sup> If the compliance panel finds that the final rule does not bring the US into compliance with its WTO obligations<sup>121</sup>, Canada will be in a position to retaliate by imposing over \$1 billion annually in retaliatory tariffs.<sup>122</sup>

Moens argues in his paper that it is not in Canada’s interest to take retaliatory action against the US because trade wars are costly, it would disintegrate the mutually beneficial trade in meat products that Canada and the US have worked to develop in the past decades, and it would harm producers and consumers by extending the dispute to other sectors.<sup>123</sup>

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<sup>117</sup> Remy Jurenas & Joel Greene, “Country-of-Origin Labeling for Foods and the WTO Trade Dispute on Meat Labeling” (Congressional Research Service, 2013) at 6, online <<http://www.fas.org/sgp/crs/misc/RS22955.pdf>>.

<sup>118</sup> Foreign Affairs, Trade and Development Canada, News Release, “Statement by Ministers Fast and Ritz on U.S. Country of Origin Labelling” (7 June 2013) online: Government of Canada <[http://www.international.gc.ca/media\\_commerce/comm/news-communiqués/2013/06/07a.aspx](http://www.international.gc.ca/media_commerce/comm/news-communiqués/2013/06/07a.aspx)>.

<sup>119</sup> *United States-Certain Country of Origin Labelling (COOL) Requirements (Complaint by Canada)* (2013), WTO Doc WT/DS384/26 (Request for the Establishment of a Panel) at 1, online: WTO <<http://docsonline.wto.org>>.

<sup>120</sup> *Supra* note 118.

<sup>121</sup> The Compliance Panel has not released its decision at the time of writing (30 November 2013).

<sup>122</sup> John Boscariol & Brenda Swick, “Canada Preparing to Impose a 100% Surtax on Imports From the United States” (2013) online: McCarthy Tétrault LLP <[http://www.mccarthy.ca/article\\_detail.aspx?id=6470](http://www.mccarthy.ca/article_detail.aspx?id=6470)>.

<sup>123</sup> Moens, “MCOOL”, *supra* note 12 at 1.

Instead, Moens proposed that Canada and the US create a single market for red meat and remove all remaining regulatory differences between the two countries.<sup>124</sup> However, this author believes the US will not be interested in such a proposal because, as argued later in this paper, the intent behind COOL is to distinguish US-origin meat from foreign meat.

#### **D. Is COOL bad for Canada after all?**

The COOL dispute is showing no signs of ending any time soon. Undoubtedly, COOL has caused significant hardship for the Canadian livestock industry. This paper argues that COOL is not detrimental to Canadian cattle and hog industries in the long run. This section will summarize the impact of COOL on the cattle and hog industries so far, and offer solutions to combat the effect of COOL in the long run.

##### **i. *COOL's impact thus far***

Since COOL went into force, Canada's cattle and hog producers have lost \$640 million<sup>125</sup> and \$500 million<sup>126</sup> in annual revenues, respectively, and Canadian cattle and hog exports to the US have decreased by 42% and 25% respectively.<sup>127</sup> There is an additional impact on employment. The livestock industry directly contributes to over 100,000 jobs in Canada and also contributes indirectly to many other jobs.<sup>128</sup>

The US has argued that factors other than COOL caused the decline in the number of cattle and hog exports to the US.<sup>129</sup> However, compared to US consumption numbers, the report conducted by the Fraser Institute indicated that the effect of COOL on trade goes beyond the other key factors influencing the US consumption of red meat such as the depression of the

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<sup>124</sup> *Ibid* at 4.

<sup>125</sup> The Canadian Cattlemen's Association, Annual Report 2013, online, CCA <<http://www.cattle.ca/assets/2013-annual-report/CCA2013ARwebmar10.pdf>>.

<sup>126</sup> Ron Gietz, "Estimates of MCOOL Damages on Canada's Pork Industry" (2013) (prepared for the Canadian Pork Council).

<sup>127</sup> Moens, "MCOOL", *supra* note 12 at iv.

<sup>128</sup> Kevin Grier & Al Mussell, "The cost of ethanol", *Financial Post* (31 January 2012), online: *Financial Post* <<http://www.financialpost.com/index.html>>.

<sup>129</sup> US-COOL (Panel Report), *supra* note 33 at para 7.518.

US economy, the rise of the Canadian dollar, the rise in feed prices,<sup>130</sup> and inventory levels.<sup>131</sup>

After the issuance of the final rule in May 2013, the largest US meat processor and third- biggest buyer of Canadian cattle, Tyson, said it would stop buying cattle shipped to its US plants from Canada.<sup>132</sup> Tyson spokesman Worth Sparkman said: “these new rules significantly increase costs because they require additional product codes, production breaks and product segregation, including a separate category for cattle shipped directly from Canada to US beef plants without providing any incremental value to our customers.”<sup>133</sup> Tyson previously purchased about 3,000 cattle per week from Canada.<sup>134</sup> It is expected that this would lead to a further drop in prices for Canadian cattle producers.<sup>135</sup>

## ii. *Solutions*

This section offers solutions to combat the detrimental effect of COOL on the Canadian livestock industry in the long run. Firstly, given that US producers have to put labelling mechanisms in place (which raise their costs), if they want access to the home consumption market, “it will make competing foreign unlabeled products relatively less expensive for hotel, restaurant and institutional (HRI) supply chains.”<sup>136</sup> This will not happen in the short run, but new mixed country of origin supply chains could arise that exclusively serve the HRI trade, which accounts for approximately 40% of all US beef supply.<sup>137</sup>

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<sup>130</sup> Moens, “MCOOL”, *supra* note 12 at 7.

<sup>131</sup> Jurenas, *supra* note 117 at 8.

<sup>132</sup> “Canadian Beef Prices Could Fall as Tyson Stops Buying”, CBC News (25 October 2013) online: CBC News <<http://www.cbc.ca/news/business/canadian-beef-prices-could-fall-as-tyson-stops-buying-1.2252149>> [Beef Price].

<sup>133</sup> Jen Skerritt, “Tyson Stops Buying Canadian Cattle Shipped to US Plants”, Bloomberg News, online: <<http://www.bloomberg.com/news/2013-10-24/tyson-stops-buying-canadian-cattle-shipped-to-u-s-plants.html>>.

<sup>134</sup> Gary Lamphier, “Canada ramps up meat-labelling fight”, *Edmonton Journal* (2 November 2013) online: <<http://www2.canada.com/edmontonjournal/news/business/story.html?id=28b0f5f0-24ef-43ec-b3fc-4e86a6cf262c>>.

<sup>135</sup> Beef Price, *supra* note 132.

<sup>136</sup> William Kerr, “The Free-Traders Win the Debates but the Protectionists Win the Elections: The Curious Case of MCOOL in the US 2002 Farm Bill” (prepared for a workshop entitled Farm Policy Developments and Policy Tensions Under NAFTA – Ninth Agricultural and Food Policy Tensions Under NAFTA, Policy Disputes Information Consortium, Montreal, Quebec, April 2003) at 4.

<sup>137</sup> Moens, “MCOOL”, *supra* note 12 at 11.

Secondly, the relative cost of COOL for table cuts of beef and pork should be less for Canadian products than US products since Canadian producers do not have to put the tracing and recordkeeping systems in place that are required of US producers.<sup>138</sup> Over time, Canada can simply ship consumer ready beef and pork products that are labelled “Product of Canada”, to the US. This will mean more stages of production and processing taking place in Canada, which creates more jobs and investments.<sup>139</sup>

In order to do so, the Canadian cattle and hogs industries will have to expand their production capacity. Currently Canada produces more calves and young pigs at the cow-calf stage than what the feedlot facilities and slaughterhouses can take.<sup>140</sup> The Canadian livestock industry will have to invest in expanding and/or building more feeding operations and slaughter facilities to process the cattle and hogs into table ready cuts to be exported to the US. Lastly, Canada should also diversify its portfolio by finding new markets for its meat products instead of relying mostly on the US.<sup>141</sup>

The reason why the livestock industry has not yet made such investments may be due to the uncertainty of COOL’s fate as it works through the WTO adjudication process.<sup>142</sup> Investment would be wasted if COOL were ultimately amended or repealed.<sup>143</sup> It is now unlikely that COOL will be repealed or amended in a way that Canada would like, and we should see the livestock industry making the needed investment to expand its production capacity soon.

## VI. IN THE NAME OF CONSUMERS

While the AB in *US – COOL* clarified the application of TBT Articles 2.1 and 2.2 to a labeling technical regulation, it did not address whether WTO Members should be able to impose discriminatory and/or trade restrictive technical regulations without first objectively and scientifically justifying those technical regulations.<sup>144</sup> The law as it is now does not require

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<sup>138</sup> Kerr, *supra* note 136 at 8.

<sup>139</sup> *Ibid* at 12.

<sup>140</sup> Statistics Canada, “Cattle industry overview” (1 January 2011) online: Government of Canada <<http://www.statcan.gc.ca/pub/23-012-x/2010002/part-partie1-eng.htm>>.

<sup>141</sup> Beef Price, *supra* note 132.

<sup>142</sup> Kerr, *supra* note 136 at 17.

<sup>143</sup> *Ibid*.

<sup>144</sup> Greg Tereposky, “USA Pork and Beef? Dolphin Safe? Low Carbon? Labeling Regulation and the International Trade Rules of the WTO” (2013) 41 *International Journal of Legal Information* 65.



scientific justification – “providing consumers information on origin” was found to be a legitimate objective in spite of the fact that the US brought no evidence on the safety and quality of beef and pork of different origins. In fact, the US insisted that COOL has nothing to do with safety and quality of beef and pork or the prevention of deceptive practices.<sup>145</sup>

Krista Boryskavich argued in her paper on genetically modified organisms that the regulation must be justified on scientific evidence to avoid the imposition of discriminatory trade barriers. She wrote: “The social psychology of consumer preference has shown that people are generally bad risk assessors and therefore, international law should not be based on consumer preference but on independent scientific risk assessment and cost/benefit analyses.”<sup>146</sup> This author argues that these analyses should be required because without them, we risk the possibility of allowing discriminatory trade measures to be justified on legitimate grounds.

### A. Economic cost/benefit analysis

In the Panel report, the Panel merely noted that “consumers generally are interested in having information on the origin of the products they purchase”.<sup>147</sup> It did not grapple with the relative costs and benefits associated with COOL.

The supporters of COOL have argued that numerous studies show consumers want country-of-origin labelling. The Consumer Federation of America released data showing 90% of a sample of 1000 adult Americans answered “yes” (either strongly or somewhat) to the question: “are you in favour of requiring food sellers to indicate, on the package label, the country of origin of the fresh meat they sell?”<sup>148</sup> However it only shows consumers are in favour of origin labelling in the abstract. It does not mean consumers are willing to pay the price premiums for receiving such information.<sup>149</sup> The opponents of COOL have argued that the beef market is consumer-driven.

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<sup>145</sup> US-COOL (Panel Report), *supra* note 33 at para 7.581.

<sup>146</sup> Krista Boryskavich & Bryan Schwartz, “The Role of Consumer Preference in the Regulation of Genetically Modified Organisms” (2005) 5 *Asper Review of International Business and Trade Law* 1 at 15.

<sup>147</sup> US-COOL (Panel Report), *supra* note 33 at para 7.650.

<sup>148</sup> Consumer Federation of America, Media Release, “Large Majority of Americans Strongly Support Requiring More Information on Origin of Fresh Meat” (2013) online: CFA <<http://www.consumerfed.org/pdfs/CFA-COOL-poll-press-release-May-2013.pdf>> at 2.

<sup>149</sup> Moens, “MCOOL”, *supra* note 12 at 17-18.

They claim that if there were evidence of consumer demand for COOL, major firms would have voluntarily adopted country-of-origin labelling to capitalize on the benefits.<sup>150</sup>

Studies have shown that changes in consumer demand following the implementation of COOL were not detected.<sup>151</sup> One study shows that the majority of in-person experiment participants stated they never look for origin information when shopping for fresh beef or pork products.<sup>152</sup> In other words, the livestock industry is incurring significant costs to provide information that the majority of consumers do not value. It suggests an aggregate economic loss for the livestock supply chain spanning from producers to consumers.<sup>153</sup> It is also interesting to note that it was US livestock producers that lobbied for COOL, not consumer groups.<sup>154</sup>

## B. Protectionism in disguise

COOL illustrates the on-going battle between Canada and the US over protectionism in the beef industry. The push for COOL has come from lobbies that represent livestock producers in the US.<sup>155</sup> The relatively low domestic cattle prices and increasing imports of Canadian and Mexican cattle during the late 1990s prompted beef producers in some regions of the US to consider adding foreign-produced livestock products to the list of imported products that must be labeled with country of origin.<sup>156</sup> Further, in 2004, R-CALF, the biggest supporter of COOL, successfully challenged the USDA's attempts to reopen the American border to Canadian beef products after the discovery of mad cow disease in Alberta in 2003.<sup>157</sup>

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<sup>150</sup> Barry Krissoff et al, "Country-of-Origin Labeling: Theory and Observation" (2004) online: USDA Economic Research Service <<http://www.ers.usda.gov/publications/wrs-international-agriculture-and-trade-outlook/wrs0402.aspx#.U8mGbbGdTg0>>. (One of the programs firms voluntarily adopted is the US Premium Beef Programme. Generally, this programme is particularly profitable for the producers and suppliers in the livestock supply chain) at 2.

<sup>151</sup> Tonsor et al, "Mandatory Country of Origin Labeling: Consumer Demand Impact" (Department of Agricultural Economics, Kansas State University, 2012) at 1.

<sup>152</sup> *Ibid.*

<sup>153</sup> *Ibid.*

<sup>154</sup> Moens, "MCOOL", *supra* note 12 at 8.

<sup>155</sup> *Ibid.*

<sup>156</sup> Umberger, *supra* note 40 at 4.2.

<sup>157</sup> Alexander Moens, "Mad Cow: A Case Study in Canadian-American Relations" (Fraser Institute, 2006) at 25.

The proponents of COOL have since then used the mad cow case as an opportunity to garner support for COOL.<sup>158</sup> Further, they argued that US consumers have a right to know where all of their food comes from, and if given a choice, consumers would purchase the domestic version.<sup>159</sup> They argued this would strengthen demand and prices for US farmers and ranchers.<sup>160</sup>

Sawka and Professor Kerr wrote, in their paper, that “this *consumer’s right to know* argument is a clever protectionist tactic because it is hard to argue with the proposition in the abstract,”<sup>161</sup> and that “what has been done in the name of consumers may not be what consumers would actually choose.”<sup>162</sup> The “economic cost/benefit analysis” section in this paper supports this proposition.

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<sup>158</sup> Umberger, *supra* note 40.

<sup>159</sup> Jurenas, *supra* note 117 at 1.

<sup>160</sup> *Ibid.*

<sup>161</sup> Alison Sawka & William Kerr, “Challenging US Country of Origin Labelling at the World Trade Organization: The Law, The Issues and The Evidence” (Canadian Agricultural Trade Policy and Competitiveness Research Network, 2010) at 1.

<sup>162</sup> *Ibid.*

