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COOL: United States not so cool for Canadian farmers

overview

In 2008, the United States ("US") changed its country-of-origin labeling (COOL) requirements for meat products such as beef and pork. The change meant that animals born and raised in a foreign country but slaughtered in the US, would also have to be labeled as originating in that foreign country. This is more complicated than the prior labeling rules where meat was properly labeled a product of the US if it was slaughtered in the US, regardless of where the animal was born or raised.

The changes increased the administrative burden associated with the sale of foreign animals. This favouring of US domestic animals led Canada and Mexico to launch a WTO complaint. The complaints were upheld before a Panel and the Appellate Body, and the US was required to remedy the situation.

In May 2013, the US implemented new COOL rules that were supposed to meet WTO requirements. The new rules have just made the problem worse by imposing an even heavier administrative burden on meat from imported animals. The 2013 rules now require that animals slaughtered in the US be labeled with the specific country in which they were born and the specific country in which they were raised.

Canada and Mexico are now considering taking retaliatory trade measures against the US.

the history of the US's country-of-origin labeling rules

Before 2002, the US's country-of-origin labeling (COOL) of meat for retail purposes was fairly simple. The country-of-origin for retail labeling purposes was the country where the animal underwent its last (pardon the euphemism) "substantial transformation": i.e. where it was slaughtered and packed. This meant that as long as the animal was slaughtered and processed in the US, it would be labeled as a product of the US.

In 2002, the US federal government passed legislation to change this. The legislation was ostensibly intended to provide the consumer with additional information about the origin of their food. The legislation provided that for an animal to be labeled as a product of the US, it would now have to be born, raised and slaughtered in the US. The details of this new scheme were to be implemented by the US Department of Agriculture in the form of Rules (the American equivalent of Canadian Regulations). The mandatory rules were originally required to be in place by 2004. This was deferred until 2008. Interim rules were made in August 2008, with slightly revised final rules coming into force in March 2009 (the "2009 COOL Rules").

Pursuant to the 2009 COOL Rules, even if the animal was slaughtered in the US, the countries where the animal was born and/or raised were also required in the labeling. The nature of the North American meat market has historically involved a lot of cross-border movement of animals in the birth, husbandry and slaughter process.

If an animal was born in Canada, raised in Mexico and slaughtered in the US, the country of origin label would read something to the effect of: "Product of the United States, Canada and Mexico". Purely US meat could be commingled during production and packaging with meat of foreign sourcing, but would still have to be labeled to reflect the broader mixed origin. Compliance with the 2009 COOL Rules was estimated to add $25-$40 per head in administrative overhead cost for animals of foreign origin. The additional overhead arose from the requirements to trace and track where animals were born and raised, as well as maintaining all the records required to substantiate this information for verification purposes.

Within a year of the 2009 COOL Rules being in force, Canadian cattle exports dropped by 50% and slaughter hog exports dropped by 58%. The COOL rules have been estimated to cost Canadian beef and pork exporters $1 billion per year.

While the commodities that the COOL rules have most significantly affected are beef and pork, the scope of the COOL rules is much broader, and also includes: lamb, goat, fish, shellfish, fresh and frozen fruits and vegetables, ginseng, and certain nuts.

Canada starts a WTO complaint against the US and its COOL rules

After the interim set of COOL rules came into force in 2008, Canada requested consultations with the US on December 1, 2008. Mexico requested consultations on December 17, 2008. WTO consultations between Canada, Mexico and the US were held in December 2008 and June 2009. The final 2009 COOL Rules came into force in early 2009, and were largely the same as the interim rules, and thus the WTO process continued.

After failing to resolve the issue, Canada launched a WTO case against the US (DS384) in October 2009. Mexico launched a similar case shortly thereafter (DS386).

The position of Canada and Mexico was that the administrative burden imposed on foreign animals by the 2009 COOL Rules increased the cost to US buyers of animals born and raised in Canada or Mexico compared to US animals. US producers would therefore prefer animals that were born, raised and slaughtered in the US to avoid the administrative burden. Canada and Mexico argued that the COOL rules therefore unfairly discriminated against Canadian and Mexican goods.

Canada and Mexico were of the view that the COOL rules violated the WTO agreement, specifically:

- Articles III:4, IX:4 and X:3 of the General Agreement on Tariffs and Trade 1994;

- Article 2 of the Agreement on Technical Barriers to Trade (the "TBT Agreement"), or in the alternative Articles 2, 5 and 7 of the Agreement on the Application of Sanitary and Phytosanitary Measures; and
- Article 2 of the Agreement on Rules of Origin.

WTO upholds Canada's complaint and US is required to remedy

In November 2011 a WTO panel found that the US's COOL rules violated the WTO Agreement. The Panel concluded that the COOL rules violated Article 2.1 of the TBT Agreement by according treatment less favourable to foreign cattle and hogs than like domestic products. The Panel also found that the COOL rules violated Article 2.2 of the TBT Agreement because they did not fulfill a legitimate objective of providing consumers with information about the origin of goods. Based on those conclusions, the Panel did not need to address whether if the COOL rules violated other provisions of the WTO Agreement.

The US appealed the Panel decision to the WTO Appellate Body. In June 2012, the WTO Appellate Body upheld the Panel's conclusion that the COOL Rules violated Article 2.1 of the TBT Agreement, but reversed the Panel's decision that the COOL Rules violated Article 2.2 of the TBT Agreement. The WTO gave the US until May 23, 2013 to bring the COOL rules into compliance with the WTO Agreement.

the US "remedy" makes the problem worse

In March 2013, the US released a draft of revised COOL rules for public comment. These draft rules required that meat products specify in what country the animal was born, where it was raised and where it was slaughtered. The required country-of-origin labeling could be something like: "Born in Canada, Raised in Mexico, Slaughtered in the United States". The US stated that the objective of these rules is to pursue the US's goal of ensuring US consumers know where their meat comes from and also to comply with the US's WTO obligations.

Canada advised the US that these rules would not remedy the WTO violation. According to both Canada and Mexico, the revised rules make the problem worse.

The 2009 COOL Rules required producers to track whether the animal was born or raised in a foreign country, and if there was such a connection, the meat could be labeled "Product of US and Canada", regardless whether the animal was either born or raised in Canada. The draft revised COOL Rules further complicate reporting requirements. Producers would have to specifically trace where the animals was born, raised and slaughtered. As an example, the producer would need to track whether the animal was born in Canada or born and raised in Canada because in the latter case the meat would need to be labeled even more specifically.

While the revisions were supported by US consumer and farm groups, they were opposed by US meat producers and food makers, whose reporting requirements would extend across the lifespan of the animal, and whose profitability would be eroded by increased input costs and increased administrative overhead.

On May 23, 2013, the US promulgated the new COOL regulations (the "2013 COOL Rules"), which were effectively the same as the draft rules. The new rules came into effect immediately upon their announcement, but US authorities have allowed a 6 month grace period for compliance.

The 2013 COOL Rules are estimated to increase the administrative burden compared to the 2009 COOL Rules, with projected costs increased from $25-$40 per head to $90-$100 per head. Far from remedying the WTO violation, the 2013 COOL Rules have apparently made the discrimination against foreign goods even more serious.

Canada's ability to retaliate

Because the WTO has found that the US is violating its WTO obligations, and the deadline for remedy imposed by the WTO has passed, Canada and Mexico both believe they are in a position to legally retaliate against the US. Retaliatory measures are referred to as the "suspension of concessions" under the WTO agreement, and

the action often taken is the assessment of tariffs on politically sensitive goods.

Retaliatory measures must first be authorized by the WTO. The process for obtaining authorization in this case will have a number of steps and take several months or longer. In the present case, the US position is that the 2013 COOL Rules remedy the violation, while Canada and Mexico disagree. The first step to imposing retaliatory measures would be to determine, pursuant to the WTO's Dispute Settlement Understanding ("DSU") Article 21.5, whether or not the 2013 COOL Rules do remedy the situation. This would be done by the original Panel, if possible. This determination of compliance is to be provided within 90 days of referral to the Panel, or such longer time as the Panel requires.

If the Panel determines that the 2013 COOL Rules do not remedy the situation, then Canada and Mexico can request authorization to suspend concessions (meaning impose specific retaliatory measures) pursuant to DSU Article 22.6. The WTO may authorize the request within 30 days of it being made, unless the US objects that the requested retaliation is disproportionate because it is not "equivalent to the level of the nullification or impairment" caused by the violation. The determination regarding proportionality will also be made by the original Panel if possible, and is to be made within 60 days. Accordingly, it will be at least five months after the request is made before Canada and Mexico are authorized to take retaliatory measures, and likely it could be much longer.

Retaliatory measures may target products from states whose legislators (Senators or Congressmen) supported the WTO-inconsistent measure, to pressure them to change their position, or be directed at other politically sensitive sectors. On June 7, 2013, Canada released a list of possible US goods that could be subject to retaliatory measures. Canada has proposed a number of possibilities, including: beef, pork, live cattle or pigs, wine, cheese, pasta, fruits and vegetables, chocolate and stainless steel tubing.

On the same day Mexico identified a similar list of retaliation targets, including: fruits, vegetables, juices, meat, dairy products, machinery, furniture and home appliances.

conclusion

The COOL dispute continues to be a significant irritant in US-Canada trade relations. The retaliatory measures Canada may impose, could significantly affect US exports to Canada in the sectors selected for retaliatory measures. Importers or consumers of these goods should be aware of the implications that the COOL dispute may have on them.

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a cautionary note