Challenging US Country of Origin Labelling at the World Trade Organization: The Law, The Issues and The Evidence

CATPRN Commissioned Paper 2010-01

October 2010

Alison L. Sawka
Research Assistant
Dept. of Bioresource Policy, Business and Economics
University of Saskatchewan

William A. Kerr
Professor
Dept. of Bioresource Policy, Business and Economics
University of Saskatchewan

http://www.catrade.org

Funding for this project was provided by the Canadian Agricultural Trade Policy and Competitiveness Research Network which is funded by Agriculture and Agri-Food Canada. The views in this paper are those of the authors and should not be attributed to the funding agencies.

Abstract

Canada and Mexico are formally challenging US country of origin (COOL) legislation at the World Trade Organization. The industries most affected by COOL are beef and pork. The effect of COOL on North American cross border supply chains is outlined. The areas of international trade law upon which a challenge could be mounted are explained and the key issues that a disputes panel would have to determine indicated. The nature of the evidence that may be required to bolster Canada's case is outlined.

Keywords: country of origin, marks of origin, protectionism, Technical Barriers to Trade, supply chains, WTO

1.0 Introduction

> The laws concerning corn may everywhere be compared to the laws concerning religion. The people feel themselves so much interested in what relates either to their subsistence in this life, or to their happiness in a life to come, that *government must yield to their prejudices*, and, *in order to preserve the public tranquillity*, establish that system which they approve of. It is upon this account, perhaps, that we so *seldom find a reasonable system* established with regard to either of those two capital objects [emphasis added]
>
> Adam Smith, 1776[1]

The case of the mandatory Country of Origin Labelling (COOL) policy of the United States suggests that the musings of Adam Smith relating to laws concerning food (synonymous with corn in his day) remain as valid today as when he set them down more than two centuries ago. It is also a good lesson regarding how tenacious, resourceful and strategically savvy protectionists can be. COOL is also an example of how a dedicated and focused minority can successfully manipulate the public policy process – the small group of US cattle producers located primarily in the northern plains states was clearly *punching above their weight* throughout the process of legislating and implementing COOL.[2]

The case is also a classic example of how protectionists crave the cloak of legitimacy to cover up their naked vested interests (Kerr and Perdikis, 2003). Country of Origin Labelling was justified on the basis that consumers would be able to make better informed decisions by knowing the geographic origin of their meat. This *consumer's right to know argument* is a clever protectionist tactic because it is hard to argue with the proposition in the abstract. Once one moves out of the neoclassical world upon which the idea of a *better informed decision* is based, the transaction costs associated with the provisions of such information may be considerable (Hobbs, 1996). Thus, in reality, to make an informed decision, consumers must have full information on the price premiums they will pay as a result of receiving the additional information. As this is far from easy to do, and to communicate, what has been done in the name of consumers may not be what consumers would actually choose.

How governments can respond to the increasing requests of consumers for the imposition of trade barriers (e.g. for animal welfare reasons, for child labour concerns, for the speculative risks associated with genetically modified products) is becoming an increasingly urgent issue for international trade institutions (Kerr, 2010). The current international trade rules make almost no provision for governments to put trade barriers in place for any other group than businesses seeking protection from import competition.[3] One of the major difficulties in devising a set of trade rules to allow the imposition of trade barriers in response to consumers' requests for

[1] An accessible version of Adam Smith's famous book can be found at Smith (1994). This quote is from Chapter 5 (page 580 of this edition)

[2] The story of R-Calf's success is clearly a worthy subject for another paper.

[3] In the simple neoclassical trade model upon which the General Agreement on Tariffs and Trade (GATT) is based, the imposition of trade barriers leads to consumers paying a higher price – enjoying a smaller consumers surplus – and thus not having an incentive to ask for trade barriers. Thus, no provision for such an eventuality was made in the GATT. It is easy to show that freely available imports can have a negative effect on consumer welfare and, hence, they may have a reason to ask for protection from their government (Kerr, 2010).

protection is determining if the request genuinely reflects consumers' preferences. While economic models generally assume that consumers are *sovereign*, it may be that they can be manipulated – captured – by producers with vested interests in having trade barriers put in place. In the case of COOL the vested producer interest – as embodied by a group of US cattle producers in the Ranchers-Cattlemen Action Legal Fund (R-Calf) – in obtaining protection is very transparent but such was their desire for a *cloak of legitimacy* that arguments pertaining to the *consumers' right to know*[4] were trotted out as the rationale for COOL.

In the case of COOL, however, while the *cloak of legitimacy* may have been desired by R-Calf, it was not necessary because provisions have been made in the World Trade Organization's (WTO) General Agreement on Tariffs and Trade (GATT) for *marks of origin*. *Marks of origin*, which require the country of origin to be indicated on a product, can be construed as a means of protecting consumers from fraud. They also can, however, be seen as a means to protect producers of import competing products – if consumers have a preference for domestically produced products. Thus, the provisions in the GATT are consistent with allowing governments to respond exclusively to producers when providing protection. The ability of governments to require *marks of origin* on products entering their markets is not given, however, on a *cart blanche* basis. The GATT places conditions on the use of *marks of origin*. Thus, it is important to understand the economic impacts of COOL before examining whether the conditions for the use of *marks of origin* have been met.

2.0 U.S. Country of Origin Legislation

The legislation for Country of Origin Labelling was first included as part of the 2002 US Farm Security and Rural Investment Act, commonly known as the 2002 US Farm Bill. This legislation makes it mandatory for retailers in the United States to inform consumers of the country from which a specific list of food products originates. The original legislation has been amended and augmented since 2002. As of 2010, the products covered are beef, veal, lamb, goat, pork, chicken, seafood, vegetables, fruits, peanuts, pecans, macadamia nuts and ginseng. The subset of meat products purchased in the United States that are required to be labeled as to their country of origin are the muscle cuts and ground products. Processed food and food services providers such as hotels, restaurants and institutions (such as hospitals, universities or prisons, HRI) are not included in the COOL legislation. For seafood, COOL requires wild and farm-raised fish and shellfish to be labeled. Fresh and frozen fruits and vegetables are also required to be country of origin labeled. COOL applies to products of both domestic and foreign origin that are sold in US supermarkets.

COOL has important policy inconsistencies because restaurant consumers are considered to be less discerning in their consumption choices than those who shop in supermarkets. Given that US producers will have to put labelling mechanisms in place that raise their costs if they wish access to the higher priced home consumption market, it will make competing foreign unlabelled product relatively less expensive for hotel, restaurant and institutional (HRI) supply

[4] See Isaac et al. (2002) for a discussion of *consumers' right to know* in international trade law.

chains. As HRI-based consumption has been growing faster than the home consumption market, over the long run COOL would seem not to be in the interest of producers of covered commodities. Further, country of origin labelling does not apply to processed foods – another fast growing area of consumption. Processed foods substitute processors labour for consumers labour in preparation and, in the process, combine relatively low cost inputs with high cost meat products. This means that a smaller proportion of a consumer's food budget is spent on high value products than when muscle meats are, for example, barbecued or roasted at home. Hence, COOL is going to make it easier for unlabelled foreign product to compete with US produced muscle meats for the consumer's food budget.

While COOL was included in the 2002 Farm Bill, it was not implemented for most products – and those of particular interest to Canada – until 2009. The reason for the long delay was that while the US Congress passed the measure the United States Administration, and in particular the United States Department of Agriculture (USDA) who would administer the program, found it difficult to devise a set of regulations and processes that would satisfy the retailers and other agribusinesses along the supply chains that would bear the brunt of the costs imposed by the policy – many of whom were diametrically opposed to COOL – and that could be effectively monitored given the USDA's limited resources (McGivern, 2009).

COOL was constantly evolving over the period 2002 to 2009. New products were added – for example chicken meat was not included in the original bill.[5] Various drafts of the regulations were circulated and consultations with stakeholders sought. After years of delays, in January 2009 a *final* rule was announced by which COOL became effective on March 16, 2009. For Canada, the impact of COOL was expected to fall most heavily on the beef and pork sectors. This disproportionate effect is because Canadian exports of these products are more highly integrated into the US market (Brocklebank et al., 2008). For some products, exports take place in the form of beef and pork produced in Canada – meat exports. In other cases, cattle and hogs are born and raised in Canada and then shipped to the US for slaughter. This scenario represents a mixed origin supply chain with animals spending part of their lives on each side of the border. Further, in some cases calves and pigs are born in Canada but then exported to the US to be fattened to market weights before they are slaughtered. Again this represents a mixed origin supply chain in the sense that the animals spend part of their lives in each country. It is these mixed supply chains that will be most severely impacted by COOL.

Under COOL there are four categories of meat products: (1) USA origin (e.g. *Product of the United States*); (2) multiple countries of origin; (3) imported for immediate slaughter; and, (4) meat from foreign sources (e.g. *Product of Canada*). For multiple countries of origin the labeling requirements are: if an animal was not born, raised, and slaughtered in the United States and was not imported for immediate slaughter, it's meat may be designated as *Product of the*

[5] This is particularly ironic for a Bill whose most strident supporters were beef cattle producers. Given the long (and loosing) battle that beef, and to some extent pork, have been fighting with chicken over the share of the consumer's budget spend on meat (Atkins, et. al, 1989), fostering or acquiescing to a law that imposes costs on beef and pork but not chicken could have only led to a further deterioration in market share.

United States, Country X, and/or Country Y where Country X and Country Y represent the actual or possible countries of foreign origin.[6]

Under the *final* rule, in the case of meat, to qualify as a *Product of the United States* the animal from which the product is derived must have been born, raised and processed in the US. Meat derived from animals coming from mixed origin supply chains must be labelled as such. To satisfy this requirement, meat and animals of mixed origins must be segregated from those that qualify as *Product of the United States*. On the other hand, foreign origin product must be *near consumer ready* and can be labelled without verification back from the exporter's plant gate (e.g. *Product of Canada*).

In the case of *imported for immediate slaughter*: if an animal was imported into the United States for immediate slaughter (within 14 days) the resulting meat products derived from that animal shall be designated as *Product of Country X and the United States*. The 2009 *final rule* regulations, however, allows the mixing of *multiple countries of origin* and *imported for immediate slaughter* products and the use of either label. In the case of ground meat, *may contain* labeling is allowed as a concession to the mixing of product in the grinding process.

Transaction cost theory suggests that through competition the most efficient supply chains will survive (Young and Hobbs, 2002). Thus, the real effect of COOL will be to alter the relative efficiency of the ways of organizing North American supply chains for beef and pork. Due to the extra segregation and monitoring costs which COOL imposes on supply chains using mixed origin cattle, these supply chains will be disadvantaged relative to supply chains which move *Product of the United States* into the hands of consumers.

Requiring the labelling of the different categorizes of, for example, beef is costly because to verify the labels the beef has to be tracked throughout the life cycle of each animal as well as the slaughtering of all animals, the processing of the meat and distribution channels. Estimates suggest that the implementation of COOL is going to be a costly process. A study done in 2003 by the USDA estimated that COOL would cost $2 to $2.6 billion a year, and those costs would fall on farmers, processors, and retailers (Trace R&D, 2009). Farmers and ranchers will have to incur some of the cost by investing in a method of record keeping to insure accurate information on all beef raised. Not only will the cost of keeping accurate records on all the processed meat be a cost, processors will also have to segregate the different categorizes of meat. The retailers will be affected by the implementation of COOL because of the additional records they will have to keep and the audits that will have to be done to comply with the rules of COOL. A study done in 2003 by Sparks Companies, Inc., estimated that the implementation and the record keeping associated with COOL will cost between $3.66 to $5.6 billion a year (Trace R&D, 2009). The implementation of COOL is a costly measure that will increase the segregation costs to the entire meat supply chain (Food & Fiber, 2009). Some of the costs associated with keeping records arises from the need for new computers programs, and the expense of training people to use the programs. Retailers have to decide whether it is still worthwhile to sell foreign meat or to focus

[6] The regulations allow a processor to mix animals that meet the definition of Product of the United States with foreign animals as long as the finished product carries the mixed label.

on selling only *Product of United States*. Some packers have already decided not to accept foreign born animals or to only accept them on certain days or shifts. As some US packing plants are not processing foreign born animals, foreign producers are being subject to discounts – a smaller demand from packers for their beef (McGivern, 2009). Some of the costs are going to be incurred by the retailer and packer but it is thought that primary producers and consumers are going to bear the largest costs. The added costs are likely going to be pushed down along the food supply chain to the consumers through higher retail prices and are also likely to be pushed back up onto cow-calf operators though lower cattle prices (McGivern, 2009).

While there has been an attempt to justify COOL on the basis of the principle of a *consumer's right to know*, there is little evidence to suggest that US consumers value such information sufficiently to voluntarily pay a significant premium for the assurance that the agricultural products they are consuming originated in the United States. The question has to be asked as to what US consumers might think a *Product of the United States* label is signalling. There is little doubt that some consumers have an ethnocentric-based preference for products made in the US; sentiments like: "I will only buy a car made in the 'good old USA', not some foreign Japanese import". Such ethnocentric preferences are often justified on the basis of *supporting American workers* or *keeping jobs in the US*. Similar preferences may be applied by some consumers to the products covered by COOL. It is not clear, however, why those same consumers would not care about the origin of food consumed in, for example, restaurants but would care about the origin of the same product purchased in a supermarket.

Consumers may, however, also think that country of origin labelling is a proxy for quality – that products made in the US are of superior quality to foreign products. Many agricultural products in the US, however, including mixed supply chain meat products covered by COOL are graded to USDA standards. Thus, if the domestic US grading system is effective there should not be a quality difference between *Product of the United States* and *Product of the United States and Canada* if it is graded in the US to US standards. In this case, by requiring different labels COOL requirements may actually be sending consumers a false signal. Having different labels may actually create doubt in the minds of consumers regarding products with imported components causing them to shift consumption away from mixed origin products. This is the type of trade barrier that the Agreement on Technical Barriers to Trade is meant to control. Note, this is an argument that only applies in the case of mixed supply chain products and the particular labelling requirements of COOL. This is a different case than the requirement that products of foreign origin be labelled as to their origin (e.g. products produced entirely in Canada having to be labelled *Product of Canada*) which is entirely consistent with the GATT provisions on Marks of Origin.[7] In the case of mixed origin products, the final product does not originate outside the US and, hence, the labelling requirement does not strictly conform to the provisions on Marks of Origin – or at least that is something a WTO panel would have to decide.

Consumers may also think that country of origin labelling is a proxy for the safety of food products; i.e. that *Product of the United States* is safer than *Product of the United*

[7] Marks of Origin provisions are discussed at length in what follows.

States/Product of Mexico. If this was a correct perception among consumers this would suggest that the US Homeland Security/USDA/FDA food safety inspectors are not effective in protecting US citizens from food-bourn illness. US authorities have been adamant that there is no difference in the safety of food no matter what the label. Thus, again requiring products to be labelled differently may be creating a false doubt in the minds of consumers. This false doubt could have a negative effect on consumer purchases of products labelled as being of mixed origin. Thus, it can act as a trade barrier and it should be subject to TBT disciplines pertaining to discriminatory labelling. Note, again this would apply only to the products of mixed origin labelling requirements of COOL and not those that apply to foreign origin products. If the quality signal or food safety signal arguments were correct, country of origin labelling might be justified on the basis that it removed a market failure rooted in asymmetric information. As they cannot be justified in this way without suggesting that US regulatory agencies pertaining to quality or food safety lack efficacy – something US authorities do not concede – market failure cannot be used as a justification for COOL requirements for labelling products of mixed country of origin.

Thus, mixed country of origin labelling can only be justified on ethnocentric grounds. This would seem to be directly contrary to the WTO principle of non-discrimination. The arguments can be made on a number of facets. Discrimination is allowed under the TBT agreement if one product is *not like* another product – where *not like* is defined as being a difference that is physically discernable when examining the product. It is hard to argue that consumers in the US can identify, for example, meat products that are derived from animals that spent part of their life in Canada from meat products that were derived from animals that spent their entire life in the US. In fact, if they could there would be no need for mixed origin labelling. Thus, products of mixed country of origin are *like* products to those solely of US origin. If they are *like* products, then to impose different labelling is discriminating against foreign products.

If the products are not physically discernibly different then the reason for labelling must be on the basis of how the product was produced – a production and processing method (PPM). The only difference between mixed origin products and sole US origin meat products, (for example) is that the production processes differ – one is produced using animals that spent part of their lives outside the US while the other is produced using animals that did not spend part of their lives outside the US. The TBT specifically prohibits PPMs from being used to justify regulations that inhibit trade – including labelling. Again, COOL's provisions on mixed origin labelling may be discriminating against mixed origin products.

There is little evidence that consumers in the US have been clambering for information pertaining to the country of origin of the beef they consume. If asked, US consumers may express an interest in knowing the origin of the food products they consume – but this begs the question of whether they value such information. In other words, the questions put to consumers may implicitly suggest that such information could be provided without cost. If done well, the research should ascertain the extra, if any, that consumers would be willing to pay for product labelled as to its country of origin. One study widely quoted by proponents of COOL concluded that US consumers would be willing to pay a 38 to 50 percent premium for US origin beef (Loureiro and Umberger, 2003). These are such very large premiums that they are difficult to accept if for no other reason that if such premiums did exist, US meat producers would have

voluntarily implemented such labelling. It has always been legal to voluntarily label meat as being *Product of the United States* but the major players in US meat industry or major retailers never initiated such a marketing strategy (McGivern, 2009) . While there have been a few studies on the value US consumers might place on COOL, the evidence remains scanty.

3.0 Challenging COOL at the WTO

Canada (October 7, 2009) and Mexico (October 9, 2009) initiated a dispute at the WTO pertaining to the US COOL regulatory regime. The first step, consultations with the US, failed to resolve the dispute and the case moved on to the stage of convening a WTO disputes panel. This raises the question as to the nature of the complaint and whether Canada (and Mexico) can win the case.

In the GATT there is a specific provision dealing with Marks of Origin, Article IX. If a Panel were to decide that COOL did not fall within the purview of Article IX then there are other parts of the GATT upon which a challenge could be mounted.

Article IX clearly applies to imported meat that must be labelled *Product of Canada*. The more difficult question relates to products moving through mixed origin supply chains. As the labels that apply to mixed origin meat products are only required domestically in the US (i.e. it does not require that the imported live animals be labelled) the US might argue that Article IX should not apply to the COOL provisions pertaining to mixed origin products. There is no precedent to go on as to how a panel might rule on the applicability of Article IX.

As Article IX does apply to imported meat that must be labelled *Product of Canada* and may apply to products labelled *Product of the United States and Canada*, what are the relevant provisions of Article IX. There would appear to be two clauses of Article IX that could be appealed to. The first is article IX.2 which reads:

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

Canada could certainly argue that COOL has caused *difficulties and inconveniences* for exporters of beef and pork and, in particular, exporters of live animals. Canada could also argue that the difficulties and inconveniences have not been *reduced to a minimum*. The problem is, however, that *difficulties*, *inconveniences* and *reduced to a minimum* have never been defined in WTO case law. It might, however, be difficult for the US to argue that it thinks that country of origin labelling would not cause difficulties and inconveniences for meat and live animal exporters.

If there was ever any doubt that US trade officials did not believe or understand that COOL represented a trade barrier that would be detrimental to foreign suppliers, the following

exchange between US and South Korean officials reported in *Inside US Trade* (January 5, 2001) should remove any doubts:

> Korea has stepped back from a new country-of-origin labeling rule for meat that U.S. officials argued would have completely choked off U.S. beef and pork exports to Korea.
>
> Korea last month agreed to delay implementation of the rule by one year, after Secretary of Agriculture Dan Glickman and Deputy US Trade Representative Richard Fisher told Korean officials that the U.S. could not implement the rule as written and so could not export beef and pork to Korea, which is the third largest market for U.S. beef exports.
>
> In a meeting with Korean Ambassador Yang Sung Chui, Fisher hinted that the move by Korea could provoke a challenge in the World Trade Organisation, …
>
> The Korean rule would have introduced mandatory country-of-origin labeling for foreign beef and pork, and defined country-of-origin as the country where the live animal resided for six months prior to slaughter in the case of cows, and for two months prior to slaughter in the case of hogs. The concern from the US meat industry was that there was currently no system for tracking passage of beef and pork from feedlot to slaughterhouse and through the packing process.

The second section of the GATT provisions on Marks of Origin upon which a case could be made whereby COOL violates WTO obligations is Article IX.4. It reads as follows:

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

Canada could argue that COOL has *materially reduced their value* (or alternatively *unreasonably* increased the cost) for meat products of Canadian origin, of meat sources from mixed origin supply chains or live animals imported into the US as part of mixed origin supply chains. Of course, recourse to this argument would require strong empirical evidence to back up the claim. Again, however, as there have been no previous GATT or WTO disputes pertaining to Article IX.4, the terms *materially reduced* and *unreasonably* have not been interpreted by a Panel. As reported above, estimates of the cost of COOL for the beef and pork industries range between US$2 billion and US$5.6 billion per year. These studies, however, were completed before the *final rule* was determined. New estimates would have be undertaken in the period since COOL came into force – otherwise the United States can argue that the evidence presented was not based on the current situation. Certainly, a stronger case can likely be made that COOL has *materially reduced the value* of Canadian product entering mixed origin supply chains than for meat entering the US as *Product of Canada*. For the latter, Article IX would seem to be the applicable GATT provision. Thus, the effect of COOL must be carefully examined for *Product of Canada* meat exports as to whether its value has been *materially reduced.*

Article IX.2 also provides an indication of the original intent of the Marks of Origin provision in the GATT – "protecting consumers against fraudulent or misleading indications." In other words, it was to protect consumers from, for example, imported products from India being fraudulently labelled as having come from France. There is no indication that COOL was designed with this purpose in mind – and in any case such *passing off* is already dealt with in

IX.5 which allow the imposition of "special duties or penalties" when deceptive marks have been applied or accurate marks of origin have been omitted. There is no indication that product from Canada was being fraudulently labelled – either by non-Canadian product being labelled as Canadian or imported Canadian product being fraudulently labelled as being a product of the US. There is no indication that meat products originating in mixed origin supply chains was being labelled as *Product of the United States* prior to COOL. As suggested above, there were no major initiatives to voluntary label products being of US origin prior to COOL.

If the Panel were to rule that Article IX's provisions do not apply to meat sourced from mixed origin supply chains, alternative avenues upon which to build a case exist. Articles 2.1, 2.2 and 2.4 of the WTO's Agreement on Technical Barriers to Trade (TBT) could form the basis for a Canadian complaint pertaining to COOL. Article 2.1 of the TBT states:

> 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.

It can be argued that COOL's technical regulations lead to animals of Canadian origin, and the meat that is derived from them, being treated less favourably than animals and meat products of US origin. This is particularly the case given that the record keeping requirements for US cattle producers appear to be less onerous than for those choosing to accept Canadian cattle into their supply chains (McGivern, 2009). Further, if a supply chain decides to only utilize cattle or pigs of US origin then it can avoid all of the costs associated with segregating product. The need for segregation means that supply chains utilizing Canadian-origin animals are, in effect, treated less favourably than those that choose not to accept animals having originated in Canada.

Article 2.2 of the TBT agreement states:

> 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 fulfil 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.

If the provisions on Marks of Origin are not deemed to provide a justification for COOL in the case of meat products of mixed national origins, then it could be argued that COOL is an *unnecessary obstacle to international trade*. The first question that must be dealt with is whether COOL fills a non-Marks of Origin *legitimate objective*. COOL clearly has nothing to do with protecting the environment or plant life or health. It has nothing to do with national security. As suggested above, COOL could not be justified on human health or safety grounds or animal life or health grounds – i.e. that COOL labeling provides a signal of differing food safety levels. Justifying COOL in this way to a WTO disputes panel would be tantamount to admitting that US

food safety inspection services are unable to do their job – something that the inspection services would vociferously oppose.

Could COOL be justified as preventing deceptive practices? The question that first must be asked is what deceptive practice. The first might be that without COOL labeling consumers might be duped into purchasing lower quality product. Given that meat that has a quality signal provided by the assigned USDA grade, meat originating from US-only origin supply chains and mixed origin supply chains go through the same quality assessment. Thus, the labeling of product as being of mixed origin cannot be a proxy for a quality signal. Thus, the deceptive practice must be that mixed origin product was, prior to COOL, being passed off as something it was not. Given that there was no voluntary labeling of *Product of the United States* prior to COOL, it is hard to argue that there was deception in the absence of Marks of Origin having been deemed to apply. Further, it is not clear what *risks non-fulfilment would create* even if mixed origin product was mislabeled.

In addition, none of the *available scientific and technical information, related processing technology or intended end-uses of products* are applicable in this case. Given that none of the *legitimate objectives* apply to COOL, it can be argued that it is an unnecessary obstacle to trade under Article 2.2 of the TBT.

The TBT's Article 2.4 states:

> 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 except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.

Before dealing with the question of whether a relevant international standard exists, the potential exception must be explored. For COOL there is no reason why a technical standard would be ineffective or inappropriate when GATT Article IX is not deemed to apply. There is no climatic, geographical or technological problem that would impair the application of an international standard. Under the WTO, three international standards organizations are explicitly recognized. These are the Codex Alimentarius Commission (Codex), the World Organization for Animal Health (OIE) and the International Plant Protection Convention (IPPC). The Codex develops standards for human foods. The *General Standard for the Labelling of Prepackaged Foods* has been developed under the Codex. COOL requires the labelling of prepackaged meat sold in supermarkets.

Section 4.5 of the General Standard for the Labelling of Prepackaged Foods is headed *Country of Origin*. Section 4.5.1 is straightforward:

> The country of origin of the food shall be declared if its omission would mislead or deceive the consumer.

Hence, all of the arguments presented above regarding deception could apply again in this case. They are not necessary in the case of the Codex General Standard for the Labelling of Prepackaged Foods, however, because Section 4.5.2 states:

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

The processing of animals into meat clearly changes the product's *nature* (Kerr, 1987) and, hence, it should be considered a *Product of the United States* for labelling purposes. The COOL directly contravenes this provision by requiring labels such as *Product of the United States and Canada*.

Thus, it would appear that Canada can make a reasonable case that COOL contravenes the WTO obligations of the United States. Of course, the US will present counter arguments and, ultimately, a disputes panel will have to decide. One of the things that the disputes panel will have to decide is whether or not the provisions of Article IX – Marks of Origin – applies to meat arising from mixed origin supply chains. If Article IX does apply to meat products arising from mixed origin supply chains then evidence will be required to support the claim that COOL regulations are *materially reducing their value*. It is to this question that we now turn.

4.0 The Evidence

A simple partial equilibrium trade model will be developed to shed some light on the question of evidence. The beef industry will be used as an example. Figure 1 illustrates the market for, for example, Western Canadian feeder cattle that are moving into feedlots for fattening to slaughter weight. Feedlots can be located in either the United States or Canada and under the North American Free Trade Agreement feeder cattle can move easily between Canada and the US. A similar model could be developed for Canadian cattle that have reached slaughter weight and could be slaughtered either in the US or Canada.

The Canadian market is depicted in the left hand panel of Figure 1, D_C represents the derived demand for Canadian feeder cattle in Canada and S_{CLR} is the long run supply curve for Canadian feeder cattle. At any price above where D_C and S_{CLR} intersect there will be feeder cattle available for export – with the quantities available for export increasing as price increases. This long run export supply is depicted in the international market – the right panel of Figure 1 – as XS_{LR}.

In the international market, MD_0 is the derived import demand from the United States for Canadian feeder cattle prior to COOL. The market clearing price will be determined where long run export supply equals the pre-COOL import demand. This price is depicted as P_{E0} in both markets. Thus, Canadian exports are (Q_{SC} minus Q_{DC0}) which is equal to the quantity traded in the international market, Q_{T0}.

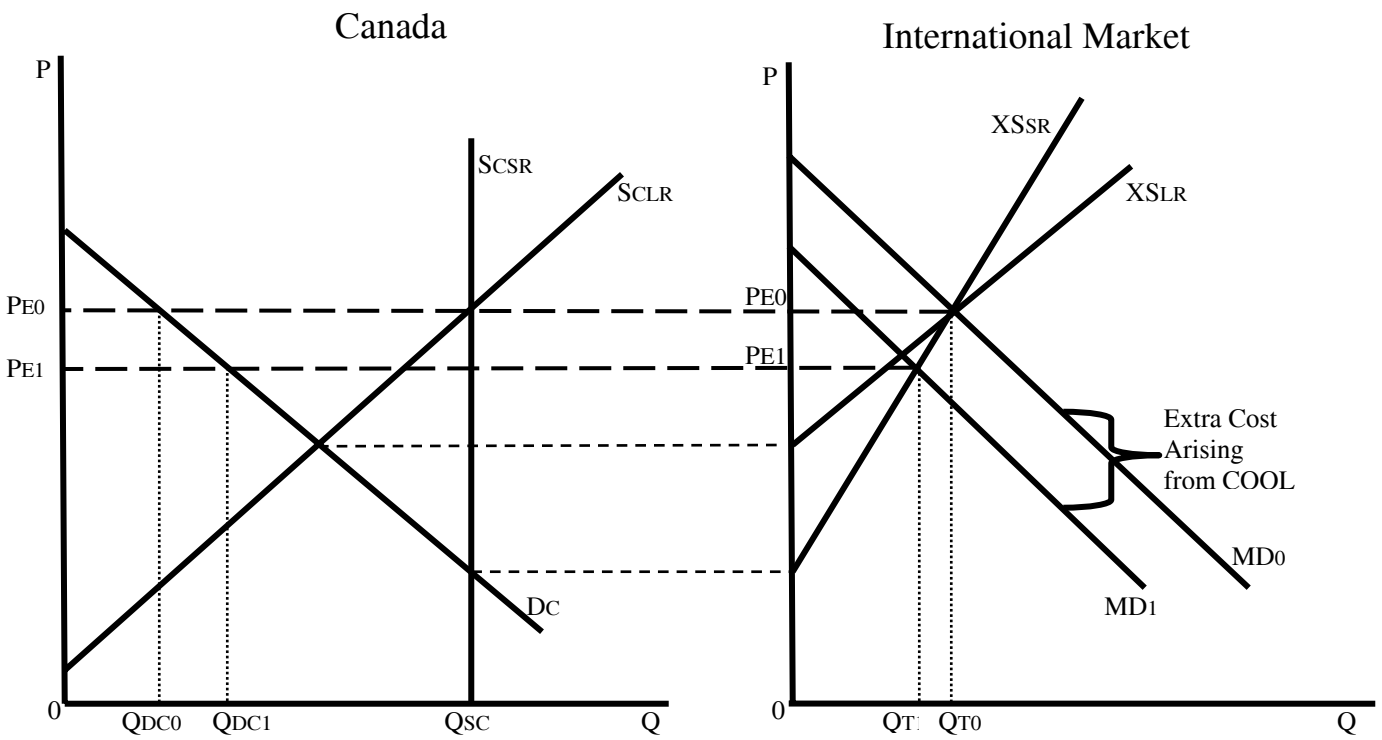

Figure 1 – The North American Market for Canadian Feeder Cattle

Once COOL is put in place, utilizing feeder cattle from Canada becomes more costly for beef supply chains in the US. As a result, they will only be willing to pay less for feeder cattle sourced from Canada. The increase in the cost of using feeder cattle sourced from Canada is shown in the right hand panel of Figure 1. The effect is a reduction in the import demand for Canadian feeder cattle – a shift from MD_0 to MD_1 in the international market. In the long run both price and quantity would adjust in the international and Canadian markets to the intersection of XSLR and MD1.

In the short run, however, the supply of feeder cattle coming onto the market is relatively fixed. This is because the number of feeder cattle marketed at any time is determined by the breeding decisions made by cow-calf producers in previous time periods. If the intersection of P_{E0} and S_{CLR} approximate a long run equilibrium, then the short run supply of feeder cattle in Canada is totally inelastic and depicted as S_{CSR}. Thus, when the import demand for Canadian feeder cattle shifts inward due to COOL, Canadian feeder cattle supplies cannot adjust to the this decline in demand except over time. This means that the short run export supply curve, XS_{SR}, is steeper than the long run export supply, XS_{LR}. Thus in the short run, the price of Canadian feeder cattle falls to P_{E1}. Hence, some Canadian feeder cattle that would have been exported remain in Canada but there is no short run adjustment in Canadian feeder cattle supplies.

This result is important for the type of evidence that is applicable for the effect of COOL on the Canadian market. Under the Article IX.4 it will be important for Canada to present evidence that COOL has been *materially reducing their value*. The result above suggests that initially most of the reduction in value will come from a decline in price. Given that the time that COOL has been in place can still be considered the short run, empirical work should concentrate on prices. Over time, of course, the quantities of Canadian feeder cattle coming onto the market will adjust to lower prices. Alternatively, the wedge between US and Canadian prices should have increased as a result of COOL. Sawka (2010) has done a preliminary examination of the size of the price difference between US and Canadian cattle before and after COOL was implemented. This was done for both feeder and slaughter cattle. The hypothesis of a larger price wedge could not be confirmed. These results suggest that resources need to be made available for more sophisticated empirical studies of price relationships between the US and Canadian market.

5.0 Conclusion

Despite the official stance of the US government – what other position could they take – that COOL is not motivated by protectionism, the protectionist politics of COOL are widely understood in the United States and elsewhere. In international trade law governments agree to put limits on their ability to respond to requests for protection. Once international law is codified governments may differ as to whether they are in compliance with the obligations set out in what has been agreed. This is the essence of international trade disputes. As it is unlikely that motivation can actually be attributed to a party (e.g. that import regulations were purposely designed to be more trade inhibiting than necessary), disputes hinge on the legal interpretations of the wording of the agreements. This would appear to be the case in the COOL dispute between Canada (and Mexico) and the United States. If the WTO Panel rules that the case is

solely to do with Article IX – Marks of Origin – then Canada needs to have strong empirical evidence pertaining to how the value of Canadian exports has been *materially reduced*. If TBT obligations are included by the Panel, the case would appear to rest on having strong legal (rather than economic) arguments.

In any case, as the dispute will take considerable time to hear and subsequently to have a decision rendered, Canadian cattle/beef and hog/pork producers will be faced with a medium term disruption to their markets and higher marketing costs as a result of COOL. In the era of an integrated North American market – as envisioned in the NAFTA – trade irritants like COOL should not arise. Adam Smith's perceptive comment about seldom finding a *reasonable system* in the case of food policy seems as valid today as it was in 1776. COOL also provides a lesson regarding protectionists. Protectionists never go away. They may suffer setbacks such as the NAFTA but they are smart, resourceful and tenacious. They are able to exploit to their advantage areas of trade law that are vague or incomplete. They should not be written off or ignored by industries in Canada. It would be better to counteract their influence before they can affect domestic legislation in import markets. Dealing with the results of protectionism, *ex post*, through formal international dispute settlement is inefficient and the result far from transparent.

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