Restoring Mandatory COOL for Beef Without Running Afoul of the WTO's Adverse Ruling

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I. Introduction

The 2015 repeal of mandatory country-of-origin labeling (COOL) for beef has deprived independent U.S. cattle producers the means to compete in their own domestic market with the billions of pounds of undifferentiated imported beef and millions of head of imported cattle that enter the United States each year from more than 20 foreign countries.[1]

So long as importers are free to import cheaper beef, and cheaper cattle subsequently converted to beef, without disclosing the foreign origins of that beef, independent U.S. cattle producers cannot compete with these imports even though they are not produced under the United States' superior production and food safety requirements; and consumers have no ability to choose to buy the superior U.S.-produced beef products.[2]

Congress repealed COOL for beef in 2015 pursuant to an adverse ruling by the World Trade Organization (WTO) that concluded the U.S. COOL law applicable to live cattle imports was a technical barrier to trade because it treated imports of Canadian and Mexican livestock less favorably than it treated domestic livestock.[3]

The WTO arrived at its adverse conclusion principally by finding: 1) the COOL law entails an increased record keeping burden on imported livestock; 2) the COOL law's labeling scheme resulted in inaccurate labels; and 3) the COOL law exempted a large volume of muscle cuts from its scope.[4]

Addressing these three WTO criticisms in new legislation to reinstate mandatory COOL for beef would both negate the current WTO authorization granted to Canada and Mexico to impose

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[1] The U.S. imported ~3 billion pounds of beef from 21 countries in 2018. *See* Beef and veal: Annual and cumulative year-to-date U.S. trade - All years and countries, available at https://www.ers.usda.gov/data-products/livestock-and-meat-international-trade-data/. The U.S. also imported ~1.9 million cattle in 2018, a slight decrease from the ~2.4 million head imported in 2014. *See* Cattle: Annual and cumulative year-to-date U.S. trade - All years and countries, available at https://www.ers.usda.gov/data-products/livestock-and-meat-international-trade-data/.

[2] One example of the U.S.' superior production standards applicable to live cattle is the Food & Drug Administration's Veterinary Feed Directive that requires domestic cattle producers to obtain veterinary authorization prior to feeding antibiotics to their cattle. Foreign cattle subsequently converted to beef and imported into the United States are not subject to this production requirement. *See* 80 Fed. Reg., 31,708 et. seq., available at https://www.govinfo.gov/content/pkg/FR-2015-06-03/pdf/2015-13393.pdf.

[3] *See* United States – Certain Country of Origin Labeling (COOL) Requirements, Recourse to Article 21.5 of the DSU by the United States, Reports of the Appellate Body, AB-2014-10 (hereafter "WTO Appellate Body"), at para. 1.10(b) at 13.

[4] *Id*., at para. 3.1(a) at 72-73; para. 6.2 at 169, 173.

retaliatory tariffs on U.S. goods,[5] and significantly improve COOL's objective of providing consumer information on origins of beef.[6]

II. New COOL Legislation for Beef

Congress should enact new legislation to reinstate mandatory COOL for beef that addresses the three shortcomings identified by the WTO by: 1) reducing the record-keeping burden for imported livestock; 2) providing importers the opportunity to improve the accuracy of labels; and, 3) expanding the scope of beef muscle cuts covered by COOL requirements.

1. Reducing the record-keeping burden for imported livestock.

Because all cattle imported into the United States are required to be permanently marked and/or permanently identified as to their country of origin,[7] the imported cattle themselves bear their country of origin brand, tattoo, and/or eartag throughout their entire lifespan while in the United States. Consequently, when those imported cattle are presented for slaughter, the packer responsible for initiating an origin claim can visually determine the foreign origins of foreign cattle (the country in which the cattle were born and raised) and can label the resulting beef from those cattle accordingly (e.g., "Born and Raised in Canada, Slaughtered in the U.S."). Therefore, for purposes of labeling beef from foreign cattle, there is no need for any additional record-keeping as the needed records are already permanently applied to the animal.

In contrast, cattle that are exclusively born and raised in the United States when presented for slaughter will bear no permanent foreign marking or foreign identification. Those cattle also require no additional record-keeping as the packer responsible for initiating an origin claim can visibly inspect the animal for any foreign markings/identification and if none exist, the resulting beef from those animals can accurately be labeled "Born, Raised, and Slaughtered in the USA."

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[5] Based on the WTO's ruling regarding the prior COOL law, the WTO authorized Canada and Mexico to impose retaliatory tariffs on United States goods. *See* Certain Country of Origin Labeling (COOL) Requirements, Recourse to Article 22,6 of the DSU by the United States, Decisions by the Arbitrator, at 81-82.

[6] *See, e.g.*, WTO Appellate Body, at para. 1.2 at 12.

[7] The U.S. Department of Agriculture requires: 1) cattle imported from Australia to be permanently identified with an official Australian eartag (*see* USDA, APHIS, Veterinary Services National Import and Export Services Protocol for the Importation of Feeder Cattle (Steers and Spayed Heifers) from Australia, February 2016, Update May 2018, at para. 3.4 at 4, available at https://www.aphis.usda.gov/regulations/vs/iregs/animals/downloads/aus-us-feeder-cattle-protocol.pdf); 2) cattle imported from Canada and Mexico to be permanently marked with a brand denoting their respective country of origin and/or identified with a permanent eartag from their respective country (*See* USDA, APHIS, Veterinary Services National Import and Export Services Protocol for the Importation of Cattle or Bison from Canada to the United States, at para. 2 at 2-3, available at https://www.aphis.usda.gov/regulations/vs/iregs/animals/downloads/ca-protocol-imp-cattle-bison.pdf; *see also* Protocol for the Import of Steers and Spayed Heifers Cattle and Bison (Feeders) from Mexico, National Import Export Services, VS, APHIS, USDA, at para. 2 at 2-3, available at https://www.aphis.usda.gov/import_export/downloads/pro_imp_bo_feeders_mx.pdf).

This methodology, known as the presumption of domestic origin, is all that is needed for determining the origins of all cattle in the United States and will eliminate the need for any additional recordkeeping for imported livestock. In fact, current COOL regulations already allow this methodology for foreign livestock such as sheep and goats: "Packers that slaughter animals that are part of another country's recognized official system (e.g. Canadian official system, Mexico official system) may also rely on the presence of an official ear tag or other approved device on which to base their origin claims." 7 C.F.R. §65.500(b). And, the regulations partially acknowledge the accuracy of U.S. origin claims for animals without any foreign markings or identification: "[P]ackers that slaughter animals that are tagged with an 840 Animal Identification Number device *without the presence of any additional accompanying marking (i.e., "CAN" or "M")* may use that information as a basis for a U.S. origin claim (emphasis added). *Id.* A small change to this existing origin-determining requirement in new COOL legislation for beef would eliminate the need for any additional record-keeping.

Thus, new COOL legislation for beef should incorporate the presumption of domestic origin methodology as the sole record-keeping requirement for verifying the origins of all cattle presented for slaughter. Such a provision will nullify the WTO's adverse finding that the COOL law entails an increased record-keeping burden on imported livestock.

2. Providing Importers with the opportunity to improve the accuracy of labels.

While the methodology discussed in Item 1 above eliminates any additional records for initiating an accurate country-of-origin claim regarding where an animal was born, raised, and slaughtered, the WTO found that because some imported cattle can be partially raised in two countries, a label claiming the animal was raised in only one country could be construed as inaccurate.[8] This problem can be remedied by affording purveyors of foreign cattle the discretion to provide additional specificity regarding other countries where the animal had been partially raised when the cattle are presented to the packer for slaughter. If, for example, a purveyor of foreign cattle presented records to the packer at time of slaughter indicating the cattle were imported into the United States four months previous, those records could be used to provide a modified label indicating the cattle had been raised in two countries (e.g., "Born in Canada, Raised in Canada and the U.S., and Slaughtered in the U.S.").

Thus, new COOL legislation for beef should impose a duty on the packer responsible for initiating a COOL claim to accept records voluntarily presented by foreign cattle purveyors to add additional information on the resulting beef. This would enable foreign cattle owners to provide greater specificity as to where the foreign-born cattle had been raised. This statutory flexibility of accommodating voluntary records to improve the accuracy of labels without imposing any new record-keeping mandate on purveyors of foreign-born cattle would mollify the WTO's adverse conclusion that the COOL law's labeling scheme resulted in inaccurate labels.

[8] *See* WTO Appellate Body, at para. 5.52 at 94; para. 5.56 at 95.

3. Expand the scope of beef muscle cuts covered by COOL requirements.

While the original COOL law required origin records for 100 percent of imported cattle, the WTO estimated that between 57.7% and 66.7% of foreign-born and raised beef, was exempt from country-of-origin labeling requirements,[9] thus supporting the WTO's contention that the cost of COOL was not justified by the benefits conferred to consumers. This problem arose because the original COOL law contained too many unnecessary exemptions, including exemptions for processed food items and food service establishments, and because it defined too narrowly which retailers would be subject to the law.

The obvious solution to this problem is to eliminate the exemptions that unnecessarily reduced the scope of muscle cuts subject to the original COOL law and broaden the definition of retailer. In addition, provisions could be added to empower currently exempted food service establishments to provide origin information on beef sold to their customers.

a. eliminate unnecessary exemptions

The COOL statute exempts covered commodities if they are an ingredient in a processed food item. 7 U.S.C. § 1638(1)(B). The regulations implementing that statutory exemption unnecessarily go too far in defining the phrase "ingredient in a processed food" by stating that a covered commodity that has merely been cooked, fried, broiled, grilled, boiled, steamed, baked, roasted, cured, smoked, or restructured is an ingredient in a processed food item and therefore exempt from labeling requirements. *See* 7 C.F.R. §65.220.

By clarifying in the new COOL legislation for beef that it is Congress' intent to maximize and not minimize the scope of covered commodities subject to COOL requirements, a much higher percentage of imported beef would be subject to the new COOL law thus remedying the previous imbalance between the costs of labeling and benefits to consumers.

b. broaden the definition of retailer

Current regulations define retailers subject to COOL requirements as only those subject to licensing under the Perishable Agricultural Commodities Act of 1930, meaning only those retailers with invoice costs for perishable agricultural commodities that exceed $230,000 annually. *See* 7 U.S.C. 499a(b)(6); 499a(b)(11). This means that meat markets, and all other retailers that do not sell over $230,000 worth of fresh fruits, vegetables or cherries in brine are exempt from current COOL requirements. *See* 7 U.S.C. 499a(b)(4).

[9] *See* United States – Certain Country of Origin Labeling (COOL) Requirements, Recourse to Article 21.5 of the DSU by Canada and Mexico, Reports of the Panel, October 20, 2014, at para. 7.273 at 106.

The new COOL legislation for beef should expand the definition of retailer to include all persons that sell beef at retail. This change would greatly expand the scope of beef subject to labeling requirements, thus further rebalancing the COOL law's costs with its benefits to consumers.

c. empower food service establishments to provide origin information on beef

The current COOL law exempts food service establishments, such as restaurants and cafeterias that sell food to the public, from complying with labeling requirements. *See* 7 U.S.C. § 1638(3); § 1638(b). However, some of these exempt establishments may desire to inform their customers as to the origins of the beef they sell and new COOL legislation for beef could empower them to do so by requiring beef suppliers to provide origin information to all downstream beef purveyors, including food service establishments.

This requirement holds potential to even further expand the scope of beef products labeled as to their country of origin without imposing any mandate upon food service establishments. Their use of the origin information would remain at their discretion.

III. Summary and Conclusion

Congress should enact new COOL legislation for beef that will constitute a substantive change to the COOL law previously critiqued by the WTO. By adopting the foregoing three recommended reforms to: 1) reduce the record-keeping burden for imported livestock; 2) provide importers with the opportunity to improve the accuracy of labels; and, 3) expand the scope of beef muscle cuts covered by COOL requirements, the previous WTO ruling would be rendered inapplicable, including the authorization to impose retaliatory tariffs. In addition, the shortcomings identified in the original COOL law's application would be corrected, thus minimizing the potential for future WTO challenges. Most importantly, these changes would greatly expand the scope of beef products subject to COOL requirements, which would be a tremendous benefit for U.S. cattle producers who desire to effectively compete in their own market and for consumers who desire to know the true origins of their beef.