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The 'COOL' Dispute – Analysis and implications

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The ongoing dispute against the United States on Certain Country of Origin Labelling Requirements (COOL) was initiated in December 2008 when Canada and Mexico requested consultations with the US.[1] The dispute is presently at the implementation stage with the report of the compliance panel having been issued on 20th October, 2014.[2] This article seeks to summarize the facts and issues in the COOL dispute and analyze the rulings of the Panel and the Appellate Body.

Factual Background: The disputed COOL Measures

The measure at issue deals with the export of hogs and cattle from Canada and Mexico used in the production of pork and beef in the U.S. It consists of the U.S. Agricultural Marketing Act, 1946 as amended by the 2008 Farm Bill and as implemented by the Interim Final Rule of 28 July, 2008 which made it obligatory for American retailers to inform customers of the country of origin of covered commodities, such as beef and pork.[3] In practical terms, it meant that products could only be labelled as originating from the U.S., if all the stages of production or rearing (i.e. birth, raising and slaughtering) took place within the U.S. Both Canada and Mexico viewed this aspect of the measure as discriminatory since the market for livestock and meat among the North American Free Trade Agreement (NAFTA)[4] countries is greatly integrated.[5]

Though there are no express restrictions to notify the consumers about the rules of origin under the WTO and the provisions were not considered discriminatory to the extent they were required to be implemented irrespective of whether the products were imported or produced locally, the quandary arose since compliance with the COOL measures required extensive record keeping and verification procedures leading to *de facto* discrimination against imported product *vis-a-vis* domestic like product.

The complainants alleged that mandatory COOL provisions were inconsistent with the obligations under Article III (National Treatment) of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and Articles 2.1 and 2.2 of the Agreement on Technical Barriers to Trade (TBT Agreement).[6]

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1 *United States – Certain Country of Origin Labelling (COOL) Requirements,* WT/DS384/R; WT/DS386/R (18 Nov., 2011). Since both the disputes dealt with the mandatory COOL provisions, the disputes were clubbed together and heard by the WTO Dispute Settlement Body.

2 WT/DS384/RW; WT/DS386/RW.

3 *Id,* at para. 7.77.

4 North American Free Trade Agreement (NAFTA) is a trilateral free trade agreement between the United States, Canada and Mexico.

5 *Supra* note 2, at para. 7.140.

6 *Supra* note 2, at para. 7.61.

Reports issued by Panel and Appellate Body

The Panel agreed with the complainants that the COOL measure falls under the scope of a "technical regulation" under Annex, 1 Para. 1 of the TBT Agreement as it was mandatory in nature and laid down product characteristics by enforcing labelling requirements. Both Panel and the Appellate Body concluded that the essential requirement under Article 2.1 is whether the governmental measure affects the conditions under which like goods, domestic and imported, compete in the market.[7] It was held that the COOL measures changed the conditions of competition in the market between the domestic livestock and the imported livestock by influencing the decision of the private actors predominantly in favour of the former.

On appeal, Appellate Body observed that analysis under Article 2.1 cannot be complete without assessing if the discriminatory treatment to the imported product arose as a consequence of legitimate regulatory distinction[8]. The Appellate Body hence analysed the design, architecture and revealing structure and after noting the requirements regarding labelling for domestic livestock and the imported livestock and different categories of labels created to identify the origin, observed that the measure lacked even-handedness. It was held that the amount of burden imposed on the upstream supplier in relation to the identification of imported livestock did not correspond to the accuracy of the information passed on to the final consumer and thus, the detrimental impact on the imported product did not stem from the legitimate regulatory distinction of providing information regarding origin of product to the consumers.[9]

The Appellate Body rejected the Panel's understanding of Article 2.2 of the TBT Agreement that the measure must meet some 'minimum threshold' of contribution to the legitimate objective.[10] It was held that the contribution that the challenged measure makes to the achievement of its objective must be determined objectively, and then evaluated along with the other factors mentioned in Article 2.2, that is: (i) the trade-restrictiveness of the measure; and (ii) the nature of the risks at issue and the gravity of the consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the measure.[11] Hence, the U.S. was requested to bring the COOL measure in conformity with obligations under the TBT Agreement.[12]

Implementation proceedings

Following the Appellate Body report, the complainant countries requested binding arbitration, pursuant to Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU),

7 WT/DS384/AB/R, WT/DS386, 29 June 2012, para. 291 to 293

8 *Id,* para 271

9 *Id,* para 341 to 346

10 *Id,* para. 496.

11 *Id,* para 461

12 *Id.*

to determine the reasonable period of time for the U.S. to implement the recommendations of the DSB.[13] On the last day of the 10 month period granted by the arbitrator, the U.S. notified that it had made changes to the COOL measures. The complainants however requested to proceed with the establishment of a compliance panel to determine whether the measures were in full compliance.[14]

Findings of Compliance Panel

Subsequent to the Appellate Body report, the COOL statute remained untouched but certain provisions of the 2009 Final Rule were amended by the 2013 Final Rule.[15] The Compliance Panel established pursuant to Article 21.5 of the DSU, found that the changes increased the disadvantageous effect on the exporters by way of higher standards of segregation according to origin and a larger burden of recordkeeping and verification procedures[16] and hence discouraged the producers from opting for imported livestock, thereby according favourable treatment to domestic livestock and meat.

It was decided that the measures could not be justified by the obligation to inform consumers regarding the countries where livestock were born, raised and slaughtered respectively.[17] Relying on its previous findings, this panel concluded that the measures violated Articles 2.1 and III: 4 of the TBT Agreement and GATT 1994 respectively and led to nullification and impairment of benefits accruing to the complainant countries.[18]

Implications and possible outcomes

The U.S. has 30 days to appeal, which again extends the leeway period for non-compliance with the DSB recommendations, or the complainant countries can impose retaliatory tariffs if the U.S. does not comply with the report of the compliance panel. It is most likely that the U.S. will appeal since there is substantial pressure domestically to appeal the ruling, which may also grant some time to the Office of the United States Trade Representative to take a final call on how best to handle the situation. In all likelihood, Canada and Mexico will proceed with the dispute, as their exports to the U.S. have halved since 2008, and the amendments to the 2009 Final Rule have only made the existing situation worse for them.[19] Canada has already decided to impose retaliatory tariffs if the U.S. does not comply with the WTO decision[20]. It remains to be seen what the ultimate outcome of the COOL dispute will be.

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13 WT/DS384/21; WT/DS386/20 (9 Oct., 2012).

14 *Supra* note 3.

15 *Supra* note 3, at para. 7.1.

16 *Id,* at para. 8.3.

17 *Id.*

18 *Id,* at para. 8.5.

19 *Id,* at para. 7.358.

20 Ottawa Threatens Tariffs against U.S. Ketchup, Chocolate, Wine, CTV News (Oct. 21, 2014).

Trade Remedy News

Trade remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
Cable Ties	China, Chinese Taipei	F.No.15/20/2013-DGAD	16-10-2014	ADD continuation recommended in sunset review
Clear Float Glass	Saudi Arabia, UAE and Pakistan	F.No.14/25/2012-DGAD	10-10-2014	Definitive ADD recommended
Compact Fluorescent lamps (CFL)	China	Office Memorandum in F.No. 15/22/2013-DGAD	20-10-2014	ADD sunset review - Time period extended up to 13-5-2015 for completing investigation
Diclofenac Sodium	China	F.No. 15/03/2013-DGAD	2-10-2014	ADD continuation recommended in sunset review
Digital Versatile Discs – Recordable of all kinds (DVD-R and DVD- RW)	China, Hong Kong and Chinese Taipei	F.No. 15/10/2013-DGAD	14-10-2014	ADD sunset review recommends continuation of duty on DVD-R only and not on DVD-RW
Electronic calculators	China	Office Memorandum in F.No. 14/19/2013	31-10-2014	ADD investigation – Time period extended till 17-4-2015 for completion
Melamine tableware and kitchenware products	China, Thailand and Vietnam	F.No. 14/10/2014-DGAD	28-10-2014	ADD investigation initiated
Morpholine	China, EU and USA	Office Memorandum in F.No. 354/239/2011-TRU (Pt-1)	22-9-2014	ADD Mid-term review – Time period extended up to 17-5-2015 for completing Investigation
Not Alloyed Ingots of Unwrought Aluminium	All countries	D. No. 22011/1/2014	7-10-2014	Safeguard investigation terminated
Pentaerythritol	Chinese Taipei	F.No. 15/19/2012-DGAD	16-10-2014	ADD continuation recommended in sunset review
Phenol	European Union, Singapore and Korea RP	F.No. 14/13/2014-DGAD	15-10-2014	ADD investigation initiated
Plastic processing machines or Injection moulding machines	Chinese Taipei, Philippines, Malaysia and Vietnam	F.No. 14/03/2014-DGAD	14-10-2014	ADD investigation initiated
Purified Terephthalic Acid	China, European Union, Korea RP and Thailand	F.No. 14/7/2013-DGAD	15-10-2014	ADD investigation – Time period extended up to 7-4-2015 for completing Investigation

Product	Country	Notification No.	Date of Notification	Remarks
Saturated Fatty Alcohols	All countries except developing countries other than Malaysia, Thailand and Indonesia	D.No. 22011/26/2013	9-10-2014	Safeguard duty recommended to be imposed for 2 years and six months
Sodium Nitrite	China	F.No. 15/2/2013-DGAD	15-10-2014	Anti-dumping duty modified and enhanced in mid-term review

Trade remedy actions against India

Product	Country	Notification No.	Date of Notification	Remarks
Frozen Warmwater Shrimp	USA	[A-533-840] 79 FR 61290	10-10-2014	ADD changed circumstances review – Premier Marine Products Private Limited is preliminarily determined as the successor-in-interest to Premier Marine Products.
Lined Paper Products	USA	[C-533-844] 79 FR 59217	1-10-2014	CVD changed circumstances review – Navneet Education determined as successor-in-interest to Navneet Publications, and will retain the cash deposit rate previously assigned to latter.
Lined Paper Products	USA	[C-533-844] 79 FR 60447	7-10-2014	CVD administrative review – Preliminarily determination of net subsidy rate of 71.71% ad valorem for A.R. Printing & Packaging India Pvt. Ltd.
Lined Paper Products	USA	[A-533-843] 79 FR 60450	7-10-2014	ADD administrative review for 2012-2013 – Preliminary finding that M/s. AR Printing had no shipments during the POR and that weighted-average dumping margin for M/s. Super Impex is 7.79%

WTO News

EU-Russia – Panel established over anti-dumping duty on vehicles, while consultations sought over tariffs on certain goods

The Dispute Settlement Body, on 20 October 2014, has established a panel to examine a complaint by EU against Russia's anti-dumping duties on light commercial vehicles from Germany and Italy (DS479). According to EU, the Russian provisions are inconsistent with Articles 2.2, 2.3, 2.4, 6.8, 6.10, 9.2 and 9.3 of the Anti-dumping Agreement as Russia did not determine normal value, export price and dumping margin for each known exporter in accordance with the obligations set out in these provisions. Violation of Articles 3.1, 3.2, 3.4 and 3.5 of the said agreement is also alleged by EU stating that Russia's injury determination was not based on positive evidence and it failed to objectively examine domestic industry's situation, significant increase in dumped imports, effect on domestic prices, etc. China, India, Japan, Korea and USA have reserved their third-party rights to participate in the panel's proceedings.

Further as per reports, European Union has, on 31-10-2014, sought consultations with the Russian Federation on latter's tariff treatment to certain goods in both agricultural and manufacturing sectors (DS485). According to EU's allegations, Russia charges duty higher than it's 'bound rates' on products like paper and paperboard, palm oil and its fractions, refrigerators and combined refrigerator-freezers. This is the sixth dispute between EU and Russia, brought before the world trade arbitrator, with most of them in recent times.

US "country of origin" disputes – WTO issues compliance panel reports

In another dispute on agricultural products, the WTO, on 20 October 2014, issued panel reports regarding compliance issues in the dispute "US – Certain Country of Origin Labelling (COOL) Requirements" (DS384 and DS386). The compliance panel found that USA's amended measure was still in violation of Article 2.1 of the Agreement on Technical Barriers to Trade and Article III:4 of the GATT, 1994, because it accorded to Canadian and Mexican livestock less favourable treatment than that accorded to like US livestock. It may be noted that consultations were sought by Canada and Mexico in these disputes way back in December, 2008 and panel reports were circulated in November 2011. It may not be surprising if this dispute also leads to a settlement between USA and Canada/Mexico by way of compensation to the two complaining countries while the US provisions continue to be in violation of various WTO Agreements.

India's agricultural import measures found to violate SPS Agreement

Agricultural products, were at the centre of another dispute also wherein the WTO has issued the panel report in the dispute "India – Measures concerning the importation of certain agricultural products" (DS430), brought before the DSB by USA. The panel in its report released on 14-10-2014, held that India's Avian Influenza ("AI") measures, restricting import of poultry and other animal origin products, are inconsistent with Articles 2.3, 3.1, 6.1 and 6.2 of the SPS Agreement inasmuch as they discriminate among Members; are not based on the relevant international standard, the Terrestrial Code; and, fail to recognize the concepts of disease-free areas and areas of low disease prevalence. The measures were further found to be inconsistent with Articles 5.1, 5.2 and 2.2 of the said Agreement because they are not based on risk assessment or scientific principles. Articles 5.6 and 2.2 of the SPS Agreement were found to be violated because the measures are significantly more trade-restrictive than required to achieve India's appropriate level of protection (ALOP). The panel also held that India acted inconsistently with Article 7, Annex B(2) and Annex B(5)(a), (b) and (d) of the SPS Agreement.

Meanwhile in the Sanitary-Phytosanitary Committee meeting held on 15-10-2014, India has reported that it is close to settling a concern about access of buffalo meat to the Russian market, and that it has reached agreement with USA on basmati rice and with Japan on marine products. It was stated that in both the cases the products are now traded normally.

Brazil files dispute against Indonesia over import restrictions on chicken

In another case relating to poultry imports and alleged violation of SPS Agreement and fourth one on agricultural products, which came up in WTO last month, Brazil has notified the WTO Secretariat on 16th of October 2014 of a request for consultations with Indonesia over certain measures imposed by Indonesia on imports of chicken meat and chicken products (DS484). According to Brazil, while Indonesia has so far not approved a Brazilian proposal for health certificate for poultry meat sent to the former in 2009, it seems to condition the approval on matters unrelated to sanitary issues and lacking scientific basis. It is stated that Indonesian measures effectively prohibit Brazilian products from entering Indonesia, and are hence inconsistent with Indonesia's obligations under the WTO's Agreement on Sanitary and Phytosanitary Measures, the Agreement on Technical Barriers to Trade, the Agreement on Agriculture, the Agreement on Import Licensing Procedures, the Agreement on Preshipment Inspection, and the GATT 1994.

Export of manufactured products from LDCs decline

WTO's Sub-Committee on Least-Developed Countries in its note dated 23-10-2014 has stated that the year 2013 confirms the previous years' trends of general decline in the share of most agricultural and manufactured product categories in case of exports by LDCs. It also reports that, on the other hand, there is a consistent rise in the share of fuels and mining products. According to the note by the Secretariat, from 2000 to 2013 average annual growth rate of LDC exports of fuels and mining products was much higher (17%) than those of manufactured products (12%) and agricultural products (11%). It was noted that the increase in the weight of extractive commodities was mainly due to a price effect.

The report also mentions that since imports increased more than exports, the overall trade deficit of LDCs also increased from US$ 53.6 billion in 2012 to US$ 60.6 billion in 2013. It notes that the range of exported products was usually limited to a few labour-intensive industries, mostly clothing.

WTO discusses valuation of software in a carrier medium

Valuation of software has always been at the centre of many domestic and international disputes. Growing technical advancement has further complicated issues when the software is presented to the Customs authorities in a carrier medium, particularly in pen drives or USB drives. Pen drives have integrated circuits, semiconductors or similar devices and are excluded from the definition of "carrier medium" and hence from the application of Decision 4.1 of the Committee on Valuation of the World Trade Organization. Uruguay in this regard, in 2012 had suggested before the WTO's Technical Committee on Customs Valuation that provisions should be made to update the decision to include integrated circuits, semiconductors and similar devices or articles incorporating such circuits or devices as carrier medium when presented to Customs solely as a means of 'temporary' storage for transfer of data or instructions (software) to data processing equipment in order to be used. Now, Switzerland has, on 27-10-2014, suggested deleting the word 'temporary' so as to cover those medium also which are capable of storing the data permanently.

It may be noted that USB flash drives are classifiable under sub-heading 8523 51 as semiconductor media: Solid-state non-volatile storage devices as per note dated 7-10-2014 of the Secretariat to the Committee on Customs Valuation. The note, probing the feasibility of the proposal to update Decision 4.1, notes that it is impossible to assess the degree to which they are being used as media to transport software. India is among the top 10 importers of the products of Heading 8523 with a share of 3.6% in the global imports.

Montenegro and New Zealand join WTO's Agreement on Government Procurement

Montenegro and New Zealand have joined the WTO Government Procurement Agreement (GPA) after their accession bids were approved on 29th October 2014. It may be noted that recently, the GPA was revised with effect from April, 2014, to modernize certain aspects of its rules and to expand its scope. Currently, it covers 43 WTO members. India is an observer of the GPA Committee since February 2010.

Ratio Decidendi

ADD investigation – Material injury and market segmentation

United States Court of International Trade has held rejected the claim that substantial evidence in a particular case required the Commission (US Import Trade Commission) to segment the market and find material injury. The court in this regard noted that it is permissible for the Commission to acknowledge underselling but still find no market-wide injury. It was also held that though underselling always has some effect on domestic industry, it is by no means certain that this effect will manifest at the market-wide level. Noting that Commission's statutory duty is not to detect injury writ large, but to decide whether there has been an injury to domestic industry as a whole, looking to the enumerated factors and what other evidence, the court held that Commission need not segment the market. The court also held that mere fact that Commission did not acknowledge segment-specific price-effect trends did not render the Commission's material-injury finding unsupported by substantial evidence.

Noting that the petitioner (domestic industry) had avoided the contention that the Commission was procedurally compelled to segment markets, the court, relying on certain precedents, observed that the authorities (Commission) are not required to segment the market every time material injury is considered. It was held that segmenting the market can actually thwart Commission's statutory duty, which is to determine whether the entire industry and not particular producers, has been injured. [*CP Kelco US, Inc.* v. *United States* – Slip Op. 14-123, dated 22-10-2014, United States Court of International Trade]

ADD investigation – 'Normal price' for domestic sales and 'Ordinary course of trade'

Court of Justice of the European Union has dismissed the appeal of the Council of the European Union against the Order of the General Court wherein the lower court, while annulling Regulation imposing anti-dumping duty, had held that the premium for non-payment did not represent part of the value of the product sold and was also not linked to the characteristics of that product. Argument of the council that sales were in the ordinary course of trade even if the seller had increased its sale price in order to cover the risk of late payment or non-payment, for the purpose of calculation of normal value in case of domestic sales, was hence rejected by the CJEU. The court in this regard also noted that Opinion of the Advocate General indicating that neither the General Agreement on Tariffs and Trade of 1994 nor the basic regulation (of EU) contains a definition of the concept of the ordinary course of trade. Further, noting that such an element which was related exclusively to the financial capacity of the particular domestic buyer, is one of the elements of the sales which the institutions must take into account, the court held that the institutions must examine whether that condition of sale has been applied to all customers in general on the market of the like product or whether it was specific to the customer at issue. [*Council of the European Union* v. *Alumina d.o.o* – Case C393/13 P, decided on 1-10-2014, EU Court of Justice (second chamber)]

News Nuggets

EU Singapore FTA – Adding the investment chapter

FTA between EU and Singapore its second largest trading partner in Asia was concluded last year and the inclusion of provisions on investment protection was completed on October 17. There has been a lot of debate on the investment chapter which is likely to be the model for treaties being negotiated with India and US. The European Commission will request the CJEU to clarify the interpretation of the Lisbon Treaty as regards trade matters. The Commission will seek clarity as to which provisions of the Free Trade Agreement with Singapore fall within the EU's exclusive or shared competence and which remain in the Member States' remit and require approval by national instances. There terms of the investment chapter in EU-Singapore FTA are different from the 13 other Bilateral Investment Protection treaties concluded by Singapore with individual member states. Some of the new provisions aimed at allowing greater flexibility to national governments and ensuring fairness include not allowing parallel claims before domestic courts and arbitral tribunals, making documents public, defining standard of treatment and legitimate expectation, pre-agreed list of arbitrators and possibility of an appeal mechanism.

WTO releases World Trade Report

The recently released World Trade Report traces the growth of world trade through the world war eras and varying perceptions to protectionism and identifies four main trends which are of current importance -the rise of new economic powers, the spread of global value chains, the growing importance of commodities trade, and the deepening integration and volatility of the world economy. Unsurprisingly, the emerging economies and distribution of benefits of growth to all figure in the report. The United States (14.3% of the world total), the United Kingdom, Germany, France and China were five top exporters of commercial services in 2013. China (11.7% of world exports) was the top exporter of merchandise followed by the United States, Germany, Japan and the Netherlands. As a single entity EU accounted for 13.3% of world exports. Another interesting statistic is the bilateral trade growth of select G-20 countries wherein growth rate of Brazil, China, India and Indonesia was higher than that of developed countries.

Overall the tone of the report is positive in stating that protectionism has become muted and countries are leaning towards free trade and rule based environment as envisaged by WTO. It is candid as the statistics do state that the bargaining power of producers, small players in developing countries is less and quotes a World Bank report to state that that nearly half of the coffee produced by an estimated 25 million farmers and farm workers is channelled through only four companies before reaching an estimated 500 million consumers.