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NOT COOL: THE CONSEQUENCES OF MANDATORY COUNTRY OF ORIGIN LABELING

*Matt Mullins**

I. INTRODUCTION

The much anticipated and hotly debated Country-of-Origin Labeling (COOL) provision of the 2002 Farm Bill went into effect on September 30, 2008.¹ The interim final rule published on August 1, 2008 finally put into law a provision first passed in the 2002 farm bill.² This provision requires grocery stores and other retailers³ who sell food products to the private consumer to label certain meats, vegetables, fruits, and nuts with their country of origin.⁴ Foods that must be labeled are identified in the bill as “covered commodities.”⁵ But, for all of the covered commodities, there exists a substantial list of products that do not require the COOL label: “processed food items.”⁶ The United States Department of Agriculture (USDA), the

* The author would like to give special thanks to Professor Harrison M. Pittman, E. Conner McNair, and my wife, Meagan, for their guidance, encouragement, and patience during the process of writing this comment.

1. Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, 74 Fed. Reg. 2682 (Jan. 15, 2009) (to be codified at 7 C.F.R. pts.60 and 65) [hereinafter Mandatory COOL].

2. *Id.*

3. *Id.*

4. Mandatory COOL, 74 Fed. Reg. 2682 (Jan. 15, 2009) (to be codified at 7 C.F.R. pts.60 and 65).

5. Geoffrey S. Becker, *CRS Report for Congress: Country of Origin Labeling for Foods*, (May 13, 2008). These covered commodities include the following: muscle cuts of beef (including veal), lamb, chicken, goat, and pork; ground beef, ground lamb, ground chicken, ground goat, and ground pork; perishable agricultural commodities (fresh and frozen fruits and vegetables); macadamia nuts; pecans; ginseng; and peanuts. *Id.*

6. Mandatory COOL, 74 Fed. Reg. 2682 (Jan. 15, 2009) (to be codified at 7 C.F.R. pts.60 and 65) [hereinafter The Final Rule]. The Final Rule defines “processed food item” as a retail item derived from a covered commodity that has undergone specific processing resulting in a change in the character of the covered

purveyor of the interim final rule, has broadly defined processing to include any item “undergoing a specific processing to change the character of the commodity or combining it with at least one other covered commodity or substantive food component.”⁷ These exceptions lead to some puzzling distinctions between covered and exempted commodities. For example, raw peanuts would require a label, but roasted peanuts would be exempt since roasting is considered by the rule to be a further processing; pork chops would require a COOL label, but ham and bacon would not require the label; and chopped lettuce in the produce section of the grocery store must be labeled, but chopped lettuce on the salad bar at the grocery store would be exempt under the restaurant exception.⁸

The COOL provision also draws some arbitrary lines between end-retailers that must label and retail establishments that are exempt. The rule imposes the labeling requirements on any retailer whose invoice cost of all purchases of perishable agricultural commodities exceeds \$230,000 during a calendar year.⁹ Based on a strict reading of the rule, this means that most grocery stores would be required to adhere to the provisions while those operating pure butcher shops would be exempt since their perishable agricultural commodities invoices would not total \$230,000 per calendar year.¹⁰

commodity, or that has been combined with at least one other covered commodity or other substantive food component (e.g., chocolate, breading, tomato sauce), except that the addition of a component (such as water, salt, or sugar) that enhances or represents a further step in the preparation of the product for consumption, would not in itself result in a processed food item. *Id.*

7. Produce Marketing Association, *PMA Analysis: USDA Final Rule for Mandatory Country of Origin Labeling*, <http://www.pma.com/issues/COOLAnalysis.cfm> (last visited Feb. 20, 2010).

8. Consumer Union’s “COOL TOOL”: Don’t Be Fooled By Country of Origin Labeling (COOL); This Guide Will Tell You What Is COOL & What Is Not 1 (2008), available at <http://www.consumersunion.org/pdf/CU-Cool-Tool.pdf>.

9. Mandatory COOL, 74 Fed. Reg. 2682 (Jan. 15, 2009) (to be codified at 7 C.F.R. pts.60 and 65). The term “retailer” adopted in the final rule is the same definition found in the original Perishable Agricultural Commodities Act of 1930 (PACA) 7 U.S.C. §499(a)(4). Also, this definition, which originally was signified as “dealer”, was updated in the 1995 Amendments to the PACA. In addition, the term retailer specifically means any person who purchases more than \$230,000 per year of “perishable agricultural commodities”. 7 U.S.C. 499(a)(b)(b). Perishable agricultural commodities is defined as “fresh fruits and fresh vegetables of any kind or character). See 7 U.S.C. 499a(b)(4), (11).

10. *Id.*

These results, while puzzling to the average person, are nothing new in the United States government's regulation of food.¹¹

II. HISTORY

While the COOL provision in its current form was first passed in the 2002 farm bill, some primitive forms of origin labeling requirements have been on the books since the Tariff Act of 1930.¹² The 1930 Act required every imported item to be conspicuously and indelibly marked in English to indicate its country of origin to the ultimate purchaser.¹³ This meant that articles arriving at the U.S. border in retail-ready packaging must display the origin identification.¹⁴ But, the 1930 provision exempts articles destined for U.S. processors which are slated to undergo substantial transformation.¹⁵ Also exempted were products on the "J List".¹⁶ While this list exempted such individual items from the labeling requirements, it did require their immediate containers to have country-of-origin labels.¹⁷

While several other acts throughout the subsequent years modified some substance and form of the labeling requirements, the next major step came with the passage of the 2002 farm bill.¹⁸ This Act required retail-level COOL for fresh produce, red meats, peanuts, and seafood.¹⁹ This Act also exempted further processed foods and restaurant and food service establishments.²⁰

The COOL provisions were originally slated to take effect on September 30, 2004, but political wrangling delayed the program starting date twice. The first delay of full implementation occurred

11. See generally Note, *Reforming the Food Safety System: What if Consolidation Isn't Enough*, 120 HARV. L. REV. 1356-57 (2007).

12. Becker, *supra* note 5, at 1.

13. *Id.*

14. *Id.*

15. Becker, *supra* note 5, at 1.

16. *Id.* The "J-list" is named because it is found in §1304(a)(3)(J) of the Tariff Act. Becker, *supra* note 5, at 1. The list is specifically created by the empowerment of the Secretary of the Treasury and allows him to specifically exempt certain classes of items. *Id.* The Secretary placed specific agricultural products on the J-list including: natural products such as vegetables, fruits, nuts, berries, and live or dead animals, fish and birds. *Id.*; see also, 19 C.F.R. 134.33(2009).

17. 19 C.F.R. 134.33

18. Ron Hale, A COOL Review - Country of Origin Labeling 2003, available at www.asi.k-state.edu/desktopModules/ueudocument.aspx?DocumentID=1601.

19. Becker *supra* note 5, at 1.

20. *Id.*

with the passage of The Consolidated Appropriations Act of 2004.²¹ The only provision that received a final rule implementing COOL provisions regarded seafood and fish.²² The seafood and fish provision was championed by the Alaskan Congressional delegation on behalf of the Alaskan fishing industry.²³ Alaskan Senator Ted Stevens was credited with pushing the measure through as a way to support his state's wild fish industry.²⁴ Another delay on the remaining COOL provisions was passed as part of the 2006 appropriations bill. That provision moved the mandatory implementation date to September, 30 2008.²⁵

Many people did not want to see mandatory COOL legislation implemented. Industry trade groups are mostly responsible for the delays in the implementation of COOL. Large producers and qualified grocers lobbied to keep the provision inactive due to their perceived cost increases.²⁶ Others predicted that the USDA used faulty assumptions and incorrect data in their original calculations of the economic impact on producers, processors, and retailers.²⁷ Other critics focused on the lack of evidence to support the proposition that COOL labeling will provide valuable information to the consumer or that COOL will lead to an increased demand for covered commodities bearing the U.S. origin label.²⁸ However, once the Republicans lost control of Congress following the 2006 elections, the way was paved for the final implementation of the COOL provisions.²⁹

21. Consolidated Appropriations Act '04 Pub. L. No. 108-199 at § 749, 118 Stat. 37 (2004).

22. Mandatory Country of Origin Labeling for Fish and Shellfish, 69 Fed. Reg. 59708 (Oct. 5, 2004) (to be codified at 7 C.F.R. pt. 60).

23. Jane Kay, *Seafood to Get Country of Origin Labels*, SAN FRANCISCO CHRONICLE, Feb. 4, 2004, available at <http://www.organicconsumers.org/foodsafety/seafood020504.cfm>.

24. *Id.*

25. Becker, *supra* note 5, at 3.

26. See Barry Krissoff, et al., *Country-of-Origin Labeling: Theory and Observation*, available at <http://www.ers.usda.gov/publications/WRS04/jan04/wrs0402/wrs0402.pdf>.

27. Becker, *supra* note 5, at 5.

28. Letter from John D. Graham, Ph.D. to Hon. William T. Hawks, Under Secretary for marketing and Regulatory Programs, United States Department of Agriculture (Oct. 27, 2003) (on file with the author).

29. Andrew Martin, *Labels Lack Food; Origin Despite Law*, NEW YORK TIMES, July 2, 2007, available at <http://www.nytimes.com/2007/07/02/business/02label.html>.

ISSUES REGARDING MANDATORY COUNTRY-OF-ORIGIN LABELING

A. *Violation of the World Trade Organization's ban on Non-Tariff Barrier's to Trade*

1. Brief History of WTO, the Agreement on Agricultural, and NTBs

The World Trade Organization (WTO) is the international forum used by member governments to resolve disputes regarding commerce and trade.³⁰ While the WTO was officially formed on January 1, 1995, its origins can be traced back to earlier agreements, specifically, the General Agreement on Tariffs and Trade (GATT).³¹ The GATT operated from 1947 through the end of 1994 when the WTO assumed and expanded the original GATT.³² The agreement, known as the Marrakech Agreement after the Moroccan city in which it was signed, created new policy initiatives that expanded the role of the new WTO beyond its original inclusions to reflect new business practices as well as the expansion of the trade of services between member nations.³³

Prior to 1995, the GATT rules were largely ineffective in regulating the world agricultural trade.³⁴ Countries created trade imbalance by placing fiscal restraints on imports while simultaneously granting export and domestic subsidies for their own producers.³⁵ In addition to the subsidy policies, non-tariff barriers (NTBs) were used to stifle market entry.³⁶ These NTBs included import quotas, regulatory labeling measures, and country of origin requirements.³⁷ The Uruguay Round of negotiations largely put an end to these disparate policies by enacting the Agreement on Agriculture.³⁸ The

30. World Trade Organization, http://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm (last visited February 9, 2009).

31. *Id.*

32. BERNARD M. HOEKMAN & PETROS C. MAVROIDIS, *THE WORLD TRADE ORGANIZATION, LAW, ECONOMICS, AND POLITICS* 8 (2007).

33. *Id.* at 11.

34. World Trade Organization, 70 Agriculture Negotiations: The Issues, and where we are now, at 5, *available at* http://www.wto.org/english/tratop_e/agric_e/agnegs_bkgnd_e.pdf.

35. *Id.*

36. *Id.*

37. *Id.*

38. World Trade Organization, Agriculture: Fairer Markets for Farmers, http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm3_e.htm (last visited Feb. 9, 2009).

stated goal of the Agreement on Agriculture was to “reform trade in the sector and to make policies more market-oriented.”³⁹

The Marrakech Round specifically addressed rules of origin and the WTO regulations that would govern these rules.⁴⁰ These rules outlined procedures for implementation, guidelines for requirements, and information for resolving certain disputes within these guidelines.⁴¹

2. Basis of Claim for Complaining Member-Countries

While no real challenge has been made regarding labeling requirements on agricultural products, a legitimate case can be formed to challenge the new Mandatory COOL legislation recently implemented by the USDA. The history of WTO Rules of Origin resolutions has been limited to a claim between India and the United States regarding apparel and textile labeling rules.⁴² Here, the WTO panel upheld the origin labeling laws passed by the United States.⁴³ This challenge represents the only instance where the WTO has issued a ruling based on the Agreement on Rules of Origin (Agreement).⁴⁴ However, the specific language in the Agreement opens the door to challenges for the new U.S. Mandatory COOL legislation. In Article 9 of the Agreement, the WTO describes the trade rules regarding new origin requirements.⁴⁵ Article Two (c) specifically states that origin rules should “not themselves create restrictive, distorting or disruptive effects on international trade.”⁴⁶

B. Background on Importing Standards and Processing Procedures

When an animal is imported into the United States for processing, the Federal Meat Inspection Act of 1906 (FMIA) says that no

39. *Id.*

40. World Trade Organization, *Agreement on Rules of Origin*, Dec. 2005, available at http://www.wto.org/english/docs_e/legal_e/22-roo.pdf.

41. *Id.*

42. See World Trade Organization, *Dispute Settlement: Dispute D5243: United States- Rules of Origin for Textiles and Apparel Products*, June 20, 2003 http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds243_e.htm (last visited Feb. 9, 2009).

43. *Id.*

44. U.S. Wins WTO Ruling on India Challenge to textile Rules Washington File, June 20, 2003, available at <http://news.corporate.findlaw.com/wash/s/20030620/2003062003cit.html>.

45. World Trade Organization, *supra* note 41.

46. *Id.*

animal shall be imported “unless they comply with all the inspection, building, construction standards, and all other provisions of this act and regulations issued thereunder applicable to such articles in commerce within the United States.”⁴⁷ So, an animal imported into the U.S. must comply with all of the safety, inspection, sanitary, and verification standards to which a domestically produced animal must comply.⁴⁸ This means that at any given U.S. processing facility, cattle imported from Mexico or Canada must be produced using the same standards as domestically grown cattle. However, under the Mandatory COOL legislation, in order for the domestically grown beef to get the desired “Product of the U.S.A.” label, these virtually identical cattle must be segregated during the entire fattening, feeding, and production process.⁴⁹ This will add additional segregation costs for the processors at the finishing plants.⁵⁰ Additionally, foreign animals are required to have more documentation to evidence their journey through the supply chain.⁵¹ To compensate for the additional costs and remove the chance for mistakes in the segregation process, some U.S. producers are refusing to accept cattle imports.⁵²

Another factor affecting processors is the simple economical mechanics of the processing plant. A typical commercial processing plant will process orders for a variety of customers each day. Some will be institutional customers ordering products that, under the interim final rule, are exempt from the COOL requirements because of the restaurant exception.⁵³ Others will be classic retailers which, under the PACA and the final rule, will require the COOL labeling. This alternating order-filling can create additional difficulty for recordkeeping as well as increase the chances of a segregation error and further increase the costs. In addition, it is estimated that 45% of U.S. beef is processed for sale to customers who either are exempted from COOL under an exception like the restaurant

47. 21 U.S.C. § 620(a).

48. *Id.*

49. Telephone Interview with Mark Dopp, Senior Vice President and General Counsel, The American Meat Institute, in Washington, D.C. (Nov. 13, 2008).

50. *Id.*

51. Iowa Public Television, *Mexico joins Canada in WTO beef dispute vs. U.S.*, Dec. 19, 2008, <http://www.iptv.org/mtom/story.cfm/news/1353> (last visited Feb. 26 2010).

52. *Id.*

53. Producers Marketing Association, *supra* note 8.

exception or who further process the beef so that it is exempted from the COOL requirements.⁵⁴

C. Analysis

WTO member-countries that import agricultural products already act within a scheduled framework of certain import controls as well as other methods of regulating imports, such as tariffs.⁵⁵ But, in the administration of label of origin rules, member-countries must do so in a manner proscribed in the Agreement.⁵⁶ The ultimate goal is to create a system that is easily administered, easily understood, and applied objectively.⁵⁷ And as with the WTO in general, the ultimate goal is the free flowing of trade and commerce between member-countries.⁵⁸

With the implementation of the Mandatory COOL, member-countries have a regulatory framework in place to challenge the provisions by virtue of being placed in an economic disadvantage. First, costs will increase due to increased recordkeeping requirements, segregation costs, and product labeling requirements. While cost estimates vary widely within the industry, the USDA estimates that the first year incremental costs for directly affected firms will be around \$2.5 billion.⁵⁹ Consequently, the report further indicates that the directly affected industries will recover a percentage of their higher costs by raising the price of their products.⁶⁰ However, standard economic theory suggests that higher prices will reduce demand for the affected products.⁶¹ In other words, when consumers pay more for the affected commodity, they will purchase less of that

54. Telephone Interview with Mark Dopp, Senior Vice President and General Counsel, The American Meat Institute, in Washington, D.C. (Nov. 13, 2008).

55. WORLD TRADE ORGANIZATION, NON-TARIFF BARRIERS RED TAPE, ETC., http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm9_e.htm (last visited Feb. 9, 2009).

56. *Id.*

57. *Id.*

58. HOEKMAN & MAVROIDIS, *supra* note 33, at 1.

59. Mandatory Country of Origin Labeling, 73 Fed. Reg. p. 45106, 45128 (Aug. 1, 2008) (to be codified at 7 C.F.R.pt. 65) (compare that with the estimates from the VanSickle article which estimate the costs to be somewhere in the neighborhood of \$193 million, or 7.7% of the USDA estimate). *But see* VAN SICKLE, ET AL., COUNTRY OF ORIGIN LABELING: A LEGAL AND ECONOMIC ANALYSIS 18 (2003), *available at* <http://edis.ifas.ufl.edu/pdffiles/FE/FE38400.pdf> (estimating the costs to be somewhere in the neighborhood of 193 million, or 7.7% of the USDA estimate).

60. Mandatory Cool, 73 Fed. Reg. at 45129 (Aug. 1, 2008).

61. *Id.*

commodity and look to replace that commodity with an alternative selection that will provide a better value.⁶² For example, if the incremental price of beef increases, consumers might look to replace some beef with chicken in their diet. The chicken industry, unlike the beef industry, is highly vertically integrated, drastically reducing some of the recordkeeping and administrative costs that are predicted to plague the mandatory COOL.⁶³ Also, pork is less affected by the change in rules since pork, unlike beef and chicken, has a relatively high rate of further processing, which exempts those products from the COOL requirements.⁶⁴ The reduced demand for the affected commodities will ultimately reduce the demand for those imported commodities as well, ultimately disadvantaging the importing trade partner.

Additionally, reduced demand and increased hassle on the part of the American producers will likely cause producers to reduce their acceptance of imported affected commodities.⁶⁵ The final rule estimates a reduction in the import of beef, pork, veal, and broiler chickens.⁶⁶

Therefore, these reasonable assessments lay the foundation for WTO member-countries to make a prima facie case against the implementation of the Mandatory COOL provisions of this interim final rule. In fact, at the time of this writing, Mexico and Canada have both filed separate complaints with the WTO against the Mandatory COOL legislation.⁶⁷

62. *Id.*

63. *Id.* at 45130. (This section indicates that 95% of chickens are produced/processed under vertical integration). This means that the integrators, like Tyson Foods for example, own the birds from the time they hatch until the time they sell the birds directly to the retailer. *Id.* This drastically reduces costs associated with record keeping as well as the need for segregation. *Id.*

64. *Id.* at 45131.

65. Klapper, *supra* note 52.

66. Mandatory COOL, 73 Fed. Reg. 45, 129 (Aug. 1, 2008).

67. Klapper, *supra* note 52. See also Anna Bahney, Meat Labeling Law Blasted, Feb. 8, 2010, available at <http://www.argusleader.com/article/20100130/NEWS/1300303/1001/news> (discussing that after two failed rounds of negotiation between Canada and the United States, Canada has successfully petitioned the WTO for a panel). This panel represents the next step in the process under current WTO regulations.

III. LACK OF ECONOMIC AND CONSUMER PURCHASING DATA TO SUPPORT A COST/BENEFIT RATIONALE FOR COOL

A. *Economic Rationale of Labeling*

The food we consume today contains many different ingredients that are grown, processed, or produced in many different places. Producers, governments, retailers, and consumers all play a role in determining which of the various bits of information are actually displayed on food labels.⁶⁸ These different contributors often act with very different goals in mind. Consumers desire many different kinds of information including the ingredients contained in a given product,⁶⁹ the origin of those ingredients, and even the method of cultivation and harvesting.⁷⁰ And the consumer can use their own purchasing power to influence the way companies label their products.⁷¹

The government's rationale for certain labeling requirements can have different social and economic goals.⁷² For example, the government requires many different foods to contain nutritional information.⁷³ This label may provide the consumer with more information while also furthering the government's social goal of creating a healthier population.⁷⁴ By promoting a healthier society, the government aims to enrich the lives of its citizens, as well as reduce costs for government-sponsored healthcare programs like Medicaid and Medicare.⁷⁵

Third parties also have incentives to label their products by highlighting attributes designed to reach certain consumer segments. Products labeled with certain specific information can create a demand for the product among the targeted consumer groups. A popular example of this trend is the rise in "organic" labeled prod-

68. ELISE GOLAN, ET. AL., *ECONOMICS OF FOOD LABELING 1* (2000), available at <http://www.ers.usda.gov/publications/aer793/aer793a.pdf>.

69. *Id.*

70. Many consumers are concerned about the use of pesticides, herbicides, harvesting techniques (hand-picked versus machine harvesting, for example), and transportation issues. *See id.*

71. *Id.*

72. *Id.*

73. FOOD & DRUG ADMIN., *GUIDANCE FOR INDUSTRY: A FOOD LABELING GUIDE* (1998) available at <http://www.cfsan.fda.gov/~dms/2lg-7a.html> (discussing regulatory requirements under Food, Drug, and Cosmetic Act and the Fair Packaging and Labeling Act); 21 U.S.C. §301, et. seq., 15 U.S.C. § 1451, et. seq.

74. Golan, *supra* note 69, at 1.

75. *Id.* at 13-14.

ucts. The National Organic Program, implemented in the early 1990's,⁷⁶ was born from the increased demand for certain products grown without chemicals.⁷⁷ Producers began to see opportunities to grow this segment of the market to capitalize on the increased demand for these products. Producers also noticed that the increased demand for certified organic foods translated directly into a price premium.⁷⁸

Whatever the underlying rationale, food labeling requirements are being advanced by many different segments of the food supply and regulatory chain. But, as with all costly inputs, economics plays a large role in the decision to label certain products. If the cost to change a label cannot be recuperated with an increase in price or increase in volume, companies do not have an economic incentive to change their label.

B. History of Voluntary COOL Labeling

In October of 2002, the Agricultural Marketing Service (AMS) published the "Guidelines for the Interim Voluntary Country-of-Origin Labeling of Beef, Lamb, Pork, Fish, Perishable Agricultural Commodities, and Peanuts" in the Federal Register.⁷⁹ This Voluntary Rule opened the door for producers and retailers to begin labeling their products with country-of-origin information. However, participation in the voluntary program did not garner significant participation.⁸⁰ The drafters of the Final Rule noted that this lack of participation primarily indicated consumer's unwillingness to pay

76. See generally 7 U.S.C. § 6501-6522(2000). This comment does not focus specifically on the National Organic Program. For a general overview and history of the National Organic Program and the Organic Food Production Act of 1990, see Kate L. Hudson *Organic Plus: Regulating Beyond the Current Organic Standards*, 25 PACE ENVTL. L. REV. 211. (2008).

77. See Golan, *supra* note 69, at 26.

78. *Id.*

79. Country of Origin Labeling: Frequently Asked Questions, available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRDC5071922> (last visited Feb. 24, 2010). The Agricultural Marketing Service (AMS) is the arm of the USDA charged with the responsibility of drafting and implementing the COOL regulations. The Interim Voluntary Rule was published in the Federal Register at 67 Fed. Reg. 63367.

80. Mandatory COOL, 74 Fed. Reg. 2658, 2682 (Jan. 15, 2009) (to be codified at 7 C.F.R. pts. 60 and 65) (noting, "the lack of widespread participation in voluntary programs for labeling products of United States origin provides evidence that consumers do not have strong enough preferences for products of United States origin to support price premiums sufficient to recoup the costs of labeling").

for country-of-origin information.⁸¹ Some executives in the industry who oppose the mandatory COOL legislation point to this as a signal that Congress passed a bill without empirical data to justify it.⁸²

*C. Contrasting Participation in the National Organic Program
with the Voluntary COOL Program*

Food producers continually innovate their labels hoping to ultimately influence consumers to purchase their products versus those of their competitors.⁸³ While food producers provide a product that is necessary for human existence, most producers' ultimate goal is financial success. And, most producers will seek to market a new or improved attribute if they believe there is money to be made from marketing that desirable attribute of their product to their targeted consumers.⁸⁴

A great example of a consumer-demand driven innovation in voluntary food labeling is the National Organic Program. By the 1980's, the USDA noticed that organically grown produce had formed a distinct market and that "average premiums in the stores ranged from over 40% to as high as 175%."⁸⁵ The sale of organic foods exceeded \$10.3 billion for 2003, and estimates have set the growth rates over 20% on an annualized basis.⁸⁶ From a pure economic standpoint, organic products are more expensive to grow than non-organics.⁸⁷ And, in order for organic producers to remain

81. *Id.*

82. R-CALF USA, Separating Fiction from Truth, How the Voluntary COOL Bill will Impact the U.S. Cattle Industry, Sept. 10, 2004, available at www.r-calfusa.com/COOL/COOL%20Fact%us%20Fiction.pdf. Boyle stated, "We as consumers want to know pertinent information about the food products we purchase, such as its price, nutritional value, calorie content, sell-by dates and safe handling instructions. But only the Congress, in its infinite wisdom, would believe that consumers are interested in the family tree of fresh meats, produce, seafood and peanuts sold in grocery stores. In fact, surveys repeatedly show that consumers care most about price, freshness and quality." Citing "Make COOL Meat Labeling Voluntary," J. Patrick Boyle, Guest Opinion, Billings Gazette, August 3, 2004.

83. See Krissoff, *supra* note 27, at 1-7.

84. *Id.* at 6.

85. Golan, *supra* note 69, at 6.

86. ORGANIC TRADE ASSOCIATION, ORGANIC FOOD FACTS, 1, <http://www.ota.com/organic/mt/food.html> (last visited Feb. 9, 2009). (The Organic Trade Association is a membership based trade organization who promotes organic initiatives for the organic industry).

87. Golan, *supra* note 86, at 26.

economically viable, they must secure a premium price that covers the additional costs of the organic program.⁸⁸

A sharp contrast to the grass-roots beginning of the National Organic Program is the bureaucratic origin of the COOL legislation. Producers and retailers did not rush to participate in the voluntary COOL program that was implemented in 2002. Several theories have been given to explain why retailers have not found an economic incentive to label their products with the country-of-origin.⁸⁹ One idea is that consumers just don't care to know from which country their food originates.⁹⁰ The lack of domestic COOL on meat products indicates that most "consumers neither give the product's country of origin much thought nor view imported products as inferior."⁹¹ Another theory says that some consumers prefer certain food items to be imported because they perceive the imported products as being superior to their domestic counterparts.⁹² Because certain products are labeled with their exporting country's name prominently displayed on the label, there appears to be an economic benefit to informing the consumer of the product's country-of-origin.⁹³

While some studies have indicated that consumers do value COOL information and are willing to pay a premium for this information, even the researchers involved in those studies acknowledge the relative uncertainty of the economic success of a mandatory program.⁹⁴ The overall conclusion drawn by most observers is that "the infrequency with which voluntary country-of-origin can be ob-

88. Golan, *supra* note 86, at 26.

89. Krissoff, *supra* note 27, at 6, 7.

90. *Id.* at 6.

91. *Id.* at 7.

92. *Id.*

93. *Id.* (Examples include New Zealand lamb products, Burgundy wine, Parma ham, or Columbian coffee). Krissoff, *supra* note 27, at 7. When consumers associate superior quality with certain regional production and are willing to pay a premium to obtain products from that region, the producer has an incentive to label and advertise the products accordingly. *Id.*

94. Wendy J. Umberger, et. al., *Consumer Demand for Country of Origin and Source Verification Labels*, available at <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRD3319323>; Wendy J. Umberger, et. al., *Country-of-Origin Labeling of Beef Products U.S. Consumers' Perceptions*, available at <http://agecon.unl.edu/mark/pdf/Umberger.pdf> (Compare Wendy J. Umberger, et. al's study in March 2003 showing U.S. consumer's willingness to pay on average 19% premium for domestic beef with her co-authored study presented in December 2003 showing that when COOL information was compared with other food attributes such as food safety inspections, tenderness, price and traceability, COOL ranked as the least important attribute to this survey group).

served suggests that food suppliers see little or no advantage in labeling domestic products as domestic.⁹⁵ That is to say, consumers are either not willing to pay a premium for the products or the premium derived will not cover the incremental costs of the additional labeling requirements.⁹⁶

IV. CONCLUSION

American consumers like to know the origins of the products they buy. We look at labels on everything from clothes to cars when making a purchasing decision. We associate certain positive qualities with certain country's production of certain products. But, we also stigmatize certain countries with certain products. We also enjoy free trade and the ability to market our products to the world as well as receive products made in every corner of the world.

But our food supply is not like a car or a pair of pants. We pay special attention to the safety and health of the food we eat so that we can remain healthy as well as satisfied. Information about the food we eat comes at a cost to the producers and retailers providing that information. Recordkeeping, testing, verification, and certification costs directly affect the price of everything we buy. While comparing similar products gives us the opportunity to make informed and rational choices, most consumers can neither grasp an infinite list of product attributes nor afford to pay the increased premium for this mountain of information. With the passage and implementation of the Mandatory COOL legislation, Congress has levied an additional "food tax" on the consuming public. Not only could these additional costs create an unfair trade environment for our WTO trading partners, but it could also place some domestic producers in an unfavorable economic position.

Congress should revise the mandatory provision and reinstall the voluntary program as an alternative for people who want to label their products with the country of origin information. Also, this would allow states to regulate their certain food industries where producer and consumer demand for the COOL information can be better recognized and implemented.

95. Krissoff, *supra* note 27, at 6.

96. *Id.* at 7.