

***United States – Certain Country of Origin Labelling (COOL) Requirements
(WT/DS384, 386)***

**Australia's Responses to Questions of the Panel Following the Second Substantive Meeting
with the Panel**

All third parties

25. *Do the third parties consider that, in order to find a violation of Article 2.2, a complainant does not need to establish a violation of the first sentence separately from that of the second sentence?*

Australia submits that in relation to the first and second sentences of Article 2.2, each sentence provides important context for the other sentence and should not therefore be considered in isolation. This is borne out by the phrase '[for] this purpose' at the beginning of the second sentence – Australia believes this phrase ought to be given meaning. Thus, for example, the elements in the second sentence provide guidance on the interpretation of whether a measure constitutes an 'unnecessary' obstacle to international trade under the first sentence.

However, Australia submits that in order for a panel to find a violation of Article 2.2, a complainant does not need to establish a violation of the first sentence separately from that of the second sentence. That is, if a technical regulation is 'more trade restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create', then it would be open to a panel to find a violation of Article 2.2 on that basis alone. Equally, Australia submits that a violation of Article 2.2 can be found if there is a breach of the first sentence of Article 2.2.

26. *Is there a relationship between the importance of an objective and the risks non-fulfilment of the objective would create under Article 2.2? If so, please explain the nature of such a relationship.*

In Australia's view there can be a relationship between the importance of the objective and the risks non-fulfilment of the objective would create, although this should be assessed on a case-by-case basis (refer to Australia's Second Oral Statement, paras. 23-24). Assessing the importance of the objective can assist in establishing the nature of the risks of non-fulfilment. If an objective is of 'high' importance, then it may be more likely that the risks of non-fulfilment of that objective will be greater. Equally, if an objective is considered to be of 'low' importance, this may indicate it is more likely that the risks of non-fulfilment will be lower.

At the same time, Australia notes that there is no specific reference to the importance of the objective in the text of Article 2.2. Australia submits that even if a measure has an objective of low importance it does not necessarily mean that only a low level of trade restrictiveness is justifiable. The language of Article 2.2 indicates that it is the risks of non-fulfilment that are to be taken into account when assessing whether a technical regulation is inconsistent with the second sentence of Article 2.2 (for example in a weighing and balancing exercise akin to that developed in relation to GATT Article XX).

Australia

27. *Please elaborate on Australia's statement in response to Panel question No. 10 that "[w]ere the Panel to conclude that the actual objective of the COOL measure is not 'legitimate' ..., the Panel would still need to find that the COOL measure had been 'prepared, adopted or applied with a view to*

or with the effect of creating unnecessary obstacles to international trade', in accordance with the first sentence of Article 2.2, in order to find an inconsistency with Article 2.2". Is the first sentence of Article 2.2 an obligation separate from and additional to the second sentence of Article 2.2, the inconsistency of which must also be proved to find a violation of Article 2.2?

Refer to Australia's response to question 25 above. Australia considers that it would be possible to ground a finding of inconsistency with Article 2.2 pursuant to a breach of either the first sentence or the second sentence. It was not Australia's intention to imply in its response to Panel question 10 that a breach of both sentences is required.

Rather, in its response, Australia was highlighting its view that simply because a measure may be inconsistent with one element of the second sentence (such as whether its objective is legitimate) this does not automatically result in a breach of Article 2.2. For example, a technical regulation that has an objective that is not legitimate, but is also not trade restrictive, will not be inconsistent with the second sentence of Article 2.2.