

AS DELIVERED

***UNITED STATES – CERTAIN COUNTRY OF ORIGIN LABELLING (COOL)
REQUIREMENTS***

(WT/DS384 and WT/DS386)

Third Party Second Oral Statement of Australia

Geneva, 2 December 2010

A. INTRODUCTION

Mr Chairman, members of the Panel.

1. Thank you for this further opportunity to present Australia's views in this dispute, and in particular, for the opportunity to participate in this second panel hearing.
2. In this statement we have chosen to focus on some of the key questions the Panel may wish to address in its consideration of Article 2.2 of the TBT Agreement.

B. QUESTIONS FOR THE PANEL'S FURTHER CONSIDERATION

(a) How should the Panel approach its interpretation of Article 2.2 of the TBT Agreement?

3. One such question is *how* the Panel should approach its interpretation of this Article.
4. Australia submits that the second sentence of Article 2.2 elaborates on the meaning of the fundamental discipline in the first sentence. Thus the elements in the second sentence must be considered in the context of the overarching commitment to ensure that technical regulations are not unnecessary obstacles to international trade.
5. Accordingly, Australia agrees with the principal parties that the first threshold question for the Panel to address under Article 2.2 is whether a technical regulation is 'trade restrictive' or an 'obstacle to international trade'.
6. Australia notes that GATT disciplines on the use of restrictions are meant to protect the competitive opportunities of imported products rather than trade flows.¹ Given this, Australia agrees with Canada and Mexico that a measure may be trade restrictive if it imposes any form of limitation on imports, discriminates against imports or denies competitive opportunities to imports.
7. If the measure is found to be trade restrictive, Australia submits that the Panel must then determine whether it is more trade restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create, in accordance with the second sentence of Article 2.2. In other words, the Panel must assess whether the measure is an *unnecessary* obstacle to international trade.

(b) How should the Panel approach its assessment of the legitimacy of the objective of the COOL measure?

8. The next question Australia would like to address is how the Panel should approach its assessment of the legitimacy of the objective of the COOL measure.

¹ See citations in the Third Party Written Submission of Australia, para. 71.

9. Australia considers that the correct approach is first to establish the objective of the measure and then to consider the legitimacy of that objective, taking into account the fundamental obligation in the first sentence of Article 2.2.
10. In making its preliminary determination of the objective of the measure, Australia agrees with the United States that the Panel should start with the text of the measure.²
11. Broader evidence relevant to the development of a measure may be considered by the Panel in making this determination. However, in Australia's view, the Panel should not lightly overturn the stated objective of a measure.
12. Australia notes that some parties and third parties have argued that for objectives not specifically listed in Article 2.2, including, in this case, the provision of consumer information, a Member must provide 'clear and compelling evidence'³ of its legitimacy. This includes evidence of a wider intent to implement a particular policy goal.
13. The inclusion of the term *inter alia* before the list of objectives in Article 2.2 clearly indicates this list is non-exhaustive. Further, the TBT Agreement affords flexibility to Members to implement technical regulations to pursue any number of legitimate domestic policy objectives.
14. Setting high thresholds for objectives not listed in Article 2.2 runs the risk of curtailing this flexibility. It may also result in Members attempting to artificially adjust the 'official' objective of a regulation so that it fits neatly within one of the listed objectives.
15. Australia believes the objective of providing consumer information is closely related to the prevention of deceptive practices. Providing additional accurate information about a product also assists consumers to make informed purchasing decisions. In Australia's view, the provision of consumer information is clearly a legitimate objective for the purposes of Article 2.2.

(c) How should the Panel approach the question of whether the COOL measure fulfils the legitimate objective?

16. Moving on to the next question, Australia submits that the Panel must assess whether the COOL measure 'fulfils' its legitimate objective. In this regard, assuming that the objective of the measure is to provide information to consumers and prevent consumer confusion, the COOL measure must actually carry out, or at least have the capacity to carry out, this objective.

² U.S. Second Written Submission, para. 119.

³ Second Written Submission of Canada, para. 70; Written Submission of New Zealand, para. 32.

17. Although we agree that a Member has some discretion to pursue legitimate objectives at the levels it considers appropriate, this discretion does not extend to a Member being able to introduce measures that do not actually fulfil, or are not capable of fulfilling, the legitimate objective.
18. In this case, evidence that may be relevant to this enquiry includes whether the information provided to consumers under the COOL measure is potentially inaccurate or misleading. Australia notes the example of the application of the COOL measure in relation to ground beef where a country of origin may potentially be listed on the label of a product that does not in fact include any product from that country.

(d) To what extent is it up to the relevant Member to strike a balance between fulfilling the legitimate objective and reducing trade restrictiveness?

19. The United States emphasises that the TBT Agreement allows Members to design measures to achieve legitimate objectives at the level they consider appropriate.⁴ Given this, the United States argues that the COOL measure was specifically designed to strike what it considers to be an appropriate balance between achieving its objective of providing consumer information whilst reducing the costs of compliance.⁵
20. Australia agrees that a Member can exercise some discretion in pursuing measures that achieve its legitimate objectives at the levels it considers appropriate. However, there is a limit to that discretion. The panel in *EC – Sardines* emphasised that although the TBT Agreement accords a degree of deference with respect to the policy objectives Members may wish to pursue, ‘it shows less deference to the means which Members choose to employ to achieve their domestic policy goals’⁶.
21. This is reflected in the preamble to the TBT Agreement which includes the caveat that a measure must not be applied in a manner which would constitute a ‘means of arbitrary or unjustifiable discrimination’. In the specific context of Article 2.2, the check on a Member’s discretion is borne out in the question of whether the measure is an *unnecessary* obstacle to international trade. And, as discussed, this may in turn necessitate a consideration of the factors set out in the second sentence of Article 2.2.
22. It is Australia’s view that although it is up to the United States to decide which policy objectives they wish to pursue and the levels at which they wish to pursue them, it is for the Panel to determine whether the means by which the United States has chosen to achieve this - the COOL measure - are more trade restrictive than necessary to fulfil the legitimate objective to the extent identified by the United States.

⁴ U.S. Second Written Submission, para. 154.

⁵ U.S. First Written Submission, para. 238.

⁶ Panel Report, *EC – Sardines*, para. 7.120.

(e) How ‘important’ is the objective of providing consumer information and to what extent should the Panel should take this into consideration?

23. Australia submits that a finding as to whether a technical regulation is ‘more trade restrictive than necessary to fulfil a legitimate objective’ must be weighed against the risks non-fulfilment of the particular legitimate objective would create. If the risks associated with non-fulfilment of a particular objective are high, a measure may still be justified regardless of its trade-restrictiveness.
24. Australia agrees that such risks may differ depending on the *nature* or, as suggested by Canada, the *importance* of the legitimate objective the measure is designed to fulfil.⁷
25. Australia is however concerned by any implication that the COOL measure’s objective of providing additional consumer information is of low importance.
26. Australia emphasises that providing consumer information can be an important objective. This is particularly the case given the increasingly globalised and complex supply chains for products such as beef and other consumables. The importance of providing consumer information is evidenced by the significant number of Members which maintain, or intend to maintain, a COOL scheme of some description.
27. The parties have acknowledged that COOL schemes are not *per se* WTO inconsistent.⁸ Australia would therefore caution that a finding that the objective of providing consumer information is of such a low order that only limited trade restrictiveness would be justifiable may have the practical effect that no Member can maintain or implement COOL measures for the purpose of providing information to its consumers.

(f) What is the relevant evidentiary threshold when claiming *de facto* discrimination?

28. Finally, Australia also wishes to briefly comment on the evidentiary threshold that must be met when claiming *de facto* discrimination under the national treatment principle in Article III:4 of the GATT 1994 and Article 2.1 of the TBT Agreement.
29. In particular, Australia notes the submission by the European Union that there is a ‘high threshold and a need for particular rigour’ in proving a *de facto* discrimination case.⁹ In addition, the European Union has suggested that it may be necessary for a complainant to wait for an undefined period of time to accurately assess the impacts of the regulation to determine whether there are equal opportunities for the different goods concerned.¹⁰

⁷ Second Written Submission of Canada, para. 86.

⁸ See, for example, Canada’s Responses to the Panel’s Questions from the First Substantive Meeting, para. 73; Mexico’s Responses to the Panel’s questions from the First Substantive Meeting, para 103.

⁹ Replies to the First Questions by the European Union, para. 32.

¹⁰ *Ibid*, para, 29-30.

30. Australia wishes to emphasise that the national treatment principle ‘protects expectations’ of the equality of the competitive relationship between imported and domestic products.¹¹ This approach is necessary to avoid the situation where a Member is only able to challenge regulations after the event and not in order to forestall less favourable treatment.¹²
31. Australia recalls its argument in relation to ground beef that the COOL measure has the potential to impact on the competitive opportunities of imported products to the detriment of those products.

C. CONCLUSION

32. To conclude, in this statement we have sought to highlight some of the key issues of interpretation surrounding Article 2.2 of the TBT Agreement, a provision on which there has been limited guidance to date.
33. In particular, Australia submits that the Panel’s assessment of the trade-restrictiveness inherent in the COOL measure’s structure and design, and its ability to fulfil its legitimate objective, may be particularly relevant considerations in determining whether the COOL measure is inconsistent with Article 2.2.
34. Australia would be pleased to answer any questions from the Panel.

¹¹ Appellate Body Report, *Japan – Alcoholic Beverages II*, page 16; GATT Panel Report, *US – Section 337*, para. 5.13; Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215; Panel Report, *Korea – Beef*, paras. 623-, 627.

¹² GATT Panel Report, *US – Section 337*, para. 5.13.