

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

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

**All third parties**

1. Please provide information about any mandatory country-of-origin labelling scheme you maintain, and reference the relevant notification(s) to the TBT Committee.

Standard 1.2.11 'Country of Origin Requirements' in the Australia New Zealand Food Standards Code (the Code) mandates country of origin labelling requirements for all packaged foods and unpackaged fresh or processed fruit, vegetables, seafood and pork sold in Australia. The Standard applies to food for retail sale and food that is supplied to catering establishments, restaurants, canteens, schools, hospitals and institutions where the food is prepared or offered for immediate consumption. Food that is sold directly to the public by restaurants, canteens, schools, caterers or self-catering institutions where the food is offered for immediate consumption is exempt from country of origin labelling. Standard 1.2.11 does not apply to New Zealand.

The Code relies on the *Trade Practices Act, 1974* (TPA) which contains requirements concerning the place of origin of goods. In particular, false or misleading representations concerning the place of origin of goods are prohibited. Country of origin statements are a sub-set of place of origin.

There are conditions for the safe use of 'product of' representations and other statements as to country of origin, such as 'made in' or 'manufactured in'. These so-called safe harbour defences for the use of 'made in', 'product of' and the new 'grown in' origin claims are set out in the TPA and can be summarised as follows:

- . **Product of** (includes other declarations such as produce of and produced in):
  - the country of origin claimed must be the country of origin of each significant ingredient of the food, and
  - virtually all the processes of production or manufacture of the goods must have happened in the country of origin claimed.
- . **Made in** (includes other declarations such as manufactured in or Australian made):
  - Goods must have been substantially transformed in the country claimed to be the origin, and
  - more than 50 per cent of the costs of production must have been carried out in the country claimed to be the origin.

Goods are substantially transformed in a country if they undergo a fundamental change in that country in form, appearance or nature such that the goods existing after the change are new and different from those existing before the change.

Where it is not possible for a 'made in' claim to be made, either due to uncertainty around the question of substantial transformation and the 50 per cent production cost test, or to adjust to seasonal changes in availability of individual ingredients, manufacturers may make a qualified claim. Common examples of such qualified claims are 'Made in Australia from imported ingredients' or 'Packaged in Australia from local and imported ingredients'. The Australian Competition and Consumer Commission has adopted the view that qualified claims do not, for example, have to meet the substantial transformation or 50 per cent content tests required to make a 'made in' claim.

- . **Grown in** (includes other declarations such as ingredient grown in):
  - provided 50 per cent or more of the total weight of the goods is comprised of ingredients or components that were grown and processed only in that country.
  - may be made when products are not only made but also grown in the country claimed as origin.

Goods, or ingredients of goods, are grown in a country if they are materially increased in size or materially altered in substance in that country by natural development or germinated or otherwise arose in, or issued in, that country, or are harvested, extracted or otherwise derived from an organism that has been materially increased in size, or materially altered in substance, in that country by natural development.

Under the *Trade Practices Amendment (Australian Consumer Law) Act (No.2) 2010*, the 'grown in' safe harbour defence is due to come into effect on 1 January 2011.

Food Standards Australia New Zealand (FSANZ) is currently progressing Proposal P1011 - Country of Origin Labelling - Unpackaged Meat, which will consider extending COOL requirements to include unpackaged beef, chicken and lamb products. Unpackaged pork already requires COOL.

There are two TBT notifications concerning Australia's COOL regime. These are:

- . G/TBT/Notif.97/113
- . G/TBT/N/AUS/45.

2. *Do third parties consider that there should be different criteria for determining origin for labelling purposes and for customs purposes? In determining origin for meat products for labelling and customs purposes, which production and processing steps are relevant?*

Australia is of the view that the determination of origin for labelling purposes and for customs purposes are distinct processes with different objectives. Conditions for the use of country of origin labels in Australia are set out in the answer to question 1. above.

On the other hand, rules of origin (ROO) exist for all of Australia's free trade agreements and preference schemes, in order to distinguish eligible 'originating goods' of preference countries from the ineligible produce of that country and goods from other countries. There are various types of ROO used in different agreements and within a single agreement for different types of goods. Common types of ROO used by Australia include wholly obtained,

change in tariff classification, regional value content or a process rule (such as final process of manufacture).

With regard to goods in Chapter 2 (meat and edible meat offal) of the Harmonized System, Australia's established position in the WTO and recent free trade agreements is to use the 'Change in Chapter' rule. By way of example under this rule, origin would not be conferred for simple processes such as drying, salting, smoking or placing in brine.

3. *In paragraphs 45-54 of its third party submission, Australia submits that the COOL requirements are de facto discriminatory. Have the other third parties experienced any adverse effect of the COOL requirements?*

N/A.

4. *Please explain whether and, if so, how Article XX of the GATT 1994 and of Article 5.6 of the SPS Agreement are relevant for interpreting Article 2.2 of the TBT Agreement.*

Australia refers the Panel to paragraphs 67, 74-76 and paragraph 85 of its Third Party Written Submission.

Australia considers that elements of the 'necessity' analysis developed under GATT Article XX are similar to the elements contained in the language of Article 2.2 of the TBT Agreement: 'more trade restrictive than necessary to fulfil a legitimate objective'. Australia therefore submits the weighing and balancing of various factors in a 'necessity' analysis conducted under GATT Article XX is relevant for interpreting Article 2.2 of the TBT Agreement.

By contrast, Article 5.6 of the SPS Agreement may be of less relevance in the context of the TBT Agreement than the interpretation of 'necessary' under GATT Article XX. In particular, Australia notes that the TBT Agreement does not include a footnote similar to that in Article 5.6 of the SPS Agreement that expressly requires that any alternative measure be 'significantly' less trade restrictive.

5. *Is Article 4.2 of the Agreement on Agriculture in any way relevant for considering the complainants' legitimate expectations as it relates to the COOL requirements? If so, explain how.*

Australia does not believe Article 4.2 of the Agreement on Agriculture applies to a country of origin labelling scheme such as the US COOL requirement. The Appellate Body in *Chile — Price Band System* (at paragraph 227) noted the type of measures Article 4.2 seeks to discipline:

'[W]e note that all of the border measures listed in footnote 1 have in common the object and effect of restricting the volumes, and distorting the prices, of imports of agricultural products in ways different from the ways that ordinary customs duties do. Moreover, all of these measures have in common also that they disconnect domestic prices from international price developments, and thus impede the transmission of world market prices to the domestic market.'

## **Australia**

6. *Is it Australia's view that any act directly attributable to the executive of a WTO Member is challengeable in WTO dispute settlement? (paragraphs 16-17 of Australia's third party written submission)*

Australia refers the Panel to the Appellate Body's comments in *US – Corrosion-Resistant Steel Sunset Review* cited in paragraph 15 of its Third Party Written Submission, noting that 'in principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings'. However, the relevant act (or omission) attributable to the executive of a WTO Member must still constitute a 'measure' for the purposes of Article 6.2 of the Dispute Settlement Understanding.

In this regard, Australia notes the Appellate Body's statement in *Guatemala Cement I* that 'a "measure" may be any act of a Member, whether or not legally binding, and it can include even non-binding administrative guidance by a government' (at footnote 47). On the other hand, not every act or statement by a WTO Member's executive need be a measure; there must be some force to give effect to the act or statement, whether via statutory instruments or societal custom.

7. *Please elaborate on the argument in paragraph 14 of Australia's third party written submission that "it is not necessary for the complainant(s) to challenge the WTO consistency of each element of the measure".*

Australia refers the Panel to the panel's comments in *EC – Sardines* cited in paragraph 13 of its Third Party Written Submission. Australia draws on this authority for the conclusion that it is not fatal to a challenge if a complaining party does not claim that all aspects of the measure are WTO-inconsistent.

8. *In paragraphs 45-54 of its third party submission, Australia submits that the COOL requirements are de facto discriminatory. Has Australia actually experienced any such discrimination under the COOL requirements with regard to Australian meat exports to the United States?*

As Australia is a third party to the dispute, it had not undertaken the same level of detailed analysis as the complainants. Based on export data, Australian shipments to the United States in fact increased seven per cent in 2009. But Australian beef exports to the United States for the first half of 2010 have declined 28 per cent year-on-year. Australian beef exports to the United States remain at about three per cent of total US annual beef production.

As well as COOL, there are a number of other factors which may have affected Australian beef exports to the United States, including demand from other more lucrative markets, the value of the Australian dollar and domestic supply issues. Anecdotally, the increase in demand for manufacturing beef in 2009 has also been attributed to the global financial crisis, which saw US consumers switch consumption to ground beef from more expensive beef products.

Feedback from the Australian and US red meat industry also suggests that the small component of Australian beef that was going into the US retail sector prior to MCOOL is

likely to have shifted to the US foodservice sector (which is exempt from MCOOL), rather than not being exported at all.

9. Please elaborate on the statement in paragraph 97 of Australia's third party written submission that you "do not perceive any conflict between CODEX-STAN 1-1985 and the COOL measure".

Australia's statement in paragraph 97 of its Third Party Written Submission refers in particular to the question of whether CODEX-STAN 1-1985 is a relevant standard for the purposes of Article 2.4 of the TBT Agreement. In particular, Australia refers the Panel to paragraphs 91-96 of its Third Party Written Submission in drawing the conclusion that CODEX-STAN 1-1985 'may not be "relevant" to this enquiry under Article 2.4' (paragraph 97).

It is in this context that Australia states that it '... , therefore, does not perceive any conflict between CODEX-STAN 1-1985 and the COOL measure'. It may be more precise to rephrase the sentence as follows:

'Australia, therefore, does not perceive any conflict between the existence of CODEX-STAN 1-1985 and the fact it was not used as a basis for the COOL measure.'

10. In paragraph 61 of its third party written submission, Australia states that "the stated objective, as put forward by the respondent, must be accepted in good faith." In what context under Article 2.2 of the TBT Agreement, if at all, should the Panel consider the complainants' arguments that the actual objective of the COOL requirements is trade protectionism?

Australia notes its understanding of the correct analysis called for under Article 2.2 of the TBT Agreement is set out in paragraph 57 of its Third Party Written Submission. Australia believes, for the purposes of Article 2.2, the Panel should consider whether the stated objective of the measure at issue is 'legitimate', not whether the stated objective is in fact the 'actual objective' of the measure at issue. Australia submits this approach is consistent with the structure and application of the TBT Agreement, and the Appellate Body's findings in *EC – Sardines*, in the context of Article 2.4 of the TBT Agreement (see paragraphs 59-60 of Australia's Third Party Written Submission).

However, as the Appellate Body stated in *EC-Sardines* (at paragraph 292), a panel must also make 'an objective assessment of the facts of the case' under Article 11 of the Dispute Settlement Understanding. It would therefore be open to the Panel, in making 'an objective assessment' of the evidence put forward by the complainants and the respondent, to conclude that actual objective of the COOL measure is trade protectionism. Nonetheless, Australia believes a panel should not lightly overturn the 'stated' objective of a measure, particularly in the face of supporting, objective evidence such as legislative history and explanatory statements.

Were the Panel to conclude that the actual objective of the COOL measure is not 'legitimate' (for example, by concluding the measure's objective is trade protectionism), Australia believes 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

inconsistency with Article 2.2. Australia draws the Panel's attention to the European Union's Third Party Written Submission (at paragraphs 53-54) in this regard. At the same time, evidence of the trade protectionist intent or effect of the COOL measure may be relevant to this analysis.