

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

**(WT/DS384 and WT/DS386)**

**Third Party Written Submission of Australia**

**18 August 2010**

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<i>US – Section 211 Appropriations Act</i>	Appellate Body Report, <i>United States – Section 211 Omnibus Appropriations Act of 1998</i> , WT/DS176/AB/R, adopted 1 February 2002, DSR 2002:II, 589
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<i>US – Superfund</i>	GATT Panel Report, <i>United States – Taxes on Petroleum and Certain Imported Substances</i> , L/6175, adopted 17 June 1987, BISD 34S/136

## I. INTRODUCTION

1. These proceedings initiated by Canada and Mexico respectively under the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) raise significant systemic issues concerning the substantive legal obligations and rights of WTO Members under the Agreement on Technical Barriers to Trade (TBT Agreement) and the General Agreement on Tariffs and Trade 1994 (GATT 1994). The US country of origin labelling requirements (the “COOL measure”) at issue in this dispute test the boundaries of those rights and obligations.
2. As the world’s second largest exporter of beef and second largest exporter of beef to the United States, these issues are of immediate relevance to Australia’s access to the US beef market.
3. Australia exports annually around 300,000 tonnes of beef and lamb to the United States with fresh, chilled and frozen beef accounting for the bulk of the trade.
4. Australia does not export livestock to the United States but does export muscle cuts and manufacturing grade beef. A significant volume of Australian beef exported to the United States is processed into other products. The largest proportion of Australia’s beef trade to the United States is manufactured beef, also referred to as beef trimmings, which are mixed with US domestic beef trimmings and sold as ground beef.
5. Australia maintains its own mandatory country of origin labelling requirements and as an exporter of many products to countries with country of origin labelling requirements seeks to ensure that such requirements do not hinder international trade. Australia notes, as the United States does also in its submission, that many WTO Members maintain country of origin labelling requirements.<sup>1</sup>
6. In its third party submission, after considering the measure at issue, Australia examines the perceived parameters of the TBT Agreement, with particular focus on:
  - (a) Whether the COOL measure, including US Secretary of Agriculture Thomas J. Vilsack’s letter to Industry Representatives dated 20 February 2009 (the “Vilsack Letter”), falls within the definition of a ‘technical regulation’ in Annex 1.1 of the TBT Agreement;
  - (b) The appropriate test to be applied under Article 2.1 of the TBT Agreement and whether this test should draw on the analysis applied by Panels and the Appellate Body under Article III:4 of GATT 1994;
  - (c) The analysis to be applied under Article 2.2 of the TBT Agreement including the appropriateness of drawing on the analysis applied by Panels and the Appellate Body under Article XX of GATT 1994; and
  - (d) The relevance of the *Codex General Standard for the Labelling of Pre-packaged Foods* under Article 2.4 of the TBT Agreement.

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<sup>1</sup> US’ First Written Submission, para 16.

7. Australia has also addressed the consistency of the COOL measure with Article III:4 of GATT 1994.
8. Australia reserves the right to raise other issues in the third party hearings with the Panel.

## II. THE MEASURE AT ISSUE

9. The COOL measure, as defined by Canada and Mexico, has a long history and has been adopted in different stages since 2002. The measure covers many commodities.<sup>2</sup> All beef product that is characterised as a covered commodity is subject to the measure. From saleyards to slaughterhouses, and feeding operations to processors and eventually to those who bear the ‘public’ responsibility of displaying country of origin to retail purchasers, the measure affects every stage of the supply chain.
10. As Mexico explains in its submission: “Although the COOL provisions challenged in this dispute apply to beef that is sold at retail level in the United States, their implementation affects the entire production process of beef derived from cattle that were born in Mexico.”<sup>3</sup> Mexico’s Panel Request specifically identifies the link between its live cattle trade to the United States, where cattle are fed and processed, and the end product, ground beef and muscle cuts.<sup>4</sup> The COOL measure’s design, structure and application are therefore critical to whether it discriminates against imported cattle and hogs, and the beef and pork derived from that livestock, and against other imported product used for sale as muscle cuts and ground meat.

### A. IDENTIFYING THE MEASURE

11. Canada and Mexico have broadly identified the measure at issue so as to encompass the 2008 Interim Final Rule and the Vilsack Letter in addition to the 2009 Final Rule and the 2002 Cool Statute, as amended, and Mexico has also included the Food Safety and Inspection Service (FSIS) Interim Rule.<sup>5</sup> The United States disputes that the

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<sup>2</sup> *Covered commodities* are listed in the *Farm Bill 2002*, 1(a) at 533 and *Farm Bill 2008* 1(a) at 1352, and are now codified in the United States Code (U.S.C.) Title 7 (Agriculture) Chapter 38 (Distribution and Marketing of Agricultural Products) Subchapter IV (Country of Origin Labeling). *Covered commodity* is defined to include ground beef, lamb, chicken, goat and pork as well as muscle cuts of beef, lamb, chicken, goat and pork but does not include these and other products “if the commodity is an ingredient in a processed food item as defined in § 65.220.”

<sup>3</sup> Mexico’s First Written Submission, para 115.

<sup>4</sup> Mexico’s Panel Request dated 9 October 2009, WT/DS386/7, 13 October 2009.

<sup>5</sup> Canada’s First Written Submission, fn 1 and paras 4 - 12; Mexico’s First Written Submission, paras 9 - 82. On 16 March 2009 the United States Department of Agriculture (USDA) Agricultural Marketing Service (AMS) Final Rule 7 Code of Federal Regulations (CFR) Parts 60 and 65 *Mandatory Country of Origin Labeling on Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts* as published on 15 January 2009, came into effect (“2009 Final Rule”): 74 Fed Reg 2658 (2009). This gives effect to amendments to the *Agricultural Marketing Act of 1946* as amended by the *Farm Security and Investment Act of 2002*, Pub.L. No. 107-171, § 10816, 116 Stat. 134, 533-535 (“2002 Farm Bill”) and the *Food, Conservation, and Energy Act of 2008*, Pub. L. No. 110-234, § 11002, 122 Stat. 923, 1351-1354 (“2008 Farm Bill”) (referred to as the 2002 Cool Statute, as amended). On 1 August 2008, the AMS of the USDA issued the 2008 Interim Final Rule on *Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts*: 73 Fed Reg 45106 (2008). On 28 August 2008, the Food Safety and

Interim Final Rule, Vilsack Letter and FSIS Interim Rule are within the scope of the COOL measure.<sup>6</sup>

12. The United States alleges that Canada and Mexico fail to address any of the elements of the COOL measure as identified by them, other than the 2009 Final Rule.<sup>7</sup> The United States appears to suggest that unless Canada and Mexico address how each element is inconsistent with the US' WTO obligations, and assess each document "on its own merits in relation to each of Canada's and Mexico's claims"<sup>8</sup> then this will negatively impact upon their respective legal claims.
13. Australia questions this argument. Australia acknowledges the Appellate Body's findings in *EC – Asbestos* that "the proper legal character of the measure at issue cannot be determined unless the measure is examined as a whole",<sup>9</sup> but notes that it is not fatal to a challenge if a complaining party does not claim that all aspects of the measure are WTO-inconsistent. As explained by the panel in *EC – Sardines*, a complaining party "can instead identify and challenge only those offending provisions of the measure it deems central to its interest in resolving the dispute."<sup>10</sup>
14. As such, Australia considers that Canada and Mexico have properly identified the measure at issue for the purposes of dispute settlement under the DSU and that it is not necessary to challenge the WTO consistency of each element of the measure.

#### **B. THE VILSACK LETTER**

15. With regard to the Vilsack Letter, and without consideration as to whether the letter constitutes either a 'technical regulation' for the purposes of the TBT Agreement or a 'law, regulation or requirement' for the purposes of GATT 1994, Australia notes the Appellate Body's comments in *US – Corrosion-Resistant Steel Sunset Review*:

In principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings.

The acts or omissions that are so attributable are, in the usual case, the acts or omissions of the organs of the state, including those of the executive branch.

In addition, in GATT and WTO dispute settlement practice, panels have frequently examined measures consisting not only of particular acts applied only to a specific situation, but also of acts setting forth rules or norms that are intended to have general and prospective application. In other words, instruments of a Member containing rules or norms could

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Inspection Service of the USDA (FSIS) issued an Interim Final Rule on *Mandatory Country of Origin Labeling of Muscle Cuts of Beef (including Veal), Lamb, Chicken, Goat and Pork, Ground Beef, Ground Lamb, Ground Chicken, Ground Goat, and Ground Pork* and issued its affirmation, on 20 March 2009: 73 Fed Reg 50701 and 74 Fed Reg 11837 respectively.

<sup>6</sup> US' First Written Submission, paras 126-130.

<sup>7</sup> US' First Written Submission, para 129.

<sup>8</sup> US' First Written Submission, paras 130.

<sup>9</sup> Appellate Body Report, *EC – Asbestos*, para 64.

<sup>10</sup> Panel Report, *EC – Sardines*, para 7.34.

constitute a “measure”, irrespective of how or whether those rules or norms are applied in a particular instance. This is so because the disciplines of the GATT and the WTO, as well as the dispute settlement system, are intended to protect not only existing trade but also the security and predictability needed to conduct future trade. This objective would be frustrated if instruments setting out rules or norms inconsistent with a Member’s obligations could not be brought before a panel once they have been adopted and irrespective of any particular instance of application of such rules or norms.<sup>11</sup>

16. In Australia’s view, as an act that can be directly attributable to the Executive of a WTO Member, the letter can be challenged in WTO dispute settlement proceedings.
17. Australia, contrary to the suggestion included in footnote 153 of the US submission, does not consider that the Vilsack Letter is of the same status as an “utterance by a government official”. The Vilsack Letter is an official document that sets out in detail the official position of the US Department of Agriculture as mandated by the Secretary of the Department and is characterised by the Secretary as representing the will of the US Congress.
18. As such, Australia considers that the Vilsack Letter is a measure for the purposes of dispute settlement under the DSU.

### III. THE AGREEMENT ON TECHNICAL BARRIERS TO TRADE

19. Consistent with the Appellate Body’s statement in *EC – Bananas III*, Australia understands that the correct order of examination of the COOL measure begins with an examination under the TBT Agreement which deals “specifically and in detail” with labelling regulations, and then with any alleged inconsistency under the more general agreement, GATT 1994.<sup>12</sup>
20. Australia recalls the observations of the Appellate Body in *EC – Asbestos*:

We observe that, although the TBT Agreement is intended to “further the objectives of GATT 1994”, it does so through a specialized legal regime that applies solely to a limited class of measures. For these measures, the TBT Agreement imposes obligations on Members that seem to be *different* from, and *additional* to, the obligations imposed on Members under the GATT 1994.<sup>13</sup>

21. In Australia’s view, the TBT Agreement in applying to “a limited class of measures”, in this case technical regulations governing country of origin, goes beyond the obligations under the GATT 1994. This understanding is consistent with the view taken by the panel in *EC – Trademarks and Geographical Indications (Australia)* that

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<sup>11</sup> Appellate Body Report, US – Corrosion-Resistant Steel Sunset Review, para 82.

<sup>12</sup> Appellate Body Report, EC – Bananas III, para 204 cited in Panel Report, EC – Sardines, para 7.15-7.19.

<sup>13</sup> Appellate Body Report, EC – Asbestos, para 80.

the ‘[t]he Preamble to the TBT Agreement expressly sets out the desire “to further the objectives of GATT 1994”.’<sup>14</sup>

22. The Preamble which informs the application of the TBT Agreement provisions<sup>15</sup> also establishes that a WTO Member may adopt technical regulations “at the levels it considers appropriate” where “necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices” (sixth paragraph). This ability to do so is:

... subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement.<sup>16</sup>

**A. A TECHNICAL REGULATION**

23. Whether a particular measure is a “technical regulation” is examined according to the definition of a technical regulation as set out in Annex 1 of the TBT Agreement:

Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

24. Australia agrees with Canada and Mexico that the COOL measure must meet the three criteria identified by the Appellate Body in *EC – Asbestos*, to fall within the definition of a “technical regulation” under the TBT Agreement:

- (a) a document must apply to an identifiable product or group of products;
- (b) the document must lay down one or more characteristics of the product (or their related processes and production methods); and
- (c) compliance with the product characteristics must be mandatory.<sup>17</sup>

25. As the COOL measure clearly identifies that the labelling requirement applies to named “covered commodities” (defined to include ground beef, lamb, chicken, goat and pork as well as muscle cuts of beef, lamb, chicken, goat and pork but not

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<sup>14</sup> Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para 7.464.

<sup>15</sup> See Appellate Body Report, *US – Shrimp*, para 129 regarding the effect of a preamble.

<sup>16</sup> TBT Agreement, sixth preambular paragraph.

<sup>17</sup> Appellate Body Report, *EC – Asbestos*, paras 66-70, cited also in Appellate Body Report, *EC – Sardines*, para 176. See Canada’s First Written Submission, paras 71-74 and Mexico’s First Written Submission, paras 238-260.

processed food items<sup>18</sup> nor food prepared or served at a food service establishment)<sup>19</sup>  
Australia submits that the COOL measure meets the first criterion.

26. With respect to “product characteristics”, under the 2009 Final Rule the label for covered commodities must include country of origin. Under § 65.400(a) of the Rule “[c]ountry of origin declarations can either be in the form of a placard, sign, label, sticker, band, twist tie, pin tag, or other format that allows consumers to identify the country of origin.” As the definition of a technical regulation expressly includes “labelling requirements”,<sup>20</sup> Australia submits that the COOL measure meets the second criterion.<sup>21</sup>
27. The third requirement of a technical regulation is that it is mandatory; it “must...regulate the “characteristics” of products in a binding or compulsory fashion” such that the regulation has “the effect of prescribing or imposing one or more “characteristics”.”<sup>22</sup>
28. As the COOL measure (specifically the Final Rule) is expressly identified as a mandatory rule which stipulates that retailers are to identify the country of origin on labels for “covered commodities” and includes enforcement procedures and penalties for non-compliance, Australia submits it is of a binding or compulsory character and thus satisfies the third criterion.<sup>23</sup> Importers, slaughterhouse facilities, suppliers, retailers and any other person “engaged in the business of supplying a covered commodity to a retailer, whether directly or indirectly (i.e. including but not limited to growers, distributors, handlers, packers, and processors)”<sup>24</sup> are subject to penalties for non-compliance with the COOL measure.
29. Australia notes that Mexico directly addresses the Vilsack Letter as a mandatory element of the COOL measure.<sup>25</sup> The letter asks that industry extend country of origin labelling to processed meats as well as by identifying the country where each production step occurs. It also asks that industry reduce the 60 day inventory allowance period for ground meat to 10 days. The United States challenges Mexico’s

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<sup>18</sup> 2009 Final Rule, 74 Fed Reg 2658 (2009) § 65.300(c). “Processed food” is defined in § 65.220.

<sup>19</sup> 2009 Final Rule, 74 Fed Reg 2658 (2009) § 65.300(b). “Food service establishments” is defined in § 65.135.

<sup>20</sup> Annex 1.1 of the TBT Agreement.

<sup>21</sup> With reference also to the Panel Report in EC – Trademarks and Geographical Indications (Australia), para 7.449: “The issue is not whether the content of the label refers to a product characteristic: the label on a product is a product characteristic.” The Panel went on to state that “[i]n any event, [the EC GI requirement]...that the country of origin be clearly and visibly indicated on the label of a product in order to provide a means of identification” is “a means of identification” that is “itself, a product characteristic.”: para 7.450, with reference to the Appellate Body Report, EC – Asbestos, para 67 and EC – Sardines, para 191.

<sup>22</sup> Appellate Body Report, EC – Asbestos, para 68; cited in EC-Sardines at para 7.29.

<sup>23</sup> The United States also acknowledged the mandatory nature of the technical regulations contained in 7 CFR 65 in its notification of the measure to the TBT Committee on 26 June 2007 and through four addenda, the last item of which was tabled on 21 April 2009: G/TBT/N/USA/281, G/TBT/USA/281/Add.1, G/TBT/N/USA/281/Add.2, G/TBT/N/USA/281/Add.3, and G/TBT/N/USA/281/Add.4.

<sup>24</sup> 2009 Final Rule, 74 Fed Reg 2658 (2009) § 65.500(b)(3); see also § 65.500(a)(2) (suppliers and retailers); § 65.500(b)(1) (suppliers); § 65.500(c) (importers); § 65.500(c)(4) (retailers).

<sup>25</sup> Canada’s First Written Submission, para 30; Mexico’s First Written Submission, paras 251-259.

characterisation of the letter. The United States refers to the “voluntary” nature of each of these proposals, relies on the use of the word “voluntary”, and notes the absence of any enforcement mechanism and of any evidence demonstrating industry compliance.<sup>26</sup>

30. However, it may be that none of the factors set out by the United States in support of its argument that the Vilsack Letter is not a technical regulation will necessarily be determinative of whether the Vilsack Letter is “binding or compulsory” or determinative of whether compliance with the Vilsack Letter is “mandatory” especially as other aspects of the letter appear to prescribe action that should be taken by industry. For example, the setting of a date for implementation (“after the effective date of the final rule”) suggests that the proposals come into force at the same time as the Final Rule and the reference to implementing “the intent of Congress” makes clear that only the implementation of the measures set out in the letter will accurately reflect the will of the US Congress.
31. In Australia’s view, Mexico is correct in asserting that how the US Department of Agriculture characterises the Vilsack Letter should not be determinative of its character.<sup>27</sup> It may be that the critical question for examination by the Panel is whether industry views this letter as mandating action.

#### **B. ARTICLE 2.1: NATIONAL TREATMENT**

32. Article 2.1 of the TBT Agreement provides:

Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.

33. There is limited guidance from WTO Panel and Appellate Body Reports on the application of Article 2.1 of the TBT Agreement. However, the panel in *EC – Trademarks and Geographical Indications (Australia)* noted the similarity in the terms used in Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994.<sup>28</sup> The approach to national treatment taken under GATT Article III:4 was also recognised by the Appellate Body in *US – Section 211 Appropriations Act*<sup>29</sup> as “useful” in interpreting the national treatment obligation in the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agreement).

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<sup>26</sup> US’ First Written Submission, paras 134-136.

<sup>27</sup> Mexico’s First Written Submission, para 254.

<sup>28</sup> EC – Trademarks and Geographical Indications (Australia), para 7.464.

<sup>29</sup> Appellate Body Report, US – Section 211 Appropriations Act, para 242: “As we see it, the national treatment obligation is a fundamental principle underlying the *TRIPS Agreement*, just as it has been in what is now the GATT 1994. The Panel was correct in concluding that, as the language of Article 3.1 of the *TRIPS Agreement*, in particular, is similar to that of Article III:4 of the GATT 1994, the jurisprudence on Article III:4 of the GATT 1994 may be useful in interpreting the national treatment obligation in the *TRIPS Agreement*.”

34. It has been noted more generally, in the GATT context, that the words “no less favourable” treatment “are to be found throughout the General Agreement and later agreements negotiated in the GATT framework as an expression of the underlying principle of equality of treatment of imported products as compared to the treatment either to other foreign products, under the most favoured nation standard, or to domestic products, under the national treatment standard of Article III.”<sup>30</sup> Australia considers that this principle of equality of treatment should inform how Article 2.1 of the TBT Agreement is applied.
35. Australia therefore concurs with Canada and Mexico, that the examination of national treatment under GATT Article III:4 with respect to “like product” and “less favourable treatment” would assist in any analysis of the application of Article 2.1 of the TBT Agreement.<sup>31</sup> Australia notes that the United States also supports a reading of “less favourable treatment” that may draw upon the GATT Article III context.<sup>32</sup>

### 1. Like products

36. Australia agrees with Canada and Mexico that it is appropriate that the criteria used to guide an analysis of the “like product” requirement in GATT III:4 should also be used to guide an analysis of the “like product” requirement in Article 2.1 of the TBT Agreement.<sup>33</sup> As with the analysis under Article III:4, ‘a determination of “likeness” under Article 2.1 of the TBT Agreement is fundamentally a determination about the nature and extent of a competitive relationship between and among products.’<sup>34</sup>
37. Australia notes that although the United States refers to “like product” as forming part of the Article 2.1 enquiry, it does not set out any means for determining “like product”.<sup>35</sup> Later, in its GATT analysis, the United States does adopt the GATT Article III:4 “like product” test and appears to accept this as the appropriate test under Article 2.1 when it states that “[a]s with the case under TBT Article 2.1, Canada and Mexico have not demonstrated that Canadian and Mexican livestock are like products with U.S. livestock...”.<sup>36</sup> However, the United States does not address any of the specific steps in determining “like product” with respect to livestock or muscle cuts or beef trimmings used in ground beef.
38. Consistent with the test for “like product” under GATT Article III:4, in Australia’s view, both Canada and Mexico have clearly established that live cattle, and in the case of Canada, live hogs, are “like products” to US live cattle and hogs.<sup>37</sup>
39. Australia notes that the United States challenges Canada and Mexico’s “like product” analysis on the basis that the subject of both the 2002 COOL Statute, as amended, and

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<sup>30</sup>GATT Panel Report, US – Section 337 of the Tariff Act, para 5.11.

<sup>31</sup> Canada’s First Written Submission, para 78. Mexico’s First Written Submission, paras 266, 268.

<sup>32</sup> US’ First Written Submission, para 149.

<sup>33</sup> Canada’s First Written Submission, para 79-80 and Mexico’s First Written Submission, para 200.

<sup>34</sup> Appellate Body Report, EC – Asbestos, para 99.

<sup>35</sup> US’ First Written Submission, para 138.

<sup>36</sup> US’ First Written Submission, para 281.

<sup>37</sup> Canada’s First Written Submission, paras 81-85 ; Mexico’s First Written Submission, paras 199-205.

the 2009 Final Rule, is meat and not livestock.<sup>38</sup> Australia makes the following points with respect to the US argument.

40. First, Australia disagrees with the US analysis of the phrase “in respect of technical regulations”<sup>39</sup> which appears to be foreshadowed in footnote 166 of the US submission: “the text of TBT Article 2.1 requires the complaining party to establish that such treatment is in respect of the technical regulation.” Australia submits that no panel or Appellate Body has adopted this interpretation. Rather, the phrase “in respect of”, in Australia’s view, means that, where technical regulations are applied by a WTO Member, that Member must ensure no less favourable treatment for “like products” affected by those technical regulations. As the phrase appears at the beginning of the provision, there appears to be no basis on which to narrow its interpretation as proposed by the United States.
41. Second, if the narrow interpretation put forward by the United States were adopted, it would appear to undermine the very purpose of Article 2.1 to ensure non-discrimination between like products arising from the imposition of technical regulations. If the US interpretation were adopted, and the source products, whether livestock, muscle cuts, or beef trimmings used in ground beef, were considered to fall outside the scope of Article 2.1 because they were not the specific subject of the COOL measure, technical regulations concerning country of origin labelling could effectively discriminate against a broad range of source products without breaching the non-discrimination obligation in Article 2.1 – a provision specifically drafted to address discrimination arising through technical regulations. This likelihood would be increased for products which underwent a number of steps before an end product was sold to a consumer. For example, Australia notes that the approach taken in the Vilsack Letter to labelling processed meats would, if implemented, require tracing of all imported product used in processed meats but the requirements that governed the ascertaining of origin for each individual product would not be subject to Article 2.1 of the TBT Agreement. Only the end product could be considered a like product under the US interpretation. In Australia’s view, such a reading of Article 2.1 would undermine its application.
42. With respect to country of origin labelling requirements, it is Australia’s view that Article 2.1 of the TBT Agreement should be applied so as to encompass “like products” that, at whatever point of the supply process, are required to be identified for the purposes of labelling the end product. Applied to the COOL measure, all early stage products, whether livestock, muscle cuts or beef trimmings used in ground beef, would be subject to Article 2.1. Australia cautions against an interpretation of Article 2.1 which would allow countries to regulate for country of origin purposes and through specific country of origin laws any product that is imported, then only to claim that such regulation falls outside the scope of Article 2.1 because it is only the final product that must physically display the label.
43. Third, Australia notes that the COOL measure, as set out by Canada and Mexico, extends to beef trimmings used in the processing of ground beef. Australia refers to

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<sup>38</sup> US’ First Written Submission, para 196.

<sup>39</sup> US’ First Written Submission, paras 197-198.

its interest, outlined earlier at paragraph 4, in the export of beef trimmings and notes that under the COOL measure, ground beef, along with other ground meats, is subject to very particular COOL requirements under § 65.300(h) of the 2009 Final Rule.

44. Australia submits that imported beef trimmings used for processing or grinding into ground beef in the United States have the same properties, nature and quality as the US product. Imported beef trimmings are manufacturing grade beef and are comparable with US beef trimmings. There is often some variance in the fat content of beef trimmings with imported product typically being leaner than some of the domestic product but US processors, as consumers of the product, interchangeably source lean product both from foreign and domestic sources. Imported beef trimmings have the same end uses as US beef trimmings, as both are processed into ground beef.<sup>40</sup> Finally, Australia notes that imported beef trimmings and US beef trimmings that are processed into ground beef are classified under the same subheading 0201 and 0202 under the Harmonised System of Tariff Classification. Thus, for the purposes of this analysis, imported beef trimmings used in ground beef are a “like product” to US domestic beef trimmings used in ground beef and such imported beef trimmings are affected by the COOL measure.

## 2. Treatment no less favourable

45. Australia agrees with the general approach set out by Canada and Mexico that the objective of the “treatment no less favourable” requirement is to provide “equality of opportunities” for imported goods.<sup>41</sup> As part of this analysis, it is necessary to examine whether the COOL measure “modifies the conditions of competition in the relevant market to the detriment of imported products.”<sup>42</sup>
46. Australia also notes the wide scope of the national treatment principle under GATT 1994 with reference to *Japan – Alcoholic Beverages II* where the Appellate Body explained that the principle “protects expectations” of the “equal competitive relationship between imported and domestic products.”<sup>43</sup>
47. In *EC – Trademarks and Geographical Indications (Australia)*, the panel said “that the starting point” for an analysis of Article 2.1 of the TBT Agreement “must be whether the measure at issue accords any difference in treatment”<sup>44</sup> but this alone will not be conclusive of whether there is an inconsistency with the national treatment

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<sup>40</sup> Australia notes the Appellate Body’s statement in *EC – Asbestos* at para 117, that ‘evidence about...the extent to which consumers are – or would be – willing to choose one product instead of another to perform [the same, or similar] end-uses, is highly relevant evidence in assessing the “likeness” of products’.

<sup>41</sup> US – Section 337 of the Tariff Act, para 5.11: see Canada’s First Written Submission, paras 87 and 88 and Mexico’s First Written Submission, para 217, with reference to the Appellate Body Report, *Korea – Various Measures on Beef*, para 137 and Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para 93.

<sup>42</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para 137.

<sup>43</sup> Appellate Body Report, *Japan – Alcoholic Beverages II*, pg 16, citing GATT Panel Report, *US – Superfund*, para. 5.1.9.

<sup>44</sup> *EC – Trademarks and Geographical Indications (Australia)*, para 7.464.

obligation in Article 2.1.<sup>45</sup> Drawing on analysis under Article III:4 of GATT 1994, the next step is to establish whether:

...such differences... do or do not accord to imported products less favourable treatment. Given that the underlying objective is to guarantee equality of treatment, it is incumbent on the contracting party applying differential treatment to show that, in spite of such differences, the no less favourable treatment standard of Article III is met.<sup>46</sup>

48. On its face, the COOL measure provides for formally identical treatment of imported product as the same requirements to identify the origin of the product apply equally to domestic product. However, Australia submits that the COOL measure has the potential to accord different treatment to imported product that amounts to less favourable treatment within the meaning of Article 2.1 of the TBT Agreement because it results in additional operational costs on imported product that are greater than the costs it imposes when domestic product is used.<sup>47</sup>

49. Australia uses the COOL requirements applicable to ground beef as an example of such *de facto* discrimination. Under the COOL measure, ground meat must be labelled with the country of origin, or all possible countries of origin in accordance with the 60 day inventory allowance.<sup>48</sup> As the ground beef market is currently structured, it is more likely for US beef trimmings used in ground beef to be present in the inventory of a production plant at all times compared to imported beef trimmings from any one country. As described by the US Department of Agriculture:

...the common practice is to purchase lean beef trimmings from foreign countries and mix those with domestic beef trimmings before grinding into a final product. Often those imported beef trimmings are not purchased with any particular regard to the foreign country, but the cost of the trimmings due to current exchange rates or availability due to production output capacity of that foreign market at any particular time. Because of that, over a period of time, imported beef trimmings being utilized in the manufacture of ground beef can and does change between various foreign countries.<sup>49</sup>

50. This description of current practice accepts that the effect of the regulations will be largely borne by imported beef trimmings as their use “can and does change”. The labelling must be altered every time there is a new source of imported beef trimmings, and when a previous source of imported beef trimmings is depleted after a 60 day

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<sup>45</sup> EC – Trademarks and Geographical Indications (Australia), para 7.469.

<sup>46</sup> US – Section 337 of the Tariff Act, para 5.11.

<sup>47</sup> See Canada’s First Written Submission, para 89 and Mexico’s First Written Submission, para 269 with reference to para 220.

<sup>48</sup> 2009 Final Rule, 74 Fed Reg 2658 (2009) § 65.300(h) “The declaration for ground beef... shall list all countries of origin contained therein or that may be reasonably contained therein. In determining what is considered reasonable, when a raw material for a specific country is not in a processor’s inventory for more than 60 days, that country shall no longer be included as a possible country of origin.”

<sup>49</sup> 2009 Final Rule, 74 Fed Reg 2658 (2009) pg. 2671.

period.<sup>50</sup> No change at all is required to labelling with respect to domestically sourced product which will be common to all or nearly all ground beef product. In Australia's view, this aspect of the COOL measure could distort the market in favour of domestic product and is likely to result in discrimination against imported product.

51. Australia does not object to identifying imported product on labels and does not agree with Mexico's claim that country of origin labelling measures "are inherently protectionist and discriminatory".<sup>51</sup> As the United States submits, "there is nothing about country of origin labelling that is inherently unfavourable to imported products."<sup>52</sup> At times it may even favour imported product.
52. However, Australia does agree with Mexico's claim that the COOL measure discriminates "by virtue of its design, structure and application".<sup>53</sup> Australia's concerns focus on the higher cost burdens that the requirements place on the use of imported product throughout the chain of supply.
53. Ultimately, the COOL measure could have a detrimental effect on the "downstream demand from retailers", who are responsible for informing the customer at the point of sale of the country of origin.<sup>54</sup> It is possible that the COOL measure, as Canada states, has already "generated risks" that make it commercially unviable for such companies to opt to use imported product.<sup>55</sup>
54. Should the Vilsack Letter also be found to be a "technical regulation", Australia agrees with Canada's assessment that the effect of the labelling practices in the letter, if implemented, "would severely curtail the ability to commingle meat from various countries of origin."<sup>56</sup> Both production step labelling and extending coverage to processed meats would impose higher costs where imported product is used. Australia notes that the United States in its submission accepts that any extension to processed meats "could significantly increase compliance costs and might even be unworkable in certain instances"<sup>57</sup> thus explaining the reasons why the US Congress chose to exempt such products.<sup>58</sup> With respect to the ground meat inventory allowance, a reduction to *10 days* as set out in the Vilsack Letter from the 60 day requirement contained in the 2009 Final Rule would reduce the minimal flexibility currently available to processors. There would be a corresponding increase in compliance costs relating to traceability, record keeping and packaging or other forms of labelling as labels would have to be changed more frequently. Under a 10 day rule, it would be likely that processors would have a clear incentive to reduce the use of imported beef trimmings or cease that use altogether.

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<sup>50</sup> 2009 Final Rule, 74 Fed Reg 2658 (2009) pg 2671: "It also must be stressed that if a country of origin is utilised as a raw material source in the production of ground beef, it must be listed on the label. The 60-day inventory allowance speaks only to when countries may no longer be listed."

<sup>51</sup> Mexico's First Written Submission, para 5.

<sup>52</sup> US' First Written Submission para 141.

<sup>53</sup> Mexico's First Written Submission, para 5.

<sup>54</sup> Canada's First Written Submission, paras 145-146, 151-152.

<sup>55</sup> Canada's First Written Submission, para 139.

<sup>56</sup> Canada's First Written Submission, para 28.

<sup>57</sup> US' First Written Submission, para 221.

<sup>58</sup> US' First Written Submission, para 221.

**C. ARTICLE 2.2: MORE TRADE-RESTRICTIVE THAN NECESSARY TO FULFIL A  
LEGITIMATE OBJECTIVE**

55. Article 2.2 provides:

Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products.

56. In Australia's view, Article 2.2 of the TBT Agreement grants Members the right to adopt technical regulations for the purpose of fulfilling legitimate objectives. The effect of this is that under the TBT Agreement it is the complainant who must establish a *prima facie* case of inconsistency with Article 2.2.<sup>59</sup> This may be contrasted to Article XX of GATT 1994 (specifically in regard to Article XX(a), (b) and (d)), which includes similar language to Article 2.2 of the TBT Agreement but which operates as an exception with the respondent bearing the burden of proof. Australia considers that Article 2.2 in this way imposes "different" and "additional" obligations consistent with the position adopted by the Appellate Body in *EC – Asbestos*.<sup>60</sup>

57. Australia submits that the correct analysis called for under Article 2.2 involves examination of:

- (a) whether the objective of the measure at issue is a 'legitimate objective';
- (a) whether the measure at issue is 'more trade restrictive than necessary to fulfil a legitimate objective', which in turn involves an assessment of:
  - whether the measure is trade restrictive;
  - whether the measure is 'to fulfil' a legitimate objective; and
  - whether there are other reasonably available alternatives that may be less trade restrictive while still fulfilling the legitimate objective at the level of protection the Member considers appropriate; and

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<sup>59</sup> Drawing on the Appellate Body's statements in *EC – Sardines* regarding the burden of proof under Article 2.4 of the TBT Agreement, paras 275 and 282.

<sup>60</sup> Appellate Body Report, *EC – Asbestos*, para 80.

(b) the risks non-fulfilment [of the legitimate objective] would create.

**1. Establishing the “legitimate objective”**

58. Australia considers that the correct approach to determining the legitimate objective of a measure under Article 2.2 of the TBT Agreement is to first establish the objective as put forward by the United States and then to consider its legitimacy given the textual context of Article 2.2 with reference also to the Preamble of the TBT Agreement.
59. In *EC – Sardines*, the Appellate Body, in the context of Article 2.4 of the TBT Agreement, found that it was incumbent upon the complainant to obtain information from the respondent to establish the legitimate objective of the measure in question.<sup>61</sup> The Appellate Body noted that there were various means available to a complainant for this purpose but essentially it is for the respondent to determine those objectives and for the complainant to accept the respondent’s “stated objectives”<sup>62</sup> in “good faith”.<sup>63</sup>

The TBT Agreement acknowledges the right of every WTO Member to establish for itself the objectives of its technical regulations while affording every other Member adequate opportunities to obtain information about these objectives.<sup>64</sup>

60. The Appellate Body also stated in *EC - Sardines*, with respect to Article 2.4 of the TBT Agreement, and in an approach which would apply equally to Article 2.2, that it is necessary to examine and determine the legitimacy of the objectives of the measure.<sup>65</sup>
61. In accordance with the Appellate Body’s approach, Australia submits that an examination of “legitimacy” is confined to an examination of whether the “stated objective”, as put forward by the respondent, is legitimate within the meaning of Article 2.2. It does not extend to an examination of whether the “stated objective” might not be the actual objective of the measure. The “stated objective” of the measure must be accepted in “good faith”. For this reason only, Australia considers that at this stage of the enquiry, it is not required of the United States to justify the “design, architecture and revealing structure”<sup>66</sup> of the COOL measure.
62. “Legitimate” means “[c]onformable to, sanctioned or authorized by, law or principle; lawful; justifiable; proper.”<sup>67</sup> In the context of the TBT Agreement, including Article 2.2, a “legitimate objective” must therefore be one which is “justifiable” and “proper” given the general purposes of the TBT Agreement set out in its Preamble, importantly including not to “create unnecessary obstacles to international trade”. This purpose is

<sup>61</sup> Appellate Body Report, *EC – Sardines*, paras 275-280.

<sup>62</sup> Appellate Body Report, *EC – Sardines*, para 289.

<sup>63</sup> Appellate Body Report, *EC – Sardines*, para 278.

<sup>64</sup> Appellate Body Report, *EC – Sardines*, para 276.

<sup>65</sup> Appellate Body Report, *EC – Sardines*, para 286.

<sup>66</sup> US’ First Written Submission, para 206.

<sup>67</sup> Shorter Oxford English Dictionary, Volume 1, Oxford University Press, Sixth Edition, 2007, p.1577.

reaffirmed in the specific purpose identified in the first sentence of Article 2.2: “to ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade.”

63. The TBT Agreement includes guidance on determining what might be considered a legitimate objective. The text of Article 2.2 provides that “legitimate objectives” include, among other things, the prevention of deceptive practices and the protection of human health and safety. Article 2.2 does not expressly restrict what might be “legitimate objectives”; the list is not exclusive but may inform what might be considered a legitimate objective.
64. The United States has put forward as the legitimate objective of the COOL measure the provision of consumer information so as to minimise consumer confusion.<sup>68</sup> This objective was also set out in the Federal Regulation proclaiming the measure. It states that the measure “is to provide consumers with additional information on which to base their purchasing decisions”<sup>69</sup>; it is not a food safety or traceability program.<sup>70</sup>
65. In the context of the flexibility provided to WTO Members to apply technical regulations for justified reasons, it is Australia’s view that enabling consumers to identify the source of a product would be a legitimate objective. Australia accepts the statement by the United States that this objective is “closely related”<sup>71</sup> to preventing deceptive practices and assists with market transparency and consumer protection. Australia observes that consumer confidence in products is of increasing importance to most consumers.

## **2. Not more trade-restrictive than necessary to fulfil a legitimate objective**

66. Australia agrees with the approach adopted by Canada which the United States supports, that the second sentence of Article 2.2 explains what the first sentence means.<sup>72</sup> The first sentence of Article 2.2 makes clear that it is not limited to how a measure is applied to a product but extends to how technical regulations are “*prepared, adopted or applied*” and whether this takes place “*with a view to or with the effect of creating unnecessary obstacles to international trade.*” (emphasis added) Article 2.2 therefore applies to the development and implementation of technical regulations. The second sentence of Article 2.2 explains that ‘[f]or this purpose, technical regulations shall not be more trade-restrictive than necessary’. In other words, the second sentence of Article 2.2 sets out the conditions technical regulations must meet in order to satisfy the fundamental obligation contained in the first sentence of Article 2.2. Australia therefore submits that the focus of the examination under the second sentence of Article 2.2 must be to assess the extent to which the technical regulation does or could obstruct international trade.

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<sup>68</sup> US’ First Written Submission, para 206. The United States notified the “objective and rationale” as “consumer information” in its amended Notification to the Committee on Technical Barriers to Trade: G/TBT/N/USA/281/Add.1, 7 August 2008.

<sup>69</sup> 2009 Final Rule, 74 Fed Reg 2658 (2009) p.2693.

<sup>70</sup> 2009 Final Rule, 74 Fed Reg 2658 (2009) p.2679.

<sup>71</sup> US’ First Written Submission, para 229.

<sup>72</sup> Canada’s First Written Submission, para 157; US’ First Written Submission, para 202.

(a) “to fulfil a legitimate objective”

67. Australia considers a relevant issue for the Panel to decide in the interpretation of Article 2.2 of the TBT Agreement is whether the measure fulfils the stated objective in the context of Article 2.2. Australia notes that this language, “to fulfil”, is not found in Article XX of GATT 1994 (where the applicable test concerns the material contribution the measure makes to the objective).
68. The ordinary meaning of “fulfil” is “[b]ring to consummation; carry out, perform, do (something prescribed)”.<sup>73</sup> Australia therefore considers that Article 2.2, in requiring that a challenged measure must be necessary “to fulfil a legitimate objective”, means that the measure must fulfil or at least have the capacity to fulfil, the legitimate objective. The relevant question in this dispute is whether the COOL measure does carry out, or have the capacity to do so, its stated objective of providing accurate additional consumer information?
69. Where a complainant can demonstrate that a measure does not or could not achieve its stated objective, it may be possible to establish that the measure does not meet the terms of the second sentence of Article 2.2 and therefore the measure would amount to an unnecessary obstacle to trade within the meaning of the first sentence of Article 2.2.
70. Australia notes that the United States has addressed that part of the enquiry which involves a consideration of whether the COOL measure fulfils the legitimate objective.<sup>74</sup> However, Australia considers that Canada has identified aspects of the COOL measure that do not appear to achieve this stated objective, particularly with respect to the labelling of ground beef.<sup>75</sup> This is so regardless of any flexibility that may have been included in the COOL measure to accommodate concerns about the trade-restrictiveness of the measure. Australia agrees with Canada that, in some respects, the COOL measure can result in misleading and inaccurate information, the labelling of ground beef providing the most obvious example of such.

(b) *trade restrictive*

71. Applying the customary rules of treaty interpretation under Articles 31 and 32 of the Vienna Convention, the ordinary meaning of the word “restrictive” is “having the nature or effect of a restriction; imposing a restriction”.<sup>76</sup> “Restriction” means “[a] thing which restricts someone or something, a limitation on action, a limiting condition or regulation.”<sup>77</sup> As noted by Canada and Mexico, it has been found that GATT disciplines on the use of restrictions are meant to protect not “trade flows”, but rather the “competitive opportunities of imported product”.<sup>78</sup> Australia therefore agrees with Canada and Mexico that trade restrictive measures include those that

<sup>73</sup> Shorter Oxford English Dictionary, Volume 1, Oxford University Press, Sixth Edition, 2007, p.1053.

<sup>74</sup> US’ First Written Submission, paras 234-241.

<sup>75</sup> Canada’s First Written Submission, paras 178-180.

<sup>76</sup> Shorter Oxford English Dictionary, Volume 2, Oxford University Press, Sixth Edition, 2007, p.2553.

<sup>77</sup> Shorter Oxford English Dictionary, Volume 2, Oxford University Press, Sixth Edition, 2007, p.2553.

<sup>78</sup> Canada’s First Written Submission, para 184 and Mexico’s First Written Submission, para 306 citing Panel Report, EC - Bananas III (Article 21.5 – Ecuador II), at para 7.330 and Panel Report, EC – Bananas III (Article 21.5 – US), at para 7.677.

impose any form of limitation of imports, discriminate against imports or deny competitive opportunities to imported product.<sup>79</sup> In Australia’s view, the COOL measure does limit trade by imposing recordkeeping and segregation costs which are likely to be greater when imported product is used and which impact on “the competitive opportunities of imported product”. In January 2004 the US Department of Agriculture’s Economic Research Service highlighted that “if mandatory COOL makes it difficult for firms to prove they have not comingled imports and domestic commodities, it may discourage imports to avoid segregation costs”.<sup>80</sup> Australia therefore submits that the COOL measure is “trade restrictive” within the meaning of Article 2.2 of the TBT Agreement.

(c) “more trade restrictive than necessary”

72. Given this conclusion, Australia notes that Article 2.2 of the TBT Agreement makes it a positive requirement that technical regulations be no more trade restrictive than “necessary”. The ordinary meaning of the word “necessary” is “[t]hat cannot be dispensed with or done without; requisite, essential, needful”.<sup>81</sup>
73. Australia notes Canada’s and Mexico’s reliance on the GATT Article XX interpretation of “necessary” to interpret the phrase “shall not be more trade restrictive than necessary to fulfil a legitimate objective” in Article 2.2 of the TBT Agreement<sup>82</sup> and offers the following comments on this approach.
74. 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”. As Mexico notes, Article 2.2 also calls for a similar “weighing and balancing” of these various elements contemplated in the weighing and balancing of various factors in a “necessity” analysis conducted under GATT Article XX.<sup>83</sup> Australia agrees with Mexico that applied to the Article 2.2 context, establishing the necessity of the trade-restrictive elements of MCOOL may require *inter alia* consideration of the extent to which the trade-restrictive elements make a contribution to the legitimate objective or contribute to the realisation of the end pursued: the greater the contribution the more easily the trade-restrictive elements of the measure might be considered to be “necessary.”<sup>84</sup> In its GATT Article XX analysis, the Appellate Body in *Korea – Various Measures on Beef* specifically addressed the element of trade-restrictiveness recalling that the last paragraph of the Preamble of GATT 1994 refers “to the elimination of discriminatory treatment in international commerce”<sup>85</sup> and concluded that:

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<sup>79</sup> Canada’s First Written Submission, paras 184-185; Mexico’s First Written Submission, paras 306-307.

<sup>80</sup> USDA Electronic Outlook Report from the Economic Research Service ‘Country-of-Origin Labeling: Theory and Observation’, WRS-04-02, January 2004. p.11.

<sup>81</sup> Shorter Oxford English Dictionary, Volume 2, Oxford University Press, Sixth Edition, 2007, p.1901.

<sup>82</sup> Canada’s First Written Submission, para 187; Mexico’s First Written Submission, para 308.

<sup>83</sup> Mexico’s First Written Submission, para 308 with reference to the Appellate Body’s findings in *Korea – Various Measures on Beef*, para 164.

<sup>84</sup> Appellate Body Report, *Korea – Various Measures on Beef*, paras 160-163.

<sup>85</sup> Appellate Body Report, *Korea – Various Measures on Beef*, footnote 105.

A measure with a relatively slight impact upon imported products might more easily be considered as “necessary” than a measure with intense or broader restrictive effects.<sup>86</sup>

75. Australia notes the inclusion of language drawn from GATT Article XX in the sixth preambular paragraph of the TBT Agreement and considers that a GATT Article XX approach is consistent with the purposes of the TBT Agreement as identified in the Preamble: to “further the objectives of GATT 1994”.<sup>87</sup>
76. Given this aim to further GATT objectives, Australia also considers that the interpretation of similar provisions in other WTO Agreements such as Article 5.6 of the SPS Agreement may be of less relevance in the context of the TBT Agreement than interpretation of “necessary” under GATT 1994. 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. For these reasons, Australia does not agree with the approach set out by the United States that any reasonably alternative measure must be “significantly” less restrictive to trade.<sup>88</sup> Australia agrees with Mexico that a consideration of whether there are reasonably available alternative measures which may be less trade restrictive while providing an equivalent contribution to the achievement of the measure’s objective is relevant to consideration of whether the measure at issue is “necessary” within the meaning of Article 2.2 of the TBT Agreement.<sup>89</sup>
77. In this respect, Australia draws attention to the Appellate Body’s statement in *China – Publications and Audiovisual Products*:
- ...while in principle a panel must assess the restrictive effect of a measure on international commerce, this test must be applied in the light of the specific obligation of the covered agreements that the respective measure infringes.<sup>90</sup>
78. Australia agrees with Canada that the technical and economic feasibility of any alternative measure should form part of the analysis of whether a reasonably available alternative exists<sup>91</sup> (see paragraphs 79-86 below).

(d) *reasonably available alternatives*

79. In Australia’s view, with respect to ground beef, the COOL measure does not appear to fulfil its objective and further, may be more trade restrictive than necessary given the availability of other alternatives. The United States maintains that the 60 day inventory allowance contained in the 2009 Final Rule is least trade-restrictive because

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<sup>86</sup> Appellate Body Report, Korea – Various Measures on Beef, para 163.

<sup>87</sup> TBT Agreement, second preambular paragraph.

<sup>88</sup> US’ First Written Submission, paras 247-249.

<sup>89</sup> Mexico’s First Written Submission, para 310.

<sup>90</sup> Appellate Body Report, China – Publications and Audiovisual Products, para 306.

<sup>91</sup> Canada’s First Written Submission, para 190. Australia notes the Panel’s comments in US – Gambling, para 308.

it takes into account the fact that beef processors have product from a range of countries in their inventories at any one time and all that the rule does is provide “an allowance for the Agency’s enforcement purposes for when the Agency would deem ground meat products as no longer accurately labeled.”<sup>92</sup> In other words, it provides processors with some flexibility so as to minimise the impact of the Rule’s requirements on their business operations.

80. The difficulty with this approach, however, is that it results in inaccuracy. Australia appreciates that the US Congress and the US Department of Agriculture may have sought to choose an approach that balanced the provision of accurate consumer information and cost burdens on foreign and domestic industries<sup>93</sup> but is of the view that this balance has not been achieved.
81. One possible alternative would be to require that labels identify “domestic” or “imported” product (without specifying the particular country of origin). This approach would provide the consumer with adequate information as to whether the source of the product was domestic or foreign. This approach would also be more accurate than the COOL measure because there would be no risk at all that the name of a source country was used when product from that country was not in the final product. At present, it is possible that the name of a source country may appear on the labelling when no product from that country is in the final product. As Canada notes, the present requirements for labelling of ground beef could mislead the consumer as to the source of product used in the ground beef:<sup>94</sup> “Of course, it is quite possible that such a product would not contain any meat from the Canadian-origin animals, even though the label could say it did.”<sup>95</sup>
82. This greater flexibility would enable processors to use imported product without being required to segregate that product by each particular country of origin and adjust their recordkeeping practices to avoid financial penalties under the COOL measure. Adopting this approach would reduce associated segregation and recordkeeping costs. Notably, processors would always have the option of voluntarily identifying specific countries of origin if consumer demand justified additional segregation and recordkeeping costs.
83. Thus, Australia submits that there exists a less trade-restrictive reasonably available alternative to the requirements contained in the COOL measure concerning ground beef.

(e) *“taking account of the risks non-fulfilment would create”*

84. The nature of the legitimate objective needs to be examined (or further examined) at this point as it is relevant to the question of determining risks associated with non-fulfilment. If the risks associated with non-fulfilment of that objective would be high, then the measure may still be justified regardless of its trade-restrictiveness.

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<sup>92</sup> 2009 Final Rule, 74 Fed Reg 2658 (2009), p.2671.

<sup>93</sup> US’ First Written Submission, para 239 with reference to US comments on the difficult decisions made by the US Congress and USDA on the labelling of muscle cuts and ground beef.

<sup>94</sup> Canada’s First Written Submission, paras 178-180.

<sup>95</sup> Canada’s First Written Submission, para 12(d).

85. This criteria is not expressly stated in the GATT Article XX test although it could be said to be incorporated into the “necessity” test adopted by the Appellate Body which “involves ‘weighing and balancing’ a number of factors relating both to the measure sought to be justified as ‘necessary’ and to possible alternative measures that may be reasonably available to the responding Member to achieve its desired objective.”<sup>96</sup>
86. Australia does not question the mandatory nature of the COOL measure, in contrast to Canada and Mexico,<sup>97</sup> but rather its overly trade-restrictive nature. As noted above, other less trade-restrictive reasonably available alternatives exist. If the alternative of marking product with ‘imported’ and ‘domestic’ were adopted, in Australia’s view, this would achieve greater accuracy with respect to the labelling of ground beef and be less trade-restrictive than the existing requirements under the COOL measure. The objectives of the COOL measure would still be met: accurate, additional information would be available to consumers. Such an alternative would not create any risk of non-fulfilment of the objective. It would possibly fulfil the objective more accurately.
87. In summary, Australia considers that the trade-restrictive aspects of the COOL measure are not necessary to fulfil the stated objective of providing consumer information and that the objective of providing consumer information could be fulfilled by the less trade-restrictive alternative for ground beef outlined above.

#### **D. ARTICLE 2.4: RELEVANT INTERNATIONAL STANDARDS**

88. Article 2.4 of the TBT Agreement provides:

Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.

89. A “standard” is defined as in Annex 1.2<sup>98</sup> with reference to an Explanatory Note.<sup>99</sup>

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<sup>96</sup> Appellate Body Report, China – Publications and Audiovisual Products, para 239 with reference to Appellate Body Report, Brazil – Retreaded Tyres, para 178, Appellate Body Report, US – Gambling, para 306-308 and Appellate Body Report, Korea – Various Measures on Beef, para 166.

<sup>97</sup> See Canada’s First Written Submission paras 192-195; Mexico’s First Written Submission, para 316.

<sup>98</sup> Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

<sup>99</sup> The terms as defined in ISO/IEC Guide 2 cover products processes and services. This Agreement deals only with technical regulations, standards and conformity assessment procedures related to products or processes and production methods. Standards as defined by ISO/IEC Guide 2 may be mandatory or voluntary. For the purpose of this Agreement standards are defined as voluntary and technical regulations as mandatory documents. Standards prepared by the international standardization community are based on consensus. This Agreement covers also documents that are not based on consensus.

90. As under Articles 2.1 and 2.2 of the TBT Agreement, the complainants bear the burden of proof under Article 2.4 which includes establishing that the relevant standard has not been used “as a basis for” the measure, as well as establishing that the relevant standard is effective and appropriate to fulfil the “legitimate objectives” pursued by the respondent through the measure.<sup>100</sup>

**1. A relevant standard**

91. Mexico identifies the *Codex General Standard for the Labelling of Prepackaged Foods* (“CODEX-STAN 1-1985”) prepared by the Codex Commission as a “relevant” international standard upon which the COOL measure should be based.<sup>101</sup> CODEX-STAN 1-1985 applies to prepackaged food and defines “prepackaged” as “packaged or made up in advance in a container, ready for offer to the consumer, or for catering purposes”.
92. In *EC – Sardines*, the Appellate Body concurred with the panel’s finding that “relevant” means “bearing upon or relating to the matter in hand; pertinent”.<sup>102</sup> Australia notes that under the COOL measure some product may be provided in “bulk containers (e.g. display case, shipper, bin, carton, and barrel)”<sup>103</sup> and be labelled with “a placard” or a “sign”<sup>104</sup>. These elements of the COOL measure do not appear to come within the term “prepackaged” as defined in CODEX-STAN 1-1985.<sup>105</sup> As such, CODEX-STAN 1-1985 may not be relevant or have any bearing upon those elements.
93. Australia further notes that the Appellate Body in *EC – Sardines* stated that it was necessary only to examine the “relevant parts” of a standard “that relate to the subject-matter of the challenged prescriptions or requirements.”<sup>106</sup> If considered a “relevant international standard” by the Panel, in Australia’s view the “relevant parts” of CODEX-STAN 1-1985 are the two specific provisions on country of origin labelling of prepackaged foods:
- 4.5.1 The country of origin of the food shall be declared if its omission would mislead or deceive the consumer.
  - 4.5.2 When a food undergoes processing in a second country which changes its nature, the country in which the processing is performed shall be considered to be the country of origin for the purposes of labelling.
94. A further relevant part is one of the overall General Principles of CODEX-STAN 1-1985 which is reflected in Sections 4.5.1 and 4.5.2:

<sup>100</sup> Appellate Body Report, *EC - Sardines*, para 275.

<sup>101</sup> Mexico’s First Written Submission, para 328-331.

<sup>102</sup> Appellate Body Report, *EC - Sardines*, para 229-230 citing Panel Report at para 7.68 quoting Webster’s New World Dictionary (William Collins & World Publishing Co., Inc, 1976) p.1199.

<sup>103</sup> § 65.400(e).

<sup>104</sup> Labelling of a type permitted under § 65.400(a) of the Rule.

<sup>105</sup> See US’ First Written Submission, fn 309 and para 262 where the US asserts that the Codex Standard will not apply or be relevant to all product that are subject to the COOL measure.

<sup>106</sup> Appellate Body Report, *EC – Sardines*, para 250.

3.1 Prepackaged food shall not be described or presented on any label or in any labelling in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character in any respect.

95. Section 7.1 of the standard is also “relevant” in that it provides for the inclusion of other information on labels “provided that it is not in conflict with the mandatory requirements of this standard and those relating to claims and deception given in Section 3 - General Principles.”
96. Consistent with the general principle set out in Section 3.1, Section 4.5.1 mandates that a label must be used where the lack of such information would not just create confusion but would actively “mislead or deceive the consumer.” In Australia’s opinion, it does not mandate the use of a label in other circumstances. As for Section 4.5.2, it is directed only at food which “undergoes processing”.
97. Thus, Australia queries whether the purpose of the CODEX-STAN 1-1985 is relevant or bears upon the COOL measure which is not intended directly to address misleading or deceptive labelling practices though it may compliment such practices.<sup>107</sup> Nor is it intended to cover processed foods. It also does not appear that the country of origin labelling prescribed by the COOL measure is intended to correct any misconceptions resulting from labelling “regarding [a product’s]...*character* in any respect.” Thus, read in the context of General Principle 3.1, it appears that Sections 4.5.1 and 4.5.2 may not be “relevant” to this enquiry under Article 2.4. This understanding appears to be supported by recent developments relating to country of origin under the CODEX-STAN 1-1985.<sup>108</sup> Australia, therefore, does not perceive any conflict between CODEX-STAN 1-1985 and the COOL measure.

## **2. effective and appropriate to fulfil the “legitimate objectives”**

98. In the alternative, should the Panel find that CODEX-STAN 1-1985 is a relevant standard that should have provided the basis for the COOL measure, Australia considers that CODEX-STAN 1-1985 Section 4.5.2 is unlikely to be effective or appropriate in all cases to fulfil the legitimate objective of providing consumer information.

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<sup>107</sup> The Federal Register summary of the Final Rule specifically states that a violation of the US MCOOL Rule may also result in a violation of other Federal rules such as those relating to false and misleading labelling that would also attract a financial penalty: 74 Fed Reg 2658 (2009), pg 2664.

<sup>108</sup> Of note is that the Codex Alimentarius Commission in July 2005 considered whether to undertake new work on country of origin labelling including the European Community’s proposal that “it was desirable to complement the general provision of section 4.5 of the General Standard by specifying circumstances under which the declaration of the country (or place) of origin should be mandatory in order to avoid consumers being misled to a material degree as to the true origin or provenance of the food...”. However, there was no consensus on whether such work should proceed. This EC proposal shows that the scope of section 4.5 in addressing false, misleading or deceptive labelling is not intended to be or sufficient to address the broader need for mandatory labelling of all products so as to identify the correct country of origin. See Report of the Thirty-Third Session of the Codex Committee on Food Labelling, 9-13 May 2005, p.11.

99. With respect to Section 4.5.2, the focus of Mexico's claim, it would appear that the purpose of this section is to ensure that a "processed" food is accurately identified as the product of the country where it has been processed and that it would be inaccurate and consequently false, misleading and deceptive if it were labelled as the product of the country where ingredients were sourced.
100. First, Australia notes that the COOL measure appears to have a broader objective than just protection from deceptive practices;<sup>109</sup> rather, its purpose is to convey additional information to consumers including to prevent consumer confusion. Australia further notes that a relevant international standard must be an appropriate and effective means to fulfil *all* legitimate objectives pursued.<sup>110</sup>
101. Second, it is not clear that "processed" food which is the subject of Section 4.5.2 of CODEX-STAN 1-1985 encompasses slaughter.
102. Third, as processed foods are exempt from the COOL measure,<sup>111</sup> in Australia's view, this raises the question of how the CODEX-STAN 1-1985 could fulfil the objective of the COOL measure.
103. For the above reasons, Australia queries whether the CODEX-STAN 1-1985 has "the function of accomplishing the legitimate objective pursued" and is "specially suitable for the fulfilment of the legitimate objective pursued" in accordance with the Appellate Body's reasoning in *EC – Sardines*.<sup>112</sup>

#### **IV. THE GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT 1994)**

##### **A. NATIONAL TREATMENT: GATT ARTICLE III:4**

104. GATT Article III:4 specifically provides:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use...

105. The comprehensive scope of Article III:4 is clearly established by the terms of Article III:1 which sets out the general prohibition on affording protection to domestic

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<sup>109</sup>Mexico's First Written Submission, para 351.

<sup>110</sup> Appellate Body Report, *EC – Sardines*, para 288.

<sup>111</sup> Processed food is presently defined in § 65.220 as "a retail item derived from a covered commodity that has undergone specific processing resulting in a change in the character of the covered commodity, or that has been combined with at least one other covered commodity or other substantive food component... Specific processing that results in a change in the character of the covered commodity includes cooking (eg. frying, broiling, grilling, boiling, steaming, baking, roasting), curing (eg. salt curing, sugar curing, drying), smoking (hot or cold), and restructuring (emulsifying and extruding)."

<sup>112</sup> Panel Report, *EC – Sardines*, para 7.116 and referred to in the Appellate Body Report, *EC – Sardines*, para 285.

production.<sup>113</sup> This principle, described in *Japan – Taxes on Alcoholic Beverages*, “informs” the application of Article III:4.<sup>114</sup> “[t]he broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures.”<sup>115</sup>

106. Australia notes the three elements that must be satisfied to establish a violation of GATT Article III:4: that the imported and domestic products are “like products”; that the measure at issue is a “law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use”; and that the imported products are accorded “less favourable treatment” than that accorded to like domestic products.<sup>116</sup>
107. Australia refers the panel to its analysis of “like product” under Article 2.1 of the TBT Agreement which draws on the test developed by the Appellate Body for establishing likeness under GATT Article III:4.<sup>117</sup>
108. In encompassing “all laws, regulations and requirements affecting” relevantly the sale, purchase, distribution or use of like products, Australia notes that Article III:4 is far broader in its scope than Article 2.1 of the TBT Agreement which is limited to “technical regulations” that “apply to a product, process, or production method.” In Australia’s view, the COOL measure, which includes audit requirements and penalties, is clearly a “regulation” for the purposes of GATT Article III:4.
109. With respect to the Vilsack Letter, Australia refers the panel to its earlier comments concerning the status of the letter under Article 2.1 of the TBT Agreement.<sup>118</sup> Should the Panel determine that the letter mandates compliance, it may be considered a “requirement”<sup>119</sup> that falls within the scope of Article III:4.
110. Australia refers the panel to its analysis of “no less favourable treatment” under Article 2.1 of the TBT Agreement which draws on the test for determining consistency of a measure with GATT Article III:4.<sup>120</sup> As in *Korea – Beef*, the relevant enquiry in assessing “no less favourable treatment” is whether the particular COOL requirements for labelling in the manner stipulated “modif[y] the *conditions of competition* in the relevant market to the detriment of the imported products.”<sup>121</sup>

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<sup>113</sup> Article III:1 of GATT 1994 provides: “The contracting parties recognize that...laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products...should not be applied to imported or domestic products so as to afford protection to domestic production.”

<sup>114</sup> *Japan – Alcoholic Beverages II*, pg 18.

<sup>115</sup> *Japan – Alcoholic Beverages II*, pg 16.

<sup>116</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para 133.

<sup>117</sup> Refer to paras 36-44 (like product).

<sup>118</sup> At paras 30-31 of Australia’s First Written Submission.

<sup>119</sup> A “requirement” is defined as “[t]he action of requiring something; a request” and which extends to “[s]omething called for or demanded; a condition which must be complied with”: Shorter Oxford English Dictionary, Volume 2, Oxford University Press, Sixth Edition, 2007, p. 2541.

<sup>120</sup> Refer to paras 45-54 (no less favourable treatment).

<sup>121</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para 137.

111. In summary, as under Article 2.1 of the TBT Agreement, Australia considers that the COOL measure has the potential to impose higher cost burdens on the use of imported product throughout the chain of supply and therefore provides less favourable treatment to imported product contrary to Article III:4 of GATT 1994.

## **V. CONCLUSION**

112. The United States, through the COOL measure, is seeking to provide consumers with additional useful information. Australia considers that such an objective is a legitimate objective.
113. However, Australia considers, in general, that mandatory country of origin labelling regimes must be designed and implemented in the least trade-restrictive manner possible so that imported products are not subject to less favourable treatment than like domestic products due to labelling requirements.
114. In Australia's view, contrary to the national treatment obligations in Article 2.1 of the TBT Agreement and Article III:4 of GATT 1994, the COOL measure has not been designed in such a manner. It has the potential to detrimentally affect the conditions of competition so as to discriminate against imported product, resulting in treatment less favourable for such product.
115. Furthermore, in Australia's view, the COOL measure does not appear to be consistent with the obligation set out in Article 2.2 of the TBT Agreement in that the trade-restrictive nature of the COOL measure is not necessary to fulfilling its objective given the less trade-restrictive and reasonably available alternative identified by Australia in relation to ground beef.