

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

(WT/DS384 and WT/DS386)

Third Party Oral Statement of Australia

Geneva, 15 September 2010

A. INTRODUCTION

Mr Chairman, members of the Panel.

1. Thank you for the opportunity to present Australia's views on this dispute, which raises important issues of legal interpretation. Australia highlighted some of these issues in its written submission. We will not repeat all of those arguments today.
2. Instead, in this statement we will identify some of the key questions which Australia believes the Panel should address in relation to the claims by Canada and Mexico that the US COOL measure is inconsistent with Articles 2.1 and 2.2 of the TBT Agreement; and in relation to the arguments put by the United States to the contrary.
3. Whilst noting the claims of Canada and Mexico extend beyond Articles 2.1 and 2.2, Australia has chosen to focus on these articles, and on these questions, because many of the questions have not yet been specifically addressed by a panel or the Appellate Body.

B. QUESTIONS FOR THE PANEL'S CONSIDERATION

(a) What is the nature of the COOL measure?

4. Canada and Mexico have broadly identified the COOL measure to encompass a number of individual measures, which together make up the measure at issue in these proceedings.
5. Australia submits that the Panel must decide whether the COOL measure, as identified by Canada and Mexico, is a measure for the purposes of dispute settlement under the DSU and a technical regulation for the purposes of the TBT Agreement.
6. Of particular interest in this calculus, is the Panel's characterisation of the so-called Vilsack Letter, sent by US Secretary of Agriculture Thomas J. Vilsack to Industry Representatives on 20 February 2009.
7. In Australia's view, the Vilsack Letter is an act directly attributable to the executive of a WTO Member, and therefore, consistent with the Appellate Body's comments in *US – Corrosion-Resistant Steel Sunset Review*, challengeable in WTO dispute settlement proceedings. The 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 that department and is characterised by the Secretary as representing the will of the US Congress.
8. For the purposes of the definition of a technical regulation in Annex 1 of the TBT Agreement, a further consideration is whether the Vilsack Letter is a mandatory element of the COOL measure. This issue is addressed by Mexico in its submission. Australia notes the argument by the United States that compliance with the Vilsack Letter is in fact voluntary. However, Australia believes that none of the factors set out

by the United States in support of this contention are necessarily determinative of whether the Vilsack Letter is in fact mandatory, or “binding or compulsory”. Nor is the US Department of Agriculture’s characterisation determinative. Rather, the critical question for the Panel to examine is whether industry views the letter as mandating action.

(b) To what products does the COOL measure relate?

9. Canada and Mexico have based their claims under Article 2.1 of the TBT Agreement (and Article III:4 of GATT 1994) on an analysis of ‘like product’ between Canadian and Mexican live cattle on the one hand, and US live cattle on the other; and between Canadian and US live hogs.
10. Australia notes that the COOL measure applies broadly to a range of covered commodities, including beef trimmings for which Australia has a particular export interest. In its third party submission, Australia also submits that imported beef trimmings are a like product to US domestic beef trimmings used in ground beef.
11. In addressing this issue, the Panel should consider whether Canada and Mexico (with what appears to be agreement from the United States) are correct in applying the GATT Article III:4 analysis of like product to the analysis of like product under Article 2.1 of the TBT Agreement.
12. Further, the Panel ought to reject the US argument that the subject of the COOL measure is in fact meat and not livestock, and therefore Canada and Mexico’s claim fails, as they have not demonstrated that Canadian and Mexican meat is a like product to US meat.
13. In this respect, Australia notes that such a narrow interpretation of the phrase “in respect of technical regulations” in Article 2.1 would in fact undermine the application of the Article. It would allow, for example, a country to actively discriminate against a broad range of source products, simply because those source products are not the subject of, or “in respect of” the actual technical regulation.
14. Australia submits the better view, in particular with respect to country of origin labelling requirements, is that Article 2.1 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 the disciplines of Article 2.1.

(c) Does the COOL measure provide for treatment less favourable?

15. Australia notes the approach taken by Canada and Mexico drawing upon the analysis developed under GATT Article III:4 in determining whether the COOL measure provides for less favourable treatment to like products of non-national origin. Should the Panel agree with this approach, then Australia believes the critical question for the

Panel to examine is whether the COOL measure “modifies the conditions of competition in the relevant market to the detriment of imported products” (as articulated by the Appellate Body in the *Korea – Various Measures on Beef* dispute).

16. In this case, where the measure provides for formally identical treatment on its face, the Panel should also consider whether the measure has the potential to accord de facto less favourable treatment. Canada and Mexico both seek to demonstrate the COOL measure accords differential treatment to imported livestock that amounts to less favourable treatment within the meaning of Article 2.1 of the TBT Agreement. Put simply, Canada and Mexico contend that the COOL measure results in additional operational costs on imported product, in particular with respect to segregation and record-keeping, than the costs it imposes when domestic product is used.
17. Should the Panel agree with Canada and Mexico on this point, then Australia would submit this does constitute differential (and less favourable) treatment for the purposes of Article 2.1 of the TBT Agreement.
18. Australia also believes this differential (and less favourable) treatment extends to ground beef, as another covered commodity of the COOL measure. As the ground beef market in the United States is currently structured, it is more likely that US beef trimmings used in ground beef will be present in the inventory of a production plant compared to imported beef trimmings from any one country. Accordingly, the impact of the COOL measure would be felt most heavily when imported product is used, creating an incentive for processors to favour domestic product (and to discriminate against imported product).
19. Australia does not believe that country of origin labelling schemes generally are “inherently protectionist and discriminatory”, as claimed by Mexico in its submission. Rather, the question for the Panel is whether the US COOL measure provides (or has the potential to provide) treatment less favourable by virtue of its “design, structure and application”.

(d) Is the COOL measure’s objective legitimate?

20. For the purposes of Article 2.2 of the TBT Agreement, Australia submits the Panel must first determine whether the objective of the measure at issue is legitimate.
21. Consistent with the findings of the Appellate Body in the *EC-Sardines* dispute, Australia believes that an examination of legitimacy is confined to whether an examination of the stated objective, as put forward by the United States, is legitimate within the meaning of Article 2.2. It does not extend to an examination of whether the stated objective is actually the objective of the measure. Rather, Australia invites the Panel to determine, with regard to the text of Article 2.2, whether the United States’ stated objective of the COOL measure – to provide consumer information so as to minimise consumer confusion - is in fact legitimate.

22. In Australia's view, 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, and accepts the US view that this objective is "closely related" to preventing deceptive practices.

(e) Does the COOL measure fulfil its legitimate objective?

23. Australia considers the Panel must then separately decide whether the COOL measure fulfils the stated objective. Australia submits the Panel must determine whether the COOL measure actually carries out, or at least has the capacity to carry out, its stated objective of providing accurate additional consumer information. Should the Panel conclude that a complainant has demonstrated that a measure does not or could not achieve its stated objective, it would be open to conclude the measure does not meet the terms of the second sentence of Article 2.2 and therefore amounts to an unnecessary obstacle to trade within the meaning of the first sentence of Article 2.2.
24. In this regard, Australia notes Canada's arguments in particular, that the COOL measure does not appear to achieve its stated objective of providing accurate consumer information, with respect to the labelling of meat products derived from livestock and of ground beef.

(f) Are there any reasonably available alternatives?

25. Australia submits that the correct analysis called for under Article 2.2 also requires the Panel to decide whether there are other reasonably available alternatives that may be less trade-restrictive while still fulfilling the legitimate objective at the level the respondent considers appropriate.
26. Australia notes that the complainants, as well as a number of third parties to this dispute, have highlighted a number of reasonably available alternatives, including: voluntary labelling schemes; labelling schemes based on substantial transformation; and, in Australia's case, mandatory labelling which identifies imported or domestic product (without specifying the particular country of origin).
27. Australia submits if the alternative of marking product with 'imported' or 'domestic' were adopted, 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. Nonetheless, the objectives of the COOL measure would still be met: accurate, additional information would be available to consumers, in particular whether the source of the product was domestic or foreign. Adopting this approach would reduce associated segregation and recordkeeping costs, as processors would not need to segregate product by each particular country of origin. Notably, processors would always have the option of voluntarily identifying specific countries of origin if consumer demand justified the additional cost.

C. CONCLUSION

28. In conclusion, Australia considers the Panel should pay careful attention to the following questions, amongst others, in assessing the consistency of the COOL measure:
- (a) What is the nature of the COOL measure?
 - (b) To what products does the COOL measure relate?
 - (c) Does the COOL measure provide for treatment less favourable?
 - (d) Is the COOL measure's objective legitimate?
 - (e) Does the COOL measure fulfil its legitimate objective?
 - (f) Are there any reasonably available alternatives?
29. 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.
30. 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.
31. 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 fulfill its objective given the less trade-restrictive and reasonably available alternatives identified by the parties and third parties, including by Australia in relation to ground beef.
32. Australia would be pleased to provide answers to any questions from the Panel, including as requested on Australia's mandatory country of origin labelling regime.