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

(WT/DS384 and WT/DS386)

Third Party Written Submission of Australia
Executive Summary

7 September 2010

I. INTRODUCTION

1. The US country of origin labelling requirements (the "COOL measure") at issue in these proceedings raise significant systemic issues concerning the 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).

II. THE MEASURE AT ISSUE

2. Canada and Mexico have broadly identified the measure at issue to encompass the 2008 Interim Final Rule and the Vilsack Letter[1] in addition to the 2009 Final Rule and the 2002 COOL Statute, as amended. Mexico has also included the Food Safety and Inspection Service Interim Rule. The COOL measure thus identified covers many commodities and affects every stage of the supply chain. Relevantly (given Australia's large exports of muscle cuts and manufactured ground beef), Australia notes ground beef (along with other ground meats) is subject to very particular COOL requirements under §65.300(h) of the 2009 Final Rule.

3. Australia disagrees with the US contention that Canada and Mexico have failed properly to identify the measure at issue because they have not addressed the WTO consistency of all elements of the COOL measure. In this regard, Australia notes the Panel's statement in *EC-Sardines* that a complaining party may elect to "identify and challenge only those offending provisions of the measure it deems central to its interest in resolving the dispute".[2]

4. Like Canada and Mexico, Australia also regards the Vilsack Letter as a measure which can be challenged in WTO dispute settlement proceedings. It is an act directly attributable to the executive of a WTO Member. The Vilsack Letter is an official document that sets out 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.

III. THE AGREEMENT ON TECHNICAL BARRIERS TO TRADE

A. DEFINITION OF TECHNICAL REGULATION

5. Australia considers the COOL measure meets the three criteria identified by the Appellate Body in *EC – Asbestos* required to fall within the definition of a "technical regulation" under Annex 1 of the TBT Agreement[3], as it relates to named "covered commodities", provides for labelling requirements (as referred to in the definition of a technical regulation in Annex 1), and is of binding or compulsory nature.

6. Australia notes Mexico directly addresses the mandatory nature of the Vilsack Letter. The United States challenges Mexico's characterisation of the letter as mandatory. 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

[1] US Secretary of Agriculture Thomas J. Vilsack's letter to Industry Representatives dated 20 February 2009.
[2] Panel Report, *EC – Sardines*, para 7.34.
[3] 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.

character. Instead, a critical question for the Panel is whether industry views this letter as mandating action.

B. ARTICLE 2.1 OF THE TBT AGREEMENT

7. There is limited direct guidance from WTO Panel and Appellate Body Reports on the application of Article 2.1 of the TBT Agreement. However, Australia believes the Panel can be informed by the interpretation of the phrases "like product" and "treatment no less favourable" in GATT Article III:4.

8. Australia notes the US argument that Canada and Mexico's "like product" analysis is deficient because the subject of the COOL measure is meat and not livestock. Australia disagrees with this interpretation and believes Article 2.1 should be applied to country of origin labelling requirements, 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. In other words, the application of the COOL measure to all early stage products, whether livestock, muscle cuts or beef trimmings used in ground beef, should be subject to Article 2.1.

9. 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.

10. Australia also submits that imported beef trimmings used for processing or grinding into ground beef in the United States are like products to domestic (US) beef trimmings. Imported beef trimmings have the same properties, nature and quality as the US product, and the same end uses as US beef trimmings, as both are processed into ground beef. Finally, Australia also 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.

11. The objective of the "treatment no less favourable" requirement is to provide "equality of opportunities" for imported goods.[4] 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".[5]

12. 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, 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.

13. 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".[6] As the United States submits, "there is nothing

[4] *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.
[5] Appellate Body Report, *Korea – Various Measures on Beef*, para 137.
[6] Mexico's First Written Submission, para 5.

about country of origin labelling that is inherently unfavourable to imported products".[7] At times it may even favour imported product. 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 such requirements do not hinder international trade. Australia notes many WTO Members maintain country of origin labelling requirements.

14. However, Australia agrees with Mexico's claim that the COOL measure discriminates "by virtue of its design, structure and application".[8] Australia's concerns focus on the higher cost burdens the requirements place on the use of imported product throughout the chain of supply. The COOL requirements applicable to ground beef are an example of such *de facto* discrimination, as labelling of all possible countries of origin in accordance with the 60 day inventory allowance could distort the market in favour of domestic product and is likely to result in discrimination against imported product.

15. Should the Vilsack Letter be found to be a "technical regulation", Australia agrees with Canada's assessment that the effect of the labelling practices in the letter "would severely curtail the ability to commingle meat from various countries of origin".[9] Both production step labelling and extending coverage to processed meats would impose higher costs where imported product is used. Further, a reduction in the ground meat inventory allowance 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.

C. ARTICLE 2.2 OF THE TBT AGREEMENT

16. Article 2.2 of the TBT Agreement grants Members the right to adopt technical regulations for the purpose of fulfilling legitimate objectives. Australia submits the correct analysis under Article 2.2 involves examination of:

(a) whether the objective of the measure at issue is a legitimate objective;

(b) 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

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

17. Firstly, Australia submits that an examination of the legitimacy of an objective is confined to an examination of whether the objective put forward by the respondent is legitimate within the meaning of Article 2.2. The text of Article 2.2 provides that

[7] US' First Written Submission para 141.
[8] Mexico's First Written Submission, para 5.
[9] Canada's First Written Submission, para 28.

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. The United States has put forward the provision of consumer information so as to minimise consumer confusion as the legitimate objective of the COOL measure.[10] Australia regards enabling consumers to identify the source of a product a legitimate objective for the purposes of Article 2.2.

18. Second, Australia 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 has the capacity to carry out, its stated objective of providing accurate additional consumer information.

19. In Australia's view, Canada has identified aspects of the COOL measure that do not appear to achieve that stated objective, particularly in the labelling of ground beef.[11] In some respects, the COOL measure can in fact result in misleading and inaccurate information. In particular, the 60 day inventory allowance could result in inaccuracy, as the label could identify the origin of products not in fact used in the ground beef.

20. Third, as noted by Canada and Mexico, GATT disciplines on the use of restrictions are meant to protect not "trade flows", but rather the "competitive opportunities of imported product".[12] Trade-restrictive measures therefore include those that impose any form of limitation, discriminate against or deny competitive opportunities to imported product. In Australia's view, the COOL measure limits trade by imposing recordkeeping and segregation costs which are likely to be greater when imported product is used and thus impact on the competitive opportunities of imported product.

21. Australia notes 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. Applied to Article 2.2, establishing the necessity of the trade-restrictive elements of the COOL measure may require 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 necessary.[13]

22. Thus, 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 reasonable availability of other alternatives.

23. One possible alternative would require labels to identify "domestic" or "imported" product (without specifying the particular country of origin). This greater flexibility

[10] 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.
[11] Canada's First Written Submission, paras 178-180.
[12] 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.
[13] Appellate Body Report, *Korea – Various Measures on Beef*, paras 160-163.

would enable processors to use imported product without needing to segregate product by country of origin or adjust recordkeeping practices to avoid financial penalties under the COOL measure.

24. In summary, Australia considers that the trade-restrictive aspects of the COOL measure are not necessary to fulfil the stated objective of providing accurate 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 OF THE TBT AGREEMENT

25. 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. 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 complement such practices).

26. 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 is unlikely to be effective or appropriate in all cases to fulfil the legitimate objective of providing accurate consumer information.

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

27. 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.[14]

28. 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

29. 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 the potential to detrimentally affect the conditions of competition so as to discriminate against imported product, resulting in treatment less favourable for such products.

30. Furthermore, Australia believes the COOL measure is inconsistent 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 fulfil its objective of providing accurate consumer information, given less trade-restrictive and reasonably available alternatives, including that identified by Australia in relation to ground beef.

[14] Appellate Body Report, *Korea – Various Measures on Beef*, para 133.