

BEFORE THE WORLD TRADE ORGANIZATION

*European Union and certain Member states — Certain measures concerning
palm oil and oil palm crop-based biofuels
(WT/DS600)*

**Third Party Oral Statement of Australia
As Delivered**

11 May 2022

1. Australia welcomes the opportunity to present its views on the legal issues raised in these proceedings, which concern WTO Members' obligations under the TBT Agreement¹ and the GATT 1994.²
2. At the outset, Australia would like to emphasise that it recognises the right of WTO Members to take measures necessary for protecting legitimate public policy objectives such as environmental protection. However, it is Australia's firmly held view that WTO Members should not, under the guise of environmental protection, implement trade protectionist measures.
3. WTO rules recognise a WTO Member's right to regulate to address legitimate public policy objectives. These rules, expressed in the WTO Agreements and interpreted in numerous WTO disputes, provide ample guidance for this panel to determine whether the measures at issue in this dispute meet those standards. In this statement, Australia makes no comment on the factual issues in this dispute or the merits of either party's case but provides views on the legal standards that must be met.
4. To that end, this statement will focus first on the correct legal standard for determining 'trade restrictiveness', 'contribution' and 'less trade restrictive alternatives' under Article 2.2 of the TBT Agreement; and second on the meaning of 'necessary' and 'relating to' in certain paragraphs of Article XX of the GATT 1994.
5. Australia recalls that it has previously provided similar observations to the members of this panel in its submission in the proceedings for DS593,³ and our views remain unchanged. Australia thanks the panel for the advance questions to the third parties in this dispute, and will provide written responses in due course.

Trade Restrictiveness of the Technical Regulation

6. First, Australia provides some observations on determining the 'trade restrictiveness' of a technical regulation.
7. In Australia's view, to determine the extent of 'trade restrictiveness', the panel should be guided by what the Appellate Body said in *Australia – Tobacco Plain Packaging*. That is, it should examine the structure, design, and operation of the measure, as well as take into account all relevant evidence adduced by the parties.⁴
8. In its first written submission, the EU contended that the trade impact of the measures at issue is 'not very important' because they do not prevent market access.⁵ Australia does not agree with this contention. The prevention of market access is not the appropriate legal standard for determining the degree of 'trade restrictiveness' under Article 2.2.
9. It is well established that Article 2.2 of the TBT Agreement recognises trade restrictiveness is permissible. What is actually prohibited are those restrictions on international trade that go

¹ The Agreement on Technical Barriers to Trade.

² The General Agreement on Tariffs and Trade 1994.

³ *EU – Palm Oil (Indonesia)*.

⁴ Appellate Body Reports, *Australia – Tobacco Plain Packaging*, paras. 6.392-6.393.

⁵ See eg, European Union's First Written Submission, para 842.

beyond what is necessary to achieve the degree of contribution that a technical regulation makes to a legitimate objective.

10. In determining the degree of ‘trade restrictiveness,’ a panel should not limit its examination to a subset of the evidence, such as market access. Rather, qualitative or quantitative arguments and evidence *demonstrating the complete prevention of market access*, could be probative to the extent that such evidence demonstrates the degree to which the measures have a limiting effect on trade. The relevant question is whether the trade restrictiveness is beyond what is required for a legitimate objective, not whether there is market access.
11. Second, Australia recalls that, in addition to claims under Article 2.2, this dispute involves claims under Article 2.1 of the TBT Agreement. In Australia's view, a finding of less favourable treatment by the Panel in relation to Malaysia's claims under Article 2.1⁶ may have probative value in the Panel's assessment of ‘trade restrictiveness’ under Article 2.2.
12. In support of this view, Australia recalls that the Appellate Body in *Australia – Tobacco Plain Packaging* indicated that, when assessing a claim under Article 2.1 of the TBT Agreement, a measure modifying the conditions of competition for a group of imported products – as compared to a group of domestic products – may suffice to indicate that the technical regulation is ‘trade restrictive’ within the meaning of Article 2.2.

Degree of Contribution that the Technical Regulation makes to the Achievement of a Legitimate Objective

13. Next Australia will provide views on the degree of contribution that a technical regulation makes to the achievement of a legitimate objective. Australia's comments concern consideration of ‘evidence’ relating to the application of the measure.
14. The EU contends that the Panel, while considering the *scientific evidence* related to the measure, should limit its examination to whether the measures at issue have adequate support from qualified scientific opinions.⁷ This is irrespective of whether the scientific opinions represent the majority view.⁸ Australia disagrees with the EU's characterisation of the limited role for the Panel in examining scientific evidence.
15. In Australia's view, it is appropriate for a panel to consider the extent to which the body of evidence before it collectively provides a reasonable basis in support of the proposition.⁹ A panel should have regard to whether such evidence ‘comes from a qualified and respected source’, whether it has the ‘necessary scientific and methodological rigor to be considered reputable science’ or reflects ‘legitimate science according to the standards of the relevant scientific community’, and ‘whether the reasoning articulated on the basis of the scientific evidence is objective and coherent.’¹⁰

⁶ Malaysia's First Written Submission, paras 522 – 585.

⁷ European Union's First Written Submission, para 362.

⁸ Ibid, para 781.

⁹ Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.627.

¹⁰ Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.516.

16. Furthermore, as recognised by the Panel in *Australia – Tobacco Plain Packaging*, Australia submits that limitations on, or the lack of, available evidence in demonstrating ‘contribution’ has probative value and should also be considered by the Panel.¹¹

Less Trade Restrictive Alternatives

17. Australia will now turn to the comparative analysis that should be undertaken when considering whether the technical regulation is ‘more trade restrictive than necessary’. Australia recalls that the Appellate Body has said that it does not expect a ‘complainant...to provide detailed information on how a proposed alternative would be implemented by the respondent in practice...’.¹²
18. In Australia’s view, while the complainant must establish a *prima facie* case, it is for the respondent to establish that a proposed alternative measure is not reasonably available.¹³

Article XX of GATT 1994

19. Finally, Australia would like to provide some comments on the meaning of ‘necessary’ and ‘relating to’ in certain paragraphs of Article XX of the GATT 1994.
20. Paragraphs (a) and (b) of Article XX require that the measures at issue be ‘necessary’, while the standard under paragraph (g) requires that the measures at issue are ‘relating to’ the conservation of exhaustible natural resources. Both standards have been interpreted by the Appellate Body.
21. ‘Necessary’ involves a holistic weighting and balancing of a number of factors, such as the importance of the interest furthered by the measure, its contribution to the objectives pursued, and the trade restrictiveness of the measure at issue. It also involves comparing the measure to possible alternative measures that achieve the same level of protection while being less trade restrictive.¹⁴ By comparison, ‘relating to’ requires ‘a close and genuine relationship of ends and means’ between the measure at issue and the conservation objective.¹⁵
22. These two are considerably different legal standards. Relying upon Articles XX(a) and (b) requires more than the mere establishment of a ‘close and genuine relationship of ends and means’ between the measure at issue and the legitimate policy objectives. It instead requires a holistic weighting and balancing of a range of factors. These two legal standards should not be conflated.

Conclusion

23. Australia thanks the Panel for the opportunity to present these views.

¹¹ Panel Reports, *Australia – Tobacco Plain Packaging*, paras 7.938 - 7.943.

¹² Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para 5.338

¹³ *Ibid.*

¹⁴ Appellate Body Report, *Brazil – Retreaded Tyres*, para 178 - 182; Appellate Body Report, *US – Gambling*, para. 307; Appellate Body Report, *Korea – Various Measures on Beef*, para. 164; Appellate Body Report, *Colombia – Textiles*, paras. 5.71-5.74.

¹⁵ Appellate Body Reports, *China – Rare Earths*, para. 5.90.