

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 Written Submission of Australia**

**14 December 2021**

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## CASES CITED IN THIS SUBMISSION

Short Title	Full Case Title and Citation
<i>Australia – Tobacco Plain Packaging</i>	Panel Reports, <i>Australia - Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging</i> , WT/DS435/R, WT/DS435/R/Add.1, and WT/DS435/R/Suppl.1; WT/DS441/R, WT/DS441/R/Add.1, and WT/DS441/R/Suppl.1 adopted on 29 June 2020, as modified by Appellate Body Reports WT/DS435/AB/R and WT/DS435/AB/R/Add.1, WT/DS441/AB/R and WT/DS441/AB/R/Add.1
<i>Australia – Tobacco Plain Packaging</i>	Appellate Body Reports, <i>Australia - Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging</i> , WT/DS435/AB/R, WT/DS435/AB/R/Add.1 and WT/DS435/AB/R/Suppl.1; WT/DS441/R, WT/DS441/AB/R/Add.1, and WT/DS441/AB/R/Suppl.1 adopted 29 June 2020
<i>Brazil – Retreaded Tyres</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, p.1527.
<i>China – Rare Earths</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum</i> , WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, adopted 29 August 2014, DSR 2014:III, p. 805
<i>Colombia – Textiles</i>	Appellate Body Report, <i>Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear</i> , WT/DS461/AB/R and Add.1, adopted 22 June 2016, DSR 2016:III, p.1227
<i>EC – Seal Products</i>	Panel Reports, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS400/R and Add.1 / WT/DS401/R and Add.1, adopted 18 June 2014, as modified by Appellate Body Reports WT/DS400/AB/R / WT/DS401/AB/R, DSR 2014:II, p. 365
<i>EC – Seal Products</i>	Appellate Body Reports, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014, DSR 2014:I, p. 7
<i>Korea – Various Measures on Beef</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, p. 5
<i>US - Clove Cigarettes</i>	Panel Report, <i>United States – Measures Affecting the Production and Sale of Clove Cigarettes</i> , WT/DS406/R, adopted 24 April 2012, as modified by Appellate Body Report WT/DS406/AB/R, DSR 2012:XI, p. 5865

Short Title	Full Case Title and Citation
<i>US – COOL</i>	Panel Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements</i> , WT/DS384/R / WT/DS386/R, adopted 23 July 2012, as modified by Appellate Body Reports WT/DS384/AB/R / WT/DS386/AB/R, DSR 2012:VI, p. 2745
<i>US – COOL</i>	Appellate Body Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements</i> , WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012, DSR 2012:V, p. 2449
<i>US – COOL (Article 21.5 – Canada and Mexico)</i>	Appellate Body Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Canada and Mexico</i> , WT/DS384/AB/RW / WT/DS386/AB/RW, adopted 29 May 2015, DSR 2015:IV, p. 1725
<i>US – Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, 5663 (Corr.1, DSR 2006:XII, 5475)
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, p. 3
<i>US – Tuna II (Mexico)</i>	Panel Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/R adopted 13 June 2012, as modified by Appellate Body Report WT/DS381/AB/R, DSR 2012:IV, p.2013
<i>US – Tuna II (Mexico)</i>	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/AB/R, adopted 13 June 2012, DSR 2012:IV, p. 1837

## **I. INTRODUCTION**

1. Australia considers that these proceedings initiated by Malaysia 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 (the GATT 1994). The European Union's (EU) palm oil and oil palm crop-based biofuel measures at issue in this dispute test the boundaries of those rights and obligations.
2. Australia recognises the right of WTO Members to take measures necessary for protecting legitimate public policy objectives, such as, environmental protection. In saying this, it is Australia's firmly held view, that WTO Members should not, under the guise of environmental action, implement trade protectionist measures.
3. In this submission, Australia will focus on the proper legal analysis that should be applied under Article 2.2 of the TBT Agreement and Article XX of the GATT 1994. The measures at issue and legal claims in this dispute are essentially the same as those at issue in proceedings initiated by Indonesia against the EU in *European Union – Certain Measures Concerning Palm Oil and Oil Palm Crop-Based Biofuels* (WT/DS593). Australia also made a third-party submission in that dispute, although a Panel report has not yet been issued. As such, Australia's views in this submission align with our views previously communicated in our third party submission in WT/DS593.
4. In particular, Australia again seeks to set out the correct legal standard for determining:
  - 'trade restrictiveness', 'contribution' and 'less trade restrictive alternatives' under Article 2.2 of the TBT Agreement; and
  - 'necessity' under Articles XX(a) and (b) and 'relates to' under Article XX(g) of the GATT 1994.
5. Australia reserves the right to raise other issues at the third party hearing before the Panel.

## **II. AGREEMENT ON TECHNICAL BARRIERS TO TRADE**

### **A. ARTICLE 2.2 OF THE TBT AGREEMENT**

6. Article 2.2 of the TBT Agreement 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.

7. To establish that a measure is inconsistent with Article 2.2, a complainant must demonstrate that: (i) the measure at issue constitutes a “technical regulation” within the meaning of the TBT Agreement;<sup>1</sup> and (ii) the measure is “more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create”.
8. The EU contends that neither Article 26 RED II nor the Delegated Regulation are technical regulations (or conformity assessment procedures) within the meaning of the TBT Agreement.<sup>2</sup> Australia notes simply that the correct legal analysis for determining whether measures are “technical regulations” has been examined in detail by numerous panels and the Appellate Body.<sup>3</sup> Australia will therefore confine its comments to the second element: whether the measures are “more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create”.
9. In relation to the second element of the test under Article 2.2, Australia recalls that the Appellate Body has said that a panel must determine the objective that the Member seeks to achieve by means of the technical regulation at issue and whether that objective is “legitimate”.<sup>4</sup> A panel must also determine whether the technical regulation is “more trade-restrictive than necessary” to fulfil that legitimate objective. In *Australia – Tobacco Plain Packaging* the Appellate Body recalled that the assessment of ‘necessity’, in the context of Article 2.2, involves a ‘relational analysis’ of the following factors: (i) the trade restrictiveness of the technical regulation; (ii) the degree of contribution that the technical regulation makes to the achievement of a legitimate objective; and (iii) the risks non-fulfilment would create.<sup>5</sup> In most cases, when considering whether a technical regulation is “more trade-restrictive than necessary”, a comparison of the challenged measure and possible alternative measures should also be undertaken.<sup>6</sup>
10. Australia’s comments on Article 2.2 below will focus on the proper legal analysis that should be undertaken when examining the factors of: the trade restrictiveness of the technical regulation; the degree of contribution that the technical regulation makes to

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<sup>1</sup> Annex 1.1 to the TBT Agreement defines a “technical regulation” as follows: 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.

<sup>2</sup> European Union First Written Submission, para 597.

<sup>3</sup> See Panel Reports, *EC – Seal Products*, paras. 7.85-7.87; *US – COOL*, paras. 7.147-7.148; *US – Tuna II (Mexico)*, paras. 7.53-7.55; *US – Clove Cigarettes*, paras. 7.24-7.25; and *Australia – Tobacco Plain Packaging*, para. 7.151. See also Appellate Body Reports, *EC – Seal Products*, paras. 5.21-5.23; and *US – Tuna II (Mexico)*, para. 183.

<sup>4</sup> Appellate Body Report, *Australia – Tobacco Plain Packaging*, para 6.3. Appellate Body Report, *US – Tuna II (Mexico)*, para. 314.

<sup>5</sup> Appellate Body Reports, *US – COOL*, para. 374 (referring to Appellate Body Report, *US – Tuna II (Mexico)*, para. 318). Restated in Appellate Body Report, *Australia – Tobacco Plain Packaging*, para 6.3.

<sup>6</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 322. See also Appellate Body Reports, *US – COOL*, paras. 374-378; *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.197; and *Australia – Tobacco Plain Packaging*, para 6.4.

the achievement of a legitimate objective; and the comparison of the challenged measure with possible alternative measures.

Trade Restrictiveness of the Technical Regulation

11. A technical regulation is “trade-restrictive” within the meaning of Article 2.2 when it has a limiting effect on international trade.<sup>7</sup> The existence and extent of the ‘trade restrictiveness’ will depend upon the circumstances of a given case, and could be determined by qualitative or quantitative arguments and evidence, or both, including evidence relating to the characteristics of the challenged measure as revealed by its design and operation.<sup>8</sup>
12. In its first written submission, the EU contends that the trade impact of the measures at issue are “not very important” because they do not prevent market access.<sup>9</sup> In Australia’s view the prevention of market access is not the appropriate legal standard for determining the degree of ‘trade restrictiveness’ under Article 2.2 of the TBT Agreement. To determine the extent of ‘trade restrictiveness,’ a panel should examine the structure, design and operation of the measure, as well as take into account all relevant evidence adduced by the parties.<sup>10</sup> In this regard, 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 the trade between WTO Members. But it does not follow, as the EU suggests, that in the absence of a complete prevention of market access, the trade restrictiveness of a measure will necessarily be “not very important.”<sup>11</sup> In determining the degree of ‘trade restrictiveness,’ a panel should not limit its examination to a subset of the evidence (eg. market access), but rather, it must examine the characteristics of the challenged measure as revealed by its design and operation, as well as all relevant evidence.<sup>12</sup>
13. Australia also notes that this case involves claims under both Article 2.1 and 2.2 of the TBT Agreement. Australia recalls that the Appellate Body has indicated that a panel’s determination that a measure modifies the conditions of competition for imported products as a group *vis-à-vis* domestic products as a group (for instance, in the context of assessing a claim under Article 2.1 of the TBT Agreement) may suffice to indicate that the technical regulation *is* trade restrictive within the meaning of Article 2.2.<sup>13</sup> That is, the existence of discrimination may contribute to the establishment of ‘trade restrictiveness’ within the meaning of Article 2.2.
14. In referring to its measures at issue and discrimination (*vis-à-vis* fossil fuels and certain high ILUC-risk biofuels), the EU suggests that a finding of “trade restrictiveness” in such circumstances would lead to the “absurd consequence” that “once a Member alters

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<sup>7</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 319.

<sup>8</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.1076.

<sup>9</sup> See eg, European Union’s First Written Submission, para 842.

<sup>10</sup> Appellate Body Reports, *Australia – Tobacco Plain Packaging*, paras. 6.392-6.393.

<sup>11</sup> European Union’s First Written Submission, paras 836 – 842.

<sup>12</sup> Appellate Body Reports, *Australia – Tobacco Plain Packaging*, paras. 6.392-6.393.

<sup>13</sup> Appellate Body Reports, *Australia – Tobacco Plain Packaging*, paras. 6.384-6.386. See also, Appellate Body Report, *US – COOL*, para. 477 (quoting Panel Reports, *US – COOL*, para. 7.574).

the functioning of the market and restricts trade in certain products it should do that without any limitation for the trade which was artificially created for other products.”<sup>14</sup>

15. Australia disagrees with the EU’s characterisation of trade restrictiveness in this manner. As a starting point, it is well established that Article 2.2 of the TBT Agreement recognises that “some” trade restrictiveness is permissible and, further, that what is actually prohibited are those restrictions on international trade that “exceed what is necessary to achieve the degree of contribution that a technical regulation makes to the achievement of a legitimate objective”.<sup>15</sup> Therefore, there is no requirement for the EU, when intervening in the market, to do so in favour of all biofuels. Article 2.2 permits “some” trade restrictiveness. What is prohibited is the imposition of restrictions on international trade that exceed what is necessary to fulfil a legitimate objective, taking into account the risks that non-fulfilment would create. The permissibility of the trade restrictiveness is taken into account in the other elements of the legal analysis under Article 2.2.
16. Therefore, in focussing on whether measures that intervene in the market are “trade restrictive”, Australia again recalls that a finding of discrimination can be relevant to this assessment. The modification of the conditions of competition, to the detriment of imported goods, may contribute to the assessment of ‘trade restrictiveness’ under Article 2.2 to the extent that it reveals a limiting effect on international trade.<sup>16</sup> In this regard, Australia submits that a finding of less favourable treatment by the Panel in relation to Malaysia’s claims under Article 2.1 of the TBT Agreement,<sup>17</sup> may have probative value in the Panel’s assessment of ‘trade restrictiveness’ under Article 2.2.

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

17. With regards to the degree of contribution that a technical regulation makes to the achievement of a legitimate objective, there is no single approach that is suited to conducting this type of analysis in all cases.<sup>18</sup> In *Australia – Tobacco Plain Packaging* the panel, quoting the Appellate Body in *US – COOL (Article 21.5 – Canada and Mexico)*, observed that the degree of achievement of a particular objective may be discerned from the design, structure, and operation of the technical regulation, as well as from evidence relating to the application of the measure.<sup>19</sup>
18. When examining scientific evidence relating to the application of the measure, the EU also contends that the Panel should limit its examination to whether the measures at issue purport to be based on science and whether there is adequate support of qualified

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<sup>14</sup> European Union’s First Written Submission, paras 843 – 845.

<sup>15</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 319; See also Appellate Body Report, *United States – COOL*, para 375.

<sup>16</sup> Appellate Body Reports, *Australia – Tobacco Plain Packaging*, paras. 6.386.

<sup>17</sup> Malaysia’s First Written Submission, paras 522 – 585.

<sup>18</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.484.

<sup>19</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.484 (quoting Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.210).



scientific opinions.<sup>20</sup> This is irrespective of whether the scientific opinions represent the majority view.<sup>21</sup>

19. Australia disagrees with the EU's characterisation of the limited role for the Panel in examining scientific evidence. Australia recalls that the function of a panel is to:

make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.<sup>22</sup>

20. In fulfilling this obligation, it is appropriate for a panel to consider the extent to which the body of evidence before it, as a whole, provides a reasonable basis in support of the proposition for which it is being invoked.<sup>23</sup> In this assessment, to the extent that scientific evidence is being relied upon, 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.”<sup>24</sup> Australia submits that these factors are also relevant to the Panel's role in examining ‘contribution’ in the current case.
21. Further to this, Australia submits that limitations or the lack of available evidence in demonstrating ‘contribution’ has probative value and should also be taken into account by the Panel. Indeed Australia recalls that in *Australia – Tobacco Plain Packaging* the panel explicitly stated that the available evidence, as well as possible limitations in, or unavailability of, certain evidence, can have an impact on the nature and extent of the conclusions that may be drawn.<sup>25</sup>

#### Less Trade Restrictive Alternatives

22. The Appellate Body has recognised that in most cases, a comparative analysis should be undertaken to establish whether a technical regulation is “more trade restrictive than necessary”.<sup>26</sup> A complainant may identify a possible alternative measure that: (i) is less trade restrictive than the challenged technical regulation; (ii) makes a contribution to the legitimate objective equivalent to that of the challenged technical regulation; and (iii) is reasonably available to the responding Member.<sup>27</sup>

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<sup>20</sup> European Union's First Written Submission, para 362.

<sup>21</sup> Ibid, para 781.

<sup>22</sup> Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

<sup>23</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.627.

<sup>24</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, para. 7.516.

<sup>25</sup> Panel Reports, *Australia – Tobacco Plain Packaging*, paras 7.938 - 7.943.

<sup>26</sup> Appellate Body Reports, *US – COOL*, para 471; *US – COOL (Article 21.5 – Canada and Mexico)*, para 5.197; *US – Tuna II (Mexico)*, para. 320.

<sup>27</sup> Appellate Body Reports, *Australia – Tobacco Plain Packaging*, para 6.461; *US – Tuna II (Mexico)*, para. 323; *US – COOL*, para. 379; *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.213.

23. With regard to the burden placed upon a complainant to identify less trade restrictive alternatives, Australia recalls that the Appellate Body has stated that:

It would appear incongruous to expect a complainant, under Article 2.2 of the TBT Agreement, to provide detailed information on how a proposed alternative would be implemented by the respondent in practice, and precise and comprehensive estimates of the cost that such implementation would entail.<sup>28</sup>

24. In Australia's view, this suggests that the complainant need not provide an extensive or complete evidence-base for establishing that a proposed alternative measure is reasonably available. Rather, it would be more appropriate for the respondent, once a complainant has made a *prima facie* case, to establish that a proposed alternative measure is not reasonably available.<sup>29</sup>

### III. GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

#### A. ARTICLE XX OF THE GATT 1994

25. Article XX of the GATT 1994 provides, in relevant part:

Subject to the requirement that such measures 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, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(a) necessary to protect public morals;

(b) necessary to protect human, animal or plant life or health;

.....

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

.....

26. It is well established for a GATT-inconsistent measure to be justified under Article XX it must meet: (1) the requirements of one of the specific exceptions listed in paragraphs (a) - (j) of Article XX; and (2) the requirements of the chapeau.<sup>30</sup> Australia will confine its comments to aspects of the first element of this legal analysis.

#### Specific Exceptions Listed in Paragraphs (a) – (j) of Article XX

27. At the outset, it is important to note that the specific exceptions listed in paragraphs (a) – (j) of Article XX set different standards for establishing the relationship between the measure at issue and the relevant policy objective. This key distinction was highlighted by the Appellate Body in *US – Gasoline* when it noted:

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<sup>28</sup> Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para 5.338

<sup>29</sup> Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para 5.338.

<sup>30</sup> Appellate Body Report, *US – Gambling*, para. 22; Appellate Body Report, *Brazil – Retreaded Tyres*, para 139; Appellate Body Reports, *EC – Seal Products*, para 5.169; Appellate Body Report, *Colombia – Textiles*, para. 6.20.

Article XX uses different terms in respect of different categories: ‘necessary’ – in paragraphs (a), (b) and (d); ‘essential’ – in paragraph (j); ‘relating to’ – in paragraphs (c), (e) and (g); ‘for the protection of’ – in paragraph (f); ‘in pursuance of’ – in paragraph (h); and ‘involving’ – in paragraph (i).

It does not seem reasonable to suppose that the WTO Members intended to require, in respect of each and every category, the same kind or degree of connection or relationship between the measure under appraisal and the state interest or policy sought to be promoted or realized.<sup>31</sup>

28. Turning to paragraphs (a) and (b) of Article XX, these grounds of justification require that the measures at issue are “necessary”. The Appellate Body has found in numerous cases that an analysis of ‘necessity’ in the context of Article XX involves a holistic weighing and balancing of a number of distinct factors, such as: the relative importance of the interests or values furthered by the challenged measure; the contribution of the measure to the objectives pursued by it; and the trade restrictiveness of the measure at issue.<sup>32</sup> Further, in most cases, a panel must then compare the challenged measure and possible alternative measures that achieve the same level of protection while being less trade restrictive.<sup>33</sup>
29. By contrast, the standard under paragraph (g) of Article XX, requires that the measures at issue ‘relate to’ the conservation of exhaustible natural resources. In *China – Rare Earths* the Appellate Body held that this standard required “a close and genuine relationship of ends and means” between the measure at issue and the conservation objective.<sup>34</sup> In particular, it would not be sufficient for the GATT-inconsistent measure to be “merely incidentally or inadvertently aimed at a conservation objective”.<sup>35</sup> The Appellate Body further highlighted that the absence of a domestic restriction, or the way in which a challenged measure applies to domestic production or consumption, could be relevant to the assessment of whether the challenged measure ‘relates to’ conservation.<sup>36</sup>
30. Accordingly, the different text used in Articles XX(a) and (b) (ie. “necessary”) and Article XX(g) (ie. “relating to”) sets considerably different legal standards. Reliance 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 requires the weighing and balancing of a range of factors, and often a comparison with less trade restrictive alternatives, to determine that the measure is actually “necessary”. In Australia’s view, therefore, the legal standards for “necessity” and “relates to” should not be conflated.<sup>37</sup>

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<sup>31</sup> Appellate Body Report, *US – Gasoline*, paras. 17 – 18.

<sup>32</sup> 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

<sup>33</sup> *Ibid.*

<sup>34</sup> Appellate Body Reports, *China – Rare Earths*, para. 5.90.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> European Union’s First Written Submission, paras 1265 – 1273.

#### IV. CONCLUSION

31. In summary, Australia submits that this dispute provides an opportunity for the Panel to clarify the proper legal analysis under Article 2.2 of the TBT Agreement and Article XX of the GATT 1994. In particular:
- ‘trade restrictiveness’ within the meaning of Article 2.2 requires an examination of whether a measure has a limiting effect on international trade. Importantly, the modification of the conditions of competition, to the detriment of imported goods, may contribute to the assessment that a measure is “trade restrictive” under Article 2.2;
  - the degree of contribution that a technical regulation makes to the achievement of a legitimate objective may be discerned from the design, structure, and operation of the technical regulation, as well as from evidence relating to the application of the measure. Limitations or the lack of available evidence in demonstrating “contribution” may have probative value and should be taken into account by the Panel;
  - where a complainant has established *prima facie* that a proposed less trade restrictive alternative measure is reasonably available, it is for the respondent to demonstrate that the proposed measure is not a valid alternative; and
  - there are key differences between the ‘necessity’ test in Articles XX(a) and (b) and the “relating to” test under Article XX(g) of the GATT 1994. These legal standards should not be conflated.
32. Australia thanks the Panel for the opportunity to submit these views.