BEFORE THE APPELLATE BODY
OF THE WORLD TRADE ORGANIZATION

United States – Certain Country of Origin Labelling (COOL) Requirements
(AB-2012-2013 / DS384, DS386)

Third Participant Written Submission of Australia

13 April 2012
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I. INTRODUCTION

1. The appeals in respect of certain aspects of the panel's findings in United States – Certain Country of Origin Labelling (COOL) Requirements under the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), raises 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).

2. As the world's second largest exporter of beef and second largest exporter of beef to the United States, the issues in this matter have particular relevance to Australia's access to the United States' beef market. Australia exports annually around 160,000 tonnes of beef to the United States with fresh, chilled and frozen beef accounting for the bulk of the trade.

3. Australia recognises the rights of Members to maintain country of origin labelling requirements. Australia maintains its own country of origin labelling requirements, and seeks to ensure that such requirements do not hinder international trade.

4. The matters submitted by the parties raise systemic issues as to the proper application of the term "more trade-restrictive than necessary to fulfil a legitimate objective" under Article 2.2 of the TBT Agreement. Australia will briefly address some of the issues raised in the appeals in this submission.

II. AUSTRALIA'S SUBMISSION ON THE PANEL'S FINDINGS

a) "More trade-restrictive than necessary to fulfil a legitimate objective"

5. The United States submits that the Panel erred by not requiring the complaining parties to meet their burden to prove that the measure is more trade-restrictive than necessary, based on the availability of significantly less trade-restrictive alternative measures that fulfil the stated objective at the level the United States considers appropriate. In particular, the United States takes exception to the Panel's decision not to consider whether less trade-restrictive alternatives were available once it had determined that the measure did not fulfil the objective.

6. In setting out the elements of Article 2.2 of the TBT Agreement, the Panel noted that although the obligation contained in the second sentence of the Article remains the same in all cases, it did not consider that the analysis of the elements need to be structured and organised in the same manner for every situation. The Panel set out the elements that need to be considered in order to satisfy Article 2.2 of the TBT Agreement in the following order:

(a) whether the technical regulation is trade-restrictive;

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1 United States' Appellant Submission, para. 120.
2 United States' Appellant Submission, para. 177.
3 Panel Report, para. 7.553.
4 Panel Report, para. 7.554.
(b) if so, the next step will be to identify the objective, and determine whether it is legitimate within the meaning of Article 2.2; 5
(c) if so, it must then be determined whether the measure fulfils the identified objective; 6
(d) if so, the next step will be to determine whether the technical regulation is more trade-restrictive than necessary to fulfil the legitimate objective – this requires analysis of the availability of less trade-restrictive alternative measures that equally fulfil the objective, taking into account the risks non-fulfilment would create. 7

7. In Australia’s view, a complaining party would succeed in its claim if it was able to demonstrate that the responding party’s measure is trade-restrictive and that it failed to comply with any of the following elements:

(a) that the objective being pursued is legitimate;
(b) that the measure fulfils, or is capable of fulfilling, the legitimate objective(s) at the level the Member considers appropriate;
(c) that less trade-restrictive alternatives are available and that those alternatives can fulfil, or are capable of fulfilling, the objective(s) being pursued at the level the Member considers appropriate, taking into account the risks that non-fulfilment would create.

8. Australia agrees with the Panel that, having decided that the measure does not fulfil, or is not capable of fulfilling, the stated objective(s), it is not necessary for the Panel to proceed with the step of determining whether less trade-restrictive measures are available and whether those alternatives can fulfil, or are capable of fulfilling the objective(s) being pursued.

9. The United States submits that if the measure pursues an objective considered "legitimate" for the purpose of Article 2.2 of the TBT Agreement, then a measure is inconsistent with Article 2.2 if the measure is "more trade-restrictive than necessary to fulfil that legitimate objective". 8 The United States submits that to establish a case that a measure is more trade-restrictive than necessary to fulfil a legitimate objective, the complaining Member must prove that: (1) there is a reasonably available alternative measure; (2) that fulfils the Member's legitimate objective at the level that the Member considers appropriate; and (3) is significantly less trade-restrictive. 9

10. In Australia’s view, the characterisation by the United States of the elements of Article 2.2 of the TBT Agreement is misplaced. If it is determined that a measure

5 Panel Report, para. 7.555.
6 Panel Report, para. 7.556; and as noted by Canada in its Other Appellant Submission, the Panels in US – Tuna II (Mexico) and in US – Clove Cigarettes combined this element with the assessment of alternative measures (Panel Reports, US – Tuna II (Mexico), paras. 7.387, 7.453, and US – Clove Cigarettes, paras. 7.333, 7.351).
7 Panel Report, para. 7.557.
8 United States’ Appellant Submission, para. 123.
9 United States’ Appellant Submission, para. 123.
does not fulfil, or is not capable of fulfilling, the objective(s) being pursued at the levels the Member considers appropriate, the characterisation by the United States would have the anomalous consequence of nevertheless requiring a complaining party to show that there are reasonably available, less trade-restrictive alternatives to a measure that does not fulfil, or is not capable of fulfilling, the objective(s) being pursued.

b) "The levels [the Member] considers appropriate"

11. The United States submits that the Panel erred by mischaracterising its position regarding its level of fulfilment. The United States submits that "it is up to Members to decide which policy objectives they wish to pursue and the levels at which they wish to pursue them". The United States notes that while this "level" is sometimes loosely referred to as the "level of protection, it is more accurate to think of this concept as the level of fulfilment".

12. Australia agrees with the United States that it is the prerogative of Members to decide which policy objectives they wish to pursue and the levels at which they wish to pursue them. However, Australia submits that the United States has improperly conflated the concept of "the levels [the Member] considers appropriate", as referred to in the 6th recital to the TBT Agreement, and the concept of "to fulfil" in Article 2.2 of the TBT Agreement. Australia submits that, as a consequence, any claims of error by the United States based on the conflation of those concepts must fail.

c) More trade-restrictive than necessary

13. As noted above, the Panel found that the "measure did not contribute in a meaningful way to the fulfilment of the objective". The United States submits that in determining whether the measure is "more trade-restrictive than necessary" the Panel erred in drawing from the interpretative framework of Article XX(b) of GATT 1994. In particular, the United States submits that jurisprudence under Article XX of GATT 1994, is not a useful guide to the Article 2.2 inquiry, particularly the Article XX(b) inquiry as to whether the measure makes a "material contribution" to its objective.

14. Australia refers to the recent comments by the Appellate Body in US – Clove Cigarettes that the "the balance set out in the preamble of the TBT between on the one hand, the desire to avoid creating unnecessary obstacles to international trade and, on the other hand, the recognition of Members' right to regulate, is not, in principle, different from the balance set out in GATT 1994, where obligations such as national treatment in Article III are qualified by the general exceptions provision of Article XX". In Australia's view, although Articles XX of GATT 1994 and Article 2.2 of the TBT Agreement are independent provisions under two separate agreements, the elements of the "necessity" analysis developed under Article XX of GATT 1994

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10 United States' Appellant Submission, para. 136.
11 United States' Appellant Submission, para. 124 - 125.
12 United States' Appellant Submission, paras. 124.
14 United States' Appellant Submission, para. 158.
provide useful guidance in interpreting the elements contained in the language of Article 2.2 of the TBT Agreement: namely with respect to the element of "more trade-restrictive than necessary to fulfil a legitimate objective" (emphasis added).

15. The United States submits that the two provisions ask different questions – namely that the question asked by Article XX(b) of GATT 1994 is whether the measure is necessary, whereas Article 2.2 of the TBT Agreement asks whether the trade-restrictiveness is necessary.\footnote{United States’ Appellant Submission, paras. 160 – 161.} Regardless, in Australia’s view both provisions require a determination of whether the measure or the trade-restrictiveness is necessary to meet a particular objective – e.g. to protect human health (in the case of Article XX(b) of GATT 1994) or to fulfil a legitimate objective (in the case of Article 2.2 of the TBT Agreement). As recently noted by the Appellate Body in \textit{US – Clove Cigarettes}, Article 2.2 suggests that obstacles to international trade may be permitted insofar as they are not found to be unnecessary, that is, more trade-restrictive than necessary to fulfil a legitimate objective.\footnote{Appellate Body Report, \textit{US – Clove Cigarettes}, para. 171.} Accordingly, Australia submits that the interpretative framework developed in relation to Article XX of GATT 1994 concerning whether a measure is necessary is useful guidance in understanding the obligation under Article 2.2 of the TBT Agreement, notwithstanding that the two provisions may ask different questions.

\textit{d) Objective of the measure}

16. Canada submits that the Panel erred in identifying a potential objective of the measure, rather than the actual objective of the measure – that is, the Panel focused its analysis on a general policy objective that the COOL measure might pursue, as articulated by the United States, rather than the actual objective pursued.\footnote{Other Appellant Submission of Canada, para. 20.} In Canada’s view, the actual objective of the COOL measure is trade protectionism.\footnote{Other Appellant Submission of Canada, para. 33.}

17. In \textit{EC – Sardines} the Appellate Body noted that 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".\footnote{Appellant Body Report, \textit{EC Sardines (AB)}, para. 276 .} The Appellate Body further noted that the TBT Agreement affords a complainant adequate opportunities to obtain information about the objectives of technical regulation, such as via Article 2.5 of the TBT Agreement, which establishes a compulsory mechanism requiring the supplying of information by the regulating Member,\footnote{Appellant Body Report, \textit{EC Sardines (AB)}, para. 277.} and the dispute settlement process itself as an avenue to obtain the necessary information to build a case.\footnote{Appellant Body Report, \textit{EC Sardines (AB)}, para. 280.} In response to Peru’s concern that Members may not respond fully or adequately to a request for information under Article 2.5, the Appellate Body noted that "we must assume that members of the WTO will abide by their treaty obligations in good faith … [a]nd always in dispute
18. Australia submits that as a starting point, Members must assume that the characterisations provided by Members about the objective(s) of their measure are provided in good faith. Nevertheless, the Appellate Body in EC-Sardines stated that a Panel must also make "an objective assessment of the facts of the case" under Article 11 of the DSU. Further, in US – Gambling the Appellate Body noted that a Panel is not bound by the characterisations of a measure by a Member, and that a Panel may also find guidance in the structure and operation of the measure and in contrary evidence proffered by the complaining party. Moreover, we note that in US - Clove Cigarettes, the Appellate Body recognised the possibility of multiple objectives.

19. It would therefore be open to a Panel, in making "an objective assessment" of the evidence put forward by the complainants and the respondent, to conclude that actual objective of the COOL measure is different from the stated objective(s). However, in Australia's view a Panel should not lightly ignore the "stated" objective(s) of a measure, particularly in the face of supporting, objective evidence such as legislative history and explanatory statements.

e) Legitimate objective

20. Canada seeks review of the Panel's conclusion that the objective of the COOL measure is legitimate within the meaning of Article 2.2 of the TBT Agreement. Canada submits the Panel failed to make an assessment of what type of objectives were at issue.

21. The Panel found that the objective of the COOL measure is to provide as much clear and accurate origin information as possible to consumers. Accordingly, Australia submits that the examination of legitimacy for the purposes of Article 2.2 of the TBT Agreement is dependent on whether the objective of the COOL measure – i.e. to provide consumer information so as to minimise consumer confusion – is in fact legitimate.

22. Australia submits that once a Panel has determined the objective of a measure, determination of its legitimacy involves, as a starting point, reference to the text of Article 2.2 of the TBT Agreement. Australia reiterates its view that Article 2.2 of the TBT Agreement does not restrict what might be legitimate objectives, as the term "inter alia" before the list of objectives clearly indicates that this is a non-exhaustive
29. The objectives listed under Article 2.2 serve to inform what could be considered a legitimate objective. Australia submits that enabling consumers to identify the source of a product is a legitimate objective, as it is closely related to preventing deceptive practices, one of the objectives explicitly identified as “legitimate” in the text of Article 2.2, and assists with market transparency and consumer protection. Providing additional accurate information about a product also assists consumers to make informed purchasing decisions. Australia agrees that providing consumer information on origin is a legitimate objective within the meaning of Article 2.2 of the TBT Agreement.

23. Australia recalls the United States’ submission that the Panel mischaracterised its position regarding its level of fulfilment. Australia notes the Panel's finding that, in some respects the COOL measure can result in misleading, inaccurate and confusing information. Accordingly, Australia submits that in the context of the COOL measure, regardless of the "levels [the Member] considers appropriate", if the measure results in the provision of information that is misleading, inaccurate and/or confusing, it cannot be said to fulfil the objective of providing clear and accurate origin information to consumers.

24. Australia notes Canada’s submission that if the Appellate Body agrees with the United States that the COOL measure fulfils the stated objective, then the Appellate Body should complete the analysis under Article 2.2 of the TBT Agreement and consider whether there are less trade-restrictive alternatives.

25. Australia recalls its submissions on less trade-restrictive alternatives, as set out in its first third participant written submission.

III. CONCLUSION

26. In this submission, Australia has sought to draw attention to specific aspects of the appeal which in its view should be taken into account in analysing both Members' and the Panel's obligations under these covered Agreements.

29 Australia’s Third Party First Written Submission, para. 63.
30 Panel Report, para. 7.651.
31 United States’ Appellant Submission, para. 136.
32 Panel Report, para. 7.715.
33 Panel Report, para. 7.620.
34 Other Appellant Submission of Canada, para. 68.
35 Australia’s Third Party First Written Submission, paras. 79 – 83.