United States – Measures Affecting the Importation of Animals, Meat and Other Animal Products from Argentina
(WT/DS447)

Third Party Oral Statement of Australia

28 January 2014
I.  INTRODUCTION

1. Thank you for the opportunity to present Australia’s views on this dispute.

2. Australia has previously provided a written submission. Our comments today are intended to reinforce some points made in that submission.

3. In our statement, we will focus on just some key issues relating to Article 3 of the SPS Agreement. The first issue is the obligation in Article 3.1 and the fact that this obligation does not prevent WTO Members from determining their own appropriate level of protection.

4. The second issue is the question of what is meant by the concept in Article 3.1 of measures being “based on” international standards, guidelines or recommendations.

5. This statement also addresses the issue of whether or not Article 5.4 imposes an affirmative obligation.

6. Australia makes no comment on the factual issues in this dispute.

II. ARTICLE 3 OF THE SPS AGREEMENT – RECOGNITION OF THE RIGHT OF WTO MEMBERS TO DETERMINE THEIR APPROPRIATE LEVEL OF PROTECTION

7. In its first written submission, Argentina argues that application of the “US Measure against Argentine Beef” is inconsistent with Article 3.1 because it is not based on international standards and is not otherwise justified by the SPS agreement.

8. The same argument is made in relation to the United States’ 2001 Regulations and also in relation to the prohibitions on imports of animals, meat and other animal products from the Patagonia region.¹

9. Article 3.1 of the SPS Agreement provides that:

   To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement, and in particular in paragraph 3.

10. Australia notes that the wording of Article 3 expressly recognises the right of WTO Members to determine their own appropriate level of protection. Article 3.3 of the SPS Agreement provides that:

   ¹ Argentina’s first written submission, paras 185-206 and 415-428.
Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5.

11. In *US/Canada – Continued Suspension*, the Appellate Body made the following statement about Article 3:

   …one of the primary objectives of the SPS Agreement is to “further the use of harmonized sanitary and phytosanitary measures between Members…This objective finds reflection in Article 3 of the SPS Agreement, which encourages the harmonization of SPS measures on the basis of international standards, while at the same time recognizing the WTO Members’ right to determine their appropriate level of protection.*

12. *EC – Hormones* is another case in which the Appellate Body confirmed the individual right of a WTO Member to determine their appropriate level of protection:

   It is clear to us that harmonization of SPS measures of Members on the basis of international standards is projected in the Agreement, as a goal, yet to be realized in the future. To read Article 3.1 as requiring Members to harmonize their SPS measures by conforming those measures with international standards, guidelines and recommendations, *in the here and now*, is, in effect, to vest such international standards, guidelines and recommendations…with *obligatory* force and effect… But, as already noted, the SPS Agreement itself sets out no indication of any intent on the part of the Members to do so.*

13. The Appellate Body further stated in *EC –Hormones* that:

   The ultimate goal of the harmonization of SPS measures is to prevent the use of such measures for arbitrary or unjustifiable discrimination between Members or as a disguised restriction on international trade, without preventing Members from adopting or enforcing measures which are both “necessary to protect” human life or health and “based on scientific principles”, and without requiring them to change their appropriate level of protection.*

14. Australia considers that these findings of the Appellate Body appropriately reflect the object and purpose of Article 3 of the SPS Agreement, particularly with regard to the

---

4 Appellate Body Report, *EC Hormones*, para. 177.
role to be played by each WTO Member in determining its own appropriate level of protection.

III. ARTICLE 3 OF THE SPS AGREEMENT – THE DISTINCTION BETWEEN “BASED ON” AND “CONFORMING TO” INTERNATIONAL STANDARDS, GUIDELINES OR RECOMMENDATIONS

15. Both parties have commented in their written submissions on the wording used in Article 3.1 of the SPS Agreement, which requires Members to base their SPS measures on “international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this Agreement and in particular in paragraph 3”.

16. Argentina has argued that the application of the “US Measure against Argentine Beef”, the United States’ 2001 Regulations and the “US Patagonia measure” are all inconsistent with Article 3.1 because they are not based on international standards and are not otherwise justified by the SPS Agreement.5

17. In EC-Hormones, the Appellate Body clarified what it means to say that Members shall base their measures on international standards, guidelines and recommendations:

…the ordinary meaning of “based on” is quite different from the plain or natural import of “conform to”. A thing is commonly said to be “based on” another thing when the former “stands” or is “founded” or “built” upon or “is supported by” the latter. In contrast, much more is required before one thing may be regarded as “conform[ing] to” another: the former must “comply with”, “yield or show compliance” with the latter.6

18. Australia is also of the view that there is a distinction between the term “based on” and the term “conform to”. In our view, “conform to” imposes a higher standard.

IV. WHETHER ARTICLE 5.4 OF THE SPS AGREEMENT IMPOSES AN AFFIRMATIVE OBLIGATION

19. Article 5.4 of the SPS Agreement states:

Members should, when determining the appropriate level of sanitary or phytosanitary protection, take into account the objective of minimizing negative trade effects.

20. In its first written submission, Argentina stated:

________________________

5 Argentina’s first written submission, paras 185-206 and 415-428.
6 Appellate Body Report, EC Hormones, para. 163.
…Argentina respectfully disagrees with any conclusion that Article 5.4 does not impose an affirmative obligation. The drafters of the treaty would not have inserted a paragraph in the middle of Article 5 that had no operative effect.  

21. With respect to this issue, Australia disagrees. The panel in EC-Hormones stated:

Guided by the wording of Article 5.4, in particular the words “should” (not “shall”) and “objective”, we consider that this provision of the SPS Agreement does not impose an obligation.  

22. As such, Australia considers that Article 5.4 does not impose an affirmative obligation.

V. CONCLUSION

23. In this statement Australia has made the following arguments in relation to particular provisions of the SPS Agreement:

• Article 3 of the SPS Agreement recognises the right of each WTO Member to determine its own appropriate level of protection;

• The meaning of the term “based on” as used in Article 3 of the SPS Agreement is different from the term “conforms to”, which imposes a higher standard; and

• Article 5.4 of the SPS Agreement does not impose an affirmative obligation.

---

7 Argentina’s first written submission, para. 293.