

*United States – Measures Concerning the Importation, Marketing and Sale of Tuna  
and Tuna Products*

**(WT/DS381)**

**Third Party Written Submission of Australia and  
Third Party Oral Statement of Australia**

**Executive Summary**

**29 October 2010**

## A. MEXICO'S CLAIMS UNDER THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

### 1. Mexico's claim under Article III:4 of GATT 1994

1. Australia considers that whether a measure is 'origin-neutral', while indicative, is not determinative of whether a measure accords less favourable treatment to imported products. Rather, the question the Panel must address for the purposes of Article III:4 of GATT 1994 is whether the US dolphin safe labelling measures modify the conditions of competition to the detriment of Mexican tuna and tuna products.<sup>1</sup> The Appellate Body has said the focus of this investigation should be on what appears to be the fundamental thrust and effect of the measure itself.<sup>2</sup>
2. Australia submits that the Panel may look to a range of criteria to determine whether an equality of competitive conditions exists, and should examine those criteria in the light of the fundamental effect the measure has on competition.<sup>3</sup>

### 2. Mexico's claim under Article I:1 of GATT 1994

3. In *Canada - Autos* the Appellate Body confirmed that Article I:1 of GATT 1994 covers *de facto* as well as *de jure* discrimination.<sup>4</sup> The Appellate Body in that case refused to accept the proposition that measures which were on their face 'origin-neutral' could not otherwise be in breach of Article I:1 of GATT 1994.<sup>5</sup>
4. In this dispute, the question to be addressed by the Panel is whether *in practice* the US dolphin safe labelling measures accord an advantage to the tuna products of any other Member that is not also immediately and unconditionally accorded to the tuna products of Mexico. More particularly, can the US dolphin safe labelling measures, which accord an advantage to tuna products of all countries regardless of origin, provided those countries act in a certain way, nevertheless be considered *de facto* discriminatory vis à vis Mexico? In this regard, Australia notes the statement of the panel in *Canada - Autos* that 'an advantage can be granted subject to conditions without necessarily implying that it is not accorded "unconditionally" to the like product of other Members.'<sup>6</sup>

---

<sup>1</sup> Appellate Body Report, *Korea – Various Measures on Beef*, paras. 135 and 137.

<sup>2</sup> Appellate Body Report, *Korea – Beef*, para. 142.

<sup>3</sup> Appellate Body Report, *Korea - Beef*, paras. 142-147; Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, para. 123.

<sup>4</sup> Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, para. 78.

<sup>5</sup> *Ibid.*

<sup>6</sup> Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, para. 10.24.

## B. MEXICO'S CLAIMS UNDER THE AGREEMENT ON TECHNICAL BARRIERS TO TRADE

### 1. Technical regulation

5. In Australia's view, the US dolphin safe labelling measures set out 'requirement(s) concerning a product label' and are therefore a 'labelling requirement' that applies to a product, process or production method within the definition of a technical regulation in paragraph 1 of Annex 1 to the TBT Agreement.<sup>7</sup>
6. Australia notes the US dolphin safe labelling measures do not *require* tuna products to be labelled or to contain certain information on the label; nor do they *prevent* the sale in the United States of tuna products containing tuna harvested in a particular manner or tuna products that do not bear the 'dolphin safe' label. The measures regulate the circumstances in which the 'dolphin safe' label may be used on tuna products. Australia therefore considers that the US dolphin safe labelling provisions are not mandatory on their face and thus on this basis do not fall within the definition of a 'technical regulation' in Annex 1.1 of the TBT Agreement.
7. Australia notes however Mexico's claim that the US dolphin safe labelling measures, if not *a priori* mandatory, are nonetheless *de facto* mandatory.<sup>8</sup> Australia shares New Zealand's view<sup>9</sup> that there may be circumstances where a government's actions in conjunction with an otherwise voluntary measure effectively make compliance with the measure mandatory. Australia also agrees with New Zealand that 'a measure that is not *a priori* mandatory will only constitute a "technical regulation" in cases where it is clearly warranted by the facts'.<sup>10</sup> In Australia's view, there must be some factor in the measure itself or the governmental actions surrounding the measure which mean for the relevant industry that a measure which appears to be voluntary on its face is effectively made 'binding or compulsory'.<sup>11</sup>
8. In the circumstances of this dispute, Mexico's argument would appear to require that the effects in the market of consumer purchasing preferences flowing from information provided via the 'dolphin safe' label be attributable to government as a *mandatory* measure. However, Australia submits that consumer preferences *alone* cannot determine whether a labelling requirement is voluntary or mandatory. Such a proposition would result in all labelling requirements falling within the definition of a 'technical regulation' and render meaningless the definition and disciplines of the TBT Agreement applying to standards.

---

<sup>7</sup> See Panel Report, *European Communities – Protection of Trademarks and Geographical Indications (Australia)*, para. 7.449; Appellate Body Report, *EC - Asbestos*, para. 67.

<sup>8</sup> First written submission of Mexico, para. 203.

<sup>9</sup> Third party written submission of New Zealand, para. 23.

<sup>10</sup> Third party written submission of New Zealand, para. 23.

<sup>11</sup> Appellate Body Report, *EC – Asbestos*, para. 68.

## C. MEXICO'S CLAIMS UNDER ARTICLES 2.1 AND 2.2 OF THE TBT AGREEMENT

### 1. Article 2.1 of the TBT Agreement

9. In Australia's view, the analysis of 'treatment no less favourable' developed under GATT Article III:4 would assist in the interpretation of Article 2.1 of the TBT Agreement.<sup>12</sup> Australia therefore considers that, like Article III:4 of GATT 1994, Article 2.1 of the TBT Agreement 'obliges Members of the WTO to provide *equality of competitive conditions* for imported products...' in respect of technical regulations.<sup>13</sup>
10. Australia submits that when considering whether Mexican tuna products have been accorded 'treatment less favourable' under Article 2.1 of the TBT Agreement, the Panel should have regard to the test set out by the Appellate Body in *Korea – Beef* in the context of Article III:4 of GATT 1994, by examining whether the measures at issue modify the conditions of competition in the US market to the detriment of imported Mexican tuna products.<sup>14</sup> Australia considers that whether a measure is 'origin-neutral', while indicative, is not in itself determinative of whether a measure accords less favourable treatment to imported products.
11. Australia submits that the Panel could also obtain guidance from the Appellate Body's views in *Korea - Beef* that 'the intervention of some element of private choice does not relieve [a Member] of responsibility under the GATT 1994 for the resulting establishment of competitive conditions less favourable for the imported product...'.<sup>15</sup> Thus, Australia considers a relevant question for the Panel is whether, having regard to the evidence, the (alleged) inability of Mexican tuna products to access the US 'dolphin safe' label is the result of *governmental action*<sup>16</sup> modifying the conditions of competition in the US market to the detriment of Mexican tuna products, having regard to the fundamental thrust and effect<sup>17</sup> of the measures at issue.

### 2. Article 2.2 of the TBT Agreement

12. In Australia's view, the first sentence of Article 2.2 establishes the fundamental obligation of Members with respect to 'technical regulations' to '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*'. The second sentence of Article 2.2 explains that '[f]or this purpose, technical regulations shall not be more trade-restrictive than necessary...'. In other words, the second sentence of Article 2.2

<sup>12</sup>See also Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, para. 7.464.

<sup>13</sup>Appellate Body Report, *Korea – Beef*, para. 135, citing Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, pp. 16-17.

<sup>14</sup>Appellate Body Report, *Korea – Beef*, para. 137.

<sup>15</sup>Appellate Body Report, *Korea – Beef*, para. 146.

<sup>16</sup>Appellate Body Report, *Korea – Beef*, para. 149.

<sup>17</sup>Appellate Body Report, *Korea – Beef*, para. 142.

sets out the conditions technical regulations must meet in order to satisfy the fundamental obligation contained in the first sentence of Article 2.2.

**(a) Legitimate objective**

13. Australia recalls the statement of the Panel in *EC – Sardines* that ‘Article 2.2 and [the] preambular text affirm that it is up to the Members to decide which policy objectives they wish to pursue and the levels at which they wish to pursue them’.<sup>18</sup> Australia submits that under Article 2.2 of the TBT Agreement, as under Article 2.4, ‘there must be an examination and a determination on the *legitimacy* of the objectives of the measure’.<sup>19</sup> There must be an assessment of whether the stated objective(s)<sup>20</sup> of a technical regulation put forward by the respondent can be considered ‘legitimate’ within the meaning of Article 2.2. However, Australia submits it is not relevant to this assessment whether the objective(s) put forward by the United States for the US dolphin safe labelling measures are considered *appropriate*.<sup>21</sup>

**(b) More trade restrictive than necessary to fulfil a legitimate objective**

14. Australia considers that the interpretation of the phrase ‘more trade restrictive than necessary to fulfil a legitimate objective’ under Article 2.2 calls for a ‘weighing and balancing’ of the elements contained in that phrase, similar to that required in a ‘necessity’ analysis under GATT Article XX.

15. Australia submits that the Panel’s examination should focus on: (a) whether the measure is trade restrictive; (b) whether the measure is ‘to fulfil’ a legitimate objective; and (c) 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.

16. Australia agrees with Mexico that measures that are ‘trade restrictive’ include those that impose any form of limitation on imports, discriminate against imports or deny competitive opportunities to imports.<sup>22</sup>

17. In examining whether the US dolphin safe labelling measures are ‘to fulfil’ a legitimate objective’, Australia submits the relevant question is whether the measures carry out, or have the capacity to carry out, their stated objectives.<sup>23</sup> In addressing this question, the evidence before the Panel concerning the perceptions and

---

<sup>18</sup> Panel Report, *European Communities – Trade Description of Sardines*, para. 7.120.

<sup>19</sup> Appellate Body Report, *European Communities – Trade Description of Sardines*, para. 286.

<sup>20</sup> Appellate Body Report, *EC – Sardines*, para. 289.

<sup>21</sup> See First written submission of Mexico, paras. 207-208.

<sup>22</sup> First written submission of Mexico, para. 217. See also Panel Report, *India – Measures Affecting the Automotive Sector*, para. 7.265; Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas (Article 21.5 – Ecuador II)*, para. 7.330; Panel Report, *EC – Bananas III (Article 21.5 – US)*, para. 7.677.

<sup>23</sup> See also First written submission of United States, para. 154.

expectations of US consumers relating to the meaning of the ‘dolphin safe’ label and the criteria behind its use will be crucial. Australia submits a relevant consideration is whether the evidence shows that consumers in fact *understand* the criteria behind the ‘dolphin safe’ label and accordingly base their purchasing decisions not only on whether dolphins were killed or seriously injured during harvesting, but also on whether the tuna contained in tuna products was caught in a particular manner.

18. Australia submits that the question of whether there are other reasonably available, less trade restrictive alternatives<sup>24</sup> is pertinent to the Panel’s consideration of whether a measure is ‘more *trade restrictive* than necessary’. Australia also considers that the *degree* of trade-restrictiveness of the US dolphin safe labelling measures (and possible alternatives to those measures) is a relevant consideration for the Panel.<sup>25</sup> Australia considers the level of protection considered appropriate by the United States in relation to the US dolphin safe labelling measures<sup>26</sup> and an examination of whether the US dolphin safe labelling measures form ‘part of a comprehensive strategy’ to address the protection of dolphins<sup>27</sup> are also relevant factors in the Panel’s consideration of whether there are other reasonably available, less trade restrictive alternatives to the measures at issue.

**(c) Taking account of the risks non-fulfilment would create**

19. Australia submits that a finding as to whether a technical regulation is ‘more trade restrictive than necessary to fulfil a legitimate objective’ must be weighed against the risks non-fulfilment of the particular legitimate objective would create. Such risks may differ depending on the *nature* of the legitimate objective the measure is designed to fulfil and the level of protection a Member considers appropriate. If the risks associated with non-fulfilment of a particular objective would be high, then the measure may still be justified regardless of its trade-restrictiveness.
20. While the terms of GATT Article XX do not call expressly for an assessment of the ‘risks non-fulfilment would create’, Australia submits there are parallels with the ‘necessity’ test adopted by the Appellate Body in its consideration of GATT Article XX, which includes consideration of the importance of the interests or values at stake.<sup>28</sup> Australia believes such consideration is relevant to the determination of the issues in this dispute.

---

<sup>24</sup> See e.g. Appellate Body Report, *EC – Asbestos*, paras. 170-174; Appellate Body Report, *Korea – Beef*, paras. 165-166; Panel Report, *US – Standards for Reformulated and Conventional Gasoline*, para. 6.24; GATT Panel Report, *US – Section 337 Tariff Act*, para. 5.26.

<sup>25</sup> Appellate Body Report, *Korea – Beef*, para. 163.

<sup>26</sup> Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, para. 15, citing Appellate Body Report, *United States – Measures Affecting Cross-Border Supply of Gambling and Betting Services*, para. 311; sixth preambular paragraph, TBT Agreement.

<sup>27</sup> Appellate Body Report, *Brazil – Tyres*, paras. 154, 172, 211; see also First written submission of the United States (corrected version), para. 171.

<sup>28</sup> Appellate Body Report, *Brazil – Tyres*, para. 178.