

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

**(WT/DS381)**

**Third Party Submission of Australia**

**Geneva, 28 April 2010**

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<b>Short Title</b>	<b>Full Case Title and Citation</b>
<i>Canada – Autos</i>	Appellate Body Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, 2985
<i>Canada – Periodicals</i>	Panel Report, <i>Canada – Certain Measures Concerning Periodicals</i> , WT/DS31/R and Corr.1, adopted 30 July 1997, as modified by the Appellate Body Report WT/DS31/AB/R, DSR 1997:I, 481
<i>EC – Asbestos</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243
<i>EC – Trademarks and Geographical Indications (Australia)</i>	Panel Report, <i>European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, Complaint by Australia</i> , WT/DS290/R, adopted 20 April 2005, DSR 2005:X, 4603
<i>EC – Sardines</i>	Appellate Body Report, <i>European Communities – Trade Description of Sardines</i> , WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3359
<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, 5
<i>Japan – Taxes on Alcoholic Beverages</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97
<i>US – Tuna (Mexico) / ‘Tuna Dolphin I’</i>	GATT Panel Report, <i>United States – Restrictions on Imports of Tuna</i> , DS21/R, 3 September 1991, unadopted, BISD 39S/155

## A. INTRODUCTION

1. Australia considers that these proceedings under the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) raise significant systemic issues as well as important questions of legal interpretation. In its written submission Australia will focus on a select few issues. However, the fact that Australia has not commented on a particular issue should not be taken as an indication that Australia accepts the views of either party on that issue. The issues which Australia focuses on in this submission are:

- (a) Whether imported tuna and tuna products from Mexico are accorded ‘less favourable’ treatment than that accorded to like domestic (that is, US) products (Article III:4 of the General Agreement on Tariffs and Trade 1994 (GATT 1994)).
- (b) Whether the US dolphin safe labelling measures<sup>1</sup> accord any advantage, favour, privilege or immunity to the tuna and tuna products of any other Member that is not also immediately and unconditionally accorded to the tuna and tuna products of Mexico (Article I.1 of GATT 1994).
- (c) Whether the US dolphin safe labelling measures fall within the definition of a ‘technical regulation’ in Annex 1.1 of the Agreement on Technical Barriers to Trade (TBT Agreement).

2. Australia reserves the right to raise other issues in the third-party hearing with the Panel.

## B. MEXICO’S CLAIMS UNDER THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

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

3. In order to establish a breach of Article III:4 of GATT 1994 three elements must be established: (i) that the imported and domestic products at issue are ‘like products’; (ii) that the measure at issue is a ‘law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use; and (iii) that the imported products are accorded ‘less favourable’ treatment than that accorded to like domestic products.<sup>2</sup>

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<sup>1</sup> In this submission, Australia uses the term ‘US dolphin safe labelling measures’ to refer to the three measures primarily challenged by Mexico in this dispute: (1) the Dolphin Protection Consumer Information Act (DPCIA), Title 16, Section 1385 of the United States Code; (2) Section 216, parts 91 and 92, of Title 50 of the Code of Federal Regulations; and (3) the 9<sup>th</sup> Circuit Court of Appeal’s decision in *Earth Island Institute v Hogarth*, 494 F.3d 757 (2007), which together establish the circumstances under which tuna and tuna products may be labelled ‘dolphin safe’ under US law.

<sup>2</sup> Appellate Body Report, *Korea – Various Measures on Beef*, WT/DS161/AB/R, WT/DS169/AB/R, paragraph 133.

4. At issue in this dispute is whether the US measures accord less favourable treatment to Mexican tuna products than to like US tuna products.
5. Australia submits that when considering this question, the Panel should have regard to the test used by the Appellate Body in *Korea – Various Measures on Beef*. In that case the Appellate Body stated that:

*‘According “treatment no less favourable” means, as we have previously said, **according conditions of competition no less favourable** to the imported product than to the like domestic product. In Japan – Taxes on Alcoholic Beverages, we described the legal standard in Article III as follows:*

...

*Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in the same way as the like domestic products once they had been cleared through customs. Otherwise indirect protection could be given”.<sup>3</sup> (emphasis added)...*

*Whether or not imported products are treated “less favourably” than like domestic products should be assessed ... by examining whether a measure modifies the conditions of competition in the relevant market to the detriment of imported products.’<sup>4</sup> (emphasis in bold added)*

6. The Appellate Body in *Korea – Various Measures on Beef* noted that the focus of this investigation should be on what appears to be the fundamental thrust and effect of the measure itself.<sup>5</sup>
7. When considering the application of Article III:4, the Panel should also have regard to Article III:1<sup>6</sup> as a general principle that informs the rest of Article III.<sup>7</sup> The Panel in *Canada - Periodicals* cited the Appellate Body Report on *Japan – Taxes on Alcoholic Beverages* which stated that:

*‘The purpose of Article III:1 is to establish this general principle as a guide to understanding and interpreting the specific obligations contained in Article III:2 and in the other paragraphs of Article III, while respecting, and not diminishing*

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<sup>3</sup> Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, pages 16-17.

<sup>4</sup> Appellate Body Report, *Korea – Various Measures on Beef*, paragraphs 135 and 137.

<sup>5</sup> Appellate Body Report, *Korea – Various Measures on Beef*, paragraphs 142 - 145.

<sup>6</sup> Article III:1 of GATT 1994 states: *‘The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.’*

<sup>7</sup> Panel Report, *Canada – Certain Measures Affecting Periodicals*, WT/DS31/R and Corr.1, adopted 30 July 1997, paragraph 5.37.

*in any way, the meaning of words actually used in the texts of those other paragraphs’.*<sup>8</sup>

8. In considering the two provisions together, the Appellate Body in *EC –Asbestos* stated:

*‘This interpretation must, therefore, reflect that, in endeavouring to ensure "equality of competitive conditions", the "general principle" in Article III seeks to prevent Members from applying internal taxes and regulations in a manner which affects the competitive relationship, in the marketplace, between the domestic and imported products involved, "so as to afford protection to domestic production."’*<sup>9</sup>

9. The United States, in its submission, asserts that, ‘the U.S. provisions do not modify the conditions of competition to the detriment of Mexican tuna or tuna products’ because ‘the U.S. provisions provide that *any tuna products* – regardless of origin – may use the dolphin safe label if they meet the criteria for the label’ and ‘these criteria are origin neutral’<sup>10</sup> (emphasis added). However, Australia submits that whether a measure is ‘origin-neutral’, while indicative, is not in itself determinative; rather, the question the Panel must address for the purposes of Article III: 4 is whether the US dolphin safe labelling measures modify the conditions of competition to the detriment of Mexican tuna and tuna products.
10. In *Japan - Alcoholic Beverages*, the Appellate Body found that the combination of customs duties and internal taxation meant that an equality of competitive conditions was not guaranteed.<sup>11</sup> In *Korea - Beef* the Appellate Body found that the effect the dual market had on competition (rather than the simple existence of the dual market itself) resulted in the measures being discriminatory.<sup>12</sup> Thus, 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 that the measure has on competition.<sup>13</sup>

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

11. To establish a violation of Article I:1 of GATT 1994, a party must demonstrate that: (i) the imported products concerned are “like” products; (ii) the measure at issue confers an advantage, favour or privilege on products originating in any other country; and (iii) the advantage, favour or privilege is not granted “immediately and

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<sup>8</sup> Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, page 18.

<sup>9</sup> Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, paragraph 98.

<sup>10</sup> United States First Submission (corrected version), paragraph 106.

<sup>11</sup> Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, page 31

<sup>12</sup> Appellate Body Report, *Korea – Various Measures on Beef*, paragraphs 142 - 145.

<sup>13</sup> Appellate Body Report, *Korea – Various Measures on Beef*, paragraphs 58, 142-144; Appellate Body Report, *EC – Asbestos*, paragraph 123.

unconditionally” to the like product originating in the territories of all other Members.<sup>14</sup>

12. The United States asserts that ‘the U.S. measures at issue in this dispute do not accord any advantage to products of any other member that is not also immediately and unconditionally accorded to products of Mexico’.<sup>15</sup> In support of this assertion, the United States refers to the decision of the GATT Panel in *Tuna Dolphin I*<sup>16</sup> which held that labelling provisions were not inconsistent with Article I.1 of GATT 1994 because they applied to all countries whose vessels fished in a particular geographical area and did not distinguish between the country of origin of the vessel that caught them.<sup>17</sup>
13. In *Canada - Autos* the Appellate Body confirmed that Article I:1 of GATT 1994 covers *de facto* as well as *de jure* discrimination.<sup>18</sup> Thus the Appellate Body in *Canada - Autos* 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>19</sup> Rather, the Appellate Body held that a measure which on its face was origin neutral but accorded the advantage of duty free treatment to motor vehicles originating in certain countries without according that advantage to like motor vehicles from all other Members was inconsistent with Canada’s obligations under Article I.1 of the GATT 1994.<sup>20</sup> That is, the relevant measures, held by the Appellate Body to be *de facto* discriminatory, accorded the advantage to ‘certain motor vehicles ... from certain countries’<sup>21</sup> and not immediately and unconditionally to like motor vehicles of all other countries.
14. On the other hand, the Panel’s decision in *Tuna Dolphin I* found the “advantage” (that is, eligibility for dolphin safe labelling) was available to the vessels of any country, provided they complied with the relevant requirements. This is unlike the situation in *Canada - Autos*, where the conferral of the benefit was based on a determination by the respondent.
15. In this case, 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,

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<sup>14</sup> Appellate Body Report, *Korea – Various Measures on Beef*, paragraph 133.

<sup>15</sup> United States First Submission (corrected version), paragraph 121.

<sup>16</sup> GATT Panel Report, *United States – Restrictions on Imports of Tuna* (DS21/R, 3 September 1991, unadopted BISD 39S/155).

<sup>17</sup> GATT Panel Report, *United States – Restrictions on Imports of Tuna*, paragraph 122.

<sup>18</sup> Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry* (WT/DS139/AB/R, WT/DS142/AB/R), paragraph 78.

<sup>19</sup> Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, paragraph 78.

<sup>20</sup> Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, paragraph 78.

<sup>21</sup> Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, para 85.

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>22</sup>

### C. CLAIMS UNDER THE AGREEMENT ON TECHNICAL BARRIERS TO TRADE

16. Mexico asserts that the US dolphin safe labelling measures constitute a technical regulation within the meaning of paragraph 1 of Annex 1 to the TBT Agreement and that that regulation is inconsistent with Articles 2.1, 2.2 and 2.4 of that Agreement.<sup>23</sup>

#### 1. Technical regulation

17. A technical regulation is defined in paragraph 1 of Annex 1 to the TBT Agreement 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.*

18. Australia recalls that the Appellate Body in *EC – Asbestos* set out three criteria that a document must meet to fall within the definition of a ‘technical regulation’ in the TBT Agreement:

- (a) the document must apply to an identifiable product or group of products;
- (b) the document must lay down one or more characteristics of the product (or their related processes and production methods); and
- (c) compliance with the product characteristics must be mandatory.<sup>24</sup>

19. With regard to the first criterion set out above, Australia notes that the United States does not disagree with Mexico’s claim that the US dolphin safe labelling measures apply to an identifiable product or group of products (that is, tuna and tuna products).

20. Australia notes however that there is disagreement between the parties concerning whether the US dolphin safe labelling measures lay down a product characteristic (the

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<sup>22</sup> Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R, adopted 19 June 2000, para 10.24.

<sup>23</sup> First Written Submission of Mexico, paragraph 192. In this written submission, Australia will only address the issue of whether the US measures constitute a technical regulation within the meaning of paragraph 1 of Annex 1 of the TBT Agreement.

<sup>24</sup> Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2000, paragraph 176 citing Appellate Body Report, *EC – Asbestos*, paragraphs 67 – 70.

second criterion of the definition of “technical regulation” under Annex 1.1 of the TBT Agreement).

21. Australia notes that ‘labelling requirements’ fall within the second sentence of the definition of a ‘technical regulation’ in Annex 1.1 of the TBT Agreement, as noted by the Appellate Body in *EC – Asbestos*:

*Further, we note that the definition of a “technical regulation” provides that such a regulation “may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements”.*<sup>25</sup> (emphasis in original)

22. In *EC – Trademarks and Geographical Indications (Australia)*, the Panel said in relation to labelling requirements:

*‘this example is qualified by the words “as they apply to a product, process or production method”. The text does not limit the scope of the example by stating what the labels must indicate in order for them to constitute a technical regulation. Rather, they explain to what the labelling requirements “apply”. This simply means that a requirement concerning a product label is a labelling requirement that applies to a product.*<sup>26</sup> (emphasis added)

23. The United States acknowledges that the US dolphin safe labelling measures ‘set out requirements that must be met for tuna to be labeled dolphin safe’.<sup>27</sup> 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.

24. Australia notes there is also disagreement between the parties as to whether compliance with the US dolphin safe labelling measures is mandatory (the third criterion of a technical regulation).

25. Australia notes that a measure may set out labelling requirements without being a technical regulation. In particular, Australia notes the definition of a standard in Annex 1.1 of the TBT Agreement provides (in relevant part) that a ‘document approved by a recognized body...with which compliance is not mandatory’ may also include ‘labelling requirements’. Australia therefore finds force in the United States’ argument that the inclusion of labelling requirements does not *of itself* qualify a document as a technical regulation and that such an interpretation would render *inutile* the definition of a standard.

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<sup>25</sup> Appellate Body Report, *EC – Asbestos*, paragraph 67.

<sup>26</sup> Panel Report, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, Complaint by Australia*, WT/DS290/R, adopted 20 April 2005, paragraph 7.449.

<sup>27</sup> United States First Submission (corrected version), paragraph 129.

26. Australia recalls the Appellate Body’s finding in *EC – Asbestos* that ‘a “technical regulation” must...regulate the ‘characteristics’ of products in a *binding or compulsory* fashion. It follows that, with respect to products, a “technical regulation” has the effect of prescribing or imposing one or more “characteristics” – “features”, “qualities”, “attributes” or other “distinguishing mark”.<sup>28</sup> Australia also notes the Appellate Body’s finding that “product characteristics” may...be prescribed or imposed with respect to products in either a positive or a negative form’ and ‘in both cases, the legal result is the same: the document “lays down” certain binding “characteristics” for products, *in one case affirmatively and in the other by negative implication*’.<sup>29</sup>
27. Australia notes that the US dolphin safe labelling measures do not *require* tuna products to be labeled or to contain certain information on the label. Rather, the measures regulate the circumstances in which the dolphin safe label may be used on tuna products. Further, the US dolphin safe measures do not *prevent* the sale in the United States of tuna products containing tuna that is harvested in a particular manner (or using a particular fishing method) or tuna products that do not bear the dolphin safe label. Australia therefore finds persuasive the United States’ argument that the US dolphin safe labelling provisions are not mandatory and do not fall within the definition of a ‘technical regulation’ in Annex 1.1 of the TBT Agreement.
28. However, Mexico further argues that the US dolphin safe labelling measures, if not *a priori* mandatory, are nonetheless *de facto* mandatory ‘because the marketing conditions in the US are such that it is impossible to effectively market and sell tuna products without a dolphin safe designation’.<sup>30</sup>
29. Australia notes that Mexico’s argument, in the circumstances of this case, 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 the actions of private individuals (including consumers) cannot alter the *nature* of a measure. That is, consumer preferences alone cannot determine whether a labelling requirement is voluntary or mandatory. To do so would result in all voluntary labelling requirements falling within the definition of a ‘technical regulation’, as by their very nature they are designed to influence (and/or respond to) consumer preferences.

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<sup>28</sup> Appellate Body Report, *EC – Asbestos*, paragraph 68.

<sup>29</sup> Appellate Body Report, *EC – Asbestos*, paragraph 69.

<sup>30</sup> First Written Submission of Mexico, paragraph 203.