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

(WT/DS381)

Third Party Oral Statement of Australia

Geneva, 19 October 2010

A. INTRODUCTION

Mr Chairman, Members of the Panel.

1. Today, Australia will address some important questions of interpretation in relation to Mexico's claim that the US dolphin safe labelling measures at issue in this dispute are inconsistent with Articles 2.1 and 2.2 of the TBT Agreement.[1] Australia notes that many of these questions, which have significant systemic implications, have not yet been specifically addressed by a panel or the Appellate Body.

A. TECHNICAL REGULATION

2. First, I would like to recall Australia's views on the threshold question of whether the US dolphin safe labelling measures constitute a technical regulation within the meaning of paragraph 1 of Annex 1 to the TBT Agreement.

3. On the issue of whether compliance with the US dolphin safe labelling measures is mandatory,[2] Australia notes that 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. Rather, 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. [3]

4. Australia notes however Mexico's claim that the US dolphin safe labelling measures, if not *a priori* mandatory, are nonetheless *de facto* mandatory.[4] Australia shares New Zealand's view[5] 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'.[6] 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'.[7]

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[1] First written submission of Mexico, paragraph 192.
[2] Appellate Body Report, *EC - Sardines*, WT/DS231/AB/R, adopted 23 October 2002, paragraph 176 citing Appellate Body Report, *EC – Asbestos*, paragraphs 67-70.
[3] See also First written submission of the United States (corrected version), paragraph 120.
[4] First written submission of Mexico, paragraph 203.
[5] Third party written submission of New Zealand, paragraph 23.
[6] Third party written submission of New Zealand, paragraph 23.
[7] Appellate Body Report, *EC – Asbestos*, paragraph 68.

5. 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. Further, 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.

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

6. Should the Panel find that the US dolphin safe labelling measures constitute a 'technical regulation' within the meaning of Annex 1.1 of the TBT Agreement, important issues of interpretation would arise for consideration by the Panel in relation to Mexico's claims under Articles 2.1 and 2.2 of the TBT Agreement.

1. Article 2.1 of the TBT Agreement

7. I turn first to the interpretation of Article 2.1 of the TBT Agreement.

8. Australia notes that the panel in *EC – Trademarks and Geographical Indications (Australia)* recognised the similarity in the terms used in Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994.[8] Australia therefore considers that 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.

9. Australia 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.[9]

10. Thus, 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.[10] Furthermore, Australia considers that whether a measure is 'origin-neutral', as asserted by the United States[11], while indicative, is not in itself determinative of whether a measure accords less favourable treatment to imported products.

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[8] Panel Report, *EC – Trademarks and Geographical Indications (Australia)*, paragraph 7.464.
[9] Appellate Body Report, *Korea – Beef*, paragraph 135, citing Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, pp 16-17 (emphasis added)
[10] Appellate Body Report, *Korea – Beef*, paragraph 137.
[11] First written submission of the United States (corrected version), paragraph 106.

11. Australia submits that this Panel could obtain guidance from the Appellate Body's views in *Korea - Beef* that 'the intervention of some 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…'.[12] Nevertheless, the Appellate Body also noted that 'what is addressed by Article III:4 is merely the *governmental* intervention that affects the conditions under which like goods, domestic and imported, compete in the market within a Member's territory'.[13]

12. Thus, Australia submits that 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 modifying the conditions of competition in the US market to the detriment of Mexican tuna products, having regard to the fundamental thrust and effect[14] of the measures at issue.

2. Article 2.2 of the TBT Agreement

(a) Interpretation of Article 2.2

13. I turn now to important issues of interpretation arising under Article 2.2 of the TBT Agreement.

14. 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'.

15. In other words, the second sentence of Article 2.2 sets out the conditions technical regulations must meet in order to satisfy the fundamental obligation contained in the first sentence of Article 2.2. Australia submits that the Panel should bear in mind this fundamental obligation in assessing whether a technical regulation is 'more trade-restrictive than necessary to fulfil a legitimate objective'.

(b) Legitimate objective

16. Turning first to the interpretation of 'legitimate objective', 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'.[15] Australia submits that

[12] Appellate Body Report, *Korea – Beef*, paragraph 146.
[13] Appellate Body Report, *Korea – Beef*, paragraph 149.
[14] Appellate Body Report, Korea – Beef, paragraph 142.
[15] Panel Report, *EC – Sardines*, paragraph 7.120.

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'.[16] That is, there must be an assessment of whether the stated objective(s)[17] of a technical regulation put forward by the respondent can be considered 'legitimate' within the meaning of Article 2.2.

17. 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 to be *appropriate*. In particular, Australia submits it is not relevant to consider whether the measures at issue 'protect animal life or health or the environment in the general sense', or whether the objective of the US measures 'is narrower than the protection of animal life or health or the environment', as argued by Mexico.[18]

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

18. 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 the weighing and balancing process required in a 'necessity' analysis under GATT Article XX.

19. Australia therefore submits that the Panel's examination of the phrase 'more trade restrictive than necessary to fulfil a legitimate objective' 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.

(i) 'trade restrictive'

20. Addressing each of these elements in turn, 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.[19]

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[16] Appellate Body Report, *EC – Sardines*, paragraph 286 (emphasis added).
[17] Appellate Body Report, *EC – Sardines*, paragraph 289.
[18] First written submission of Mexico, paragraphs 207-208.
[19] First written submission of Mexico, paragraph 217. See also Panel Report, *India – Autos*, paragraph 7.265; Panel Report, *EC – Bananas III (Article 21.5 – Ecuador II)*, paragraph 7.330; Panel Report, EC – *Bananas III (Article 21.5 – US)*, paragraph 7.677.

(ii) 'to fulfil' a legitimate objective

21. Australia considers a relevant issue for the Panel to consider is the nexus between the measure and the stated objective in the context of Article 2.2 of the TBT Agreement, which requires that a technical regulation be '*to fulfil*' a legitimate objective.

22. Australia considers that Article 2.2, in requiring that the measure not be more trade restrictive than necessary 'to fulfil' a legitimate objective, means that the measure must carry out, or at least have the capacity to carry out, its legitimate objective. Thus the relevant question in this dispute is whether the US dolphin safe labelling measures carry out, or have the capacity to carry out, their stated objectives.[20]

23. In addressing this question, the evidence before the Panel concerning the perceptions and expectations of US consumers relating to the meaning of the 'dolphin safe' label and the criteria behind its use will be crucial. In particular, Australia submits that a relevant consideration for the Panel is whether the evidence before it 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.

(iii) reasonably available alternatives

24. Australia submits that the question of whether there are other reasonably available, less trade restrictive alternatives[21] is pertinent to the Panel's consideration of whether a measure is 'more *trade restrictive* than necessary'.

25. 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 in examining this element of Article 2.2. [22]

26. Australia submits that the level of protection considered appropriate by the United States in relation to the US dolphin safe labelling measures is another relevant factor in the Panel's examination of this issue. [23]

27. Finally, the United States suggests that 'the U.S. dolphin safe labeling provisions together with the measure called for under the AIDCP and other provisions of U.S. law form part of a comprehensive U.S. strategy to protect dolphins'.[24] Without

[20] See also First written submission of United States, paragraph 154.
[21] See e.g. Appellate Body Report, *EC – Asbestos*, paragraphs 170-174; Appellate Body Report, *Korea – Beef*, paragraphs 165-166; Panel Report, *US – Gasoline*, paragraph 6.24; GATT Panel Report, *US – Section 337 Tariff Act*, paragraph 5.26.
[22] Appellate Body Report, *Korea – Beef*, paragraph 163.
[23] Appellate Body Report, *Brazil – Tyres*, paragraph 156 citing Appellate Body Report, *US – Gambling*, paragraph 311; see also sixth preambular paragraph, TBT Agreement.
[24] First written submission of the United States (corrected version), paragraph 171.

commenting on the merits of the United States' claim, Australia agrees that the examination of whether the US dolphin safe labelling measures form 'part of a comprehensive strategy' to address the protection of dolphins is a relevant factor in the Panel's consideration of whether there are other reasonably available, less trade restrictive alternatives to the measures at issue.[25]

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

28. 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.

29. 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, which includes consideration of the importance of the interests or values at stake.[26] Australia considers that such consideration is relevant to the determination of the issues in this dispute.

30. Thank you Mr Chairman, Members of the Panel. Australia would be pleased to provide answers to any questions from the Panel.

[25] Appellate Body Report, *Brazil – Tyres*, paragraphs 154, 172, 211.
[26] Appellate Body Report, *Brazil – Tyres*, paragraph 178.