

**United States – Measures Concerning the Importation, Marketing and Sale of Tuna
and Tuna Products
(WT/DS381)**

Australia's Responses to Questions of the Panel Following the First Substantive Meeting
with the Panel

B. AUSTRALIA

3. In paragraph 10 of your third party written submission you argue that the Panel, when conducting its analysis under Article III:4 of the GATT, "may look to a range of criteria to determine whether an equality of competitive conditions exists". Please clarify which criteria, in your view, would be relevant for the Panel's determination in the present case. Please also indicate your view on the role, if any, that consumer preferences should play in such analysis.

Australia considers that, drawing on previous cases, there are a range of criteria the Panel may look to in determining whether an equality of competitive conditions exists in the present dispute. As noted in its written submission, Australia submits these criteria should be examined in the light of the fundamental effect that the measure has on competition.

Australia recalls the statement of the Appellate Body that 'Article III protects expectations not of any particular trade volume but rather of the *equal competitive relationship* between imported and domestic products'.¹ Therefore, in order to establish that a measure adversely affects the competitive opportunities of imported products vis-à-vis like domestic products, it is not necessary to demonstrate actual effects on trade.²

Australia considers a relevant criterion is 'the design, the architecture, and the revealing structure of a measure'.³ In *Japan – Alcoholic Beverages* the Appellate Body endorsed the panel's comments that 'through a combination of high import duties and differentiated internal taxes, Japan manages to "isolate" domestically produced shochu from foreign competition...'.⁴ In *China – Publications and Audiovisual Products*, the panel considered that 'the restrictions on the distribution channels available set forth in Article 3 and the limitations on the type of distributors available set forth in Article 4 of the *Imported Publications Subscription Rule* may reasonably be expected to adversely

¹ Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, p17, citing GATT Panel Report, *United States – Taxes on Petroleum and Certain Imported Substances*, L/6175, adopted 17 June 1987, paragraph 5.1.9.

² Panel Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/R, adopted 27 September 2004, upheld by Appellate Body Report WT/DS276/AB/R, paragraph 6.184 (findings on Article III.4 were not appealed).

³ Appellate Body Report, *Japan – Alcoholic Beverages*, p31.

⁴ Appellate Body Report, *Japan – Alcoholic Beverages*, p35, citing Panel Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/R, WT/DS10/R, WT/DS11/R, adopted 1 November 1996, as modified by Appellate Body Report WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, paragraph 6.35.

modify the conditions of competition in the marketplace between imported and domestic like products'.⁵ As such, Australia considers 'the design, the architecture and the revealing structure' of a measure is relevant to determining whether the measures are 'applied in a way that affords protection to domestic production'⁶ and whether it adversely modifies the conditions of competition to the detriment of imported products.⁷

Australia considers another relevant criterion in this dispute is whether the US dolphin safe labelling measures impose an *additional burden* on imported products that are not imposed in relation to domestic products. Mexico asserts that the additional certification required for tuna harvested in the ETP using purse-seine nets to access the 'dolphin safe' label adversely affects the competitive opportunities between Mexican tuna products and like US products.⁸ The panel in *Canada – Wheat Exports and Grain Imports* noted that 'GATT/WTO jurisprudence supports the view that the imposition of additional, or extra, requirements on imported products as compared to like domestic products constitutes less favourable treatment'.⁹

Australia agrees with Korea¹⁰ that another relevant factor in assessing the fundamental thrust and effect¹¹ of a measure may be the prevailing market conditions just prior to the introduction of the US measures and how the introduction of such measures have affected sales of domestic and imported tuna in the US market.

However, Australia also agrees with the European Union¹² that the statement of the Appellate Body in *Dominican Republic – Import and Sale of Cigarettes* makes clear that 'the existence of a detrimental effect on a given imported product resulting from a measure does not necessarily imply that this measure accords less favourable treatment to imports if the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product...'.¹³ In *EC – Approval and Marketing of Biotech Products*, the panel found that the detrimental effect on the imported product was the result of a 'factor or circumstance unrelated to the foreign origin of the product', in that case 'a

⁵ Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R, paragraph 7.1539 (findings on Article III.4 were not appealed).

⁶ Appellate Body Report, *Japan – Alcoholic Beverages*, p32.

⁷ Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, paragraph 137.

⁸ See e.g. First written submission of Mexico, paragraph 165.

⁹ Panel Report, *Canada – Wheat Exports and Grain Imports*, paragraph 6.185 citing Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, adopted 1 February 2002, paragraph 268 and GATT Panel Report, GATT Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages*, DS23/R, adopted 19 June 1992, paragraphs 5.32 and 5.35. See also Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R and Corr.1, adopted 5 April 2002, paragraph 7.307.

¹⁰ Third party oral statement of Korea, paragraph 5.

¹¹ Appellate Body Report, *Korea – Beef*, paragraph 142.

¹² Third party oral statement of the European Union, paragraph 12.

¹³ Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005, paragraph 96.

perceived difference between...products in terms of their safety...’.¹⁴ Australia considers a careful examination of the facts before the Panel in this dispute is required to determine whether any detrimental effect resulting from the measures is the result of a ‘factor or circumstance unrelated to the foreign origin of the product’. In the circumstances of this dispute, Australia considers consumer preferences for ‘dolphin safe’ tuna related to the perceived environmental impact of particular fishing methods may be such a factor.

Australia, as a third party, does not have access to the full facts and circumstances in the present dispute and therefore does not consider it is appropriate to draw specific conclusions on the facts. However, Australia agrees with the European Union that other relevant factors in assessing whether less favourable treatment has been accorded to Mexican tuna products may be the relative timeframes for introduction of the US dolphin safe labelling measures vis-à-vis the presence of US and other countries’ fishing fleets in the ETP and their use of purse-seine nets to encircle dolphins¹⁵, whether Mexico and/or other countries fishing in the ETP are able to qualify for the ‘dolphin safe’ label by using fishing methods other than encirclement of dolphins using purse-seine nets¹⁶, and the costs Mexican fishing fleets would incur, relative to the costs that may already have been incurred by the fishing fleets of the US or other countries, in changing the geographical location and/or method in which they harvest tuna.¹⁷

4. *You have argued in your third party submission, that labelling requirements are by their very nature designed to influence (and/or respond to) consumer preferences and that the actions of private individuals (including consumers) cannot alter the nature of a measure, insofar as consumer preferences alone cannot determine whether a labelling requirement is voluntary or mandatory. To the extent that the measures may affect consumers’ perception of what “dolphin-safe” tuna is, please clarify how this impact should a finding of less favourable treatment?*

Australia acknowledges that consumer perceptions of what ‘dolphin safe’ tuna is could be relevant to the creation of demand among participants in the US tuna market (such as processors and retailers) for tuna that can be labelled ‘dolphin safe’. 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.

However, in *Korea – Beef*, the Appellate Body said ‘even if we were to accept that the dual retail system “encourages” the perception of consumers that imported and domestic beef are “different” we do not think it has been demonstrated that such encouragement

¹⁴ Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, Add.1 to Add.9, and Corr.1, adopted 21 November 2006, paragraph 7.2514.

¹⁵ Third party written submission of the European Union, paragraph 9.

¹⁶ Third party written submission of the European Union, paragraphs 11-12.

¹⁷ Third party written submission of the European Union, paragraph 13.

necessarily implies a competitive advantage for domestic beef'.¹⁸ Thus, in Australia's view, even if it could be demonstrated that the US dolphin safe labelling measures encouraged a particular perception of what 'dolphin-safe' tuna is, this would not necessarily mean that the measures modified the conditions of competition in the market to the detriment of imported products.

Australia notes that 'the Article III:4 requirement is one addressed to relative competitive opportunities created by the government in the market, not to the actual choices made by enterprises in the market'.¹⁹ In *Korea – Beef*, the Appellate Body noted that '[t]he dramatic reduction in number of retail outlets for imported beef followed from the decisions of individual retailers who could choose freely to sell the domestic product or the imported product. *The legal necessity of making a choice was, however, imposed by the measure itself. The restricted nature of that choice should be noted.* The choice was limited to selling domestic beef only or imported beef only. *Thus, the reduction of access to normal retail channels is, in legal contemplation, the effect of that measure.* In these circumstances, the intervention of some element of private choice does not relieve Korea of responsibility under the GATT 1994 for the resulting establishment of competitive conditions less favourable for the imported product than for the domestic product.'²⁰

Thus, Australia submits the focus of the Panel's examination should be on the 'relative competitive opportunities' created by the US Government in the market, not the 'actual choices made by enterprises in the market' (such as processors and retailers of tuna). In other words, a relevant question is whether the 'legal necessity of making a choice' (in this case, whether to purchase, process or sell only tuna that can be labelled 'dolphin safe' in the US market) is 'imposed by the measure itself' or by the governmental intervention²¹ in the market more broadly.

5. *You seem to argue that labelling schemes that are not a priori mandatory could nonetheless be de facto mandatory, and that while consumer preferences alone cannot make a labelling scheme de facto mandatory, governmental action surrounding the measure could effectively make it binding or compulsory. (see paragraphs 4 and 5 of your oral statement). What kind of action or measures attributable to the government could, in your view, transform a prima facie voluntary standard into a mandatory technical regulation?*

As noted in Australia's oral statement, Australia considers 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'.

¹⁸ Appellate Body Report, *Korea – Beef*, paragraph 141.

¹⁹ Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/RW, adopted 29 January 2002, as modified by Appellate Body Report WT/DS108/AB/RW, paragraph 8.128 citing GATT Panel Report, *US – Malt Beverages*, paragraph 5.31.

²⁰ Appellate Body Report, *Korea – Beef*, paragraph 146 (emphasis added).

²¹ Appellate Body Report, *Korea – Beef*, paragraph 149 (emphasis added).

Australia considers further guidance on the types of action or measures attributable to government that could transform a prima facie voluntary standard into a mandatory technical regulation can be drawn from an examination of the case law concerning the distinction between governmental and private actions.

The panel in *Japan – Film* commented that ‘panels have been faced with making sometimes difficult judgments as to the extent to which what appear on their face to be private actions *may nonetheless be attributable to government because of some governmental connection to or endorsement of those actions*’.²² The panel also noted that ‘...past GATT cases demonstrate that the fact that an action is taken by private parties does not rule out the possibility that it may be deemed to be governmental if there is *sufficient government involvement* with it.’²³ (emphasis added)

In *Japan – Semi-Conductors*, Japan argued that ‘[e]xports were limited by private enterprises in their own self-interest and such private action was outside the scope of Article XI:1’.²⁴ However, the panel found that ‘...an *administrative structure* had been created by the Government of Japan which operated to *exert maximum possible pressure on the private sector* to cease exporting at prices below company-specific costs...the Panel considered that the complex of measures exhibited the *rationale as well as the essential elements of a formal system of export control*’.²⁵

In *Korea – Beef*, the Appellate Body noted that while individual retailers could choose freely to sell the domestic product or the imported product, ‘[t]he *legal necessity of making a choice was, however, imposed by the measure itself. The restricted nature of that choice should be noted.*’²⁶

The panel in *Argentina – Hides and Leathers*, while agreeing with the view of the panel in *Japan – Film*, noted: ‘we do not think that it follows either from that panel’s statement or from the text or context of Article XI:1 that Members are under an obligation to exclude any possibility that governmental measures may enable private parties, directly or indirectly, to restrict trade, where those measures themselves are not trade-restrictive.’²⁷ Similarly, the Appellate Body in *Korea – Beef* emphasised that ‘[w]hat is addressed by Article III.4 is merely the *governmental intervention* that affects the

²² Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998, paragraph 10.52.

²³ Panel Report, *Japan – Film*, paragraph 10.56.

²⁴ GATT Panel Report, *Japan – Trade in Semi-Conductors*, paragraph 102, cited in Panel Report, *Japan – Film*, paragraph 10.54.

²⁵ GATT Panel Report, *Japan – Semi-Conductors*, paragraph 117 cited in Panel Report, *Japan – Film*, paragraph 10.54.

²⁶ Appellate Body Report, *Korea – Beef*, paragraph 146.

²⁷ Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather*, WT/DS155/R and Corr.1, adopted 16 February 2001, paragraph 11.19.

conditions under which like goods, domestic and imported, compete in the market within a Member's territory'.²⁸

F. GUATEMALA

16. *In the last page of your third party oral submission you indicate that the United States notified the measure challenged in this dispute under Article 2.9.2 of the TBT Agreement. In the same paragraph, you recognize that notifications under that provision do not prejudice the legal nature of the notified measure. Please indicate to what extent, in your view, the Panel should take into account such notification in its analysis of whether the United States' measure should be considered as a technical regulation within the meaning of Annex 1.1 of the TBT Agreement.*

Australia agrees with Guatemala's statement that notifications under Article 2.9.2 of the TBT Agreement do not prejudice the legal nature of the notified measure. Australia notes that while notifications reflect a WTO Member's intentions and arguments for introducing a measure, they are not legal documents and as such do not bind the Member in question.

G. JAPAN

18. *In paragraph 23 of your written submission, you suggest that Mexico has "ample means to ascertain which objectives the United States was serving through the DPCIA and its regulations". As an example of one of those means, you refer to the transparency obligations under Article 2.9.2 of the TBT Agreement, which require WTO Members to include for each notified technical regulation "a brief indication of its objective and rationale". Please clarify what are in your view, the legal consequences of such notifications.*

Australia considers that a 'brief indication of the objective and rationale' of the measure provided in a notification under Article 2.9.2 of the TBT Agreement would be highly relevant to an examination of the objectives of a measure under, *inter alia*, Article 2.2 and Article 2.4 of the TBT Agreement. However, Australia submits that a statement of the objective and rationale for a measure in such a notification should be examined in the light of the totality of evidence before the Panel. Further, Australia reiterates its response to Question 16 that notifications under Article 2.9.2 of the TBT Agreement are not legal documents and as such do not bind the Member in question.

K. TO ALL INTERESTED THIRD PARTIES

26. *Reference was made, in a number of interventions in the Third Party session, to the rulings of the Appellate Body in EC – Sardines, in support of the view that the measures at issue constitute technical regulations, or to distinguish its circumstances from the present case. Please comment on the relevance of these rulings and whether*

²⁸ Appellate Body Report, *Korea - Beef*, paragraph 149 (emphasis added).

they support, in your view, the proposition that the US "dolphin-safe" labelling provisions are mandatory within the meaning of Annex 1.1 of the TBT Agreement.

Australia agrees with the European Union that there are important differences between the measures at issue in the *EC – Sardines* case and the measures at issue in the present dispute.²⁹ Australia would draw a distinction between measures which qualify a product for a certain name or type versus a measure which allows discretion for the accreditation or certification of that product (relating to, for example, its method of production). The measures in *EC - Sardines* went to the very question of whether the product could be sold under a certain *nomenclature* in the market. In the present dispute, the US dolphin safe labelling measures qualify the producer to make a certain claim in relation to tuna products (which, for example, might make them more marketable).

As noted by other third parties to this dispute,³⁰ it is important to maintain the distinction in the TBT Agreement between a technical regulation and a standard. In Australia's view, the fact that a standard or otherwise voluntary measure contains mandatory language is not sufficient to describe that measure as mandatory. Arguably all standards have a mandatory element: that is, you must comply with certain criteria to be accredited or certified as meeting that standard, or to be permitted to use a label that enables a certain claim to be made about the product. The important point is whether *compliance* with the measure is mandatory.

In *EC - Sardines*, it was not possible to sell the product as 'preserved sardines' in the European Union except in compliance with the measure at issue. In the present dispute, it is still possible to sell tuna in the US market as tuna, just not with the additional 'dolphin safe' indicator on the label, where the tuna products concerned do not meet the criteria for use of the label. As the European Union has noted in its oral statement, 'economic operators who wanted to market products as "preserved sardines" in the EU had *no choice* but to exclusively use fish of [the] species [Sardina pilchardus]'. However, under the US measures, 'economic operators can market their products as "tuna" irrespective of whether they use fish harvested according to the methods set out in the [US measures] or not. They have the *choice* of, additionally, using the "dolphin safe" label, in which case their tuna needs to comply with the requirements of the [US measures].'³¹

Finally, Australia notes that in the *EC - Sardines* it was virtually impossible for the complainants to meet the requirements of the measure at issue. In this case, although Mexico has argued it would be difficult for it to comply with the requirements of the US dolphin safe labelling measures, it is still technically able to do so.

²⁹ Third party oral statement of the European Union, paragraph 9.

³⁰ See e.g. Third party oral statement of Japan, paragraph 5; Third party oral statement of New Zealand, paragraph 6.

³¹ Third party written submission of the European Union, paragraph 9 (emphasis added).