BEFORE THE APPELLATE BODY OF THE WORLD TRADE ORGANISATION

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

(AB-2012-2/DS381)

Third Participant Submission of Australia

Geneva, 10 February 2012
I. INTRODUCTION

1. Mexico and the United States have appealed a number of aspects of the Panel report. Australia will address the following issues in its submission:

   (a) the meaning of a "technical regulation" under Annex 1.1 of the Agreement on Technical Barriers to Trade ("TBT Agreement"); and

   (b) the Panel's exercise of judicial economy in relation to Mexico's claims under Article I:1 and Article III:4 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994").

2. Australia reserves the right to raise other issues in the hearing before the Appellate Body.

II. "TECHNICAL REGULATION"

3. Australia endorses the reasoning and findings of the separate opinion in relation to whether the US dolphin safe labeling provisions ("the US measures") are a technical regulation within the meaning of Annex 1.1 of the TBT Agreement. In particular, Australia endorses the view expressed in the separate opinion that private actions alone cannot make a measure de facto mandatory, turning an otherwise voluntary norm into a technical regulation.\(^1\)

4. Accordingly, Australia supports the request by the United States that the Appellate Body reverse the Panel's finding that the US measures are a technical regulation within the meaning of Annex 1.1 of the TBT Agreement.

III. THE PANEL'S EXERCISE OF JUDICIAL ECONOMY

5. It is Australia's view that the Panel erred in exercising judicial economy in respect of Mexico's claims under Articles I:1 and III:4 of GATT 1994.

6. Australia recalls that the Appellate Body has previously emphasized that the aim of the dispute settlement system is "to secure a positive solution to a dispute"\(^2\) and that "to provide only a partial resolution of the matter at issue would be a false judicial economy."\(^3\)

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2. Article 3.7 of the Understanding of Rules and Procedures Governing the Settlement of Disputes.
7. Subsequently, in *Brazil – Tyres*, the Appellate Body reiterated this statement and went on to say that "a panel's discretion to decline to rule on different claims of inconsistency adduced in relation to the same measure is limited by its duty to make findings that will allow the DSB to make sufficiently precise recommendations and rulings 'in order to ensure effective resolution of disputes to the benefit of all Members'."\(^4\)

8. Having regard to the previous findings of the Appellate Body, Australia considers that, in view of the lack of consensus among the panelists as to whether the US measures met the threshold requirements of being a technical regulation within the meaning of Annex 1.1 of the TBT Agreement, the Panel's failure to address Mexico's claims of inconsistency under Article I:1 and Article III:4 of GATT 1994 constituted false judicial economy and a legal error.

9. We take this view having regard to:

   (a) the possibility of the Panel's finding being reversed;

   (b) the simultaneous and cumulative application of Article I:1 and Article III:4 of GATT 1994 and Article 2.1 of the TBT Agreement;\(^5\) and

   (c) the differences in scope and application of each of the non-discrimination obligations contained in those provisions.\(^6\)

10. Should the Appellate Body find that there are sufficient findings of fact from the Panel's record to enable it to complete the analysis in relation to Article I:1 and Article III:4 of GATT 1994, Australia would welcome the Appellate Body doing so. In such circumstances, Australia requests that the Appellate Body refer to Australia's discussion of Article I:1 and Article III:4 of GATT 1994 in its third party submission to the Panel.\(^7\)

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\(^5\) WTO obligations exist simultaneously and harmoniously under different WTO agreements and apply cumulatively; see Appellate Body Report, *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products* (WT/DS98/AB/R), para. 74.

\(^6\) Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* (WT/DS135/AB/R)/DSR 2001:VII, 3243, para. 80; "the TBT Agreement imposes obligations on members that seem to be different from, and additional to, the obligations imposed on Members under the GATT 1994."

\(^7\) See also Panel Report, paras. 5.32-5.34.