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

(WT/DS381)

Recourse to Article 21.5 of the DSU by the United States

Second Recourse to Article 21.5 of the DSU by Mexico

Third Participant Oral Statement of Australia

Geneva, 25 January 2017
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I. INTRODUCTION

1. Australia thanks the Panel for the opportunity to present its views in this dispute.

2. In our statement today, Australia will expand on some of the issues raised in our written submission regarding the correct interpretation of the TBT Agreement and, in particular, Article 2.1. We will also briefly address the first question posed by the Panel to the third parties.

II. THE CORE INQUIRY OF AN ARTICLE 2.1 ANALYSIS

3. To recall, the Appellate Body has made clear that not every instance of a detrimental impact on imports arising from a technical regulation constitutes a breach of Article 2.1 of the TBT Agreement. Rather, where such detrimental impact stems exclusively from a legitimate regulatory distinction, the technical regulation does not violate Article 2.1.

4. Thus, once a de facto detrimental impact on imports is established, Australia considers the crux of an Article 2.1 analysis is in determining whether the regulatory distinction at issue is designed and applied in a manner that is legitimate (or is instead designed and applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination).

III. CONSIDERATION OF OBJECTIVES IN AN ARTICLE 2.1 ANALYSIS

5. As noted in our written submission, Australia considers that an assessment of the legitimacy of the regulatory distinction at issue must be made in light of the objective of the technical regulation. In Australia’s view, determining the legitimacy of the regulatory distinction requires an analysis of whether the regulatory distinction is rationally connected to the objective of the technical regulation. Where the regulatory distinction bears no rational connection to the objective of the technical regulation, Australia considers it would constitute arbitrary or unjustifiable discrimination and amount to a breach of Article 2.1.

6. As further noted in our written submission, Australia considers that the objectives of the measure at issue in this dispute formed an integral part of the calibration analysis articulated by the Appellate Body in the original proceedings, and to which we now turn.

IV. CALIBRATION

7. Australia considers that the calibration analysis adopted by the Appellate Body in the original proceedings was used as a means of determining whether the regulatory distinction imposed by the measure at issue was legitimate (or instead constituted a means of arbitrary or unjustifiable discrimination) in the particular circumstances of this dispute. The Appellate Body described calibration as having “special relevance in these proceedings”. It also clarified that calibration is “not, in and of itself, a generally applicable test of whether detrimental impact stems exclusively from a legitimate regulatory distinction” but rather terminology that originated in the United States’ submissions. The Appellate Body further emphasised that the “use of the terms ‘even-handed’ and ‘calibrated’ did not constitute different legal tests.”

8. In Australia’s view, calibration should be viewed as a useful analytical method when the circumstances of a case warrant its use. However, it should only be used to inform an analysis of the core inquiry – which is whether a regulatory distinction is legitimate, or instead constitutes arbitrary or unjustifiable discrimination. It is not of itself a test of consistency with Article 2.1.

V. EVEN-HANDEDNESS

9. We also agree with Canada that the legitimate regulatory distinction test under Article 2.1 of the TBT Agreement is not a test of “even-handedness”.

10. We note the Appellate Body first used the phrase “even-handed” in connection with Article 2.1 in US — Clove Cigarettes, saying that in making an assessment of whether a differentiation stems from a legitimate regulatory distinction:

5 Appellate Body Report US — Tuna II (21.5 — Mexico), para. 7.98.
6 Footnote to Canada’s third party written submission.
“...a panel must carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue, and, in particular, whether that technical regulation is even-handed, in order to determine whether it discriminates against the group of imported products.”

11. In this framing of the test, even-handedness is simply one of the considerations that goes to determining whether or not a detrimental impact stems exclusively from a legitimate regulatory distinction as opposed to constituting arbitrary or unjustifiable discrimination.

12. The issue was again examined in US — COOL, which cited the Clove Cigarettes decision. However, here, the Appellate Body appears to have treated even-handedness as being the test for legitimate regulatory distinction rather than merely part of the test, as had been the case in Clove Cigarettes, in finding that:

“In assessing even-handedness, a panel must “carefully scrutinise the particular circumstances of the case…” (emphasis added).  

13. The Appellate Body report in the original proceedings of the current matter cited the Clove Cigarettes version of the test, but in the compliance proceedings the Appellate Body used the US — COOL formulation (despite citing US — Clove Cigarettes).

14. In Australia’s view, as with the calibration analysis, even-handedness should be viewed as a useful analytical method when the circumstances of a case warrant its use. However, it should only be used to inform an analysis of the core inquiry – which is whether a regulatory distinction is legitimate, or instead constitutes arbitrary or unjustifiable discrimination. It is not of itself a test of consistency with Article 2.1.

7 Appellate Body Report US — Clove Cigarettes, para. 182.
10 Appellate Body Report US — Tuna II (21.5 — Mexico), para. 7.31, 7.97, 7.239.
VI. QUESTIONS TO THE THIRD PARTIES

15. In responding to the questions posed by the Panel to the Third Parties, Australia would agree that the objectives set out by the Panel continue to be the objectives of the 2016 Tuna Measure. In Australia’s view it is important to see these as inter-linked and mutually supportive objectives.

VII. CONCLUSIONS

16. In its compliance stage report in this matter, the Appellate Body “noted that, in determining whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction, the ‘particular circumstances’ of the case may inform the appropriate way in which to assess even-handedness in that specific case.” This is clearly true. The differentiations made within a measure, the bases on which those differentiations are made, and the way they interact with the measure’s objectives will all dictate the analytical process required of a panel in a given case.

17. However, in Australia’s view, the core inquiry of any such assessment is determining whether the regulatory distinction at issue is designed and applied in a manner that is legitimate, or is instead designed and applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination. The particular analytical process adopted by a panel in the specific circumstances of a given case should give effect to, not replace, this core inquiry.

18. As a final comment, Chair, Australia would like to recall that these proceedings form part of a continuum, which requires proper consideration be given to previous recommendations and rulings of the Dispute Settlement Body. The key objective of these proceedings is to provide guidance and clarity that can be relied upon by disputing parties, and the membership more broadly, when implementing dispute outcomes.

19. We thank the Panel for the opportunity to provide our views.