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 Written Submission of Australia

Geneva, 16 December 2016
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I. 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.

2. In this written submission, Australia addresses two key issues relating to the legal framework for assessing compliance of the United States’ Interim Final Rule (2016 IFR), issued on 22 March 2016, under Article 21.5 of the DSU and Article 2.1 of the Agreement on Technical Barriers to Trade (TBT Agreement). In particular:

   a. that the Panel should focus its considerations on whether the 2016 IFR has addressed the issues which the Appellate Body found to cause the inconsistency of the previous measure with Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the General Agreement on Tariffs and Trade 1994 (GATT 1994); and

   b. that the “calibration analysis” test, for the purposes of Article 2.1 of the TBT Agreement, was clearly stated by the Appellate Body in its report and already takes into account the objectives of the relevant measure – it should therefore be applied by the Panel in these proceedings.

II. FUNCTION AND SCOPE OF PROCEEDINGS UNDER ARTICLE 21.5

3. The Appellate Body has stated that a compliance review should not be confined to an assessment of whether a responding Member has implemented a Dispute Settlement Body (DSB) recommendation. Article 21.5 of the DSU instead requires a panel to examine the consistency of the measures taken to comply with the WTO Agreement¹. Relevant to these proceedings, this is particularly important in compliance reviews where a new or different measure – which was not before a panel or the Appellate Body in earlier proceedings – is the subject of the review, in case the measure introduces additional or different inconsistencies with the WTO Agreement.

¹ Appellate Body Report, Canada – Aircraft (Article 21.5), paras 40 – 42.
4. That said, Australia notes the Appellate Body’s comment that these proceedings form part of a continuum – this requires due recognition to be accorded to the recommendations and rulings made by the DSB in the original proceedings, based on the adopted findings of the Appellate Body and original panel.\(^2\)

5. As such, while the Panel is not confined only to consideration of whether a responding Member has implemented a DSB recommendation, Australia does not consider that it is the purpose of a compliance review to re-open questions which have been substantively answered by the Appellate Body in earlier proceedings and are not required to be re-visited in light of a new and different measure. Australia notes, in this context, that a key objective of the dispute settlement system is to promptly resolve disputes and provide clarity to Members on their WTO obligations. In that regard, Australia considers that the Panel should focus its considerations on whether the 2016 IFR has addressed the issues which the Appellate Body found to cause the inconsistency of the previous measure with Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994.

III. THE “CALIBRATION ANALYSIS” TEST

a. The legal framework for assessing compliance under Article 2.1 of the TBT Agreement

6. Australia notes that to establish a breach of Article 2.1 of the TBT Agreement, three elements must be established as follows:

a. The measure is a “technical regulation”\(^3\);

b. That the relevant products are “like products”\(^4\); and


\(^3\) As defined by Annex 1.1 to the TBT Agreement.

\(^4\) Australia notes that, while the meaning of the term “like products” could be interpreted more narrowly or broadly depending on the context, the term “like products” is generally understood as relating to “the nature and extent of a competitive relationship” between and among products. See, Panel Report, US — Tuna II (Mexico), paras 7.223 – 7.225.
c. That the measure accords less favourable treatment to the imported products than to the relevant group of like products.

7. Australia further notes that the “less favourable treatment” element involves a two-step analysis as follows:

   a. The measure must modify the conditions of competition to the detriment of imported products vis-à-vis like domestic products and/or like products of third countries; and

   b. If the first step is satisfied, it must be determined whether the detrimental impact on imported products stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products. To make such a determination, it should be assessed whether the measure is “even handed” in its design, architecture, revealing structure, operation and application in the light of the particular circumstances of the case.

b. Application of the calibration analysis test

8. The Appellate Body stated in its report, and both the United States and Mexico appear to agree, that a calibration analysis is an important part of determining whether a measure is even-handed.

9. The Appellate Body considered that it was particularly relevant in the circumstances of this dispute to consider whether, under the previous measure, “the differences in labelling conditions for tuna products containing tuna caught by large purse-seine vessels in the ETP, on

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7 Ibid.
10 United States’ First Written Submission, para 67; Mexico’s First Written Submission, para 15.
the one hand, and for tuna products containing tuna caught in other fisheries, on the other hand, are “calibrated” to the differences in the likelihood that dolphins will be adversely affected in the course of tuna fishing operations by different vessels, using different fishing methods, in different areas of the ocean.”

10. The United States re-stated this articulation of the calibration analysis test in its submissions and relied upon it in formulating its 2016 IFR.

11. Mexico, on the other hand, argued in its submissions that a broader calibration analysis test should be applied which requires consideration of “whether the different regulatory treatment is “calibrated” in a WTO-consistent manner to the different relevant circumstances in different tuna fisheries, taking into account the objectives of the measure.”

12. Australia agrees with Mexico that, as a general principle, an assessment of the legitimacy of the regulatory distinction at issue must be made in light of the objective of the technical regulation. The calibration of a measure forms part of the determination of the even-handedness of a measure, but so too does an assessment of whether or not the regulatory distinctions can be reconciled with, or rationally connected to, the legitimate policy objectives of the measure.

13. Having laid out our view in principle, Australia notes that the Appellate Body already took into account the policy objectives of the measure in articulating its calibration test for the purposes of this dispute – that the regulatory distinctions (i.e. the differences in labelling conditions for tuna products caught by different vessels, using different methods and in different areas of the oceans) should be calibrated to the differences in the likelihood that dolphins will be adversely

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12 United States’ First Written Submission, para 67; United States’ Second Written Submission, para 14.
13 United States’ Second Written Submission, para 20.
14 Mexico’s First Written Submission, para 15 (emphasis added).
15 Mexico’s Second Written Submission, paras 22 – 23.
16 We note the objectives of the United States dolphin-safe labelling regime “are first ‘ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins’ and second ‘contributing to the protection of dolphins, by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins’”. Appellate Body Report, US – Tuna II (Article 21.5 – Mexico), para 7.16 and repeated by the United States in its First Written Submission at para 31.
affected in the course of tuna fishing operations through those different fishing methods. Therefore, Australia submits that it is unnecessary for the Panel in these proceedings to undertake a revised analysis of the contribution of the policy objectives to the measure. Australia considers that the Panel instead ought to focus on, and make a decision with respect to, the defined issue in these proceedings – whether the 2016 IFR is consistent with the WTO Agreement – in accordance with the calibration analysis test which the Appellate Body has previously and clearly outlined.

14. Australia notes that Mexico also argued that the accuracy of certification, reporting and/or record-keeping should form part of the calibration analysis test.17

15. For similar reasons as outlined above, Australia does not support Mexico’s argument that such considerations should be added to the calibration analysis test. It was not included in the Appellate Body’s articulation of the test and is unnecessary to address the defined issue in these proceedings.

16. More broadly, and consistent with our views on the function and scope of proceedings under Section II, these points are consistent with the Appellate Body’s comment that due recognition must be accorded to the recommendations and rulings made by the DSB in the original proceedings, based on the adopted findings of the Appellate Body and original panel18.

**IV. CONCLUSION**

17. In conclusion, Australia submits that the Panel should focus on whether the 2016 IFR has addressed the issues which caused the United States’ previous measure to be WTO-inconsistent, and that the “calibration analysis” test set out by the Appellate Body should be applied to the 2016 IFR to answer that question.

17 Mexico’s First Written Submission, para 218.