Before the World Trade Organization

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

Executive Summary of Australia's Third Party Written Submission and Oral Statement

24 February 2016
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I. INTRODUCTION

1. Australia’s statements have addressed several issues raised in these proceedings under the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

2. This summary sets out Australia’s views on the function and scope of article 21.5 of the DSU proceedings and the core inquiry of an analysis under article 2.1 of the Technical Barriers to Trade (TBT) Agreement.

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 Agreement.¹

4. The Appellate Body has also previously noted 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. 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.

¹ Appellate Body Report, Canada – Aircraft (Article 21.5), paras 40 – 42.
III. THE CORE INQUIRY OF A TBT AGREEMENT ARTICLE 2.1 ANALYSIS

6. 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. Where such detrimental impact stems exclusively from a legitimate regulatory distinction, the technical regulation does not violate Article 2.1.4

7. 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).

IV. CONSIDERATION OF OBJECTIVES IN AN ARTICLE 2.1 ANALYSIS

8. 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.

9. 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 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, and which already takes account of the measure’s objectives.

V. CALIBRATION ANALYSIS

10. 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”.5 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.6 The Appellate Body further emphasised that the “use of the terms ‘even-handed’ and ‘calibrated’ did not constitute different legal tests.”7

11. 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.

VI. EVEN-HANDEDNESS

12. Similarly, the even-handedness of a measure has been identified by the Appellate Body as 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.

13. 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:

“...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

7 Appellate Body Report US — Tuna II (21.5 — Mexico), para. 7.98.
regulation is even-handed, in order to determine whether it discriminates against the group of imported products.”

14. 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).”

15. 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).

16. 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.

VII. OBJECTIVES OF THE 2016 TUNA MEASURE

17. Australia agrees 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.

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8 Appellate Body Report US — Clove Cigarettes, para. 182.
11 Appellate Body Report US — Tuna II (21.5 — Mexico), para. 7.31, 7.97, 7.239.
12 As set out in ‘Questions in advance of the Panels’ Third Party session’ circulated 17 January 2017: “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.”
VII CONCLUSION

18. 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.

19. 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.