

WORLD TRADE ORGANISATION

Third Party Submission to the Panel

***UNITED STATES – MEASURES CONCERNING THE
IMPORTATION, MARKETING AND SALE OF TUNA AND TUNA
PRODUCTS***

(WT/DS381)

THIRD PARTY SUBMISSION OF NEW ZEALAND

28 April 2010

EXECUTIVE SUMMARY

1 New Zealand's participation as a third party to this dispute reflects its substantial interest in the legal issues arising from the United States' measures that stipulate how tuna and tuna products may qualify for a dolphin-safe label for use in the United States market. As an exporting nation, the proper implementation of the WTO Agreement on Technical Barriers to Trade (the TBT Agreement) is of fundamental importance to New Zealand. Likewise, the potential for technical regulations, standards and conformity assessment procedures to constitute unnecessary barriers to trade is of great concern.

2 The TBT Agreement imposes disciplines on Members in relation to technical regulations, standards and conformity assessment procedures. It gives clear guidance to Members on the procedures that are to be followed, and the requirements that must be met, in relation to the preparation, adoption and application of regulations, standards and conformity assessment procedures.

3 New Zealand addresses three issues in this submission. First, New Zealand considers that Annex 1 of the TBT Agreement provides for a wide range of labelling requirements to be considered in principle as "technical regulations". Second, this submission addresses the Annex 1 criteria of "mandatory", arguing that a measure that is not *a priori* mandatory will only constitute a 'technical regulation' in cases where it is clearly warranted on the facts. For example, there may be situations where a Government's conduct is such that it essentially makes compliance obligatory with what would otherwise be a 'standard' under the TBT Agreement.

4 Finally, New Zealand examines the meaning of the term "international standard" in Article 2.4. New Zealand submits that, to constitute an international standard under Article 2.4, a standard must be made by an international body. Further, that international body must fulfil two criteria. First, it must be an international body whose specified activities include standardisation. Second, it

must be open to at least all members of the WTO in order to provide for their participation in the preparation and establishment of standards.

1 INTRODUCTION

5 This submission is made by New Zealand in its capacity as a third party in the proceedings brought by Mexico against the United States concerning measures applied by the latter concerning the importation, marketing, and sale of tuna and tuna products.¹

2 NATURE OF NEW ZEALAND'S INTEREST

6 New Zealand's participation as a third party to this dispute reflects its substantial interest in the legal issues that arise from the United States' measures that stipulate how tuna and tuna products may qualify for a dolphin-safe label for use in the United States market. As an exporting nation, the proper implementation of the WTO Agreement on Technical Barriers to Trade (the TBT Agreement) is of fundamental importance to New Zealand. Likewise, the potential for technical regulations, standards and conformity assessment procedures to constitute unnecessary obstacles to trade is of particular concern. These considerations have prompted New Zealand's participation as a third party in this panel proceeding.

3 THE TBT AGREEMENT

3.1 General

7 New Zealand recognises the rights of WTO Members to take measures necessary to ensure, *inter alia*, the protection of animal health or the environment, or for the prevention of deceptive practices, at the levels they consider appropriate.² However, any such measures are subject to the

¹ See Mexico's request for consultations (WT/DS/381/1) and Mexico's request for establishment of a Panel (WT/DS381/4). New Zealand reserved its third party rights to participate in this proceeding at the 20 April 2009 meeting of the DSB at which the Panel was established (WT/DS/381).

² Preamble to the TBT Agreement.

disciplines of the WTO Agreements. With respect to technical regulations and standards, and procedures for assessment of conformity with technical regulations and standards, New Zealand notes the particular importance the TBT Agreement places on ensuring that such measures do not create unnecessary obstacles to trade.

8 The TBT Agreement imposes disciplines on Members regarding the procedures that they must follow, and the requirements they must meet, in relation to the preparation, adoption and application of technical regulations, standards, and conformity assessment procedures.

9 The United States' measures raise several questions regarding compliance with a number of provisions of the TBT Agreement, as well as the General Agreement on Tariffs and Trade (GATT).

3.2 TBT Agreement Annex 1.1: Definition of Technical Regulation

Coverage of Labelling Requirements

10 An important issue in international trade law and policy is the extent to which labelling requirements fall within the definition of "technical regulation" in Annex 1.1 of the TBT Agreement. New Zealand has a systemic interest in the interpretation of the scope of the TBT Agreement and takes this opportunity to make a submission on this matter. This is an important threshold issue for defining which measures are subject to the disciplines on technical regulations.

11 New Zealand considers that Annex 1.1 would provide for a wide range of labelling measures to fall within the definition of "technical regulation" and, therefore, to be subject to the relevant TBT disciplines. Such measures have the potential to have a significant impact on trade, and allowing a large body of what are in fact technical barriers to escape the strictest disciplines of the TBT Agreement (those disciplines applicable to technical regulations) would undermine the objectives of the Agreement.

12 The starting point in the legal analysis of this issue is the language of Annex 1.1 of the TBT Agreement, which defines a technical regulation as a:

Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

13 As Mexico identifies,³ the Appellate Body in *EC – Asbestos*⁴ and *EC-Sardines*⁵ has considered the interpretation of Annex 1.1 and established three criteria by which to assess whether a document falls within the definition of “technical regulation”: (i) the document must apply to an identifiable product or group of products; (ii) the document must lay down one or more characteristics of the product; and (iii) compliance with the product characteristics must be mandatory.

14 There appears to be a difference of opinion between Mexico and the United States on the interpretation of this provision, particularly with regard to the meaning of “product characteristic” and the relationship between the two sentences of Annex 1.1. New Zealand wishes to comment on this issue, which is important to defining the scope of the type of document that may be considered to be a “technical regulation”.

15 New Zealand considers that Mexico’s argument is correct in that the Appellate Body’s decisions interpret “product characteristic” in a manner that would enable a broad interpretation to be taken of the term ‘technical

³ First Written Submission of the United Mexican States, para 195.

⁴ *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, 12 March 2001, para 66-70.

⁵ *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, 26 September 2002, para 176.

regulation'.⁶ The Appellate Body has observed that the second sentence of Annex 1.1 provides examples of “product characteristics”, which include features that are not only intrinsic to the product itself, but also related characteristics, such as the means of identification and the presentation and appearance of the product.⁷ In essence, this would mean that any labelling requirement for a product is potentially a “product characteristic”.

16 New Zealand notes that the United States proposes an alternative interpretation of Annex 1.1. It argues in a footnote to its submission that the Appellate Body appears to have mistakenly read the second sentence as providing examples of “product characteristics” covered by the first sentence of the definition. The United States argues that a plain interpretation of the words “it” and “also” in the second sentence means that that part of Annex 1.1 actually “sets out aspects other than product characteristics that may be the subject of a document with which compliance is mandatory and thus fall within the definition of a technical regulation.”⁸

17 New Zealand sees some merit to the argument that regardless of whether one characterises a labelling requirement as a “product characteristic”, the wording of the second sentence would be broad enough to encompass a wide variety of labelling measures.. New Zealand notes, however, that for the purposes of this dispute, both interpretive approaches could lead to the conclusion that the labelling measure at issue would potentially fall within the scope of Annex 1.1, subject to the satisfaction of the first and third criteria described by the Appellate Body.

⁶ First Written Submission of United Mexican States, para 197-8.

⁷ *EC-Asbestos*, para 67.

⁸ First Written Submission of the United States of America, footnote 141.

Is the United States' measure a 'mandatory' regulation?

18 Mexico argues that the United States' measure is mandatory in terms of Annex 1.1 because, under the Dolphin Protection and Conservation Information Act (DPCIA), it is unlawful to include on the label of any tuna product offered for sale in the United States the term 'dolphin safe' or any analogous term or symbol if the product contains tuna harvested in the eastern tropical Pacific by a large purse-seine vessel using a purse-seine net intentionally deployed on or to encircle dolphins. This prohibition remains in force even when the fishing methods contemplated in the Agreement on the International Dolphin Conservation Program (AIDCP) are used.

19 The Appellate Body stated in *EC-Asbestos* that "product characteristics" may be prescribed or imposed with respect to products in either a positive or a negative form.⁹ Therefore, Mexico argues that the prohibition in the DPCIA satisfies the requirement for identification of a technical regulation that the measure be mandatory. Tuna products offered for sale in the United States are not permitted to possess certain characteristics (i.e., the dolphin safe label or any other analogous label or mark) unless the prescribed requirements are met. Mexico further argues that even if the labelling scheme were not to be considered *a priori* mandatory, it is *de facto* mandatory because the market conditions in the United States are such that it is impossible to effectively market and sell tuna products without a dolphin safe designation.

20 New Zealand notes that there is a distinction between a mandatory requirement to label (where a product must be labelled in order to be sold in a market) and a mandatory labelling requirement (such as here, where regulations prescribe requirements that are mandatory in the event that a producer wishes to use a particular label). The measure in question in the present dispute is an example of the latter type of requirement: there is no formal legal requirement that tuna be labelled 'dolphin safe' in order to be sold

⁹ *EC-Asbestos*, para 69.

on the United States market. However, if such a label is used, it must comply with certain conditions as set out in the DPCIA.

21 Annex 1.1 makes no mention of whether measures must be *a priori* mandatory, or whether a *de facto* mandatory measure will qualify as a technical regulation. However, the TBT Agreement divides the measures covered into those that are mandatory (technical regulations), and those that are not (standards). Regulations and standards are subject to different obligations, with the obligations in Article 2 applying to regulations, and those in Article 4 and Annex 3 applying to standards.

22 Given this difference, it is central to the application of the Agreement that a distinction be maintained between mandatory and voluntary measures. The obligations falling on Members are *direct* (they regulate government behaviour directly) with respect to technical regulations, while they are *transitive* (they concern engagement with standardising bodies) with respect to voluntary standards. Merging the two categories would frustrate the clearly intended distinction between them.

23 In New Zealand's view, therefore, in the context of the TBT Agreement, a measure that is not *a priori* mandatory will only constitute a 'technical regulation' in cases where it is clearly warranted by the facts. For example, there may be situations where a Government's conduct is such that it essentially makes compliance obligatory with what would otherwise be a 'standard' under the TBT Agreement. New Zealand submits that the Panel should find that such an assessment would require a close examination of the facts of each situation to ensure that the principles of the TBT Agreement are being upheld.

3.3 Is there a relevant international standard under Article 2.4?

24 Pursuant to Article 2.4 of the TBT Agreement, Members must use international standards as a basis for their technical regulations except where

such standards would be an “ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems”.

25 The Appellate Body in *EC-Sardines* agreed with the Panel that “the ordinary meaning of the term ‘relevant’ is ‘bearing upon or relating to the matter in hand; pertinent’.”¹⁰ Therefore, Mexico must show that there is an international standard that relates to or is pertinent to the technical regulation in question.

26 The TBT Agreement does not include a definition of the term “*international standard*”. However, in accordance with relevant and related definitions used in the TBT Agreement and relevant ISO guidelines (elaborated upon in more detail below), New Zealand considers that, to constitute an international standard under Article 2.4, a standard must be made by an international body. Further, that international body must fulfil two criteria. First, it must be an international body whose specified activities include standardisation. Second, it must be open to at least all members of the WTO in order to provide for their participation in the preparation and establishment of standards. This submission addresses the foundations for these requirements.

The requirement that the standard be made by an international body

27 The conclusion that an international standard must be made by an international body derives from the definition of “standard” in Annex 1.2 of the TBT Agreement. This definition refers to a “document approved by a *recognized body* that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product,

¹⁰ *EC-Sardines*, WT/DS231/AB/R, paras 229-230.

process or production method” [emphasis added].¹¹ Thus, a standard as defined in Annex 1.2 of the TBT Agreement involves approval of a document by a ‘*recognized body*’.

28 The definition of ‘standard’ in Annex 1.2 is elaborated upon in an explanatory note which refers to the topic of international standards. It provides that “standards prepared by the *international standardization community* are based on consensus. This Agreement covers also documents that are not based on consensus” [emphasis added]. An inference may be drawn from this explanatory note that in the context of international standards as contemplated in Article 2.4, the recognized body in question must be an international one. This inference may be drawn because of the reference to standards being prepared by the ‘international standardization community’, which, on an ordinary meaning refers to standardising bodies or organisations that operate in the international sphere and have an international character.

29 The term ‘international standardization community’ is not itself defined in the TBT Agreement. However, the term ‘standardizing body’ is defined in the ISO/IEC Guide 2: 1991, and on an ordinary reading of the term, it may be inferred that a standardization community involves standardising bodies”. “*Standardising body*” is defined as a “body that has recognized activities in standardization”.¹²

30 The concept of a “standardising body” is internationalised in Article 2.6, which uses the term “international standardising body”. Article 2.6 requires Members to play a full part, within the limits of their resources, in the preparation by appropriate “*international standardizing bodies*” of international standards for products for which they either have adopted, or expect to adopt, technical regulations.

¹¹ The Panel in *EC-Sardines* referred to the Annex 1.2 definition in its discussion of what constitutes an international standard.

¹² ISO/IEC Guide 2: 1991, paragraph 4.3.

31 Article 31(1) of the Vienna Convention on the Law of Treaties provides that a treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. The ordinary meaning of the words “international standard” in Article 2.4 must therefore be considered in their context which, in this situation, includes Article 2.6. This context supports the argument that a “recognized body” referred to in Annex 1.2 must be an international one. The Code of Good Practice in Annex 3, paragraph G makes a similar reference to playing a full part in the preparation by relevant international standardising bodies of international standards, thus providing further context.

32 The context within which Article 2.4 is situated thus supports an interpretation that an ‘international standard’ is one that is prepared by an “*international standardizing body*”. While it might be suggested that, if the negotiators had intended for a “recognized body” as required under Article 2.4 to be an “international standardizing body” as in Article 2.6, then they would have used consistent language, this would be misguided. Article 2.6 is about the creation of international standards and it is therefore appropriate that it should refer to the forum in which those standards are created. Article 2.4, on the other hand, is about the outcome of such creation (that is, the standards themselves). There is no need to refer here to the forum in which such standards were created. Therefore it is consistent to suggest that the term ‘international standard’ in Article 2.4 be read in the context of Article 2.6 and that this suggests the involvement of an “international standardizing body”.

33 In light of the foregoing, New Zealand considers that an international standard must be developed by an international standardising body. In New Zealand’s view, a body must fulfil two criteria in order to be an international standardising body: standardisation must be a specified activity of the body; and it must be open to all WTO Members.

First criteria for the international body: specified activities of standardisation

34 The term “*body*” is defined in the ISO/IEC Guide 2: 1999 as a “legal or administrative entity that has specific tasks and composition”.¹³ As noted above, with standardising bodies in particular, the defining specific task of the body is that it has “recognised activities in standardisation”. New Zealand notes that some international organisations that are not specifically established for the sole purpose of setting standards may also have this function as part of their role, and considers that these organisations may also act as standardising bodies in some discrete situations. In the majority of cases, however, standardising bodies will have been established for, at least partially, the express purpose of creating international standards.

35 It is helpful to consider what are referred to in academic commentary as the ‘classic international standardising bodies’. Bodies referred to in this category are, first and foremost, the International Organisation for Standardisation (ISO), the International Electrotechnical Commission (IEC), and the International Telecommunications Union (ITU).¹⁴ These are organisations that have the specified task of standardisation and they are illustrative of the types of international bodies that would clearly meet the criteria of having the specified activity of standardisation. Other such organisations are the 49 bodies identified by the World Standard Services Network (WSSN). These organisations are all bodies whose *raison d’être* is in large part to prepare

¹³ ISO/IEC Guide 2: 1991, paragraph 4.1. Annex 1 of the TBT Agreement provides that the terms presented in the sixth edition of the ISO/IEC Guide 2: 1991, General Terms and Their Definitions Concerning Standardization and Related Activities, “shall, when used in this Agreement, have the same meaning as given in the definitions in the said Guide taking into account that services are excluded from the coverage of this Agreement”.

¹⁴ These are the bodies referred to in the following comprehensive text on the TBT Agreement: Rüdiger Wolfrum, Peter-Tobias Stoll, and Anja Seibert-Fohr, eds., *WTO Technical Barriers and SPS Measures* (Max Planck Institute for Comparative Public Law and International Law, Martinus Hijhoff Publishers, 2007) at para 46.

standards, and the title of many of them include the word ‘international’ in their title.¹⁵

36 Prior to implementation of the TBT Agreement in 1994, the TBT Committee had endeavoured to delineate ‘international standardising bodies’ for the purposes of the Tokyo Round Standards Code, and listed organisations of a type which are similar to these ‘classic’ international standardising bodies, including ISO, the Food and Agriculture Organization, the International Postal Union, and the International Atomic Energy Agency.¹⁶ Following implementation of the TBT Agreement, the TBT Committee has continued to work in the area of international standards, with its work providing a clear indication of the type of bodies that it considers to be international standardising bodies and the principles that such bodies should embrace.¹⁷

37 In 2000, the TBT Committee adopted a Decision which contained a set of principles considered to be important for international standards development.¹⁸ Paragraph 1 of the Decision states that “the following principles and procedures should be observed, when international standards, guides and recommendations (as mentioned under Articles 2, 5 and Annex 3 of the TBT

¹⁵ The list includes: CIMAC (International Council on Combustion Engines, scope: acceptance tests for combustion engines); IAEA (International Atomic Energy Agency, scope: nuclear energy, nuclear and radiation safety, radioisotopes, and documentation); ICAO (International Civil Aviation Organisation, scope: air transport, air navigation, aviation safety, airports design, airworthiness, aircraft noise, international law, etc; and IUPAC (International Union of Pure and Applied Chemistry, scope: nomenclature, terminology, symbols, quantities and units in chemistry).

¹⁶ Proposed GATT Code of Conduct for Preventing Technical Barriers to Trade, GATT Doc. Spec (71)143; List of International Standardizing Bodies for purposes of Articles 10.4 and 13.3 of the [Tokyo Round Standards] Agreement, GATT Secretariat 1980 (GATT Doc. TBT/W/8).

¹⁷ See WTO Doc. G/TBT/W/106, *Information provided by Bodies involved in the Preparation of International Standards*, 26 March 1999. See also, Second TBT Triennial Review, where the Committee invited ten organisations to a session to consider the role of international standards in the Committee, and to develop an improved understanding of the role of international standards within the Agreement. The ten organisations were: FAO, FAO/WHO Codex, IEC, ISO, OIE, OIML, ITU, OECD, UN/ECE, and WTO. Second TBT Triennial Review, G/TBT/9, *Second Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade Under Article 15.4*, 13 November 2000, at Annex 1, para 2.

¹⁸ *Decision on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 of the TBT Agreement*, G/TBT/9, 13 November 2000, at para 20 and Annex 4.

Agreement for the preparation of mandatory technical regulations, conformity assessment procedures and voluntary standards) are elaborated, to ensure transparency, openness, impartiality and consensus, effectiveness and relevance, coherence, and to address the concerns of developing countries". The principles include that "Membership of an international standardized body should be open on a non-discriminatory basis to relevant bodies of at least all WTO Members". In its Fifth Triennial Review, the TBT Committee emphasised the importance of the full application of the six principles set out in the 2000 Decision.¹⁹

Second criteria: openness to at least all Members of the WTO

38 New Zealand notes at the outset of its comments on this issue that the context of the management of living marine resources is subject to a specialised international legal regime. It considers that Regional Fisheries Management Organisations/Arrangements are the appropriate bodies for managing shared fisheries, and reaffirms the ability of countries to enact trade-related measures based on the decisions of those bodies.

39 The present dispute, however, concerns the definition of "international standardising body" in the specific context of Article 2.4 of the TBT Agreement. New Zealand notes that Annex 1.4 of the TBT Agreement defines "*international body or system*" as a "body or system whose membership is open to the relevant bodies of at least all Members". The relevance of this definition to the meaning of 'international standard' in Article 2.4 is that, pursuant to Article 31(1) of the Vienna Convention on the Law of Treaties, it provides the context of the TBT Agreement.

40 In further support of the requirement of open membership, is the requirement in Article 2.6 that Members play a full part in "the preparation by appropriate international standardizing bodies of international standards for

¹⁹ G/TBT/26, *Fifth Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade Under Article 15.4*, 13 November 2009, at para 21.

products for which they either have adopted, or expect to adopt, technical regulations". If membership of standardising bodies is not open to WTO Members then this hinders their ability to meet their obligations under Article 2.6.

41 The openness criterion is also supported by various documents and statements of the TBT Committee as referred to in paras 37 and 38 above. These are relevant to interpretation of the TBT Agreement pursuant to Article 31(3)(b) of the Vienna Convention on the Law of Treaties which refers to "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation". Decisions of the TBT Committee are made by consensus and are thus a reflection of practice by Members with respect to the application of the TBT Agreement. Accordingly, such practice may be taken into account, together with the context as referred to in Article 31(1).

42 The requirement that international standards be made by international bodies with the specified activity of standardization and that are open to all WTO Members supports the object and purpose of the TBT Agreement which includes harmonisation of standards (Article 2.6, for example, speaks of "harmonizing technical regulations on as wide a basis as possible"). Harmonisation is facilitated where all Members can be involved in the preparation of standards. The international nature of standards also reduces the risk of a proliferation of inconsistent standards set by bodies with limited memberships. A proliferation of such standards would also impact upon a Member's ability to participate in standard-setting activities across all the necessary bodies, thereby undermining the Article 2.6 requirement. Such a proliferation of standards would also be particularly onerous for exporters from small countries.

43 New Zealand notes that the TBT Committee has reached a decision that 'openness' as mentioned in Annex 1.4 refers to something broader than

simply membership. Rather, it includes “proposal and acceptance of new work items; technical discussion and proposals; submission of comments on drafts in order that they can be taken into account; reviewing existing standards; voting and adopting standards; and dissemination of the adopted standards”.²⁰ The TBT Committee has emphasised that full participation of relevant bodies of all WTO Members is essential for the development of international standards.²¹

Conclusion on definition of “international standard”

44 Considering the sum of these various definitions and requirements, read in the light of the context, object and purpose of the TBT Agreement, New Zealand submits that an “international standard” under Article 2.4 must be a document approved by a recognized body, such body being an international standardizing body within the definition provided by the ISO/IEC Guide 2:1991, and whose membership is open to the relevant bodies of at least all WTO Members.

²⁰ G/TBT/1/Rev.8, 27.

²¹ G/TBT/1/Rev.8, 26.