

BEFORE THE APPELLATE BODY  
OF THE WORLD TRADE ORGANIZATION

*UNITED STATES – MEASURES CONCERNING THE IMPORTATION, MARKETING  
AND SALE OF TUNA AND TUNA PRODUCTS  
(WT/DS381/AB)*

Third Participant Written Submission of New Zealand

10 February 2012

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## **I. INTRODUCTION**

1 New Zealand's submission in the appellate phase of this dispute reflects its substantial interest in the legal issues that have arisen in the dispute between Mexico and the U.S. concerning the latter's measures that stipulate how tuna and tuna products may qualify for a dolphin-safe label for use in the United States market. In particular, both the U.S. and Mexican appeals raise systemic issues concerning the application of obligations of WTO Members under the TBT Agreement.

2 New Zealand's submission will focus on three legal issues raised on appeal. The first issue New Zealand will discuss is the interpretation of the term 'mandatory' in Annex 1.1 of the TBT Agreement. The question of whether a measure is 'mandatory' or not is an important threshold question and the answer will determine how and when the obligations of the Agreement apply. As an exporting nation, New Zealand has an interest in the answer to this question as it is critical in ensuring the application of the Agreement in a manner that provides for robust discipline of technical regulations and standards that affect trade.

3 The second issue that New Zealand will focus on is the meaning of the term 'international standard' in Article 2.4 of the TBT Agreement. Article 2.4 sets out that where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them as a basis for their technical regulations except where such international standards would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued. Under Article 2.4, the regulating Member bears the burden of showing when an international standard need not be used as a basis for regulations. An underlying objective of Article 2.4 – and one which New Zealand supports – is to encourage harmonisation in appropriate circumstances. However, in order not to impose too onerous a burden on regulating Members, the application of Article 2.4 should be limited to those circumstances where standards are truly international. This calls for care to be exercised when determining whether or not

any given standard constitutes an ‘international standard’ within the meaning of Article 2.4.

4 The final issue that New Zealand will consider is the interpretation of the term ‘legitimate objective’ within the meaning of Article 2.2 of the TBT Agreement. If a Member can demonstrate that it is pursuing a legitimate objective under Article 2.2 it will have greater freedom to impose measures that may restrict trade. New Zealand supports an interpretive approach to Article 2.2 that provides Members with sufficient regulatory autonomy in areas of public policy. It also wishes to emphasise the importance of a robust obligation that aids in the prevention of trade restrictive measures. To this end, New Zealand argues that whether consumer information is a legitimate objective will require careful consideration of the facts and circumstances of the particular case.

## **II. NEW ZEALAND’S SUBMISSION ON THE PANEL’S FINDINGS**

### **A. Interpretation of the term “mandatory” in Annex 1.1 of the TBT Agreement**

5 The U.S. alleges that the panel erred in its finding that the U.S. measure at issue is a technical regulation within the meaning of Annex 1.1 of the TBT Agreement. The U.S. contends that the measure is not a technical regulation because it is not ‘mandatory’<sup>1</sup>. New Zealand agrees with the Panel that there is a distinction in Annex 1.1 between ‘technical regulation’ (which has a ‘mandatory’ character) and ‘standard’ (which has a ‘not mandatory’ or ‘voluntary’ character).<sup>2</sup>

6 In the context of labelling, New Zealand considers that this Annex 1.1 distinction can be thought of as consisting of two situations: 1) a mandatory requirement to label (where a product must be labelled in order to be sold in a market) and; 2) mandatory criteria for use of a label (where regulations prescribe criteria that are mandatory in the

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<sup>1</sup> Appellant submission of the U.S., paras 29-35.

<sup>2</sup> *Panel Report*, paras 7.104 and 7.108.

event that a producer wishes to use a particular label)<sup>3</sup>. In the first situation, the requirement will constitute a technical regulation. In the second situation (where producers retain the choice whether or not to label) the requirement to use stated criteria will not *a priori* be a technical regulation. However, as we explain in paragraph 10, in some cases mandatory criteria for use of a label may constitute a *de facto* technical regulation.

7 In New Zealand's view, the majority of the Panel was incorrect in failing to apply the distinction explained in paragraph 6 when analysing whether or not the U.S. measure was mandatory.

8 The majority of the Panel appears to have based its conclusion that the measure was *de jure* mandatory on three key factors, namely, that the measure: a) was legally enforceable and binding under U.S. law; b) prescribed requirements that must be complied with in order to make *any* claim about the manner in which the tuna was caught; and c) leaves no discretion to resort to any other standard to inform consumers about the dolphin safety of tuna (emphasis in Panel Report).<sup>4</sup> However, New Zealand submits that the Panel's focus should have been on whether there was a mandatory requirement for tuna producers to label their product as 'dolphin safe' to be sold in the U.S. market, rather than whether the labelling criteria were binding in nature .

9 Therefore, New Zealand respectfully submits that the Appellate Body should first consider whether there is a *de jure* mandatory requirement for tuna producers to label their product as 'dolphin safe'. If it determines that there is not a mandatory requirement to label but that use of the label is only voluntary, the second step should be to consider whether there are facts and circumstances which mean that the criteria for use of the dolphin safe label could nevertheless be considered a *de facto* mandatory requirement to label, thus a technical regulation.

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<sup>3</sup> Third Party Submission of New Zealand, para 20.

<sup>4</sup> *Panel Report*, paras 7.142-7.144.

10 New Zealand reiterates its view that it is possible for there to be a measure that is *de facto* mandatory and that therefore constitutes a ‘technical regulation’. Such a conclusion would require a close examination of the facts to ensure that the negotiated distinction in the TBT Agreement between technical regulations and standards is being upheld, and should only be reached in cases where it is clearly warranted by the facts<sup>5</sup>. One of the factors that the Appellate Body may wish to consider in this case is the relevance of the fact that the U.S. measure appears to prohibit the use of other terms or statements relating to dolphin safety.

**B. Meaning of the term ‘international standard’ in Article 2.4 of the TBT Agreement.**

11 The U.S. alleges that the Panel was incorrect to find that the Agreement on International Dolphin Conservation Program (AIDCP) definition is a relevant international standard within the meaning of Article 2.4 of the TBT Agreement<sup>6</sup>.

12 New Zealand notes the Panel’s finding that an ‘international standard’ is composed of three elements 1) a standard; 2) adopted by an international standardizing/standard organization; and 3) made available to the public<sup>7</sup>. New Zealand supports the Panel’s approach to ascertaining whether the AIDCP dolphin safe standard is an ‘international standard’ for the purposes of Article 2.4. The Panel’s approach allows for a careful consideration of any standard claimed to be an international standard and should ensure that an inappropriate burden is not imposed on regulating Members with respect to the use of international standards.

13 New Zealand welcomes the guidance provided by the Panel in its approach to determining whether an organisation is an ‘international standardizing/standard organisation’, and endorses the Panel’s consideration of whether standardising activities are recognised activities carried out by the organisation<sup>8</sup>. Similarly, New Zealand notes

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<sup>5</sup> Third Party Submission of New Zealand, para 23.

<sup>6</sup> Appellant Submission of the U.S., para 136

<sup>7</sup> Panel Report, para 7.664

<sup>8</sup> Panel Report, para 7.685

with approval the Panel's consideration of whether membership of that organisation is open on a non-discriminatory basis to relevant bodies of at least all WTO Members<sup>9</sup>.

14 Consistent with the broader principles of transparency upheld in the TBT Agreement<sup>10</sup>, New Zealand also supports the Panel's view that, for a standard to be truly an 'international standard', it must be made available to the public.

**C. Interpretation of "legitimate objective" within the meaning of Article 2.2 of the TBT Agreement**

15 New Zealand notes continued disagreement between the Parties as to what the U.S. objectives were for the measure in question. Mexico has submitted a conditional appeal in which they have requested the Appellate Body to re-examine whether the second objective (protecting dolphins by discouraging certain fishing practices) is in fact a legitimate objective within the meaning of Article 2.2<sup>11</sup>. In its conditional appeal, Mexico argues that the Panel applied an incorrect legal test when assessing whether the U.S.' objectives were legitimate<sup>12</sup>. New Zealand wishes to make a submission as to the correct test to use in making a determination of legitimacy of objectives under Article 2.2.

16 As Mexico highlights<sup>13</sup>, the Panel concluded that "the objectives of protecting consumers from deceptive practices and contributing to protecting dolphins by discouraging certain fishing practices *do not go against the object and purpose of the TBT Agreement...*" (emphasis added). However, New Zealand does not agree with Mexico that this was the test applied by the Panel in assessing whether the U.S. measure was a legitimate objective. In New Zealand's view, the Panel appropriately considered whether the measure fell within any of the legitimate objectives listed under Article 2.2

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<sup>9</sup> Panel Report, para 7.691.

<sup>10</sup> The principle of transparency is evidenced in Articles 2.10-2.12 of the TBT Agreement which set out requirements for the notification, consultation and publication processes for the implementation of technical regulations as well as allowing sufficient time for producers and exporting members to comply with the technical regulations. These processes contribute to transparency and certainty in the market.

<sup>11</sup> Appellant submission of Mexico, para 261.

<sup>12</sup> Appellant submission of Mexico, para 267.

<sup>13</sup> Appellant submission of Mexico, para 266.

(in this case ‘prevention of deceptive practices’ and the ‘protection of... animal or plant life or health, or the environment’)<sup>14</sup>.

17 New Zealand agrees with the Panel’s finding that Article 2.2 of the TBT Agreement provides a non-exhaustive list of legitimate objectives including: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment<sup>15</sup>.

18 Even though the list is non-exhaustive, New Zealand submits that the use of the phrase ‘legitimate objectives’ implies that some objectives are illegitimate (such as protection of domestic producers from foreign competition). In order to ensure that illegitimate objectives are not used to justify trade restrictive measures, New Zealand considers that an objective not included in the illustrative list (such as consumer information) should only be considered legitimate under Article 2.2 where the regulating Member is able to provide clear and compelling evidence of its legitimacy.

*‘Consumer information’ as a legitimate objective*

19 In the present case, the Panel, under the heading ‘consumer information objective’, accepted that the aim of the U.S. measure was to ensure “that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affect dolphins”<sup>16</sup>. The Panel went on to conclude that this objective fits within the broader goal of preventing deceptive practices.<sup>17</sup>

20 New Zealand is concerned that while in the end the Panel found that the U.S. objective was to prevent deceptive practices, it used the term ‘consumer information’ to such an extent in its analysis that it appeared to suggest that consumer information is the same thing as prevention of deceptive practices. While consumer information can (as the

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<sup>14</sup> Panel Report, paras 7.436-7.444.

<sup>15</sup> Panel Report, para 7.437.

<sup>16</sup> Panel Report, para 7.413.

<sup>17</sup> Panel Report, para 7.437.



US argues in the current case) be a tool through which a Member seeks to counter or prevent deceptive practices, they are not interchangeable terms. New Zealand considers that from a systemic perspective, there is a fundamental distinction between the objectives of consumer information and prevention of deceptive practices. This distinction has practical consequences for Members defending measures under Article 2.2. A Member regulating to prevent deceptive practices (which is specifically recognised as a legitimate objective in Article 2.2) only has to show that its measure is in fact aimed at preventing deceptive practices. On the other hand, a Member regulating to provide consumer information must first demonstrate that consumer information is indeed a legitimate objective in the circumstances of the case.

21 In determining whether ‘consumer information’ is a legitimate objective in any particular case, the nature of the objectives in the illustrative list in Article 2.2 should be taken into account. The interests protected by the listed legitimate objectives (national security requirements, protection of human health or safety, animal or plant life or health, or the environment) are particularly important or guard against grave consequences. The nature of these objectives should therefore colour the interpretation of whether consumer information can be considered a legitimate objective.

### III. CONCLUSION

22 New Zealand considers that this appeal raises systemic issues which have broad implications for the interpretation of Member’s obligations under the TBT Agreement. In this submission, New Zealand has sought to draw attention to some specific aspects of the Panel Report which in its view should be taken into account by the Appellate Body in analysing both Members’ obligations under the TBT Agreement. New Zealand considers that these issues will significantly contribute to how the TBT Agreement is applied and implemented by Members and therefore to how the TBT Agreement’s principles and objectives are upheld.

23 We respectfully request that the Appellate Body considers the issues raised by New Zealand in this submission.