

**WORLD TRADE ORGANIZATION**

New Zealand Third Party Submission to the Panel

***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 Mexico*

**THIRD PARTY SUBMISSION OF NEW ZEALAND**

**5 August 2014**

## **CONTENTS**

<b>I.</b>	<b>INTRODUCTION</b>	<b>1</b>
<b>II.</b>	<b>DSU: A MEASURE TAKEN TO COMPLY MUST BE IMPLEMENTED</b>	<b>1</b>
<b>III.</b>	<b>THE NATURE OF DE FACTO DISCRIMINATION UNDER THE GATT AND THE TBT AGREEMENT</b>	<b>2</b>
<b>IV.</b>	<b>“TREATMENT NO LESS FAVOURABLE” UNDER ARTICLE 2.1 OF THE TBT AGREEMENT</b>	<b>4</b>
<b>V.</b>	<b>CONCLUSION</b>	<b>5</b>

## CASES CITED IN THIS SUBMISSION

<b>Short Title</b>	<b>Full Case Title and Citation</b>
<i>Canada – Autos</i>	Appellate Body Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, p. 2985
<i>EC – Seal Products</i>	Appellate Body Reports, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS400/R / WT/DS401/R /, adopted 18 June 2014
<i>Korea – Alcoholic Beverages (Article 21.3(c))</i>	Award of the Arbitrator, <i>Korea – Taxes on Alcoholic Beverages – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS75/16, WT/DS84/14, 4 June 1999, DSR 1999:II, p. 937
<i>Mexico – Taxes on Soft Drinks</i>	Appellate Body Report, <i>Mexico – Tax Measures on Soft Drinks and Other Beverages</i> , WT/DS308/AB/R, adopted 24 March 2006, DSR 2006:I, p. 3
<i>US – Clove Cigarettes</i>	Appellate Body Report, <i>United States – Measures Affecting the Production and Sale of Clove Cigarettes</i> , WT/DS406/AB/R, adopted 24 April 2012
<i>US – COOL</i>	Appellate Body Reports, <i>United States – Certain Country of Origin Labelling (COOL) Requirements</i> , WT/DS384/AB/R / WT/DS386/AB/R, adopted 23 July 2012
<i>US – Tuna II (Mexico)</i>	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/AB/R, adopted 13 June 2012

## I. INTRODUCTION

1. New Zealand welcomes this opportunity to provide views on the matters at issue in the compliance phase of the dispute in respect of the United States Amended Tuna Measure.<sup>1</sup> New Zealand's continued participation as a third party in these compliance proceedings reflects both our trade interest as an exporter of tuna products, and our systemic interest in the proper interpretation and implementation of the General Agreement on Tariffs and Trade (GATT 1994), the Agreement on Technical Barriers to Trade (TBT Agreement) and the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

2. New Zealand comments on what constitutes "compliance" under Article 21 of the DSU, the nature of *de facto* discrimination under the GATT and the TBT Agreement and the interpretation of "treatment no less favourable" under Article 2.1 of the TBT Agreement.

## II. DSU: A MEASURE TAKEN TO COMPLY MUST BE IMPLEMENTED

3. New Zealand notes the claim by Mexico that the United States has in effect "unilaterally granted itself a further extension to the RPT [Reasonable Period of Time for Implementation] by not enforcing the measure it has introduced for the purpose of bringing itself into compliance" during a six month "education and outreach" grace period where the measure is legally in force, but does not appear to be fully enforced.<sup>2</sup> New Zealand has concerns about the significant systemic implications for the dispute settlement process if compliance is found to be achieved when a Member merely announces it will enforce the rules in the future. This should be strongly discouraged. Consistency with WTO obligations must involve compliance both in law and in fact.

4. As stated in Article 21.1 of the DSU, "prompt compliance" with recommendations and rulings of the DSB is essential for the effective resolution of disputes. The DSU recognises that immediate compliance may not be possible in all circumstances, but requires that Members comply within a reasonable period of time as determined under Article 21.3. New Zealand submits that any grace periods should be taken into consideration in the determination of the RPT itself. The Member seeking the grace period could raise this concern in the course of seeking to

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<sup>1</sup> In this submission, New Zealand uses the term "Amended Tuna Measure" to refer to the statute, section 1385 of the *Dolphin Protection Consumer Information Act* (16 U.S.C. § 1385 (2012)), the implementing regulations, §216.91 and 216.92 of the *United States Code of Federal Regulations*, 50 C.F.R. 216, Subpart H (2013) as amended by *Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products*, 78 Fed. Reg. 40,997, 40,997 and the decision *Earth Island Institute v. Hogarth* 494 F.3d 757 (9<sup>th</sup> Cir. 2007).

<sup>2</sup> Mexico First Written Submission (FWS), 8 April 2014, para. 99.

agree on a RPT with the complaining Member(s) or during Article 21.3(c) arbitration proceedings.<sup>3</sup>

### III. THE NATURE OF DE FACTO DISCRIMINATION UNDER THE GATT AND THE TBT AGREEMENT

5. At their core, the national treatment and Most Favoured Nation (MFN) obligations in Articles I:1 and III:4 of the GATT and Article 2.1 of the TBT Agreement are concerned with non-discrimination. The Appellate Body has clarified that discrimination under these articles is not limited to *de jure* discrimination, but extends also to *de facto* discrimination.<sup>4</sup>

6. The Parties appear to disagree about the extent to which a measure that is origin-neutral on its face, such that any Member could choose to meet its conditions, can nevertheless be *de facto* discriminatory.

7. Mexico's First Written Submission alleges that the amended measure accords less favourable treatment to imported products vis-à-vis like domestic products inconsistent with the obligation in Article III:4 as:

... the Panel and Appellate Body found that most tuna caught by Mexican vessels, being caught in the ETP by setting on dolphins, would not be eligible for inclusion in a dolphin-safe product under the US dolphin-safe labelling provisions, while most tuna caught by US vessels is potentially eligible for the label.<sup>5</sup>

8. By contrast, the United States submit that:

The amended measure has no exceptions – the eligibility requirements apply to all tuna products. And those eligibility requirements relate to fishing methods, which is not an immutable condition. Any Member may produce non-eligible tuna products one year and eligible products the next year, depending on the different choices that its fleet makes year to year.<sup>6</sup>

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<sup>3</sup> See Award of the Arbitrator, *Korea – Alcoholic Beverages (Article 21.3(c))*, para. 47 where the arbitrator noted that a thirty day grace period was required for the enforcement of certain measures under Korean law and included this additional period after the promulgation of the amendments to the legislation as part of the RPT.

<sup>4</sup> Appellate Body Report, *Canada – Autos*, para. 78.

<sup>5</sup> Mexico FWS at para. 329 (footnote omitted); see also Mexico Second Written Submission (SWS) at para. 221. In relation to Article I:1 of the GATT, see Mexico FWS at para. 315 and Mexico SWS at paras. 205-207; and in relation to Article 2.1 of the TBT Agreement, see Mexico FWS at paras. 221-233 and Mexico SWS at para. 135.

<sup>6</sup> United States FWS at para. 312; see also United States SWS at paras. 140-142. In relation to Article I:1 of the GATT, see United States FWS at paras. 280-289 and United States SWS at paras. 132-133; and in relation to Article 2.1 of the TBT Agreement, see United States FWS at para. 226 and paras. 228-239 and United States SWS at paras. 89-90.

9. New Zealand does not comment on whether there is *de facto* discrimination in the instant case but would like to make some general observations. We note that the Appellate Body made the following comments on *de facto* discrimination under Article 2.1 of the TBT Agreement in the original proceedings:

In its analysis, the Panel appears to juxtapose factors that “are related to the nationality of the product” with other factors such as “fishing and purchasing practices, geographical location, relative integration of different segments of production, and economic and marketing choices.” In so doing, the Panel seems to have assumed, incorrectly in our view, that regulatory distinctions that are based on different “fishing methods” or “geographical location” rather than national origin *per se* cannot be relevant in assessing the consistency of a particular measure with Article 2.1 of the *TBT Agreement*. The Panel’s approach is difficult to reconcile with the fact that a measure may be *de facto* inconsistent with Article 2.1 even when it is origin-neutral on its face.<sup>7</sup>

10. Like the Appellate Body, New Zealand considers that there can be *de facto* discrimination where a regulatory distinction is based on matters other than national origin, or characteristics with an inherent relationship with origin. For instance, *de facto* discrimination has been found in relation to: (i) a customs duty exemption for motor vehicles that was in reality only available to a small number of countries in which the exporter is affiliated with a designated Canadian importer or manufacturer;<sup>8</sup> (ii) an exemption from soft drink and distribution taxes for soft drinks using non-cane sugar sweeteners instead of cane sugar sweeteners;<sup>9</sup> and (iii) an exemption from a ban on the manufacture and sale on flavoured cigarettes for menthol cigarettes.<sup>10</sup> Theoretically all Members could avail themselves of the exemptions from customs duty, soft drink and distribution taxes, or the manufacturing and sale ban, by meeting the conditions for accessing these. Thus, motor vehicle exporters could seek an affiliation with a relevant designated Canadian manufacturer/importer, soft drink producers could use non-cane sweeteners instead of cane sweeteners, and cigarette producers could flavour cigarettes with menthol rather than clove. Notwithstanding this, however, these distinctions were found to be discriminatory *in practice*.

11. New Zealand cautions against any approach that would restrict *de facto* discrimination to instances where the relevant distinction is inherently related to origin. Narrowing the ambit of *de facto* discrimination under the GATT and the TBT Agreement in this way would significantly limit the effectiveness of one of the core obligations in the WTO rules. The fact that a Member could theoretically comply with conditions or access an advantage is not a complete answer to a

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<sup>7</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 225.

<sup>8</sup> Appellate Body Report, *Canada – Autos*.

<sup>9</sup> Appellate Body Report, *Mexico – Taxes on Soft Drinks*.

<sup>10</sup> Appellate Body Report, *US – Clove Cigarettes*.

discrimination claim. The focus in a non-discrimination assessment should continue to be on whether the impugned measure modifies the competitive conditions of the relevant market in the case of Article III:4 of the GATT and Article 2.1 of the TBT Agreement, and whether an advantage has been accorded immediately and unconditionally to like products originating in or destined for the territory of other Members in the case of Article I:1.

#### **IV. “TREATMENT NO LESS FAVOURABLE” UNDER ARTICLE 2.1 OF THE TBT AGREEMENT**

12. Article 2.1 of the TBT Agreement provides:

Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.

13. New Zealand would like to comment on the test for “treatment no less favourable”. The Appellate Body has clarified that “treatment no less favourable” requires panels to assess whether the technical regulation modifies the conditions of competition in the relevant market to the detriment of the imported products vis-à-vis like domestic products or like imported products from another country. However, a finding of detrimental impact on competitive opportunities is not dispositive of “less favourable treatment” under Article 2.1.<sup>11</sup> Technical regulations, by their nature, necessarily distinguish between products.<sup>12</sup> This supports the Appellate Body’s approach that requires a further analysis of whether any detrimental impact “stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products”.<sup>13</sup>

14. The Appellate Body has clarified that a regulatory distinction that is not designed in an even-handed manner will not be legitimate.<sup>14</sup> In determining whether a regulatory distinction is even-handed, panels have been directed to consider the “design, architecture, revealing structure, operation, and application of the technical regulation at issue”.<sup>15</sup> New Zealand submits that

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<sup>11</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 182, as followed in Appellate Body Reports, *US – Tuna II (Mexico)*, para. 215 and *US – COOL*, para. 271.

<sup>12</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 211.

<sup>13</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 181, as followed in Appellate Body Reports, *US – COOL*, para. 271 and *US – Tuna II (Mexico)*, para. 215.

<sup>14</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 182 as followed in Appellate Body Report, *US – COOL*, para. 271.

<sup>15</sup> Appellate Body Report, *US – Clove Cigarettes*, para. 182 as followed in Appellate Body Report, *US – COOL*, para. 271.

examination of these aspects should focus on the rationale or objective that the regulatory distinction pursues, and assess this against the objective of the measure as a whole.

15. In this dispute, this would involve looking at the rationale for tuna products caught by setting on dolphins in the ETP not being eligible for the label while tuna products caught by other fishing methods in other areas of the ocean are eligible. This would then be assessed against whether the distinction assists or hinders the objective of the dolphin-safety labelling regime as a whole.

## V. CONCLUSION

16. New Zealand considers that this appeal raises systemic issues which have broad implications for the interpretation of Members' obligations under the DSU, the TBT Agreement and the GATT 1994. In this submission, New Zealand has sought to draw attention to the importance of implementation and enforceability of measures taken to comply with rulings and recommendations of the DSB within a reasonable period of time, to the nature of *de facto* discrimination under the GATT and the TBT Agreement and the interpretation of "treatment no less favourable" in Article 2.1 of the TBT Agreement. New Zealand considers that these issues will significantly contribute to how the TBT Agreement and the GATT 1994 are applied and implemented by Members and therefore to how those Agreements' principles and objectives are upheld.