UNITED STATES – MEASURES CONCERNING THE IMPORTATION, MARKETING AND SALE OF TUNA AND TUNA PRODUCTS
Recourse to Article 21.5 of the DSU by Mexico (DS381/RW)

(AB-2015-6)

THIRD PARTICIPANT ORAL STATEMENT BY NEW ZEALAND

21 September 2015
I. INTRODUCTION

1. Mr Chairman, distinguished members of the Appellate Body, New Zealand welcomes this opportunity to provide its views on matters at issue in the appeal of the Compliance Panel’s report.

2. In its written submissions, New Zealand drew attention to three matters. It is the first of these that New Zealand will address in its oral statement – that is, whether a panel may consider the measure “as a whole” when determining compliance under Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

II. ARTICLE 21.5 OF THE DSU

3. A compliance panel’s task under Article 21.5 of the DSU is clear. It is to rule on the “disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings” of the Dispute Settlement Body (DSB).

4. What is less clear, however, is the scope of what the compliance panel may consider in undertaking this task. The legal issue before the Appellate Body is whether the Compliance Panel was only able to examine the measure declared by the United States as the measure taken to comply with the DSB’s recommendations and rulings, or whether it was also able to examine the measure as a whole, including those components that the United States claims have not changed.

III. DECLARED MEASURE TAKEN TO COMPLY

5. The United States submits that a compliance panel can only examine the measures that a respondent declares as “the measures taken to comply” (in this dispute, the 2013 Final Rule).

6. The Appellate Body has already given some guidance on this question in previous jurisprudence. At paragraph 73 of US – Softwood Lumber IV (Article 21.5 – Canada), the Appellate Body found that the “measures taken to comply” in an Article 21.5 proceeding may not necessarily be the measure identified by the respondent.

7. In fact, reports issued by the Appellate Body and panels have demonstrated a broad approach to what constitutes the “measures taken to comply”, including:
a measure adopted at a later point in time from the declared measure taken to comply (EC Bananas III (Article 21.5 – India) (Appellate Body) paragraphs 230 - 260);

measures “inextricably linked” to the steps taken in response to the DSB’s rulings in the original dispute (Australia Automotive Leather II (Article 21.5 – US) (Panel) paragraphs 6.1 – 6.7); and

a measure that has a sufficiently close nexus with the DSB rulings (US – Upland Cotton (Article 21.5 – Brazil) (Panel) paragraphs 9.9 - 9.27).

8. So there may be measures other than the declared compliance measure that fall within the scope of the “measures taken to comply” in compliance proceedings.

IV. MEASURE AS A WHOLE

9. New Zealand considers that the role of the Compliance Panel in this dispute required it to examine the measure as whole.

10. In US – Shrimp (Article 21.5 – Malaysia) at paragraph 87, the Appellate Body stated that the task of a compliance panel is to consider the measure taken to comply in its totality. The measure in this dispute comprised a number of components that establish the conditions for use of a “dolphin-safe” label on tuna products. The Appellate Body in the original proceedings found these components to be a “single and legally mandated set of requirements”, and that the measure as a whole was the “technical regulation” within the meaning of Annex 1.1 of the TBT Agreement (refer to paragraphs 193 and 199).

11. Consequently, New Zealand considers that the Compliance Panel’s task in this dispute was not limited to considering only the declared change. The panel correctly described its task as assessing whether or not the United States had brought the measure as a whole into conformity with WTO law. The close legal and policy relationship between the various components as described in the original proceedings supports this view.

12. New Zealand agrees that finality to disputes is important and that an Article 21.5 compliance panel should not be an opportunity to simply re-litigate unsuccessful claims on the same facts brought in the original proceedings. Finality and predictability are fundamental to the legitimacy of the dispute settlement system.
13. However, not including the measure as a whole within the scope of this compliance proceeding risks both the legitimacy and utility of the dispute settlement system. Finality will not be achieved if the measure as a whole is inconsistent with WTO law at the end of the compliance process.

14. Article 3 of the DSU identifies that the WTO dispute settlement system is aimed at achieving a satisfactory and timely settlement of Members' disputes. To constrain the scope of the Compliance Panel by denying its ability to consider the measure as a whole runs counter to that outcome.

V CONCLUSION

15. Mr Chairman, Members of the Appellate Body; that concludes New Zealand's oral statement. Thank you for your attention.