WORLD TRADE ORGANIZATION
New Zealand Third Participant Submission to the Appellate Body

UNITED STATES – MEASURES CONCERNING THE IMPORTATION, MARKETING AND SALE OF TUNA AND TUNA PRODUCTS (AB-2015-6)
Recourse to Article 21.5 of the DSU by Mexico (DS381/RW)

THIRD PARTICIPANT SUBMISSION OF NEW ZEALAND

26 June 2015
Table of Contents

I. INTRODUCTION .............................................................................................................. 2

II. CONSIDERATION OF THE MEASURE ‘AS A WHOLE’ IS REQUIRED................................................................. 2

III. ARTICLE 2.1: THE FRAMEWORK TO ASSESS “TREATMENT NO LESS FAVOURABLE” .................................................. 3

IV. APPLICATION OF THE AGREEMENT ON THE INTERNATIONAL DOLPHIN CONSERVATION PROGRAM ........................................................................................................... 5

V. CONCLUSION .................................................................................................................. 6
# CASES CITED IN THIS SUBMISSION

<table>
<thead>
<tr>
<th>Short Title</th>
<th>Full Case Title and Citation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Canada – Aircraft (Article 21.5 – Brazil)</td>
<td>Appellate Body Report, Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU, WT/DS70/AB/RW, adopted 4 August 2000</td>
</tr>
<tr>
<td>US – Tuna II (Mexico) (AB)</td>
<td>Appellate Body Report, United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, WT/DS381/AB/R, adopted 13 June 2012</td>
</tr>
<tr>
<td>US – Tuna II (Article 21.5 – Mexico) (Panel)</td>
<td>Panel Report, United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico, WT/DS381/RW, circulated 14 April 2015</td>
</tr>
</tbody>
</table>
EXECUTIVE SUMMARY

New Zealand welcomes this opportunity to provide its views on matters at issue in the appeal of the Compliance Panel’s report. In this submission, New Zealand draws attention to three matters concerning this appeal. First, in determining compliance of an implementing measure under the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), a panel is required to consider the measure “as a whole”. Second, in relation to the approach to “treatment no less favourable” in Article 2.1 of the *Agreement on Technical Barriers To Trade* (TBT Agreement), New Zealand considers that the so-called “calibration test” is simply part of the assessment of whether the regulatory distinction is even-handed and not a ‘separate test’. Third, in New Zealand’s view it would be unreasonable for the United States to impose observer requirements on other countries involved in tuna fisheries in other parts of the world where there is a different risk of dolphin mortality as a result of different fishing methods than occurs in the Eastern Tropical Pacific (ETP).
I. INTRODUCTION

1. New Zealand welcomes this opportunity to provide its views on matters at issue in the appeal of the Compliance Panel’s report.\(^1\) New Zealand’s continued participation as a third party in these proceedings reflects its systemic interest in the legal issues that arise from the United States Amended Tuna Measure\(^2\) and its interests as a country that fishes for tuna both within and outside its waters.

2. In this submission, New Zealand draws attention to three matters concerning this appeal. Section II sets out our views on a panel’s mandate in determining compliance of an implementing measure under the DSU. Section III sets out our views on the approach to “treatment no less favourable” in Article 2.1 of the TBT Agreement. New Zealand considers that these issues contribute to compliance in WTO disputes and to how the TBT Agreement will be applied by WTO Members. New Zealand also comments in Section IV on the application of the Agreement on the International Dolphin Conservation Program (AIDCP), which receives emphasis in the appellants’ and appellees’ submissions and the Compliance Panel’s report.

II. CONSIDERATION OF THE MEASURE ‘AS A WHOLE’ IS REQUIRED

3. Mexico claims in this appeal that the Compliance Panel erred in concluding that specific elements of the Amended Measure were inconsistent with WTO provisions rather than examining the consistency of the compliance measure as a whole.\(^3\)

4. The United States, on the other hand, argues that because the Appellate Body only found one element of the original measure did not comply with the relevant WTO provisions, compliance is a straightforward case of a Member amending that aspect of its measure to make it compliant.\(^4\) Consequently, the issue before the Appellate Body is whether the Compliance Panel should have only assessed whether the new 2013 Final Rule addressed the original Appellate Body’s recommendations and rulings, or whether it

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\(^1\) New Zealand reserved its third party rights to participate in the original proceeding at the meeting of the Dispute Settlement Body (DSB) on 19 November 2009, and in the compliance proceedings at the meeting of the DSB on 26 September 2013.


\(^3\) Other Appeal Submission of Mexico, 10 June 2015, para 66.

\(^4\) Appellant Submission of the United States of America, 5 June 2015, para 5.
was correct to consider each of the elements that comprised the Amended Measure (both new and original elements).

5. Previously, the Appellate Body has clarified that a compliance panel’s task under Article 21.5 of the DSU is not limited to examining whether the implementing measure remedies the violation or other nullification or impairment as found by the original panel (or Appellate Body). A panel is obliged to examine the consistency of the whole measure as amended against the relevant WTO Agreements.\(^5\) While it may be necessary to assess elements of the original measure, that assessment is made to inform a panel’s decision on whether the amended measure as a whole is compliant. The Appellate Body has also clarified that a complainant’s claims may be new and different from those raised in respect of the original measure in the original panel proceeding.\(^6\) Therefore, the measure as a whole rather than only the amendments must be assessed.

6. A holistic assessment is required because, in New Zealand's view, while individual elements of a measure may be consistent with the obligation in Article 2.1 of the TBT Agreement, the combined effect may nevertheless be inconsistent if the nature or number of distinctions is such that the measure as a whole accords less favourable treatment to imported products. A change to one element of a measure may have implications for another element, and in turn affect the measure in its totality. It is for this reason that it is critical that compliance panels consider the compliance measure as a whole.

III. ARTICLE 2.1: THE FRAMEWORK TO ASSESS "TREATMENT NO LESS FAVOURABLE"

7. Article 2.1 of the TBT Agreement provides:

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

8. New Zealand wishes to comment on the test for “treatment no less favourable” in Article 2.1. The Appellate Body has clarified that “treatment no less favourable” requires panels to assess whether the technical regulation at issue modifies the conditions of

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\(^5\) Appellate Body Report Canada – Aircraft (Article 21.5 – Brazil), paras 40-42.
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.\textsuperscript{7}

9. Nonetheless, a finding of detrimental impact on competitive opportunities is not dispositive of “less favourable treatment” under Article 2.1. Technical regulations, by their nature, necessarily distinguish between products.\textsuperscript{8} The Appellate Body has clarified that the test for “treatment no less favourable” under Article 2.1 requires an assessment of whether any detrimental impact stems exclusively from a legitimate regulatory distinction.\textsuperscript{9} The Appellate Body has found that a regulatory distinction that is not designed and applied in an even-handed manner will not be legitimate.\textsuperscript{10}

10. 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”.\textsuperscript{11} The United States argues that the Appellate Body in the original proceedings clarified that the answer to that question will depend on whether the regulatory distinction is even-handed in the manner in which it addresses the risks to dolphins arising from different fishing methods in different areas of the ocean.\textsuperscript{12} In contrast, Mexico claims that Appellate Body jurisprudence in interpreting Article 2.1 of the TBT Agreement “does not include a ‘calibration test’ that can override the even-handedness and arbitrary discrimination tests”.\textsuperscript{13}

11. In New Zealand’s view, the so-called “calibration test” is no more than an assessment of whether the regulatory distinction is even-handed. There is no separate test. As New Zealand commented in its submissions in the original proceedings, an assessment of whether a regulatory distinction is designed and applied in an even-handed manner should focus on the connection between the rationale behind the regulatory distinction, and the objective of the measure as a whole.\textsuperscript{14}

12. In this dispute, such an assessment would involve looking at the rationale for tuna products caught by setting on dolphins in the ETP large purse seine fishery not being eligible for the dolphin-safe 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

\textsuperscript{8} Appellate Body Report, \textit{US – Tuna II (Mexico) (AB)}, para 211.
\textsuperscript{10} Ibid.
\textsuperscript{11} Ibid.
\textsuperscript{12} United States Appellee Submission, 23 June 2015, para 18.
\textsuperscript{13} Executive Summary of Appellee Submission of Mexico, 23 June 2015, para 8.
\textsuperscript{14} Third Party Submission of New Zealand, 5 August 2014, para 14.
distinction assists or hinders the objective of the dolphin-safe labelling regime as a whole. In other words, is the rationale for the distinction consistent with the measure’s overall objective?

13. The reason why this assessment should be undertaken is that if the rationale is not consistent with the measure’s overall objective, then the discrimination determined to arise from the measure could not be said to stem exclusively from a legitimate regulatory distinction.

IV. APPLICATION OF THE AGREEMENT ON THE INTERNATIONAL DOLPHIN CONSERVATION PROGRAM

14. New Zealand also wishes to comment on the application of the Agreement on the International Dolphin Conservation Program (AIDCP). The AIDCP is a multilateral agreement between 14 of the 21 members of the Inter-American Tropical Tuna Commission. It only applies to those 14 members who are parties to the agreement.

15. Mexico’s argument appears to be that the United States discriminates against Mexican tuna products by not unilaterally requiring the vessels of the United States and other WTO Members to carry observers to certify the dolphin safe status of the tuna, while Mexican vessels must carry observers, pursuant to Mexico’s international legal commitments.\(^{15}\)

16. New Zealand does not agree that captain certifications as to the dolphin safe status of the tuna harvested by their vessels are so unreliable that the United States must require observers on all vessels in the Atlantic, Indian, and Pacific Oceans that seek to produce “dolphin safe” tuna for the United States tuna product market simply because Mexico, as a party to the AIDCP, has agreed to have (educated and trained) observers on all of its large purse seine vessels.

17. In New Zealand’s view it would be unreasonable for the United States to impose observer requirements on other countries involved in tuna fisheries in other parts of the world where there is a different risk of dolphin mortality as a result of different fishing methods than occurs in the ETP. Such observer requirements must be agreed by the countries concerned, as they were by Mexico under the AIDCP, and they cannot be unilaterally imposed by one country.

V CONCLUSION

18. New Zealand considers that this appeal raises issues which have implications for the interpretation of Members' obligations under the DSU and the TBT Agreement. In this submission, New Zealand has sought to draw attention to a compliance panel's mandate in determining compliance of an implementing measure and the approach to "treatment no less favourable" in Article 2.1 of the TBT Agreement. New Zealand has also commented on the application of the AIDCP requirements to non-parties to that agreement. New Zealand considers that these issues will contribute to how these Agreements are applied and implemented by Members.