insights

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The Tuna-Dolphin Encore - WTO Rules on Environmental Labeling

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Introduction

The WTO panel on Mexico's challenge to U.S. rules for labeling "dolphin-safe" tuna products issued its long-awaited decision on September 15, 2011. The panel decision in *US—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US—Tuna II (Mexico))*[1] soon after came under attack by environmental groups. The decision is important both because of the iconic intersection between tuna, dolphins, trade, and the environment—first seen in the "*US—Tuna I (Mexico)*" case twenty-one years ago—and also because of how it applies the WTO Agreement on Technical Barriers to Trade ("TBT Agreement") to labeling schemes relating to environmental criteria on how a product is produced.

The United States and Mexico have both appealed the panel decision. The WTO Appellate Body should issue its report on the case by April 18. The Appellate Body will also rule separately on two other panel decisions interpreting the TBT Agreement.[2] This *Insight* provides an overview of the panel report and a preview of the issues on appeal.

Factual Background

In this dispute, Mexico challenged a U.S. labeling scheme regarding tuna products. The WTO panel grouped together the relevant measures, as delineated below, and referred to them together as:[3]

1. U.S. Dolphin Protection Consumer Information Act ("DPCIA")[4]
2. U.S. implementing regulations for the DPCIA[5]
3. The 2007 U.S. federal case ruling in *Earth Island Institute v. Hogarth*[6]

The U.S. Congress enacted the DPCIA in response to campaigns regarding dolphin mortality in the Eastern Tropical Pacific ("ETP"), located near the Mexican coast, where tuna associate with dolphins, and fishermen would catch both together by encircling them

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DOCUMENTS OF NOTE

Panel Report, *US—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*

TBT Agreement

with purse seine nets ("setting on dolphins").[7] The DPCIA prohibits the use of labels or related claims that tuna products are "dolphin-safe" if tuna are caught by setting on dolphins in the ETP. Labeling tuna as "dolphin-safe" is not legally required.[8]

In 1989-90, Mexico brought and won a General Agreement on Tariffs and Trade ("GATT") challenge against a U.S. ban on tuna from Mexico, imposed under the Marine Mammal Protection Act. The GATT panel report was never adopted, and the parties ultimately resolved the issues by negotiations resulting in the 1999 Agreement on the International Dolphin Conservation Program ("AIDCP") initiated by the Inter-American Tropical Tuna Commission.

The AIDCP provides for a labeling scheme, which focuses on dolphin mortality and injury rather than on setting on dolphins.[9] It is less stringent than the DPCIA because it only requires a showing of "no significant adverse impact."[10]

Based on scientific studies concerning the AIDCP standards, the U.S. Department of Commerce decided in 2002 that the "no significant adverse impact" standard would suffice to meet U.S. goals.[11] This led to many years of litigation, culminating in the Ninth Circuit decision, *Earth Island Institute v. Hogarth*, vacating the Department of Commerce finding.[12] As a result, the United States never adopted the AIDCP standard, and the more stringent DPCIA standard remained in place. This issue is at the heart of the *US— Tuna II (Mexico)* case.

Mexico's Challenge

In challenging the DPCIA-related measures under the TBT Agreement and the GATT, Mexico argued that the DPCIA is a "technical regulation" that is discriminatory (TBT Article 2.1), more trade-restrictive than necessary (TBT Article 2.2), and had unjustifiably failed to use an international standard (the AIDCP scheme) as a basis for the DPCIA label (TBT Article 2.4). Mexico also claimed that the DPCIA denies most-favored nation treatment and national treatment to Mexican products under GATT Articles I:1 and III:4.

For Mexico's TBT claims, the threshold question was whether the DPCIA and its related measures qualified as "technical regulations" triggering the obligations of TBT Article 2. The panel majority found that they did. The panel went on to find that the measures did not violate TBT Articles 2.1 or 2.4, but that in light of the facts, the measures violated TBT Article 2.2 as they were more trade-restrictive than necessary to achieve a legitimate objective.[13] Exercising judicial economy, the panel declined to rule on Mexico's claims under GATT Articles I:1 and III:4.[14]

"Dolphin-safe" tuna labeling measures as a "technical regulation"

The core disciplines of the TBT Agreement, found in Article 2, apply only if a measure is a "technical regulation," defined as a "[d]ocument which lays down product characteristics or their related processes and production methods . . . with which compliance is mandatory."[15] A technical regulation may also include labeling requirements "as they apply to a product, process or production method."[16] Technical regulations are distinct from "standards," which lay down product characteristics for "common and repeated use" but for which compliance is voluntary.[17]

The panel found that compliance with product characteristics or related process and production methods ("PPMs") is "mandatory" if the document containing them "has the

General Agreement on Tariffs and Trade 1994

Marrakesh Agreement Establishing the World Trade Organization

Vienna Convention on the Law of Treaties

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effect of regulating in a legally binding or compulsory fashion the characteristics at issue," and prescribes compulsory requirements as to how tuna in products are caught in relation to dolphins.[18] The panel majority concluded that the U.S. measures are technical regulations because they "prescribe and impose the conditions under which a product may be labeled dolphin-safe;"[19] tuna not caught in the prescribed manner is prohibited from being identified and marketed under this appellation;[20] and the measures ban labeling with any statement relating to dolphins, whether misleading or otherwise, if the prescribed conditions are not met.[21] The minority's separate opinion rejected this conclusion because the U.S. measures do not require either the use of the dolphin-safe label or the use of specific fishing techniques necessary for access to the label.[22]

The majority's reasoning could imply that virtually any state action that is a "document laying down product characteristics" or related PPMs is mandatory (and therefore a technical regulation) if it requires compliance, even when such compliance is optional and partly enforced by the private sector. The United States has argued at length for the minority position in its appeal, and it can be expected that the Appellate Body will clarify this issue in its upcoming report.

The *Tuna—Dolphin II* panel has also cut the Gordian knot on one of the big unresolved issues in the TBT Agreement: whether "technical regulations" can include rules on PPMs that do not relate to the product as such (such as labeling of tuna for how it was caught). A 1995 WTO Secretariat note on TBT negotiating history concluded that "many participants [in the negotiations] were of the view that standards based *inter alia* on PPMs unrelated to a product's characteristics should not be considered eligible for being treated as in conformity with the TBT Agreement."[23] But in *US—Tuna II (Mexico),* neither side wanted the DPCIA measures to be excluded from TBT for this reason. Both the panel's majority and minority concluded that the subject matter of the measures falls within the scope of the definition of "technical regulation."[24] The panel decision is not entirely clear on the applicability of non-product related PPMs; and, as the United States has not appealed this interpretation, the Appellate Body may not address it either.

Discrimination claims

Mexico claimed that the DPCIA discriminates *de facto* against Mexican tuna products, which are almost all caught in the ETP by setting on dolphins—a practice that complies with AIDCP rules (such as requirements to release dolphins from nets)—because U.S. tuna products, containing the dolphin-safe label and allegedly using fishing methods more dangerous to dolphins, were treated more favorably than those denied the U.S. label.

The panel agreed that Mexico had established that Mexican tuna products were "like" U.S. tuna products and tuna products originating in other countries[25] and that access to the label creates a commercial advantage for tuna products complying with DPCIA rules.[26] However, the panel concluded that Mexican tuna products had not been afforded less favorable treatment.[27] The panel found that the label was applied equally to all fleets, without regard to flag,[28] and that discrepancies in access were the result of business choices regarding fishing methods rather than the U.S. measures themselves.[29]

Like the reading of national treatment in the 1994 GATT panel on *US—Auto Taxes*,[30] this interpretation is problematic. Mexico has appealed these panel findings, leaving another issue to be resolved on appeal.

"More trade-restrictive than necessary to satisfy a legitimate objective"

The panel decided for Mexico on the most controversial TBT claim: Article 2.2 of the TBT Agreement, which requires that "technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create."[31] The three TBT cases of 2011 are the first ever to apply these delicately balanced provisions, placing WTO panels in the difficult position of determining what objective a domestic regulation fulfills, whether that objective is legitimate, and whether less trade-restrictive means exist to fulfill the objective.

For the purpose of its analysis, the panel accepted the U.S. characterization of the tuna labeling scheme's objectives to 1) ensure that consumers are not misled about whether tuna products contain tuna caught in a manner that adversely affected dolphins, and 2) contribute to dolphin protection.[32] In a unique move, the panel considered the information contained in the Non-Party *Amici Curiae* Brief*,* particularly the sensitivity of the dolphin-safe issue to U.S. consumers.[33] The panel then decided that the U.S. objectives fell within "legitimate objectives" listed in TBT Article 2.2 (prevention of deceptive practices and protection of animal life or health or the environment).[34] Mexico has conditionally appealed these findings in part.

However, the panel also found that these measures were more trade-restrictive than necessary.[35] Looking at the costs and benefits of having the U.S. label, the panel noted that the U.S. labeling scheme allows use of a "dolphin-safe" label on virtually *any* tuna caught outside the ETP and does not address the risk of dolphin mortality or injury from non purse-seine fishing methods used elsewhere.[36] The panel also found, as Mexico had suggested, that allowing the use of the AIDCP dolphin-safe label on tuna in *addition* to the DPCIA-mandated label, and adding information on the use of dolphin-safe fishing methods to the DPCIA label, would be "at least as apt to contribute to the objective" of preventing consumers from being misled.[37]

Finally, the panel made a controversial finding for many environmental groups: the U.S. labeling scheme may actually undercut dolphin protection. According to the panel, by giving access to the "dolphin-safe" label to virtually all non-ETP tuna caught without purse-seining, and denying access to ETP tuna caught under the controlled conditions required by the AIDCP, the DPCIA gave non-ETP fishing fleets using non purse-seine methods no incentive to use safer fishing techniques.[38] Thus, in relation to non purse-seine fishing outside the ETP, U.S. measures were "not able to contribute to the protection of dolphins."[39] The panel also found that allowing concurrent use of the AIDCP label in the U.S. market would be a reasonably available less-restrictive alternative. The United States has appealed this finding.

It is not clear whether Mexico actually met its burden of proof to show that the U.S. measure was more trade restrictive than necessary. Mexico did not prove 1) that the relevant international standard, AIDCP in this case, was effective in furthering U.S. goals, and 2) that this alternative measure would be less trade restrictive.[40] Rather, Mexico argued that the U.S. labeling scheme does not protect dolphins outside the ETP, which may be harmed through other fishing methods, and that the labeling measure fails to inform consumers of the discrepancy.[41] The United States has also appealed the panel's conclusion that Mexico met its burden.

Use of international standards

The panel also ruled on Mexico's claim under TBT Article 2.4, which provides that where

technical regulations are required, and "relevant international standards" exist, the international standards must be used as a basis for the technical regulations unless the international standards would be ineffective or inappropriate to fulfill the legitimate objectives pursued.[42] Mexico argued that the United States had breached Article 2.4 by not basing its dolphin-safe label on the AIDCP's labeling scheme.

The key issue here is what constitutes an "international standard" for purposes of the privileged status conferred by Article 2.4. The TBT Agreement does not define "international standard." The parties referred to a TBT Committee Decision adopted in 2000, which provides guidelines and procedures (regarding, *inter alia*, transparency, relevance, and consensus) for standardizing bodies developing international standards.[43] Relying on definitions in the ISO/IEC Guide 2, the panel found that for the purposes of TBT Article 2.4, the AIDCP is an "international standardizing organization," and the AIDCP dolphin-safe definition and certification are a "relevant international standard."[44] (The United States has appealed this finding.) The panel then found that the United States failed to base its dolphin-safe labeling provisions on this relevant international standard, but that Mexico had failed to satisfy its burden of proof that the AIDCP labeling scheme alone was an effective means of achieving the U.S. legitimate objectives.[45] Mexico has appealed this finding and the panel's conclusion that the U.S. labeling scheme did not violate Article 2.4 of the TBT Agreement.

Conclusion

This is the first WTO panel decision to apply the TBT Agreement to a domestic environmental regulation. Not only did it revive some of the issues first addressed in prior 1990's environmental/trade cases, it has also accepted and systematically considered, both in its questions to Mexico and in its final analysis, a non-party *amicus curiae brief*—an unusual move by WTO panels.[46]

The panel decision presents a "mixed bag" of winners and losers. It finds the U.S. labeling scheme legitimate and recognizes the United States' autonomy to regulate tuna fishing.[47]

The panel's conclusion regarding the relationship between the U.S. label and the AIDCP implies that it would have tolerated a properly designed environmental label that was not trade restrictive.

The competing legal obligations and policy objectives of trade and non-trade interests create much discord among environmental groups and trade groups; undeniably, however, the two are interlinked.[48] An important first step for such reconciliation is to address the difficult issue of non-product related PPMs, while dealing with the legitimate concerns of developing countries that such regulations limit access of their exports to the developed nations. *US—Tuna II (Mexico)* urges us to consider a more balanced approach to trade and social policies addressing sustainability and threats to our environment, fit for the needs of today's globalized world.

About the Author

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Endnotes:

[1] Panel Report, *US—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R (Sept. 15, 2011) [hereinafter *US—Tuna II (Mexico)*].

[2] Panel Report, *US—Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R (Sept. 2, 2011); *see also* Panel Report, *US—Certain Country of Origin Labeling (COOL) (Canada)*, WT/DS384/8 (Nov. 18, 2011), and Panel Report, *US—COOL (Mexico)*, WT/DS386/7 (Nov. 18, 2011).

[3] *US—Tuna II (Mexico)*, *supra* note 1, ¶ 2.1.

[4] Dolphin Protection Consumer Information Act, 16 U.S.C. § 1385 (1990) [hereinafter DPCIA].

[5] 50 C.F.R. 216.91-92.

[6] Earth Island Institute v. Hogarth, 484 F.3d 1123 (9th Cir. 2007), *amended by* 494 F.3d 757 (9th Cir. 2007); *see also US—Tuna II (Mexico)*, *supra* note 1, ¶ 2.1.

[7] Written Submission of Non-Party Amici Curiae, Humane Society International American University, Washington College of Law, Program on International and Comparative Environmental Law, *US—Tuna II (Mexico)*, WT/DS381 (May 6, 2010) [hereinafter *Amicus Curiae* Brief].

[8] *US—Tuna II (Mexico)*, *supra* note 1, ¶ 7.122; *see also* 16 U.S.C. § 1385 (d)(1), *supra* note 4.

[9] *See US—Tuna II (Mexico)*, *supra* note 1, ¶¶ 2.35-2.41.

[10] *Amicus Curiae* Brief, *supra* note 7, ¶ 27.

[11] *Id*. ¶¶ 26-28.

[12] *Id*. ¶ 28; *see also* Earth Island Institute, 484 F.3d 1112.

[13] *See US—Tuna II (Mexico*), *supra* note 1, ¶ 8.1.

[14] *See id*. ¶ 7.748.

[15] Technical Barriers to the Trade Agreement art. 1, Annex 1A to the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 1867 U.N.T.S. 14, 33 I.L.M. 1143 (1994) [hereinafter TBT Agreement].

[16] *Id*.

[17] *See* TBT Agreement, Annex 1, art. 4; *see also id*. Annex 3.

[18] *US—Tuna II (Mexico)*, *supra* note 1, ¶ 7.111.

[19] *Id.* ¶ 7.131.

[20] *Id.* ¶ 7.137.

[21] *Id.* ¶ 7.143.

[22] *Id.* ¶¶ 7.152-7.153.

[23] Negotiating History of the Coverage of the Agreement on Technical Barriers to Trade with Regard to Labelling Requirements, Voluntary Standards, and Processes and Production Methods Unrelated to Product Characteristics, ¶ 3(c), WT/CTE/W/11 (Aug. 29, 1995) (further analysis in ¶¶ 103- 151).

[24] *US—Tuna II (Mexico)*, *supra* note 1, ¶ 7.78; *see also* ¶ 7.147 (minority opinion).

[25] *Id.*¶ 7.251.

[26] *Id*. ¶¶ 7.312-7.334.

[27] *Id*. ¶¶ 7.374-7.375.

[28] *Id*. ¶ 7.310.

[29] *Id*. ¶ 7.334.

[30] *US—Taxes on Automobiles*, DS31/R (Sept. 29, 1994).

[31] TBT Agreement, *supra* note 15, art. 2.2.

[32] *See US—Tuna II (Mexico)*, *supra* note 1, ¶¶ 7.425, 7.401, 7.403, 7.424.

[33] *See Amicus Curiae* Brief, *supra* note 7; *see also Tuna—Dolphin II (Mexico)*, *supra* note 1, ¶¶ 7.1-7.9, 7.182, 7.288 & 7.363

[34] *See US—Tuna II (Mexico)*, *supra* note 1, ¶¶ 7.440-7.443.

[35] *See id.* ¶¶ 7.465, 7.620-7.623.

[36] *Id*. ¶¶ 7.540-7.544; s*ee also id.* ¶ 7.529.

[37] *Id*. ¶ 7.577.

[38] *See id.* ¶ 7.598. *See also WTO Panel Rules 'Dolphin-Safe' Tuna Labels Too Restrictive*, L.A. Times, Sept. 16, 2011, at 2; Leslie Kaufman, *Ruling May Jeopardize 'Dolphin Safe' Label*, N.Y. Times Green Blog (Sept. 15, 2011, *6:52 PM),* http://green.blogs.nytimes.com/2011/09/15/ruling-may-jeopardize-safe-dolphin-label/.

[39] *See US—Tuna II (Mexico)*, *supra* note 1, ¶ 5.999.

[40] *Id*. ¶¶ 7.391-7.404.

[41] *See id*. ¶¶ 7.514-7.516

[42] TBT Agreement, *supra* note 15, art. 2.4

[43] Mexico's Responses to the Panel's Questions from the Second Substantive Meeting, ¶¶ 140-141 (Jan. 19, 2010). *See also US—Tuna II (Mexico)*, *supra* note 1, ¶ 7.665. TBT Committee Decision, *Principles for the Development of International Standards, Guides, and Recommendations*, ¶ 20, G/TBT/9 (Nov. 13, 2000), and Annex 4, 26-29, G/TBT/1/Rev. 8 (May 23, 2002).

[44] *See US—Tuna II (Mexico)*, *supra* note 1, ¶¶ 7.678-7.687, 7.705-706.

[45] *Id*. ¶¶ 7.721-7.740.

[46] Mexico's Responses to the Panel's Questions from the Second Substantive Meeting, *US—Tuna II (Mexico)*, ¶ 88, DS381 (Jan. 19, 2010). *See also* Comments of the United States on the Answers of Mexico to the Second Set of Questions from the Panel to the Parties, *US—Tuna II (Mexico)*, ¶ 10, DS381 (Jan. 6, 2011).

[47] Mark J. Palmer, *WTO Ruling on US 'Dolphin Safe' Tuna Label is a Mixed Bag,* Environmentalist Blog (Sept. 22, 2011), http://www.earthisland.org/journal/index.php/elist/eListRead/wto_ruling_on_us_dolphin_safe_tuna_label_is_a_mixed_bag/.

[48] *See* Jose Alvarez, *The WTO As Linkage Machine*, 96 Am. J. Int'l L. 146 (2002).