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The WTO Appellate Body Knocks Down U.S. "Dolphin-Safe" Tuna Labels But Leaves a Crack for PPMs

By Elizabeth Trujillo

Introduction

On June 13, 2012, the Dispute Settlement Body ("DSB") of the World Trade Organization ("WTO") adopted the Panel and Appellate Body Reports in an important environmental labeling case, *US—Tuna II*,[1] which brings environmental issues to the forefront of trade. This decision, alongside its partner cases, *US—Clove Cigarettes*[2] and *US—COOL*,[3] clarifies key provisions of the WTO's Agreement on Technical Barriers to Trade ("TBT Agreement")[4] while exploring the relationship between trade liberalization and government regulation of the environment.[5] Can free trade accommodate regulations that protect the environment by targeting non-product-related process and production methods ("PPMs")? Although *US—Tuna II* does not answer this question, it represents an important step for WTO jurisprudence in this regard.[6]

In this case, Mexico challenged the United States' labeling scheme under the U.S. Dolphin Protection Consumer Information Act ("DPCIA") and associated regulations and rulings. The scheme is designed to protect dolphins and to provide information to consumers about how tuna was caught. The "dolphin-safe" label under this scheme can be applied to tuna only if it is caught using methods other than "setting on" dolphins or driftnet fishing on the high seas. For tuna caught in the Eastern Tropical Pacific region ("ETP"), access to the label requires a certification that the tuna was not caught by setting on dolphins *and* that "no dolphins were killed or seriously injured" in the process. For tuna outside the ETP, the latter certification is not required.[7]

This *Insight* examines some of the issues considered on appeal under TBT Annex 1.1 and Articles 2.1, 2.2, and 2.4. Significantly, the Panel in *US—Tuna II* concluded that the U.S. measure is a "technical regulation" that does not treat Mexican tuna products less favorably than like U.S. products contrary to TBT Article 2.1, but that it is more trade restrictive than

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necessary and thus contrary to TBT Article 2.2. The Appellate Body, while agreeing that the measure is a technical regulation, reversed the Panel's conclusions on Articles 2.1 and 2.2.

Is the U.S. Scheme a Technical Regulation? – TBT Annex 1.1

TBT Annex 1.1 defines a technical regulation as a "[d]ocument which lays down product characteristics or their related processes and production methods . . . with which compliance is mandatory . . . ." As a threshold issue, the United States appealed the Panel's conclusions regarding the mandatory nature of the U.S. requirements.[8] The Appellate Body agreed with the Panel that the U.S. measure is mandatory and therefore a "technical regulation" because it forms part of U.S. law and regulations and imposes legally enforceable conditions that must be met to have access to the "dolphin-safe" label.[9] This conclusion blurs the distinction in the TBT Agreement between a voluntary "standard" and a mandatory "technical regulation." It suggests that any legislative or regulatory act that affects market access and contains legally mandated and enforceable conditions may constitute a technical regulation.[10]

Treatment No Less Favorable – TBT Article 2.1

TBT Article 2.1 requires WTO Members to 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."

The Appellate Body found that the Panel used "an incorrect approach" in upholding the U.S. measure under Article 2.1.[11] A determination of less favorable treatment focuses on government action;[12] specifically, the Appellate Body considered whether 1) the U.S. measure modifies the competitive conditions in the U.S. market to the detriment of Mexican tuna products as compared to U.S. or other members' tuna products; and 2) the detrimental impact "reflects discrimination against the Mexican tuna products."[13] The Appellate Body found that the Panel incorrectly assumed that regulatory distinctions based on fishing methods rather than national origin are consistent with Article 2.1. According to the Appellate Body, such distinctions may nevertheless modify the conditions of competition.[14] This reading of Article 2.1 as covering *de facto* discrimination through regulations that are origin neutral on their face is in line with preceding jurisprudence on Article III of the General Agreement on Tariffs and Trade ("GATT") 1994 and the recent Appellate Body decision in *US—Clove Cigarettes*.

The Appellate Body concluded that the United States had not demonstrated that the measure is "even-handed" and that "the detrimental impact of the US measure on Mexican tuna products stems exclusively from a legitimate regulatory distinction"—namely, the distinction between tuna caught by setting on dolphins in the ETP and tuna caught using different fishing methods outside the ETP.[15] The Appellate Body therefore reversed the Panel's finding for the United States under Article 2.1 and found instead that the labeling scheme provides less favorable treatment to Mexican tuna products contrary to Article 2.1.[16]

More Trade Restrictive than Necessary? – TBT Article 2.2

The Appellate Body reversed the Panel's ruling that the U.S. measure is more "trade-restrictive than necessary to meet a legitimate objective." In line with *US—Gambling*,[17] the Appellate Body carefully analyzed the weighing and balancing required in assessing the

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necessity of the measure. A Panel must balance factors including: the trade-restrictiveness of the measure; its contribution to a legitimate objective; and the risks of not fulfilling that objective.[18] The burden is on the complainant to show that a regulation creates an unnecessary obstacle to trade. The respondent must rebut the complainant's *prima facie* case with evidence to the contrary and, for example, by showing that the alternative proposed by the complainant is not reasonably available, not less trade restrictive, or does not make an equivalent contribution to the legitimate objective.[19]

Following an earlier GATT dispute,[20] the United States and Mexico entered into the 1999 Agreement on the International Dolphin Conservation Program ("AIDCP"), which provides for a less stringent labeling scheme focusing on dolphin mortality and injury. The Panel concluded that the U.S. scheme would be less trade-restrictive if used in conjunction with the AIDCP scheme.[21] However, the Appellate Body disagreed that this combination represented a relevant alternative demonstrating inconsistency with TBT Article 2.2. In comparing the effect of the U.S. scheme with that of the proposed alternative of the U.S. scheme in conjunction with the AIDCP scheme, the Panel considered tuna caught inside and outside the ETP rather than correctly focusing on the ETP. Furthermore, the Appellate Body disagreed with the Panel that applying the U.S. scheme in conjunction with the AIDCP scheme would achieve the U.S. objectives "to the same extent" as the U.S. scheme alone. The Appellate Body therefore reversed the Panel's finding that the U.S. measure is more trade-restrictive than necessary contrary to TBT Article 2.2.[22] The Appellate Body dismissed Mexico's conditional claims.[23]

Relevant International Standard - TBT Article 2.4

TBT Article 2.4 states that Members shall use relevant international standards as "a basis for their technical regulations except when such international standards . . . would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued . . ."[24] The United States successfully appealed the Panel's finding that the AIDCP scheme is "a relevant international standard."[25] This aspect of the appeal focused on the Panel's conclusion that that the AIDCP is a "recognized international body" of the kind that may adopt international standards.

The Panel had deferred to the definition of "international standard" in the ISO/IEC Guide.[26] The Appellate Body concluded that this focus is consistent with the introductory clause of TBT Annex 1, but that the definitions in the TBT Agreement take precedence to the extent of inconsistency.[27] Therefore, since TBT Annex 1 states that a standard is approved by a "body" rather than an "organization," the legal question under the TBT Agreement is whether the AIDCP scheme is adopted by an "international standardizing *body*."[28] Furthermore, such a body must be "'recognized' with respect to its 'activities in standardization,'"[29] and its membership must be "*open* to the relevant bodies of at least all Members."[30] The Appellate Body looked to a TBT Committee Decision[31] to interpret the term "open" and "recognized activities in standardization," on the basis that the Committee Decision constitutes a "'subsequent agreement'" within the meaning of Article 31(3)(a) of the Vienna Convention on the Law of Treaties.[32] This move sets a precedent for WTO Committee Decisions to have legal force in future WTO adjudicatory proceedings.

In accordance with the TBT Committee Decision, the Appellate Body found that the AIDCP is not open because it has few members, whose membership was conditioned on an invitation to participate. Accordingly, the Panel erred in characterizing the AIDCP as an international standardizing organization and in concluding that the AIDCP scheme is a

"relevant international standard" under TBT Article 2.4. The Appellate Body did not disturb the Panel's ruling that the U.S. measure is not inconsistent with TBT Article 2.4.[33] Finally, the Appellate Body found that the Panel misused judicial economy in not addressing Mexico's GATT claims and concluded that GATT applied to this case.[34]

Conclusion

US—Tuna II is a landmark case for the trade and environment relationship and, more specifically, for the future adjudication of technical regulations under the TBT Agreement. In finding the U.S. labeling scheme inconsistent with TBT Article 2.1, the Appellate Body effectively characterized a measure based on non–product–related PPMs as a discriminatory technical regulation. However, the case leaves open the applicability of the TBT Agreement to PPM-based regulations in general—a controversial issue especially for developing nations because of the effect such regulations may have on market access of their products.[35]Furthermore, by deferring to the TBT Committee Decision, this case blurred the future role of WTO Committees in setting new rules and interpretative guidelines —especially relevant in light of the current impasse in the Doha Round negotiations.

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Endnotes:

[1] Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products,* WT/DS381/R (May 16, 2012) [hereinafter *US—Tuna II (Mexico)* AB Report]; *see also* Panel Report*, United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products,* WT/DS381/R (Sept. 15, 2011) [hereinafter *US—Tuna II (Mexico)* Panel Report].

[2] Appellate Body Report, *United States—Clove Cigarettes Measures Affecting the Production and Sale of Clove Cigarettes,* WT/DS406/AB/R (Apr. 4, 2012) [hereinafter *US—Clove Cigarettes* AB Report]*; see also* Panel Report, *United States—Clove Cigarettes,* WT/DS406/R (Sept. 2, 2011).

[3] Request for the Establishment of a Panel by Canada, *United States—Certain Country of Origin Labeling (COOL) (Canada)*, WT/DS384/8 (Oct. 9, 2009) & Request for the Establishment of a Panel by Mexico, *United States—Certain Country of Origin Labeling (COOL) (Mexico)*, WT/DS386/7 (Oct. 13, 2009).

[4] Agreement on Technical Barriers to Trade, 1868 U.N.T.S. 120, *available at* http://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm [hereinafter TBT Agreement].

[5] Robert Hudec, *GATT/WTO Constraints on National Regulation: Requiem for an 'Aims and Effects' Test*, 32 Int'l Law. 619-49 (1998); Elizabeth Trujillo, *Mission Possible: Reciprocal Deference Between Domestic Regulatory Structures and the WTO*, 40 Cornell Int'l L. J. 201, 221–25 (2007).

[6] *See United States Restrictions on Imports of Tuna*, GATT Doc. DS29/R (Jan. 16, 1994), 33 I.L.M. 839 (1994) (unadopted Panel report) [hereinafter *Tuna*, Panel Report]; *see United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R15 (May 15, 1998), 37 I.L.M. 832 (1998).

[7] *US—Tuna II* Panel Report, ¶¶ 2.3-2.16; *see also* Elizabeth Trujillo, *The Tuna-Dolphin Encore: WTO Rules on Environmental Labeling,* ASIL Insights (Mar. 7, 2012), *available at* http://www.asil.org/insights120307.cfm.

[8] *US—Tuna II* AB Report, *supra* note 1, ¶ 181.

[9] *Id*. ¶¶ 194–95.

[10] *Id*. ¶ 199.

[11] *Id*. ¶ 227.

[12] *Id*. ¶ 236–37.

[13] *Id*. ¶ 231. The Appellate Body was inconsistent here in stating that the comparison is also as to "tuna products originating in any other Member." In paragraph 215, it correctly stated that Article 2.1 seeks to ascertain "whether the technical regulation at issue modifies the conditions of competition in the relevant market to the detriment of the group of imported products *vis à vis* the group of like domestic products or like products originating in any other country."

[14] *Id*. ¶ 225; *see also US—Clove Cigarettes* AB Report, *supra* note 2, ¶ 182.

[15] *US—Tuna II* AB Report, *supra* note 1, ¶¶ 284, 297.

[16] *Id*. ¶¶ 297–99.

[17] Appellate Body Report, *US—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 307, WT/DS285/R (Apr. 7, 2005).

[18] *US—Tuna II* AB Report, *supra* note 1, ¶¶ 318 & 322.

[19] *Id*. ¶¶ 322–23.

[20] *See Tuna*, Panel Report, *supra* note 6.

[21] *US—Tuna II* Panel Report, *supra* note 1, ¶¶ 7.577 & 7.578.

[22] *US—Tuna II* AB Report, *supra* note 1, ¶¶ 328–31.

[23] *Id*. ¶¶ 341–42.

[24] TBT Agreement, *supra* note 4, art. 2.4.

[25] *US—Tuna II* AB Report, *supra* note 1, ¶ 343.

[26] *US—Tuna II* Panel Report, *supra* note 1, ¶ 7.663; *see* ISO/IEC Guide 2:1991, General Terms and Their Definitions concerning Standardization and Related Activities (6th ed.1991) [hereinafter ISO/IEC Guide].

[27] *US—Tuna II* AB Report, *supra* note 1, ¶¶ 353–54.

[28] *Id*. ¶ 356 (original emphasis).

[29] *Id*. ¶ 357; *see* ISO/IEC Guide, *supra* note 26.

[30] TBT Agreement, *supra* note 4, Annex 1.4 (emphasis added); *US—Tuna II* AB Report, *supra* note 1, ¶ 359.

[31] TBT Committee Decision on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5, and Annex 3 to the TBT Agreement, G/TBT/1/Rev.10 (Jan.1, 1995) (revised June 9, 2011).

[32] *US—Tuna II* AB Report, *supra* note 1, ¶ 372. For purposes of treaty interpretation, the Vienna Convention allows to take into account "any subsequent agreement between parties." *See* Vienna Convention on the Law of Treaties art. 31(3)(a), May 23, 1969, 1155 U.N.T.S. 331.

[33] *US—Tuna II* AB Report, *supra* note 1, ¶¶ 398–99.

[34] *Id.* ¶¶ 402–06.

[35] *See* 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 ¶¶ 103–51).