WTO DISPUTE ANALYSIS*

Centre for WTO Studies
Indian Institute of Foreign Trade
New Delhi

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Report of the Appellate Body

UNITED STATES – MEASURES CONCERNING THE IMPORTATION, MARKETING AND SALE OF TUNA AND TUNA PRODUCTS

(WT/DS381/AB/R)
(Circulated on 16 MAY 2012)

Parties:

Appellant/ Appellee:	United States (US)
Other Appellant / Appellee:	Mexico
Third Participants:	Argentina, Australia, Brazil, Bolivarian Republic of Venezuela, Canada, China, Ecuador, European Union, Guatemala, Japan, Korea, New Zealand, Separate customs Territory of Taiwan, Penghu, Kinmen and Matsu, Thailand and Turkey.

Appellate Body Division:

Zhang (Presiding Member), Bhatia (Member), Graham (Member)

I. BACKGROUND

This appeal concerns issues of law and legal interpretations developed in the Panel Report *United States – Measures concerning the Importation, Marketing and Sale of Tuna and Tuna Products*[1] ("Panel Report"). The Panel was established to consider a complaint by Mexico regarding the consistency of certain measures imposed by the US on the importation, marketing, and sale of tuna and tuna products with the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and the *Agreement on Technical Barriers to Trade* (the "*TBT Agreement*").

In particular, Mexico claimed that the *United States Code*, Title 16, Section 1385 (the "Dolphin Protection Consumer Information Act" of "DPCIA"), the *United States Code of Federal Regulations*, Title 50, Section 216.91 and Section 216.92 (the "implementing regulations"), and a ruling by a US federal appeals court in *Earth Island Institute v Hogarth* (the "Hogarth ruling") were inconsistent with the United States' obligations under Article 2 of the *TBT Agreement* and Articles I and III of the GATT 1994.

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**This issue can also be accessed online at http://wtocentre.iift.ac.in/DisputeAnalysis.asp . Queries and comments are most welcome and may be directed to disputes_cws@iift.ac.in.

[1] WT/DS381/R, 15 September 2011

Taken together, the DPCIA, the implementing regulations, and the Hogwarth ruling, set out the requirements relating to when the tuna products sold in the US may be labelled as "dolphin-safe". More specifically, they conditioned eligibility for a dolphin-safe label upon certain documentary evidence that varied depending on the area where the tuna contained in the tuna product was harvested and the type of vessel and fishing methods by which it was harvested. In particular, tuna caught by "setting on" dolphins was not eligible for a "dolphin-safe label" in the US, regardless of whether the fishing method was used inside or outside the eastern tropical Pacific Ocean (the "ETP"). The fishing technique of "setting on" dolphins took advantage of the fact that tuna tended to swim beneath the schools of dolphins in the ETP. However, the use of a "dolphin-safe" label was not obligatory for the importation or sale of tuna products in the US. (Para 172)

The Panel treated the legal instruments identified by Mexico as a single measure for the purpose of Mexico's claims and its findings, and referred to the measure at issue as "US dolphin-safe labelling provisions". Having found that the US "dolphin safe" labelling provision constituted a "technical regulation" within the meaning of Article 1.1 of the *TBT Agreement*, the Panel concluded the following on the substantive claims of Mexico:

a. With respect to the Mexico's claim that the measure was inconsistent with Article 2.1 of the *TBT Agreement*, the Panel found there was no violation of US's obligations under the provision.
b. The measure was more trade restrictive than necessary to fulfil its objectives, taking into account of the risks non-fulfilment would create and hence the measure was inconsistent with Article 2.2 of the *TBT Agreement*.
c. With respect to Mexico's claim under Article 2.4 of the *TBT Agreement*, the Panel found that the Agreement on the International Dolphin Conservation Program (the "AIDCP") was a relevant international standard, but that Mexico had failed to prove that it is an effective and appropriate means to fulfil the US's objectives at its chosen level of protection. (Para 3)

With respect to Mexico's claims under Articles I:1 and III:4 of the GATT 1994, the Panel decided to exercise judicial economy. Notice of Appeal was filed by the US on 20 January 2012 to appeal certain issues of law and legal interpretation developed by the Panel. On 25 January 2012, Mexico too notified the DSB of its intention to appeal certain issues of law and legal interpretation and filed a Notice of Other Appeal.

II. KEY ISSUES AND APPELLATE BODY FINDINGS

A. Legal Characterisation of the Measure at Issue

Introduction

The Panel had determined as a threshold matter, whether as contended by Mexico, the measure at issue constituted a "technical regulation" to which Article 2 of the *TBT Agreement* applied. In its analysis, the Panel had applied a three-tier test to arrive at intermediate findings, where one of the findings was that the measure at issue established "labelling requirements, compliance with which is mandatory". (Para 179)

Based on its review of the measure at issue, the Panel considered that, effectively, the specific requirements of the measure at issue were the only option available to address "dolphin-safety" and that, through access to the label, the US measure regulated "the 'dolphin-safe' status of tuna products in a binding and exclusive manner". On this basis, the Panel had concluded that the US "dolphin-safe" labelling provisions constituted a "technical regulation" subject to the disciplines of Article 2 of the *TBT Agreement*. (Para 180)

US's appeal focused on the Panel's finding that the measure at issue established labelling requirements "with which compliance is mandatory" and the Panel's conclusion that the US measure therefore constituted a "technical regulation" within the meaning of Annex 1.1 of the *TBT Agreement*.

Interpretation of Annex 1.1 to the TBT Agreement

Before reviewing the definition of 'technical regulation' contained in Annex 1.1 to the *TBT Agreement*, the Appellate Body recalled that it had previously in *EC – Sardines*[2] held that in order to fall under the definition of "technical regulation", a document must apply to an identifiable product or group of products, it must lay down one or more characteristics of the product, and "compliance with the product characteristics must be mandatory". (Para 183)

The Appellate Body noted that Annex 1.1 defined the term "technical regulation" by reference to a 'document' which was defined quite broadly as 'something written, inscribed, etc., which furnishes evidence or information upon any subject'. The Appellate Body also noted that subject matter of a technical regulation was clarified in the language in Annex 1.1 which states that a technical regulation may establish or prescribe "product characteristics or their related processes and production methods". Annex 1.1 to the *TBT Agreement* further states that a technical regulation may include or "deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method." Regarding the meaning of the notion of "labelling requirements", the Appellate Body noted that the word "requirement" meant "a condition which must be complied with". The term "labelling requirements" thus referred to provisions that set out criteria or conditions to be fulfilled in order to use a particular label. (Paras 184-186)

The Appellate Body then turned to the second sentence of Annex 1.2 to note that the definition of 'standard' for purposes of the *TBT Agreement*, contained language identical to that found in the second sentence of Annex 1.1 and hence with respect to the second sentence of these provisions, the subject matter of a particular measure was therefore not dispositive of whether a measure constituted a technical regulation or a standard. Instead, the Appellate Body noted that, "terminology", "symbols", "packaging", "marking", and "labelling requirements" may be the subject-matter of either technical regulations or standards. Thus, the fact that "labelling requirements" may consist of criteria or conditions that must be complied with in order to use a particular label, did not imply therefore that the measure was for that reason alone a "technical regulation" within the meaning of Annex 1.1. (Para 187)

Whether the Measure at Issue constitutes a Technical Regulation?

The Appellate Body began it analysis by noting that the DPCIA and the implementing regulations constituted legislative or regulatory acts of the US federal authorities. Taken together, the DPCIA, the implementing regulation and the Hogarth ruling set out the requirements for when tuna products sold in the US may be labelled as "dolphin-safe". The US measure had established a single and legally mandated set of requirements for making any statement with respect to the broad subject of 'dolphin-safety' of tuna products in the US. The US measure covered the entire field of what 'dolphin-safe' meant in relation to the tuna products in the US. The Appellate Body attached importance to these characteristics of the measure at issue in assessing whether it can properly be characterized as a 'technical regulation' within the meaning of the *TBT Agreement*. (Para 193)

Furthermore, the Appellate Body noted that the US measures provided for specific enforcement mechanisms and surveillance mechanisms to guarantee compliance with its norms and imposed sanctions

[2] Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, Para. 176

in case of wrong labelling. According to the US, whether the measure at issue was legally enforceable did not provide a basis for drawing distinction between technical regulations and standards. The Appellate Body however noted that while it was true that 'labelling requirements' either in a standard or in a technical regulation may be subject to enforcement, the US measure not only set out certain conditions for the use of a label, but it also enforced a prohibition against the use of any other label containing the terms 'dolphin-safe', 'dolphins', 'porpoises', or 'marine mammals' on a tuna product that did not comply with the requirements set out in the measure. The measure at issue established a single definition of 'dolphin-safe' and treated any statement on a tuna product regarding 'dolphin-safety' that did not meet the conditions of the measure as a deceptive practice or act. (Paras 194- 195)

(***Key Question***: *Is absence of a requirement to use a particular label to place a product for sale on the market, determinative in an evaluation of technical regulation under Annex 1.1 of the TBT Agreement?)*

US also contended that compliance with a labelling requirement was "mandatory" within the meaning of Annex 1.1 only "if there is also a requirement to use the label in order to place the product for sale on the market". By contrast, in the US's view, compliance with a labelling requirement was not mandatory in situations where producers retained the option of not using the label but nevertheless were able to sell the product on the market. The Appellate Body rejected the US position and held that:

> "To us, the mere fact that there is no requirement to use a particular label in order to place a product for sale on the market does not preclude a finding that a measure constitutes a "technical regulation" within the meaning of Annex 1.1. Instead, in the context of the present case, we attach significance to the fact that, while it is possible to sell tuna products without a "dolphin-safe" label in the United States, any "producer, importer, exporter, distributor or seller" of tuna products must comply with the measure at issue in order to make any "dolphin-safe" claim." (Para 195)

The US also suggested that the Panel's allegedly erroneous interpretation of Annex 1.1 was 'largely based on its reading of the Appellate Body Report in *EC – Sardines*[3]. According to the US, the Panel's reliance on that Appellate Body report was incorrect for two reasons.

a. First, in that dispute, neither the panel nor the Appellate Body considered whether compliance with the measure at issue was mandatory.
b. Second, *EC – Sardines* involved a requirement that products marketed as "preserved sardines" be prepared exclusively from a certain type of sardines.

The US maintained that this was product characteristic "intrinsic to" preserved sardines, and unless preserved sardines met this product characteristic, they were prohibited from being marketed as such. By contrast, the measure in the present case did not relate to product characteristics that tuna products must meet to be sold on the US market and could be sold in the US as tuna products either with or without a "dolphin-safe" label. However, according to the Appellate Body the fact that the it had characterized the measure at issue in *EC – Sardines* as a "technical regulation" appeared to support the notion that the mere fact that it was legally permissible to sell a product on the market without using a particular label was not determinative when examining whether a measure was a "technical regulation" within the meaning of Annex 1.1. (Paras 193 - 198)

Thus, according to the Appellate Body, a determination of whether a particular measure constituted a technical regulation must be made in the light of the characteristics of the measure at issue and the circumstances of the case. The Appellate Body concluded:

[3] Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002

"… the US measure prescribes in a broad and exhaustive manner the conditions that apply for making any assertion on a tuna product as to its "dolphin-safety", regardless of the manner in which that statement is made. As a consequence, the US measure covers the entire field of what "dolphin-safe" means in relation to tuna products. For these reasons, we *find* that the Panel did not err in characterizing the measure at issue as a "technical regulation" within the meaning of Annex 1.1 to the *TBT Agreement*." (Para 199)

B. ***Article 2.1 of the TBT Agreement***

Introduction

Mexico appealed the Panel's finding that it had failed to demonstrate that the US 'dolphin-safe' labelling provisions were inconsistent with Article 2.1 of the *TBT Agreement*. The Appellate Body noted that Article 2.1 of the *TBT Agreement* consisted of three elements that must be demonstrated in order to establish an *inconsistency* with the provisions, namely:

(i) that the measure at issue constituted a "*technical regulation*" within the meaning of Annex 1.1;
(ii) that the imported products must be *like* the domestic product and the products of other origins; and
(iii) that the treatment accorded to imported products must be *less favourable than* that accorded to like domestic products and like products from other countries.

Mexico's appeal concerned the Panel's finding in respect of the third element, namely, the "treatment no less favourable" standard in Article 2.1. (Paras 200 - 201)

Panel's findings and Mexico's appeal regarding "Treatment no less favourable"

On the basis of its reading of Article 2.1 of the *TBT Agreement*, the Panel had found that less favourable treatment would arise in respect of technical regulations:

> "… if imported products originating in any Member were placed at a disadvantage, compared to like domestic products and imported products originating in any other country, with respect to the preparation, adoption or application of technical regulations. "[4] (Para 203)

According to the Panel, the essence of the measures covered under Article 2.1 of the *TBT Agreement* was to set out certain product characteristics or their related processes and production methods or, for example, labelling requirements as they applied to products or processes and production methods that must be complied with. The Panel further emphasized that the question of what was less favourable treatment within the meaning of Article 2.1 was also "informed by the terms of the preamble [of the *TBT Agreement*], which makes it clear that measures covered by the *TBT Agreement* must not be 'applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail'." The Panel concluded that Mexico had failed to demonstrate that the US "dolphin-safe" labelling provisions afforded less favourable treatment to Mexican tuna products within the meaning of Article 2.1 of the *TBT Agreement*. Instead, the Panel found that the US "dolphin-safe" labelling provisions did not inherently discriminate on the basis of the origin of the products, and did not make it impossible for Mexican tuna products to comply with the requirement not to set on dolphins. (Paras 204 - 207)

On appeal, Mexico argued that the Panel had erred in its interpretation and application of the phrase "treatment no less favourable" in Article 2.1 of the *TBT Agreement*. According to Mexico, the Panel had

[4]Panel Report, Para 7.273

failed to fully consider the context of Article 2.1 and the object and purpose of the *TBT Agreement*. Mexico submitted that the "applicable test" under Article 2.1 of the *TBT Agreement* was to assess whether a measure modified the *conditions of competition* in the relevant market to the detriment of the imported products in question. In addition to challenging the Panel's interpretation and application of Article 2.1, Mexico also claimed that the Panel had acted inconsistently with its obligations to make an objective assessment of the matter in accordance with Article 11 of the DSU . The US considered that the Panel had properly interpreted Article 2.1 of the *TBT Agreement* and rightly found that the US "dolphin-safe" labelling provisions did not accord Mexican tuna products "less favourable treatment" than it accorded to US tuna products and tuna products originating in other countries. (Para 208-209)

"Treatment No Less Favourable" under Article 2.1 of the TBT Agreement

The Appellate Body noted that Article 2.1 should not be read to mean that any distinctions, in particular, the ones that were based exclusively on particular product characteristics or on particular processes and production methods, would *per se* constitute "less favourable treatment" within the meaning of Article 2.1. According to the Appellate Body, the context provided by Article 2.2 supported a reading that Article 2.1 did not operate to prohibit *a priori* any restriction of international trade. Further, the question of what was 'less favorable treatment' within Article 2.1 was also informed by a consideration of the context provided by the preamble of the *TBT Agreement* where the sixth recital of the preamble recognized that a WTO Member may take measures necessary for, *inter alia*, the protection of animal or plant life or health, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that such measures were "not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination" or a "disguised restriction on international trade" and were "otherwise in accordance with the provisions of this Agreement". (Paras 212 - 214)

The Appellate Body also found relevant context in Article III:4 of the GATT 1994, where the expression 'treatment no less favourable' can be found as well. The Appellate Body considered its previous findings on Article III:4 of the GATT 1994 that *conditions of competition* in the relevant market should be assessed to be instructive in assessing the meaning of the expression, provided that the specific context in which the term appears in Article 2.1 of the *TBT Agreement* is taken into account. The Appellate Body also noted that in *US – Clove Cigarettes*, it had held that a panel must further analyze whether the detrimental impact on imports stemmed exclusively from the legitimate regulatory distinction rather than reflecting discrimination against the group of imported products. (Paras 214 - 217)

Panel's approach to assessing "Treatment No Less Favourable"

The Appellate Body examined the following arguments of Mexico, with respect to the Panel's findings and analyzed the Panel's approach in each of the findings. These are briefly discussed below:

First, Mexico argued that the Panel had correctly considered the ordinary meaning of the phrase "treatment no less favourable", yet it had failed to fully consider the context of Article 2.1 and the object and purpose of *TBT Agreement*. Mexico, referring to the sixth recital of the preamble of the *TBT Agreement* submitted that technical regulations that meet all the criteria of the recital should not be prohibited by Article 2.1 even if they modified the conditions of competition in the relevant market to the detriment of the imported product in question. Mexico however asserted that the US labelling provisions did not meet these criteria. The Appellate Body noted that while it did consider that the preamble of the *TBT Agreement* informed the meaning of Article 2.1, however, it did not agree with Mexico's suggested approach that the preamble set out a test that was separate and independent from Article 2.1. (Paras 218 - 219)

Second, Mexico also argued that the Panel had departed from the way in which the phrase "treatment no

less favourable" had been examined in previous disputes under Article III:4 of the GATT 1994 and it faulted the Panel in particular, for imposing a standard under which a measure could be found to be inconsistent with Article 2.1 of the *TBT Agreement* only if it imposed an "absolute prohibition" on imports. The Appellate Body held that contrary to what the Panel appeared to have assumed, the facts that a complainant could comply or could have complied with the conditions imposed by a contested measure did not mean that the challenged measure was therefore inconsistent with Article 2.1 of the *TBT Agreement*. (Para 220-221)

Third, Mexico submitted that the Panel had erred in relying on the findings of the Appellate Body report in *Dominican Republic – Import and Sale of Cigarettes*, because the facts of this dispute are different from those in that case. Mexico stated that a measure that was "origin neutral" on its face could still violate the national treatment obligation if it has the effect of modifying the conditions of competition to the detriment of the imported product. The Appellate Body noted that in finding that Mexico had failed to demonstrate that the US 'dolphin-safe' labelling afforded 'less favourable treatment' to Mexican tuna products, the Panel had reasoned, *inter alia*, that the measures at issue on applying the same origin neutral requirement to all tuna products, did not inherently discriminate on the basis of the origin of the products. (Paras 222 - 224)

(***Key Question***: *In a 'less favourable' treatment analysis under Article 2.1, is any adverse impact on competitive opportunities for imported products vis-à-vis like domestic products, caused by the measure at issue, potentially relevant for the analysis?)*

According to the Appellate Body, the Panel appeared 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 seemed to have assumed, incorrectly in the Appellate Body's view, that regulatory distinctions that were based on different "fishing methods" or "geographical location" rather than national origin *per se* could not be relevant in assessing the consistency of a particular measure with Article 2.1 of the *TBT Agreement*. Contrary to the Panel, the Appellate Body considered that in an analysis of "less favourable treatment" under Article 2.1, *any* adverse impact on competitive opportunities for imported products *vis-à-vis* like domestic products that is caused by a particular measure may potentially be relevant.[5] (Para 225)

Fourth, Mexico also faulted the Panel for failing to find that the US measure was "discriminatory" in that it used a market access restriction to "pressure" Mexico and the Mexican fleet to adopt essentially the same "dolphin-safe" regime as in force in the United States, thereby *per se* targeting the origin of the tuna products. The Appellate Body noted that any adverse impact on competitive opportunities for imported products *vis-à-vis* like domestic products that was caused by a technical regulation may potentially be relevant for an assessment of "less favourable treatment". It may thus have been pertinent for the Panel to consider, along with other factors, the question of whether the US measure had the effect of exerting pressure on Mexico to modify its practices. This alone, however, would not have been sufficient to establish a breach of Article 2.1. (Para 226)

In sum, the Appellate Body concluded that the Panel had applied an incorrect approach in assessing whether the measure at issue was inconsistent with Article 2.1 of the *TBT Agreement*.

[5]Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes, WT/DS406/AB/R*, adopted 24 April 2012, footnote 372 to Para 179.

Whether the US Measure is inconsistent with Article 2.1 of the TBT Agreement?

In this part, the Appellate Body dealt with the question whether in the light of the findings of fact made by the Panel and the uncontested facts on the record, it could be concluded that Mexico had established that the US "dolphin-safe" labelling accord "less favourable treatment" to Mexican tuna products than that accorded to tuna products of the US and those originating in other countries. The Appellate Body's analysis of this issue proceeded in two parts. First, it assessed whether the measure at issue modified the conditions of competition in the US market to the detriment of Mexican tuna products as compared to US tuna products or tuna products originating in any other Member. Second, it reviewed whether any detrimental impact reflected discrimination against the Mexican tuna products. (Para 228-231)

1. Whether the Measure modifies the conditions of competition in the US market to the detriment of Mexican Tuna Products?

According to the Appellate Body, the Panel had clearly established that the lack of access to the "dolphin-safe" label of tuna products containing tuna caught by setting on dolphins had a detrimental impact on the competitive opportunities of Mexican tuna products in the US market. Mexico and US disagreed as to whether any detrimental impact on Mexican tuna products resulted from the measure itself rather than from the actions of private parties. Relying on its previous finding in *Korea – Various Measures on Beef*[6], the Appellate Body noted that the relevant question was thus whether the *governmental* intervention "affects the conditions under which like goods, domestic and imported, compete in the market within a Member's territory". The Appellate Body concluded that the measure at issue that modified the competitive conditions in the US market to the detriment of Mexican tuna products, and:

> "…even if Mexican tuna products might not achieve a wide penetration of the US market in the absence of the measure at issue due to consumer objections to the method of setting on dolphins, this does not change the fact that it is the measure at issue, rather than private actors, that denies most Mexican tuna products access to a "dolphin-safe" label in the US market. The fact that the detrimental impact on Mexican tuna products may involve some element of private choice does not, in our view, relieve the United States of responsibility under the *TBT Agreement*, where the measure it adopts modifies the conditions of competition to the detriment of Mexican tuna products." (Para 239)

2. Whether the detrimental impact reflects discrimination?

According to the Appellate Body, the Panel had made factual findings and reviewed a fair amount of evidence and arguments in the context of its analysis under Article 2.2 that were relevant to the issue of whether the detrimental impact to Mexican tuna products reflects discrimination and thus are pertinent to the assessment of the measure at issue under Article 2.1. The Appellate Body reviewed these factual findings under the following headings:

a. Uncontested findings by the Panel

The Appellate Body found, *inter alia*, the following findings of the Panel to be uncontested:

(i) Setting on dolphins within the ETP may result in a substantial amount of dolphin mortalities and serious injuries and had the capacity of resulting in observed and unobserved effects on dolphins.
(ii) Further, the use of certain fishing techniques other than setting on dolphins caused harm to dolphins.

[6] Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001,

(iii) As currently applied, the US measure did not address mortality (observed or unobserved) arising from fishing methods other than setting on dolphins outside the ETP, and that tuna caught in this area would be eligible for the US official label, even if dolphins had in fact been killed or seriously injured during the trip. (Para 251)

b. Findings by the Panel subject to the US's appeal under Article 11 of the DSU

The US challenged several aspects of the Panel's analysis under Article 2.2 as inconsistent with the Panel's duty, pursuant to Article 11 of the DSU, to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case." In particular, the US challenged the Panel's findings with respect to the relative harm to dolphins from different fishing methods as internally contradictory and inconsistent with the evidence before it. The Appellate Body recalled that for a claim under Article 11 to succeed, the Appellate Body must be satisfied that the panel had exceeded its authority as the initial trier of facts. As the initial trier of facts, a panel must provide "reasoned and adequate explanations and coherent reasoning", and must base its finding on a sufficient evidentiary basis. Moreover, a participant claiming that a panel disregarded certain evidence must explain why the evidence is so material to its case that the panel's failure to address such evidence has a bearing on the objectivity of the panel's factual assessment. (Para 254)

On an examination of each of the claims of the US, the Appellate Body concluded that Panel had acted consistently with it duties under Article 11 of the DSU in its analysis of the arguments and evidence before it. (Para 281)

c. Whether the measure is calibrated

The US had argued before the Panel that to the extent that there were any differences in criteria that must be satisfied in order to substantiate "dolphin-safe" claims, they were "calibrated" to the risk that dolphins may be killed or seriously injured when tuna was caught. The Panel was however 'not persuaded' that the US had demonstrated that the likelihood of the US dolphin-safe labelling provision were 'calibrated' to the likelihood of injury. The Appellate Body saw no error in the Panel's assessment and concluded that the US had not demonstrated that the difference in labelling conditions for tuna products containing tuna caught by setting on dolphins in the ETP, on the one hand, and for tuna products containing tuna caught by other fishing methods outside the ETP, on the other hand, was "calibrated" to the risks to dolphins arising from different fishing methods in different areas of the ocean. It followed from this that the United States had not demonstrated that the detrimental impact of the US measure on Mexican tuna products stemmed exclusively from a legitimate regulatory distinction. (Paras 282-297)

3. Conclusion

The Appellate Body *reversed* the Panel's finding, in paragraphs 7.374 and 8.1(a) of the Panel Report, that the US "dolphin-safe" labelling provisions were not inconsistent with Article 2.1 of the *TBT Agreement*, and *found*, instead, that the US "dolphin-safe" labelling provisions provided "less favourable treatment" to Mexican tuna products than that accorded to tuna products of the United States and tuna products originating in other countries and were therefore inconsistent with Article 2.1 of the *TBT Agreement*.(Para 299)

Mexico's claims under Article 11 of the DSU

Mexico alleged that the Panel had acted inconsistently with Article 11 of the DSU by failing to consider evidence put forward by Mexico that it was impossible for the Mexican tuna industry to change its fishing

practices to adapt to the US "dolphin-safe" labelling provisions. The Appellate Body stated that having already found that the Panel had erred in finding that Mexico failed to establish that the measure at issue was inconsistent with the US's obligations under Article 2.1 of the *TBT Agreement*, it need not determine whether, in assessing Mexico's claims under that provision, the Panel also failed to satisfy its obligations under Article 11 of the DSU.

C. ***Article 2.2 of the TBT Agreement***

US appealed the Panel's findings that the measure at issue was more trade restrictive than necessary to fulfil the legitimate objectives pursued by the US and that, therefore, the measure was inconsistent with Article 2.2 of the *TBT Agreement*. The US alleged that the Panel had erred in its application of Article 2.2 of the *TBT Agreement* and failed to make an objective assessment of the matter before it as required pursuant to Article 11 of the DSU. The Panel had assessed the US's objectives based on the description of those objectives by both parties, as well as on the basis of the design, structure, and characteristics of the measure at issue. The Panel had then ascertained whether these objectives were 'legitimate' within the meaning of Article 2.2 of the *TBT Agreement*, followed by an assessment whether the measure at issue was more trade restrictive than necessary to achieve the US's objectives. (Paras 301 -304)

The Panel had found that the measure at issue could only partially fulfil the consumer information objective, because, *inter alia*, under the US "dolphin-safe" label, consumers might be misled into thinking that a tuna product did not involve injury or killing of dolphins, even though this may in fact have been the case. The Panel considered that allowing compliance with the "dolphin-safe" labelling requirements of the AIDCP in conjunction with the existing US "dolphin-safe" label would have been a *less* trade restrictive alternative that would achieve a level of protection equivalent to that of the measure at issue. Accordingly, the Panel concluded that the measure at issue was more trade restrictive than necessary to fulfil the *consumer information* objective. The Panel subsequently considered whether the measure at issue fulfilled the *dolphin protection* objective and whether this objective could also be fulfilled by allowing the AIDCP label to coexist with the US "dolphin-safe" label in the US market. The Panel concluded that the measure at issue could at best, only partially fulfil its stated objective of protecting dolphins and hence in relation to both the consumer information objective and the dolphin protection objective, the Panel found the measure at issue to be more trade restrictive than necessary to fulfil its legitimate objectives, and this inconsistent with Article 2.2 of the *TBT Agreement* (Paras 305-308)

Mexico also raised a conditional other appeal with respect to the Panel's finding under Article 2.2 of the *TBT Agreement*.

The United States' Appeal

On appeal, the US requested the Appellate Body to reverse the Panel's finding and alleged that in assessing the evidence relating to the extent to which the US's measure fulfilled the US's objectives, the Panel had failed to make an objective assessment of the matter before it as required under Article 11 of the DSU. In response, Mexico argued that the Panel's finding was correct because the US's objectives could be fulfilled with a less trade-restrictive alternative measure, namely, allowing the AIDCP label and the US "dolphin-safe" label to *coexist* in the US market. (Paras 309-310)

1. Article 2.2 of the *TBT Agreement*

(***Key Question***: *What are the factors that should be taken into account when assessing whether a technical regulation is "more trade restrictive than necessary" within the meaning of Article 2.2 of the TBT Agreement?)*

The Appellate Body noted the first sentence of Article 2.2 required WTO Members to ensure that their technical regulations were not prepared, adopted, or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade. The second sentence explained that "[f]or this purpose, technical regulations shall not be more trade restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create". A panel adjudicating a claim under Article 2.2 of the *TBT Agreement* must seek to ascertain to what degree, or if at all, the challenged technical regulation, as written and applied, actually contributes to the legitimate objective pursued by the Member. The degree of achievement of a particular objective may be discerned from the design, structure, and operation of the technical regulation, as well as from evidence relating to the application of the measure. (Paras 312-317)

The Appellate Body also noted that both the first and second sentence of Article 2.2 referred to the notion of "necessity". Article 2.2 was concerned with restrictions on international trade that exceeded what was necessary to achieve the degree of contribution that a technical regulation made to the achievement of a legitimate objective. In sum, the Appellate Body considered that an assessment of whether a technical regulation was "more trade-restrictive than necessary" within the meaning of Article 2.2 of the *TBT Agreement* involved an evaluation of a number of factors. A panel should begin by considering factors that include:

(i) the degree of contribution made by the measure to the legitimate objective at issue;
(ii) the trade - restrictiveness of the measure; and
(iii) the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the measure. (Pars 318-322)

According to the Appellate Body, in most cases, a comparison of the challenged measure and possible alternative measures should be undertaken. In particular, it may be relevant for the purpose of this comparison to consider whether the proposed alternative was less trade restrictive, whether it would make an equivalent contribution to the relevant legitimate objective, taking account of the risks non-fulfilment would create, and whether it was reasonably available. Further, with respect to the burden of proof, the Appellate Body concluded that the burden of proof in showing that a technical regulation was inconsistent with Article 2.2, the complaint must prove it claim that challenged measures created an unnecessary obstacle to trade. (Para 323)

2. The Panel's application of Article 2.2

The US alleged that the Panel had erred in finding that the 'coexistence' of the US "dolphin-safe" label and the AIDCP label provided a reasonably available, less trade-restrictive means of achieving the objectives pursued by the US at its chosen level. According to the US, allowing the AIDCP label to coexist with the US "dolphin-safe" label would not have addressed risks to dolphins outside the ETP, since by its terms it only applied to tuna caught inside the ETP. The US also alleged that the Panel erred by implying that it was required to fulfil its objective to the same level inside and outside the ETP, regardless of the costs, and that this approach did not respect "well-established approaches to policymaking", such as weighing costs and benefits, which were also consistent with the *TBT Agreement*. (Para 324)

According to the Appellate Body, the Panel's analysis of whether Mexico had demonstrated that the US "dolphin-safe" labelling provisions were "more trade-restrictive than necessary" within the meaning of Article 2.2 was based, at least in part, on an improper comparison. With respect to the *dolphin protection* objective, the Panel had contrasted the AIDCP labelling requirements with the US "dolphin-safe" labelling provisions, stating that "allowing compliance" with the former "to be advertised on the US market would discourage observed dolphin mortality resulting from setting on dolphins to the same extent as the existing US dolphin-safe provisions do". Similarly, with respect to the *consumer information*

objective, the Panel noted, *inter alia*, that, "under the US measures", it was possible that tuna caught during a trip where dolphins were in fact killed or injured may be labelled "dolphin-safe". The Panel had compared that to the scenario "under the AIDCP", where "a label would only be granted if no dolphins were killed, but where certain unobserved adverse effects could nonetheless have been caused to dolphins". According to the Appellate Body, this comparison, however, failed to take into account that the alternative measure identified by Mexico was *not* the AIDCP regime, as such, but rather the *coexistence* of the AIDCP rules with the US measure. (Para 328)

According to the Appellate Body, for fishing activities *outside* the ETP, the degree to which the US's objectives were achieved under the alternative measure would not be higher or lower than that achieved by the US measure, but would be the same since AIDCP rules was limited to the ETP. *Inside* the ETP, however, the measure at issue and the alternative measure set out different requirements. Under the alternative measure identified by Mexico, tuna that was caught by *setting on* dolphins would be eligible for a "dolphin-safe" label if the prerequisites of the AIDCP label had been complied with. By contrast, the measure at issue prohibited *setting on* dolphins, and thus tuna harvested in the ETP would only be eligible for a "dolphin-safe" label if it was caught by methods other than setting on dolphins. Thus, according to the Appellate Body:

> "In particular, for tuna harvested inside the ETP, the Panel should have examined whether the labelling of tuna products complying with the requirements of the AIDCP label would achieve the United States' objectives to an equivalent degree as the measure at issue. We note, in this regard, the Panel's finding, undisputed by the participants, that dolphins suffer adverse impact beyond observed mortalities from setting on dolphins, even under the restrictions contained in the AIDCP rules. Since under the proposed alternative measure tuna caught in the ETP by setting on dolphins would be eligible for the "dolphin-safe" label, it would appear, therefore, that the alternative measure proposed by Mexico would contribute to both the consumer information objective and the dolphin protection objective to a *lesser degree* than the measure at issue, because, overall, it would allow more tuna harvested in conditions that adversely affect dolphins to be labelled "dolphin-safe". (Paras 329-330)

Thus, the Appellate Body held that the Panel's comparison and analysis was flawed and could not stand, and hence it reversed the Panel's finding that the measure at issue was inconsistent with Article 2.2 of the *TBT Agreement*. The Panel did not find it necessary to address the US's additional claim that the Panel had acted inconsistently with its obligations under Article 11 of the DSU. (Para 333)

Other Appeal by Mexico

Mexico raised two claims in its appeal with respect to the Panel's finding under Article 2.2 of the *TBT Agreement*, conditional upon the Appellate Body reversing the Panel's finding that the measure at issue was inconsistent with Article 2.2 of the *TBT Agreement*. These were:

a. First, Mexico requested that the Appellate Body to reverse the Panel's intermediate finding that the US's objective of contributing to the protection of dolphins by ensuring that the US market was not used to encourage fishing fleets to catch tuna in a manner that adversely affected dolphins was a legitimate objective within the meaning of Article 2.2.
b. In the alternative, Mexico requested that the Appellate Body find the measure at issue to be inconsistent with Article 2.2 based on the Panel's earlier finding that the US measure did not entirely fulfil the United States' objectives. (Para 334)

With respect to the first claim, the Appellate Body noted that the mere fact that a WTO member adopted a measure that entailed a burden on trade in order to pursue a particular objective could not *per se* provide a

sufficient basis to conclude that the objective that was being pursued was not a 'legitimate objective' within the meaning of Article 2.2. It also noted Mexico's argument that the US's dolphin protection objective was unnecessary, and constituted a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade, and was therefore inconsistent with the sixth recital of the preamble of the *TBT Agreement*. The Appellate Body held that according to the sixth recital, what must not be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade was a *measure*, and not the objective pursued by the technical regulation. (Para 339)

With respect to the second claim, Appellate Body noted that Mexico's allegation of error was based on its contention that it was not possible to find that there was a less trade-restrictive alternative measure that fulfilled the US's objectives when the measure at issue itself did not fulfil the objectives. The Appellate Body recalled that both with respect to the consumer information objective and the dolphin protection objective, the Panel had concluded that the measure at issue could *partially* achieve the objective and had not found that US "dolphin-safe" labelling provisions did not fulfil their objectives or were not "capable" of fulfilling the US's objectives. Therefore, the Appellate Body rejected both the Mexico's other claims with respect to Article 2.2 of the *TBT Agreement*. (Paras 340-342)

D. ***Article 2.4 of the TBT Agreement***

Introduction

The US and Mexico each appealed different elements of the Panel's findings under Article 2.4 of the *TBT Agreement*. The US appealed the Panel's finding that the "AIDCP dolphin-safe definition and certification" constituted a "relevant international standard" within the meaning of Article 2.4 of the *TBT Agreement*. In particular, the US appealed the Panel's intermediate finding that the AIDCP constituted an "international standardizing organization" for the purposes of Article 2.4 of the *TBT Agreement*. Mexico appealed the Panel's conclusion that it had failed to demonstrate that the AIDCP standard was an effective and appropriate means to fulfil the objectives pursued by the US. (Para 343)

The Panel had interpreted the term "international standard" in Article 2.4 of the *TBT Agreement* to mean a "standard that is adopted by an international standardizing/standards organization and made available to the public". The Panel in turn interpreted the term "international standardizing organization" to refer to "a legal or administrative entity based on the membership of other bodies or individuals that has an established constitution and its own administration, has recognized activities in standardization, and whose membership is open to the relevant national body of every country." (Para 344)

The United States Appeal

1. The meaning of the term "International Standard"

The Appellate Body noted that the composite term "international standard" was not defined in Annex 1 of the *TBT Agreement*; however Annex 1.2 to the *TBT Agreement* did define the term 'standard'. Moreover, Annex 1.4 to the *TBT Agreement* defined an 'international body or system'. The *TBT Agreement* thus established the characteristics of a standard and of an international body. Further, the Appellate Body noted that the introductory clause of Annex 1 to the *TBT Agreement* provided that terms used in the *TBT Agreement* that are also 'presented' in the ISO/IEC Guide 2: 1991, General Terms and Their Definitions Concerning Standardization and Related Activities (the "ISO/IEC Guide 2: 1991") "shall … have the same meaning as given in the definitions in the said Guide". The term "international standard" is defined in the ISO/IEC Guide 2: 1991 as a "standard that is adopted by an international standardizing/standards organization and made available to the public". However, the Appellate Body noted that since the *TBT Agreement* envisaged that international standards to be prepared by international standardizing bodies and

not organizations, the *TBT Agreement* prevailed over definitions in the ISO/IEC Guide 2:1991. (Paras 349-356)

(***Key Question***: *Whether a decision of the TBT Committee can be considered as a 'subsequent agreement' within the meaning of Article 31(3)(a) of the Vienna Convention?)*

Before the Panel, the US had relied on the TBT Committee Decision on the Principles for the Development of International Standards, Guides and Recommendations with relation to Articles 2, 5 and Annex 3 to the Agreement (the "TBT Committee Decision") in support of its interpretation of the term "international standard" as a standard that is, *inter alia*, adopted by a body whose membership is open to the relevant bodies of at least all WTO Members. (Para 367)

According to the Appellate Body, pursuant to Article 3.2 of the DSU, panels and the Appellate Body were to "clarify" the provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". This raised the issue whether the Decision could qualify as a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" within the meaning of Article 31(3)(a) of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*"). The Appellate Body noted, *inter alia*, that the Decision was adopted subsequent to the conclusion of the *TBT Agreement*, the membership of the TBT Committee comprised all WTO Members and that the Decision was adopted by consensus "with a view o clarify the concept of international standards under the Agreement". Thus the TBT Committee Decision could be considered as a "subsequent agreement" within the meaning of Article 31(3)(a) of the *Vienna Convention*. (Paras 368-372)

The Appellate Body concluded that the TBT Committee Decision clarified the temporal scope of the requirement that an international standardizing body be *open* to the relevant bodies of at least all WTO Members, and specified that the body should be open on a non-discriminatory basis. (Para 378)

(a) The Panel's interpretation of the term "international"

(***Key Question***: *For the purposes of Article 2.4 of the TBT Agreement, can an organisation which accepts participants by invitation only, be treated as an 'open' organisation?)*

The US appealed the Panel's interpretation of the term "international" in Article 2.4 as it was based on an incorrect understanding of what was required for an organisation to be "open". US argued that AIDCP was a body in which Members may participate by invitation only and hence was not open. Mexico did not disagree with the interpretation but argued that AIDCP was open when the AIDCP definition of "dolphin safe" was developed. The Appellate Body concluded:

> "The question whether a body is "open" if all WTO Members or their relevant bodies can accede pursuant to an invitation has to be decided on a case-by-case basis. It is conceivable that an invitation might indeed be a "formality". In our view, this would be the case if the invitation occurred automatically once a Member or its relevant body has expressed interest in joining a standardizing body. A panel must therefore carefully scrutinize the provisions, procedures, and practices governing accession to a standardizing body before concluding that it is "open to the relevant bodies of at least all Members"." (Para 386)

(b) The Panel's Interpretation of the concept of "Recognised Activities in Standardization"

The Panel had found that the term 'recognized' referred to the body's activities in standards development, and that the participation of these activities of the countries that were parties to the Agreement was evidence of their recognition; and such recognition, may also be inferred from the recognition of the

resulting standard, i.e. when its existence, legality and validity had been acknowledged. The Appellate Body agreed with the Panel and stated that it saw no reason why participation in a body's standardizing activities could not constitute evidence suggesting that a body was engaged in a "recognized body". The Appellate Body also noted that it found it difficult to see why an international organization that developed a single standard could not have "recognized activities in standardization", if other evidence suggested that the body's standardization activities were recognized. (Paras 387-394)

(c) The Panel's Interpretation of the term "Organization"

The Appellate Body recalled that, for the purposes of the *TBT Agreement*, international standards needed to be adopted by "international standardizing *bodies*", which may, but need not necessarily, be "international standardizing organizations" and hence concluded that the Panel had thus erred in finding that it had to consider whether the AIDCP standard was adopted by an "organization", rather than by a "body". (Para 395)

2. Whether the Panel erred in finding that the AIDCP standard is a "Relevant International Standard" within the meaning of Article 2.4 of the *TBT Agreement*?

The Panel had found that the AIDCP standard was a "relevant international standard" within the meaning of Article 2.4 of the *TBT Agreement*, based on its intermediate conclusions that the AIDCP "dolphin-safe" definition and certification constituted a standard, that the AIDCP was an "international standardizing organization", and that the AIDCP standard was made available to the public. The Appellate Body however concluded that the AIDCP was not open to the relevant bodies of at least all Members and thus not an "international standardizing body" for purposes of the *TBT Agreement*. It followed that the Panel also erred in finding, in paragraph 7.707 of the Panel Report, that the "AIDCP dolphin-safe definition and certification" constitute a "relevant international standard" within the meaning of the *TBT Agreement*. (Paras 396-399)

Mexico's Appeal

Mexico appealed the Panel's finding that it had failed to demonstrate that the AIDCP standard was an effective and appropriate means to fulfil the US's objectives at the US's chosen level of protection. Since the Appellate Body found that the Panel erred in finding that the AIDCP standard was a "relevant international standard" within the meaning of Article 2.4 of the *TBT Agreement*, it did not need to address this issue. (Para 400)

Conclusion

Thus, the Appellate Body *reversed* the Panel's finding, in paragraph 7.693 and 7.707 of the Panel Report. In the light of this, the Panel's finding, in paragraph 8.1(c) of the Panel Report, that the measure at issue was not inconsistent with Article 2.4 of the *TBT Agreement* stands. (Para 401)

E. Mexico's Claims under Article I:1 and III:4 of the GATT 1994

(***Key Question***: *For the purposes of exercising judicial economy, can a panel treat the obligations under Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994, as substantially the same?)*

Mexico submitted that the Panel erred in exercising judicial economy with respect to Mexico's claims under Articles I and III of the GATT 1994, thereby acting inconsistently with its obligations under Article 11 of the DSU, and requested the Appellate Body to complete the legal analysis by ruling on these claims. The Appellate Body noted that the Panel's decision to exercise judicial economy rested upon the

assumption that the obligations under Article 2.1 of the *TBT Agreement* and Articles I:1 and III:4 of the GATT 1994 were substantially the same. According to the Appellate Body this assumption was incorrect as it had found that the scope and content of these provisions was not the same. Moreover, the Panel should have made additional findings under the GATT 1994 in the event that the Appellate Body were to disagree with its view that the measure at issue is a "technical regulation" within the meaning of the *TBT Agreement*. By failing to do so, the Panel engaged, in an exercise of "false judicial economy" and acted inconsistently with its obligations under Article 11 of the DSU.(Para 400 - 405)

The Appellate Body also concluded that since it had found the US "dolphin-safe" labelling provisions to be inconsistent with Article 2.1, it did not consider it necessary to complete the legal analysis in this case.

III. DISPUTE NOTES ON SELECT ISSUES

- Sources of International Law: The Appellate Body in its analyses has mainly relied on treaty text (viz. *TBT Agreement* and GATT 1994) and the previous relevant Panel / Appellate Body Reports. The Appellate Body has also relied on the *Vienna Convention* to refer to the customary rules of interpretation as codified in Articles 31 for interpretation of certain issues. Additionally, the Appellate Body has also relied on a TBT Committee Decision in its analysis of Article 2.4 of the TBT Agreement.

- Treatment no less favourable under Article 2.1 of the *TBT Agreement*: The Appellate Body found relevant context in Article III:4 of the GATT 1994 for interpretation of 'treatment no less favorable' under Article 2.1 of the TBT Agreement. Relying on the jurisprudence developed under GATT, 1994, the Appellate Body found that conditions of competition in the relevant market was instructive in assessing the meaning of the expression 'treatment no less favourable', *provided that the specific context in which the term appears in Article 2.1 of the TBT Agreement is taken into account*. Thus, the Appellate Body in *US – Tuna II* appears to broadly follow the approach in *US- Clove Cigarettes*. It also recalled the finding in *US- Clove Cigarettes*, where it was held that a panel must further analyze whether the detrimental impact on imports stemmed exclusively from the legitimate regulatory distinction rather than reflecting discrimination against the group of imported products.

- Reliance on TBT Committee Decision for interpretation of Article 2.4 of the *TBT Agreement*: The Appellate Body relied on the TBT Committee Decision on the Principles for the Development of International Standards, Guides and Recommendations with relation to Articles 2, 5 and Annex 3 to the Agreement, in support of its interpretation of the term "international standard". According to the Appellate Body the TBT Committee Decision qualified as a "subsequent agreement" between the parties within the meaning of Article 31(3)(a) of the *Vienna Convention.* This indicates a deviation from the rigid stand taken by the Panel in *EC – Sardines*, where it said that TBT Committee Decision was a policy statement of preference and not the controlling provision in interpreting the expression 'relevant international standard' as set out in Article 2.4 of the TBT Agreement.

  This interpretation comes soon after the Appellate Body finding in *US-Clove Cigarettes*, where paragraph 5.2 of the Doha Ministerial Decision was also considered as a 'subsequent agreement' of the parties within the meaning of Article 31(3)(a) of the *Vienna Convention.*

- International Standardizing Body: The Appellate Body, relying on the TBT Committee Decision has clarified that an 'invitation only' body is not *a priori* treated as not 'open' for the assessing an existence of an international standardizing body. According to the Appellate Body, whether a body is 'open' or not has to be decided on a case by case basis, as it is possible that the invitation requirement for participation is simply a formality.