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WTO Panels Give Clarity to WTO's Agreement on Technical Barriers to Trade



By Duane W. Layton, Tiffany Smith, and Leticia Lizardo

Three separate World Trade Organization dispute settlement panels have recently issued reports interpreting the WTO's Agreement on Technical Barriers to Trade (TBT Agreement). These panel reports significantly increase the jurisprudence relating to the TBT Agreement and, for certain issues, represent the first time panels have issued opinions on the issues. The panels were established by the WTO's Dispute Settlement Body at the request of Mexico, Canada, and Indonesia to review U.S. measures affecting trade in cattle, hogs, tuna, and clove cigarettes.

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In many instances, the three panels approached their interpretation of the TBT Agreement in a similar manner. However, on other issues, the panels took divergent approaches. It is possible that one or more of the parties may request an appellate review of certain legal conclusions reached by the panels, which will result in further interpretation of the TBT Agreement. To date, however, the three panel reports in these cases represent the most significant advancement in interpreting the TBT Agreement since it was adopted in 1994.

The Disputes

U.S. Country-of-Origin Labeling Requirements. Mexico and Canada challenged the U.S. statutory provisions and implementing regulations setting out the United States' mandatory country-of-origin labeling regime for beef and pork (COOL measure), as well as a letter issued by the U.S. Secretary of Agriculture Tom Vilsack on the implementation of the COOL measure (Vilsack letter).

The *U.S.-COOL* panel determined that the COOL measure is a technical regulation under the TBT Agreement, and that it is inconsistent with the United States' WTO obligations. In particular, the panel found that the COOL measure violates Article 2.1 of the TBT Agree-

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ment by according less favorable treatment to imported Mexican and Canadian cattle and hogs than to like domestic products. The panel also found that the COOL measure does not fulfill its legitimate objective of providing consumers with information on origin, and therefore violates Article 2.2 of the TBT Agreement.

The panel further found that the Vilsack letter's ''suggestions for voluntary action'' went beyond certain obligations under the COOL measure, and that the letter thus constituted unreasonable administration of the COOL measure in violation of Article X:3(a) of the General Agreement on Tariffs and Trade (GATT 1994). The panel determined that the Vilsack letter was not a ''technical regulation'' and did not review it under the TBT Agreement.

U.S. Measures on the Importation, Marketing, and Sale of Tuna and Tuna Products. Mexico challenged several U.S. measures that condition access to the U.S. Department of Commerce's official dolphin-safe label upon providing certain documentary evidence that varies depending on the area where the tuna is harvested and the fishing method by which it is harvested. The *U.S.-Tuna* panel first determined that the U.S. dolphin-safe labeling provisions constituted a technical regulation under the TBT Agreement. One of the members of the panel expressed a dissenting opinion on this particular issue, but sided with the majority for the rest of the report.

The panel found that the U.S. dolphin-safe labeling provisions do not discriminate against Mexican tuna products and are therefore not inconsistent with Article 2.1 of the TBT Agreement. Although the panel found that Mexican tuna products are ''like'' tuna products originating in the United States or any other country, the panel concluded that Mexican tuna products are not afforded less favorable treatment than domestic tuna products on the basis of their origin.

However, the panel did agree with Mexico that the U.S. dolphin-safe labeling provisions are inconsistent with Article 2.2 of the TBT Agreement because they are more trade-restrictive than necessary to fulfill the legitimate objectives of (i) ensuring that consumers are not misled or deceived about whether tuna products were caught in a manner that adversely affects dolphins, and (ii) contributing to the protection of dolphins by ensuring that the U.S. market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins—taking account of the risks nonfulfillment would create. In reaching this decision, the panel concluded that (i) the U.S. dolphin-safe labeling provisions only partly address the legitimate objectives pursued by the United States, and (ii) Mexico had provided the panel with a less trade-restrictive alternative capable of achieving the same level of protection intended by the U.S. dolphin-safe labeling provisions.

U.S. Measures Affecting the Production and Sale of Clove Cigarettes. Indonesia challenged Section 907(a)(1)(A) of the United States' Federal Food, Drug and Cosmetic Act (FFDCA), which was added to the FFDCA by Section 101(b) of the Family Smoking Prevention and Tobacco Control Act. This measure bans the production and sale of clove cigarettes, as well as most other flavored cigarettes, in the United States. However, the measure excludes menthol-flavored cigarettes from the ban. Indonesia is the world's main producer of clove cigarettes, and the vast majority of clove cigarettes consumed in the United States prior to the ban were imported from Indonesia.

The *U.S.-Clove Cigarettes* panel first determined that the TBT Agreement should apply because Section 907(a)(1)(A) is a ''technical regulation.'' It then evaluated Indonesia's claims under the TBT Agreement.

The panel found that to ban clove cigarettes, but not menthol, is inconsistent with the national treatment obligation in Article 2.1 of the TBT Agreement because it accords clove cigarettes less favorable treatment than that accorded to menthol-flavored cigarettes. The panel found that clove- and menthol-flavored cigarettes are ''like products'' within the meaning of Article 2.1 of the TBT Agreement, based in part on its factual findings that both types of cigarettes are flavored and appeal to youth.

However, the panel rejected Indonesia's second main claim that the ban is inconsistent with TBT Article 2.2 because it was unnecessary. In this regard, the panel found that Indonesia had failed to demonstrate that the ban is more trade-restrictive than necessary to fulfill a legitimate objective (in this case, reducing youth smoking). This decision was based, in part, on its finding that there is extensive scientific evidence supporting the conclusion that banning clove and other flavored cigarettes could help reduce youth smoking. The panel further found that the United States acted inconsistently with some, but not all, of the provisions of the TBT Agreement covered by Indonesia's claims of procedural violations.

Analysis

In each of the three cases, the panels first considered whether the challenged measures were ''technical regulations'' using the test developed by the WTO Appellate Body in *EC-Asbestos* and *EC-Sardines*[1] for identifying a technical regulation. A measure is a ''technical regulation'' if (i) the measure applies to an **identifiable product** or groups of products, (ii) it lays down **one or more characteristics of the product**, and (iii) compliance with the product characteristics is **mandatory**.

After determining in each case that certain of the challenged measures were technical regulations, the panels then assessed the parties' claims under specific articles of the TBT Agreement. While each case also included other TBT claims specific to the facts of each case, two major claims regarding TBT Articles 2.1 and 2.2 were raised by the parties in each case.

TBT Article 2.1

Does the Measure Discriminate Against Imports? An analysis of the panels' approach to these claims and the implications for interpreting these provisions of the TBT Agreement follows.

Article 2.1 of the TBT Agreement provides that:

> Members shall ensure that in respect of technical regulations, products imported from the territory of any Member

[1] *EC-Sardines*: Peru challenged EC Regulation (EEC) 2136/89, which limited the species of fish that could be traded as ''sardines.'' The measure was determined to be an unjustifiable barrier to trade in violation of Articles 2 of the TBT Agreement.

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shall be accorded treatment no less favorable than that accorded to like products of national origin and to like products originating in any other country.

Prior to the issuance of these three panel reports, there had been little jurisprudence regarding the proper interpretation of TBT Article 2.1. The *EC-Trademarks and Geographical Indications (Australia)* [2] case established the following three elements as the legal test under Article 2.1 of the TBT Agreement: (i) that the measure at issue is a ''technical regulation,'' (ii) that the imported and domestic products at issue are ''like products'' within the meaning of that provision, and (iii) that the imported products are accorded ''less favorable'' treatment than that accorded to like domestic products.

In determining how to analyze this article, the panels in each of the three cases applied jurisprudence from the GATT 1994, Article III:4, which contains almost identical language. The panels considered whether the imported products were ''like'' a domestic product and, if so, whether the imported product was treated ''less favorably'' than the like domestic products.

In assessing likeness, the *U.S.-COOL*, *U.S.-Tuna*, and *U.S.-Clove Cigarettes* panels all considered the traditional four criteria used in cases interpreting GATT Article III:4, but they viewed the criteria in the context of the TBT Agreement. The four criteria examined by the panels were:

- the physical characteristics of the imported and domestic products;
- the products' end uses;
- consumer perceptions and behavior regarding the products; and
- the international tariff classification of the products.

After considering the criteria listed above, each of the three panels determined that the imported product in question was ''like'' a domestic product—to wit, Mexican and Canadian livestock were like U.S. livestock, Mexican tuna products were like U.S. tuna products, and clove cigarettes were found to be like menthol cigarettes produced and sold in the United States.

The panels then evaluated whether the imported products were treated ''less favorably'' than the like domestic product. The panels clarified that Article 2.1 covers both *de jure* and *de facto* discrimination. The *U.S.-COOL* and *U.S.-Clove Cigarettes* panels applied existing jurisprudence from the WTO Appellate Body developed in the context of GATT Article III:4 for evaluating less favorable treatment. Each of the panels referred to the WTO Appellate Body decision in *Japan-Alcoholic Beverages II*, [3] which noted that Article III:4 serves to further the equality of competitive conditions for imported products in relation to domestic products or the equal competitive relationship between imported and domestic products, rather than the expectations of any particular trade volume. In evaluating less favorable treatment under TBT Article 2.1, the panels applied the legal test from *Japan-Alcoholic Beverages II* and considered:

- whether the imported and domestic products were treated differently;
- whether the different treatment was to the detriment of the imported product; and
- whether the different treatment could be explained by factors other than the foreign origin of the product.

The *U.S.-Clove Cigarettes* panel quickly concluded that because imported clove cigarettes were banned, but domestically produced menthol cigarettes were not, the criteria above were satisfied and the ban on certain flavored cigarettes in Section 907(a)(1) afforded less favorable treatment to clove cigarettes. Because the U.S. ban treated imported clove cigarettes less favorably than ''like'' domestically produced menthol cigarettes, the panel found that the United States was in violation of Article 2.1 of the TBT Agreement.

The *U.S.-COOL* panel considered the statutory definition of the relevant meat labels under COOL, followed by an assessment of the COOL regime applicable to muscle cuts and ground meat. The panel sought to determine: (i) whether the different categories of labels under the COOL measure accorded different treatment to imported livestock; (ii) whether the COOL measures involved segregation and, consequently, differential costs for imported livestock; and (iii) whether through the compliance costs involved, the COOL measure created any incentive to process domestic livestock, thus reducing the competitive opportunities of imported livestock.

The panel also noted that a cost resulting from a regulation may qualify as a competitive disadvantage if it is incurred only by imported and not ''like'' domestic products. With respect to muscle cut labels, the panel found that the COOL measures create an incentive in favor of processing exclusively domestic livestock and a disincentive against handling imported livestock, which resulted in *de facto* discrimination against imported Canadian and Mexican livestock. With regard to ground meat, the panel found that the complainants had not demonstrated that the COOL measures resulted in less favorable treatment of imported livestock.

After making its findings under Article 2.1, the panel decided to make findings on the actual trade effects of the COOL measure even though it recognized that these findings were not decisive regarding analysis of the

[2] *EC-Trademarks and Geographical Indications:* alleged lack of protection of trademarks and geographical indications (GIs) for agricultural products and foodstuffs in the EC. The U.S. contended that EC Regulation 2081/92, as amended, does not provide national treatment with respect to geographical indications and does not provide sufficient protection to preexisting trademarks that are similar or identical to a geographical indication. The U.S. considered this situation to be inconsistent with the EC's obligations under the TRIPs Agreement, including but not necessarily limited to Articles 3, 16, 24, 63 and 65 of the TRIPS Agreement. The panel agreed with the United States and Australia that the EC's GI Regulation does not provide national treatment to other WTO Members' right holders and products.

[3] *Japan-Alcoholic Beverages:* The European Communities, Canada, and the United States challenged Japan's Liquor Tax Law, claiming that spirits exported to Japan were discriminated against under the Japanese liquor tax system because it levies a substantially lower tax on ''shochu'' than on whisky, cognac, and white spirits. In a ruling affirmed by the Appellate Body, a WTO dispute settlement panel concluded that the Japanese Liquor Tax Law was discriminatory and was inconsistent with GATT Article III:2.

complainants' claims. This is the first time a panel has considered trade effects in an analysis of ''less favorable treatment.'' While the panel relied only on the framework established by the WTO Appellate Body regarding whether the measure adversely affected the conditions of competition to the disadvantage of imports in reaching its conclusion on Article 2.1, the panel considered that its finding of fact regarding a negative impact on trade supported the conclusion that the measure treated imported livestock less favorably.

In *U.S.-Tuna*, Mexico did not argue that the treatment of its tuna products was ''different.'' Rather, it argued that certain requirements of the U.S. measure resulted in de facto discrimination, despite the fact that the treatment was not different. Consequently, the *U.S.-Tuna* panel conducted its own analysis into whether the U.S. measure resulted in Mexican tuna being at a disadvantage on the U.S. market compared to U.S. tuna products. The panel determined that, to the extent Mexican tuna products were treated ''less favorably'' in the U.S. market, the circumstance arose as a result of private commercial decisions and not as a consequence of the measure itself. The panel found no violation of TBT Article 2.1.

TBT Article 2.2

Is the Measure More Trade-Restrictive Than Necessary? Article 2.1 of the TBT Agreement provides that:

> Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; and protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information, related processing technology or intended end-uses of products.

The three panels concurred that the first sentence of Article 2.2 sets out a general principle ''not to create unnecessary obstacles to international trade'' and that the second sentence contains more detailed obligations. Therefore, the second sentence establishes two requirements that technical regulations must fulfill: (i) they must pursue a legitimate objective, and (ii) they must not be more trade-restrictive than necessary to fulfill that legitimate objective, taking into account the risks non-fulfillment will create.

The panels in *U.S.-Clove Cigarettes* and *U.S.-Tuna* carried out their analysis following the order above (i.e., first looking at the legitimate objective pursued by the technical regulation and then analyzing whether the measure was more trade-restrictive than necessary).

However, in *U.S.-COOL*, even though the panel recognized that the obligation in Article 2.2 remains the same in all cases, it considered that the analysis of these elements does not need to be structured and organized in the same manner for every situation. On this basis the panel considered that Article 2.2 should be analyzed in this particular case as follows:

- first, to determine whether the technical regulation was trade-restrictive;
- second, if the measure was found to be trade-restrictive, to identify the objective pursued and examine its legitimacy; and
- third, if the objective was determined to be legitimate, to assess whether it fulfils the identified objective. If it did, the analysis would then proceed to examine whether the measure is more trade-restrictive than necessary, including an analysis of the availability of a less trade-restrictive alternative measure that would equally fulfill the objective, taking into account the risks that non-fulfillment would create.

Legitimate Objective. Reflecting the difference in the sequence of the analysis taken by the *U.S.-COOL* panel, we now provide a summary on how the three panels addressed the elements in Article 2.2.

In *U.S.-Clove Cigarettes*, Indonesia encouraged the panel to determine whether the United States' ″Special Rule for Cigarettes″ (Special Rule) violated Article 2.2 of the TBT Agreement by considering ''whether the ban on some flavors, but not all, contained in the Special Rule is likely to achieve the level of protection sought by the United States and whether less trade-restrictive measures are available that could also achieve that same level of protection.'' In reviewing this question, the panel adopted a two-step analysis that evaluated whether the challenged measure (i) pursued a legitimate objective, and (ii) was more trade-restrictive than necessary to fulfill the objective (taking into account the risks non-fulfillment would create). The panel began its analysis by evaluating whether Indonesia had correctly identified the objective of the Special Rule and then determined whether the objective was ''legitimate.'' The panel made an affirmative finding on both points.

In *U.S.-Tuna*, the panel followed the WTO Appellate Body's reasoning in *EC-Sardines* with respect to its analysis of Article 2.4 TBT (which also refers to legitimate objectives). That case established that the complainant has the burden to demonstrate the existence of a violation, including that the measures are more trade-restrictive than necessary to fulfill a legitimate objective. Thus, an analysis of Article 2.2 requires a determination of what such objective is and its legitimacy.

With respect to the objectives, the panel applied the same considerations as those recognized by the WTO Appellate Body in the context of Article XIV of the WTO's General Agreement on Trade and Services (GATS), which recognized that a panel's analysis is not bound by a WTO member's characterization of the objectives of its own measures, but instead must be made in an independent and objective fashion based on the evidence in the record. In particular, the *U.S. Tuna* panel considered the description of the objectives of the measures by both parties, as well by the structure and design of the measures at issue.

The panel identified two objectives: ensuring accurate information for consumers and protecting dolphins. The panel recognized that, to the extent the objectives operate on the basis of incentives created by consumer choice, achievement of the second objective seems to be dependent in large part on the achievement of the first objective. The panel explained that Article 2.2 provides a non-exhaustive list of legitimate objectives, like the protection of animal life, plant life, health or the environment and clarified that a measure to protect animal life or health does not need to be directed exclusively to endangered or depleted species or popu-

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lations to be legitimate. The panel found that the objectives of the U.S. dolphin-safe provisions were legitimate within the meaning of Article 2.2 of the TBT Agreement.

In the *U.S.-COOL* case, Mexico and Canada claimed that the objective of the measure was trade protectionism, while the United States claimed that the objective pursued was to provide consumer information about origin. The *U.S.-COOL* panel first defined ''legitimate objectives'' in the context of Article 2.2. It stated that a technical regulation, including the alleged intent behind the enactment of the particular technical regulation, must be distinguished from the policy objective that is pursued. Therefore, a technical regulation, including its specific characteristics and features, must be distinguished from the objective pursued by the technical regulation itself. Furthermore, whether a WTO member pursues a legitimate objective within the meaning of Article 2.2 is a separate issue from whether the measure in question was in fact adopted to fulfill and does fulfill that objective.

The panel considered that for the purpose of identifying the objective of the COOL measure, it was not necessary to consider the alleged intent behind the implementation of the measure; instead, these arguments were more relevant when analyzing whether the COOL measure fulfils the identified objective. The panel concluded that the objective pursued by the United States was to provide as much clear and accurate origin information as possible to consumers.

The panel defined ''legitimate'' as meaning ''conformable to law or principle,'' ''justifiable and proper'' or ''conformable to a recognized standard type.'' The panel rejected Canada's claim by stating that it did not find in the text of this article or in the TBT Agreement an explicit requirement that a policy objective pursued by a technical regulation must be specifically linked in nature to the objectives listed in Article 2.2. It also noted that consumer protection is a recognized legitimate objective under Article VI:4 of the GATS.

The panel concluded that providing consumer information concerning country of origin can constitute a legitimate objective. It reached this conclusion based on the evidence regarding U.S. consumer preferences as well as the practice in a considerable proportion of WTO members where mandatory country-of-origin labeling exists.

Based on the evidence, the panel considered that providing consumers with information on the origin of the products they purchase is in keeping with the requirements of current social norms in a considerable part of the WTO membership. It recalled the words of the panel in EC-Sardines (referring to the conclusion of the panel in Canada-Pharmaceutical Patents) that a legitimate objective refers to ''protection of interests that are 'justifiable' in the sense that they are supported by relevant public policies or other social norms.'' On this basis, the panel asserted that social norms must be accorded due weight in considering whether a particular objective pursued by a government can be considered legitimate. The panel determined that the objective of the COOL measures was legitimate.

Having found in each case that the measures pursued a ''legitimate objective,'' the panels turned to the question of whether the measures were more ''trade-restrictive than necessary'' to achieve their objectives.

More Trade-Restrictive Than Necessary

When analyzing whether the measures concerned were more trade-restrictive than necessary, the three panels recognized that the legal interpretative approach under Article XX was relevant for the interpretation of Article 2.2. In addition, as explained below, the U.S.-Tuna and U.S.-COOL panels also considered that, to the extent appropriate, Article 5.6 of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) could also serve as a basis for the interpretation since it contains similar language to that of Article 2.2 of the TBT Agreement.

Although the question of whether SPS Article 5.6 was applicable to TBT Article 2.2 was raised in *U.S.-Clove Cigarettes*, that panel determined that there was not a significant distinction between the language of SPS Article 5.6 and GATT Article XX(b) since the measure at issue was a ban, and consequently any measure that achieved the objective short of a ban would be significantly less trade-restrictive.

In *U.S.-Clove Cigarettes*, when evaluating whether the Special Rule was ''more trade-restrictive than necessary,'' the panel examined four key issues raised by Indonesia in its first written submission:

- whether jurisprudence from Article XX(b) of the GATT 1994 was relevant to the interpretation of the more trade-restrictive than necessary standard in TBT Article 2.2;

- whether the ban on clove cigarettes exceeds the level of protection sought by the United States;

- whether the Special Rule makes a material contribution to the objective of reducing youth smoking.

- Whether there are less trade-restrictive measures that would make an equivalent contribution to the achievement of the objective pursued at the level of protection sought.

The panel agreed with Indonesia that jurisprudence from Article XX(b) of the GATT 1994 was relevant to the interpretation of Article 2.2. However, it disagreed with Indonesia on the remaining questions. The panel found that Indonesia had not demonstrated that the Special Rule exceeded the level of protection sought by the United States, and that it had not demonstrated that the Special Rule did not make a material contribution to the objective of reducing youth smoking. In conducting its evaluation of whether the Special Rule made a material contribution to reducing youth smoking, the panel chose to evaluate the contribution made by banning clove cigarettes in isolation, and not in light of the fact that menthol was not banned.

Finally, the panel concluded that Indonesia had not made a prima facie case that there were less trade-restrictive alternatives that were reasonably available and that would make an equivalent contribution to the achievement of the objective of reducing youth smoking. As a result of these negative findings, the panel did not find a violation of Article 2.2.

In *U.S.-Tuna*, the panel stated that while a degree of ''trade-restrictiveness'' may be justified where it is ''necessary to fulfill a legitimate objective,'' a measure could not be justified under Article 2.2 if it is more trade-restrictive than is necessary to achieve the objective at issue. Therefore, a measure that would be ''more trade-

restrictive than necessary'' within the meaning of the second sentence of Article 2.2 would create ''unnecessary obstacles to trade'' within the meaning of the first sentence.

The panel considered trade-restrictive measures to be those that impose any form of limitation of imports, discriminate against imports, or deny competitive opportunities to imports. The panel also stated that not being more trade-restrictive than necessary implies that trade-restrictiveness is only permissible to the extent that it is necessary to the achievement of the objective. Consequently, where it would be possible to achieve the same objective through a less trade-restrictive measure, then the measure at issue would be in violation of Article 2.2. This interpretation was based on the legal approach of the WTO Appellate Body in Article XX GATT.

The panel clarified that the aspect of the measure to be justified as ''necessary'' is its trade-restrictiveness rather than the necessity of the measure for the achievement of the objective. The term ''necessary'' essentially means that the trade-restrictiveness must be ''required'' for the fulfillment of the objective.

In essence, the panel stated that in order to determine ''whether a measure is more trade-restrictive than necessary within the meaning of Article 2.2, it should assess the manner in which and the extent to which the measures at issue fulfill the objectives. This assessment should take into account the WTO member's chosen level of protection, and compare this with a less trade-restrictive alternative measure, in order to determine whether such an alternative measure would similarly fulfill the objectives pursued by the technical regulation at the WTO member's chosen level of protection.''

When determining whether a measure is more trade-restrictive than necessary, the *U.S.-Tuna* panel noted that it is required to take into account ''the risks that non-fulfillment would create.'' The panel interpreted this as meaning that its analysis must consider the likelihood and the gravity of potential risks (and any associated adverse consequences) that might arise in the event that the legitimate objective being pursued will not be fulfilled. This implies that an alternative means of achieving the objective that would entail greater ''risks of non-fulfillment'' would not be a valid alternative, even if it is less trade-restrictive. As a result, the complainant must identify an alternative measure that is capable of achieving the objective pursued by the challenged measure at the same level as the challenged measure, taking into account the risks non-fulfillment will create.

On this basis, the panel examined Mexico's claim in light of the two objectives pursued by the U.S. measures and found that the U.S. dolphin-safe provisions were more trade-restrictive than necessary to fulfill their legitimate objectives, taking into account the risk non-fulfillment would create, because Mexico identified less trade-restrictive alternatives that could fulfill the objectives at the same level as the challenged measures.

In *U.S.-COOL*, the panel started its analysis by examining whether the measure was trade-restrictive without addressing the level of its trade-restrictiveness. On the basis of its findings under Article 2.1., the panel concluded that the measure was trade-restrictive since it had previously found that the COOL measure negatively affected the conditions of competition for imported livestock in the U.S. market.

In considering the level of trade-restrictiveness (i.e., whether the measure was more restrictive than necessary), the panel established that it would first consider whether the COOL measure fulfilled the objective before analyzing its level of restrictiveness. However, the panel found that the COOL measure did not fulfill the identified objective because it fails to convey meaningful origin information to consumers. Consequently, it found the measure to be inconsistent with Article 2.2 without addressing whether the measure was more trade-restrictive than necessary.

Conclusions

The three panels were much more consistent in their analysis of TBT Article 2.1 than Article 2.2. This appears to result from the extensive jurisprudence under GATT Article III:4 and the extremely close parallels in the language in TBT Article 2.1 and GATT Article III:4. The panels in each case followed the criteria established in the Report of the Working Party on *EU-Border Tax Adjustments*, [4] for determining likeness and found in each case that the imported product was ''like'' a domestically produced product.

Each of the panels considered whether the respective measures created differences in the conditions of competition that disadvantaged imports in their analysis of whether the measures treated the imported goods ''less favorably'' than the ''like'' domestic products. In *U.S.-Clove Cigarettes* and *U.S.-COOL*, the panels determined that the imported products were treated less favorably than the like domestic product in violation of TBT Article 2.1. In *U.S.-Tuna*, the panel did not find a violation of TBT Article 2.1, but conducted its analysis in substantially the same manner as the clove cigarette and COOL panels.

Interpreting TBT Article 2.2 presented the panels with a number of questions of first impression. Although all three panels considered jurisprudence from GATT Article XX(b), they did so at differing points in their analyses and applied the jurisprudence in slightly different ways. In each case, the panels considered whether the challenged measures contributed to fulfilling their legitimate objectives.

In *U.S.-Clove Cigarettes*, the panel determined that the Special Rule did contribute to reducing youth smoking and found no violation of TBT Article 2.2 since Indonesia had failed to demonstrate an alternative measure that also achieved the objective. In *U.S.-Tuna*, the panel found that the measures partially achieved their objective and that there were less trade-restrictive measures that could also partially achieve the objective (i.e., fulfill the objective at the same level). And in *U.S.-COOL*, the panel found that the measure was trade-restrictive, but did not fulfill its legitimate objective and was consequently more trade-restrictive than necessary.

[4] Report of the Working Party on Border Tax Adjustment: A Working Party was established in 1968 to examine the provisions of the General Agreement on Tariffs and Trade (GATT) relevant to border tax adjustments, the practices of contracting parties in relation to such adjustments; and the possible effects of such adjustments on international trade. The Report of the Working Party adopted in 1970 set out the criteria for determining ''like'' or ''similar'' products.

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Any party to a WTO dispute has the right to appeal a panel's decision to the WTO Appellate Body for a review of issues of legal interpretation. Thus, the Appellate Body will likely provide the final word on whether these panels have interpreted Article 2.1 and 2.2 properly. To the extent that the panels conducted their analyses using different approaches, the Appellate Body may indicate a preference for a particular approach. Even though the outcome of an appeal (should one or more be filed) is not yet known, the panels in these three cases have significantly added to the jurisprudence surrounding two of the core provisions of the WTO TBT Agreement.

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