

## Examining The WTO's Decision On Tuna Labeling Rules

*Law360, New York (May 29, 2012, 12:53 PM ET)* -- On May 16, 2012, the Appellate Body of the World Trade Organization circulated its decision on U.S. measures that condition access to the U.S. Department of Commerce's official "dolphin-safe" label for tuna products (WT/DS381/AB/R). The decision in this case marks the second time this year that the Appellate Body has prioritized the competitive relationship between products subject to a technical regulation in its review of a panel's decision.

Mexico initiated the dispute against the United States, alleging that the conditions for use of the dolphin-safe label are inconsistent with Articles 2.1, 2.2 and 2.4 of the WTO Agreement on Technical Barriers to Trade (TBT agreement). The Appellate Body's decision adds to the recently growing jurisprudence on the TBT agreement.

To qualify for the dolphin-safe label, the DOC requires certain documentary evidence that varies depending on the area where the tuna is harvested and the fishing method by which it is harvested. Mexico challenged these conditions before a WTO panel. That panel found in Mexico's favor on its claim under Article 2.2 of the TBT agreement, finding that the U.S. labeling provisions restricted trade more than was needed to meet the U.S. objectives of protecting dolphins.

However, the panel ruled against Mexico's claims under Articles 2.1 and 2.4, concluding, respectively, that the U.S. labeling conditions did not discriminate against Mexico and were not inconsistent with international standards. The United States appealed the panel's decision.

The Appellate Body reversed the panel's findings on Articles 2.1 and 2.2. On balance, the Appellate Body's report comes out in Mexico's favor, but for reasons and on legal grounds much different from the panel's report.

The panel had found that the U.S. dolphin-safe labeling provisions did not discriminate against Mexican tuna products and were, therefore, not inconsistent with Article 2.1 of the TBT agreement. The panel determined that, to the extent Mexican tuna products were treated less favorably in the U.S. market, it was due to private commercial decisions and not as a consequence of the U.S. labeling provisions themselves. The Appellate Body reversed this decision and found the labeling measures discriminated against Mexico in violation of Article 2.1.

According to the Appellate Body, the U.S. measures modify the conditions of competition in the U.S. market to the detriment of Mexican tuna products by excluding most of Mexico's tuna products from access to the "dolphin-safe" label, while granting access to most U.S. tuna products and tuna products from other countries.

The Appellate Body examined whether the detrimental impact derives exclusively from a legitimate regulatory distinction. It looked at whether the different conditions for access to a dolphin-safe label are “calibrated” to the risks to dolphins from different fishing methods in different areas of the ocean, as the United States had claimed.

Based on the panel’s factual findings, the Appellate Body found that the U.S. measures treat the risks unequally, because the risks from fishing methods used by other countries are not addressed. Thus, it concluded that the discrimination against Mexican tuna products does not stem exclusively from a legitimate regulatory distinction and is inconsistent with Article 2.1 of the TBT agreement.

The Appellate Body also reversed the panel’s finding under Article 2.2 of the TBT agreement, this time siding with the United States. The panel had agreed with Mexico that the U.S. dolphin-safe labeling provisions were inconsistent with Article 2.2 of the TBT agreement because they were more trade-restrictive than necessary to fulfill the legitimate objectives of (1) ensuring that consumers are not misled or deceived about whether tuna products were caught in a manner that adversely affects dolphins and (2) 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.

In reaching this decision, the panel concluded that the U.S. dolphin-safe labeling provisions only partly address the legitimate objectives pursued by the United States, and that 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. The Appellate Body disagreed with the panel, explaining that Mexico’s proposed alternative measure would not make an equivalent contribution to the U.S. objectives because it would allow more tuna harvested in harmful conditions to dolphins to be eligible for the dolphin-safe label.

The Appellate Body did uphold one of the panel’s findings. It agreed with the panel that the U.S. labeling measures did not violate Article 2.4 of the TBT agreement. Article 2.4 provides that WTO members must use relevant international standards as the basis for technical regulations to the extent such standards are effective and appropriate means for fulfilling the objectives pursued by the technical regulation. The panel found that the standards referred to by Mexico would not be appropriate or effective to achieve the U.S. objectives.

Although the Appellate Body agreed with the panel’s conclusion that the U.S. measures did not violate Article 2.4, it reversed the panel’s intermediate finding that the “dolphin-safe” definition and certification developed within the framework of the Agreement on the International Dolphin Conservation Program (AIDCP) is a “relevant international standard” within the meaning of Article 2.4 of the TBT agreement. According to the Appellate Body, the panel erred in finding that the AIDCP, to which new parties can accede only by invitation, is “open to the relevant body of every country and is therefore an international standardizing organization” for purposes of Article 2.4.

The Appellate Body’s report in the tuna case comes on the heels of its decision in a case brought by Indonesia against U.S. measures on clove cigarettes. In both cases, the panels and the Appellate Body interpreted provisions of the TBT agreement, some of which were being interpreted for the first time in WTO disputes. In the clove cigarettes case, the Appellate Body largely upheld the lower panel’s decision finding that the U.S. ban on the production and sale of clove and other flavored cigarettes, but not menthol-flavored cigarettes, violated Article 2.1 but not Article 2.2 of the TBT agreement.

In reaching this conclusion, the Appellate Body based its conclusions in part on the competitive relationship in the marketplace between clove and menthol cigarettes. In the tuna case, the Appellate Body's reversal of the panel's finding was based on an assessment of the "conditions of competition" with respect to these articles, which suggests the development of a more coherent approach to the interpretation of the TBT agreement. The Appellate Body reports in these cases significantly increase the jurisprudence relating to the TBT agreement.

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