WTO Appellate Body Report: United States – Tuna II
May 2012

Summary

Decision
The WTO Appellate Body has ruled that the US “dolphin safe” labelling scheme for canned tuna violates the national treatment obligations of the United States under the WTO Agreement on Technical Barriers to Trade (TBT Agreement). However, it rejected Mexico’s claims that the labelling law was “more trade-restrictive than necessary” to fulfil the US objectives of dolphin conservation.

Commentary – Significance of Decision
The decision of the Appellate Body in US – Tuna II is the second in a trilogy of Appellate Body rulings that will help to define what WTO Members can and cannot do when adopting technical regulations. The other two cases are US – Clove Cigarettes, on which the Appellate Body ruled in April, and US – Country of Origin Labelling, which will be released in June.

After two decisions, the Appellate Body has provided a clear indication of its interpretive approach to key provisions of the TBT Agreement. Importantly, the Appellate Body has adopted a competition-based approach to determining whether a technical regulation provides “less favourable treatment” to imported like products. In US – Tuna II, the Appellate Body affirmed the approach it adopted in US – Clove Cigarettes that in assessing a claim of less favourable treatment for imports under TBT Article 2.1, a panel should “seek to ascertain whether the technical regulation at issue modifies the conditions of competition in the relevant market to the detriment of the group of imported products vis-à-vis the group of like domestic products or like products originating in any other country.”

The Appellate Body has thus definitively resolved a fundamental issue that had previously remained an open question. Although the competition-based approach is well-established for trade in goods under the GATT, it had been uncertain whether a different approach was required for technical regulations, where governments adopt measures to pursue regulatory objectives such as health, safety, or environmental protection.

Indeed, in US – Clove Cigarettes, the Panel opted for a regulatory approach over a competition test. It stated that “we do not believe that the interpretation of Article 2.1 of the TBT Agreement, in the circumstances of this case where we are dealing with a technical regulation which has a legitimate public health objective, should be approached primarily from a competition perspective.” Instead, it considered that the “declared legitimate public health objective” of the US law had to “permeate and inform our likeness analysis.” The Appellate Body reversed the Panel on this issue, stating that it disagreed that Article 2.1 should focus on “the legitimate objectives and purposes of the technical regulation, rather than on the competitive relationship between and among the products.” According to the Appellate Body, regulatory concerns could be taken into account “to the extent that they are relevant to the examination of certain likeness criteria and are reflected in the products’ competitive relationship” As noted above, the competition approach was affirmed by the Appellate Body in US – Tuna II.

These two decisions thus root the national treatment disciplines of the TBT Agreement firmly within the jurisprudence that has been developed under the GATT. The Appellate Body’s approach is sound and has a strong textual basis, given the parallel wording of the national treatment provisions of the GATT and the TBT Agreement.

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Applying these principles in the current case, the Appellate Body found that the US measures provided “less favourable treatment”, as the lack of access by Mexican tuna to the “dolphin safe” label had a “detrimental impact on the competitive opportunities of Mexican tuna products in the US market.”

The Appellate Body’s ruling in US – Tuna II has been heavily criticized by a number of groups, which view the decision as evidence of the WTO’s supposed hostility to conservation or environmental objectives. Yet the problem in this case was not the US objective of protecting dolphins, but rather the means chosen to pursue that goal. The US law focused on one area of the oceans, the Eastern Tropical Pacific (ETP). Tuna harvested outside the ETP were eligible for the “dolphin safe” label, even if dolphins had in fact been killed or injured in those areas. Mexico had argued that the United States applied “relaxed compliance standards” outside the ETP, and the Appellate Body agreed. In the view of the Appellate Body, the US measure was not “calibrated” to “the risks to dolphins arising from different fishing methods in different areas of the ocean” and therefore the detrimental impact of the US law on Mexican tuna did not stem “exclusively from a legitimate regulatory distinction.”

One way for the United States to comply with this ruling would be to apply its “dolphin safe” scheme to tuna harvested in all areas of the ocean. During the appeal, the United States objected to this on the grounds of cost, as it would require the use of observers to certify that dolphins had not been killed or injured outside the ETP. But such an approach would address the Appellate Body’s finding that the US regulation did not address dolphin conservation in an “even handed” way.

**Report**

**Background: The US “dolphin safe” label**

Mexico challenged a series of US statutory and regulatory provisions that together established the conditions for the use of the “dolphin safe” label on canned tuna sold in the United States. The US law conditioned the availability of the “dolphin safe” label on a variety of factors, particularly the type of fishing technique used, and the area in which the tuna was harvested.

Under the US measure, the “dolphin safe” label could not be used for any tuna caught by “setting on” dolphins. The technique of “setting on” dolphins, according to the Appellate Body, involved “chasing and encircling the dolphins with a purse seine net in order to catch the tuna swimming beneath the dolphins.”

The US law also targeted the ETP, where the “tuna-dolphin association” occurred more frequently than in other areas of the ocean. The Appellate Body pointed to the uncontested finding of the Panel that where tuna was caught outside the ETP it would be eligible for the US “dolphin safe” label, “even if dolphins have in fact been caught or seriously injured during the trip, since there is, under the US measures as currently applied, no requirement for a certificate to the effect that no dolphins have been killed or seriously injured outside the ETP.”

**US “dolphin safe” labelling scheme is “mandatory”**

The Appellate Body recalled its earlier jurisprudence that for a measure to be considered as a “technical regulation” under the TBT Agreement, a document had to “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.’” Only the latter criterion – mandatory compliance – was at issue in this dispute.

The United States argued that its labelling scheme was not “mandatory”, as exporters were free to sell tuna in the United States without the “dolphin safe” label. However, the Appellate Body found that “the mere fact that it is legally permissible to sell a product on the market without using a particular label” was not determinative. It ruled that “the measure at issue sets out a single and legally mandated definition of a ‘dolphin-safe’ tuna product and disallows the use of other labels on tuna products that do not satisfy this definition.” Thus, the Appellate Body considered the US measure to be “mandatory,” and confirmed that it was a “technical regulation” for the purposes of the TBT Agreement.

**National treatment: technical regulations cannot modify “conditions of competition”**

Article 2.1 sets out the core national treatment and MFN disciplines of the TBT Agreement. It provides that “Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.”

The Appellate Body set out the three elements that had to be established in order to demonstrate a breach of this provision: (i) the measure was a “technical regulation”; (ii) the imported and domestic products were “like”; and (iii) the treatment accorded to imported products was “less favourable” than that accorded to like domestic products or the like products of other countries.
As noted above, the Appellate Body affirmed its ruling in US – Clove Cigarettes that in examining claims under TBT Article 2.1, panels had to determine whether the technical regulation modified the conditions of competition to the detriment of imports. The panel then had to “analyze whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products.”

**US “dolphin safe” labelling scheme not “even-handed”**

The Appellate Body found that “the lack of access to the ‘dolphin-safe’ label of tuna products containing tuna caught by setting on dolphins has a detrimental impact on the competitive opportunities of Mexican tuna products in the US market.”

The Appellate Body rejected the US argument that the detrimental impact on Mexican tuna resulted from “the actions of private parties,” i.e., the consumers who chose not to buy tuna without the “dolphin safe” label. The Appellate Body reasoned that “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 Appellate Body next considered “whether this detrimental impact reflects discrimination.” Mexico argued that “[i]mports of tuna products produced from tuna harvested outside the ETP – in other words, virtually all of the tuna products currently sold in the US market – can be labelled as dolphin-safe under relaxed compliance standards even though there are no protections for dolphins outside the ETP.”

The Appellate Body noted that “the participants do not contest that, as currently applied, the US measure does 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 have in fact been killed or seriously injured during the trip.” The Appellate Body concluded that “the United States has 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, is ‘calibrated’ to the risks to dolphins arising from different fishing methods in different areas of the ocean.” The United States therefore had “not demonstrated that the detrimental impact of the US measure on Mexican tuna products stems exclusively from a legitimate regulatory distinction.”

The Appellate Body concluded that the US measures were not “even-handed in the way in which they address the risks to dolphins arising from different fishing techniques in different areas of the ocean.” The Appellate Body therefore reversed the Panel’s ruling and found that the US “dolphin-safe” labelling provisions violated Article 2.1 of the TBT Agreement.

**US measure not “more trade restrictive than necessary”**

Article 2.2 of the TBT Agreement provides in part 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.” It adds that “[f]or this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfilment would create.”

The Appellate Body considered that whether a technical regulation “fulfils” an objective requires an assessment of “the degree of contribution that the technical regulation makes toward the achievement of the legitimate objective.” It stressed that “Article 2.2 does not prohibit measures that have any trade-restrictive effect. It refers to ‘unnecessary obstacles’ to trade and thus allows for some trade-restrictiveness…” Article 2.2 was “concerned with restrictions on international trade that exceed what is necessary to achieve the degree of contribution that a technical regulation makes to the achievement of a legitimate objective.”

With respect to the “risks non-fulfilment would create,” the Appellate Body opined that this suggested that “the comparison of the challenged measure with a possible alternative measure should be made in the light of the nature of the risks at issue and the gravity of the consequences that would arise from non-fulfilment of the legitimate objective.”

The Panel had found that a reasonably available, less trade-restrictive alternative to the US measure was the “coexistence” of the US “dolphin safe” labelling scheme and the label provided under the multilateral Agreement on the International Dolphin Conservation Program (AIDCP).

The Appellate Body found the Panel’s analysis on this proposed alternative to be flawed, in part because the geographic scope of application of the AIDCP rules was limited to the ETP. Thus, according to the Appellate Body, “the conditions for fishing outside the ETP would be identical under the alternative measure proposed by Mexico, since only those set out in the US measure would apply. Therefore, for fishing activities outside the ETP the degree to which the United States’ objectives are achieved under the alternative measure would not be higher or lower than that achieved by the US measure, it would be the same [original emphasis].”
More importantly, the Appellate Body ruled 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.’” Thus, the Appellate Body concluded that “the Panel’s comparison and analysis is flawed and cannot stand.” It reversed the Panel’s finding that the US measure breached TBT Article 2.2.

“International standardizing body” must be open to all WTO Members

As a final issue, the Appellate Body considered the US measure against the requirements of TBT Article 2.4. This provision states in part that “[w]here technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them…as a basis for their technical regulations except when such international standards…would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued…."

The Appellate Body found that “a required element of the definition of an ‘international’ standard for the purposes of the TBT Agreement is the approval of the standard by an ‘international standardizing body’, that is, a body that has recognized activities in standardization and whose membership is open to the relevant bodies of at least all [WTO] Members.” It reached this conclusion in part based on a decision of the TBT Committee, which it considered to be a “subsequent agreement” within the meaning of the Vienna Convention on the Law of Treaties. As the AIDCP was not open to all WTO Members, it was not an “international standardizing body” for the purposes of the TBT Agreement. The Appellate Body therefore affirmed the Panel’s finding that the US measure did not violate TBT Article 2.4.

The decision of the Appellate Body in United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (DS381) was released on May 16, 2012.