

USA Pork and Beef? Dolphin Safe? Low Carbon? Labeling Regulation and the International Trade Rules of the WTO

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Introduction

In 2012, the WTO Appellate Body issued three reports which clarified the framework governing technical regulations under Articles 2.1 (non-discrimination) and 2.2 (unnecessary obstacles to trade) of the WTO *Agreement on Technical Barriers to Trade* (“TBT Agreement”): *U.S. – Clove Cigarettes*; *U.S. – Tuna Dolphin II*; and *U.S. – COOL*.¹

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** The views expressed in this paper are those of the author and do not necessarily reflect the views of the Government of Mexico or any other client of the author.

¹ Appellate Body Report, *United States - Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012; Appellate Body Report, *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012; Appellate Body Report, *United States – Certain Country of Origin Labeling (COOL) Requirements*, WT/DS384/AB/R, WT/DS386/AB/R, adopted 23 July 2012.

A “technical regulation” is defined in the *TBT Agreement* as a: Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production methods.²

Technical regulations play an important role in the domestic laws of WTO Members and are used for a broad range of purposes including consumer information. It is expected that technical regulations will also play a key role in the implementation of national regimes to address climate change issues. Thus, the three Appellate Body reports have significant implications for the future actions of WTO Members. Although there is no doctrine of *stare decisis* or binding precedent in WTO law, the Appellate Body has ruled that subsequent panels are not free to disregard the legal interpretations and the *ratio decidendi* contained in previous Appellate Body reports that have been adopted by the WTO Dispute Settle Body.³ Accordingly, the three reports will strongly influence the future interpretation and application of the *TBT Agreement* to technical regulations.

All three disputes concerned U.S. technical regulations. *U.S. – Clove Cigarettes* concerned a U.S. ban on the importation of clove cigarettes. The ban was challenged by Indonesia, the primary exporter of clove cigarettes to the U.S. prior to the regulation. *U.S. – Tuna Dolphin II* concerned a labeling requirement that regulated the use of the term “dolphin-safe” on tuna products distributed and sold in the U.S. market. The requirement restricted the meaning of “dolphin safe” to a single U.S. definition and prohibited the use of the term under any other definitions including the international dolphin safe definition in the *Agreement on the International Dolphin Conservation Program* (“AIDCP”). Mexico, which labeled its tuna products using the AIDCP procedure, challenged the regulation because it prevented its tuna products from being labeled dolphin safe, a designation that was needed to access the principal distribution channels in the U.S. market. The *U.S. – COOL* dispute concerned a country of origin labeling regulation that required the use of the label “Product of the U.S.”/ “Product of U.S.A.” on beef and

² *TBT Agreement*, Annex 1.1.

³ Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*,

WT/DS344/AB/R, adopted 20 May 2008, para. 158 and footnote 308.

pork produced exclusively from livestock that was born, raised and slaughtered in the United States. The regulation adversely affected exports of Mexican and Canadian cattle and hogs to the U.S. market because it made it more expensive for U.S. meat processors to handle imported livestock. Mexico and Canada challenged the regulation.

While the Appellate Body found that all three technical regulations pursued legitimate objectives, it also found that they were discriminatory and, therefore, violated Article 2.1 of the *TBT Agreement*. It is notable that, even though the technical regulations restricted trade in imported products, the Panel in *U.S. – Clove Cigarettes* and the Appellate Body in the other two disputes found that they did not violate the prohibition against unnecessary obstacles to trade in Article 2.2 of the *TBT Agreement*. In making its rulings, the Appellate Body clarified the circumstances under which a WTO Member can implement a technical regulation that has trade restrictive and/or discriminatory effects on international trade.

This paper addresses only a few of the many complex issues that arose in these disputes. It focuses on labeling requirements and their treatment under the *TBT Agreement*. It will not discuss the *U.S. – Clove Cigarettes* report which dealt with a technical regulation that imposed a ban on clove cigarettes. That report is relevant insofar as the Appellate Body presented its initial interpretation of Article 2.1 of the *TBT Agreement* which was then elaborated upon in *U.S. – Tuna Dolphin II* and *U.S. – COOL*.

2. U.S. - Tuna-Dolphin II, Eco-Labeling and Consumer Choice

The *U.S. – Tuna Dolphin II* dispute involves a fascinating set of facts that illustrate many of the problems that have been and will continue to be encountered in eco-labeling and other environment-related technical regulations.

Eco-labeling is aimed at informing consumers about the environmental characteristics of products. By providing such information, consumers can make an informed decision on whether or not to purchase a product. While eco-label technical regulations do not impose an outright ban or restriction on the sale or distribution of products, the sale and/or distribution of such products could be substantially curtailed by consumer choice.

The following is a simplified summary of the key facts.

U.S. – Tuna Dolphin II concerned the use of the “dolphin safe” label on tuna products (e.g., canned tuna). A dolphin safe label is important in the U.S. market because, due to consumer and environmental NGO pressure, the principal distribution channels in the U.S. tuna product market require a dolphin safe label before they will carry a tuna product. Thus, without the label, tuna products such as those from Mexico cannot access most of the U.S. market.

The need for the label arose from the natural association between tuna and dolphin in the Eastern Tropical Pacific Ocean (“ETP”) and the tuna fishing practices during the 1960s and 1970s. Mature yellow fin tuna swim fast enough to follow beneath pods of dolphin in the ETP (tuna also associate with dolphins in other oceans). Fishermen locate schools of underwater tuna by finding and chasing dolphins on the ocean's surface and then encircle the dolphins with purse seine nets to harvest the tuna underneath.

In the early years of fishing by encircling dolphins there was considerable incidental dolphin mortality. The U.S. National Research Council estimated that, from 1960 to 1972, more than 100,000 dolphins were killed each year by the U.S. fleet alone.⁴ These unacceptable mortalities led to a series of unilateral and multilateral actions that culminated in the AIDCP. The AIDCP, which applies only to the ETP and to which both Mexico and the United States are signatories, closely regulates the tuna fishery. It mandates special fishing practices for encircling dolphins (e.g., special nets that allow encircled dolphins to escape, minimum vessel size, dolphin rescue procedures including special boats and divers, etc.). It also requires that all vessels fishing in the ETP carry an independent international observer to document compliance with the AIDCP procedures and to record all incidental dolphin mortalities and serious injury. The compliance procedures for the AIDCP are expensive for the fishing fleets operating in the ETP; however, they have been extremely effective. Annual observed dolphin mortalities or serious injury in the ETP have dropped from over 100,000 per year before the multilateral procedures to 1,000-2,000 per year, an amount that both the United States and Mexico agree is statistically insignificant. As a result of its effectiveness, the U.S. Department of State and the FAO have acknowledged that:

The AIDCP has been an unqualified success and has diligently applied the relevant principles set forth in the Code, in particular those aspects relating to the precautionary approach and to the utilization of fishing gear and techniques

⁴ National Research Council, *Dolphins and the Tuna Industry* (National Academy Press: Washington, D.C., 1992), p. 4.

which minimize the catch of non-target species. The enormous reduction in dolphin mortality attributable to the Agreement, while maintaining sustainable fisheries, is a practical, hands-on contribution. The results are tangible and measurable. The process established by the Agreement is continuous and not a one-off phenomenon. And the success of the AIDCP has the potential to be catalytic.⁵

Under the AIDCP, where the fishing procedures are followed and the independent observer records no dolphin mortalities or serious injury, the tuna caught in a fishing set qualify to be labeled as dolphin safe and can use the AIDCP dolphin safe label. In addition, the procedures minimize by-catch and thereby promote sustainable fishing practices.

The WTO dispute arose because the challenged U.S. technical regulation limited the use of the term “dolphin safe” in the United States to a single exclusive definition. Under the U.S. definition, the term “dolphin safe” can be used on tuna only if there is no setting on dolphins (i.e., encircling dolphins) during the tuna set. Thus, even if a fishing vessel catches tuna using the strict procedures of the AIDCP and qualifies to label the tuna as “dolphin safe” under that multilateral environmental agreement, the dolphin safe label could not be used in the U.S. market because dolphins are encircled.

The different definition in the U.S. was justified because of the belief that, notwithstanding that the observed effects of fishing by encircling dolphins (i.e., mortalities and serious injury) are statistically insignificant, there were unobserved adverse effects on dolphins (e.g., stress from chasing and encirclement, cow-calf separation). The WTO panel and the Appellate Body accepted that there was evidence of such adverse effects; however, there was no evidence that the effects were statistically significant. The United States’ position was that the unobserved adverse effects were significant and justified its definition that any fishing method involving encircling dolphins was not dolphin safe. Mexico’s position was that there was no evidence the unobserved adverse effects were significant and that tuna caught in conformity with the AIDCP should be able to bear the dolphin safe label.

The environmental policy issues in the dispute were complicated by the fact that the alternative tuna fishing method promoted by the United States’ labeling measure had its own adverse effects on the oceanic

⁵ U.S. Department of State, *Dolphin Conservation Agreement Wins Award at United Nations Food and Agriculture Organization*, Media Note, November 22, 2005.

ecosystem. The principal alternative to fishing for tuna by encircling dolphins is to encircle an artificial fish aggregating device (“FAD”). A FAD is a permanent, semi-permanent or temporary structure or device made from any material and used to lure fish by casting a shadow under which fish aggregate. The problem with this fishing method is that FADs attract high numbers of juvenile tuna as well as other species such as sharks, billfish, mahi-mahi, sea turtles and others which become “by catch” when a FAD is encircled and the purse seine net is drawn up. Mexico’s position was that FAD fishing was environmentally unacceptable because of its associated by-catch and the adverse effect it had on fisheries stocks of both tuna and other fish species. In Mexico’s view, it was more environmentally responsible to fish for tuna by encircling dolphins in accordance with the strict procedures of the AIDCP. By-catch was avoided when using the AIDCP method because only mature yellow fin tuna could keep up with dolphin pods. Moreover, by harvesting mature tuna and not juveniles, tuna fishery stocks were sustained. Finally, by avoiding by-catch, other fisheries’ stocks were protected.

These facts give rise to several interesting questions including:

- *Should WTO Members be able to restrict the information made available to consumers when implementing an eco-label?* Mexico argued that the trade restrictive and discriminatory effect of the U.S. technical regulation was due to the fact that it established a single exclusive definition of “dolphin safe”. In its view, the dispute could be resolved simply by allowing more than one eco-label, each having its own specific meaning. The U.S. label could indicate to consumers that no dolphins were set upon when the tuna was caught. The multilateral AIDCP label could indicate that dolphins were set upon in accordance with the strict procedures of the AIDCP and that there were no observed mortalities or serious injury. U.S. consumers could then decide whether or not to buy the tuna product based on this full information. The United States argued that a single exclusive definition was necessary because multiple definitions would confuse consumers.
- *If Members are permitted to restrict information on eco-labels to a single, exclusive definition, how should the legitimacy of that definition be assessed?* Mexico argued that there was no objective evidence (e.g., a credible scientific study) of statistically significant unobserved adverse effects on dolphins to justify a single definition and that the

multilateral AIDCP definition not only protected dolphins but protected other fisheries' stocks. The United States argued that there was evidence of unobserved adverse effects on dolphins that justified the single definition.

• *Should the commercial benefits that are provided in return for private actors incurring the substantial expense of complying with a multilateral environmental agreement be recognized and supported by WTO Members?* Mexico argued that the commercial benefit that offsets the high cost of the Mexican tuna fleet complying with the AIDCP was the ability to use the dolphin safe label in the U.S. market. The U.S. technical regulation denied that benefit to the Mexican fleet. Mexico further argued that banning the commercial benefits associated with multilateral environmental agreements could lead to fishing fleets abandoning the agreement's fishing methods.

• *Should WTO Members be able to impose discriminatory and/or trade restrictive technical regulations without first objectively and scientifically justifying those technical regulations?* Mexico argued that the sole reason for the U.S. measures was the belief that there were significant unobserved adverse effects on dolphins. However, there was no objective scientific evidence that such effects were statistically significant.

• *Should a technical regulation be permitted that is aimed at remedying one environmental problem but causes another?* Mexico argued that the U.S. technical regulation was aimed at remedying statistically insignificant adverse effects on dolphin but caused adverse effects on other fisheries' stocks because of the high by-catch from the principal alternative fishing method.

The WTO panel and the Appellate Body did not answer these questions. The focus was on whether the U.S. technical regulation was discriminatory under Article 2.1 of the *TBT Agreement*⁶ and whether it was an unnecessary obstacle to trade under Article 2.2 of that Agreement.⁷

⁶ Article 2.1 reads: Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no

With respect to Article 2.1, the Appellate Body established a two-part test. First, does the technical regulation modify the conditions of competition in the relevant market to the detriment of imported products as compared to like domestic products or products originating in any other Member? Second, if it does modify conditions of competition, does the detrimental impact of the technical regulation stem exclusively from a legitimate regulatory distinction?

With respect to the first question, the Appellate Body found 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 U.S. market in that Mexican tuna products could not access the principal distribution channels without the label. With respect to the second question, it found that the adverse impact was not due to a legitimate regulatory distinction because the technical regulation was not “even-handed” in the way in which it addressed the risks to dolphins arising from different fishing techniques in different areas of the ocean. It found that the technical regulation addressed tuna fishing in the ETP and it addressed using the dolphin set fishing method outside the ETP. However, the use of certain tuna fishing methods other than setting on dolphins outside the ETP had produced significant levels of dolphin by-catch. The technical regulation did not address the observed mortality, and any resulting adverse effects on dolphin populations, from these fishing methods in these fisheries. Rather, tuna caught using other fishing methods in these other fishing areas could be labeled dolphin safe even though there were dolphin mortalities and serious injury. On this basis, the Appellate Body found that the U.S. technical regulation was discriminatory and inconsistent with Article 2.1 of the *TBT Agreement*.

less favorable than that accorded to like products of national origin and to like products originating in any other country.

⁷ Article 2.2 reads: 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; 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.

With respect to Article 2.2, the Appellate Body established a two-part test. First, does the technical regulation pursue a legitimate objective"? Second, if it does pursue a legitimate objective, is the technical regulation more trade restrictive than necessary to fulfill that legitimate objective, taking into account the risks non-fulfillment would create?

With respect to the first question, the Appellate Body found that the technical regulation had two legitimate objectives: (i) ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was 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. With respect to the second question, the Appellate Body found that Mexico had not demonstrated that there was a less trade-restrictive alternative measure that would fulfill the two objectives to the same extent. Specifically, Mexico's alternative of allowing two labels (*U.S.* label and AIDCP label) would allow tuna products to be labeled dolphin safe even though there were unobserved adverse effects on dolphins associated with setting on dolphins under the AIDCP procedures (e.g., cow-calf separation). The Appellate Body did not address the statistical significance of those adverse effects. Rather, it focused solely on the fact that there were adverse effects and that the objective of the regulation was to inform consumers about all such effects.

While the Appellate Body's findings in the dispute clarified the application of Articles 2.1 and 2.2 to a labeling technical regulation, the above-noted interesting questions have been left unanswered.

3. *U.S.* – *COOL*, Labeling the Country of Origin of Meat

The *U.S.* – *COOL* dispute addressed a different kind of labeling measure. The technical regulation at issue imposed an obligation on retailers selling specific imported or domestically produced products (e.g., beef and pork) in the United States to label those products with their country of origin. It imposed specific rules for determining the origin of the beef and pork based on where the cattle and hogs from which the beef and pork were derived were born, raised and slaughtered. The Category A label (i.e., "Product of the *U.S.*" which is United States country of origin) applied only to meat derived from animals that were exclusively born, raised and slaughtered in the United States. Other labels (Categories B-D) applied to meat derived from animals that were born, raised or slaughtered in another country or commingled meat from multiple sources.

Under the technical regulation, Category A label meat could not be labeled with an alternative label unless it was commingled with meat from the other categories on a single production day. This requirement essentially required that almost all meat that qualified for the Category A label had to use that label. This prevented the use of a single blended label that could be applied to meat that was produced from U.S., Mexican or Canadian livestock.

The design of the regulation and its operation within the U.S. market meant that segregation of livestock was a practical way to ensure compliance which, in the extreme, meant that producers processed either exclusively domestic or exclusively imported livestock. Given the particular circumstances of the U.S. livestock market—including the fact that livestock imports were small compared to overall U.S. livestock production and demand, and U.S. livestock demand could not be fulfilled with exclusively foreign livestock—the least costly way of complying with the COOL measure was to rely exclusively on domestic livestock. As a consequence, the number of processors accepting Mexican and Canadian livestock declined, the number of days per week in which that livestock would be processed in the remaining plants was restricted, prices for Mexican and Canadian livestock were discounted, etc.

The Appellate Body applied the above two-part tests for assessing the consistency of the technical regulation with Articles 2.1 and 2.2 of the *TBT Agreement*.

With respect to Article 2.1, the Appellate Body found that the technical regulation created an incentive for U.S. market participants to process exclusively domestic livestock and a disincentive against handling imported livestock. In this way, it reduced the competitive opportunities of imported livestock as compared to domestic livestock. With respect to whether this detrimental impact stemmed exclusively from a legitimate regulatory distinction, the Appellate Body found that the technical regulation was not even handed because it imposed a disproportionate burden on upstream producers and processors. The level of information conveyed to consumers through the mandatory labeling requirements was far less detailed and accurate than the information required to be tracked and transmitted by the producers and processors (i.e., where the livestock was born, raised and slaughtered). This more detailed information is what necessitated the segregation and reduced competitive opportunities for imported livestock. Nothing explained or justified this disconnect between the information provided to consumers and required of producers and processors. In this light, the regulatory distinctions imposed by the regulation were found to

amount to arbitrary and unjustifiable discrimination against imported livestock, such that they could not be said to be applied in an even-handed manner. On this basis, the Appellate Body found that the COOL technical regulation violated Article 2.1 of the *TBT Agreement*.

With respect to Article 2.2, the Appellate Body found that the provision of information to consumers on origin, namely, information on the countries in which the livestock from which the meat they purchase is produced were born, raised, and slaughtered, was a legitimate objective. With respect to whether the technical regulation more trade restrictive than necessary to fulfill that legitimate objective, taking into account the risks non-fulfillment would create, the Appellate Body found that there was not enough evidence of an alternative measure that could fulfill the consumer information objective to make a determination under this provision. It therefore did not rule on Article 2.2.

As in the case of *U.S. – Tuna Dolphin II*, while the Appellate Body's findings in the dispute clarified the application of Articles 2.1 and 2.2 to a labeling technical regulation, the above noted interesting questions have been left unanswered.

4. Implications for Climate Change Measures

Future climate change measures could take various different forms ranging from import bans to labeling requirements. Such measures could be implemented in the form of technical regulations and be subject to the disciplines in Articles 2.1 and 2.2 the *TBT Agreement*. The low carbon fuel standards that have been adopted in California and that were proposed in the European Union are an example of climate change measures. Many of the interesting questions posed above will apply to climate change measures and, likely, will have to be answered by future WTO panels and the Appellate Body.