

Inside U.S. Trade

WTO Appellate Body Rules For Mexico In Tuna Fight, But For New Reasons

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The World Trade Organization Appellate Body this week ruled in favor of Mexico's complaint against a U.S. labeling requirement for dolphin-safe tuna, but did so for different legal reasons than an earlier panel that also had handed Mexico a victory in the decades-old dispute.

In a decision released on May 16, the Appellate Body faulted U.S. labeling requirements for canned tuna as a violation of Article 2.1 of the WTO's Agreement on Technical Barriers to Trade (TBT). The article states that members should treat imports no less favorably than domestic products or imports from other countries.

The appellate ruling affirmed the right of countries to regulate, but not do so in an arbitrary manner, one observer said. The Appellate Body said U.S. dolphin-safe labeling requirements have a detrimental impact on Mexico's ability to sell tuna in the U.S. market because they do not allow Mexican tuna to enter the principal channels of distribution. It said this detrimental impact amounted to a violation of Article 2.1 because it did not fairly address the harm to dolphins that arises from other fishing methods used to capture tuna in oceans other than the Eastern Tropical Pacific (ETP).

That means tuna harvested by fishing vessels outside the ETP using various fishing methods can be labeled as dolphin-safe label even if dolphins end up being killed or seriously injured, while tuna netted on Mexican vessels cannot, even if those vessels have observers on board certifying that no dolphins were killed or seriously injured.

The U.S. law at issue stipulates that tuna harvested by any method that sets nets on dolphins cannot use the dolphin-safe label.

A spokeswoman for the Office of the U.S. Trade Representative said on May 17 that the U.S. disagrees with the Appellate Body's findings that the U.S. does not set conditions for use of the label in a way that reflects the risks faced by dolphins in oceans other than the ETP. "To be clear, we disagree that the U.S. measures do not apply even handedly," she said in an e-mail.

In contrast to the Appellate Body, the original dispute panel found last year that the U.S. requirements were not discriminatory and therefore did not violate Article 2.1 of the TBT. The Appellate Body overturned this finding, which Mexico had appealed, because it found the panel had used an incorrect legal approach to reach its conclusion.

In another reversal of the panel, the Appellate Body found that the U.S. tuna labeling requirements were not more trade restrictive than necessary to achieve the legitimate objective of protecting dolphins and informing U.S. consumers that the tuna they buy was fished in a way that did not harm dolphins.

It therefore overturned the panel's finding that the labeling violates TBT Article 2.2, which was an issue that the U.S. had raised in its appeal.

The Appellate Body based that Article 2.2 ruling largely on its analysis that the alternative to the U.S. labeling requirements proposed by Mexico would not contribute to the U.S. objectives in the ETP to the same degree as only permitting the U.S. label, which defines "dolphin-safe" differently.

Mexico had proposed allowing use of the dolphin-safe label established under the Agreement on the International Dolphin Conservation Program (AIDCP) as an alternative to the label established under U.S. law.

The Appellate Body contrasted the U.S. labeling provisions with the requirements of the AIDCP, which allows encirclement but has observers on board the vessels who certify that no dolphins were seriously injured or killed during specific fishing sets.

In considering Article 2.2, the Appellate Body looked only at the impact of the labeling requirement in the ETP, not the rest of the world's oceans, as did the panel. The panel found that the AIDCP label would convey more useful information to consumers about the dolphin safety of tuna caught in the ETP than the U.S. label conveys about dolphin safety of tuna caught outside the ETP.

The USTR spokeswoman said the decision offered "mixed results" and noted that the U.S. is still studying it. In a May 17 e-mail, she noted that the Appellate Body agreed that the U.S. measures "contribute" to the U.S. objectives and agreed with the U.S. in overturning the panel's finding that the measures were more trade restrictive than necessary.

The Appellate Body, like the panel, agreed that the protection of dolphins and consumer information are a legitimate objective under the TBT, but said the U.S. measure failed to fulfill it because it did not provide consumers with accurate information that dolphins were not harmed in the capture of the tuna they were buying.

The Appellate Body also upheld the panel's finding that the dolphin-safe labeling requirement is a technical regulation that falls under the scope of the TBT. It rejected the U.S. argument in its appeal that the labeling requirements are an international standard not covered by the TBT.

It based its technical regulation finding on largely the same reasoning that the panel used by stating that is mandatory and establishes a single, exclusive standard for defining the term dolphin safe.

The Appellate Body also faulted the panel for not ruling on Mexico's non-discrimination claims under Article I and Article III:4 of the General Agreement on Tariffs and Trade.

It said the panel wrongly exercised judicial economy based on an incorrect assumption that the obligations under TBT 2.1 and GATT Articles I and III are the same.

The Appellate Body also noted that the panel should have made findings on non-discrimination under GATT Articles I and III so that the issue would have been addressed even if the Appellate Body had found that the labeling measure was not a technical regulation subject to the TBT Agreement.

In light of Mexico's agreement during the appeals hearing that it was unnecessary for the Appellate Body to rule on the Article I and III claims if it ruled in favor of Mexico on the TBT 2.1 claim, the Appellate Body did not make findings on the Article I and III claims.

The Appellate Body also upheld the panel's finding that the U.S. dolphin-safe labeling provisions are not a violation of TBT Article 2.4, which requires technical regulations to be based on relevant international standards where possible.

The panel had found that the dolphin-safe definition and certification established by the AIDCP used by Mexico are a relevant international standard for the purposes of the U.S. dolphin safe provisions. But it concluded that this standard would not have been appropriate or effective for the U.S. to fulfill its objective.

The Appellate Body found that the AIDCP is not an international body for purposes of the TBT agreement because it is a regional organization that is not open automatically to all World Trade Organization members. The Appellate Body said that this is a requirement for an organization to be considered "international" within the meaning of Article 2.4.

The Appellate Body also suggested, however, that an international organization for this purpose need not be limited to those organizations that engage in standards-setting on an exclusive basis. This leaves open the possibility that in future cases, a wider range of organizations could be considered qualified to issue "international standards."

This ruling, while not significant for the dolphin-safe tuna dispute, may have systemic implications for decisions about which organizations can qualify as international bodies whose standards are encompassed by the obligation in Article 2.4, a private-sector lawyer said.

Regarding Article 2.1, the Appellate Body found that the inability of Mexican tuna to obtain the dolphin-safe label created a competitive disadvantage in the U.S. market.

But the Appellate Body made clear that the existence of such a detrimental effect is not sufficient to show less favorable treatment under Article 2.1. Instead, a panel must further analyze whether the detrimental impact on imports stems "exclusively" from a legitimate regulatory distinction rather than reflecting discrimination against a group of imports, according to the Appellate Body.

This is the position it took in the Indonesian challenge of a U.S. ban on flavored cigarettes under the TBT, which the Appellate Body decided earlier this year.

In the second aspect of its analysis, however, the Appellate Body found that the detrimental impact of the labeling requirement was not based on a legitimate regulatory distinction because it bestows a dolphin-safe label for tuna caught outside the ETP in circumstances where there is still a serious risk of dolphins being killed or seriously injured, even while denying it to Mexico solely for setting nets on tuna that swim with dolphins.

As a result, the Appellate Body concluded that the U.S. has failed to demonstrate that this difference in labeling conditions is calibrated to the risks to dolphins arising from the different fishing methods. Therefore, it said, it follows that the U.S. has not demonstrated that the detrimental impact of the different labeling requirements stems exclusively from a legitimate regulatory distinction.

"In these circumstances, we are not persuaded that the United States has demonstrated that the measure is even handed in the relevant respects, even accepting that the fishing technique of setting on dolphins is particularly harmful to dolphins," the Appellate Body said.