

# US – TUNA II (MEXICO)<sup>1</sup>

## (DS381)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	Mexico	TBT Annex 1.1, Arts. 2.1, 2.2 and 2.4 DSU Art. 11 GATT Arts. I:1 and III:4	Establishment of Panel	20 April 2009
			Circulation of Panel Report	15 September 2011
Respondent	United States		Circulation of AB Report	16 May 2012
			Adoption	13 June 2012

### 1. MEASURE AND PRODUCT AT ISSUE

- **Measure at issue:** (1) United States Code, Title 16, Section 1385 – “Dolphin Protection Consumer Information Act” (DPCIA); (2) Code of Federal Regulations, Title 50, Section 216.91 “Dolphin-safe labelling standards” and Section 216.92 “Dolphin-safe requirements for tuna harvested in the ETP [Eastern Tropical Pacific Ocean] by large purse seine vessels”; (3) the ruling by a US federal appeals court in *Earth Island Institute v. Hogarth*, 494 F.3d 757 (9th Cir. 2007). Together, these measures set out the conditions under which tuna products sold in the United States may be labelled as “dolphin-safe”.
- **Product at issue:** Tuna and tuna products.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS

- **TBT Annex 1.1 (definition of technical regulation):** The Appellate Body found that “the US measure establishes a single and legally mandated set of requirements for making any statement with respect to the broad subject of ‘dolphin-safety’ of tuna products in the United States”. Thus, it upheld the Panel’s ruling characterizing the measure at issue as a “technical regulation” within the meaning of TBT Annex 1.
- **TBT Art. 2.1 (national treatment – technical regulations):** According to the Appellate Body, the measure at issue modified the competitive conditions in the US market to the detriment of Mexican tuna products and the United States did not demonstrate that this stemmed solely from “legitimate regulatory distinctions”. The Appellate Body, therefore found that the US “dolphin-safe” labelling measure was inconsistent with Art. 2.1 and reversed the Panel’s contrary finding.
- **TBT Art. 2.2 (not more trade-restrictive than necessary):** The Appellate Body disagreed with the Panel’s ruling that the measure at issue was more trade-restrictive than necessary to fulfil US legitimate objectives, and found instead that “the alternative measure proposed by Mexico [AIDCP ‘dolphin safe’ labelling combined with the existing US standard] would contribute to both the consumer information objective and the dolphin protection objective to a lesser degree than the measure at issue”. The Appellate Body thus reversed the Panel’s finding that the measure was inconsistent with Art. 2.2.
- **TBT Art. 2.4 (international standard):** The Appellate Body modified the Panel’s conclusion and ruled that the AIDCP “dolphin-safe” definition and certification did not constitute a “relevant international standard” within the meaning of Art. 2.4, since “the AIDCP is not open to the relevant bodies of at least all Members and thus not an ‘international standardizing body’ for purposes of the TBT Agreement”. It nonetheless upheld the Panel’s ultimate finding that the measure did not violate Art. 2.4.
- **DSU Art. 11 and GATT Arts. I:1, III:4 (exercise of judicial economy by the Panel):** The Appellate Body found that the Panel’s assumption that the obligations under TBT Art. 2.1 and GATT Arts. I:1 and III:4 were substantially the same was incorrect. Therefore, the Appellate Body concluded that the Panel engaged in “false judicial economy” and acted inconsistently with DSU Art. 11 in declining to address Mexico’s claims under GATT Arts. I:1 and III:4. Mexico did not seek completion of the analysis under GATT Arts I:1 and III:4 in the event that the Appellate Body were to find a violation of TBT Art. 2.1.

### 3. OTHER ISSUES<sup>2</sup>

- **Standard of review (DSU Art. 11):** The Appellate Body concluded, that “the Panel acted consistently with its duties under Article 11 of the DSU in its analysis of the arguments and evidence before it”, and rejected the United States’ claims in this respect.

<sup>1</sup> *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*

<sup>2</sup> Other issues addressed: scope of interim review (DSU Art. 15.2).

## US – TUNA II (ARTICLE 21.5 – MEXICO)<sup>1</sup> (DS381)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	<i>Mexico</i>	<i>TBT Art. 2.1</i> <i>GATT Arts I:1, III:4, XX(g)</i>	Establishment of Panel	<i>22 January 2014</i>
			Circulation of Panel Report	<i>14 April 2015</i>
Respondent	<i>United States</i>		Circulation of AB Report	<i>20 November 2015</i>
			Adoption	<i>3 December 2015</i>

### 1. MEASURE TAKEN TO COMPLY WITH THE DSB RECOMMENDATIONS AND RULINGS

- The United States' amended tuna measure.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS

- **TBT Art. 2.1 (holistic analysis of measure at issue):** The Appellate Body criticized the panel for analysing the measure in what it called a “segmented” fashion. According to the Appellate Body, analysing a measure in a segmented manner may raise concerns when the constituent parts of the measure are interrelated and operate in an integrated way. The Appellate Body explained that while it is not necessarily inappropriate for a panel, in analysing the conformity of a measure with obligations under the WTO covered agreements, to proceed by assessing different elements of the measure in a sequential manner, a segmented approach may raise concerns when a panel fails to make an overall assessment that synthesizes its reasoning or intermediate conclusions concerning related elements of a measure at issue so as to reach a proper finding of consistency or inconsistency in respect of that measure.
- **TBT Art. 2.1 (treatment less favourable – whether detrimental impact stems exclusively from a legitimate regulatory distinction):** In reversing the panel's analysis of whether the measure's detrimental impact stemmed exclusively from a legitimate regulatory distinction, the Appellate Body stated that a panel does not err by assessing whether the detrimental impact can be reconciled with, or is rationally related to, the policy pursued by the measure at issue, so long as, in doing so, it does not preclude consideration of other factors that may also be relevant to the analysis. In the present case, however, the Appellate Body found that the panel had erred by failing to consider whether the regulatory distinctions embedded in the measure were “calibrated with”, “tailored to”, or “commensurate with” the different risks to dolphins from different fishing methods in different areas of the ocean.
- **GATT Art. XX:** The Appellate Body confirmed that, so long as the similarities and differences between Art. 2.1 of the TBT Agreement and Art. XX of the GATT 1994 are taken into account, it may be permissible for a panel to rely on reasoning developed in the context of one agreement for purposes of conducting an analysis under the other. The Appellate Body also considered that, by not identifying the different risks to dolphins from different fishing methods in different areas of the ocean, the panel failed to properly assess whether the regulatory distinctions under the amended tuna measure were calibrated to such risks.

### 3. OTHER ISSUES

- **Burden of proof:** The Appellate Body clarified that, under TBT Art. 2.1, a complainant must show that, under the technical regulation at issue, the treatment accorded to imported products is less favourable than that accorded to like domestic products or like products originating in any other country. Provided that it has shown detrimental impact, a complainant may, therefore, make a *prima facie* showing of less favourable treatment by, for example, adducing evidence and arguments showing that the measure is not even-handed, which would suggest that the measure is inconsistent with Art. 2.1. If, however, the respondent shows that the detrimental impact on imported products stems exclusively from a legitimate regulatory distinction, it follows that the challenged measure is not inconsistent with Art. 2.1.
- **Scope of proceedings (DSU Art. 21.5):** With respect to the question whether an unchanged aspect of an original measure can be challenged for the first time in Art. 21.5 compliance proceedings, the Appellate Body stated that the possibility to challenge an element of the measure at issue for the first time in compliance proceedings, even if that element may not have changed, hinges on the “critical question” of whether such an element forms “an integral part of the measure taken to comply”. However, the Appellate Body also reiterated that compliance proceedings cannot be used to re-open issues decided in substance in the original proceedings, or to reargue claims against aspects of a measure which were not decided on the merits in the original proceedings, and are therefore not covered by DSB's recommendations and rulings. Additionally, the Appellate Body emphasized the importance of compliance panels taking due account in their findings of the relevant reasoning from the original dispute that led to the original measure being found to be WTO-inconsistent.

<sup>1</sup> *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by the United States*

**US – TUNA II (MEXICO) (ARTICLE 21.5 – UNITED STATES)/  
US – TUNA II (MEXICO) (ARTICLE 21.5 – MEXICO II)<sup>1</sup>**  
(DS381)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	United States, Mexico	TBT Art. 2.1 GATT Arts. I:1, III:4, XX(g)	Referred to the Original Panel	9 May 2016 (United States) 22 June 2016 (Mexico)
			Circulation of Panel Report	26 October 2017
Respondent	Mexico, United States		Circulation of AB Report	14 December 2018
			Adoption	11 January 2019

### 1. MEASURE TAKEN TO COMPLY WITH THE DSB RECOMMENDATIONS AND RULINGS

- The United States' measure regulating the conditions for tuna products sold in the United States to be labelled "dolphin-safe" or to make similar claims on their labels (2016 Tuna Measure).

### 2. SUMMARY OF KEY PANEL/AB FINDINGS

- TBT Art. 2.1 (treatment less favourable – whether detrimental impact stems exclusively from a legitimate regulatory distinction):** The Panels assessed the even-handedness of the 2016 Tuna Measure through the lens of calibration – that is, whether the measure's relevant regulatory distinctions were calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean. The Panels proceeded to establish the risk profiles of the relevant fishing methods and extensively reviewed the evidence pertaining to such risks. On the basis of detailed factual findings, the Panels concluded that the different elements of the measure, that is (a) the eligibility criteria, (b) the certification requirements, (c) the tracking and verification requirements, and (d) the determination provisions, were calibrated to the differences in the overall risks to dolphins. Consequently, the Panels found that the treatment accorded to Mexican tuna products was based on legitimate regulatory distinctions and consistent with TBT Art. 2.1. On appeal, the Appellate Body upheld the Panels' reasoning and conclusions.
- TBT Art. 2.1 (holistic analysis of measure at issue):** The Panels emphasized that by first looking at whether each of the elements of the 2016 Tuna Measure was calibrated to differences in the overall risks to dolphins, they were not undertaking an isolated consideration of each element. Hence, the Panels proceeded to consider how these elements interrelate with each other. On the basis of the correlation among the four elements, the Panels concluded that the 2016 Tuna Measure, as a whole, was calibrated. The Appellate Body upheld the Panels' findings in this regard.
- GATT Art. XX (general exceptions – chapeau):** The Panels agreed with the parties that the 2016 Tuna Measure violated both GATT Arts. I:1 and III:4 and was provisionally justified under subparagraph (g) of Art. XX. In a finding upheld by the Appellate Body, the Panels concluded that since the measure is calibrated to different levels of risks posed to dolphins by different fishing methods in different areas of the ocean, it is not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination.

### 3. OTHER ISSUES<sup>2</sup>

- Burden and standard of proof:** The United States and Mexico were both complainants and respondents in the Panel proceedings. Further, the Panels observed that their submissions did not distinguish between claims and arguments made in respect of the two proceedings. In these circumstances, the Panels decided that it was appropriate to apply the principles on burden of proof in a cumulative or holistic fashion and find in favour of the party that overall presented a more convincing case in terms of arguments and evidence. However, the Panels noted that they would continue to be guided by the principle that the party asserting a fact is responsible for providing proof thereof.

<sup>1</sup> *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by the United States; and United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Second Recourse to Article 21.5 of the DSU by Mexico.*

<sup>2</sup> Other issues addressed: harmonised panels, failure to request consultations, partially open panel meetings, business confidential information, description of the measures at issue, consultation with experts, recommendations under DSU Art. 19.1, sufficiency of notice of appeal.