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WTO Issues Seriously Flawed Panel Report on

"Dolphin-Safe" Tuna Products

Following last month's article on the WCO[1] and the earlier discussion on the WTO dispute settlement process on border taxes,[2] this month's topic is again outside a U.S.-centric trade and customs focus. In September 2011, the World Trade Organization's Dispute Settlement Body published a Panel Report decision on a challenge by Mexico against the U.S. system of "dolphin-safe" labels for tuna and tuna products.[3] At press time, the period for the United States to lodge an appeal had not yet run so it is uncertain if the Panel Report will be the final word. But the decision is extraordinary and merits early attention, not least because it illustrates the point in last month's article, that every WTO dispute is ultimately traceable to commerce—in this case, the conditions under which Mexican producers are able to enter the U.S. market.

Though almost all of Mexico's claims were disallowed, it did prevail on one. As discussed below, this author's view is that the Panel Report in Tuna III[4] is seriously flawed and should neither be adopted[5] nor followed.[6]

Overview

Mexico alleged (paras. 7.741-7.748)[7] that United States practices in its "dolphin-safe" regime were inconsistent with U.S. obligations under (1) the GATT 1994 (Articles I.1 and III.4); and (2) the Technical Barriers to Trade (TBT) Agreement (discrimination, Art. 2.1; creating unnecessary trade restrictions, Art. 2.2; and not based on international standards, Art. 2.4). The focus of Mexico's grievance was the dolphin-safe labeling regime comprising the following:

- Dolphin Protection Consumer Information Act (DPCIA).[8]
- The implementing regulations: the dolphin-safe labeling standards and dolphin-safe requirements for tuna harvested in the ETP [Eastern Tropical Pacific Ocean] by large purse seine vessels.[9]
- The Ninth Circuit decision in *Earth Island Institute v. Hogarth*, 494 F.3d 757 (CA-9, 2007).

Taken together, these measures set the standards under which tuna and tuna products in U.S. commerce might bear a "dolphin-safe" label. The U.S. measures specify that no such label may be used in connection with tuna or tuna products caught (1) on the high seas by means of driftnets; (2) outside the ETP in any fishery where there is a regular and significant dolphin-tuna association by purse seine nets intentionally set on dolphins unless there are written certifications by the vessel captain and an observer that no dolphins were killed or seriously injured in the sets where tuna were caught; (3) outside the ETP in any other fishery unless the product is accompanied by a vessel captain certification that no purse seine nets were intentionally set on dolphins during that voyage; (4) in the ETP by a vessel using a purse seine net unless there is an accompanying certification by the captain and an observer that no intentional sets on dolphins had taken place and that no dolphins had been killed or seriously injured in the sets in which the tuna were caught; or (5) by a vessel in a fishery identified as having a regular and significant dolphin mortality unless there is a captain/observer certification that no dolphins had been killed or seriously injured.[10]

Of these specific conditions, Mexico's challenge was

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directed at the fourth, applicable to purse seine fishing in the ETP. The heart of the Panel Report was concerned with Mexico's challenges under TBT Art. 2.

TBT Art. 2 "Technical Regulation" Claim

Mexico alleged that the measures were both discriminatory and unnecessary. For its TBT Art. 2 analysis, the Panel determined that the measures constituted a "technical regulation" under the TBT Agreement, even though they governed labeling and not "product characteristics" directly (paras. 7.71-7.78),[11] and were mandatory (paras. 7.128-7.145). One of the Panel members issued a separate opinion on this all-important last point (paras. 7.147-7.188). Placement of such a label is not mandatory or imposed in any way, but is an optional designation only, and additional to the customs[12] and FDA label requirements, which are mandatory.[13]

One U.S. argument was that such a label is not a requirement for entry into or sale within the United States, but if a company voluntarily sought to use such a label, it could do so if it met the requirements of use.[14] Those requirements are applied evenly and without discrimination. The measures were intended to meet legitimate objectives of (1) not misleading consumers on how tuna was caught, and (2) contributing to the protection of dolphins.

Status as a "technical regulation," defined in TBT Annex 1, para. 1, is a prerequisite for application of TBT Art. 2, and the Panel seemed to conflate the standards for a voluntary label and a mandated labeling requirement.[15] A truly mandatory labeling scheme for food products was the subject of two other WTO actions brought by Canada and Mexico against the U.S. "country of origin labeling" (COOL) requirements for beef and pork products, as administered by the U.S. Department of Agriculture.[16] An example of a nonmandatory label is the Federal Trade Commission regulations on use of "Made in the U.S.A." or other country-of-origin claims. Except for certain selected product categories such as textiles and apparel,[17] origin labeling is not required by the FTC Act.[18] But if a seller wants to advertise or introduce products into the U.S. market and claim that they are "Made in U.S.A.," the longstanding FTC practice prescribes that "all or virtually all" of the components must be of U.S. origin.[19] Beyond that, the FTC insists that claims of origin for other countries must be accurate and not misleading.[20]

Regardless of its strictures, this FTC regime generally does not impose a mandatory obligation on the seller of goods to list the country of origin. Nor do the U.S. dolphin-safe label measures make the use of such labels a mandated, nondiscretionary usage. The Panel recognized that the U.S. measures do not formally restrict the importation or sale of tuna or tuna products without the dolphin-safe labels (para. 7.568). Evidence showed that U.S. producers of tuna products would continue to apply strict dolphin-safe labels even if the U.S. statute and regulations were relaxed (paras. 7.179-7.183). This suggests private action and not de jure or de facto state action by the United States.

The United States and several countries that reserved third-party rights[21] presented much argument on this important mandatory (in the sense of "compulsory") vs. voluntary distinction. The U.S. noted that "labeling requirement" does not and cannot connote a mandatory technical regulation, since the phrase also appears in connection with technical "standards," which are, by definition, not mandatory.[22] Most argued against a finding of a "mandatory" nature or status for the U.S. measures.

A fair reading of the separate opinion leaves one mystified because this was a dissent. The dissenter nevertheless continued to participate in the review (para. 7.188). One would have thought that the dissent, which goes to the very heart of an Art. 2 analysis, and concludes that Art. 2 should not apply (para. 7.186), would have carried over to undercut the legitimacy of the entire decision. The separate opinion holds that the U.S. measures are neither de jure nor de facto mandatory in nature or effect (para. 7.186). Indeed, one is left with the question—does this lack of consensus inherent in a "separate opinion" not invalidate the entire Panel Report on the applicability of Art. 2, TBT and all of its subparts? The WTO Dispute Settlement Understanding is silent on this point.

Stated otherwise, as a matter of international law or of WTO jurisprudence, can a WTO decision expressed in a Panel Report be given normative effect in the face of a lack of consensus within the panel or appellate body on a dispositive question? To be clear, that decisive question is the third criterion for status as a technical regulation, i.e., that the measure at issue is mandatory (para. 7.186).[23]

The lack of consensus aside, the Panel Report added to the confusion on this point when it acknowledged, later in the opinion, that "the U.S. dolphin-safe provisions do not formally restrict the importation of sale of tuna or tuna products that are not labeled dolphin-safe" (para. 7.568).

TBT Art. 2.1 Discrimination Claim

The Panel rejected Mexico's TBT Art. 2.1 discrimination claim that the U.S. measures treated Mexican products less favorably than like products of

national origin or like products of any other country (para. 7.378). The Panel found that Mexican tuna products were "like" tuna products originating in the U.S. or in third countries (para. 7.251) but there was no showing that the Mexican products were treated less favorably than the U.S. and third-country products (para. 7.374). In this latter regard, the Panel determined that access to the dolphin-safe label does confer an advantage in the U.S. market (para. 7.291), but also found that Mexico is not denied access to that advantage by the U.S. measures' requirements (para. 7.311).

The Panel also found that Mexico was not denied access by any matter of fishing practices (para. 7.312). The simple factual crux of the matter is that U.S. tuna fleets abandoned entirely "setting on" dolphins by 1994 (para. 7.327),[24] while Mexico's tuna fishing fleet fishes almost exclusively in the ETP by setting on dolphins, in conditions meeting requirements for dolphin-safe labels under the Agreement on International Dolphin Conservation Program (AIDCP) but not under the U.S. dolphin-safe measures.[25]

It is from this "less favorable treatment" analysis under Art. 2.1 in the full Panel Report that the panelist who issued a separate opinion derived some of his authority.[26] It would be as easy to determine the theoretical point in space where two parallel lines converge as to reconcile the Panel conclusion that Mexico's fishing and canning practices were strictly voluntary,[27] with the Panel holding that the U.S. measure are a mandatory technical regulation. If the Panel concluded its Art. 2.1 analysis with the observation that the adverse impact on Mexican tuna products in the U.S. is due to "the choices made by Mexico's own fishing fleet and canners" (para. 7.378), i.e., their voluntary actions or omissions, and not as a direct result of access being denied due to measures or practices imposed on them, why would not the same voluntary nature of those U.S. measures preclude a finding that the measures, and the concomitant reservation of choice by Mexican producers and others, are mandatory, thus defeating "technical regulation" status under Art. 2?

TBT Art. 2.4 Claim: Failure to Apply a Relevant International Standard[28]

The Panel determined that Mexico's TBT Art. 2.4 claim, that the U.S. should have applied an available international standard, was not valid. Mexico complained that the

1 Neville, "The WCO as Lawmaker," 23 JOIT 20 (January 2012).

2 Neville, "The Next Frontier: Border Taxes in Emerging Markets," 22 JOIT 17 (September 2011).

3 United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, WT/DS381/R, September 15, 2011 ("Tuna III"), www.wto.org/english/tratop_e/dispu_e/381r_e.pdf.

4 The two earlier cases, both pre-WTO and brought under the GATT, were GATT Panel Report, United States—Restrictions on Imports of Tuna (DS21/R, September 3, 1991, unadopted, BISD 39S/155 ("Tuna I"); and GATT Panel Report, United States—Restrictions on Imports of Tuna, DS29/R, June 16, 1994, unadopted ("Tuna II").

5 Art. 16 of the WTO Dispute Settlement Understanding provides the mechanism for adoption of panel reports.

6 This article tracks much of the discussion of this decision that will appear in chapter 3 of the forthcoming treatise, *International Trade Law: Statutes and Strategies* (Thomson Reuters/WG&L), scheduled for Spring 2012 publication.

7 Unless otherwise specified, para. numbers refer to the Tuna III Panel Report.

8 16 U.S.C. section 1385.

9 50 C.F.R. sections 216.91 and 216.92, respectively.

10 16 U.S.C. sections 1385(d)(1), (2)(h).

11 Based on the Appellate Body Report in EC—Trade Description of Sardines, WT/DS/231/AB/R (September 26, 2002), para. 189.

12 19 U.S.C. section 1304, 19 C.F.R. section 134.0 *et seq.*

13 21 C.F.R. part 101, section 101.1 *et seq.*

14 In its third-party submission, New Zealand drew a distinction between a mandatory requirement to label (a product must be labeled to be sold in a market) and a mandatory labeling requirement (regulations prescribe requirements that are mandatory if a producer wants to use a particular label). Para. 5.170.

15 They missed the points made, *inter alia*, by New Zealand, paras, 5.170-.5.172.

16 United States—Certain Country of Origin Labeling (COOL) Requirements, WT/DS384/R (Canada) and WT/DS386/R (Mexico) (November 18, 2011).

17 Textile Fiber Products Identification Act, 15 U.S.C. section 70, 16 C.F.R. section 303.1 *et seq.*

18 15 U.S.C. sections 41-58. This is in contrast to the labeling requirements for imported products under the customs laws, 19 U.S.C. section 1304, 19 C.F.R. section 134.1 *et seq.* See, e.g., CBP rulings 734053 (September 20, 1991) and 735506 (August 28, 1994).

19 For further information, see the FTC's Bureau of Competition website, http://business.ftc.gov/documents/bus03-complying-made-usa-standard.

20 Section 43 of the Lanham Act, 15 U.S.C. section 1125, prohibits false origin claims. More generally, section 5 of the Federal Trade Commission (FTC) Act, 15 U.S.C. section 45, declares unfair or deceptive acts or practices unlawful.

21 E.g., Australia, Brazil, EU, Guatemala, Japan, Korea, New Zealand, Turkey.

U.S. had not based its measures on what it considered a relevant international standard, the AIDCP. The Panel found that the standard would not have been appropriate or effective for U.S. purposes (paras. 7.738-7.739) because the AIDCP, taken alone, fails to address unobserved adverse effects on dolphins from repeated chasing, encircling, and deploying of purse seine nets on them (para. 7.738). The Panel determined that the AIDCP protocols were not as effective as the U.S. measures in regard to meeting the U.S. objectives.[29]

TBT Art. 2.2 Trade Restriction Claim

The Panel found that the measures did violate TBT Art. 2.2 because they are more trade restrictive than necessary in meeting the U.S. objectives that the Panel found to be legitimate (para. 7.443).[30] As a general matter, the Panel determined that the U.S. dolphin-safe labeling program only partially addresses the legitimate U.S. objectives, and Mexico had provided the Panel with a less trade-restrictive alternative that is also partially effective. Because this was the one Mexican claim that was validated, and also because the Panel applied faulty reasoning, it deserves further attention.

In its Art. 2.2 analysis, the Panel applied the three-factor test from another WTO Agreement, Art. 5.6 of the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement), following the lead of the Appellate Body Report in an earlier ease.[31] Those three factors are: (1) the alternative measure is reasonably available taking into account technical and economic feasibility; (2) it achieves the member's appropriate level of sanitary or phytosanitary protection; and (3) it is significantly less restrictive to trade than the SPS measure contested.[32]

The Panel first found that there were two separate objectives of the U.S. measures: (1) ensuring that consumers are not mislead or deceived about whether tuna products contain tuna that was 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 (paras. 7.413 and 7.425, respectively). The Panel noted the interrelationship of these two objectives (paras. 7.426-7.427).

Obviously there is an element of reasoning-meeting-itself-as-it-rounds-a-corner at play. If the legal standard may be fairly characterized as whether a given measure is or is not more trade restrictive than necessary to achieve a given objective, the setting of that objective will draw the line for purposes of defining acceptability of the trade restriction. We will return to this point.

After finding the U.S. objectives legitimate (paras. 7.443 and 7.444), the Panel analyzed the extent of the trade restriction, taking account of the risks that non-fulfillment would create. The Panel noted that an alternative that was less trade restrictive, but that would carry greater risks of non-fulfillment, would not be acceptable (para. 7.467). The burden was on the complainant, Mexico, to identify a reasonably available alternative (paras. 7.392 and 7.468).

The Panel expended considerable effort in reviewing the various fishing methods and geographic determinants associated with the taking of tuna. It was not disputed that the taking of tuna by setting on dolphins in the ETP, where there is a significant association between the two species, has adverse consequences for the dolphins.

The Panel then showed its logical legerdemain by finding that Mexico's suggested alternative, the AIDCP dolphin-safe label, offered a reasonably available and less trade-restrictive means of achieving the same level of protection for dolphins. The AIDCP, while helpful, does not specifically prohibit the international setting on dolphins, as do the U.S. measures. In this respect, the AIDCP offers only a partial solution. The point is that the alternative measure was partially effective in a different manner than the U.S. measures.

A close reading of the Panel Report reveals a lack of clarity about exactly what was Mexico's proposed alternative. The Panel did not present a clear and unambiguous statement of Mexico's alternative, and its scattered representations of Mexico's proffered alternative were cursory to the point of opacity. The Panel's

confusing recitation on this crucial issue marked a departure from its otherwise detail-laden discussion.

We never do learn any details of the alternative. The Panel apparently meant us to be satisfied with its own representation that Mexico did not argue for an AIDCP substitution (para. 7.570),[33] but that statement of the "Panel's understanding" is contradicted, at least in regard to Mexico's initial position as recorded by the Panel Report.

What is interesting is that Mexico was permitted to restate its alternative. It is helpful to trace the evolution of the Mexican alternative, starting with the Panel's summary of Mexico's proposed alternative from the first written submission. The Panel cited Mexico's view that the AIDCP would accomplish the same results in the ETP tuna fishery:

> 4.59 The preservation of dolphin stocks in the ETP tuna fishery is an important objective. According to available scientific and technical information, that objective is being fulfilled by the AIDCP. The U.S. measures do not further contribute to the achievement of this objective. *In the absence of the U.S. measures, the preservation of dolphin stocks in the ETP tuna fishery will continue to be accomplished by the requirements and procedures of the AIDCP.* Since the U.S. measures are not necessary, the fact they deny competitive opportunities to Mexican tuna products and tuna and thereby create trade re-strictions mean that they are more trade-restrictive than necessary within the meaning of Article 2.2 of the TBT Agreement. [Emphasis added.]

Surely this is exactly the "substitution" that the U.S. said it was. In its opening oral statement at the first substantive meeting, if the Panel Report is accurate on this point, Mexico again offered up the AIDCP as the alternative. In this paragraph, Mexico appears to posit yet again that its alternative measure is the AIDCP standard on a stand-alone basis:

> 4.143 Thus, the U.S. measures have the effect of disadvantaging Mexican tuna products and the Mexican industry, which the United States agrees is full compliance with the AIDCP, while allowing tuna products from many other countries to be misleadingly labeled dolphin-safe even if dolphins were killed in the sets in which the tuna was caught. Thus, the U.S. measures are more trade restrictive than necessary to accompany the stated objectives. *If the objective is to encourage fishing methods that do not cause adverse effects to dolphins the AIDCP standard would accomplish the U.S. goal in a less restrictive manner.* Indeed, the U.S. government long agreed. It was the court decision [*Earth Island Institute v. Hogarth*, noted above] that prevented the United States from implementing its multilateral commitments. [Emphasis added.]

The U.S., in its opening oral statement, responded that the AIDCP and its implementing measures would not be suitable alternative measures:

> 4.177 With regard to Mexico's claims under Article 2.2, we disagree with Mexico's contention that the objectives of the U.S. dolphin-safe labeling provisions could be fulfilled in the absence of the U.S. provisions, in particular because the AIDCP and measures implemented pursuant to it fulfill those objectives. While the AIDCP has made an important contribution to dolphin conservation in the ETP, setting on dolphins to catch tuna continues to adversely affect dolphins. If the U.S. provisions permitted tuna products containing tuna caught by setting on dolphins to be labeled dolphin-safe, the U.S. provision would no longer fulfill the provisions' objectives.

It was in its second written submission that Mexico introduced an ambiguity into the discussion, arguing that insofar Art. 2.2 was in issue:

> The fulfillment of the objectives using less trade restrictive measures
>
> 4.277 To the extent that the U.S. measures fulfill any objectives, taking into account the risks of non-fulfilment, those objectives could be fulfilled using less trade restrictive measures. *A less trade restrictive way of fulfilling the objectives would be to create dolphin-safe standards rather than a technical*

22 See, e.g., para. 4.382. The definition of a "standard" is at TBT Annex, para. 2.

23 TBT Annex 1, para. 1, provides that the first two criteria are that the measure (1) applies to an identifiable product or group of products and (2) lays down one or more characteristics of the product.

24 See para. 2.3, fn. 2, which defines "setting on" as "intentional deployment on or encirclement of dolphins with purse seine nets."

25 The practices of Mexico's and other countries' tuna fleets are discussed at paras. 7.312-7.334.

26 For example, compare paras. 7.178-7.185 with 7.351, 7.361-7.364.

27 E.g., para 7.334 ("we are not persuaded that any current discrepancy in their relative situations is a result of the [U.S.] measures rather than the result of their own choices") and para. 7.349 (Mexican canners are free to use tuna caught by non-Mexican vessels).

28 This article departs at this point from the Panel's order of analysis to discuss the Art. 2.4 and GATT 1994 claims.

29 Paras. 7.728-7.731 (not effective in meeting the consumer information objective) and 7.732-7.739 (not effective in protecting dolphins).

30 These practices, protecting consumers from deceptive practices and contributing to protecting dolphins by discouraging certain fishing practices, do not go against the object and purpose of the TBT Agreement.

31 Appellate Body Report, Australia—Measures Affecting Importation of Salmon, WT/DS/18/AB/R, November 6, 1998, DSR 1998: VIII, 3327.

32 *Id.* para. 194.

33 "In the Panel's view, Mexico has not suggested, as described by the United States, eliminating the DPCIA provisions in lieu of the AIDCP." This is a reference to the U.S. position described at paras. 4.99 and 7.567.

34 A "standard" is defined at Annex 1, at para. 2, TBT, expressly to be "not mandatory."

35 This would be so regardless of the breezy Panel assurance that all of this could be made clear to consumers. Para. 7.618.

> *regulation whereby the AIDCP standard could be recognized and a label complying with the AIDCP standard used.* In this way U.S. consumers will be fully informed of all aspects of dolphin-safe fishing methods and they can choose accordingly when purchasing tuna products from U.S. retailers. [Emphasis added.]

Here, there is an otherwise unexplained reference to a dolphin-safe "standard"[34] rather than a "technical regulation," and that the AIDCP might be recognized as meeting the requirement for that standard. If the Panel Report is faithful to Mexico's written position, Mexico is suggesting that (1) a radically new government regulatory scheme, with status as a mere standard, would be satisfactory to meet U.S. objectives; and (2) the AIDCP standards would suffice in that task. Again, there is no overt reference to the AIDCP label program being used at the same time as the U.S. measures, but this statement begs the question—what are the choices available? The ambiguity is introduced by the free-floating reference to U.S. consumer being free to "choose."

In response, the U.S. second written submission denied that the AIDCP and the AIDCP resolutions would fulfill the U.S. objectives. The U.S. specifically noted that setting on dolphins was not discouraged or prohibited by the AIDCP (paras. 4.319-4.320). The U.S. also argued that Mexico had not demonstrated that the U.S. measures restrict trade (para. 4.321).

In its opening oral statement at the second substantive meeting, Mexico's proposed alternative scheme, couched in terms of "consumer choice," suggests two entirely separate labeling schemes—the AIDCP and the U.S. dolphin-safe labels in the alternative. The inference from the reported text is clear: Mexico suggested (1) a downgrading of the dolphin-safe label to a "standard," as before; and (2) a simultaneous opportunity to use either the AIDCP label or a U.S. style label:

> 4.350 [A]ll of the objectives of the U.S. measures are already being fulfilled by the AIDCP, at least for the tuna products made from tuna harvested in the ETP. For tuna products produced from tuna harvested outside the ETP, the stated objectives are not being fulfilled. *A less trade restrictive way of fulfilling the objectives would be to create dolphin-safe standards rather than a technical regulation whereby the AIDCP standard could be recognized and a label complying with that standard used. In this way U.S. consumers will be fully informed of all aspects of dolphin-safe fishing methods and they can choose accordingly when purchasing tuna products from U.S. retailers.* [Emphasis added.]

It is not surprising then, when Mexico's stated positions are considered, that the Panel understood Mexico to have advocated for a "coexistence" of the two labels, the AIDCP and the U.S. measures, "to provide fuller information to U.S. consumers" (paras. 7.570, 7.607). This suggests the simultaneous presence of two entirely separate types of acceptable dolphin-safe labels for tuna products in the marketplace. It would open the door to tuna products meeting AIDCP standards by making those easier-to-meet standards equally acceptable.

WTO Panel Report—Equivalency Rationale on Dolphin Protection

1. Threats to dolphins from tuna fishing outside the ETP are not insignificant (paras. 7.598, 7.600).
2. Some dolphins may be adversely affected by tuna fishing techniques outside the ETP (paras. 7.597 and 7.598).
3. The U.S. measures do not adequately preclude that tuna caught outside the ETP under conditions that adversely affect dolphins will not be labeled dolphin-safe (paras. 7.597, 7.599, 7 .614) and may in fact foster harmful fishing techniques (para. 7.598).
4. The U.S. measures' objectives are general, making no distinctions in fishing technique or in location (7.593).*
5. Ergo, the U.S. measures are only partially effective in preventing dolphin protection (paras. 7.600, 7.614, 7.621); this is in parallel with the finding vis-a-vis the consumer information objective at para. 7.563.
6. Because the U.S. measures are only partially effective, there is no loss or diminution if an alternative that is also partially effective is accepted because the same level of protection is achieved (para. 7.621).
7. The AIDCP by itself would discourage observed dolphin mortality from setting on dolphins to the same extent as the U.S. measures (para. 7.612), but are less effective in preventing unobserved dolphin mortality (para. 7.613), in the ETP.
8. Therefore, the AIDCP measures by themselves are only partially effective (para. 7.613).
9. This partial effectiveness is the same result as in the U.S. measures ((5) above), i.e., the U.S. is already accepting risk in the areas outside the ETP so these inside-ETP risks posed by the AIDCP should be acceptable (para. 7.618).
10. The proffered alternative, i.e., the AIDCP in addition to the existing U.S. standard, is less trade restrictive but affords the same level of protection as the U.S. measures (para. 7.615).

* This is a keystone element, on which the Panel's entire logical arch is supported. The Panel overlooks the U.S. focus in the proceedings on the ETP and on the technique of setting on dolphins; it misstates the U.S. position (see, e.g., para. 7.397). As noted above, the Panel declined the U.S. request to accept the clarification of its objective, which would have specifically identified setting on dolphins. Para. 6.27.

First U.S. Objective: Consumer Information

The Panel stated that it understood Mexico's position to be that a less trade-restrictive alternative is reasonably available to the United States to fulfill its objective, by allowing the AIDCP certification to be recognized "in addition to" the existing U.S. standard (para. 7/473). To further

muddy the waters, the Panel understood "Mexico's suggestion as advocating the inclusion of more information on U.S. dolphin-safe labels...." (para. 7.575). Ostensibly, this would fall under the rubric of "more information to the consumer is a good thing." To be effective, however, this concept of "more information" suggests a single labeling scheme. But apparently that is not being sought when and where there are co-existing labels. Importantly, the Panel neglected to address Mexico's suggestion that all of these would have the status of "standards." Presumably, Mexico's bifurcated labeling scheme would work only in such a "standards" context.

The notion that consumers would be better informed and not hopelessly confused by anything other than a single labeling scheme, whether a technical regulation or a standard, is utter nonsense.[35] Reverting to the "coexistent" or dichotomous label regime, even when presented as "conveying more complete information to consumers" (para. 7.576), the prospect of two differing labels meeting two different standards, and in a sense competing for legitimacy in the market, conjures images only of puzzled consumers.

All of this raises fundamental questions: how and why did the Panel not insist that this all-important question of a less trade-restrictive alternative must be advanced by Mexico with precision and exactitude? Why was it proper, instead, to leave this as a matter of interpretation or "understanding" of positions, some of which were advanced at oral argument? Is the Mexican suggestion really an alternative at all, when it relies on the continued presence of the U.S. measures? Has there ever been a dispute where a partial alternative, in the form of an additional measure, has been affirmed on appeal? How has the Appellate Body considered "alternatives" in other disputes—has it upheld panels that have substituted their own interpretation of alternatives for those argued by the parties? Is there an Appellate Body precedent for any of this? Finally, why was Mexico permitted to continuously restate and evolve its stated alternative, as shown by a close review of the Panel Report, while the U.S. was not permitted to restate its objective to include a specific reference to setting on dolphins?[36] At the very least, these are issues that demand clarification, either by the Panel *sua sponte* or on remand from the Appellate Body.

The Panel noted that certain tuna fishing methods other than setting on dolphins have the potential of adversely affecting dolphins (para. 7.531). The Panel also determined that by means of the U.S. measures, consumers could not be assured that no dolphins were killed or injured or were not otherwise adversely affected with respect to tuna caught outside the ETP. This is because access to the dolphin-safe label is available for tuna caught in areas other than the ETP (para. 7.545). The Panel also determined that granting access to the U.S. market for tuna caught outside the ETP by a method other than setting on dolphins does represents a genuine risk of consumer confusion (para. 7.562).

The Panel concluded that the U.S. measures were only partially effective. The dolphin-safe label did not mean that dolphins had not been killed or injured if the tuna had been caught outside the ETP (paras. 7.562-7.564). Because of this partial effectiveness of the U.S. measures, the Panel saw a risk of "consumer confusion."

If prohibiting setting on dolphins is the specifically stated objective, or one of the specifically stated objectives, of the U.S. measures, those

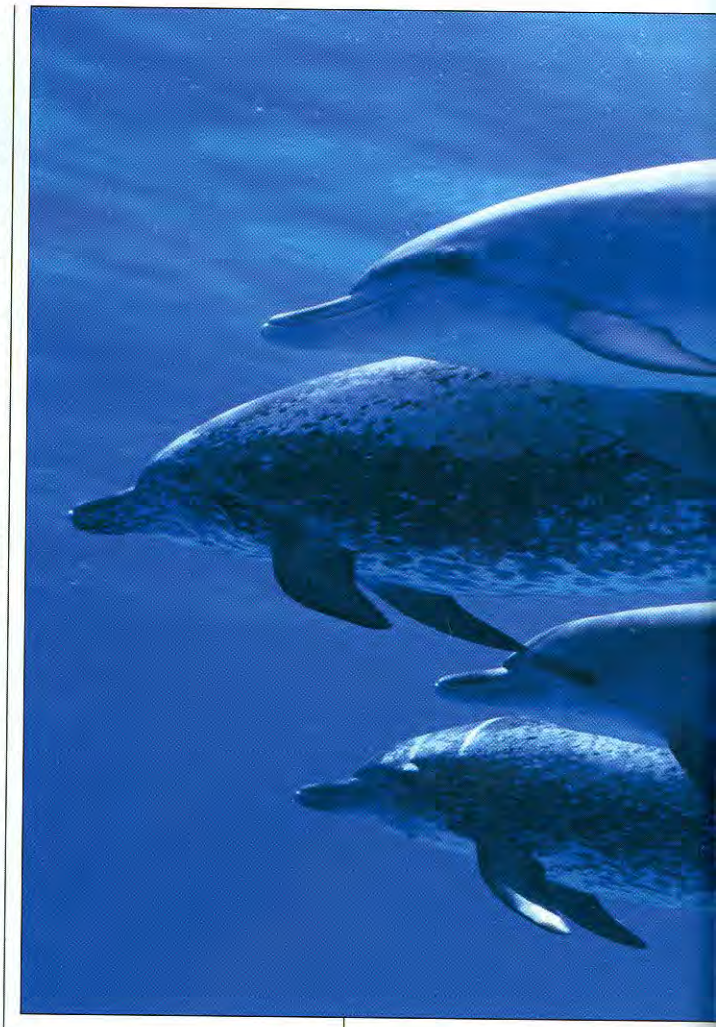
measures are fully effective in meeting that objective and the proffered alternative, the AIDCP protocols, is not effective. This should eliminate the AIDCP from further consideration and, more importantly, it should mean that Mexico has not met its burden of providing a less trade-restrictive alternative means of achieving the same level of protection.

There is evidence of a fact-finding failure and an accompanying logical failing of the first rank. The U.S. measures take specific aim at intentional setting on dolphins in the ETP as a means of achieving its two legitimate objectives (dolphin protection and consumer information). Indeed, it might be argued, and the U.S. did so argue, that ending setting on dolphins in the ETP is itself a legitimate objective[37] and not simply a method or means to attain an objection. That there are other tuna fishing circumstances, techniques, and geographic loci that pose a risk of adverse effects for dolphin populations should be quite irrelevant to the inquiry. To be more effective, another more comprehensive dolphin-safe regime that effectively manages those other risks as well might be implemented.

The Panel concluded that the U.S. measures are not effective outside the ETP.[38] Assume, *arguendo*, that the Panel is correct here that the U.S. dolphin-safe regime currently deals effectively with only some of the many perceived risks to dolphins. This in no way lessens the legitimacy of the measures as the regime's chosen means in achieving the overall objective of protecting dolphins. The Panel cited the U.S.-Gasoline Appellate Body Report for the proposition that members should be free to set their own environmental policies, objectives, and legislation.[39] Clearly the U.S. should be free to pursue as an objective, from among those many measures that might benefit dolphins, one that deals principally with setting on dolphins in a specific locale. Despite the Panel's expressed fealty to the authority of members to set their own prerogatives (para. 7.622), in accepting the AIDCP label scheme, the Panel has negated the U.S. objective of preventing setting on dolphins.

It is at this point that the pre-determinative effect of the definition of the U.S. objectives becomes apparent. Based on the evidence presented on the issue of setting on dolphins and the unique character of the ETP tuna fishery, it should be beyond cavil that one of those U.S. objectives is discouraging or ending intentional setting on dolphins as a tuna fishing technique in the ETP, whatever other goals are expressed. The first stated U.S. objective, preventing consumer confusion, is really a means to the end of stopping setting on dolphins. In any event, the U.S. came to state that its second objective was ensuring that the U.S. market is not used to encourage fishing fleets to catch tuna "by setting on dolphins" (para. 7.397).[40] The Panel concluded that by discouraging the use of high-seas driftnets, the U.S. measures were not limited to discouraging setting on dolphins (paras. 7.420-7.425). But an additional proscription of high-seas driftnets does not obviate that the U.S. measures are intended to stop setting on dolphins, and indeed may be primarily so intended.

Having determined that the U.S. measures are only partially effective (which is a function of defining the objective in the broadest terms—essentially, protecting all dolphins, everywhere), that the AIDCP label was also partially effective set up the finding that the Mexican alternative achieved the same level of protection in a less trade-restrictive manner (para. 7.577).[41] The U.S would not need to forego its own labels but could accept the addition of the AIDCP dolphin-safe labels (para. 7.576). The Panel even suggested that this would lead to a reduction of possibilities of consumer deception.



In essence, the Panel was suggesting that the U.S. should tolerate what the Panel considered to be one partially effective method for another. What makes this forced bargain all the worse is that (1) the certainty that setting on dolphins in the ETP is very harmful to dolphins, which is accepted by Mexico and acknowledged by the Panel, is being equated with and swapped for (2) the still-open and uncertain question of the extent of adverse effects on dolphins of other techniques and in fisheries outside the ETP.

Second U.S. Objective: Dolphin Protection

On the second objective, dolphin protection, the Panel's analysis of the effectiveness of the Mexican alternative was quite short and it continued to apply its equivalency rationale

(see sidebar). Thus, the Panel concluded that the amalgam of the AIDCP-cum-U.S. measures was an alternative measure equally effective as the U.S. measures for the two U.S. objectives in its Art. 2.2 analysis. Presumably, if the Panel analysis under Art. 2.2 had been conducted on the same stand-alone basis as the Art. 2.4 analysis of the AIDCP, the AIDCP would not have been as effective as the U.S. measures. That would have led to a rejection of Mexico's Art. 2.2 claims.

The reality of the Mexican alternative should have led to its rejection as a bona fide alternative because, when affixed to tuna or tuna products, the AIDCP will in every case be applied on a stand-alone basis to that specific article. That is the nature of the two labels "coexisting." It is only at the metaphysical level that the two labels' coexistence can have any other manifestation. In the real world, there will be two side-by-side, stand-alone measures whereby some tuna and tuna products will bear the U.S. measures' dolphin-safe label and others the AIDCP label. For the latter category, the AIDCP protocol will be, and necessarily must be, as ineffective for these Art. 2.2 purposes as the Panel found it to be for Art. 2.4. Also, for those tuna and tuna products bearing the AIDCP label, that label will have been used in lieu of the U.S. measures' labels. Thus, Mexico is arguing for the very substitution effect that the Panel denied was involved.

There is a stark question here—will the Mexican proposed alternative measure, either (1) the AIDCP on a stand-alone basis or (2) the "coexisting" U.S. measures and the AIDCP taken together, afford the same level of protection in meeting the U.S. objective of preventing setting on dolphins specifically,[42] and protecting dolphins generally? The only answer is no. Mexico should have failed on this Art. 2.2 claim as it did in its Art. 21.1 and Art. 2.4 efforts.

Conclusion

The Panel Report is seriously flawed. The probable impact of the death of one of the original panelists during the proceedings cannot be overlooked but that does not explain away the errors. A more in-depth and deliberate analysis, especially one framed by the existing WTO decisional jurisprudence, may lead to further or differing conclusions and to other observations but, based on my admittedly and necessarily brief study, the following issues remain.

The U.S. measures are not mandatory and, thus, cannot be "technical regulations" for purposes of TBT Art. 2. If the U.S. measures are "voluntary" for purposes of Art. 2.1, how can the Panel reconcile that finding with its determination that the measures are mandatory in its Art. 2 "technical regulation" evaluation? What is or should be the normative effect of a lack of consensus on this "technical regulation" criterion for an application of Art. 2?

The Panel misrepresented the U.S. dolphin protection objectives inasmuch as it stated in its crucial Art. 2.2 review that the U.S. had only "general" objectives, thus allowing its "equivalency of results" analysis to proceed. The Panel unfairly allowed Mexico to restate its proposed alternative but denied the U.S. the opportunity to formally restate its objective. This unequal treatment violates the fundamental "goose/gander" due process norm[43] that underlies the WTO dispute settlement process, regardless of the discretion or flexibility of panels to set their own procedures by Art. 12 of the WTO Dispute Settlement Understanding.

The alternative suggested by Mexico remains ambiguous. As stated above in the series of open questions on Mexico's alternative, there is a serious and lingering flaw in the Panel Report in its failure to precisely state the alternative proposed by Mexico. If Mexico failed to make a satisfactory statement of an alternative, its claim should have been rejected rather than the Panel filling the gap with its own "understanding." The Panel neglected to analyze the implications of the status of Mexico's proposed alternative as a "standard."

The Mexican proposal of "coexisting" labels is in reality for two stand-alone labels—the U.S. dolphin-safe label and the AIDCP label. As a result, the AIDCP label will substitute for the U.S. label, albeit for only some tuna and tuna products, exactly as the U.S. charged. In that case, and the notion of partial substitution notwithstanding, the Art. 2.2 claim must fail as did the Art. 2.4 claim. The Art. 2.2 finding that allowing AIDCP labeling would not result in lowered levels of protection for dolphins is in error on the all-important objective of the U.S. dolphin-safe label—preventing intentional setting on dolphins. ●

36 See para. 6.27 and the references to the U.S. position on setting on dolphins as an objective.

37 See, e.g., paras. 7.397, 7.402, 7.420.

38 The qualification that the Panel made about the scientific evidence ("scientific information concerning the effects of tuna fishing on dolphins") may not be all that conclusive. Para. 7.623.

39 Appellate Body Report, United States—Standards for Reformulated and Conventional Gasoline, WT/DS2/R, May 20, 1996, as modified by Appellate Body Report WT/DS2/R/AB/R, DSR 1996: I, 29, page 28 (cited at para. 7.441). Japan argued that the panel should treat a member's identification of its objectives deferentially. Paras. 5.141-5.143.

40 See also paras. 7.402 and 7.420.

41 "Both the existing U.S. measures and the alternative suggested by Mexico may reduce to some extent, but do not eliminate, the possibilities of U.S. consumers being misled."

42 Mexico conceded that setting on dolphins may adversely affect dolphins. Para. 7.493.

43 Expressed as "what's sauce for the goose is sauce for the gander," this traditional phrase is well known to lawyers in the common law tradition as denoting the enduring obligation to meet the standards of fairness and equal treatment to both parties.