

THE US-TUNA II CASE

BRIEFING ON THE LATEST REPORTS OF THE PANELS

Background

The trade dispute between Mexico and the US over tuna products is one of the most famous in the animal welfare world. It has been going on for the past 30 years, since the US established a ban on imports of tuna caught with dolphin-deadly purse seine nets. At the basis of this measure lies a phenomenon that occurs in the Eastern Tropical Pacific (ETP). There, dolphins are known to congregate above schools of tuna, which allows fishermen to use the dolphins – easier to spot – to circle the tuna and facilitate the catch. This fishing method obviously leads to the harming or killing of dolphins in the process.

After the World Trade Organisation (WTO) ruled out the ban as non-compliant with international trade law, the US replaced it by a voluntary labeling system, the famous ‘Dolphin-safe’ label. While all products would be allowed on the US market, the US consumers would be able to show their support with their dollars, by buying labeled tuna only. Since then, Mexico and the US have been fighting at the WTO over the compliance of the label with the organisation’s rules. According to Mexico, the label discriminates against its fleet as it imposes additional conditions for the ‘dolphin-safe’ label to be granted to tuna caught in the ETP region, compared to others. From the US point of view, this difference in criteria is related to the risks encountered by dolphins, which are higher in the ETP where the specific phenomenon of dolphins swimming above schools of tuna has been observed. According to [Public Citizen](#), an important US NGO, the label has already contributed to a 97% decrease of dolphins death related to tuna fishing.

The disputed measures

The US 2016 Tuna measures – and the previous versions of the legislation – aim at setting eligibility criteria for tuna products to be granted a ‘dolphin-safe’ label. The two complementary objectives of the measure are to avoid consumers being misled and to contribute to the protection of dolphins. The measure can be considered as a technical barrier to trade the compliancy of which must be checked against the WTO-covered Technical Barrier to Trade (TBT) agreement. In a nutshell, the measures set stricter criteria for tuna caught in the ETP region using large purse seine nets – for instance imposing the presence of a certified observer onboard - than for other fisheries. Mexican purse seine fishing boats that are fishing tuna in the ETP still often resort to setting on dolphins as a fishing method, which excludes them from accessing the precious label.

The WTO has ruled against the US in 2011, 2012, 2015 and in April 2017. When a country has been ruled against, it has to put its measure into compliance, and is given time to do so. That is how the row has been ongoing for so long. In the previous episode, in April 2017, Mexico had been allowed to fine the US 163 million USD. The US has thus made some modifications to its policy and requested a WTO compliance panel to rule on whether this new set of measures was compliant with WTO rules. The positive decision adopted by the

panel is a good surprise, in the light of the history of defeats faced by the US on the matter. However some details in the findings may have negative implications in the long term.

The October 2017 Panel Report

The panel restated what has been agreed previously by both parties: the Tuna Measures falls under the TBT agreement; the US and Mexican tuna products are 'like' products, and the US measures create a distinction and modify the conditions of competition to the detriment of Mexican tuna products on the US market. The question that was left open is whether that detrimental impact "stems exclusively from a legitimate regulatory distinction". The panel, after assessing the label's eligibility criteria and its certification, tracking and verification document requirements, concluded that the measures were overall calibrated to the risks encountered by dolphins in the various situations. The amendment by the US of the determination provisions contained in the measures, so that the stricter criteria applied to ETP large purse seine fishery could also be applied to other fisheries if similar risks to dolphins were to be found, strengthened the measures by making them more lively, more able to adapt to changing circumstances.

The first detail to be found in the findings that might have a detrimental impact in the long term if not challenged in appeal concerns sustainable development. One of Mexico's arguments was that the US measure did not meet its obligations regarding sustainable development under the WTO treaties. In fact Mexico stated that its own fishery practices are more sustainable than the ones favoured by the US regulations¹ and argued that the US could not pursue objectives within their trade measures in a manner which would be inconsistent with sustainable development, one of the objectives of the WTO recognized in the preamble to the WTO treaty.² The Panel rejected this argument, but not on the substance. The Panel did not assess the sustainability of the US and Mexican fishing methods, but rather stated that the US measure is pursuing "some other objective". Therefore it considered that it did not need to engage in a discussion about sustainable development.

This approach seems to be inconsistent with what is required of the Panel. While the preamble to the WTO treaty does not constitute an obligation, it has been ruled by the Appellate Body that the recital on sustainable development should be used to "add colour, texture and shading to interpretation of the agreements annexed to the WTO Agreement".³ Striking down a measure adopted under one of the substantive obligations of the WTO treaties might go beyond what the Appellate Body meant,⁴ but the Panel even failed to consider the issue of sustainability, arguing that the US pursued "some other objective". This could allow WTO members to defend the enactment of measures that are harmful to sustainable development by claiming they are pursuing some other credible objective. The panel should have engaged in a discussion about how the US measure contributes to or detracts from sustainable development. It is surprising that the panel failed to do so given that the measure at stake is one so closely linked to sustainable development.

¹ Panel report, 7.90 citing: Mexico's second written submission, paras 30-31.

² Marrakesh Agreement Establishing the World Trade Organisation (15 April 1994) LT/UR/A/2 (WTO Agreement), preamble recital 1 - [http:// docsonline.wto.org](http://docsonline.wto.org)

³ *United States - Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body* (1998) WT/DS58/AB/R (US - Shrimp), Para 153.

⁴ Panel report, para 7.131.

Defending animal welfare at the WTO level has so far not been easily achieved. A landmark victory has been the EC-Seal products case in which the EU ban on seal products was upheld based on the public morals exception contained in the WTO treaties. The ruling recognized that the EU measure aimed at defending the morality of its citizens. However, sustainable development is closely linked with animal welfare⁵ and it could be the case that in the long term animal welfare might be better protected through a reference to the sustainable development objective of the WTO, rather than through an exception contained in WTO-covered agreements.

Another detail in the report that should be underlined is the initial assessment that tuna caught by setting on dolphins and without doing so are 'like' products. The panel makes reference to both parties agreeing on that fact and declares it does not see anything that would lead to doubt that conclusion⁶. Although it was not really the place of a compliance panel to rediscuss this matter – as nothing had changed in the measure that could have affected that previous finding – it is still a missed opportunity. Even though in this case the panel has recognized that a discrimination between 'like' products is justifiable under a specific GATT exception, it still goes against a more progressive view that would consider that products can also be differentiated based on how they were produced, for instance based on rearing conditions respecting the welfare of the animals.

The next steps

This ruling is not final. Mexico has already announced it would appeal it. In addition one must underline that, rather than a complete U-turn in terms of legal thinking, the decision adopted by the Panel seems more to reflect an accommodating mood vis-à-vis the US. Indeed, the US have been criticizing the WTO even more strongly since the election of Donald Trump and the organisation is well aware that they need to preserve the support of Washington to avoid sinking into irrelevance.

The appeal could also see other aspects of the US measures under attack. In an article recently published on the dispute, Coglianese and Sapir underline distinctions made by the US measures that have not been addressed yet by the WTO Dispute Settlement Body.⁷ One of these distinctions – for instance the case of driftnet fishing not operated in the high seas – could be brought to the fore by the Appellate Body and lead to a different ruling... The saga is thus not over, but it is a victory that should be savoured!

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⁵ Eurogroup for Animals, '[Animal Welfare, Trade and Sustainable Development](#)', October 2017

⁶ Panel report, para 7.74

⁷ Cary Coglianese and Andre Sapir, 'Risk and Regulatory Calibration: WTO Compliance Review of the US Dolphin-Safe Tuna Labeling Regime' (2017) World Trade Review 327