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## Memo

From: Todd Tucker, Public Citizen

To: Consumer and Environmental Groups

Date: January 5, 2012

Re: Considerations for U.S. in Appellate Body Review of Lower Panel WTO Tuna-Dolphin Ruling

On September 15, 2011, a panel report ruling against the U.S. dolphin-safe tuna label regime was circulated to World Trade Organization (WTO) members after Mexico successfully challenged the measure. The panel found that the labels constituted a mandatory technical regulation that violated the WTO's Agreement on Technical Barriers to Trade (TBT) Article 2.2 because they are "more trade restrictive than necessary to achieve a legitimate objective, taking into account the risks that non-fulfilment would create..."<sup>1</sup>

In nearly 200 rulings over 16 years, this was the first time that the WTO ever found a violation under this article, which has long been of concern to consumer and environmental advocates.<sup>2</sup> It was one of the first rulings under the TBT – one of 17 agreements administered by the WTO. The report was circulated just a week after a WTO ruling that the U.S. ban on flavored cigarettes violated Article 2.1 of the TBT. In November, the WTO issued a third ruling against a popular U.S. consumer policy (country-of-origin labels on meat) that held that this policy violated both of these TBT articles.

The U.S. has worked with Mexico and the Dispute Settlement Body (DSB) to extend the deadline for giving notification of a decision to appeal from November 2011 until January 20, 2012.<sup>3</sup> **Given the profoundly negative implications for this particular U.S. policy and for the precedent the TBT interpretations in this ruling would set against consumer and environmental protection policies in general, the U.S. should notify the DSB of its intent to appeal the lower panel ruling.**<sup>4</sup> This memo outlines some substantive considerations for this appeal. At a minimum, an appeal will buy time (around two years, when compliance proceedings are taken into account). An appeal would also offer a necessary opportunity to carve back the new overreaching TBT jurisprudence issued by the lower panel before it opens the door to further attacks on legitimate consumer and environmental regulations. Given the popularity and importance of the dolphin-safe tuna labeling policy, however, the U.S. should also be poised to maintain the policy and challenge the legitimacy of any sanctions authorized by the DSB.

### Brief summary of details of the WTO ruling and its implications

In this WTO panel report, the dolphin-safe labeling regime was defined as the sum of three "measures":

- (a) *United States Code*, Title 16, Section 1385 ("Dolphin Protection Consumer Information Act");
- (b) *Code of Federal Regulations*, Title 50, Section 216.91 ("Dolphin-safe labeling standards") and Section 216.92 ("Dolphin-safe requirements for tuna harvested in the ETP [Eastern Tropical Pacific Ocean] by large purse seine vessels");
- (c) The ruling in *Earth Island Institute v. Hogarth*, 494 F.3d 757 (9th Cir. 2007).

Dolphins and tuna associate in the Eastern Tropical Pacific (ETP), but not elsewhere in significant enough numbers to make setting of purse-seine nets on dolphins a viable commercial strategy. Given the special threat this practice poses to the dolphins used as an indicator of the presence of tuna, the U.S. therefore tailors its labeling and verification regime to apply additional safeguards to the ETP fishery.

In order for tuna caught in the ETP with large purse-seine nets to be incorporated into a tuna product that receives the dolphin-safe label, it must be accompanied by written statements executed by a fishing vessel's captain and a special observer providing the certification [required under § 1385 (h)], and endorsed in writing by the exporter, importer, and processor of the product, that no tuna were caught on the trip in which such tuna were harvested using a purse seine net intentionally deployed on or to encircle dolphins, and that no dolphins were killed or seriously injured during the sets in which the tuna were caught. The tuna must also be accompanied by written statements by an authorized representative of the nation whose domestic tuna fishing program meets the requirements of the International Dolphin Conservation Program (IDCP) that an IDCP-approved observer was on board the vessel during the entire trip and provided the certification required under § 1385 (h) above. Tuna not caught in the ETP, or not with large purse seine nets, face less stringent requirements,<sup>5</sup> on the basis that these fishing methods and geographic considerations are the most reliable indicators of risk for harm to dolphins during tuna fishing.

On October 24, 2008, Mexico began WTO dispute settlement proceedings against the U.S., a process that culminated on September 15, 2011, when a DSB ruling was circulated to WTO members. The WTO panel was comprised of Mario Matus (Chile), Elisabeth Chelliah (Singapore), and Franz Perrez (Switzerland). The panel made two major findings:

1. Despite the facts that the labels are voluntary and that tuna can be and is sold in the U.S. without the label, the WTO panel concluded that the dolphin-safe tags were "mandatory" technical regulations.<sup>6</sup>
2. The WTO panel then ruled that the dolphin-safe labels violated Article 2.2 because they do not fulfill their objective of informing consumers and thereby protecting dolphins, essentially because the U.S. mainly focuses its regulatory capital on the ETP region, where dolphin deaths from tuna fishing has been a well-documented, serious problem.

Each WTO member has the general obligation to "ensure the conformity of their law, regulations and administrative procedures" with the WTO agreements' rules.<sup>7</sup> **Therefore, if the ruling is not appealed or if it is upheld on appeal, the U.S. will risk trade sanctions if it does not water down or eliminate the dolphin-safe tuna labels.**<sup>8</sup>

Consumer and environmental groups will object to the panel’s ruling on both of its major findings. The ruling’s implications are dire, especially in the context of a long battle to save dolphins that stretches back decades. This struggle has been beset by countless trade-related obstacles: 1991 and 1994 GATT rulings led to the U.S. eliminating the (more potent) import ban of dolphin-unsafe tuna,<sup>9</sup> and environmentalists fighting successfully in U.S. court to block the Clinton and Bush administrations from also watering down the voluntary labeling policy. These groups narrowly blocked this executive branch effort, which U.S. courts deemed “Orwellian” and “a compelling portrait of political meddling.”<sup>10</sup> **The legitimacy of the WTO is likely to be further undermined if the U.S. fails to challenge this latest WTO attack on dolphins or if the Appellate Body upholds the lower panel ruling. Consumer and environmental groups will see that the WTO allows anti-environmental forces a second (or third) bite at the apple, even when such forces fail in their U.S. legal and political efforts to undermine a domestic policy to which they object.**

### *Voluntary dolphin-safe labels as mandatory technical regulations*

The TBT distinguishes between “technical regulations” and “technical standards.” The former are mandatory and subject to more extensive WTO disciplines than are the latter.<sup>11</sup> Mexico, along with most third parties to the dispute, argued that the labeling regime was mandatory and thus subject to the stricter TBT requirements, such as Articles 2.1 and 2.2. The Office of the U.S. Trade Representative (USTR), which provided the U.S. defense, pointed out that this was meritless. Their argument is worth quoting at length:

“Mexico identifies no government action that makes compliance with the U.S. dolphin safe labeling provisions mandatory, but rather argues that the actions of consumers and retailers makes the U.S. provisions in fact mandatory. [...] the actions of private actors alone cannot form a basis for concluding that compliance with a voluntary labeling scheme is in fact mandatory.

111. Further, Mexico’s argument implicitly concedes that compliance with the U.S. dolphin safe labeling provisions is not in fact mandatory. Mexico’s argument is based on the assertion that major distribution channels will only purchase and sell tuna products that are labeled dolphin safe. This means, however, that even under Mexico’s own admission there are distribution channels in the United States that will purchase and sell tuna products that are not labeled dolphin safe. Indeed, the facts on record in this dispute demonstrate that. Dolores brand Mexican tuna products that contain tuna that was caught by setting on dolphins and not labeled dolphin safe is widely available in the United States and is popular in grocery stores in the United States that cater to Latino consumers and readily available over the Internet from a U.S.-based Internet grocer.

112. The panel in US – Tuna Dolphin 1 examined a similar issue finding that ‘the labeling provisions of the DPCIA do not restrict the sale of tuna products; tuna products can be sold freely both with and without the ‘Dolphin Safe’ label. Nor do these provisions establish requirements that have to be met in order to obtain an advantage from the government. Any advantage which might possibly result from access to this

label depends on the free choice by consumers to give preference to tuna carrying the 'Dolphin Safe' label.'

113. Moreover, the facts of this dispute do not support Mexico's assertion that major distribution channels for tuna products will only purchase and sell tuna that is labeled dolphin safe. While U.S. consumers and retailers generally have a preference for tuna that is not caught in a manner that adversely affects dolphins, some marketers of tuna products have chosen to omit the dolphin safe label on their tuna products even though those products meet the conditions to be labeled dolphin safe.

114. For the forgoing reasons, Mexico has failed to establish that the U.S. dolphin safe labeling provisions are technical regulations within the meaning of Annex 1 of the TBT Agreement and accordingly has failed to establish that the U.S. dolphin safe labeling provisions are subject to Article 2 of the TBT Agreement. As a consequence, the U.S. dolphin safe labeling provisions cannot be found inconsistent with Article 2.1, 2.2 or 2.4 of the TBT Agreement, and the Panel should therefore reject Mexico's claims under those articles."<sup>12</sup>

The U.S. noted that, if voluntary technical measures were deemed to be "mandatory," then the definition of "technical standard" would be rendered *inutile* (i.e. without effect).<sup>13</sup> The panel even seemed to concede some of these points.<sup>14</sup>

Despite this, the majority of the panel found in Mexico's favor, stating that the dolphin-safe labels are "*de jure* mandatory" because they prescribe the use of dolphin-safe claims on labels, and that misusing them (i.e. labeling tuna as dolphin-safe when it does not meet the requirements) is punishable by law. As the panel stated:

"The measures leave no discretion to resort to any other standard to inform consumers about the 'dolphin-safety' of tuna than to meet the specific requirements of the measure. Effectively, the 'dolphin-safe' standard reflected in the measures at issue is, by virtue of these measures, the *only* standard available to address the issue. Through access to the label, the measures thus effectively regulate the 'dolphin-safe' status of tuna products in a binding and exclusive manner and prescribe, both in a positive and in a negative manner, the requirements for 'dolphin-safe' claims to be made. This distinguishes this situation from one in which, for example, various competing standards may co-exist in relation to the same issue, with different but related claims, each of which may be protected in its own right."<sup>15</sup>

Notably, one of the panelists dissented on this point, arguing that this interpretation of "mandatory" leaves the notion of voluntary "technical standard" *inutile*, and conflates the notion of truth-in-labeling with having a mandatory nature.<sup>16</sup> The panelist argued that the dolphin-safe labels are not *de jure* mandatory, and can at best be considered *de facto* mandatory (but that Mexico had appeared not to make that case).<sup>17</sup> The panelist went on to note that, not only was any decline in purchases of Mexican tuna products not attributable to state action, but agreed with the U.S. that retailer boycotts predated any government labeling action, and that this opposition was likely to outlast any government labeling regime.<sup>18</sup>

## *Article 2.1 – discrimination*

Article 2.1 of the TBT reads:

“2.1 Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.”

As the panel had already decided that the dolphin-safe tuna labels were a “technical regulation,” it proceeded to consider whether Mexican tuna products were “like” tuna products from the U.S. and other countries. On the basis of the four-plank “likeness” evaluation used in the WTO’s General Agreement on Tariffs and Trade (GATT) jurisprudence (physical properties, end uses, consumer willingness to substitute, and tariff classification<sup>19</sup>), the panel ruled that Mexican tuna products were “like” U.S. tuna products.<sup>20</sup>

The panel then proceeded to evaluate Mexico’s claim of less favorable treatment:

“Mexico explains that the factual basis for its discrimination claim is that the ‘prohibition’ against the use of the dolphin-safe label on most Mexican tuna products denies competitive opportunities to those products compared to like products from the United States and other countries. As described above, Mexico explains that its products do not have access to the label regulated by the measures, because Mexican tuna are caught ‘almost exclusively’ in the ETP by setting on dolphins, while US tuna products have access to the label, because the US fleet fishes outside the ETP by other fishing methods. The ‘prohibition’ that Mexico alleges therefore rests on an assumption that its products fall under one (less desirable) regulatory category, i.e. tuna caught by setting on dolphins, which is not eligible for the label under any circumstances, while those of the United States and a number of other countries fall under another (more desirable) one, i.e. tuna caught outside the ETP using other methods, which is eligible for the label.”<sup>21</sup>

In evaluating Mexico’s claims, the panel stated that:

1. “access to the label” constituted an advantage granted by the state;<sup>22</sup>
2. while Mexico claims that its traditional fishing grounds (the ETP) and traditional fishing methods (setting on dolphins with purse seine nets) means its tuna has less access to the label’s advantage, these characteristics are not unique to Mexico,<sup>23</sup> and other nations’ fleets also fish the ETP and therefore face similar restraints<sup>24</sup>;
3. there was no requirement for Mexican tuna processors to utilize Mexican fish (dolphin safe or not);<sup>25</sup>
4. many Mexican fishers don’t set on dolphins;<sup>26</sup> and
5. U.S. and other fleets adapted their practices to take advantage of the label,<sup>27</sup> and 90 percent of the world’s tuna companies have adopted a strict “no setting on dolphins” standard.<sup>28</sup>

In light of this, the WTO panel ruled that Article 2.1 was not violated by the dolphin-safe labeling practices.<sup>29</sup> (This finding was probably influenced in part by the limited basis of the way Mexico made its argument: Mexico focused on tuna products rather than tuna per se. If it had focused on tuna, and argued that its tuna was disadvantaged by the impact “upstream” from the labeling regime, it may have been able to make a more convincing *de facto* discrimination claim. Indeed, the panel acknowledged that Mexico’s fleet in practice might be disadvantaged. A WTO panel sided with Mexico on a similar upstream impact from country of origin labeling on meat with respect to Mexican cattle in the *U.S.-COOL* case.)

### ***Article 2.2 finding – trade restrictiveness***

Article 2.2 of the TBT reads:

“2.2 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 fulfil a legitimate objective, taking account of the risks non-fulfilment 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.”

There are seven prongs of analysis under Article 2.2, including identifying:

1. The objective of the measure;
2. The legitimacy of the objective (taking into consideration the third sentence);
3. Whether the measure fulfills the legitimate objective;
4. The risks of non-fulfillment of the legitimate objective (taking into consideration the fourth sentence);
5. Whether the measure is trade restrictive;
6. Whether the measure is more trade restrictive than necessary to fulfill the legitimate objective; and
7. Whether the measure had the intent or effect (or both) of “creating unnecessary obstacles to international trade,” and whether this was through the preparation, adoption, or application (or some combination thereby) of the measure.

The U.S. argued that the objectives of the labeling regime were “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 contributing to the protection of dolphins, by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins.”<sup>30</sup> The panel accepted the U.S. arguments on both counts,<sup>31</sup> and found that the objective was “legitimate”.<sup>32</sup> While Mexico argued that the dolphin-safe labeling regime should not be regarded as legitimate because it doesn’t protect non-dolphins, the panel disagreed.<sup>33</sup>

(The value of this finding should not be overstated, however. In only one case (*EC – Tariff Preferences*) has a panel ruled against the legitimacy of a policy *per se* when similar clauses from other WTO agreements were under consideration. The default stance of panelists and the Appellate Body is to affirm the legitimacy of the *purpose* of a domestic policy, but then rule against the *ways* in which a country sought to achieve that goal. In many cases, the policy “means” are virtually dictated by the “ends” for technical or political reasons, rendering the WTO baby-splitting “a distinction without a difference.” Because the WTO rules are so broad in constraining how policies may be formulated, the possibility of a conflict between a policy aimed at what the WTO considers a “legitimate” policy goal and the WTO rules is a constant concern.)

The panel then jumped to an analysis of various factors:

“in order to determine whether a measure is more trade restrictive than necessary within the meaning of Article 2.2, we must assess the manner in which and the extent to which the measures at issue fulfil their objectives, taking into account Member's chosen level of protection, and compare this with a potential less trade restrictive alternative measure, in order to determine whether such alternative measure would similarly fulfil the objectives pursued by the technical regulation at the Member's chosen level of protection. To the extent that a measure is capable of contributing to its objective, it would be more trade-restrictive than necessary if an alternative measure that is less trade-restrictive is reasonably available, that would achieve the challenged measure's objective at the same level.... We also note that, in making this determination, we are required to take into account ‘the risks that non-fulfilment would create.’”<sup>34</sup>

The panel then wrote,

“As we understand it, there are two related aspects to Mexico’ [sic] argument: first, if access to the label *is* available to tuna caught in conditions where dolphins may in fact have been harmed, this would be misleading to the consumer, in that it would lead it to believe incorrectly that such tuna was caught in conditions that are not harmful to dolphins; secondly, to the extent that some tuna caught in conditions that are equally harmful to dolphins are *denied* access to the label, this is also misleading in that the consumer would not be in a position to accurately identify these products as equally harmful or not harmful to dolphins.”<sup>35</sup>

The panel stated that “information is lacking to evaluate the existence and extent of the threats faced by different species of dolphins in different areas around the globe, especially outside the ETP.”<sup>36</sup> But even without substantial evidence, the panel noted speculations in studies that said “certain tuna fishing techniques other than setting on dolphins may also cause harm to dolphins”<sup>37</sup> and that there may be some dolphin by-catch outside of the ETP,<sup>38</sup> but the incidence was hard to know due to lack of data.<sup>39</sup> On the basis of these theoretical possibilities, the panel said that “where such tuna is caught outside the ETP, it would be eligible for the US official label, even if dolphins have in fact been caught or seriously injured during the trip, since there is, under the US measures as currently applied, no requirement for a certificate to the effect that no dolphins have been killed or seriously injured outside the ETP.”<sup>40</sup> Despite the lack of evidence

that tuna was being mislabeled, the panel concluded that consumers might be confused by the labeling scheme.

The panel disregarded persuasive arguments by the U.S. that imposing a 100 percent observer coverage outside of the ETP in regions where there was not a significant tuna-dolphin association was out of line with standard cost-benefit considerations,<sup>41</sup> and that “any differences in documentation to substantiate dolphin-safe claims are calibrated to the risk that dolphins will be killed or seriously injured when tuna is caught.”<sup>42</sup>

The panel did not even firmly establish that the labeling regime was “trade restrictive”, much less “more than necessary”. The panel repeatedly acknowledged that most U.S. tuna is imported,<sup>43</sup> which would seem to be *prima facie* evidence for a lack of trade restrictiveness. In a 321-page ruling, the panel only attempted to evaluate the trade restrictiveness in one passage:

“We first note that the US dolphin-safe provisions do not formally restrict the importation or sale of tuna or tuna products that are not labelled dolphin-safe. However, as noted above, the parties agree that the US public has a preference for tuna products that are dolphin-safe, and access to the label is therefore a valuable advantage on the US market. To the extent that the proposed alternative would provide access to the label, and thus to this advantage, to a greater range of tuna products, including imported tuna products, it would be less-trade restrictive than the existing US measures, in that it would allow greater competitive opportunities on the US market to those products”.<sup>44</sup>

On the basis of this flawed analysis, the panel concluded that the U.S. had violated Article 2.2. The panel wrote that “what Mexico suggests is that the US dolphin-safe label and the AIDCP label should be allowed to coexist on the US market in order to provide fuller information to US consumers.”<sup>45</sup> (This refers to a label considered under the Agreement on the International Dolphin Conservation Program, an international instrument which does not prohibit setting on dolphins.) The panel stated that “this would enhance the ability of the dolphin-safe labels to remedy market failures arising from asymmetries of information between tuna producers, retailers and final consumers in the US market. Well-informed consumers would be in a better position to use their purchasing power to influence the way tuna fisheries and canners operate.”<sup>46</sup>

### ***Article 2.4 finding***

Article 2.4 of the TBT reads:

“2.4 Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.”

The panel found that “the United States failed to base the US dolphin-safe labelling provisions on the relevant international standard of the AIDCP.”<sup>47</sup> But then found that “the AIDCP



standard, applied alone, would not be an effective or appropriate means of fulfilling the US objective of ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins”<sup>48</sup> because it “does not convey any information on the fishing method that has been used for harvesting tuna contained in the product that bears the AIDCP logo, or on the impact that such method may have on dolphins...”<sup>49</sup> Moreover, it “fails to address unobserved adverse effects derived from repeated chasing, encircling and deploying purse seine nets on dolphins, such as separation of mothers and their dependent calves, killing of lactating females resulting in higher indirect mortality of dependent calves and reduced reproductive success due to acute stress caused by the use of helicopters and speedboats during the chase...”<sup>50</sup> For this reason, Mexico’s challenge of the dolphin-safe labels under Article 2.4 failed (despite the fact that the panel’s ruling in the Article 2.2 context that the AIDCP label should be used).

### **Grounds for appellate review**

The next stage in the proceedings (should the U.S. or Mexico opt to take it) is to have the case heard by a three-member panel (i.e. “division”) selected from the WTO’s Appellate Body, which is composed of seven Members<sup>51</sup> who are appointed by the DSB to serve for four-year terms.<sup>52</sup> Article 6(2) of the WTO’s Working Procedures for Appellate Review states that: “The Members constituting a division shall be selected on the basis of rotation, while taking into account the principles of random selection, unpredictability and opportunity for all Members to serve regardless of their national origin.”<sup>53</sup>

Under WTO dispute resolution rules, the parties are not normally supposed to make new factual arguments or invoke new defenses at the appellate stage. As Article 17.6 of the WTO’s Understanding on Rules and Procedures Governing the Settlement of Disputes states, “An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.”<sup>54</sup> Nonetheless, this section of the memo will outline a range of objections to the ruling – some articulated in legal interpretation *per se*, while others on the basis of policy and political objections to which the Appellate Body should be attentive.

### ***Appeal arguments that the U.S. might make***

*The panel erred in deeming the dolphin-safe labels mandatory.*

The dissenting panelist’s comments will give the U.S. ammunition to get the dolphin-safe tuna labels deemed voluntary “technical standards” rather than mandatory “technical regulations.” That would be the quickest way to overturn the entire ruling, given voluntary technical standards are not required to comply with the more stringent Article 2.1 and 2.2 rules for technical regulations.

*The panel’s interpretation of Articles 2.1 and 2.2 led to an untenable and absurd conclusion.*

The panel’s conclusions lead to a number of Catch 22 situations.

Mexico asserted that the U.S. objective should be read as “to preserve dolphin stocks in the course of tuna fishing operations in the ETP” rather than protecting dolphin stocks more broadly.<sup>55</sup> Interestingly, if the U.S. had accepted that characterization of the measure for the purposes of the DSB proceedings, dolphin-safe tuna labels might have survived Article 2.2 scrutiny. However, if the U.S. had made its objective region-specific, it might have been more likely to be found in violation of Article 2.1, as Mexico could argue that its ships overwhelmingly fish in the region, that its tuna processors overwhelmingly use Mexican tuna, and therefore the labels shift the conditions of competition against Mexican tuna products.

Similarly, if the U.S. attempted to comply with the Article 2.2 ruling by extending the ETP level of scrutiny over setting on dolphins and purse seine nets to other regions and methods, it would create a burden on the commerce of other fishing nations that might be deemed unjustifiable in the absence of a clear tuna-dolphin association in those other fisheries. That, in turn, could open the U.S. up to further TBT Article 2.2 or GATT discrimination claims from other nations.

This type of absurd and unreasonable Catch 22 situation also characterized the panel rulings in the *U.S.-Clove Cigarettes* and *U.S.-COOL* cases. For this reason, and given that Articles 2.1 and 2.2 are being interpreted for the first time in these cases, USTR could make a strong case that the AB should consult supplementary means of interpretation, like preparatory works and the writing of consumer and administrative law experts on the cost-benefit analyses of targeted regulations. (This approach is envisioned under the Vienna Convention on the Law of Treaties Article 32.<sup>56</sup>)

*The panel was inconsistent in its recognition that the dolphin-safe label incentivizes private conduct.*

The U.S. could argue that the Article 2.2 finding must be reversed because the panel was willing to acknowledge that any differential impact on Mexican tuna was as a result of private actors for the sake of Article 2.1 analysis,<sup>57</sup> but then attributed a trade-restrictive impact to state actions in the context of the Article 2.2 analysis.

*The panel misidentified the objective of the dolphin-safe labels, and whether it could fulfill its aims.*

As noted above, the panel interpreted the U.S. objective in an overly broad way, essentially requiring that the labels grant perfect information and therefore contribute to the global elimination of dolphin deaths from fishing. Since no policy could ever hope to achieve such total aims, it would have been more appropriate to (through analysis of the structure of the labeling measure itself) identify the objective as an increase in consumer information leading to a reduction in dolphin deaths. (This reflects some of the “best practices” from the Article 2.2 analysis of the *U.S.-Clove Cigarettes* case, where the panel appeared to accept that a ban on flavored cigarettes was geared at reducing but not eliminating teen smoking.<sup>58</sup>)

*The panel mishandled the evidence before it.*

The panel’s handling of the evidence presented to it would shock anyone familiar with basic social science methodology. USTR should argue on appeal that the failure of the lower panel to

consider the factual information is a basis to reverse the Article 2.2 analysis and resulting violation finding.

USTR could argue that, in the absence of a compelling problem of dolphin deaths outside of the ETP, it was incorrect for the panel to presume that any non-zero risk of a dolphin death outside of the ETP should require applying equally rigorous and costly (and susceptible to TBT Article 2.2 trade-restrictiveness-attacks) oversight procedures.

While panels are given deference at the WTO as trier-of-facts, this does not excuse them from the need of actually examining those facts.

USTR argued that the tuna-dolphin association occurs most frequently in the ETP, and that reducing unobserved dolphin mortalities (i.e. promoting recovery of overall dolphin stocks, not just reducing observed deaths) was an objective of the U.S. measure. Purse seine chases are uniquely destructive to stocks because of the possibility of separating cows from calves.<sup>59</sup> This claim was a major basis for why the U.S. argued that it has not converted to a AIDCP standard, which foresees allowing purse seine nets.

Rather than trying the facts, the panel engaged in a “he said, she said” pursuit, where Mexico could invalidate USTR’s factual claims simply by presenting speculations to the contrary.<sup>60</sup> On the basis of this dubious adjudication of the evidence, the panel ruled that there were chances that dolphin-unsafe tuna could be labeled dolphin-safe.<sup>61</sup>

While USTR argued that the additional requirements that face the ETP fleet were adequately calibrated to the risk, the panel essentially dismissed and distorted the very notion of risk-based regulation: “even assuming that the United States’ contention that certain environmental conditions in the ETP (such as the intensity of tuna-dolphin association) are unique, the evidence submitted to the Panel suggests that the *risks* faced by dolphin populations in the ETP are *not*.”<sup>62</sup>

The panel also stated that there was “strong evidence that regular and significant mortality and serious injury of dolphins also exists outside of the ETP.”<sup>63</sup> Characterizing this as “strong” is certainly overstating the matter. (Even on some analyses in USTR’s favor, the panel seemed prone to exaggeration: “when consumers buy a tuna product labelled dolphin-safe under the US measures, they may be completely assured that no dolphin was adversely affected during the catching of that tuna in the ETP. However, consumers would not have equal certainty that no dolphin was killed or injured or that dolphins were not otherwise adversely affected in respect of tuna caught outside the ETP.”<sup>64</sup> Although consumers have higher assurances with respect to the ETP, they lack “complete assurance” as to dolphin protection, nor could any regulatory regime offer “complete assurance.”)

This interpretation appears to situate “risk” at the level of the individual dolphin, rather than the species as a whole. This logic would suggest that it would be impermissible to require that bikers wear helmets if there’s the possibility that someone not on a bike might need a helmet. You can either make everyone wear helmets all the time, or no one must wear a helmet any of the time, by the panel’s logic.

In a further Orwellian twist, the panel noted that “the evidence suggests that observed dolphin mortality in the ETP, by contrast, is low relative to population size”<sup>65</sup> as support for the notion that compliance efforts should be focused elsewhere. But there is considerable evidence that this reality is because of the initial success of the initial (GATT-illegal) ban on dolphin-unsafe tuna, followed by the labeling regime. Prior to these policies’ implementation, dolphin mortality rates in the ETP were staggering.

Ironically, the panel noted that there is not strong evidence that dolphin deaths outside of the ETP are a significant problem. (For instance, the panel noted the speculative conclusion that “the US National Oceanic and Atmospheric Administration (NOAA) Fisheries cautions in this respect that the lack of evidence that dolphins are being affected by fishery-related activities in certain fisheries should not be wrongfully taken as evidence of the absence of a problem...” as a way of discounting concrete U.S. factual claims.<sup>66</sup>) But the lack of evidence that purse seine net fishing could be done in a way not harmful to dolphins was precisely the precautionary reason why U.S. courts refused to allow the Clinton and Bush administrations to weaken the label. In the U.S. court context, lack of adequate data was cited as a reason for defaulting in favor of dolphin protection and congressional prerogatives.<sup>67</sup> In the WTO case, lack of evidence was used to default against environmental protection.

Finally, it is unclear if the panel consulted the substantial number of documents produced under the U.S. court proceedings’ discovery process. The U.S. certainly should argue that the AB consider this data to reverse the shoddy analysis of the lower panel.

*The panel held the U.S. accountable on the basis of speculative findings.*

The Appellate Body in *EC-Sardines* has already interpreted Article 2.4 of the TBT as requiring that member countries must continually update their regulations (even existing ones) to reflect so-called “international standards.”<sup>68</sup> This is burdensome enough to public interest regulation. But the panel in this case went further, suggesting that members must base technical regulations on the outcome of future studies that would not even constitute international standards.

As noted, the panel noted that there is not strong evidence that dolphin deaths outside of the ETP are a significant problem. For instance, the panel quoted a study that stated “*allegations and sparse documentation* of [tuna-dolphin] interactions have existed for more than twenty years” in West Africa, and that therefore observers might be needed to “document the occurrence of association of tuna schools with whales and dolphins and the frequency of encirclement and magnitude of any bycatch”<sup>69</sup> [italics added]. The panel noted that “in the western Pacific Ocean, where most of the tuna sold in the US market is sourced from, there are also examples of incidental dolphin mortalities which affect a percentage of the dolphin populations in that area that is higher than *the percentage of dolphins observed to be affected* in the ETP (which is less than 0.1 per cent) under the controlled conditions of the AIDCP. The Panel notes in particular, that the same study indicates that in the Philippines, Indonesia, Thailand, and elsewhere in the western central Pacific, *relatively little is known about abundance, distribution, and bycatch levels* of cetaceans such as the Irrawaddy dolphin, Indo-Pacific humpback dolphin, Indo-Pacific bottlenose dolphin, finless porpoise, and spinner dolphin (and its dwarf form) and that ‘comprehensive cetacean abundance and bycatch surveys are needed to develop effective

mitigation strategies’, including assessments on “incidental catch in the tuna purse seine and drift gillnet fisheries.”<sup>70</sup> [italics added]

These passages fail to note a central U.S. claim – that the measures in the ETP are geared towards reducing *observed and unobserved* dolphin mortalities, about which relatively good data exist. In these other fisheries, in contrast, very little is even *observed*.

In essence, the panel’s line of argument holds states and environmental protection hostage to gaps in existing knowledge.

*The panel should not have attributed commercial advantages from the label to the state.*

As the dissenter on the panel noted, U.S. dolphin-safe preferences pre-dated any government-sanctioned dolphin-safe label, and may well outlast them.<sup>71</sup> The European Union also noted in this respect that “use of the label depends on the free choice of market operators and that the labelling conditions do not seem to differentiate on the basis of the origin of the goods.”<sup>72</sup>

To the extent that consumers purchase dolphin-safe tuna, that has little-to-nothing to do with state action, but rather with their own private preferences. If private preferences expressed in the marketplace yield some benefit to producers responsive to those demands, the free market is functioning as it should.

While the panel ruled in the U.S.’ favor on the Article 2.1 claim, it nonetheless found that the labels constitute an “advantage.” This suggests that even basic state functions that are about providing information and being responsive to pre-existing citizen demands can be examined as if they were a subsidy. If even such “light touch” regulatory responses are deemed to go “too far” in impacting market outcomes, then virtually no form of state involvement in the economy is safe from WTO scrutiny.

## **Conclusion**

The U.S.’ best opportunity to get the whole case dismissed is to convince the AB that the dolphin-safe labels are not mandatory. The fact that a dissenting panelist agreed with this point of view may be helpful.<sup>73</sup> The European Union also provided a detailed defense of the U.S. labels on this score.<sup>74</sup>

While advocates of more interventionist policies (such as across-the-board import bans) have long known that their preferred measures could be deemed WTO-illegal, it will be news to many advocates of lighter touch, nudging regulation like consumer labels that they may also wind up in the WTO’s crosshairs. In particular, all three of the measures ruled against in the recent WTO panel reports (COOL, dolphin-safe labels, and the flavored cigarette ban) were watered down in the legislative and regulatory process to reduce compliance costs and target the riskiest activities.

For instance, the dolphin-safe labels focus compliance efforts on the Eastern Tropical Pacific – the only region where tuna are known to associate dolphins in significant numbers, and thus where the biggest tuna-related threats to dolphins are located. But the WTO panel ruled that focusing

compliance efforts in this region (despite the lack of empirical evidence of major threats elsewhere) ran afoul of TBT Article 2.2.<sup>75</sup> In an era of budget austerity, interpretation of WTO obligations that put any disincentives in the way of smart use of scarce regulatory resources not only undermine most countries' current approach to regulation, but will increase public and policymaker antipathy towards the WTO and create throw-the-baby-out-with-the-bathwater anti-trade sentiments.

Finally, there is a significant resource asymmetry between corporations on the one hand, and consumer and environmental advocates on the other. It is rare that the latter are accorded an unqualified (or even qualified) victory in national legislative processes: the obstacles posed by courts, Congress and regulators in the dolphin case were all significant. Two findings of GATT violation contributed to the striking down of the (more potent) dolphin-unsafe tuna import ban,<sup>76</sup> and environmentalists struggled for a decade to block the Clinton and Bush administrations from watering down the (softer) labeling policy.<sup>77</sup> It is untenable for the future of trade expansion that the WTO represent a final card stacking the deck against hard-won consumer victories. USTR should vigorously pursue its appeal rights and argue for the WTO Appellate Body to overturn the dolphin-safe labeling and other two recent WTO rulings against consumer safeguards in the U.S. (and consumers') favor.

## ENDNOTES

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<sup>1</sup> Panel Report, *U.S. – Measures Concerning the Importation, Marketing And Sale Of Tuna And Tuna Products*, WT/DS381/R, circulated 15 September 2011, at para 8.1.

<sup>2</sup> When the U.S. Congress debated the Uruguay Round Agreements Implementation Act in a lame-duck session in 1994, Rep. Peter DeFazio (D-Ore.) said: “This agreement will put at risk the environmental, food, consumer, health and safety laws of this Nation to something called a World Trade Organization, an organization that will settle disputes over trade barriers, and trade barriers is interpreted as anything that restricts the free movement of goods, whether it is restrictions against child labor, whether it is restrictions against dangerous substances in food and pesticides.... We are lowering ourselves to the worst standards, to the lowest common denominator, in order to get something that a few multinational corporations desperately want.” Senator Robert Byrd (D-W.V.), a noted expert on the legislative process who recently passed, warned: “U.S. laws and State laws in many areas must comport first with the WTO’s trade rules, or such laws can be challenged as an ‘illegal trade barrier’ by other countries. Federal and State laws dealing with toxics and hazardous waste, consumer protection, recycling and waste reduction, pesticides and food safety, energy conservation, wildlife protection, and natural resource and wilderness protection, would all be vulnerable to WTO challenge. The new GATT would prevent countries from rejecting products based on how they are made; for example, with child labor or with ozone depleting chemical processes.... If environmental laws get in the way of trade, they must fall. If consumer protection gets in the way, if standards of innumerable kinds, get in the way of trade, they go. Humane methods of trapping tuna, in order to protect dolphins go out the window. Flipper loses. Rigid pesticide controls which make products more expensive are GATT illegal. Out they go. Child labor laws restricting trade are illegal. Who cares? Only trade matters. What happens when our laws are declared a violation of GATT? The Administration would like us to accept the proposition that no U.S. laws are wiped out here, and technically they are not. What will happen is that other member nations, perhaps prodded, or even dominated by one or a group of multinational corporations, will bring a complaint against the U.S. before the WTO, and a Dispute Panel could rule in secret against a U.S. law, as being GATT illegal. The room for pernicious manufactured claims should be obvious to all of us. This puts great pressure on us to change our laws.”

<sup>3</sup> See procedural details at: [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds381\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm)

<sup>4</sup> While there is no doctrine of binding precedent at the WTO, panels often cite each other and the Appellate Body in increasingly consistent fashion.

<sup>5</sup> Panel Report, *U.S. – Tuna II*, at para 2.14. The table here-in provides a concise breakdown of the requirements to obtain the dolphin safe label based on different regions and fleet types.

<sup>6</sup> Panel Report, *U.S. – Tuna II*, at para 7.145.

<sup>7</sup> Agreement Establishing the World Trade Organization Art. XVI(4).

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<sup>8</sup> As we note in the summary, however, the U.S. should not face this prospect passively.

<sup>9</sup> GATT Panel Report, *United States – Restrictions on Imports of Tuna*, DS21/R, 3 September 1991, unadopted, BISD 39S/155; GATT Panel Report, *United States – Restrictions on Imports of Tuna*, DS29/R, 16 June 1994, unadopted.

<sup>10</sup> *Earth Island Inst. v. Evans*, 2004 U.S. Dist. LEXIS 15729 (N.D. Cal. 2004).

<sup>11</sup> Annex I of the TBT defines technical regulation as: “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 labelling requirements as they apply to a product, process or production method.” Technical standard is defined as: “Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.” See legal text at: [http://wto.org/english/docs\\_e/legal\\_e/17-tbt\\_e.htm#annexI](http://wto.org/english/docs_e/legal_e/17-tbt_e.htm#annexI)

<sup>12</sup> USTR, *United States – Measures Affecting the Importation, Marketing and Sale of Tuna and Tuna Products* (WT/DS381), U.S. Second Written Submission, December 1, 2010, at 41-42. Available at: [http://www.ustr.gov/webfm\\_send/2429](http://www.ustr.gov/webfm_send/2429)

<sup>13</sup> Panel Report, *U.S. – Tuna II*, at para 7.94

<sup>14</sup> “In the present dispute, Mexico does not allege that the US dolphin-safe provisions positively require, *de jure*, the use of the dolphin-safe label. Indeed, it is undisputed that the measures at issue do not impose a positive requirement to label tuna products for sale on the US market as dolphin-safe. Neither the statutory and regulatory provisions nor the court decision challenged by Mexico contain language that imposes the use of the dolphin-safe label for tuna products as a condition for these products to be marketed in the United States.” Panel Report, *U.S. – Tuna II*, at para 7.118.

<sup>15</sup> Panel Report, *U.S. – Tuna II*, at para 7.144.

<sup>16</sup> Panel Report, *U.S. – Tuna II*, at para 7.157.

<sup>17</sup> As this panelist wrote:

“7.174 The question is therefore whether, despite the absence of a *de jure* requirement in the measures at issue to use the ‘dolphin-safe’ label in order to market tuna products in the United States, tuna products are nonetheless *compelled* to carry that label as a result of some other action attributable to the United States.

7.175 In summary, the ‘dolphin-safe’ label may be considered *de facto* mandatory in order to market tuna products in the United States, if doing otherwise becomes impossible, not because it would contradict a mandatory provision in the measures, but because it would be prevented by a factual situation that is sufficiently connected to the actions of the United States. Thus, this analysis is two-fold. First, the impossibility of marketing tuna products in the United States without the ‘dolphin-safe’ label must be established. Second, such impossibility must arise from facts sufficiently connected to the US dolphin-safe provisions or to another governmental action of the United States.

7.176 First, it has to be noted that tuna products are sold in the United States without the ‘dolphin-safe’ label. Not only has the US submitted evidence in this regard, Mexico has also not challenged this fact. However, Mexico maintains that the dolphin-safe labelling scheme ‘is *de facto* mandatory because *the market conditions* in the United States are such that it is impossible to *effectively* market and sell tuna products without a dolphin-safe designation’ (emphases added). As non-labelled tuna is sold in the US to a certain limited extent, to ‘effectively’ market has to mean having access to the major distribution channels and not being limited to the limited market segment that exists in the US for non-labelled Tuna.

7.177 To the extent that Mexico's argument is based on an impossibility of ‘effectively’ marketing and selling tuna products without a dolphin-safe designation, this would not, in my view, provide a sufficient basis for a determination that compliance with the US dolphin-safe labelling requirements is ‘mandatory’ within the meaning of Annex 1.1. Compliance with a voluntary technical document such as a standard may substantially increase the chances of a product being *effectively* sold in a given market. Conversely, failure to comply with such standard may have negative consequences for the competitiveness of a product in that market. However, this fact alone would not alter the voluntary or “not mandatory” nature of that standard, within the meaning of the *TBT Agreement*.

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7.178 In explaining the adverse effects of the measures, Mexico argued that they have direct effects on tuna products, because major retailers in the United States refuse to buy tuna products that cannot be labelled dolphin safe, and indirect effects on tuna caught by the Mexican fleet, because major producers of tuna in the United States also refuse to purchase Mexican or other tuna caught in the ETP because tuna product containing such tuna could not be included in tuna products labeled dolphin safe. I agree with the United States, however, that these are decisions made by private actors that do not necessarily involve the participation of the State. Such private actions alone should not be able to turn an otherwise voluntary norm into a technical regulation.”

<sup>18</sup> Panel Report, *U.S. – Tuna II*, paras 7.181-182.

<sup>19</sup> Panel Report, *U.S.-Tuna II*, para 7.235.

<sup>20</sup> Panel Report, *U.S.-Tuna II*, para 7.251.

<sup>21</sup> Panel Report, *U.S.-Tuna II*, para 7.279.

<sup>22</sup> Panel Report, *U.S.-Tuna II*, para 7.287.

<sup>23</sup> Panel Report, *U.S.-Tuna II*, para 7.306.

<sup>24</sup> Panel Report, *U.S.-Tuna II*, para 7.307.

<sup>25</sup> Panel Report, *U.S.-Tuna II*, para 7.310.

<sup>26</sup> Panel Report, *U.S.-Tuna II*, para 7.313.

<sup>27</sup> Panel Report, *U.S.-Tuna II*, paras. 7.328-330.

<sup>28</sup> Panel Report, *U.S.-Tuna II*, para 7.368.

<sup>29</sup> Panel Report, *U.S.-Tuna II*, para 7.374.

<sup>30</sup> Panel Report, *U.S.-Tuna II*, para 7.401.

<sup>31</sup> Panel Report, *U.S.-Tuna II*, paras. 7.413, 7.425.

<sup>32</sup> Panel Report, *U.S.-Tuna II*, para. 7.444.

<sup>33</sup> Panel Report, *U.S.-Tuna II*, para 7.442.

<sup>34</sup> Panel Report, *U.S.-Tuna II*, paras 7.465-466.

<sup>35</sup> Panel Report, *U.S.-Tuna II*, para 7.516.

<sup>36</sup> Panel Report, *U.S.-Tuna II*, para 7.518. See also, para 7.530.

<sup>37</sup> Panel Report, *U.S.-Tuna II*, para 7.520.

<sup>38</sup> Panel Report, *U.S.-Tuna II*, para 7.522.

<sup>39</sup> Panel Report, *U.S.-Tuna II*, paras 7.524, 528.

<sup>40</sup> Panel Report, *U.S.-Tuna II*, para 7.532.

<sup>41</sup> Panel Report, *U.S.-Tuna II*, para 7.540.

<sup>42</sup> Panel Report, *U.S.-Tuna II*, para 7.559.

<sup>43</sup> Panel Report, *U.S.-Tuna II*, para 7.354.

<sup>44</sup> Panel Report, *U.S.-Tuna II*, para 7.568.

<sup>45</sup> Panel Report, *U.S.-Tuna II*, para 7.570..

<sup>46</sup> Panel Report, *U.S.-Tuna II*, para 7.575.

<sup>47</sup> Panel Report, *U.S.-Tuna II*, para 7.716.

<sup>48</sup> Panel Report, *U.S.-Tuna II*, para 7.731

<sup>49</sup> Panel Report, *U.S.-Tuna II*, para. 7.729.

<sup>50</sup> Panel Report, *U.S.-Tuna II*, para 7.738.

<sup>51</sup> More information on the Appellate Body can be found here:

[http://www.wto.org/english/tratop\\_e/dispu\\_e/ab\\_members\\_descrp\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm) By January 2012, the members will be: Peter Van den Bossche (Belgium), Ricardo Ramírez-Hernández (Mexico), Shotaro Oshima (Japan), David Unterhalter (South Africa), Yuejiao Zhang (China), Thomas Graham (US), and Ujal Bhatia (India).

<sup>52</sup> An accessible introduction to the WTO dispute settlement process can be found here:

[http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/displ\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm)

<sup>53</sup> Text available at: [http://www.wto.org/english/tratop\\_e/dispu\\_e/ab\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/ab_e.htm)

<sup>54</sup> See text at: [http://wto.org/english/docs\\_e/legal\\_e/28-dsu\\_e.htm](http://wto.org/english/docs_e/legal_e/28-dsu_e.htm)

<sup>55</sup> Panel Report, *U.S.-Tuna II*, para 7.394.

<sup>56</sup> The VCLT states in part:

“Article 31

*General rule of interpretation*

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.



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2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

## Article 32

### *Supplementary means of interpretation*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.”

See full text at [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf)

<sup>57</sup> Panel Report, *U.S. – Tuna II*, at para 7.376.

<sup>58</sup> Panel Report, *U.S.-Clove Cigarettes*, para. 7.377.

<sup>59</sup> Panel Report, *U.S. – Tuna II*, at para 7.495.

<sup>60</sup> Panel Report, *U.S.-Tuna II*, paras 7.504, 7.509, 7.518-531, 7.562.

<sup>61</sup> Panel Report, *U.S.-Tuna II*, para 7.538.

<sup>62</sup> Panel Report, *U.S.-Tuna II*, para 7.552.

<sup>63</sup> Panel Report, *U.S.-Tuna II*, para 7.543.

<sup>64</sup> Panel Report, *U.S.-Tuna II*, para 7.545.

<sup>65</sup> Panel Report, *U.S.-Tuna II*, para 7.557.

<sup>66</sup> Panel Report, *U.S.-Tuna II*, para 7.518.

<sup>67</sup> Panel Report, *U.S.-Tuna II*, para 7.715.

<sup>68</sup> See case details at: [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds231\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds231_e.htm)

<sup>69</sup> Panel Report, *U.S.-Tuna II*, para 7.553.

<sup>70</sup> Panel Report, *U.S.-Tuna II*, para 7.554.

<sup>71</sup> Panel Report, *U.S.-Tuna II*, para 7.287.

<sup>72</sup> Panel Report, *U.S.-Tuna II*, para 5.110.

<sup>73</sup> Although it is worth noting that this dissenting panelist justified his finding on what is arguably a misreading of the precedents. For instance, the panelist argued that the dolphin-safe labeling requirements were fundamentally unlike the European requirement that “preserved sardines” be allowable only to refer to European sardines. (This refers to a measure at issue in the only major pre-2011 TBT case, which ruled that this was a technical regulation that violated the TBT.) The panelist in the present case argued that the sardine requirement was not “a labeling requirement but a naming requirement.” (See Panel Report, *U.S. – Tuna II*, at para 7.157.) But this distinction may find little currency with the Appellate Body: both the U.S. and WTO Appellate Body have argued against such a distinction in the *EC-Sardines* case. The U.S. stated that: “117. The United States submits that, contrary to what the European Communities claims, there is no need to prove that the EC Regulation is an explicit “technical regulation” for *Sardinops sagax*. Although the EC Regulation mentions only *Sardina pilchardus* by name, the United States asserts that this does not mean that the EC Regulation cannot be challenged by another Member, especially when that Member is precluded from labelling its sardine species as “sardines” by that regulation. 118. The United States also rejects the European Communities’ attempt to distinguish between labels and names, and states that the Panel correctly noted that both labelling and naming requirements are means of identifying a product.” (Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3359.) The WTO panel and Appellate Body also cast doubt on this distinction, see Appellate Body, *EC-Sardines*, at paras 188-193.

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<sup>74</sup> “5.107 With regard to the ordinary meaning of the term "mandatory", compliance with labelling requirements is "mandatory" if the labelling requirements are "compulsory", regulated "in a binding or compulsory fashion" or effectively "prescribed or imposed". The European Union would be reticent to deduce the "mandatory" nature of the US labelling scheme from the mere fact that economic operators in the United States are prohibited "by law" from using the label if they do not meet its conditions. Exclusively focusing on the form of the labelling scheme would appear formalistic since the US labelling scheme is optional in the sense that it leaves economic operators the freedom to choose whether they want to use the label or not. Whereas the conditions under which economic operators may bear the label are binding, the use of the US labelling scheme is not compulsory. In that sense, the measures at issue differ from labelling provisions which a law forces economic operators to use for certain specified products.

5.108 In the view of the European Union, the measures at issue differ significantly from those addressed in EC – Sardines. Whereas a product could not be marketed as "preserved sardines" under the EC Regulation if it contained fish from species other than *Sardina pilchardus*, the US labelling scheme does not prevent economic operators from marketing their products as "tuna" irrespective of whether the fish was harvested in accordance with the "dolphin-safe" criteria of the DPCIA or not. Consumers in the United States can identify tuna that was not harvested in accordance with the DPCIA as "tuna".

5.109 The European Union would also caution against including within the scope of the term "mandatory" labelling schemes which Mexico considers to be "de facto mandatory" because of market conditions. Consumers in a given market may prefer, or even overwhelmingly prefer, purchasing products that bear a certain label. But such consumer preferences do not make the use of the label "compulsory" or effectively "prescribed or imposed". Certain legal concepts in the WTO Agreements may extend to de facto situations. The problem with Mexico's proposed concept of "de facto mandatory" labelling schemes is, however, that it is not based on the design or structure of the measure, but on consumer preferences in the US market. As these factors are entirely outside the control of the US legislator, the European Union would be reticent to extend the term "mandatory" to such scenarios (i.e. consumer preferences) without any clear textual guidance from WTO provisions.”

See Panel Report, *U.S.-Tuna II*, paras 5.107-109.

<sup>75</sup> Panel Report, *U.S.-Tuna II*, paras 512 and 620.

<sup>76</sup> GATT Panel Report, *United States – Restrictions on Imports of Tuna*, DS21/R, 3 September 1991, unadopted, BISD 39S/155; GATT Panel Report, *United States – Restrictions on Imports of Tuna*, DS29/R, 16 June 1994, unadopted.

<sup>77</sup> *Earth Island Inst. v. Evans*, 2004 U.S. Dist. LEXIS 15729 (N.D. Cal. 2004).