

**L**atin America's experience in dispute settlement within WTO: the cases of technical standards, sanitary and phytosanitary measures and intellectual property

Tania García-Millán



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# **L**atin America's experience in dispute settlement within WTO: the cases of technical standards, sanitary and phytosanitary measures and intellectual property

Tania García-Millán



UNITED NATIONS

**ECLAC**

Division of International Trade and Integration

Santiago, November 2011

This document was prepared by Tania García-Millán, Consultant with the Division of International Trade and Integration of the Economic Commission for Latin America and the Caribbean (ECLAC).

The author would like to thank Sebastián Herreros for his valuable comments and suggestions.

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United Nations publication  
ISSN printed version 1680-869X  
LC/L.3421  
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Printed in United Nations, Santiago, Chile

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## Abstract

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Latin America and the Caribbean is among the fastest growing markets in the world and an important trading partner for many countries. The positive byproducts of this trend include deeper integration and strengthened economic and diplomatic relations with trading partners around the world. However, as trade continues to grow, disputes will naturally arise between nations with respect to a wide range of trade barriers. Often these disputes are addressed within the framework of the World Trade Organization's Dispute Settlement System.

This document describes the experience of the region in the WTO Dispute Settlement System by analyzing key disputes involving technical barriers to trade, sanitary and phytosanitary measures and intellectual property. These three areas, although conceptually diverse, have in common dealing with domestic, behind the border regulatory issues, as opposed to traditional trade barriers such as tariffs or import licences. Another common feature of the three areas is that each of them is regulated by a specific multilateral agreement negotiated during the Uruguay Round of the General Agreement on Tariffs and Trade (GATT). This negotiation, which lasted from 1986 to 1994, also resulted in the creation of the WTO.

As the magnitude of border measures has consistently lowered over the last two or three decades, domestic regulatory provisions have acquired an increasing prominence as potential obstacles to trade. To this extent, the analysis of the disputes presented here may point at future trends for Latin America and the Caribbean's participation in WTO dispute settlement.



## I. Introduction

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Latin American and Caribbean countries have been active participants in the WTO's Dispute Settlement System since its creation in 1995. They have been parties to disputes as complainants, respondents and third-parties, using the Dispute Settlement System to resolve —either by mutually-agreed upon solutions or litigation— what they have considered unfair trade practices by other WTO members. These disputes have set important precedents in WTO jurisprudence and have been critical in the interpretation of key WTO Agreements such as the Technical Barriers to Trade Agreement, Sanitary and Phytosanitary Measures and the Trade-Related Aspects of Intellectual Property Rights.

The ability for Latin American and Caribbean countries to use the Dispute Settlement System for the settlement of trade disputes has limited the ability of other WTO-member countries to unilaterally impose, and sustain, discriminatory and unfavorable trade terms —a core component of the World Trade Organization. In some instances, the differences have been resolved at the initial stage of consultations— a testament to the equalizing character of the WTO Dispute Settlement System. In other instances where a mutual agreement has not been reached in the early stages, Latin American countries have succeeded and prevailed in highly-contested disputes against the United States and the European Communities, among others.

In addition to the obvious and immediate benefits of engaging in the Dispute Settlement System to resolve trade disputes, participation also confers additional advantages such as the ability to effectively and proactively shape WTO law in the long-term as well as help in the interpretation of public international law. For example, a dispute brought by Peru against the European Communities involving the labeling of sardines, was a case of first impression for a Panel and interpreted for the first time certain provisions of the Technical Barriers to Trade Agreement.



As trade expands between Latin America and other regions of the world, these legal developments will serve as guidance to other WTO-members in the creation of their own national regulations that can impact international trade. Moreover, the Latin American experience in the WTO, both within the Dispute Settlement System and otherwise, will serve to guide other developing countries who are in the process of becoming members or aspire to accede to the WTO.

## II. Latin America and the Caribbean's participation in WTO Dispute Settlement: An overview

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Latin America and the Caribbean has been able to effectively navigate the WTO Dispute Settlement System to defend its rights and advance its interests. Since the System's inception in 1995, Latin American and Caribbean countries have been involved in 112 disputes as a complaining party, 87 disputes as a responding party and have been third-parties to disputes 300 times, for a total of 499 engagements. (See Table 1). Latin America and the Caribbean is among the most active developing regions in the WTO Dispute Settlement System (along with Asia) and is ahead of both the United States (by nearly double) and the European Union (formerly the European Communities) overall in terms of frequency of engagement.<sup>1</sup> These disputes have involved nearly every WTO Agreement.<sup>2</sup>

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<sup>1</sup> The European Union has been involved in 85 cases as a complainant, 70 cases as a respondent and 105 cases as a third-party for a total of 260 disputes; The United States has been involved in 98 disputes as a complainant, 113 disputes as a responding party and 87 disputes as a third-party for a total of 298 engagements.

<sup>2</sup> Includes: Agreement Establishing the World Trade Organization, Agreement on Agriculture, Anti-Dumping Agreement, Agreement on Implementation of Article VII (Customs Valuation), General Agreement on Tariffs and Trade 1994 (GATT 1994), Agreement on Import Licensing Procedures, Trade-Related Aspects of Intellectual Property Rights (TRIPS), Agreement on Rules of Origin, Agreement on Safeguards, Agreement on Sanitary and Phytosanitary Measures, General Agreement on Trade in Services, Agreement on Subsidies and Countervailing Measures, Agreement on Technical Barriers to Trade, Agreement on Textiles and Clothing (this Agreement terminated on January 1, 2005), Agreement on Trade-Related Investment Measures and Protocol of Accession. There has been no involvement in cases arising under Government Procurement (Note: Only Chile, Argentina and Colombia are observer governments to the Agreement) or in Civil Aircraft (Note: Only Argentina, Brazil and Colombia are observer governments to the Agreement) or Preshipment Inspection (in which there have been no disputes to date). Source: World Trade Organization online at [http://wto.org/english/tratop\\_e/dispu\\_e/dispu\\_agreements\\_index\\_e.htm](http://wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm).

**TABLE 1**  
**LATIN AMERICAN AND CARIBBEAN COUNTRIES AS COMPLAINANTS, RESPONDENTS**  
**AND/OR THIRD-PARTIES**

Country	Complainant	Respondent	Third-Party
Antigua and Barbuda	1	--	--
Argentina	15	17	31
Barbados	--	--	4
Belize	--	--	4
Bolivia, Plurinational State of	--	--	1
Brazil	25	14	65
Chile	10	13	26
Colombia	5	3	29
Costa Rica	5	--	15
Cuba	--	--	13
Dominica	--	--	3
Dominican Republic	--	7	4
Ecuador	3	3	14
El Salvador	1	--	13
Grenada	--	--	1
Guatemala	8	2	20
Guyana	--	--	3
Honduras	7	--	17
Jamaica	--	--	8
Mexico	21	14	56
Nicaragua	1	2	10
Panama	5	1	6
Paraguay	--	--	15
Peru	3	4	10
Saint Kitts and Nevis	--	--	3
Saint Lucia	--	--	3
Saint Vincent and the Grenadines	--	--	1
Suriname	--	--	1
Trinidad and Tobago	--	2	3
Uruguay	1	1	5
Venezuela, Bolivarian Republic of	1	2	16
<b>Total</b>	<b>112</b>	<b>87</b>	<b>300</b>

Source: World Trade Organization online at [http://www.wto.org/english/thewto\\_e/tif\\_3/org6\\_e.htm](http://www.wto.org/english/thewto_e/tif_3/org6_e.htm).

As is evident from Table 1, participation patterns vary widely across countries. On the one hand, small economies -such as several from the Caribbean- have generally not been very active in the WTO Dispute Settlement System. On the other hand, large economies (such as Argentina, Brazil and Mexico) and middle-sized, export-oriented ones (such as Chile) have been very active in shaping WTO jurisprudence. What is particularly notable is that although there are some intra-regional disputes, most disputes involve countries outside the region such as the United States, the EU and its member countries, China and India, among others. This is clear proof of the global presence of Latin American and Caribbean exports.

Moreover, although there have been concerns about the different experiences of developing nations versus developed nations in the Dispute Settlement Body (e.g., insufficient access to resources or legal expertise) there have been numerous cases where Latin American and Caribbean countries have named the United States and/or the European Union as respondents involving issues ranging from technical barriers to trade to intellectual property. For example, Argentina has been a complainant in seventeen disputes and named the EU three times as a respondent and the United States three times as well. Similarly, Brazil has requested consultations with the EC on seven occasions and the United States on 10 occasions.

The disputes involving the Technical Barriers to Trade Agreement, Agreement on the Application of Sanitary and Phytosanitary Measures and Trade-Related Aspects of Intellectual Property will be explored in the next several chapters. As will be evident from these disputes, Latin America and the Caribbean is playing an active role in world trade and accordingly, taking on a proactive role in the direction of WTO jurisprudence.



### **III. Disputes involving the Agreement on Technical Barriers to Trade**

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#### **A. Brief description of the TBT Agreement**

The Technical Barriers to Trade Agreement (hereinafter also referred to as “TBT Agreement”), annexed to the Agreement Establishing the World Trade Organization, is designed to ensure that countries pass legitimate standards and not protectionist measures which undermine negotiated-upon trade preferences. Although the TBT does not actually establish technical standards, it does provide general procedural and other requirements to be observed by countries when adopting or maintaining such measures. In doing so, it is designed to avoid unnecessary obstacles to trade.

As the text of the preamble of the TBT Agreement indicates, the purpose of the TBT is to encourage the development of international standards and conformity assessment systems and to ensure that technical regulations and standards, including packaging, marking and labeling requirements, and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade. The TBT recognizes that a country is allowed to take measures to ensure the quality of exports and to protect human, animal or plant life or health or the environment. Further, countries may prevent against deceptive practices and protect essential security interests. That autonomy, however, is limited by the prohibition of standards or technical regulations which rise to the level of arbitrary or unjustifiable discrimination between countries or disguised restrictions on international trade.

The Agreement also acknowledges the contributions which international standardization can make to the transfer of technology from developed to developing countries. Further, it also provides that assistance can be given to developing countries which may encounter special difficulties in the formulation and application of technical regulations, standards and procedures. For example, in the early 2000s, the World Trade Organization provided technical assistance to Latin American and Caribbean member countries with respect to notification procedures relating to standards and technical regulations as well as information regarding the formulation, implementation and compliance of international standards.

## B. The EC-Sardines Dispute

Since the creation of the Dispute Settlement System, the TBT Agreement has been cited 41 times by WTO-member countries in the request for consultations. In ten instances, Latin American and Caribbean countries have been complainants (e.g., Argentina, Chile, Mexico, Peru and Venezuela, Bol. Rep. of); Argentina has been a respondent in two disputes and Mexico has been a respondent in three disputes. It should be noted that one dispute was intra-regional: Mexico-Measures Affecting Imports of Matches (Complainant: Chile). Latin American and Caribbean countries have been third parties in 62 disputes (e.g., Argentina, Brazil, Chile, Colombia, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Paraguay, Uruguay, Venezuela, Bol. Rep. of).

Among the most significant disputes involving the TBT Agreement —both in terms of the interpretation of the provisions contained therein as well as the impact on the region— is the European Communities-Trade Description of Sardines (Short name: EC-Sardines). This case was of first impression for a WTO Panel as the TBT Agreement had not been previously interpreted by a Panel or the Appellate Body.<sup>3</sup> In fact, even the Tokyo Round Agreement on Technical Barriers to Trade (the “Tokyo Round Standards Code”) which preceded the TBT Agreement had also not been address by any Panel or Appellate Body. Moreover, other significant issues were also addressed in this dispute such as the applicability of the TBT Agreement to national regulations enacted prior to the existence of the Agreement and which party bears the burden of proof to establish a prima facie case. Since then, the EC-Sardines case has been cited by other Panels on multiple instances for the legal standards established therein.

In the instant dispute, Peru filed a request for consultations on March 20, 2001 pursuant to the Dispute Settlement Understanding (“DSU”) Article 4 based on a European Communities Council Regulation EEC No. 2136/89 (“EC Regulation”) enacted on June 21, 1989 which regulated “common marketing standards for preserved sardines and trade descriptions for preserved sardines and sardine-type products.” See Annex A for the pertinent text of the EC Regulation. Specifically, the EC Regulation limited the use of the label “sardines” exclusively to the species *Sardina Pilchardus Walbaum* (“*Sardina Pilchardus*”) which is commonly found in the Mediterranean Sea and consequently, prohibited the use of the same label on *Sardinops Sagas Sagax* (“*Sardinops Sagax*”), the species commonly exported from Peru.

Based on the aforementioned, Peru alleged, inter alia, that the EC Regulation was: (1) an unnecessary obstacle to international trade in violation of TBT Agreement Articles 2.1, 2.2 and 2.4; and (2) in contravention of the principle of non-discrimination under GATT 1994 Articles I and III.<sup>4</sup> It requested a finding that: (1) EC Regulation was inconsistent with WTO Agreements and should be brought into conformity without undue delay; and (2) to be able to market its sardines in accordance with a naming standard consistent with the TBT. Various Latin American countries —Chile, Colombia,

<sup>3</sup> In the EC-Measures Affecting Asbestos and Products Containing Asbestos (Short name: EC-Asbestos) the Panel and the Appellate Body examined whether the measure at issue was a technical regulation as defined by Annex 1.1 but did not complete the legal analysis of the TBT claims as there was no “adequate basis” upon which to examine them.

<sup>4</sup> On May 31, 2001, the parties held consultations but failed to reach an agreement and subsequently, on June 7, 2001, Peru requested the establishment of a Panel. The Panel was composed on August 31, 2001 and met 3 times with the parties between November 2001 and January 2002 and met on one occasion with the third parties in November 2001. The Panel submitted an interim report to the parties on March 28, 2002; the parties requested the Panel to suspend its proceedings in order to engage in negotiations. The parties were unable to reach a mutually satisfactory solution and the Panel issued its final report on May 22, 2002 with findings in favor of Peru. On June 25, 2002, the EC notified the DSB of its intention to file an appeal; the Appellate Body issued its report on September 26, 2002.

Ecuador and Venezuela, Bol. Rep. of— as well as Canada and the United States reserved their third-party rights.

Peru requested that the Panel analyze the claims in the following order: TBT Agreement Articles 2.4, 2.1 and 2.2, GATT 1994 Art. III:4. Further, it requested that the Panel only address the subsidiary claims (TBT Agreement Articles 2.1, 2.2 and GATT 1994 Article III:4) only if it found that the EC Regulation was in compliance with TBT Agreement Article 2.4. The analysis below will follow the order employed by the Panel (TBT Agreement Article 2.4 will be analyzed first).

## 1. The EC Regulation

The dispute concerned the EC's limited permissibility of the label "sardines" to *Sardina Pilchardus* and in exclusion of *Sardinops Sagax* notwithstanding the vast similarities between the two small fish species. Both species are used in the preparation of preserved and canned fish products packed in water, oil or other suitable medium.

The EC Regulation at issue stated that its purpose and scope was:

This Regulation defines the standards governing the marketing of preserved sardines and the trade description for preserved sardines and preserved sardine-type products marketed in the Community. (Article 1).

Moreover, Article 2—at the core of the dispute— stated in relevant part:

Only products meeting the following requirements may be marketed as preserved sardines and under the trade description referred to in Article 7:

- they must be prepared exclusively from fish of the species 'Sardina pilchardus Walbaum';
- they must be pre-packaged with any appropriate covering medium in a hermetically sealed container;
- they must be sterilized by appropriate treatment.

See Annex A for the text of the EC Regulation. The EU contended that the objectives of the Regulation as a whole were to: (a) keep products of unsatisfactory quality off the market; (b) facilitate trade relations based on fair competition; (c) ensure transparency of the market; (d) ensure good market presentation of the product; and (e) to provide appropriate information to consumers. In essence, by enacting the Regulation, the EC sought consumer protection, market transparency and fair competition.

## 2. Peru's Arguments – Technical Barriers to Trade, Article 2.4

Peru alleged that the EC Regulation prohibiting *Sardinops Sagax* to be marketed as "sardines" in the EC constituted, among other things, an unfair trade obstacle. Peru cited TBT Agreement Articles 2.4, 2.2 and 2.1 and GATT 1994 Article III:4.

Peru stated that the elements of a prima facie case to prove a violation of TBT Agreement Article 2.4 were:

- (1) Demonstrating the existence of a technical regulation;
- (2) The existence of a relevant international standard; and
- (3) The failure of the EC to base the measure at issue on the international standard.

Peru argued that it satisfied the three elements of the prima facie case because the EC Regulation was a technical standard within the meaning of the TBT Agreement, a relevant international standard applicable to the product at issue already existed (Codex Stan 94 explained below) and, lastly, the EC did not base its Regulation on said standard. Once those three elements were met, Peru asserted, the burden shifted to the EC to rebut the presumption.



As an initial matter, Peru argued that the EC Regulation was a technical standard within the meaning of the TBT Agreement because it fulfilled the three criteria laid down in the Appellate Body Report in EC-Asbestos: (i) the EC regulation applied to an identifiable product or products (“sardines”); (ii) it laid down one or more product characteristics (what products may be marketed as “sardines”); and (iii) compliance with the Regulation was mandatory (as compared to voluntary).

In satisfying the second element of the *prima facie* case, Peru advanced that the Codex Alimentarius Commission—a joint organization of the United Nations Food and Agricultural Organization and the World Health Organization (“Codex Alimentarius Commission”)—had a relevant regulation in place, Codex Stan 94, which regulated sardines and sardine-type products—precisely the product at issue in this dispute. Codex Stan 94 provides, in relevant part:

Article 2.1 – Product Definition: Canned sardines or sardine type products are prepared from fresh or frozen fish of the following species: *Sardina pilchardus*, *sardinops melanostictus*, *S. nopolcahrdus*, *S. ocellatus*, *S. sagax*, *S. caeruleus*...

Article 6.1 – Name of Food: The name of the product shall be:

“Sardines” (to be reserved exclusively for *Sardina Pilchardus* (Walbaum)); or

“X sardines” where “X” is the name of the country, a geographic area, the species, or the common name of the species, or any combination of these elements in accordance with the law and custom of the country in which the product is sold, and in a manner not to mislead the consumer.

See Annex B for the pertinent text of Codex Stan 94.

Peru argued that the EC Regulation at the core of the dispute was not based on Codex Stan 94. If it had been, Peru would have been able to market its products in the EC using any of the following labels as permitted by Codex Stan 94 Article 6.1:

1. Pacific Sardines (geographical area in which the species is found)
2. Sardines –*Sardinops Sagax* (species); or
3. *Sardinops Sagax* (common name of species).

### **3. EC's Arguments**

In attempting to defeat Peru's *prima facie* case, the EC alleged that the EC Regulation was enacted before the TBT Agreement came into effect and as such, the TBT Agreement was inapplicable. Relying on the text of Article 2.4, the EC alleged that the TBT Agreement applied only to the preparation and adoption of technical regulations and did not apply to the maintenance of technical regulations—in essence, it was inapplicable to the EC Regulation which was enacted before the TBT Agreement came into existence. To illustrate its point, the EC noted that the TBT Agreement is unlike the SPS Agreement (specifically Articles 2.2, 3.3 and 5.6) which expressly prohibit the maintenance of certain measures.

Notwithstanding this threshold issue, the EC addressed each element of Peru's *prima facie* case arising under TBT Agreement Article 2.4. The EC did concede that its Regulation was a technical regulation within the meaning of the TBT Agreement and that it lay down marketing standards for preserved *Sardina Pilchardus* but, qualified its admission by noting the regulation applied only to *Sardina Pilchardus* and not any other product. Consequently, the Regulation had to be read as a whole and Article 2 of the EC Regulation should not be read in isolation and interpreted as a technical regulation for preserved *Sardinops Sagax* (as Peru intended), preserved herrings or any other products. In making this argument, it relied on the EC-Asbestos case which held that “the proper legal character of the measure at issue cannot be determined unless the measure is examined as a whole.” Moreover, it also argued that the Regulation was not technical because it referred only to labeling and not naming.

Secondly, the EC argued that Codex Stan 94 was not a relevant international standard because it was procedurally deficient as it was not adopted according to the principle of consensus as required by

the TBT Committee in the Decision.<sup>5</sup> It also argued that Codex Stan 94 Article 6.1.1(ii), cited by Peru, was not a “relevant” international standard because the EC Regulation did not address products other than preserved *Sardina Pilchardus* (See Paragraph 6.1.1(i)). Moreover, the EC argued that it was not obliged to use Codex Stan 94 as a basis for the EC Regulation because, at the time the EC Regulation was adopted, the standard did not exist nor was its adoption imminent.

Lastly, the use of the term sardines for any species other than *Sardina Pilchardus* would not have been in accordance with the law and customs of the member states of the EC and would be misleading for consumers. The EC stated that there was a clear and uniform expectation in the EC among consumer that the term “sardines” referred only to preserved *Sardina Pilchardus*. In this regard, the EC argued that the regulation follows the guidance provided by Codex Stan 94.

Alternatively, the EC argued that the Regulation was necessary to fulfill legitimate objectives which Codex Stan 94 could not accomplish because it did not adequately distinguish between species.

With respect to the burden of proof, the EC stated that the burden of proving that the EC Regulation is not in compliance with the TBT Agreement rested entirely with Peru. As such, all of the elements of prima facie case to demonstrate a violation of Article 2.4 had to be established by Peru.

#### **4. Findings by the Panel and the Appellate Body**

After evaluating the arguments of the parties involved, and the submissions of third-parties, the Panel held that the EC Regulation was a technical regulation and in violation of TBT Agreement Article 2.4. Thus, the remaining allegations (e.g., TBT Agreement Articles 2.2, 2.1 and GATT 1994 Article III:4) were not considered. The Panel's rulings and reasoning are discussed below.

A central issue the Panel had to decide was whether the TBT Agreement could apply to the within dispute given that the Agreement was enacted subsequent to the EC Regulation's adoption. In reaching a determination, the Panel relied on the general principle of international law embodied in the Vienna Convention on the Law of Treaties 1969 (“Vienna Convention”), Article 28, Non-Retroactivity of Treaties stating that: “unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of entry into force of the treaty with respect to that party.” Although Codex Stan 94 is not a treaty in and of itself, the Panel held that the basic legal principles reflected in the Vienna Convention were relevant to the interpretation of WTO covered agreements.

Although the temporal issue had not previously been considered by Panels or the Appellate Body in the context of the TBT Agreement, it had been addressed in the context of the SPS Agreement in the watershed case of European Communities-Measures Concerning Meat and Meat Products (Short name: EC-Hormones) where the Appellate Body held that the SPS Agreement applied to situations or measures that had not ceased to exist. Relying on this reasoning, the Panel in the instant case held that the EC Regulation was a “situation or measure that did not cease to exist” and, since the TBT Agreement did not reveal a contrary intention to limit temporal application, the TBT Agreement applied to the measure at issue.

##### **Applicability of TBT Article 2.4:**

Once it was determined that the TBT Agreement could apply, the analysis shifted to whether it did apply (e.g., did the EC Regulation qualify as a technical regulation). The Panel determined that the EC Regulation was in fact a technical regulation within the meaning of TBT Annex 1.1. It held that, based on the text of TBT Agreement Annex 1.1, a technical regulation “lays down product characteristics” and “compliance is mandatory.” The Panel reasoned that the EC Regulation clearly encompassed product characteristics because it specified features and qualities affecting composition, size, shape, color and texture of preserved sardines. Furthermore, the language of the EC Regulation that

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<sup>5</sup> Decision on Principles and Procedures for the Development of International Standards, Guides and Recommendations.

the requirements contained therein [were] “binding in its entirety and directly applicable to all Member States” was clear evidence that compliance was mandatory. Thus, the TBT Agreement was applicable.

Upon making a finding that the TBT Agreement applied to the EC Regulation, the Panel proceeded to analyze whether the EC Regulation rose to the level of a violation of TBT Agreement Article 2.4.

The Panel first had to make a finding with respect to Codex Stan 94. In this regard, it found that the Codex Alimentarius Commission was an international body [within the meaning of TBT Agreement Annex 1.4] and that a standard adopted by a recognized body need not be approved by consensus (as the EC had argued). As such, for purposes of the dispute, Codex Stan 94 was an international standard.

Once this procedural hurdle was overcome, the analysis shifted to whether it was a relevant standard as required by Article 2.4. The Panel concluded that Codex Stan 94 was relevant because both the provision and the EC Regulation were similar in scope and regulated, inter alia, presentation, packing medium, labeling, odor and flavor. Further, the panel held that the EC was required to use Codex Stan 94 as a basis for its Regulation. This holding, the Panel reasoned, was supported both by the text of TBT Agreement Article 2.4 as well as Article 28 of the Vienna Convention. It stated that the EC Regulation had not ceased to exist and that the obligations arising under WTO Agreements are not static but rather, continuous and ongoing. In fact, the TBT Agreement, the Panel noted, “imposes an ongoing obligation on Members to reassess their existing technical regulations in light of the adoption of new international standards or the revision of existing international standards.”

Moreover, the Panel found Codex Stan 94 was not used as a basis for the EC Regulation because the latter did not permit any product other than *Sardina Pilchardus* to be labeled as “sardines” even when combined with the name of a country, name of a geographic area, name of the species of the common name (as Codex 94 allowed).

Additionally, the Panel found that Codex Stan 94 was effective to fulfill the legitimate objectives of the EC regulation. It reasoned that although the EC had the burden of proof to show that Codex Stan 94 was ineffective or inappropriate, Peru had provided sufficient evidence to demonstrate that Codex Stan 94 was not ineffective or inappropriate. Simply, the Panel found no reason why the inclusion of the name of a country, name of a geographic area, name of the species or the common name with the term “sardines” to refer to *Sardinas Sagax* would be ineffective or inappropriate. Codex Stan 94 allowed Members to provide a precise trade description for preserved sardines and thereby promoted the EC's objectives of market transparency so as to protect consumers and promote fair competition.

The findings of the Panel were that:

1. Codex Stan 94 is a relevant international standard;
2. Codex Stan 94 was not used as a basis for the EC Regulation; and
3. Codex Stan 94 is not ineffective or inappropriate to fulfill the legitimate objectives pursued by the EC Regulation.

As such, the Panel concluded that the EC Regulation is inconsistent with TBT Agreement Article 2.4.

Following the issuance of the Panel's Report on May 29, 2002, the EC informed the DSB on June 25, 2002 of its intent to appeal certain issues of law covered in the report and legal interpretations developed by the Panel pursuant to Article 16.4 of the DSU.

The Appellate Body upheld the Panel's finding that: (1) the EC Regulation was a technical regulation within the meaning of Article 2.4; (2) the TBT Agreement applied to measures that were adopted before January 1, 1995 that have not ceased to exist; (3) Codex Stan 94 was a relevant international standard under Article 2.4; and (4) Codex Stan 94 was not used as a basis for the EC Regulation for substantially the same reasons advanced by the Panel.

The Appellate Body did, however, reverse the Panel's finding that the burden of proof lay with the EC to demonstrate that Codex Stan 94 was an ineffective or inappropriate means for the fulfillment

of the legitimate objectives pursued by the EC Regulation. It found instead that the burden of proof rested with Peru to demonstrate that Codex Stan 94 was an effective and appropriate means to fulfill those legitimate objectives. Notwithstanding, it was a harmless error as the Appellate Body found that the evidence presented by Peru during the Panel proceeding was sufficient to satisfy its required burden of proof. The Appellate Body, like the Panel, employed judicial efficiency and found it unnecessary to complete an analysis under Article 2.2. or 2.1 of the TBT Agreement or Article III:4 of GATT 1994.

Subsequently, pursuant to Article 21.3(b) of the DSU, the parties agreed to a reasonable period of time for the EC to implement the recommendations and rulings of the Panel and Appellate Body.<sup>6</sup> Shortly thereafter, the parties notified the DSB that they reached a mutually acceptable solution and agreed, among other things, that the EC would amend its regulation to state “preserved sardine-type products” (which included *Sardinops Sagax*) could be “marketed under a trade description consisting of the word ‘sardines’ joined together with the scientific name of the species.”<sup>7</sup>

Peru succeeded in its claim and was eventually able to fairly and effectively market *Sardinops Sagax* in the EC.

## C. The US-Tuna Dispute

Another significant—and more recent—dispute arising under the TBT Agreement is United States—Measures Concerning the Imports and Sale of Tuna and Tuna Products (Short name: US-Tuna), a dispute between Mexico and the United States involving the use of the “dolphin-safe” label on tuna and tuna products sold in the United States. The dispute relates to the prohibition of the use of the label “dolphin-safe” on Mexican exports of tuna and tuna products (destined for the US) despite that the label is used on tuna products from other countries.

The US-Tuna dispute is significant not only because of the legal issues addressed by the Panel but also because of the underlying conservation concerns with respect to dolphins, the long history of international and diplomatic efforts to resolve the outstanding issues (both with respect to the dolphin crisis and the measures at issue) and the unique character of a dispute involving a developing and developed nation.

### 1. The Dolphin Crisis

Although the within dispute was filed by Mexico in 2008, efforts to address the dolphin crisis can be traced back as early as 1976 with the creation of the International Dolphin Conservation Program in order to address concerns regarding dolphin injuries and mortality in the Eastern Tropical Pacific Ocean (“ETP”).<sup>8</sup> Subsequent to its creation, a series of multilateral agreements were reached in response to the evidence that many dolphins were dying in the ETP each year including the La Jolla Agreement (1992) to which the US and Mexico are signatories. Subsequently, the Panama Declaration (1995) served to further solidify the commitments and objectives of the La Jolla Declaration (1992) and stated the parties’ intentions to conclude a binding international agreement on dolphin conservation in the ETP. Annex 1 of the Panama Declaration lists certain “envisioned changes in United States law” including the following:

...the term “dolphin-safe” may not be used for any dolphin caught in the [ETP] by a purse seine vessel in a set in which a dolphin mortality occurred as documented by observers by weight calculation and well location.

In 1998, the negotiations on the Agreement on the International Dolphin Conservation Program (AIDCP) concluded and the agreement came into force in 1999. Both Mexico and the US are signatories to the Panama Declaration and parties to the AIDCP. Through a comprehensive program of monitoring,

<sup>6</sup> The parties agreed to extend the time for implementation on two occasions.

<sup>7</sup> It should be noted that the Notification of Mutually Agreed Solution stated that “trade descriptions based on geographic names alone are not sufficiently distinctive.”

<sup>8</sup> The Eastern Tropical Pacific Ocean extends from San Diego, California, USA along the coast of the Americas to Northern Peru.

tracking, verification, and certification, featuring the use of independent observers on board tuna fishing vessels, the AIDCP dramatically reduced observed dolphin mortality in the ETP. In June 2001, the parties adopted the “Resolution to Adopt the Modified System for Tracking and Verification of Tuna” which included the following definitions:

- a. Dolphin safe tuna is tuna captured in sets in which there is no mortality or serious injury of dolphins;
- b. Non-dolphin safe tuna is tuna captured in sets in which mortality or serious injury of dolphins occurs.

Nearly simultaneously, the US was engaged in its own national efforts to address the dolphin crisis in the ETP. In 1972, the Marine Mammal Protection Act (“MMPA”) was passed for the overall protection of dolphins and other mammals. The MMPA was later amended to prohibit the import into the United States of any marine products and any fish or fish product harvested where there was not a program comparable to that of the United States minimizing the incidental taking of marine mammals. Pursuant to these amendments, the US imposed an import embargo on all tuna from Mexico (as well as from other countries) for failure to achieve comparability with US tuna harvesting standards that prohibited setting on dolphins. In response, Mexico challenged the embargo in dispute settlement proceedings under GATT 1947 but the panel was never adopted.

Additionally, in 1990, the United States enacted legislation known as the Dolphin Protection Consumer Information Act (“DPCIA”) which established the standard for labeling tuna products as “dolphin-safe.” Subsequently, in 1997, the US enacted the International Dolphin Conservation Program Act (“IDCPA”) to comply with the commitments of the Panama Declaration. The legislation authorized a change in the “dolphin-safe” labeling standard contingent on the outcome of United States Department of Commerce (“US DOC”) studies analyzing “whether the intentional deployment on or encirclement of dolphin with purse seine nets is having a significant adverse impact on any depleted dolphin stock in the [ETP].” Thus, the standard would be changed in accordance with the US international obligation unless there was clear evidence that the method of fishing was actually having a significant adverse impact on dolphins.

In December 2002, the US DOC determined that there was insignificant evidence to conclude that the intentional encirclement of dolphins with purse seine nets was having a significant adverse effect on “depleted dolphin stocks in the ETP.” Multiple NGOs disputed the findings and the Earth Island Institute filed suit challenging the US DOC’s initial and final findings in the matter *Earth Island Institute v. Hogarth*, 494 F.3d 757 (9th Cir. 2007). The Ninth Circuit Court of Appeals affirmed the District Court’s holding that the US DOC abused its discretion when it triggered a change in the dolphin-safe label standard. Therefore, despite its international commitments, the US did not change its standard and as a result, Mexico was still prohibited from using the “dolphin-safe” label on its products. See Table 2.

**TABLE 2**  
**INTERNATIONAL EFFORTS AND US AND MEXICO’S ACTIONS IN THE DOLPHIN CRISIS**

International Efforts	US Actions	Mexico’s Actions
1972	Marine Mammal Protection Act (“MMPA”) is enacted.	
1990	Dolphin Protection Consumer Information Act is enacted (amended MMPA).	
1991	US begins embargo of Mexican tuna.	Mexico files disputes in GATT 1947 System, <i>United States – Restrictions On Imports of Tuna</i> (Panel report was unadopted.)

(continued)



Table 2 (concluded)

	International Efforts	US Actions	Mexico's Actions
1992		Signing of the La Jolla Agreement.	
1995	Signing of the Panama Declaration.	US embargo on Mexican tuna ends.	
1999	AIDCP comes into effect.		
2001	Resolution to Adopt the Modified System for Tracking and Verification of Tuna adopted		
2007		Ruling in <i>Earth Island Institute v. Hogarth</i> .	
2008			Requests consultations with US in accordance with DSU (DS381).

Source: Author.

Based on the foregoing, Mexico sought recourse within the Dispute Settlement System and on October 24, 2008, requested consultations with the US pursuant to DSU Article 4 citing violations of GATT 1994 Articles I:1 and III:4 and TBT Agreement Articles 2.1, 2.2. and 2.4. The parties failed to reach a mutually acceptable agreement and a Panel was established on April 20, 2009 and composed on December 2, 2009. Argentina, Brazil, Ecuador, Guatemala and Venezuela, among others,<sup>9</sup> reserved their third-party rights. The Panel then held multiple substantive meetings with the parties and third-parties. On July 8, 2011 the Panel issued its final report. The factual aspects, legal arguments and findings of the Panel are discussed below. It should be noted that Mexico specifically requested that the Panel not exercise judicial economy and instead, analyze all of the claims raised by Mexico. It requested that the Panel first consider the claims arising under GATT 1994 III:4, I:1 and Article 2.1 of the TBT and then the claims arising under Articles 2.2 and 2.4 of the TBT.

## 2. Mexico's Arguments

Mexico alleged that the prohibition of the “dolphin-safe” label on its tuna and tuna products caught in the ETP is a discriminatory practice and an unfair obstacle to trade. Mexico identified various US measures which affected the importation, marketing and sale of tuna and tuna products including:

- (1) United States Code, Title 16, Section 1385 (codified at 16 U.S.C. §1385), commonly referred to as the Dolphin Protection Consumer Information Act;
- (2) Code of Federal Regulations, Title 50, Section 216.91 (codified at 50 C.F.R. §216.91) commonly referred to as the Dolphin-safe labeling standards;
- (3) Code of Federal Regulations, Title 50, Section 216.92 (codified at 50 C.F.R. §216.92) commonly referred to as the Dolphin-safe requirements for tuna harvested in the [Eastern Tropical Pacific Ocean] by large purse seine vessels; and
- (4) The holding in *Earth Island Institute v. Hogarth*, 494 F.3d 757 (9th Cir. 2007).

The aforementioned measures provide a number of requirements which must be met in order for tuna or tuna products sold in the US to bear the label “dolphin-safe” —a label which indisputably has great commercial value for US consumers. For example, these regulations require, depending on

<sup>9</sup> Australia, Canada, China, the European Communities, Japan, Korea, New Zealand, Chinese Taipei, Thailand and Turkey also reserved their third-party rights.

whether the tuna is fished in the ETP or outside the ETP, various certifications, written statements with respect to the manner in which the tuna was caught and/or the presence of internationally-legitimate observers during fishing expeditions, among other things. See Annex C for Exhibit US-59 submitted by the United States which details the requirements of the US dolphin-safe measures. If a product is found to be wrongfully labeled during a spot check, the product will likely be seized as evidence and the US authorities may decide to forfeit, destroy or re-export the product (in the case of imports). Such determinations are made on a case-by-case basis and are fact sensitive. Moreover, the US may impose sanctions for offering for sale or export tuna products which are falsely labeled and violators may be prosecuted under the DPCIA provisions or other federal laws for establishing false statements, or smuggling prohibitions.

The United States' measures prohibit the use of a dolphin-safe label on imports of tuna products from Mexico notwithstanding that these products meet the definition of dolphin-safe under the governing multilateral environmental agreements (e.g., The La Jolla Agreement, the Panama Declaration and the AIDCP) to which both Mexico and the United States are parties. Mexico alleges, inter alia, that the United States' measures, and the obligations contained therein, are inconsistent with GATT 1994 Articles I:1 and III:4 as well as the TBT Agreement Articles 2.1, 2.2 and 2.4.<sup>11</sup>

### **Claims arising under GATT 1994**

#### **GATT 1994 Article III:4**

Mexico argued that while it has maintained environmentally sustainable practices for fishing tuna and participated in multilateral initiatives to protect dolphins, Mexican tuna cannot use a dolphin-safe label yet, other countries that have not adopted comparable measures, are able to utilize a dolphin-safe label on their products sold in the United States.

At the core of Mexico's allegations, it sustained that Mexican tuna and tuna products imported into the United States are accorded less favorable treatment relative to like US tuna and tuna products. In order for Mexico to prevail on this issue, it had to show that Mexican and US tuna are like products. In this regard, Mexico stated that it fulfilled the four criteria used in EC-Asbestos for "like" products: (1) the [physical] properties, nature and quality of the products are identical; (2) the end-uses of the products are identical as tuna from Mexico and the US are destined for consumption by consumer and for processing into tuna products at a canner; (3) but for the regulatory distinction (e.g., use of the dolphin-safe label) consumers' taste and habits are the same; and (4) both Mexican and US tuna have the same tariff classification (1604.14 of the Harmonized System which refers to "Tunas, Skipjack and Bonito, Sarda SPP, Prepared or Preserved").

If the products are like products, the analysis then shifts to whether Mexican tuna products are afforded less favorable treatment than US tuna products. In this respect, Mexico alleged that the less favorable treatment accorded by the US is of a de facto nature rather than de jure – essentially, the US does not discriminate on the basis of the origin of country but rather on the basis of where the tuna is harvested and the fishing method.<sup>12</sup> This de facto less favorable treatment modifies the conditions of competition in the US market to the detriment of Mexican products.

#### **GATT 1994 Article I:1**

Mexico alleged that there is also a violation of GATT 1994 Article I:1 because: (1) the imported products are "like" products (and relies on substantially the same reasons made under GATT 1994 Article III:4); (2) Mexico is denied the "advantage, favor or privilege" of designating its tuna products as dolphin-safe which strips it of a significant commercial advantage relative to other WTO-members; and (3) the US measures are de facto discriminatory because they distinguish on the basis of where the tuna

<sup>11</sup> Mexico initially also cited Article 2.3 but later abandoned this claim.

<sup>12</sup> In illustrating this argument, Mexico notes that the fishing fleets of Mexico and the fishing fleets of the US harvest tuna in different ocean fisheries using different fishing methods. Specifically, Mexican tuna are caught almost exclusively in the ETP using purse-seine nets set upon dolphins whereas the US fleet fish outside of the ETP using other fishing methods such as FADs (Fish Aggregating Devices). As such, the different labeling requirements of the US measures are applied and inevitably, Mexican tuna products are not eligible to be labeled dolphin-safe while US products are.

is harvested and the fishing method (the same argument raised under GATT 1994 III:4) and violate the most-favored-nation obligations.

### **Claims arising under the Technical Barriers to Trade Agreement**

Mexico advanced that the US measures were technical regulations pursuant to Annex 1.1 because they: (1) apply to an identifiable product (e.g., tuna and tuna products); (2) lay down the characteristics under which a tuna product can be labeled as dolphin-safe; and (3) the regulation is mandatory because it prohibits the use of dolphin-safe label unless specific requirements are met. As such, the TBT applies.

#### **TBT Article 2.2**

These technical regulations, Mexico argued, are inconsistent with Article 2.2 because they do not fulfill legitimate objectives. Mexico stated that the US measures not only not protect animal life, health or the environment but instead, worsen it because the regulations promote alternative use of fishing methods that could be more harmful and undermine economic incentives for countries to enter into multilateral agreements (e.g., AIDCP). The regulations trade off preservation of dolphin stock with the protection of other animal life or the health of the environment—not legitimate objectives within the meaning of TBT Art. 2.2.

However, even if the regulations were found to fulfill a legitimate objective, they still do not adequately preserve dolphin stock in the ETP more than what the AIDCP already does successfully. In this way, the US measures are more trade restrictive than necessary.

#### **TBT Article 2.4**

Mexico also argued that the technical regulations are also inconsistent with Article 2.4 because the US failed to base its standard on the AIDCP, an already existing relevant standard that is an effective and appropriate means for the fulfillment of the objectives pursued. As noted by Mexico, the AIDCP specifically regulates under what conditions tuna and tuna products can be certified as dolphin-safe and bear a dolphin-safe label—exactly the same purpose as the US regulations. Instead of using this standard, the US imposed a unilateral standard that does not pursue a legitimate objective, or alternatively, can be (and is) accomplished by the AIDCP.

#### **TBT Article 2.1**

Mexico further argued that the US regulations are in contravention of Article 2.1 for substantially the same reasons it raises under GATT Article III:4 (the US regulations do not accord products imported from Mexico treatment no less favorable than that accorded to like products of national origin) and GATT Article I:1 (the US measures do not accord products imported from Mexico treatment no less favorable than that accorded to like products originating in any other country).

## **3. United States' Arguments**

The United States took the posture that these measures were enacted in order to establish conditions under which the voluntary “dolphin-safe” label may be used on tuna and tuna products. Specifically, these measures did not allow tuna products to be labeled as “dolphin-safe” if they contained tuna that was caught by intentionally encircling and deploying purse seine nets on dolphins—a process commonly referred to as “setting on dolphins”—which involves chasing, encircling and deploying purse seine nets on dolphins to catch tuna that swim and associate with dolphins. The only known fishery where this takes place is the ETP.

### **Claims arising under GATT 1994**

#### **GATT 1994 Article III:4**

The US argued that Mexico failed to establish a prima facie case under GATT Article III:4. As an initial matter, the dolphin-safe labeling provisions did not discriminate based on origin and therefore cannot afford less favorable treatment to Mexican tuna products as compared to like domestic products. In support of its argument, the US stated that the measures provided that any tuna products regardless of origin may use the dolphin-safe label if they meet the criteria outlined in the measures. In fact, there were already Mexican tuna and tuna products that are not caught by setting on dolphins that are eligible



for the dolphin-safe label – clear evidence of non-discrimination. Thus, the US contended that there was no violation of GATT Article III:4.

#### **GATT 1994 Article I:1**

Moreover, the US argued, there is no violation of GATT 1994 Article I:1 either. The US measures do not accord any advantage to products of any other WTO-member that is not also immediately and unconditionally accorded to products of Mexico within the meaning of GATT 1994 Article I:1. The measures are origin-neutral and are equally applicable to all tuna irrespective of its origin. Although Mexico tried to characterize the provisions as unfairly targeting its tuna, it failed to point out that vessels flagged from various other countries also catch tuna in the ETP (e.g., Ecuador, Colombia, El Salvador, Guatemala, Nicaragua, Panama and Venezuela, Bol. Rep. of). Its allegations of discrimination, the US said, are simply unfounded.

In further support of its position, the United States stated that there had already been a previous finding on this very issue in US – Tuna (Mexico) under the GATT Dispute System. In what were the same arguments by Mexico, the GATT panel concluded that the dolphin-safe measures imposed by the US were not inconsistent with Article I:1 (but the Panel report was never adopted).

#### **Claims arising under the TBT Agreement**

The United States argued that the measures were not technical regulations within the meaning of Annex 1 of the TBT Agreement and thus, Articles 2.1, 2.2. and 2.4 did not apply.

The United States claimed that a technical regulation is a document with which compliance is mandatory and “lay[s] down product characteristics...” or “deal[s] exclusively with terminology...or labeling requirements as they apply to a product...” On the contrary, it stated, Article 4 and Annex 3 of the TBT Agreement set out members’ obligations with respect to documents with which compliance is voluntary —commonly referred to as a standard. Both Article 2 and Article 4 include labeling requirements and, whether such a requirement falls within the scope of a technical regulation (Article 2) or a standard (Article 4) depends on whether compliance is mandatory or voluntary.

The US alleged that the dolphin-safe labeling measures were not technical regulations because the measures specify only the conditions under which the tuna may be labeled dolphin-safe and do not specify the product characteristics the tuna must meet to be sold in the US market. Secondly, the regulations are not mandatory —the dolphin-safe label is a voluntary labeling scheme. The US stood firm that it is perfectly legal and allowable to sell tuna products in the US that are not dolphin-safe and do not bear the label. [It should be noted that the GATT 1947 Panel reached the same conclusion with respect to the DPCIA.] Thus, Article 2 is simply inapplicable.

#### **TBT Article 2.1**

Notwithstanding, if the TBT does apply, there is no violation of Article 2.1 for substantially the same reasons that there is no violation of GATT Articles I:1 and III:4.

#### **TBT Article 2.2**

Similarly, there is no violation of Article 2.2 either. The US measures were designed to fulfill the following objectives: (1) ensure that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins; and (2) to the extent that consumers choose not to purchase tuna without the dolphin-safe label, the US provisions ensure that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins. The US provisions were within the exceptions of Article 2.2 as they serve to protect “animal...life or health, or the environment” by protecting dolphins and also prevent “deceptive practices” by ensuring that tuna products are not falsely or misleadingly labeled dolphin-safe. With respect to Mexico’s characterization that the US measures are a “trade-off” between dolphin preservation and other marine life, the US stated that it is not for Mexico to decide what policy objectives the US should pursue and also, Mexico’s position ignored that there are a number of measures in place to protect other marine species and the environment.

The US portrayed Mexico's secondary argument—that the even if the US measures could in principle fulfill a legitimate objective they actually do not—as being without merit. The measures ensured that consumers are not misled or deceived about the tuna products they purchase and to the extent consumers purchase unlabeled products, the measures did not encourage the practice of setting on dolphins to catch tuna in the ETP.

Moreover, the US contends that its measures are not more trade restrictive than necessary and Mexico failed to establish that there was a reasonable alternative measure that fulfills the provisions' objectives that is significantly less trade-restrictive. With respect to the AIDCP, it was not a reasonably available alternative because although it has made an important contribution to dolphin protection in the ETP, dolphin populations remain depleted and have not recovered. The AIDCP is simply one part of the overall comprehensive strategy the US has employed to protect dolphins.

#### **TBT Article 2.4**

Likewise, there was no violation of Article 2.4. Mexico cited an AIDCP resolution (“Resolution to Adopt the Modified System for Tracking and Verification of Tuna”) as the relevant international standard however the US disputed that it was not (1) a standard; (2) international; or (3) relevant.

The US defended its assertion by noting that the AIDCP Resolution is not a standard because it does not set out rules, guidelines or characteristics for products or related processes and production methods instead, sets out a definition for purposes of an inter-governmental agreement. The Resolution is also not adopted by an international body (e.g., a legal or administrative entity that has specific tasks or composition) and instead is limited to approval by the parties to the agreement itself.

The United States further stated that it was also not international because only a limited number of countries participated in the adoption of the Resolution and the AIDCP by its own terms limits those who are eligible to do so (unlike an international body whose membership is open to at least all WTO-members).

Lastly, the US argued, it was not relevant because the AIDCP Resolution does not set out any rules, guidelines or characteristics with respect to the labeling of tuna products and thus, has no bearing on the US measures. Further, using the definition “dolphin-safe” as defined in the AIDCP Resolution (tuna caught in a set in which no dolphins were observed killed or seriously injured) would not be effective to ensure that consumers are not misled about whether dolphins were adversely affected.<sup>13</sup> In fact, although the US conceded that the AIDCP has made important contributions to the protection of dolphins in the ETP it does not ensure that dolphins are not killed or seriously injured when dolphins are used to catch tuna (the AIDCP contemplates that up to 5000 dolphins may be killed during setting to catch tuna). In this way, the US provisions protected dolphins in ways that went beyond the protections provided by the AIDCP. Thus, the AIDCP cannot effectively address the objectives pursued by the US regulations.

For these reasons, the United States requested that the panel should reject Mexico's claims that the regulations are in contravention of WTO agreements.

## **4. Panel Findings**

The first issue the Panel considered was in what order Mexico's claims would be analyzed. The Panel decided that it would rule on the provisions of the TBT before ruling on GATT 1994 given the specificity of the TBT Agreement and its precedence over GATT 1994 in the event of a conflict between the provisions of two agreements.

After deciding that the claims arising under the TBT would be analyzed first, it had to consider whether the regulations were technical regulations within the meaning of Annex 1 of the TBT

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<sup>13</sup> The definition employed by the AIDCP uses the term observed as the limiting factor.

Agreement.<sup>14</sup> Relying on the test established in EC-Asbestos and later followed in EC-Sardines, the Panel held that the US regulations were technical regulations because: (1) the measures applied to an identifiable group of products (tuna and tuna products); (2) the measures lay down labeling requirements as they applied to a product, process or production method and the subject-matter of the measures falls within the scope of the second sentence of Annex 1.1; and (3) they are de jure mandatory because they regulated dolphin-safe labeling requirements in a “binding or compulsory fashion.”<sup>15,16</sup>

### **TBT Article 2.1**

In order to determine whether less favorable treatment is accorded to Mexican imported products than to like products of US origin or like products originating in any other country with respect to these measures, it was necessary for the Panel to examine whether the products were “like” products within the meaning of TBT Art. 2.1. Seeking guidance from the context of Article III:4 as interpreted by the Appellate Body in EC-Asbestos, the Panel noted that “like products” under Article 2.1 may be understood as relating to “the nature and extent of a competitive relationship” between and among products.

The Panel compared Mexican tuna products and US tuna products, as well as tuna products originating in any other country.<sup>17</sup> It found that Mexican tuna are like tuna products of US origin and like those of tuna products originating in any other country within the meaning of TBT Article 2.1. It reasoned that: (i) the products share common physical characteristics and properties; (ii) have the same end uses and tariff classification; and (iii) but for the dolphin-safe label, consumers’ tastes and habits are identical with respect to Mexican and US tuna products.

After determining that the products at issue were like products, the Panel shifted its analysis to whether they were accorded less favorable treatment. The Panel determined that less favorable treatment would arise [between like products] with respect to technical regulations if imported products originating in any Member [country] were placed at a disadvantage, compared to like domestic products and imported products originating in any other country, with respect to the preparation, adoption or application of technical regulations.<sup>18</sup>

In order to determine whether Mexico experienced less favorable treatment, the Panel developed a two prong approach and considered whether: (1) access to the “dolphin-safe” label was an advantage; and (2) were Mexican tuna products denied access to the label under the measures at issue, so that they faced a disadvantage on the US market as compared to US or imported tuna products originating in any other country. The Panel found that the “dolphin-safe” label was an advantage as it had a significant commercial value on the US market and is the only way dolphin-safe status can be obtained. In analyzing the second prong, the Panel relied on the Appellate Body’s reasoning in EC-Asbestos that an

<sup>14</sup> With respect to the analysis of the claims, Mexico requested that all the measures be ruled upon collectively – not separately or independently - because they are all part of the same dolphin-safe labeling regime. In response to questions by the Panel, Mexico stated that “[a] measure can be made up of more than one instrument. It is common in the domestic legal systems of many WTO members for a measure to comprise legislative provisions, regulatory provisions and other kinds of legal instruments.” The United States did not object to this approach and the Panel agreed that there was no “legal, factual or logistical obstacle” to treat the interrelated measures as a single measure for purpose of the dispute (16 U.S.C. §1385, 50 C.F.R. §§216.91,92 and Hogarth ruling). The panel decided to analyze the claims in the following order: TBT Articles 2.1, 2.2, 2.4 and GATT Arts. I:1, III:4.

<sup>15</sup> Although Mexico argued that the regulations were primarily de facto mandatory, the Panel held that it was de jure because the “dolphin-safe” standard imposed by the US measures was the only standard available and prescribed, both in a positive and negative manner, the requirements for “dolphin-safe”.

<sup>16</sup> It should be noted that although the majority of the Panel agreed that it was a technical regulation, one Panelist disagreed and dissented. The Panelist concluded that the measures at issue did not meet the three-prong test formulated in EC-Asbestos, followed in EC-Sardines and applied here because the measures at issue did not require mandatory compliance with the prescribed product characteristics or process and production method.

<sup>17</sup> The Panel sought clarification as to whether the products to be compared for likeness were: (i) US tuna and Mexican tuna in general, (ii) Mexican tuna caught in the ETP by setting on dolphins and US tuna caught otherwise; or (iii) between Mexican dolphin-safe tuna and US dolphin-safe tuna. Mexico indicated that its claims were limited to findings concerning tuna products and specified that the great majority of Mexican tuna products are made from tuna caught in the Mexican fleet. Further, for purposes of establishing a violation, it focuses on the most common type of tuna product: tuna meat packaged in retail ready cans and pouches.

<sup>18</sup> This concept of “less favorable treatment” is consistent with the general concept articulated by the Appellate Body that “the essence of non-discrimination obligations is that like products should be treated equally irrespective of their origin.”

inquiry into less favorable treatment involves a comparison of how the group of domestic like products and the group of like imported products are treated. After a thorough analysis on the various financial and market effects of the regulations on Mexican tuna (e.g., costs to adapt to regulations, pressure from the US market), the Panel found that Mexico had not proved that the US dolphin-safe provision afforded less favorable treatment to its tuna products within the meaning of Article 2.1. The Panel reasoned that although the measures may have a detrimental impact on certain imports it does not amount to less favorable treatment. Further, the Panel found that the measures apply to the same origin-neutral requirements to all tuna products, do not inherently discriminate on the basis of the origin of the products and do not make it impossible for Mexican tuna products to comply with the requirements therein.

### **TBT Article 2.2**

The Panel noted that the plain text of Article 2.2 requires that:

- (1) Technical regulations must pursue a legitimate objective; and
- (2) They must not be more trade-restrictive than necessary to fulfill that legitimate objective, taking into account the risks non-fulfillment would create.

Additionally, the burden rested with Mexico to prove that there is a violation of Article 2.2.

In this regard, the Panel found that the goals of the US regulations fell within the scope of legitimate regulations enunciated by Article 2.2: “prevention of deceptive practices” and “protection of...animal or plant life or health, or the environment.” Specifically, it found that the objective of preventing consumers of tuna products from being deceived by false dolphin-safe allegations fall within the broader goal of preventing deceptive practices; the protection of dolphins is within the scope of protecting animal life or health or the environment and a measure that aims at the protection of animal life or health does not need to be directed exclusively to endangered or depleted species or populations to be legitimate.

Although the Panel found that the measures pursued legitimate objectives, the Panel had to determine whether they were more trade restrictive than necessary to fulfill the objectives taking into account the risks of non-fulfillment. The Panel noted that in order to determine whether a measure is more trade restrictive than necessary within the meaning of Article 2.2, it is necessary to assess the manner in, and the extent to, which the measures at issue fulfill the objectives taking into account a Member's chosen level of protection in comparison with a less trade restrictive alternative in order to determine whether the alternative measure would similarly fulfill the objectives pursued by the original regulations. To the extent an alternative measure can fulfill the Member's objective in a less trade-restrictive manner, the original measure will be considered more trade restrictive than necessary. The risks of non-fulfillment should also be evaluated.

The Panel found that the US measures were more trade-restrictive than necessary to fulfill their legitimate objectives even when taking into account the risks non-fulfillment would create. The Panel reasoned that that the US dolphin-safe measures only partly addressed the adverse effects on dolphins resulting from tuna fishing; further, they did not adequately address observed mortality and resulting adverse effects on dolphin populations resulting from tuna caught by methods other than setting on dolphins or high seas driftnet fishing outside the ETP. As such, the US measures were inconsistent with Article 2.2 of the TBT Agreement.

### **TBT Article 2.4**

In analyzing the elements of Article 2.4, the Panel relied heavily on the standards and reasoning of the Appellate Body in EC-Sardines. The Panel utilized the same 3-prong approach in making its determination: (i) the existence of a relevant international standard; (ii) whether the international standard was used as a basis for the technical regulation; and (iii) whether the international standard is an ineffective or inappropriate means to fulfill the legitimate objectives pursued. Additionally, the burden of proof rested with the complaining party.

In applying the test to the instant dispute, the Panel noted that it had to determine whether: (i) the AIDCP was a relevant international standard; (ii) whether the US used it as a basis in its dolphin-safe labeling provisions; and (iii) whether the AIDCP is an effective and appropriate means of fulfilling the objectives of the US measures.

With respect to whether the AIDCP was a relevant international standard, the Panel found that it was relevant because: (i) the AIDCP has “recognized activities in standardization” and thus constituted a “standardizing body”; (ii) it is an international standardizing organization because its membership is open on a non-discriminatory basis to the relevant bodies of at least all WTO members in accordance with the principle of openness as described in the TBT Committee decision,<sup>19,20</sup> and (iii) the AIDCP’s dolphin-safe definition and certification are relevant because, like the US measures, it regulated the same subject matter inasmuch as they both deal with the definition of the criteria for identifying tuna as “dolphin-safe” and the labeling requirements.

After determining that the AIDCP was an international relevant standard, the focus turned on whether the US used it as a basis in formulating its measures. The Panel found that the United States had failed to use the AIDCP as a basis and in fact, as explained by the Hogarth court:

“The program was formalized into a legally-binding agreement known as the Panama Declaration, pursuant to which the United States’ delegation agreed to seek a weakening of the dolphin-safe labeling standard and allow such a label to be affixed to tuna caught with purse seine nets as long as no dolphins were observed to be killed or seriously injured during the set... When the delegation asked Congress to change the standard, however, Congress refused to relax its strict requirements without affirmative evidence that the tuna fishery was not significantly contributing to the slowness of the recovery rate of already depleted dolphin stocks...”

Clearly, according to the Panel, the United States failed, and later refused, to base the US dolphin-safe labeling provisions on the relevant international standard of the AIDCP.

The Panel then had to determine whether Mexico had met its burden of showing that the AIDCP standard is appropriate and effective to fulfill the US dolphin-safe labeling provisions objectives.<sup>21</sup> The Panel determined that the AIDCP label would not address the United States’ objectives because it would not allow consumers to be informed with respect to the fishing method used for harvesting tuna or on the impact such method may have on dolphins. As such, the AIDCP standard, as applied alone, would not be an effective or appropriate means to fulfill the US objectives of ensuring that customers are not misled or deceived about whether tuna was caught in a manner than adversely affects dolphins.

The Panel also ruled that the AIDCP was not appropriate to fulfill the United States’ second objective —the protection of dolphins— because it cannot properly contribute to the same level of protection the US sets out in its measures as it does not address all of the adverse effects experienced by dolphins during tuna harvesting (e.g., unobserved 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).

For all of the aforementioned reasons, the Panel held that Mexico failed to satisfy its burden of proving an Article 2.4 violation.

<sup>19</sup> Decision on Principles and Procedures for the Development of International Standards, Guides and Recommendations.

<sup>20</sup> The Panel also noted that the AIDCP dolphin-safe definition and certification was made available to the public, was transparent and could be effectively disseminated to all interested parties in the territories of the parties of the AIDCP in accordance with the TBT decision.

<sup>21</sup> The Panel distinguished the Article 2.4 analysis from Article 2.2 by clarifying that under the latter, Mexico had suggested that a label complying with the AIDCP standard would be allowed to coexist with the existing US standard; under Article 2.4, the inquiry was whether the international standard by itself could fulfill the legitimate objectives of the United States.



### **Claims arising under GATT 1994**

Contrary to Mexico's requests, the Panel did not evaluate the claims arising under GATT 1947 because the Panel found that the dispute was sufficiently resolved based on the findings made under the TBT Agreement and there is no reason to examine additional claims. Further, any discrimination claims raised under GATT 1994 Articles I:1 and III:4 were addressed under Article 2.1 of the TBT Agreement and the Panel had already provided a thorough analysis of the claims made under Articles 2.1 and 2.4 of the TBT Agreement.

## **5. US – Tuna: Looking Forward**

At the time of the writing of this publication, the 60-day period for adoption of a report by the Panel or, alternatively for the parties to file a Notice of Intent to Appeal under DSU 16.4 expired on November 15, 2011 (the Panel report had been circulated to all of the parties on September 15, 2011). However, the United States and Mexico jointly requested that the DSB adopt a draft decision extending the 60-day period until January 20, 2012. The DSB agreed to extend the time until said date for the adoption of the Panel's report or for notice of an appeal.<sup>22</sup> During the extended period the following could happen: (1) the Panel report is adopted and the United States brings its measures into conformity with TBT Article 2.2.; or (2) the United States (as the non-prevailing party) notifies the DSB of its intent to appeal the Panel's findings (under TBT Article 2.2).

If the United States files an appeal, the United States will likely try to overturn the Panel's finding that its measures are technical regulations. The United States will likely argue that its dolphin-safe measures are voluntary and thus, qualify as standards pursuant to Annex 1.2, and are not technical regulations pursuant to Annex 1.1 —this will allow the US to avoid Article 2 of the TBT Agreement altogether. This is perhaps the strongest basis of appeal for the United States since even the Panel could not unanimously agree that the US measures were mandatory. In a dissenting opinion, a sole Panelist reasoned that:

The notion of “mandatory compliance” within the meaning of Annex 1.1 implies the obligatory character of the characteristics prescribed in the measure, and not simply the legal enforceability of the measures. A distinction should be made, in this context, between on the one hand, the legally binding character of a document laying down labeling requirements and, on the other hand, mandatory compliance with the conditions advertised on the use of the label.

If the Appellate Body agrees with the dissenting Panelist, reverses the Panel's holding and finds that the United States measures are not inconsistent with Article 2.2 and also upholds the rulings on Articles 2.1. and 2.4, the Appellate Body will then have to address the violations raised by Mexico under GATT 1994 Articles I:1 and III:4. However, even under the GATT 1994 analysis, the Appellate Body will likely find that the United States measures are not discriminatory for substantially the same reasons they are not discriminatory under Article 2.1. (e.g., the measures are origin-neutral). As such, it is possible that the United States could succeed on appeal.

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<sup>22</sup> Japan (a third-party to the dispute) noted that a decision of this kind must remain an exception.

## **IV. Disputes involving the Agreement on the Application of Sanitary and Phytosanitary Measures**

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### **A. Brief description of the SPS Agreement**

The Agreement on the Application of Sanitary and Phytosanitary Measures (“SPS”) is designed to protect a country’s consumers and ensure that they are being supplied with food, animal and plant products that are safe. The SPS allows countries to set their own standards but with some limitations: the standard must be based on science, should be applied only to the extent they are necessary to protect human, animal or plant life or health and should not arbitrarily or unjustifiably discriminate between countries where identical or similar conditions prevail. WTO-member countries are encouraged to use international standards where they exist or, may use higher standards if there is scientific justification or based on appropriate standard of risks so long as the approach is consistent and not arbitrary. In some instances, a safety first approach allows member countries to apply precautionary measures.

Both the SPS and the TBT Agreements are closely related and deal with health-related trade restrictions. However, there are some differences. By way of example, the SPS will protect human and animal life from risks involving additives, contaminants, toxins, plants carrying diseases, pests, etc. It will protect plant life from pests or disease causing organism. The TBT Agreement, on the other hand, is designed to address standards or procedures for assessing whether a product conforms to technical standards such as terminology, symbols, packaging, marking or

labeling requirements as they apply to the products, process or production method. Despite the differences, they share some overlapping concerns which sometimes results in parties citing both Agreements in a request for consultations.

The international trade standards encouraged by the SPS are formulated in various ways by non-governmental organizations, treaty organizations and professional and technical organizations among others. For example, the International Telecommunications Union (ITU) is a specialized agency of the United Nations that develops standards and guidelines for communications technology; Codex Alimentarius, a joint organization of the United Nations Food and Agricultural Organization and the World Health Organization is focused on developing food standards and related guidelines to protect, among other things, the health of consumers; and the International Civil Aviation Organization (ICAO) establishes international standards and recommended practices in technical fields of aviation, security and safe transport of dangerous goods in the air, to name a few.

Since its implementation, the SPS Agreement has been cited 37 times in requests for consultations by WTO-member countries. In four instances, Latin America and Caribbean countries have been complainants: Argentina, Ecuador, Mexico and Nicaragua. Mexico was named as a respondent in two disputes of which one was an intra-regional dispute: Mexico – Certain Measures Preventing the Importation of Black Beans from Nicaragua (Complainant: Nicaragua). Latin American and Caribbean countries have been third-parties in 57 instances (e.g., Argentina, Brazil, Chile, Colombia, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Paraguay, Peru and Uruguay).

## **B. The US – COOL Dispute**

A recent case involving both Agreements is United States – Certain Country of Origin Labeling (Short name: US – COOL), Complainant: Mexico. The dispute stems from a mandatory country of origin labeling (COOL) for beef and pork imposed by the United States and implemented by:

- (1) Agricultural Marketing Act of 1946, as amended by the Farm, Security and Rural Investment Act of 2002 and the Food, Conservation and Energy Act of 2008; and
- (2) Letter issued by the United States Secretary of Agriculture Tom Vilsack on the implementation of the COOL measure.

Mexico alleges that the determination of the nationality of certain products deviates considerably from the international country of origin labeling standards and that such requirements are not necessary to fulfill any legitimate objectives. Mexico requested consultations on December 17, 2008 and alleged that the US actions were in violation of:

- (1) GATT 1994 Articles III, IX and X;
- (2) TBT Article 2 or alternatively, SPS Articles 2, 5, 7; and
- (3) Agreement of Rules of Origin Article 2.

Additionally, the US provisions nullify or impair the benefits accruing to Mexico under GATT 1994 Article XXIII:I(b).

On December 30, 2008, Canada requested to join the consultation and the US accepted its request. Subsequently, on May 7, 2009, Mexico requested further consultations as a result of additional amendments and measures adopted after Mexico's initial request for consultations in 2008. Mexico cited the same violations as above for the US amendments. Canada requested to join the further consultations and subsequently, Peru also requested to join. The US acquiesced with both requests.

On October 9, 2009, Mexico requested the establishment of a Panel, the DSB deferred and on November 19, 2009, the DSB established a single panel to examine the within dispute jointly with DS384, United States – Certain Country of Origin Labeling (COOL) Requirements where Canada was the complainant (Short name: US – COOL).



Argentina, Australia, Brazil, China, Chinese Taipei, Colombia, the EC, Guatemala, India, Japan, Korea, Peru and New Zealand reserved their third-party rights. On May 2010, the Director-General composed the Panel and it was expected that the Panel's work would conclude by the middle of 2011.

On November 18, 2011, the Panel circulated its joint report on DS386 (Complainant: Mexico) and DS384 (Complainant: Canada). The Panel determined that the COOL measure at issue was a technical regulation within the meaning of the TBT Agreement and in violation of Article 2.1 of the Agreement because it accorded less favorable treatment to imported Mexican cattle than to like domestic products. Additionally, the Panel also found that the COOL measure was in violation of Article 2.2 of the Agreement because it does not fulfill its legitimate objective of providing consumers with information on origin.

With respect to Secretary Vilsack's letter, the Panel found that the "suggestions for voluntary action" contained therein, went beyond certain obligations under the COOL measures and therefore, constituted an unreasonable administration of the COOL measure in contravention of Article X:3(a) of GATT 1994. The Panel did not analyze the letter under the framework of the TBT Agreement as it determined that the letter was not a technical regulation.

The Panel found that Mexico had failed to make a prima facie showing that the US measures violated TBT Article 2.4, 12.1 (general special and differential provision) or 12.3 (take account of special needs of developing country Members). Although Mexico had made additional allegations under GATT 1994 Articles III:4 and XXIII:1(b), the Panel found it unnecessary to examine those claims.

### **C. The EC- Approval and Marketing of Biotech Products Dispute**

Another dispute involving both the SPS and TBT is European Communities – Measures Affecting Marketing of Biotech Products (Short name: EC – Approval and Marketing of Biotech Products). The dispute was initiated by Argentina concerning certain measures taken by the European Communities and its member States (e.g., Austria, France, Germany, Greece, Italy and Luxembourg) affecting imports of agricultural and food products originating in Argentina. Specifically, Argentina alleged that (1) EC-level measures in effect since October 1998 applying a moratorium on the approval of biotech products<sup>23</sup> resulted in a restriction of imports of agricultural and food products from Argentina; and (2) individual member State measures maintained national marketing and import bans on biotech products even though products had already been approved by the European Communities for import and marketing within the European Communities.

Argentina alleged that the European Communities and the aforementioned individual member States were in violation of:

- (1) SPS Agreement Articles 2, 5, 7, 8, 10 and Annexes B and C;
- (2) TBT Agreement Articles 2, 5 and 12;
- (3) Agriculture Agreement Article 4; and
- (4) GATT 1994 Articles I, II, X and XI.

Australia, Brazil, Canada, India, Mexico, New Zealand and the United States requested to join consultations and all requests were approved. In June 2003, the parties met in consultations but failed to reach an agreement. On August 29, 2003, the DSB established a Panel to examine the within dispute jointly with DS291, European Communities – Measures Affecting Marketing of Biotech Products (Complainant: United States) and DS292, European Communities – Measures Affecting Marketing of Biotech Products (Complainant: Canada). Australia, Brazil, Chile, China, Colombia, El Salvador, Honduras, Mexico, New Zealand, Norway, Paraguay, Peru, Chinese Taipei, Thailand, Uruguay and the

<sup>23</sup> Biotech products refers to plant cultivars that had been developed through recombinant deoxyribonucleic acid ("recombinant DNA") technology.

United States reserved their third party rights. On March 4, 2004, the Panel was composed and on May 10, 2006 the final Panel report was issued.

The Panel found the existence of a general de facto moratorium on approvals of biotech products was in effect and that although it had not been formally adopted, all applications for approval were subject to the moratorium.

The Panel also found that the European Communities' decision to apply a general moratorium on the approval of biotech products was a decision concerning the application/operation of approval procedures and was not applied to achieve European Communities' level of sanitary and phytosanitary protection. As such, it was not an SPS measure subject to Articles 5.1 or 2.2 of the SPS Agreement.

Further, the Panel found that the European Communities had acted inconsistently with Annex C(1)(a) and by implication Article 8 because the general moratorium led to undue delay in the completion of EC approval procedures relating to at least one biotech product at issue. However, the Panel did note that the European Communities did not act in violation of Articles 5.1, 5.5, 5.6, 2.2 or 2.3 of the SPS Agreement.

With respect to product-specific measures, the Panel found that in 24 of the 27 product-specific approval procedures, there had been undue delay. Therefore, the European Communities had acted inconsistently with Annex C(1)(a) and by implication, Article 8. The Panel noted that the European Communities had not acted inconsistently with its obligations under Articles 5.1, 5.5 and 5.2 of the SPS Agreement.

Moreover, with respect to individual EC member state safeguard measures, the Panel noted that there was sufficient evidence to conduct a risk assessment within the meaning of Article 5.1 and Annex A(4) for the biotech products and as such, the aforementioned Articles were applicable. In this respect, the Panel found that none of the measures at issue were based on risk assessment as required by Article 5.1 and as defined by Annex A(4). Therefore, the European Communities had, by implication, also acted inconsistently with Article 2.2.

An appeal was not filed and the European Communities expressed its intention to implement the recommendations of the Panel. Pursuant to DSU Article 21.3(b), the European Communities discussed an appropriate time frame with Argentina, Canada and the United States. The parties extended the reasonable period of time for implementation on several occasions and on March 19, 2010, notified the DSB that the parties had reached a mutually acceptable solution under DSU Article 3.6. Specifically, the parties agreed to establish a bilateral dialogue on issues related to the application of biotechnology in the future.

## **D. The Turkey – Fresh Fruit Import Procedures Dispute**

Another case in which a complainant invoked the SPS Agreement is Turkey - Certain Import Procedures for Fresh Fruit (Short name: Turkey – Fresh Fruit Import Procedures), Complainant: Ecuador. On August 31, 2001, Ecuador requested consultations with Turkey based on certain measures imposed by Turkey affecting the import of fresh fruit, particularly bananas.<sup>24</sup> According to Ecuador, the measures require that the Turkish Ministry of Agriculture issue a document entitled “Kontrol Belgesi” (a control certificate). Ecuador alleged that this procedure constituted a barrier to trade inconsistent with Turkey's obligations arising under:

- (1) GATT 1994 Articles II, III, VIII, X and XI;
- (2) SPS Agreement Articles 2.3, 8 and Annexes B and C;
- (3) Agreement on Import of Licensing Procedures Article 1, Paragraphs 2,3,5,6;
- (4) Agreement on Agriculture Article 4;
- (5) GATS Articles VI and XVIII.

<sup>24</sup> Unlike the disputes previously cited in this chapter, the complainant did not cite the TBT Agreement.

The EC, United States and Colombia reserved their third-party rights. On June 14, 2002, Ecuador requested the establishment of a Panel, the DSB later deferred the establishment of the Panel and further to a second request by Ecuador, a Panel was established on July 29, 2002. The parties asked the DSB to suspend the composition of the Panel given that the parties were engaged in the consultations to find a mutually satisfactory solution.

On November 22, 2002, the parties informed the DSB that they had found a mutually agreed upon solution to their dispute. The Notification of Mutually Agreed Solution submitted to the Dispute Settlement Body indicated that:

Turkey has advised Ecuador that the application of the control certificate system has been modified and that accordingly, the control certificates for the importation of bananas are being issued by the Ministry of Agriculture and Rural Affairs for the quantities requested by the importers. Turkey further committed itself not to revert to practices of the kind that gave rise to Ecuador's concerns and Ecuador agreed to withdraw its complaint.

## **V. Disputes involving the Agreement on Trade-Related Aspects of Intellectual Property Rights**

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### **A. Brief description of the TRIPS Agreement**

The TRIPS agreement seeks to provide protection to intellectual property around the world. Given the varied protection and enforcement of these rights in different countries, the TRIPs Agreement plays an important role in providing common international rules for the protection of copyright and related rights, trademarks (including service marks), geographical indications, industrial designs, patents, layout designs (topographies) of integrated circuits and undisclosed information including trade secrets.

The TRIPs Agreement has been cited 29 times by WTO-member countries and used by Brazil twice in requests for consultations, once with the United States and most recently, with the European Communities and a member country. The United States has named Brazil as a respondent in one dispute and has named Argentina as a respondent in two disputes. Latin American and Caribbean countries have been third-parties in 14 instances (e.g., Argentina, Brazil, Colombia, Cuba, Dominican Republic, Honduras, Guatemala, Mexico and Nicaragua).

## **B. The European Union and a Member State – Seizure of Generic Drugs in Transit Dispute**

Although there has not been extensive litigation involving Latin American and Caribbean countries with respect to the TRIPS Agreement, a dispute was recently filed by Brazil entitled European Union and a Member State – Seizure of Generic Drugs in Transit. On May 12, 2010, Brazil requested consultations with the European Union and the Netherlands regarding repeated seizures of generic drugs originating in India and other developing countries that transit through ports and airports in the Netherlands to Brazil and other developing countries. Brazil alleges that these actions are contrary to:

- (1) TRIPS Articles 1.1, 2, 28, 31, 41.1, 41.2, 42, 49, 50.3, 50.7, 50.8, 51, 52, 53.1, 53.2, 54, 55, 58, 59;
- (2) Agreement Establishing WTO Articles XI:4; and
- (3) GATT 1994: Articles V:1-5, V:7, X:3.

On May 28, 2010, Canada, Ecuador and India requested to join consultations and on May 28, 2010, China, Japan and Turkey made the same request. The EU accepted their requests to join consultations. As of the writing of this publication, the parties were still in consultations.

## **VI. Conclusions and recommendations**

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Many Latin American and Caribbean countries are active players in the WTO and have benefitted from using the Dispute Settlement Body to defend their rights and advance their interests. However, there is a dichotomy in the region between those countries that are continuously active in the Dispute Settlement Body and those that only participate as third parties or, in some cases, do not participate at all. For example, Argentina, Brazil, Chile and Mexico are highly active and have been involved in disputes that have been critical in the interpretation of key WTO Agreements. Other countries have played far less active roles. In fact, some countries such as Bolivia, Plur. St. of, Paraguay and Trinidad and Tobago, among others, have never initiated a dispute. This may be due, among other reasons, to insufficient technical, financial and institutional resources to pursue complex cases often involving provisions from several WTO Agreements within the same dispute.

Countries with high participation rates should continue to use the Dispute Settlement System to engage in consultations with trading partners concerning perceived violations of WTO Agreements. The equalizing nature of the Dispute Settlement System and its notions of justice and due process allow countries to pursue claims stemming from alleged violations of WTO Agreements. Member States should enter into consultations in good faith and, in the event that the consultations do not yield a mutually acceptable solution, pursue their case within the framework of the Dispute Settlement System at both the Panel and, if necessary, at the Appellate level.

Moreover, Latin American and Caribbean nations should create a regional network of legal resources to assist individual countries in the region in navigating the Dispute Settlement System. This may result in the less active countries, particularly those of Central America and the Caribbean, becoming more engaged in disputes either as complainants or third-parties by learning from the experiences of the more active countries.

Beyond actual participation, there are other ways in which Latin American and Caribbean countries can improve their experience in the Dispute Settlement System. For example, they should engage as proactively as possible in organizations focused on developing international trade standards such as the ITU, Codex Alimentarius, ICAO and other related organizations. Greater involvement in the formulation of such standards can result in direct benefits to individual countries when participating in disputes involving the TBT and SPS Agreements. Moreover, it can have tangential benefits such as encouraging countries to formulate national legislation consistent with the SPS, TBT and TRIPS Agreements and in conformity with international standards.

In the same vein, and consistent with the increasing importance of climate change in international trade, the countries of the region should actively participate in those international fora where methodologies are being developed to calculate the “carbon footprint” of traded products. Carbon footprint-related regulations and standards have been proliferating in recent years, especially in developed country markets, and may in some cases have a restrictive impact on the region's exports to those markets. If Latin American and Caribbean countries are able to meaningfully participate in the development of international methodologies for measuring the carbon footprint of traded products, that would reduce the scope for future disputes at the WTO (and increase the region's chances of success in the event that those disputes arise).

Although there have been concerns with respect to the experience of developing countries in the World Trade Organization, Latin America and the Caribbean is so far a successful and constant participant of the Dispute Settlement System. It is imperative that Latin America and the Caribbean continues to play an active role in the WTO, increases cohesion within the region in terms of access to, and use of, the Dispute Settlement System and continues to serve as a successful example of WTO-membership for other developing countries currently in the accession process or with aspirations to accede in the future.

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## **Annex**

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## Annex A

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### COUNCIL REGULATION (EEC) No 2136/89

of 21 June 1989

#### laying down common marketing standards for preserved sardines

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation (EEC) No 3796/81 of 29 December 1981 on the common organization of the market in fishery products <sup>(1)</sup>, as last amended by Regulation (EEC) No 1495/89 <sup>(2)</sup>, and in particular Article 2 <sup>(3)</sup> thereof,

Having regard to the proposal from the Commission,

Whereas Regulation (EEC) No 3796/81 provides for the possibility of adopting common marketing standards for fishery products in the Community, particularly in order to keep products of unsatisfactory quality off the market and to facilitate trade relations based on fair competition;

Whereas the adoption of such standards for preserved sardines is likely to improve the profitability of sardine production in the Community, and the market outlets therefor, and to facilitate disposal of the products;

Whereas it must be specified in this context, particularly in order to ensure market transparency, that the products concerned must be prepared exclusively with fish of the species *Sardina pilchardus* Walbaum and must contain a minimum quantity of fish;

Whereas, in order to ensure good market presentation, the criteria for the preparation of the fish prior to packaging, the presentations in which it may be marketed and the covering media and additional ingredients which may be used should be laid down; whereas these criteria must not, however, be such as to preclude the introduction of new products on to the market;

Whereas, to prevent the marketing of unsatisfactory products, certain criteria which preserved sardines must satisfy in order to be marketed in the Community for human consumption should be defined;

Whereas Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States related to the labelling, presentation and advertising of

foodstuffs for sale to the ultimate consumer <sup>(4)</sup> as last amended by Directive 86/197/EEC <sup>(4)</sup> and Council Directive 76/211/EEC of 20 January 1976 on the approximation of the laws of the Member States relating to making-up by weight or by volume of certain pre-packaged products <sup>(5)</sup> as last amended by Directive 78/891/EEC <sup>(6)</sup>, specify the particulars required for correct information and protection of the consumer as regards the contents of packages; whereas, for preserved sardines, the trade description should be determined according to the culinary preparation proposed, having particular regard to the ratio between the various ingredients in the finished product; whereas, where the covering medium is oil, the way in which the oil must be described should be specified;

Whereas the Commission should have responsibility for the adoption of any technical implementing measures,

HAS ADOPTED THIS REGULATION:

#### Article 1

This Regulation defines the standards governing the marketing of preserved sardines in the Community.

#### Article 2

Only products meeting the following requirements may be marketed as preserved sardines and under the trade description referred to in Article 1:

- they must be covered by CN codes 1604 13 10 and ex 1604 20 50;
- they must be prepared exclusively from fish of the species *Sardina pilchardus* Walbaum;
- they must be pre-packaged with any appropriate covering medium in a hermetically sealed container;
- they must be sterilized by appropriate treatment.

#### Article 3

The sardines must, to the extent required for good market presentation, be appropriately trimmed of the head, gills,

<sup>(1)</sup> OJ No L 33, 8. 2. 1979, p. 1.

<sup>(2)</sup> OJ No L 144, 29. 5. 1986, p. 38.

<sup>(3)</sup> OJ No L 46, 21. 2. 1976, p. 1.

<sup>(4)</sup> OJ No L 311, 4. 11. 1978, p. 21.

<sup>(1)</sup> OJ No L 379, 31. 12. 1981, p. 1.

<sup>(2)</sup> OJ No L 148, 1. 6. 1989, p. 1.

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caudal fin and internal organs other than the ova, milt and kidneys, and, according to the market presentation concerned, backbone and skin.

#### Article 4

Preserved sardines may be marketed in any of the following presentations:

1. sardines: the basic product, fish from which the head, gills, internal organs and caudal fin have been appropriately removed. The head must be removed by making a cut perpendicular to the backbone, close to the gills;
2. sardines without bones: as the basic product referred to in point 1, but with the additional removal of backbone;
3. sardines without skin or bones: as the basic product referred to in point 1, but with the additional removal of the backbone and skin;
4. sardine fillets: portions of flesh obtained by cuts parallel to the backbone, along the entire length of the fish, or a part thereof, after removal of the backbone, fins and edge of the stomach lining. Fillets may be presented with or without skin;
5. sardine trunks: sardine portions adjacent to the head, measuring at least 3 cm in length, obtained from the basic product referred to in point 1 by making transverse cuts across the backbone;
6. any other form of presentation, on condition that it is clearly distinguished from the presentations defined in points 1 to 5.

#### Article 5

For the purposes of the trade description laid down in Article 7, a distinction shall be drawn between the following covering media, with or without the addition of other ingredients:

1. olive oil;
2. other refined vegetable oils, including olive-residue oil used singly or in mixtures;
3. tomato sauce;
4. natural juice (liquid exuding from the fish during cooking), saline solution or water;
5. marinade, with or without wine;
6. any other covering medium, on condition that it is clearly distinguished from the other covering media defined in points 1 to 5.

These covering media may be mixed, but olive oil may not be mixed with other oils.

#### Article 6

1. After sterilization, the products in the container must satisfy the following minimum criteria:

- (a) for the presentations defined in points 1 to 5 of Article 4, the sardines or parts of sardine must:

- be reasonably uniform in size and arranged in an orderly manner in the container,
- be readily separable from each other,
- present no significant breaks in the abdominal wall,
- present no breaks or tears in the flesh,
- present no yellowing of tissues, with the exception of slight traces,
- comprise flesh of normal consistency. The flesh must not be excessively fibrous, soft or spongy,
- comprise flesh of a light or pinkish colour, with no reddening round the backbone, with the exception of slight traces;

- (b) the covering medium must have the colour and consistency characteristic of its description and the ingredients used. In the case of an oil medium, the oil may not contain aqueous exudate in excess of 8% of net weight;

- (c) the product must retain the odour and flavour characteristics of the species '*Sardina pilchardus* Walbaum' and the type of covering medium, and must be free of any disagreeable odour or taste, in particular bitterness, or taste of oxidation or rancidity;

- (c) the product must be free of any foreign bodies;

- (e) in the case of products with bones, the backbone must be readily separable from the flesh and friable;

- (f) products without skin and without bones must present no significant residues thereof.

2. The container may not present external oxidation or deformation affecting good commercial presentation.

#### Article 7

Without prejudice to Directives 79/112/EEC and 76/211/EEC, the trade description on the pre-packaging of preserved sardines must correspond to the ratio between the weight of sardines in the container after sterilization and the net weight, both expressed in grams.

- (a) For the presentations defined in points 1 to 5 of Article 4, the ratio shall be not less than the following values:

- 70% for the covering media listed in points 1, 2, 4 and 5 of Article 5,
- 65% for the covering medium described in point 3 of Article 5;
- 50% for the covering media referred to in point 6 of Article 5.

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No L 212/81

Where these values are complied with, the trade description must correspond to the presentation of the sardine on the basis of the corresponding designation referred to in Article 4. The designation of the covering medium must form an integral part of the trade description.

In the case of products in oil, the covering medium must be designated by one of the following expressions:

- 'in olive oil', where that oil is used,  
or
  - 'in vegetable oil', where other refined vegetable oils, including olive-residue oil, or mixtures thereof are used,  
or
  - 'in . . . oil', indicating the specific nature of the oil.
- (b) For the presentations referred to in point 6 of Article 4, the ratio referred to in the first subparagraph must be at least 35 %.
- (c) In the case of culinary preparations other than those defined in (a), the trade description must indicate the specific nature of the culinary preparation.
- By way of derogation from Article 2, second indent at point (b) of this Article, preparations using

homogenized sardine flesh, involving the disappearance of its muscular structure, may contain the flesh of other fish which have undergone the same treatment provided that the proportion of sardines is at least 25 %.

- (d) The trade description, as defined in this Article, shall be reserved for the products referred to in Article 2.

#### Article 8

Where necessary, the Commission shall adopt, in accordance with the procedure laid down in Article 33 of Regulation (EEC) No 3796/81, the measures necessary to apply this Regulation, in particular the sampling plan for assessing conformity of manufacturing batches with the requirements of this Regulation.

#### Article 9

This Regulation shall enter into force on the third day following its publication in the *Official Journal of the European Communities*.

It shall apply as from 1 January 1990.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Luxembourg, 21 June 1989.

*For the Council*  
*The President*  
C. ROMERO HERRERA

## Annex B

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CODEX STAN 94 - 1981

Page 1 of 6

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### CODEX STANDARD FOR CANNED SARDINES AND SARDINE-TYPE PRODUCTS

#### CODEX STAN 94 – 1981

#### 1. SCOPE

This standard applies to canned sardines and sardine-type products packed in water or oil or other suitable packing medium. It does not apply to speciality products where fish content constitute less than 50% m/m of the net contents of the can.

#### 2. DESCRIPTION

##### 2.1 PRODUCT DEFINITION

2.1.1 Canned sardines or sardine type products are prepared from fresh or frozen fish of the following species:

- *Sardina pilchardus*
- *Sardinops melanostictus*, *S. neopilchardus*, *S. ocellatus*, *S. sagax*, *S. caeruleus*,
- *Sardinella aurita*, *S. brasiliensis*, *S. maderensis*, *S. longiceps*, *S. gibbosa*
- *Clupea harengus*
- *Clupea bentincki*
- *Sprattus sprattus*
- *Hyperlophus vittatus*
- *Nematalosa vlaminghi*
- *Etrumeus teres*
- *Ethmidium maculatum*
- *Engraulis anchoita*, *E. mordax*, *E. ringens*
- *Opisthonema oglinum*

2.1.2 Head and gills shall be completely removed; scales and/or tail may be removed. The fish may be eviscerated. If eviscerated, it shall be practically free from visceral parts other than roe, milt or kidney. If ungutted, it shall be practically free from undigested feed or used feed.

##### 2.2 PROCESS DEFINITION

The products are packed in hermetically sealed containers and shall have received a processing treatment sufficient to ensure commercial sterility.

##### 2.3 PRESENTATION

Any presentation of the product shall be permitted provided that it:

- (i) contains at least two fish in each can; and
- (ii) meets all requirements of this standard; and
- (iii) is adequately described on the label to avoid confusing or misleading the consumer;
- (iv) contain only one fish species.

#### 3. ESSENTIAL COMPOSITION AND QUALITY FACTORS

##### 3.1 RAW MATERIAL

The products shall be prepared from sound fish of the species listed under sub-Section 2.1 which are of a quality fit to be sold fresh for human consumption.

Formerly CAC/RS 94-1978. Adopted 1981. Revisions 1995, 2007. Amendments 1979, 1989.
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CODEX STAN 94 - 1981

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**3.2 OTHER INGREDIENTS**

The packing medium and all other ingredients used shall be of food grade quality and conform to all applicable Codex standards.

**3.3. DECOMPOSITION**

The products shall not contain more than 10 mg/100 g of histamine based on the average of the sample unit tested.

**3.4 FINAL PRODUCT**

Products shall meet the requirements of this Standard when lots examined in accordance with Section 9 comply with provisions set out in Section 8. Product shall be examined by the methods given in Section 7.

**4. FOOD ADDITIVES**

Only the use of the following additives is permitted.

Additive	Maximum Level in the Final Product
<b><u>Thickening or Gelling Agents</u></b> (for use in packing media only)	
400 Alginic acid	GMP
401 Sodium alginate	
402 Potassium alginate	
404 Calcium alginate	
406 Agar	
407 Carrageenan and its Na, K, and NH <sub>4</sub> salts (including furcelleran)	
407a Processed <i>Eucheima</i> Seaweed (PES)	
410 Carob bean gum	
412 Guar gum	
413 Tragacanth gum	
415 Xanthan gum	
440 Pectins	
466 Sodium carboxymethylcellulose	
<b><u>Modified Starches</u></b>	
1401 Acid treated starches	GMP
1402 Alkaline treated starches	
1404 Oxidized starches	
1410 Monostarch phosphate	
1412 Distarch phosphate esterified with sodium trimetaphosphate; esterified with phosphorus oxychloride	
1413 Phosphated distarch phosphate	
1414 Acetylated distarch phosphate	
1420 Starch acetate	
1422 Acetylated distarch adipate	
1440 Hydroxypropyl starch	
1442 Hydroxypropyl starch phosphate	
<b><u>Acidity Regulators</u></b>	
260 Acetic acid	GMP
270 Lactic acid (L-, D-, and DL-)	
330 Citric acid	



Natural Flavours

Spice oils  
 Spice extracts  
 Smoke flavours (Natural smoke solutions and extracts)

GMP

**5. HYGIENE AND HANDLING**

- 5.1 The final product shall be free from any foreign material that poses a threat to human health.
- 5.2 When tested by appropriate methods of sampling and examination as prescribed by the Codex Alimentarius Commission, the product:
- (i) shall be free from micro-organisms capable of development under normal conditions of storage;
  - (ii) no sample unit shall contain histamine that exceeds 20 mg per 100 g;
  - (iii) shall not contain any other substance including substances derived from microorganisms in amounts which may represent a hazard to health in accordance with standards established by the Codex Alimentarius Commission;
  - (iv) shall be free from container integrity defects which may compromise the hermetic seal.
- 5.3 It is recommended that the product covered by the provisions of this standard be prepared and handled in accordance with the appropriate sections of the Recommended International Code of Practice - General Principles of Food Hygiene (CAC/RCP 1-1969) and the following relevant Codes:
- (i) the Recommended International Code of Practice for Canned Fish (CAC/RCP 10-1976);
  - (ii) the Recommended International Code of Hygienic Practice for Low-Acid and Acidified Low-Acid Canned Foods (CAC/RCP 23-1979);

**6. LABELLING**

In addition to the provisions of the Codex General Standard for the Labelling of Prepackaged Foods (CODEX STAN 1-1985) the following specific provisions apply:

**6.1 NAME OF THE FOOD**

The name of the product shall be:

- 6.1.1 (i) "Sardines" (to be reserved exclusively for *Sardina pilchardus* (Walbaum)); or
- (ii) "X sardines" where "X" is the name of a country, a geographic area, the species, or the common name of the species, or any combination of these elements in accordance with the law and custom of the country in which the product is sold, and in a manner not to mislead the consumer.
- 6.1.2 The name of the packing medium shall form part of the name of the food.
- 6.1.3 If the fish has been smoked or smoke flavoured, this information shall appear on the label in close proximity to the name.
- 6.1.4 In addition, the label shall include other descriptive terms that will avoid misleading or confusing the consumer.

**7. SAMPLING, EXAMINATION AND ANALYSES****7.1 SAMPLING**

- (i) Sampling of lots for examination of the final product as prescribed in Section 3.3 shall be in accordance with the FAO/WHO Codex Alimentarius Sampling Plans for Prepackaged Foods (AQL-6.5) (CODEX STAN 233-1969);
- (ii) Sampling of lots for examination of net weight and drained weight where appropriate shall



be carried out in accordance with an appropriate sampling plan meeting the criteria established by the CAC.

#### 7.2 SENSORIC AND PHYSICAL EXAMINATION

Samples taken for sensoric and physical examination shall be assessed by persons trained in such examination and in accordance with Annex A and the *Guidelines for the Sensory Evaluation of Fish and Shellfish in Laboratories (CAC/GL 31 - 1999)*.

#### 7.3 DETERMINATION OF NET WEIGHT

Net contents of all sample units shall be determined by the following procedure:

- (i) Weigh the unopened container.
- (ii) Open the container and remove the contents.
- (iii) Weigh the empty container, (including the end) after removing excess liquid and adhering meat.
- (iv) Subtract the weight of the empty container from the weight of the unopened container. The resultant figure will be the net content.

#### 7.4 DETERMINATION OF DRAINED WEIGHT

The drained weight of all sample units shall be determined by the following procedure:

- (i) Maintain the container at a temperature between 20°C and 30°C for a minimum of 12 hours prior to examination.
- (ii) Open and tilt the container to distribute the contents on a pre-weighed circular sieve which consists of wire mesh with square openings of 2.8 mm x 2.8 mm.
- (iii) Incline the sieve at an angle of approximately 17-20° and allow the fish to drain for two minutes, measured from the time the product is poured into the sieve.
- (iv) Weigh the sieve containing the drained fish.
- (v) The weight of drained fish is obtained by subtracting the weight of the sieve from the weight of the sieve and drained product.

#### 7.5 PROCEDURE FOR PACKS IN SAUCES (WASHED DRAINED WEIGHT)

- (i) Maintain the container at a temperature between 20°C and 30°C for a minimum of 12 hours prior to examination.
- (ii) Open and tilt the container and wash the covering sauce and then the full contents with hot tap water (approx. 40°C), using a wash bottle (e.g. plastic) on the tared circular sieve.
- (iii) Wash the contents of the sieve with hot water until free of adhering sauce; where necessary separate optional ingredients (spices, vegetables, fruits) with pincers. Incline the sieve at an angle of approximately 17-20° and allow the fish to drain two minutes, measured from the time the washing procedure has finished.
- (iv) Remove adhering water from the bottom of the sieve by use of paper towel. Weigh the sieve containing the washed drained fish.
- (v) The washed drained weight is obtained by subtracting the weight of the sieve from the weight of the sieve and drained product.

#### 7.6 DETERMINATION OF HISTAMINE

AOAC 977.13

#### 8. DEFINITION OF DEFECTIVES

A sample unit will be considered defective when it exhibits any of the properties defined below.

**8.1 FOREIGN MATTER**

The presence in the sample unit of any matter, which has not been derived from the fish or the packing media, does not pose a threat to human health, and is readily recognized without magnification or is present at a level determined by any method including magnification that indicates non-compliance with good manufacturing and sanitation practices.

**8.2 ODOUR/FLAVOUR**

A sample unit affected by persistent and distinct objectionable odours or flavours indicative of decomposition or rancidity.

**8.3 TEXTURE**

- (i) Excessively mushy flesh uncharacteristic of the species in the presentation.
- (ii) Excessively tough or fibrous flesh uncharacteristic of the species in the presentation.

**8.4 DISCOLOURATION**

A sample unit affected by distinct discolouration indicative of decomposition or rancidity or by sulphide staining of more than 5% of the fish by weight in the sample unit.

**8.5 OBJECTIONABLE MATTER**

A sample unit affected by Struvite crystals - any struvite crystal greater than 5 mm in length.

**9. LOT ACCEPTANCE**

A lot will be considered as meeting the requirements of this standard when:

- (i) the total number of defectives as classified according to section 8 does not exceed the acceptance number (c) of the appropriate sampling plan in the Sampling Plans for Prepackaged Foods (AQL-6.5) (CODEX STAN 233-1969);
- (ii) the total number of sample units not meeting the presentation defined in 2.3 does not exceed the acceptance number (c) of the appropriate sampling plan in the Sampling Plans for Prepackaged Foods (AQL-6.5) (CODEX STAN 233-1969);
- (iii) the average net weight or the average drained weight where appropriate of all sample units examined is not less than the declared weight, and provided there is no unreasonable shortage in any individual container;
- (iv) the Food Additives, Hygiene and Labelling requirements of Sections 4, 5 and 6 are met.

**ANNEX "A": SENSORY AND PHYSICAL EXAMINATION**

1. Complete external can examination for the presence of container integrity defects or can ends which may be distorted outwards.
2. Open can and complete weight determination according to defined procedures in Sections 7.3, 7.4 and 7.5.
3. Carefully remove product and examine for discolouration, foreign matter and struvite crystals. The presence of a hard bone is an indicator of underprocessing and will require an evaluation for sterility.
4. Assess odour, flavour and texture in accordance with the *Guidelines for the Sensory Evaluation of Fish and Shellfish in Laboratories (CAC/GL 31-1999)*

## ANNEX C

### US Dolphin Safe Labeling Conditions

This table assumes the vessel is not on the high seas engaged in driftnet fishing for tuna. Tuna products containing tuna harvested in this manner cannot be labelled dolphinsafe under any circumstance.<sup>26</sup> In addition to the other requirements reflected in this table, a condition for carrying an alternative dolphin safe label applicable to all tuna product, regardless of location or fishery/vessel type, is that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught.<sup>27</sup>

Location	Fishery/Vessel type	Tuna-Dolphin (T-D) association/Harm to dolphins	Dolphin Safe Labeling Condition	Authority
Inside the ETP	Large* purse seine	[ETP has a T-D association]	Written statements executed by the captain and observer providing the certification [required under § 1385 (h)], and endorsed in writing by the exporter, importer, and processor of the product, that <ul style="list-style-type: none"> <li>– 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</li> <li>– no dolphins were killed or seriously injured during the sets in which the tuna were caught</li> </ul> Written statement by Secretary or designee/IATTC representative/ authorized representative of nation whose nation program meets the requirements of the International Dolphin Conservation Program that <ul style="list-style-type: none"> <li>– an IDCP-approved observer was on board the vessel during the entire trip and provided the certification required under § 1385 (h) above</li> </ul>	§ 1385 (d)(1)(C); § 1385 (d)(2)(B); § 1385 (h)(2)(A)
	Small purse seine**	[ETP has a T-D association]	None	§ 1385 (d)(1)(C); § 1385 (d)(2)(A)
	Non purse seine	Regular and significant mortality or serious injury to dolphins	Written statement executed by the captain of the vessel and an observer participating in a national or international program acceptable to the Secretary that <ul style="list-style-type: none"> <li>– no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught, provided that the Secretary determines that such an observer statement is necessary</li> </ul>	§ 1385 (d)(1)(D)
		No regular and significant mortality or serious injury to dolphins	None	

\* Vessel greater than 400 short tons (362.8 metric tons) carrying capacity. US Code of Federal Regulations §216.91(a)(1).

\*\* These vessels are 400 short tons (362.8 metric tons) or less carrying capacity and are not permitted to set on dolphins to catch tuna. AIDCP, Annex VIII, Exhibit Mex-11; 50 CFR 216.24(a)(2)(i), Exhibit US-23B; see also United States' first written submission, para. 16, fn.10.

<sup>26</sup> § 1385 (d)(1)(A).

<sup>27</sup> § 1385 (d)(3)(C)(i).

Location	Fishery/ Vessel type	Tuna-Dolphin (T-D) association/Harm to dolphins	Dolphin Safe Labelling Condition	Authority
Outside the ETP	Purse seine	Regular and significant T-D association similar to association in the ETP	Written statement executed by the captain of the vessel and an observer participating in a national or international program acceptable to the Secretary, certifying that <ul style="list-style-type: none"> <li>- no purse seine net was intentionally deployed on or used to encircle dolphins during the particular voyage on which the tuna were caught and</li> <li>- no dolphins were killed or seriously injured in the sets in which the tuna were caught</li> </ul>	§ 1385 (d)(1)(B)(i)
		No regular and significant T-D association	Written statement executed by the captain of the vessel certifying that <ul style="list-style-type: none"> <li>- no purse seine net was intentionally deployed on or used to encircle dolphins during the particular voyage on which the tuna was harvested</li> </ul>	§ 1385 (d)(1)(B)(ii)
	Non purse seine	Regular and significant mortality or serious injury to dolphins	Written statement executed by the captain of the vessel and an observer participating in a national or international program acceptable to the Secretary (provided that the Secretary determines that such an observer statement is necessary) that <ul style="list-style-type: none"> <li>- no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught</li> </ul>	§ 1385 (d)(1)(D)
		No regular and significant mortality or serious injury to dolphins	None	

i § 1385 (d)(1)(A).

ii § 1385 (d)(3)(C)(i).

iii Vessel greater than 400 short tons (362.8 metric tons) carrying capacity. US Code of Federal Regulations §216.91(a)(1).

iv These vessels are 400 short tons (362.8 metric tons) or less carrying capacity and are not permitted to set on dolphins to catch tuna. AIDCP, Annex VIII, Exhibit Mex-11; 50 CFR 216.24(a)(2)(i), Exhibit US-23B; see also United States' first written submission, para. 16, fn.10.

## Annex D

### Table of Authorities

**TABLE A.1  
INTERNATIONAL TREATIES**

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Vienna Convention on the Law of Treaties (Vienna, 23 May 1969)  
1155 U.N.T.S. 331 entered into force on 27 Jan. 1980.

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Source: Author.

**TABLE A.2  
WTO AGREEMENTS**

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Agreement Establishing the World Trade Organization

Agreement on Agriculture  
Article 4

Anti-dumping Agreement

Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 - Customs and Valuations  
Article XI:4

Agreement on Import Licensing Procedures  
Article 1

Agreement on Rules of Origin  
Article 2

Agreement on Safeguards

Agreement on Subsidies and Countervailing Measures

Agreement on Technical Barriers to Trade Agreement  
Article 2.1  
Article 2.2  
Article 2.3  
Article 2.4  
Article 12.1  
Article 12.3  
Annex 1.1  
Annex 1.2

Agreement on Textiles and Clothing

Agreement on Trade-Related Investment Measures

Agreement on Trade in Civil Aircraft

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(continued)

Table A.2 (concluded)

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Dispute Settlement Understanding  
 Article 4  
 Article 16.4  
 Article 21.3(b)

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General Agreement on Trade in Services

General Agreement on Tariffs and Trade 1994

Article I  
 Article II  
 Article III  
 Article V  
 Article VIII  
 Article X  
 Article XI  
 Article XIX  
 Article XXIII

Agreement on Government Procurement

Agreement on Preshipment Inspection

Agreement on Application of Sanitary and Phytosanitary Measures

Article 2.2  
 Article 2.3  
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 Annex C

Trade-Related Aspects of Intellectual Property Rights

Article 1.1  
 Article 2  
 Article 28  
 Article 31  
 Article 41.1  
 Article 41.2  
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 Article 49  
 Article 50.3  
 Article 50.7  
 Article 50.8  
 Article 51  
 Article 52  
 Article 53.1  
 Article 53.2  
 Article 54  
 Article 55  
 Article 58  
 Article 59

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Source: Author.

**TABLE A.3**  
**DISPUTE SETTLEMENT BODY REPORTS**

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Full Case Title and Citation

Appellate Body Report, European Communities – Trade Description of Sardines, WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII,3359.

Panel Report, European Communities – Trade Description of Sardines, WT/DS231/R and Corr.1, adopted 23 October 2002, as modified by Appellate Body Report WT/DS231/AB/R, DSR2002:III, 3451

Appellate Body Report, European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001: VIII, 3243

Panel Report, European Communities-Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/R and Add.1, adopted 5 April 2001, as modified by Appellate Body Report WT/DS135/AB/R, DSR2001:VIII, 3305.

Panel Report, European Communities – Measures Affecting the Approval and Marketing of Biotech Products, WT/DS291/R, WT/DS292/R, WT/DS293/R, Add.1 to Add.9, and Corr.1, adopted 21 November 2006, DSR 2006:III-VIII, 847

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Source: Author.

**TABLE A.4**  
**GATT DISPUTES**

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Full Case Title and Citation

GATT Panel Report, United States – Restrictions on Imports of Tuna, DS21/r, 3 September 1991, unadopted, BISD 39S/155

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Source: Author.

**TABLE A.5**  
**DOMESTIC REGULATIONS**

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Title

European Communities Council Regulation No. 2136/89  
Article 2  
Article 7

16 U.S.C. §31

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(continued)



Table A.5 (conclusión)

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16 U.S.C. §1385  
50 C.F.R. §216.91  
50 C.F.R. §216.92

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Earth Island Institute v. Hogarth 494 F.3d 757 (9<sup>th</sup> Circ. 2007)

Source: Author.

**TABLE A.6**  
**INTERNATIONAL STANDARDS**

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Codex Alimentarius Commission Codex Stan 94  
Article 6.1.1

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Source: Author.



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