Congressional Research Service
Informing the legislative debate since 1914

The World Trade Organization Agreement on Technical Barriers to Trade and Recent Food Labeling Cases

(name redacted)
Legislative Attorney

September 25, 2015

Congressional Research Service
7-....
www.crs.gov
R44210

CRS REPORT
Prepared for Members and
Committees of Congress

Summary

The World Trade Organization's (WTO) Agreement on Technical Barriers to Trade (TBT Agreement) contains obligations that WTO members must adhere to when they impose requirements on a product's characteristics. Countries typically implement such requirements in order to protect human health or the environment, prevent deceptive practices, or further other legitimate policy goals. However, these measures can be trade-distorting, and sometimes countries implement such regulations solely to protect domestic markets. To that end, the TBT Agreement is intended to balance the need to protect members' regulatory autonomy with the need to prevent unnecessary obstacles to international trade.

To date, relatively few WTO disputes have been raised challenging member compliance with the TBT Agreement's provisions. However, in recent years, the United States has faced claims alleging its failure to abide by the terms of the TBT Agreement. In two of these cases, *U.S.–COOL* and *U.S.–Tuna II*, the WTO found that the United States violated the nondiscrimination obligations contained in Article 2.1 of the TBT Agreement because the measures treated foreign products less favorably than domestic products. The Appellate Body reports from these two disputes provide insight into how the WTO applies these nondiscrimination provisions, and can provide guidance to Congress when it enacts future programs that regulate product characteristics.

First, to provide a basic understanding of the objectives and requirements of the TBT Agreement, this report provides a general overview of that instrument. Next, it briefly describes the regulatory programs at issue in these two WTO disputes before analyzing how the WTO's Appellate Body applied Article 2.1 of the TBT Agreement in *U.S.–COOL* and *U.S.–Tuna II*. The report takes an in-depth look at the test established by the Appellate Body for determining whether a measure is impermissibly discriminatory. Finally, the report provides a brief description of how the United States amended these programs in response to the WTO decisions, and explains why subsequent WTO rulings found that the amended programs still failed to comply with international trade obligations.

Contents

Introduction 1
The Technical Barriers to Trade Agreement 3
U.S. Labeling Programs at Issue in *U.S.–COOL* and *U.S.–Tuna II* 5
The COOL Program and Requirements 6
Dolphin Protection Consumer Information Act (DPCIA) 7
WTO Appellate Body Analysis of the Labeling Programs Under Article 2.1 of the TBT Agreement 9
Preliminary Matters: Does Article 2 of the TBT Agreement Apply? 10
National Treatment and Most-Favored Nation Treatment: Does the Measure Impermissibly Discriminate Against Foreign Products? 12
The WTO's Article 2.1 Test 12
The Article 2.1 Test as Applied in *U.S.–COOL* 15
The Article 2.1 Test as Applied in *U.S.–Tuna II* 17
Continuation of WTO Proceedings 18
U.S.–COOL Proceedings: Compliance Panel and Retaliation 19
U.S.–Tuna II Proceedings: Compliance Panel 20
Conclusion 21

Contacts

Author Contact Information 22

Introduction

The World Trade Organization's (WTO) Agreement on Technical Barriers to Trade (TBT Agreement) establishes obligations that WTO members must adhere to when they impose requirements on a product's characteristics.[1] To date, relatively few WTO disputes have been raised challenging member compliance with the TBT Agreement's provisions. However, in recent years, the United States has faced claims alleging its failure to abide by the terms of the TBT Agreement.[2] In two of these cases, which are still ongoing, the WTO found that certain U.S. labeling requirements for food products violated the TBT Agreement's nondiscrimination obligations—that is, the measures at issue treated foreign products less favorably than domestic products.[3] The Appellate Body reports from these two disputes provide insight into how the WTO applies these nondiscrimination provisions, and can provide guidance for Congress to consider when enacting future programs that regulate product characteristics. This report analyzes the Appellate Body decisions in two disputes: *U.S.–Certain Country of Origin Labeling Requirements* (*U.S.–COOL*) and *U.S.–Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (*U.S.–Tuna II*).

In 2008, Canada and Mexico, through WTO dispute settlement procedures, requested consultations[4] with the United States regarding U.S. country of origin labeling (COOL) requirements for certain beef and pork products.[5] In the WTO dispute *U.S.–COOL*, Canada and Mexico claimed that the labeling program, *inter alia*, violated U.S. obligations under the TBT Agreement, arguing that the COOL program impermissibly treated foreign livestock less favorably than domestic livestock.[6] After the parties exhausted the available dispute settlement procedures, including appeals, the WTO Appellate Body ruled in favor of Canada and Mexico, finding that the COOL program impermissibly discriminated against the foreign livestock.[7]

---

[1] Agreement on Technical Barriers to Trade, Marrakesh Agreement Establishing the World Trade Organization, April 15, 1994, 1867 U.N.T.S. 154 (hereinafter TBT Agreement).

[2] *See, e.g.*, Request for Consultations by Canada, *U.S.–Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/1 (December 4, 2008).

[3] Appellate Body Report, *U.S.–COOL*, WT/DS384/AB/R (June 29, 2012) (hereinafter Appellate Body Report, *U.S.–COOL*); Appellate Body Report, *U.S.–Tuna II*, WT/DS381/AB/R (May 16, 2012) (hereinafter Appellate Body Report, *U.S.–Tuna II*).

[4] Pursuant to the WTO's Dispute Settlement Understanding (DSU), members may challenge any other member's trade regulation as a violation of a WTO agreement. Dispute Settlement Understanding, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 (1994) (hereinafter DSU). The first step in the dispute settlement process requires that a member consult with the other member to see if a mutually agreeable solution to the problem can be reached. DSU art. 4. If no mutually acceptable solution is agreed upon, a member may request to have a WTO dispute settlement panel determine whether the measure at issue violates a WTO obligation. DSU art. 6. For more information on the dispute settlement process, *see* CRS Report RS20088, *Dispute Settlement in the World Trade Organization (WTO): An Overview*, by (name redacted), (name redacted), and (name redacted) .

[5] Request for Consultations by Canada, *U.S.–Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/1 (December 4, 2008). Canada subsequently updated its request for consultations following slight changes to the COOL program in 2009. Request for Consultations by Canada, *U.S.–COOL*, WT/DS384/1/Add.1 (May 11, 2009). Mexico similarly submitted a request for consultations and further amended that request. Request for Consultations by Mexico, *U.S.–COOL*, WT/DS386/1 (December 22, 2008); Request for Consultations by Mexico, *U.S.–COOL*, WT/DS386/1/Add.1 (May 11, 2009).

[6] Appellate Body Report, *U.S.–COOL*.

[7] Article 21.5 Appellate Body Report, *U.S.–COOL*, WT/DS384/AB/RW, WT/DS386/AB/RW (May 18, 2015) (hereinafter Article 21.5 Appellate Body Report, *U.S.–COOL*).

After the WTO reached its final decision on the merits in May 2015, Canada and Mexico requested permission from the WTO to retaliate against the United States through the suspension of concessions.[8] The WTO Dispute Settlement Understanding (DSU) allows WTO members to retaliate against an offending party by raising tariffs or suspending other concessions made under WTO agreements in an amount equal to the impairment of trade caused by the offending measure.[9] In their request for retaliation, Canada and Mexico have claimed that the U.S. COOL program, as currently implemented, impairs trade by approximately $3 billion per year.[10] The United States has challenged the amounts that Canada and Mexico have claimed—that appeal is currently being heard by arbitrators at the WTO, with a decision on the amount of impairment due in the coming months.[11]

In another recent WTO case involving the United States, *U.S.–Tuna II*, Mexico claimed that the United States' "dolphin-safe" labeling program for tuna products, established by the Dolphin Protection Consumer Information Act (DPCIA),[12] also violated the TBT Agreement.[13] In that case, Mexico argued that the dolphin-safe label program impermissibly treated tuna from Mexico less favorably than domestic tuna and tuna from other foreign nations.[14] To date, the WTO has ruled in favor of Mexico in this dispute as well; however, Mexico and the United States are awaiting a decision from the WTO's Appellate Body.[15] If Mexico succeeds on appeal, it would be able to seek permission from the WTO to retaliate against the United States.[16]

These disputes were two of the first Appellate Body rulings to apply the nondiscrimination requirements of the TBT Agreement.[17] The United States lost both of these disputes for failing to comply with those obligations established in Article 2.1 of the TBT Agreement, the focus of this report. First, to provide a basic understanding of the objectives and requirements of the TBT Agreement, this report provides a general overview of that instrument. Next, it briefly describes the regulatory programs at issue in these two WTO disputes and analyzes how the WTO's Appellate Body applied Article 2.1 in *U.S.–COOL* and *U.S.–Tuna II*. The report takes an in-depth look at the test established by the Appellate Body for determining whether a measure is impermissibly discriminatory. Finally, the report provides a brief description of how the United States amended these programs in response to the WTO decisions, and explains why subsequent WTO rulings found that the amended programs still failed to comply with international trade obligations.

[8] Recourse by Canada to Article 22.2 of the DSU, *U.S.–COOL*, WT/DS384/35 (June 5, 2015) (hereinafter Recourse by Canada to Article 22.2 of the DSU, *U.S.–COOL*). Recourse by Mexico to Article 22.2 of the DSU, *U.S.–COOL*, WT/DS386/35 (June 19, 2015) (hereinafter Recourse by Mexico to Article 22.2 of the DSU, *U.S.–COOL*).

[9] DSU art. 22.

[10] *See* Recourse by Canada to Article 22.2 of the DSU, *U.S.–COOL*; Recourse by Mexico to Article 22.2 of the DSU, *U.S.–COOL*.

[11] *See* Recourse to Article 22.6 of the DSU by the United States, *U.S.–COOL*, WT/DS386/36.

[12] 16 U.S.C. §1385.

[13] Appellate Body Report, *U.S.–Tuna II*.

[14] *See id.*

[15] *See* Notification of an Appeal by the United States, *U.S.–Tuna II*, WT/DS381/24 (June 10, 2015).

[16] DSU art. 22.

[17] *See* Jonathan Carlone, Note, *An Added Exception to the TBT Agreement After* Clove, Tuna II, *and* COOL, 37 B.C. Int'l & Comp. L. Rev. 103, 114 (2014).

The Technical Barriers to Trade Agreement

Shortly following World War II, developed countries sought to reach a multilateral international agreement aimed at reducing barriers to international trade. In 1947, these countries established the General Agreement on Tariffs and Trade 1947 (GATT 1947) in order to reduce tariffs and implement rules preventing discrimination in international trade.[18] Through this agreement, the international community sought to liberalize trade markets and provide for a greater flow of goods across international borders. However, in the decades following the establishment of the GATT 1947, countries sought to further open global markets by reducing *non-tariff* barriers to trade.

The international community recognized that countries frequently adopt measures that regulate a product's characteristics, typically to protect the environment or human health, ensure the quality of products, prevent deceptive practices, or achieve some other legitimate objective. However, these measures can be trade-distorting, and sometimes countries implement such regulations solely to protect domestic markets. To that end, the TBT Agreement is intended to balance the need to protect members' regulatory autonomy with the need to prevent unnecessary obstacles to international trade.[19]

The WTO members announced that they were establishing the TBT Agreement to "ensure that technical regulations and standards, including packaging, marking and labelling requirements, and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade."[20] The TBT Agreement furthers this goal by providing a set of legal obligations that WTO members must adhere to when establishing such measures.

The TBT Agreement applies to measures that regulate a product's characteristics.[21] A measure is covered under the TBT Agreement if it regulates on the basis of a product's intrinsic qualities, qualities that are related to the product, or qualities that the product lacks.[22] Characteristics that are related to the product include their identification, presentation, and appearance.[23] In *EC–Sardines*,[24] for example, Peru challenged an EU regulation establishing standards for what qualified as preserved sardines.[25] The EU regulation established that only one kind of fish, *Sardina pilchardus*, could be labeled for sale as "preserved sardines."[26] The Appellate Body held that this measure prescribed product-related characteristics because it conditioned the labeling of

[18] General Agreement on Tariffs and Trade, preamble, October 30, 1947, 55 U.N.T.S. 194 (providing that the goals of entering the GATT included the "substantial reduction of tariffs and other barriers to trade").

[19] TBT Agreement, preamble.

[20] *Id.*

[21] *See* TBT Agreement Annex 1(1). Notably, however, the TBT Agreement does not apply to measures that are otherwise covered under the WTO Agreement on Sanitary and Phytosanitary Measures, which focuses primarily on food safety. TBT Agreement, arts. 1.3, 1.5. Sanitary and phytosanitary measures include measures applied to protect human health from risks arising from additives, contaminants, toxins, or disease-causing organisms in food and feedstuffs, or to protect from risks arising from diseases carried by animals or plants or from the entry of pests.

[22] Appellate Body Report, *EC–Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 67, WT/DS135/AB/R (March 12, 2001) (hereinafter Appellate Body Report, *EC–Asbestos*).

[23] *Id.*

[24] Appellate Body Report, *EC–Trade Description of Sardines*, WT/DS231/AB/R (September 26, 2002) (hereinafter Appellate Body Repot, *EC–Sardines*).

[25] *Id.* at ¶ 2.

[26] *Id.*

a product based on specific product characteristics, the species of fish.[27] Similarly, in *EC–Asbestos*, the Appellate Body found that a French decree criminalizing the sale of products containing asbestos fibers fell under the scope of the TBT Agreement because it required all products to have a shared characteristic—that is, all products had to be asbestos-free.[28]

The TBT Agreement classifies measures that regulate on the basis of a product's characteristics into three categories: (1) technical regulations; (2) standards; and (3) conformity assessment procedures (CAPs).[29] Technical regulations are documents that prescribe product characteristics with which compliance is *mandatory*.[30] Technical regulations can include labeling requirements, import bans, or prohibitions that are related to product characteristics.[31] Standards are documents that have been approved by a recognized body, and prescribe product characteristics with which compliance is *voluntary*.[32] CAPs are procedures, such as those related to testing, verification, inspection, or certification, that are used to ensure that the requirements prescribed by a given standard and/or technical regulation are satisfied.[33]

The TBT Agreement lays out obligations that WTO members must adhere to when enacting technical regulations, standards, and CAPs.[34] These obligations can be enforced through the WTO's dispute settlement procedures established by the DSU.[35] Therefore, a country may request the establishment of a WTO dispute settlement panel to determine whether another party's measure violates the terms of the TBT Agreement. To date, most of the WTO disputes involving the TBT Agreement, including *U.S.–COOL* and *U.S.–Tuna II*, have focused on the provisions concerning technical regulations.[36] These provisions are contained in Article 2 of the Agreement, which is the focus of this report.

Article 2 of the TBT Agreement contains various requirements that WTO members must adhere to when issuing technical regulations. Article 2 requires that a party shall remove technical regulations that are no longer necessary due to changed circumstances;[37] shall base their technical regulations on accepted international standards, when appropriate;[38] shall explain the justification for such regulations when another party so requests;[39] and shall participate in the creation and adoption of international standards with a view toward harmonizing technical regulations.[40] members must also ensure that their measures are not "more trade restrictive than necessary" to fulfill a legitimate government objective.[41] Furthermore, Article 2 of the TBT agreement contains

[27] *Id.* at paras. 190-193.

[28] Appellate Body Report, *EC–Asbestos*, at ¶ 75.

[29] *See* TBT Agreement Annex 1.1-1.3.

[30] TBT Agreement, Annex 1(1).

[31] Appellate Body Report, *EC–Asbestos*, at ¶ 64.

[32] TBT Agreement Annex 1(2).

[33] TBT Agreement Annex 1(3).

[34] *See* TBT Agreement arts. 2, 4, 5.

[35] TBT Agreement art. 14.

[36] WTO website, Disputes by Agreement, https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A22# (last visited September 22, 2015) (showing that most disputes brought under the TBT Agreement have involved Article 2, the provision relating to technical regulations).

[37] TBT Agreement art. 2.3.

[38] TBT Agreement art. 2.4.

[39] TBT Agreement art. 2.5.

[40] TBT Agreement art. 2.6.

[41] TBT Agreement art. 2.2.

numerous provisions that call for increased transparency among members with regard to technical regulations.[42]

Arguably the most significant obligations, at least with regard to recent litigation that has occurred, are found in Article 2.1 of the TBT Agreement. Article 2.1 requires that countries comply with "national treatment" obligations and "most-favored nation" (MFN) obligations.[43] National treatment obligations provide that a country's technical regulations may not treat foreign products less favorably than like products of domestic origin. MFN obligations require that technical regulations treat products from one foreign country no less favorably than products from other foreign countries. The Appellate Body found, in *U.S.–COOL* and *U.S.–Tuna II*, that the U.S. labeling programs violated these prohibitions on discrimination.[44]

Before analyzing how the WTO Appellate Body has evaluated certain labeling requirements under Articles 2.1 of the TBT Agreement, it is worth pointing out that the TBT Agreement, unlike other WTO agreements, does not provide any explicit exceptions to these obligations. For example, Article XX of the GATT provides that members may implement measures that would otherwise violate GATT obligations if the measures are enacted to protect human health or the environment, conserve natural resources, or "protect public morals."[45] The measure is GATT-compliant if it falls under one of these exceptions, provided it is not a disguised restriction on trade or implemented in an arbitrary manner.[46] Whether a member has properly invoked one of the exceptions is subject to review by a WTO dispute panel. Furthermore, under Article XXI of the GATT, a member may maintain an otherwise impermissible measure if the member has enacted it to protect national security.[47] The TBT Agreement does not contain a corresponding set of explicit exceptions.[48] This characteristic has led some commentators to ask whether the TBT Agreement obligations are intended to be more stringently applied than other WTO agreements.[49] However, as illustrated below, the Appellate Body appears to have read at least some of these exceptions into the text of the TBT Agreement.[50]

U.S. Labeling Programs at Issue in *U.S.–COOL* and *U.S.–Tuna II*

Prior to analyzing the WTO's decisions in these labeling cases, it is helpful to discuss the statutory and regulatory programs at issue in the disputes. The next sections of the report provide a brief summary of the COOL program and the DPCIA requirements in order to provide context for later analysis of the disputes.

[42] TBT Agreement art. 2.11.

[43] TBT Agreement art. 2.1.

[44] *See* Appellate Body Report, *U.S.–COOL*; Appellate Body Report, *U.S.–Tuna II*.

[45] GATT art. XX.

[46] *Id.*

[47] GATT art. XXI.

[48] *See* TBT Agreement.

[49] *See, e.g.*, Nathalie Bernasconi-Osterwalder et al., Environment and Trade: A Guide to WTO Jurisprudence 215 (2006) ("[I]n contrast to the GATT, the TBT Agreement offers no exceptions to the national and most-favoured nation treatment obligations in its body text ... Thus, the TBT Agreement could be perceived to be stricter than the GATT.").

[50] *See infra* "The WTO's Article 2.1 Test."

The COOL Program and Requirements

The COOL requirements for muscle cuts of beef and pork products went into effect following the enactment of the 2008 farm bill.[51] The U.S. Department of Agriculture (USDA) promulgated interim regulations on the COOL program in August 2008,[52] and then promulgated a final rule in January 2009.[53] It is worth noting that the USDA amended the COOL regulations in 2013, following the initial determinations from the WTO that the program violated the TBT Agreement.[54] This section discusses the regulations from the 2009 USDA rule because those were the regulations in dispute during the initial WTO proceedings discussed later in this report.

The COOL statute requires all muscle cuts to be labeled according to their country of origin.[55] The country of origin is determined by where certain production steps occur—that is, the appropriate label is determined by where the animal was born, raised, and slaughtered.[56] The statute distinguishes between countries of origin by using four different categories (Categories A through D) for muscle cuts:

- Category A: meat derived from animals exclusively born, raised, and slaughtered in the United States;
- Category B: meat derived from animals of multiple countries of origin (production steps occur in multiple countries, including the United States), but not imported to the United States for immediate slaughter;[57]
- Category C: meat derived from animals that were imported into the United States for immediate slaughter; and
- Category D: meat derived from animals where no production steps occurred in the United States.[58]

Under the 2009 regulations, the label for Category A meat read "Product of the United States."[59] Packaging for meat that qualified for Category B needed to list, in any order, the applicable foreign country and the United States on the label; therefore, Category B meat could be labeled as "Product of the United States and [Country X]" or as "Product of [Country X] and the United States."[60] The Category C label had to read "Product of [Country X] and the United States," in

[51] P.L. 110-246 §11002, 112 Stat. 1651 (2008). Although the COOL program imposed requirements on other commodities, such as macadamia nuts, pecans, and ground meat, *id.*, this section will only address the regulations on muscle cuts of pork and beef—the products at issue throughout the WTO proceedings. For further details on legislative and policy debates regarding earlier iterations of the COOL program, *see* CRS Report RS22955, *Country-of-Origin Labeling for Foods and the WTO Trade Dispute on Meat Labeling*, by (name redacted)

[52] Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, 73 Fed. Reg. 45106 (August 1, 2008).

[53] Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, 74 Fed. Reg. 2658 (January 15, 2009).

[54] Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, 78 Fed. Reg. 31367 (May 24, 2013).

[55] 7 U.S.C. §1638a(a)(2).

[56] *Id.*

[57] For example, meat derived from animals born in a foreign country, but raised and slaughtered in the United States.

[58] 7 U.S.C. §1638(a)(2).

[59] 7 C.F.R. §§65.260, 65.300(d) (2009).

[60] 7 C.F.R. §65.300(e)(1) (2009). Note, if more than one foreign country is involved, the label may also include [Country Y].

that order.[61] Finally, meat of exclusively foreign origin, Category D, received a label stating "Product of [Country X]."[62] Notably, the 2009 rule allowed for commingling of meat from different origins during the production process.[63] The regulations prescribed which label could be used if meats from different origins were commingled. For example, if Category B meat was processed on the same day as Category C meat, then end products could receive the Category B label.[64] Similarly, the Category B label would be used if meat from Category A was comingled with meat from Category B.[65]

The COOL statute also imposes record-keeping requirements on all producers. The statute provides that the USDA "may conduct an audit of any person that prepares, stores, handles, or distributes a covered commodity."[66] These record-keeping requirements are enforced by penalty provisions; willful noncompliance with the COOL program can lead to fines of up to $1,000 per violation.[67]

Importantly, the COOL statute contains numerous exemptions from the labeling requirements. First, the COOL requirements do not apply to processed products.[68] The USDA defines "processed" rather expansively—if meat is cooked, cured, smoked, or restructured in any way, it is considered processed and not subject to the COOL requirements.[69] Second, the statute exempts all food sold in restaurants or food bars (any place that serves prepared food) from COOL requirements.[70] Between these two exceptions, a significant percentage of meat is exempt from the COOL program by the time the product reaches the consumer; however, all upstream producers still would need to maintain records regarding the origin of each production step.[71] These exemptions were of particular significance to the WTO's decisions, discussed below.

Dolphin Protection Consumer Information Act (DPCIA)

The other labeling program in dispute at the WTO is the DPCIA.[72] Congress enacted the DPCIA in 1990 in response to fishing practices that were found to be particularly damaging to dolphin populations.[73] The DPCIA created a regulatory program, implemented through the Department of

[61] 7 C.F.R. §§65.180, 65.300(e)(3) (2009).

[62] *See* 7 C.F.R. §65.300(f) (2009).

[63] *See* 7 C.F.R. §65.300(e) (2009).

[64] *See* 7 C.F.R. §65.300(e)(4) (2009).

[65] *See* 7 C.F.R. §65.300(e)(2) (2009).

[66] 7 U.S.C. §1638a(d).

[67] 7 U.S.C. §1638b(b).

[68] 7 U.S.C. §1638(2)(B).

[69] 7 C.F.R. §65.220 ("*Processed food item* means a retail item derived from a covered commodity that has undergone specific processing resulting in a change in the character of the covered commodity, or that has been combined with at least one other covered commodity or other substantive food component (e.g., chocolate, breading, tomato sauce) ... Specific processing that results in a change in the character of the covered commodity includes cooking ... curing ... smoking. Examples of items excluded include teriyaki flavored pork loin.").

[70] 7 U.S.C. §1638a(b); 7 C.F.R. §65.140 ("*Food service establishment* means a restaurant, cafeteria, lunch room, food stand, saloon, tavern, bar, lounge, or other similar facility operated as an enterprise engaged in the business of selling food to the public.").

[71] Livestock producers may not know whether the end product will be processed or sold at a food establishment.

[72] 16 U.S.C. §1385.

[73] *See* 16 U.S.C. §1385(b) ("The Congress finds that—(2) it is the policy of the United States to support a worldwide ban on high seas driftnet fishing, in part because of the harmful effects that such driftnets have on marine mammals, including dolphins."). The DPCIA was also amended in 1997. P.L. 105-42 (1997).

Commerce (DOC), that establishes when tuna products[74] can be labeled as "dolphin-safe."[75] In particular, the statute denies the "dolphin-safe" label for tuna caught using purse seine nets that were "set on" dolphins.[76] For reasons explained below, the statute provides more stringent requirements for tuna that have been caught in a particular area of the Pacific Ocean—these more stringent requirements caused Mexico to challenge the program in the WTO.

In the eastern tropical Pacific (ETP), an area off the western coast of Mexico and Central America in the Pacific Ocean, yellowfin tuna typically swim underneath dolphin pods.[77] There is a strong ecological association between the two species, which, for apparently unknown reasons, seems to be stronger in the ETP. Therefore, in the ETP, tuna-fishing boats often look for dolphin pods on the surface of the water, and then seek to catch the tuna that are associated with those dolphins.[78] The fishing boats sometimes "set on" the dolphins (cast nets around the dolphins and associated tuna) to catch tuna, and, incidental to this practice, dolphins may drown when they get caught in the fishing nets.[79] Concerned with the high mortality rate of dolphins from these fishing practices, Congress passed the DPCIA.

The DPCIA, and its implementing regulations,[80] establish when a tuna product is eligible for the "dolphin-safe" label. If the tuna has not been caught using methods compliant with the DPCIA, then that tuna may not be labeled "dolphin-safe," and the producer cannot use "any other term or symbol that ... claims or suggests that tuna contained in the product were harvested using a method of fishing that is not harmful to dolphins."[81] Any person found to knowingly and willfully mislabel tuna products covered under the statute is subject to a civil penalty of up to $100,000.[82] It is worth noting that the DOC amended the implementing regulations in 2013 in response to the WTO proceedings discussed below;[83] however, this section discusses the dolphin-safe regulations as they existed when the initial WTO disputes were brought against the United States in 2009.[84]

In establishing what types of fishing practices qualify for the dolphin-safe label, the law differentiates between fishing that occurs in the ETP, because of the ecological association between dolphins and tuna in that area, and fishing that occurs elsewhere in the world.[85] For tuna caught in the ETP, a producer can label the product "dolphin-safe" only if the captain of the vessel and an independent observer certify that "no purse seine net was intentionally deployed on or used to encircle dolphins" during the trip, and that "no dolphins were killed or seriously injured" during the expedition.[86] Therefore, tuna caught in the ETP using purse seine nets that were set on dolphins are not eligible for the dolphin-safe label (regardless of whether dolphins are

[74] The DPCIA defines "tuna product" as "a food item which contains tuna and which has been processed for retail sale, except perishable sandwiches, salads, or other products with a shelf life of less than 3 days." 16 U.S.C. §1385(c)(5).

[75] 16 U.S.C. §1635(d).

[76] *Id.*

[77] *See* Appellate Body Report, *U.S.–Tuna II*, at n. 355.

[78] *Id.*

[79] *Id.*

[80] 50 C.F.R. §§216.90-216.95.

[81] 16 U.S.C. §1385(d).

[82] 16 U.S.C. §1385(e).

[83] Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products, 78 Fed. Reg. 40997 (July 9, 2013).

[84] 50 C.F.R. §§216.90-216.95 (2009).

[85] *See* 16 U.S.C. §1385(1)(B), (C).

[86] 50 C.F.R. §§216.91(a)(1), 216.92(b) (2009).

harmed). Similarly, tuna from the ETP cannot be labeled dolphin-safe, regardless of the fishing method used, if the independent observer witnesses the death or serious injury of a dolphin during the trip. However, outside of the ETP, because there is no association between dolphin pods and schools of tuna, the certification requirements are different. In those locations, the captain needs only to certify that purse seine nets were not intentionally deployed on or used to encircle dolphins during the fishing expedition.[87] There is no requirement to certify that no dolphins were harmed or killed, and there is no requirement for an independent observer to be onboard the ship. Notably, the DPCIA regulates only the use of the dolphin-safe label; the law does not prohibit the import, marketing, or sale of tuna that does not qualify for the label.[88]

WTO Appellate Body Analysis of the Labeling Programs Under Article 2.1 of the TBT Agreement

Toward the end of 2008, Canada and Mexico, pursuant to WTO dispute settlement procedures, requested consultations with the United States regarding the COOL program.[89] After consultations did not resolve the dispute between the parties, Canada and Mexico requested the establishment of a dispute settlement panel to determine whether the U.S. COOL program complied with WTO obligations.[90] The WTO established the dispute settlement panel in May 2010.[91] Canada and Mexico alleged, *inter alia*, that the U.S. COOL program violated Article 2.1 of the TBT Agreement.[92]

Similarly, in 2008, Mexico requested consultations with the United States regarding the dolphin-safe labeling program.[93] After consultations did not result in a mutually agreed-upon solution, Mexico requested the establishment of a dispute panel, which was established on April 20, 2009.[94] Mexico also claimed, *inter alia*, that the U.S. labeling program for tuna violated Article 2.1 of the TBT Agreement.[95] The WTO's Appellate Body decisions from these disputes provide insight into the application of Article 2.1, and on how to determine if a measure qualifies as a technical regulation under the TBT Agreement.

[87] *See* 50 C.F.R. §216.91(2) (2009).

[88] *See* 16 U.S.C. §1385.

[89] Request for Consultations by Canada, *U.S.–Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/1 (December 4, 2008). Canada subsequently updated its request for consultations following slight changes to the COOL program in 2009. Request for Consultations by Canada, *U.S.–COOL*, WT/DS384/1/Add.1 (May 11, 2009). Mexico similarly submitted a request for consultations and further amended that request. Request for Consultations by Mexico, *U.S.–COOL*, WT/DS386/1 (December 22, 2008); Request for Consultations by Mexico, *U.S.–COOL*, WT/DS386/1/Add.1 (May 11, 2009).

[90] Request for the Establishment of a Panel by Canada, *U.S.–COOL*, WT/DS384/8 (October 10, 2009); Request for the Establishment of a Panel by Mexico, *U.S.–COOL*, WT/DS386/7 (October 13, 2000).

[91] Constitution of the Panel Established at the Requests of Canada and Mexico, *U.S.–COOL*, WT/DS384/9, WT/DS386/8 (May 11, 2010).

[92] *See* Appellate Body Report, *U.S.–COOL*, at ¶ 4.

[93] Request for Consultations by Mexico, *U.S.–Tuna II*, WT/DS381/1 (October 28, 2008).

[94] Request for the Establishment of a Panel by Mexico, *U.S.–Tuna II*, WT/DS381/4 (March 10, 2009); Constitution of the Panel Established at the Request of Mexico, *U.S.–Tuna II*, WT/DS381/5 (December 15, 2009).

[95] Appellate Body Report, *U.S.–Tuna II*, at ¶ 1.

Preliminary Matters: Does Article 2 of the TBT Agreement Apply?

An analysis of whether a particular measure violates Article 2 of the TBT Agreement begins by establishing whether the measure in question is in fact a technical regulation under the TBT Agreement.[96] Determining whether the measure is a technical regulation is a threshold question because, if it is not, "then it does not fall within the scope of the TBT Agreement."[97] According to the *EC-Sardines* case, a technical regulation must meet three criteria: (1) the document must apply to an identifiable product or group of products; (2) the document must "lay down" one or more characteristics of those products; and (3) "compliance with the product characteristics must be mandatory."[98]

The United States did not dispute that the COOL program was a technical regulation—it applies to an identifiable group of products (beef and pork); it lays down characteristics of beef and pork by requiring the products to be labeled; and compliance with COOL is mandatory because all muscle cuts subject to COOL must be labeled properly, and producers can face monetary penalties for failing to abide by the requirements.[99] Alternatively, the determination of whether the labeling program was a technical regulation was an important factor in *U.S. Tuna II*. The first two prongs of the test were relatively simple for the Appellate Body to establish. First, the labeling program applied to an identifiable group of products, namely tuna.[100] Second, the measure laid down certain characteristics of the product in order to qualify for the dolphin-safe label—that is, the tuna had to be caught using particular fishing methods in order to be labeled as "dolphin-safe."[101] Indeed, the United States did not appeal these findings.[102] However, the third prong of the test, whether the measure was mandatory, was a point of contention between the parties.

The United States contended that the dolphin-safe tuna label was not a mandatory label because the measure did not prohibit the import, marketing, or sale of any tuna, regardless of the fishing methods used.[103] Mexican distributors, the U.S. noted, were still able to access the U.S. market for tuna—the law prevented only certain tuna from being labeled as dolphin-safe.[104] Therefore, because the DPCIA does not block the sale of such tuna, the United States argued, compliance with the labeling program is voluntary and, thus, the measure should not qualify as a technical regulation. Mexico countered that the program should be viewed as mandatory because the dolphin-safe label could be used only if producers complied with the requirements of the DPCIA,

[96] *See id.* at ¶ 178; Appellate Body Report, *EC–Sardines*, at ¶ 175; Appellate Body Report, *EC–Asbestos*, at ¶ 59.

[97] Appellate Body Report, *EC–Sardines*, at ¶ 175.

[98] *Id.* at ¶ 176.

[99] *See* Appellate Body Report, *U.S.–COOL*, at ¶ 267; Panel Report, *U.S.–COOL*, at paras. 7.146-7.217, WT/DS384/R, WT/DS386/R (November 18, 2011). It is worth noting that a portion of Canada's and Mexico's complaint was set aside on this ground. Canada and Mexico had also challenged agency guidance, namely a letter from the Secretary of Agriculture, suggesting that producers provide even more information on their labels than required. The WTO panel found that this agency guidance document, which is by definition not legally binding, made only suggestions to U.S. producers, and was therefore not a technical regulation because complying with the letter was not mandatory. Panel Report, *U.S.–COOL*, at ¶ 63, WT/DS384/R, WT/DS386/R (November 18, 2011).

[100] *See* Appellate Body Report, *U.S.–Tuna II*, at ¶ 179.

[101] *Id.*

[102] *Id.*

[103] *Id.* at ¶ 196.

[104] *Id.*

and producers were prohibited from making any other statements regarding dolphin-safe fishing practices on a label.[105]

The Appellate Body agreed with Mexico and laid out a method for evaluating whether a measure is "mandatory" for the purposes of the TBT Agreement.[106] Notably, the fact that a producer must meet certain requirements to use a particular label is not dispositive of whether the measure is a technical regulation.[107] A labeling program that establishes that a product must contain certain characteristics in order to use a certain label is not *per se* a technical regulation. However, the Appellate Body also found that the United States' position, which contended that a labeling requirement is mandatory only if it prevents the sale of the product on the market, was also misguided.[108] The Appellate Body noted that the definition of a technical regulation in the TBT Agreement does not mention the term "market."[109] Therefore, a measure can still be a technical regulation even if it does not prohibit the sale of such a product on the market. The Appellate Body compared the DPCIA with the measure at issue in *EC—Sardines*.[110] In that case, the technical regulation at issue prohibited the sale of fish labeled as "preserved sardines" unless it was a specific species of fish.[111] The Appellate Body noted that the measure in *EC–Sardines* did not prohibit the *sale* of the other species of fish; it only prohibited their sale if they were labeled as preserved sardines.[112] Therefore, the Appellate Body noted, a labeling measure can be a technical regulation even if that particular label is not required in order to put the product on the market.[113]

The Appellate Body declared that the determination of "whether a particular measure constitutes a technical regulation must be made in light of the characteristics of the measure at issue and the circumstances of the case."[114] Therefore, there does not appear to be a bright line test, but, rather, a case-by-case evaluation that takes into consideration the facts of the dispute. Such a case-by-case assessment should consider the "nature of the matter addressed by the measure," and evaluate whether the measure (1) is an enforceable law or regulation; (2) prohibits or requires certain conduct; and (3) provides for the only manner to address a particular issue.[115]

The Appellate Body then applied each of these three criteria to the measure at issue to find that the labeling program is mandatory for the purposes of the TBT Agreement. First, the DPCIA and its implementing regulations are enforceable laws and regulations.[116] Second, the DPCIA prohibits and prescribes certain conduct with regard to the labeling of tuna products.[117] Finally, and seemingly most importantly, the WTO stressed that the DPCIA provided the *only* means for identifying tuna products as dolphin-safe.[118] The fact that the law prohibited tuna producers from

[105] *Id.* at ¶ 182.

[106] *Id.* at paras. 183-99.

[107] *Id.* at paras. 187-88.

[108] *Id.* at paras. 196-98.

[109] *Id.* at ¶ 196.

[110] *Id.* at paras. 197-98.

[111] Appellate Body Report, *EC–Sardines*, at ¶ 3.

[112] Appellate Body Report, *U.S.–Tuna II*, at paras. 197-98.

[113] *Id.* at ¶ 198.

[114] *Id.* at ¶ 188.

[115] *Id.*

[116] *Id.* at ¶ 191.

[117] *Id.* at paras. 192-93.

[118] *Id.* at ¶ 193 ("Consequently, the US measure establishes a single and legally mandated set of requirements for (continued...)

making any reference to marine mammal safety unless they complied with the terms of the DPCIA seemed to sway the determination by the Appellate Body greatly.[119] Even true statements regarding dolphins are prohibited on a label if the tuna does not qualify for the DPCIA's label. The Appellate Body emphasized that the measure "covers the entire field of what 'dolphin-safe' means in relation to tuna products in the United States."[120] These factors all weighed in favor of the Appellate Body's finding that the DPCIA is a technical regulation and subject to the requirements of Article 2 of the TBT Agreement.

National Treatment and Most-Favored Nation Treatment: Does the Measure Impermissibly Discriminate Against Foreign Products?

The Appellate Body evaluated the COOL program and the DPCIA under Article 2.1 of the TBT Agreement. As discussed above, Article 2.1 requires that "Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country."[121]

Thus, this article provides for both national treatment obligations (a member must not treat foreign products less favorably than domestic products) and MFN obligations (a member may not treat products from one foreign country more favorably than it treats the products of any other foreign country) with respect to the establishment and implementation of technical regulations. In *U.S.–COOL*, Canada and Mexico alleged that the COOL program violated the national treatment requirements—namely, that COOL treats foreign livestock less favorably than it treats domestic livestock.[122] In *U.S.–Tuna II*, Mexico claimed that the dolphin-safe labeling program violated both the national treatment and the most-favored nation requirements of Article 2.1.[123] In practice, the Appellate Body has evaluated the national treatment obligations and the MFN obligations under the same test, discussed below.

The WTO's Article 2.1 Test

The test for whether a product violates the requirements of Article 2.1 contains three parts: (1) the document must be a "technical regulation"; (2) the foreign and domestic products must be "like products"; and (3) the technical regulation must treat the foreign products less favorably than either domestic products, in a national treatment claim, or other foreign products, in an MFN claim.[124] As discussed above, the WTO found in both disputes that the statutes and regulations qualified as technical regulations.[125] Furthermore, the United States did not contest, in either dispute, whether the products at issue were "like products." This left the Appellate Body to

(...continued)

making any statement with respect to the broad subject of 'dolphin-safety' of tuna products in the United States.").

[119] *Id.* ("We attach importance to these characteristics of the measure at issue in assessing whether it can properly be characterized as a 'technical regulation' within the meaning of the TBT Agreement.").

[120] *Id.*

[121] TBT Agreement art. 2.1.

[122] Appellate Body Report, *U.S.–COOL*, at ¶ 4.

[123] Appellate Body Report, *U.S.–Tuna II*, at ¶ 1.

[124] Appellate Body Report, *U.S.–Measures Affecting the Production and Sale of Clove Cigarettes*, at ¶ 87, WT/DS406/AB/R (April 4, 2012) (hereinafter *U.S.–Clove Cigarettes*).

[125] *See supra* "Preliminary Matters: Does Article 2 of the TBT Agreement Apply?"

evaluate the third criterion: whether the COOL program and DPCIA treated foreign products less favorably than domestic products. To make this determination, the Appellate Body evaluates two factors: (1) whether the measure has a detrimental impact on the foreign products, and, if so, (2) whether the technical regulation is based on a legitimate regulatory distinction.[126]

Under the first factor, importantly, a technical regulation need not discriminate against foreign products on its face in order to have a detrimental impact. In both cases, the Appellate Body noted that Article 2.1 prohibits both *de jure* and *de facto* discrimination.[127] Therefore, a reviewing panel should not look just at the text of the document, because even a measure phrased in origin-neutral language may have a detrimental effect on foreign products. In both the COOL and DPCIA disputes, the measures were determined to have a *de facto* detrimental effect on foreign products vis-à-vis domestic products.[128]

In order to determine whether the measure has a detrimental impact, the reviewing body shall look to see the effect that the *measure* has on the market for the products.[129] For example, if the detrimental impact is caused by the independent actions of private parties, such as private firms or consumers making a choice independent of the measure, rather than because of the technical regulation itself, then the measure will not be deemed to have a detrimental impact on the market. As the Appellate Body stated, there must be a "genuine relationship between the measure at issue and an adverse impact on competitive opportunities for imported products."[130] However, importantly, if the technical regulation *incentivizes* private parties to act in a particular manner that causes a detrimental impact, that impact can still properly be attributed to the measure at issue.[131] The central question to ask is whether the regulatory action "affects the conditions under which like goods ... compete in the market within a Member's territory."[132]

This examination is fact-intensive, and should consider characteristics of the particular market, consumer preferences, the relative market share of the countries involved, and historical patterns of trade in that industry.[133] After evaluating these facts, if the regulation provides an advantage to products of domestic origin when compared to the foreign product, then there is a detrimental impact.

If the technical regulation does have a detrimental impact, the reviewing WTO panel shall determine if the technical regulation is based on a "legitimate regulatory distinction."[134] Mere detrimental effect is not enough to establish a violation of Article 2.1—that is, if the member implementing the regulation can show that the regulation is based on a legitimate regulatory distinction that is applied in an "even-handed" manner, then the technical regulation is valid.

---

[126] Appellate Body Report, *U.S.–Clove Cigarettes*, at paras. 180-82.

[127] Appellate Body Report, *U.S.–COOL*, at ¶ 269; *see also* Appellate Body Report, *U.S.–Tuna II*, at ¶ 225; Appellate Body Report, *U.S.–Clove Cigarettes*, at ¶ 182.

[128] *See* Appellate Body Report, *U.S.–COOL*, at ¶ 269; Appellate Body Report, *U.S.–Tuna II*, at ¶ 225.

[129] Appellate Body Report, *U.S.–Clove Cigarettes*, at paras. 180-82.

[130] Appellate Body Report, *U.S.–COOL*, at ¶ 270; *see also* Appellate Body Report, *U.S.–Tuna II*, at ¶ 214.

[131] Appellate Body Report, *U.S.–COOL*, at ¶ 270; *see also* Appellate Body Report, *Korea–Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, at ¶ 137, WT/DS161/AB/R (January 10, 2001) (holding, when applying GATT national treatment obligations, that a measure that incentivizes parties to act in a particular way causes detrimental impact).

[132] Appellate Body Report, *U.S.–COOL*, at ¶ 270.

[133] Appellate Body Report, *U.S.–COOL*, at ¶ 270; Appellate Body Report, *U.S.–Tuna II*, at ¶ 236.

[134] Appellate Body Report, *U.S.–Clove Cigarettes*, at paras. 180-82; Appellate Body Report, *U.S.–Tuna II*, at paras. 240-43; Appellate Body Report, *U.S.–COOL*, at ¶ 271.

Notably, this part of the test is not readily apparent from reading the text of Article 2.1, as there is no explicit exception for legitimate regulatory distinctions listed in the article.[135] However, the Appellate Body has established that simply because a measure has a detrimental effect on certain products, it does not mean that those products are treated less favorably.

The Appellate Body noted that technical regulations, by their very definition, distinguish between products based on their characteristics and, thus, such distinctions do not automatically establish "less favourable treatment" under the TBT Agreement, even if they restrict trade.[136] The Appellate Body noted that Article 2.2 of the TBT Agreement provides guidance on how to interpret Article 2.1.[137] Article 2.2 provides that a technical regulation should not be "more trade restrictive than necessary," showing that measures are allowed to restrict trade to at least some extent.[138] Finally, the Appellate Body cited the preamble of the TBT Agreement to show that WTO members recognize that measures may be enforced to pursue certain legitimate regulatory objectives such as the protection of human or environmental health.[139] Therefore, the judicial test for determining if a measure treats a foreign product "less favorably" is more complex than merely showing that a measure has restricted trade of a product—if the technical regulation is based on a legitimate regulatory distinction that is applied in an "even-handed" manner, then the technical regulation will not violate Article 2.1.[140] However, if the technical regulation is applied in an arbitrary manner, then the detrimental impact reflects discrimination in violation of the TBT Agreement.[141]

In evaluating whether a legitimate regulatory distinction exists, the reviewing body must first determine what regulatory distinction is being made by the regulation at issue.[142] A technical regulation, as discussed above, "lays down" characteristics of a product to distinguish the product from another product (e.g., products containing asbestos compared to products without asbestos). The reviewing court must determine *how* the products are being distinguished.[143] For example, in the DPCIA dispute, the regulatory distinction is based on labeling conditions for tuna caught in the ETP compared to tuna caught outside the ETP—the regulation imposes different requirements based on this distinction.[144]

Once the reviewing body determines the regulatory distinction, it must then decide whether the distinction is justified because it is a legitimate regulatory distinction. The Appellate Body does not seem to have provided a clear test to decide whether a measure stems exclusively from a legitimate regulatory distinction. Rather, the reviewing body must evaluate on a case-by-case

[135] *See* TBT Agreement art. 2.1.

[136] Appellate Body Report, *U.S.–Tuna II*, at ¶ 211.

[137] Appellate Body Report, *U.S.–Tuna II*, at ¶ 212.

[138] *See* TBT Agreement art. 2.2; *see also* Appellate Body Report, *U.S.–Tuna II*, at ¶ 212 ("The context provided by Article 2.2 supports a reading that Article 2.1 does not operate to prohibit *a priori* any restriction of international trade.").

[139] Appellate Body Report, *U.S.–Tuna II*, at ¶ 212 ("The sixth recital of the preamble recognizes that a WTO Member may take measures necessary for, *inter alia*, the protection of animal or plant life or health, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that such measures 'are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination.'").

[140] Appellate Body Report, *U.S.–COOL*, at ¶ 271.

[141] *See id.*

[142] *Id.* at ¶ 341 ("We first identify the relevant regulatory distinction."); s*ee also* Appellate Body Report, *U.S.–Tuna II*, at ¶ 284.

[143] Appellate Body Report, *U.S.–Tuna II*, at ¶ 284.

[144] *Id.*

basis whether the measure at issue is applied in an "even-handed" manner.[145] Such an inquiry is highly fact-intensive and requires an examination of the particular circumstances of the case. Ultimately, the reviewing body asks if the regulatory distinction, which has already been determined to cause harm to foreign products, is being implemented in a legitimate manner considering the objective sought.[146]

The Article 2.1 Test as Applied in *U.S.–COOL*

As discussed previously, the first two prongs of the Article 2.1 test were not contested in the *U.S.–COOL* case.[147] The parties agreed that COOL was a technical regulation that applied to "like" products. Therefore, the Appellate Body focused on the third and final portion of the Article 2.1 analysis—that is, whether the COOL program treated Canadian and Mexican livestock less favorably than domestic livestock.

First, the Appellate Body found that the technical regulation had a detrimental impact on Canadian and Mexican livestock. Specifically, the WTO found that the COOL measure established a *de facto* requirement that all livestock processors segregate their livestock by origin based on where the animals were born, raised, and slaughtered in order to keep verifiable records and transmit that information down the supply chain, as required by the law.[148] These records, under the COOL statute, must be maintained to avoid facing the statute's penalty provisions.[149] This *de facto* requirement to segregate the livestock imposed significant costs on livestock producers. Further, after assessing the facts, the WTO found that livestock producers in the United States avoided the added costs associated with segregating livestock by processing only domestic livestock or purchasing foreign livestock at reduced prices.[150] The United States argued that the decision to process only domestic livestock was a business decision made by private parties independent of the measure at issue.[151] However, the Appellate Body rejected this argument by finding that the technical regulation at issue *incentivized* the processing of only domestic livestock, and was therefore the cause of the detrimental impact.[152] Having found that the COOL statute caused a detrimental impact on foreign products, the Appellate Body then proceeded to the next portion of the test.

Based on the facts specific to the *U.S.–COOL* dispute, the WTO found that the detrimental impact on foreign livestock did not stem from a legitimate regulatory distinction.[153] It established that the purpose of COOL was to provide consumers with information regarding the origin of their meat

[145] *See id.* at paras. 347-50.

[146] Appellate Body Report, *U.S.–Clove Cigarettes*, at ¶ 225 (noting the objective of the measure at issue when determining whether the technical regulation is based on a legitimate regulatory distinction); Appellate Body Report, *U.S.–COOL*, at ¶ 349 (beginning the discussion of whether the measure was based on a legitimate regulatory distinction by "point[ing] out, as a preliminary matter, that the ... objective pursued by the United States through the COOL measure" is to provide consumers with information).

[147] *See* Appellate Body Report, *U.S.–COOL*, at ¶ 267.

[148] *Id.* at ¶ 289.

[149] 7 U.S.C. §§1638a(d), 1638b.

[150] Appellate Body Report, *U.S.–COOL*, at ¶ 287 ("[T]he least costly way of complying with the COOL measure is to rely exclusively on domestic livestock.").

[151] *See id.* at paras. 288-90.

[152] *Id.*

[153] *See id.* at paras. 347-50.

products.[154] To accomplish this objective, the Appellate Body noted that the COOL statute requires upstream producers to maintain verifiable records on the origin of *all* livestock and meat, and forward them to the next business in the production chain so the meat can be labeled properly.[155] However, all the information maintained and transmitted down the supply chain was not transmitted to the consumer in a useful manner, if at all.[156] The Appellate Body noted that the labels involved were confusing, and, even if understood, failed to provide the consumer with the amount of information that the upstream producers were required to maintain.[157]

While producers had to track where all animals were born, raised, and slaughtered throughout the supply chain, the consumer would rarely receive that information on the product's label.[158] It is difficult for a consumer, without being particularly educated on the issue, to understand what the different labels mean.[159] The Appellate Body also pointed out that the statute's provisions allowing the different categories of meat to be commingled adds further confusion for a consumer.[160] For example, if a slaughterhouse processed Category B meat on the same day as Category C meat, under the regulations, that meat would be eligible to receive a Category B label.[161] Therefore, a consumer could not be sure where each production step occurred based on reading the label, even assuming that the consumer understood the general distinction between the labels. Furthermore, the Appellate Body noted that a substantial amount of meat is exempt from the COOL program, such as meat that is processed or sold in a prepared food establishment, like a restaurant.[162] For meat exempt from label requirements, the consumer does not learn about where any of the meat originated; yet the upstream producers are still required to maintain and transmit all the information regarding the origin of the livestock for each production step.[163]

Thus, the Appellate Body ruled that the amount of information required to be maintained by upstream producers (which caused the detrimental impact) was not commensurate with the information actually conveyed to the consumer.[164] The detrimental impact on foreign livestock caused by increased costs due to *de facto* segregation requirements could not be explained by the need to provide consumers with information on the origin of meat products because little of that information actually reached the consumer.[165] Therefore, the WTO found that the detrimental impact caused by the technical regulation did not stem from a legitimate regulatory distinction, and impermissibly discriminated against foreign products.[166]

[154] *Id.* at ¶ 332.

[155] *Id.* at ¶ 339.

[156] *Id.* at paras. 343-44.

[157] *Id.* at ¶ 347.

[158] *Id.* at paras. 343-50.

[159] *Id.* at ¶ 338 ("A label stating 'Product of the US, Mexico', for example, does not describe what 'US and Mexico' means as far as origin of the meat is concerned.").

[160] *Id.* at ¶ 343.

[161] *See id.*

[162] *Id.* at ¶ 344.

[163] *Id.*

[164] *Id.* at paras. 347-50.

[165] *Id.* at ¶ 349.

[166] *Id.*

The Article 2.1 Test as Applied in *U.S.–Tuna II*

After establishing that the DPCIA and implementing regulations qualified as technical regulations and that the foreign tuna products were like domestic tuna products and products from other foreign countries,[167] the Appellate Body turned to whether the tuna labeling regulations treated the Mexican tuna products less favorably.

First, the Appellate Body determined that the measure caused a detrimental impact on the Mexican tuna products. The facts established, and the United States did not appeal the finding, that "dolphin-safe" labels added significant value to tuna products in the U.S. market because retailers and consumers in the United States greatly prefer purchasing tuna with that label.[168] Thus, after reviewing market data, the WTO found that access to the dolphin-safe label constitutes an advantage. The Appellate Body then had to determine if it was the measure itself that denied Mexico access to that label and, thus, caused a detrimental impact.

As previously discussed, the DPCIA provides for more stringent requirements for tuna caught in the ETP than for tuna caught outside of the ETP. Because the Mexican fishing fleet operates mostly in the ETP, the Appellate Body noted, under the technical regulation, "most tuna caught by Mexican vessels ... would not be eligible for inclusion in a dolphin-safe product."[169] The technical regulation had the *de facto* effect of imposing more stringent requirements on Mexican fishers vis-à-vis fishers from the United States and other foreign countries. Therefore, the regulation had a detrimental effect on Mexican tuna products.

The United States argued, again, that independent decisions made by private actors, such as consumers, caused the detrimental impact, not the measure itself; however, the WTO disagreed with that argument.[170] The Appellate Body found that the measure controlled access to the label and, therefore, any value added to the product by the label is provided by the technical regulation.[171] The Appellate Body noted that the "fact that the detrimental impact on Mexican tuna products may involve some element of private choice does not, in our view, relieve the United States of responsibility under the TBT Agreement."[172] Ultimately, the technical regulation caused a change in the way products competed on the U.S. market, to the detriment of Mexican tuna.[173] However, the Appellate Body still had to determine whether the detrimental impact stemmed from a legitimate regulatory distinction.

The Appellate Body found that the DPCIA does not stem from a legitimate regulatory distinction, and, thus, the DPCIA represents discrimination in violation of Article 2.1.[174] First, the Appellate Body noted that the stated objective of the United States' measure was to ensure consumers are not misled regarding whether tuna products contain tuna that was caught in a manner that harms dolphins.[175] The United States argued that because there is a substantially larger risk to dolphins in the ETP, the distinction made by the measure is legitimate—that is, the different conditions in the ETP provide a basis for the technical regulation treating tuna caught in the ETP differently

[167] *See supra* "Preliminary Matters: Does Article 2 of the TBT Agreement Apply?."

[168] Appellate Body Report, *U.S.–Tuna II*, at ¶ 233.

[169] *Id.* at ¶ 234.

[170] *See id.* at ¶ 236.

[171] *Id.* at paras. 237-38.

[172] *Id.* at ¶ 239.

[173] *Id.*

[174] *Id.* at paras. 240-43.

[175] *Id.* at ¶ 242.

from tuna caught outside the ETP.[176] The Appellate Body agreed that fishing in the ETP poses a significant threat to dolphins.[177] However, the Appellate Body also noted that other fishing methods undertaken outside of the ETP also posed a threat to dolphins, even if the threat is not as substantial.[178] The Appellate Body found it problematic that the technical regulation did not address the threats to these dolphins.[179] Under the technical regulation, tuna caught in the ETP would not be eligible for a dolphin-safe label if an independent observer found that any dolphins were killed or harmed during the trip (regardless of the fishing methods used).[180] Meanwhile, outside the ETP, tuna *would be* eligible for the dolphin-safe label even if someone observed that a dolphin was killed or injured during the trip.[181] The WTO found that while the measure takes an absolute approach to dolphin safety in the ETP, where Mexico fishes, it takes a much more lenient approach in all other parts of the globe.[182] The Appellate Body emphasized:

> We note, in particular, that the US measure *fully* addresses the adverse effects on dolphins resulting from setting on dolphins in the ETP, whereas it does not address mortality (observed or unobserved) arising from fishing methods other than setting on dolphins outside the ETP. In these circumstances, we are not persuaded that the United States has demonstrated that the measure is even-handed in the relevant respects, even accepting that the fishing technique of setting on dolphins is particularly harmful to dolphins.[183]

The Appellate Body concluded that the DPCIA is not properly "calibrated" to address risks to dolphins from different parts of the ocean and is, therefore, not even-handed.[184] Thus, because the measure had a detrimental effect on Mexican tuna products, and the technical regulation was not applied in an even-handed manner, the DPCIA reflects discrimination in violation of Article 2.1 of the TBT Agreement.[185]

Continuation of WTO Proceedings

In each dispute, after the Appellate Body found that the United States' technical regulations violated obligations contained in WTO agreements, the United States had a "reasonable period of time" to comply with the WTO's findings.[186] In both cases, the executive agencies responsible for implementing the programs revised the applicable regulations in an attempt to bring the programs into compliance with WTO obligations.[187] WTO compliance panels found, in both disputes, that

[176] *Id.* at ¶ 282.

[177] *See id.* at ¶ 287-89.

[178] *Id.* at ¶ 289.

[179] *Id.* at ¶ 297.

[180] *Id.* at ¶ 175.

[181] *Id.* at ¶ 289.

[182] *Id.* at ¶ 297.

[183] *Id*.

[184] *Id.* at paras. 297-99.

[185] *Id.* at ¶ 299.

[186] DSU art. 21(3).

[187] *See* Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, 78 Fed. Reg. 31367 (May 24, 2013); Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products, 78 Fed. Reg. 40997 (July 9, 2013).

those changes did not cure the defects with the technical regulations.[188] In *U.S.–COOL*, the dispute has proceeded to the retaliation phase of the dispute settlement process.[189] In *U.S.–Tuna II*, the United States is waiting on the Appellate Body's opinion on its appeal of the compliance panel findings.[190] This section of the report provides a very brief description of the amendments to the regulations and the subsequent findings of the compliance panels and Appellate Body reviewing those amendments. The applied test under Article 2.1, as discussed above, remained the same.

U.S.–COOL Proceedings: Compliance Panel and Retaliation

The USDA, through notice-and-comment rulemaking, amended the regulations pertaining to the COOL program in 2013.[191] In the department's amendments, it appears that the USDA attempted to make the information maintained by upstream producers "commensurate" with the information provided to consumers. In this manner, the new regulations provided that the labels on all muscle cuts of meat had to include where all of the production steps occurred.[192] For example, instead of a Category A label reading "Product of the U.S.," the label is now required to read "born, raised, slaughtered in the U.S."[193] The other categories of labels were similarly amended to include the production steps.[194] Furthermore, the new rule prohibited commingling of meats to help ensure that each label appropriately reflected the origin of the meat.[195] Therefore, the USDA attempted to adhere to the WTO ruling not by removing the incentive for segregation, but by ensuring that consumers received more of the collected information.[196]

However, Canada and Mexico were unsatisfied with the changes to the COOL program. Both countries requested that a WTO compliance panel review the changes to the U.S. program to determine whether the new regulations satisfied WTO obligations.[197] The compliance panel found that although the changes to the program provided *more* information to the consumer, the actions

[188] *See* Recourse to Article 21.5 of the DSU by Mexico, Report of the Compliance Panel, *U.S.–Tuna II*, WT/DS381/RW (April 14, 2015) (hereinafter Report of the Compliance Panel, *U.S.–Tuna II*); Recourse to Article 21.5 of the DSU by Canada and Mexico, Report of the Panel, *U.S.–COOL*, WT/DS384/RW (hereinafter Report of the Compliance Panel, *U.S.–COOL*); Recourse to Article 21.5 of the DSU by Canada and Mexico, *U.S.–COOL*, WT/DS384/AB/RW (May 18, 2015) (hereinafter Article 21.5 Report of the Appellate Body, *U.S.–COOL*).

[189] *See* Recourse by Canada to Article 22.2 of the DSU, *U.S.–COOL*; Recourse by Mexico to Article 22.2 of the DSU, *U.S.–COOL*.

[190] Communication from the Appellate Body, Recourse to Article 21.5 of the DSU by Mexico, *U.S.–Tuna II*, WT/DS381/26 (noting that the Appellate Body estimates its report to be circulated to WTO members by November 20, 2015).

[191] *See* Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Wild and Farm-Raised Fish and Shellfish, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, 78 Fed. Reg. 31367 (May 24, 2013).

[192] *Id.* at 3167 ("Under this final rule, origin designations for muscle cut covered commodities derived from animals slaughtered in the United States are required to specify the production steps of birth, raising, and slaughter of the animal from which the meat is derived that took place in each country listed on the origin designation.").

[193] *Id.* at 31385 ("The United States country of origin designation for muscle cut covered commodities shall include all of the production steps (i.e., 'Born, Raised, and Slaughtered in the United States').").

[194] *See id.*

[195] *Id.* at 3167 ("In addition, this rule eliminates the allowance for commingling of muscle cut covered commodities of different origins.").

[196] *See id.* ("These changes will provide consumers with more specific information about the origin of muscle cut covered commodities."). For more information on the 2013 amendments to the COOL regulations, *see* CRS Report RS22955, *Country-of-Origin Labeling for Foods and the WTO Trade Dispute on Meat Labeling*, by (name redacted).

[197] *See* Report of the Compliance Panel, *U.S.–COOL*; Article 21.5 Report of the Appellate Body, *U.S.–COOL*.

were not enough to bring the measure into compliance.[198] The compliance panel noted, *inter alia*, that the burden on upstream producers was still not commensurate with information provided to consumers because of the statutory exemptions for processed meat and for meat sold at prepared food establishments.[199] Following the same tests as outlined above, the WTO found that the COOL program was not based on a legitimate regulatory distinction, and thus represented impermissible discrimination in violation of Article 2.1 of the TBT Agreement.[200]

Canada and Mexico have since requested permission from the WTO to retaliate against U.S. products due to the United States' failure to bring the COOL program into compliance with WTO obligations.[201] Together, Canada and Mexico have sought retaliation for approximately $3 billion in impairment.[202] The United States has challenged the amount of damages that Canada and Mexico have claimed.[203] Currently, the dispute regarding the amount of impairment the COOL program causes is being heard by an arbitration panel at the WTO.[204] Canada and Mexico then will be able to suspend concessions (e.g., raise tariffs) on U.S. products in the amount determined by the arbitration panel.[205] However, if the United States brings the COOL program into compliance with WTO obligations, the authority to suspend concessions will terminate.[206] In order for the United States to bring the measure into compliance, Congress will have to amend the COOL statute.[207]

U.S.–Tuna II Proceedings: Compliance Panel

Following the Appellate Body's determination in *U.S.–Tuna II*, discussed above, the DOC amended the implementing regulations for the DPCIA in an attempt to come into compliance with the WTO ruling.[208] Because the WTO Appellate Body found that the DPCIA violated Article 2.1 because it fully addressed dolphin mortality in the ETP while failing to address dolphin mortality outside of the ETP, the amended regulations imposed stricter requirements on tuna caught outside of the ETP to better "calibrate" the dolphin-safe labeling program.[209] Thus, again, the United States appears to have attempted to solve the problem not by alleviating the burden on the foreign

[198] *See* Report of the Compliance Panel, *U.S.–COOL*, at ¶ 7.272 (noting that the amended regulations address some of the informational disconnects addressed in the original proceedings).

[199] *Id.* (noting that the amended measure "fails to address in any way" the exemptions for processed products and meat sold in food establishments).

[200] *Id.* at ¶ 7.5.5; Article 21.5 Report of the Appellate Body, *U.S.–COOL*, at ¶ 6.2 (finding the compliance panel did not err in its Article 2.1 analysis).

[201] Recourse by Canada to Article 22.2 of the DSU, *U.S.–COOL*; Recourse by Mexico to Article 22.2 of the DSU, *U.S.–COOL*.

[202] *See* Recourse by Canada to Article 22.2 of the DSU, *U.S.–COOL*; Recourse by Mexico to Article 22.2 of the DSU, *U.S.–COOL*.

[203] Recourse to Article 22.6 of the DSU by the United States, *U.S.–COOL*, WT/DS386/36.

[204] Constitution of the Arbitrator, *U.S.–COOL*, WT/DS384/37 (June 24, 2015).

[205] DSU art. 22.

[206] DSU art. 22(8) ("[S]uspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached.").

[207] For a discussion on legislative proposals to amend or repeal COOL requirements, see CRS Report RS22955, *Country-of-Origin Labeling for Foods and the WTO Trade Dispute on Meat Labeling*, by (name redacted)

[208] Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products, 78 Fed. Reg. 40997 (July 9, 2013).

[209] *Id.* at 41002.

producers, but rather by tailoring the rule so that it qualified as an even-handed and legitimate regulatory distinction. The amended regulations maintained the requirements for ETP vessels to keep an independent observer onboard the ship to certify that no dolphins were killed or injured during the trip.[210] However, it added, *inter alia*, a requirement that ships outside the ETP have the *captain* certify that no dolphins were killed or harmed during the particular fishing expedition.[211]

The compliance panel again followed the Article 2.1 test outlined above. First, it found that requiring an independent observer "involves an expenditure of significant resources."[212] Because only vessels operating in the ETP are required to maintain an independent observer, the regulation had a *de facto* detrimental impact on the Mexican tuna fleet, which mostly fishes in that area.[213] Second it sought to determine whether the detrimental impact stems from a legitimate regulatory objective. Although admitting that the DOC amendments brought the program closer to compliance,[214] the panel still found that the technical regulation was not applied in an even-handed manner.[215] The compliance panel found that independent observers have skills and qualifications that captains do not necessarily have,[216] yet only fishing vessels in the ETP are subject to this independent observer requirement.[217] Thus, it is still more difficult and costly for Mexican tuna products to qualify for the dolphin-safe label.[218] The panel stated that the varying provisions, which could allow for less accurate information regarding dolphin mortality for tuna caught outside the ETP, is "in contradiction with the objectives of the amended tuna measure," and found that the measure is not even-handed.[219]

The United States has appealed the ruling by the compliance panel.[220] The Appellate Body has indicated that it expects its report to be circulated in November 2015.[221] If the Appellate Body agrees that the DPCIA program violates Article 2.1 of the TBT Agreement, Mexico may seek permission to retaliate against the United States for failing to comply with WTO obligations.[222]

Conclusion

While, to date, the TBT Agreement has not been subject to extensive analysis from the Appellate Body, the Appellate Body's decisions in these two labeling disputes provide insight into the obligations imposed by that agreement. These cases can provide guidance to Congress and executive agencies when formulating technical regulations, including labeling programs.

---

[210] *See id.*

[211] *Id.*

[212] Report of the Compliance Panel, *U.S.–Tuna II*, at ¶ 7.162.

[213] *Id.*

[214] *Id.* at ¶ 7.141 ("[The] new uniformity in the required substantive certification ... moves the amended measure towards compliance with WTO law.").

[215] *Id.* at ¶ 7.234.

[216] *Id.* at ¶ 7.225.

[217] *See id.* at ¶ 7.162.

[218] *See id.* at paras. 7.232-7.234.

[219] *Id.* at ¶ 7.233.

[220] Notification of an Appeal by the United States, *U.S.–Tuna II*, WT/DS381/24 (June 10, 2015).

[221] Communication from the Appellate Body, Recourse to Article 21.5 of the DSU by Mexico, *U.S.–Tuna II*, WT/DS381/26 (noting that the Appellate Body estimates its report to be circulated to WTO members by November 20, 2015).

[222] DSU art. 22.

Legislators and agency officials must consider whether any regulatory scheme has a detrimental effect on foreign trade, and, if so, they must ensure that the program is tailored appropriately so that it is applied in an even-handed manner.

Author Contact Information

(name redacted)
Legislative Attorney
[redacted]@crs.loc.gov, ...