

amended tuna measure can be explained and justified in the light of differences in the relative risks associated with different methods of fishing for tuna in different areas of the oceans. Nevertheless, we have been able to examine whether or not the labelling conditions applied under the amended tuna measure constitute arbitrary or unjustifiable discrimination in certain scenarios that would present comparably high risks to dolphins inside and outside the ETP large purse-seine fishery. We find, in this respect, that aspects of the design of the amended tuna measure are difficult to reconcile with the objective of protecting dolphins from harm. In particular, we consider that the determination provisions do not provide for the substantive conditions of access to the dolphin-safe label to be reinforced by observer certification in all circumstances of comparably high risk, and that this may also entail different tracking and verification requirements than those that apply inside the ETP large purse-seine fishery. Thus, the United States has not demonstrated that these aspects of the amended tuna measure do not constitute arbitrary or unjustifiable discrimination within the meaning of the chapeau of Article XX. For all of these reasons, it has not been established that the amended tuna measure is justified under Article XX of the GATT 1994.

7.360. Consequently, in addition to finding that the amended tuna measure is inconsistent with Article I:1, and with Article III:4, of the GATT 1994, we find that it has not been demonstrated that the amended tuna measure is applied in a manner that does not constitute arbitrary or unjustifiable discrimination; and, thus, that the amended tuna measure is not justified under Article XX of the GATT 1994.

8 FINDINGS AND CONCLUSIONS

8.1. For the reasons set out in this Report, the Appellate Body:

a. with respect to Article 2.1 of the TBT Agreement:

- i. finds that the Panel erred in the application of Article 2.1 in its analysis of whether the amended tuna measure modifies the conditions of competition to the detriment of Mexican tuna products in the US market;
- ii. finds that the United States has not established that the Panel erred in its articulation of the relevant legal standard for the purposes of assessing whether the detrimental impact of the amended tuna measure on Mexican tuna products stems exclusively from a legitimate regulatory distinction;
- iii. finds that the Panel erred in finding that, in the original proceedings, the Appellate Body settled the issue of whether the eligibility criteria are even-handed;
- iv. finds that the Panel erred in the application of Article 2.1 in its analysis of whether the detrimental impact of the certification requirements and the tracking and verification requirements on Mexican tuna products stems exclusively from a legitimate regulatory distinction;
- v. finds that the United States has not established that the Panel erred in its assessment of whether the determination provisions are even-handed;
- vi. finds that neither Mexico nor the United States has established that the Panel acted inconsistently with its duty to conduct an objective assessment of the matter pursuant to Article 11 of the DSU in its analyses of the consistency of the eligibility criteria and the certification requirements with Article 2.1 of the TBT Agreement;
- vii. reverses the Panel's finding, in paragraph 8.2.a of its Report, that the eligibility criteria do not accord less favourable treatment to Mexican tuna products than that accorded to like products from the United States and to like products originating in any other country, and are thus consistent with Article 2.1, as well as the Panel's discrete findings, in paragraphs 8.2.b and 8.2.c of its Report, that the different certification requirements and the different tracking and verification requirements each accord less favourable treatment to Mexican tuna products than that accorded to like products from the United States and to like products originating in any other country, in violation of Article 2.1; and

- viii. completes the legal analysis and finds: that the amended tuna measure modifies the conditions of competition to the detriment of Mexican tuna products in the US market; that such detrimental impact does not stem exclusively from a legitimate regulatory distinction; and, thus, that the amended tuna measure accords less favourable treatment to Mexican tuna products as compared to like tuna products from the United States and other countries and is therefore inconsistent with Article 2.1 of the TBT Agreement;
- b. with respect to Articles I:1 and III:4 of the GATT 1994:
- i. finds that the Panel erred in the application of Articles I:1 and III:4 in its analyses of whether the amended tuna measure provides an "advantage, favour, privilege, or immunity" to tuna products from other countries that is not "accorded immediately and unconditionally" to like products from Mexico, in a manner inconsistent with Article I:1 of the GATT 1994, and of whether that measure accords less favourable treatment to Mexican tuna products than that accorded to like domestic products, in a manner inconsistent with Article III:4 of the GATT 1994; and
- ii. reverses the Panel's discrete findings, in paragraph 8.3 of its Report, that the eligibility criteria, the different certification requirements, and the different tracking and verification requirements are each inconsistent with Articles I:1 and III:4 of the GATT 1994;
- c. with respect to the chapeau of Article XX of the GATT 1994:
- i. finds that the Panel erred in the application of the chapeau of Article XX in its analyses of whether the eligibility criteria, the different certification requirements, and the different tracking and verification requirements are each applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail; and
- ii. reverses the Panel's finding, in paragraph 8.5.a of its Report, that the eligibility criteria are applied in a manner that meets the requirements of the chapeau of Article XX, as well as the Panel's discrete findings, in paragraphs 8.5.b and 8.5.c of its Report, that the different certification requirements and the different tracking and verification requirements are each applied in a manner that does not meet the requirements of the chapeau of Article XX; and
- d. in completing the analysis under the GATT 1994:
- i. finds that the amended tuna measure is inconsistent with Article I:1, and with Article III:4, of the GATT 1994; and
- ii. finds that it has not been demonstrated that the amended tuna measure is applied in a manner that does not constitute arbitrary or unjustifiable discrimination and, thus, that the amended tuna measure is not justified under Article XX of the GATT 1994.

8.2. The Appellate Body concludes that the United States has not brought its dolphin-safe labelling regime for tuna products into conformity with the recommendations and rulings of the DSB. The Appellate Body recommends that the DSB request the United States to bring its measure, found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the TBT Agreement and the GATT 1994, into conformity with its obligations under those agreements.

Signed in the original in Geneva this 2nd day of November 2015 by:

Shree Baboo Chekitan Servansing
Presiding Member

Ujal Singh Bhatia
Member

Yuejiao Zhang
Member
