http://dx.doi.org/10.18623/rvd.v16i35.1535

THE WTO UNDERSTANDING ABOUT THE 'DOLPHIN SAFE' CERTIFICATION IN TUNA FISHING: THE US TUNA II CASE

Joana Stelzer[1]
Universidade Federal de Santa Catarina (UFSC)

Everton das Neves Gonçalves[2]
Universidade Federal de Santa Catarina (UFSC)

Keite Wieira[3]
Escola Superior de Criciúma (ESUCRI)

ABSTRACT

This paper aims at analyzing the US Tuna II case, which was tried by the WTO Dispute Settlement System, in order to identify the role of the Dolphin safe certification imposed by the United States on tuna fishing in order to protect dolphins. This assessment was developed in light of WTO's Technical Barriers to Trade Agreement, as well as from the point of view of the definition and conceptualization of technical regulations. In order to reach the desired conclusion, it was necessary to understand the case, the above-mentioned agreement – including the National Treatment and the Most Favored Nation principles –, the creation of unnecessary obstacles to international trade and harmonization, the concept of technical regulations and, lastly, the decisions of the Panel and the Appellate Body. Based on this information, the final ruling on the case was analyzed based on its compliance with WTO rules on barriers and from the point of view of fair conditions of competition in international trade. As for the

1 Post-Doctor in Law by Universidade de São Paulo (USP). Doctor and Master in Law in the field of International Relations by Universidade Federal de Santa Catarina (UFSC). Associate Professor I for UFSC. Professor accredited in the Graduate Program in Law of Universidade Federal de Santa Catarina (PPGD/CCJ/UFSC) for Master's and Doctorate Courses. ORCID: http://orcid.org/0000-0002-9503-4080 / e-mail: contatojoana@yahoo.com.br

2 Doctor in Law in the field of Economic Law by Universidade Federal de Minas Gerais (UFMG). Doctor en Derecho, área de Derecho Internacional Económico, por la Universidad de Buenos Aires (UBA). Master in Law by UFSC. Full Professor for UFSC. Professor accredited in the Graduate Program in Law of Universidade Federal de Santa Catarina (PPGD/CCJ/UFSC) for Master's and Doctorate Courses. ORCID: http://orcid.org/0000-0002-5116-9362 / e-mail: evertong@veorial.net

3 Doctoral Student in Law in the field of International and Economic Law and Sustainable Trade. Master in Law (UFSC) in the field of International Relations by UFSC. Specialist in Customs and Brazilian Foreign Trade Law by Universidade do Vale do Itajaí (UNIVALI). Professor of the Law Course of Escola Superior de Criciúma (ESUCRI). ORCID: http://orcid.org/0000-0002-5319-5548 / e-mail keitewieira@gmail.com

methodology, it is a plain qualitative and descriptive survey. The method of approach was critical inductive, with logical-grammatical interpretation, and documentary technical procedure.

Keywords: Agreement on Technical Barriers to Trade; animal protection certification; Dolphin safe; US TUNA II.

A COMPREENSÃO DA OMC SOBRE A CERTIFICAÇÃO 'DOLPHIN SAFE' NA PESCA DO ATUM: O CASO US TUNA II

RESUMO

O presente estudo tem como objetivo a análise do caso US Tuna II, julgado pelo Sistema de Solução de Controvérsias da OMC para identificar o papel da certificação (Dolphin safe) imposta pelos Estados Unidos na pesca de atum, visando à proteção dos golfinhos. Essa apreciação desenvolveu-se à luz do Acordo de Barreiras Técnicas ao Comércio da OMC, bem como sob a ótica da definição e da conceituação de regulamento técnico. Para que se pudesse atingir a conclusão desejada, fez-se necessária a compreensão do caso, do acordo citado, incluindo os princípios do Tratamento Nacional, da Nação Mais Favorecida, da criação de obstáculos desnecessários ao comércio internacional e da harmonização; do conceito de regulamento técnico e, por fim, das decisões do painel e do órgão de apelação. Com base nessas informações, analisou-se a decisão final do caso sob a diretriz da adequação às normas da OMC sobre barreiras e sob a ótica das condições justas de concorrência no comércio internacional. Quanto à metodologia, trata-se de uma pesquisa pura, qualitativa e descritiva. O método de abordagem foi o indutivo crítico, de interpretação lógico-gramatical e procedimento técnicos documentais.

Palavras-chave: *Acordo de Barreiras Técnicas ao Comércio; certificação de proteção animal; Dolphin safe; US TUNA II.*

FOREWORD

The understanding and role of the Dolphin safe certification imposed by the United States on tuna fishery for protecting dolphins and based on technical barriers standards laid down by the World Trade Organization (WTO) is once again the target of arguments due to its disturbing legal motivations.

From a factual point of view, it should be made clear that, for reasons not yet well known, tuna schools often swim under large groups of dolphins, and since 1959 tuna fishermen have used this association to catch these fish. Meanwhile, many consumers have demanded respect for ethical animal rights standards by the fishing industry, as tuna fishing entailed bringing on board the boats dolphins exhausted by the chase. Even when returned to the sea, those dolphins often died due to the predatory practice. This led to the creation of the Dolphin Safe label, widely used in the United States, requiring that nets could no longer be deliberately cast on dolphins.

Two steps were taken in June 1994: the adoption of the label by the US tuna fishing fleet and a ban on imports of tuna caught in countries that did not replicate such practices. The discussions, however, did not end because of this circumstance. Indeed, countries like Mexico, that were forced to follow the protective environmental framework (to the detriment of others that did not need to follow the rule), claimed inconsistency before the World Trade Organization (WTO).

In view of these considerations, the study was put under discussion in order to assess the decision of the WTO Dispute Settlement Body not only on the basis of compliance with technical barriers rules, but also in terms of fair competition conditions in the international market. The standing of WTO in the face of the issue was described like this: does the US regulation conditioning the use of the dolphin protection certification fall within the concept of a technical regulation? The question concerns the restriction brought by the US norm that would cause a differential and unfavorable treatment of Mexico – which led the case to WTO – because, by restricting the use of the seal to disproportionate and discriminatory rules (fishing in the ETP area), it would be restricting the access of Mexican tuna to the US market. Indeed, the international trade community is already aware that tuna that does not use the dolphin seal is widely rejected by the US consumer.

To clarify the matter, the general objective was to describe the reasons for confrontation in the Tuna II Case by both the United States and Mexico. The specific objectives were to describe the dilemmas involved in the case and which were focused on the protective efficacy of the Dolphin Safe certification; to discuss the protectionist purpose of the technical barriers invoked; and to highlight the WTO ruling, which was analyzed by the WTO Appellate Body Panel in their report and the WTO Dispute Settlement System.

Among the theories presented to provide desired level of detail, we analyzed the WTO's own argument, with an emphasis on hermeneutic analysis. Thus, once the theoretical framework was established based on authors Silvia M. de Oliveira (2005) and Alan O. Sykes (2017), the analysis turned to the concept of technical regulation, as well as to the WTO Technical Barriers Agreement, including the principles of National Treatment, Most-Favored Nation, Creation of Unnecessary Obstacles to International Trade, and Harmonization.

Regarding methodology, as for its nature, this is a plain survey, because there was great interest in deciphering the understanding of what are technical barriers. Regarding the problem approach, this is a qualitative study supported by the interpretation of the rules by the WTO Dispute Settlement System. As for the purposes, it was descriptive, in an effort to indicate the main points that structured the resulting judgment. The method of approach was the critical inductive one, without failing to take its fragility into account, since future decisions of the WTO cannot be guaranteed to follow the reasoning employed in the Tuna II case. Even so, given the complexity of the case, this method was useful in that it allowed for the delineation of the key ideas that guided the judgment. As for the method of interpretation, it was logical-grammatical, and as for technical procedures, they were mostly documentary.

1 THE US TUNA II CASE IN FACE OF DOLPHIN SAFE AND SETTING ON DOLPHINS CERTIFICATIONS

Perhaps because of a geographical criterion, in the case of neighboring countries, which makes import and export logistics easier, the dispute between the United States and Mexico on the tuna trade and the protection of dolphins fished in the Eastern Tropical Pacific (ETP) is an old one. In October 2008, following the enactment of the US domestic legislation

called the US Dolphin Protection Consumer Information Act, which regulates on the conditions under which tuna caught in the eastern Pacific could be marketed to the United States using the Dolphin Seal Safe Label, Mexico engaged the United States in the form of an inquiry under the rules of the World Trade Organization (WTO) Dispute Settlement System.

Since the mandatory attempt to reach a compromise failed, in March 2009 a special panel was formed to try case number 381 by analyzing the inconsistencies pointed out by Mexico. Other countries, including Brazil, entered the dispute as interested third parties, thus ensuring their participation by means of statements presented during the suit.

As for the essence of the case, it is necessary to analyze the alleged inconsistent measures that the United States would be taking to Mexico's detriment. The US legislation in question has become a rule in the legal system on order to standardize and regulate the conditions of use of the Dolphin Safe seal. In order to achieve that, the standard disposed, among other issues, the fishing technique known as Setting on Dolphins.

Within the eastern Pacific area, there is a natural association between dolphins and tuna. The ability of tuna to swim as fast as dolphins is considered as the reason the two species become swimmates. As a result of this association, a fishing technique was created (Setting on Dolphins) where, on sighting dolphins on the surface, the fishermen cast the nets under them, trying to catch the tuna that usually swim close to the belly of the dolphins. This fishing technique results in a high mortality rate for dolphins, since when the fish are separated many of them end up being killed or seriously injured. Still, babies that depend on their mothers, when separated, end up starving or becoming easy prey to predators.

Faced with such a situation, the US legislation determined that fishermen using such that technique should be prohibited from displaying the dolphin protection seal on the packaging of products intended for importation into the United States. Moreover, regardless of the technique employed, for tuna caught in eastern Pacific (ETP) to receive such a seal, the captain of the ship and another observer would have to testify that no dolphin had been killed or seriously injured during the fishing process of that tuna. It is important to note that the law did not provide for the application of this criterion for fish from any other region, but the ETP (SYKES, 2017).

It is also important to stress that, although the United States had already abandoned the Setting on Dolphins technique, the method was

still used by Mexico, which was the most frequent fishing operator in that region (SYKES, 2017). As most of the tuna sold and exported by Mexico did not qualify for the seal, the country, put under a disadvantaged by the measure, asked for the WTO for help by filing the above-mentioned suit. The Mexican pleading made it clear that the country was in compliance with the Agreement on the International Dolphin Conservation Program (AIDCP), which provides for measures to reduce dolphin mortality without, however, prohibiting the Setting on Dolphins technique (SYKES, 2017). It should be noted that the agreement also has rules for the use of the dolphin protection seal (IATTC, 2005), and that these regulations differ from those created by the US legislation, because they are different seals, but with the same objective: ensuring the safety of dolphins.

Also, the Mexicans were emphatic in stating that the technique condemned by the US legislation was not only used in the ETP, but in other oceanic regions of the world, where the association between tuna and dolphins is also common. The major inconsistencies pointed out by Mexico concerning the certification measure were related to Articles 2.1, 2.2 and 2.4 of the on Technical Barriers Agreement (TBT) to Trade and the corresponding GATT provisions.

The US defense went in the direction that their legislation was not aimed at imposing technical barriers to imports, but rather regulating the use of the dolphin seal. There was nothing to prevent Mexico, if it continued fishing in the ETP using the rejected technique, to export its product to the United States without the corresponding seal, and for that reason, it made no sense to talk about import restrictions.

It is also important to mention that this was not the first opportunity when the American country was a defendant in proceedings filed the Mexican country. In the year 1990, Mexico requested an inquiry with the United States claiming that the US measures in favor of tuna were restricting and prohibiting the importation of Mexican tuna. This request resulted in a report by the then GATT Special Group (WTO, 2019d) known as US TUNA I.

At the time, the Mammals Protection Act enforced by the US Navy banned the importation of tuna caught in the ETP zone, by way of an embargo, for allegedly causing damage to the mammals of that region. The United States' defense, based on the GATT 47 dispute settlement system, stated that that was an exceptional measure that fell under Article XX of GATT, paragraphs b and g (measures necessary for animal protection and

conservation of non-renewable natural resources). According to Orlando Celso da Silva Neto (2006), the restrictive measure authorized by Article XX of GATT, even if it implied obstacles to free trade, was legitimate in aiming at ensuring the objectives listed in the instrument text, provided it was not applied in an unjustified, discriminatory and excessively restrictive way.

In that sense, the Panel understood that Mexico was actually right, since the United States was acting in disregard of Article XI of GATT 47, which prohibited quantitative import restrictions and/or prohibitions. This was the conclusion, because it was pointed out that there was insufficient evidence to show that the American Navy Act sought the alleged protection of the environment and mammals without restricting international trade in a discriminatory manner.

Even though Mexico won the litigation, given the report of the GATT Appellate Court, that report was not adopted by the member countries and failed to produce legal effects. As the countries involved were engaged in parallel negotiations in the North American Free Trade Agreement (NAFTA), the issue was no longer considered as important in the multilateral trading system.

During this second opportunity, that is to say, in US TUNA II case (detailed above), which was now under the jurisdiction of the WTO Dispute Settlement System, the United States once again published internal regulations that now restricted Mexican tuna imports. This time, however, the US law was based on a certification in favor of dolphins.

2 THE *DOLPHIN SAFE* SEAL: BETWEEN ANIMAL PROTECTION AND THE TECHNICAL BARRIER TO INTERNATIONAL TRADE

Since the dispute was established based on an argument against the framework of the US measure as a technical barrier, it is necessary to discuss the protectionist purpose of said technical barriers:

> Most standards and technical regulations are adopted for the purpose of protecting human health or safety. [...] Also animal and plant life or health may be protected by a technical barrier, including regulations aimed at ensuring that animal and plant species do not become extinct [...] (OLIVEIRA, 2005, p. 292).

In the present case, although the United States barrier (requirements for Dolphin Safe certification) aims at the protection of a species of animal (dolphins), Mexico believed that such a regulation would be covering a

true protectionist measure in favor of the US domestic industry, especially because it is known that "technical barriers can be easily manipulated to cover up protectionist measures" (OLIVEIRA, 2005, p. 278).

Mexico's motivation to promote the request for inquiry and, subsequently, the request for the establishment of the panel, was "[...] the use of technical standards and regulations with the purpose of restricting trade and discriminating against foreign suppliers" (OLIVEIRA, 2005, p. 278) through the certification, since "[...] the certification process itself could be used for protectionist purposes [...]" (OLIVEIRA, 2005, p. 280), also because the restrictions were imposed by a Country that fishes and sells tuna to compete with imported Mexican tuna in its domestic market. As already mentioned, the main articles of the Technical Barriers Agreement that were pointed out in the case are:

> 2.1: Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favorable than that accorded to like products of national origin and to like products originating in any other country (WTO 2019a).

This article sets forth the Most Favored Nation and National Treatment rule, and also determines that no member state should receive less favored treatment in terms of technical barriers. Thus, it determines that the same national treatment should be extended to products imported from other member states. Both rules are described as follows:

> Article 2 (1) states that, with regard to technical regulations, products imported from the territory of any Member shall be accorded treatment no less favorable than that accorded to like products of national origin and to like products originating in any other country. These obligations also apply to conformity assessment procedures, which should be applied to products imported from other WTO members in a no less favorable way than that agreed upon for similar products of domestic origin and for similar products originating from any other country (OLIVEIRA, 2005, p. 294).

Article 2.2 of the Technical Barriers Agreement, which Mexico also pointed out as violated under the US protectionist measure, provides:

> Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks,

> relevant elements of consideration are, *inter alia*: available scientific and technical information related processing technology or intended end-uses of products (WTO 2019a).

Article 2.2, in turn, reflects the rule of not imposing unnecessary obstacles to trade. In the case of an agreement on technical barriers, it is essential to establish that, even if it is a regulated subject, i.e., one that is legitimate to impose, it cannot be accepted that unnecessary obstacles to the proper development of trade are posed. Thus, an obstacle cannot be more restrictive to trade than is necessary to achieve the desired protection objective.

> As legitimate objectives are recognized in Article 2, paragraph 2, *inter alia*, national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. [...] a technical regulation and an unnecessary obstacle to trade when: (i) is more restrictive than necessary to achieve a given objective, or (ii) the intended objective is not legitimate; and a regulation is more restrictive than necessary when the objective pursued can be achieved through alternative measures that have less restrictive effects on trade, taking into account the risks that failure to achieve the objective would pose (OLIVEIRA, 2005, p. 295).

We should also mention Article 2.4 of the Technical Barriers Agreement:

> Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems (WTO, 2019a).

That article refers to the harmonization rule.

> The agreement encourages, in accordance with Article 2 (4), the use of existing international standards for the elaboration of national regulations or part of them, except where such international standards or their elements are an ineffective or inappropriate means for the fulfillment of the *legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems*. In this regard, we stress the use of the expression *for instance*, which does not limit the factors capable of attributing inefficacy or inappropriateness to the standards to achieve the pursued objectives (OLIVEIRA, 2005, p. 295).

Having analyzed the possible inconsistencies of the US measure pointed out by Mexico, we now move to the analysis of the line of defense of the United States. In order to do so, it is imperative to analyze the

requirements of a technical regulation. In other words, it is necessary to verify whether the US regulation that conditions the use of the certification of protection to dolphins falls within the concept of a technical regulation, since, if the two concepts are compatible, there will be no question of inconsistency in the US measure or violation of the WTO rules as pointed out by the Mexico. Therefore, it is necessary to analyze the concept of a technical regulation mentioned in TBT Annex 1, item 1:

> 1 Technical Regulation: Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method (WTO, 2019a).

From reading the text, we see that a technical regulation is destined to a specific product that disposes on processing and production methods. In addition, in the case of a technical regulation, its application is compulsory. From this point of view, it is necessary to analyze all those legal requirements and applications according to the interpretation of the panel and the appellate group responsible for the Mexico x United States case. It is important, therefore, to keep in mind that at no time did the American country place restrictions on imports of tuna caught in ETP, but rather on the use of the Dolphin Safe seal.

3 DOLPHIN SAFETY OR TECHNICAL REGULATION: THE DECISION OF THE WTO DISPUTE SETTLEMENT SYSTEM

The WTO ruling went through covered the Report of the decisions of the Panel e the Appellate Body of the WTO Dispute Settlement System, analyzing the application of the legal provisions of the organization.

The first point considered by the Panel was whether the US standard could be considered a Technical Regulation. In order to verify whether the measure laid down by the United States was a technical regulation – which is mandatory – and not an optional/voluntary technical standard, the analysis was based on Annex 1 of the Technical Barriers Agreement (TBT Agreement). The Report of the Panel established:

> 7.54 We therefore now consider whether the US measures challenged by Mexico constitute a technical regulation within the meaning of Annex 1.1 of the TBT Agreement, on the basis of these three elements, as articulated by the Appellate Body.
> 7.55 Accordingly, we will consider the following issues in turn:

> (a) Whether the US dolphin-safe labeling provisions apply to an identifiable group of products;
> (b) Whether they lay down one or more characteristics of these products;
> (c) Whether compliance with them is mandatory within the meaning of Annex 1 (WTO, 2019b, p. 135).

According to the Panel's analysis, all the characteristics of a technical regulation were present in the US measure: (a) identifiable product: tuna; (b) establishment of one or more characteristics of the product: the establishment of requirements for the use of the seal applicable to a process method, namely, the fishing technique; and (c) mandatory: in fact, the US Dolphin Safe seal was compulsory. In order to use the seal, it was necessary to comply with the legal determinations imposed by the domestic measure.

From the requirements quoted, the latter demanded greater analysis: whether the measure was mandatory. This is because, as the United States defense pointed out, the country allows the sale of tuna without the seal in its domestic market; that is, there is no obstacle violating the WTO rules keeping Mexico from exporting tuna to the United States. What the US intended to rule upon was merely the use of the dolphin protection seal in products whose importation is allowed without any obstacle. To address the issue, the Panel first analyzed the term "mandatory" in light of the legislation.

> First, we note that dictionary definitions of the term "mandatory" include "binding" as well as "compulsory, binding, non-discretionary" or "required by law or a compulsory mandate". This suggests that the notion of "mandatory" may encompass the legally binding and enforceable nature of the instrument, and may also relate to its content by prescribing/imposing a particular behavior. We also note that the ISO/IEC Guide 2 establishes that the expression "mandatory requirement", should be used to mean only "a requirement made compulsory by law or regulation" (WTO 2019b, p. 144).

From this perspective, the act of legal regulation with binding and compulsory force was considered as mandatory:

> In sum, we consider that compliance with product characteristics or their related production methods or processes is "mandatory" within the meaning of Annex 1.1, if the document in which they are contained has the effect of regulating in a legally binding or compulsory fashion the characteristics at issue, and if it thus prescribes or imposes in a binding or compulsory fashion that certain product must or must not possess certain characteristics, terminology, symbols, packaging, marking or labels or that it must or must not be produced by using certain processes and production methods (WTO, 2019b, p. 146).

Taking the above definition as clear, i.e. the measure being mandatory, to be clear, we proceeded to the following analysis: regardless of the free marketing of tuna without the seal, it is necessary to understand whether the characteristics laid down for obtaining the seal itself were mandatory and prohibitive.

This is because, for Mexico, regardless of importation without the seal being possible, it cannot be accepted that a WTO member country has legislation that establishes any mandatory characteristics for its products, even for the use of a seal. Faced with this argument, the Panel decided in its report:

> In the present dispute, Mexico does not claim that the US dolphin provisions require the use of the dolphin label. Indeed, it is undisputed that the measures in question do not impose a positive requirement to label tuna products for sale on the United States market as dolphin-safe. Neither the statutory and regulatory provisions nor the court decision disputed by Mexico contain wording that imposes the use of the dolphin-safe label for tuna products as a condition for such products to be marketed in the United States.
>
> Mexico argues, however, that these measures negatively require that "tuna products offered for sale in the United States should not have certain characteristics," unless certain conditions are met. Specifically, Mexico submits that the measures in question involve a ban on the use of a dolphin safe label on Mexican tuna products marketed in the United States. In Mexico's view, this prohibition may be expressed as a requirement that tuna products offered for sale in the United States must not possess certain characteristics (i.e., distinguishing marks – the dolphin-safe label or any other analogous label or mark) unless the prescribed requirements are met" (WTO, 2019b, p. 148).

According to that, the panel's decision was based on the fact that the measures are indeed binding. In addition to being issued by the Government, those who produce all binding acts impose a penalty for non-compliance, since failure to comply with the characteristics imposed by the US standard would imply a ban on the use of the seal. In addition, the US measure not only regulates the use of the dolphin protection seal, but also restricts the use of the terms "dolphin" or "marine mammal" and other dolphin-related terms in tuna packaging, if the binding conditions in the law they created are not met.

In other words, the measure prohibited Mexico from resorting to any other legislation – and there were others, such as the above-mentioned agreement – were it would be appropriate to pass on to the consumer the information that Mexico was helping protect dolphins, as can be seen from this quote of Panel's report.

> 7.142 First, the measures at issue are legally enforceable and binding under US law (they are issued by the government and include legal sanctions). This is an important component of the "mandatory" character of the measures. This alone, however, might not necessarily distinguish them from any standard that is protected against abusive or misleading use under general law, such as trademark protection or laws against deceptive practices.
> 7.143 In addition, however, the measures at issue prescribe certain requirements that must be complied with in order to make any claim relating to the manner in which the tuna contained in tuna product was caught, in relation to dolphins. The measures at issue regulate not only the use of the particular label at issue, but more broadly the use of a range of terms for the offering for sale of tuna products, beyond even the specific "dolphin-safe" appellation. The measures at issue thus prohibit the use of other terms such as "porpoise" or "marine mammal" or any statement relating to dolphins, porpoises or marine animals, whether misleading or otherwise, if the conditions set out in the regulation are not met (WTO, 2019b, p. 152).

So, given this description, the US measures made it clear that they regulated not only the use of the specific label, but a whole series of terms for selling tuna products (besides, of course, the Dolphin Safe denomination itself). According to the United States, there would be a legal status and form to be obeyed.

> 7.144 Furthermore, the measures embody compliance with a specific standard as the exclusive means of asserting a "dolphin-safe" status for tuna products. The measures leave no discretion to resort to any other standard to inform consumers about the "dolphin-safety" of tuna than to meet the specific requirements of the measure. Effectively, the "dolphin-safe" standard reflected in the measures at issue is, by virtue of these measures, the only standard available to address the issue. Through access to the label, the measures thus effectively regulate the "dolphin-safe" status of tuna products in a binding and exclusive manner and prescribe, both in a positive and in a negative manner, the requirements for "dolphin-safe" claims to be made. This distinguishes this situation from one in which, for example, various competing standards may co-exist in relation to the same issue, with different but related claims, each of which may be protected in its own right (WTO, 2019b, p. 152).

Indeed, given this description, the US measures made it clear that there was no possibility of any other criterion for informing consumers on dolphin safety. Only through the United States Dolphin Safe standard were tuna products sold in a binding and exclusive manner.

> 7.145 In light of all the above, we find that the measures at issue establish labeling requirements, compliance with which is mandatory. In light of our conclusion that the measures at issue establish *de jure* mandatory labeling requirements, we do not find it necessary to consider further Mexico's argument that they are also *de facto* mandatory (WTO, 2019b, p. 152).

As a result of this analysis, the WTO Dispute Settlement System trial Panel considered that the measure imposed by the United States was in fact mandatory and was a technical regulation. Based on the fact that the American standard was characterized as a technical regulation, it was up to the Panel to verify whether this technical regulation violated the rules established in the Technical Barriers Agreement (with reference to GATT articles).

First, in order to understand the alleged irregularities in the light of the Most Favored Nation Principle and the National Treatment Principle, it was necessary to analyze whether the tuna marketed by Mexico was similar to other tuna exported to the United States and that sold by the country itself. In the Panel's view, for the products under consideration (Mexican tuna, US tuna and tuna from other member countries) to be similar, they would require four characteristics: (i) similar physical characteristics; (ii) final destination of the similar product; (iii) similar treatment by consumers given to the product to meet a demand; and (iv) the international classification of products for the definition of import tax (Common Goods Nomenclature – CGN):

> 7.235 To demonstrate that Mexican tuna products and tuna products originating in the United States or any other country are like, Mexico has followed the approach derived from the GATT Working Party Report on Border Tax Adjustments. This approach is based on an analysis of four general criteria, reflecting "four categories of 'characteristics' that the products involved might share: (i) the physical properties of the products; (ii) the extent to which the products are capable of serving the same or similar end-uses; (iii) the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand; and (iv) the international classification of the products for tariff purposes (WTO, 2019b, p. 171).

Given these items, it was understood that Mexican tuna, US tuna and tuna from other WTO member countries were, in fact, similar. However, notwithstanding the similarity, the panel concluded that insufficient evidence was provided that the US rule was in violation of Art. 2.1 of the TBT since, for the Panel, the US measure is neutral, imposing general provisions for any tuna. The Panel concluded that it was just a coincidence that the circumstances had a negative impact on Mexican tuna imports.

While recognizing that products with the dolphin-safe seal had a distinct market value – a conclusion taken from the analysis of the fact that its recipients in the US market, i.e. consumers in that country, tend to reject

tuna that does not display the dolphin protection seal, thus characterizing a greater benefit to the US and other tuna that carry the seal. The Panel took the standing that such factors did not alter fair competition conditions, since the US rejection was caused by dolphin-protection awareness and environmental movements of the 1980s and 1990s:

> 7.287 We agree with the United States that US consumers' decisions whether to purchase dolphin-safe tuna products are the result of their own choices rather than of the measures. However, as observed above, it is the measures themselves that control access to the label and allow consumers to express their preferences for dolphin-safe tuna. An advantage is therefore afforded to products eligible for the label by the measures, in the form of access to the label.
> 7.288 We further note that it is undisputed that US consumers are sensitive to the dolphin-safe issue. This is acknowledged by both Mexico and the United States, and is also confirmed by the evidence presented with the *amicus curiae* brief to which the United States has referred to in its answers to questions. This evidence suggests that, following public campaigning by the environmental organization "Earth Island Institute" in the late 1980s (including through film footage shot in 1987-88 showing the capture and killing of dolphins during a fishing trip where setting on dolphins was used), tuna processors were under pressure to stop purchasing tuna caught in conditions that were harmful to dolphins. The evidence presented to the Panel also shows that major tuna processors reacted to these dolphin-safe concerns, and that this led to changes in their purchasing policies as of April 1990. These policies are still in place: such companies will not purchase tuna from vessels that fish in association with dolphins (WTO 2019b, p. 181).

Therefore, WTO recognized that US consumers were sensitive to the dolphin matter and that major tuna processors had reacted to awareness campaigns about dolphin-related tuna fishing concerns, leading to changes in purchasing policies.

> 7.289 These elements suggest that the dolphin-safe label has a significant commercial value on the US market for tuna products, as the only means through which dolphin-safe status can be claimed. Indeed, the evidence that canners refuse to buy tuna caught in association with dolphins suggest that the pressure is sufficient to induce processors of tuna products to avoid altogether tuna that would make their final products ineligible for the label. While this is only indirect evidence as to the final consumers' behaviors, it suggests that the producers themselves assume that they would not be able to sell tuna products that do not meet dolphin-safe requirements, or at least not at a price sufficient to warrant their purchase (WTO 2019b, p. 181).

In addition to understanding that the rejection of the market was based on consumer choice, the Panel mainly based themselves on the fact that the US measure sought to impose restrictions on Setting on Dolphins fishing,

not on the Mexican country or products originating there – which only coincidentally employ this technique. Also, they concluded that the US standard would not have made it impossible for the Mexican tuna to obtain the seal; it only provided limitations on the fishing technique that was being used, which could be replaced.

> 7.377 In the present case, as discussed above, it appears to us that the measures at issue, in applying the same origin-neutral requirement to all tuna products, do not inherently discriminate on the basis of the origin of the products, and that they also do not make it impossible for Mexican tuna products to comply with this requirement.
> 7.378 Rather, on the basis of the elements presented to us in these proceedings, it appears to us that the impact of the US dolphin-safe provisions on different operators on the market and on tuna products of various origins depends on a number of factors that are not related to the nationality of the product, but to the fishing and purchasing practices, geographical location, relative integration of different segments of production, and economic and marketing choices. In this context, any particular adverse impact felt by Mexican tuna products on the US market is, in our view, primarily the result of "factors or circumstances unrelated to the foreign origin of the product", including the choices made by Mexico's own fishing fleet and canners (WTO, 2019b, p. 206).

By analyzing the above circumstances, the Panel decided that the US measure was not inconsistent with the provisions of Article 2.1 of the Technical Barriers Agreement. On the other hand, regarding non-imposition of unnecessary obstacles to trade, the Panel understood that the US technical regulation was, in fact, in violation of Art. 2.2 of the Technical Barriers Agreement.

To reach this decision, they analyzed whether the technical regulation achieved a legitimate objective and whether the established barrier were more restrictive than necessary to achieve the intended objective, taking into account the risk that the non-fulfillment of the requirement would create (WTO, 2019b, p. 207).

The legitimate objectives pointed out by the United States and cited in the Panel's report were: (i) ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins; (ii) contributing to the protection of dolphins, by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins (WTO, 2019b, p. 210).

On the fact that the technical barrier was no more restrictive than necessary, the US asserted (and the Panel's report followed) that the issue

should be analyzed from the viewpoint that there was no other way to achieve the above goals that were significantly less severe (WTO, 2019b, p. 219-220).

However, for Mexico, a less serious and more reasonable way would be to allow the use of the Dolphin Safe seal as ruled in the International Dolphin Conservation Agreement. Mexico claimed that the target would then be met, because consumers would be informed about the safety of dolphins in a less harmful, less burdensome way, according to the Panel's reports (WTO, 2019b, p. 251).

Based on the above allegations, the Panel concluded that the US norm included a restriction beyond what was necessary (although it provided protection for dolphins), as the provisions of the international seal agreement were effective and also achieved the objectives of protection of dolphins. Moreover, regarding the US claim to restrict the use of the Setting on Dolphins technique, it was considered more restrictive than necessary due to the absence of evidence of the effects caused on dolphins and the difference of these effects when using the same technique outside the ETP (WTO, 2019b, p. 262-263).

The last point examined by the Panel was the observance of the principle of harmonization, as laid down in Article 2.4 of the Technical Barriers Agreement. While Mexico asserted that the US measures for the Dolphin Safe certification were not based on the existing relevant international standard (AIDCP agreement), the United States argued the fact that the AIDCP did not set a relevant standard. In addition, they stated that the dolphin safety definitions of the mentioned agreement do not meet US objectives, as reported by the Panel (WTO, 2019b, p. 263).

To address this issue, the Panel reported on the objectives of the AIDCP:

> 1. To progressively reduce incidental dolphin mortalities in the tuna purse-seine fishery in the Agreement Area to levels approaching zero, through the setting of annual limits;
> 2. With the goal of eliminating dolphin mortality in this fishery, to seek ecologically sound means of capturing large yellowfin tunas not in association with dolphins; and
> 3. To ensure the long-term sustainability of the tuna stocks in the Agreement Area, as well as that of the marine resources related to this fishery, taking into consideration the interrelationship among species in the ecosystem, with special emphasis on, *inter alia*, avoiding, reducing and minimizing bycatch and discards of juvenile tunas and non-target species (WTO, 2019b, p. 278).

Irrespective of the AIDCP legitimate objectives, the Panel concluded that such predictions would not fully achieve the US intent to inform consumers that no adverse effects on dolphins had occurred during tuna fishing, as the international agreement seal only aimed at keeping those mammalians from being killed (WTO, 2019c, p. 289). Therefore, the Panel believed that the United States did not act inconsistently with Article 2.4 of the Technical Barriers Agreement. Given all the points analyzed, at the conclusion of their report the Panel ruled for the following recommendations:

> VIII. RULINGS AND RECOMMENDATIONS
> 8.1 In light of the above findings, the Panel finds that the US dolphin-safe provisions:
> (A) are not inconsistent with Article 2.1 of the TBT Agreement;
> (B) are inconsistent with Article 2.2 of the TBT Agreement because they are more traderestrictive than necessary to achieve a legitimate objective, taking into account the risks that non-fulfillment would create;
> (C) are not inconsistent with Article 2.4 of the TBT Agreement (WTO, 2019b, p. 292).

The Appellate Body, however, did not accept these standings in full and, in their report, ruled as follows:

> X. Conclusions
> For the reasons set out in this Report, the Appellate Body:
> (A) finds that the Panel did not err in characterizing the measure at issue as a "technical regulation" within the meaning of Annex 1.1 to the TBT Agreement;
> (B) finds that the Panel erred in its interpretation and application of the phrase "treatment no less favorable" in Article 2.1 of the TBT Agreement; reverses the Panel's finding, in paragraphs 7.374 and 8.1(a) of the Panel Report, that the US "dolphin-safe" labeling provisions are not inconsistent with Article 2.1 of the TBT Agreement; and finds instead that the US "dolphin-safe" labeling provisions are inconsistent with Article 2.1 of the TBT Agreement;
> (C) finds that the Panel erred in concluding, in paragraphs 7.620 and 8.1(b) of the Panel Report, that it has been demonstrated that the measure at issue is more trade restrictive than necessary to fulfill the United States' legitimate objectives, taking account of the risks non-fulfillment would create; and therefore reverses the Panel's finding that the measure at issue is inconsistent with Article 2.2 of the TBT Agreement (WTO, 2019c, p. 151-152).

With regard to Mexico's claims, the Appellate Body stressed:

> (D) rejects Mexico's claim that the Panel erred in finding that the United States' objective of "contributing to the protection of dolphins, by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins" is a legitimate objective within the meaning of Article 2.2 of the

> TBT Agreement;
> (E) rejects Mexico's request to find the measure at issue inconsistent with Article 2.2 of the TBT Agreement based on the Panel's finding that the measure did not entirely fulfill its objectives (WTO, 2019c, p. 151-152).
> Finally, regarding the fact that the AIDCP Dolphin Safe certification is an international standard compatible with the TBT Agreement:
> (F) reverses the Panel's finding, in paragraph 7.707 of the Panel Report, that the "AIDCP dolphin-safe definition and certification" constitute a "relevant international standard" within the meaning of Article 2.4 of the TBT Agreement. In the light of this, the Panel's finding, in paragraph 8.1(c) of the Panel Report, that the measure at issue is not inconsistent with Article 2.4 of the TBT Agreement stands; and
> (G) finds that the Panel acted inconsistently with Article 11 of the DSU in deciding to exercise judicial economy with respect to Mexico's claims under Articles I:1 and III:4 of the GATT 1994 (WTO, 2019c, p. 151-152).

Like for the Panel, the Appellate Body also believed the US regulation to be a technical regulation (WTO, 2019c, p. 80). However, regarding the interpretation of the less favorable treatment of Article 2.1 of the TBT, the Appellate Body held that the American rule is incompatible, as it restricts Mexican tuna access by altering competition conditions in the US market and thus giving Mexico a less favorable treatment when compared to Mexican productions and products from other member countries. Also, it discriminated against tuna fishing in ETP and other areas around the world, as follows:

> In the light of uncontested facts and factual findings made by the Panel, we consider that Mexico has established a *prima facie* case that the US "dolphin-safe" labeling provisions modify the conditions of competition in the US market to the detriment of Mexican tuna products and are not even-handed in the way in which they address the risks to dolphins arising from different fishing techniques in different areas of the ocean.
> [...] Thus, in our view, the United States has not justified as non-discriminatory under Article 2.1 the different requirements that it applies to tuna caught by setting on dolphins inside the ETP and tuna caught by other fishing methods outside the ETP for access to the US "dolphin-safe" label. The United States has thus not demonstrated that the detrimental impact of the US measure on Mexican tuna products stems exclusively from a legitimate regulatory distinction.
> For these reasons, we reverse the Panel's finding, in paragraphs 7.374 and 8.1(a) of the Panel Report, that the US "dolphin-safe" labeling provisions are not inconsistent with Article 2.1 of the TBT Agreement. We find, instead, that the US "dolphin-safe" labeling provisions provide "less favorable treatment" to Mexican tuna products than that accorded to tuna products of the United States and tuna products originating in other countries and are therefore inconsistent with Article 2.1 of the TBT Agreement (WTO, 2019c, p. 114-115).

Once again going against the conclusions of the Panel, the Appellate Body analyzed Article 2.2 of the Technical Barriers Agreement. For the Appellate Body, the US standard is no not more restrictive than necessary, as it aims at informing the consumer on any harm suffered by dolphins and not only on their mortality rates (which is protected by the international agreement). Thus, they concluded that the US objective would not be achieved in the same way only by means of the AIDCP limitations (WTO, 2019c, p. 127).

Finally, on the analysis of Item 2.4 of the Technical Barriers Agreement, the Panel's ruling was once again altered. For the Appellate Body, among other reasons, AIDCP is not a relevant international standard, as, in order to be international, the agreement should not only be open (free participation), but all development stages of the standards should also be open. It is important to stress that this interpretation was the from the Technical Barriers Agreement committee (WTO, 2019a p. 142). Therefore, there is no need to talk of inconsistency with the international standard, and so they maintained the ruling that the measure was not inconsistent.

Given the decision of the members, the United States was ordered to make its technical regulation compatible with the provisions of the Technical Barriers Agreement. It turns out that Mexico is still seeking such adequacy, having requested a Compliance Panel in 2015 and authorization to retaliate against the US in 2016.

CONCLUSION

International environmental law, which is a typical process of legal globalization, resulted from the excesses of consumer society. Thus, protective legislation on the environment by animal law, created around the 1960s and 1970s, brought about a multifaceted process that became involved in the legal tangle of international trade law. The same was the case with the Dolphin Safe seal. The tense connection between the interests of the tuna industry and measures enabling dolphin protection, followed by environmental Non-Governmental Organizations (NGOs) and Consumer Organizations, made this into one of the most complex issues in the WTO.

After major tuna processors succumbed to NGO pressure and lined up in favor of the Dolphin Safe certification, it was time for Mexican tuna to be reached law framework milestone. While the tuna industry in the United States was making efforts to diminish its neighbor's competitive

advantage, Mexico was looking for solutions to overcome environmental regulatory dictates. Because of this situation, the WTO eventually decided for a change of balance between those involved, especially in the Tuna II case.

With the reform of the ruling by the World Trade Organization Dispute Settlement Body's Appellate Body, the only inconsistency found in the US measure was the less favorable treatment given to Mexican tuna compared to US tuna and tuna from other member countries. Thus, the Appellate Body considered the final ruling under the WTO guidelines on non-tariff technical barriers and fair conditions of competition in international trade to be coherent.

As much as the US restrictions did not directly concern technical barriers to the import process, and Mexico might export tuna without the Dolphin Safe seal to the United States, such a restriction has brought differentiated and unfavorable treatment to Mexico, because by restricting the use of the seal to disproportionate and discriminatory rules (fishing in the ETP area), Mexican tuna access to the American market was restricted, thus changing competition conditions.

This is because, as stated above, society knows that tuna that does not carry the dolphin protection seal is widely rejected by the US consumer. The Appellate Body concluded by agreeing with the decision that was based on the economic concerns regarding the reflexes of the measure that was used of the certification to, in fact, impose a protectionist measure in favor of the US domestic industry, thus causing unfair competition.

As a result, WTO has laid down a new balance of power between environmental claims, animal rights, trade rules and national interests, as it has proven impossible to offer an alternative that at the same time should meet the interests of the US tuna industry, the Mexican tuna industry and the NGOs and, why not, of the animals themselves that appeared as subjects powerless to present their reasons. In such a reality, the foundations of the WTO decisions reflect the state of the art when the discussion concerns the accommodation of international trade law in the face of the requirements of animal preservation.

BIBLIOGRAPHY

IATTC – INTER-AMERICAN TROPICAL TUNA COMMISSION. *Agreement on the International Dolphin Conservation Program (AIDCP)*. La Jolla: IATTC, 2005. Available at: <https://www.iattc.org/PDFFiles2/AIDCP-Dolphin-Safe-certification-system-REV-Oct2005.pdf>. Access on: 11 abr. 2019.

NETO, O. C. S. Liberação do comércio e outros valores. In: BARRAL, W.; PIMENTEL, P. (Coords.). *Comércio internacional e desenvolvimento*. Florianópolis: Fundação Boiteux. 2006. p. 87-113.

OLIVEIRA, S. M. *Barreiras não tarifárias no comércio internacional e direito ao desenvolvimento*. Rio de Janeiro: Renovar, 2005.

SYKES, A. O. Regulatory consistency requirements in international trade. *Stanford Law and Economics Olin Working Paper*, n. 502, 18 jan. 2017. Available at: <https://ssrn.com/abstract=2901653>. Access on: 12 nov. 2017.

WTO – WORLD TRADE ORGANIZATION) *Agreement on technical barriers to trade*. Available at: <http://www.worldtradelaw.net/uragreements/tbtagreement.pdf.download#page=1>. Access on: 15 abr. 2019a.

_____. *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – US TUNA II* (Relatório do Grupo Especial 381 de 2013). Available at: <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm#collapseA>. Access on: 10 abr. 2019b.

_____. *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – US TUNA II* (Relatório do órgão de apelação 381 de 2015). Available at: <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm#collapseA>. Access on: 11 abr. 2019c.

_____. *United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – US TUNA I* (Relatório do órgão especial DS21/R de 1991). Available at: <https://www.wto.org/english/tratop_e/dispu_e/gatt_e/91tuna.pdf>. Access on: 24 abr. 2019d.

Article received on: 05-May-19.

Article accepted on: 13-Jun-19.

How to quote this article (ABNT):

STELZER, J.; GONÇALVES, E. N.; WIEIRA, K. The WTO understanding about the 'Dolphin Safe' certification in tuna fishing: The US Tuna II Case. *Veredas do Direito*, Belo Horizonte, v. 16, n. 35, p. 233-255, may/aug. 2019. Available at: <http://www.domhelder.edu.br/revista/index.php/veredas/article/view/1535>. Access on: day month. year.