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WTO Case Law on Product Standards and Labeling: New Cases, New Challenges

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Andrew Shoyer
Washington, D.C.
ashoyer@sidley.com

Overview

- **Eco-labeling is an old subject** for international trade policy
  - Debates in WTO CTE since 1990s
  - Doha Declaration, para. 32(iii)(2001)
- But **new WTO DS decisions** (since September 2011) create case law on two key provisions of TBT Agreement
  - When are product standards/labels **discriminatory**?
  - When are they "more **trade-restrictive** than necessary"?
- Will require **Appellate Body** to resolve gaps in 2012

Examples of Japan's Eco-Labels

Source: "Eco Mark Office," Japan Environment Association (JEA), http://www.ecomark.jp/english/index.html

Source: Eco-Leaf Environmental Labeling Program (JEMAI), http://www.jemai.or.jp/english/ecoleaf/index.cfm

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Examples of U.S. "Dolphin-Safe" Labels

Source: National Oceanic and Atmospheric Administration, U.S. Department of Commerce, http://www.dolphinsafe.gov

Source: Earth Island Institute, http://www.earthisland.org/dolphinSafeTuna/

TBT Agreement – Three Terms

- Technical Regulation
  - Compliance is mandatory
- Standard
  - Compliance is not mandatory
- Conformity Assessment Procedure
  - Used to determine compliance with a technical regulation or standard

What's a 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. (TBT Agreement - Annex 1.1)

COMPARE -

Regulation [document providing binding legislative rules, that is adopted by an authority] that provides technical *requirements* [provision that conveys criteria to be fulfiled], either directly or by referring to or incorporating the content of a *standard*, *technical specification*, or *code of practice*. (ISO/IEC Guide 2:1991)

Main obligations regarding technical regulations

- **Most-Favored-Nation and National Treatment** :

  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. (TBT Agreement – Article 2.1)

- **Avoiding Unnecessary Obstacles to Trade**:

  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. . . Technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective . . . . (TBT Agreement – Article 2.2)

Recent Panel Reports in TBT Disputes

- *US – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (DS381) ("Tuna II") (September 2011)
- *US – Measures Affecting the Production and Sale of Clove Cigarettes* (DS406) ("Clove Cigarettes") (September 2011)
- (PENDING) *US – Certain Country of Origin Labelling* (COOL) Requirements (DS384/386) ("COOL") (End 2011?)

Main Issues in New TBT Cases

- Is the measure at issue a technical regulation? (Annex 1.1)
- Are products involved "like" products? (Article 2.1)
- Were such products accorded "no less favorable" treatment ? (Article 2.1)
- Is the objective legitimate? (Article 2.2)
- **Is the measure more trade-restrictive than necessary in order to pursue such objective? (Article 2.2)**

Tuna II:
What were the measures at issue?

US "dolphin-safe" labeling requirements contained in:

i. the *United States Code*, Title 16, Section 1385 ("Dolphin Protection Consumer Information Act");

ii. the *Code of Federal Regulations*, Title 50, Section 216.91 ("Dolphin-safe labeling standards") and Section 216.92 ("Dolphin-safe requirements for tuna harvested in the ETP [Eastern Tropical Pacific Ocean] by large purse seine vessels"); and

iii. the ruling in *Earth Island Institute v. Hogarth*, 494 F.3d 757 (9th Cir. 2007).

Tuna II:
Were the measures "technical regulations"?

"[W]e 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 products 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." (para. 7.111)

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Tuna II:
Were the products involved "like" products?

The panel used traditional GATT criteria to determine "likeness", namely:

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 classificatio**n of the products for tariff purposes. (paras 7.234-240)

Tuna II:
Were the products involved "like" products?

The Panel found that the information presented "does suggest that US consumers have certain preferences with respect to tuna products, based on their dolphin-safe status," and it did not exclude that such preferences "may be relevant to an assessment of likeness." However, the Panel noted that the basis for its analysis is a comparison between "Mexican tuna products and tuna products of US origin and tuna products originating in any other country, not between dolphin-safe and not dolphin-safe tuna." (paras 7.249-250).

"Mexican tuna products and tuna products of US and other origins **are like** products within the meaning of Article 2.1" (para. 7.252)

Tuna II:
Were such products accorded "no less favorable" treatment?

The panel said that "equality" of treatment does not necessarily imply identity of treatment for all products, but rather an absence of inequality to the detriment of imports from any Member." (para. 7.275)

"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**. We therefore agree with Mexico that access to the label provides an advantage on the US market." (paras. 7.289 & 7.291)

"We are not persuaded that any current discrepancy in their relative situations is a result of the measures rather than the result of their own choices." (para. 7.334)

"We are not persuaded that this implies that Mexican tuna products are being denied access to the advantage provided by the US dolphin safe labelling provisions or demonstrates the existence of "less favourable treatment" being afforded to Mexican tuna products by the US measures." (para. 7.345)

Tuna II:
Was the objective legitimate?

"We also find that the **US objectives relate to genuine concerns** in relation to the **protection of the life or health of dolphins** and **deception of consumers** in this respect. The evidence presented by the parties amply demonstrates that dolphins and other marine mammals may be adversely affected by tuna fishing activities." (para. 7.438)

"The Panel does not consider that the objective of contributing to the protection dolphins of the US dolphin-safe provisions should be considered illegitimate because it does not cover the protection of other marine species." (para. 7.442)

"In the Panel's view, the objectives of protecting consumers from deceptive practices and contributing to protecting dolphins by discouraging certain fishing practices do not go against the object and purpose of the TBT Agreement, even in light of the existence of potentially conflicting objectives that could also be recognized as legitimate." (para. 7.443)

Tuna II:
Were the measures more trade-restrictive than necessary?

The Panel explained that "under Article 2.2 of the TBT Agreement, the analysis involves an assessment of the degree of trade-restrictiveness of the measure at issue in relation to what is "necessary" for the fulfilment of the legitimate objective being pursued, and this can be measured against possible alternative measures that would achieve the same result with a lesser degree of trade-restrictiveness." (para. 7.458)

Tuna II:
Were the measures more trade restrictive than necessary?

The Panel considered two points:

i. "the manner and extent to which" the measures fulfill the objective; and

ii. whether this objective could be similarly fulfilled by a less trade-restrictive measure. (para. 7.465)

Tuna II:
Were the measures more trade restrictive than necessary?

On the first question -

Mexico had a good argument – that US consumers are misled because "no certification that no dolphin was killed or seriously injured . . . is required . . . by methods other than setting on dolphins, even though such methods may in fact have resulted in significant harm to dolphins." (para. 7.478)

The Panel found that "[t]o the extent that the US dolphin-safe provisions deny access to the [US] label to products containing tuna caught by setting on dolphins, they enable the US consumer to avoid buying tuna caught in a manner involving . . . observed and unobserved adverse impacts on dolphin." (para. 7.505)

BUT "consumers would not have equal certainty that no dolphin was . . . adversely affected in respect of tuna caught outside the ETP." (para. 7.545)

Tuna II:
Were the measures more trade-restrictive than necessary?

And on the second question –

ALTERNATIVE "permit the use in the US market of the AIDCP 'dolphin-safe label.'" (para.7.566)

"[W]e find that, in relation to the **objective** of **consumer information**, **Mexico has identified a less trade-restrictive alternative** that would achieve a **level of protection equivalent** to that achieved by the US measures, taking account of the risks non-fulfilment would create.

"Thus, the Panel concludes that Mexico has demonstrated that the **US dolphin-safe provisions are more trade restrictive than necessary** to fulfil their objective of ensuring that consumers are not misled about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins, and the United States has not successfully rebutted this claim." (para. 7.578)

Clove Cigarettes:
What was the measure at issue?

A provision of the *Family Smoking Prevention Tobacco Control Act of 2009* that bans clove cigarettes. Section 907, which was signed into law on 22 June 2009, prohibits, among other things, the production or sale in the United States of cigarettes containing certain additives, including cloves, but permits the production and sale of other cigarettes, including cigarettes containing menthol.

Clove Cigarettes:
Was the measure "technical regulation"?

The Panel established three elements:

i. Whether the measure applies to an identifiable product or group of products

ii. Whether the measure lays down one or more "product characteristics"

iii. Whether compliance with the product characteristics is mandatory

"We therefore **find** that Section 907(a)(1)(A) lays down product characteristics with which **compliance** is "**mandatory**" and it thus meets the third element of the definition of a "technical regulation"

Clove Cigarettes:
Were the products involved "like" products?

The Panel in *Clove Cigarettes* **used** the same four criteria:

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 classificatio**n of the products for tariff purposes.

Clove Cigarettes:
Were the products involved "like" products?

IMPORTANT – in contrast to the typical approach under GATT 1994 Article III, the Panel used the legitimate objective of reducing youth smoking to limit the scope of the consumers whose tastes and habits should be examined under criterion (iii).

Further, the Panel stated that "the weighing of the evidence relating to the likeness criteria should be influenced by the fact that [the measure] is a technical regulation having the immediate purpose of regulating … for public health reasons." The declared legitimate objective "must permeate and inform our likeness analysis." (paras 7.118-121).

"[W]e find that **clove cigarettes and menthol cigarettes are like products** for the purpose of Article 2.1 of the *TBT Agreement."* (para. *7.248)*

Clove Cigarettes:
Were such products accorded "no less favorable" treatment?

The panel distinguished between *de jure* and *de facto* less favorable treatment.

De facto less favorable treatment depends on the following factors:

i. impact of the measure on the **competitive relationship of groups** of imports *versus* groups of domestic like products;

ii. whether the measures **modify** these conditions of competition *to the detriment* of the group of imported like products; and

iii. whether the detrimental effect(s) can be explained by factors or circumstances **unrelated to the foreign origin of the product**; but

iv. no separate demonstration that the measures are applied "so as to afford protection" (from GATT 1994 Article III:1) is required." (paras 7.262-269)

Clove Cigarettes:
Were such products accorded "no less favorable" treatment?

"We therefore conclude that, **by banning clove cigarettes while exempting menthol cigarettes** from the ban, Section 907(a)(1)(A) does accord imported clove cigarettes **less favourable treatment** than that it accords to domestic menthol cigarettes, for the purpose of Article 2.1 of the *TBT Agreement."* (para. 7.292)

Clove Cigarettes:
Was the objective legitimate?

"It is self-evident that measures to reduce youth smoking are aimed at the protection of human health, and Article 2.2 of the *TBT Agreement* explicitly mentions the 'protection of human health' as one of the 'legitimate objectives' covered by that provision." (para. 7.347)

In our view, there is "a genuine relationship of ends and means" between the objective pursued and the measure at issue". (para. 7.417)

"[W]e conclude that Indonesia has failed to demonstrate that the objective of the ban is not 'legitimate.'" (para. 7.350)

Clove Cigarettes:
Were the measures more trade restrictive than necessary?

Indonesia listed 25 alternative measures for the Panel to consider!! BUT the Panel found that "[a] mere listing . . . is insufficient to establish a prima facie case." (para. 7.423)

"In addition, each . . . alternative measure[] . . . appears to involve a greater risk of non-fulfillment . . . " (para. 7.424)

"[P]rohibiting the sale of flavoured cigarettes . . . recommended in the WHO *Partial Guidelines.*" (para. 7.428)

"Accordingly, we find that Indonesia has **failed to demonstrate** that Section 907(a)(1)(A) is inconsistent with Article 2.2 of the *TBT Agreement*." (para. 7.432)

COOL:
What are the measures at issue?

(i) the Agricultural Marketing Act of 1946, as amended by the Farm, Security and Rural Investment Act of 2002 and the Food, Conservation, and Energy Act of 2008;

(ii) the Interim Final Rule on Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, and published on 1 August 2008 as 7 CFR Part 65 and on Mandatory Country of Origin Labeling of Muscle Cuts of Beef (including Veal), Lamb, Chicken, Goat and Pork, Ground Beef, Ground Lamb, Ground Chicken, Ground Goat, and Ground Pork, published on 28 August 2008 as 9 CFR Parts 317 and 381;

(iii) the Final Rule on Mandatory Country of Origin Labeling of Beef, Pork, Lamb, Chicken, Goat Meat, Perishable Agricultural Commodities, Peanuts, Pecans, Ginseng, and Macadamia Nuts, published on 15 January 2009 as 7 CFR Part 65;

(iv) the **letter** to "Industry Representative" **from the United States Secretary of Agriculture**, Thomas J. Vilsack, of 20 February 2009; and

(v) any modifications, administrative guidance, directives or policy announcements issued in relation to items (i) through (iv) above.

COOL:
What are the measures at issue?

The measures listed include the obligation to inform consumers at the retail level of the country of origin in respect of covered commodities, including beef and pork.

The eligibility for a designation of a covered commodity as exclusively having a US origin can only be derived from an animal that was exclusively born, raised and slaughtered in the United States.

This would exclude such a designation in respect of beef or pork derived from livestock that is exported to the United States for feed or immediate slaughter.

COOL:
What are the legal issues?

Canada alleges that the mandatory COOL provisions appear to be inconsistent with the United States' obligations under the WTO Agreement, including:

- Articles III:4, IX:4 and X:3 of the GATT 1994;
- Article 2 of the TBT Agreement, or, in the alternative, Articles 2, 5 and 7 of the SPS Agreement; and
- Article 2 of the Agreement on Rules of Origin.

Conclusion

- What remains for the Appellate Body?
  - Annex 1.1 – What is “mandatory” in definition of “technical regulation”?
  - Article 2.1 – Should “like product” analysis in TBT Agreement deviate from analysis under GATT Article III:4?
  - GATT Article XX – Does it apply to TBT Agreement?
- What lessons for regulators?
  - Article 2.2 has real teeth, and regulators ignore trade impacts at their peril
  - Relying on international regime helps (AIDCP, WHO Framework)

World Offices

BEIJING

Suite 608, Tower C2
Oriental Plaza
No. 1 East Chang An Avenue
Dong Cheng District
Beijing 100738
China
T: 86.10.5905.5588
F: 86.10.6505.5360

BRUSSELS

NEO Building
Rue Montoyer 51 Montoyerstraat
B-1000 Brussels
Belgium
T: 32.2.504.6400
F: 32.2.504.6401

CHICAGO

One South Dearborn
Chicago, Illinois 60603
T: 312.853.7000
F: 312.853.7036

DALLAS

717 North Harwood
Suite 3400
Dallas, Texas 75201
T: 214.981.3300
F: 214.981.3400

FRANKFURT

Taunusanlage 1
60329
Frankfurt am Main
Germany
T: 49.69.22.22.1.4000
F: 49.69.22.22.1.4001

GENEVA

Rue de Lausanne 139
Sixth Floor
1202 Geneva
Switzerland
T: 41.22.308.00.00
F: 41.22.308.00.01

HONG KONG

Level 39
Two Int'l Finance Centre
8 Finance Street
Central, Hong Kong
T: 852.2509.7888
F: 852.2509.3110

LONDON

Woolgate Exchange
25 Basinghall Street
London, EC2V 5HA
United Kingdom
T: 44.20.7360.3600
F: 44.20.7626.7937

LOS ANGELES

555 West Fifth Street
Los Angeles, California 90013
T: 213.896.6000
F: 213.896.6600

NEW YORK

787 Seventh Avenue
New York, New York 10019
T: 212.839.5300
F: 212.839.5599

PALO ALTO

1001 Page Mill Road
Building 1
Palo Alto, California 94304
T: 650.565.7000
F: 650.565.7100

SAN FRANCISCO

555 California Street
San Francisco, California 94104
T: 415.772.1200
F: 415.772.7400

SHANGHAI

Suite 1901
Shui On Plaza
333 Middle Huai Hai Road
Shanghai 200021
China
T: 86.21.2322.9322
F: 86.21.5306.8966

SINGAPORE

6 Battery Road
Suite 40-01
Singapore 049909
T: 65.6230.3900
F: 65.6230.3939

SYDNEY

Level 10, 7 Macquarie Place
Sydney NSW 2000
Australia
T: 61.2.8214.2200
F: 61.2.8214.2211

TOKYO

Sidley Austin Nishikawa
Foreign Law Joint Enterprise

Marunouchi Building 23F
4-1, Marunouchi 2-chome
Chiyoda-Ku, Tokyo 100-6323
Japan
T: 81.3.3218.5900
F: 81.3.3218.5922

WASHINGTON, D.C.

1501 K Street N.W.
Washington, D.C. 20005
T: 202.736.8000
F: 202.736.8711

SIDLEY AUSTIN LLP
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