

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.

8.1. 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

- 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,

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