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NAFTA Update and Trade News Highlights from August 2010 through October 2010

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NAFTA UPDATE AND TRADE NEWS HIGHLIGHTS FROM AUGUST 2010 THROUGH OCTOBER 2010

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I. UNITED STATES REQUESTS NAFTA PANEL TO RESOLVE CHOICE-OF-FORUM DISPUTE WITH MEXICO IN TUNA-DOLPHIN DISPUTE

A. OVERVIEW

On September 28, 2010,

> [t]he Office of the United States Trade Representative (USTR) announced. . .that the United States has requested that the North American Free Trade Agreement (NAFTA) Free Trade Commission establish a dispute settlement panel regarding Mexico's decision not to remove its "dolphin safe" labeling dispute from the World Trade Organization (WTO) to the NAFTA.[1]

THE United States previously made a request in writing to Mexico on March 24, 2009 to have the dispute settled under NAFTA procedures—the United States contends that following such a request, NAFTA is the sole venue for resolution of the dispute.[2] Article 2005, paragraph 4 of NAFTA provides:

In any dispute referred to in paragraph 1 that arises under Section B of Chapter Seven (Sanitary and Phytosanitary Measures) or Chapter Nine (Standards-Related Measures):

> (a) concerning a measure adopted or maintained by a Party to protect its human, animal or plant life or health, or to protect its environment, and
> (b) that raises factual issues concerning the environment, health, safety or conservation, including directly related scientific matters, where the responding Party requests in writing that the matter be considered under this Agreement, the complaining Party may, in respect of that matter, thereafter have recourse to dispute settlement

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1. Press Release, Office of the U.S. Trade Representative, U.S. Requests Dispute Settlement Panel in Tuna Dolphin NAFTA Choice of Forum Dispute (Sept. 24, 2010), *available at* http://www.ustr.gov/about-us/press-office/press-releases/2010/september/united-states-requests-dispute-settlement-panel.
2. *Id.*

procedures solely under this Agreement.[3]

In a statement by the USTR, Nkenge Harmon said, "[w]e regret that Mexico continues to move forward with its WTO proceeding[.] In the NAFTA, the United States, Canada and Mexico agreed to give a defending party the right to choose NAFTA dispute settlement in circumstances such as these, and we are seeking to enforce this right."[4] In this case, according to the United States, once the choice of forum provision of NAFTA is invoked, then the complaining party, Mexico, must remove its complaint from the WTO proceedings and exclusively pursue dispute resolution under NAFTA.[5]

In Mexico's request for the establishment of a dispute panel by the WTO, it characterized the underlying dispute as one where measures by the United States have led to the prohibition on labeling tuna and tuna products from Mexico as "dolphin safe" even when the harvesting method complies with multilateral standards established by the Inter American Tropical Tuna Commission.[6] The issue is that case-law and statutes[7] in the United States provide that when tuna is harvested by a process of "intentionally encircling dolphins with purse seine nets," a technique often utilized by Mexican fishing vessels to fish for tuna, then tuna sellers may not label their products as dolphin safe.[8] As noted by the court in *Earth Island Inst. v. Hogarth*, [g]iven the choice of whether to purchase dolphin-safe tuna or to purchase tuna not labeled dolphin-safe, American consumers overwhelmingly chose to purchase tuna that was labeled dolphin-safe."[9] It is this difference in market perception that Mexico refers to when claiming that the United States measures ultimately result in less favorable treatment of Mexican goods and have the "effect of creating unnecessary obstacles to trade" in violation of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and the Agreement on Technical Barriers to Trade (TBT Agreement).[10]

B. PROCEDURAL HISTORY

The dispute commenced on March 9, 2009 when Mexico requested the establishment of a dispute panel by the WTO to review the consistency of U.S. laws with its obligations under the WTO Agreement concerning the

3. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA], *available at* http://www.nafta-sec-alena.org/en/view.aspx?x=343&mtpiID=153#A2005.
4. Press Release, *supra* note 1.
5. *Id.*
6. Request for the Establishment of a Panel by Mexico, *United States–Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/4 (Mar. 10, 2009), *available at* http://docsonline.wto.org/DDFDocuments/t/WT/DS/381-4.doc.
7. Dolphin Protection Consumer Information Act, 16 U.S.C. 1385 (2010); *Earth Island Inst. v. Hogarth*, 494 F.3d 757, 761 (9th Cir. 2007).
8. *Hogarth*, *supra* note 7; Press Release, *supra* note 1.
9. *Hogarth*, *supra* note 7.
10. Request for the Establishment of a Panel by Mexico, *supra* note 6.

use of dolphin safe labeling requirements.[11] The United States then invoked the choice of forum provision of NAFTA and on March 24, 2009 requested that Mexico remove its complaint from the WTO to NAFTA; however, Mexico did not comply and a WTO panel was established by the Dispute Settlement Body on April 20, 2009.[12]

Consultations between the two governments regarding the choice of forum dispute were held late in 2009, but "[w]hen consultations did not resolve the dispute, the United States requested the NAFTA Free Trade Commission, which is composed of the NAFTA countries' trade ministers or their designees, meet to discuss the matter. The Commission met on May 7, 2010 but was also unable to resolve the dispute."[13] Under Chapter 20 of NAFTA, if government-to-government consultations and meetings with the Free Trade Commission both fail to resolve the dispute, then "a consulting Party may call for the establishment of a five-member arbitral panel" as the United States has done in the present case.[14]

C. LEGAL ISSUES

The U.S. panel request does not address the underlying issues in the case, but rather focuses on the narrow procedural issue of whether this dispute should be resolved under NAFTA procedures or those of the WTO.[15] As has been noted, the WTO has never before faced a NAFTA finding that a dispute must be settled in a NAFTA forum, and it is unclear whether the WTO would even suspend ongoing proceedings in the face of such a finding.[16] Because of this, the case has the potential to clarify the relationship of NAFTA and the WTO in those areas of dual competencies.

Historically, the United States has "argued against the direct application of non-WTO international norms in WTO disputes," and in the present case the United States did not bring an initial objection "to the WTO as a proper forum in its first written submission."[17] If the NAFTA panel finds that NAFTA is the proper forum, then the United States could argue before the WTO that the claims by Mexico under the WTO are no longer admissible; furthermore, if the WTO authorizes Mexico to implement retaliatory measures after such a finding by a NAFTA panel, the United States could argue that it has the freedom to impose retaliatory measures under NAFTA in kind as a response—effectively leading to a stalemate between both sides.[18]

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11. Press Release, *supra* note 1.
12. *Id.*
13. *Id.*
14. NAFTA Secretariat, *Overview of the Dispute Settlement Provisions* (Jan. 19, 2010), http://www.nafta-sec-alena.org/en/view.aspx?x=226.
15. Jamie Strawbridge, *U.S. Tuna-Dolphin Panel Request Could Clarify NAFTA-WTO Relationship*, INSIDE U.S. TRADE, Oct. 1, 2010, *available at* 2010 WLNR 19508740.
16. *Id.*
17. *Id.*
18. *Id.*

Among the arguments available to Mexico is that the case is properly before the WTO because fifteen WTO members joined as third parties to the dispute in addition to arguments regarding the application of the present facts and whether they support all of the elements contained in Article 2005(4) as necessary to allow a responding party the right of choice of forum.[19]

D. Comparison with Other Cases

Some commentators have noted that this situation is similar to a prior case from 2005 and 2006 involving the United States and Mexico, but with roles reversed, in which Mexico requested a five-member arbitral panel under NAFTA based on measures enacted by the United States related to the importation of sugar, but was blocked by the United States from establishing one.[20] In Mexico's written response to the WTO panel, it argued that "this [was] a dispute arising under a regional free trade agreement and it would be inappropriate for [a WTO] Panel to hear it."[21] It further "maintain[ed] that the Panel should decline to exercise its jurisdiction to resolve the. . .dispute and should recommend that the parties resort to the NAFTA dispute settlement mechanism to resolve in an integral manner the broader sweeteners trade dispute."[22] Mexico contended that the dispute arose following the generation of a surplus of sugar that it had a right to export to the United States, but that the United States disputed how much could be exported.[23] Mexico submitted to the dispute settlement mechanisms under Chapter 20 of NAFTA and it held consultations with the United States, a meeting with the Free Trade Commission, and finally requested the establishment of an arbitral panel—but at the last step of the process, the United States refused to give consent to the establishment of a panel, effectively blocking Mexico's efforts to resolve the dispute under NAFTA.[24] Unlike WTO procedures, which contain an element of automaticity, NAFTA does not automatically convene a panel at a complaining party's request following an unsuccessful meeting with the Fair Trade Commission, but rather the appointment of a Chapter 20 panel must be agreed to by both parties.[25]

A review by the WTO Appellate Body in 2006 upheld the position that a WTO Panel "would seem. . .not to be in a position to choose freely whether or not to exercise its jurisdiction, and declined to make a ruling on whether or not NAFTA was the proper venue for this dispute, as re-

19. *Id.*
20. *Id.*; Posting of Simon Lester to Int'l Econ. L. and Pol'y Blog, *The Tuna/Dolphin NAFTA Panel Request* (Sep. 28, 2010, 7:33 AM), http://worldtradelaw.typepad.com/ielpblog/2010/09/the-tunadolphin-nafta-panel.html.
21. Panel Report, *Mexico–Tax Measures on Soft Drinks and Other Beverages*, ¶ 4.71, WT/DS308/R (Oct. 7, 2005) *available at* http://docsonline.wto.org/DDFDocuments/t/WT/DS/308R-00.doc.
22. *Id.*
23. *Id.* ¶ 4.91.
24. *Id.* ¶ 4.91-4.92.
25. *Id.* ¶ 4.91.

quested by Mexico."[26] In the same report, the WTO Appellate Body states that, "[m]indful of the precise scope of Mexico's appeal, we express no view as to whether there may be other circumstances in which legal impediments could exist that would preclude a panel from ruling on the merits of the claims that are before it."[27] At least one commentator has taken note of the possibility that "[a] NAFTA panel procedural finding that Mexico had no right to pursue its substantive claims under the WTO could constitute such a 'legal impediment'" to the exercise of a WTO panel's jurisdiction.[28]

II. NAFTA PANEL DISMISSES CHAPTER 11 CLAIM BY U.S. CHEMICAL COMPANY

The Canadian government successfully defended a Chapter 11 claim by Chemtura Corporation, a U.S. chemical manufacturing company, which alleged that a Canadian ban on lindane for use as a pesticide resulted in financial losses.[29] Chemtura "failed to persuade arbitrators that government regulators acted without regard for scientific evidence or due process" in banning the chemical for such a use.[30]

A. BACKGROUND

Since first being introduced in Canada in the 1930's, lindane "has been designated as a possible carcinogen, an environmental contaminant, and identified as the cause of various additional negative health consequences in humans and animals, including death."[31] Among those countries that have already banned outright or limited the use of lindane are: Japan, Germany, New Zealand, Austria, Brazil, Norway, and the United States.[32] Chemtura manufactured a pesticide for the treatment of canola seeds that included lindane, but a prohibition on its use in the United States resulted in two industry groups in Canada voluntarily enacting measures, with guidance from Canada's federal regulator, the Pest Management Regulatory Agency ("PRMA"), "to phase out the use of lindane for canola seed treatment in Canada."[33] As part of this voluntary phase out, the PRMA conducted a risk assessment of lindane that was completed in October 2001 and concluded that there was "unacceptable risk

26. Strawbridge, *supra* note 15.
27. Appellate Body Report, *Mexico -Tax Measures on Soft Drinks and Other Beverages*, ¶ 54, WT/DS308/AB/R (Mar. 6, 2006), *available at* http://docsonline.wto.org/DDFDocuments/t/WT/DS/308ABR.doc.
28. Strawbridge, *supra* note 15.
29. Luke Eric Peterson, *Canada Beats Off Chemtura NAFTA Chapter 11 Claim*, PACIFIC FREE PRESS, Aug. 26, 2010.
30. *Id.*
31. Cris Best, *Chemtura v. Canada: The Federal Government Successfully Defends NAFTA Claim Resulting from Pesticide Ban*, THE COURT, Sept. 8, 2010, http://www.thecourt.ca/2010/09/08/chemtura-v-canada-the-federal-government-successfully-defends-nafta-claim-resulting-from-pesticide-ban.
32. *Id.*
33. *Id.*

to the health of workers exposed to lindane during seed treatment and planting."[34] Furthermore, the PRMA made the following findings regarding health considerations in the use of lindane:

> An acute overexposure to lindane can produce a variety of symptoms in animals and humans. Symptoms may include nausea, exhaustion, convulsions or seizures. Health effects in animals exposed daily to lindane over long periods of time included effects on the liver, lung, kidney, spleen, thymus and testes. There is suggestive evidence that lindane is genotoxic and causes cancer in animals. There were also indications that lindane caused damage to the central nervous system and altered hormone levels in developing animals at doses that were not toxic to the mother, indicating that the young are more sensitive to lindane than the adult animal.[35]

The only company that did not voluntarily comply with the phase out was Chemtura, and after the PRMA took regulatory action to ban the use of lindane on canola seeds the company brought a complaint seeking arbitration by a NAFTA panel.[36]

B. Finding and Analysis by the Panel

"In short, the NAFTA tribunal found that the lengthy regulatory process and related decision were acceptable; and considering the worldwide treatment of Lindane, Canada was well within reason to ban its use as a pesticide."[37] In considering the primary argument by Chemtura that its investment was expropriated, the court reaffirmed the practice of other NAFTA tribunals in applying a three-part test that considers "(i) whether there is an investment capable of being expropriated, (ii) whether that investment has in fact been expropriated, and (iii) whether the conditions set in Article 1110(1)(a)-(d) have been satisfied."[38] In determining whether investments were in fact expropriated, the court noted that there must have been "substantial deprivation," a fact intensive test that involves consideration of factors such as the relative weight of the investment to the total business and the degree of control over the operations of the business by the country in question.[39] In this case, the court observed that sales of lindane-based products amounted to only ten percent of total sales—a small portion of business operations—and that the Canadian government at no time interfered with the management of Chemtura, its operations, or its payment of dividends.[40] Based on this, the

34. *Re-evaluation Note REV2009-08, Lindane Risk Assessment*, Health Canada, Aug. 27, 2009, *available at* http://www.hc-sc.gc.ca/cps-spc/pest/part/consultations/_rev2009-08/lindane-eng.php#a3.
35. *Id.*
36. Best, *supra* note 31.
37. *Id.*
38. *Chemtura Corp. v. Gov't of Can.*, ¶ 242 (Perm. Ct. Arb. 2010), *available at* http://www.pca-cpa.org/upload/files/Chemtura%20Award%202%20Aug%202010%20scanned.pdf.
39. *Id.* ¶ 249.
40. *Id.* ¶ 262-64.

court concluded that "the measures did not amount to a substantial deprivation of [Chemtura's] investment."[41]

In addition to dismissing the claims brought by Chemtura, the "arbitrators also ordered the company to reimburse Canada for $3 million in legal costs and expenses."[42] Ultimately, this award may have the effect of signaling to other current NAFTA complaints with similar facts what the outcome may be. One such case is a NAFTA Chapter 11 claim by Dow Chemical Company filed in 2009.[43] According to one commentator, Dow "ostentatiously sat on its hands 'perhaps to see how arbitrators chose to resolve the earlier-launched Chemtura case.' However, with arbitrators refusing to compensate Chemtura for the loss of its lindane business, Dow may now think twice before attempting to recoup its own pesticide sales losses."[44] Although arbitrators are not bound by the decision of earlier tribunals, Dow's complaint for losses from pesticide sales is certainly factually similar to that of Chemtura's case and has the potential to result in the same outcome.[45]

41. *Id.* ¶ 265.
42. Peterson, *supra* note 29.
43. *Id.*
44. *Id.*
45. *See id.*

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