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RECONCILING REGULATORY SPACE WITH EXTERNAL ACCOUNTABILITY THROUGH WTO ADJUDICATION – TRADE, ENVIRONMENT AND DEVELOPMENT

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Reconciling regulatory space with external accountability through WTO adjudication –

Trade, environment and development

Maria Weimer

Abstract:

This paper argues in favor of broadening the trade and environment debate in the WTO to include a developmental perspective. It takes the *US-Tuna II* dispute between the United Sates and Mexico as an example to show the complex intertwinement between economic, environmental and developmental issues. WTO litigation involving environmental regulation cannot be narrowed down to a conflict between the right to regulate and free trade. It also touches upon the issue of global justice and the power asymmetries structurally embedded in the global economy. The recognition of the WTO as a legitimate global institution depends on its ability to reconcile respect for the right to regulate with the need to give due regard to the interests and concerns of foreign constituencies affected by domestic regulation, thereby ensuring external accountability. This requires imposing other-regarding obligations able to induce reflexivity in domestic regulation. The paper applies this framework by analyzing the legal reasoning of the Appellate Body in *US-Tuna II* (in both the original and the compliance report). Here the Appellate Body deferred to a stringent and unilateral standard of the United States while imposing only minimal accountability vis-à-vis Mexico by requiring that the US standard be applied 'even-handedly.' The paper criticizes that 'even-handedness' does not necessarily improve regard for affected foreigners. Based on a comparison with the Appellate Body's reasoning in *US-Shrimp* the paper argues that reflexivity-inducing other-regarding obligations require a higher burden of justification from the regulating state, especially in disputes between developed and less developed states.

Introduction

In its report in *United States – Tuna*,[1] adopted in 2012, the Appellate Body, the main adjudicating body of the World Trade Organization, ruled against the United States on the basis that the latter's 'dolphin-safe' label, designed to protect dolphins from certain harmful practices in the tuna fishing industry, infringed WTO rules due to its discriminatory nature. This report, together with the compliance report adopted in 2015 and equally ruling against the US, are the latest manifestation of a long-lasting contestation between the US and Mexico over the proper approach to sustainable tuna fishery and 'dolphin-safe' ecolabeling. Going back to the early

[1] Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* – AB-2012-2, WT/DS381/AB/R (16 May 2012), hereafter AB report *US-Tuna II*.

1990s,[2] this dispute not only gave rise to the trade and environment debate[3] – it is also emblematic of what John Jackson once called the 'perpetual puzzle of international economic institutions,'[4] that is the tension between the goals of open trade and the respect for national sovereignty.[5]

The potential impact of the WTO on domestic regulation[6] raises concerns that it might overly curtail the domestic right to regulate especially in core areas of national policy-making, such as public health and environmental protection.[7] Over the last two decades a lot has been said and written about the perils of sacrificing environmental protection and domestic democracy at the altar of trade liberalization. Importantly, the WTO has not been immune to this critique. The evolution of WTO case law since the entry into force of the Marrakesh Agreement, and especially of AB decisions, which showed deference to domestically set levels of protection, can be seen as a response to this critique as much as an effort on the part of the AB to safeguard the acceptability of its decisions amindst powerful challenges to its authority.[8]

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[2] See GATT 1947 Panel Report, *Unitied States – Restrictions on Imports of Tuna*, DS21/R (3 September 1991).

[3] First in the GATT 1947, then in the WTO; see Edith Brown Weiss, John Jackson, and Nathalie Bernasconi-Osterwalder, *Reconciling Environment and Trade: Second Edition* (BRILL, 2008).

[4] John H. Jackson, *World Trade and the Law of GATT* (Lexis Law Pub, 1969), 788 according to whom the puzzle is "to give measured scope of legitimate national policy goals while preventing the use of these goals to promote particular interests at the expense of the greater common welfare."

[5] See Robert Howse, "Adjudicative Legitimacy and Treaty Internpretation in International Trade Law: The Early Years of WTO Jurisprudence," in *The EU, the WTO, and the NAFTA: Towards a Common Law of International Trade*, ed. Joseph H. H. Weiler (Oxford University Press, 2000); Gregory Shaffer, "The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters," *Harvard Environmental Law Review* 25 (2001): 1–93; Alan O. Sykes, "Domestic Regulation, Sovereignty and Scientific Evidence Requirements: A Pessimistic View," in *Trade and Human Health and Safety*, ed. George A. Bermann and Petros C. Mavroidis (Cambridge University Press, 2006).

[6] See Gráinne De Búrca and Joanne Scott, eds., *The EU and the WTO: Legal and Constitutional Issues* (Hart Publishing, 2001).

[7] Lukasz Gruszczynski, *Regulating Health and Environmental Risks Under WTO Law: A Critical Analysis of the SPS Agreement* (Oxford University Press, 2010).

[8] According to Shaffer "WTO jurisprudence has recursively evolved over time in light of state and civil society responses, and has been less restrictive and deferential than pre-1995 GATT panels." Gregory Shaffer, "How the World Trade Organization Shapes Regulatory Governance," *Regulation & Governance* 9, no. 1 (March 1, 2015): 1–15, doi:10.1111/rego.12057; see also Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (OUP Oxford, 2012), 167–95; Nicholas A. DiMascio and Joost Pauwelyn, "Non-Discrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?," *American Journal of International Law* 102, no. 48 (2008) who argue that since 2000 in particular the WTO has shifted towards more favorable treatment of domestic regulators over foreign importers. See also Robert Howse,

The WTO case law on trade and environment, however, has also revealed the under-complexity of this very dichotomy. Some of the most high-profile cases[9] including *US-Tuna* have shown that the conflict at stake is not just one between trade and environment, but that both are deeply intertwined with another global concern, namely the right to development[10] and the livelihood of particularly vulnerable communities (e.g. developing countries or indigenous communities). The latter arguably never managed to get the same publicity, nor to mobilize the same pressure as the trade and environment problem in the WTO.

This paper argues in favour of broadening the trade and environment debate.[11] It stresses the complex intertwinement between economic, environmental and developmental issues in the WTO, which calls for a more differentiated evaluation of WTO adjudication involving these issues. It has been shown that when setting environmental and other standards, powerful developed states and regional organisations, such as the US and the EU, are acting as global standard setters, because their regulation has far-reaching extraterritorial effects.[12] Moreover, unilateral regulation in these fields is often driven by the interests of domestic economic actors.[13] This situation can create a particular challenge for less developed countries, not only because they often lack the (e.g. financial or technical) capacity to adjust to the standards of developed states, but also because while being directly affected they do not have a say in the

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"The World Trade Organization 20 Years On: Global Governance by Judiciary," *European Journal of International Law* 27, no. 1 (2016): 9–77.

9 *US-Gasoline, US-Shrimp, US-Tuna, EC-Biotech, EC-Seals.*

10 See discussion of the latter in Denise Prévost, *Balancing Trade and Health in the SPS Agreement: The Development Dimension | Uitgeverij Prometheus* (Wolf Productions, 2011).

11 For a critical discussion of the 'trade and' debate, see Andrew T. F. Lang, "Reflecting on 'Linkage': Cognitive and Institutional Change in The International Trading System," *The Modern Law Review* 70, no. 4 (July 1, 2007): 523–49, doi:10.1111/j.1468-2230.2007.00651.x.

12 See Maria Weimer and Ellen Vos, "The Role of the EU in Transnational Regulation of Food Safety: Extending Experimentalist Governance?," in *Extending Experimentalist Governance? The EU and Transnational Regulation*, ed. Jonathan Zeitlin (Oxford University Press, 2013); For extraterritoriality in EU law see Joanne Scott, "The New EU Extraterritoriality," *Common Market Law Review* 51, no. 5 (October 1, 2014): 1343–80.

13 The extension of stringent regulatory standards to third countries helps avoiding a comparative disadvantage, which would otherwise arise for domestic companies bound by strict health and environmental standards when they compete with foreign companies, see Zaki Laïdi, The Normative Empire: the Unintended Consequences of European Power, 2008 available at https://hal.archives-ouvertes.fr/hal-00972756/document.

formulation of these standards. This shows that WTO litigation involving environmental regulation cannot be narrowed down to a conflict between the democratic right to regulate and a neoliberal free trade agenda. Rather it also touches upon the issue of global justice and the power assymetries structurally embedded in both the global economy and global governance institutions.

Against this background, the paper argues that the recognition of the WTO as a legitimate global institution depends on its ability to reconcile two fundamental objectives: the respect for the right to regulate (e.g. on environmental and other social matters) on the one hand and the need to give due regard to the interests and concerns of foreign constituencies affected by domestic regulation on the other hand. Furthermore, it is shown that the AB is indeed seeking to establish an equilibrium between these two objectives on a case by case basis, and that this search characterizes both the AB's legal reasoning and interpretative choices.

Drawing on the literature on global governance and accountability,[14] the paper develops the idea that by imposing other-regarding obligations WTO law can act as a mechanism of external accountability of powerful states vis-à-vis foreign constituencies, especially in cases involving assymetric relations, such as between developed and less developed states[15] (section 1). It then applies this concept to the *US-Tuna* dispute by analyzing the legal reasoning of the AB in the 2012 *US-Tuna II* report and the 2015 compliance report (sections 3-6). The paper

[14] Richard B. Stewart, "Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness," *The American Journal of International Law* 108, no. 2 (2014): 211–70, doi:10.5305/amerjintelaw.108.2.0211; Eyal Benvenisti, "Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders," *American Journal of International Law* 107 (2013); Robert O Keohane, "Global Governance and Democratic Accountability," in *Taming Globalization: Frontiers of Governance*, ed. David Held and Mathias Koenig-Archibugi (Polity, 2003); Shaffer, "How the World Trade Organization Shapes Regulatory Governance"; Richard Stewart and Michelle Ratton Sanchez Badin, "The World Trade Organization and Global Administrative Law," *New York University Public Law and Legal Theory Working Papers* 166 (December 1, 2009); Gráinne De Búrca, Robert O. Keohane, and Charles Sabel, "Global Experimentalist Governance," *British Journal of Political Science* 44, no. 3 (July 2014): 477–486, doi:10.1017/S0007123414000076.

[15] It is acknowledged that the notion 'developing country' is in flux and that there is wide variety of levels of economic and political development among less developed countries. Assymetric relations can therefore occur in different contexts involving different stages of economic development, and potentially also other types of power assymetries (e.g. resource dependency).

provides a contextual analysis of the AB reports by placing them in the broader context of the 'tuna-dolphin' controversy.[16] Section 2, therefore, discusses the politics of 'tuna-dolphin' revealing the complex intertwinement of environmental, economic, developmental and political aspects of 'dolphin-safe' labeling. Overall, the paper seeks to contribute to resolving the 'perpetual puzzle' mentioned at the outset of this introduction, by examining the way, in which the AB attempted to reconcile the US' right to regulate with the need for external accountability towards Mexico.[17] In this way, the paper helps to better understand when and in what way WTO law can help improving the access of less developed countries to powerful markets while reconciling the latter objective with the need to respect domestic regulatory choice in favor of a particular level of environmental protection.

1. WTO law as a mechanism of external accountability of powerful states towards affected foreigners

The role of the WTO in global governance and legal ordering[18] is best understood against the background of the broader discussion on legitimacy and justice in global governance including on the role of law therein.[19] The WTO is the prime example of an influential specialized global regulatory body – one of the many that are populating the fragmented international le-

[16] Thereby it follows new legal realist approaches, see Gregory Shaffer, "The New Legal Realist Approach to International Law," *Leiden Journal of International Law* 28, no. 2 (June 2015): 189–210, doi:10.1017/S0922156515000035.

[17] The International Monetary Fund categorized Mexico as an emerging market developing economy in its 2016 World Economic Outlook, see at http://www.imf.org/external/pubs/ft/weo/2016/01/pdf/statapp.pdf.

[18] See Shaffer, "How the World Trade Organization Shapes Regulatory Governance"; Stewart and Badin, "The World Trade Organization and Global Administrative Law"; Howse, "The World Trade Organization 20 Years On: Global Governance by Judiciary."

[19] See Benvenisti, "Sovereigns as Trustees of Humanity"; Stewart, "REMEDYING DISREGARD IN GLOBAL REGULATORY GOVERNANCE"; Keohane, "Global Governance and Democratic Accountability"; De Búrca, Keohane, and Sabel, "Global Experimentalist Governance"; Poul F. Kjaer, *Constitutionalism in the Global Realm: A Sociological Approach* (Routledge, 2014); Eyal Benvenisti and George W. Downs, "The Empire's New Clothes: Political Economy and the Fragmentation of International Law," *Stanford Law Review* 60, no. 2 (2007): 595–631; Terence C. Halliday and Gregory Shaffer, *Transnational Legal Orders* (Cambridge University Press, 2015); Joel P. Trachtman, "International Legal Control of Domestic Administrative Action," *Journal of International Economic Law* 17, no. 4 (December 1, 2014): 753–86, doi:10.1093/jiel/jgu045.

gal and regulatory space. As such, it suffers from what Stewart has identified as the problem of disregard in global governance:

> 'The most powerful global regulatory regimes promote the objectives of dominant states and economic actors, whereas regimes to protect weaker groups and individuals are often less effective or virtually nonexistent and are thus unable to protect their interests and concerns. As a result of these two types of disregard, the dominant actors in global regulatory governance enjoy disproportionate benefits from international cooperation, while weaker groups and individuals suffer deprivation and often serious harm.[20]'

Similarly, Benvenisti and Downs have argued that the increased fragmentation of the international legal order[21] aggravates the power assymetries between most developed states and poorer countries. According to them

> 'The "pluralism" produced by this fragmentation is less representative, less diverse, and less generative than that term normally implies. With only a few exceptions, the design and operation of the resulting international legal order reflect the interests of only a handful of developed states and their internal constituencies.'[22]

The structural bias of the WTO legal system in favour of developed countries is well documented.[23] Firstly, wealthy countries, such as the US and the EU, have dominated the process of formation of WTO rules presenting less developed countries with a 'fait accompli.'[24] Sec-

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[20] Stewart, "REMEDYING DISREGARD IN GLOBAL REGULATORY GOVERNANCE."

[21] Which they define as the increased proliferation of international regulatory institutions with overlapping jurisdictions and ambiguous boundaries, see infra.

[22] Benvenisti and Downs, "The Empire's New Clothes."

[23] On the WTO and developing countries see Gregory C. Shaffer and Ricardo Meléndez-Ortiz, *Dispute Settlement at the WTO: The Developing Country Experience* (Cambridge University Press, 2010); Prévost, *Balancing Trade and Health in the SPS Agreement: The Development Dimension | Uitgeverij Prometheus*; Graham Mayeda, "The TBT Agreement and Developing Countries," in *Research Handbook on the WTO and Technical Barriers to Trade*, ed. Tracey Epps and Michael J. Trebilcock (Edward Elgar, 2013).

[24] Richard H. Steinberg, "In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO," *International Organization* 56, no. 2 (March 2002): 339–374, doi:10.1162/002081802320005504; Richard H. Steinberg, "Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints," *American Journal of International Law* 98 (2004): 247; On the reasons

ondly, the subsequent interpretation and application of these rules is typically characterized by deference to the interests of the most powerful WTO members. Such deference results from the need on the part of spezialized adjudicatory bodies, such as the AB, to secure the acceptance of their authority in a fragmented international legal space. To use Benvenisti and Downs' words again,

> "International institutions operating in this sort of environment cannot help but be aware of the fact that a powerful state might refuse to accept a ruling if it goes against them and go elsewhere in the future. This vulnerability leads the institutions to be more accommodative to the interests of powerful states than they otherwise might have be, and it reduces the likelihood that any given institution will grow independent enough to pose a serious challenge to their discretion."[25]

The evolution of AB jurisprudence in cases involving public health and environmental regulation towards a more deferential approach to domestically set levels of protection over the last two decades is an illustration of this quest for acceptance.[26] There are moreover important democratic and institutional arguments in favour of deference to domestically set levels of protection. Firstly, it is an important expression of the respect for democratic choices by domestic constituencies to protect non-economic public goods threatened by globalization and free trade.[27] Secondly, national regulators have a better institutional capacity and expertise to gauge policy options and to assess their broader implications.[28] International tribunals are ill-

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why developing countries agreed to accept the WTO bargain see Howse, "The World Trade Organization 20 Years On: Global Governance by Judiciary."

[25] Benvenisti and Downs, "The Empire's New Clothes."

[26] See Howse, "The World Trade Organization 20 Years On: Global Governance by Judiciary"; Closely linked is also the tendendy of the AB to accept domestic legislative choices while censuring only their implementation – an approach that has by some been criticized as confirming a bias against developing coun-tries, see Mayeda, "The TBT Agreement and Developing Countries."

[27] See Dani Rodrik, *The Globalization Paradox: Democracy and the Future of the World Economy* (W. W. Norton & Company, 2011) who argues that globalization depends on the ability of nation states to regulate their economies.

[28] See for a discussion of these arguments Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration* (Cambridge University Press, 2015); From a Science and Technology perspective Sheila Jasanoff,

equipped to substitute domestic regulatory judgment in situations involving either difficult political choices or epistemic uncertainties.

And yet it is important to recognize that deference might also come at the price of further entrenching existent power assymetries in the application of WTO agreements, because it favours the position of developed countries with large export markets, such as the US and the EU, as global standard setters. Due to both the attractiveness of their markets to foreign traders and the stringency of their standards, the US and the EU are able to unilaterally extend their regulatory requirements to third countries as a condition of market access.[29] Arguably, this can be seen as a positive development given its potential to contribute to a 'race to the top' in regulating global markets.[30] And yet, the unilateral setting of global standards by few developed states shifts the definition power over legitimate regulatory policy to those states, which in turn raises the following question: how to ensure regard for the concerns and interests[31] of foreign constituencies affected by unilateral regulation in the setting of these standards, especially in the context of assymetric relations involving different stages of development?

This paper argues that the WTO, while ensuring deference, can, against all odds, alleviate the problem of disregard by imposing other-regarding obligations upon regulating states. It therefore conceives of WTO law as a mechanism of external accountability of powerful states vis-à-vis affected foreigners. External accountability is defined here as the ability of the WTO as

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"Epistemic Subsidiarity – Coexistence, Cosmopolitanism, Constitutionalism," *European Journal of Risk Regulation* 4, no. 2 (2013): 133–41.

[29] So-called California or Brussels effect. It is controversial whether this creates obstacles to developing countries or opportunities to improve their competitiveness and welfare, see Spencer Henson and Steven Jaffee, "Standards and Agro-Food Exports from Developing Countries: Rebalancing the Debate," World Bank Policy Research Working Paper (The World Bank, June 25, 2004), http://elibrary.worldbank.org/doi/abs/10.1596/1813-9450-3348.

[30] Shaffer, "How the World Trade Organization Shapes Regulatory Governance."

[31] Following Stewart interests are see 'as grounded in the material conditions of human welfare, including sustenance, health, security, housing, and education, that can be more or less objectively determined. Concerns have a more subjective character, reflecting values like individual dignity, justice and equity, integrity of institutions and community, and cultural, religious, social, and ecological ideals.' See Stewart, "REMEDYING DISREGARD IN GLOBAL REGULATORY GOVERNANCE," 212.

a multilateral organization to enforce demands for legal accountability among WTO members as peers. Legal accountability,[32] in turn, is understood as a mechanism allowing an account holder (i.e. a WTO member) to bring a legal action against the accounter (i.e. another WTO member) in a court or tribunal (i.e. the WTO dispute settlement bodies) to determine whether a specific conduct of the accounter infringes the law (i.e. the legal obligations laid down in WTO agreements) and thereby the account holder's legal rights (e.g. the right to non-discrimination and equal treatment stemming from WTO agreements); and, if so, to obtain an appropriate remedy (either compliance with WTO obligations or the right to compensation or suspension of trade concessions[33]). In other words, by imposing upon its members the duty to justify import restrictions the WTO is able to impose reflexive disciplines forcing its members to consider the external effects of internal policy making on foreign jurisdictions.[34] The paper thus follows the view that incremental change and reform of existing global governance institutions including the WTO is both desirable and possible despite the imperfections and power assymetries of the current system.[35]

The term *external* accountability accentuates the problem of disregard, and is seen as a counterpart to *internal* accountability of states. In a globalized and interdependent world, domestic governments are thus not only required to answer to their domestic constituencies (internal accountability of states towards their citizens), but also to foreign constituencies negatively affected by domestic policies (external accountability). Both forms of accountability are seen

[32] See Stewart, "REMEDYING DISREGARD IN GLOBAL REGULATORY GOVERNANCE"; Mark Bovens, "Analysing and Assessing Accountability: A Conceptual Framework," *European Law Journal* 13, no. 4 (July 1, 2007): 447–68, doi:10.1111/j.1468-0386.2007.00378.x.

[33] See Article 22 of the Dispute Settlement Understanding.

[34] See Charles F. Sabel and Jonathan Zeitlin, "Experimentalist Governance," in *Oxford Handbook of Governance* (Oxford University Press, 2012).

[35] See Stewart, "REMEDYING DISREGARD IN GLOBAL REGULATORY GOVERNANCE"; Shaffer, "How the World Trade Organization Shapes Regulatory Governance."

as complementary and normatively desirable to ensure responsible use of power in global politics.[36] [37]

Accordingly, the recognition of the WTO as a legitimate global institution depends on its ability to reconcile two fundamental objectives: the respect for the right to regulate as an expression of domestic democratic choices on the one hand, and the need to give due regard to the interests and concerns of foreign constituencies affected by domestic regulation on the other hand.[38] It is clear that striking an adequate balance between both objectives presents a challenge to the WTO and its adjudicating bodies, because it raises difficult questions, such as who should decide on legitimate levels of protection, and under which conditions are those decisions considered as justified. Moreover, the key question concerns the legitimate authority of the AB, a specialized judicial body, to review domestic regulation.[39] In other words, how far can the AB go in imposing other-regarding obligations given that states for the time being retain their importance as main venues for democratic self-determination.[40]

Instead of addressing this question in the abstract, this paper analyzes the ways in which the AB attempts to reconcile the right to regulate with external accountability in the process of legal reasoning. It aims to show that by interpreting and applying WTO law to disputes at hand, WTO dispute settlement bodies are searching for a difficult equilibrium. The adequacy of that equilibrium arguably depends on the particular context in which a WTO dispute takes place. In disputes involving assymetric relations, such as the one discussed in this article, the

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[36] Benvenisti, "Sovereigns as Trustees of Humanity" employs the notion of sovereigns as trustees of their people on the one hand and of humanity as a whole on the other hand; Keohane, "Global Governance and Democratic Accountability" states that „for the United States to be held accountable, internal accountability will have to supplement external accountability rather than substituting for it."; see also Christian Joerges, Poul F. Kjaer, and Tommi Ralli, "A New Type of Conflicts Law as Constitutional Form in the Postnational Constellation," *Transnational Legal Theory* 2, no. 2 (July 1, 2011): 153–65, doi:10.5235/tlt.v2n2.153.

[37] This paper therefore does not consider the accountability of the WTO towards its members.

[38] On the normative foundsations of this objective see Benvenisti, "Sovereigns as Trustees of Humanity."

[39] See Henckels, *Proportionality and Deference in Investor-State Arbitration*.

[40] See Benvenisti, "Sovereigns as Trustees of Humanity"; Joerges, Kjaer, and Ralli, "A New Type of Conflicts Law as Constitutional Form in the Postnational Constellation."

power imbalance imprinted in the global economy accentuates the normative demand for external accountability – the requirement on both economically and politically powerful developed countries to take into account different stages of economic development as well as the negative externalities of their internal policy choices on foreign constituencies.[41]

2. The politics of 'tuna-dolphin' and regulatory responses

> "In the tropical waters of the Pacific Ocean west of Mexico and Central America, large yellowfin tuna (…) swim together with several species of dolphins (…). This ecological association of tuna and dolphins is not clearly understood, but it has had two important practical consequences: it has formed the basis of a successful tuna fishery, and it has resulted in the deaths of a large number of dolphins. This is the heart of the tuna-dolphin issue."[42]

The tuna-dolphin controversy in the Eastern Tropical Pacific (ETP) concerns the fishing technique of 'setting on dolphins,' whereby fishing vessels use so-called 'purse-seine' nets to surround tuna-dolphin associations. The dolphins are then released and the tunas are loaded onto the vessel. Dolphins can get injured or die as a result of becoming trapped or entangled in the net, and in the early years of the ETP fishery incidental mortalities were very high.[43] This issue has gained widespread public attention in the 1980s starting in the US and from there

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[41] This is reinforced by arguments relating to developmental justice and the right to development. See United Nations Declaration on the Right to Development, G.A. Resolution 41/128 U.N. GAOR, 41st Sess., Supp. No. 53, at 186, U.N. Doc. A/41/53 (United Nations, Geneva), 4 December 1986; see also World Conference on Human Rights, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, Vienna), 25 June 1993, para. 10; and the Preamble of the WTO which recognizes 'that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development.' 'Marrakesh Agreement Establishing the World Trade Organization', in The Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts (World Trade Organization, Geneva), 1994, 6-18, 2nd recital. For an analysis of the TBT Agreement from a development perspective see Mayeda, "The TBT Agreement and Developing Countries."This paper does not discuss the WTO rules on special and differential treatment.

[42] Southwest Fisheries Science Center of the National Oceanic and Atmospheric Administration, United States Department of Commerce, "The Tuna Dolphin Issue"(in the following referred to as NOAA, "The Tuna Dolphin Issue") available at http://swfsc.noaa.gov/textblock.aspx?Division=PRD&ParentMenuId=248&id=1408.

[43] See J. Joseph, "The tuna dolphin controversy in the Eastern Pacific Ocean: biological, economic, and political impacts", 25 *Ocean Development and International Law* (1994), pp. 1-30; See also National Academy of Science, Commission on reducing porpoise mortality from fishing, dolphins and the tuna industry, 48 (1992).

spreading all over the world. The resulting environmental movement (the dolphin-safe movement) had spurred a search for regulatory solutions both at the national and international level. Early US regulation focused on the domestic fishing fleet by establishing dolphin-mortality limits and observer programmes in the ETP.[44] While this has significantly reduced US fleet dolphin mortality in the region,[45] mortality caused by the foreign fleet remained high.[46] The breakthrough for both regulation and the environmental movement pressing for it was in 1988 when Sam La Budde, an American environmental activist working for the environmental NGO Earth Island Institute (see below), posed as a crewmember on a large tuna seiner. His video footage of dolphins drowning in tuna seine nets in the ETP shocked US politicians and the public alike. Parker describes the momentum created by this event in the following terms:

> "Environmentalists were concerned with the stocks. U.S. fishers were concerned with their loss of competitive advantage as a result of the exemption of the foreign fleet from strict conservation requirements. Both stressed the environmental-futility of requiring the U.S. fleet to conserve while leaving the now-much larger foreign fleet - which was causing 75% of the dolphin deaths – totally uncontrolled. Dissatisfaction (…) mounted rapidly on all sides. The nationwide airing of the La Budde video in the spring of 1988 brought the simmering discontent to a boil, initiating a course of events that led directly to the November passage of the 1988 MMPA Amendments."[47]

As a result, the US Congress passed a Marine Mammal Protection Act (MMPA) Amendment ordering the executive to negotiate an international conservation agreement and mandating

[44] See Marine Mammal Protection Act of 1972, 16 U.S.C. § 1361 et seq, 1401-1407, 1538, 4107.

[45] Partially due to the retreat of US fishing vessels from the ETP.

[46] In 1986 an estimated 112,000 dolphins died in foreign nets compared to 20,000 killed by the US fleet, see Richard W Parker, "The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict," *Geo. Int.'l Envt. L. Rev.* 12, no. 1 (n.d.) with further references.

[47] Ibid., 11.

embargoes on tuna imports from countries whose regulatory programs and fleets failed to meet the US dolphin conservation standards.

2.1. The power of NGOs – the Earth Island Institute's dolphin-safe label

Parallel developments at the level of private regulation, however, turned out to be much more significant for the future of the US 'dolphin-safe' label. Seizing the momentum of the public outcry following the La Budde video, the environmental NGO Earth Island Institute (EII) organized one of the most successful consumer-driven environmental campaigns ever launched.[48] In cooperation with the US tuna industry, the latter acting under the threat of consumer boycotts,[49] EII developed its dolphin-safe label in the early 1990s. The latter entails an absolute ban on dolphin sets.[50] The EII was able early on to secure the support for its approach of both US tuna industry and the US Congress. While monitoring and certifying most of the tuna industry to its private label, [51] the EII also ensured protection of the label under US public law, which ultimately eliminated competition from other dolphin-safe labels (such as the AIDCP label used by Mexico) on the US market. The EII successfully lobbied the US Congress in the passing of the Dolphin Protection Consumer Information Act (DPCIA) in 1990.[52] The latter made it a violation of the US deceptive advertising provisions to use the

[48] Ian Baird and Noah Quastel, "Dolphin-Safe Tuna from California to Thailand: Localisms in Environmental Certification of Global Commodity Networks," *Annals of the Association of American Geographers* 101, no. 2 (March 1, 2011): 338, doi:10.1080/00045608.2010.544965.

[49] H.J. Heinz, the largest US tuna distributor declared in April 1990 that it would no longer purchase any tuna that was not dolphin safe, and was followed by other big US tuna companies the result that a large majority of the US tuna market was converted overnight, see Ibid., 343 with further references.

[50] See EII website at http://savedolphins.eii.org/campaigns/dsf.

[51] Over time the EII dolphin-safe label expanded beyond the ETP fishery certifying tuna as dolphin-safe from all around the world. According to the EII website, it has been adopted by approximately 300 tuna companies, canneries, brokers, import associations, retail store, and restaurant chains around the globe, see ibid.

[52] According to Baird and Quastel the DPCIA "largely reflected EII's concerns and gave particular protection to the private regulatory network against fraudulent use of the label and specified standards for the use of the label." See Baird and Quastel, "Dolphin-Safe Tuna from California to Thailand," 343.; see also personal interview with an official of the Inter American Tropical Tuna Commission (IATTC) on 24.10.2014; and personal interview with a member of the EII International Marine Mammal Project on 21.10.2014.

term ‘dolphin-safe’ if the tuna was harvested on a trip in which dolphins had been encircled – a provision subsequently challenged by Mexico before the WTO (see below).

2.2. *International cooperation – the Agreement on the International Dolphin Conservation Program (AIDCP)*

As mentioned above, in the 1988 MMPA amendment the US Congress ordered the executive to engage in international negotiations to address the tuna-dolphin problem. The US government was therefore actively pursuing the conclusion of a multi-lateral agreement in this field.[53] Progress in international law-making on dolphin conservation was achieved gradually over the 1990s including the signing of the 1992 La Jolla Agreement, the 1995 Panama Declaration, and finally the 1998 Agreement on the International Dolphin Conservation Program (AIDCP) between the US, Mexico and other countries that border or fish for tuna in the ETP.[54] Several NGOs, such as Greenpeace, the World Wildlife Fund, the Center for Marine Conservation, the Environmental Defense Fund, and the National Wildlife Federation were actively engaged in the negotiation of these agreements.[55] The result was the establishment of an International Dolphin Conservation Program that was inconsistent with a moratorium on dolphin sets as envisaged by the EII label. The AIDCP approach opposes to the killing of dolphins, but recognizes the need for fishers in the region to earn their living. Moreover, it adopts a broader eco-system perspective by including the sustainability of tuna stocks and the reduc-

[53] The GATT *US-Tuna I* panel report, although not adopted, has exerted additional pressure to resolve this problem at the international level, see above fn. 3.

[54] Members of the AIDCP are Belize, Colombia, Costa Rica, Ecuador, El Salvador, European Union, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru, United States, Vanuatu, Venezuela.

[55] These groups focused on principles of ecosystem management and were concerned about reducing bycatch of sharks, sea turtles, billfish, and juvenile tuna and so supported an arrangement that would incrementally reduce, but not completely stop, dolphin deaths, see Brian G. Wright, “Environmental NGOs and the Dolphin-tuna Case,” *Environmental Politics* 9, no. 4 (December 1, 2000): 82–103, doi:10.1080/09644010008414552.

tion of by-catch of other maritime species as its objectives.[56] The AIDCP's definition of 'dolphin-safe' allows dolphin sets, while committing signatories to implement a conservation program that would progressively reduce dolphin mortality in the ETP to insignificant levels approaching zero while maintaining tuna populations in that territory.[57] Tuna can be labeled 'dolphin safe' under the AIDCP when it is captured in sets in which there is no mortality or serious injury of dolphins. To enforce that it prescribes the use of particular gear, equipment, and catching practices; mandated training for captains; and a third party observer on all vessels who would certify whether any dolphin were killed or seriously injured. The result of this conservation program is reported to be declining dolphin mortality in the ETP by over 99%, from around 132,000 per year in the mid-1980s to less than 1,000 in 2011.[58]

Despite of the EII's lobbying against the AIDCP, its conclusion triggered changes in US legislation, namely in the DPCIA and its legal definition of 'dolphin-safe.' The International Dolphin Conservation Program Act of 1997 amended the original DPCIA to provide that tuna caught by dolphin-sets in the ETP could be labeled as 'dolphin-safe' when an international observer certifies that no dolphin were killed or seriously injured in the set. However, the amendment included an additional provision not reflected in the AIDCP. The use of the dolphin-safe label for tuna caught by dolphin-sets was conditioned upon the provision that the US National Marine Fisheries Service (NMFS) finds that the setting on dolphins is not 'having a significant adverse impact on any depleted dolphin stock in the ETP.'[59] This reflected a

[56] Website of the IATTC – International Dolphin Conservation Program at https://www.iattc.org/IDCPENG.htm.

[57] Parker, "The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict," 48.

[58] See http://www.iattc.org/DolphinSafeENG.htm (retrieved on 20 June 2013). In 2005, the AIDCP was awarded the Margarita Lizzaraga award by the FAO in recognition of its 'comprehensive, sustainable, and catalyctic initiatives' in support of the Code of Conduct for Responsible Fisheries.

[59] 16 U.S.C. § 1385 (g) (1) – (2) (2006).

concession to the defenders of the original labeling law in the US Congress.[60] Based on a scientific study, the NMFS found no evidence that existing levels of dolphin-mortality were harming the stocks, and authorized the provisional lifting of embargoes and amendment of the US 'dolphin-safe' definition. For a short period Mexican tuna was permitted to use the AIDCP label in the US. However, EII successfully challenged the NMFS findings in US courts.[61] As a result, the US law was again prohibiting the use of 'dolphin-safe' for any tuna caught in the ETP through dolphin-sets effectively excluding most Mexican tuna from the US market.

2.3. Different labels, different constituencies

It follows that the recent WTO litigation between the US and Mexico is another manifestation of the conflict between two competing approaches to 'dolphin-safe' labeling. The ongoing contestation shows that the resolution of the tuna-dolphin problem touches upon complex issues of sustainable fishery, animal welfare, moral choice, as well as deeply entrenched economic, developmental and political interests.

Dolphin sets are highly attractive economically, because they yield very large catches of premium yellowfin tuna.[62] Mexico considers the ETP as its natural and traditional fishing area, and has developed a massive fishing fleet to harvest the tuna along with an associated infrastructure and employment base. According to Mexico, 'a number of coastal communities were effectively built and sustained on the comparative advantage given by the strength of the

[60] According to an official of the IATTC the introduction of this condition was a result of EII influence on the US Congress, in particular through the support of the Californian senator Barbara Boxer; personal interview from 24.10.2014.

[61] Brower v. Daley 2000; Brower v. Evans 2001 & Earth Island Institute v. Hogarth 2007. Both rulings became part of the challenged measure in the WTO dispute (see below).

[62] See Parker, "The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict."

tuna resource along Mexico's coast.'[63] Last but not least, Mexico has made considerable investments in dolphin protection methods under the AIDCP.[64]

Other issues are less straight forward. The question of what constitutes an ecologically sustainable tuna fishing method remains highly controversial. Alternative fishing methods are said to contribute to the depletion of tuna stocks as they tend to catch juvenile tuna before they had reproduced.[65] Moreover, they may also cause the by-catch of non-target species other than dolphins, e.g. sharks and sea turtles.[66] It has been argued that regulation should adopt a more holistic approach focusing on the overall impact of a tuna fishery on maritime species rather than on the methods employed. [67] The AIDCP claims to adopt such a perspective arguing that dolphin sets can be used in a sustainable way while also considering the socio-economic and developmental needs of the ETP coastal nations such as Mexico.[68]

In contrast, the EII and currently the US approach focuses on the cruelty of chasing and encircling of dolphins. It emphasizes that even an improved use of dolphin sets might still cause considerable stress and suffering to the dolphins involved. This framing of the tuna dolphin issue can be explained by the ideological commitments of EII to the protection of aquatic mammals, and therefore to animal rights. According to Baird & Quastel,

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[63] Panel report *US-Tuna II* para 4.27.

[64] Ibid at para 4.28.

[65] For the ETP see Parker, "The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict."

[66] A. M. M. Miller and S. R. Bush, "Authority without Credibility? Competition and Conflict between Ecolabels in Tuna Fisheries," *Journal of Cleaner Production* 107, no. 10.1016/j.jclepro.2014.02.047 (2015): 137–45, doi:10.1016/j.jclepro.2014.02.047.

[67] See from an eco-sustainability perspective, Ibid.

[68] See Baird and Quastel, "Dolphin-Safe Tuna from California to Thailand" who argue that environmental problems are strongly intertwined with social issues and livelihood struggles in developing countries .

> "the organization's roots in American radical environmentalism led to animal protection being seen in terms of conflicts with humans and industrial activity. (…) (The EII) maintained alliances with animal rights organizations, and even one dolphin death was seen as too many."[69]

The EII approach also stresses the risk of potential mortality and other unobserved effects (eg mother calf separation) after the release of the dolphins. Moreover, defenders of this approach are also concerned with dolphin populations in the ETP. In their view, the killing of over seven millions of dolphins in this region over the last decade has not only been cruel, but has also endangered dolphin stocks.[70] Others see this issue as being scientifically uncertain. While there is agreement that unlimited killing of dolphins is unsustainable, there is no agreement on the sustainable level of mortality, or how much precaution should be built into conservation efforts in light of the existing degree of uncertainty.[71]

Ultimately, the two competing dolphin safe labels also represent different constituencies. While the EII definition is rooted within the particular sociological context of Western American ethical consumption,[72] the AIDCP largely reflectes the interests and concerns of less developed countries fishing in the ETP who invested considerable efforts in reducing dolphin mortality while pursuing their economic interests in the region.

3. The Appellate Body report in *US-Tuna II*

The *US-Tuna II* dispute between the US and Mexico mainly concerned the question whether the US 'dolphin-safe' labeling requirements as laid down in the DPCIA and related regulations violate the TBT Agreement. Mexico challenged several US measures, namely a DPCIA provision, related federal regulations, and the court ruling in *EII v. Hogarth*. These measures

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[69] See Ibid.

[70] Personal interview with a member of the EII International Marine Mammals Project on 21.10.2014.

[71] Personal interview with an official of the National Oceanic and Atmospheric Administration on 22.10.2014.

[72] Baird and Quastel, "Dolphin-Safe Tuna from California to Thailand."

together establish the conditions for the use of the US 'dolphin-safe' label[73] in the US market by requiring certain documentary evidence, which varies depending on the area where the tuna was harvested and the fishing method by which it was harvested. In particular, tuna caught by setting on dolphins is currently not eligible for a 'dolphin-safe' label in the United States. As a consequence, the fishing practices predominantly used by the Mexican tuna fleet do not meet these criteria, even though they comply with the AIDCP 'dolphin-safe' standard.

Mexico made three substantive claims under the TBT agreement.[74] It argued that the US labeling requirements constituted 'less favorable treatment' to Mexican tuna under TBT Article 2.1; 'unnecessary obstacles to international trade' under TBT Article 2.2; and were not based on applicable international standards, namely the AIDCP standard, under TBT Article 2.4. The AB upheld the first claim ruling that the US failed to demonstrate that its labeling conditions were non-discriminatory. The legal reasoning, which led the AB to this conclusion, was a careful – and one aware of the political sensitivity of the case – threading through the possible interpretations of the legal terms of the TBT agreement pondering and weighing the institutional implications of each of them in the ultimate pursuit of a balance between US regulatory autonomy and the commitment to trade liberalization invoked by Mexico.

[73] The US label should be distinguished from the private EII 'dolphin-safe' label. However, as explained above, it currently reflects the EII definition of 'dolphin-safe,' which is due to EII campaigning of Congress and legal actions before the US courts. Would US legislation allow the use of an alternative label on the US market, it would give Mexico the possibility to place tuna products labeled as "dolphin-safe" on the US market following the AIDCP standard.

[74] The panel did not address Mexico's claims under the GATT referring to reasons of "judicial economy." While the AB criticized this approach as a "false" use of judicial economy, it did not "complete the analysis." AB report *US-Tuna II*, paras 405-406.

3.1. Setting the stage – deference to the US' right to set the appropriate level of dolphin protection

The first important interpretative choice made by the AB in this dispute was *not* to question the legitimacy of the US 'dolphin-safe' policy. It accepted the US' approach to ban dolphin-sets, thereby setting a high level of dolphin protection. This issue permeated the analysis of Mexico's claims under Art. 2.1 and 2.2 TBT. Most importantly, deference to the US policy choice has decisively influenced the overall structure of AB's legal reasoning, as well as the outcome of this dispute. It has set the first stone in the subsequent legal construction of the level of external accountability to be imposed on the US.

An assessment of the US regulatory objective was particularly relevant for the assessment under Art. 2.2[75] whether the US measure was more trade restrictive than necessary to fulfill the legitimate objectives pursued by the US, namely, inter alia, to contribute 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."[76] It has been argued that Art. 2.2 offers the opportunity for WTO tribunals to integrate a developmental perspective into their legal analysis under the TBT by probing more deeply the importance of the regulatory goal pursued by the importing state as well as the effectiveness of the measure in achieving it.[77] In practice, however, WTO tribunals have so far been reluctant to do so preferring deference to the level of protection chosen by the importing state. In the present case the AB has continued this trend.

When interpreting the term "no more trade restrictive than necessary to fulfill a legitimate objective" under Art. 2.2 the AB stated that a Member State is not prevented from taking

[75] However it also came up in the assessment of Art. 2.1. see para 244 and 291 of AB report *US-Tuna II*.

[76] Para 302; the US measure also pursued a second objective, namely to protect the consumers from misleading information on tuna labels.

[77] See Mayeda, "The TBT Agreement and Developing Countries."

measures necessary to achieve its legitimate objectives at the levels it considers appropriate.[78] Without discussing the legitimacy of the US regulatory objective, the AB turned directly to the test of "more trade restrictive than necessary" finding that the latter involves a process of weighing and balancing between a number of factors, such as

> "(i) the degree of contribution made by the measure to the legitimate objective at issue;
>
> (ii) the trade-restrictiveness of the measure; and
>
> (iii) the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective(s) pursued by the Member through the measure."[79]

The AB further stated that a comparison of the challenged measure and possible alternative measures should be undertaken.[80] The test thereby developed by the AB does not suggest the willingness to balance the importance of the regulatory objective against the negative trade consequences for affected foreigners.[81] However, it does suggest the possibility to consider the complexity of a dispute such as the one at hand. For example, the AB could have considered the trade-restrictiveness of the US policy as compared to an alternative measure. Mexico has argued that a reasonably available alternative would have been to permit the use of the AIDCP label on the US market, thereby eliminating the exclusivity of the US label. As explained above (at 2.) the AIDCP label also aims at dolphin protection without however prescribing the fishing techniques to achieve that goal.[82] Tuna is labeled as 'dolphin-safe' under the AIDCP where an international observer has certified that no dolphins were killed or injured in the set. Moreover, the AB could have considered the gravity of consequences that

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[78] Para 316 of AB report *US-Tuna II* report.

[79] Para 322 ibid; see also Gabrielle Zoe Marceau, "The New WTO TBT Jurisprudence in US-Clove Cigarettes, WTO US-Tuna II, and US-COOL," *Asian Journal of WTO & International Health Law and Policy* 8, no. 1 (2013): 1ss.

[80] para 322 of AB report *US-Tuna II*.

[81] There is thus no proportionality test carried out under Art. 2.2. For reasons against such test see Venzke, *How Interpretation Makes International Law*.

[82] I.e. without banning dolphin-sets. The AIDCP therefore differs from the US approach in that it neglects the possibility of *unobserved* harm to dolphins, which have been released back into the ocean without being killed or injured.

would arise, if the US would be prevented from exclusively defining what counts as dolphin-safe tuna on the US market. The AB could have weighed the arguments speaking both against and in favour of the AIDCP approach[83] in order to determine 'the gravity of the consequences' that would arise were the US prevented from fulfilling its objective. The application of the test of 'more trade restrictive than necessary' by the AB in this case, however, did not address any of these complex issues. Instead, the AB focused on the question whether allowing the use of the AIDCP label would achieve the US' objectives to an equivalent degree as the measure at issue. Its answer was straightforward:

> 'We note, in this regard, the Panel's finding, undisputed by the participants, that *dolphins suffer adverse impact beyond observed mortalities from setting on dolphins*, even under the restrictions contained in the AIDCP rules. Since under the proposed alternative measure tuna caught in the ETP by setting on dolphins would be eligible for the "dolphin-safe" label, it would appear, therefore, that the alternative measure proposed by Mexico would contribute to both the consumer information objective and the dolphin protection objective to a lesser degree than the measure at issue, because, overall, it would allow more tuna harvested in conditions that adversely affect dolphins to be labelled "dolphin-safe."' (emphasis added)[84]

The finding of *unobserved* adverse impacts on dolphins, therefore, was crucial to consider the absolute ban of dolphin sets as necessary. The decisive issue, in other words, was that the US chose to protect dolphins at this level. The legitimacy of this approach either from an environmental or from a developmental perspective was not examined by the AB.

[83] On the pros and cons of both approaches see above at 2.

[84] Para 330 of AB report *US-Tuna II* report.

3.2. Intensifying scrutiny – the US dolphin-safe label as exercise of public power in need of justification

While deferring to the US policy choice, the AB made clear that it comes with responsibility. Hence, as a next step the AB showed that it was willing to apply a stricter standard of scrutiny when assessing whether the *application* of the US policy was non-discriminatory. According to Article 2.1 TBT "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" (emphasis added). Here the AB was facing the question whether the US provisions on dolphin-safe labeling were to be considered an expression of public power in need of justification under the TBT agreement.

This issue first arose with regard to the qualification of the US measure as a technical regulation in the sense of Annex 1 TBT. The US claimed that its measure was not 'mandatory,' because the labeling of tuna products as dolphin safe was not mandatory on the US market, and was therefore driven by private market choices (producers choosing to label their products in response to consumer demand) rather than regulatory command. The measure was therefore to be considered as a voluntary standard. The AB disagreed. It endorsed the view that there is a crucial difference between the US dolphin-safe label and voluntary labeling schemes. The US provisions not only set out certain conditions for the use of the label, but prohibit the use of any alternative labels pertaining to testify the dolphin-safety of tuna products. Therefore, the US measure authoritatively established a single definition covering the entire field of what 'dolphin-safe' means in relation to tuna products in the United States. This 'monopolistic' na-

ture of the US label, which made it exclusive on the US market, triggered the justification requirements under the TBT agreement.[85]

Moreover, the issue of public versus market power re-occurred in the determination made by the AB under Art. 2.1 of the detrimental effects of the US measure. In order to establish whether the US measure constituted a less favourable treatment of Mexican tuna products, the AB had to assess 'whether the measure at issue modifies the conditions of competition in the US market to the detriment of Mexican tuna products as compared to US tuna products or tuna products originating in any other Member.'[86]

The US claimed that any detrimental effect on Mexico's market access was a result of consumer choices, and was therefore not attributable to the US labeling provisions. The conditions of competition were the result of US tuna processors and consumers boycotting Mexican tuna products. The panel upheld this argument, but was reversed by the AB. As with the definition of a technical regulation, the AB stressed the power of the US measure pointing out the significant commercial value of the dolphin-safe label on the US market as well as its exclusivity. It stated:

> "It follows that, even if Mexican tuna products might not achieve a wide penetration of the US market in the absence of the measure at issue due to consumer objections to the method of setting on dolphins, this does not change the fact that it is the measure at issue, rather than private actors, that denies most Mexican tuna products access to a "dolphin-safe" label in the US market. The fact that the detrimental impact on Mexican tuna products may involve some element of private choice *does not, in our view, relieve the United States of responsibility under*

[85] See Isabel Feichtner, "Power and Purpose of Ecolabelling: An Examination Based on the WTO Disputes Tuna II and COOL," April 22, 2015.
[86] Para 215 AB report *US-Tuna II*.

the TBT Agreement, where the measure it adopts modifies the conditions of competition to the detriment of Mexican tuna products." (emphasis added)[87]

3.3. Holding power to account: even-handedness and calibration under Art. 2.1 TBT

The next step in the AB's reasoning concerned the vigour of the required justification and, hence, the accountability standard to be imposed upon the US. The detrimental effect on Mexico was not sufficient to vindicate a finding of discrimination under Art. 2.1 against the US. The AB also analyzed "whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction." It thereby restated the reasoning developed in *US-Glove Cigarettes.*[88] According to the latter, the interpretation of "treatment no less favourable" in Art. 2.1 is informed by the 6th recital of the preamble of the TBT agreement, which contains a similar wording as the chapeaux of Art. XX GATT,[89] as well as by the object and purpose of the TBT agreement, which is to strike a balance between, on the one hand, the objective of trade liberalization and, on the other hand, the Member's right to regulate.[90] Therefore, Art. 2.1 TBT should not be interpreted as prohibiting any detrimental impact on competitive opportunities for imports in cases where such detrimental impact stems exclusively from legitimate regulatory distinctions.[91] It follows, therefore, that in Art. 2.1 TBT only prohibits de jure and de facto discrimination against imported products, with the latter being excluded where

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87 Ibid para 239..

88 Appellate Body Report *United States - Measures Affecting the Production and Sale of Clove Cigarettes,* AB 2012-1, WT/DS406/AB/R (4 April 2012), hereafter AB report *US-Gloves.*

89 Ibid at para 100, where the AB has emphasized the similar language and the overlap in the scope of application between Art. 2.1 TBT and Art. III:4 GATT thus confirming that "Article III:4 of the GATT 1994 is relevant context for the interpretation of the national treatment obligation of Article 2.1 of the TBT Agreement. We consider that, in interpreting Article 2.1 of the TBT Agreement, a panel should focus on the text of Article 2.1, read in the context of the TBT Agreement, including its preamble, and also consider other contextual elements, such as Article III:4 of the GATT 1994."

90 That balance, according to the AB, is not different than the one expressed in the GATT 1994, "where obligations such as national treatment in Article III are qualified by the general exceptions provision of Article XX." See AB report in *US-Gloves* para 96

91 Ibid paras 174 and 181.

there is a legitimate regulatory distinction. In particular, in order to determine whether a measure is de facto inconsistent with Art. 2.1

> 'a panel must carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue, and, in particular, whether that technical regulation is *even-handed*.'[92]

In the case at hand this meant assessing whether 'the US measure is even-handed in the manner in which it addresses the risks to dolphins arising from different fishing methods in different areas of the ocean."[93] The subsequent analysis focused on a comparison of how the US addresses risks to dolphins inside and outside of the ETP. The AB set out to verify whether the US applies the same high standard of dolphin protection across all fisheries. An important finding in this regard was that the use of certain fishing techniques other than setting on dolphins causes harm to dolphins, and that

> "as currently applied, the US measure does not address mortality (observed or unobserved) arising from fishing methods other than setting on dolphins outside the ETP, and that tuna caught in this area would be eligible for the US official label, even if dolphins have in fact been killed or seriously injured during the trip."

The US did not contest this finding, but argued that the US dolphin-safe provisions are 'calibrated' to risks to dolphins arising from different fishing methods in different areas of the ocean, focusing in particular on the supposedly higher risks to dolphins in the ETP. The AB disagreed. It noted a bias in the US regulatory scheme because while imposing a high standard on Mexico (i.e. protection of dolphins including unobserved harm), it did not address ad-

[92] Para 225 AB report *US Tuna-II*.
[93] Ibid para 232.

verse effects on dolphins 'resulting from the use of fishing methods predominantly employed by fishing fleets supplying the United States' and other countries' tuna producers.'[94]

> "We note, in particular, that the US measure fully addresses the adverse effects on dolphins resulting from setting on dolphins in the ETP, whereas it does not address mortality (observed or unobserved) arising from fishing methods other than setting on dolphins outside the ETP."[95]

Therefore, the US measure was not found to be calibrated and even-handed 'even accepting that the fishing technique of setting on dolphins is particularly harmful to dolphins.'

3.4. No accountability via international standards under Art. 2.4 TBT

In addition to Art. 2.1 and 2.2 TBT Mexico also raised a claim under Art. 2.4 TBT arguing that the US was under an obligation to base its measure on the AIDCP dolphin-safe standard as a relevant international standard. In other words, an alternative pathway of holding the US to account for the external effects of its dolphin-safe policy would have been via internationally agreed norms. As explained above (at 1.) the US was originally an important driving force behind the AIDCP as an attempt to resolve the tuna-dolphin issue via multilateral cooperation. The US is until today a member of this multilateral environmental treaty, and is in principle under an international legal obligation to implement the AIDCP in national law. The question, which the AB had to resolve, however, was whether non-compliance with the AIDCP also mattered under WTO law, and could be sanctioned under Art. 2.4 TBT.

According to Art. 2.4 TBT WTO Members are required to use existent international standards as the basis for their technical regulations. Because the TBT Agreement does not define the notion 'international standard' the AB had first to interpret this term in order to subsequently

[94] Ibid para 292.
[95] Ibid para 297.

ascertain whether it applies to the AIDCP. In proceeding with the first step the AB has made far-reaching pronouncements[96] concerning the procedural legitimacy of international standards – a test which international standards have to pass before they can be granted the powerful legal effects under the TBT Agreement.[97]

According to the AB, an international standard must be approved by an *international standardization body* that has *recognized activities* in standardization and whose membership is *open* to the relevant bodies of at least all WTO Members.[98] The body must be open 'at every stage of standards development' and 'on a non-discriminatory basis.'[99] Moreover, the AB used a non-binding decision of the TBT Committee as guidance for when an international body has 'recognized' activities in standardization.[100] According to that decision international standards shall comply with the principles of 'transparency, openness, impartiality and consensus, effectiveness and relevance, coherence,' and have to address 'the concerns of developing countries.'[101]

According to the AB, the AIDCP did not pass this test. In particular, it was found not to be open to all WTO members, because accession to the AIDCP required an invitation based on a decision taken by consensus by the parties to that Agreement. Mexico argued that being invited to accede to the AIDCP is a pure 'formality,' and that no additional countries or regional

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96 Ibid paras 349-380.

97 For a discussion of the legal normativity and legitimacy of international standards see Robert Howse, "A New Device for Creating International Legal Normativity : The WTO Technical Barriers to Trade Agreement And 'international Standards,'" in *Constitutionalism, Multilevel Trade Governance and Social Regulation*, ed. Christian Joerges and Ulrich Petersmann, Constitutionalism, Multilevel Trade Governance and Social Regulation. - Oxford [U.a.] : Hart, ISBN 978-1-84113-665-3. - 2006, P. 383-395, 2006; Joanne Scott, "International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and the WTO," *European Journal of International Law* 15, no. 2 (April 1, 2004): 307–54, doi:10.1093/ejil/15.2.307; Joost Pauwelyn, Ramses Wessel, and Jan Wouters, *Informal International Lawmaking* (OUP Oxford, 2012).

98 Para 369 AB report *US-Tuna II*.

99 Ibid paras 373-375.

100 Decision on "Principles for the Development of International Standards, Guides, and Recommendations with Relation to Articles 2, 5, and Annex 3 of the Agreement". The decision was adopted by the TBT Committee in the context of the Second Triennial Review of the Operation and Implementation of the TBT Agreement in 2000. The TBT Committee comprises all WTO members, and it adopted the TBT Committee decision by consensus.

101 Para 379 AB report *US-Tuna II*.

economic integration organizations have actually expressed interest in joining the AIDCP.[102] However, the AB was not convinced stressing that an international standardization body must not privilege any particular interests in the development of international standards.[103] It found that Mexico had failed to show that the issuance of an invitation occurs automatically once a WTO Member has expressed interest in joining. Therefore, the AIDCP was not found to be an 'international' body for the purposes of the TBT Agreement.[104]

4. Between deference and external accountability – walking a tight rope

The above analysis shows that when interpreting the TBT agreement the AB was searching for an adequate equilibrium between two fundamental objectives: the US' right to regulate and the need to hold the US to account for the external effects of its unilateral policy on Mexico. By finding that the US dolphin-safe label constituted a technical regulation that created a detrimental effect on Mexican tuna products, for which the US government was to be held responsible, the AB rightly recognized the label as an exercise of public power in need of justification[105] – a public power that made a political choice in favor of a particular understanding of dolphin-safe. The AB accepted that choice thereby deferring to a stringent and narrowly defined standard of a powerful developed state. This also served a deathblow to the recognition of the AIDCP standard as a legitimate alternative in this dispute. However, this was in turn balanced out to some extent by the AB's use of the concepts of 'even-handedness' and 'calibration' in the analysis of discrimination under Article 2.1. While exercising deference to the US right to set its standard, the AB held the US to account for not equally applying it to all tuna fisheries, thereby holding the US to its own standard.

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[102] Mexico's appellee's submission, para. 208 AB report *US-Tuna II*.
[103] Ibid para. 384.
[104] Ibid paras 398-399.
[105] And not merely a voluntary standard, see Feichtner, "Power and Purpose of Ecolabelling."

The outcome of this interpretative exercise was to impose a certain level of external accountability on the US without questioning its right to set a high level of dolphin protection. The AB thereby continued the trend set by the AB in *US-Shrimp* to acknowledge the right of the importing state to pursue unilateral environmental policy that has extra-jurisdictional objects.[106] While this seems to confirm an improved trade and environment balance in WTO jurisprudence, doubts remain whether the approach chosen by the AB in this report is satisfactory from a developmental perspective.

The AB's deference to the US standard (ie no setting on dolphins) has significantly shaped the outcome of the dispute including the intensity of the accountability standard imposed on the US. This is in line with the overall trend whereby WTO tribunals do not evaluate the importance or legitimacy of domestic regulatory goals. A deferential approach seems prudent both from a democratic perspective on the right to regulate as well as from a perspective of institutional legitimacy of the WTO system: international specialized (trade) tribunals are hardly the appropriate institution to scrutinize the legitimacy of political choices made by domestic constituencies.[107] Moreover, two decades after the GATT panel decision in *US-Tuna I*, which spurred the trade and environment controversy in the WTO, *US-Tuna II* was certainly an important test case of symbolic significance. Just as with *US-Shrimp*, the AB decision in *US-Tuna II* can be seen as a 'response to challenges to WTO legitimacy by powerful constituencies in the United States and Europe'[108] which pressured their governments to seek changes in the application of WTO rules. In interpreting and applying the TBT rules to the dispute at hand the AB was therefore walking a tight rope – trying to respect the choices of

[106] On the discussion of so-called non-product-related product and production methods see E. Partiti, "The Appellate Body report in US-Tuna II and its impact on eco-labeling and standardization" 40 *Legal Issues of Economic Integration* (2013), 73-94 at 78.

[107] Henckels, *Proportionality and Deference in Investor-State Arbitration*; Benvenisti, "Sovereigns as Trustees of Humanity."

[108] See Gregory Shaffer, "The WTO Shrimp-Turtle Case (United States - Import Prohibition of Certain Shrimp and Shrimp Products)," *American Journal of International Law* 93 (1999): 507.

those powerful constituencies while correcting their biases (ie. their disregard for the interests and concerns of affected foreigners, in this case Mexico).

And yet precisely the power of those Western constituencies of developed states makes the outcome of this dispute problematic. It illustrates that deference to the domestic level of protection can contribute to entrenching power assymetries in the interpretation of the WTO agreements,[109] because it favors the position of developed countries with large markets as global standard setters. Such countries (eg the US and the EU member states) often use their market power to impose regulatory standards on foreign exporting countries forcing the latter to enhance their regulations (so called "California effect" or the "Brussels effect").[110] While this can contribute to a "race to the top" in regulating global markets,[111] it also shifts the definition power over legitimate regulatory policy to developed states. In the governance of global markets the crucial question then is how to improve the participation of all those affected by unilateral trade regulation in the setting of transnational standards.

The WTO can act as a global institution providing voice especially to countries at a lower stage of economic development.[112] One way of remedying disregard in the application of WTO law would be to demand that deference be combined with justification obligations that are able to induce reflexivity (ie the consideration of concerns and interests of affected foreigners) in domestic decision-making.[113] This can be by way of due process requirements and other procedural disciplines, such as reason giving, consultation of trade partners, scientific disciplines, and via the duty to base regulation on international standards.[114] The AB rejected

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[109] Mayeda, "The TBT Agreement and Developing Countries."

[110] See Shaffer, "How the World Trade Organization Shapes Regulatory Governance" with further references.

[111] See Ibid.

[112] See Alvaro Santos, "Carving Out Policy Autonomy for Developing Countries in the World Trade Organization: The Experience of Brazil and Mexico," *Virginia Journal of International Law* 52, no. 3 (2012): 551–632.

[113] Sabel and Zeitlin speak of experimentalist distabilisation, see Sabel and Zeitlin, "Experimentalist Governance."

[114] See Stewart and Badin, "The World Trade Organization and Global Administrative Law."

the last option in the present case instead relying on the test of even-handedness as an expression of the non-discrimination principle. Can this test be seen as an adequate expression of a reflexive discipline as discussed in this paper (see above at 1.)?

5. Reflexive disciplines as other-regarding obligations in *US-Shrimp*

A comparison with the AB report in *US-Shrimp*, a case with many parallels to *US-Tuna*,[115] is instructive in this regard. In *US-Shrimp,*[116] a dispute involving India, Malaysia, Pakistan and Thailand as complainants, the WTO applied Art. XX of the GATT in order to hold the US to account for the unilateral imposition of US environmental standards aiming to protect endangered sea turtles in the global shrimp-fishery. The disputed US measure was an import prohibition of shrimp from all countries, which did not have regulatory programs in place to protect endangered sea turtles comparable to that of the US.[117] The US regulatory objective (protection of sea turtles) fell within the scope of the exception provided in Article XX(g), namely the protection of "natural resources." However, the AB found that the *application*[118] of the US measure violated the "chapeau" of Art. XX, because it constituted an "unjustifiable and arbitrary discrimination" against the complainants.

Despite the seemingly similar legal solution, the supporting arguments in *US-Shrimp* were quite different as compared to *US-Tuna II.* The main arguments invoked by the AB in the former case were the "coercive effect," the failure to consider local conditions, the failure to reach a multilateral solution as well as the lack of flexibility and due process in the application of the US standard to foreign traders. The AB criticized that the US regulator imposed on

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115 See Shaffer, "The WTO Shrimp-Turtle Case (United States - Import Prohibition of Certain Shrimp and Shrimp Products)."

116 WT/DS58/AB/R (Oct 12, 1998) *United States – Import Prohibition of Certain Shrimp and Shrimp Products,* Appellate Body report.

117 The US required commercial shrimp trawlers to use turtle excluder devices (TEDs) in waters where endangered sea turtles were present.

118 I.e. the regulatory statute implementing US Congress legislation.

all other exporting Members 'essentially the same policy' as that applied in the US without any flexibility, which would have allowed considering how alternative measures to protect sea turtles in the harvesting nations could be seen as 'comparable' to the US regulatory programme.[119] The US regulation was found to establish a 'rigid and unbending standard' while other policies and measures adopted by the exporting country for the protection and conservation of sea turtles were not considered. Moreover, the AB found it to be inacceptable

> "in international trade relations, for one WTO Member to use an economic embargo to *require* other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member's territory, *without* taking into consideration different conditions which may occur in the territories of those other Members."[120]

Interestingly, the AB also criticized the US for its failure to engage the complainants

> "in serious, across the board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition against the shrimp exports of those other Members."[121]

The application of the US measure was found to be an unjustifiable discrimination, because, inter alia, the US had an alternative course of action other than the unilateral and non-consensual procedures of the import prohibition.[122]

A detailed analysis of the AB report in *US-Shrimp* goes beyond the scope of this paper.[123] It suffices to note the striking difference in language chosen by the AB as compared to the *US-Tuna* report. In *US-Shrimp* the AB is highly critical of the unilateral imposition of the US pol-

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[119] Para 162 AB report *US-Shrimp.*

[120] Ibid para 164.

[121] Ibid para. 166.

[122] Ibid para. 171.

[123] See for a more detailed analysis Robert Howse, "The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate," *Columbia Journal of Environmental Law* 27, no. 2 (2002): 489; Shaffer, "The WTO Shrimp-Turtle Case (United States - Import Prohibition of Certain Shrimp and Shrimp Products)."

icy choice without any flexibility and consideration of local conditions in the exporting countries. In *US-Tuna* a very similar unilateral imposition of the US preservationist approach to dolphin-safe is accepted provided that it is applied equally to other fisheries than the ETP. In *US-Shrimp*, the policy choice to protect endangered sea turtles is respected, but the US is required to give voice to the exporting countries allowing them to show that alternative measures are "comparable" and equally able to protect sea turtles. In *US-Tuna*, the AB accepted not only the US objective of protecting dolphins, but also the choice of how best to achieve that goal, namely through an absolute prohibition of dolphin-sets. Finally, while the lack of multilateral solutions was criticized in *US-Shrimp*, such solution was available to the US in *US-Tuna*. The US not only negotiated the AIDCP, but also tried to implement it in national law (see above at 2.). The AIDCP is a multi-lateral environmental agreement, which includes Mexico and other ETP coastal states. Moreover, in the promise of access to the US market, the latter have heavily invested in compliance with this agreement.[124] Therefore, while often less developed countries struggle to participate in the setting of international standards, the AIDCP is a positive example of ownership by and representation of such countries. Moreover, the AIDCP enabled a transparent and contextual regime with a holistic approach to the tuna-dolphin problem, which considers dolphin protection together with other ecological and socio-economic concerns of the ETP tuna fishery. It could therefore be argued that it complies with several of the principles for international standards as mentioned by the AB report in relation to Art. 2.4, especially with the requirement that international standards have to address the concerns of developing countries.

There are of course important differences between *US-Shrimp* and *US-Tuna*, which partially explain the difference in the reasoning and outcome in these disputes. Most notably, the US

[124] According to an IATTC official in the last 15-20 years Mexico has been trying to become a serious international player in international fisheries, perceiving itself as a very responsible fishing nation that has done a lot of progress, for which it wants to be recognized, personal interview on 24.10.2014.

measure in *US-Shrimp* was an import ban imposing regulatory requirements on foreign governments. In contrast, in *US-Tuna*, the measure was a labeling standard that was not per se compulsory. However, because of the evolution of the US market as well as the prohibition to use alternative labels the US dolphin-safe label arguably had a similar effect to an import ban. Another difference was in the applied legal provisions (GATT in *US-Shrimp* and TBT agreement in *US-Tuna*). However, also this difference does not fully explain the difference in reasoning given that in *US-Tuna* the AB employed an interpretation of Art. 2.1 TBT parallel to that employed under the GATT.[125] In particular, the AB interpreted the meaning of Art. 2.1 TBT in the light of the sixth recital of the preamble of the TBT Agreement, which contains a similar language as Art. XX "chapeau" of the GATT.[126] Accordingly, the AB interpreted Art. 2.1 TBT as meaning that "technical regulations may pursue legitimate objectives, but must not be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination."[127] It follows that in both cases the AB used a legal standard (under Art. 2.1 TBT and Art. XX GATT respectively) that required striking a balance between, on the one hand, the Member's right to regulate and, on the other hand, the duty to respect the treaty rights of the other Members. Whereas in *US-Shrimp* the AB described this balance as a "delicate one of locating out a line of equilibrium (…) so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations"[128] under the relevant agreement, such delicate balance was missing in its report in *US-Tuna*.

[125] Moreover, in the later compliance report (see below) the AB also undertook an analysis directly under the GATT without essentially changing its reasoning.

[126] "The sixth recital of the preamble recognizes that a WTO Member may take measures necessary for, inter alia, the protection of animal or plant life or health, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that such measures "are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination" or a "disguised restriction on international trade" and are "otherwise in accordance with the provisions of this Agreement". Para 213 of AB report in *US-Tuna II*.

[127] Para 214 AB report *US-Tuna II*.

[128] Para 159 AB report *US-Shrimp*.

As a result, both the nature and effect of the justification requirements imposed in *US-Shrimp* and *US-Tuna* differed significantly. In the former, the AB read the non-discrimination requirement to define flexibility, respect for local conditions, due process and multilateralism as other-regarding obligations under WTO law. In the latter, non-discrimination defined as even-handedness essentially boiled down to a consistency requirement. The US was allowed to uphold a 'rigid and unbending' standard, and hence to disregard Mexico's interests and concerns, as long as it applied that standard consistently across fisheries – a pyrrhic victory for Mexico.

6. The Appellate Body compliance report

In the aftermath of the AB report in *US-Tuna II* it seemed as if the changes required from the US to comply were minimal. The US administration has adjusted its regulation concerning the documentation requirements for the 'dolphin-safe' label in 2013.[129] It maintained the ban on dolphin-sets, but extended the ETP requirement to certify that no dolphin mortalities or serious injuries occurred during the fishing of a tuna to all other fisheries. However, outside the ETP a self-certification by the captain of the vessel was sufficient, whereas tuna coming from the ETP was still subject to the additional requirement of certification by an approved independent on-board observer. For non-ETP fisheries, observer certification was only required in certain cases, namely where the US National Marine Fisheries Service (NMFS) had determined that such additional certification was necessary (so-called determination requirements, see below).[130]

[129] The so-called 2013 Final Rule, see panel compliance report paras 3.32 to 3.52.

[130] No such determination was made so far. Moreover, the new measure prescribes certain tracking and verification requirements. Dolphin-safe and non-dolphin safe tuna shall be separated across all fisheries. However, the requirement to document the tracking in the form of so-called Tuna Tracking Forms is introduced only for the ETP large purse-seine fishery.

In November 2013 Mexico requested the establishment of a panel pursuant to Article 21.5 of the Dispute Settlement Understanding (DSU) on the ground that these amendments failed to implement the rulings of the AB in the original dispute. Mexico argued that the amended measure continues to discriminate against Mexican tuna products raising claims under Articles 2.1 TBT as well as I:1 and III:4 of the GATT. Both the panel and the AB agreed. However, the AB reversed the panel's reasoning, and completed the legal analysis.[131]

6.1. Calibration in the face of risk and empirical uncertainty

In so doing the AB reinforced the logic followed in its original report, namely to defer to the US policy choice in favour of a high level of dolphin protection while at the same time holding it to account for not consistently applying the same standard to all tuna fisheries. The legal analysis under both TBT and GATT therefore again focused on the question whether the amended measure was "even-handed in its design, architecture, revealing structure, operation, and application."[132] However, in contrast to the original report, characterized by a series of interpretative choices, the reasoning in the compliance report focused heavily on questions of evidence and risk.

The AB began its analysis[133] under Article 2.1. TBT by agreeing with the Panel that the amended measure was *more* calibrated than the original measure, because it contributed to addressing 'adverse effects on dolphins resulting from the use of fishing methods predominatlty employed by fishing fleets supplying the US' and other countries' tuna producers outside the ETP large purse-seine fishery.'[134] Yet, the AB also set out to assess whether the

[131] AB compliance report paras 7.231- 7.360.

[132] AB Compliance report para 7.239.

[133] With regard to the first requirement of detrimental impact under Article 2.1 the AB found that the situation has not changed as compared to the original measure, see ibid paras 7.234-7.238.

[134] AB compliance report para 7.242.

amended measure was '*adequately* calibrated to the relative adverse effects on dolphins arising outside the ETP large purse-seine fishery as compared to those inside that fishery' (emphasis added).[135] The resolution of this question in turn hinged upon the factual findings and evidence regarding the different risk profiles in these different fisheries.

This question, however, was highly contested. Before the Panel both parties have mounted significant amounts of conflicting evidence concerning the risks associated with different fishing practices in different tuna fisheries. Mexico claimed that practices other than setting on dolphins employed outside the ETP were creating mortality and serious injury 'equal to or greater than' dolphin sets; as well as creating unobserved harm to dolphins. The US, in contrast, claimed that the situation in the ETP was unique in terms of both observed and unobserved harms to dolphins.[136] Given this empirical uncertainty as well as the fact that 'the Panel never resolved the question of the overall levels of risk in the different fisheries, and how they compared to each other'[137] the AB found itself to be unable to assess fully whether all of the regulatory distinctions drawn under the amended measure can be explained and justified in the light of differences in the relative risks to dolphins in those different fisheries.

The AB proceeded by nevertheless assessing some features of the amended measure, most notably the determination requirements, because, in its view, their assessment did not depend on factual findings of relative risks.[138] According to the amended measure, two types of NMFS determination were possible: 1) that there is a *regular and significant association* between dolphins and tuna *in a non-ETP purse-seine fishery*, similar to that in the ETP; and 2) that there is a *regular and significant mortality or serious injury* of dolphins within *all other fisheries*. Either of these determinations would trigger the requirement of an independet ob-

[135] Ibid.
[136] Compliance report paras 7.243-7.248.
[137] Compliance report para 7.248.
[138] AB Compliance report para 7.254.

server certification in addition to the captain certification. To determine even-handedness, the AB assessed whether observer certification was required in all scenarios of comparably high risks to dolphins inside and outside the ETP, finding that this was not the case. It should be noted that, contrary to the AB's claim, this finding could not have been made without relying on factual assessments.[139] It did in fact reflect a particular assumption about both the nature and extent of risks to dolphins in different fisheries. The AB, therefore, seemed to be concerned that the existing determination provisions did not allow for comparable regulation of risk scenarios where non-setting practices cause harm to dolphins, and where 'regular and significant' tuna-dolphins associations outside of the ETP heighten the risk of such harm.[140] This led to the conclusion 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 risks, and that this may also entail different tracking and verification requirements than those that apply inside the ETP large purse-seine fishery. For this reason, it has not been demonstrated that the differences in the dolphin-safe labelling conditions under the amended tuna measure are calibrated to, or commensurate with, the risks to dolphins arising from different fishing methods in different areas of the oceans.'[141]

The same approach was adopted under Articles I:1, III:4,[142] and XX of the GATT 1994.[143] In particular under Article XX, which contains clauses allowing for a justification of measures

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[139] See para 7.256 which shows that a finding on the determination provisions depended on the question whether or not risk conditions in other fisheries approximated those in the ETP.

[140] See AB Compliance report paras 7.258-7.264 where the AB expresses these concerns based on factual findings made by the Panel.

[141] AB Compliance report para 7.266.

[142] See with regard to the detrimental impact of the US measure on Mexican tuna products ibid paras 7.337 – 7.340.

[143] In its original report the AB criticized the Panel for not having analysed Mexico's claims under the GATT 1994, without however completing the legal analysis.

found to be inconsistent with Articles I:1 and III:4, the AB again invoked even-handedness as the key legal concept for analyzing US compliance.[144]

6.2. From discrimination analysis to regulatory rationality – lack of deference and intrusive review

As in the original report the AB employed the concept of even-handedness (ie consistency) to hold the US to account for the detrimental impact of its unilateral policy on Mexico. The key argument leading to the finding of inconsistency and hence discrimination in both reports was that fishing techniques other than dolphin-sets cause harm to dolphins, and yet this is not adequately reflected in the design of the US measure.[145] The AB rejected the claim that the situation in the ETP tuna fishery is 'unique' in terms of risks to dolphins. Both reports therefore implicitly relate to the argument that environmental policy in the field of sustainable fishery should focus on the overall impact of a fishery on maritime species (including dolphins) rather than on particular fishing methods.[146]

However, there is an important difference between the two reports with regard to the intrusiveness of the AB review. In the original report the AB deferred to the US policy choice in the face of difficult political and value judgments surrounding that choice. In the compliance report, the AB was facing scientific controversy and hence empirical uncertainty, which equl-

[144] The AB noted, however, with reference to the AB report in *EC-Seals* that it is „mindful that there are both similarities and differences between the analyses under the chapeau of Article XX of the GATT 1994 and Article 2.1 of the TBT Agreement." See para 7.345. In para 7.347 it further agreed with the Panel that so long as the similarities and differences between both provisions are taken into account, „it may be permissible to rely on reasoning developed in the context of one agreement for purposes of conducting an analysis under the other." The measure was found to be provisionally justified under Art. XX (g). In its analysis under the chapeau, the AB assessed whether the distinction 'drawn in the measure between different fishing methods in different areas of the oceans' is arbitrary or unjustifiable. At this point the AB again turned to calibration. It considered necessary to establish "whether the requirements of the amended tuna measure are calibrated to any differences in risks to dolphins inside and outside the ETP large purse-seine fishery." It did not complete the analysis with respect to all features of the measure, but only with regard to the determination provisions. See para AB compliance report para 7.342 – 7.344 and 7.359.

[145] Para 251 of the AB report *US-Tuna II* and para. 7.258 - 7.264 of the AB compliance report.

[146] Miller and Bush, "Authority without Credibility?"

ly justifies a call for deference towards the domestic regulatory assessment.[147] The AB's detailed engagement with questions of evidence and risk however meant that it was dangerously close to overstepping the boundaries of a discrimination analysis, slipping into an assessment of US regulatory rationality instead.

As stated by the AB, 'the question as to the relative risk profiles associated with different fishing practices in different areas of the oceans has become more acute'[148] in the compliance proceedings. In the original report the finding of lack of even-handedness under Article 2.1 TBT had been made, because the original measure did not require to document whether any dolphins had been killed or seriously injured outside of the ETP thereby ignoring the incidence of harms arising from practices other than setting on dolphins[149] despite the *uncontested* finding that other practices cause harm to dolphins.[150]

The amended measure introduced such a requirement. Now the AB considered it necessary to *gauge* 'whether these new requirements are sufficient to address the risks posed to dolphins outside the ETP large purse-seine fishery,' which in turn required 'a more thorough understanding of the relative risk profile outside that fishery as compared to the risks to dolphins within that fishery, and, in particular, the risks associated with setting on dolphins.'[151] The question of *what kind of risks* dolphins face from different practices in different fisheries, however, was not only factually complex, but also highly contested among the parties. The answer to this question required a contextual understanding of the conditions in every fishery which is hardly something an international tribunal is able to ascertain.[152] In situations of em-

[147] On the notions of normative and empirical deference see Henckels, *Proportionality and Deference in Investor-State Arbitration*.
[148] Para 7.251 of the AB compliance report.
[149] Para 7.250 of the AB compliance report.
[150] Para 251 of the AB report *US-Tuna II* stating that this finding by the Panel was not contested by the participants.
[151] Para 7.251 AB compliance report.
[152] This was acknowledged by the AB in para 7.252 of the AB compliance report.

pirical uncertainty international tribunals are required to exercise deference toward the regulatory assessment by domestic regulators for reasons of institutional competence and contextual expertise.[153]

With regard to the determination provisions, the AB effectively substituted the US regulatory assessment of the risk levels and adequate responses in the design of the amended measure with its own assessment. As stated above, the finding of lack of even-handedness for the determination provisions reflected a particular empirical assumption about both the nature and extent of risks to dolphins in different fisheries. [154] The relevant passages of the AB report[155] are embroiled with technicalities, are difficult to read, and offer little clarity as to how the AB came to its conclusions concerning the adequate design of the determination requirements. The result of this intrusive standard of review by the AB was that it effectively reviewed the regulatory rationality of the US measure rather than its discriminatory nature leaving little to no discretion to the US in this respect.

This is problematic given that Articles 2.1 TBT, I.1, III.4 and XX GATT only prohibit discrimination. Neither of these provisions imposes more far-reaching obligations of regulatory rationality.[156] Imperfect regulations, which do not result in discrimination are therefore not caught by these provisions. Moreover, the lack of empirical deference by the AB in this case seems unusual. In *EC-Hormones*, for example, the AB found that evidence of genuine anxieties about legitimate regulatory concerns (in that case public health) prevents a finding that a

[153] Henckels, *Proportionality and Deference in Investor-State Arbitration*; Jasanoff, "Epistemic Subsidiarity – Coexistence, Cosmopolitanism, Constitutionalism."

[154] See AB compliance report para 7.256 which shows that a finding on the determination provisions depended on the question whether or not risk conditions in other fisheries approximated those in the ETP.

[155] Ibid paras 7.256 – 7.266.

[156] As found in certain other WTO provisions, for example Article 5.1 SPS. See Sykes, "Domestic Regulation, Sovereignty and Scientific Evidence Requirements." See however Howse, "The World Trade Organization 20 Years On: Global Governance by Judiciary" who treats regulatory rationality as part of the non-dicsrimination review.

measure leads to discrimination even where it draws an unjustified and arbitrary distinction in the level of protection in respect of different substances.[157]

It is interesting to contemplate why the AB decided to rule on the determination provisions, instead of showing the same restraint as it did with respect to the other features of the measure. The determination provisions could potentially trigger an independent observer requirement. Without on-board observers in the tuna fishery the collection of data and information about risks to dolphins in different fisheries is difficult. It can be argued that there can be no credible certification without observer coverage. The observer coverage in the ETP is precisely the reason why risks to dolphins there are so well documented. It could therefore be invoked against the US that without documenting risks to dolphins in other fisheries it should not be able to rely on the argument that there is no evidence of comparable risks to dolphins in other fisheries. The ETP is unique not only for its tuna-dolphin association, but also for the extent of independent observer work.[158]

One can only speculate whether the AB's focus on the determination requirements was an attempt to induce more reflexivity in US regulation by increasing the chances of observer coverage beyond the ETP.[159] Even if that were the case, the AB could have achieved something similar by adopting a procedural approach to the standard of review. It could for example have employed a reasonableness test ascertaining whether the US has had a sufficient evidentiary basis for reasonably designing the determination requirements. In case of a negative finding in this respect, the AB could have required the US to gather more evidence and information about the relative risks to dolphins in different fisheries before deciding on the ap-

[157] Para 245-246 Appellate Body Report *European Communities - EC Measures Concerning Meat and Meat Products (Hormones)* - AB-1997-4, WT/DS26//AB/R, WT/DS48/AB/R (16 January 1998). The finding in question was under Article 5.5 SPS, which seen together with Art. 2.3 SPS contains a language similar to the chapeau of Art. XX GATT.

[158] See Parker, "The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict."

[159] Triggering these requirements would still depend on the willingness of domestic institutions to carry out more research in other fisheries.

propriate design of the dolphin-safe label. In other words, to act in a legitimate way, the AB was required to combine deference with the imposition of reflexive disciplines (e.g. duty to consider, to give reasons, to gather more evidence) able to improve due regard for affected foreigners.

7. Conclusions

This paper has argued that the recognition of the WTO as a legitimate global institution depends on its ability to reconcile two fundamental objectives: the respect for the right to regulate (e.g. on environmental or public health matters) on the one hand and the need to give due regard to the interests and concerns of foreign constituencies affected by domestic regulation on the other hand. By imposing other-regarding obligations, the WTO law can act as a mechanism of external accountability of powerful states vis-à-vis affected foreigners, especially where assymetric relations and different stages of economic development are involved. Therefore, deference towards domestic regulators should be combined with justification obligations that are able to induce reflexivity (ie the consideration of concerns and interests of affected foreigners) in domestic decision-making. Such reflexive disciplines can be the duty to consider extraterritorial effects, to consult trade partners, to give reasons, to base regulation on international standards, to carry out scientific assessments, to ensure flexibility and respect for local conditions, and to pursue multilateral regulatory solutions.

Taking the *US-Tuna II* dispute between the US and Mexico as an example, the paper first showed that the tuna-dolphin issue is a complex transboundary regulatory problem, the resolution of which touches upon issues of sustainable fishery, animal welfare, moral choice, as well as deeply entrenched economic, developmental and political interests. The recent WTO litigation is a manifestation of the conflict between two competing solutions to this problem. Moreover, the competing 'dolphin-safe' labels in question represent different constituencies.

The US definition follows the approach of the environmental NGO Earth Island Institute, which is rooted within the particular sociological context of Western American ethical consumption. The AIDCP followed by Mexico, on the other hand, reflects a more pragmatic approach, which aims to reconcile dolphin protection with other both ecological and developmental interests in the region.

In this highly sensitive context, the AB's legal reasoning in the *US-Tuna II* report was a careful threading through the possible interpretations of the legal terms of the TBT agreement pondering and weighing the institutional implications of each of them in the ultimate pursuit of a balance between the regulatory autonomy of one of the WTO's most powerful members and the commitment to trade liberalization invoked by a less developed country. The AB accepted the right of the US to define its 'dolphin-safe' policy as an absolute ban on setting on dolphins, thereby deferring to a stringent unilateral labeling standard with extraterritorial effects. At the same time, the AB recognised that power comes with responsibility. By finding that the US label was a technical regulation with detrimental effects on Mexican tuna products, the AB recognized the label as an exercise of public power in need of justification under the TBT agreement. The AB required the US to design its 'dolphin-safe' labeling requirements in a way that is *even-handed* in the manner it which it addresses the risks to dolphins arising from different fishing methods in different areas of the ocean. In other words, the AB demanded consistency. The US could not impose a high standard of dolphin protection in the Eastern Tropical Pacific (Mexico's fishing region) while not doing the same in other fisheries. Thereby, while exercising deference, the AB held the US to its own high standard.

However, it was also argued that even-handedness as a justification requirement provided only for a minimal level of external accountability in this case. Rather than inducing reflexivity and due regard to Mexico's interests and concerns, this requirement allowed the US to extend its standard beyond the ETP in order to achieve compliance – a pyrrhic victory for Mexico.

This could be seen as problematic given that deference comes at the price of further entrenching power assymetries in the application of the WTO agreements, because it favors the position of developed countries with large markets as global setters. A comparison with the AB's legal reasoning in *US-Shrimp*, a case very similar to *US-Tuna II*, showed that the AB could have done more. In *US-Shrimp* the AB read the non-discrimination requirement to define flexibility, respect for local conditions, due process and multilateralism as reflexivity inducing other-regarding obligations under WTO law. Arguably, in *US-Tuna* the AB could have read similar requirements into its legal interpretation under Articles 2.1 ('the design, architecture, revealing structure, operation, and application of the technical regulation'); 2.2 ('more trade restrictive than necessary'); 2.4 TBT ('international standard'); and, in the case of the compliance report, under the chapeau of Article XX GATT ('arbitrary and unjustifiable'). In this way, the AB could have required the US to better explain if and in what way it had considered the external impact of its 'dolphin-safe' policy on Mexico when designing that policy (i.e. the DPCIA and related regulations), and when abandoning the AIDCP approach thereby moving from a multilateral to a unilateral solution; and finally, when setting its level of protection so as to protect dolphins not only from *observed*, but also from *unobserved* adverse impacts. Such an approach could have helped ensuring a similar balance as the one sought after in *US-Shrimp*, namely that 'neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations' under the relevant WTO agreements.

In the subsequent *US-Tuna* compliance report, the AB reinforced the logic followed in the original report by using even-handedness as a justification requirement under both TBT and GATT. However, this time the AB has gone too far by failing to defer to the US regulatory assessment of risks to dolphins in different fisheries amidst scientific controversy and empirical uncertainty in this regard. By performing an intrusive review of US regulatory rationality

with regard to certain features of the amended measure, the AB overstepped the boundaries of a discrimination analysis under Articles 2.1 TBT and I.1, III.4, XX GATT. Instead of substituting the US risk assessment with its own assessment of the relative risk profiles in different oceans, the AB should have constrained itself to imposing reflexive disciplines. For example, it could have exercised a reasonableness test aiming to ascertain whether there was a sufficient evidentiary basis for the US measure eventually requiring the US to improve the quality of that basis. Just as with deference towards domestic policy choices, the right to regulate also requires deference to domestic risk assessmsents, especially in situations of empirical uncertainty.

Overall, this paper has shown that finding an adequate equilibrium between the right to regulate and external accountability is a challenging task for WTO adjudicators – one which they meet with mixed success. An important task for scholars is to ascertain instances of judicial practice at its best. This paper has attempted to identify such instances, as well as avenues for future adjudication.