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INTERNATIONAL LAW AND PRACTICE

Reconciling Regulatory Space with External Accountability through WTO Adjudication – Trade, Environment and Development

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Abstract

This article argues in favour of broadening the trade and environment debate in the World Trade Organization (WTO) to include a developmental perspective. WTO litigation involving environmental regulation 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, therefore, depends on its ability to reconcile the 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. By imposing other-regarding obligations, WTO law can act as a mechanism of external accountability of powerful states vis-à-vis affected foreigners, especially where asymmetric relations and different stages of economic development are involved. The article applies this framework to analyze the legal reasoning of the Appellate Body in the *US-Tuna II* dispute between the US and Mexico – a dispute illustrating the complex intertwinement between economic, environmental and developmental issues. It concludes that the use of the concepts of 'even-handedness' and 'calibration' under Article 2.1 of the Technical Barriers to Trade Agreement and Article XX of the General Agreement on Tariffs and Trade did not enable the Appellate Body to strike an adequate balance between the right to regulate and external accountability. While in the original report the Appellate Body used 'even-handedness' to impose only a minimal level of external accountability on the US, in the compliance report, the Appellate Body has gone too far by failing to defer to the US risk assessment amidst scientific controversy and uncertainty.

Keywords

developing countries; external accountability; right to regulate; trade and environment; WTO

Introduction

In *United States – Tuna*[1] the Appellate Body (AB) of the World Trade Organization (WTO) found the US' dolphin-safe label, designed to protect dolphins from certain harmful practices in the tuna fishing industry, to infringe WTO rules due to its

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

discriminatory nature. In a subsequent compliance proceeding, the AB equally ruled against the US.[2] Both rulings reflect a long-lasting contestation between the US and Mexico[3] over the proper approach to sustainable tuna fishery and dolphin-safe eco-labelling. Going back to the early 1990s,[4] this dispute has not only given rise to the trade and environment debate, but it is also emblematic of what John Jackson once called the 'perpetual puzzle of international economic institutions',[5] that is, the tension between the goals of open trade and the respect for national sovereignty.[6]

The potential impact of the WTO on domestic regulation 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] A lot has been written about the perils of sacrificing environmental protection and domestic democracy on 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, including AB decisions, which showed deference to domestically set levels of protection, was a response to this critique and an effort on the part of the AB to safeguard the acceptability of its decisions amidst powerful challenges to its authority.[8]

The WTO case law on trade and environment, however, has also revealed the complexity underlying 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, or to mobilize the same pressure as the trade and environment problem in the WTO.

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[2] Appellate Report United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, Recourse to Article 21.5 of the DSU by Mexico, adopted 20 November 2015, WT/DS381/AB/RW at paras. 7.231–7.360 (AB Compliance Report).

[3] Both parties continue the dispute through new proceedings on remedies and compliance initiated in 2016, see www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm.

[4] See GATT Panel Report, United States – Restrictions on Imports of Tuna, 3 September 1991, not adopted, BISD 39S/155.

[5] J.H. Jackson, *World Trade and the Law of GATT* (1969), at 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'.

[6] See G. Shaffer, 'The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters,' (2001) 25 *Harvard Environmental Law Review* 1; A.O. Sykes, 'Domestic Regulation, Sovereignty and Scientific Evidence Requirements: A Pessimistic View', in G.A. Bermann and P.C. Mavroidis (eds.), *Trade and Human Health and Safety* (2006), 257.

[7] L. Gruszczynski, *Regulating Health and Environmental Risks Under WTO Law: A Critical Analysis of the SPS Agreement* (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', G. Shaffer, 'How the World Trade Organization Shapes Regulatory Governance', (2015) 9(1) *Regulation & Governance* 1; see also I. Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (2012), 167–95; R. Howse, 'The World Trade Organization 20 Years On: Global Governance by Judiciary', (2016) 27(1) EJIL 9; N.A. DiMascio and J. Pauwelyn, 'Non-Discrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?', (2008) 48 AJIL 102, who argue that since 2000 in particular the WTO has shifted towards more favourable treatment of domestic regulators over foreign importers.

[9] E.g., *US-Gasoline*, *US-Shrimp*, *US-Tuna*, *EC-Biotech*, *EC-Seals*.

[10] See D. Prévost, *Balancing Trade and Health in the SPS Agreement: The Development Dimension* (2011).

This article 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 is argued that WTO litigation involving environmental regulation cannot be narrowed down to a conflict between the domestic right to regulate and a neoliberal free trade agenda. It also touches upon the issue of global justice and the power asymmetries structurally embedded in both the global economy and global governance institutions. Therefore, 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) and the need to give due regard to the interests and concerns of foreign constituencies affected by domestic regulation. 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,[12] the article argues 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 asymmetric relations, such as between developed and less developed states[13] (Section 1). It then applies this argument to the *US-Tuna* dispute by analyzing the legal reasoning of the AB in both the original (Section 3) and the compliance report (Section 6). The article takes a contextual approach[14] by analyzing both reports in the broader context of the 'tuna-dolphin' controversy. Section 2, therefore, briefly explains the 'tuna-dolphin' issue revealing the complex intertwinement of environmental, economic, developmental and political aspects of dolphin-safe labelling. By drawing on a comparison with the AB report in another seminal trade and environment case, *US-Shrimp*, Sections 4 and 5 develop the notion of other-regarding obligations in WTO law. Overall, the article seeks to examine the way in which the AB attempted to reconcile the US' right to regulate with the need for external accountability towards Mexico.[15] In this way, it enhances our understanding about when and in what way WTO law can help improve the access of less developed countries to powerful markets while reconciling the latter objective

[11] For a critical discussion of the 'trade and' debate, see A. Lang, 'Reflecting on "Linkage": Cognitive and Institutional Change in The International Trading System', (2007) 70(4) *The Modern Law Review* 523.

[12] R.B. Stewart, 'Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness', (2014) 108(2) AJIL 211; E. Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders', (2013) 107(2) AJIL 295; R.O. Keohane, 'Global Governance and Democratic Accountability', in D. Held and M. Koenig-Archibugi (eds.), *Taming Globalization: Frontiers of Governance* (2003), 130; Shaffer, *supra* note 8; G. De Búrca, R.O. Keohane, and C. Sabel, 'Global Experimentalist Governance', (2014) 44(3) *British Journal of Political Science* 477.

[13] 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. Asymmetric relations can therefore occur in different contexts involving different stages of economic development, and potentially also other types of power asymmetries (e.g., resource dependency).

[14] See G. Shaffer, 'The New Legal Realist Approach to International Law', (2015) 28 LJIL 189.

[15] The International Monetary Fund categorized Mexico as an emerging market developing economy in 2016. See www.imf.org/external/pubs/ft/weo/2016/01/pdf/statapp.pdf.

with the need to respect domestic regulatory choice in favour 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 is best understood against the background of the broader discussion on legitimacy and justice in global governance including on the role of law therein.[16] The WTO is the prime example of an influential specialized global regulatory body – one of the many that are populating the fragmented international 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 non-existent 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.[17]

Similarly, Benvenisti and Downs have argued that the increased fragmentation of the international legal order aggravates the power asymmetries between most developed states and poorer countries:

> 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.[18]

The structural bias of the WTO legal system in favour of developed countries is well documented.[19] Firstly, wealthy countries, such as the US and EU member states, have dominated the process of formation of WTO rules presenting less developed countries with a 'fait accompli'.[20] Secondly, 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 specialized adjudicatory bodies, such as the AB, to secure the acceptance of their

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[16] See Benvenisti; Stewart; Keohane; De Búrca, Keohane, and Sabel all *supra* note 12; E. Benvenisti and G. Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law', (2007) 60(2) *Stanford Law Review* 595; T. Halliday and G. Shaffer, *Transnational Legal Orders* (2015); J. Trachtman, 'International Legal Control of Domestic Administrative Action', (2014) 17(4) *Journal of International Economic Law* 753.

[17] Stewart, *supra* note 12, at 211.

[18] See Benvenisti and Downs, *supra* note 16, at 626.

[19] See G. Shaffer and R. Meléndez-Ortiz, *Dispute Settlement at the WTO: The Developing Country Experience* (2010); G. Mayeda, 'The TBT Agreement and Developing Countries', in T. Epps and M. Trebilcock (eds.), *Research Handbook on the WTO and Technical Barriers to Trade* (2013), 358.

[20] See R. Steinberg, 'In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO', (2002) 56(2) *International Organization* 339; R. Steinberg, 'Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints' (2004) 98 AJIL 247; On the reasons why developing countries agreed to accept the WTO bargain see Howse, *supra* note 8.

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.[21]

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.[22] 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.[23] Secondly, national regulators have a better institutional capacity and expertise to gauge policy options and to assess their broader implications. International tribunals are ill-equipped to substitute domestic regulatory judgment in situations involving either difficult political choices or epistemic uncertainties.[24]

Yet deference might come at the price of further entrenching existing power asymmetries in the application of WTO agreements, because it favours the position of developed countries with large export markets 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.[25] Moreover, unilateral regulation is often driven by the interests of domestic economic actors.[26] Arguably, this can be seen as a positive development given its potential to contribute to a 'race to the top' in regulating global markets.[27] And yet, this situation creates a particular challenge for less developed countries, because they often lack the (e.g., financial or technical) capacity to adjust to the standards of developed states. Moreover, the unilateral setting of global standards by few developed states shifts the definition

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21 See Benvenisti and Downs, *supra* note 16, at 627.

22 See Howse, *supra* note 8; Closely linked is also the tendency 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 countries, see Mayeda, *supra* note 19.

23 See D. Rodrik, *The Globalization Paradox: Democracy and the Future of the World Economy* (2011).

24 See M. Ioannidis, 'Beyond the Standard of Review. Deference Criteria in WTO Law and the Case for a Procedural Approach' and C. Henckels, 'The Role of the Standard of Review and the Importance of Deference in Investor-State Arbitration', both in L. Gruszczynski and W. Werner (eds.), *Deference in International Courts and Tribunals. Standard of Review and Margin of Appreciation* (2014), 91 and 113 respectively.

25 See A. Bradford, 'The Brussels Effect', (2012) 107(1) *Northwesten University Law Review* 1; M. Weimer and E. Vos, 'The Role of the EU in Transnational Regulation of Food Safety: Extending Experimentalist Governance?', in J. Zeitlin (ed.), *Extending Experimentalist Governance? The EU and Transnational Regulation* (2013), 51.

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

27 Shaffer, *supra* note 8.

power over legitimate regulatory policy to those states, raising the following question: how to ensure regard for the concerns and interests[28] of foreign constituencies affected by unilateral regulation in the setting of these standards, especially in the context of asymmetric relations involving different stages of development?

This article 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 a multilateral organization to enforce demands for legal accountability among WTO members as peers. Legal accountability,[29] in turn, is understood as a mechanism allowing an account holder (i.e., a WTO member) to bring a legal action against an account giver (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 account giver 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). 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.[30]

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 as complementary and normatively desirable to ensure responsible use of power in global politics.[31] Therefore, 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 policy choices, and the need to give due regard to the interests and concerns of foreign constituencies affected by domestic regulation.[32] It is acknowledged that striking an adequate balance between these objectives raises

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[28] Following Stewart, *supra* note 12, at 212, interests are seen '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'.

[29] See Stewart, *supra* note 12; M. Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework', (2007) 13(4) *European Law Journal* 447.

[30] See C. Sabel and J. Zeitlin, 'Experimentalist Governance', in D. Levi-Faur (ed.), *Oxford Handbook of Governance* (2012), 169.

[31] Benvenisti, *supra* note 12, 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, *supra* note 12, at 133 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 C. Joerges, P. Kjaer, and T. Ralli, 'A New Type of Conflicts Law as Constitutional Form in the Postnational Constellation', (2011) 2(2) *Transnational Legal Theory* 153.

[32] On the normative foundations of this objective see Benvenisti, *supra* note 12.

difficult questions, such as who should decide on legitimate levels of protection, and under which conditions are those decisions considered justified. The key question concerns the legitimate authority of the AB to review domestic regulation: How far can it go in imposing other-regarding obligations given that states, for the time being, retain their importance as main venues for democratic self-determination.[33]

Instead of addressing this question in the abstract, this article 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 depends on the particular context in which a WTO dispute takes place. In disputes involving asymmetric relations, such as the one discussed in this article, the 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.[34]

2. The tuna-dolphin issue – different labels, different constituencies

At the heart of the *US-Tuna II* dispute between the US and Mexico is the question of how best to resolve the so-called tuna-dolphin issue – a complex transboundary regulatory problem touching upon issues of sustainable fishery, animal welfare, moral choice, as well as deeply entrenched economic, developmental and political interests:[35]

> 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.[36]

The tuna-dolphin controversy in the Eastern Tropical Pacific (ETP) concerns the fishing technique of 'setting on dolphins', whereby fishing vessels use so-called

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33 See Benvenisti, *supra* note 12; See Joerges, Kjaer, and Ralli, *supra* note 31.

34 This is reinforced by arguments relating to developmental justice and the right to development. See United Nations Declaration on the Right to Development, GA Res A/RES/41/128, annex 41 UN GAOR Supplement. No. 53, 186, UN Doc. A/41/53 (1986) at 186; See also World Conference on Human Rights, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23 (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', 1994 Marrakesh Agreement Establishing the World Trade Organization, 1867 UNTS 154.

35 See J. Joseph, 'The Tuna Dolphin Controversy in the Eastern Pacific Ocean: Biological, Economic, and Political Impacts', (1994) 25 *Ocean Development and International Law* 1.

36 Southwest Fisheries Science Center of the National Oceanic and Atmospheric Administration, United States Department of Commerce, 'The Tuna Dolphin Issue', available at swfsc.noaa.gov/textblock.aspx?Division=PRD&ParentMenuId=228&id=1408.

'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.[37] This issue gained widespread public attention in the 1980s starting in the US and from there 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.

Two parallel developments were particularly important. On the one hand, the US dolphin-safe label, challenged by Mexico, follows the approach originally developed by the Californian environmental NGO Earth Island Institute (EII) in co-operation with the US tuna industry.[38] This approach entails an absolute ban on dolphin sets. While monitoring and certifying most of the tuna industry to its private label, the EII also ensured protection of the label under US public law, which ultimately eliminated competition from other dolphin-safe labels on the US market. The EII successfully lobbied the US Congress in the passing of the Dolphin Protection Consumer Information Act (DPCIA) in 1990.[39] The latter made it a violation of the US deceptive advertising provisions to use the 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.

On the other hand, the US government was initially also pursuing international co-operation to resolve the tuna-dolphin problem. In 1988 the US Congress passed an amendment of the Marine Mammal Protection Act ordering the executive to negotiate an international conservation agreement and mandating embargoes on tuna imports from countries whose regulatory programs and fleets failed to meet the US dolphin conservation standards. 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.[40]

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. Tuna can thus be labelled 'dolphin safe' 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; training for captains; and third party observers on all vessels certifying whether any dolphin were killed or seriously injured. The result of this conservation

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37 See Joseph, *supra* note 35.

38 R. Parker, 'The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict', (1999–2000) 12 *Georgetown International Environmental Law Review* 1.

39 See I. Baird and N. Quastel, 'Dolphin-Safe Tuna from California to Thailand: Localisms in Environmental Certification of Global Commodity Networks', (2011) 101(2) *Annals of the Association of American Geographers* 338; also, personal interview with an official of the Inter-American Tropical Tuna Commission (IATTC) on 24 October 2014; and personal interview with a member of the EII International Marine Mammal Project on 21 October 2014.

40 Belize, Colombia, Costa Rica, Ecuador, El Salvador, European Union, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru, United States, Vanuatu, Venezuela.

program is reported to be declining dolphin mortality in the ETP by over 99 per cent, from around 132,000 per year in the mid-1980s to less than 1,000 in 2011.[41] The effective implementation of the AIDCP into US law was ultimately hampered by domestic opposition including successful litigation brought by the EII in US courts.[42] As a result, US law as it stands today prohibits the use of dolphin-safe for any tuna caught in the ETP through dolphin-sets including tuna certified as dolphin-safe under the AIDCP.

The two competing dolphin safe labels also represent different constituencies.[43] The US definition of dolphin-safe follows the EII approach,[44] which is rooted within the particular sociological context of Western American ethical consumption.[45] The EII approach focuses on the cruelty of setting on dolphins emphasizing that even an improved use of dolphin sets might still cause considerable stress and suffering to dolphins. In contrast, the AIDCP, followed by Mexico, reflects a more pragmatic approach, which aims to reconcile dolphin protection with other both ecological and developmental interests in the region. In fact, what constitutes ecologically sustainable tuna fishing is controversial. Fishing methods other than dolphin sets can contribute to the depletion of tuna stocks, as they tend to catch juvenile tuna before they have reproduced.[46] Moreover, they may also cause the by-catch of non-target species other than dolphins, e.g., sharks and sea turtles. 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.[47] The AIDCP claims to adopt such a perspective, arguing that dolphin sets can be used in a sustainable way while also considering 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.[48]

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 labelling requirements as laid down in the DPCIA and related regulations violated the Technical Barriers to Trade Agreement (TBT Agreement). Together these provisions require certain documentary evidence, which varies depending on the area where the tuna was harvested and the fishing method

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41 See www.iattc.org/DolphinSafeENG.htm. In 2005, the AIDCP was awarded the Margarita Lizzaraga award by the Food and Agriculture Organization of the United Nations in recognition of its 'comprehensive, sustainable, and catalytic initiatives' in support of the Code of Conduct for Responsible Fisheries.

42 *Brower v. Daley*, 93 F. Supp. 2d 1071 (N.D.Cal., 2000); *Brower v. Evans*, 257 F.3d 1058 (9th Cir 2001); *Earth Island Institute v. Hogarth*, 484 F.3d 1123 (9th Cir. 2007). These rulings became part of the challenged measure in the WTO dispute.

43 For a discussion of both approaches see Parker, *supra* note 38.

44 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.

45 Baird and Quastel, *supra* note 39.

46 For the ETP see Parker, *supra* note 38.

47 A. Miller and S. Bush, 'Authority without Credibility? Competition and Conflict between Ecolabels in Tuna Fisheries', (2015) 107(10) *Journal of Cleaner Production* 137.

48 See Section 4.

by which it was harvested. In particular, tuna caught by setting on dolphins is currently not eligible for a dolphin-safe label in the US. As a consequence, 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.[49] It argued that the US labelling requirements constituted 'less favourable treatment' of Mexican tuna under Article 2.1 of the TBT Agreement; 'unnecessary obstacles to international trade' under Article 2.2 of the TBT Agreement; and were not based on applicable international standards, namely the AIDCP standard, under Article 2.4 of the TBT Agreement. The AB upheld the first claim ruling that the US failed to demonstrate that its labelling 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.

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

The first important interpretative choice made by the AB in this dispute was to accept the legitimacy of the US policy approach to dolphin-safe tuna entailing an absolute ban on dolphin-sets. Such deference to the US policy choice has decisively influenced both the overall structure and outcome of AB's legal reasoning by setting the first stone in the legal construction of the level of external accountability to be imposed on the US.

An assessment of the US regulatory objective was particularly relevant under the Article 2.2[50] analysis of whether the US measure was more trade restrictive than necessary to fulfil the US objective, 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'.[51] It has been argued that Article 2.2 of the TBT Agreement offers the opportunity for WTO tribunals to integrate a developmental perspective into their legal analysis under the TBT Agreement 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.[52] In practice, however, WTO tribunals, including in this case, have so far preferred to defer to the level of protection chosen by the importing state.

When interpreting the term 'no more trade restrictive than necessary to fulfil a legitimate objective' under Article 2.2 of the TBT Agreement, the AB stated that

[49] 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 *US-Tuna II*, *supra* note 1, paras. 405–6.

[50] But see also the assessment of Art. 2.1 in ibid., paras. 244 and 291.

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

[52] See Mayeda, *supra* note 19.

a member state is not prevented from taking measures necessary to achieve its legitimate objectives at the levels it considers appropriate.[53] 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, traditionally used in WTO case law,[54] of weighing and balancing between several 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.[55]

This does not suggest the willingness of the AB to balance the importance of the regulatory objective against the negative trade consequences for affected foreigners.[56] 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 (in Section 2) the AIDCP label also aims at dolphin protection without, however, prescribing that the fishing techniques achieve that goal. Tuna is labelled as dolphin-safe under the AIDCP where an international observer has certified that no dolphins were killed or injured in the set. Moreover, balancing 'the nature of the risks at issue and the gravity of consequences' indirectly allows the AB to consider the importance of the regulatory objective pursued.[57] The AB, for example, could have weighed the arguments speaking both against and in favour of the AIDCP approach[58] in order to determine 'the gravity of the consequences' that would arise were the US prevented from exclusively defining what counts as dolphin-safe tuna on the US market. 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 of 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

53 AB *US-Tuna II*, *supra* note 1, para. 316.
54 See Venzke, *supra* note 8, at 180–95.
55 AB *US-Tuna II*, *supra* note 1, para. 322.
56 There is thus no proportionality test carried out under Art. 2.2 of the TBT Agreement. For reasons against such test see Venzke, *supra* note 8.
57 I am grateful to an anonymous reviewer for this point.
58 See *supra* Section 2.

> 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".[59]

The finding of *unobserved* adverse impacts on dolphins, therefore, was crucial to consider the absolute ban of dolphin sets as necessary. The AB did not examine the legitimacy of this approach either from an environmental or from a developmental perspective.

3.2. Intensifying scrutiny – the US labelling standard as exercise of public power in need of justification

While deferring to the US policy choice, the AB made clear that this 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 of the TBT Agreement:

> 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.

Here the AB was facing the question whether the US provisions on dolphin-safe labelling 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 of the TBT Agreement. The US claimed that it should be considered as a voluntary standard, because the labelling 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 AB, however, found that there is a crucial difference between the US dolphin-safe label and voluntary labelling schemes. The US provisions not only set out certain conditions for the use of the label, but also 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 US. This exclusive nature of the US label triggered the justification requirements under the TBT Agreement.

Moreover, the issue of public versus market power re-occurred in the determination made by the AB under Article 2.1 of the TBT Agreement where the AB assessed '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'.[60] The US claimed that

[59] AB *US-Tuna II*, *supra* note 1, para. 330 (emphasis added).
[60] Ibid., para. 231.

any detrimental effect on Mexico's market access was a result of consumer choices, and was therefore not attributable to the US labelling provisions. The conditions of competition were the result of US tuna processors and consumers boycotting Mexican tuna products. The panel upheld this argument, but it 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 the TBT Agreement*, where the measure it adopts modifies the conditions of competition to the detriment of Mexican tuna products.[61]

It follows that 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[62] – a public power that made a political choice in favour of a particular understanding of dolphin-safe. As shown above, however, the AB accepted that choice thereby deferring to a stringent and narrowly defined standard of a powerful developed state.

3.3. Holding power to account: Even-handedness and calibration under Article 2.1 of the TBT Agreement

The AB's deference was, however, 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 of the TBT Agreement. This step of legal reasoning concerned the vigour of the required justification and, hence, the accountability standard to be imposed upon the US. Next to detrimental effect, 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*.[63] According to that reasoning, the interpretation of 'treatment no less favourable' in Article 2.1 of the TBT Agreement is informed by the 6th recital of the preamble of the agreement, which contains a similar wording as the chapeaux of Article XX of the GATT,[64] 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 liberaliza-

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61 Ibid., para. 239 (emphasis added).

62 See I. Feichtner, 'Power and Purpose of Ecolabelling: An Examination Based on the WTO Disputes Tuna II and COOL', (2014) 57 *German Yearbook of International Law* 255.

63 Appellate Report United States - Measures Affecting the Production and Sale of Glove Cigarettes, adopted 4 April 2012, AB 2012-1, WT/DS406/AB/R (AB *US-Gloves*).

64 Ibid., para. 100.

tion and, on the other hand, the member's right to regulate.[65] Therefore, Article 2.1 of the TBT Agreement 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.[66] In order to determine whether a measure is *de facto* inconsistent with Article 2.1 of the TBT Agreement:

> 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*.[67]

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'.[68] The AB thus compared how the US addresses risks to dolphins inside and outside of the ETP verifying 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 also 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.[69]

The AB therefore found there to be 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 adverse effects on dolphins 'resulting from the use of fishing methods predominantly employed by fishing fleets supplying the US' and other countries' tuna producers':[70]

> 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.[71]

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'. In this way, while exercising deference to the US right to set its own standard, the AB held the US to account for not equally applying it to all tuna fisheries.

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65 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', ibid., para. 96.
66 Ibid., paras. 174 and 181.
67 AB *US Tuna-II*, *supra* note 1, para. 225.
68 Ibid., para. 232.
69 Ibid., para. 251.
70 Ibid., para. 292.
71 Ibid., para. 297.

3.4. No accountability via international standards under Article 2.4 of the TBT Agreement

In addition to Articles 2.1 and 2.2 of the TBT Agreement, Mexico also raised a claim under Article 2.4 of the TBT Agreement, 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 (in Section 2) the US was originally an important driving force behind the AIDCP as an attempt to resolve the tuna-dolphin issue via multilateral co-operation. The US is until today a member of the AIDCP, and is in principle under an international legal obligation to implement it 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 Article 2.4 of the TBT Agreement.

According to Article 2.4 of the TBT Agreement, 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 ascertain whether it applies to the AIDCP. In proceeding with the first step, the AB has made far-reaching pronouncements[72] concerning the procedural legitimacy of international standards – a test that international standards have to pass before they can be granted the powerful legal effects under the TBT Agreement.[73]

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.[74] The body must be open 'at every stage of standards development' and 'on a non-discriminatory basis'.[75] Moreover, the AB used a non-binding decision of the TBT Committee as guidance for when an international body has 'recognized' activities in standardization.[76] 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'.[77]

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

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72 Ibid., paras. 349–80.

73 See R. Howse, 'A New Device for Creating International Legal Normativity: The WTO Technical Barriers to Trade Agreement and "international Standards"', in C. Joerges and U. Petersmann (eds.), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (2006), 383.

74 AB *US-Tuna II*, *supra* note 1, para. 369.

75 Ibid., paras. 373–5.

76 Decision on 'Principles for the Development of International Standards, Guides, and Recommendations with Relation to Articles 2, 5, and Annex 3 of the Agreement' G/TBT/1/Rev.10 (2011). 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.

77 AB *US-Tuna II*, *supra* note 1, para. 379.

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 economic integration organizations have actually expressed interest in joining the AIDCP.[78] However, the AB was not convinced, finding 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.[79]

4. Reconciling deference with external accountability – lessons from *US-Shrimp*

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. As a result, the AB was able 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. 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.

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 tuna resource along Mexico's coast'.[80] Moreover, on the promise of access to the US market Mexico has made considerable investments in dolphin protection methods under the AIDCP,[81] which the US helped negotiate. Therefore, by accepting the right of the US to define its dolphin-safe policy as an absolute ban on setting on dolphins, the AB deferred to a stringent unilateral standard with extraterritorial effects that seemed to ignore Mexico's economic and developmental interests as well as environmental concerns in this case.[82] Could the AB have made different interpretative choices to ensure that those interests and concerns are better reflected in US regulation?

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78 Mexico's appellee's submission, in ibid., para. 208.

79 Ibid., paras. 398–9.

80 Panel Report United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, adopted 15 September 2011, WT/DS381/R *US-Tuna II*, para. 4.27 (Panel *US-Tuna II*).

81 Ibid., para. 4.28. 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 October 2014.

82 See *supra* Section 2.

A comparison with the AB report in *US-Shrimp*, a case similar to *US-Tuna*,[83] is instructive in this regard. In *US-Shrimp*,[84] a dispute involving India, Malaysia, Pakistan and Thailand as complainants, the AB applied Article 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.[85] The US regulatory objective (protection of sea turtles) fell within the scope of the exception provided in Article XX(g) of the GATT, namely the protection of 'natural resources'. However, the AB found that the *application* of the US measure violated the chapeau of Article XX of the GATT, because it constituted an 'unjustifiable and arbitrary discrimination' against the complainants.

A detailed analysis of the AB report in *US-Shrimp* goes beyond the scope of this article.[86] It suffices to note the striking difference in legal reasoning as compared to *US-Tuna*. In *US-Shrimp*, the AB criticized the US regulation as a 'rigid and unbending standard' with 'coercive effect'. The AB read due process rights of foreign interests in the interpretation of the chapeau of Article XX of the GATT;[87] and censured the unilateral imposition of 'essentially the same policy' as that applied in the US without any flexibility to consider local conditions in the exporting countries.[88] In *US-Tuna* a very similar unilateral imposition of the US ('no dolphin-sets') approach to dolphin-safe tuna 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 was respected, but the US was required to give voice to the exporting countries allowing them to show that alternative measures are 'comparable' and equally able to protect sea turtles.[89] 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, in *US-Shrimp*, the AB criticized the US for its failure to engage the complainants 'in serious, across the board negotiations with the objective of concluding bilateral or multi-lateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition against the shrimp exports of those other Members'.[90] 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

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83 See G. Shaffer, 'The WTO Shrimp-Turtle Case (United States - Import Prohibition of Certain Shrimp and Shrimp Products)', (1999) 93 AJIL 507.

84 Appellate Report United States – Import Prohibition of Certain Shrimp and Shrimp Products, adopted 12 October 1998, WT/DS58/AB/R (AB *US-Shrimp*).

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

86 See for a more detailed analysis R. Howse, 'The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate', (2002) 27(2) *Columbia Journal of Environmental Law* 489; Shaffer, *supra* note 83.

87 See R. Stewart and M. Sanchez Badin, 'The World Trade Organization: Multiple Dimensions of Global Administrative Law', (2011) 9 *International Journal of Constitutional Law* 556, at 571.

88 AB *US-Shrimp*, *supra* note 84, para. 164.

89 Ibid., para. 162.

90 Ibid., para. 166.

than the unilateral and non-consensual procedures of the import prohibition.[91] In *US-Tuna*, this issue was not problematized despite the fact that the US not only negotiated the AIDCP, but also tried to implement it in national law. Moreover, 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 (Mexico and other ETP coastal states).[92] 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 Article 2.4 of the TBT Agreement, 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*. Most notably, the US measure in *US-Shrimp* was an import ban imposing regulatory requirements on foreign governments. In contrast, in *US-Tuna*, the measure was a labelling 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, this difference also does not fully explain the difference in reasoning given that in *US-Tuna* the AB employed an interpretation of Article 2.1 of the TBT Agreement parallel to that employed under the GATT.[93] In particular, the AB interpreted Article 2.1 of the TBT Agreement in the light of the sixth recital of the preamble of the TBT Agreement, which contains a similar language as Article XX 'chapeau' of the GATT,[94] and Article 2.1 of the TBT Agreement 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'.[95] Hence, in both cases the AB used a legal standard (under Article 2.1 of the TBT Agreement and Article XX of the 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'[96] under the relevant agreement, such delicate balance was missing in its report in *US-Tuna*.

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91 Ibid., para. 171.

92 See Parker, *supra* note 38.

93 Moreover, in the later compliance report (see *infra*) the AB also undertook an analysis directly under the GATT without essentially changing its reasoning.

94 In that it followed the reasoning of AB *US-Gloves* emphasizing the similar language and the overlap in the scope of application between Art. 2.1 of the TBT Agreement and Art. III:4 of the GATT and 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', *supra* note 63, para. 100.

95 AB *US-Tuna II*, *supra* note 1, para. 214.

96 AB *US-Shrimp*, *supra* note 84, para. 159.

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.

5. Reflexive disciplines as other-regarding obligations

One way of remedying disregard in the application of WTO law is to demand that deference be combined with justification obligations that are able to induce reflexivity in domestic decision-making. This can best be achieved by way of a process-perfecting approach to the standard of review of domestic regulation.[97] The task of WTO adjudication should not be 'supplanting the substance of national regulatory policies',[98] but to guard the procedural legitimacy of the domestic policy process. Accordingly, 'domestic authorities that respect international due process standards and reach their conclusions after having sufficiently considered foreign arguments deserve more deference than authorities reaching their decisions behind closed doors'.[99]

Other-regarding obligations under WTO law should therefore aim at ensuring that domestic decision-making is based on an open and deliberative exchange of arguments; that it is transparent, inclusive and reasoned as well as based on all relevant information. In this way, a process-perfecting review could help destabilizing policy solutions that have occurred as a result of parochial and entrenched domestic interests.[100] Such an approach to WTO legal reasoning could be achieved in different ways going beyond instances where WTO law explicitly regulates domestic procedures.[101] When interpreting open-textured provisions, such as 'more trade restrictive than necessary', 'arbitrary and unjustifiable' or 'international standards' the WTO adjudicators should consider to what extent foreign affected interests and concerns were actually taken into account in the domestic process; as well as impose the duty to provide for a reasoned explanation of how they were taken into account. It would also entail granting affected foreigners certain participation rights in the domestic process, such as the right to be heard, to give input, and to have an opportunity to ask for a review of the domestic decision.[102] Moreover, WTO review should impose a duty of care upon domestic regulators similar to requirements imposed

[97] For a discussion of this approach see Ioannidis, *supra* note 24, at 108–11 with further references.
[98] J. McGinnis and M. Movsesian, 'The World Trade Constitution', (2000) 114 *Harvard Law Review* 511, at 580.
[99] See Ioannidis, *supra* note 24, at 106.
[100] See C. Joerges and J. Neyer, 'Politics, Risk Management, World Trade Organization Governance and the Limits of Legalisation', (2003) 30 *Science and Public Policy* 219, at 221.
[101] Such as in anti-dumping or safeguard cases, see for the discussion of different legal techniques Ioannidis, *supra* note 24, at 110.
[102] See Stewart and Sanchez Badin, *supra* note 87, at 571.

upon regulators in domestic and European administrative law.[103] This duty would entail showing that a decision is based on all available information and considers all relevant facts including the duty to gather scientific evidence and carry out scientific assessments;[104] and to explain in a coherent and internally consistent way how that information basis supports the final decision.

More specifically, in *US-Tuna II*, the AB should have continued the approach adopted in *US-Shrimp* by interpreting non-discrimination as requiring flexibility, respect for local conditions, due process and multilateralism. It should have read these 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'); and 2.4 ('international standard') of the TBT Agreement; This would 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.

6. The compliance report – calibration in the face of risk and empirical uncertainty

To comply with the AB report in *US-Tuna II* the US administration has adjusted the documentation requirements for the dolphin-safe label in 2013.[105] 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). 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 Article 2.1 of the TBT Agreement as well as Articles I:1

[103] See, e.g., J. Scott and S. Sturm, 'Courts as Catalysts: Rethinking the Judicial Role in New Governance' (2007) 13(3) *Columbia Journal of European Law* 565.

[104] It is acknowledged that scientific benchmarks can also be controversial; see L. Gruszczynski and V. Vadi, 'Standard of Review and Scientific Evidence in WTO Law and International Investment Arbitration', in L. Gruszczynski and W. Werner (eds.), *Deference in International Courts and Tribunals. Standard of Review and Margin of Appreciation* (2014), 152; it is therefore important that domestic risk assessment is not substituted by WTO review.

[105] The so-called 2013 Final Rule, see Panel Report United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, Recourse to Article 21.5 of the DSU by Mexico, adopted 14 April 2015, WT/DS381/RW, paras. 3.32–3.52 (Panel Compliance Report).

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.[106]

As in the original report, the AB employed the concept of even-handedness to hold the US to account for the detrimental impact of its unilateral policy on Mexico. In the compliance report, the legal analysis under both the TBT Agreement and the GATT again focused on the question whether the amended measure was 'even-handed in its design, architecture, revealing structure, operation, and application'.[107] 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.[108] 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.[109]

However, there are important differences between the two reports in terms of legal reasoning and standard of review. While in the original report the AB made a series of interpretative choices, its reasoning in the compliance report focused heavily on questions of evidence and risk. Moreover, 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 contrast, in the compliance report the AB's review was more intrusive despite the fact that it was facing scientific uncertainty, which equally justifies deference towards the domestic regulatory assessment.[110]

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'[111] in the compliance proceedings. In the original report the finding of lack of even-handedness under Article 2.1 of the TBT Agreement had been made, because the original measure did not require documenting 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[112] despite the *uncontested* finding that other practices cause harm to dolphins.[113] The amended measure introduced such a requirement, which led to the finding that it was *more* calibrated than the original measure.[114] Now the AB considered it necessary to assess whether the amended measure was also *adequately* calibrated, and to *gauge* 'whether these new requirements are sufficient to address the risks posed to dolphins outside the ETP large

[106] AB Compliance Report, *supra* note 2, paras. 7.231–7.360.
[107] Ibid., para. 7.239.
[108] AB *US-Tuna II*, *supra* note 1, para. 251 and AB Compliance Report, *supra* note 2, paras. 7.258–7.264.
[109] Miller and Bush, *supra* note 47.
[110] On the notions of normative and empirical deference see Henckels, *supra* note 24.
[111] AB Compliance Report, *supra* note 2, para. 7.251.
[112] Ibid., para. 7.250.
[113] AB *US-Tuna II*, *supra* note 1, para. 251.
[114] Under Art. 2.1 of the TBT Agreement and under Arts. I:1, III:4 and XX of the GATT 1994, see AB Compliance Report, *supra* note 2, paras. 7.242, 7.348, because it contributed to addressing 'adverse effects on dolphins resulting from the use of fishing methods predominantly employed by fishing fleets supplying the US' and other countries' tuna producers outside the ETP large purse-seine fishery'.

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'.[115]

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. Before the panel both parties mounted significant amounts of conflicting evidence. 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.[116] 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'[117] the AB was 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 nevertheless proceeded by 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.[118] The determinations would trigger the requirement of an independent observer 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:

> 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.[119]

The same approach was adopted under Articles I:1, III:4, and XX of the GATT 1994. In particular under Article XX, which contains clauses allowing for a justification of measures 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.[120]

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[115] Ibid., para. 7.251.
[116] Ibid., paras. 7.243–7.248.
[117] Ibid., para. 7.248.
[118] Ibid., para. 7.254.
[119] Ibid., para. 7.266.
[120] The measure was found to be provisionally justified under Art. XX(g). 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 and '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 ibid., paras. 7.342–7.344, 7.359.

It is apparent that the determination of risks to dolphins in different fisheries required a contextual understanding of the conditions in every fishery, which is hardly something an international tribunal is able to ascertain.[121] In situations of empirical uncertainty international tribunals are required to exercise deference toward the domestic regulatory assessment for reasons of institutional competence and contextual expertise.[122] Therefore, 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. Contrary to the AB's view, the finding of lack of even-handedness for the determination provisions could not have been made without relying on factual assessments. In fact, it reflected a particular empirical assumption about both the nature and extent of risks to dolphins in different fisheries.[123] The relevant passages of the AB report[124] 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 was an intrusive review by the AB of regulatory rationality of the US measure leaving little to no discretion to the US in this respect.

This is problematic given that Article 2.1 of the TBT Agreement and Articles I.1, III.4 and XX of the GATT only prohibit discrimination. Neither of these provisions imposes more far-reaching obligations of regulatory rationality.[125] 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 measure leads to discrimination even where it draws an unjustified and arbitrary distinction in the level of protection in respect of different substances.[126]

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 along the lines of a procedural approach as elaborated above. It should have exercised a reasonableness test aiming to ascertain whether there was a sufficient evidentiary basis for designing the determination requirements, and eventually requiring the US to improve the quality of that basis. 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 appropriate design of the dolphin-safe label. In other

[121] This was acknowledged by the AB in ibid., para. 7.252.

[122] See Henckels, *supra* note 24; Gruszczynski and Vadi, *supra* note 104.

[123] See AB Compliance Report, *supra* note 2, 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; and paras. 7.258–7.264 where the AB refers to factual findings made by the Panel.

[124] *Ibid.*, paras. 7.256–7.266.

[125] As found in certain other WTO provisions, for example Art. 5.1 of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement); See Sykes, *supra* note 6; However, Howse, *supra* note 8, treats regulatory rationality as part of the non-discrimination review.

[126] Appellate Report European Communities - EC Measures Concerning Meat and Meat Products (Hormones), adopted 16 January 1998, WT/DS26//AB/R, WT/DS48/AB/R, paras. 245–6. The finding in question was under Art. 5.5 of the SPS Agreement, which seen together with Art. 2.3 of the SPS Agreement contains a language similar to the chapeau of Art. XX of the GATT.

words, to act in a legitimate way, the AB was required to combine deference with the imposition of other-regarding obligations (e.g., duty to consider; to give reasons; to gather more evidence) able to improve due regard for affected foreigners.

7. Conclusions

This article 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) and the need to give due regard to the interests and concerns of foreign constituencies affected by domestic regulation. By imposing other-regarding obligations, WTO law can act as a mechanism of external accountability of powerful states vis-à-vis affected foreigners, especially where asymmetric relations and different stages of economic development are involved. Deference towards domestic regulators should be combined with justification obligations that are able to induce reflexivity (i.e., the consideration of concerns and interests of affected foreigners) in domestic decision-making. This can best be achieved by way of a process-perfecting approach to the standard of review of domestic regulation. Such review could help destabilizing policy solutions that have occurred as a result of parochial and entrenched domestic interests.

This framework was applied to analyze, against the background of other WTO case law, the legal reasoning of two AB reports in the *US-Tuna II* dispute between the US and Mexico – a dispute of paradigmatic importance to demonstrate the complex intertwinement between economic, environmental and developmental issues at stake in WTO case law. The analysis concluded that the use of the concepts of 'even-handedness' and 'calibration' under Article 2.1 of the TBT Agreement and Article XX of the GATT did not enable the AB to strike an adequate balance between the right to regulate and external accountability. In the original *US-Tuna II* report, 'even-handedness' as a justification requirement imposed only a minimal level of external accountability on the US. Instead of inducing reflexivity and due regard for Mexico's interests and concerns, this requirement allowed the US to extend its dolphin-safe standard beyond the region of the ETP, while still effectively banning Mexican tuna from the US market – a pyrrhic victory for Mexico. In contrast, in the subsequent compliance report, the AB went 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. Just as with deference towards domestic policy choices, the right to regulate also requires deference to domestic risk assessments, especially in situations of uncertainty.

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