

THE NEW WTO TUNA DOLPHIN DECISION: RECONCILING TRADE AND ENVIRONMENT?

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Summary: The WTO is often criticised for consistently refusing to accept the environmental measures of its Members due to their adverse impacts on international trade. The aim of this paper is to examine the recent developments in WTO law considering this clash between liberal trade and environmental protection. The analysis is based on the most recent US – Tuna II (Mexico)¹ case, the third in the Tuna Dolphin line of case law. The paper shows that the Appellate Body still greatly favours free trade over the environment, but that some progress can still be found in the latest Tuna ruling. Notions of technical regulation, likeness, less favourable treatment, extraterritoriality and necessity are examined in light of this dispute. The paper also gives a broader perspective on the suitability of the Technical Barriers to Trade Agreement to endorse environmental protection in the form of ‘green trade barriers’, as well as suggestions for a new approach that the WTO Dispute Settlement Body should take in an effort to strike a balance between protecting the environment and facilitating economic prosperity through liberal trade.

1. Introduction

‘The Earth is one, but the world is not.’²

Dating back from as early as 1987, this quotation still perfectly depicts the status of environmental protection in the world today. On the one hand, the need to respond to environmental concerns on a global level has become increasingly pertinent in recent years, while on the other hand, global solutions are hard to find when some other interests besides environmental protection come into play. One such interest is often the maintenance of economic prosperity in the form of trade liberalisation. The arena in which environmental protection frequently clashes with free trade, especially given its heterogeneity, is the World Trade Organisation (WTO). However, from the perspective of environmental protection, the

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¹ United States - Measures concerning the importation, marketing and sale of tuna and tuna products, WT/DS381/R.

² World Commission on Environment and Development, *Our Common Future* (OUP 1987) 27.

results are far from satisfactory. The WTO has been repeatedly criticised for pursuing trade liberalisation while sacrificing the environment, human health or animal welfare,³ and has even been referred to as the ‘GATT-zilla trade monster’.⁴

In the WTO arena, the interplay of trade and the environment can often be found in so-called ‘green trade barriers’.⁵ For example, one country adopts a (high) environmental standard which certain products should meet and then makes compliance with those standards a condition for foreign products to access its market. In effect, the environmental standards of the regulating country are thus also applied outside its territory, in the exporting country. A spill-over effect would here be most desirable, but unfortunately it often happens that powerful and wealthy countries impose their own vision of appropriate environmental protection, usually setting the bar too high for less developed countries. In this way, the phenomenon of ‘eco-imperialism’⁶ is created, leaving less developed countries out of trade relations and thus decreasing their chances of prospering economically, which then further perpetuates their inability to bear the costs of high(er) environmental protection.

The aim of this paper is to examine recent developments in addressing the antagonism between environmental protection and trade liberalisation in the WTO. This will be done by analysing the most recent ruling in the *Tuna Dolphin* saga – *US-Tuna II (Mexico)*,^{7,8} preceded by the first *US-Tuna I (Mexico)*⁹ case and the second *US-Tuna (EEC)*¹⁰ case. These three cases form a perfect ground for such an analysis. The facts of all three cases involve a US ‘green trade barrier’ aimed at protecting the dolphin population by introducing certain requirements that tuna products, domestic or foreign, have to meet with regard to safety to dolphins. The cases are also interesting for the EU, not only because it was one of the parties in the second case, but also because comparable tensions

³ W Zhou, ‘*US-Clove Cigarettes and US-Tuna II (Mexico)*: Implications for the Role of Regulatory Purpose under Article III:4 of the GATT’ (2012) 15(4) *JIEL* 1076.

⁴ Used in, eg, JH Jackson, ‘World Trade Rules and Environmental Policies: Congruence of Conflict?’ (1992) 49 *Washington & Lee Law Review* 1235.

⁵ JL Dunoff, ‘Reconciling International Trade with Preservation of the Global Commons: Can We Prosper and Protect?’ (1992) 49 *Washington & Lee Law Review* 1407.

⁶ *ibid* 1241.

⁷ Panel report, United States - Measures concerning the importation, marketing and sale of tuna and tuna products (15 September 2011) *WT/DS381/R*.

⁸ Appellate Body Report, United States – Measures concerning the importation, marketing and sale of tuna and tuna products (16 May 2012) *WT/DS381/AB/R*.

⁹ GATT Panel Report, United States – Restriction on Imports of Tuna, 3 September 1991, unadopted, *BISD 39S/155* (hereinafter *US – Tuna I (Mexico)*).

¹⁰ GATT Panel Report, United States – Restrictions on Imports of Tuna, 16 June 1994, unadopted, *DS29/R444* (hereinafter *US – Tuna II (EEC)*).

exist in the EU as well.¹¹ Furthermore, it will be interesting to see how the approach of the Panel and the Appellate Body (AB) in these cases developed as regards the conflict between trade and environment and how the parties adapted their policies to the (un)responsiveness of WTO dispute settlement to environmental concerns. The paper will focus on the most recent *US-Tuna II (Mexico)* case in order to determine whether the WTO is at least on the way to striking a fine balance between endorsing environmental protection while maintaining free trade relations. This will prove to be a very rewarding exercise as the most recent *Tuna* case, unlike its predecessors, involves the application of the Agreement on Technical Barriers to Trade (TBT).

In order to fully address the issue at hand, this paper will first give a brief outline of the first two *Tuna* cases (Part 2). After dealing extensively with all the issues raised by the most imminent *US – Tuna II (Mexico)* in Part 3, the paper will turn to examine how the TBT Agreement responds to the trade – environment conflict (Part 4). Part 5 will take a more general perspective and analyse possible approaches to tackle the antagonism at issue. Finally, concluding remarks will be presented in Part 6.

2. Setting the scene: the road to *US-Tuna II (Mexico)*

2.1. *US – Tuna I (Mexico)*

The *US – Tuna I (Mexico)*¹² dispute revolves around the US Marine Mammal Protection Act (MMPA).¹³ This piece of legislation was introduced in the US in order to tackle the issue of dolphin mortality related to tuna fishing in the Eastern Tropical Pacific Ocean (ETP).¹⁴ In that part of the ocean, unlike in other parts, tuna and dolphins tend to travel together – the dolphins stay on the surface of the ocean, while schools of tuna swim underneath.¹⁵ Therefore, the presence of dolphins serves as a strong indicator to fishermen that tuna is there as well. The fishermen then circle the tuna along with the dolphins with purse seine nets.¹⁶ Even though the dolphins are not the prey of the fishermen, they end up getting caught in the nets and dragged to the fishing boat, usually not surviving this ordeal.¹⁷ As will become relevant further in the development of the *Tuna* cases and in this paper, it should be noted that unlike US vessels which

¹¹ N de Sadeleer, 'Trade v Environment in EU law' – Collection of papers <<http://www.tradeenvironment.eu/working-papers/>> accessed 9 September 2013.

¹² *US – Tuna I (Mexico)* (n 9).

¹³ F Macmillan, *WTO and the Environment* (Sweet & Maxwell 2001) 70.

¹⁴ *ibid* 71.

¹⁵ *ibid*.

¹⁶ *ibid*.

¹⁷ *ibid*.

fish elsewhere in the ocean, the Mexican tuna boats fish almost exclusively in the ETP, where the tuna-dolphin association is present.

In order to prevent such incidental killings of dolphins, the MMPA introduced a general prohibition of the 'taking' (harassment, hunting, capture, killing or attempt thereof) of marine mammals, including dolphins, except when explicitly authorised by means of a permit.¹⁸ At the time of this dispute, the American Tuna Boat Association was the only holder of such a permit, which set a limit of 20,500 incidental dolphin kills per year.¹⁹ As to imported tuna, certain trade restrictions were imposed, which became the core of this *Tuna* dispute. Firstly, the importation of tuna and tuna products was banned if tuna was caught in a way which involved the incidental killing of marine mammals in excess of the US standards.²⁰ The only way imported tuna (products) could access the US market was to demonstrate that the average national rate of the incidental taking of marine mammals in the country where the fishing vessel was registered did not exceed the average US rate by more than 1.25 times in the same time period.²¹ Secondly, embargoes on tuna products were introduced not only against states which did not demonstrate conformity with the aforementioned provisions,²² but also against intermediary nations unless they showed they had also embargoed the directly embargoed nation.²³ Thirdly, the US President could use his discretionary power to impose a total ban on all fishing products from directly or indirectly embargoed nations six months after the introduction of the embargo.²⁴ Lastly, a labelling regime was established under the Dolphin Protection Consumer Information Act (DPCIA).²⁵ The 'dolphin-safe' label could be used on tuna products marketed in the US for which documentary evidence was provided that tuna was not harvested by intentionally setting on dolphins with purse seine nets.²⁶

As one of the directly embargoed nations, Mexico decided to challenge the US provisions under the GATT. It claimed that the US violated Article I (General Most-Favoured-Nation Treatment), Article III (National Treatment on Internal Taxation and Regulation), Article XI (General Elimination of Quantitative Restrictions) and Article XIII (Non-discriminatory Administration of Quantitative Restrictions), and that no justification could be found under Article XX (General Exceptions) of the GATT.²⁷

¹⁸ *US – Tuna I (Mexico)* (n 9) [2.3].

¹⁹ Macmillan (n 13) 71.

²⁰ *US – Tuna I (Mexico)* (n 9) [2.5].

²¹ *ibid* [2.6].

²² *ibid* [2.7].

²³ *ibid* [2.10].

²⁴ *ibid* [2.9].

²⁵ *ibid* [2.12].

²⁶ Macmillan (n 13) 112.

²⁷ *US – Tuna I (Mexico)* (n 9) [3.1]-[3.5].

The Panel took the view that the ban on tuna products should be considered under Article XI:1 and not under Article III:4 because the MMPA did not regulate tuna products *as such*, nor did it prescribe special fishing techniques, but was aimed at preventing the taking of dolphins in the course of harvesting tuna.²⁸ Therefore, the provisions in question were to be considered as quantitative restrictions to import and not as internal regulations.²⁹

The real battle started in considering the possibility of justifying the US measures under Article XX (b) on the protection of animal life and (g) on the conservation of exhaustible natural resources, as argued by the US.³⁰ The debate under Article XX in this dispute reflects one of the most contentious issues in the whole of the *Tuna* saga, and that is the issue of extraterritoriality. Should the US be allowed to impose standards of environmental protection which in effect do not give a choice to Mexico as to their application if it wants to maintain trade relations? The Panel's reply was a clear-cut 'no' – Article XX (b) and (g) exceptions are not available to preserve animal life or natural resources *outside the jurisdiction* of the country invoking the exception.³¹ The Panel supported its conclusion with the now famous 'reasonableness argument'³² – if Article XX exceptions were available in such cases, any Member could unilaterally impose their own environmental policies that other countries would not be able to disregard without jeopardising their rights under the GATT.³³

The Panel further considered an alternative scenario. Even if the US could invoke the GATT exceptions for unilateral measures, the measures would still have to be necessary for achieving the set aim, as required by Article XX (b).³⁴ The Panel referred to the meaning of 'necessary' as laid down in *Thai Cigarettes*³⁵ according to which a measure is necessary only if another reasonably available GATT consistent measure could not be applied.³⁶ According to the Panel, a measure satisfying this criterion would be to conclude a bilateral agreement on dolphin protection.³⁷ The Panel then went on to conclude that the US measure related to 'unpre-

²⁸ *ibid* [5.10].

²⁹ *ibid* [5.18].

³⁰ *ibid* [5.22].

³¹ *ibid* [5.27].

³² A Rosas, 'Non-commercial Values and the World Trade System: Building on Article XX' in K Van der Borgh (ed), *Essays on the Future of the WTO: Finding a New Balance* (Cameron May 2003) 75, 82.

³³ *US – Tuna I (Mexico)* (n 9) [5.27].

³⁴ *ibid* [5.28].

³⁵ GATT Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes* (7 November 1990) 37S/200, DS10/R BISD 29th Supp 200 (1991).

³⁶ *ibid* [74].

³⁷ *US – Tuna I (Mexico)* (n 9) [5.28].

dictable conditions' because Mexico could not have been aware of the US average dolphin killing rate and thus it was unable to adapt its own rate.³⁸ How the latter exactly related to the conditions set in *Thai Cigarettes* remained a mystery.³⁹

As to the labelling under DPCIA, the Panel very easily concluded that it was in line with the GATT. It considered that the labelling scheme did not breach Article I:1 (Most Favoured Nation) because it did not put Mexico at any disadvantage compared to other countries.⁴⁰ In itself, the labelling scheme did not restrict the sale of tuna in any way, as tuna could be marketed freely without the 'dolphin-friendly' label.⁴¹ On top of that, no discrimination based on the country of origin was made, as the DPCIA applied to all tuna caught in the ETP, regardless of the country in which the vessel catching the tuna was registered.⁴² The decision of the Panel on the labelling scheme might seem of secondary importance in this case, but it will turn out to be quite valuable in the analysis of the most recent *Tuna* case.⁴³

As an interim conclusion, it is no wonder that the first *Tuna* decision was not welcomed by environmentalists,⁴⁴ as it quite clearly opted for endorsing trade liberalisation by condemning almost all of the US measures, rather than opening up at least a niche for environmental protection. Given especially the narrow construction of Article XX and a straightforward refusal of extraterritoriality, it was inconceivable that any 'green barrier' would pass such a strict test.

2.2. US – Tuna II (EEC)

The second case in the *Tuna* trio – *US – Tuna II (EEC)*⁴⁵ – basically involves the same set of facts as the first one, with the exception of the complainants, which were in this case the EEC and The Netherlands, both under the intermediary nation embargo.⁴⁶ In relation to the Panel's finding in the previous case on the possibility to conclude international agreements on dolphin protection as a less trade-restrictive alternative, it is worth mentioning that in between the two disputes, the countries which were the members of the Inter-American Tropical Tuna Commis-

³⁸ *ibid.*

³⁹ Macmillan (n 13) 73.

⁴⁰ *US – Tuna I (Mexico)* (n 9) [5.42].

⁴¹ *ibid.*

⁴² *ibid* [5.43].

⁴³ See Part 4 of this paper.

⁴⁴ Sea Turtle Restoration Project, "WTO vs. Democracy" <<http://seaturtles.org/article.php?id=70>> accessed 20 April 2013.

⁴⁵ *US – Tuna II (EEC)* (n 10).

⁴⁶ Macmillan (n 13) 74.

on (IATTC), including the US and Mexico, signed the ‘La Jolla Agreement’⁴⁷ aimed at gradually reducing dolphin mortality in the ETP.⁴⁸ However, the EEC and The Netherlands were not members of the Commission, which explains how this dispute came into place.⁴⁹

The Panel in the EEC case followed much the same approach as the Panel in the *US – Tuna I (Mexico)* case. As in the previous case, it concluded that the embargoes were not in line with Article XI:1.⁵⁰ However, it was in relation to Article XX (b) and (g) that a slight difference is visible. The Panel stated that the *text* of Article XX does not *a priori* exclude the extraterritorial application of environmental protection policies.⁵¹ After letting out this little ray of sunshine for the environment, the Panel then turned to the already familiar ‘reasonableness’ argument⁵² and further added that if other Members were forced to change their policies, the balance of rights and obligations between contracting parties, especially when it comes to market access, would be seriously impaired.⁵³ Besides the almost *obiter dictum* as regards Article XX, the Panel maintained all of its conclusions from the previous *Tuna* dispute,⁵⁴ while the labelling scheme was not at all challenged by the complainants.

Regardless of the slightly nuanced approach of the Panel in *Tuna II*, the outcome was the same as in the previous dispute – in short, the US measures were found to be contrary to the GATT. One could still interpret this report as the Panel softening its approach by admitting that the bare text of the GATT does not *a priori* exclude extraterritoriality. However, it could also be argued that this reasoning was implicit in the previous dispute and that the Panel was simply more careful in its reasoning, given the strong reactions of environmental groups.

3. The most recent *US – Tuna II (Mexico)* ruling

3.1. Summary of the dispute

3.1.1. Background and the contested measures

With both of the previous *Tuna* Panel reports left unadopted, the US and Mexico managed to (temporarily) settle the issue through negotia-

⁴⁷ La Jolla Agreement for the Reduction of Dolphin Mortality in the Eastern Pacific Ocean (21 April 1992, La Jolla, California).

⁴⁸ Macmillan (n 13) 74.

⁴⁹ *ibid.*

⁵⁰ *US – Tuna II (EEC)* (n 10) [5.10].

⁵¹ *ibid* [5.25].

⁵² *ibid* [5.26].

⁵³ *ibid* .

⁵⁴ *ibid* [6.1]

ting the Agreement on the International Dolphin Conservation Program (AIDCP) in 1999 under the auspices of the Inter-American Tropical Tuna Commission (IATTC).⁵⁵ The AIDCP sets out a labelling scheme – a ‘dolphin-friendly’ label is allowed to be carried by products for which it was shown that there was ‘no significant adverse impact’ on dolphin mortality.⁵⁶ This standard is obviously far less stringent than the US DPCIA standard, which requires evidence to be shown that fishermen were not intentionally setting on dolphins to catch tuna.⁵⁷ After scientific research, the US Department of Commerce concluded that the AIDCP standard is suitable for the US aims.⁵⁸ However, this conclusion was subsequently overturned in *Earth Island v Hogarth*⁵⁹ – a case brought by an environmentalist NGO against the US Secretary of Commerce. Consequently, the US never adopted the AIDCP standard, while its own more stringent DPCIA standard remained in place.⁶⁰ This is precisely the reason why Mexico initiated the third dispute in the *Tuna* saga.⁶¹

The DPCIA prescribes a set of rules that have to be observed by fishermen in order for a tuna product to carry the ‘dolphin-safe’ label. There are five categories of circumstances in which tuna can be caught.⁶² These categories are established by using the criteria of the location of the fishing (inside or outside the ETP), the fishing gear used (purse seine nets or other equipment), the presence or absence of tuna-dolphin interaction in the form of joint travel in the fishing areas concerned, as well as the level of dolphin casualties or injuries.⁶³ In short, for most of the categories, the DPCIA requires written statements of vessels’ captains and independent observers that no dolphins were killed or injured during the harvest and/or that no purse seine nets were used to encircle dolphins in the course of the harvesting voyage.⁶⁴ Mexico challenged the DPCIA and the way it was implemented, as well as the *Earth Island v Hogarth* ruling.⁶⁵ As a novelty in comparison to the first two cases, Mexico challenged the US measures not only under Articles I:1 and III:4 of the GATT, but also under Articles 2.1, 2.2 and 2.4 of the TBT Agreement.⁶⁶ The following part of this paper

⁵⁵ E Trujillo, ‘The Tuna-Dolphin Encore – WTO Rules on Environmental Labelling’ (7 March 2012) 16(7) ASIL <<http://www.asil.org/insights120307.cfm>> accessed 23 April 2013.

⁵⁶ *ibid.*

⁵⁷ *ibid.*

⁵⁸ *ibid.*

⁵⁹ United States Court of Appeals for the Ninth Circuit, *Earth Island Institute v Hogarth*, 484 F.3d 1123 (9th Cir. 2007).

⁶⁰ Trujillo (n 55).

⁶¹ *ibid.*

⁶² Panel report, *US – Tuna II (Mexico)* (n 7) [5.43].

⁶³ *ibid.*

⁶⁴ *ibid.*, see table, 7-8.

⁶⁵ *ibid.* [2.1].

⁶⁶ *ibid.* [3.1].

will only briefly outline the conclusions of the Panel and the AB in this case.

3.1.2. Summary of the Panel findings

The Panel firstly observed the measures under the TBT Agreement,⁶⁷ as this agreement is considered, in relation to the GATT, as ‘dealing in detail, and specifically’ with the matters that it covers.⁶⁸

Mexico claimed in respect of compliance with the relevant TBT provisions that the US measures were a discriminatory and unnecessary technical regulation.⁶⁹ The Panel agreed that this does constitute a technical regulation since compliance with the measure is mandatory in the sense of Annex 1.1 of the TBT Agreement which gives a definition of a technical regulation.⁷⁰ As technical regulations, unlike standards, must comply with the requirements of Article 2, it then continued its analysis under Article 2.1 and concluded that Mexican and US tuna should be considered as ‘like products’ but that Mexican (or any other foreign) tuna was not afforded treatment less favourable in relation to US (domestic) products since the dolphin-safe label does not distinguish tuna products based on the country of origin.⁷¹ However, in respect of Article 2.2, the Panel found that the US measures were more trade-restrictive than necessary to achieve the legitimate objectives of ensuring that consumers are not misled and of protecting the dolphin population.⁷² In examining the measures under Article 2.4, the Panel referred to the AIDCP standard and concluded that it was a relevant international standard⁷³ for the measures in question, but not appropriate or effective to achieve their objectives.⁷⁴ As to the GATT, in exercising judicial economy, the Panel refrained from ruling on Mexico’s claims in that respect.⁷⁵

Therefore, according to the Panel, the US failed to fulfil its obligations under Article 2.2 of the TBT Agreement.

⁶⁷ *ibid* [7.46].

⁶⁸ *ibid* [7.43].

⁶⁹ United States – Measure Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, DS381, <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm> accessed 24 April 2013.

⁷⁰ Panel report, *US – Tuna II (Mexico)* (n 7) [7.145].

⁷¹ *ibid* [7.374].

⁷² *ibid* [7.620]-[7.621].

⁷³ *ibid* [7.702].

⁷⁴ *ibid* [7.730].

⁷⁵ *ibid* [7.748].

3.1.3. Summary of the AB findings

Both the US and Mexico were not satisfied with the report of the Panel. The US challenged the Panel's finding that the measures in question should be deemed as technical regulations,⁷⁶ as well as the conclusion that they were more trade restrictive than necessary,⁷⁷ while also claiming that the AIDCP standard should not be considered as a relevant international standard.⁷⁸ Mexico, on the other hand, urged the AB to uphold the findings which the US had appealed.⁷⁹ It further requested the AIDCP standard to be found appropriate and efficient,⁸⁰ while adding that the dispute should be considered under the GATT as well.⁸¹

Before overruling some of the Panel's findings, the AB firstly confirmed that the measures in question should be considered a technical regulation.⁸² It then parted from the Panel by stating that the measure was inconsistent with Article 2.1 as it was in fact discriminatory because Mexican tuna, unlike US or other tuna, was mostly excluded from accessing the 'dolphin-safe' label.⁸³ It also reversed the Panel regarding the necessity of the measure, by concluding that alternative measures could not be considered as equivalent, thus exonerating the US from the Article 2.2 breach.⁸⁴ As to the last issue on international standards under Article 2.4, the AB did not disagree with the Panel on the lack of suitability of the AIDCP standard,⁸⁵ but added that new parties could accede to the AIDCP only by invitation, which means that the AIDCP should not have been considered as a 'relevant international standard'.⁸⁶

Now that the main consideration of the Panel and the AB in *US – Tuna II (Mexico)* have been outlined, the following section will examine them in detail, while putting the thus generated conclusions into the specific context of the conflict between trade and the environment.

3.2. The technical regulation/standard distinction

The TBT Agreement distinguishes between technical regulations and standards in that technical regulations must be necessary to achieve the

⁷⁶ AB Report, *US – Tuna II (Mexico)* (n 8) [11].

⁷⁷ *ibid* [19].

⁷⁸ *ibid* [30].

⁷⁹ *ibid* [46], [56], [72].

⁸⁰ *ibid* [100].

⁸¹ *ibid* [108].

⁸² *ibid* [199].

⁸³ *ibid* [299].

⁸⁴ *ibid* [333].

⁸⁵ *ibid* [400].

⁸⁶ *ibid* [399].

legitimate aim that they pursue,⁸⁷ while they are applied in a non-discriminatory manner⁸⁸ and are preferably based on international standards, if relevant international standards exist in a given case.⁸⁹ For the purposes of distinguishing technical regulations from standards, both are defined in Annex 1 of the TBT. After comparing the two definitions in the context of the dispute in question, it becomes clear that both a technical regulation and a standard lay down product characteristics or their process and production methods, which can also include labelling.⁹⁰ The difference rests in the fact that compliance with a technical regulation is mandatory, while with a standard it is not.⁹¹ There is also case law on this issue – for example, in *EC – Sardines*⁹² the AB considered that there are three criteria that must be satisfied in order for a measure to be identified as a technical regulation. Firstly, it must apply to an identifiable product; secondly, it should lay down one or more characteristics of that product; and, thirdly, compliance with these characteristics must be mandatory.⁹³

Both the Panel and the AB in *US – Tuna II (Mexico)* concluded that the ‘dolphin-safe’ label under the DPCIA was in fact a technical regulation.⁹⁴ However, if the given arguments are carefully analysed, their conclusions seem quite puzzling.

When it comes to the three criteria set out above, it is quite clear that the ‘dolphin-safe’ labelling system under the DPCIA applies to tuna as an identifiable product and that it lays down a product characteristic of being harvested in a dolphin-friendly manner. Therefore, the issue which remains unresolved here is whether the labelling system should be considered as mandatory. As the US argued, if a certain tuna product does not comply with the requirements prescribed to carry the ‘dolphin-safe’ label, it can still be freely marketed in the US without such a label. Therefore, and along the lines of a separate opinion⁹⁵ of one of the panellists in *US – Tuna II (Mexico)*, the decision to comply is ‘voluntary and discretionary’.⁹⁶ The question is, then, how and *why* the Panel and the AB came to the conclusion that compliance with the DPCIA is mandatory?

⁸⁷ Article 2.2 TBT.

⁸⁸ Article 2.1 TBT.

⁸⁹ Article 2.4 TBT.

⁹⁰ Annex 1.1 and 1.2 TBT.

⁹¹ *ibid.*

⁹² AB Report, European Communities – Trade Description of Sardines (26 September 2002) WT/DS231/AB/R

⁹³ *ibid* [7.25]-[7.30].

⁹⁴ *US – Tuna II (Mexico)*, Panel report (n 7) [4.274]; *US – Tuna II (Mexico)*, AB Report (n 7) [199].

⁹⁵ *US – Tuna II (Mexico)*, Panel report (n 7) [7.152]-[7.153].

⁹⁶ *ibid* [7.153].

It must be underlined that the AB's considerations appear to be contradictory in these terms – '[t]o us, the mere fact that there is no requirement to use a particular label in order to place a product for sale on the market does not preclude a finding that a measure constitutes a technical regulation [...]',⁹⁷ ie that it should be considered mandatory. In further developing this argument, the AB extensively relied on *EC – Sardines*,⁹⁸ where a product could be marketed under the name of 'preserved sardines' only if one particular species of sardines was contained therein, while products containing all other species could still be marketed without the 'preserved sardines' appellation.⁹⁹ In that case, the measure was deemed to be a technical regulation, which led the AB to conclude in this case that the existence of a possibility to legally market a product under a different label does not in itself exclude the measure from the scope of a technical regulation.¹⁰⁰

However, if the technical regulation/standard distinction as envisaged in the TBT is to be maintained, such an interpretation seems hard to apply. The meaning of the notion 'technical regulation' is in this case interpreted in such broad terms that it simply does not leave room for a substantial definition of the term 'standard'. If this interpretation is accepted, then any legal *possibility* to use a certain label is to be considered as a technical regulation, even though a market operator cannot be forced to *comply* with its provisions.

In the context of the treatment of 'green barriers' under the WTO, this consideration in fact puts a burden on any Member wishing to pursue an environmental policy objective. It is only natural that Member States try to push for greater environmental protection by introducing trade measures in a non-compulsory manner, so that they would avoid excessive costs on market operators which are not competitive enough to bear them. However, after *US – Tuna II (Mexico)*, it seems that even such measures cannot escape scrutiny under Article 2 of the TBT.

It should further be noted that both the Panel and the AB emphasised in their reports that the DPCIA also prescribes sanctions against operators which claim their tuna product to be 'dolphin-safe' while not meeting the DPCIA requirements to carry such a label.¹⁰¹ This finding was used as additional support for the argument on the mandatory character of the label in question.¹⁰² However, as Mavroidis points out, even

⁹⁷ *US – Tuna II (Mexico)*, AB Report (n 89) [196].

⁹⁸ *EC – Sardines* (n 92).

⁹⁹ *US – Tuna II (Mexico)*, AB Report (n 8) [198].

¹⁰⁰ *ibid.*

¹⁰¹ *US – Tuna II (Mexico)*, Panel report (n 7) [7.142]; *US – Tuna II (Mexico)*, AB Report (n 8) [140].

¹⁰² *ibid.*

standards need enforcement: ‘if [they] can be used by products that fall short of meeting the established statutory requirements, then they *ipso facto* are denied of any *raison d’être*’.¹⁰³

In relation to the previous argument, the AB also noted that it attaches great significance to the fact that if a tuna product does not meet the DPCIA requirements, a market operator cannot make *any* ‘dolphin-safe’ claim.¹⁰⁴ Does this mean the AB would come to a different conclusion if *another* label, other than ‘dolphin-safe’, could be used instead? If this was the message the AB was trying to convey, it is in order to analyse the consequences of such a conclusion.

In the course of a tuna harvest, dolphins are either harmed or they are not, and so a product is either dolphin-safe or it is not. Consequently, the way in which the absence of harm to dolphins is ensured is what would distinguish different labels. Therefore, the outcome of the technical regulation/standard question might have been different if the US recognised the possibility of carrying the ‘dolphin-safe’ label for products which comply with requirements that achieve the same effect as the DPCIA when it comes to dolphin safety. In the context of reconciling trade objectives with environmental protection, perhaps such a conclusion is not that senseless after all. It follows from the above that if the DPCIA was designed in this way, it would have to be considered voluntary, and therefore a standard escaping scrutiny under Article 2 of the TBT. In this way, environmental policies would be endorsed, while still offering a wide range of possibilities for the market operators. This can also serve to explain why the AB considered the DPCIA label as mandatory – because no other dolphin-safe label was allowed.

Even though there are objections to the reasoning of the Panel and the AB regarding the technical regulation/standard distinction, the mere fact that they chose to consider the DPCIA as a technical regulation does not necessarily mean the battle is lost for environmental protection. It could be argued that this was actually a policy choice, and that the Panel and the AB wanted to make a statement about Article 2 of the TBT in relation to the trade vs environment conflict, which this dispute embodies. How this was done will be dealt with in the following parts of this paper.

3.3. Like products and the ‘PPM distinction’

It should be recalled that Article 2.1 of the TBT agreement prescribes that treatment no less favourable than that accorded to products of

¹⁰³ P Mavroidis, ‘Driftin’ Too Far from Shore (Why the Test for Compliance with the TBT Agreement Developed by the WTO Appellate Body is Wrong, and What Should the AB Have Done Instead)’ (2013) I WTR 21 (emphasis added).

¹⁰⁴ *US – Tuna II (Mexico)*, AB Report (n 8) [196].

national origin should be accorded to 'like' products from other countries. Determining 'likeness' comes as a first step in the analysis of the conformity of the US dolphin-safe labelling scheme with this Article.

In *US – Tuna II (Mexico)*, the Panel held that US and Mexican tuna should be considered as 'like' products.¹⁰⁵ It came to this conclusion by applying the criteria for determining 'likeness' set forth in *EC- Asbestos*.¹⁰⁶ The analysis there involved determining:

(i) the physical properties of the products; (ii) the extent to which the products are capable of serving the same or similar end-uses; (iii) the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand; and (iv) the international classification of the products for tariff purposes.¹⁰⁷

The Panel concluded that the products in question satisfy all of these criteria, and they should, therefore, be considered as 'like' products.¹⁰⁸

Several conclusions can be drawn from this assertion. It is noticeable that the products compared here as to their 'likeness' are *all* US tuna products and *all* Mexican tuna products, regardless of whether they are 'dolphin-safe' or not. Therefore, the 'PPM distinction', ie differentiating between products based on their process and production method, has not been taken into account. This conclusion does not come as a surprise since the issue of the relevance of PPMs has not yet been fully settled in WTO case law. For example, in the first *Tuna* dispute,¹⁰⁹ the Panel considered that PPMs were irrelevant in determining the 'likeness' of products, while in *EC – Asbestos*¹¹⁰ and *Chile – Alcohol*¹¹¹ the conclusion was that they still might be taken into account. Of course, the inclusion of PPMs in determining the 'likeness' of products is an issue that does not relate only to disputes where trade and environment are in conflict, but in fact reflects an issue in the overall approach in WTO case law. Therefore, an attempt to assess PPMs in that context would perhaps go beyond the scope of this paper. Still, it is worth analysing it in the context of the *US – Tuna II (Mexico)* alone.

¹⁰⁵ *US – Tuna II (Mexico)*, Panel report (n 7) [7.251].

¹⁰⁶ AB report, European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, (12 March 2001) WT/DS135/AB/R [102].

¹⁰⁷ *US – Tuna II (Mexico)*, Panel report (n 7) [7.235].

¹⁰⁸ *ibid* [7.251].

¹⁰⁹ *US – Tuna I (Mexico)* (n 9) [5.15].

¹¹⁰ *EC – Asbestos* (n 104) [101]-[102].

¹¹¹ AB Report, Chile – Taxes on Alcoholic Beverages (13 December 1999) WT/DS87/AB/R, WT/DS110/AB/R [46].

As stated above, the Panel compared *all* US and *all* Mexican tuna products as to their 'likeness'.¹¹² In fact, since most US tuna products are considered as 'dolphin-safe' because they carry the label, the comparison was actually made between domestic 'dolphin-safe' tuna products and imported tuna products, regardless of their safety to dolphins. In this respect, Mavroidis argues that the Panel should have compared domestic 'dolphin-safe' tuna products with the imported '*dolphin-safe*' products, which would then allow the Panel to consider if those two groups of products, which pursue the same objective, are treated as required by Article 2.1, ie whether there is less favourable treatment of imported 'dolphin-safe' tuna *on the basis of its origin*. It is beyond doubt that such an approach would definitely favour environmental protection over liberal trade, as the US legislation allows any product meeting the DPCIA requirements to carry the 'dolphin-safe' label, regardless of its origin or the origin of the vessel which caught the tuna. However, this kind of approach would completely miss the point of this dispute – the question is not whether there is discrimination between products that have already accessed the label, but whether the access itself is discriminatory in relation to the origin of the products. In other words, the issue lies in determining whether the requirements imposed by the DPCIA for access to the label constitute a legitimate (non-discriminatory) environmental policy choice. Of course, the possible differences in treatment of domestic and imported 'dolphin-safe' tuna products are not a nugatory issue. However, that debate can be dealt with only *after* determining whether the DPCIA could have been introduced in the first place.

Another issue that the Panel dealt with in greater detail relates to the perception of US consumers of tuna products concerning their safety to dolphins. As a third party, it was the EU which argued that consumer perception and preferences in this respect might have an impact in determining whether the products in question are 'like'.¹¹³ The Panel acknowledged that US consumers indeed to a certain extent distinguish between 'dolphin-safe' and 'dolphin-unsafe' tuna products, but in doing so, they do not distinguish the products as to their origin.¹¹⁴ Moreover, if the Panel accepted that consumer perception in this respect is relevant, that would mean that Mexican tuna products are, in the eyes of consumers, *a priori* considered as 'dolphin-unsafe', which cannot in any way be concluded from the facts of the case.¹¹⁵ Therefore, consumer preference in this case does not have an impact on determining the 'likeness' of the products. This assertion is in fact in accordance with what had previo-

¹¹² Mavroidis, 'Driftn' Too Far from Shore' (n 103) 15-16.

¹¹³ *US – Tuna II (Mexico)*, Panel report (n 7) [7.248].

¹¹⁴ *ibid* [7.249].

¹¹⁵ *ibid* [7.250].

usly been said about the groups of products compared – all US and all Mexican tuna products and how this kind of approach enables the Panel to conclude if the labelling scheme could have been introduced in the first place.

Still, one might argue that consumer perception is relevant for that matter as well. If consumers already distinguish between ‘dolphin-safe’ and ‘dolphin-unsafe’ tuna products, why did the US government have to regulate consumer behaviour in the first place, when consumers are already acting in line with the government’s policy of favouring ‘dolphin-safe’ over ‘dolphin-unsafe’ products?¹¹⁶ At first glance, this argument seems plausible, but only to the extent that it does not take into consideration the fact that ‘dolphin-unsafe’ products are still allowed on the US market, only without the label. In other words, it follows that the US introduced the DPCIA label in order to inform the consumers about which products are ‘dolphin-safe’, so that they can accordingly exercise their previously developed preference for ‘dolphin-safe’ products. It would be completely different if the US had *banned* ‘dolphin-unsafe’ tuna products from the market (as it did in the previous *Tuna* cases) because, given the already developed consumer preference, there would be no need to correct consumer behaviour in forcing them to buy only ‘dolphin-safe’ products.

In conclusion, even though not including the PPM distinction in determining ‘likeness’ might be considered as opting for an ‘environmentally unfriendly’ approach, this does not seem to be the case in *US – Tuna II (Mexico)*. Given the fact that none of the parties appealed on this point and that the AB consequently did not address the issue of ‘likeness’, it is actually the determination of ‘less favourable treatment’ that is more relevant for resolving the conflict between free trade and environmental protection.

3.4. ‘Less favourable treatment’

After determining that the US and the Mexican tuna products are to be considered as ‘like’, the next step under Article 2.1 of the TBT Agreement is to determine if imported ‘like’ products are treated less favourably than domestic ‘like’ products. It must be underlined that the conclusion of the Panel and the AB differ greatly in this respect. They will be examined in turn.

The Panel concluded that there is no less favourable treatment of Mexican tuna products in the case at hand.¹¹⁷ It relied on the AB ruling in *Korea – Various Measures on Beef*¹¹⁸ in finding that the analysis should

¹¹⁶ Mavroidis ‘Driftn’ Too Far from Shore’ (n 103) 11.

¹¹⁷ *US – Tuna II (Mexico)*, Panel Report (n 7) [7.378].

¹¹⁸ AB Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (10

rely on the treatment afforded by the measures themselves, rather than on the consequences that arise due to other factors unrelated to the measure itself.¹¹⁹ In other words, the Panel concluded that the US and the Mexican tuna products are indeed in different positions on the market, as most US tuna products carry the ‘dolphin-safe’ label, while the Mexican ones do not.¹²⁰ However, this is not a result of the measure itself, because the measure applies origin-neutral criteria and allows all tuna products to access the label if they meet the prescribed requirements.¹²¹ Therefore, the potential adverse impact that the Mexican tuna products are experiencing on the US market as a result of not carrying the ‘dolphin-safe’ label is not related to the nationality of the product, but to the ‘fishing and purchasing practices, geographical location, relative integration of different segments of production, and economic and marketing choices’.¹²² To put it simply, the reason why Mexican tuna products are in a less advantageous position in the US market is connected to the choice of Mexican fishing fleets not to abandon the fishing technique of setting on dolphins.¹²³

Unfortunately from an environmentalists’ point of view, the AB reversed¹²⁴ this finding of the Panel. On a preliminary note, it underlined that ‘treatment no less favourable’ should not be determined on the basis of whether imported products have access to an advantage on the market – in this case, that would be the ‘dolphin-safe’ label – but whether ‘the contested measure modifies the conditions of competition to the detriment of imported products’.¹²⁵ It firstly concluded that carrying the ‘dolphin-safe’ label is indeed an advantage in the US market because consumers tend to buy those products more.¹²⁶ Therefore, it is the governmental action in the form of the labelling scheme that has modified the conditions of competition in the market to the detriment of Mexican tuna products.¹²⁷ Hence, the detrimental impact to Mexican products is indeed a consequence of the measure itself.¹²⁸

However, this alone does not automatically render the measure in violation of Article 2.1; it should further be analysed ‘whether the detri-

January 2011) WT/DS161/AB/R, WT/DS169/AB/R [149].

¹¹⁹ *US – Tuna II (Mexico)*, Panel Report (n 7) [7.334].

¹²⁰ *ibid* [7.376].

¹²¹ *US – Tuna II (Mexico)*, Panel Report (n 7) [7.378].

¹²² *ibid*.

¹²³ *ibid*.

¹²⁴ *US – Tuna II (Mexico)*, AB Report (n 8) [297].

¹²⁵ *ibid* [221].

¹²⁶ *ibid* [233].

¹²⁷ *ibid* [239].

¹²⁸ *ibid*.

mental impact reflects discrimination'.¹²⁹ The following part of the AB ruling is hard to understand and it can be stated without exaggeration that it represents the most contentious finding in its report. The AB concluded that while the 'dolphin-safe' labelling scheme fully addresses dolphin mortality in the Eastern Tropical Pacific (ETP) as a result of setting on dolphins, it does not address mortality in other parts of the ocean resulting from other fishing methods.¹³⁰ Therefore, the DPCIA is not 'calibrated' to the risks that different fishing methods impose in different areas of the ocean and the US failed to demonstrate that the detrimental impact on Mexican tuna products 'stems exclusively from a legitimate regulatory distinction'.¹³¹

A couple of remarks are in order.

On the one hand, the finding that discrimination is present, which was the point of this AB exercise, does not flow effortlessly from the finding that the DPCIA was not 'calibrated' to the risks imposed. This consideration of the AB dwells more on the fact that the measure is inconsistent rather than discriminatory. Of course, consistency could have been an issue if the US measure treated the products differently based on their origin – that would have been a clear-cut case of discrimination, but this simply does not follow from the facts of the case. From the viewpoint of environmental protection, this conclusion is far from satisfactory. A 'green barrier' once again failed to pass the 'WTO test'.

On the other hand, things might not be as dark for the environment as they seem. *Argumentum a contrario* to what had been stated by the AB, if the US *had* calibrated the risks, the measure would *not* have been found in violation of Article 2.1. In other words, the US labelling scheme should have included strict requirements not only for tuna caught *inside* the ETP, but for tuna caught *outside* the ETP as well in order to remedy the discrimination. The AB even seems to have given a hint on how this could be done.¹³² It suggested that certification from an independent observer that no dolphins were harmed during a fishing voyage outside the ETP would be sufficient, for example by simply asking the captain of the vessel to provide the relevant document.¹³³ This suggestion of the AB is quite striking as it would not contribute to trade liberalisation. In other words, if this suggestion is indeed implemented, the US market would not open up for Mexican tuna products. Nothing would change for Mexico

¹²⁹ *ibid* [240].

¹³⁰ *ibid* [297].

¹³¹ *US – Tuna II (Mexico)*, AB Report (n 8) [297].

¹³² J Pauwelyn, 'Tuna: The End of the PPM distinction? The Rise of International Standards?' (*International Economic Law and Policy Blog*, 22 May 2012) < <http://worldtradelaw.typepad.com/ielpblog/2012/05/tuna-the-end-of-the-ppm-distinction-the-rise-of-international-standards.html> > accessed 21 April 2013.

¹³³ *US – Tuna II (Mexico)*, AB Report (n 8) [296], [297]. See also Pauwelyn (n 132).

as an ETP fishing nation, while other nations fishing outside the ETP (the US included) would have to deal with the stricter requirements.

It can be concluded from the above that the AB in fact implicitly opted for environmental protection. Even though the US measure failed to pass its scrutiny, there are obviously ways to rectify the contravention while still protecting the dolphins, in fact even to a greater extent, rather than loosening the labelling requirements in favour of free trade. Nevertheless, one cannot help but wonder what would happen if the US indeed ‘calibrated’ the measure. Mexico would have to deal with greater costs of dolphin-friendly tuna fishing, which it might or might not be able to support. This shows that perhaps opting for either trade or environment in fact is not the answer. However, since in WTO dispute settlement a measure is either upheld or is not, considering a solution which does neither could lead to reconsidering the overall approach to trade measures, which would overstep the boundaries of this paper.

A further consideration that arises here is whether such a ‘calibrated measure’ would be found WTO compliant in the end. This hypothetical question that reveals new perspectives on the conflict between trade liberalisation and environmental protection will be dealt with in Part 4 of this paper.¹³⁴ But before going into that, the remainder of the Panel’s and AB’s findings in *US – Tuna II (Mexico)* still needs to be addressed. The following part deals with one of the crucial issues for this debate – the application of (US) environmental policies outside its jurisdiction (Mexico).

3.5. Extraterritorial application of environmental policies

Before going into the details of *US – Tuna II (Mexico)* regarding this issue, it should be recalled that in the previous *Tuna* disputes, the question of unilaterally imposing environmental policies which results in their application outside the territory of the regulating country was raised in relation to Article XX of the GATT and its (un)availability for use to justify such measures. In *US – Tuna II (Mexico)*, the extraterritoriality issue was treated slightly differently than in the previous *Tuna* cases, given the TBT context as well as the jurisprudence developed in the meantime.

In the proceedings before the Panel, Mexico was obviously hoping to push the debate¹³⁵ in the direction of the so-called ‘reasonableness’¹³⁶ or ‘slippery-slope’¹³⁷ argument, which was the turning point in the first two *Tuna* cases. As already stated above, the Panel’s ‘all-or-nothing

¹³⁴ Part 4.2 of this paper.

¹³⁵ *US – Tuna II (Mexico)*, Panel Report (n 7) [4.189]-[4.198].

¹³⁶ Rosas (n 32) 82.

¹³⁷ R Howse, ‘The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate’ (2002) 27 *CJEL* 507.

approach¹³⁸ in those two cases basically relied on the consideration that if contracting parties were allowed to unilaterally impose environmental policies outside their jurisdiction, other contracting parties could not deviate from the set requirements without jeopardising their rights under the GATT.¹³⁹ Moreover, the GATT would cease to be a multilateral trade framework, as legal certainty in respect of trade would only be maintained between countries with the same internal regulation.¹⁴⁰

This conclusion has, however, been modified in between the second and the most recent *Tuna* case only in relation to Article XX of the GATT. The controversial AB report in *US – Shrimp*¹⁴¹ introduced a very bold statement regarding this issue. Given that the AB was heavily criticised at the time, as some considered that it should have left the matter to be settled through negotiation rather than litigation,¹⁴² the famous paragraph 121 deserves to be cited in full:

It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country, renders a measure a priori incapable of justification under Article XX. Such an interpretation renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply.¹⁴³

When it comes to protecting the environment under the WTO, this finding certainly goes in its favour. Not only because the ‘reasonableness’ argument seems to have been dropped, but also because the AB implicitly recognised that, given the difficulties in reaching a consensus in international negotiations on environmental agreements, some leeway should still be given to countries with environmentally friendly policies. After all, any measure that makes use of Article XX may require a change of policy in exporting countries, but that is inherent to the fact that it is an exception to the general rules.¹⁴⁴ Therefore, the ‘reasonableness’ argument indeed renders the use of Article XX devoid of its purpose.

In the subsequent cases, namely *US – Shrimp II*,¹⁴⁵ the AB confirmed that the extraterritorial application of unilaterally adopted environmen-

¹³⁸ Dunoff (n 5) 1416.

¹³⁹ *US – Tuna I (Mexico)* (n 9) [5.27]

¹⁴⁰ *ibid.*

¹⁴¹ AB Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products (12 October 1998) WT/DS58/AB/R.

¹⁴² Howse (n 137) 17.

¹⁴³ *US – Shrimp* (n 141)[121].

¹⁴⁴ N Notaro, *Judicial Approaches to Trade and Environment – The EC and the WTO* (Cameron May 2003) 191.

¹⁴⁵ AB report, United States – Import Prohibition of Certain Shrimp and Shrimp Products (22 October 2011) WT/DS58/AB/RW.

tal policy measures is justifiable under Article XX,¹⁴⁶ but it added that the adoption of such measures must be preceded by ‘serious negotiating efforts’.¹⁴⁷ To a certain extent, this finding cast doubt as to whether paragraph 121 from the first *US – Shrimp*¹⁴⁸ case can still be considered as a matter of principle. That is why *US – Tuna II (Mexico)* is all the more important, as it laid down a suitable set of facts that would once again invoke this issue. The only difference is that in *US – Tuna II (Mexico)* the extraterritoriality problem had to be solved not in the context of only Article XX of the GATT, but also in the context of the TBT. The TBT, however, had never been discussed in this respect before.

In addressing the issue of extraterritoriality, the Panel in *US – Tuna II (Mexico)* firstly reiterated the AB in *US – Shrimp I* and quoted the famous paragraph 121 word for word.¹⁴⁹ It then easily concluded that the same principle applied to Article 2.1 of the TBT as well.¹⁵⁰ Up to this point, it seems that the possibility to justify extraterritorially applicable environmental policies is recognised as a fully fledged principle. Moreover, this principle goes beyond the GATT and covers the TBT too.

However, the Panel then noted that the US labelling scheme does not require another *Member State* to comply with any particular fishing method, but that it is the *products themselves* that need to comply with the requirements of the labelling scheme,¹⁵¹ thus ensuring that the US market is not used as an incentive to fleets to harvest tuna by setting on dolphins.¹⁵² The second part of this statement on the aim of the measure might be welcomed by environmentalists as additional support to extraterritoriality on behalf of the Panel, but it is the first part that seems somewhat worrying. In other words, one could argue that the conclusion of the Panel in fact poses certain limits: because the US measures are aimed at the products and not the policies of other Member States, it is possible to justify unilateralism. Perhaps the Panel’s conclusion would have been the exact opposite if the measures actually prescribed that no tuna may be imported if it comes from a country where tuna is caught by setting on dolphins,¹⁵³ thus ‘forcing’ that country to change its policy if it wanted to maintain trade relations in respect of tuna products. This, however, would raise the issue of discrimination between ‘dolphin-friendly’ and ‘dolphin-unfriendly’ countries in the sense of Article 2.1 of the TBT and the Most Favoured Nation principle set forth therein.

¹⁴⁶ *ibid* [123]-[124].

¹⁴⁷ *ibid*.

¹⁴⁸ *US – Shrimp* (n 141).

¹⁴⁹ *US – Tuna II (Mexico)*, Panel Report (n 7) [7.371].

¹⁵⁰ *ibid*.

¹⁵¹ *ibid* [7.372].

¹⁵² *ibid*.

¹⁵³ *ibid*.

After a detailed analysis of the Panel's findings, it is worth noting that the AB did not refer to the issue of extraterritoriality in its report, despite Mexico's efforts to steer the discussion in this respect.¹⁵⁴

In the end, the Panel's findings can still be seen as a step forward in recognising 'green barriers' under the WTO. Perhaps the greatest novelty is that the TBT Agreement is apparently also covered by the *US – Shrimp*¹⁵⁵ doctrine, despite all the possible limitations that might exist, including the fact that it has not yet been confirmed by the AB. Besides, this is not where the debate ends. The following part of this paper will treat the necessity requirements under Article 2.2 of the TBT, as applied in *US – Tuna II (Mexico)*.

3.6. The 'necessity' test

It should be recalled that Article 2.2 of the TBT stipulates that 'technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create'. It then gives an open-ended list of objectives deemed legitimate, including the prevention of deceptive practices, protection of animal life and the environment.

In its report, the Panel concluded that the US measure followed a twofold objective. Firstly, the 'consumer information objective' which aims at 'ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins',¹⁵⁶ and secondly, the 'dolphin protection objective' which seeks 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'.¹⁵⁷ Then, the Panel quite easily concluded that these objectives are to be considered as 'legitimate' because they fall under the broader goals of preventing deceptive practices and protecting animal life or health or the environment, both of which are listed in Article 2.2 of the TBT.¹⁵⁸

As to whether the measure is more trade-restrictive than necessary, the Panel examined if there was a reasonably available alternative measure which was less trade-restrictive but still achieved the set objectives at the same level.¹⁵⁹ As an alternative measure, Mexico suggested the coexistence of both the US 'dolphin-safe' label and the AIDCP label which

¹⁵⁴ *US – Tuna II (Mexico)*, AB Report (n 8) [61], [86], [n 675].

¹⁵⁵ *US – Shrimp* (n 141).

¹⁵⁶ *US – Tuna II (Mexico)*, Panel Report (n 7) [7.401], [7.413],

¹⁵⁷ *ibid* [7.401], [7.425].

¹⁵⁸ *ibid* [7.437].

¹⁵⁹ *ibid* [7.465].

prescribes less stringent requirements for obtaining it.¹⁶⁰ It is interesting to note here that the following assessment of the Panel was subsequently used by the AB in determining whether there was ‘less favourable treatment’ under Article 2.1.¹⁶¹ Basically, the Panel concluded that since the US DPCIA label does not take into account adverse effects on dolphins outside the ETP, it only partially meets the pursued objectives.¹⁶² On the other hand, the proposed alternative to use the AIDCP label achieves the set objectives at the same level, to the extent that it does not create any additional adverse impact on dolphins or any additional ambiguity as to consumer information.¹⁶³

As has already been mentioned, the AIDCP is less stringent compared to the US scheme under the DPCIA.¹⁶⁴ Therefore, the Panel’s conclusion simply cannot stand. The AB came to the same result – it is true that *outside* the ETP there is no difference between the US scheme and the AIDCP;¹⁶⁵ however, as for tuna caught *inside* the ETP, the AIDCP is obviously not as strict as the DPCIA, so both the consumer information and dolphin protection objectives would be achieved to a lesser degree.¹⁶⁶ Therefore, the US scheme is not more trade restrictive than necessary within the meaning of Article 2.2 of the TBT.¹⁶⁷

It could be argued that these findings, taken on their own, do not bear significant relevance for the overall conflict between free trade and environmental protection in the WTO arena, as they are more or less confined to the specific facts of this case. However, they will turn out to be very useful in assessing later in this paper the possibilities of adopting a new general approach in the WTO towards the reconciliation of free trade and environmental interests.¹⁶⁸

In any event, it is worth noting that the AB, even if as an *obiter dictum*, noted that a Member State is allowed to achieve the legitimate objectives ‘at the levels it considers appropriate’,¹⁶⁹ which obviously includes high levels of protection of the environment. If this assertion is read in conjunction with the AB’s suggestion on how the US should ‘calibrate’ its measures to avoid discrimination, it becomes at least perceivable that a ‘green barrier’ could be allowed under the usually trade-

¹⁶⁰ *US – Tuna II (Mexico)*, Panel Report (n 7) [7.577], [7.578].

¹⁶¹ Part 3.4 of this paper.

¹⁶² *US – Tuna II (Mexico)*, Panel Report (n 7) [7.599], [7.615].

¹⁶³ *ibid* [7.577], [7.578], [7.618].

¹⁶⁴ See Part 3.1.1 of this paper.

¹⁶⁵ *US – Tuna II (Mexico)*, AB Report (n 8) [329].

¹⁶⁶ *ibid* [330].

¹⁶⁷ *ibid* [333].

¹⁶⁸ Part 5 of this paper.

¹⁶⁹ *US – Tuna II (Mexico)*, AB Report (n 8) [316].

oriented WTO rules. Whether this is indeed so and whether it is a result of the application of the TBT instead of the GATT will be examined in the following part of this paper.

4. The TBT instead of the GATT – any change for the environment?

As the previous parts of this paper have shown, there are quite a few differences between the most recent *US – Tuna II (Mexico)* and the previous two *Tuna* cases. One of them, which has not yet been addressed in this paper, reflects a fundamentally different approach of the Panel to the case at hand, also followed by the AB. In *US – Tuna II (Mexico)* the measures at issue were analysed under the TBT Agreement and not under the GATT as the previous ones were. This is a consequence of two considerations. First of all, at the time of the two previous *Tuna* disputes the TBT had not yet entered into force.¹⁷⁰ Second, it follows from *EC – Asbestos*¹⁷¹ that a measure should firstly be examined in light of the TBT since that agreement deals ‘specifically and in greater detail’ with technical barriers to trade.¹⁷² Only if a measure is found to be TBT consistent is further analysis under the GATT in order.¹⁷³ Since the measure in *US – Tuna II (Mexico)* was considered to be in violation of the TBT, the Panel exercised judicial economy and refrained from deciding the matter on the GATT.¹⁷⁴

Considering that *US – Tuna II (Mexico)* turned out to be the most ‘environmentally friendly’ of all *Tuna* cases, it can be argued that it was the application of the TBT instead of the GATT that opened up a niche for the recognition of ‘green barriers’ to trade. In this respect, it is in order to assess how the specific design and structure of the TBT adapts to striking a balance between environmental protection and economic prosperity deriving from free trade.

4.1. The suitability of the TBT to tackle ‘green barriers’ to trade

First of all, the TBT Agreement promotes international standardisation.¹⁷⁵ Members are obliged to use international standards as a basis for their technical regulations and are allowed to depart from them only ‘when such international standards [...] would be an ineffective or inappropri-

¹⁷⁰ The date of the entry into force of the TBT Agreement is 1 January 1995.

¹⁷¹ Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, (18 September 2000) WT/DS135/R.

¹⁷² *ibid* [8.16].

¹⁷³ P Van den Bossche, D. Prévost, M. Matthee, ‘WTO Rules on Technical Barriers to Trade’ (2005/6) Maastricht Faculty of Law Working Papers 14.

¹⁷⁴ *US – Tuna II (Mexico)*, Panel Report (n 7) [7.748].

¹⁷⁵ P Mavroidis, *Trade in Goods: The GATT and the Other WTO Agreements Regulating Trade in Goods* (2nd edn, OUP 2012) 670.

te means for the fulfilment of the legitimate objectives pursued',¹⁷⁶ as required by Article 2.4. Therefore, in order to avoid violations of the TBT, Members are, at least in theory, inclined to engage in negotiations in order to find common accord with other Members as to the introduction and use of a particular international standard. Of course, the relevance of this feature of the TBT is less visible in the course of WTO *litigation*, when the usual course of action is to determine whether the departure from international standards is in line with the already discussed Articles 2.1 and 2.2 of the TBT. As is visible from the previous parts of this paper, an example of such a case is the here treated *US – Tuna II (Mexico)* where the largest portion of legal analysis bore on Articles 2.1 and 2.2, while it was stated at the very end that the AIDCP standard would not be an appropriate tool to achieve the set objectives.¹⁷⁷ Even though *US – Tuna II (Mexico)* is probably not a good example of successful international standardisation, it is worth noting that the US and Mexico still made an effort to try and find a solution by means of an international agreement aimed at protecting an environmental value. Of course, this might have been a result of their previous litigation under the GATT concerning the same issue.¹⁷⁸ Still, as an overall observation, international standardisation is a useful tool to tackle cross-border environmental protection and the TBT certainly endorses such a tool.

Secondly, the TBT Agreement has a different focus from that of the GATT,¹⁷⁹ which enables it to address environmental policies more comprehensively. In the TBT, consumers' perceptions are immaterial because the TBT applies once a Member State decides to regulate certain products¹⁸⁰ in order to steer consumer behaviour towards its legitimate policy objectives. Therefore, a legitimate objective has already been identified and applied before the TBT 'kicks in'.¹⁸¹ This feature of the TBT is quite useful as it avoids unnecessary hurdles in determining the 'likeness' of products vis-à-vis their process and production method that is not reflected in the physical characteristic of the product ('unincorporated PPMs'¹⁸²). Although this issue has never been settled in a Panel or AB report, the very design of the TBT provisions indicates that it regulates unincorporated PPMs as well because at least some of the legitimate

¹⁷⁶ Article 2.4 of the TBT Agreement (emphasis added).

¹⁷⁷ *US – Tuna II (Mexico)*, Panel Report (n 7) [7.740]; *US – Tuna II (Mexico)*, AB Report (n 8) [401].

¹⁷⁸ *US – Tuna I (Mexico)* (n 9); *US – Tuna (EEC)* (n 10).

¹⁷⁹ Mavroidis, *Trade in Goods* (n 175) 691.

¹⁸⁰ *ibid.*

¹⁸¹ *ibid.*

¹⁸² World Trade Organisation, "Environment: Issues – Labelling" <http://www.wto.org/english/tratop_e/envir_e/labelling_e.htm> accessed 23 April 2013.

objectives listed in Article 2.2 could not be achieved by other means.¹⁸³ One of these objectives is certainly environmental protection, and *US – Tuna II (Mexico)* serves here as a perfect example. One might argue then that it would be more favourable for Members' environmental policies to leave unincorporated PPMs outside the scope of the TBT. However, the point of the exercise is not to opt for environmental protection no matter what, but to try and find a balance between environmental protection and free trade. In this respect, the TBT in fact endorses striking such a balance, since, at least in theory, it allows environmental policies to 'survive' the test under Articles 2.1 and 2.2, especially by taking into account the risks that non-application of these policies would create.¹⁸⁴

However, *US – Tuna II (Mexico)* shows that passing the scrutiny of the Panel and the AB under the TBT is not at all an easy task, which brings us to the next consideration.

The TBT can in fact be considered 'stricter' than the GATT.¹⁸⁵ The TBT is more burdensome for regulators because they have to comply with an additional requirement which goes beyond non-discrimination, which is the necessity requirement.¹⁸⁶ From the perspective of 'green barriers', even under the GATT the necessity requirement comes into play in a very particular case – that of Article XX (b), under which a regulator is allowed to deviate from the non-discrimination provisions if the measure is 'necessary to protect human, animal or plant life or health'. In other words, a measure under the GATT can be discriminatory but still pass the necessity test under the justifications part. However, it should be noted that the 'rule-exception' relationship which Article XX has with the non-discrimination obligations under the GATT is not replicated in the TBT Agreement.¹⁸⁷ Under the latter, it seems that a measure must pass both the non-discrimination test under Article 2.1 and the necessity test under 2.2.¹⁸⁸ Consequently, regulators bear a heavier burden in bringing their 'green barriers' in line with the TBT, which might also provoke a certain 'chilling effect' on potential regulators, as opposed to a situation where the regulations are subject only to the GATT.¹⁸⁹

All in all, it seems that the TBT Agreement does not entail a substantially more favourable environment for 'green barriers'. Only with respect to PPMs does it offer a more comprehensive analysis of their compliance with WTO obligations, which does not necessarily mean that it is thus

¹⁸³ Commentary of R Howse in Pauwelyn (n 132).

¹⁸⁴ Article 2.2 of the TBT Agreement.

¹⁸⁵ Mavroidis, *Trade in Goods* (n 175) 671.

¹⁸⁶ *ibid.*

¹⁸⁷ Van den Bossche, Prévost, Matthee (n 173) 16.

¹⁸⁸ Mavroidis, *Trade in Goods* (n 175) 671.

¹⁸⁹ *ibid.*

more conducive for justifying ‘green barriers’, especially given the already mentioned extra-burden in the form of the compulsory necessity test.

Nevertheless, regardless of all these considerations, even if a ‘green barrier’ is found to be TBT-compliant, it follows from *EC – Asbestos*¹⁹⁰ and *EC – Sardines*¹⁹¹ that it would still have to be examined under the GATT. Therefore, to the extent that the TBT is not treated as a substitute to the GATT, a TBT-compliant ‘green barrier’, or any measure for that matter, must be GATT-compliant as well.

This conclusion opens a new discussion. It is recalled from Part 3.6 of this paper that in *US – Tuna II (Mexico)* the AB suggested that a more ‘calibrated’ US ‘dolphin-safe’ label would be in line with the TBT. In other words, if the label had addressed the risks for dolphins outside the ETP, it would not have been found in violation of Article 2.2 of the TBT. In line with what was previously said about the relationship between the TBT and the GATT, such a hypothetical measure would have to be found GATT-compliant if it were to be lawfully maintained. Of course, it can only be presumed that the US will try to follow this suggestion of the AB. Still, if the developments in the trade vs environment conflict brought by *US – Tuna II (Mexico)* are to be fully addressed, an analysis of this hypothetical, ‘calibrated’ label under the GATT is in order. If it is possible for such a measure to pass scrutiny under the GATT, it can be concluded that there is hope for ‘green barriers’ under the WTO.

4.2. A glimpse into the future – the ‘calibrated’ label under the GATT

The hypothetical measure to be examined is a ‘dolphin-safe’ labelling scheme which imposes requirements on fleets as to the methods used and the harm caused to dolphins, regardless of their country of origin, which harvest tuna both inside the ETP, where a dolphin-tuna association is present to a high degree, and outside the ETP, where such an association exists only to a lesser degree. Following Mexico’s claims in *US – Tuna II (Mexico)*, this hypothetical measure will be examined under GATT Articles I:1 and III:4.¹⁹² These Articles basically stipulate an obligation not to discriminate among imported like products based on their origin (Most Favoured Nation) as well as not to discriminate against imported like products so as to afford protection (National Treatment).

Surprisingly, whether the hypothetical measure was in line with these GATT provisions was in fact already answered in the first *US – Tuna I (Mexico)* dispute, albeit implicitly. It should be recalled that even in this

¹⁹⁰ *EC – Asbestos* (n 171) [8.16].

¹⁹¹ *EC – Sardines* (n 92) [313].

¹⁹² *US – Tuna II (Mexico)*, Panel Report (n 7) [3.1].

first *Tuna* case, the ‘non-calibrated’ DPCIA labelling system was in place and the Panel quite easily concluded that it did not violate the GATT since in affording the label it did not distinguish products as to their origin (!).

However, in order to fully analyse this issue, it should further be considered whether the hypothetical measure could be considered as protectionist.¹⁹³ In order to examine this, the findings of the Panel in *US – Tuna II (Mexico)* seem to be quite useful. The Panel concluded that the US fleets fish mostly outside the ETP, while Mexico fishes mostly inside the ETP. If the labelling scheme is not ‘calibrated’ as suggested by the AB, the requirements for obtaining the label for tuna caught outside the ETP are far less stringent than for tuna caught inside the ETP. This could be considered as an indication of a protectionist intention of the US because US fleets are thus *de facto* in a more advantageous position than the Mexican fleets. On the contrary, this argument could not be used against the hypothetical ‘calibrated’ labelling scheme, because the ‘calibrated’ label would address the risks for dolphins outside the ETP as well, thus imposing more stringent requirements for the US fleet too.

It can, therefore, be concluded that the hypothetical ‘calibrated’ measure would be considered as consistent with the relevant provisions of the GATT. Given that the TBT is considered to entail a greater burden for regulators, as argued in the previous part of this paper,¹⁹⁴ this conclusion is not surprising.

As an overall conclusion to Part 4, *US – Tuna II (Mexico)* and the further points of analysis it raised show that the TBT is not particularly more favourable for ‘green barriers’ than the GATT. It is more likely that the opposite is true, but that could be argued in relation to any measure, regardless of whether it follows an environmental policy or not. Still, it should be acknowledged that the AB in *US – Tuna II (Mexico)* turned out to be more ‘environmentally friendly’ than the Panel in the previous *Tuna* disputes, especially by hinting to the US how it could maintain its dolphin protection policy without contravening WTO rules. Although minute, this difference in approach should still be regarded as progress towards finding a balance between environmental protection and free trade. The next part will, however, analyse the possible changes in the *overall* approach to striking that balance which should be adopted in WTO dispute settlement.

5. Suggestions for a new approach

Although a slight shift in the approach in the WTO dispute settlement is visible in *US – Tuna II (Mexico)*, the case does not bring a major

¹⁹³ As required by Article III:1 of the GATT.

¹⁹⁴ Part 4.1 of this paper.

change. In other words, the AB report does not introduce a new principle or substantial change to the already settled approach in addressing measures under the TBT. It especially does not adapt the analysis to the specific case of ‘green barriers’ to trade. After all, it is not hard to imagine that the AB’s ‘hint’ to the US on how to maintain its environmental policy is simply confined to the specific facts of the case. There is no guarantee that future cases would have similar implications. Moreover, even in this case, the US did not manage to defend its dolphin protection policy as it stands today. Therefore, questions can be asked about what kind of approach should be adopted in order to make the WTO more friendly towards ‘green barriers’.

5.1. The ‘emergency’ approach

Zhao¹⁹⁵ suggests a version of a balancing test between an environmental measure and trade liberalisation. Basically, if the lack of a measure can lead to a serious consequence, such as the extinction of a species, environmental protection should prevail.¹⁹⁶ In other words, Zhou suggests the application of an ‘emergency’ or ‘urgency’ criterion in the analysis.

It is true that this suggestion was made in the context of Article XX of the GATT, but it should still be noted that something similar to an ‘emergency’ criterion is actually already implemented in the TBT Agreement. Article 2.2 stipulates that the necessity test involves examining the risks non-fulfilment of a set objective (ie environmental protection) would create. Therefore, in the context of the TBT, the contribution of this approach is of little relevance. However, even in the context of the GATT, which does not provide such a provision, there are some further issues. To be more specific, it is difficult to define what an urgent measure actually is. Zhou gives an example of a measure which, if not implemented, would lead to the extinction of a species. This is far from satisfactory. First of all, such an approach requires extensive support in science and sometimes not even science can give a straightforward answer. For example, if measures which seek to rectify global warming were to be introduced, scientific evidence would be of little assistance as there is still no consensus in scientific circles as to whether certain techniques would be able to reverse it.¹⁹⁷ This, on the other hand, does not mean that the measure should not be allowed, especially if it does not create significantly adverse

¹⁹⁵ Y Zhao, ‘Environmental Protection vs Free Trade: A Quest for a More Balanced Approach within the WTO’ in K Van der Borgh (ed), *Essays on the Future of the WTO: Finding a New Balance* (Cameron May 2003) 205, 223.

¹⁹⁶ *ibid.*

¹⁹⁷ UK Royal Society, *Geoengineering the Climate: Science, Governance and Uncertainty* (UK Royal Society Policy Document 10/09, September 2009).

effects on trade liberalisation. Secondly, the application of such a criterion sets the bar too low for many regulating countries. For example, the EU strongly endorses the application of the precautionary principle,¹⁹⁸ which entails regulation as early as when there is a risk that adverse effects for the environment might occur. It appears that a precautionary approach, to the extent that it involves a high level of environmental protection, is also in line with the WTO case law, since the AB in *US – Tuna II (Mexico)* acknowledged that a Member is allowed to achieve the legitimate objectives ‘at the level it considers appropriate’.¹⁹⁹

Therefore, the application of an ‘emergency criterion’ would not contribute to reconciling trade liberalisation and environmental protection in an appropriate manner, as it would result in opting for environmental protection only in exceptional cases.

5.2. The ‘limiting principles’ approach

Dunoff²⁰⁰ suggests the introduction of what he calls ‘limiting principles’ which aim to find a subtle balance between environmental protection and free trade. This involves examining (i) the type and strength of the environmental interest protected, (ii) whether there is discrimination between domestic and imported or among imported products, and (iii) whether the trade restriction is suitable and proportionate in achieving the environmental aim.²⁰¹ Some of these elements, namely (ii) and (iii), are already present in the WTO jurisprudence. What is new in this approach is that it largely relies on scientific evidence to show the strength of the environmental interest²⁰² and further entails a balancing exercise between the risks for the environment and the costs for trade.²⁰³ However, the ultimate decision on which level of risk for the environment would be acceptable remains to be resolved by means of political decisions in the global community.²⁰⁴

Although the approach is quite elaborate, the crucial downside is the fact that the most important issue of deciding what is acceptable and what is not still remains in the political arena. It is quite obvious that a consensus in the global community on environmental protection, preferably including the adoption of various international instruments, would be ideal. However, this scenario is simply unrealistic. After all, not dealing with environmental issues at the international level is one of the

¹⁹⁸ Article 191 TFEU.

¹⁹⁹ *US – Tuna II (Mexico)*, AB Report (n 8) [316].

²⁰⁰ Dunoff (n 5)18-24.

²⁰¹ *ibid* 19.

²⁰² *ibid* 20.

²⁰³ *ibid*.

²⁰⁴ *ibid*.

reasons why some Members tend to unilaterally adopt trade-restrictive environmental policies, which then creates litigation in the WTO. Solving the cause with the cause obviously cannot be the answer.

5.3. The ‘consistency approach’

The author of this paper suggests that a so-called ‘consistency approach’ should be adopted instead. Basically, the underlying postulate of this approach suggests that if a lack of protectionism of domestic products is demonstrated, then the environmental concerns should prevail. When it comes to the end result of a dispute, or, in other words, how a measure will be qualified in dispute settlement, simple logic tells us that there are only two sides of the coin – either it will be considered that the regulating country indeed wishes to protect the environment or that it is trying to conceal its protectionist intention behind its environmental policies. Therefore, if the measure is not protectionist, then it must reflect genuine environmental concern and should thus be allowed.

The question is then how the protectionist intent can be demonstrated. This has been a cumbersome debate under the GATT for years²⁰⁵ but perhaps *US – Tuna II (Mexico)* and its particular TBT context can provide some answers. As has been demonstrated in previous parts of this paper,²⁰⁶ the AB held that discrimination is present in the case at hand because the measure was not ‘calibrated’ to the risks for dolphins in all parts of the ocean. It was also demonstrated that discrimination does not follow from the lack of ‘calibration’. The author believes that the message the AB was trying to convey, but it did not have support in the text of the TBT Agreement, was that by *de facto* imposing stricter standards on Mexican vessels which fish in the ETP than on its own fleet which fishes outside the ETP, the US in fact acted in a protectionist manner and that is why its ‘dolphin-safe’ labelling system did not pass examination under the TBT. Therefore, the approach suggested here should consist of examining if there is *consistency* in the overall structure and application of the contested measure, ie if the measure poses an equal burden both on the domestic and on foreign market operators. After all, if the US wanted Mexico to replace its fishing techniques with those that are more dolphin-friendly, it should have made the effort and ensured that indeed its own fleet bears the costs of protecting dolphins in all parts of the ocean.

This ‘consistency approach’ would also be compatible with the approach based on a ‘legitimate regulatory purpose’ put forward by a

²⁰⁵ A Mattoo, A Subramanian, ‘Regulatory Autonomy and Multilateral Disciplines: The Dilemma and a Possible Resolution’ (1998) 1(2) JIEL 306.

²⁰⁶ Part 3.4 of this paper.

number of academics.²⁰⁷ The notion of ‘consistency’ would facilitate the search for such a purpose in the examination of the disputed measures, as the fact that both domestic and foreign market operators are burdened excludes the possibility that there was a protectionist purpose behind the measures. The same criterion would also, at least indirectly, overrule measures which are not protectionist but are in fact irrational in other ways (eg not based on an actual threat for the environment). Knowing that such a measure could pass the scrutiny in WTO dispute settlement only if it burdens all market operators - *including domestic ones* - equally, it can be assumed that regulators would be reluctant to disadvantage the position of the products from their country just to achieve the same effect on foreign products and market operators.

The author further asserts that even though this approach might already have been implicitly adopted by the AB in *US – Tuna II (Mexico)*, it should be recognised as a matter of principle. Taken together with the ‘usual’ consideration on discrimination and necessity, the ‘consistency test’ would create a number of benefits. On the one hand, the conflict between environmental concerns and trade liberalisation would be addressed more comprehensively in a balancing exercise that does not go to such lengths that would be inappropriate for a heterogeneous organisation like the WTO. On the other hand, the issue of protectionism as one of the greatest ‘enemies’ of free trade would be addressed in an open manner without endangering the genuine environmental policy objectives of regulating countries.

However, one question still remains unanswered and that is whether and how less developed countries, such as Mexico compared to the US, would be able to handle the additional costs the elevated environmental standards entail. Indeed, the suggested approach does not properly address the antagonism between ‘the rich and the poor’, but perhaps WTO dispute settlement is not an appropriate arena to do so.

6. Conclusion

The aim of this paper was to examine how the WTO tackles the very delicate problem of reconciling trade liberalisation and environmental protection. On the one hand, some countries are pushing for free trade in order to facilitate economic prosperity, while others, unsatisfied with the lack of response of the international community to environmental concerns, introduce environmental regulation in the form of trade barriers. Such ‘green barriers’ are supposed to be aimed at genuinely protecting

²⁰⁷ D Regan, ‘Regulatory Purpose in GATT Article III, TBT Article 2.1, the Subsidies Agreement, and Elsewhere: Hic et Ubique’ in G Van Calster and D Prévost (eds), *Research Handbook on Environment, Health and the WTO* (Edward Elgar Publishing 2013) 41-78.

the environment, but sometimes countries use them to conceal their protectionist intentions. Therefore, striking a balance between these interests is a delicate exercise, especially in a heterogeneous community like the WTO. Unfortunately for the environment, the WTO most often strikes that balance far from the equilibrium, almost completely opting for trade liberalisation.

The conflict between free trade and environmental protection in the WTO was examined on the basis of the most recent *US – Tuna II (Mexico)* ruling. This case serves as a perfect ground for analysis, not only because of its factual background, but also because it is the third one in the *Tuna* saga and as such it allows us to see possible progress in the WTO's approach.

The analysis has given ambiguous results.

On the one hand, the overall outcome of *US – Tuna II (Mexico)* is unsatisfactory, as once again a 'green barrier' did not manage to pass the WTO test. Furthermore, the Panel and the AB at times used reasoning for which it is hard to find a rationale, as, for example, regarding the distinction between a technical regulation and a standard. In addition, the 'PPM debate' seems to be completely sidelined in determining the 'likeness' of products.

On the other hand, it appears that the question of the extraterritorial application of unilaterally adopted policies has ceased to be an issue, including under the TBT Agreement. Of course, this does not mean that the Panel and the AB have unequivocally chosen environmental protection over free trade; they only gave the possibility for 'green barriers' to be allowed under the TBT as well.

In any event, certain progress is noticeable, especially in the approach taken by the AB in comparison to the Panel reports from the previous *Tuna* disputes. Even though its conclusion that the US green barrier treats foreign products less favourably than domestic ones is far from obeying the rules of proper legal reasoning, the AB managed to subtly give a 'hint' to the US on how it can remedy its contravention of the TBT. What is particularly striking in this observation is that if the US follows this suggestion, the situation would not result in more trade liberalisation, but in fact a greater level of environmental protection. It can be concluded, or at least hoped, that the AB is slowly but surely shifting the approach in WTO dispute settlement closer to environmental protection.

The paper further examined another novelty brought by *US – Tuna II (Mexico)* and that is the use of the TBT Agreement instead of the GATT as the basis for analysis of the contested measures. On the one hand, the TBT in its structure and design has not proven to be more 'environmen-

tally friendly' than the GATT. Given the heavier burden it places on the regulator, quite the contrary might be concluded. On the other hand, it has been shown that the TBT is able to address the issue of green barriers in a more comprehensive manner, avoiding some of the hurdles found in the GATT.

Still, if environmental protection and trade liberalisation are to be reconciled, the WTO should do more than simply hold on to the already used techniques. In that regard, the paper examined three suggestions on how the overall approach to the trade vs environment conflict should be changed.

However, regardless of which approach is chosen, the WTO and the broader international community will soon have to address this antagonism in the political arena. The GATT and the WTO were created mainly to facilitate trade and not to serve as a platform for (inter)national environmental strategies. The pressure to respond to global environmental concerns is constantly growing and it is only a matter of time before it becomes impossible to ignore.