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# Trade Liberalisation, Developing Countries and the Discipline of Trade-impacting Measures Related to Environmental Conservation: An Appraisal of *United States-Measures Concerning Importation, Marketing and Sale of Tuna Products**

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## Abstract

*At its inception in 1947, the General Agreement on Tariffs and Trade (GATT) was dominated by developed or industrialised countries and the legal framework it administered simply did not address trade-related issues of special interest to developing countries. However, with more developing countries joining the GATT and with this group of countries becoming the majority bloc in the World Trade Organization (WTO), the need to enlarge their beneficial and sustainable participation in global trade as well as shield their exports from illegal trade restrictions imposed by developed country members, arises. This article explores the WTO Appellate Body and Panel decisions in United States-Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US-Tuna II) and seeks to establish the extent to which they provide guidance for the balancing of the developmental welfare of developing countries and the legitimate regulatory interests of the developed countries in matters where trade and environmental issues intersect. In the process, it isolates the measures that gave rise to Mexico's complaints against the United States of America (US) and discusses the contributions of these particular decisions of the Appellate Body and Panel to WTO jurisprudence in addition to exploring their implications for the obligations of Member States not to discriminate against imports and refrain from adopting regulatory measures that*

*may constitute unnecessary obstacles to international trade. Inevitably, this article highlights the jurisprudential contribution of the US-Tuna II dispute to our understanding of the legal obligations of the WTO to act consistently when dealing with its developed and developing Member States in the arena of trade-impacting measures pertaining to the environment.*

## 1 INTRODUCTION

One of the global community's basic expectations of the WTO is that it should routinely provide its Member States with opportunities to discuss and reach binding agreements on the adoption or amendment of national-level mechanisms or policies likely to negatively impact on trading partners and related welfare interests.[1] In that regard, Member States with largely broad economies and a wider trade and industry capital base must have much more to offer to developing WTO Member States and little to lose in trade negotiations with these parties.[2] In contrast, WTO Member States with a small trade and industry capital base and limited economic diversity have little to offer to their developed counterparts and stand to lose more if trade-related negotiations with developed countries fail.[3] Nonetheless, with the dispute resolution system of the GATT/WTO progressively adopting a legalistic rather than political disposition, Member States now have the capacity to effectively hold each other accountable to their obligations and/or commitments.[4] The plausible initiative to replace dispute settlement through negotiations with a largely legalistic form of dispute settlement, has led to a shift from a power-based GATT/WTO dispute settlement system to one premised on judicial review.[5] Such an approach espouses the doctrine of equality before the law – a development which allows for disputes to be addressed on the basis of merit rather than economic superiority.

In the contemporary trading environment, the WTO's judicial review process is most relevant regarding issues related to environmental protection matters linked to trade, specifically where there are genuine concerns that specific regulatory practices adopted by some developed WTO Member States may constitute trade barriers and considerably reduce developing countries' market-access benefits which should flow from negotiated tariff reductions.[6] To address problems related to protectionist non-tariff barriers the Agreement on Technical Barriers to Trade (TBT) plays a significant role.[7] However, the TBT's provisions

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* See the Appellate Body Report, *United States-Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Mexico)*, WT/DS381/AB/R, circulated to WTO Members 16 May 2012 (hereinafter *US-Tuna II*).

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1 Gerhart and Kella "Power and Preferences: Developing Countries and the Role of the WTO Appellate Body" 2005 *North Carolina J of Intl L and Commercial Regulation* 515. See also Lester et al *World Trade Law: Text Materials and Commentary* (2012) 816; Lang *World Trade Law after Neoliberalism: Re-imagining the Global Economic Order* (2011) 250; and McGrady "Tobacco Product Regulation and the WTO: Appellate Body Report, US-Clove Cigarettes" http://www.oneillinstitutetradeblog.org/wp-content/uploads/2012/04/briefing-paper.pdf (accessed 04-03-2015).

2 Gerhart and Kella 2005 *North Carolina J of Int Law and Commercial Regulation* 515. See also Lester et al 816.

3 Gerhart and Kella 2005 *North Carolina J of Int Law and Commercial Regulation* 515.

4 *Ibid.* See also Ndlovu "South Africa and the World Trade Organization Anti-Dumping Agreement Nineteen Years into Democracy" 2013 *SAPL* 279.

5 Lester et al 816.

6 Meltzer "Beyond Discrimination? The WTO Parses the TBT Agreement in US-Clove Cigarettes, US-Tuna II (Mexico) and US-Cool" 2013 *Melbourne JIL* 699 724. See also Warikandwa and Osode "Managing the Trade-Public Health Linkage in Defence of Trade Liberalisation and National Sovereignty: An Appraisal of *United States-Measures Affecting the Production and Sale of Clove Cigarettes*" 2014 *PER/PELJ* 1263 1267.

7 The Agreement on Technical Barriers to Trade, 1186 UNTS 276, 1 January 1980. See also Marceau and Trachtman "A Map of the World Trade Organisation Law of Domestic Regulation of Goods: The Technical Barriers to Trade Agreement, the Sanitary Phyto-Sanitary and General Agreement on Tariffs and Trade" in Berman and Mavroidis (eds) *Trade and Human Health and Safety* (2006) 9; Jackson "World Trade Rules and Environmental Policies: Congruence of Conflict" 1992 *Washington & Lee LR* 1227 1235; Dunoff "Reconciling International Trade with Preservation of the Global Commons: Can we Prosper and Protect?" 1992 *Washington & Lee LR* 1407 1407; Chow and Schoenbaum *International Trade Law: Problems, Cases, and Materials* (2008) 52-53; Ming Du "Domestic Regulatory Autonomy under the TBT Agreement: From Non-Discrimination to Harmonization" 2007 *Chinese JIL* 269-270; Shaffer "United States-Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products" 2013 *American JIL* 192.

have often been a source of tension amongst WTO Member States in so far as their application is deemed to be in conflict with so-called legitimate government policies. This is often the case in situations where developed countries adopt "environmental protection or conservation measures" that have the net-effect of obstructing market access for products originating from developing countries.[8] As occurred in the *US-Tuna II* case, the US enacted environmental conservation instruments such as the United States Code of Federal Regulations, Title 50, Section 216.91 and Section 216.92 as well as the Dolphin Protection Consumer Information Act.[9] These conservation measures, as adopted by the US, were sharply protectionist in nature as their success greatly depended on discriminating against Mexican tuna products which were, on the face of it, arguably non-compliant with the measures.[10]

Considering that the WTO's principal regulatory objective is to ensure the elimination of discriminatory trade practices,[11] this article examines how measures adopted by the US as technical regulations in matters relating to environmental conservation constituted an illegal trade barrier, which gave Mexican tuna products less favourable treatment in comparison to similar tuna products from the US. By way of a thorough analysis of the rulings and reasoning adopted in *US-Tuna II* – arguably a leading case on contemporary discourses concerning the relationship between trade and environment[12] – this article speculates on how rulings of the WTO Appellate Body and Panel could influence future settlements of trade disputes concerning the application of technical regulations under the TBT in order to cater for the best interests of developing countries over and above addressing the unquestionable need to balance the interests of all WTO Member States.

## 2 BACKGROUND TO THE *US-TUNA II* DISPUTE

For commercial purposes, tuna is often caught using large nets known as purse seine nets. Purse seine nets, according to the Collins English Dictionary, refer to huge nets, mostly pulled by at least a couple of fishing vessels, which surround large numbers of fish and are closed by a cord similar to the lash used to fasten a money pouch's neck.[13] Since large numbers of tuna regularly swim close to, or beneath, dolphin groups, using purse seine nets leads to high dolphin mortality rates since they are trapped in the process of catching tuna. Dolphin herds are often encircled with the purpose of reaching large schools of tuna frequently swimming below the dolphins. As a result of Mexico employing the aforementioned fishing techniques, more than 100 000 dolphins died annually between the 1960s and the 1990s. Rob pointed out that

8 Partiti "The Appellate Body Report in US-Tuna II and Its Impact on Eco-Labelling and Standardization" 2013 *Legal Issues of Economic Integration* 73. See also Lang *World Trade Law after Neoliberalism: Re-Imagining the Global Economic Order* (2011) 250.

9 Silveira and Obersteiner, "The Scope of the TBT Agreement in Light of Recent WTO Case Law" 2013 *Global Trade and Customs J* 112. See also Gabrielle "The New TBT Jurisprudence in US-Clove Cigarettes, WTO US-Tuna II and US-COOL" 2013 *Asian J of WTO & Int Health Law & Policy* 1 3.

10 McGivern "The TBT Agreement Meets the GATT: The Appellate Body Decision in US-Tuna II (Mexico)" 2012 *Global Trade and Customs J* 350. See also Trujillo "The Tuna-Dolphin Encore-WTO Rules on Environmental Labelling" http://www.asil.org/insights120307cfm (accessed 14-01-2015); Howse and Levy "The TBT Panels: US-Clove Cigarettes, US-Tuna, and US-COOL" in Brown and Mavroidis (eds) *The WTO Case Law of 2011 the American Law Institute Reporters' Studies* (2012) 509; Mavroidis "Drifting 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 Appellate Body have Done Instead" 2013 *World Trade Review* 509 531; and Zhou "US-Clove Cigarettes and US-Tuna II (Mexico): Implications for the Role of Regulatory Purpose under Article III:4 of the GATT" 2012 *J of Int Economic Law* 1075 1122.

11 Jackson and Davey *Legal Problems of International Economic Relations* (1986) 297. See also Mavroidis *The General Agreement on Tariffs and Trade* (2005) 7.

12 Shaffer 2013 *American JIL* 192. Meltzer 2013 *Melbourne JIL* 724; Jakir "The New WTO Tuna Dolphin Decision: Reconciling Trade and Environment?" 2013 *Croatian Yearbook of European Law and Policy* 143 144; Layton et al "WTO Appellate Body Brings Coherence to Trade Rules on Technical Regulations" http://m,mayerbrown.com/wto-appellate-body-bings-coherence-to-trade-on-technical-regulations-07-09-2012/ (accessed 29-01-2015).

13 See *Collins English Dictionary Complete and Unabridged* 10 ed (2009).

> [i]n the eastern tropical Pacific Ocean (ETP) ... [s]ince the 1960's, the practice of intentionally setting purse seine nets on dolphins to catch tuna ... resulted in the incidental killing and injury of many dolphins. In 1986, an estimated 133,000 dolphins were killed in this way. By 1991, the number of dolphins killed had been reduced to an estimated 27,500 due to the growing consensus on the need to reduce dolphin mortality, and the introduction of improved fishing methods and equipment. The number of dolphins in the ETP, after a decline in the 1970's and 1980's, is now stable at current levels of mortality.[14]

However, in the 1990s, the number of dolphins dying due to purse seine fishing methods significantly decreased.[15] This was largely attributed to the fact that Mexican fishermen adopted new tuna-fishing techniques – which allowed dolphins to escape during the process of fishing.[16] This development should have prompted the US to grant dolphin-safe labels to Mexican tuna products.[17] On the contrary, the reduction in dolphin mortality rates did little to persuade the US to grant dolphin-safe labels to Mexican tuna products.[18] Rather, the US opted to pronounce Mexico's tuna exports as being dolphin-unsafe. The US measure was evidently ill-conceived due to the fact that at the time it was adopted, there was a marked reduction in dolphin mortality rates during tuna-fishing trips by Mexican fishermen.[19] In justifying its unscientific decision, the US alleged that Mexico had violated Sections 101 and 101(a) of the US Marine Mammal Protection Act of 1972. These aforementioned sections banned any reliance on fishing techniques which put dolphins' survival at risk and/or subjected them to malicious fishing practices.[20]

The *US-Tuna II* dispute arose from a challenge from Mexico against US domestic laws that regulated the according of dolphin-safe labels to foreign-harvested tuna as well as products produced and/or packaged in other countries. The US, in a hypothetical endeavour to avert dolphin mortality enacted the Dolphin Protection Consumer Information Act (DPCIA) aimed at regulating the use of the dolphin-safe label on tuna products.[21]As applied by both the implementing regulations[22] and in a judgment by a federal appellate court in the case of *Earth Island Institute v Hogarth,*[23] the DPCIA permits the according of a dolphin-safe label to tuna products produced from tuna caught in the ETP zone using purse seine nets, only if an observer endorses that no dolphins were injured or killed in the harvesting process, and that there was no calculated use of purse seine nets to enclose dolphins during a fishing trip.[24] Alternatively, if tuna is caught beyond the ETP zone where no dolphin-tuna association exists, the captain of a vessel should certify that purse seine nets were not employed as a means of encircling dolphins during a fishing trip.[25]

Mexico disputed the consistency of this measure with the US's responsibilities in terms of the TBT and the GATT 1994.[26] In October 2008, Mexico asked for a meeting with the US concerning the following three issues:

14 Robb (ed) *International Environmental Law Reports: Trade and Environment* (2001) (Vol 2) 9 paras 2.1–2.2

15 Robb 9 para 2.1. See also Joseph "The Tuna-Dolphin Controversy in the Eastern Pacific Ocean: Biological, Economic, and Political Impacts" 1994 *Ocean Development & Int Law* 1 30; Ramach "Dolphin Safe Tuna Labelling: Are the Dolphins Finally Safe?" 1996 *Virginia Environmental LJ* 743; and Calley *Market Denial and International Fisheries Regulation: The Targeted and Effective Use of Trade Measures Against the Flag of Convenience Fishing Industry* (2012) 60.

16 Robb 9, para 2.1.

17 Robb 9, para 2.2.

18 *Ibid.*

19 *Ibid.*

20 *Ibid.*

21 See the Dolphin Protection Consumer Information Act 16 USC 1385 2006 (hereinafter DPCIA).

22 See the Dolphin-Safe Labelling Standards, 50 CFR 216.91 2012.

23 *Earth Island Institute v Hogarth* 494 F 3d 757 (9th Circuit 2007).

24 Panel Report (hereinafter PR), *US-Tuna II*, WT/DS381/R, 15 September 2011, para 2.20. See also Arcuri "Back to the Future: US-Tuna II and the New Environment-Trade Debate" 2012 *European J of Risk Regulation* 177.

25 PR, *US-Tuna II* paras 7-8.

26 See the Marrakech Agreement Establishing the World Trade Organisation, opened for signature 15 April 1994, 1867 UNTS 3, entered into force 1 January 1995, Annexure 1A, General Agreement on Tariffs and Trade 1994 (GATT 1994). See further Marceau "The New TBT Jurisprudence in *US-Clove Cigarettes*, WTO *US-Tuna II*, and *US-COOL*" 2013 *Asian J of WTO and Int Health and Policy* 1; and Marceau and Trachtman "A map of the World Trade Organisation Law of Domestic Regulation of Goods: The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade" 2014 *J of World Trade* 432.

1. The US Code, Title 16, Section 1385 (Dolphin Protection Consumer Information Act);
2. The Code of Federal Regulations, Title 50, Section 216.91 (Dolphin-safe labelling standards) and Section 216.92 (Dolphin-safe requirements for tuna harvested in the ETP by large purse seine vessels); and
3. *The Earth Island Institute v Hogarth* ruling.[27]

Mexico argued that the legal instrument in question created different labelling conditions and requirements for tuna products to the effect that all like US tuna products and most tuna products from other countries had access to the dolphin-safe label, whilst Mexican tuna products were denied access to the label.[28] This conflicted with Articles I(1) (the Most-Favoured-Nation provision) and III(4) (treatment no less favourable provision) of the GATT 1994. The TBT Agreement's Articles 2(1), 2(2) and 2(4) were also raised and used as a basis for Mexico's call for the Panel to pass judgment over the issue in March 2009.[29]

## 3 WTO PANEL DECISION

The majority of the Panel ruled that the US measure, which did not condition imports of tuna upon meeting the statutory conditions for the label dolphin-safe, but which rather conditioned its lawful use upon meeting certain criteria (while allowing other tuna and tuna products, which fell short of the statutory requirements for acquiring the dolphin-safe label, to be marketed simply as tuna) was a technical regulation and not a standard.[30] A minority opinion by a member of the Panel emphasised that the US measure would be a "technical regulation" only if all imported tuna had to carry the label dolphin-safe in order to market Mexican tuna products in the US market. This was evidently not the case here and, consequently, the challenged measure was in the eyes of this Panellist a standard and not a technical regulation.[31]

However, Mexico's assertion to the effect that the US law contravened the TBT's national treatment obligation provision in Article 2.1 was rejected by the Panel,[32] which found that Mexico had not led compelling evidence to suggest that the measure afforded tuna products from Mexico a less favourable treatment than those harvested in the ETP zone.[33] The Panel pointed out that whereas the US tuna fleet had elected to abolish the practice of setting upon dolphins to harvest tuna, the Mexican tuna fishermen had opted to continue with the fishing method.[34] The Panel also observed that the US tuna processors' resolution to stop buying tuna products harvested through the use of purse seine nets had come into effect before the adoption of the DPCIA and its dolphin-safe definition. In this regard, Mexican fishers could have implemented different fishing techniques to ensure compliance with provisions regulating whether or not a party qualifies to be accorded a dolphin-safe label. The Panel thus established that even though Mexican tuna fishermen were prejudiced by the impact of the US regulations, this in the main was not attributed to factors related to the product's source of origin, but rather the outcomes of Mexican fishers' earlier stated personal preferences regarding which tuna fishing practices to adopt.[35]

27 Appellate Body Report (hereinafter ABR), *US-Tuna II*, WT/DS381/AB/R, circulated to WTO Members 16 May 2012, para 1.11. See also Mexico's first written submission, para 11.
28 Mexico's second written submission, para 112.
29 PR, *US-Tuna II* paras 7-8.
30 PR, *US-Tuna II* paras 7.100ff, 7.120 and 7.131.
31 *Ibid*. para 7.146ff.
32 Article 2.1 of the TBT provides that: "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."
33 PR, *US-Tuna II* para 7.374.
34 *Ibid*. paras 7.327-7.328.
35 *Ibid*. para 7.378.

Furthermore, the Panel ruled that the US dolphin-safe measures contravened the TBT's Article 2.2.[36] The Panel found that whereas the US regulations' environmental objectives were on the face of it justifiable in the context and meaning of Article 2.2, the DPCIA was on the whole significantly more trade-limiting than required to realise the aforementioned goals.[37] The Panel also established that permitting the use of a different label, as provided for in the Agreement on the International Conservation Program (AIDCP),[38] would be a plausible option for regulations that are not trade-prohibitive and would be capable of providing "a level of safeguard equal to that attained by the DPCIA, considering the dangers non-compliance would bring into being."[39]

## 4 APPELLATE BODY DECISION

The Appellate Body concurred with the Panel's ruling that the US regulation in question amounted to a technical regulation.[40] As such, the Appellate Body approved the majority view of the Panel and ruled that it is pertinent that the products in issue comply with the outlined statutory requirements, as non-compliance would be indicative of the products not being dolphin-safe.[41]

However, it dismissed as incorrect the Panel's decisions on TBT's Article 2.1. On the contrary, it concluded that the measure in question as matter of fact gave tuna products from the US and other countries favourable treatment in comparison to the treatment afforded to the same Mexican tuna products.[42] The Appellate Body correctly[43] ruled that the US regulation tailored the US market's competition environment to suit other products rather than the Mexican tuna products.[44] Such an approach could arguably be viewed as a protectionist regulatory measure by the US, which could be considered a trade barrier. It was thus not surprising that the Appellate Body ruled that the US could not justify the measure's approach of setting stringent requirements to attain the authority to use the dolphin-safe label for tuna caught in the ETP zone as a fair procedure in contrast to the less rigorous requirements set out for tuna harvested outside the ETP zone, which equally poses significant risks of high dolphin mortality rates.[45]

Regarding Article 2.4, the Appellate Body concurred with the US that the Panel misdirected itself in its ruling that it had to consider whether the AIDCP was an "organisation", rather than a "body" for it to be able to implement rules which assume the force of international standards.[46] Rather, for a rule to assume the force of an "international standard", it had to be adopted by a recognised international standardising organisation, which has the authority to carry out legitimate and recognised activities in setting out standards with its membership being accessible to the appropriate organisations of largely all the WTO's affiliates.[47]

36 TBT's Article 2.2 provides as follows: "Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia:* national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia:* available scientific and technical information related processing technology or intended end-uses of products."

37 PR, *US-Tuna II* paras 7.577-7.578.

38 See the Agreement on the International Dolphin Conservation Program opened for signature 21 May 1998, TIAS No 12956, entered into force 15 February 1999.

39 PR, *US-Tuna II* paras 7.577-7.578. The panel also found that the stated objectives of the DPCIA were partly fulfilled outside of the ETP zone concerning attempts to eradicate fishing practices which could potentially put dolphins' survival at risk, see PR *US-Tuna II* para 7.599.

40 ABR, *US-Tuna II* paras 172-199.

41 *Ibid.* para 199.

42 *Ibid.* para 299.

43 The Appellate Body's ruling is deemed correct on the basis that it is consistent with the objectives of GATT 1994 Article III:4 which aims at ensuring equal treatment in respect of competitive opportunities for imports and competing domestic products. See Herwig "Competition, Not Regulation - or Regulated Competition? No Regulatory Purpose Test Under the Less Favourable Treatment Standard of GATT 1994 Article III: 4 Following *EC-Seal Products*" 2015 *The European J of Risk Regulation* 1.

44 ABR *US-Tuna II* para 298.

45 *Ibid.* para 297.

46 *Ibid.* para 395.

47 *Ibid.* para 359.

Therefore, in the view of the Appellate Body, it is immaterial to simply point out that a body carries out renowned standardisation activities. Instead, it is necessary to demonstrate that such a body carries out standardisation activities which are well known to the majority of WTO Member States, or at least to such Member States as have a justified basis to believe that the global organisation in issue engages in such practices.[48] Should a majority of the WTO Member States take part in the standardising body's activities, this would be regarded as substantial evidence to the effect that the body's standardising activities are renowned.[49] Alternatively, material evidence should be furnished to the effect that the standardising body complied with any "[d]ecision of the WTO Committee on Technical Barriers to Trade[50] setting out the principles and procedures that those bodies have to follow in the development of international standards."[51] As such, the Appellate Body correctly ruled that since the AIDCP's membership was by invitation and thus not accessible to all WTO Member States, the organisation could not be regarded as an "international standardising body" in accordance with the provisions of the TBT.[52]

## 5 EVALUATION OF WTO APPELLATE BODY AND PANEL DECISIONS

The WTO Appellate Body and Panel sought to establish whether the dolphin-safe label requirement conformed to the provision of the TBT's Article 2.1. To achieve this objective, it adopted a three-step test consisting of, firstly, establishing whether the regulation in question was a technical measure, secondly, whether the products in question were like products and, thirdly, whether less favourable treatment had been given to tuna products from Mexico in comparison to those originating from other jurisdictions and that were being sold in the US market.[53]

### 5 1 Was the "dolphin-safe label" consistent with TBT's Article 2.1?

The Appellate Body confirmed the Panel's ruling regarding the technical regulation and like product criteria. In concurring with the Panel's ruling, the Appellate Body pointed out that the US tuna products labelling system was a technical regulation as it provided only one legal definition for what constitutes dolphin-safe labelled tuna. It also specified the circumstances that must prevail for an exporter to be entitled to use a dolphin-safe label, whilst preventing any use of optional labels pertaining to the safety of dolphins in instances where the prescribed conditions set out in the adopted measures were not complied with.[54] Only products, which were viewed as complying with the measures, would be considered as dolphin-safe tuna.[55] Key to complying with the US measure was adhering to the requirement that tuna could not be harvested in the ETP zone using the method of "setting on dolphins." The requirement was binding and not optional in that it formed the solitary basis upon which tuna harvested within the ETP zone could qualify to be labelled as dolphin-safe.[56]

One of the fundamental reasons for adopting the TBT was the need to prevent WTO Member States from implementing protectionist technical regulations to differentiate between imported goods as a mechanism to protect their domestic products.[57]

48 *Ibid.* para 362.
49 *Ibid.* para 390.
50 Decisions and Recommendations Adopted by the WTO Committee on Technical Barriers to Trade since 1 January 1995 WTO Doc G/TBT/1Rev.10 9 June 2011 Note by the Secretariat. See also annexure B of the Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with relation to Article 2.5 and annexure 3 of the Agreement.
51 ABR, *US-Tuna II* paras 373-375.
52 *Ibid.* paras 397-398.
53 *Ibid.* para 398.
54 *Ibid.* paras 195-196.
55 *Ibid.* para 199.
56 PR, *US-Tuna II* para 7.76.
57 Article 2.1 of the TBT provides that: "WTO members must make certain that in respect of technical regulations, goods imported from the territory of any Member shall be given treatment no less favourable than that given to similar products of national origin and to similar goods coming from any other country." See also WTO Secretariat, Guide to Uruguay Round Agreement (1999) 72.

To comply with the TBT and to avoid being labelled as being protectionist, any such technical regulations must not afford "imported products less favourable treatment than like domestic products and no less favourable treatment than like imported products."[58] Article 2.1 of the TBT mirrors the GATT 1947 Article 1's national treatment provisions as well as the GATT 1947 Article III's Most Favoured Nation (MFN) provisions in that both the national treatment and MFN obligations prohibit a less favourable treatment of similar products. However, before the decision of the Appellate Body in the case of *US-Clove Cigarettes* no ruling had been made regarding how Article 2.1 directly followed the GATT 1947 jurisprudence. In that regard, the extent of the obligations set out under Article 2.1 remained a debatable subject. However, there was an evident distinction between the GATT 1947 obligations and Article 2.1. The difference was to the effect that the GATT 1947 obligations provided positive defences for the violation of environmental obligations through Article XX exceptions,[59] whilst the TBT does not provide for any such exceptions.

Regarding Mexico's claim of less favourable treatment, it had to be established whether the measure was just and fair. In this regard, a two-pronged approach was applied. Firstly, it had to be determined whether the US measure in question treated the foreign tuna products less favourably than similar tuna products that were domestically harvested and labelled. It is accepted that the Appellate Body reached a plausible conclusion that the adoption of a measure, which does not allow foreign tuna products "access to the 'dolphin-safe' label on the basis that they were caught by setting on dolphins impacted negatively on the competitiveness of those products on the US market."[60] In attempts to justify the adverse effects of its regulations on foreign tuna products, the US argued that consumer preferences meant that the domestic tuna products were preferred over foreign tuna products.[61] In dismissing the US argument, the Appellate Body ruled that even if Mexican tuna products would have been unsuccessful in penetrating "the US market in the absence of the measure at issue due to consumers' objections to the fishing method of setting on dolphins, it would not disprove the fact that it is the measure and not private actors, that denied Mexican tuna products access to the 'dolphin-safe' label in the US market."[62]

Secondly, it had to be established whether the US regulation against Mexican tuna products, which in effect adversely impacted on trade in the aforementioned products, was tantamount to a less favourable treatment of the products or whether it represented a legitimate regulatory intervention to control unjustifiable trade-related practices which are detrimental to the environment. This issue is especially significant if one considers that regulation for environmental purposes has been adopted by some developed countries as a form of disguised protectionism against products originating from developing countries.[63] However, it is widely accepted that there is a genuine need to regulate against trade practices – in, or emanating from, developed or developing countries – which are harmful to the environment. The Appellate Body ruled that whereas the environmental conditions in the ETP zone could be unique, there was nothing irregular about the dangers faced by dolphins in the ETP region.[64] Accordingly, the Appellate Body concluded that the label does not consider dolphin mortality from fishing methods "employed outside the ETP given 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."[65] It was thus evident that the regulation enacted by the US did not seek to address the negative

58 *Ibid.* 73.
59 For example GATT 1947 Art XX(b) allows for its violation if it is "necessary for the protection of human, anmal or plant life or health." See also Fontanelli "Necessity Killed the GATT - Art XX GATT and the Misleading Rhetoric about 'Weighing and Balancing'" 2012/13 *European J of Legal Studies* 36; and Regan "The Meaning of 'Necessary' in GATT Article XX and GATS Article XIV: The Myth of Cost-Benefit Balancing" (2007) *World Trade Review* 347.
60 ABR, *US-Tuna II* para 235.
61 *Ibid.* para 235-236.
62 *Ibid.* para 239.
63 Warikandwa and Osode 2014 *PER/PELJ* 1263.
64 ABR, *US-Tuna II* para 248.
65 *Ibid.* para 251.

> ...consequences on dolphins emanating from fishing techniques used by fishing convoys supplying other countries and the US' tuna manufacturers. Clearly, any potential threats to dolphins emanating from harmful fishing techniques apart from setting on dolphins could be checked by enforcing a different substantive condition which prohibits the killing or injuring of dolphins when tuna is being caught.[66]

In its defence, the US robustly argued that the much-maligned regulatory measures are indicative of the fact that a lesser probability of a

> ...dolphin being killed or seriously injured in a fishery outside the ETP has to be measured against the extra burden imposed by conditioning the use of a 'dolphin-safe' label upon a certification obtained after an independent observer's report. This US contention was construed by the Appellate Body as suggesting that, mainly due to costs, the US does not impose a certification prerequisite with respect to tuna fishing outside the ETP.[67]

Not surprisingly, the US contention and its underlying reasoning were categorically dismissed by the Appellate Body, which concurred with the Panel's decision that there was no justification for imposing different conditions pertaining to an official dolphin-safe label for tuna caught in similar conditions.[68] To comprehend the Appellate Body's reasoning it is imperative for one to realise that it was immaterial for the purposes of applying the dolphin-safe label to establish whether the tuna in question was caught inside or outside the ETP zone for it to be certified as dolphin-safe.[69] Rather, what was required for WTO consistency was to ensure that all tuna, irrespective of its source of origin or the fisheries in which it was caught, was subjected to identical assessments for compliance with the dolphin-safe standards. This finding is compelling and plausible given that some tuna certified as dolphin-safe by the US authorities would have been caught in the exact or similar conditions or circumstances as the tuna that was refused the dolphin-safe label.[70] This finding by the Appellate Body leads to the inescapable conclusion that the US measure was not a legitimate regulatory measure, but rather a measure that was protectionist by nature and design. In this regard, it is especially significant that the Appellate Body, in trying to establish the cause of the differential treatment given to tuna in the US market, was unable to comprehend why additional regulatory compliance requirements were imposed on the tuna products which were refused a dolphin-safe label as opposed to those which were granted this label.[71] It is submitted that if there was no reason which could be established for the discrimination against Mexico's tuna products other than that the products were not of the same source of origin as the tuna which received the dolphin-safe label, then the Appellate Body's ruling that the US measure was neither justifiable nor WTO compliant is indeed salutary.[72] The US dolphin-safe label-related requirements were thus correctly deemed to be

> inconsistent with Article 2.1 of the TBT. The US measures were not even-handed in the way in which they address the risks to dolphins arising from different fishing techniques in different areas of the ocean.[73]

Accordingly, the US failed to justify

> as non-discriminatory under Article 2.1, the different requirements that it applies to tuna caught by setting on dolphins inside the ETP and tuna caught by other fishing methods outside the ETP for access to the 'dolphin-safe' label.[74]

66 ABR, *US-Tuna II* para 292.
67 *Ibid.* para 293.
68 *Ibid.*
69 *Ibid.* para 294.
70 *Ibid.*
71 *Ibid.*
72 *Ibid.*
73 *Ibid.* para 298.
74 *Ibid.*

### 5 2 Was the "dolphin-safe" label consistent with the necessity test under Article 2.2?

It has become important in the contemporary trade environment to establish whether certain regulatory trade practices are adopted for legitimate, just and equitable reasons aimed at the protection of pertinent public interests or whether they are adopted simply for unscientific protectionist agendas aimed at limiting the competitive advantage of one group of WTO Member States over another. Apart from attempting to prevent protectionism through discriminatory regulations falling under Article 2.1, the TBT in Article 2.2 also entails that technical measures must not be enacted to unnecessarily obstruct trade. Free and just trade practices should be viewed as development-enhancing mechanisms which the WTO should espouse and actively promote.

Article 2.2 of the TBT provides the primary object and purpose of the TBT as prohibiting unnecessary barriers to trade created in the form of technical regulations. Article 2.2 seems to follow other WTO "necessity" provisions such as Article XX(a), (b), and (d) of GATT 1947 as well as Article 5.6 of the Sanitary and Phytosanitary Measures Agreement.[75] However, a key difference to note between Article 2.2 of the TBT and the said provisions of the GATT 1947 and SPS Agreement is that Article 2.2 requires consideration of the "risks of non-fulfilment" of the member's justifiable aim when determining whether or not a regulation is necessary. As was the case with Article 2.1, prior to the decisions in the *US-Clove Cigarettes* case, WTO jurisprudence had not fully addressed the requirements and issues implicated in the provisions of Article 2.2 of the TBT.[76]

The test applied in *US-Tuna II* was whether the measures adopted are more restrictive to trade than would be essential to realise the aim of environmental protection. To address this issue, the Panel considered the following

> (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) being pursued by the Member through the measure.[77]

To avoid falling into a category of protectionism, the determination made should seek to balance the merits and demerits of the challenged measure against the alternative measures, which could have been adopted if the challenged measure was not accepted. In this regard, it would be plausible to establish whether the proposed alternative regulation is less trade prohibitive as compared to the adopted measure, whether it would make a similar input towards the attainment of the appropriate justifiable purpose, taking into consideration the dangers non-compliance would cause, and whether it is reasonably available.[78] The US failed to meet the threshold set in the *US-Tuna II* case, hence its measures could not be justified and could be viewed as a subtle type of masked protectionism.

### 5 3 Development of trade-related environmental policies and the TBT

The US approach in the *US-Tuna II* dispute raises serious questions about the legitimacy of the impugned measures against Mexican tuna products. This assertion emanates from the understanding that matters relating to regulation for environmental purposes were among the key reasons for negotiating and subsequently adopting the TBT.[79] It is generally accepted

75 Agreement on the Application of Sanitary and Phytosanitary Measures, Marrakesh Agreement Establishing the World Trade Organization, 1867 UNTS 493, (hereinafter SPS Agreement).

76 PR, *US-Clove Cigarettes* para 7.329. Art 2.2 had been briefly discussed in the cases of *European Communities-Measures Affecting Asbestos and Asbestos-Containing Products*, and *European Communities-Trade Description of Sardines*, but the disputes were not analysed under Art 2.2.

77 ABR, *US-Tuna II* para 322.

78 *Ibid.*

79 Flett "WTO Space for National Regulation: Requiem for a Diagonal Vector Test" 2013 *J of Int Economic Law* 37. See also Hudec "GATT/WTO Constraints on National Regulation: A Requiem for an 'Aim and Effects' Test" 1998 *The International Lawyer* 619; Horn and Mavroidis "Still Hazy after All These Years: The Interpretation of National Treatment in the GATT/WTO Case-Law on Tax Discrimination" 2004 *EJIL* 39 43; and Davey and Pauwelyn "MFN-Unconditionality: A Legal Analysis of the Concept in View of its Evolution in the GATT/WTO Jurisprudence with Particular Reference to the Issue of 'Like Product'" in Cottier and Mavroidis (eds) *Regulatory Barriers and the Principle of Non-discrimination* (1998) 13-50.

that the TBT was also introduced to address challenges pertaining to non-tariff trade barriers.[80] However, opposition against the TBT has gradually increased, particularly amongst developed countries, with proposals for the implementation of a flexible interpretation of the agreement being advanced to allow more policy space for Member States to regulate trade matters related to the environment.[81]

Developed countries, including the US, have been the chief proponents for calls to afford governments more policy space to regulate trade matters relating to the environment. Arguably, such calls may mask hidden protectionist agendas, such as those of the US who on the face of it adopted "legitimate" regulatory measures to ensure environmental protection whereas the underlying objective was to discriminate against Mexican tuna products.[82] The US measures disregarded the fact that Mexico's interest in standards-related barriers to market access, which the TBT seeks to limit, is at an unprecedented high.[83] This is attributed to the fact that due to the slow progress towards industrialisation being faced by most developing countries, producers in these countries desperately need access to developed countries' export markets to drive their development agenda.[84] Protectionist regulatory measures that are inconsiderate to developing countries' developmental needs unavoidably prevent such countries from achieving their developmental goals. The argument advanced here is not aimed at creating the impression that US regulation should have been tailored to suit the developmental interests of Mexico. Rather, the argument is that the regulatory measure adopted by the US could not be justified in terms of the existing GATT rules and was thus protectionist by nature.[85]

TBT provisions, which prohibit the unjustified denial of market access of one WTO Member State's products by another,[86] can ensure that market access for producers based in developing countries is consistent with bargained-for tariff cuts. This reasoning is in line with the TBT's Article 2.1, which prohibits discrimination against imported products based on national origin and correctly classifies such practices as prohibited and therefore illegal. Furthermore, the TBT's provisions, which facilitates the alignment of scientific environmental regulations to global principles and which fosters a reciprocal acceptance of domestic standards, can significantly reduce costs for exporters, such as those from the developing countries, who have a dire need to maximise economies of scale.[87] Article 2.2 aims to prohibit technical regulations that impose unnecessary obstacles to trade but limits governments' policy and regulation space.[88]

The *US-Tuna II* dispute could not have been adjudicated by the WTO Panel and Appellate Body at a more appropriate time. With so much expectations having been raised when the WTO was established on the 1st of January 1995, immediately following the conclusion of the

80 Howse and Turk "The WTO Impact upon Internal Regulations: A Case study of the Canada-EC Asbestos Dispute" in Bermann and Mavroidis (eds) *Trade and Human Health and Safety* (2006) 77.

81 Berstein and Hannah "Non-State Global Standard Setting and the WTO: Legitimacy and the Need for Regulatory Space" 2008 *J for Int Economic Law* 575. and Horn and Weiler "European Communities-Trade Description of Sardines: Textualisation and its Discontent" in Horn and Mavroidis (eds) *The WTO Case Law of 2002* (2005) 248.

82 Layton et al http://m.mayerbrown.com/wto-appellate-body-brings-coherence-to-trade-rules-on-technical-regulations-07-09-2012/ (accessed 01-01-2015).

83 See Eighteenth Annual Review of the Implementation and Operation of the TBT Agreement, WTO Doc G/TBT/33, 27 February 2013 (Note by the Secretariat) paras 2.6-2.10. See also Office of the United States Trade Representative "2013 Report on Technical Barriers to Trade" April 2013.

84 Makwana "Share the World's Resources: Sustainable Economics to End Global Poverty" http://www.stwr.org/imf-world-bank-trade/reforming-international-trade.html (accessed 21-01-2015).

85 Sibanda "WTO Appellate Body Ruling in United States - Certain Country of Origin Labelling Requirements: Trading Away Consumer Rights and Protections, or Striking a Balance Between Competition-Based Approach in Trade and Consumer Interests?" 2015 *De Jure* 136.

86 World Trade Organisation "Technical barriers to trade" https://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm (accessed 20-02-2018).

87 Voon "Flexibilities in WTO Law to Support Tobacco Control Regulation" 2013 *American J of Law & Medicine* 199.

88 See Appellate Body Report (hereinafter ABR), *United States-Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012; Panel Reports (hereinafter PR), *United States-Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R / WT/DS386/R, circulated to WTO Members 18 November 2011; ABR, *European Communities-Regime for the Importation, Sale and Distribution of Bananas* (*EC-Bananas III*), WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591 and ABR, *European Communities-Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243.

Uruguay Round of the GATT, little has come the way of developing countries.[89] With the legitimacy of the WTO being increasingly questioned by developing countries, the *US-Tuna II* dispute gave the WTO Appellate Body and Panel the opportunity to redeem the organisation and its dispute settlement system, which had been shrouded in controversy for a long time.[90] At the centre of the controversy are issues of power imbalances that have led to what Howse described as a "neo-liberal 'deep integration'" of the multilateral trade agenda and/or system.[91] However, with a shift from a superpower-driven to a judicial dispute settlement system, there is hope that more rulings similar to those made by the Appellate Body and Panel in the *US-Tuna II* case will be issued. Such an approach may lead to the end of super-power politics in the WTO and usher in a new era of what Howse regards as "the enhanced legitimacy and dynamic evolution of substantive norms and the political and diplomatic processes that generate them."[92] With the decisions reached by the Panel and Appellate Body in the *US-Tuna II* dispute, there emerges a plausible basis to conclude that the WTO might in future offer more to developing countries than it has thus far.

## 6 CONCLUSION

Developing countries have had doubts about the GATT/WTO regime's candour in efforts to promote and protect their special developmental interests.[93] This has largely been attributed to the WTO dispute settlement system's perceived inability to effectively eliminate the resort to unilateral power when developed country members impose new obligations on their developing counterparts, thereby limiting their competitiveness in global trade.[94] It has been shown in this article that the WTO has had difficulty in addressing the power imbalances between developed and developing countries under its power-based dispute settlement system. It is furthermore submitted that a power-based dispute settlement system may be incapable of ensuring fairness, equality and justice for all. However, the legalisation of the WTO dispute resolution process can be viewed as a step in the right direction and a potentially effective tool to benefit developing countries regarding their special developmental interests. The rulings of the WTO Appellate Body and Panel in *US Tuna II* signal a positive move towards developing a jurisprudence that is especially sensitive to the interests of developing countries.[95] Accordingly, the approach and reasoning adopted in this case is certain to make developing country Member States more inclined to believe that the benefits of being part of the WTO far outweigh the costs of not joining this body.

89 Jones *Reconstructing the World Trade Organization for the 21st Century: An Institutional Approach* (2015) 71. See further Bhagwati et al "The World Trade System: Trends and Challenges" http://www.columbia.edu/~jb38/papers/pdf/paper1-the_world_trading_system.pdf (accessed 06-08-2017).

90 Kulovesi *The WTO Dispute Settlement System: Challenges of Environment, Legitimacy and Fragmentation* (2011). See further Sinha "A Review of Kati Kulovesi, The WTO Dispute Settlement System: Challenges of Environment, Legitimacy and Fragmentation (Kluwer Int'l 2011)" 2012 *Trade Law & Development* 1.

91 Howse "The World Trade Organization 20 Years on: Global Governance by Judiciary" 2016 *EJIL Law* 77.

92 *Ibid*.

93 Ndlovu 2013 *SAPL* 279. See also Warikandwa and Osode 2014 *PER/PELJ* 1263.

94 Lester et al 817. See also Howse and Turk 77-79; Marceau and Trachtman 2006 9, 12; Matsushita *et al The World Trade Organisation: Law, Practice and Policy* (2003) 132.

95 Carlone "An Added Exception to the TBT Agreement after Clove, Tuna II, and Cool" 2014 *Boston College Int'l and Comparative LR* 37(1) 138. WTO Secretariat "World Trade Report 2012 Trade and Public Policies: A closer look at Non-Tariff Measures in the 21st Century" 126–127 (2012) http://www.wto.org/english/res_e/booksp_e/world_trade_report12_e.pdf (accessed 04-03-2015).