

BACK TO THE FUTURE: US-TUNA II AND THE NEW ENVIRONMENT-TRADE DEBATE

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(Forthcoming in: *European Journal of Risk Regulation*, May 2012)

I. US-Tuna again: new legal issues in old trade disputes

The so-called *Tuna-Dolphin* case is of one the icons of the trade-environment debate of the GATT era. After almost 20 years, *Tuna-Dolphin* is being disputed anew. The environmental good protected and the fishing practices contested are virtually the same. Dolphins (the good protected) and (yellowfin) tuna were, and still are, swimming together in the eastern tropical Pacific Ocean (ETP). When tuna are caught with purse seine nets¹ in the ETP (contested fishing practice), dolphins get accidentally killed. Back in the early nineties, the main measure disputed before a GATT panel was a US prohibition on imports of tuna from Mexico.² The import ban was motivated by the protection of the environment because Mexican vessels were fishing with the controversial purse seine nets technique. The legal focus of the case was naturally Article XX of GATT 1947. As is well-known, the Panel report, while remaining unadopted, condemned the US ban.³

Next to this central prohibition, the dispute related also to a ‘dolphin-safe’ labeling requirement, established by the US Dolphin Protection Consumer Information Act (DPCIA). In a report, much contested by environmental scholars and activists, the labeling requirement was the only environmental measure upheld by the

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¹ The fishing practice that uses purse seine nets consist in using very large nets to encircle schools of fish. In this case, the schools encircled are schools of dolphins as they typically swim together with tunas. Once the schools of fish are encircled, the nets are pulled together by closing the net from the bottom, so that the fishes cannot escape.

² GATT Panel Report, *United States – Restrictions on Imports of Tuna*, DS21/R, DS21/R, 3 September 1991, unadopted, BISD 39S/155 (*US – Tuna (Mexico)*). Next to the prohibition on imports from Mexico, the US banned the importation of tuna from countries that, in turn, were importing from Mexico (a sort of ‘anti-tuna-laundering’ measure); also these measures were disputed before a GATT Panel, cf. GATT Panel Report, *United States – Restrictions on Imports of Tuna*, DS29/R, 16 June 1994, unadopted (*US – Tuna (EEC)*).

³ See *US – Tuna (Mexico)*, above note 2.

Panel. A very similar labeling regime is the main issue disputed in the current *US-Tuna II* dispute.⁴

On April 20, 2009 a Panel was established, at the request of Mexico, to assess the legality of a set of US measures relating to the labeling regime of tuna products. These measures, taken together, establish the circumstances under which tuna products can be labeled as ‘dolphin-safe.’ Most importantly for the case disputed, the measures provide that tuna caught in the eastern tropical Pacific Ocean (ETP), with purse seine nets intentionally used to encircle dolphins, cannot be labeled ‘dolphin-safe’;⁵ whereas the requirements to obtain the dolphin-safe label outside the ETP are more lenient. These measures, which include federal regulations as well as the ruling of a US court,⁶ have been treated together by the Panel as the ‘US dolphin-safe labelling provisions.’

To distinguish the current circumstances from those of the GATT *Tuna-Dolphin* cases, it is worth noting that a multilateral agreement for the conservation of dolphins (the Agreement on the International Dolphin Conservation Program, AIDCP), to which both Mexico and United States are parties, was concluded and entered into force in 1999.⁷ This Agreement establishes a set of rules to certify dolphin-safe tuna, which differ from the US scheme. The major difference is that under the AIDCP rule, tuna caught with the purse seine nets technique can be labeled as dolphin-safe, provided that certain procedures to minimize the incidental killing of dolphins are followed. While most Mexican vessels cannot get the ‘dolphin-safe’ label under American law because of the purse seine nets techniques used, they commonly do comply with the requirements established by the AIDCP.

Mexico raised the claims that the US measures violate Articles I:1 and III:4 GATT 1994 and Articles 2.1, 2.2 and 2.4 of the TBT Agreement. The Panel, exercising judicial economy, focused on the TBT Agreement claims only, and did not

⁴ Panel Report *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, 15 September 2011 (*US-Tuna II*).

⁵ Next to setting on dolphins, also high seas driftnet fishing disqualified for the dolphin-safe labeling. Mexico did not raise any issue in relation to this fishing technique.

⁶ The set of measures includes three measures (i) the *United States Code*, Title 16, Section 1385 (“Dolphin Protection Consumer Information Act” or DPCIA), (ii) the *Code of Federal Regulations*, Title 50, Section 216.91 (“Dolphin-safe labeling standards”) and Section 216.92 (“Dolphin-safe requirements for tuna harvested in the ETP [Eastern Tropical Pacific Ocean] by large purse seine vessels”) and (iii) the ruling in *Earth Island Institute v. Hogarth*, 494 F.3d 757 (9th Cir. 2007).

⁷ For more information on the AIDCP, visit the website: <http://www.iattc.org/IDCPENG.htm>

rule on the GATT claims. Accordingly, the legality of the labeling regime has been assessed not against the GATT 1994, but against the Agreement on Technical Barriers to Trade (TBT Agreement).

In contrast to the previous GATT cases, the labeling regime has now failed the test, an outcome, that could be interpreted by some as evidence that the expansion of international trade law comes at the cost of environmental protection. Whether this conclusion is correct is a matter of debate; what is undisputed, however, is that to recast the trade-environment debate in the new millennium, we need to gain a better understanding of the WTO agreements regulating this area. The operation of the TBT Agreement is arguably crucial in this field because of the increasing relevance of the type of measures typically falling under the scope of the Agreement, such as standardization, information regulation, labeling schemes and private standards for (global) environmental governance. Yet, the TBT Agreement remains one of the least explored among the WTO agreements.⁸ The *US-Tuna II* Panel report offers an opportunity to reflect on the following issues:

- (i) what measures fall under the category of ‘technical regulations’ and what fall under ‘standards’ (Annex I, TBT Agreement);
- (ii) when is a TBT measure discriminatory (Article 2.1 TBT Agreement);
- (iii) when is a TBT measure more trade restrictive than necessary (Article 2.2 TBT Agreement) and
- (iv) to what extent should TBT measures be based on international standards (Article 2.4 TBT Agreement).

⁸ While the TBT Agreement has been invoked in several disputes, only in *EC-Asbestos* and *EC-Sardines*, the WTO Courts had the opportunity to interpret the text of the Agreement in some depth; cf. Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, 5 April 2001 (*EC-Asbestos*); Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, 23 October 2002 (*EC – Sardines*). More recently, the TBT Agreement has been invoked in several cases and at the end of 2011 three important Panel reports were released. Next to the case discussed in this article, Panels have issued reports in the dispute between the US and Indonesia on Clove Cigarettes, and the one between the US and Canada concerning certain mandatory country of origin labelling (COOL) provisions in the agricultural field; see Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/R, 2 September 2011, (*US – Clove Cigarettes*); Panel Report, *United States - Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384,386, 18 November, 2011 (*US – COOL*).

II. The murky distinction between ‘technical regulations’ and ‘standards’

The claims raised by Mexico under the TBT Agreement presuppose that the measures at issue are ‘technical regulations.’⁹ The US, by contrast, argued that the contested measures should be categorized as ‘standards.’ This Panel report offers interesting material to feed the debate on how to interpret the concepts of ‘technical regulations’ and ‘standards.’¹⁰

Annex I of the TBT Agreement defines the two categories in the following terms:

ANNEX 1: TERMS AND THEIR DEFINITIONS FOR THE PURPOSE OF THIS AGREEMENT

...

1. Technical regulation

Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

...

2. Standard

Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory.

It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

⁹ This is because Article 2 of the TBT Agreement refers only to the ‘preparation, adoption and application of technical regulation.’

¹⁰ On this issue, it is worth mentioning that well-known legal scholar Robert Howse has submitted an amicus curiae brief before the Appellate Body, where he argues that when assessing the legality of the US measures the relationship between Article 2 and Article 5, concerning ‘Conformity with Technical Regulations and Standards’, should have been considered; in other words, he seems to argue that the core of the US measures concerned conformity assessment with respect to standards, rather than technical regulation. Cf. Robert Howse, Amicus Curiae Submission before the World Trade Organization Appellate Body, in the case United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, AB-2012-2/DS381, 17 February, 2012, pp. 4-9.

The distinguishing feature of technical regulations vis-à-vis standards appears to be their *mandatory* nature. Mexico argued that the US labeling provisions are mandatory, adding that the measures should be considered as either *de jure* or *de facto* mandatory. The Panel concluded that the US measures constitutes ‘technical regulation’ within the meaning of Annex I:1.¹¹ The Panel, however, did not reach consensus on this point, and the report includes a dissenting opinion, a rare occurrence in the WTO dispute settlement practice. According to the dissenting panelist, the US labeling provisions are standards and not technical regulations. Let me begin by briefly describing the view of the Panel’s majority and then turn to that the dissenting panelist.

The majority of the Panel found that the US provisions are *de jure* mandatory for a set of different reasons. One passage, crucial in the reasoning of the Panel, is the following:

It is not compulsory to *meet* these requirements ... in order to sell tuna on the US market. The US measures therefore do not impose any *requirement to label*, in a “positive” manner. However, they do prescribe and impose *the conditions under which* a product may be labelled dolphin-safe. In particular, the measures prescribe “in a negative form”, to use the Appellate Body's terms, that no tuna product may be labeled dolphin-safe or otherwise refer to dolphins, porpoises or marine mammals if it does not meet the conditions set out in the measures, and thus *impose* a prohibition on the offering for sale in the United States of tuna products bearing a label referring to dolphins and not meeting the requirements that they set out.¹²

The Panel, following previous jurisprudence,¹³ interpreted the measures as mandatory by conceptualizing a prescription *in a negative form*. This reasoning is complemented by a number of other considerations. ‘First, the measures at issue are legally enforceable and binding under US law (they are issued by the government and include

¹¹ Panel Report, para. 7.145.

¹² Panel Report, para. 7.131, emphasis in original.

¹³ The reasoning of the Panel is very similar to the one in *EC – Trademarks and Geographical Indications (Australia)*; cf. Panel Report, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, Complaint by Australia*, WT/DS290/R, adopted 20 April 2005, DSR 2005:X, 4603, paras. 7.453-456. The Panel does also refer to the reasoning by the Appellate Body Report in *EC – Sardines*, supra note 8.

legal sanctions). This is an important component of the “mandatory” character of the measures.¹⁴ The Panel added that this is not *per se* a decisive issue. The pervasive nature of the labeling requirements is another determinant factor for judging the measures mandatory.¹⁵

The dissenting panelist, by contrast, argued that the US measures cannot be considered mandatory because the tuna can be freely sold in the US market, irrespective of the existing labeling regime. Considering the measures mandatory, only because they prescribe that, in order to obtain the label, certain standards have to be met, is equal to considering any labeling scheme as mandatory and thus as technical regulation. The dissenting Panelist, by contrast, distinguished compulsory from voluntary labeling schemes: ‘...[T]he requirement that compliance is mandatory cannot relate to the obligation to meet certain requirements to be allowed to use the label, but to the question whether a labelling scheme is *compulsory* – i.e. whether products *must* use a label *in order to be marketed* – or *voluntary* – i.e. products *may be marketed* with or without the label.’¹⁶

The Panel report shows that in the interpretation of what constitutes technical regulations and standards a grey area is left. At least three categories of measures can be distinguished:

1) measures adopted by public bodies, establishing (labeling) requirements that are *conditio sine qua non* to access the market (e.g. only dolphin-safe tuna can enter the US market);

2) measures adopted by public bodies, establishing (labeling) requirements, which need not to be met in order to access the market (e.g. the current US labeling regime); and

3) measures adopted by private entities, establishing certain (labeling) requirements (e.g. the regime of the Forest Stewardship Council, FSC).¹⁷

Generally, the first category fits with the definition of technical regulation and the latter with the definition of standards.¹⁸ The most relevant interpretative problems

¹⁴ Panel Report, Para 7.142.

¹⁵ Panel Report, para. 7.143.

¹⁶ Panel Report, para. 7.151, emphasis added.

¹⁷ A similar taxonomy has been articulated by a number of WTO scholars in the well-known International Trade Law and Policy blog, with inputs, inter alia, by Lorand Bartels, Simon Lester and Robert Howse; thread available at: <http://worldtradelaw.typepad.com/ielpblog/2011/09/technical-regulations-vs-standards-in-the-tuna-panel-report.html> (last visited 9 December, 2011).

arise in relation to the second category: on the one hand, the majority of the Panel seems to consider such measures as technical regulations (provided that complementary conditions are met); on the other, the dissenting panelist holds the opposite view.

While it is beyond the scope of this analysis to discuss at length the merits of these two views, let me note in passing that the reasoning of the majority of the Panel has already been criticized by a number of scholars.¹⁹ The Panel's way of conceptualizing technical standards, in fact, may stretch the meaning of the concept 'mandatory' too far because it classifies as mandatory measures that leave operators free to enter the market.

In particular, the Panel's concept of 'prescription *in a negative form*,' even if drawing on previous case law,²⁰ seems unsuitable to achieve clarity in this and similar cases. In fact, virtually any labeling scheme contains prescriptions in negative forms. This is because the *raison-d'être* of a label is to exclude from its regime those products that do not meet the conditions set by the labeling scheme. In other words, labeling regimes by their very nature contain 'prescriptions in a negative form' of the type: 'no product may be labeled XX if it does not meet the conditions set out in the measures.'²¹ This means that the Panel's reasoning implies that any labeling regime is a technical regulation. A conclusion clearly at odds with the text of the TBT Agreement, not the least because the definition of standards provided in Annex 1(2) of the Agreement explicitly refers to labeling requirements.

¹⁸ It should be noted, however, that the argument can be made that private standards can also fall within the category of technical regulations, if they are so pervasive that in practice companies are able to enter the market only when they abide to the private standards. Such an argument has been discussed by Wlostowski; cf. Tomasz Wlostowski, 'Selected Observations on the Regulation of Private Standards by the WTO', *Polish Yearbook of International Law*, 205-33, p. 219.

¹⁹ It is also worth mentioning that several academic scholars have already sided with the view of the dissenting panelist. Cf. the thread on this issue at the International Law and Policy Blog, available at: <http://worldtradelaw.typepad.com/ielpblog/2011/09/technical-regulations-vs-standards-in-the-tuna-panel-report.html> (last visited 9 December, 2011).

²⁰ The Panel rests on the reasoning of the Appellate Body Report in *EC – Sardines*, supra note 8 and *EC – Trademarks and Geographical Indications (Australia)*, supra note 13.

²¹ Note that this sentence is slightly paraphrasing, so as to generalize it, the following passage of the Panel's Report: 'no tuna product may be labelled dolphin-safe or otherwise refer to dolphins, porpoises or marine mammals if it does not meet the conditions set out in the measures, and thus *impose* a prohibition on the offering for sale in the United States of tuna products bearing a label referring to dolphins and not meeting the requirements that they set out'; Panel Report, para. 7.131.

Yet, the Panel's reasoning invites reflections on the fact that even voluntary labeling regimes are not all equal. Among these schemes, some:

- a) do not allow competing labeling schemes; while others
- b) allow competing labeling schemes.

The US regime does allow competing labeling schemes only to a very limited extent.²² One could imagine a more competitive regime where the US Department of Commerce (DOC) label 'dolphin-safe' is granted only when the US standards are met, and at the same time, tuna caught following AIDCP standards can be granted a *competing* label – say 'dolphin-friendly' or 'AIDCP-tuna'; the AIDCP-tuna would mean toleration for incidental killing of dolphin, but overall control on conservation of the dolphin species. While, for the skeptics, this distinction may not provide a sufficient justification to treat the US measures as mandatory, at least it shows that among these measures some are more restrictive of the markets than others. If the mandatory/voluntary nature of a measure is conceptualized along a continuum, the conclusions of the Panel's majority may then become a little more convincing.

What remains problematic in the reasoning of the Panel's majority, however, is its conceptual architecture. As shown above, the concept of 'prescription in a negative form' is of little use to discern the mandatory nature of a measure. Equally unconvincing is the part of the Report where a strong link is established between the fact that a measure is issued by a *public body* and its mandatory nature.²³ Such a reading could in practice imply that measures adopted by public bodies will almost always be judged as 'technical regulations.' Such a reading of the TBT Agreement may be considered against the principle of effective treaty interpretation, because the norms concerning standards include the scenario in which standards are enacted by central *government* standardization bodies.

II.A. But, what is the practical relevance of this distinction?

The practical relevance of the technical regulations/standards distinction is arguably less salient than it may appear at first sight. It is true that if the measures had qualified

²² Subparagraph (d)(3) of the DPCIA allows for competing 'dolphin-safe' marks only when three conditions are met: 1. no dolphins have been killed or seriously injured while fishing the tuna, 2. the label is supported by a tracking and verification program comparable in effectiveness to the US one and 3. the label complies with any labeling, advertising and marketing laws and regulations of the Federal Trade Commission.

²³ See the passage of the Panel Report cited above, note 14.

as standards, Article 2 of the TBT Agreement would not have applied. Yet, Article 4.1, first sentence, of the Agreement provides that ‘Members shall ensure’ that the bodies preparing, adopting and applying the standards ‘accept and *comply* with the Code of Good Practice for the Preparation, Adoption and Application of Standards in Annex 3 to this Agreement.’ The Code of Good Practice contains many of the substantive obligations already formulated in Article 2 for technical regulations. For instance, Annex 3(D) virtually reproduces Article 2.1, where it establishes that the principle of non-discrimination applies to standards. Also, when it comes to the role of international standards, the Code virtually reproduces Article 2.4 of the TBT Agreement.²⁴

The obligations relative to not creating unnecessary obstacles to international trade are less articulate in Annex 3(E), when compared with Article 2.2 of the TBT Agreement. What are the implications of the different formulations of these norms? If one is of the view that the more succinct text of Annex 3(E) implies a more lenient regime, then the difference between technical regulations and standards may gain relevance. This particular issue has not been interpreted by the WTO courts, leaving the question of the practical relevance of the distinction between technical regulations and standards open.

It should also be noted that the obligations of Article 4.1, second sentence, are clearly less stringent than those of Article 2 and Article 4.1, first sentence, because Members are merely asked to ‘take such reasonable measures as may be available to them.’ This part of Article 4, however, applies only to measures adopted by local government and non-governmental standardizing bodies.’ Such rule would be relevant in the case discussed, only if the US major retailers of tuna products would be considered as non-governmental standardizing bodies, an issue analyzed in the next section.

III. The role of private actors in the shadow of *US-Tuna II*

While *US-Tuna II* on the surface deals only with US *public* policy, the dispute raises also questions about the role of private actors in international trade law. Mexico has indirectly brought this issue into the dispute, with the allegation that the US measures should have been considered if not *de jure*, at least *de facto* mandatory. The main

²⁴ Cfr. Annex 3(F) TBT Agreement.

argument of Mexico is that ‘the labelling scheme ... is *de facto* mandatory because the market conditions in the United States are such that it is impossible to effectively market and sell tuna products without a dolphin-safe designation.’²⁵ In other words important retailers refuse to purchase tuna without the dolphin-safe label. Following Mexico’s reasoning, the behavior of private actors is crucial for determining the nature of the measures.

The majority of the Panel did not consider it necessary to assess this issue, as it already found that the measures were *de jure* technical regulations. The dissenting Panelist, having found the opposite, investigated whether the US measures could be considered *de facto* mandatory. The gist of his reasoning on this point is that a measure can be considered as *de facto* mandatory when a two-tier test is met: (i) it should be practically impossible for a product to enter the market without the label and (ii) the impossibility to access the market should be caused by the Member’s behavior and not by exogenous market factors.²⁶ In the specific case, the Panelist concluded that the obstacles to marketing the tuna products without the dolphin-safe label in the US market were caused by *private market actors*, rather than by the US public policy. From the evidence brought by the US, in fact, it emerged that the policy of the major US retailers was of not purchasing tuna caught with purse seine nets techniques, irrespective of the State’s public policy.²⁷ The reasoning of the dissenting Panelist is a clear attempt to de-link the behavior of private actors from the actions by the State:

‘In explaining the adverse effects of the measures, Mexico argued that they have direct effects on tuna products, because major retailers in the United States refuse to buy tuna products that cannot be labelled dolphin safe ... I agree with the United States, however, that these are decisions made by private

²⁵ Panel Report, para. 4.54.

²⁶ Panel Report, para. 7.175.

²⁷ As evidence of the choice operated by market actors, the Panel quotes the following passage from the website of one of the major market actor in the market for tuna products: "Bumble Bee Foods, LLC remains fully committed to the 100% dolphin-safe policy we implemented in April 1990. ... The US Government Dolphin-Safe Regulations are in the process of being modified through the International Dolphin Conservation Program. The new regulations will allow for a less stringent US Dolphin-Safe Regulation. Despite the new, less stringent 'compliance' criteria, Bumble Bee remains committed to and in compliance with a 'no encirclement' policy. The commitment of Bumble Bee to dolphin-safety will remain unchanged regardless of any changes to the dolphin-safe law. We continue to strictly adhere to our 100% dolphin-safe policy." Panel Report, para. 7.362.

actors that do not necessarily involve the participation of the State. Such private actions alone should not be able to turn an otherwise voluntary norm into a technical regulation.²⁸

If, on the one hand, this reasoning is convincing, on the other, it may be seen as in opposition to the overall goal of the TBT Agreement of diminishing technical barriers to trade, regardless of their private or public nature. While the issue is still very controversial,²⁹ it could be argued that one of the specific features of the TBT Agreement is to render Members accountable for the behavior of so-called private regulators, even if to a limited extent.³⁰ Such an approach could be defended on the basis that the rise of private regulation in regulating markets is an important source of trade barriers.³¹ If this approach is endorsed and the dissenting Panelist is correct, then, the question arises as to whether the alleged trade barriers imposed by the US major retailers could otherwise fall under the purview of the TBT Agreement.

One way to bring the behavior of the US retailers under the purview of the TBT Agreement is to argue that their concerted action is in effects a way to set 'standards'. To defend this case, Mexico would have to show the following three points: 1) the US major retailers are 'non-governmental standardizing bodies' within the meaning of Article 4.1, TBT Agreement; 2) their labeling criteria qualify as standard, within the meaning of Annex 1(2), TBT Agreement; and that 3) the US did

²⁸ Panel Report, para. 7.178.

²⁹ For a rather critical stand on the application of the TBT (and the SPS) Agreement(s) to private standards see Wlostowski (2010), cit. supra note 18.

³⁰ Wlostowski has identified four types of responsibility, which range from the rather encompassing formulation of Article 3.5 of the TBT Agreement ('Members are fully responsible') to less restrictive formulations that impose on Member the obligation of 'taking reasonable measures as may be available to them' (Article 3.1 and 4.1, second sentence of the TBT Agreement); cf. Wlostowski (2010), pp. 227-29, cit. supra note 18. Whether the obligations established by Article 4.1 are of conduct or of result is another relevant issue, which has been discussed by Bohanes & Sandford (2008), 'The (Untapped) Potential of WTO Rules to Discipline Private Trade-Restrictive Conduct', Working Paper Presented at the Society of International Economic Law Inaugural Conference, Geneva, July 15-17, 2008, at p. 35.

³¹ Leaving private regulation out of the WTO legal framework would have arguably left a great margin for protectionist behavior enacted by non-state actors. For an overview of this phenomenon see: Schepel, (2005), *The Constitution of Private Governance*, Hart Publishing. Few authors have already examined the relationship between private standards and WTO law. For an overview see: Bernstein and Hannah, (2008) 'Non-State Global Standard Setting and the WTO: Legitimacy and the Need for Regulatory Space', 11 (3) *Journal of International Economic Law*, 575-608; Bohanes & Sandford (2008), cit. above note 30; Prevost, (2008), 'Private Sector Food-Safety Standards and the SPS Agreement: Challenges and Possibilities', 33 *South African Yearbook of International Law*, 1-37.

not take the ‘available’ ‘reasonable measures’ ‘to ensure’ that the US retailers accept and comply with the Code of Good Practice.³²

At first sight, these claims are not defensible. Non-government standardization bodies, while not defined in the Agreement, seem to refer to bodies recognized ‘by the state’, ‘whose *central* functions are to prepare and issue standards’.³³ Clearly the US retailers fall outside this definition. Similarly, if we look at the definitions of standards, i.e. ‘document approved by a recognized body’, the US tuna retailers’ policy seems to fall outside of this domain. However, one could try to argue that these measures are *de facto* standards issued by a *de facto* non-governmental standardization body.

Legal scholars Jan Bohanes and Iain Sandford, have argued that it is plausible to conceptualize the term ‘recognized standardizing body’ in the light of one of the objects and purposes of the TBT Agreement. They focus on the 5th paragraph of the Preamble of the TBT Agreement that sets as a goal the minimization of ‘the degree to which standards ... can constitute unnecessary obstacles to international trade’.

‘In this light, in determining what is a recognized standardizing body, it may be useful to consider whether the *market* effectively recognizes the standardizing activities of the body. For example, if a body or group has sufficient market power through its standardizing activities to substantially exclude foreign competitors from the market (with potential therefore to constitute unnecessary barriers to international trade), this should fall within the scope of the disciplines in the TBT Agreement.’³⁴

Looked at from this perspective, it seems possible to articulate an argument where a private company that normally is not operating as a standardization body is judged as a *de facto* standardization body for the purposes of the TBT Agreement. For analogous reasons, if a policy is not contained in an approved document, but it clearly has the effect of providing ‘for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods ...’, it may

³² The second sentence of Article 4.1 of the TBT Agreement reads: ‘[Members] shall take such reasonable measures as may be available to them to ensure that local government and non- governmental standardizing bodies within their territories, ... accept and comply with this Code of Good Practice.’

³³ See Bohanes and Sandford, (2008), above note 30 emphasis added, at p. 33.

³⁴ Ibidem, at p. 33, footnote 75; emphasis in original.

be considered a *de facto* standard. One reason to consider such a scenario as plausible is that otherwise Members and private actors could elude the effects of the TBT Agreements by acting through informal procedures. Such a reading may be justifiable in order to give best effects to the TBT Agreement.³⁵

In the specific case, it may have been difficult for Mexico to prove that the US retailers in practice set standards. In this respect, it is important to note, that even if the TBT Agreement deals with the behavior of private actors, its focus is circumscribed only to the standardization activities of these entities and not on any anti-competitive behavior of firms. Thus, if the retailers were to act so as to exclude foreign competitors from the market, without adopting and/or implementing standards, this would be the province of competition law, a field outside the scope of the TBT Agreement.

While the issues discussed here have not been brought up by Mexico and are accordingly very speculative, they provide food for thought for future disputes involving private parties.

IV. *US-Tuna II* and Non-Discrimination

Article 2 encompasses the most important obligations of the TBT Agreement; most notably, non-discrimination, the prohibition of using measures more trade restrictive than necessary and the positive obligations to base technical regulations and standards on existing international standards. This dispute, together with *US - Cloves Cigarettes* and *US - COOL*, is one of the first to venture into the interpretation of this important Article. This analysis follows the order of the Report.³⁶ After having concluded that the US measures are technical regulations within the meaning of Annex 1 of the TBT

³⁵ Against this approach see Wlostowski (2010), cit. supra note 18. The author identifies two sets of arguments against the application of the TBT (and SPS) Agreement(s) to private standards: the first set includes mainly arguments of political/pragmatic nature (e.g. 'importing WTO Members, with extended retailer and distribution interests ... will be extremely unhappy with subjecting private standards to WTO regulations' p. 232); the second deals with legal issues (e.g. the WTO rules in this realm are very vague and if applied to private parties are likely to result in a Pyrrhic victory at most).

³⁶ The fact that the order of the Panel's report is followed does not imply endorsement of this order. It is in fact possible to argue that the order of the analysis should be reversed in such a way that the necessity of the measure needs to be scrutinized first, and its non-discriminatory nature subsequently. In an informal conversation about this case, Professor Petros Mavroidis suggested that this 'reversed' ordering may make more sense than the ordering followed by this Panel.

Agreement, the Panel proceeded with the analysis of whether the measures violated the non-discriminatory mandate of Article 2.1 of the TBT Agreement.³⁷

The Panel started the analysis under Article 2.1 by scrutinizing whether the products are ‘like products.’ Relying on much of the jurisprudence of Article III, GATT 1994, the Panel chose to focus on the ‘competitive relationship’ between the products in its legal analysis of likeness.³⁸ On this basis, the Panel came to the conclusions that these were like products.³⁹ It should be noted, however, that the categories compared by the Panel are tuna products originating from Mexico and tuna products originating in the US or any other country.⁴⁰ The case on this point could have taken a more interesting turn if the comparison had been between ‘tuna’ and ‘dolphin-safe tuna’ or even ‘Mexican dolphin-safe tuna’ vs. ‘US dolphin-safe tuna.’

The Panel went on to investigate whether the Mexican tuna was granted ‘less favorable treatment’ than the US like products or any other products originating in other countries. The test devised by the Panel is two-tier: ‘We ... must consider whether (a) access to the label is an advantage and (b) Mexican tuna products are denied access to it under the measures.’⁴¹ The Panel concluded that the US dolphin-safe label has a ‘significant commercial value’ and in this sense it can be considered a measure granting an advantage.⁴² To investigate the second issue, the Panel ruled that it was necessary to first identify the ‘relevant timeframe for assessment.’⁴³ The main issue is whether the measures should be assessed as of the time when they were first implemented or as of the time of the Panel’s establishment. The Panel endorsed the former view and conducted its investigation of the market as of the time when the DPCIA was adopted. It was then concluded that at that time (1990), US and Mexican vessels were equally setting on dolphins, and in order to get the US label, all

³⁷ Article 2.1 of the TBT Agreement reads: ‘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.’

³⁸ It is interesting to note that almost contextually, the Panel in *US – Clove Cigarettes*, opted for a rather different interpretation of likeness, where the likeness test should be informed by the regulatory goal of the measure. Panel Report, *US – Clove Cigarettes*, note 8 above, para. 7.119.

³⁹ Panel Report, *US – Tuna II*, para. 7.251.

⁴⁰ Panel Report, para. 7.233.

⁴¹ Panel Report, para. 7.284.

⁴² Panel Report, para. 7.289 and 7.291.

⁴³ Panel Report, para. 7.296.

companies had to switch to the new technology.⁴⁴ Following this reasoning the Panel established that Mexican tuna products are (and were) not denied access to this label.⁴⁵ Thus, the Panel concluded that the Mexican products were not granted less favorable treatment.

The question of the timeframe for assessing non-discrimination is a relevant one and deserves some further reflection. While there is something to be saved in the Panel's reasoning in this regard, it should be also noted that the Panel's approach does not capture the complexity of a non-discrimination analysis. What the Panel does, in fact, is to discuss the effects of the measures on the market-actors.⁴⁶ In that respect, it seems correct to look at the moment of implementation of the standards. This is because one should look at how firms were affected in that specific moment by the regulatory measure. Otherwise, it suffices for some firms not to adapt and a measure would be found discriminatory even if, when it was enacted, had equal effects on firms of different nationalities.

However, there is another dimension that may be relevant when assessing the discriminatory character of a measure: the *nature of the problem* that the measure wants to address. In this case, if the nature of the problem changes over time, it is meaningful to extend the timeframe up to the time of the establishment of the Panel.

⁴⁴ Panel Report, 7.324; The Panel phrased its conclusions as follows: '... as of 1990 (enactment of the first version of the DPCIA), Mexico and the United States had a comparable number of purse seine vessels operating in the ETP, although it remains unclear what proportion of those purse seiners was setting on dolphins (as opposed to unassociated sets). In addition, the Mexican fleet had a higher number of baitboats (non-purse seine vessels) than the US fleet had. On that basis, it appears that the United States and Mexico were in a comparable position with regard to their fishing practices in the ETP, in that both of them had the majority of their fleet operating in the ETP composed of purse seine vessels potentially setting on dolphins.'

⁴⁵ Panel Report, para. 7.345.

⁴⁶ It should also be noted that, under Article 2.1, an analysis limited to the market-effects of the measures may be misleading. Arguably, under the TBT Agreement, the test for finding discrimination should not merely replicate the one under Article III GATT 1994. This is because there is no Article XX GATT 1994 in the TBT Agreement that provides a shield for measures adopted to pursue legitimate regulatory goals. While the relationship between Article 2.1 and 2.2 of the TBT Agreement has not been clarified by the Appellate Body, it seems that there is no rule-exception relationship between these two provisions. In support of this statement is the fact that the Panel, when conducting the analysis under Article 2.2 in *US – Tuna II*, has placed the burden of proof on the complainant (cfr. Panel Report, para. 7.392 and 7.468). This implies that a measure found in violation of Article 2.1 could not be 'saved' by a finding of compliance with Article 2.2. Thus, even if measures have different effects on market-actors originating from different countries, they may arguably be found to be non-discriminatory. Otherwise, it may be impossible for a Member to protect the environment, health and safety of its constituency, as provided for in the sixth Preamble paragraph of the TBT Agreement.

This is because a TBT measure may well have a limited geographical scope determined by the nature of the problem. However, if the nature of the problem changes, the geographical scope may lose its initial legitimacy. It could be that when the Panel was established there was no scientific evidence of serious harms to dolphin outside the ETP area. However, if with the passage of time, scientific evidence emerge and unequivocally point at the fact that other fishing techniques outside the ETP are *equally* harmful for dolphins, it seems ‘WTO-reasonable’ to consider the discriminatory character of the measures at the time of the establishment of the Panel. Article 2.3 of the TBT Agreement seems to support such reasoning.

IV.A. (Non-)Discrimination reconsidered

In order to better appreciate this issue, it is worth questioning whether some of the facts analyzed by the Panel under Article 2.2 could not have been assessed under Article 2.1. In particular, it seems plausible to scrutinize whether the different conditions for tuna caught in and outside the ETP area set by the US labeling regime can be considered discriminatory. When these facts are assessed under Article 2.1, two general considerations are due. The first consideration is that non-discrimination under Article 2.1 does not imply *formal* equality of treatment. This means that a labeling regime can treat differently products originating from different countries and still be judged non-discriminatory. An example with fictitious figures may clarify this point. Assume that when the US adopted its labeling regime, harm to dolphins (both in terms of mortality and morbidity risks) was for the most part (say 95%) caused by purse-seine nets setting on dolphins in the ETP area. The US measures, even if more lenient for fishing practices outside the ETP area, could be considered perfectly legitimate and non-discriminatory because most of the problem was caused in the ETP area. In fact, having formal equality of treatment may not make sense as it would unreasonably increase the costs of products, as certification, verification and tracking programs are costly.

The second consideration is that when a labeling regime is enacted, in order to assess the non-discriminatory nature of the regime it seems reasonable to scrutinize whether products originating from different countries are *substantively* granted the same access to the label. Let us relax the assumptions made above and assume that Mexico had demonstrated that tuna products fished outside the ETP were granted the

US dolphin-safe label even if caught in a manner that harms dolphins *in the same way and to the same extent* than the Mexican fishing practices do. As it will be discussed in the next section, the analysis of the scientific evidence about the mortality and morbidity risks for dolphins by-caught outside the ETP area conducted by the Panel is quite patchy. However, if such an analysis had been conducted in a more systematic manner and Mexico had brought sufficient evidence, it seems that there would have been strong grounds to find discrimination. In fact, if a label would be granted, *ceteris paribus*, to products of all nationalities except Mexican, it is difficult not to consider the question of discrimination.

It is worth repeating that an essential condition to prove discrimination in this case would be the solidity of the scientific evidence relied upon; anecdotal and/or uncertain scientific evidence should not be considered sufficient for at least two reasons: firstly, because the burden of proof is on the complainant; secondly, because otherwise it would be relatively easy to attack any environmental measure.

V. Trade-restrictive nature of the US measures

Article 2.2 of the TBT Agreement provides that:

‘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.’

In order to assess compliance with this norm, the Panel proceeded in three steps.⁴⁷ 1) It first identified the objectives of the US measures. 2) It then analyzed whether these

⁴⁷ At the basis of its reasoning, the Panel explained the relationship between the first and the second sentence: ‘... complying with the requirements contained in the second sentence of

objectives are legitimate and, 3) finally, scrutinized whether the US measures are more trade restrictive than necessary to fulfill their objectives. The Panel found that the US measures pursue two objectives: a consumer information⁴⁸ and a dolphin protection objective.⁴⁹ After having found both objectives legitimate,⁵⁰ the Panel moved to the last and most crucial issue of its analysis, i.e. the evaluation of the trade-restrictiveness of the US measures. The Panel interpreted the provisions of Article 2.2 as closely related to those of Article 5.6 of the Sanitary and Phytosanitary (SPS) Agreement.⁵¹ From this analysis, it concluded that the obligations contained in Article 2.2 are positive obligations and do not have the nature of exception, in contrast with the nature of the Article XX, GATT 1994. It follows that the burden of proof is on the complainant.⁵²

Thus, the Panel went on to ascertain whether Mexico made a *prima facie* case that the US measures were more trade-restrictive than necessary. The crucial question was whether the measure suggested by Mexico was a less-trade-restrictive measure, capable of fulfilling the objectives previously identified. The alternative measure suggested by Mexico would consist in allowing the AIDCP dolphin-safe label in the US market.⁵³

In order to assess this issue, the Panel compared the extent to which the US measures are able to achieve their objectives with how the AIDCP labeling scheme would do that. In relation to the first objective (consumer information), the Panel found that consumers are left with a margin of uncertainty under both labeling schemes. Under the US dolphin-safe label, the consumer would not be sure whether tuna caught outside the ETP involved the accidental killing of dolphins. Under the AIDCP regime, consumers will be uncertain whether accidental killing of dolphins occurred when the purse seine nets technique was used to catch tuna. Thus, the objective of not misleading consumers is achieved in an imperfect way by both the

Article 2.2 serves the purpose of ensuring that technical regulations do not create unnecessary obstacles to international trade.' Panel Report, para. 7.386.

⁴⁸ Cf. Panel Report, paras. 7.408-7.413. The core of the consumer protection objective coincides with what was claimed by the US: "ensuring that consumers are not misled or deceived about whether tuna products contain tuna that was caught in a manner that adversely affects dolphins". Panel Report, para. 7.413.

⁴⁹ Panel Report, paras. 7.414-7.427.

⁵⁰ Panel Report, para. 7.444.

⁵¹ Panel Report, para. 7.461.

⁵² Panel Report, para. 7.468.

⁵³ Panel Report, para. 7.566.

AIDCP and the US measures. This is the logical premise, according to the Panel, to conclude that both measures *equally* achieve the first goal of the US measures. Following a similar reasoning, in relation to the second objective (dolphin protection), the Panel found that the US measures ‘may only *partially* fulfill their objectives’⁵⁴ and from there it inferred that Mexico produced sufficient scientific evidence to show that the AIDCP regime provided equal protection to dolphins than the US measures. Upon this basis, the Panel thus found that the alternative suggested by Mexico is indeed capable of fulfilling the objectives of the US measures to the same extent that the US measures do, and thus concluded that the US measures violated Article 2.2 because they are more trade-restrictive than necessary.⁵⁵

V.A. Four flaws in the Panel’s reasoning

V.A.1. Assuming trade restrictiveness

The focus of this analysis is on four deficiencies in the Panel’s reasoning. The first relates to the lack of assessment of the ‘trade-restrictive’ nature of the US measures. The Panel focuses mainly on the notion of ‘necessity’ and emphasizes that under Article 2.2 of the TBT Agreement, it is relevant to assess the necessity of the trade-restrictiveness rather than the necessity of the measures itself.⁵⁶ However, the Panel does not analyze or assess whether the US measures as such can be said to be trade-restrictive. The Panel, thus, *assumes* that the measures are trade-restrictive. Yet, it is legitimate to ask: Are the US measures establishing the ‘dolphin-safe’ regime trade-restrictive and, if yes, to what extent? Why does the Panel not consider to what extent a law establishing conditions on environmental labeling restricts the market? One would have expected some discussion of this issue, given that the US measures do not impose a ban on tuna harvested with purse-seine nets setting on dolphins. These tuna products are virtually free to enter the market. If a product-ban could plausibly be assumed trade-restrictive, a labeling regime cannot! It is arguably legitimate to ask whether this labeling regime *de facto* restricts the market; however, the Panel does not engage in this type of analysis. Its assumption of trade-restrictiveness remains thus unsubstantiated.

⁵⁴ Panel Report, para. 7.599.

⁵⁵ Panel Report, paras 7.620-7.621.

⁵⁶ Cfr. Panel Report. Para 7.460. In making this parallel the Panel compared Article XX GATT with Article 2.2 of the TBT Agreement.

It should be further noted that if the interpretative approach to Article XX GATT is considered relevant for the interpretation of Article 2 TBT Agreement, a Panel should not assess trade-restrictiveness by itself, as virtually all regulatory measures can be said to be to some degree trade-restrictive. A Panel should rather engage in an analysis that balances the degree of trade-restrictiveness with the values protected.⁵⁷

V.A.2. The difficult art of comparing: if two wrongs make a right!

The second problem with the reasoning of the Panel relates to the way it constructed the comparison. The Panel found that the US measures do insufficiently achieve both of their goals; the alternative proposed by Mexico – a regime where the US label would co-exist with the AIDCP label – would also partially achieve the US goals, in the view of the Panel. The Panel does not compare in what ways the different measures achieve the goals; it seems to focus only on the degree of imperfection of the measures. This reasoning seems to rest on a sort of quantitative test of the type: if you achieve 60% of your goal, any measure capable of achieving 60% of that goal are equally suitable. While the Panel refers to a number of studies containing evidence on dolphin mortality outside the ETP zone,⁵⁸ it does not bring conclusive evidence as to the relative size of the problem in non-ETP seas. The Panel has not consulted experts and relies ‘on a limited amount of *ad hoc* studies’ to draw conclusions.⁵⁹ Thus, one is left with the following question: could any measure that *partly* provides protection to dolphins be considered as achieving the same goal as the US measures? In other words, when a measure reaches its goals in an imperfect manner, any other ineffective means will be comparable, no matter the degree of ineffectiveness? Such a reasoning may be rather perverse for environmental policy. If any evidence of imperfection of a measure can be used against it, environmental measures would clearly have short lives under WTO law.

V.A.3. Morbidity risks in the shadow

⁵⁷ Cfr. Appellate Body Report, *Brazil - Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, 17 December 2007.

⁵⁸ Cfr. Panel Report, paras 7.520-7.523.

⁵⁹ Panel Report, paras 7.519.

The third problem with the Panel's reasoning relates to the way in which the Panel has treated the goals pursued by the US measures. The US raised the issue that its measures were not only aimed at reducing dolphin mortality but also at reducing other forms of hazards to dolphins, such as 'separation of dependent calves from their mothers, reduced reproductive success due to stress induced foetal mortality, acute cardiac and muscle damage, cumulative organ damage, compromised immune function and increased predation.'⁶⁰ While the Panel acknowledges these issues, its assessment of scientific evidence focuses primarily on dolphin-mortality, remaining ambiguous on the rest.⁶¹

V.A.4. Uncertainty and the burden of proof

Fourthly, the analysis of the Panel leaves open an important question regarding the role of uncertainty. The Panel concluded this part of the report by emphasizing that the information available over the effects of the fishing practices on dolphins' mortality is at best uncertain:

Finally, we note that, as reflected in our analysis above, our findings take into account the information, including scientific information concerning the effects of tuna fishing on dolphins that is available to us for the purposes of these proceedings. From these elements, it appears that a number of aspects of this issue are *not fully documented* and that *further research may be necessary* in order to ascertain the exact situation in various areas.⁶²

This statement raises the question: If the burden of proof is on the complainant, should the presence of scientific uncertainty not have been weighted in favor of the defendant rather than the opposite?

VI. International Standards and lack of coherence of the Panel Report

The Panel finally investigated whether the US measures violate Article 2.4 of the TBT Agreement, which provides that '[w]here technical regulations are required and relevant international standards exist ..., Members shall use them ... as a basis for their technical regulations except when such international standards ... would be an

⁶⁰ Panel Report, para. 7.588.

⁶¹ Cfr. Panel Report, paras 7.520-7.523.

⁶² Panel Report, para. 7.623; emphasis added.

ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued.’ After having concluded that the AIDCP constitutes relevant international standards (a conclusion challenged by the US in the appeal)⁶³ and that the US dolphin-safe labeling provisions are not based on the AIDCP standards, the Panel turned to the analysis of whether these standards are an effective means to fulfill the objectives of the US measures.

This question is similar to the one posed under Article 2.2. In fact, the less-trade-restrictive measure suggested by Mexico is to allow the AIDCP label next to the US one. It is worth noting that the AIDCP regime is the same one that under Article 2.4 constitutes relevant international standards. The main difference with the analysis under Article 2.2 is that the alternative measure suggested by Mexico is not just the AIDCP label, but to allow this label in the US market without prejudice to the existing US labeling scheme. In other words, the two regimes would co-exist under Mexico’s proposal. By contrast, the scenario under Article 2.4 is that the US standard should have been based entirely on the AIDCP standards. The question then is whether the AIDCP regime is capable of fulfilling the objectives of the US measures. The Panel concluded that ‘Mexico has failed to demonstrate that the AIDCP dolphin-safe standard is an effective and appropriate means to fulfil the US objectives at the United States’ chosen level of protection.’⁶⁴

The reasoning of the Panel in this respect is puzzling. Note that the Panel did not compare the effects of a regime where the AIDCP would co-exist with the US label with a regime where the AIDCP provides the only standards. The crucial difference in the Panel’s reasoning with the one under Article 2.2 is that in the Article 2.2 analysis the Panel *re-defined the objectives* of the US measures in light of the extent to which these measures were capable of reaching them. The Panel judged that both the US measures and the AIDCP regime only partially fulfilled the objectives and, thus, were valid alternatives. Under Article 2.4, by contrast, the ‘comparative dimension’ of the conceptualizations of the objectives faded away; the objectives have been described in absolute terms. Under Article 2.2 the evidence persuaded the

⁶³ The US contested, *inter alia*, one of the basic conditions to conclude that that the AIDCP is an international standard, namely that the AIDCP is an international standardizing organization. The jolt of the US reasoning is that the AIDCP was and is not open to all Members and thus cannot be considered as an international standardizing body. Cf. Appellant Submission of the United States of America, AB-2012-2/DS-381), paras. 138-48.

⁶⁴ Panel Report, para. 7.740.

Panel that the AIDCP regime was a less-trade restrictive alternative, capable of fulfilling the objectives of the US measures. However, under Article 2.4, the same evidence persuaded the Panel of just the opposite. The logical coherence of the Panel report on these issues is rather shaky.

VII. Concluding Remarks

2011 at the WTO could be re-named as the year of the TBT Agreement. The Panel reports in *US-Cloves Cigarettes*, *US - COOL* and in *US-Tuna II* are giving new life to the TBT, a WTO Agreement that for long time remained in the shadow of the ‘hot topics’ in the trade-environment debate. *US-Tuna II* has (re-)opened the debate on the issue of how to classify a measure as technical regulation or standards, and more generally on when measures can be considered mandatory or voluntary. The practical relevance of this distinction may be less salient than it appears at first sight, because the obligations related to technical regulations are very similar to those related to standards. Yet, the distinction made by the majority of the Panel remains disputable because it appears to artificially expand the meaning of mandatory measures.

This article has raised some doubts concerning the logical consistency of the Panel’s analysis under Article 2 of the TBT Agreement. In particular the less trade-restrictive test articulated by the Panel suffers from several flaws. First, the Panel assumed that the US measures were trade-restrictive; however, such an assumption is far from obvious when the measures considered establish a *voluntary* labeling regime. Second, the Panel seems to have relied on a test by which if a measure does not reach its objectives perfectly, any other ineffective measures adopted with allegedly the same goals can be judged as a valid less-trade restrictive alternative. In other words, two wrongs seem to make a right in the view of the Panel; a conclusion that, for obvious reasons, will not be greeted with enthusiasm by environmentalists. Finally, the Panel has subverted the very idea underlying the burden of proof by relying on self-reported uncertain scientific evidence to come to the conclusion that Mexico has proved its case. If the WTO Courts started to use uncertain scientific evidence against Members’ environmental measures, the WTO could easily be criticized for resting on a sort of ‘anti-precautionary’ principle.

It should be noted that, if the US wanted to comply with this Report, it would not have to relax its standards; rather, it could tighten up its standards and certification requirements for all the tuna fished outside the ETP and thus further restrict trade of

tuna products caught outside the ETP. Since both parties have appealed the Panel Report on January 2012, it remains to be seen whether/to what extent the Appellate Body will uphold the Panel's legal analysis and conclusions.