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Power and Purpose of Ecolabelling: An Examination Based on the WTO Disputes *Tuna II* and *COOL*

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Abstract: Ecolabels are frequently presented as consumer information tools that efficiently promote environmental aims such as the sustainability of fisheries. Two recent WTO dispute settlement cases -- *Tuna II* and *COOL* -- have called into question the characterisation of labels as 'consumer information tools' by illuminating the regulatory power and purposes of labelling. *Tuna II* moreover clarifies that WTO law does not necessarily privilege ecolabelling over more openly interventionist government measures aimed at environmental protection. In this contribution I first sketch two views of ecolabelling -- one that depicts ecolabelling as primarily aiming at consumer information and another that stresses the regulatory function of labelling. I then turn to the dispute settlement reports in *Tuna II* and *COOL* in order to specify the government authority involved in many labelling schemes. I conclude this contribution with the call for a critical assessment of ecolabelling. The power of ecolabelling may be employed to reshape markets and promote green growth. At the same time, however, it may consolidate a trend that places the consumer at the centre of initiatives for societal change and loses sight of potentially more radical transformations through the engagement of human beings as citizens.

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I. Ecolabelling and the WTO

- 1 Ecolabels as instruments to promote sustainable consumption and production patterns are high on the agenda of national, regional, and international bureaucracies.¹ Already in 1992 Agenda 21 in its chapter ‘Changing Consumption Patterns’ called on “[g]overnments, in cooperation with industry and other relevant groups, [to] encourage expansion of environmental labelling [...] designed to assist consumers to make informed choices.”² As concerns the marine environment, a number of labelling schemes aim at promoting the sustainability of fisheries. Single issue schemes, such as the US ‘dolphin-safe’ labelling scheme that will be discussed in detail in this contribution, aim at the protection of particular species, other labelling schemes, such as those of the Marine Stewardship Council and Friend of the Sea, take a more comprehensive approach aiming at marine biodiversity protection. With respect to transboundary challenges, such as marine biodiversity loss, ecolabelling promises to address some of the deficits of environmental protection through international law. Ecolabels that certify compliance with (binding or non-binding) standards provide means to enhance the effectiveness of such standards by allowing consumers to act as “enforcers” of sustainability norms through their consumption decisions.
- 2 In this contribution I wish to take a step back from the particulars of individual labelling schemes as well as the specificities of the protection of marine fisheries and instead inquire into the characteristics of ecolabels that make them potentially powerful governance instruments – governance instruments that due to their authority require justification.³ The power of ecolabelling remains concealed when proponents of ecolabelling schemes describe them as

¹ See only European Commission, Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan, COM(2008) 397 final; the Food and Agricultural Organization (FAO) activities on ecolabelling in fisheries management, overview available at: www.fao.org/fishery/topic/12283/en (accessed on 28 November 2014); United Nations Environment Programme (UNEP) Project “Enabling developing countries to seize ecolabelling opportunities,” project website available at: <http://www.unep.org/resourceefficiency/Consumption/StandardsandLabels/InitiativesandProjects/CapacityBuilding/Eco-labellingProject/tabid/101355/Default.aspx> (accessed on 16 March 2015).

² United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, 3-14 June 1992, Agenda 21, para. 4.21, available at: <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf> (accessed on 16 March 2015).

³ The authority of ecolabelling schemes and their need for justification is recognised by the FAO Guidelines for the Ecolabelling of Fish and Fishery Products from Marine Capture Fisheries (Rev. 1 2009), available at: <http://www.fao.org/docrep/012/i1119t/i1119t.pdf> (accessed on 27 January 2015).

market-based “communication/information provision tools”⁴ which bear the potential to create ‘win-win’ or even ‘win-win-win’ situations allowing consumers to maximise benefits from consumption, producers to turn into profit consumer preferences for sustainable products, and the environment to gain breathing space from the resulting changes in production and consumption patterns.⁵ Such a depiction no longer presents ecolabels as born out of necessity given the weaknesses of government in transboundary constellations,⁶ but promote them as efficient instruments in the endeavour to transform the global economy into one that generates ‘Green Growth.’⁷

3 It is the benefit of two recent World Trade Organization (WTO) dispute settlement cases *United States – COOL*, concerning US legislation and implementing regulations on country of origin labelling,⁸ and *United States – Tuna II*, concerning the US ‘dolphin-safe’ labelling scheme,⁹ to have called into question the characterisation of labels as ‘consumer information tools.’¹⁰ The WTO as an international organisation to which observers frequently attribute a free trade bias¹¹ would – one might assume – welcome potentially growth-

⁴ See, for example, BIO Intelligence Service, Policies to encourage sustainable consumption, Final report prepared for European Commission (DG ENV) (2012), 13 (listing environmental product labels as “communication/information provision tool” towards sustainable consumption).

⁵ Cf. FAO, Fisheries and Aquaculture Department, Labeling and Certification, available at: <http://www.fao.org/fishery/topic/13293/en> (accessed on 28 November 2014).

⁶ For such an approach see *Jürgen Friedrich*, Environment, Private Standard-Setting, MPEPIL, available via: <http://www.mpepil.com> (accessed on 28 November 2014).

⁷ World Bank, Inclusive Green Growth: The Pathway to Sustainable Development (2012), available at: http://siteresources.worldbank.org/EXTSDNET/Resources/Inclusive_Green_Growth_May_2012.pdf (accessed on 25 February 2015); for a situation of ecolabelling within approaches of ecological modernisation see *Anna Couturier/Kannika Thaimai*, Eating the Fruit of the Poisonous Tree? Ecological Modernisation and Sustainable Consumption in the EU, Working Paper, Institute for International Political Economy Berlin, No. 20/2013.

⁸ World Trade Organization (WTO), *United States – Certain Country of Origin Labelling (COOL) Requirements*, Report of the Panel of 18 November 2011, WT/DS384/R, WT/DS386/R (COOL, Panel); *id.*, *United States – Certain Country of Origin Labelling (COOL) Requirements*, Report of the Appellate Body of 29 June 2012, WT/DS384/AB/R, WT/DS386/AB/R (COOL, Appellate Body).

⁹ *Id.*, *United States – Measures Concerning the Importation Marketing and Sale of Tuna and Tuna Products*, Report of the Panel of 15 September 2011, WT/DS381/R (Tuna II, Panel); *id.*, *United States – Measures Concerning the Importation Marketing and Sale of Tuna and Tuna Products*, Report of the Appellate Body of 16 May 2012, WT/DS381/AB/R (Tuna II, Appellate Body).

¹⁰ While in *Tuna II* the government measure at issue was an ecolabelling scheme, COOL did not concern ecolabelling, but country of origin labelling. Nonetheless, also COOL provides important insights especially as concerns the power of labels that on their face are aimed primarily at consumer information.

¹¹ See only *Lori Wallach/Michelle Sforza*, Whose Trade Organization? Corporate Globalization and the Erosion of Democracy: An Assessment of the World Trade Organization (1999).

generating ecolabels as an alternative to stricter environmental regulation, such as outright government bans of unsustainable products or production methods. Yet, the dispute settlement reports resulting from *COOL* and *Tuna II* not only illuminate the power and purposes of labelling; they also clarify that WTO law does not necessarily privilege ecolabelling over more clearly interventionist government measures aimed at environmental protection. They may serve as a starting point for a more far-reaching critique of labelling from an ecology and democracy perspective.

- 4 In the following I first broadly sketch two views of ecolabelling. One depicts ecolabelling as primarily aiming at consumer information in order to place the consumer in a position to make informed consumption decisions and freely choose between sustainable and unsustainable products. By contrast, the other view stresses the regulatory and steering function of labelling. It focuses on labels as instruments that shape consumer preferences and are used to achieve regulatory aims. (II.) The contribution then turns to the two recent WTO cases involving labelling – *COOL* and *Tuna II* – in order to specify the regulatory power involved in many labelling schemes. In *Tuna II* the Appellate Body held the US ‘dolphin-safe’ labelling scheme to constitute a technical regulation and not, as argued by the US and one dissenting panellist, a voluntary standard within the meaning of the WTO Agreement on Technical Barriers to Trade (TBT Agreement)¹² and thus – correctly in my view – heightened the burden on the United States government to justify its labelling regime under WTO law. (III.) Both in *Tuna II* and in *COOL* the dispute settlement organs had to determine whether changes in conditions of competition to the detriment of the claimants’ products were attributable to the US labelling schemes or rather to the choices of private actors. Here, too, the dispute settlement reports underline the governmental power involved in labelling by finding causal relationships to exist between changes in competitive conditions and the governmental labelling requirements. (IV.) Finally, the discussion of the objectives of the US ‘dolphin-safe’ labelling scheme in *Tuna II* sheds light on the regulatory function of ecolabels. The assessment in *COOL* of the US country of origin labelling measure in light of its objectives clarifies that also labels that primarily aim at

¹² Agreement on Technical Barriers to Trade (Annex 1A to the WTO Agreement), 15 April 1994, UNTS 1868, 120.

consumer information (and not at the steering of consumer behaviour) can only be fully understood and justified through an inquiry into the reasons why consumers demand and why governments require the provision of certain types of information (V.). In the concluding part of this contribution I call for a critical assessment of ecolabelling. If it is acknowledged that ecolabelling involves significant regulatory power, careful scrutiny of the arguments in favour of ecolabelling as a pathway towards green growth is all the more necessary. The power of ecolabelling may be employed and ultimately serve to reshape markets and promote growth. At the same time it may consolidate a trend that places the consumer at the centre of initiatives for societal change and loses sight of potentially more radical transformations through the engagement of human beings as citizens. (VI.)

II. Two Views of Ecolabelling: Information or Regulation

- 5 Product labels, whether they set out the sugar content of food stuff, the energy use of appliances, the dangers of tobacco consumption, or the origin of fish from sustainable fisheries, provide information to consumers. They usually provide this information for a reason – because consumers request it, because governments want to induce people to save energy and smoke less, because civil society organisations have made it their task to contribute to the protection of fishstock by certifying the sustainability of fisheries. With respect to some types of labels, including ecolabels, the regulatory purpose is more evident than it is with respect to others. Yet, even ecolabels that clearly pursue a regulatory purpose are frequently depicted as ‘information tools.’¹³ In what follows I first elaborate on the view of ecolabels as conveyors of information to consumers to then lay out the various regulatory aspects of labels, and ecolabels in particular.

1. Ecolabelling as Information

- 6 Ecolabelling can be associated with a particular form of governance, namely one that attributes a political role to consumers who through their consumption decisions exercise a vote – not only about the utility of a product but potentially also about aspects of the lifecycle of a product which are not reflected in

¹³ See *supra*, note 4.

product characteristics. Through their consumption choices consumers, as market participants, can induce transformations within the economy that reduce its harmful effects on the environment.¹⁴ From a systems-theoretical perspective 'consumer voting' appears as a more effective way to limit the destructive tendencies of the economic system than 'citizen-voting' in political elections given the incapacity of the political system to directly intervene in the economic system.¹⁵ From a business perspective ecolabelling promises not only environmental, but also economic gains as the differentiation between more and less sustainable products which ecolabels make possible potentially opens new markets, for example if consumers of tuna products labelled 'dolphin-safe' buy these products not only because they care for tuna, but because they derive some extra utility from the fact that these products carry an ecolabel.¹⁶ Sufficient information is a prerequisite for consumers to exercise voting power on questions of sustainability through consumption. And choice between labelled and unlabelled products is a prerequisite for business to capitalise on preferences for ecolabels while still being able to cater to the demand for unlabelled (and therefore possibly cheaper) products.

- 7 Against this background the view of ecolabels as information tools appears as one that emphasises the power of consumers to influence the economy through their informed choices. At the same time the conception of ecolabels as creating choice through differentiation stresses the potential of ecolabels to benefit the economy by inducing growth. Ecolabels viewed this way can be understood to partake in a turn from government to governance through market-based instruments.¹⁷

¹⁴ Cf. *Couturier/Thaimai* (note 7); *Alexandre Maybeck/Vincent Gitz*, Signs to Choose: Voluntary Standards and Ecolabels as Information Tools for Consumers, in: *Alexandre Maybeck/Suzanne Redfern* (eds.), *Voluntary Standards for Sustainable Food Systems: Challenges and Opportunities. A Workshop of the FAO/UNEP Programme on Sustainable Food Systems* (2013), 171.

¹⁵ Cf. *Gunther Teubner*, *Verfassungsfragmente: Gesellschaftlicher Konstitutionalismus in der Globalisierung* (2012), 143.

¹⁶ *Charles F. Mason*, The Economics of Eco-Labeling: Theory and Empirical Implications, *International Review of Environmental and Resource Economics* 6 (1) (2013), 1, 2-3.

¹⁷ Cf. *Jaye Ellis*, Constitutionalization of Non-Governmental Certification Programmes, *Indiana Journal of Global Legal Studies* 20 (2013), 1035.

2. Ecolabelling as Regulation

8 From a different viewpoint one may call into question the depiction of ecolabels as mere information tools and stress the power involved in labelling as well as the need for government involvement to make labelling effective. Three aspects are presented in the following which complexify the qualification of labels as information tools: first the intricate connection between the provision of information and the reasons/purposes for which information is provided, second the significance of the way in which information is presented, and third the need for reliability of and consumer trust in the information provided.

a) Selection of Information

9 Labels cannot exhaustively inform about the characteristics of a product, the process of its production or its life-cycle. Neither would the information fit on a label, nor are consumers able or willing to process vast amounts of information prior to making their consumption decisions. Thus labels only provide selected information. The selection is motivated by the reasons for labelling. For some ecolabels it is directly linked to a regulatory purpose. Ecolabels are frequently based on certain standards concerning product characteristics, production methods or environmental impact over the life-cycle of a product. These standards may have been elaborated by governments, business, non governmental organisations (NGOs) or so-called multistakeholder initiatives. Labels are used to certify and signal to the consumer that the labelled product complies with these standards.¹⁸ Examples are the US 'dolphin-safe' label (discussed below), the Marine Stewardship Council's¹⁹ or the Friend of the Sea's²⁰ ecolabels. These ecolabels are instruments to promote the regulatory purposes of the standards on which they are based. Other labels are not based on regulatory standards, but nonetheless aim at steering consumer behaviour towards certain objectives. Thus tobacco labels pointing out to consumers the

¹⁸ Friedrich (note 6).

¹⁹ The Marine Stewardship Council's fisheries standard is available *via*: <http://www.msc.org> (accessed on 28 November 2014).

²⁰ The Friend of the Sea certification criteria are mainly based on the FAO guidelines for the ecolabelling of fish and fishery products from marine capture fisheries and are available *via*: <http://www.friendofthesea.org/about-us.asp?ID=2> (accessed on 28 November 2014).

dangers of smoking aim to promote healthier life styles and energy labels aim at reducing energy-consumption.²¹

10 There exist, however, also labels (usually not ecolabels) that do indeed appear to aim primarily at consumer information without being linked to a regulatory purpose. Examples are the government mandated country of origin labels for meat products in the United States (discussed below). The United States government points to consumer demand for country of origin information as the reason for the labelling scheme.²² If the provision of such information is costly and if consumers despite their valuing this information are not willing to pay for it, legislation that mandates labelling is one way to ensure that the information is being provided. Moreover legislation provides for a collective process to determine which information consumers desire to obtain in the first place.

11 From the foregoing two conclusions may be drawn that cast doubt on the depiction of labels as information tools facilitating informed consumer choice. First, many ecolabels aim at steering consumer behaviour towards a regulatory objective – often on the basis of standards created by governments, NGOs, or joint initiatives of business and civil society. Second, those labels which may correctly be depicted as mere information-tools frequently will require some collective and governmental intervention to come into existence. This will especially be the case if the information is not such that consumers are willing to pay for its provision.

b) Presentation of Information

12 Labels not only transmit selected information to consumers, they also present this information in a particular way. Behavioural economics, but also our own experiences as consumers, tell us that presentation or framing is key for the effects the respective information will have. Presentation influences whether consumers notice information, whether and how they process it.²³ If as consumers we are given too much information, we may not be able to process it correctly within the short time we usually allocate to our daily consumption

²¹ For the argument that the selective presentation of information may affect consumer aims, see *Cass R. Sunstein, Why Nudge? The Politics of Libertarian Paternalism* (2014), 66-68.

²² WTO, *COOL*, Panel, para. 7.627.

²³ On the effects of framing see *Sunstein* (note 21), 29-30; specifically with respect to ecolabel design see *Folke Ölander/John Thøgersen, Informing versus Nudging in Environmental Policy, Journal of Consumer Policy* 37 (2014), 341, 345 *et seq.*

decisions.²⁴ We may also react irrationally to certain signals; thus health-conscious consumers have been found to choose candy bars with green labels over candy bars with red labels.²⁵

- 13 A recent study for the European Commission recommends that regulators should learn from marketing experts “how to effectively communicate information aimed at influencing consumers’ decisions.”²⁶ This statement stands in stark contrast to the image of the consumer maximising his or her given preferences through an informed choice and rather evokes the image of a consumer steered or nudged by a label to make consumption decisions she did not previously know she wanted to make.²⁷ On the middle ground between the fully informed consumer freely acting on the basis of given preferences and the consumer steered and nudged by marketing techniques and ‘choice architecture’²⁸ we may locate those consumers who have a preference, say for sustainable products without having a clear idea what it means for a product to be sustainable and who are happy to rely on others to make that judgment for them. Such consumers may look less for information but rather for a reliable evaluation that a certain product is ‘good’ or ‘sustainable.’ This intuition is supported by studies that find that labels with simple messages, such as ‘dolphin-safe,’ have indeed proven more effective in the sense of inducing changes in consumption than complex information-disclosure labels.²⁹

c) Reliability of Information

- 14 Given the multiplicity of labels (often based on private standards) there is the danger, not only of information overload, but also of consumer confusion and lack of consumer trust in labelling. As a consequence government involvement

²⁴ See for example *Brian Wansink/Steven T. Sonka/Clare M. Hasler*, *Front Label Health Claims: When Less is More*, *Food Policy* 29 (2004), 659.

²⁵ Study cited in *Cass R. Sunstein/Lucia A. Reisch*, *Automatically Green: Behavioural Economics and Environmental Protection*, *Harvard Environmental Law Review* 38 (2014) 127, 130-131.

²⁶ *BIO Intelligence Service* (note 4), 13.

²⁷ For a justification of such nudging as ‘libertarian paternalism,’ see *Sunstein* (note 21).

²⁸ The term choice architecture denotes the features of the environment that influence people’s choices and which may be changed in order to steer behaviour into different directions, *Cass Sunstein/Richard Thaler*, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (2008).

²⁹ *Abhijit Banerjee/Barry D. Solomon*, *Eco-labeling for Energy Efficiency and Sustainability: A Meta-Evaluation of US Programs*, *Energy Policy* 31 (2003), 109; *Mario F. Teisl/Brian Roe/Robert L. Hicks*, *Can Eco-Labels Tune a Market? Evidence from Dolphin-Safe Labeling*, *Journal of Environmental Economics and Management* 43 (2002), 339.

in labelling may be required in order to ensure that information provided by labels is correct and reliable, but also that labelled products indeed promote desirable goals. Governments may become active with respect to labelling by establishing guiding principles for labelling schemes, by prioritising or harmonising standards or by establishing their own labelling schemes and certification mechanisms.³⁰ Moreover, to avoid consumer confusion and to enhance the effectiveness of labelling governments may prohibit the use of labels competing with labels backed by government authority which is what the US did in its 'dolphin-safe' labelling scheme discussed below.

III. Qualification of Labelling Schemes under the TBT Agreement of the WTO: Voluntary Standards or Mandatory Regulation

15 In *Tuna II* and *COOL* the dispute settlement panels and the Appellate Body clarified a number of questions concerning the treatment of labelling schemes under the TBT Agreement that WTO members have been discussing since the 1990s, predominately in the Committee on Trade and Environment. The main contentious issues debated by WTO members included whether labelling schemes (and which) were to be qualified as mandatory regulation or voluntary standards under the TBT Agreement, whether so-called non-product related process and production methods were covered by the TBT Agreement, the effects of ecolabels on exports from developing countries, and the transparency of labelling regimes.³¹ A particularly significant clarification is the Appellate Body's qualification of the US 'dolphin-safe' labelling scheme as mandatory regulation within the meaning of the TBT Agreement even though the labelling scheme concerns non-product related process and production methods and does not require all tuna products marketed in the US to carry a 'dolphin-safe' label.³² The qualification as mandatory regulation stresses the governmental power involved in labelling. As a consequence the labelling scheme must meet

³⁰ *Banerjee/Solomon* (note 29); *Maybeck/Gitz* (note 14), 181, 182; FAO Food Control and Consumer Protection Group, Roles of Public Actors in the Voluntary Standards, in: *Maybeck/Redfern* (eds.) (note 14), 215; *BIO Intelligence Service* (note 4), 13.

³¹ For accounts of these discussions, see *Manisha Sinha*, An Evaluation of the WTO Committee on Trade and Environment, *Journal of World Trade* (JWT) 47 (2013), 1285, 1298-1301; *Reinhard Quick*, Do We Need Trade and Environment Negotiations or Has the Appellate Body Done the Job?, *JWT* 47 (2013), 957.

³² See *infra*, III.A.

stricter requirements for justification than voluntary standards which are also covered by the TBT Agreement.

1. The US 'Dolphin-Safe' Labelling Scheme at Issue in *Tuna II*

- 16 The *Tuna II* dispute between Mexico and the United States concerns the US 'dolphin-safe' labelling scheme. Mexico had brought the dispute before the WTO with a request for consultation in 2008 claiming that the US labelling scheme discriminated against Mexican tuna (and thus violated Article III General Agreement on Tariffs and Trade (GATT)³³ and Article 2.1 TBT Agreement), that it constituted an unjustified barrier to trade (in violation of Article 2.2 TBT Agreement), and that (according to Article 2.4 TBT Agreement) it should have been based on the 'dolphin-safe' certification standards of the Agreement on the International Dolphin Conservation Program (AIDCP)³⁴ to which both the US and Mexico are a party.³⁵
- 17 The US labelling scheme is established by the US Dolphin Protection Consumer Information Act and implementing regulations.³⁶ It introduces a number of distinctions relevant for the case:³⁷ First, it distinguishes between fishing techniques, in particular between driftnet fishing, purse seine fishing which uses the technique of encircling and setting on dolphins, and purse seine fishing which does not set on and encircle dolphins. According to the US legislation tuna caught with driftnets may never be labelled 'dolphin-safe'. Tuna caught with purse seine nets may also not be labelled 'dolphin-safe' if purse seine nets are used to encircle and set on dolphins. The technique of purse seine fishing in combination with the setting on and encircling of dolphins is used in areas where there is a natural association of dolphins and tuna such as

³³ General Agreement on Tariffs and Trade 1994 (Annex 1A to the WTO Agreement), 15 April 1994, UNTS 1867, 190.

³⁴ Agreement on the International Dolphin Conservation Program, 21 May 1998, ILM 37 (1998), 1246, available via: <https://www.iattc.org/IDCPDocumentsENG.htm> (accessed on 16 March 2015).

³⁵ WTO, *United States – Measures Concerning the Importation Marketing and Sale of Tuna and Tuna Products*, Request for the Establishment of a Panel by Mexico, 10 March 2009, WT/DS381/4.

³⁶ Dolphin Protection Consumer Information Act, United States Code, Title 16, Section 1385 and United States Code of Federal Regulations, Title 50, Section 216.91 and Section 216.92.

³⁷ The requirements of the labelling scheme are set out in detail in WTO, *Tuna II*, Panel, paras. 2.3-2.33.

the Eastern Tropical Pacific Ocean (ETP). The dolphins are encircled, thus tuna is attracted and then caught.

- 18 Due to the fact that in the ETP tuna associate with dolphins, but no such natural association between dolphins and tuna occurs in other waters, the legislation introduces a second, regional distinction. If purse seine vessels fish tuna in the ETP, the resulting tuna products may be labelled 'dolphin-safe' if the vessel's captain and an independent observer certify that the technique of setting on dolphins and encircling them was not used and no dolphin was killed or injured. For purse seine vessels that fish outside the ETP only a certification that they do not encircle dolphins is required.
- 19 If the labelling requirements are met the official US 'dolphin-safe' label may be placed on tuna products. The labelling legislation also states that no alternative label expressing that a tuna product is 'dolphin-safe' may be used unless specific additional conditions are met. As a consequence tuna that is caught in compliance with the certification standards developed under the Agreement on the International Dolphin Conservation Program³⁸ may not be labelled 'dolphin-safe' as long as it does not also meet the stricter requirements of the US labelling scheme. The parties to this Agreement, including Mexico and the United States, had – as a reaction to public pressure – developed standards for the protection of dolphins in the ETP. Mexico, in compliance with these standards, has taken measures to protect dolphins. Yet it continues to use purse seine nets in the ETP to encircle and set on dolphins in order to catch the tuna which is swimming with these dolphins.³⁹
- 20 The US explains its stricter standards, according to which tuna caught by encircling and setting on dolphins is never eligible for a 'dolphin-safe' label, with a concern for unobserved dolphin mortality. Mortality not immediately observable during the respective fishing operation may result from encircling, for example if infants are being separated from their mothers or dolphins experience stress that in turn may lead to infertility. As the US 'dolphin-safe' tuna label takes into account these dangers to dolphins it does not consider any tuna caught by setting on and encircling of dolphins as 'dolphin-safe'.⁴⁰

³⁸ On the history and content of these standards, see *ibid.*, paras. 2.34-2.41.

³⁹ See arguments by Mexico, *ibid.*, paras. 4.1 *et seq.*

⁴⁰ See arguments by the United States, *ibid.*, paras. 4.355 *et seq.*

2. Qualification of the US 'Dolphin-Safe' Labelling Scheme as Mandatory Regulation

21 Mexico argued that the US 'dolphin-safe' labelling scheme *inter alia* violated non-discrimination obligations of the GATT as well as the TBT Agreement. As the TBT Agreement includes more specific provisions with respect to certain technical barriers to trade than the GATT, the dispute settlement panel in this case first determined whether the labelling scheme fell within the scope of the TBT Agreement, *i.e.* whether it constituted a technical regulation, a standard, or a conformity assessment procedure within the meaning of Annex 1 to the TBT Agreement.⁴¹ The panel without much discussion and in accordance with a test established by the Appellate Body in earlier case law to determine whether a measure constitutes a technical regulation within the meaning of Article 1.1 Annex 1 of the TBT Agreement⁴² found that the labelling scheme applied to identifiable products (tuna products)⁴³ and that it laid down labelling requirements with respect to product, process, or production method (Article 1.1 cl. 2 Annex 1 TBT Agreement).⁴⁴ The panel thus took the view that labels concerning production methods that do not affect the physical characteristics of a product can fall within the scope of the TBT Agreement. As a result, even though tuna has the same product qualities whether dolphins were affected by its catch or not, labelling which addresses the fishing technique used can constitute a technical regulation within the meaning of Article 1.1 Annex 1 TBT Agreement. As indicated above this question previously had been subject to much discussion in the WTO Committee on Trade and Environment and the literature.⁴⁵ The parties to the dispute agreed with this finding and did not appeal it.

⁴¹ On the order of analysis between GATT and TBT Agreement see *Petros C. Mavroidis*, *Trade in Goods* (2nd ed. 2012), 669, 670.

⁴² WTO, *EC – Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Appellate Body of 12 March 2001, WT/DS135/AB/R, para. 66-70; *id.*, *EC – Trade Description of Sardines*, Report of the Appellate Body of 26 September 2002, WT/DS231/AB/R, paras. 175-176. The definition of “technical regulation” in Art. 1.1 Annex 1 of the TBT Agreement reads “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”.

⁴³ *Id.*, *Tuna II*, Panel, para. 7.62.

⁴⁴ *Ibid.*, para. 7.78.

⁴⁵ *Supra*, note 27.

- 22 What was contentious, however, was the third requirement to be met in order to consider a labelling scheme a technical regulation, namely that the labelling requirements be *mandatory*. This requirement distinguishes labelling requirements that constitute technical regulations within the meaning of Article 1.1 Annex 1 TBT Agreement from standards as defined in Article 1.2 Annex 1 TBT Agreement. While two panel members found that compliance with the US ‘dolphin-safe’ labelling scheme was mandatory,⁴⁶ one panelist member dissented.⁴⁷ The finding of the panel majority was later appealed by the US, but affirmed by the Appellate Body.⁴⁸ The US claimed – supported on this issue by *Robert Howse as amicus curiae*⁴⁹ – that the labelling requirements were not mandatory because tuna products may be sold on the US market with or without a ‘dolphin-safe’ label.⁵⁰ The counterargument that was endorsed by the panel majority and subsequently the Appellate Body states that compliance is mandatory because the US labelling legislation not only demands that the requirements of the labelling scheme are met for a product to be eligible for the US ‘dolphin-safe’ label, but also disallows the use of any other labels that testify to the ‘dolphin-safety’ of tuna products, even though these products do not comply with the requirements of the US labelling scheme.⁵¹
- 23 The US argued that it is typical for voluntary labelling standards that a label may only be used if the standards on which the label is based are met. The US argumentation can be illustrated with the following example: If you conclude that the US scheme is mandatory – thus the US implicitly argued – you must also conclude that the requirements to use the Friend of the Sea (FOS) label are mandatory for a fish product may only carry the FOS label if it complies with the FOS labelling requirements. Yet, clearly this is a voluntary scheme as producers do not have to participate in it and may sell their products also without the FOS label. This argumentation is not convincing, however, as the

⁴⁶ WTO, *Tuna II*, Panel, para. 7.145.

⁴⁷ *Ibid.*, paras. 7.146-7.188.

⁴⁸ *Id.*, *Tuna II*, Appellate Body, para. 199.

⁴⁹ *Robert Howse*, WTO, *Tuna II* (AB-2012-2/DS381), Amicus Curiae Submission of 17 February 2012, 8-9.

⁵⁰ WTO, *Tuna II*, Panel, paras. 7.91-7.99.

⁵¹ *Id.*, *Tuna II*, Appellate Body, para. 199. While the Appellate Body limited its analysis to whether the labelling scheme was *de jure* mandatory, the Panel also examined whether it was (as claimed by Mexico) *de jure* and *de facto* mandatory and confirmed that it was, WTO, *Tuna II*, Panel, paras. 7.113-7.144.

US labelling scheme differs in one crucial respect from voluntary labelling schemes such as the FOS labelling scheme. The difference is that the FOS labelling requirements do not and cannot prevent producers from using another label such as the Marine Stewardship Council (MSC)'s label if they do not comply with the FOS requirements, but do meet the less demanding requirements of the Marine Stewardship Council. In contrast to the US government neither MSC nor FOS have the regulatory power to prescribe the information that must or must not be provided on the packaging of products marketed in the US. Yet, the US labelling scheme does make such a prescription. It does not allow the marketing of tuna products with a 'dolphin-safe' label if the respective tuna was not fished in accordance with the standards laid out in US legislation. The choice for the producer is to either comply with the US labelling requirements or not to use any 'dolphin-safe' label at all. Thus the US legislation creates a monopolistic labelling scheme non-compliance with which is sanctioned and enforcement of which is backed by government authority.

24 From the point of view of the effectiveness of labelling schemes, and as pointed out by *Robert Howse*,⁵² the US legislation of course makes a lot of sense. If different tuna products carry different 'dolphin-safe' labels, consumers must inquire into the standards underlying these labels and then compare them in order to make an informed decision and decide which products meet their sustainability preferences best. It is easily understandable that faced with several labels standing for different sets of information consumers concerned with dolphin safety may choose not to buy any tuna at all. If by contrast only one label is being used and this label is being backed by governmental authority consumers may feel confident that buying tuna carrying this label they do not contribute to harm done to dolphins during tuna fishing. Yet, it also becomes clear that more is involved here than the provision of information or the way information is presented. Rather what the labelling legislation represents is an authoritative determination by the legislator as to which requirements need to be met in order for tuna to be 'dolphin-safe.' Exercising its authority the US

⁵² *Robert Howse*, Consumer Labelling on Trial at the WTO, in: Marise Cremona *et al.* (eds.), *Reflections on the Constitutionalisation of International Economic Law: Liber Amicorum for Ernst-Ulrich Petersmann* (2014), 593.

legislator decided (and in this point departed from the standards under the International Dolphin Conservation Programme) that also psychological stress incurred by dolphins being encircled during tuna fishing leads to these fishing operations not being 'dolphin-safe.' The government backing of the US 'dolphin-safe' label which excludes the use of labels based on different standards is the reason for the qualification of the US labelling scheme as a mandatory technical regulation which results in a higher burden of justification for the government than applies to voluntary standards under the TBT Agreement.⁵³

IV. Attribution of the Consumption and Production Effects of Labelling: Private Choice or Public Power

- 25 A second question debated in both cases – *Tuna II* and *COOL* – and central to determining the power of labelling is whether any impact on trade observed in connection with government-backed labelling is attributable to the labelling scheme or the free choice of private economic actors. While studies show that labelling does affect consumer and producer behaviour,⁵⁴ opinions differ on the question to whom to attribute the effects of labelling.
- 26 Both of the recent WTO labelling disputes concerning the US 'dolphin-safe' and the US country of origin labelling schemes shed light on how the authors of labelling schemes – in this case the US government and administration – impact production and consumption. In both cases the dispute settlement organs had to inquire whether the labelling schemes accorded to the claimants' (Mexican and Canadian) products 'less favourable' treatment within the meaning of the non-discrimination obligation of Article 2.1 TBT Agreement than to like US products. As both measures do not discriminate *de jure* between foreign and US products, the dispute settlement organs had to begin their inquiry with an assessment whether the government measures at issue changed the conditions of competition to the detriment of the claimants' products.⁵⁵ A finding of detrimental impact on competitive opportunities is a

⁵³ According to the TBT Agreement members shall ensure that their central government standardisation bodies comply with the TBT Code of Good Practice for the Preparation, Adoption and Application of Standards (Annex 3 TBT Agreement) and with respect to standards of non-governmental and local government bodies members must take reasonable measures to ensure compliance by these bodies with the code (Art. 4.1 TBT Agreement).

⁵⁴ See for example *Teisl/Roe/Hicks* (note 29).

⁵⁵ WTO, *Tuna II*, Appellate Body, para. 255; *id.*, *COOL*, Appellate Body, para. 286.

necessary, not, however, a sufficient condition to find discrimination. Moreover it must be shown that such detrimental impact does not stem exclusively from a legitimate regulatory distinction.⁵⁶ While I address regulatory distinctions/purposes in section V. below, in the following I concentrate on an argument put forward by the US government to object to the claims that it was the governmental labelling scheme that changed conditions of competition to the detriment of Mexican tuna products and Canadian and Mexican meat products respectively. The US argued in *Tuna II* and *COOL* that it was the free choices of private actors that affected conditions of competition and not the US labelling schemes. The Appellate Body in both cases did not follow this argument, but instead pointed out the causal role of the government in shaping the market for tuna and meat products in the US through mandatory labelling requirements.

1. COOL – Attribution of the Production Effects of Labelling

27 In the *COOL* dispute Canada and Mexico claimed, *inter alia*, that the US country of origin labelling scheme, consisting of the *COOL* statute and implementing regulations (the *COOL* measure),⁵⁷ discriminated against Canadian and Mexican livestock (cattle and hogs) in violation of Article 2.1 TBT Agreement and that it was more trade restrictive than necessary and thus violated Article 2.2 TBT Agreement.

28 In this dispute it was not contentious that the *COOL* measure constitutes a technical regulation within the meaning of Article 1.1 Annex 1 TBT Agreement.⁵⁸ The *COOL* measure establishes information requirements in relation to three different stages in the life of slaughter-animals: birth, raising, and slaughter. It provides for four different labels: Label A for meat products where all three production stages took place in the US (indicating the US as country of origin), Label D where all three production stages took place abroad (indicating only the country declared as country of origin on import documentation for customs purposes) and Labels B and C for products of mixed US and foreign origin

⁵⁶ *Id.*, *US – Measures Affecting the Production and Sale of Clove Cigarettes*, Report of the Appellate Body of 4 April 2012, WT/DS406/AB/R, para. 182; *id.*, *Tuna II*, Appellate Body, para. 215; *id.*, *COOL*, Appellate Body, para. 286.

⁵⁷ For a detailed description of the measure see *id.*, *COOL*, Panel, paras. 7.75 *et seq.*

⁵⁸ For the respective finding of the Panel see *ibid.*, para. 7.216.

(indicating up to three countries where the animal was born, raised, and slaughtered in a specific order laid down by the COOL measure). Label B is applied to meat from livestock born abroad, but raised and slaughtered in the US, Label C to meat products from livestock born and raised abroad, and imported to the US for immediate slaughter.

29 The high potential administrative burdens imposed on producers by this labelling scheme are immediately apparent. Information on origin with respect to each stage – birth, raising, and slaughter – has to be recorded and passed on from upstream to downstream producers to retailers. The US legislator took account in particular of the difficulties of implementation that arise when livestock of different origin is ‘commingled’ and the COOL measure provides that meat of different origin that is commingled on one production day may bear the same label. Thus, for example, if cattle born and raised in the US is slaughtered in a US slaughterhouse on the same day as cattle born in Canada, but raised in the US, the resulting meat products may all carry Label B thus designating the meat as of multiple origin even though some of the meat is of exclusive US origin. These ‘commingling’ provisions do not allow producers to freely choose between labels. They prescribe, for example, that commingled meat may never carry Label A so that Label A is reserved for meat products that stem from livestock born, raised, and slaughtered in the US, while meat carrying Label B or C may be of mixed origin or exclusive US origin (but commingled with meat of mixed origin).

30 Mexico and Canada claimed that the COOL measure treated livestock from Mexico and Canada less favourably than livestock from the US and thus violated Article 2.1 TBT Agreement. As evidence for less favourable treatment they referred *inter alia* to COOL discounts being applied by slaughterhouses to imported livestock (meaning lower prices paid by slaughterhouses for imported livestock) and to the fact that some producers exclusively relied on US livestock as a result of the COOL measure.⁵⁹ The panel agreed with the claimants that the COOL measure changed the conditions of competition to the detriment of imported livestock.⁶⁰ The panel’s argumentation, upon appeal upheld by the

⁵⁹ For the respective arguments put forward by Canada see *ibid.*, paras. 7.374-7.376.

⁶⁰ *Ibid.*, paras. 7.372, 7.381 and 7.420.

Appellate Body,⁶¹ in short went as follows: The cheapest way for producers to comply with the obligation to provide accurate information about each stage of production is to segregate livestock of different origin. While segregation allows producers to reduce the costs of maintaining reliable information on country of origin as required by the COOL measure, it will be even less costly to process exclusively US livestock, reasons being that foreign livestock only makes up for a small market share in the US and does not fully meet consumer demand and that US livestock is often located nearer to US domestic markets than foreign livestock. As the costs of compliance with the COOL measure cannot be fully passed on to consumers the lower costs of exclusively processing livestock of US origin create an incentive to do so. The COOL measure thus affects competitive opportunities to the detriment of foreign livestock.⁶²

31 Neither panel nor Appellate Body followed the US argument that a change in competitive conditions was not attributable to the US government since the COOL measure did not legally require producers to rely exclusively on US livestock. The US argued that if producers did opt for doing so, this was a choice of private actors not mandated by law. panel and Appellate Body by contrast affirmed earlier case-law and held that in order to attribute a change in competitive conditions to a measure it was sufficient that the measure provided incentives for private behaviour that led to such effects.⁶³

32 Even if panel and Appellate Body may be criticised for not conducting a more careful empirical inquiry to establish the effects of the labelling measure on meat production,⁶⁴ COOL illustrates how a label that on its face merely aims at consumer information without purporting to pursue any further regulatory objective can have potentially far-reaching effects. If compliance with labelling requirements implies significant administrative burdens for producers, the respective labelling scheme may incentivise changes in production to minimise such burdens. This is all the more likely if producers are not able to pass on the costs of labelling to consumers. If consumers had a preference for meat raised

⁶¹ *Id.*, COOL, Appellate Body, para. 292.

⁶² *Ibid.*, paras. 256-292.

⁶³ *Ibid.*, paras. 288-291; *id.*, Korea – Various Measures on Beef, Report of the Appellate Body of 11 December 2000, WT/DS169/AB/R, para. 145.

⁶⁴ Petros C. Mavroidis/Kamal Saggi, What is not so Cool about US–COOL Regulations? A Critical Analysis of the Appellate Body’s Ruling on US–COOL, World Trade Review 13 (2) (2014), 299.

abroad, US meat producers would be less likely to rely exclusively on US livestock in order to reduce implementation costs of country of origin labelling. Producers might instead be willing to bear the administrative costs of producing meat of exclusively US *and* meat of mixed origin as they would – given consumer preferences – be able to pass on the costs of compliance with the labelling requirements to consumers. If, however, consumers prefer meat of US origin, relying exclusively on US livestock will not only reduce the costs of complying with the labelling requirements, but may also put producers in a position to profit from this consumer preference by selling meat of US origin at a higher price.

- 33 It may be concluded that the COOL measure illustrates the potential power of labelling schemes to induce far-reaching changes in production either because such changes are necessary in order to provide reliable information or because changes allow producers to reduce the cost of providing the required information. The issue of attribution further prompts us to think about the reasons and purposes of requiring certain information to be exhibited on products, a question that will be addressed in section V. below.

2. *Tuna II* – Attribution of the Consumption Effects of Labelling

- 34 In *Tuna II* Mexico claimed that the US ‘dolphin-safe’ labelling scheme discriminated against Mexican tuna products in violation of Article 2.1 TBT Agreement. Mexico supported this claim as follows:⁶⁵ Most tuna caught by Mexican fleets is caught in the Eastern Tropical Pacific using purse seine vessels setting on and encircling dolphins. As the Mexican tuna industry is characterised by a high degree of vertical integration most tuna products of Mexican origin contain tuna caught in the ETP by Mexican vessels. As a consequence most Mexican tuna products do not have access to the US ‘dolphin-safe’ label as this label may not be carried by products that contain tuna which was caught by setting on dolphins. Moreover, even if tuna is not caught by setting on and encircling dolphins, fleets fishing with purse seine nets in the ETP have to meet stricter requirements than fleets fishing with purse seine nets outside the ETP for their tuna to be eligible for the US ‘dolphin-safe’

⁶⁵ WTO, *Tuna II*, Panel, paras. 4.41 *et seq.*

label. Mexican tuna products were thus at a competitive disadvantage *vis-à-vis* tuna products from the US and third countries which contained tuna not caught in the ETP. Mexico further supported its discrimination claim with the fact that US processors of major tuna brands – StarKist, Bumblebee, and Chicken of the Sea – had ceased to purchase unlabelled Mexican tuna products for fear of consumer boycotts and NGO scandalisation.

35 Assessing Mexico’s discrimination claim the panel found first that Mexican tuna products were like tuna products originating in the US or other countries.⁶⁶ This finding was not disputed. What was disputed, however, was whether any disadvantage suffered by Mexican tuna *vis-à-vis* tuna from the US or other countries was attributable to the US labelling requirements or rather to the action of private persons, namely the large US tuna processors not buying Mexican tuna or consumers not buying Mexican tuna products. As in the *COOL* case the US argued that the detrimental effects to Mexican tuna were due to private choice. They pointed out that major US tuna processors had decided – prompted by lobbying of environmentalists and consumer boycotts – no longer to buy tuna caught by setting on dolphins already before the US adopted the first labelling legislation in 1990.⁶⁷ Following the US argumentation the panel was not convinced that it was the labelling scheme rather than the independent decisions of US processors that denied Mexican tuna access to major distribution channels. It also was not persuaded that retailers and consumers would purchase Mexican tuna products if they were eligible for an alternative ‘dolphin-safe’ label linked to lower protection standards than the official US label.⁶⁸

36 One may interpret the panel’s argumentation as adhering to a conception of ecolabels as mere consumer information tools. The panel understood the US ‘dolphin-safe’ label to build on existing consumer preferences – in this case for tuna caught in a particular way. All the label does is to allow consumers to act on this preference. It does so by providing consumers with the information to distinguish between tuna products that meet their preferences and those that do not. The government by codifying labelling requirements does not steer

⁶⁶ *Ibid.*, para. 7.251.

⁶⁷ *Ibid.*, para. 7.182.

⁶⁸ *Ibid.*, paras. 7.361-7.368.

behaviour. It merely addresses an information asymmetry between producers and consumers relating to production methods and thus promotes the proper functioning of the market by enabling consumers to act freely in accordance with their preferences. Consumer behaviour may in turn affect production to the effect that unlabelled products for which there is no or only little demand are no longer produced. The US fleet, for example, by 1994 had entirely ceased to set on dolphins for the purpose of catching tuna.⁶⁹

37 Yet, the *Tuna II* dispute reveals the dimensions in which labelling schemes go beyond merely satisfying consumer demand for information. It is true that ecolabelling may be a reaction to certain consumer sentiments or NGO scandalisation and in the case of the tuna controversy it certainly was. It is also true, however, that the elaboration of standards on which an ecolabel is being based, frequently will shape and concretise heretofore only vaguely articulated consumer preferences, for example for 'dolphin-safe' tuna. Consumers may have a preference for tuna caught in a way that does not harm dolphins. Yet, they may have no clear idea about which fishing techniques are harmful to dolphins, they may not even want to assess expert opinions themselves, but may simply want to rely on a trusted authority to make the determination which tuna products to consider 'dolphin-safe'. Labelling schemes do this work for the consumer. They set (or endorse) standards, in this case standards that determine which requirements have to be met for tuna to be 'dolphin-safe' and they also determine how much and in which form information is conveyed to the consumer. If the government adopts labelling legislation, it may, as the US government did for the 'dolphin-safe' label, determine that no label apart from the official label may be used. Thus governmental legislation that determines the standards that need to be met for tuna to be considered 'dolphin-safe' and that only allows those products that meet these standards to be labelled 'dolphin-safe' not only enables markets to function as they would, were consumers fully informed about all product and process characteristics (information which due to its quantity they would not be able to fully process) but actively shapes consumer preferences and thus induces changes in production and consumption.

⁶⁹ *Ibid.*, para. 7.327.

- 38 The Appellate Body recognised this power of the US labelling scheme and attributed a change in market conditions to the detriment of Mexican tuna to the US measure. It stressed that the label is of significant commercial value on the US market. And as it is the US labelling legislation that grants or denies access to the label and thus to a commercially valuable asset, the Appellate Body argued, the labelling legislation changes the conditions of competition to the detriment of Mexican tuna products which are less likely to be eligible for the label than tuna products from the US or third countries.⁷⁰
- 39 In this case – as in *COOL* – the finding that the labelling scheme changed the conditions of competition to the detriment of the claimant’s products was not sufficient to find a violation of the non-discrimination obligation of Article 2.1 TBT Agreement. What follows from this finding, however, is that the labelling scheme requires justification under WTO law. The respondent can meet this justificatory burden by showing that the detrimental impact of the measure on the competitive opportunities of foreign products is due to a legitimate regulatory distinction. The determination whether less favourable treatment was justified or constituted discrimination in *COOL* and *Tuna II* thus required an inquiry into the purposes of labelling.

V. The Purposes of (Eco-)Labelling

- 40 As set out above, the information to be provided by a label is always the outcome of a selection. This selection will frequently be explained by the purpose for which information is exhibited on a label. Yet, pointing to ‘consumer information’ *tout court* as the objective of labelling hardly bears any explanatory value. Informed consumer choice is an unattainable goal as exhaustive information cannot possibly be provided by a label nor processed by a consumer. The purpose of product labels thus can only be informed choice in relation to particular product/process/life-cycle aspects. The decision which information to reveal about which aspects of a product may be linked to consumer demand for certain information – for example how much sugar foodstuff contains – or to a regulatory aim that is being pursued – for example to deter people from eating too many sweets – or a mixture of both. That it is

⁷⁰ WTO, *Tuna II*, Appellate Body, para. 239.

difficult or impossible to clearly distinguish between the regulatory purpose and the information purpose of labels becomes clear when comparing *COOL* and *Tuna II*. In both cases the dispute settlement organs inquired into the purpose of the respective labelling scheme when assessing claims that the measure at issue was discriminatory (Article 2.1 TBT Agreement) and more restrictive of trade than necessary (Article 2.2. TBT Agreement).

1. COOL – Consumer Information through Country of Origin Labelling

- 41 In *COOL* the dispute settlement organs had to inquire into the purposes of the US country of origin labelling scheme in order to determine whether the detrimental impact of the *COOL* measure on imported livestock *vis-à-vis* US livestock was justified by a legitimate regulatory distinction. If such a justification on the basis of regulatory purpose can be demonstrated the measure does not violate the non-discrimination provision of Article 2.1 TBT Agreement. Moreover, the dispute settlement organs had to engage with the purpose of the *COOL* measure when assessing whether it was more trade restrictive than necessary and thus inconsistent with Article 2.2. TBT Agreement.
- 42 Both panel and Appellate Body followed the US statement of purpose according to which the measure was aimed at consumer information on origin.⁷¹ They did not agree with the Canadian and Mexican claims that the true aim of the labelling regime was protection of the US meat industry.⁷² The panel further was of the view, upheld on appeal, that the objective to provide information on origin was a legitimate objective under the TBT Agreement.⁷³
- 43 The Appellate Body also upheld the panel's finding that the *COOL* measure discriminated against Canadian and Mexican livestock in violation of Article 2.1 TBT Agreement.⁷⁴ It faulted the panel for its reasoning, as the panel had not – after finding a detrimental impact of the labelling regime on Canadian and Mexican livestock – continued to assess whether this detrimental impact stemmed exclusively from a legitimate regulatory distinction.⁷⁵ Yet, when completing the analysis it relied on the panel's findings that the information that

⁷¹ WTO, *COOL*, Panel, paras. 7.617, 7.620, 7.685; WTO, *COOL*, Appellate Body, para. 433.

⁷² WTO, *COOL*, Panel, para. 7.576.

⁷³ *Ibid.*, para. 7.651; WTO, *COOL*, Appellate Body, para. 453.

⁷⁴ WTO, *COOL*, Appellate Body, para. 350.

⁷⁵ *Ibid.*, para. 293.

reached consumers by the way of labelling did not correspond to the recordkeeping and verification requirements imposed on producers with respect to the three relevant stages of production. The panel had found that while processors of livestock had to record information about origin for each piece of livestock at each stage of production and pass on this information to the next production stage the eventual labels affixed to meat products did not convey this information to consumers. In fact only Label A, according to the panel, transmitted any meaningful information, namely that all three production stages had taken place in the US. By contrast meat exhibiting Labels C or B due to the commingling provisions could be either of exclusive US origin or of mixed origin. Label D only designates the country of origin for customs purposes and does not differentiate between stages of production. Thus even consumers perfectly informed about the COOL measure and its labelling requirements cannot from Labels B, C, or D know the exact origin of the respective meat product.⁷⁶ Given the discrepancy between the obligations the COOL measure imposes on meat processors with respect to maintaining information about origin on the one hand and the amount of information transmitted to consumers *via* the country of origin labels on the other hand as well as the fact that no rational basis was identified for this disconnect, the Appellate Body came to the conclusion that the COOL measure resulted in an arbitrary disproportionate burden on upstream producers and processors and was not justifiable.⁷⁷

- 44 There is indeed a significant discrepancy between the purported purpose of the labelling measure, namely to provide information on origin with respect to the three production stages birth, raising, and slaughtering and the information which ultimately reaches the consumer. If a meat product carries a label of category A consumers will know that all stages took place in the US; if a product exposes a label of category B or C consumers will know that slaughter took place in the US and that it is possible that all other stages took place abroad; and if a meat product exhibits a label of category D consumers will know that all stages took place abroad, but will not know whether all stages took place in the country that the label indicates, as the label indicates only the country of origin relevant for customs purposes. The labels thus provide some country of origin

⁷⁶ *Ibid.*, paras. 332-339

⁷⁷ *Ibid.*, paras. 340-349.

information which, however, only in case of Label A reliably identifies where livestock was born, raised, and slaughtered. Yet, as *Robert Howse* convincingly argued, the fit between labelling measure and the actual consumer labels becomes much closer if the purpose of the COOL measure is being specified.⁷⁸ If we probe further we may detect the rational basis between the COOL measure and the specific form that consumer information takes under the labelling scheme which the Appellate Body was missing.⁷⁹ According to *Howse* consumers may have different reasons for valuing information about origin of meat products, one of them being that they take origin as a proxy for safety. Thus they may hold meat that was born, raised, and slaughtered in the US to be safer than meat originating from abroad or they may value the information that livestock was slaughtered in the US because they fear contamination of meat with *E. coli* bacteria and believe that the risk of contamination is higher for meat slaughtered in foreign slaughterhouses.⁸⁰

45 If the purpose of the labelling scheme is thus specified namely as meeting particular consumer demands to know whether livestock was born, raised, *and* slaughtered in the US and to know whether it was imported before slaughtering, then the examination of whether this purpose justifies the particular design of the labelling measure may find a closer fit between the labelling requirements and the information conveyed to consumers. Without conducting such an analysis here⁸¹ I merely wish to point out that the *COOL* case demonstrates that even labels which at first sight plainly aim at the provision of information – here facts about origin – may when taking a closer look reveal purposes that go beyond the mere provision of information. The US country of origin labelling scheme arguable caters to demands for reassurance about meat safety. If the government is mandating labels and if labelling imposes relatively high compliance costs on producers it appears necessary to engage seriously with these purposes. The TBT Agreement calls for such an engagement. It allows governments wide discretion as regards the objectives they aim to pursue with their technical regulations, including labelling schemes, the objectives listed in Article 2.2. TBT Agreement being but examples of legitimate regulatory

⁷⁸ *Howse* (note 49).

⁷⁹ WTO, *COOL*, Appellate Body, para. 347.

⁸⁰ *Howse* (note 49).

⁸¹ For a defense of the COOL measure, see *ibid.*

objectives.⁸² Yet, it also demands that a government is able to relate the requirements a labelling scheme imposes on market participants to the regulatory aims that are pursued with the measure. In the *COOL* case for the US to claim that the purpose of the labelling scheme was country of origin information *tout court* was not convincing given the differential impact the measure had on imported and domestic livestock and the limited information that actually reached the consumer. Scrutiny with respect to the purposes of labelling schemes may also allow for a critical assessment whether alternative labels or entirely different measures may indeed be better suited to achieve a given purpose. Under the TBT Agreement an inquiry into alternative measures is mandated by the requirement in Article 2.2 TBT Agreement that a measure shall not be more trade-restrictive than necessary to fulfil a legitimate objective.⁸³

2. *Tuna II* – Environmental Protection through Ecolabelling

46 In *Tuna II* the panel accepted the submission by the US that its ‘dolphin-safe’ labelling scheme pursued two objectives: One objective was to ensure that consumers were not misled or deceived about tuna that was caught in a manner that adversely affected dolphins.⁸⁴ The other objective of the measure was to contribute to the protection of dolphins by ensuring that the US market was not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins.⁸⁵ The acknowledgement of the latter as a legitimate objective by panel and Appellate Body⁸⁶ confirms that the dispute settlement organs hold the extraterritorial protection of the environment or animal health to be a legitimate regulatory purpose under WTO law. The only link that existed here between the domestic measure (the labelling scheme) and the

⁸² WTO, *COOL*, Appellate Body, paras. 370-372.

⁸³ In *COOL* the Panel had ended its analysis under Art. 2.2 TBT Agreement with a finding that the *COOL* measure did not fulfil the objective of consumer information and therefore violated Art. 2.2 TBT Agreement (WTO, *COOL*, Panel, para. 7.719). The Appellate Body reversed this finding, holding that the measure did contribute towards achieving the objective of consumer information (WTO, *COOL*, Appellate Body, para. 468); however, it could not complete the analysis whether the measure was more trade-restrictive than necessary for the lack of findings by the panel or undisputed facts with respect to the trade-restrictiveness of alternative measures suggested by the claimants (para. 491).

⁸⁴ WTO, *Tuna II*, Panel, paras. 7.401 and 7.413.

⁸⁵ *Ibid.*, paras. 7.401 and 7.425.

⁸⁶ *Ibid.*, para. 7.444; WTO, *Tuna II*, Appellate Body, para. 337.

environmental danger abroad (threats to the health of dolphins) was domestic consumption of tuna products containing tuna fished in extraterritorial waters. Thus one can read the Appellate Body report in *Tuna II* to acknowledge that governments may legitimately aim to protect the environment from harmful production processes abroad by regulating domestic consumption.⁸⁷ Even though the Appellate Body in *Tuna II* only recognised that extraterritorial environmental harm may be addressed through product-labelling it opened the door for using the same argumentation (that the domestic market shall not be used to encourage unsustainable production) also in relation to more far-reaching regulatory measures such as, for example, an outright marketing ban. If a government wants to ensure that domestic consumption does not contribute to unsustainable production such a ban may be justifiable as necessary and the least trade-restrictive measure to achieve this objective.

47 To return to the purposes of the 'dolphin-safe' labelling scheme: Even though in *Tuna II* the US submitted that the labelling scheme pursued a regulatory objective (protection of dolphins), the dispute settlement organs still treated the two objectives – consumer information and dolphin protection – separately. This separation of the information and regulatory function appears to be artificial and problematic as the objective of preventing consumer deception can only be understood in light of the objective to protect dolphins and the level of protection the US seeks to realise. As I argued above the label 'dolphin-safe' conveys a particular understanding of what constitutes 'dolphin-safe' tuna fishing. What is considered 'dolphin-safe' is not merely a question to be answered by reference to natural science. Whether a certain fishing technique is 'dolphin-safe' or not cannot be assessed in terms of true or false. The question can only be answered by reference to certain standards the establishment of which involve a number of value judgments. Such as, for example, how much distress to dolphins is acceptable or in general terms: which level of protection shall be attained.

48 Not misleading consumers must therefore be interpreted to mean that the label certifies that tuna has been caught in a manner for which the legislator has

⁸⁷ Cf. *Gregory Shaffer*, *The WTO Tuna-Dolphin II Case (United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products)*, University of Minnesota Law School, Legal Studies Research Paper Series, Research Paper No 12-62, 8, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2176863 (accessed on 3 December 2014).

expressed a preference in the labelling provisions. It follows that it is not convincing to assume that differential treatment of like products through an ecolabelling scheme can be justified merely in terms of consumer information. Rather justification hinges on whether the regulatory objective that informs the labelling requirements is recognised as legitimate by the TBT Agreement and whether its pursuit explains the differential treatment between products. The Appellate Body when assessing the question whether the detrimental impact on Mexican tuna products caused by the labelling scheme was justified by the regulatory objective to realise a particular level of dolphin protection came to the conclusion that it was not and that the labelling scheme consequently violated Article 2.1. TBT Agreement. According to the Appellate Body the US measure was not calibrated to the risks to dolphins from different fishing techniques. While it fully addressed the risks for dolphins stemming from the fishing technique of setting on dolphins used by the Mexican fleet it did not to the same extent address the risk of mortality outside the ETP resulting from other fishing methods.⁸⁸ Purse seine vessels fishing outside the ETP only have to certify that they do not encircle or set on dolphins to be eligible for the US 'dolphin-safe' label, but do not have to certify that no dolphins were killed or seriously injured.⁸⁹ The Appellate Body also indicated how the discrimination might be remedied, namely by changing the US labelling scheme to the effect that captains of vessels fishing outside the ETP have to certify that no dolphins are being harmed during tuna fishing operations.⁹⁰

49 Appellate Body and panel not only had to inquire into the regulatory objectives of the 'dolphin-safe' labelling scheme when assessing Mexico's discrimination claim on the basis of Article 2.1 TBT Agreement. They also addressed this issue when determining whether the US labelling scheme was more trade-restrictive than necessary and thus violated Article 2.2 TBT Agreement. The assessment hinged on the question whether the US could have adopted a less trade-restrictive measure by allowing the 'dolphin-safe' label of the AIDCP to coexist with the US 'dolphin-safe' label. According to the Appellate Body a measure to constitute a less trade-restrictive alternative must not only be less

⁸⁸ WTO, *Tuna II*, Appellate Body, para. 297.

⁸⁹ *Ibid.*, para. 292.

⁹⁰ *Ibid.*, para. 296.

trade-restrictive than the measure at issue, it must also make an equivalent contribution to the relevant legitimate objective and be reasonably available.⁹¹ The panel found that to allow the label established under the AIDCP to coexist with the US label constituted a less trade-restrictive measure that would achieve the US consumer information and dolphin protection objectives to the same extent as the exclusivity of the US 'dolphin-safe' label.⁹² The Appellate Body disagreed and reversed the panel's finding that the US labelling scheme was more trade-restrictive than necessary and therefore violated Article 2.2 TBT Agreement.⁹³ Correctly, in my view, the Appellate Body argued that the alternative measure would not achieve the same level of protection sought by the US labelling scheme. As a consequence of admitting the AIDCP label, tuna caught in the ETP by setting on dolphins could be sold in the US with a 'dolphin-safe' label. Since this technique, however (according to the judgment of the US legislator) involves harm to dolphins, the US would achieve its objective of protecting dolphins to a lesser extent.⁹⁴ The Appellate Body moreover held the view that also the consumer information objective would be achieved to a lesser extent as 'unsafe' tuna would be eligible for 'dolphin-safe' labelling⁹⁵. Yet, as argued above, this finding can only be made on the basis of a certain understanding of what means 'dolphin-safe' as expressed in the US labelling scheme.

VI. The Hidden Power of Ecolabels

50 The recent WTO disputes *Tuna II* and *COOL* demonstrate that it is inadequate to characterise ecolabels as information tools that allow consumers to realise their given preferences. Rather the dispute settlement reports serve to highlight that labelling schemes when backed by government authority are powerful regulatory instruments in need of justification. Furthermore, the reports provide important clarifications as to the extent of WTO members' right to regulate. They demonstrate the long way dispute settlement in the trade regime has come since the first tuna dolphin controversy within the GATT. Contrary to the

⁹¹ *Ibid.*, para. 323.

⁹² WTO, *Tuna II*, Panel, paras. 7.563, 7.564, 7.577, 7.564.

⁹³ *Id.*, *Tuna II*, Appellate Body, para. 331.

⁹⁴ *Ibid.*, para. 330.

⁹⁵ *Ibid.*

early contentious decisions in the realm of trade and environment they explicitly acknowledge that governments may distinguish between products exhibiting the same physical characteristics if such a distinction is justified by a legitimate regulatory interest for example to prevent unsustainable production. The Appellate Body in *Tuna II* accepted as a legitimate regulatory objective the objective to ensure that the domestic market is not used to encourage detrimental production processes abroad. Thus it not only emphasised the need for justification of government labelling schemes, but also indicated that WTO law does not stand in the way of other, less 'market-based' and more interventionist government measures for the protection of the environment.

51 A careful and critical assessment of labelling may well lead us to the conclusion that ecolabels are not very effective in containing unsustainable production and consumption and that the emphasis on market-based instruments such as ecolabels neither maintains real freedom of choice nor empowers the consumer but rather disempowers citizens. Effectiveness may be limited given that capacity of consumers to 'vote' through consumption is restricted. Restrictions result from limits of mental processing capacity of information relevant for sustainable consumption. They also stem from the fact that decision-making with a view to promoting sustainability frequently requires more than the assessment of a single issue (such as 'dolphin-safety'), but rather a weighing and balancing of many different social, economic, and environmental aspects. Such weighing and balancing typically takes place in collective government institutions such as legislatures and cannot be outsourced to individual consumers. Yet, government institutions in their endeavour to promote growth increasingly turn to marketing-experts in order to learn how to influence consumers and to so-called market instruments such as labels to promote sustainability not through mandating sustainable production but through consumer choice for sustainable products. Thus a scenario emerges in which government and politics less and less provide citizens with an opportunity to realise their collective autonomy and governments' marketing experts nudge consumers into making the 'right' choices.⁹⁶

⁹⁶ Cf. Christopher McCrudden, *Nudging and Human Dignity*, 6 January 2015, available at: <http://www.verfassungsblog.de/nudging-human-dignity/#.VMeu8S7F1x8> (accessed on 27 January 2015).

52 While there are good reasons to support ecolabelling schemes that make up for government weaknesses, for example in preventing overfishing in a transnational constellation, we should be careful before we embrace ecolabels as preferable to government intervention that bans unsustainable products and production methods. While ecolabels may provide us with a choice as consumers -- between fish products with one or the other label or no label at all -- as citizens we can debate and open up a very different set of choices including the choice whether we want to sustain economies of growth or not.