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The Epic Struggle for Dolphin-Safe Tuna

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The Epic Struggle for Dolphin-Safe Tuna: To Be Continued—A Case for Accommodating Nonprotectionist Eco-labels in the WTO

ABSTRACT

In May 2012, the World Trade Organization (WTO) struck down the United States' dolphin-safe tuna labeling standard as a barrier to trade that is prohibited by the Technical Barriers to Trade Agreement (TBT). The analysis in the US-Tuna II report questions the validity of standardized eco-labels enforced by WTO Member States, which are an increasingly popular means to achieve environmental and consumer protection. This Note considers the merits of state-backed eco-labeling schemes, the implications of the US-Tuna II report for the WTO's approach to nontrade interests, and potential accommodations within the current WTO framework for eco-labels. It ultimately suggests that WTO dispute resolution bodies depart from US-Tuna II; instead of rejecting environmental legislation that has any discriminatory effect upon trade, future decisions should concentrate upon whether the statute is intended to serve a protectionist purpose. It also suggests that the WTO consider awarding monetary aid to ease developing nations' financial or technological burdens in complying with upheld regulations.

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I. INTRODUCTION

In May 2012, the Dispute Settlement Body of the World Trade Organization (WTO) struck down the United States' dolphin-safe tuna labeling standards as a violation of the Technical Barriers to Trade Agreement (TBT). The dolphin-safe tuna label's standards were set in the Dolphin Protection Consumer Information Act (DPCIA), which mandated that sellers use the label only if their products were caught by proscribed fishing methods.¹ The standards themselves were the enormously popular product of a decade of legislative drafting, agency interpretation, and court review.²

1. Dolphin Protection Consumer Information Act, 16 U.S.C. § 1385 (1990).

2. See Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶ 172, WT/DS381/AB/R

In *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (US-Tuna II)*, the WTO Appellate Body (Appellate Body)³ held that the United States' dolphin-safe labeling standard was a "technical regulation" and therefore subject to compliance with the TBT.⁴ It then ruled that the labeling standard violated the TBT because it would affect international trade; while American producers had already achieved compliance, the majority of Mexican vessels engage in fishing methods that disqualify them from using the dolphin-safe labels.⁵ In addition, the Appellate Body examined the scientific data Congress itself used when determining eco-labeling standards were necessary but found the evidence did not justify the legislation.⁶ The Appellate Body did not inquire into whether the DPCIA was enacted with a discriminatory purpose.⁷

The *US-Tuna II* case has potentially far-reaching implications for state-enforced eco-labeling standards. First, if the WTO upholds its interpretation of the TBT going forward, the decision confirms academic suspicion that all state-backed eco-labeling standards will likely fall within the provisions of the TBT. At the time of writing, over nineteen individual states have enacted green-labeling

(May 16, 2012) [hereinafter US-Tuna II AB] (describing the process involved in creating the standards). *Contra* Appellate Body Report, *US—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter Shrimp-Turtle].

3. This Note often references the WTO's dispute resolution processes. The Dispute Settlement Understanding (DSU) governs dispute resolution mechanisms for WTO members. If it believes another member has breached its WTO obligations, a WTO member must first initiate consultations with the breaching member. If these mediations fail, the complainant member may request a Panel be set up to hear its dispute. The Panel, which is usually composed of three or five individuals nominated by the WTO Secretariat, decides whether the complainant is correct based upon pleadings of the member parties, as well as oral arguments and outside fact-finding. The Panel then issues its decision in a written report (Panel Report). Either member can appeal its legal findings to the Appellate Body. In any given dispute, three of the seven members of the Appellate Body will hear the dispute; for ease, this Note refers to these three members as the Appellate Body. The Appellate Body then issues its own report (Appellate Body Report) with its legal findings. If it loses its appeal, a defendant member must follow the recommendations of the Panel Report or Appellate Body Report in order to bring itself back into compliance with WTO obligations within a reasonable period of time. If it fails to do so, then the member parties may determine mutually-acceptable compensation, such as tariff reductions or compensatory aid. A helpful summary of the dispute resolution process within the WTO is available at the WTO's website. See *Understanding the WTO: Settling Disputes*, THE WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm [<http://perma.cc/YQ7B-JMHT>] (archived Feb. 13, 2014) (last visited Mar. 12, 2014); see also RALPH H. FOLSOM ET AL., *INTERNATIONAL BUSINESS TRANSACTIONS: A PROBLEM-ORIENTED COURSEBOOK* 356–58 (11th ed. 2012).

4. US-Tuna II AB, *supra* note 2, ¶ 407.

5. *Id.* ¶ 234.

6. *Id.* ¶ 407.

7. *Id.*

standards or guidance, and eco-labeling has generally garnered support as a market-based means of promoting environmental conservation.⁸ If the WTO's judicial bodies hold to the interpretation of the TBT's provisions in *US-Tuna II*, it may effectively eliminate eco-labeling as a tool for achieving nontrade goals.

Second, the case is arguably the product of the WTO's inability to adopt an official approach to accommodating environmental and other nontrade interests that have incidental effects on trade.⁹ *US-Tuna II* followed a decade-long stalemate within the WTO regarding how, or whether, to accommodate regulations that are based upon environmental interests.¹⁰ The effects of this dissension continue to snowball as WTO members enact more environmental regulation, and accordingly face a growing number of complaints under the TBT.¹¹

Third, the decision arguably presents a turn away from the WTO's recent attempts to accommodate nontrade interests within its framework. Like other WTO agreements, the TBT recognizes that its members have the right to enact environmental regulations.¹² Yet in *US-Tuna II*, the Appellate Body did not consider whether the eco-label was motivated by a discriminatory purpose. If this analysis is broadly applied, WTO members will be unable to apply marketing standards to foreign suppliers that do not already practice the desired production methods; effectively, adherence to the WTO's interpretation of the TBT would limit countries' ability to protect consumers from foreign producers' potentially deceptive labels and

8. *Product Category List by Country*, GLOBAL ECO-LABELING NETWORK, http://www.globalecolabelling.net/categories_7_criteria/list_by_country/index.htm [<http://perma.cc/VC9Y-E2UH>] (archived Feb. 13, 2014) (last visited Mar. 14, 2014). The list also includes regional organizations, including the European Union, Nordic Countries, and North America.

9. This Note asserts that state-backed eco-label schemes are defensible on the grounds of both environmental and consumer protection.

10. See Gregory C. Shaffer, *The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Issues*, 25 HARV. ENVTL. L. REV. 1, 1–2 (2001) (discussing the criticism the WTO faced in the 1990s).

11. See Samir R. Gandhi, *Regulating the Use of Voluntary Environmental Standards Within the World Trade Organization Legal Regime: Making a Case for Developing Countries*, 39 J. WORLD TRADE 855, 856 (2005) (noting that from 2000 to 2003, WTO member countries notified the WTO of 268 environment-related requirements; during the same period, the annual number of notifications increased from 59 to 89).

12. See Agreement on Technical Barriers to Trade, at pmbl., Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round vol. 27 (1994), 33 I.L.M. 1144 (1994) [hereinafter TBT Agreement] (“Recognizing that no country should be prevented from taking measures necessary to ensure the protection of human, animal or plant life or health, of the environment.”).

encourage purchases from producers who achieve environmental objectives.

This Note examines the value of state-backed eco-labeling schemes, the potential implications of *US-Tuna II* for the WTO's approach to accommodating nontrade interests, and potential adjustments within the current WTO framework for eco-labels. Part II describes the Appellate Body's reasoning in *US-Tuna II*. Part III examines the merits and criticism of state-standardized eco-labels from an economic and policy perspective. Part IV considers the implications of *US-Tuna II* within the context of the WTO's attempts to accommodate nontrade interests.

Ultimately, this Note suggests in Part V that the WTO accommodate members' regulations, including state-mandated eco-labeling schemes, which are not based upon protectionist interests. Rather than waiting for the diplomatic body¹³ to reform its agreements, the WTO adjudicatory bodies¹⁴ should abandon the Appellate Body's precedent in *US-Tuna II* when interpreting the TBT. Part V also suggests that WTO adjudicatory bodies award monetary aid to challengers of legitimate environmental regulations, thereby promoting conservation efforts extraterritorially and reducing trade barriers.

II. *US-TUNA II*: A CASE STUDY OF THE WTO'S APPROACH TO ENVIRONMENTAL LEGISLATION UNDER THE TBT

A. *Legislative and Judicial History of the DPCIA*

The DPCIA demonstrates the potential cooperation and conflicts between domestic policymakers, nongovernmental actors, and international trade interests. Rather than considering only domestic requirements for legislative and administrative justification, the legislative and administrative bodies must ensure their actions conform to the TBT. The DPCIA's messy history of legislative enactment, invalidation, redrafting, and administrative interpretation demonstrates that it is likely difficult for all governmental actors to prioritize WTO compliance when they already face a plethora of domestic environmental and trade interests.

13. In order to distinguish from its dispute resolution bodies, this Note uses the term "diplomatic body" to refer to the WTO's function as an international forum for its members. The WTO's formal agreements are adopted only by consensus of all members. See *Whose WTO Is It Anyway?*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm [<http://perma.cc/8BE5-AF39>] (archived Feb. 13, 2014) (last visited Mar. 14, 2014) (indicating that all major decisions are normally taken by consensus).

14. This Note refers to the Appellate Body and future Panels as "adjudicatory bodies."

The demand for dolphin-safe tuna emerged from concern about staggering dolphin fatalities resulting from bycatch in the Eastern Tropical Pacific (ETP).¹⁵ In that region, dolphins and yellowfin tuna have a unique ecological association; the two species travel together throughout that expanse, and dolphins' surfacing makes their movement visible above the surface.¹⁶ Since the 1950s, fishermen used this association to their advantage by "setting on" dolphins; fishermen track pods of dolphins in order to locate tuna schools and then use purse seine nets to ensnare the entire school.¹⁷ The dolphins are often caught as bycatch; they can be released manually, but this takes time and effort, and even then is sometimes not successful. During the 1970s, the public became aware of the high dolphin mortality rates, estimated at that time to be in the hundreds of thousands per year.¹⁸

The United States' first attempt to alter tuna-fishing methods took the form of an outright ban upon any tuna imports that did not comply with domestic standards; these standards required that dolphin kills associated with tuna catches decrease to "insignificant levels" and regulatory dolphin protection programs.¹⁹ The Marine Mammal Protection Act arguably created the public's demand for dolphin-safe tuna.²⁰ That legislation was challenged by Mexico under

15. See *The Tuna-Dolphin Issue*, SOUTHWEST FISHERIES SCIENCE CENTER, <http://swfsc.noaa.gov/textblock.aspx?Division=PRD&ParentMenuId=228&id=1408> [<http://perma.cc/QJP3-BY6Q>] (archived Feb. 13, 2014) [hereinafter *The Tuna-Dolphin Issue*] ("The number of dolphins killed since the fishery began in the late 1950s is estimated to be over 6 million animals, the highest known for any fishery.").

16. See *id.* (explaining that fishermen locate schools of tuna by chasing down the dolphins that swim with schools and set nets around them, catching the dolphins along with tuna).

17. *Id.*; *Conservation: Threats to the Bottlenose Dolphin and Other Marine Mammals*, THE DOLPHIN INSTITUTE, http://www.dolphin-institute.org/resource_guide/conservation.htm [<http://perma.cc/G3E2-4JVB>] (archived Feb. 13, 2014).

18. See Elisabeth Eaves, *Dolphin-Safe But Not Ocean-Safe*, FORBES (June 24, 2008, 6:00 PM), http://www.forbes.com/2008/07/24/dolphin-safe-tuna-tech-paperplastic-08-cx_ee_0724fishing.html [<http://perma.cc/XA5Z-598P>] (archived Feb. 5, 2014) ("The save-the-dolphins campaign that began in the 1970s initially met with huge success. It helped reduce dolphin deaths in the Eastern Tropical Pacific (ETP) from something well above a hundred thousand per year to just a few thousand by the mid-'90s.").

19. See *U.S. Enforces Tuna Embargo*, N.Y. TIMES (Feb. 3, 1992), <http://www.nytimes.com/1992/02/03/business/us-enforces-tuna-embargo.html> [<http://perma.cc/8SN4-K9EZ>] (archived Feb. 22, 2014) (noting that when the act was first enforced, the embargo covered yellowfin tuna harvested by fishermen from Mexico and Venezuela, and imports from 22 countries). For a brief but thorough history of the United States' regulation of the dolphin-safe tuna legislation, consult Donald W. McChesney, *Dolphin-Safe or Fisherman-Friendly? Abuse of Discretion in Amendment of the Dolphin-Safe Tuna Labeling Standard*, 38 U.C. DAVIS L. REV. 1725, 1728-44 (2005).

20. See *Marine Mammal Protection Act and Litigation Highlights*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/enrd/4680.htm> [<http://perma.cc/Z8VB-ZMJS>]

the General Agreement on Tariffs and Trade (GATT).²¹ In *United States—Restrictions on Imports of Tuna (US-Tuna I)*,²² GATT's appellate judicial body found the regulation to be an invalid restriction on interstate trade.²³ The public's response was nothing short of an outcry, and Congress echoed popular concerns regarding GATT's inability to accommodate environmental and health concerns.²⁴

The demand for dolphin-safe tuna increased through the efforts of environmental activist groups, including the Earth Island Institute, an American not-for-profit conservation organization.²⁵ Earth Island encouraged the U.S. tuna industry to end the controversial practice of using purse seine nets to capture tuna.²⁶ Within 4 years, the world's three largest tuna producers, all U.S. corporations, agreed to stop selling tuna caught by the intentional chasing and netting of dolphins.²⁷ Earth Island also created and monitored the use of its own dolphin-safe eco-label.²⁸

Partially in response to the deceptive use of dolphin-safe labels, Congress enacted the DPCIA in 1990.²⁹ The choice to federally standardize dolphin-safe tuna labels coincided with a broader movement to regulate environmental advertising.³⁰ The DPCIA

(archived Feb. 22, 2014) (noting that the Marine Mammal Protection Act banned the practice of setting on dolphins and thus created "the market for 'dolphin-safe' tuna").

21. "GATT" is used to refer both to the treaty and its members, which met for nine rounds between 1947 and 1994. In 1995, the treaty was amended to create the WTO. The WTO Appellate Body is a descendant of GATT's appellate judicial body. See Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154; *The GATT Years: From Havana to Marrakesh*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm [<http://perma.cc/CU2E-3W5C>] (archived Feb. 22, 2014) (providing a brief history of GATT and the WTO).

22. Panel Report, *United States—Restrictions on Imports of Tuna*, WT/DS29/R (June 16, 1994) [hereinafter US-Tuna I].

23. See *id.* ¶ 57 (concluding that the import prohibitions on tuna and tuna products in the Marine Mammal Protection Act failed to conform with GATT requirements).

24. JACQUELINE D. KRICKORIAN, *INTERNATIONAL TRADE LAW AND DOMESTIC POLICY: CANADA, THE UNITED STATES, AND THE WTO* 8–9 (2013).

25. See *Questions and Answers About Earth Island Institute's Dolphin Safe Tuna Program*, EARTH ISLAND INSTITUTE, <http://www.earthisland.org/immpp/QandAdolphinSafe.html> [<http://perma.cc/KV5B-HWKQ>] (archived Feb. 22, 2014) (detailing the mission of the Earth Island Institute).

26. *Id.*

27. *Id.*

28. *Id.*

29. See Food and Agric. Org., *Product Certification and Eco-labeling for Fisheries Sustainability* 16 (FAO Fisheries Technical Paper 422, 2001) [hereinafter *FAO Report*], available at <ftp://ftp.fao.org/docrep/fao/005/y2789e/y2789e00.pdf> (last visited Mar. 14, 2014) (explaining that the U.S. Congress passed the DPCIA to make the government responsible for verifying that tuna products are dolphin-safe); McChesney, *supra* note 19, at 1731 ("In 1990, Congress passed the Dolphin Protection Consumer Information Act ('DCPIA') in furtherance of the MMPA's goals.").

30. See *FAO Report*, *supra* note 29, at 10 (describing the eco-labeling regulatory scheme used by the Food and Agriculture Organization). Notably, in 1992, the Federal

provided that tuna would be eligible for dolphin-safe labels only if producers certified that they did not set on dolphins.³¹ It placed an additional eligibility requirement upon sellers of tuna from the ETP: producers in that region must also certify that “no dolphins were killed or seriously injured in the nets in which the tuna were caught.”³² Congress based its regional differentiation upon the strong ecological association between tuna and dolphins that is unique to the ETP; it found that dolphins were especially vulnerable within that region.³³

The DPCIA’s strict requirements caused U.S. trade partners, including Mexico, to protest the legislation.³⁴ The United States and these countries subsequently created a multilateral agreement, the International Dolphin Conservation Program, in which all parties agreed to limit dolphin mortality to set quotas.³⁵ In exchange, the

Trade Commission first issued its green guides, which provided marketers with standards for all environmental marketing claims, and consumers with tools to interpret them. *See* Guides for the Use of Environmental Marketing Claims 16 C.F.R. § 260 (2010); *Environmentally Friendly Products: FTC’s Green Guides*, FED. TRADE COMM’N (Jan. 3, 2013), <http://www.ftc.gov/opa/reporter/advertising/greenguides.shtml> [<http://perma.cc/4VQR-UL2E>] (archived Feb. 22, 2014); *see also* Jennifer Woods, Note, *Of Selling the Environment – Buyer Beware? An Evaluation of the Proposed F.T.C. Green Guides Revisions*, 21 LOY. CONSUMER L. REV. 75, 75 (2008) (“[T]he Federal Trade Commission (FTC) established the Green Guides (Guides) in 1992 to assist companies in determining appropriate means for making claims about the environmental benefits of their products.”).

31. Elizabeth Trujillo, *The WTO Appellate Body Knocks Down U.S. “Dolphin-Safe” Tuna Labels But Leaves a Crack for PPMs*, 16 ASIL INSIGHTS 25 (July 26, 2012), available at <http://www.asil.org/insights/volume/16/issue/25/wto-appellate-body-knocks-down-us-%E2%80%9Cdolphin-safe%E2%80%9D-tuna-labels-leaves> [<http://perma.cc/WRF3-VYP2>] (archived Feb. 22, 2014) (“For tuna caught in the Eastern Tropical Pacific region (‘ETP’), access to the label requires a certification that the tuna was not caught by setting on dolphins *and* that ‘no dolphins were killed or seriously injured’ in the process.”); *see also* US-Tuna II AB, *supra* note 2, ¶ 172 (“[T]una caught by ‘setting on’ dolphins is currently not eligible for a ‘dolphin-safe’ label in the United States.”).

32. US-Tuna II AB, *supra* note 2, ¶ 174.

33. *See The Tuna-Dolphin Issue*, *supra* note 15 (“The bycatch of dolphins in the eastern tropical Pacific (ETP) purse-seine tuna fishery stands apart from marine mammal bycatch in other fisheries, not only in scale but in the way the dolphins interact with the fishery.”).

34. *See generally* Panel Report, *United States—Restrictions on Imports of Tuna*, WT/DS21 (Sept. 3, 1991) (ruling that a ban on imports based upon non-physical attributes violated GATT Article XI, and that SPS did not provide an exception because the regulation affected extraterritorial environmental practices).

35. *See* McChesney, *supra* note 19, at 1731–32 (“The La Jolla Agreement established the International Dolphin Conservation Program (‘IDCP’) in which participating nations agreed to adopt dolphin mortality limits. Under these mortality limits, each vessel from a signatory country’s tuna fleet could not exceed a set number of dolphin deaths.”); *see also* La Jolla Agreement for the Reduction of Dolphin Mortality in the Eastern Pacific Ocean, June 1992, 1 U.S.T. 230, 33 I.L.M. 936 (1994).

Clinton administration agreed to seek a congressional lift of the DPCIA's embargo.³⁶

Congress hesitated to abandon its strict provisions within the DPCIA, which had reduced dolphin mortality significantly.³⁷ In 1997, Congress allowed that if the secretary of commerce found scientific evidence that the fishing industry in the ETP did not have an adverse impact on the dolphin population, then Congress could reduce the region's regulatory burden.³⁸ In his analysis, the secretary of commerce weighed Mexico's trade concerns, despite the fact that Congress did not permit him to consider economic or international consequences.³⁹ The secretary twice asserted that the fishery had no impact upon dolphin populations, and the Ninth Circuit twice struck down his findings as arbitrary and capricious.⁴⁰ In its second decision, *Earth Island Institute v. Hogarth*, the Ninth Circuit ordered that the DPCIA should continue in force.⁴¹

After the *Hogarth* decision, Mexico requested WTO consultations with the United States to challenge the DPCIA, related regulations, and *Hogarth* as violations of the TBT; when negotiations failed, it requested adjudication by a WTO Panel.⁴² In particular, its complaint challenged the DPCIA's differentiation between tuna caught in the ETP and all other regions.⁴³

36. President's Transmittal of the United Nations Convention on the Law of the Sea and the Agreement Relating to the Implementation of Part XI to the U.S. Senate with Commentary, 34 I.L.M. 1393 (1995).

37. See McChesney, *supra* note 19, at 1733–34 (citing *Brower v. Daley*, 93 F. Supp. 2d 1071, 1074 (N.D. Cal. 2000)) (noting that between 1992 and 1998, the annual estimated dolphin fatalities decreased from 15,550 to 1,900).

38. See *Earth Island Inst. v. Hogarth*, 494 F.3d 757, 760 (9th Cir. 2007) (“According to the bill’s proponents, Congress would weaken the then-strict tuna labeling requirements, and permit broader use of ‘dolphin-safe’ labeling, only if the Secretary found that the fishery was not having a significant adverse impact on already depleted dolphin stocks.”).

39. See *id.* at 768–69 (“[T]he Secretary afforded the Mexican and South American governments numerous opportunities to bypass the ODP procedures for submitting comments for agency review and instead plead their case directly to the highest levels.”).

40. See *id.* at 763–66 (“Congress still does not have the answer to the fundamental question outlined in the IDCPA almost a decade ago, as to whether the fishery produces stress effects on the dolphins that prevent population recovery.”).

41. See *id.* at 766 (rejecting the district court’s order to enforce the DPCIA’s former embargo, and instead ruling that dolphin-safe tuna label standards comply with DPCIA).

42. See *Dispute Settlement: Dispute DS381 United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm [<http://perma.cc/WYP-3FJR>] (archived Feb. 22, 2014) (providing a brief recounting of the proceedings).

43. See *id.* (“Mexico’s main claims were that the measures were discriminatory, and that they were also unnecessary.”).

B. The Labeling Standard as a Technical Regulation

The threshold matter in the Appellate Body's decision in *US-Tuna II* was whether the DPCIA⁴⁴ created a technical regulation subject to the TBT.⁴⁵ The TBT defines a technical regulation as a "[d]ocument which lays down product characteristics or their related processes and production methods . . . with which compliance is mandatory . . ."⁴⁶ It further clarifies that the regulation may deal exclusively with "labeling requirements as they apply to a product, process or production method."⁴⁷ The United States asserted that the labeling scheme was not a technical regulation because use of the label was not mandatory.⁴⁸

The Appellate Body found the Mexican government's challenge persuasive. The Mexican government argued that the regulation was mandatory because it restricted retailers "to a single choice" for labeling tuna products as dolphin safe.⁴⁹ If the dolphin-safe requirements were not met, tuna packaging could not include any references to dolphins or other marine mammals.⁵⁰ In effect, the DPCIA presumes that any mention of dolphin safety on tuna labels is deceptive unless it meets DPCIA requirements.⁵¹ In interpreting the

44. In analyzing the dolphin safe labeling, the WTO Panel and Appellate Body's analysis considered the DPCIA, 16 U.S.C. § 1385, the implementing regulations, 50 C.F.R. § 216.91, and the 9th Circuit ruling in *Earth Island Institute v. Hogarth*, as a unit. See *US-Tuna II*, *supra* note 2, ¶ 172. For ease, this Note refers to the entire regulatory scheme as the DPCIA.

45. The TBT is a WTO Agreement aimed at reducing unnecessary obstacles to trade, including regulatory standards; it does this by requiring that all "technical regulations" do not impose undue obstacles to international competition. The TBT recognizes that members still retain the right to achieve "legitimate policy objectives, such as the protection of human health and safety, or the environment." See *Technical Barriers to Trade*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm [<http://perma.cc/PUQ2-JWJ5>] (archived Feb. 5, 2014).

46. TBT Agreement, *supra* note 12, at Annex 1; see also *Technical Information on Technical Barriers to Trade*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/tbt_e/tbt_info_e.htm [<http://perma.cc/8RPH-FPJG>] (archived Feb. 22, 2014) [hereinafter *WTO Technical Information*] ("While conformity with standards is voluntary, technical regulations are by nature mandatory.").

47. TBT Agreement, *supra* note 12, at Annex 1.

48. The DPCIA does not require that tuna be labeled "dolphin safe" for it to be sold in the United States. See *US-Tuna II AB*, *supra* note 2, ¶ 181 ("The United States takes issue with several aspects of the Panel's analysis, alleging in particular that the Panel erred in its interpretation of the word 'mandatory' by making it indistinguishable from the term 'requirement'.")

49. *Id.* ¶ 182.

50. See *id.* ¶ 172 ("The DPCIA and the implementing regulations also prohibit any reference to dolphins, porpoises, or marine mammals on the label of a tuna product if the tuna contained in the product does not comply with the labeling conditions spelled out in the DPCIA.")

51. See *id.* ¶ 195 ("Rather, the measure at issue establishes that including on the label of a tuna product the term 'dolphin-safe' [. . .] without meeting the conditions

definition of technical regulation, the Appellate Body determined that the appropriate inquiry may “involve considering whether the measure . . . sets out specific requirements that constitute the sole means of addressing a particular matter”⁵² As a result, it ruled the DPCIA a technical regulation because it “covers the entire field of what ‘dolphin-safe’ means in relation to tuna products.”⁵³

C. DPCIA as a Violation of the “no less favored nation” Requirement

The Appellate Body held that the DPCIA violated Article 2.1 of the TBT, which requires that technical regulations ensure that all imports from WTO Member States “shall be accorded treatment no less favourable than that” given to like products of any other origin.⁵⁴ The United States argued that Mexican tuna was not treated differently under the DPCIA because its regulation differentiated between tuna’s regional origin (the ETP versus all other seas), rather than the producer’s origin.⁵⁵

The Appellate Body again rejected the United States’ interpretation of the treaty. Instead, it held that less favorable treatment results when a regulation modifies the conditions of competition that have a detrimental impact upon Mexican products.⁵⁶ The fact that consumers were free to purchase tuna without the dolphin-safe label was irrelevant.⁵⁷ The Appellate Body noted that most Mexican-produced tuna would not qualify for dolphin-safe labels under the DPCIA. At least two-thirds of Mexican vessels set on dolphins⁵⁸ and therefore were effectively unable to produce dolphin-safe tuna under the DPCIA; in contrast, the American fleet did not

set forth in the measure, is, in itself, a violation of Section 45 of Title 15 of the *United States Code*.”).

52. *Id.* ¶ 188. *But see* *WTO Technical Information*, *supra* note 46 (implying that the TBT is intended to cover regulations that prevent non-conforming goods to be sold on the market).

53. US-Tuna II AB, *supra* note 2, ¶ 199.

54. TBT Agreement, *supra* note 12, at art. 2.1.

55. *See* US-Tuna II AB, *supra* note 2, ¶ 209 (noting that “for the United States, the emphasis is on whether a measure modifies the conditions of competition based upon the origin of imported product”).

56. *See id.* ¶¶ 231, 235 (defining the test as whether the measure modifies the conditions of competition to the detriment of Mexican tuna products and then finding the test satisfied because the regulation had a “detrimental impact” because most Mexican vessels would not comply with the regulation).

57. *See id.* ¶ 238 (“[I]t is the measures themselves that control access to the label and allow consumers to express their preferences for dolphin-safe tuna. An advantage is therefore afforded to products eligible for the label by the measures, in the form of access to the label.”).

58. The United States set this type of fishing apart due to its particular concern that it posed harm to dolphins; “setting on dolphins” involves chasing pods of dolphins to find tuna schools, and its criticism directly led to the United States’ adoption of tuna labels in the 1980s.

set on dolphins in the ETP at the time of the legislation's passage.⁵⁹ The Appellate Body held that because evidence showed that U.S. consumers preferred dolphin-safe tuna, the Mexican fleet's inability to use the label was detrimental to Mexican tuna producers' ability to compete in the United States.⁶⁰

The Appellate Body also ruled that the detrimental impact on Mexican tuna "reflected discrimination."⁶¹ The United States asserted that the more stringent regulations of ETP tuna were "calibrated" to the differing risks to dolphins arising from different regional fishing methods.⁶² However, the Appellate Body held that the United States had not satisfied its burden of justifying the regional differentiation.⁶³ While the setting-on method was common in the ETP and posed a risk to dolphins,⁶⁴ it was not clear that dolphins faced a reduced risk outside the ETP when other fishing methods were used.⁶⁵ Therefore, the United States had not demonstrated that the regulation was evenhanded.⁶⁶

D. US-Tuna II's *Result*

The Appellate Body's adopted report ultimately required the United States to amend the DPCIA to comply with the TBT.⁶⁷ The United States and Mexico agreed that the United States would have until July 13, 2013, to comply with the report's decision.⁶⁸ At the time of writing, the United States had not revealed how it would amend the DPCIA. If it should fail, the United States would risk facing

59. *Id.* ¶ 234.

60. *See id.* ¶¶ 233–38 (noting how the evidence showed that the DPCIA impeded Mexican tuna producers' ability to compete).

61. *Id.* ¶ 298.

62. *Id.* ¶ 282.

63. *Id.* ¶ 407.

64. *Id.* ¶ 251 (summarizing the uncontested factual findings of the Panel).

65. *See id.* ¶ 258 (upholding the Panel's factual finding); *see also id.* ¶ 264 (quoting the Panel opinion) ("[T]here are clear indications that the use of certain tuna fishing techniques other than setting on dolphins may also cause harm to dolphins.").

66. *Id.* ¶ 297. *See id.* ¶ 292 ("[I]t thus appears that the measure at issue does not address adverse effects on dolphins resulting from the use of fishing methods predominantly employed by fishing fleets supplying the United States' and other countries' tuna producers.").

67. This recommendation was made by the Appellate Body, US-Tuna II AB, *supra* note 2, ¶ 408, and adopted by the Dispute Settlement Body on June 13, 2012, *Dispute Settlement: Dispute DS 381*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm [<http://perma.cc/7DXQ-5MWF>] (archived Feb. 12, 2014) (last visited Feb. 26, 2013).

68. *Id.* (noting that the United States and Mexico reported to the WTO on June 25, 2012, and that they agreed that a "reasonable" time to enact compliance would be 13 months).

retaliatory trade sanctions granted within the WTO's Dispute Settlement Understanding.⁶⁹

Yet it is unclear whether the threat of retaliatory trade sanctions is real. Under the Dispute Settlement Understanding, retaliatory trade sanctions are a last resort. The parties must first exhaust negotiations to achieve "mutually acceptable compensation."⁷⁰ Then the challenging party can request that the WTO authorize retaliatory trade sanctions.⁷¹ These sanctions must be proportional to the impairment suffered due to the noncompliance.⁷² Moreover, history suggests that retaliatory trade sanctions are rarely used by WTO members, especially by smaller trading partners against larger nations.⁷³

III. *US-TUNA II'S* IMPLICATIONS FOR CONSUMER PROTECTION AND ENVIRONMENTAL OBJECTIVES

A. Empirical Evidence on the Debated Success of Eco-Labeling

Eco-labels are seals of approval granted by private or public organizations to inform consumers about the environmental impact of a product, usually regarding processes and production methods (PPMs).⁷⁴ They are designed to influence consumers at the point of sale, thereby employing market forces to pressure producers to improve their environmental impact.⁷⁵ The three varieties of eco-labels are defined by their enforcement mechanisms: voluntary self-reporting standards, nongovernmental organization (NGO) standards, and state-mandated standards such as the DPCIA's.

69. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 22, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

70. *Id.*

71. *See id.* ("If no satisfactory compensation has been agreed . . . any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.")

72. *See id.* at art 22.4 ("The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment.")

73. *See infra* Part V (discussing whether retaliatory trade sanctions are an effective threat against developed nations).

74. Tavis Potts & Marcus Haward, *International Trade, Eco-labeling, and Sustainable Fisheries – Recent Issues, Concepts and Practices*, 9 ENV'T, DEV. & SUSTAINABILITY 91, 92 (2007). *See FAO report, supra* note 29, at 10 ("Ecolabels are seals of approval given to products that are deemed to have fewer impacts on the environment than functionally or competitively similar products.")

75. *See FAO report, supra* note 29, at 10 ("The rationale for basic labelling information at the point of sale is that it links fisheries products to their production process.")

Though eco-labels are praised for their theoretical efficiency, their actual success in promoting environmental quality is less certain.⁷⁶ Market research suggests that eco-labels have increased consumer awareness of their purchasing habits' environmental impact,⁷⁷ and consumers report that they are willing to pay more for environmentally friendly products.⁷⁸ However, there is little market evidence available to assess the magnitude of that willingness to pay, and consumers' actual purchasing habits do not necessarily track their self-reported preferences.⁷⁹

There are some notable examples of eco-labels' success. The dolphin-safe tuna label is arguably the poster child for eco-labeling's potential. After the label's creation, the supply of tuna-safe products increased.⁸⁰ The label also impacted consumers' purchasing habits; the canned tuna's U.S. market share increased by 1 percent between 1990 and 1995, indicating that consumers substituted away from competing products that were not eligible for the eco-label.⁸¹ There is also widespread evidence of voluntary labeling mechanisms' success. Of particular note is the Sierra Club and Earth Land Institute's "turtle friendly" campaign, created in the wake of the WTO's *Shrimp-Turtle* case, in which the WTO invalidated a U.S. ban on shrimp imports from countries without similar turtle-protection regulations.⁸² After the United States abandoned its regulation,

76. See Mario F. Teisl et al., *Can Eco-labels Tune a Market? Evidence from Dolphin-Safe Labeling*, 43 J. ENVTL. ECON. & MGMT. 339, 340 (2002) (noting how few studies have actually studied the behavioral effectiveness of eco-labels); ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT [OECD], PRIVATE VOLUNTARY ECO-LABELS: TRADE DISTORTING, DISCRIMINATORY AND ENVIRONMENTALLY DISAPPOINTING 2 [hereinafter OECD REPORT] ("[T]he evidence that such labels are even affecting positive environmental outcomes is mixed."); Nicolai V. Kuminoff et al., *The Growing Supply of Ecolabeled Seafood: An Economic Perspective*, 9 SUSTAINABLE DEV. L. & POLY 25, 28 (2008) (questioning whether obtaining goals of environmental policy will lead to improved environmental quality).

77. See Teisl et al., *supra* note 76, at 340 (explaining that a change in labeling can change market behavior).

78. See *id.* at 355 ("[I]f a significant portion of the consumer population demands environmentally friendly products, the presence of an eco-labeling program may provide firms an incentive to differentiate.").

79. See *id.* at 340 ("[A] change in awareness does not necessarily translate into a change in behavior and consumers do not necessarily follow their own purchasing assertions."); Kuminoff et al., *supra* note 76, at 27 ("There is almost no market-based evidence on how consumers have actually reacted to the recent introduction of fresh and frozen seafood products that have been certified by MSC or other organizations.").

80. Teisl et al., *supra* note 76, at 355.

81. See *id.* at 355 ("After the introduction of the label, shares of other products decreased as people substituted back to tuna, providing an interesting look at how people substitute between products based on moral or ideological grounds."); Kuminoff et al., *supra* note 76, at 26 ("[P]reliminary evidence from supermarket scanner data suggests that the introduction of the dolphin-safe tuna label increased the market share of canned tuna by one percent between 1990 and 1995.").

82. *Shrimp-Turtle*, *supra* note 2, ¶ 187.

NGOs successfully discouraged supermarkets from purchasing products that did not conform to standards similar to the United States'. Within 3 years, more than 75 percent of the U.S. retail shrimp market was dominated by the turtle friendly label.⁸³

The potential power of information, which drives eco-labels' success, is also supported by the success of "spotlighting," a regulatory method that requires companies to disclose their PPMs' environmental effects to the public. For example, the U.S. Toxic Release Inventory program, which required firms to disclose their emissions of toxic chemicals, compelled firms to self-monitor and "confront disagreeable realities" regarding their own operations.⁸⁴ As a result, the regulated entities decreased the release of the reported chemicals by 57 percent over a period of 16 years.⁸⁵ Studies of a similar program in Canada suggest that firms with retail market exposure are more likely to reduce their emissions.⁸⁶

B. *The Purpose of State-Mandated Eco-labeling Standards*

International organizations have recognized the potential value of eco-labeling. In particular, the UN's Food and Agriculture Organization has noted that eco-labeling is one of the "least-coercive market-based mechanisms to improve conservation outcomes" and has promoted the international acceptance of eco-labels.⁸⁷ Similarly, the World Summit on Sustainable Development explicitly endorsed

83. See OECD REPORT, *supra* note 76, at 4 ("By 1999, it was estimated that the lobbying campaign had ensured that more than 75% of the U.S. retail shrimp market was dominated by the 'turtle-friendly' label.").

84. See Clifford Rechtschaffen, *Shining the Spotlight on European Union Environmental Compliance*, 24 PACE ENVTL. L. REV. 161, 168 (2007) (noting that the Toxic Release Inventory subjects regulated entities "to the scrutiny of a variety of external parties—including investors, community residents, and regulators—each of whom can exert powerful pressures to improve the firm's performance").

85. *Id.* (noting that Environmental Protection Agency officials, environmentalists, and regulated entities "tout TRI as one of the United States' most effective environmental laws").

86. *Id.* at 169–70 (noting that Canada's pollutant registry, the National Pollutant Release Inventory, has reduced release and transfers of pollutants by 10 percent within 8 years, but that firms with consumer market exposure reduced their emissions more than other firms).

87. *FAO Report*, *supra* note 29, at 54. See EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW 235 (Christoph Herrmann & Jorg Philipp Terhechte eds., 2011) (noting that in determining whether the EU Eco-labeling Programme violates the TBT, "it should be noted on a general level that labeling is commonly seen as a suitable and comparatively rather non-restrictive means for pursuing environmental goals"); see also Potts & Haward, *supra* note 74, at 97 (discussing how the Food and Agriculture Organization helps develop an international acceptance of eco-labels).

countries' adoption of eco-labeling schemes based upon PPMs, provided that they are not motivated by protectionism.⁸⁸

Arguably, in light of *US-Tuna II*, producers' self-reporting or NGO eco-labeling standards are permissible alternatives to state-standardized labels under the TBT. Many scholars suggest that private-labeling schemes are unlikely to violate the TBT, as they would likely be considered voluntary.⁸⁹ However, under the TBT, private schemes may face similar compliance issues if there is any state involvement in their development.⁹⁰ If a scheme were developed by private actors in consultation with states, aided by state funding, or at the encouragement of states, it might fall within the TBT's purview.⁹¹

Despite the likelihood that state and NGO standards may be scrutinized by the WTO, they serve an additional purpose that producers' self-regulatory standards cannot serve: consumer protection. Without state oversight of their standards, labels create potential for fraudulent misrepresentations. Consumers may be confused by a label's use of common and vague terms, such as *environmentally friendly* and *green*, for which there are no standard definitions.⁹² Consumers may also fall prey to deceptive claims, as producers could exploit consumers' willingness to pay more for an ecofriendly product.⁹³

Monitored enforcement of PPM-based labels is particularly necessary because different production methods do not result in discernible differences in quality.⁹⁴ For example, a consumer cannot taste or see a difference between tuna that was caught by setting on dolphins from tuna produced by more benign fishing methods. Thus, deceptive use of self-reporting eco-labeling schemes may preserve the

88. EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW, *supra* note 87, at 236.

89. See, e.g., Potts & Haward, *supra* note 74, at 92 (while acknowledging that there is "debate on what criteria would labeling need to fulfill in order to avoid contravening [WTO] rules. Voluntary private eco-labeling schemes are unlikely to be challengeable at WTO . . .").

90. NGO standards face the same criticism as state standards in preventing developing countries from competing against their competitors in developed countries. See, e.g., Gandhi, *supra* note 11; see also Marcy Nicks Moody, Note, *WARNING: MAY CAUSE WARMING: Potential Trade Challenges to Private Environmental Labels*, 65 VAND. L. REV. 1401, 1445 (2012) (discussing how the lines between public, private, and market activity can be difficult to draw and how state involvement affects privately administered labels).

91. See OECD REPORT, *supra* note 76, at 2 ("However, to the extent that private sector initiatives have been developed in consultation with governments (or even received financial assistance from them) they raise the possibility of legal challenges under WTO rules.").

92. *FAO Report*, *supra* note 29, at 15.

93. *Id.*

94. *Id.* at 13.

asymmetry of information between producers and consumers on the environmental impact.⁹⁵ NGO and state standards are necessary to ensure that eco-label terms relating to PPMs are clear and that producers follow their own labeling standards.⁹⁶

In achieving consumer protection, state standards have unique advantages over NGO standards. First, they may be more effective due to consumer trust in governmental standards.⁹⁷ Consumer trust and awareness is essential to the success of a label, as consumers are unlikely to change their purchasing decisions otherwise.⁹⁸ Second, state actors' potential to control the floodgates of competing, privately sponsored eco-labels reduces the risk that the consumers would be inundated and confused.⁹⁹ The long-term success of eco-labeling is uncertain because of a number of unresolved questions, including the competition between conflicting eco-labeling claims.¹⁰⁰

C. *The Growth of State-Backed Labeling Standards*

Several states have noted that eco-labeling has the power to efficiently promote social and environmental objectives, such as sustainability¹⁰¹ or the ethical treatment of animals,¹⁰² while imposing lower costs than intrusive regulation.¹⁰³ States may favor environmental disclosures, as opposed to direct regulation of PPMs, because they inspire support from various political contingencies.¹⁰⁴ Economists endorse the use of eco-labels over regulations that directly intervene in market activity because it avails more

95. *Id.* at 16.

96. *Id.* at 13.

97. EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW, *supra* note 87, at 235.

98. Potts & Haward, *supra* note 74, at 96.

99. See EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW, *supra* note 87, at 235 (noting how state-run schemes may be more effective in curbing consumer disorientation).

100. See Kuminoff et al., *supra* note 76, at 28 (highlighting the problem of conflicting eco-labeling claims).

101. See *FAO Report*, *supra* note 29, at 53 (noting that many governments recognize how eco-labeling schemes can help countries fulfill commitments on "important environmental imperatives such as responsible fisheries and the conservation and sustainable use of biological diversity").

102. See Thomas G. Kelch, *The WTO Tuna Labeling Decision and Animal Law*, 8 J. ANIMAL & NAT. RESOURCE L. 121, 137 (2012) ("The EU has used a labeling scheme to some good effect in its egg labeling scheme with data showing that consumers, in at least Britain, have altered their behavior since the beginning of the egg labeling scheme in that country, moving toward purchasing eggs produced under non-intensive farming methods.")

103. See Rechtschaffen, *supra* note 84, at 167 (highlighting that governments prefer information disclosure "because it does not require a lot of governmental resources, infrastructure, or personnel").

104. *Id.* at 167.

information to consumers.¹⁰⁵ Environmental advocates support these measures because they are effective.¹⁰⁶ Market studies indicate that companies regard negative publicity as a powerful motivation to reduce their environmental footprint.¹⁰⁷

Perhaps the most comprehensive example of a state-backed eco-labeling scheme is the European Union's eco-label program. Through a mechanism similar to that of the DPCIA, the European Union approves producers' applications to use standardized labels on their packaging if the product meets production criteria.¹⁰⁸ These criteria focus upon the particular product's environmental impacts through raw material extraction, production, distribution, and disposal;¹⁰⁹ the standards are set at levels attained by the top 10 to 20 percent of existent products.¹¹⁰ The success of the program is demonstrated by the number of applications that have been filed; the European Union granted 17,000 products the permission to use the eco-label.¹¹¹

D. *Opposition to State-Backed Eco-labeling Standards*

In criticizing state-backed eco-labeling schemes, developing nations commonly make two free trade arguments, both of which were asserted by Mexico in *US-Tuna II*. First, forced adoption of higher social or environmental standards is often truly spurred by protectionism.¹¹² A WTO member may adopt criteria that implicitly

105. *Id.*

106. *See id.* (“[E]nvironmental advocates favor [information disclosure] because it can promote citizen empowerment and create incentives for firms to reduce harmful activities.”).

107. *Id.* (“Indeed, in one compliance study, managers at a pulp and paper mill told researchers that the sanctions the facility feared the most were the informal sanctions imposed by the public and the media and that ‘they were motivated less by avoiding regulatory violations per se than by avoiding ‘anything that could give you a bad name.’”).

108. *Eco-label FAQ's*, EUROPEAN COMM'N, <http://ec.europa.eu/environment/eco-label/faq.html> [<http://perma.cc/L2KA-SG7G>] (archived Feb. 22, 2104).

109. Rechtschaffen, *supra* note 84, at 180.

110. *EU Eco-label for Businesses*, EUROPEAN COMM'N, <http://ec.europa.eu/environment/eco-label/eu-eco-label-for-businesses.html> [<http://perma.cc/BHB5-TQPS>] (archived Feb. 22, 2014).

111. *Eco-label Facts & Figures*, EUROPEAN COMM'N, <http://ec.europa.eu/environment/eco-label/facts-and-figures.html> [<http://perma.cc/KL4R-SXC8>] (archived Feb. 22, 2014).

112. *See Gandhi*, *supra* note 11, at 857 (2005) (“Developing countries have tended to take a dim view of the increased use of NGO standards . . . partly because certain NGO standards could be disguised restrictions on trade that escape WTO discipline only on account of their voluntary, non-governmental nature.”); Sungjoon Cho, *Linkage of Free Trade and Social Regulation: Moving Beyond the Entropic Dilemma*, 5 CHI. J. INT'L L. 625, 632 (2004–2005) (“[M]any developing countries have alleged that the reality behind such rhetoric, obscured by the moral high ground, amounts to little more than disguised protectionism.”).

discriminate against countries that do not already share similar environmental standards or economic conditions.¹¹³ In addition, domestic industry groups can lobby for regulated standards requiring PPMs that they already employ, thereby ensuring that foreign producers will be burdened by regulatory compliance.¹¹⁴ For example, in *US-Tuna II*, Mexico argued that the United States adopted the DPCIA's regulations because U.S. producers were already in compliance.¹¹⁵

Based upon the United States' and European Union's fickle positions on state eco-labeling standards, this criticism appears to be grounded in some truth.¹¹⁶ Rather than consistently supporting eco-labels that promote sustainability, both members have criticized the other's standards when they disfavored their own domestic industries.¹¹⁷ Critics also note the correlation of the growth of eco-label standards with the decreased use of tariffs since the 1990s.¹¹⁸ It is possible that eco-labels "gave developed country producers a modest marketing edge to help alleviate the impact of tariff reductions."¹¹⁹

Second, developing nations assert that the imposition of varying environmental regulations decreases their exports' competitive advantage.¹²⁰ Their producers are at a disadvantage in responding to higher environmental standards because they have less access to technology than their developed nation competitors.¹²¹ Aside from

113. See Elliot B. Staffin, *Trade Barrier or Trade Boon? A Critical Evaluation of Environmental Labeling and Its Role in the "Greening" of World Trade*, 21 COLUM. J. ENVTL. L. 205, 263 (1996) ("In selecting eco-labeling criteria that, in part, are shaped by its own domestic needs, a country will implicitly discriminate against those countries that do not share the same environmental standards or economic conditions."); see also Gandhi, *supra* note 11, at 857 (noting that this criticism is relevant in the debate over NGO standards).

114. OECD REPORT, *supra* note 76, at 3.

115. *US-Tuna II*, *supra* note 2. See Richard Parker, *The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict*, 12 GEO. INT'L ENVTL. L. REV. 1, 46 (1999) (noting that similar concerns arose in *US-Tuna I*).

116. See Shaffer, *supra* note 10, at 21–22 (noting that within the CTE, "the United States and EC were concerned by each other's labeling and environment-related standards that could disproportionately raise their own producers' costs").

117. See *id.* (discussing countries' reactions to other countries' standards that burden foreign trade and threaten to disproportionately raise production costs).

118. OECD REPORT, *supra* note 76, at 4.

119. *Id.* (internal citation omitted).

120. See Potts & Haward, *supra* note 74, at 92 ("Developing countries do fear the risks of certification being applied as a non-tariff trade barrier – eco-labels might become yet another barrier of entry into the lucrative fish markets of the developed states."); Gandhi, *supra* note 11, at 857 ("Developing countries have tended to take a dim view of the increased use of NGO standards partly because they could be based upon requirements that discriminate against their own producer.").

121. See Cho, *supra* note 112, at 645 ("[P]roducers in rich countries have a much easier time complying with higher regulatory standards than do their counterparts in poor countries since the former enjoy higher levels of technology.").

thwarting the WTO's purpose of encouraging free trade, such regulatory costs could also amount to a discriminatory and excessive burden in violation of GATT,¹²² as well as the United Nations' Rio Declaration of the UN Conference on Environment and Development.¹²³

*E. Environmental and Consumer Protection Concerns as
Legitimate Policy Goals*

The international community has generally accepted consumer rights as an uncontroversial, legitimate policy goal.¹²⁴ The United States has long aimed to protect consumers; during his presidency, John F. Kennedy proposed that the government should protect consumers' basic rights to safety, to be informed, to choose, and to be heard.¹²⁵ Since that time, the international consumer rights movement has embraced these four goals as the building blocks of modern consumer protection.¹²⁶

Intergovernmental organizations have also recognized the importance of states' protection of their citizens as consumers.¹²⁷ Notably, UN policy encourages strong domestic protection of consumer rights and specifically included environmental concerns within its guidelines on consumer protection in 1999.¹²⁸ Environmental and consumer rights advocates have asserted that consumer protection and environmental concerns are inseparable.

122. See Gandhi, *supra* note 11, at 864 ("In the case of manufacturers from developing countries that can ill afford the increase costs of compliance, . . . [an eco-labeling scheme] could constitute a discriminatory market restriction.").

123. See United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3–14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1, Annex I (Aug. 12, 1992).

124. Environmental legislation only came to the forefront of developed nations' policy slates in the 1970s and international trade discussions in the 1980s. See Shaffer, *supra* note 10, at 17–19. In contrast, consumer rights have gained international recognition. See Larry A. DiMatteo et al., *The Doha Declaration and Beyond: Giving a Voice to Non-Trade Concerns Within the WTO Trade Regime*, 36 VAND. J. TRANSNAT'L L. 95, 129–31 (2003).

125. DiMatteo et al., *supra* note 124, at 129–30 (internal citation omitted).

126. *Consumer Rights*, CONSUMERS INT'L, <http://www.consumersinternational.org/who-we-are/consumer-rights> (last visited Feb. 23, 2014) [<http://perma.cc/AP22-VWAF>] (archived Feb. 16, 2014).

127. See DiMatteo et al., *supra* note 124, at 130 (noting that the 1985 adoption of the UN Guidelines for Consumer Protection "effectively established international recognition for the consumer interest," and also that "[i]t is generally accepted that domestic consumer protection . . . is necessary in all economies").

128. See E.S.C. Res. 1999/7, U.N. Doc. E/RES/1999/7 (July 26, 1999) (stating that the promotion of "sustainable consumption" is an objective of consumer protection and stating that "each Government should set its own priorities for the protection of consumers in accordance with the economic, social and environmental circumstances of the country and the needs of its population").

Consumers International, an international lobbying group, has specifically recognized that consumers have a right to “a healthy environment;” they further recognize that consumers have responsibility for ecological sustainability¹²⁹

States’ interests in consumer protection and environmental sustainability intersect through eco-labeling standards. State-enforced eco-labeling standards share consumer protection’s general goal of correcting market failures caused by inequality of information.¹³⁰ State oversight ensures that consumers are not misled by labels and that producers adhere to their own standards. As a result, the state’s oversight inspires consumers’ trust in the standard, allowing citizens to let their environmental preferences be known through their purchasing habits.

IV. THE WTO’S QUANDRY REGARDING NONTRADE INTERESTS

The WTO has not adopted an explicit policy regarding when, if ever, environmental concerns may justify incidental barriers to trade.¹³¹ This failure is consistent with the organization’s broader inability to accommodate nontrade interests.¹³² Scholars have generally recognized that by tolerating such regulations, the WTO would open up a Pandora’s box; countries would suddenly be able to justify trade barriers with any sovereign interest, ranging from labor standards to religious or cultural traditions.¹³³ However, Member States have not simply abandoned nontrade policy goals. In the decade preceding *US-Tuna II*, the WTO’s rejection of several PPM regulations was controversial.¹³⁴ Until the WTO can accommodate nontrade sovereign interests, Member States will face difficulty in complying with WTO agreements.

A. *The WTO’s Obstacles in Accommodating Nontrade Interests*

US-Tuna II is arguably a product of the WTO political body’s inability to accommodate regulations that impose incidental, rather

129. CONSUMERS INT’L, *supra* note 126.

130. See DiMatteo et al., *supra* note 124, at 131 (“Consumer protection laws allow governments to . . . redress the inequalities of information and power.”).

131. See generally Shaffer, *supra* note 10 (exploring the criticisms of the WTO’s treatment of trade and environmental matters).

132. See generally Cho, *supra* note 112 (finding that the WTO has failed to resolve the conflict between trade and social interests, historically reflecting a trade-bias when these interests compete).

133. See *id.* at 626 (noting a “glaring tension between free trade and social regulations in areas such as environmental protection”).

134. See CHRISTIANE R. CONRAD, PROCESS AND PRODUCTION METHODS (PPMs) IN WTO LAW: INTERFACING TRADE AND SOCIAL GOALS 25–26, 30 (2011) (highlighting the debate surrounding several PPMs).

than protectionist, barriers to trade. Since the early 1990s, environmental activists have criticized the WTO's inability to tolerate environmental interests as evidence that it is dominated by business interests.¹³⁵ However, given the disparate interests presented by Member States, the WTO's failure to compromise is not surprising.¹³⁶

Since its founding, the WTO has recognized that states have legitimate interests in environmental issues that may incidentally affect trade relations.¹³⁷ The preamble of the WTO's founding agreement specifically noted that members could pursue environmental protection according to their individual needs and levels of development.¹³⁸ Moreover, GATT created a special committee, the Group on Environmental Measures and International Trade, to discuss these interests 40 years ago.¹³⁹ The WTO continues to officially recognize that "[s]ustainable development and protection and preservation of the environment are fundamental goals."¹⁴⁰ The preambles of recent agreements, including the TBT and Sanitary & Phytosanitary Agreement (SPS), formally recognize that each member may "set its own standards . . . that are necessary to preserve human, animal, and plant health and life."¹⁴¹

However, these documents do not reflect that members agree on *the extent* to which nontrade interests may impact trade relations.¹⁴²

135. See Shaffer, *supra* note 10, at 1–2, 12 (“[Mainstream US environmental groups] central claim is that WTO decisions on trade and environment issues are anti-democratic and thus lack legitimacy.” (internal citation omitted)); Thomas Schoenbaum, *Free International Trade and Protection of the Environment: Irreconcilable Conflict?*, 86 AM. J. INT’L L. 700, 700 (1992) (“The GATT is depicted as a sinister charter that allows ‘big business’ a free hand to plunder the bounty of the natural world.”).

136. Schaffer, *supra* note 10, 17–20.

137. See JAMES K.R. WATSON, *THE WTO AND THE ENVIRONMENT: DEVELOPMENT OF COMPETENCE BEYOND TRADE* 156–60 (2013) (summarizing GATT and the WTO's long history of recognizing the link between environmental protection and trade).

138. Marrakesh Agreement Establishing the World Trade Organization, at pmb., Apr. 15, 1994, 1867 U.N.T.S. 154 (stating that the parties agree “to protect and preserve the environment . . . in a manner consistent with [members'] respective needs and concerns at different levels of economic development,” amongst other concerns) [hereinafter Marrakesh Agreement].

139. See WATSON, *supra* note 137, at 157 (noting that when it was founded in November 1971, the Group on Environmental Measures and International Trade was the first “institutional trade and environment body” even prior to the 1972 Stockholm Convention on the Human Environment).

140. *Trade and Environment*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/envir_e/envir_e.htm [<http://perma.cc/EC6J-U492>] (archived Feb. 17, 2014).

141. TBT Agreement, *supra* note 12, at pmb.

142. See Richard J. McLaughlin, *Sovereignty, Utility, and Fairness: Using U.S. Takings Law to Guide the Evolving Utilitarian Balancing Approach to Global Environmental Disputes in the WTO*, 78 OR. L. REV. 855, 864–66 (1999) (noting that “[i]n theory GATT/WTO provides States Parties wide latitude to impose regulatory measures within their own territory as long as the measures have a legitimate

The WTO has made several attempts to discuss environmental issues and adopt a uniform approach to tolerating environmental regulations when they affect trade relations.¹⁴³ Shortly after its founding in 1994, it created the Committee on Trade and Environment (CTE), which was designed to address trade and environmental issues.¹⁴⁴ At the Doha Conference in 1999, WTO members intended to draft a formal agreement on environmental regulations.¹⁴⁵ They structured negotiations around ten environmental talking points, one of which was “Eco-labeling, Packaging and Environmental Taxes.”¹⁴⁶ The United States, Canada, and the European Union were the most active negotiators.¹⁴⁷

Yet disagreements at the Doha Conference prevented the adoption of meaningful provisions regarding nontrade interests.¹⁴⁸ Tension resulted both from disparate interests amongst members, particularly between developing and developed nations, and from powerful developed nations’ inconsistent domestic concerns.¹⁴⁹ The United States and the European Union, the WTO’s most powerful members, failed to agree on several points due to their domestic industries’ commercial concerns. For example, the United States had enacted the DPCIA’s dolphin-safe tuna labeling scheme but asserted at Doha that members “should not let the important principles of GATT be trampled upon by governments trying to protect the environment”¹⁵⁰ The ambivalence of the United States and the European Union was a significant obstacle to building consensus. A positive outcome may have been achieved if their agendas had

regulatory purpose and do not treat foreign and domestic product differently” but that when conflicts arise, this discretion is limited (internal footnote omitted).

143. See Shaffer, *supra* note 10, at 17–20 (discussing the formation of the CTE).

144. See *The Committee on Trade and Environment (regular CTE)*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/envir_e/wrk_committee_e.htm [<http://perma.cc/YC3-TPTN>] (archived Feb. 17, 2014) (“The committee’s mandate is broad, and it has contributed to identifying and understanding the relationship between trade and the environment in order to promote sustainable development.”).

145. See Shaffer, *supra* note 10, at 21 (quoting GATT Council, *Minutes of Meeting: Held in the Centre Williams Rappard on 29–30 May 1991*, at 14, C/M/250 (June 28, 1991)).

146. *Id.* at 30.

147. *Id.* at 44.

148. Instead, the members directed the CTE to continue research about eco-labelling’s effect on trade. WORLD TRADE ORG., UNDERSTANDING THE WTO 88 (5th ed. 2011). In the wake of the Doha agreement, scholars were ambivalent on whether the vaguely worded reforms had created meaningful movement toward accommodating nontrade interests. See DiMatteo et al., *supra* note 124, at 159 (“The issue that remains is whether the Doha Declaration . . . represent a substantial step forward . . . or a merely a public relations instrument.”). Given the Appellate Body’s rejection of all regulations that impose trade restrictions in effect in US-Tuna II, it seems that Doha’s talking points did not have lasting effect. See generally US-Tuna II AB, *supra* note 2.

149. Shaffer, *supra* note 10, at 21–23.

150. See *id.* (quoting GATT Council, *Minutes of Meeting: Held in the Centre Williams Rappard on 29–30 May 1991*, at 14, C/M/250 (June 28, 1991)).

aligned, as they successfully harnessed their clout at the same conference to protect intellectual property rights that were opposed by developing countries.¹⁵¹

Despite the WTO's inability to adopt a formal resolution regarding nontrade interests, contemporary academics believed that the WTO's judicial reports indicated movement toward accommodating environmental interests.¹⁵² Some of the Appellate Body's decisions in the late 1990s indicated that existing WTO agreements might tolerate some nonprotectionist PPMs. In particular, the Appellate Body addressed two U.S. trade embargos against fish products that did not comply with U.S. regulations.¹⁵³ Despite the fact that both were struck down, the Appellate Body's decisions implied that PPM regulations were not per se violations of GATT.¹⁵⁴

For example, in the *Shrimp-Turtle* case,¹⁵⁵ the Appellate Body noted that WTO members may ban imports based not only on PPMs but also upon the environmental policies of exporting countries.¹⁵⁶ In order to justify such drastic measures, the Member State need only show that its regulation was "reasonably related" to a "legitimate policy" of conservation.¹⁵⁷ The regulation would only be struck down if its rigid approach amounted to "arbitrary or unjustifiable discrimination" between countries.¹⁵⁸ Similarly, in determining whether the United States' favorable tax treatment of domestic wine violated GATT, the court implied that an embargo might be valid if it were not "enacted with the 'aim and effect' of protectionism."¹⁵⁹

The WTO also has not adopted a formal policy regarding members' abilities to protect consumers. Unlike the United Nations, the WTO has not taken comprehensively recognized consumer rights

151. See *id.* at 82–83 ("In the Uruguay Round of trade negotiations, the United States and EU successfully negotiated new WTO rules mandating the protection of intellectual property rights, despite developing country opposition.").

152. See, e.g., Howard F. Chang, *Toward a Greener GATT: Environmental Trade Measures and the Shrimp-Turtle Case*, 74 S. CAL. L. REV. 31, 32 (2000) (using the ruling in the "shrimp-turtle case" to illustrate the WTO's progression toward a more liberal treatment of environmental trade measures).

153. *Id.* at 34–38. See CONRAD, *supra* note 134, at 30 (noting that "it could be argued that as a consequence of the *Shrimp Turtle* dispute it is widely accepted that production-based trade measures are in principle justifiable under Article XX" (citation omitted)).

154. CONRAD, *supra* note 134, at 30.

155. *Shrimp-Turtle*, *supra* note 2.

156. Chang, *supra* note 152, at 36–38.

157. *Id.* at 39 (quoting *Shrimp-Turtle*, *supra* note 2, ¶ 141).

158. *Id.* at 39–40.

159. Elizabeth Trujillo, *Mission Possible: Reciprocal Deference Between Domestic Regulatory Structures and the WTO*, 40 CORNELL INT'L L.J. 201, 218–19 (2007) (quoting Panel Report, *United States—Measures Affecting Alcoholic and Malt-Beverages*, WT/DS23/R-39S/206 (Mar. 16, 1992)).

as a legitimate goal.¹⁶⁰ Instead, the WTO formally accommodates health and safety measures regarding the physical characteristics of products under the SPS¹⁶¹ but has rejected consumer protection that is aimed at requiring the extraterritorial use of particular PPMs.¹⁶² In order to ensure such regulations are not protectionist policies in disguise, the WTO requires that the regulation's necessity and efficacy be supported with firm scientific evidence.¹⁶³

B. US-Tuna II: A Shift in the WTO Appellate Body's Stance on Environmental Interests

The Appellate Body's decision in *US-Tuna II* clarified that the WTO's tolerance of consumer protection under the SPS agreement does not extend to eco-labels.¹⁶⁴ Under the decision's reasoning, it seems that any state-standardized labeling scheme will be considered a technical regulation.¹⁶⁵ As a result, the Appellate Body's interpretation leaves "no space for voluntary labeling schemes as

160. See DiMatteo et al., *supra* note 124, at 131–32 ("One of the most pervasive criticisms of the WTO, from a consumer perspective, is that it has no comprehensive consumer protection policy.")

161. The SPS permits Member States to regulate the safety of imports that may affect human and environmental health domestically. See Agreement on the Application of Sanitary and Phytosanitary Measures, MTN/FA II-A1A-4 (Dec. 15, 1993) [hereinafter SPS Agreement], available at http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm [<http://perma.cc/BPN4-CCQK>] (archived Feb. 17, 2014) ("No Member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health . . ."); *US-Tuna II AB*, *supra* note 2 (noting that "human health and safety" is among the "legitimate considerations" permitted by the TBT Agreement); see also CONRAD, *supra* note 134, at 23 (noting that after *US-Tuna I*, "[t]he legal distinction between measures linked to products and measures linked to production gained ground and led some to consider its status as legal doctrine" (internal citation omitted)).

162. See SPS Agreement, *supra* note 161, at art. 4 (requiring that "Members shall accept the sanitary or phytosanitary measures of other Members as equivalent, even if these measures differ from their own").

163. See *Standards and Safety: Food, Animal and Plant Products: How Safe Is Safe?*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm4_e.htm [<http://perma.cc/4L7-S6XD>] (archived Feb. 17, 2014) (noting that countries can set their own standards, but that they must be based upon science and "should not arbitrarily or unjustifiably discriminate between countries where identical or similar conditions prevail").

164. See Samuel N. Lind, *Eco-labels and International Trade Law: Avoiding Trade Violations While Regulating the Environment*, 8 INT'L LEGAL PERSP. 113, 115–33 (discussing the ability under GATT to impose different regulatory burdens on products, and also explaining the "dolphin safe" tuna labeling program and how it relates to mandatory labeling restrictions); see also CONRAD, *supra* note 134, at 30 ("[I]t seems to be widely believed that the basic lines along which PPM measures are assessed under WTO law have been established.")

165. See Kelch, *supra* note 102, at 136 (discussing the Panel decision in *US-Tuna*).

standards.”¹⁶⁶ The decision closes the possibility that state-standardized labels might be considered voluntary under WTO agreements, a belief that was previously held by some intergovernmental institutions.¹⁶⁷ For example, in 2000, the Fishing and Agriculture Organization of the United Nations issued guidance on eco-labeling schemes and WTO agreements. It noted that “voluntary schemes” such as the DPCIA, which give producers complete discretion to join a scheme and consumers to choose a labeled product, do not appear to violate the TBT or GATT.¹⁶⁸

The Appellate Body’s broad interpretation of the TBT may indicate that it is returning to its trade-centric roots and has abandoned its previous efforts toward accommodating nontrade interests.¹⁶⁹ Some academics have found *US-Tuna II* to be consistent with the founding purposes of GATT.¹⁷⁰ Indeed, *US-Tuna II*’s reasoning is more consistent with earlier, pre-WTO rulings that GATT members could not discriminate against imports based upon their origin’s domestic policies.¹⁷¹ Early Panel decisions also implied that PPM regulations would be subject to strict scrutiny under WTO agreements.¹⁷²

In any event, *US-Tuna II*’s reasoning amounts to a rejection of previous dicta indicating that a PPM regulation might survive if it is not based upon a protectionist purpose. This test emerged in the *Shrimp-Turtle* case, which may now be regarded as the high-water mark of the Appellate Body’s concern for nontrade interests. In *US-Tuna II*, the Panel employed the reasoning suggested in *Shrimp-Turtle*; it held that because the DPCIA was not enacted to serve a discriminatory purpose, it did not violate TBT Article 2.1.¹⁷³

166. Panel Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶ VII.52, WT/DS381/R (Sept. 15, 2011) [hereinafter *US-Tuna Panel Report*].

167. See Potts & Haward, *supra* note 74, at 92 (citing OECD REPORT, *supra* note 76, at 12) (noting that eco-labels that were granted by public organizations were “usually applied voluntarily”).

168. See *FAO Report*, *supra* note 29, at 58, 63 (relying upon the Appellate Body’s finding in *Tuna I* that the U.S. ‘dolphin safe’ tuna labeling scheme was voluntary).

169. See, e.g., Cho, *supra* note 112, at 651–52 (noting that “under the new WTO system,” the Appellate Body has concentrated upon Member States’ protectionist motives in enacting and applying regulations based upon nontrade interests).

170. See, e.g., Schoenbaum, *supra* note 135, at 710 (“The panel’s decision . . . is based on a literal reading of GATT Article III.”).

171. See CONRAD, *supra* note 134, at 21 (noting that in a study on “Trade and the Environment,” the GATT Secretariat stated that it was “not possible under GATT’s rules to make access to one’s own market dependent on the domestic environmental policies or practices of the exporting country” (internal citation omitted)).

172. See *id.* at 30 (“[I]t seems to be widely believed that the basic lines along which PPM measures are assessed under WTO law have been established.”).

173. *US-Tuna Panel Report*, *supra* note 166, ¶ VII.87.

Nevertheless, the Appellate Body rejected the Panel's ruling.¹⁷⁴ Thus, the Appellate Body strongly departed from its previous recommendation of considering a member's actual motivations in enacting legislation.

The Appellate Body may have applied a stringent analysis because the DPCIA was analyzed under the TBT, a treaty that was designed to combat nonprotectionist, but costly, technical barriers to trade.¹⁷⁵ However, such a strong divergence from the Appellate Body's test for compliance under the SPS is questionable for two reasons. First, both the SPS and TBT pursue the same purpose: ensuring the elimination of domestic regulations that intend to or actually create barriers to trade.¹⁷⁶ Second, both agreements recognize that members have legitimate interests in protecting the environment.¹⁷⁷ It seems, therefore, that the WTO judicial bodies should adopt a similar approach when evaluating whether a regulation violates either the SPS or the TBT. In particular, they should consistently weigh whether a member's nonprotectionist interest is the actual motivation behind the regulation.¹⁷⁸

In addition, both the Appellate Body and Panel scrutinized the United States' scientific evidence regarding the necessity of a more stringent regulatory standard for ETP tuna. The findings easily

174. Compare US-Tuna II AB, *supra* note 2, ¶ 298 (applying the analysis of whether the regulation was “even-handed in the way in which they address the risks to dolphins arising . . . in different areas of the ocean”), with Shrimp-Turtle, *supra* note 2, ¶ 186 (finding that the United States' rigid categorization of countries amounted to “arbitrary and unjustifiable discrimination” between countries where the same conditions prevail because the United States did not have any evidence for difference in risks between countries).

175. FAO Report, *supra* note 29, at 60. See *Legal Texts: The WTO Agreements*, WORLD TRADE ORG., http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#dAgreement [<http://perma.cc/H3P5-B9DR>] (archived Feb. 17, 2014) (noting that an “innovative feature” of the TBT over GATT was that it covered PPMs).

176. See *WTO Technical Information*, *supra* note 46 (citing the “[h]igh number of technical regulations and standards” as a reason for the TBT); Trujillo, *supra* note 159, at 215 (“In writing Article III [of GATT], the drafters sought to prevent internal measures that would discriminate between imported and ‘like’ domestic products, creating a ‘constructive tariff’ on imports and effectively benefiting domestic producers.” (quoting JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 279–80 (1969))).

177. See TBT Agreement, *supra* note 12, at pmb1. (“[N]o country should be prevented from taking measures necessary . . . for the protection of human, animal, and plant life or health, of the environment, or for the prevention of deceptive practices . . .”); General Agreement on Tariffs and Trade art. XX, Oct. 30, 1974, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT] (permitting trade actions that are “necessary to protect human, animal or plant life or health”).

178. Cf. Panel Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/R/USA (Aug. 18, 1997) (reviewing for a violation of SPS agreement, the Panel conducted an in-depth review of whether scientific data supported the EU's ban on importation of beef produced through use of growth hormones in determining whether the legislation had a valid, non-protectionist interest).

passed the U.S. courts' rational basis standard of review, but the Appellate Body did not find the same evidence convincing. This disparity in standard of review requires that a WTO member's legislature collect enough scientific evidence to satisfy not only their domestic standard of judicial review but also that of any future WTO adjudication. As the WTO's adjudicatory bodies do not follow precedent, it will be difficult to anticipate what this requires.¹⁷⁹ In addition, the Appellate Body's scrutiny is misplaced because it exceeds the court's expertise; the WTO admits that its adjudicatory bodies' specialized knowledge relates only to trade, rather than science.¹⁸⁰

V. PROPOSED SOLUTION: REINTERPRETING THE TBT'S APPLICATION TO STATE ECO-LABEL STANDARDS AND MONETARY AID

The WTO has an interest in promoting decisions that are popular amongst its members' citizens and NGOs in order to protect its institutional integrity.¹⁸¹ Both the WTO and individual judges wish to protect the WTO's overall credibility and legitimacy, both of which may be compromised by controversial judicial decisions.¹⁸² This risk is particularly acute in the environmental arena. After its controversial invalidations of U.S. marine life protections in the 1990s, the WTO experienced unprecedented backlash by individuals and special interest groups.¹⁸³ Activists accused the WTO of being an anti-environmental body, and years of poor publicity led to widespread belief that the WTO was the puppet of commercial interests.¹⁸⁴ If they face popular opposition, members may be tempted to disregard WTO adjudicatory decisions.¹⁸⁵

This potential outcome would prolong a pattern of members failing to amend their domestic policies in the face of WTO

179. See *supra* Section IV.b.

180. See UNDERSTANDING THE WTO, *supra* note 148, at 88 (describing the nature of work done by the Trade and Environment Committee).

181. See Cho, *supra* note 112, at 627 (describing the competing interests that the WTO must balance in order to effectively achieve its goals).

182. See KRIKORIAN, *supra* note 24, at 208 (discussing tensions inherent in WTO adjudication).

183. See Cho, *supra* note 112, at 625–26 (noting that protests regarding the Seattle round drew 50,000–100,000 participants and united unlikely interest groups between “turtles and Teamsters”).

184. See Shaffer, *supra* note 10, at 1–3 (presenting several WTO criticisms).

185. For example, Europe continued its embargo of beef from cattle raised with growth hormones even after the WTO Appellate Body ruled that its ban violated GATT Article XX. See generally RENÉE JOHNSON & CHARLES E. HANRAHAN, CONGRESSIONAL RESEARCH SERV., THE U.S.–EU BEEF HORMONE DISPUTE (2010), available at <http://www.fas.org/sgp/crs/row/R40449.pdf> (discussing the EU's continued ban on imports of hormone-treated meat).

adjudicatory body reports. WTO adjudications have had relatively limited effect upon the domestic policies of Member States.¹⁸⁶ After a report is adopted, states can choose to change their laws to literally comply with the decision without actually changing domestic policy or can simply opt for a lower cost penalty.¹⁸⁷ Given the limited sanctions that the adjudicatory bodies can impose, these costs are often small.¹⁸⁸

A. Enacting Change Without Amending the WTO Agreements

The WTO's treatment of regulations that differentiate between PPMs, rather than an end product's features, does not allow Member States to adequately pursue legitimate environmental objectives.¹⁸⁹ Amending the WTO's current stance on eco-labels and other PPM regulations could take one of the following three approaches: 1) members amending the text of GATT; 2) members formally adopting authoritative interpretations of the current GATT articles, including the TBT; or 3) altering the interpretation of GATT articles by WTO adjudicatory bodies on a case-by-case basis.¹⁹⁰ Given the "apparent impossibility" of members agreeing upon the pursuit of environmental objectives, alternatives should be explored.¹⁹¹ As a result, this Note suggests that the WTO's political body abandon its previous attempts to achieve formal principles that guide environmental legislation for the time being.

Some scholars have suggested that member consensus, either through amending the GATT text or adopting interpretations of existent language, is the only legitimate option for change. The decision to ever place nontrade interests before international free trade is a sensitive issue and therefore should result only from member consensus.¹⁹² Some scholars question whether WTO adjudicatory bodies have the ability to make rules at all, believing

186. See KRIKORIAN, *supra* note 24, at 203 (recognizing practical limitations of the WTO's adjudicatory power).

187. See *id.* at 206–07 (describing how states sometimes circumvent WTO decisions).

188. See *id.* at 211 (illustrating the effects of limited sanctions).

189. Cf. Trujillo, *supra* note 159, at 229 (“[I]n applying Article III [of GATT], the WTO Panels stray so far in the direction of free trade that they ignore the possibility of a legitimate domestic regulatory policy that (1) though discriminatory, places on ‘incidental burdens’ on free trade; and (2) arises from domestic industries traditionally regulated or ‘partially’ regulated.”).

190. See CONRAD, *supra* note 134, at 438 (laying out the three potential amendment approaches).

191. *Id.*

192. See *id.* (“Many scholars argue that the interrelations between international trade and non-economic policies are of great importance and therefore require political negotiations and a solution supported by all WTO members.” (internal citation omitted)).

such powers should be reserved for diplomatic bodies.¹⁹³ However, adherence to this principle will likely result in a continued stalemate on environmental issues; given the difficulties the members faced at Doha, adoption of GATT amendments will not likely be an easy option. Similarly, adoption of authoritative interpretations by the Ministerial Conference would be equally as difficult, as it would require consensus by three-fourths of WTO members.¹⁹⁴

The WTO's environmental experts, the CTE, are unlikely to easily change the WTO's approach to eco-labeling, given the WTO's organizational structure. Though the Doha Declaration mandates that the CTE continue to research eco-labeling throughout its normal meetings, the committee can use its findings only to make recommendations to other committees that interpret the SPS and TBT.¹⁹⁵ Additionally, the Technical Barriers to Trade Committee was given the same charge at Doha and is considered by members to be a more effective forum for discussing eco-labeling standards.¹⁹⁶ The overlapping jurisdiction may make it more difficult for environmental experts' opinions to be heard and ultimately prevail.

Given the structural difficulties in formally changing WTO's stance on eco-labels, the Appellate Body should enact change on a flexible, case-by-case basis.¹⁹⁷ Unlike the first two options, change through the Appellate Body has the advantage of not requiring the formal consent of most Member States on a single provision.¹⁹⁸ Instead, any dispute's Panel need only balance the trade and nontrade interests of the particular parties before them. Moreover, the vague language within the TBT provides a statutory foundation that allows for judicial interpretation.¹⁹⁹

193. See WATSON, *supra* note 137, at 32 (noting that the Chicago School of Economics believes the WTO should be closed off from environmental interests and that rule making power should be limited to diplomatic bodies).

194. See Marrakesh Agreement, *supra* note 138, at art. X (describing the amendment process).

195. See WATSON, *supra* note 137, at 173–74 (“The CTE can only make recommendations that can be adopted by the committees responsible for the operation of the SPS and TBT agreements.”).

196. See *id.* at 174 (discussing the superiority of the TBT committee as “the place to negotiate” on the issue of labeling).

197. See CONRAD, *supra* note 134, at 439 (delving deeply into potential amendment process to increase the effectiveness of WTO adjudicatory bodies in this area).

198. See *id.* at 439 (noting the preference for this option because “the required changes can indeed be achieved on the basis of the existing agreements” and “[s]ince the large WTO membership and higher likelihood of political impasse often prevent negotiated solutions”).

199. The TBT only requires that regulations “do not create unnecessary obstacles to international trade” and are not applied in a manner that results in “arbitrary or unjustifiable discrimination.” See TBT Agreement, *supra* note 12, at pmb., art. 2.2 (emphasis added).

This approach will require that the WTO judicial bodies step back from the *US-Tuna II* effects test to determine whether an eco-label violates the TBT. The departure would not be insignificant; the Appellate Body's adopted report will likely remain persuasive authority for the WTO's next interpretation of the TBT.²⁰⁰ The WTO states on its website that if a previous report's interpretation of a WTO rule is persuasive, then future decisions will likely follow it.²⁰¹ This comports with judicial systems' general esteem for predictability.²⁰² However, consistent with the general practice of international courts, the Appellate Body does not create binding precedent.²⁰³ The WTO's Dispute Settlement Understanding states that adjudicatory bodies do not have the power to create rules.²⁰⁴ Thus, the Appellate Body has the necessary power to depart from its earlier decisions when required by justice or common sense.²⁰⁵

Other scholars have suggested that the WTO adopt the narrowest possible interpretation of its own jurisdiction over environmental controversies. This would likely be an effective measure in combatting the extension of WTO jurisdiction over controversies regarding labeling standards created by NGOs.²⁰⁶ It is also a solution that the WTO itself indirectly proposes to its members; if a trade dispute arises because a country is complying with an outside environmental agreement to which both states are parties, the parties should settle that dispute through the environmental agreement.²⁰⁷ However, where the parties to the controversy cannot rely upon another adjudicatory body with more environmental expertise, the WTO may be the only forum available. In those situations, the WTO has no choice but to exercise jurisdiction, despite its lack of expertise on environmental concerns.²⁰⁸

Some critics have suggested that a separate intergovernmental body for environmental issues, such as a World Environmental

200. See WATSON, *supra* note 137, at 91 (noting that the Appellate Body adopted reports "have strong persuasive power and may be viewed as a form of non-binding precedent").

201. *Id.* at 90.

202. *Id.*

203. See *id.* at 74, 89 (noting that judges have the right to depart from persuasive precedent and that if the WTO were to adopt precedent, it would depart from traditions of public international law).

204. DSU, *supra* note 69, at art 3.5 (noting that all arbitration awards "shall be consistent" with the WTO agreements and "shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements").

205. *Id.*

206. See, e.g., Moody, *supra* note 90, at 1431-32 (proposing this solution in determining if the WTO has jurisdiction over controversies regarding NGO's environmental label standards).

207. See UNDERSTANDING THE WTO, *supra* note 148, at 67 (identifying the appropriate dispute resolution forums for such situations).

208. *Id.* at 65 ("The WTO is only competent to deal with trade.").

Organization, might lead to more effective environmental commitments.²⁰⁹ However, given the WTO's difficulty in establishing consensus even between developed organizations, the impact that such an organization would have is questionable.²¹⁰ Providing an additional forum is unlikely to eradicate the source of international dissolution on environmental issues: the competing commercial and environmental interests of states on both domestic and international levels.²¹¹

B. Proposed Judicial Review: Distinguishing Environmental from Protectionist Motivations

This Note suggests that the Appellate Body interpret the TBT in a manner that recognizes environmental concerns as legitimate domestic policy goals, as stated in the Doha Declaration.²¹² In determining whether eco-labeling standards violate the TBT, the WTO judicial bodies should focus upon rooting out covert protectionism.²¹³ Accordingly, the WTO judicial body should only hold state-standardized eco-label schemes invalid under the TBT if they are based upon protectionist motives.²¹⁴ This inquiry upholds the TBT's central purpose of eradicating trade barriers driven by protectionism but veiled by the assertion of other legitimate policy goals.²¹⁵ This will require a departure from the WTO adjudicative branch's approach in determining the validity of the DPCIA under the TBT and a return to the reasoning it laid out in its decisions in the late 1990s.²¹⁶

209. See, e.g., *Why Greens Should Love Trade*, THE ECONOMIST, Oct. 7, 1999, at 18 (commenting on how "greens" are increasingly resorting to the WTO to gain binding decisions that are not really about trade at all, and so might be more appropriately handled by a separate environment-focused body, a "World Environment Organization").

210. See Schaffer, *supra* note 10, at 85 (discussing the calls for and possibility of a World Environmental Organization).

211. *Id.* at 85–86.

212. See DiMatteo et al., *supra* note 124, at 157 (noting that the Doha Declaration "recognizes a number of [nontrade concerns]" including the environment).

213. See John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 566–72 (2000) (explaining the advantages of the "antidiscrimination model that the WTO has chosen to address national regulations that potentially interfere with free trade").

214. *Cf.* Trujillo, *supra* note 159, at 228–29 (proposing that the WTO adopt a similar approach in interpreting GATT as that in U.S. Commerce Clause common law).

215. See *Standards and Safety: Technical Regulations and Standards*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm4_e.htm#TRS [<http://perma.cc/JL2-RT2Z>] (archived Feb. 16, 2014) ("The Technical Barriers to Trade Agreement (TBT) tries to ensure that regulations, standards, testing and certification procedures do not create unnecessary obstacles [to trade].").

216. In the 1990s, the WTO Appellate Body focused upon whether "a given domestic regulation was applied consistently and evenhandedly or whether it respected

One particular virtue of this approach is that it falls squarely within the expertise of the adjudicatory bodies. The WTO judges are well-placed to evaluate whether legislation is covertly protectionist, as they have conducted similar analyses in several cases.²¹⁷ In each case, the Panel should complete a full review of the legislative history. Just as it would in assessing the value of safety regulations for imports under the SPS,²¹⁸ the WTO judicial body should require the challenged party to demonstrate that the regulation serves its purported purpose. This would most likely involve an in-depth analysis of the legislative history of the standards, including what forces inspired their enactment.

C. Requiring a Reasonable Foundation of Scientific Support

In determining whether legislation is based upon legitimate, nontrade interests, the judges may consider whether the country that passed environmental legislation considered scientific evidence. This comports with the WTO's requirement that its members provide as much information as possible regarding their environmental policies to prevent the appearance of covert protectionism.²¹⁹ However, the court's standard of review should be considerably lower than that required in *US-Tuna II*. It should only require that the Member State's interpretation of data reasonably supports the efficacy of the chosen regulation. As demonstrated by the divergence of opinion between Congress and the Appellate Body in *US-Tuna II*, scientific data can be interpreted in many ways, depending upon the values of the person considering it. If WTO judges do not leave room for a variety of perspectives, then they risk striking popular legislation that is not protectionist.

If the challenged eco-label regulation differentiates based upon country of origin, then the WTO judicial body should require supporting scientific evidence that justifies such geographical discrimination. Similarly, regional discrepancies within regulations may signal that the challenged legislation's true purpose is to favor some nations over others.²²⁰ Under this approach, the Panel and

fundamental principles of law, rather than investigating, on its own accord, whether the regulation's substance was necessary or related to the achievement of the regulating state's social policy goals." Cho, *supra* note 112, at 651.

217. See *id.* at 651-52 (describing the difficulty involved in distinguishing between legitimate environmental regulation and "protectionism," and noting a number of cases in which the WTO Appellate Body has done such); see, e.g., Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998).

218. See DiMatteo et al., *supra* note 124, at 132 (explaining procedures under the SPS).

219. UNDERSTANDING THE WTO, *supra* note 148, at 70.

220. See *US-Tuna II AB*, *supra* note 2, ¶ 241 (noting Mexico's argument that the United States' regulation was intended to discriminate based on country of origin).

Appellate Body in *US-Tuna II* were correct in requiring scientific data that justified the different regional regulations. However, once the United States presented that evidence, the judges should have reviewed Congress's findings for reasonableness.

More importantly, WTO judges should not strictly scrutinize scientific evidence justifying the member's environmental concerns. If its judges continue to apply the *US-Tuna II* analysis, the WTO risks striking down laws based upon reasonable interpretations. *US-Tuna II* demonstrates the potential for disagreement in interpreting close cases; while Congress found that changing the DPCIA was unnecessary because the commissioner could not find evidence that the regulation was not justified, the WTO found an absence of evidence that the regulation was justified. Instead, the WTO should return to the relaxed inquiry used in *Shrimp-Turtle*, when the Appellate Body noted that a Member State need only show that its regulation was "reasonably related . . . to a legitimate policy" of conservation.²²¹

Also, strict scrutiny might prevent member nations from taking precautionary approaches regarding emerging environmental issues, especially those that cannot be studied through the use of short-term data.²²² This hurdle to innovative regulation arose in cases when the Appellate Body interpreted the SPS. Though the agreement requires members to provide scientific evidence supporting the need for their health and safety regulations, the SPS allows for Member States to take "precautionary measures" temporarily before scientific evidence uniformly confirms a health risk.²²³ In practice, however, it seems that this precautionary principle is not followed by the WTO judiciary. In a notable example, both a WTO Panel and the Appellate Body rejected the European Union's ban on beef produced through the use of hormones; though the European Union believed these hormones would have long-term effects on human health that were

221. See *Shrimp-Turtle*, *supra* note 2, ¶ 141 ("The means are, in principle, reasonably related to the ends. The means and ends relationship between Section 609 and the legitimate policy of conserving an exhaustible, and, in fact, endangered species, is observably a close and real one . . .").

222. The WTO's requirement of firm scientific evidence in the US-EU controversy over use of hormones in beef production demonstrates how Member States would be unable to assert interests in preventing environmental concerns before full effects are known. See Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products*, ¶ 46, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) (adopted Feb. 13, 1998) [hereinafter *EC Meat Measures Case*].

223. See SPS Agreement, *supra* note 161, at art. 5.7 ("In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information . . . In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.").

not yet known, the WTO struck the ban down because the European Union failed to produce a firm body of evidence.²²⁴ Similar results would likely arise in many other controversial environmental topics, such as emerging regulations on carbon dioxide emissions.

D. Awarding Monetary Aid to Unsuccessful Challenging Parties

To prevent any trade-restrictive effects of valid eco-labeling schemes, the WTO should consider awarding monetary aid to members who are unsuccessful in challenging the eco-labeling scheme. Under the Dispute Settlement Understanding, WTO judicial bodies may approve compensatory damages only after they find a regulation not to comply with WTO obligations.²²⁵ This Note suggests that when the WTO upholds eco-labeling schemes that lead to incidental barriers to trade, monetary damages should be available to members who experience high barriers to compliance. These monetary damages would come from the successful, regulating member. Up-front monetary aid would potentially reduce the challenging member's technological or financial obstacles to compliance, while permitting the regulating member to achieve its environmental goals.

Such an award should be based upon a party's demonstrated financial inability to comply with the other party's environmental regulations. The WTO judicial body should review evidence presented by the challenging party demonstrating: 1) its noncompliant industry's current practices; and 2) its inability to overcome the financial or technological burden of compliance. For example, in *US-Tuna II*, Mexico would have satisfied the first prong because it demonstrated that two-thirds of its fishing vessels used fishing methods that render products ineligible for the United States' dolphin-safe label.²²⁶ However, Mexico did not provide evidence on why its fishing vessels could not switch to other fishing methods. It could have satisfied the second prong by quantifying the financial cost of switching to compliant fishing methods, or by showing that its industry does not have access to technology that enables the switch.

In cases where monetary aid is appropriate, it should be granted upon the condition that the challenging member uses the award to comply with the eco-labeling standards. The restriction serves several purposes. First, the award of aid builds upon the WTO's suggestion that members grant developing countries financial and technological

224. See, e.g., *EC Meat Measures Case*, *supra* note 222, at 46 (striking down the EU's prohibition of beef produced with growth hormones, as scientific research did not support their assertion of health and safety impacts upon human health).

225. DSU, *supra* note 69, at art. 22.1 ("[N]either compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation Compensation is voluntary").

226. *US-Tuna II AB*, *supra* note 2, ¶ 234.

assistance to adopt environmentally friendly PPMs, rather than imposing regulations.²²⁷ Second, the question removes some of the academic debate regarding whether private parties or Member States should be the recipients of monetary awards.²²⁸ The states themselves could determine how to best distribute the aid to their industries. Third, the limited remedy might serve a gatekeeping function by discouraging members from challenging regulations with which they do not wish to comply. In these cases, states will know *ex post* that the case will not result in the invalidation of the regulation.

If adopted as this Note outlines, monetary aid should reduce the incidental effect of environmental regulations as technical barriers to trade. First, it should increase the ability of developing nations' industries to compete with producers in developed nations. Second, this monetary aid would directly combat the concern of developing nations that eco-labels could serve as covert protectionist legislation. Potential monetary liability may deter members from passing protectionist policies dressed up as environmental legislation, or encourage the adoption of multiparty environmental agreements over unilateral regulation. This is a particularly important feature, as evidence suggests that even when the WTO strikes down legislation, developing countries do not enforce retaliatory trade sanctions against its larger trade partners.²²⁹

Remedial aid may also further the regulating state's legitimate environmental goals. Monetary aid should increase the ability and willingness of developing nations to adopt more environmentally friendly production methods. This should appease environmentalists and could chip away at the WTO's reputation of having its own trade-driven, anti-environmental agenda.

Admittedly, there are two potential drawbacks to this proposal. First, it would require an amendment through the WTO's diplomatic bodies, which this Note found to be unrealistic in the context of formally accommodating state eco-label standards or environmental regulations more generally.²³⁰ WTO judicial bodies could grant aid only if they are given the power by an amendment to the Dispute Settlement Understanding. There is some indication that this

227. UNDERSTANDING THE WTO, *supra* note 148, at 66.

228. See Alan O. Sykes, *Optimal Sanctions in the WTO: The Case for Decoupling (And the Uneasy Case for the Status Quo)*, in *THE LAW, ECONOMICS AND POLITICS OF RETALIATION IN WTO DISPUTE SETTLEMENT* 340 (Chad P. Bown & Joost Pauwelyn eds., 2010) (explaining the debate over monetary awards to member states).

229. See Kyle Bagwell et al., *The Case for Tradable Remedies in WTO Dispute Settlement*, in *ECONOMIC DEVELOPMENT & MULTILATERAL TRADE COOPERATION* 395, 397–98 (Simon J. Evenett & Bernard M. Hoekman eds., 2006) (noting that between 1995 and 2003, not one developing country implemented countermeasures “to induce compliance even when faced with non-implementation”).

230. See *supra* Part V.

recommendation has gained traction, as it has already been posed by African members to reform the implementation devices available to the WTO.²³¹

Second, monetary aid awards may face criticisms applied to all WTO monetary awards regarding enforcement and ease of calculation. Enforcement is unfortunately an issue for all WTO remedies, as WTO adjudication is not binding upon parties.²³² One way to combat such uncertainty would be to amend the Dispute Settlement Understanding to make monetary aid awards binding. Scholars have often suggested that binding damages are a feasible award in WTO adjudications.²³³ Also, monetary aid should be easier to calculate than the compensatory damages that the WTO already awards. For example, critics have noted that compensatory damages are difficult to implement in the context of trade violations because calculations depend upon value judgments. For example, a Panel awarding compensatory damages must decide whether to calculate solely for past harm or include an estimate for uncertain future harm.²³⁴ Monetary aid's magnitude is simpler to calculate, as it is based only upon the prospective costs of implementing compliance.

VI. CONCLUSION

The decades-old battle between environmental and trade protections seems to inevitably lead to defeat, both for WTO members and the organization itself. Neither group has ignored the public outcry that resulted when the WTO struck down the United States' monumental environmental regulations in the 1990s. Yet, as evidenced in the Doha negotiations, WTO members face perhaps insurmountable difficulties in adopting a uniform accommodation policy for environmental regulations. The stalemate reflects not only the inherent conflict between these two interests but also the fact that a member's legislation often reflects a domestic tug of war between these two interests. Therefore, any realistic proposal for WTO reform must accommodate reality: its members are most likely to agree only if reform provides them protection when they both oppose or assert environmental legislation.

231. Bagwell et al., *supra* note 229, at 396.

232. See *id.* at 396–97 (discussing the implementation process for WTO obligations).

233. See William J. Davey, *Sanctions in the WTO: Problems and Solutions, in THE LAW, ECONOMICS AND POLITICS OF RETALIATION IN WTO DISPUTE SETTLEMENT*, *supra* note 228, at 360 (noting that compensatory damages awarded by WTO tribunals should be binding).

234. See Sykes, *supra* note 228, at 340 (raising questions about the calculation of compensatory damages for trade violations).

This Note's two suggested reforms attempt to do exactly that. The first recommends that instead of requiring the WTO diplomatic body to achieve consensus through formally amending its agreements, its adjudicatory bodies instead reinterpret what the members have already passed. WTO judges should acknowledge that the preambles of WTO agreements and the Doha Declaration acknowledge that Member States have legitimate interests in environmental concerns; a reasonable interpretation of this language is that members may justifiably legislate protections for nontrade interests, even when they result in incidental effects on international trade.

Second, this Note's suggestion that the WTO judiciary grant monetary aid offers a carrot for the losing party of an eco-labeling controversy. This measure may face great opposition because it would increase the WTO's ability to impose binding decisions. However, the availability of aid would be limited to cases where the challenging party has proven that it faces an insurmountable burden to compliance. In addition, awards of monetary aid would promote the WTO's general objectives of decreasing technological barriers to trade and supporting legitimate environmental protection. Not only will aid enable developing nations to comply with stringent environmental standards, but WTO members may be deterred from enacting protectionist measures if they know they will later be required to aid efforts of foreign industry to compete.

The proposed solution faces two practical hurdles that should not be ignored. First, the Appellate Body may be reluctant to depart from its nonbinding, but persuasive, precedent in *US-Tuna II*. However, given the public outcry following its decisions in *US-Tuna I* and the *Shrimp-Turtle* case, the WTO should support the reinterpretation of the TBT if it leads to amelioration of the WTO's perceived legitimacy. Second, any reform of the WTO's Dispute Settlement Understanding will require the consensus of Member States. Such reform will likely face significant opposition, given members' continuing fear of losing sovereignty. However, such concerns should be somewhat assuaged because monetary concessions will lead to members' greater freedom to protect nontrade interests without risking trade sanctions.

Despite the WTO's inability to adopt a formal approach to accommodating nontrade interests, eco-labels and environmental regulations continue to grow amongst WTO members. Not only does the WTO's strict promotion of trade interests alone compromise the ability of members to pass popular legislation, but it threatens the WTO's reputation as a relevant and authoritative international organization. This Note hopes to contribute to the discussions on reforming both the WTO's stance on environmental interests and its enforcement mechanisms. The combined reinterpretation of the TBT and the award of monetary aid are reforms that are not only effective

but also could attract universal support from Member States battling environmental and trade interests.

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